

January 2, 2017" Uphill Battle to Ban Flag Burning

The major legal obstacle facing President-Elect Trump's veiled threat to criminalize flag burning is the 1989 Supreme Court case of *Texas v. Johnson*. For the first time in the *Johnson* case the Supreme Court directly addressed the question of whether states could criminalize the act of flag burning in light of the First Amendment right to free speech. At that time, 48 out of the 50 states had laws banning flag desecration. In earlier cases, the Supreme Court had upheld bans against the commercialization of the American flag, but protected the right to speak out against the flag.

During the 1984 Republican National Convention in Dallas, Texas, Gregory Johnson, a member of the Revolutionary Communist Youth Brigade, participated in a protest against the Reagan Administration. During the protest, someone handed Johnson an American flag. In front of the Dallas City Hall, he doused the flag with kerosene and set it on fire.

Johnson was arrested and charged with violating a Texas law that prohibited vandalizing "venerated objects." He was found guilty and sentenced to a year in jail. The case eventually made its way to the Supreme Court. In a controversial 5-4 decision, the Supreme Court overturned Johnson's conviction.

The Court emphasized the First Amendment right to free speech and held that speech can be verbal, written, *or* symbolic. When trying to decide if a non-verbal act should be considered symbolic or expressive speech, courts must ask if "an intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it."

Using this standard, the Court had little difficulty labeling Johnson's flag burning incident as expressive speech. After all, the incident occurred during a public protest and the "overtly political conduct was both intentional and overwhelmingly apparent."

Citing the four-prong test established in an earlier draft-card burning case, *United States v. O'Brien*, attorneys for Texas argued that states could regulate speech under some circumstances. For example, states have a compelling interest in preventing breaches of peace and in protecting such an important national symbol. The Supreme Court agreed that states may prohibit speech that tended to incite "imminent lawless action." However, in Johnson's case, there was no imminent threat of inciting a dangerous disturbance.

Further, the Court ruled that laws prohibiting all incidents of flag burning were directly aimed at suppressing speech and overly broad in their application. This was a direct affront to the First Amendment right to free speech. The Court held that the Texas law violated the "bedrock principle underlying the First Amendment, . . . that the Government may not prohibit expression of an idea simply

because society finds the idea itself offensive or disagreeable.” This ruling also effectively overturned the desecration laws of the other 47 states.

Congress condemned the Court’s decision and swiftly passed the federal Flag Protection Act (FPA) of 1989 under which anyone who mutilated, burned, or trampled on the flag faced a year jail sentence. In 1990, the Supreme Court ruled the FPA unconstitutional and struck it down. Several attempts over the years to pass a constitutional amendment prohibiting flag desecration have failed.

In light of these facts, Trump faces a steep, uphill battle to ban all flag burning.