# Flag Burning: Ashes of First Amendment Protections

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**Abstract:**

This article sets out to establish and qualify the existing relationship between the First Amendment protections for free speech and protest and the Trump administration's concern for national unity and future restrictions on that right to serve the national interest. Using textual references to the Constitution, as well as various SCOTUS decisions and other sources, this article will document the chronology of the way that the flag has been protected and what that means for future legislation and decisions on the issue of the First Amendment. If there is an exception carved out for flag burning, that creates an opening for further restrictions on content-based issues that have been historically held to the highest degree of scrutiny, as it is one of our most important rights. In response to Executive Order 14341, "Prosecuting Burning of the American Flag" decisions from SCOTUS cases directly affirming the right to flag burning, such as Texas v. Johnson, and United States v. Eichman, will be used in the process. The history of restrictions on flag burning will also be evaluated, as has been shown in the Flag Protection Act of 1989.

## Article

### Introduction

On August 25th, 2025, President Trump and the White House issued a statement following the signing of Executive Order 14341 which calls on the Attorney General to push for harsh penalties for those who have participated in flag burning. The Trump administration has condemned the act of flag burning as un-American and a way to "incite violence and riot"; attempting to assert that the burning of the flag is not to be protected under the First Amendment as a valid expression of free speech and political protest. Historically, burning of the flag has been protected by the Supreme Court, dating back to as early as 1989 with the decision from *Texas v. Johnson.* It has since been continuously reaffirmed by cases such as *United States v. Eichman*, which overturned a ban from 18 U.S.C. Section 700 because it was deemed unconstitutional as it violated First Amendment rights. The central holding of the order is that under the current framework relating to flag burning as free speech, it is possible to ban it under a compelling interest. The Trump administration defines the act of flag burning as "uniquely offensive and provocative" and "expression of opposition to the political union."[1] This classification almost explicitly characterizes it as a method of political expression and establishes

[1] Exec. Order No. 14341, 3 C.F.R. 42127 (2025)

it as an opposing viewpoint. Despite their insistence that it is essential to maintain national unity and should be protected under various exceptions to First Amendment protections, that is not supported by the history of SCOTUS rulings regarding symbolism of the flag and protection to political speech.

For all of the above reasons, the proposed amendment and Executive Order 14341 are unconstitutional violations of First Amendment rights to Freedom of Protest and Freedom of Expression.

**Setting the Stage for Flag Burning Protections**

There has been a long history of relevant protections to political speech and doctrine created as safeguard for the unrestricted political expression that our country was built upon. In the case of contributing factors to the modern interpretation of the scope of First Amendment protections relevant to the recent "Prosecuting Burning of the American Flag" order. Contributions begin from the inclusion of the "fighting words" doctrine in *Chaplinsky v. New Hampshire* in 1925 to *Virginia v. Black* in 2003 and the addition of "true threats" into the consideration of constitutional supportability of laws restricting political expression. *Terminiello v. City of Chicago* and *Cohen v. California* present additional restrictions to what may or may not be banned based on content. Each case presenting its own doctrine that is held in contention with the violations from Trump's crusade against flag burning.

The Trump administration has tried to circumvent the protections of the First Amendment and the provisions for free speech and content bans in favor of attacking the validity of the "fighting words doctrine." This doctrine, which was first introduced after *Chaplinsky v. New Hampshire* in 1942, established exceptions to previous protections under the First Amendment. However, this is only in the case of "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words-those which by their very utterance inflict injury or tend to incite an immediate breach of the peace," that there may be constitutionally supportable content-based restrictions to free speech.[2] It is especially important to recognize that for something to fall under the fighting words doctrine, it can have no political value, which is what the Trump administration is seeking to attack flag burning for, effectively restricting content. The content that is being censored has historically been positively affirmed through various court cases like *Terminiello* and *Cohen*, even beyond the range of the fighting words doctrine.

