

TEXAS v. GREGORY LEE JOHNSON, 491 U.S. _____ (1989)
FLAG BURNING AND SYMBOLIC SPEECH

The Facts

At the end of a demonstration in Dallas to protect government policies, Gregory Johnson doused an American flag with kerosene and set it on fire. While the flag burned, the protestors shouted, “America the red, white, and blue, we spit on you.” Although no one was injured or threatened during the demonstration, some witnesses were offended by the flag burning. As a result, Johnson was convicted of the crime of desecrating a flag under Texas law. Johnson claimed that his flag burning was a form of symbolic speech that should be protected by the First Amendment. But the attorney for Texas justified Johnson’s conviction on two grounds: preventing breaches of the peace and preserving the flag as a symbol of national unity.

Issues for Discussion

1. Should the Supreme Court uphold laws prohibiting desecration of the flag? Why or why not?
2. Was Johnson’s behavior a form of expression that should be protected by the First Amendment?
3. Even if the burning of the flag is a form of symbolic speech, aren’t there some types of speech that the government should be able to prohibit and punish? What about speech that deeply offends most Americans?
4. Couldn’t Johnson have expressed his critical views of America in other ways without violating the Texas law?

Decision of the United States Supreme Court

The Court overturned Johnson's conviction for desecrating a flag because it violated his First Amendment right to freedom of expression.

Reasoning of the Court

Johnson was convicted for an act of political protest, a type of expressive conduct protected by the First Amendment. This does not mean that the government can never restrict expression, but it does mean that such restrictions are subject to "the most exacting scrutiny." Texas' defense of Johnson's conviction does not survive this scrutiny.

The state may restrict expression that "breaches the peace" or is intended to produce "imminent lawless action" and is likely to produce such action. But Johnson's behavior did neither. The government may also prohibit "fighting words," but Johnson's symbolic protest against government policies was not "a direct personal insult or an invitation to exchange fisticuffs." Nor does the state's interest in "preserving the flag as a symbol of nationhood" justify Johnson's conviction.

Although the government may encourage proper treatment of the flag, this does not mean it may criminally punish a person for burning a flag as means of political protest. This is because the First Amendment prohibits the government from punishing people for their controversial symbolic expression simply because the majority finds the expression offensive.

According to the Court, this decision is a "reaffirmation of the principles of freedom" that the flag reflects and of the conviction that "toleration of criticism such as Johnson's is a sign and source of our strength." The Court concluded: "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... We do not consecrate the flag by punishing its desecration, for in doing so, we dilute the freedom that this cherished emblem represents."

In a dissenting opinion, Chief Justice Rehnquist wrote that he would have upheld the Texas law since it deprived Johnson of "only one rather inarticulate symbolic form of protest" and left him with every other way to express his disapproval of national policy. According to the Chief Justice, one purpose of democratic society is "to legislate against conduct that is regarded as evil and profoundly offensive" -- whether it be "embezzlement, pollution, or flag burning." It would be ironic, he concluded, that the government could draft men into the armed forces to "fight and perhaps die for the flag," but could not "prohibit the public burning of the banner under which they fight."

UNMARKED OPINION CASE STUDY STRATEGY

After reviewing the facts and issues in the Case of the Flag Burning, pass out Opinion A and B. Ask students to select the opinion they agree with and explain why. After a thorough discussion of the decisions and their opinions and reasoning, tell students what the actual holding was. Use the political cartoon to help generate discussion.

Opinion A is the majority opinion written by Justice Brennan and joined by Marshall, Blackman, Scalia, and Kennedy. Opinion B is Rehnquist's dissenting opinion in which he is joined by White and O'Conner. Stevens filed a dissenting opinion, as well. (*Texas v. Gregory Lee Johnson.*)

THE CASE OF THE FLAG BURNING

While the Republican national convention was taking place in Dallas in 1984, Gregory Lee Johnson participated in a political demonstration. Demonstrators marched through Dallas streets stopping at several locations to state "die-ins" intended to dramatize their opposition to nuclear weapons. One demonstrator took an American flag from a flag pole and gave it to Johnson.

The demonstration ended in front of Dallas City Hall where Johnson unfurled the American flag, doused it with kerosene, and set it on fire. While the flag burned, protestors chanted, "America, the red, white, and blue, we spit on you." There were no injuries or threats of injury during the demonstration.

Of the 100 demonstrators, only Johnson was arrested. He was charged under a Texas criminal statute that prohibited desecration of a venerated object (including monuments, places of worship or burial, or a state or national flag), "in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action." At his trial, several witnesses testified that they had been seriously offended by the flag burning. He was convicted, sentenced to one year in jail, and fined \$2,000.

His case was appealed to the United States Supreme Court. Study the two opinions on the next page and decide which should be the majority opinion in this case.