

Flag Burning



By Paul Engel

October 7, 2025

- Does burning the American flag offend you?
- Is flag burning protected by the First Amendment?
- Have you looked at Trump's executive order about flag burning?

When it comes to freedom of speech, there are two things that generate a fair amount of controversy. The first is yelling "Fire" in a crowded theater and the second is burning the United States flag. Recently, Donald Trump issued an Executive Order about flag burning. So let's take a look at the order and some of the law and history around flag burning.

Background

I know flag burning is a controversial subject. Many people will point out that the Supreme Court found flag burning protected by the First Amendment, but is that true? Let's start by taking a closer look at that case.

During the 1984 Republican National Convention, respondent Johnson participated in a political demonstration to protest the policies of the Reagan administration and some Dallas-based corporations. After a march through the city streets, Johnson burned an American flag while protesters chanted. No one was physically injured or threatened with injury, although several witnesses were seriously offended by the flag burning.

[Texas v. Johnson \(1989\)](#)

This case all started at the 1984 Republican National Convention and Gregory Lee Johnson's protest against the Reagan administration and certain corporations. As pointed out in the opinion, no one was injured or threatened. However, some people were offended.

Johnson was convicted of desecration of a venerated object in violation of a Texas statute, and a state court of appeals affirmed. However, the Texas Court of Criminal Appeals reversed, holding that the State, consistent with the First Amendment, could not punish Johnson for burning the flag in these circumstances.

[Texas v. Johnson \(1989\)](#)

Here we have our first constitutional problem. Not the conviction, which was wrong, but the reason the Texas Court of Criminal Appeals reversed. They claimed that the state violated the First Amendment by convicting Mr. Johnson. There's just one problem with that. Mr. Johnson was convicted of a law passed by the Texas Legislature, not Congress. As the First Amendment states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, ...

[U.S. Constitution, Amendment I](#)

Since Mr. Johnson wasn't convicted of violating a law made by Congress, it could not be a violation of the Constitution. But there's more to this problem.

The court first found that Johnson's burning of the flag was expressive conduct protected by the First Amendment.

[Texas v. Johnson \(1989\)](#)

The First Amendment doesn't protect freedom of "expressive conduct," but of speech and press. And burning a flag is

neither speech nor press.

The court concluded that the State could not criminally sanction flag desecration in order to preserve the flag as a symbol of national unity. It also held that the statute did not meet the State's goal of preventing breaches of the peace, since it was not drawn narrowly enough to encompass only those flag burnings that would likely result in a serious disturbance, and since the flag burning in this case did not threaten such a reaction.

[Texas v. Johnson \(1989\)](#)

I agree, the state cannot criminally sanction flag desecration. Just because the flag is a symbol of this nation doesn't allow peoples' rights to be infringed in order to protect it. Besides, if the flag burning had led to violence or other disturbances, there were other Texas laws that could be used.

Further, it stressed that another Texas statute prohibited breaches of the peace and could be used to prevent disturbances without punishing this flag desecration.

Held: Johnson's conviction for flag desecration is inconsistent with the First Amendment.

[Texas v. Johnson \(1989\)](#)

So here we have another court that comes to the right conclusion for the wrong reasons.

Trump's Executive Order

Which brings us to Trump's Executive Order.

Section 1. Purpose. Our great American Flag is the most sacred and cherished symbol of the United States of America, and of American freedom, identity, and strength.

PROSECUTING BURNING OF THE AMERICAN FLAG

Is the flag the MOST sacred symbol?

1 a: dedicated or set apart for the service or worship of a deity

b: devoted exclusively to one service or use (as of a person or purpose)

2 a: worthy of religious veneration : HOLY

b: entitled to reverence and respect

SACRED – Merriam-Webster Dictionary Online

It's almost as if Trump is painting the flag as a religious symbol. However, our pledge of allegiance to that flag states, we pledge allegiance to the flag and the Republic for which it stands. That republic was created by its supreme law, the Constitution of the United States. Can we pledge allegiance to the flag and then trample the supreme law of the Republic it stands for?

Over nearly two-and-a-half centuries, many thousands of American patriots have fought, bled, and died to keep the Stars and Stripes waving proudly. The American Flag is a special symbol in our national life that should unite and represent all Americans of every background and walk of life. Desecrating it is uniquely offensive and provocative. It is a statement of contempt, hostility, and violence against our Nation – the clearest possible expression of opposition to the political union that preserves our rights, liberty, and security.

PROSECUTING BURNING OF THE AMERICAN FLAG

The American flag is a symbol, and yes, many people have fought and died for it, but the flag is a symbol of what? If we use that symbol to destroy what it symbolizes, than what

good is it? Should a symbol of rights and liberty be used to infringe on our rights and liberty? And what about safety?

Burning this representation of America may incite violence and riot. American Flag burning is also used by groups of foreign nationals as a calculated act to intimidate and threaten violence against Americans because of their nationality and place of birth.

[PROSECUTING BURNING OF THE AMERICAN FLAG](#)

Burning the flag MAY incite violence, but so can speeches, publications, and assemblies. We do not criminalize them because they may incite violence, we criminalize the actual incitement to violence. While the Supreme Court used the wrong reason to protect this type of demonstration, the Constitution, as the supreme law of the land, does protect our right to do with our property what we want.

