The Flag Burning Debate

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The first rendition of the American flag was first flown on January 1, 1776, at the militia fort atop Prospect Hill overlooking Boston, Massachusetts. This flag was composed of thirteen alternating bars of red and white with a smaller rendition of the Union Jack in the upper left hand corner. This design inspired Betsy Ross to sew the most well known of the pre-independence banners in May of the same year. Her flag gave birth to the famous stars and stripes trend that would continue to be the trademark of American sovereignty through the rest of the Revolutionary War and on through the next three centuries. On June 14, 1777, the Second Continental Congress formally accepted the Betsy Ross design as the official flag of their swaddling nation. The flag as it is defined today, with the original thirteen red and white stripes and fifty white stars in the upper left hand corner on a field of blue, was finally adopted by Congress in 1960 after the addition of Hawaii as the fiftieth state in the union. Over the course of Ol Glory's history, she has flown over the North Pole with Robert Perry, fluttered at the peak of Mt. Everest next to Barry Bishop, and stood stiff against the solar winds when placed on the moon by Neil Armstrong. President Harry Truman even invoked a national holiday out of reverence for the flag to be held annually on June 14. Despite these and countless other obvious ties between the American flag and American patriotism, America's sovereignty and the nation as a whole, on June 11, 1990 the United States Supreme Court deemed any law protecting the integrity of this national symbol unconstitutional. The Supreme Court made a heinous mistake when it ruled in a controversial decision that the charges brought against Shawn Eichman for violating the Flag Protection Act of 1989 were unconstitutional and furthermore that Congress had no authority to protect a national emblem; thereby, unfairly dooming the flag to forever be a prop defamed by radical protesters incapable of conveying their message through civilized dialect.

Flag Burning Catalyst: *Texas v. Johnson*

The flag burning controversy began with the *Texas v. Johnson* (1989) decision that declared the Texas law prohibiting the desecration of venerated objects including the American flag was unconstitutional. In this decision, the Supreme Court held that the Texas statute was unconstitutional because it prohibited the communicative impact of Johnson's expressive conduct (*Johnson* 1989: 412); Johnson was arrested because his burning of the American flag was deemed offensive to the observers. The Court held in the majority opinion, written by Justice Brennan, that government has no right, under protection of the First Amendment, to forbid an action

Law and Society Review at UCSB, Volume 1 (2002).

merely because society finds the idea offensive or disagreeable, even where our flag is involved (*Johnson* 1989: 397). Justices Marshall, Scalia, Blackman and Kennedy supported this opinion. It did not hold, however, that all flag burning in any circumstance was protected.

The dissenters in this case, led by Chief Justice Rehnquist, held that in finding the Texas law protecting the flag unconstitutional, the Court ignored Justice Holmes' familiar aphorism that a page of history is worth a volume of logic (*Johnson* 1989: 421). Chief Justice Rehnquist elaborated on the many tragic and heroic deeds throughout which our flag has flown, quoting accounts from the Civil War and then up through 1949, when President Truman established June 14 as Flag Day. The dissenters point to several instances where rights have been either excluded from First Amendment protection, as in the case of "fighting words" (*Chaplinsky v. New Hampshire* 1942: 568), or where a specific organization has been granted express use of a symbol or phrase, such as the phrase "Olympic" and the multi-colored rings (*San Francisco Arts & Athletics, Inc. v. United States Olympic Committee* 1987: 582). In all, the dissenter's basic argument was that the flag deserved consideration independent of negative precedence because of its "unique position" as a national symbol. These thoughtful arguments, however, did not deter the fumbling majority who proceeded with tunnel-like vision to rely strictly upon the First Amendment as the basis for protecting Johnson's inarticulate plea of idiocy.