*Terminiello* focuses on the content of the speech and establishes that political speech must be able to incite and invite conversation, even if it is hostile and the government has no authority to police that. They establish that "[a] function of free speech under our system of

[2] *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)

government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[3] The language that the Trump administration uses when talking about their view of flag burning is highly contestable solely with the application of doctrine from *Terminiello*. The decision from *Terminiello,* intentionally promotes inflammatory speech as it is a pillar of American discourse and shows the value of the diversity of opinions. They even lean into the idea that the restrictions would impose "standardization of ideas" and that it might shrink the availability of minority political opposition. A selection from the executive order reads "[t]he 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."[4] The Trump administration intends on establishing the American flag as ubiquitous with his administration and as a symbol of national power, and those who burn in protest to be anti-American and the enemy.

*Cohen v. California* is more focused on the method of speech and protections for the delivery of political thought rather than the messaging like in *Terminiello*. The idea that a government may regulate speech based on how it is conveyed is held to enable "[a]ny broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections."[5] Again reaffirming that the order is unconstitutional because of the implications for censorship based on political opposition. In *Cohen*, there is also the introduction of the defense that offended persons may simply "avert their eyes." If someone were to take offense to the image of burning the flag, they would not be coerced into violence and they may simple "avert their eyes" since the relative size of the messaging is small. The offended viewer is not being directly targeted, and they have plenty of opportunities to remove themselves from the situation.

Finally, the Trump administration has adamantly reaffirmed that in their view, burning the American flag is directly linked to intimidation and can be reasonably found to incite violence. This is contradicted by the ruling in *Virginia v. Black*, in which the constitutionality of blanket bans on cross burning based on the history of the imagery being used to intimidate is called into question. This case established the use of "true threat" when determining exceptions to free speech. The definition of a true threat under this case is that "true threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[6] Flag burning does not have the history of intimidation that is seen with cross burning and based on that standard it

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[3] *Terminiello v. City of Chicago*, 337 U.S. 1 (1949)
[4] Id.
[5] *Cohen v. California*, 403 U.S. 15 (1971)
[6] Id.

cannot be restricted on the same basis. This combination of doctrines established in these cases are more appropriately applied through the following flag burning specific cases.

**Historical variance in flag-specific restrictions on free speech:**

The long history of protections for free speech, specifically flag burning, is built off foundational and landmark supreme court cases that not only directly deal with the current subject matter, but also the way that constitutional challenges are handled. Under strict scrutiny standards, it makes it almost impossible to ban speech based on the content unless there is a compelling interest. Compelling interest is the highest standard of judicial review. Under this standard, the court must prove that two qualifications are met, one being that the restriction is narrowly tailored and be least restrictive to speech, and the other being that there are no other methods to achieve the goal. Some examples of acceptable compelling interests include protecting against imminent violence (fighting words), and national security, especially during wartime. Although this does not represent the totality of offenses, these are some of the most common and relevant instances where flag burning is and should be limited.

Between the years of 1984 and 1991, politically motivated instances of flag burning and the government responses have shaped the way that the Court currently rules on the issue. In response to the Reagan presidency and the rise in conservativism during the cold war, Gregory Lee Johnson burned an American flag outside of the Republican National Convention. He was arrested and held in violation of the Texas Penal Code § 42.09(a)(3) (1983) which criminalized the desecration of a venerated object. The statute read "Intentionally or knowingly desecrates a public monument, a place of worship or burial, or a state or national flag."[7] When the court deemed the statute to violate the First Amendment, they rejected the restrictions on the grounds that it presented as overly broad and not narrowly tailored enough to uphold a compelling interest as presented by the strict scrutiny standard.