Notwithstanding the Supreme Court's rulings on First Amendment protections, the Court has never held that American Flag desecration conducted in a manner that is likely to incite imminent lawless action or that is an action amounting to "fighting words" is constitutionally protected. See *Texas v. Johnson*, 491 U.S. 397, 408-10 (1989).

[PROSECUTING BURNING OF THE AMERICAN FLAG](#)

But as the court pointed out in the case *Texas v. Johnson*, there are other laws that can be used to try cases of incitement and lawlessness. As the court wrote in the opinion:

Johnson's expression of dissatisfaction with the Federal Government's policies also does not fall within the class of "fighting words" likely to be seen as a direct personal insult or an invitation to exchange fisticuffs.

[Texas v. Johnson \(1989\)](#)

The court was specific that Johnson's protest did not fall

into the class of “fighting words,” which shows that not all flag burning is fighting words or incitement to violence. So why prohibit some expression because it “might” lead to violence?

My Administration will act to restore respect and sanctity to the American Flag and prosecute those who incite violence or otherwise violate our laws while desecrating this symbol of our country, to the fullest extent permissible under any available authority.

[PROSECUTING BURNING OF THE AMERICAN FLAG](#)

Here is where the rhetoric meets the law. [Title 4, Section 8](#) of the United States Code is entitled “Respect for flag.”

No disrespect should be shown to the flag of the United States of America; the flag should not be dipped to any person or thing. Regimental colors, State flags, and organization or institutional flags are to be dipped as a mark of honor.

[4 USC §8 – Respect for flag](#)

While there are laws against inciting violence, 4 USC §8 is not a criminal law. In fact, by using the word “should,” it’s only a suggestion, not a demand or command.

Sec. 2. Measures to Combat Desecration of the American Flag.
(a) The Attorney General shall prioritize the enforcement to the fullest extent possible of our Nation’s criminal and civil laws against acts of American Flag desecration that violate applicable, content-neutral laws, while causing harm unrelated to expression, consistent with the First Amendment. This may include, but is not limited to, violent crimes; hate crimes, illegal discrimination against American citizens, or other violations of Americans’ civil rights; and crimes against property and the peace, as well as conspiracies and attempts to violate, and aiding and abetting others to violate, such laws.

PROSECUTING BURNING OF THE AMERICAN FLAG

So Trump's "flag burning" EO really calls for prosecution of other crimes using the American Flag. Furthermore, Trump's order limits the Department of Justice, in the case where a state or local law is violated, to referring the matter to the appropriate state or local authority.

(b) In cases where the Department of Justice or another executive department or agency (agency) determines that an instance of American Flag desecration may violate an applicable State or local law, such as open burning restrictions, disorderly conduct laws, or destruction of property laws, the agency shall refer the matter to the appropriate State or local authority for potential action.

PROSECUTING BURNING OF THE AMERICAN FLAG

So while there is plenty of bluff and bluster in this Executive Order, legally there aren't any real teeth to it.

Is Flag Burning Constitutional?

Is burning the flag protected by the First Amendment? No. The Supreme Court and others first came up with the idea of First Amendment protection of "symbolic speech" in the 1931 case *Stromberg v. California*. Both the *Stromberg* and *Johnson* cases were based in State law though, not a law made by Congress, and therefore could not violate the First Amendment, even though the court said otherwise.

The Court of Criminal Appeals began by recognizing that *Johnson's* conduct was symbolic speech protected by the First Amendment:

Texas v. Johnson (1989)

So the courts invented "symbolic speech" in order to illegally pretend that state laws are covered by the First Amendment.

Does that mean that flag burning is not protected by the Constitution? Also no, because of this little thing we like to call “due process”.

... nor shall any State deprive any person of life, liberty, or property, without due process of law;

U.S. Constitution, Amendment XIV

You see, if you purchase or are gifted a flag, it's your property. And the Fourteenth Amendment prohibits states from depriving you of your property without due process of law, an established process to protect the rights of the individual. Furthermore, your liberty, your ability to live your life as you see fit without unnecessary external interference, is also protected by the Fourteenth Amendment. Which is why the language of Trump's Executive Order focuses on crimes that are committed while burning the flag rather than attempting to criminalize flag burning itself.

Conclusion

Should the American people respect the American flag? I think so. From how it is displayed to reciting the pledge of allegiance, we can show respect to the symbol of this republic, but we cannot use our desire to respect the flag as an excuse to disrespect the republic for which it stands. Probably the greatest cornerstone of the republic is the protection of our liberty, including our right to show our disfavor of our country. If we lose freedom of expression, nothing else protected by the Constitution really matters, does it? What good does your right to be secure from unreasonable searches and seizures do if you cannot express your disfavor with their violation? What good does your right to keep and bear arms do if you cannot protest laws that infringe on your rights? Whether flag burning is “symbolic speech” or the exercise of your liberty, it is protected by the Constitution of the United States, and that cannot be

taken away by any law or executive order.

Finally, keep this in mind, according to the Respect for Flag law...

(k) The flag, when it is in such condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by burning.

[4 USC §8 – Respect for flag](#)

So if the preferred way to destroy a flag is by burning, this has nothing to do with flag burning, but with people who are offended by how some people treat the flag. Look all you want, the Constitution does not protect your right to not be offended. If it did, I guess I could sue Donald Trump for offending me by so blatantly violating his oath to support the Constitution, the supreme law of the land.

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