Flag Protection Act of 1989

The *Johnson* case and the subsequent decision immediately caught Congress' attention. At the time, forty-eight out of the fifty states in the union had anti-flag burning statutes in their Constitutions, and Congress was determined to guarantee the American flag the protection it so richly deserves. Accordingly, after hearing depositions by several speakers on the value of the American flag and the subsequent wording of an act that would comply with the Johnson ruling, Congress enacted the Flag Protection Act on October 28, 1989 (Section 700 of Title 18, United States Code). The Act read:

> Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.

The Act also had a mandate which stated that any appeal could be taken directly to the U.S. Supreme Court and that the Court should expedite the decision to the greatest extent possible. The goal of this Act, as publicized by both the House and the Senate, was not to abridge free speech as the Courts had suggested, but to merely "remove the American flag as a prop" from those wishing to convey individual views (*United States v. Eichman* 1990: 407).

The passing of this Act sparked two separate instances of

immediate rebellion. The first and foremost of these two acts of delinquency involved Shawn Eichman, who was arrested for burning an American flag at a protest in Washington, D.C., on October 30, 1989, in direct conflict with the newly enacted Flag Protection Act. The second, less rigorously pursued infraction was committed on the steps of a post office building in Seattle, Washington, by Mark Haggerty and several associates. This case was not as important to the government because Mr. Haggerty stole the flag that he disgraced from the pole on the post office property and was therefore burning a flag that belonged to the United States government. Because of these circumstances, the case would not be of as much value in setting precedence in the burning of privately owned flags as the *Eichman* case.

United States v. Eichman

Judge Rothstein dismissed the initial hearing scheduled for Ms. Eichman in the District Court for the District of Colombia before the actual trial in a summary judgment on March 5, 1990, on the grounds that the Flag Protection Act was unconstitutional as applied to the politically expressive conduct of the accused (District Court for the District of Colombia Docket No. 89-1434). This ruling was the exact reason the clause allowing immediate appeal to the Supreme Court was included in the subtitles of the original act. The government wasted no time in the appeals process and the Supreme Court heard the first arguments on May 14, 1990.

The defense for the appellees in this case was concise and to the point; prohibiting flag burning, they contended, was a blatant infringement upon free speech. First Amendment rights were at the heart of this argument that relied upon the fact the amendment stated:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

William N. Kunstler, the lead attorney in the defense of Ms. Eichman, also relied heavily on the precedent set in the Johnson case which he alleged held that any law prohibiting defacement of the flag was unconstitutional. This assumption was in direct contrast with the decision held by the majority of the Court which was that "the restriction on Johnson's political expression is content based, since the Texas statute is not aimed at protecting the physical integrity of the flag in all circumstances" (*Johnson* 1989: 402). In this statement the Court has stated that it did not specifically forbid Congress from making a law that would protect the physical integrity of the flag in every circumstance is exactly what the Flag Protection Act was; it forbade every possible type of disgrace.

Another of Mr. Kunstler's arguments relied on *Hustler Magazine, Inc. v. Falwell* (1988) in which he quoted part of the

Court decision stated that speech is not subject to regulation "simply because it may embarrass others or coerce them into action" (*Hustler* 1988: 55). This finding unfortunately does not directly apply to the circumstances in regards to Ms. Eichman because actions and speech have been regulated if they are construed to evince action. The archetypal example of this was set in the *Chaplinsky v. New Hampshire* (1942) decision of which held that, "allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances" (*Chaplinsky* 1942: 571). This decision specifically dealt with speech that would "constitute a breach of the peace by the speaker-including 'classical fighting words'... and other disorderly words, including profanity, obscenity and threats" (*Chaplinsky* 1942: 573). This holding had direct relevance to the actions of Ms. Eichman for if burning an American flag does not incite violent thoughts of breaching the peace then the vandal is probably surrounded by similarly minded hoodlums.

