

December 19, 2016; Can Trump Ban Flag Burning?

On November 29th of this year, apparently in response to a college flag – burning incident, President-Elect Donald Trump sent out the following tweet: “Nobody should be allowed to burn the American flag – if they do, there must be consequences – perhaps loss of citizenship or a year in jail!”

Trump’s motivation behind this rather inflammatory digital outburst is unclear. We don’t know if he was really expressing a deep-seated belief or if he sent the tweet as a diversionary tactic to draw public attention away from another news story that might have proven embarrassing to his presidential transition.

Regardless, the tweet tweaked some raw nerves on both sides of the issue. The liberal media condemned Trump’s outburst while the conservative press rallied behind the sanctity of the red, white, and blue banner.

The key question is, could Trump as president actually be successful in criminalizing the act of flag burning? Before attempting to answer this question, let’s go back in time to see how the American public, and the courts, have reacted to and addressed earlier acts of disrespectful behavior toward the flag. In doing so, I credit the First Amendment Center for their excellent on-line overview of the topic.

On June 14, 1777, the Continental Congress adopted the American flag as the nation’s symbol. In the beginning, the flag was frequently used to promote certain commercial products, such as clothing, and as the theme for product advertising. Not until the Civil War did the flag begin to take on a more important role of flaming the fires of patriotism. But even after the Civil War, with the growth of industrialization, the flag continued to play an important role in advertising and marketing commercial products. The growing commercialization of the flag did not sit well with the public.

In the last decade of the 20th century, certain groups, such as trade unions, immigrants, and radical political groups, began using the flag as a means of protest against, and challenge to, the *status quo*. For the most part, public reaction was swift and harsh. Between 1897 and 1905, 31 states passed anti- “desecration” laws. By 1932, all 48 states had passed similar statutes.

These laws frequently outlawed activities such as attaching anything to the flag or marking it, using the flag for advertising, or verbally or physically “harming” the flag.

Lawsuits sprung up around the country challenging these new laws. The first wave of these legal challenges frequently proved successful. Local and state courts ruled that the flag desecration laws were an illegal restriction on property rights. However, the legal tide shifted in 1907 when the Supreme Court issued a ruling in the case, *Halter v. Nebraska*. Halter sold bottles of “Stars and Stripes” beer and was

found guilty of violating Nebraska's flag law. In an 8 to 1 decision, the Supreme Court upheld the law arguing that commercializing the flag degraded and cheapened it "in the estimation of the people." Nebraska, like all other states, was entitled to "exert its power to strengthen the bonds of the Union and . . . may encourage patriotism and love of country among its people."

As we'll learn next week, not until the Vietnam War did the Supreme Court revisit this topic and issue rulings that drastically altered the right to use the flag as a symbol of protest.