1983 WL 182074 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
December 9, 1983

***1** The Honorable Dill Blackwell
Member
House of Representatives
Route 5
Box 238
Travelers Rest, South Carolina 29690

Dear Representative Blackwell:
You have requested that this office advise you concerning whether § 16-17-210 et seq. of the Code of Laws of South Carolina (1976 as amended) may be constitutionally applied to preclude the display of a painting of a certain cartoon character upon the American flag. As we understand it, the flag was located at the Greenville County Museum of Art until November 20, 1983, but is no longer there. We further understand that, while the flag was located at the Museum, it was kept in a locked room, segregated from all other art works. We have had no occasion to view the flag in question.

Sections 16-17-210 and 220 represent the codification of a lengthy and complex statute which generally forbids a knowing public display, exhibition or exposure of a United States Flag or a facsimile thereof having any 'word, inscription, figure, work, picture, design, device, symbol, name, character, drawing, notice or advertisement of any nature . . . placed thereon or attached thereto . . .'. The statute also prohibits the knowing placement of any 'word, inscription . . . [etc.]' upon the flag or the public desecration or mutilation of the flag. It is a statute not unlike those enacted by most states and the federal government. See, 41 A.L.R.3d 502. To our knowledge, the statute has received no interpretation or construction by our Supreme Court.

We perceive two threshold obstacles in responding to your specific question concerning the First Amendment. First, we are not in a position to determine whether the statute is applicable to the situation you have described. We note that § 16-17-220 appears to require that the display or exhibit of a flag in the form prohibited must be 'in the public view'. Where the flag was apparently kept continuously under lock and key, the threshold question of applicability of § 16-17-220, at least to any display by a Museum, would of course be presented. Moreover, the statute expressly requires that the prohibited conduct be done 'knowingly', thereby mandating that some form of scienter be proven. Obviously, this issue, as well as others, involve questions of fact which we would be unable to resolve.

Second, even assuming that the statute is applicable to the situation you present, we are informed that the flag in question is no longer present or even in the State. Thus, it would appear that the need for an opinion by this office concerning the First Amendment question has been substantially reduced. Nevertheless, we have researched in detail the First Amendment question presented and now offer you the benefit of our research.

The United States Supreme Court has stated with respect to the American flag that it is
. . . the symbol of the nation's power the emblem of freedom in its truest, best sense.

***2** Halter v. Nebraska, 205 U.S. 34, 44, 51 L.Ed. 696 (1907). At the same time, the Court has held on a number of occasions that an unorthodox display or use of the American flag may be a form of symbolic expression and thereby may be protected by the First Amendment. Street v. New York, 394 U.S. 576, 22 L.Ed.2d 572 (1969); Smith v. Goguen, 415 U.S. 566, 583-590, 396 L.Ed.2d 605 (1974); Spence v. Washington, 418 U.S. 405, 41 L.Ed.2d 842 (1974). See also, Board of Education v. Barnette,

319 U.S. 624, 87 L.Ed. 628 (1943); United States v. O'Brien, 391 U.S. 367, 20 L.Ed.2d 672 (1968); Stromberg v. California, 283 U.S. 359, 75 L.Ed. 1117 (1931); Cohen v. California, 403 U.S. 15, 29 L.Ed.2d 284 (1971). In Spence, the Court reversed a conviction under a statute similar in purpose to § 16-17-210 et seq. Under the circumstances presented, noted the Court, Spence had been prosecuted 'for the expression of an idea through activity.' 418 U.S. supra at 411. The Court was careful to emphasize, however that the particular facts involved were essential to its holding. Not only was it significant that the flag was intended as a form of speech, but the Court deemed it important that the flag was displayed on private property 'rather than in an environment over which the State by necessity must have supervisory powers unrelated to expression.' Supra. Further, the Court expressly observed that the factual record before it was absolutely 'devoid of proof of any risk of breach of the peace' or violence in the display. Supra at 409. Under that particular set of facts, the Court rejected the State's arguments that the First Amendment interests asserted by Spence should not prevail.

