

January 9, 2017; Guam's Flag Law Fails Test

Let's take a close look at Guam's own desecration law. And, in light of what we've learned from our review of various U.S. Supreme Court cases, ponder its constitutionality.

As you may recall, I began my research on this topic in response to President-Elect Trump's tweet, "Nobody should be allowed to burn the American flag – if they do, there must be consequences – perhaps loss of citizenship or year in jail!!"

To be candid, I only became aware that Guam had a "desecration" law as a result of my research for this series. I had never come upon it in the past. The law is found in Guam's criminal code and reads as follows:

9GCA §61.45 Desecration Defined and Punished.

(a) A person commits a misdemeanor if he intentionally desecrates any public monument or structure, or place of worship or burial, or if he intentionally desecrates the national flag or any other object of veneration by the public or a substantial segment thereof in any public place.

(b) As used in this Section, desecrate means defacing, damaging, polluting or otherwise physically mistreating in a way that the person knows will outrage the sensibilities of persons likely to observe or discover his action.

Based on our review of relevant Supreme Court cases, there can be little doubt that our statute is blatantly unconstitutional and needs to be amended. The law is aimed directly at expressive or symbolic speech rather than verbal speech. We know this because the statute focusing solely on specific actions of *physical* mistreatment of the flag and mentions nothing about verbal affronts.

So, for example, would I violate the law and face a year in jail if in protest I burned my own American flag in front of the Hagatna post office and someone passing by took offense? Would this really withstand judicial scrutiny?

As we saw last week, the Supreme Court has held that a regulation prohibiting conduct with nonspeech elements can only survive a First Amendment challenge 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.

Our statute violates all four of prongs of this test! The Guam Legislature does not have the constitutional power to ban *all* forms of offensive symbolic speech aimed at the flag regardless of the circumstances. And, there is no substantial government interest that could justify such an all-inclusive prohibition. Under this law I am arguably prohibited from using any symbolic speech that will “outrage” *anyone*, even if he or she is very sensitive.

Guam certainly can’t argue that the regulation is “unrelated to the suppression of speech” or that it “prohibits no more speech than is essential.” After all, the law’s specific goal is to suppress *all* perceived acts of desecration toward “object[s] of veneration.” I wonder who gets to decide which objects fall under this prohibition and what actions are to be considered offensive?

In closing this series, let’s remember the words of Justice Kennedy. “It is poignant but fundamental that the flag protects those who hold it in contempt.”