Attorney General Kenneth Starr took the helm for the government in this landmark case. The central argument at the forefront of Starr's argument was that by prohibiting flag burning, Congress was within its legal bounds in regards to free speech because the subject would still have countless other expressive options with which to convey his or her message. Basically, Starr's point was that the speaker can defame the politics of the United States until he or she is blue in the face because it is not the message that the law was designed to suppress, but only one particular method of conveying that message. Chief Justice Rehnquist's analysis of the Act's goal was to "deprive [the subject] of only one rather inarticulate symbolic form of protest - a form of protest that was profoundly offensive to many-and [leave them] with a full panoply of other symbols and every conceivable form of verbal expression to express [his or her] deep disapproval of national policy" (*Johnson* 1989: 434). Another instance of a form of communication being deprived First Amendment protection was *New York v. Ferber* (1982) which held that, "the States are entitled to greater leeway in the regulation of pornographic depictions of children" because the consequences of the conveyance were detrimental to the child's emotions, future psyche "and classifying child pornography as a category of material outside the First Amendment's protection [was] not incompatible with this Court's decisions dealing with what speech is unprotected" (*Ferber* 1982: 747).

The overall breadth of society?s value for the American flag at this point in time is without question, as Starr also made perfectly clear. At the time of this appeal, only two out of the fifty states in the union did not have flag protection statutes in their state constitutions. This was also supported by facts reported by Warren S. Apel of the Freedom Forum which stated that, "nearly all 50 state legislatures have expressed advance approval of [a Federal Flag Protection] amendment." This "unique value" of the flag as a national symbol, as Justice Stevens dissented in the *Texas v. Johnson*, should allot the Flag Protection Act special consideration as much as or even more so

than fighting words and child pornography.

Amicus Curiae Brief from Senator Bidden

Senator Joseph R. Bidden Jr. also urged the Court to reverse the District Court's decisions in his brief of amicus curiae, or address by a friend of the Court (*Eichman* 1990: 611). He reiterated the facts already presented by Starr that the *Johnson* case only struck down two attempts at prohibiting flag burning, it did not give flag burners complete immunity. He quoted Dean Geffory R. Stone, a witness who testified before the members of Senate Committee on the Judiciary, as saying "the Court did not hold in *Johnson* that there is an inviolable First Amendment right to burn the American Flag" (*Eichman* 1990: 637). The Flag Protection Act, in contrast to the Texas statute, was content neutral and aimed at protecting "the physical integrity of the flag at all times," (*Eichman* 1990: 617) and therefore, could not be claimed to be suppressing a specific anti-government message. Senator Bidden also contended that in the decision of *Smith v. Goguen* (1974), in which the Court overturned a conviction which held Mr. Goguen accountable for wearing an American Flag sewn on the seat of his pants, the Court intimated that a statute "aimed at protecting the physical integrity of the flag in all circumstances" would be held constitutional (*Goguen* 1974: 590).

According to Senator Bidden, there is actually a test set forth by the Court in *Clark v. Community for Creative Non-Violence* (1984) which is based on the decision that, "Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions" (*Clark* 1984: 293). This three-pronged test to ensure that freedom of speech is not unduly infringed upon has been established as follows:

1) The restrictions must be content neutral.
2) The restrictions must be narrowly tailored to serve a significant government interest.
3) The restrictions must leave ample alternative channels for communication of the information.

When the Flag Protection Act is regarded under such scrutinizing light, it still can be held to agree with all three rules set forth, and therefore, must be held constitutional.

Amicus Curiae Brief from Governor Cuomo

Mario M. Cuomo, the Governor of the state of New York at the time of the trial, also had a profound interest in the reversal of the District Court's decision. He had a concurring content neutral act in the processes of approval by the New York State Legislature which depended on the reversal of Judge Rothstein's initial dismissal in order to be further considered and possibly enacted. Governor Cuomo's *amicus curiae* brief focused on the "curing" of the constitutionality problems presented in the *Johnson* case. He stated that the Flag Protection Act "avoids the constitutional defects this Court found in the Texas statute by banning all physical assaults on

the flag regardless of whether any communication is involved" (*Eichman* 1990: 647). Governor Cuomo relies on another three stage test to validate his "curing" claim, the test set forth in *O'Brien v. U.S.* (1968). Dave O'Brien was arrested and subsequently incarcerated for burning his draft card on the steps of the South Boston Court House in 1968. The Supreme Court upheld the conviction on the basis that the action of burning the card was not protected, but the speech component of O'Brien's expression would have been protected speech. This decision gave birth to the *O'Brien* test for constitutionality which, in regards to the Eichman case, states that:

1) The governmental interest in protecting a unique symbol of national unity is important and substantial.
2) The government interests advanced in the Act are not related to the suppression of expression.
3) The incidental interference of the Act with expression is minimal and no greater than necessary.

In much the same way as Senator Bidden, Governor Cuomo addressed each statement of fact individually and concluded that the Flag Protection Act which Shawn Eichman held in so much contempt was, in truth, constitutional by these definitions.

Amicus Curiae Brief from The House of Representatives

The Speaker of the House of Representatives and his Leadership Group submitted their own *amicus curiae* brief, as was their right since a Congressional Act was being challenged. Their brief focused on the efforts of William J. Hughes, a senior member of the Judiciary Committee and the Chairman of that Committee's Subcommittee on Crime. He spearheaded the effort to construct the desired statute with respect to the *Johnson* decision and believed that a Constitutional amendment was unnecessary because a constitutionally feasible statute was very obtainable. Representative Hughes specifically touched on Justice White's statement in regards to the Goguen case that

> "The United States has created its own flag, as it may. The flag is national property, and the nation may regulate those who would make, imitate, sell, possess, or use it. I would not question [nor should the Court] those statutes which proscribe mutilating, defacement, or burning of the flag or which otherwise protect its physical integrity" (quotations omitted) (586-587).

The House of Representatives directly countered the respondents claim that the government's sole interest in protecting the physical integrity of the flag arises out of its symbolic value, because there were other significant reasons as well. Congress contended that they passed the Flag Protection Act because "it wished to shield the flag from harm as an incident of sovereignty with a specific legal significance apart from its symbolic value...and that protecting the flag protects that sovereignty interest" (*Eichman* 1990: 741). To prove this, the House presented to the District Court numerous instances in which "violations of the flag's integrity have been

deemed threats to the sovereignty of this nation" (District Court for the District of Colombia Docket No. 89-1434, 12a). The asserted goal was to illuminate the persistent determination of Congress to afford our flag its duly granted protection without infringing upon the opportunity of citizens to exercise their right to speak out against their government, its policies, or the flag that represents it.

The Decision of the Court

The Court rendered its decision in favor of the respondents on June 11, 1990. The five-to-four decision was met with heated controversy from Congress and the majority of the general public. The general sentiment was that a Constitutional Amendment should not be necessary to protect our flag, but the Court left little choice in the matter. The opinion of the Court was written by Justice Brennan and concurred by Justices Marshall, Blackmun, Scalia and Kennedy. In his deposition, Justice Brennan stated that the government, in defense of its long-labored over Act, "invited us to reconsider our rejection in Johnson of the claim that flag burning as a mode of expression, like obscenity or "fighting words," does not enjoy the full protection of the First Amendment. This we decline[d] to do" (*Eichman* 1990: 313). There is no explanation as to why the Court decided to blatantly ignore a request of a coequal branch of government that, as a basic principle, speaks with the voice of the American public. The Court merely offered an overbearing statement stating that it would not even grace the government's concern with consideration. Instead, he countered that the government's goal in passing the Act was to prohibit unsavory ideas from being shared through expressive speech, of which there was no proof in the written composition of the Act, but which applies directly to First Amendment protection.