Texas' argument was centered on the idea that the action was intended to disrespect and defile the flag in a way that would cause offense and discord for those who were aware of the action. In the court's opinion, "The Texas law is thus not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others."[8] This sets a poor defense under accusations of First Amendment violations, because causing offense to others is not representative of a compelling interest in the eyes of the Court. There was particular interest paid to the disproving claims of other compelling interests in the facts of the case, such as the appearance of immediate violence during or caused by the burning of the flag. As there was

[7] Texas Penal Code § 42.09(a)(3) (1983)
[8] Id.

"[n]o disturbance of the peace [that] actually occurred or threated to occur because of Johnson's burning of the flag," it does not constitute valid restrictions under the "fighting words" doctrine. [9]

As a result of the decision made by the court in *Johnson,* congress passed the Flag Protection Act of 1989 which aimed to supersede the holdings of that case. The language from the act establishes federal procedure to criminalize flag burning and exists as a direct challenge to the *Johnson* ruling. The language from the act is remarkably similar to the rejected Texas state statute, declaring that "[w]hoever 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 t h a n one year, or both."[10] However, there was an important omission from the text. By removing the word "offensive" in regard to the messaging, they aimed to appear more content neutral. In addition, the time between the *Johnson* ruling and the introduction of the act that was very similar to the core issue of the previous case is essentially asking SCOTUS to revisit their decision and the ruling on the grounds of protection for flag burning and the first amendment. Aside from the similarities to the Texas statute, there was an additional section that further confirms the Act's role as a challenge to judicial authority over free speech when faced with national unity. In this section, a clause was introduced that bypasses traditional appeals process to send complaints directly to the Supreme Court. Section three of the Act declares that "[a]n appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment," and that upon arrival to the Court that the Supreme Court would "accept jurisdiction over the appeal and advance on the docket and expedite to the greatest extent possible."[11] This great effort was met with a decision in the form of *United States v. Eichmann*.

The changes made to emphasize content neutrality did not sway the opinion of SCOTUS when deciding on *Eichmann*. Although it appears like Congress did enough to distance themselves from a content-based restriction in text, they were unable to present a compelling interest, and the Court's interpretation of their proposal tied them back to content based restrictions on free speech. The state argued that an interest in "'protect[ing] the physical integrity of the flag under all circumstances' in order to safeguard the flag's identity 'as the unique and unalloyed symbol of the Nation,'" should be considered compelling, the Court could not find that stance supportable.[12] In their eyes, the protections for flying an American flag are the same as for destroying it. If there was an inherent value assigned to the flag, in this case a sense of national pride and recognition, burning a flag in protest would hold the same amount of political speech and therefore, could not be affirmed without violating the constitutional rights of the one who lights the match.

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[9] *Texas v. Johnson*, 491 U.S. 397 (1989)
[10] Id.
[11] Pub. L. No. 101-131, 103 Stat. 777 (1989)
[12] *Eichman*, 496 U.S. 310 (1990)

**Conclusion**

The Supreme Court has continuously and without confusion affirmed that flag burning is to be protected under free speech. From *Terminiello v. Chicago*'s recognition that speech is protected due to it's nature and founding in political discourse, to *Cohen v. California*'s rejection of offense as a valid basis for censorship, the Court has consistently shown the value of a wide variety of political ideas being protected regardless of the morality of the time. *Texas v. Johnson* ties these ideas to the symbol of the flag. Desecration of the flag is still highly protected due to the symbolism itself. Even in the face of the Flag Protection Act of 1989, *United States v. Eichman* solidified the idea that the government cannot issue content-based suppression on the ground of political discourse. *Virginia v. Black* further clarifies that only symbolic expression wielded as a true threat falls outside constitutional protection, a standard flag burning as protest does not meet.

Executive Order 14341 is highly unconstitutional due to all these contributing factors which build complex protections that are not undone by the work of the Trump administration. Despite their misrepresentation of the "fighting words" doctrine and the validity of bans on speech contrarian to current policy and the symbolism of the American flag, the Court and past policies have overwhelmingly showed their support for the free speech of American citizens in the form of flag burning.