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Flag Protection: A Brief History and Summary of Recent Supreme Court Decisions and Proposed Constitutional Amendment

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Summary

This report is divided into two parts. The first gives a brief history of the protection of the flag issue from the enactment of the Flag Protection Act in 1968 until the present consideration of an amendment to the Constitution in the 106th Congress. The second part briefly summarizes the two decisions of the United States Supreme Court, *Texas* v. *Johnson* and *United States* v. *Eichmann*, which struck down the state and federal flag protection statutes as applied in the context punishing expressive conduct.

In 1968, in the midst of the Vietnam conflict, Congress enacted the first Federal flag protection act of general applicability. The law was occasioned by the numerous public flag burnings in protest of the war. For the next 20 years, the lower courts upheld the constitutionality of the federal statute and the Supreme Court declined to review these decisions.

In *Texas* v. *Johnson*, the majority of the Court held that Johnson's conviction for flag desecration, under a Texas statute, was inconsistent with the First Amendment and affirmed the decision of the Texas Court of Criminal Appeals which held that Johnson could not be punished for burning the flag as part of a public demonstration.

In response to *Johnson*, Congress amended the Federal flag protection statute by passing the Flag Protection Act of 1989. The Court in reviewing this Act in *United States* v. *Eichmann* expressly declined the invitation to reconsider *Johnson* and its rejection of the contention that flag-burning as a mode of expression, like obscenity or "fighting words," does not enjoy the full protection of the First Amendment. The only question not addressed in *Johnson*, and therefore the only question the majority felt necessary to address, was "whether the Flag Protection Act is sufficiently distinct from the Texas statute that it may constitutionally be applied to proscribe appellees' expressive conduct." The majority of the Court held that it was not.

Congress, recognizing that *Johnson* and *Eichman* had left little hope of an anti-desecration statute being upheld, has considered in each Congress subsequent to these decisions a constitutional amendment to empower Congress to protect the physical integrity of the flag. Three joint resolutions, H.J.Res. 5, H.J.Res. 33, and S.J.Res. 14, were introduced in the 106th which propose amending the Constitution to permit prohibition of flag desecration. H.J.Res. 33 passed the House by a vote of 305 to 124 on June 24, 1999. On March 29, 2000, S.J.Res.14 failed, by a vote of 63-37, to receive the necessary two-thirds vote in the Senate.

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History

In 1968, in the midst of the Vietnam conflict, Congress enacted the first Federal Flag Protection Act of general applicability.[2] The law was occasioned by the numerous public flag burnings in protest of the war.[3] For the next 20 years, the lower courts upheld the constitutionality of the federal statute and the Supreme Court declined to review these decisions.[4]

In this 20-year period prior to *Johnson*, the Supreme Court did visit the flag issue three times. Each time the Court found a way to rule in favor of the protestor and overturn a state conviction on very narrow grounds, avoiding definitively ruling on the constitutionality of convictions for politically inspired destruction or alteration of the American flag.[5] In *Street* v. *New York*,[6] the Court overturned a state conviction

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[1]For a more detailed discussion of these cases, see, John Luckey, *Texas v. Johnson: Flag Desecration and the First Amendment*, CRS Report 89-394 (June 29, 1989) and John Luckey, *United States v. Eichman: the Flag Protection Act of 1989 Held Unconstitutional*, CRS Report 90-301 (June 19, 1990).

[2]P.L. 90-381, 82 Stat. 291 (1968), codified at 18 U.S.C. § 700. Prior to this Act there was an act which prohibited desecration of the flag in the District of Columbia.

[3]*See*, S.Rept. 90-1287, 90th Cong., 2nd Sess. 2 (1968).

[4]*See*, e.g. *Joyce v. United States*, 454 F.2d 971 (D.C. Cir. 1971), *cert. den.* 405 U.S. 969.; *United States v. Crosson*, 462 F.2d 96 (9th Cir. 1972), cert. den. 409 U.S. 1064; and *Kime v. United States*, 673 F.2nd 1318 (4th Cir. 1982), *cert. den.* 459 U.S. 949.