We have found no United States Supreme Court decision or any decision of a lower federal court which deals with the First Amendment implications of applying a statute similar to § 16-17-210 et seq. in the context of a public museum or art gallery. See generally, 22 L.Ed.2d 972, 'Constitutionality of statutes . . . prohibiting . . . disrespect . . . of American Flag—Federal cases'; see also, 41 A.L.R.3d 502. However, one case, United States ex rel. Radich v. Criminal Ct. of N.Y., 385 F.Supp. 165 (S.D.N.Y. 1974), concerned the application of such a statute, where a flag was displayed at a private art gallery. Relying primarily upon Spence, supra, the Court attempted to balance the competing First Amendment and governmental interests and concluded that application of the statute violated the defendant's First Amendment rights. First, just as in Spence, the Court was careful to note that the display was held on private, not public, property and was thus clearly a forum warranting First Amendment protection. Then, the Court concluded that the particular display in question 'neither trammeled upon nor dimmed' the symbolic character of the flag.' 385 F.Supp., supra at 178. Neither was the State's interest in protecting the sensibilities of passersby served by application of the statute because the display in question occurred in the privacy of defendant's 'second floor art gallery.' And, as in Spence, the Court could find 'no objective evidence' that a breach of the peace was likely or imminent.

***3** There is no evidence that any crowd had gathered outside of the gallery nor is there proof that any disturbance or altercation had occurred within the premises.

Supra at 180. Thus, the Court in Radich rejected the notion adopted by some courts that acts of flag desecration were inherently inflammatory.

Where the constitutionally guaranteed right to freedom of speech and the free dissemination of ideas, be they popular or unpopular, is to be chilled or abridged, the state must demonstrate more than mere speculative or hypothetical possibility of disorder; it must present to the trier of facts objective evidence which would lead to the conclusion that, at the very least, a disorder was in fact likely and imminent.

385 F.Supp., supra at 183.

In addition, we have found one public property case which is somewhat analogous, though by no means identical, to the situation you have presented. In Sefick v. City of Chicago, 485 F.Supp. 644 (N.D.Ill.E.D. 1979), an artist brought an action challenging a decision by a city official to revoke permission to display certain of his sculptures in the lobby of the city's civic center. This display did not involve an American flag, but instead concerned sculptures satirizing various aspects of American government and society. The Court first concluded that as an art work the sculpture represented constitutionally protected speech. Then, noting that the city was under 'no constitutional compulsion to provide this public forum', the Court concluded however that 'once this forum has been provided, constitutional guarantees come into play'. 485 F.Supp., supra at 649. See, Police Dept. of City of Chicago v. Mosely, 408 U.S. 92, 96, 33 L.Ed.2d 212 (1972). In this instance, the city had voluntarily opened the Center to the display of various art works. Said the Court:

In those circumstances which do not involve obscenity, libel, speech calculated to create a clear and present danger to other individuals, or regulations involving the manner, time and place of speech, a governmental entity ordinarily cannot select which issues are worth discussing or which views should be heard when public facilities are involved. . . . Once the defendants have

opened up the forum, as is the case here, given permission to display an exhibit, the plaintiff's right of expression cannot be 'infringed by the denial of or placing conditions upon a benefit or privilege.' [citations omitted].

485 F.Supp. supra at 649. The Court thus reasoned that revocation of the permit to display the works was based upon 'the content of that tableau.' Supra at 650. And the city was not able to show that its revocation was 'in furtherance of any substantial governmental interest', supra; visitors had not been put in the position of a 'captive audience', not could it be said that if the exhibit were allowed to remain, the city had adopted the artist's point of view. Thus, since no substantial governmental interest could be demonstrated for regulation of the speech in question, plaintiff's First Amendment rights were deemed to have been infringed.

***4** Aside from the foregoing decisions, there are also a number of other United States Supreme Court cases which, although not factually similar to the situation you have presented, are certainly relevant to your inquiry. The Supreme Court, in a First Amendment case such as this almost always first focuses upon the question of whether the particular-physical location of the expression in question has been established as a public forum. As Spence v. Washington clearly suggests, this question would surely be important in a case involving display of an American flag in a public art museum. As the Court has continuously stated, while meeting halls, street corners, parks and playgrounds usually constitute public forums for purposes of the First Amendment, other governmental property which has not been opened to general public use for purposes of expression, such as jails, military compounds, government office buildings and a city's rapid transit system generally is not. See, Lehman v. City of Shaker Heights, 418 U.S. 298, 304, 41 L.Ed.2d 770 (1974); Adderley v. Florida, 385 U.S. 39, 17 L.Ed.2d 149 (1966); U.S. Postal Service v. Greenburgh Civic Assn., 453 U.S. 114, 69 L.Ed.2d 517 (1981); Greer v. Spock, 424 U.S. 828, 47 L.Ed.2d 505 (1976). In Adderley, supra, for example, the Court emphasized the distinction by stating that '[t]he State, no less than a private owner of property has power to preserve the property under its control for the use to which it is lawfully dedicated.' 424 U.S. at 836. However, we would further note that the Court has already found a municipal auditorium, which has generally been opened to the public for the showing of plays, (analogous to the situation here) to be a public forum 'designed for and dedicated to expressive activities'; thus, a prior restraint of the showing of a particular play based upon its content has been held to be constitutionally invalid. Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 43 L.Ed.23 448 (1975). Likewise, university buildings generally opened to student groups have been held to be public forums, Widmar v. Vincent, 454 U.S. 267, 70 L.Ed.2d 440 (1981) as have in some cases public school libraries, Board of Education v. PICO, 457 U.S. 853, 73 L.Ed.2d 435 (1982). See also, the discussion in Toward or Gayer Bicentennial C. v. R.I. Bicentennial F., 419 F.Supp. 632, 639 (D.R.I. 1976) [State house is 'limited public forum' for activities related to bicentennial themes].

