

UNITED STATES v. EICHMAN (1990)

FLAG BURNING - PART 2

SUMMARY

By a 5-4 vote, the Supreme Court has invalidated a recent federal statute criminalizing the desecration of the American flag under certain circumstances. The opinion was issued on June 11, 1990 in the case of *United States v. Eichman*.

BACKGROUND

In 1989 in a case called *Texas v. Johnson*, the Supreme Court invalidated a Texas statute that punished persons who desecrated a national flag in such a way that the action was likely to seriously offend an observer. The Court concluded that such conduct was protected by the First Amendment.

The decision was a highly controversial one, and there was an effort in Congress to amend the Constitution to overturn the ruling. Many members, however, felt that amending the Constitution was a very drastic step and proposed that a statutory effort be attempted instead. They believed that a statute could be drafted that would meet Constitutional standards.

The theory went as follows: the problem with the Texas statute was its emphasis on offending people. You committed a crime in Texas not by burning a flag, but by burning a flag in public and getting people upset. The First Amendment protects expressions of ideas when they upset people. To ban conduct because it upsets people is to limit the expression of objectionable ideas, and the First Amendment does not permit this. If, on the other hand, a statute simply made it a crime to desecrate a flag, the emphasis would be on the protection of the property. This was more likely to pass constitutional review, many believed.

In 1989, Congress passed just such a statute. Shortly thereafter, at least two groups burned flags in public as part of protests which, to some degree, were designed to challenge the new statute's constitutionality. Two lower federal courts found the statute to be unconstitutional, and the Supreme Court took the unusual step of hearing the two cases on an expedited basis.

ANALYSIS

The majority of the Court was completely unpersuaded by the new rationale for the statute. Congress chose to protect the flag, they argued, not because of its value as property but because of its value as a symbol of national unity. They concluded that punishing those who attack a symbol amounts to punishing those who disagree with an "official" idea. Since the right to disagree with official policy is protected by the First Amendment, they concluded the expression of that idea through flag burning is also protected.

The dissenters argued that the majority had missed a vital point. They agreed that Congress may not forbid expressive conduct, but they argued that the dissenter has many effective means of making his or her point. Congress, they said, has an interest in protecting the flag as a symbol of national unity and purpose, and this interest must be weighed against the protesters' interest in using the flag, as opposed to some other means, in making their point. Since they saw this case as one of competing interests, they would have required a weighing of those interests.

It appears as though we may have heard the end of the flag burning debate for the near future. At one time, it was the most hotly debated issue on the floor of the Senate and House of Representatives. Privately, most members of Congress appeared to think that a statute banning flag burning was a bad idea and that a constitutional amendment doing the same thing would be even worse. But members who were up for re-election that year were concerned how it would look in their home district if they appeared to support flag burning.

EXCERPTS FROM THE MAJORITY OPINION (By Justice Brennan)

“As was explained in Johnson, if we were to hold that a State may forbid flag-burning whenever it is likely to endanger the flag's symbolic role, but allow it whenever burning a flag promotes that role — as where, for example, a person ceremoniously burns a dirty flag — we would be permitting a State to prescribe what shall be orthodox...”

EXCERPTS FROM THE DISSENT (By Justice Stevens)

“Of course the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. None of us disagree with that proposition. But it is equally well settled that certain methods of expression may be prohibited if (a) the prohibition is supported by a legitimate societal interest that is unrelated to the suppression of ideas the speaker desires to express; (b) the prohibition does not entail any interference with the speaker's freedom to express those ideas by other means; and (c) the interest in allowing the speaker complete freedom of choice among alternative methods of expression is less important than the societal interest supporting the prohibition.”