The dissenters in the *Eichman* decision, the same as in *Johnson*, were led by the Chief Justice William Rehnquist. Joining him were Justices Stevens, White, and O'Connor. The dissenting opinion focused on the true analysis of the case, which Justice Stevens addressed in his opening remark of, "The Court's opinion ends where proper analysis of the issue should begin" (*Eichman* 1990: 319). The various messages conveyed by burning a flag vary between circumstances and generations. For example, in the 1960s, burning a flag might have been in protest of the Vietnam War, while in *Johnson*, Mr. Johnson was upset by the Republican Party platform, and then in *Eichman*, Ms. Eichman was demonstrating against the Flag Protection Act. These varied messages conveyed by burning a flag are thus random and often ambiguous, so the contention that the Flag Protection Act of 1989 suppressed a particular anti-government message is invalid because there is no concrete message that can be gathered from an individual burning a flag. The dissenters ended their argument with the disputation that "the interest in allowing a speaker complete freedom of choice among alternative methods of expression is less important than the [obvious] social interest supporting the prohibition" (*Eichman* 1990: 319).

Analysis of the Injustice Done to the American Flag

The Court's decision failed to take into account what should have been a contributing factor in their decision: the social drive to protect the nation's most recognizable symbol from defacement. Congress, the self-proclaimed voice of the people, gave careful consideration to the constitutionality of the Flag Protection Act and concluded that the statute complied with the requirements set forth by the First Amendment. Such a determination by an equivalent branch of government should have been accorded consideration and deference by the Court, which is removed from public influence because of the rules of tenure. The Court has before deferred to Congress' constitutional judgments in a variety of cases, most importantly including the assessment of various statutes' validity with regards to the First Amendment. "Thus, in evaluating the First Amendment claims of respondents, we must afford great weight to the decisions of Congress" is an archetypal quote from the decision in *Colombia Broadcasting Systems, Inc. v. Democratic National Committee* (1973: 102) in which the Court conceded that Congress should decide the fate of an FCC decision. "The customary deference accorded the judgments of Congress is certainly appropriate when...Congress specifically consider[s] the question of the Act's constitutionality," (*Rostker v. Goldberg* 1981: 64) is a policy that should have been granted accommodation in this case because the situation enumerated collates precisely with the Eichman case, but was clearly thrown by the wayside and paid no heed.

There have been several cases of legal precedence decided by the Court which upheld the Flag Protection Act. Probably the most relevant was *United States v. William Charles Cary, Jr.* (Eighth Circuit District Court Docket No. 88-5485). Cary was convicted by an Eighth Circuit Court under the Flag Protection Act for burning an American flag at an Armed Services Recruitment Center in Minneapolis, Minnesota. His conviction withstood "exacting scrutiny" and he served his prison sentence to its full extent and paid his fine in full. *Halter v. Nebraska* (1907) also upheld a prosecution for misuse of the flag and verified that it is within the government's power to pass laws concerning the treatment of the flag considering the fact that it is such a potent American symbol.

It was a grave travesty that the Court did not find sufficient proof that protecting the American Flag was first constitutional, and secondly in America's best interest. "The examples are many of the application by this Court of the principle that certain forms of conduct mixed with speech may be regulated or prohibited," (*Cox v. Louisiana* 1965: 563) is a fact that the majority opinion was unwilling to consider. "The right [of free speech], however, is not absolute- the communicative value of a well-placed bomb in the Capitol does not entitle it to the protection of the First Amendment," (*Eichman* 1990: 322) is a powerful analogy, professed by Justice Stevens in the closing statements of the *Eichman* case, to the right of

free speech the Court majority wishes to grant to violent demonstrators. It is a shame that children will still be asked to pledge allegiance to and even to fight and die for the same flag that they see thieves, vandals and hooligans burning for the simple sake of their inability to articulate personal grievances in an intelligent and civilized manner. As the intent of Congress clearly exhibited, the Flag Protection Act was not drafted to deprive protestors the right to convey their political opinion, but to protect a valued symbol of national unity and sovereignty so that the children of tomorrow will have the opportunity to value the flag as lovingly as did the veterans of yesterday.

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