[5]See, John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482 (1975) and Charles Tiefer, *The Flag-Burning Controversy of 1989-1990: Congress' Valid Role in Constitutional*

(continued...)

for flag-burning, holding that the flag-burner was prosecuted for his words rather than his acts. In 1974, the Court overturned a prosecution by finding that the state statute was vague.[7] In *Spence* v. *Washington*,[8] the Court held that the taping of a peace symbol to a flag was expressive conduct and thus protected by the First Amendment. In both of these later cases the court expressly referred to the federal statute in a positive manner.[9]

It was against this background, that the Supreme Court took the *Johnson* case. In 1984, during the Republican National Convention in Dallas, Texas, Johnson had participated in a demonstration protesting the policies of the Reagan administration. In front of the city hall, Johnson unfurled an American flag, which another member of the demonstration had taken from a flag pole and had given to him, doused it with kerosene, and set it on fire. He was charged with the desecration of a venerated object in violation of a Texas statute.[10] Johnson was tried, convicted, and sentenced to one year in prison and fined $2,000. The conviction was upheld by the Court of Appeals of the Fifth District of Texas at Dallas.[11] The Texas Court of Criminal Appeals reversed.[12] In a 5 to 4 decision, the U.S. Supreme Court affirmed this reversal on June 21, 1989,[13] thus, in effect, holding that the flag protection statutes of 47 states and the federal statute could not be applied to a flag burning which was part of a public demonstration.[14]

In response to this decision, Congress enacted the Flag Protection Act of 1989.[15] The Act changed the focus of the protection granted the flag from protecting it against desecration, which the Court had ruled unconstitutional, to protecting its physical integrity. The primary purpose of amending the federal desecration statute was to remove any language which the courts might find made the statute one that was aimed at suppressing a certain type of expression. If the statute was neutral as to expression, for instance, if it proscribed all burning of flags, then arguably, the more easily passed *O'Brien* test would be applied under which the government would

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[5](...continued)
Dialogue, 29 Harv. J. on Leg. 357 (1992).

[6]394 U.S. 576 (1969).

[7]*Smith v. Goguen*, 415 U.S. 566 (1974).

[8]418 U.S. 405 (1975).

[9]*Goguen*, at 582 and *Spence* at 415.

[10]Tex. Penal Code Ann. § 42.09 (1989).

[11]706 S.W.2d 120 (1986).

[12]755 S.W.2d 92 (1988).

[13]*Texas v. Johnson*, 491 U.S. 397 (1989).

[14]Alaska and Wyoming do not have this type of statute. For a list of the citations to the state flag desecration statutes in effect at the time, *see, Texas v. Johnson*, at 428, n.1 (Rehnquist, C.J., dissenting) (1989). See, also, Vastine Davis Platte, *Flag Desecration and Flag Misuse Laws in the United States*, CRS Report 95-182 (March 29, 1995).

[15]P.L. 101-131 (H.R. 2978).

need only show that the statute furthers an important or substantial governmental interest, and that the restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest.[16] All of the opinions in *Johnson* had recognized a governmental interest in protecting the physical integrity of the flag to some degree. Therefore, it was at least arguable that such a neutral statute would meet the second part of the test.

The new statute made criminal intentionally mutilating, defacing, physically defiling, burning, maintaining on the floor or ground, or trampling upon the flag of the United States. Exemption was given for conduct consisting of disposal of a worn or soiled flag. The term "flag of the United States" was defined to mean any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed. Provision was made for expedited Supreme Court review of the constitutionality of the Act.

The Flag Protection Act of 1989 became effective on October 28, 1989. On that date protesters in Seattle Washington and Washington D.C. were arrested for violation of the new Act. These cases were dismissed upon findings that the Act was unconstitutional as applied to their burning a United States flag in a protest context.[17] The D.C. and Seattle cases were appealed to the Supreme Court under the Act's expedited review provision.[18] On June 11, 1990, the Court announced its ruling.[19] In another 5 to 4 decision,[20] the Court held that the Flag Protection Act of 1989 could not be constitutionally applied to a burning of the flag in the context of a public protest.

In the summer of 1990, both Houses of Congress considered and failed to pass by the required two-thirds vote[21] an amendment to the Constitution which would have empowered Congress to enact legislation to protect the physical integrity of the flag.

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[16]See, *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

[17]*United States v. Haggerty*, 731 F.Supp. 415 (W.D. Wa. 1990) and *United States v. Eichman*, 731 F.Supp. 1123 (D.D.C. 1990)..

[18]*United States v. Eichman*, 89-1433, and *United States v. Haggerty*, 89-1434.

[19]*United States v. Eichman*, 496 U.S. 310 (1990).

[20]It should be noted that both *Johnson* and *Eichman* were 5 to 4 decisions with the division of the Court identical. Justice Brennan delivered the opinion of the Court, in which Justices Marshall, Blackmun, Scalia, and Kennedy, joined. The dissenting justices were Chief Justice Rehnquist, Justices Stevens, White, and O'Connor. Three of the majority justices are no longer on the Court, Justice Brennan being replaced by Justice Souter, Justice Marshall being replaced by Justice Thomas, and Justice Blackmun being replaced by Justice Ginsburg. One of the minority justices has been replaced, Justice White being replaced by Justice Breyer. With this large a changeover in the Court, one cannot predict the outcome of a similar case with any great certainty.

