

## **TEXAS v. GREGORY LEE JOHNSON**

491 U.S. 397, 109 S.Ct. 2533

Argued March 21, 1989

Decided June 21, 1989



In August 1984, the Republican National Convention was held in Dallas, Texas. On August 22, a group of about 100 demonstrators marched through Dallas streets, chanting political slogans and stopping outside several corporations to stage "die-ins." During these "die-ins," people in the group would collapse on the ground in a symbolic display of the effects of a nuclear war. Their protest was intended to dramatize the consequences of nuclear war and policies of the Republican Party.

Gregory Johnson was a leader and organizer of the group known as the Republican War Chest Tour. Along the way, walls of buildings were spray-painted, potted plants were overturned, and papers were torn up. No evidence was presented during the trial that Johnson took part in these acts of vandalism. At least two undercover police officers were in the group, but they made no attempt to stop the alleged illegal action.

One protester climbed a flagpole outside one of the buildings where the protesters had demonstrated and stole an American flag. When the group reached Dallas City Hall, the flag was handed to Johnson, who soaked it in kerosene and set it on fire. While the flag was burning, the protesters chanted, "America, the red, white, and blue, we spit on you." A witness to the flag burning collected the flag's remains and buried them in his backyard.

Two police officers and an employee of the Army witnessed the burning and testified that they were offended by the action. No violence occurred, and no one was physically injured or threatened during the demonstrations. Nearly 45 minutes after the event, police arrived and arrested Johnson, who was the only demonstrator charged with a crime. He was charged with desecration of a venerated object, in violation of the Texas Penal Code, which provided:

- A: A person commits an offense if he intentionally or knowingly desecrates:*
- (1) a public monument;*
  - (2) a place of worship or burial; or*
  - (3) a state or national flag.*
- B: For purposes of this section, "desecrate" means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.*

C: *An offense under this section is a Class A misdemeanor.*  
(*Tex. Penal Code Ann. Section 42.09*)

A total of forty-eight state legislatures (all except Alaska and Wyoming), as well as the United States Congress, had passed similar laws.

Johnson was convicted and sentenced to one year in jail and assessed a \$2,000 fine, the maximum punishment available for this crime. He appealed to the Texas Intermediate Appellate Court, which upheld his conviction. The Texas Court of Criminal Appeals, however, reversed the decision and ordered that the charges be dropped since the statute was not drawn narrowly enough to encompass only those flag-burnings that were likely to result in a serious disturbance of the peace. This court found that the flag's special status was not endangered by Johnson's conduct. The State of Texas then appealed to the United States Supreme Court. The state's concern was to preserve the flag as a symbol of national unity and to prevent breaches of the peace.

- ISSUE: Is the desecration of the American flag as a political protest protected under the freedom of expression clauses of the First and Fourteenth Amendments?

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Decision

A rare coalition of the Court comprised the majority: Justices Brennan, Blackmun, Kennedy, Marshall, and Scalia. The five-to-four decision stated that no laws could prohibit political protesters from burning the American flag and declared unconstitutional the flag desecration laws of forty-eight states and of the United States. Justice Brennan, speaking for the majority, said, "We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents." He stated that:

*Acknowledging that this Court had not yet decided whether the Government may criminally sanction flag desecration in order to preserve the flag's symbolic value, the Texas court nevertheless concluded that our decision in West Virginia Board of Education v. Barnette (1943), suggested that furthering this interest by curtailing speech was impermissible. "Recognizing that the right to differ is the centerpiece of our First Amendment freedoms," the court explained, "a government cannot mandate by that a feeling of unity in its citizens. Therefore, that very same government cannot carve out a symbol of unity and prescribe a set of approved messages to be associated with that symbol when it cannot mandate the status or feeling the symbol purports to represent."*

The majority opinion went on to indicate that we "cannot carve out a symbol of unity and prescribe a set of approved messages to be associated with that symbol when it cannot mandate the status or feeling the symbol purports to represent."

The Court believed that Johnson was prosecuted for voicing his disapproval of United States policies and that this type of expression may not be prohibited simply because society does not agree with the idea. They felt that the flag's place would be strengthened instead of weakened by this decision because the nation is resilient, not rigid. Brennan wrote, "The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong." The Court indicated that there is nothing in the Constitution or precedent cases that the American flag is in a separate category of its own.

