Texas v. Johnson (1989)

Argued: March 21, 1989

Decided: June 21, 1989

Background

Before the founding of the United States, people under British rule did not have freedom of speech. The British government had many rules regarding what kind of material could be written, printed, or spoken. In 17th century England, judges created the principle of **constructive treason**. This idea stated that a person could be found guilty of treason, or the betrayal of one's own country, for owning written material that was critical of the king of England.

After the American Revolution, the founders wanted to make sure that the American government did not have the power over speech that Britain had. They believed that it was important for members of society to be able to discuss different ideas and viewpoints freely, even if they were critical of the government.

To protect this right, the founders included the freedom of speech in the First Amendment, which states that "Congress shall make no law… abridging the freedom of speech." This means that it is unconstitutional for Congress to pass laws that punish people for their speech. Later, the 14th Amendment made it unconstitutional for states to abridge the freedom of speech as well. The U.S. Supreme Court has interpreted the First Amendment to protect **symbolic speech**, which is the expression of ideas through actions instead of written or spoken words.

However, the Supreme Court has held that there are several kinds of speech that are not protected by the First Amendment. Unprotected speech includes **incitement** (using speech to cause violence), **defamation** (saying or writing false information about people with the intent to harm them), threats, and **obscene** material (something that is offensive or indecent, usually involving sexual content).

Facts

During the Republican National Convention in 1984, Gregory Lee Johnson participated in a political demonstration on the steps of Dallas City Hall. The demonstrators were opposed to nuclear weapons. One demonstrator took an American flag from a flagpole and gave it to Johnson, who set fire to the flag. While the flag burned, protesters chanted "America, the red, white, and blue, we spit on you." There were no injuries or threats of injury during the demonstration, although some people who witnessed it said that they were very upset or offended by it.

Following the protest, Johnson was arrested, charged with, and convicted of violating a Texas law banning the **desecration** (damage or disrespect) of the American flag in a way that would seriously offend one or more persons observing the action. Johnson appealed, arguing that the Texas law violated the First Amendment. On appeal, the Texas Court of Criminal Appeals agreed with

Johnson and overturned his conviction. The state of Texas asked the U.S. Supreme Court to hear the case, and it agreed.

Issue

Does a law banning the burning of the American flag violate the First Amendment?

Constitutional Amendments, State Statute, and Supreme Court Precedents

- **First Amendment to the U.S. Constitution**

  "Congress shall make no law… abridging the freedom of speech…or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

- **14th Amendment to the U.S. Constitution**

  > "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law…"

  This amendment prohibits state and local governments as well as Congress from abridging the protections guaranteed in the Bill of Rights, such as the freedom of speech.

- **Texas Penal Code Section 42.09: "Desecration of Venerated Object"**

  "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. 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. An offense under this section is a Class A misdemeanor."

- *United States v. O'Brien* (1968)

  To protest the Vietnam War, four men burned their draft cards at a public demonstration. They were convicted of breaking a federal law prohibiting the destruction or changing of a draft card. They challenged it, saying the law violated their freedom of speech. The Supreme Court ruled that the law was constitutional. The Court said that not every activity constitutes "speech." Here, burning of draft cards was closer to conduct than speech. The government is free to make laws regulating conduct. In addition, it said that the nation's need to maintain the armed forces was more important than free speech.

- *Spence v. Washington* (1974)

  Harold Spence, a college student, wanted to protest the actions of American troops in Cambodia. He hung an American flag upside down from his apartment window. Over the flag, he placed a peace symbol made from black tape. At his trial for a criminal offense based on his treatment of the flag, Spence stated that his purpose was to associate the American

flag with peace instead of war and violence. Spence was convicted of violating a Washington state law that prohibited placing anything over a flag. The U.S. Supreme Court ruled in favor of Spence. It stated that the flag was displayed in his own home, and that he was clearly expressing an idea through his action. The state could not demonstrate a clear reason for preventing the expression of that idea.