[21]The vote in the House was 254 to 177 (34 votes short of two thirds). The vote in the Senate was 58 to 42 (9 votes short of two thirds).

In the 104th and 105th Congresses, the House passed proposed Constitutional Amendments which would have authorized Congress to enact legislation to protect the flag from physical desecration.[22] In the 104th Congress, the Senate considered a "flag" Amendment, but came three votes short of passing it.[23] In the 105th Congress, the Senate Judiciary Committee reported (without written report) an Amendment to authorize protection of the flag, S.J.Res. 40. The Senate did not bring this resolution to the floor for consideration.

Three joint resolutions, H.J.Res. 5, H.J.Res. 33, and S.J.Res. 14, were introduced in the 106th which propose amending the Constitution to permit prohibition of flag desecration. The following was the text of S.J.Res. 14 and H.J.Res. 33:

> Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled, (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission for ratification
>
> Article
>
> The Congress shall have the power to prohibit the physical desecration of the flag of the United States.

H.J.Res. 33 passed the House by a vote of 305 to 124 on June 24, 1999.[24] On March 29, 2000, S.J.Res. 14 failed, by a vote of 63-37, to receive the necessary two-thirds vote in the Senate.[25]

Texas v. Johnson

In *Texas* v. *Johnson*, the majority of the Court held that Johnson's conviction for flag desecration, under a Texas statute, was inconsistent with the First Amendment and affirmed the decision of the Texas Court of Criminal Appeals which held that Johnson could not be punished for burning the flag as part of a public demonstration.

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[22]In the 104th Congress, the House, by a vote of 312 to 120 passed H.J.Res. 79 CONG. REC. H6446 (daily ed. June 28, 1995) (record vote no. 431). In the 105th Congress, the House, by a vote of 310 to 114 passed H.J.Res. 54, 143 CONG. REC. H3755-56 (daily ed. June 12, 1997)(record vote no. 202).

[23]On December 12, 1995, the Senate, by a vote of 63 to 36, failed to pass S.J.Res. 31, 141 CONG. REC. S18394 (daily ed. December 12, 1995)(record vote no. 600)(with 99 Senators voting, 66 votes were required for passage).

[24]145 CONG. REC. H4844 (daily ed. June 24, 1999)(record vote no. 252)

[25]146 CONG. REC. S1874 (daily ed. March 29, 2000)(record vote no. 48)

The opinion outlined the questions which must be addressed in a case where First Amendment protection is sought for conduct rather than pure speech. First, the Court must determine if the conduct in question is expressive conduct. If the answer is yes, then the First Amendment may be invoked, and the second question must be answered. The second question is whether the state regulation of the conduct is related to the suppression of expression. The answer to this question determines the standard which will be utilized in judging the appropriateness of the state regulation.

The test of whether conduct is deemed expressive conduct sufficient to bring the First Amendment into play is whether 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.[26] The opinion emphasizes the communicative nature of flags as previously recognized by the Court,[27] but states that not all action taken with respect to the flag is automatically expressive. The context in which the conduct occurred must be examined.[28] The majority found that Johnson's conduct met this test. The burning of the flag was the culmination of a political demonstration. It was intentionally expressive, and its meaning was overwhelmingly apparent. In these circumstances the burning of the flag was conduct "sufficiently imbued with elements of communication" to implicate the First Amendment.[29]

The finding that burning the flag in this circumstance was expressive conduct required the Court next to look at the statute involved to see if it was directly aimed at suppressing expression or if the governmental interest to be protected by the statute was unrelated to the suppression of free expression. If the statute were of the latter type, the government would need only show that it furthers an important or substantial governmental interest, and that the restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest.[30] If the statute was aimed at suppression of expression, then it could be upheld only if it passed the most exacting scrutiny.[31]

Texas offered two state interests which it sought to protect with this statute: prevention of breaches of the peace; and preservation of the flag as a symbol of nationhood and national unity. The majority rejected the first of these interests as not being implicated in the facts of this case. No disturbance of the peace actually occurred or was threatened. The opinion also points out that Texas has a statute

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[26]*Texas v. Johnson*, 491 U.S. 397, at 405 (1989), citing *Spence v. Washington*, 418 U.S. 405, 410-411 (1974).