All of the decisions cited above would certainly be relevant to a court's analysis of the extent that First Amendment rights are implicated in the situation you have presented. The First Amendment interest involved would then have to be balanced against the State's interest in enforcing a statute designed to prevent desecration of and the public display of a desecrated American flag, such as § 16-17-210 et seq. purports to do. In summary, the important issues which would have to be resolved are: (1) is the display of the flag designed or intended as a form of symbolic speech; (2) if so, whether such speech occurs in a forum which has been opened to the public for purposes of expression and whether application of § 16-17-210 et seq. constitutes content based regulation of expression; (3) whether the government possesses any interest in preservation of the peace through enforcement of the statute, i.e. whether there was factual evidence that a breach of the peace or violence was likely or threatened by such a display of the flag; (4) whether the particular display presents any risks that viewers would be 'misled in assuming that the Government endorsed . . . [the] viewpoint . . .' of the displayer, Spence v. Washington, supra, and whether enforcement of § 16-17-210 et seq. serves that interest; (5) whether the State possesses an interest in 'preserving the physical integrity of a privately owned flag' and protecting it from permanent desecration and whether enforcement of the statute serves that interest, Spence, supra; (6) whether enforcement of the statute serves any other substantial or compelling governmental interest. The Supreme Court has summarized the analysis that is required of courts in the area of the First Amendment by saying:

***5** Whenever . . . [the constitutional freedoms of speech and association] are asserted against the exercise of valid governmental powers a reconciliation must be effected, requiring an appropriate weighing of the interests involved.

Konigsberg v. State Bar of California, 366 U.S. 36, 61, 6 L.Ed.2d 105 (1961).

As the Court clearly stated in U.S. ex rel. Radich, supra, resolution of factual questions are indeed critical to this balancing process. And, of course, only a court, through the receipt of testimony under oath and other evidence, is empowered and equipped to determine the facts required to reconcile the competing interests. This office has repeatedly stated that issues of fact must be resolved by a court. See, e.g. op. Atty. Gen. November 2, 1983.

The cases we have cited, especially those involving use of the American flag as a form of expression, have generally found in favor of the First Amendment. [1] However, as we have noted, these cases were all careful to emphasize that the particular facts involved therein were critical to their decision. As the Court stated in Speiser v. Randall, 357 U.S. 513, 520, 2 L.Ed.2d 1450 (1958) when dealing

. . . with the complex of strands in the web of freedom which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied.

Furthermore, the Court has also on occasion utilized the following First Amendment analysis:

[A] governmental regulation is sufficiently justified . . . [1] if it furthers an important or substantial governmental interest; [2] if the governmental interest is unrelated to the suppression of free expression; and [3] if the incidental restriction on alleged First Amendment freedoms, is no greater than is essential to the furtherance of that interest. (emphasis added)

United States v. O'Brien, 391 U.S., supra at 377. Several present members of the Court apparently are of the view that the State has a compelling interest in preserving either the physical integrity of the flag or its function as a national symbol; this interest, they reason, is validly served by statutes such as § 16-17-210 et seq. and is unrelated to the content or suppression of speech. See, Spence v. Washington 41 L.Ed.2d supra at 850-854 (Rehnquist, Burger and White, J.J. dissenting); Smith v. Goguen, 39 L.Ed.2d, supra at 617-621 (White, J. concurring), 622 (Blackmun, J. dissenting). Concurring in the Court's opinion in Goguen, Justice White wrote:

I would not question those statutes which proscribe mutilation, defacement, or burning of the flag or which otherwise protect its physical integrity, without regard to whether such conduct would provoke violence. Neither would I find it beyond congressional power, or that of state legislatures, to forbid attaching to or putting on the flag any words, symbols or advertisements. All of these objects, whatever their nature, are foreign to the flag, change its physical character, and interfere with its design and function.

***6** 39 L.Ed.2d, supra at 620. Spence also seemed to recognize the state's interest in at least the permanent physical integrity of the flag, when the Court observed that '[a]ppellant was not charged under the desecration statute . . . nor did he permanently disfigure the flag or destroy it.' 41 L.Ed.2d, supra at 849.