Arguments for Texas (petitioner)

- For 200 years, the American flag has been regarded as the symbol of the nation. This symbol is considered sacred and is important to many Americans.
- The flag symbolizes more than national unity. It has strong significance for war veterans and their families. It symbolizes the shared values of freedom, equal opportunity, and religious tolerance. It is in the government's interest to protect this important American symbol.
- Texas did not punish Johnson for his message; it punished the way he chose to convey that message. The government has the power to pass laws regulating conduct. There are other laws about burning items in a public space.
- Even if the action of flag burning can be interpreted as speech, *all* speech need not be allowed. There must be reasonable limits. There are other ways that Johnson could have expressed his views.

Arguments for Johnson (respondent)

- The government may not prohibit expression just because society finds the ideas presented offensive. The purpose of the First Amendment is to protect minorities from having their opinions suppressed by the majority.
- The Supreme Court has long recognized that speech can be more than the spoken or written word. Actions are symbolic speech when the actor intends to communicate a particular message that would most likely be understood by those watching.
- Johnson's actions did not incite violence or disrupt the peace. Therefore, this speech is not within one of the exceptions to the First Amendment.
- Although it is important for the government to preserve the flag as a symbol, it is more important to ensure Americans' rights to protest when they disagree with the government.

Decision

In a 5-4 decision, the Supreme Court overturned Johnson's conviction and struck down Texas's law as unconstitutional.

Majority

Writing for the majority of the Court, Justice Brennan held that Johnson's act of burning the American flag was protected by the First Amendment. Burning the flag is considered **expressive conduct** because Johnson intended for his actions to communicate an idea, and his audience understood that he was trying to communicate an idea through his actions. The majority explained that the freedom of speech protects ideas and actions that society might find offensive. Justice Brennan stated that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."

The Court also held that states did not have the authority to decide which actions were acceptable to perform on a certain symbol. The government did have a legitimate interest in protecting the flag as a symbol of the nation; however, that interest could be served in other ways without criminally punishing a person for burning a flag as a means of political protest. This means that the law violates the First Amendment.

Dissents

Chief Justice Rehnquist wrote that the American flag is unique because it is a symbol of the nation. The government is, therefore, justified in banning flag burning. He said that the flag is not just another "idea" or "point of view." He argued that flag burning should not be protected because it is not necessary to the free exchange of ideas. Any idea that Johnson was trying to communicate could have been expressed using lawful language instead.

Justice Stevens also dissented, arguing that Johnson was punished for his conduct, not for his ideas or expression. He believed that the method by which Johnson expressed his ideas did not deserve protection because it decreased the value of a national symbol.

Impact

The Supreme Court's decision in *Texas v. Johnson* effectively struck down flag-burning bans that were in place in 48 states, including Texas. In response to this case, Congress passed the Flag Protection Act in 1989, which was a federal law banning the desecration of the flag. Once again, Johnson decided to protest this law. He joined Shawn Eichman, David Blalock, and Scott Tyler in burning a flag on the steps of the U.S. Capitol. They were all arrested, but the government decided not to prosecute Johnson, stating that there was not enough evidence to charge him with violating the federal law.

However, Eichman, Blalock, and Tyler were charged and convicted of violating the Flag Protection Act. Their cases were combined into one case, *United States v. Eichman* (1990), that was also heard in the Supreme Court. The same justices who overturned the Texas law in *Texas v. Johnson* once again made up the majority to strike down the Flag Protection Act as unconstitutional.

Gregory Lee Johnson continues to participate in protests regarding police brutality, prisoners' rights, and war. In 2016, he was arrested for burning the flag in Cleveland, Ohio, during the Republican

National Convention. Although, he was never convicted, the city of Cleveland agreed to pay him $225,000 for violating his First Amendment rights. He was again arrested in 2019 for burning two American flags outside of the White House during a Fourth of July celebration as a way of protesting President Trump's policies. Once again, the charges were dropped.

Flag burning remains a very controversial topic. Congress has considered constitutional amendments banning the desecration of the flag many times, but it has never successfully gained the support necessary for ratification.

Additional information about *Texas v. Johnson,* including background at three reading levels, opinion quotes and summaries, teaching activities, and additional resources, can be found at https://www.landmarkcases.org/.