[27]See, *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943) (pledge of allegiance), *Spence v. Washington*, 418 U.S. 405 (1974) (attaching a peace sign to the flag), *Stromberg v. California*, 283 U.S. 359 (1931) (displaying a red flag), and *Smith v. Goguen*, 415 U.S. 566 (1974) (wearing a flag on the seat of one's pants).

[28]*Johnson*, at 406.

[29]*Id*.

[30]See, *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

[31]*Johnson*, at 412, citing *Boos v. Barry*, 485 U.S. 312, 321 (1988).

specifically prohibiting breaches of the peace,[32] which tends to confirm that flag desecration need not be punished to keep the peace.[33]

The second governmental interest, that of preserving the flag as a symbol of national unity, was found by the majority to be directly related to expression in the context of activity.[34] The Texas law did not cover all burning of flags. Rather it was designed to protect it only against abuse that would be offensive to others. Whether Johnson's treatment of the flag was proscribed by the statute could only be determined by the content of his expression. Therefore, exacting scrutiny must be applied to the statute.[35]

The majority held that the Texas statute could not withstand this level of scrutiny. There is no separate constitutional category for the American flag. The government may not prohibit expression of an idea merely because society finds the idea offensive, even when the flag is involved. Nor may a state limit the use of designated symbols to communicate only certain messages.[36]

United States v. Eichman

The Court in reviewing the Flag Protection Act of 1989 in *United States* v. *Eichman* expressly declined the invitation to reconsider *Johnson* and its rejection of the contention that flag-burning as a mode of expression, like obscenity or "fighting words," does not enjoy the full protection of the First Amendment.[37] The only question not addressed in *Johnson*, and therefore the only question the majority felt necessary to address, was "whether the Flag Protection Act is sufficiently distinct from the Texas statute that it may constitutionally be applied to proscribe appellees' expressive conduct."[38]

The government argued that the governmental interest served by the Act was protection of the physical integrity of the flag. This interest, it was asserted, was not related to the suppression of expression and the Act contained no explicit content-based limitations on the scope of the prohibited conduct. Therefore the government should only need to show that the statute furthers an important or substantial

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[32]Tex. Penal Code Ann. § 42.01 (1989).

[33]*Johnson*, at 410.

[34]*Id*., citing *Spence* at 414 n. 8.

[35]*Id*. at 412.

[36]*Id*. at 415-416.

[37]*United States v. Eichman*, 496 U.S. 310, at 315 (1990). The majority also declined to reassess *Johnson* in light of Congress' recognition of a "national consensus" favoring a prohibition on flag-burning, stating:

Even assuming such a consensus exists, any suggestion that the Government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment. Id. at 318.

[38]*Id*.

governmental interest, and that the restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest.[39]

The majority, while accepting that the Act contained no explicit content-based limitations, rejected the claim that the governmental interest[40] was unrelated to the suppression of expression. The Court stated:

> The Government's interest in protecting the "physical integrity" of a privately owned flag rests upon a perceived need to preserve the flag's status as a symbol of our Nation and certain national ideals. But the mere destruction or disfigurement of a particular physical manifestation of the symbol, without more, does not diminish or otherwise affect the symbol itself in any way. For example, the secret destruction of a flag in one's own basement would not threaten the flag's recognized meaning. Rather, the Government's desire to preserve the flag as a symbol for certain national ideals is implicated "only when a person's treatment of the flag communicates [a] message" to others that is inconsistent with those ideals.[41]

In essence the Court said that the interest protected by the Act was the same interest which had been put forth to support the Texas statute and rejected in *Johnson*.

The opinion went on to analyze the language of the Act itself. Again, while there was no explicit limitation found in this language, the majority found that each of the specified terms, with the possible exception of "burns," unmistakably connoted disrespectful treatment of the flag and thus argues against the expression neutrality of the Act.[42] Therefore, although the Act was "somewhat broader" than the Texas statute, it still suffered from the same fundamental flaw, namely it suppressed expression out of concern for its likely communicative impact.[43] This being the case, the Majority found that the *O'Brien* test was inapplicable and the Act must be subject to "the most exacting scrutiny." As in *Johnson*, the statute in question could not withstand this level of scrutiny.

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[39]See, *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

[40]The opinion notes that there are at least two other interests the government has in protecting the flag, but these interests are not involved in the context of flag-burning of a privately owned flag. The decision does not affect the extent the government's interest in protecting publicly owned flags might justify special measures on their behalf. *Eichman*, at 316, nt. 5. The government, also, has a legitimate interest in preserving the flag's function as an "incident of sovereignty," but the facts of this case did not interfere or threaten that interest. *Id.* at 316, nt. 6.

[41]*Eichman*, at 315-316.

[42]*Id.* at 317.

[43]*Id.* at 318.