However, the opportunity has not yet presented itself for a majority of the Court to agree that the physical integrity of a privately owned flag in itself might uphold application of a statute similar to § 16-17-210 et seq. But one of the leading constitutional scholars in the area of the First Amendment is of the opinion that this interest is insufficient to uphold such statutes and that their application does not meet the Court's requirement in O'Brien that the state's regulation be 'unrelated to the suppression of free expression.' See, Ely, 'Flag Desecration: A Case Study In The Roles of Categorization and Balancing In First Amendment Analysis'. 88 Harv.L.Rev. 1482, 1508. Cf. Wooley v. Maynard, 430 U.S. 705, 51 L.Ed.2d 752 (1977).

In short, there is at this point no clear cut answer to your question. The fact that the Supreme Court has thus far decided all of the flag cases to come before it on relatively narrow grounds indicates that 'the Court finds the issue troubling.' Ely, supra at 1482. Indeed, there appears to be sharp division among the Court's own members on the question. Therefore, we can only conclude that application of § 16-17-210 et seq. in the context your have raised would certainly implicate very serious

First Amendment concerns. Depending upon how the facts are resolved by a court, the State would be constitutionally able to regulate (what appears to be) symbolic speech only upon a successful showing that such regulation was designed to further substantial or compelling governmental interests. Thus far, few decisions have found the proposed governmental interests sufficient to outweigh First Amendment right in all circumstances, [2] but in these cases the government's interest in maintaining the permanent physical integrity of the flag was not fully addressed. Accordingly, the various governmental interests arguably involved here, including prevention of a threatened disturbance and whether this flag was permanently impaired, would have to be clearly demonstrated before a court in a factual record. U.S. ex rel. Radich, supra. [3]

If we can be of further assistance, please let us know.
Sincerely,

Robert D. Cook
Executive Assistant for Opinions

Footnotes

1 In addition, see Goguen v. Smith, 471 F.2d 88 (1st Cir. 1972), [affd. on other grounds, sub nom, Smith v. Goguen, supra, concluding that flag desecration statute in question was overly broad]; Royal v. Superior Court, 531 F.2d 1084 (1st Cir. 1976) [New Hampshire's flag desecration statute unconstitutionally vague]; Cline v. Rockingham County Superior Court, 502 F.2d 789 (1st Cir. 1974) [First Amendment rights prevail under the circumstances, but Court noted flag having peace symbol painted thereon was not displayed 'in any of the special public areas where the state necessarily has some power to restrict expressive activity because of strong countervailing interests.' 502 F.2d, supra at 791]; Street v. New York, 394 U.S. supra at 593 [First Amendment included the freedom 'to express publicly one's opinion about our flag . . .'; even though disrespect for our flag to be deplored, conviction reversed].
On the other hand see, Halter v. Nebraska, 205 U.S., supra [Supreme Court upheld state statute making it a misdemeanor to use flag for advertising purposes]; Common-Wealth v. Morgan, (Pa.), 331 A.2d 444 (1975) [court found constitutional desecration statute, where narrowed to prohibit only acts of desecration which affect physical integrity of flag.]; State v. Hershey, (Ohio), 289 N.E.2d 190 (1970) [conviction of defendant under desecration statute affirmed].

2 Application of the overbreadth doctrine would likely come into play here. See, Goguen v. Smith, supra; Grayned v. City of Rockford, 408 U.S. 104, 33 L.Ed.2d 222 (1972).
One additional question would be whether it makes any constitutional difference in this context if the display in question was removed after being shown initially or was refused showing altogether. Cases such as Sefick, supra and Board of Ed. v. PICO, supra suggest that in certain situations this distinction might be significant because of the discretion initially afforded officials to choose their subject matter. However, other such cases as Southeastern Promotions, Ltd., supra and Widmar v. Vincent, supra do not distinguish between the two so long as the challenged decision is based upon the content of the expression. And if § 16-17-210 et seq. is applicable, unlike the situations in Sefick and PICO, any discretion to show the display is statutorily removed.

3 We do not attempt to resolve questions concerning whose First Amendment rights are being raised by a particular application of the statute or who may raise them. See, Roe v. Wade, 410 U.S. 113, 35 L.Ed.2d 147 (1973); 50 L.Ed.2d 902, '. . . Supreme Court's Views As To Party's Standing To Assert Rights Of Third Persons . . .'. Nor is it necessary for purposes of your question to determine which portion of the statute [i.e. mutilation, improper use etc.] might be applicable to this situation since each probably implicates First Amendment issues. Ely, supra.

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