

December 26, 2016; Key Cases in Flag Desecration

The question we pondered last week is whether Donald Trump can make good on his threat to jail or revoke the U.S. citizenship of those who burn the American flag. Despite the fact that in 1907 the U.S. Supreme Court approved laws that punished people who used the flag for commercial purposes, subsequent Court decisions cast a strong doubt on whether most flag burners could face imprisonment or loss of citizenship.

Supreme Court decisions in two Vietnam War-era cases in particular laid the foundation to mount a viable legal defense for those prosecuted for flag desecration. The first case, *United States v. O'Brien*, actually had nothing to do with flag burning itself. On March 31, 1966, David O'Brien was arrested for burning his draft card on the steps of the South Boston Courthouse. Through this act he hoped to encourage others to oppose the Vietnam War and to "reevaluate their position with Selective Services [and] with the armed forces."

He was criminally prosecuted and found guilty of violating a federal law that prohibited anyone from "knowingly" destroying or mutilating draft cards. O'Brien challenged his conviction arguing that burning his draft card was a form of symbolic speech protected by the First Amendment. In reviewing his conviction, the Court established a test that would ultimately also be applied to flag burning cases.

The Court held that a regulation prohibiting conduct that combines both "speech" and "nonspeech" elements, can survive a First Amendment challenge *only if* the regulation:

- Is within the constitutional power of the government to enact.
- Furthers a substantial government interest.
- The interest must be unrelated to the suppression of speech.
- Prohibits no more speech than is essential to further that interest.

In its 1968 decision, Court determined that prohibitions against draft card burning met all four parts of this test and sustained O'Brien's conviction. The Court held that maintaining the Selective Service's administrative integrity was a critical governmental function and unrelated to suppressing speech.

The following year, the Court decided *Street v. New York*, an actual flag-burning case. Upon learning that civil rights activist James Meredith had been shot, Sidney Street burned a flag in public. When questioned by police he stated, "Yes; that is my flag; I burned it. If they let that happen to Meredith, we don't need an American flag." Under a New York law, it was a crime to "publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon [the flag] either by words or act." Street was found guilty.

In rendering a decision in favor of Street and reversing his conviction, the Supreme Court zeroed in on Street's spoken words rather than on the actual act of

burning the flag. The Court held that prosecuting someone solely for verbally assaulting the flag clearly violated provisions 3 and 4 of the *O'Brien* 4-prong test. Because the State of New York failed to clearly establish whether Street had been prosecuted for the act of flag burning or merely for his verbal utterance, his conviction must be overturned.

Next week, we'll discuss a 1989 Supreme Court case that directly addressed the act of burning the flag – a case that may well prove fatal to any attempt by Trump to carry out his threat.