The majority opinion would seem to allow a state to prosecute flag desecration under vandalism laws. However, this same act could not be prosecuted if that prosecution depended on expressive content, such as the response from onlookers. The Court had to first determine whether Johnson's actions were expressive conduct, and Texas

conceded this in its oral arguments. Brennan mentioned in his majority opinion that the Court had allowed expressive conduct when students were allowed to wear black arm bands to protest military involvement in Vietnam (*Tinker v. Des Moines*, 1969) and when a group of blacks was allowed to "sit-in" in a "whites only" area to protest segregation (*Brown v. Louisiana*, 1966).

Brennan indicated that the government generally has more freedom in restricting expressive conduct than in restricting written or spoken word, but that First Amendment protection doesn't end at the spoken or written word. He went on to state that, "Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable ...."

The State had two interests in this conviction: preventing breaches of the peace and preserving the flag as a national symbol. The majority opinion indicated that the first interest is not an issue in this case since no disturbance of the peace occurred and that the second is related to the "suppression of expression." Johnson was prosecuted only because he knew others would be offended by his actions. "If he had burned the flag as a means of disposing of it because it was dirty or torn, he would not have been convicted ...."

In a concurring opinion, Justice Kennedy noted that:

*The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result.*

Kennedy did agree that the flag holds a place of honor but that the Constitution does not set aside this symbol in a special category.

Chief Justice Rehnquist wrote a dissenting opinion, in which he was joined by Justices White and O'Connor:

*... For more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in a way respondent Johnson did here.*

*At the time of the American Revolution, the flag served to unify the Thirteen Colonies at home, while obtaining recognition of national*

sovereignty abroad. Ralph Waldo Emerson's Concord Hymn describes the first skirmishes of the Revolutionary War in these lines:

*"By the rude bridge that arched the flood  
Their flag to April's breeze unfurled,  
Here once the embattled farmers stood  
And fired the shot heard round the world." ...*

*The American flag played a central role in our Nation's most tragic conflict, when the North fought against the South. The lowering of the American flag at Fort Sumter was viewed as the start of the war ....*

*The American flag ... has come to be the visible symbol embodying our Nation. It does not represent the views of any particular political philosophy....*

These Justices agreed that the Court's decision was disregarding Justice Holmes' statement that "a page of history is worth a volume of logic." Rehnquist noted that the flag is regarded by millions of Americans with an "almost mystical reverence." He cited *Chaplinsky v. New Hampshire (1942)*, indicating that freedom of expression is not absolute. He said that Johnson could have made any verbal denunciation of the flag that he wished, and could even have burned it privately without breaking the law.

Justice Stevens read his emotional dissent from the bench. He stated in part that:

*... sanctioning the public desecration of the flag will tarnish its value -- both for those who cherish the ideas for which it waves and for those who desire to don the robes of martyrdom by burning it.... A country's flag is a symbol of more than "nationhood and national unity."*

To differentiate between disagreeable ideas and disagreeable conduct, Stevens went on to say that if Johnson had spray painted his message on the Lincoln Memorial, the government could prohibit his "expression." He felt that there should be a "legitimate interest in preserving the quality of an important national asset."

NOTE: In response to this case, Congress acted quickly and passed the Flag Protection Act of 1989. Eichman and others were found guilty in federal district court for violating this law when they set fire to several American flags on the steps of the United States Capitol. Others were prosecuted in a different federal district court when they knowingly

set fire to an American flag in Seattle, Washington. The United States Supreme Court heard these cases as *United States v. Eichman* in 1990.

As in *Texas v. Johnson*, Justices Brennan, Marshall, Blackmun, Scalia, and Kennedy again agreed with the district courts. Justice Brennan again wrote the opinion of the Court, holding that the Flag Protection Act could not be upheld under the First Amendment. He stated that this law "suffers from the same fundamental flaw as the Texas law, and its restriction on expression cannot be justified without reference to the content of the regulated speech." Brennan added that, "Punishing desecration of the flag dilutes the very freedom that makes this emblem so revered ...."