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Recent Developments: Texas v. Johnson: Flag-Burning as Protest Protected within Context of First Amendment

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specifically orders to the contrary in a particular case.

Seeking to ascertain the legislative intent of section 4-609, the court made an extensive review of the statute's legislative history. The court found that presentence investigations were first addressed in 1953 Md. Laws, ch. 625, which provided that the Board of Parole and Probation would be available to the judges of the circuit courts "for the purpose of making presentence or other investigations" requested by the court.

In 1968, the statute was expanded to include judges of any court of limited criminal jurisdiction, "including, but not limited to the Municipal Court of Baltimore City, any people's court or any trial magistrate, . . . in all cases which may include commitment for two or more years" Md. Ann. Code art. 41 §124 (Supp. 1968). 1972 Md. Laws, ch. 532 made presentencing investigations available in cases where the commitment was for less than two years, and present subsection (c) was added in 1976. In 1982, misdemeanors were added to the list of crimes entitling a defendant to an investigation and, in 1983, the investigation was made mandatory in any case in which the death penalty was requested. In 1987, the requirement for a presentencing report was further extended to include cases where imprisonment for life without a possibility of parole is requested.

Reading the plain language of section 4-609 in the context of the legislative history of the statute, the court of appeals determined that the statute reflected an obvious legislative preference for the use of presentence investigation reports, and determined that to overcome the presumption in favor of these reports, a court must have a valid reason, particular to the facts of a given case, for refusing to order an investigation. The court reiterated that a presentence report in capital cases is mandatory. In all cases falling within subsection (c)(1), the presentencing report also must be prepared and considered, unless the court orders to the contrary.

The court observed that a trial judge is vested with broad discretionary powers, including the power to fashion an appropriate sentence. The court noted however, that this discretion is limited. This judicial discretion must be reflected in the record, and it must not be arbitrary or capricious, otherwise, the court's action is erroneous. *Nelson*, 315 Md. at 70, 553 A.2d at 671.

In the case *sub judice*, the trial judge

refused to order an investigation, because: 1) there had been no showing that there was anything pertaining to the defendant's background that the defense lawyer himself could not have developed; and 2) the process was costly. The court of appeals rejected both reasons. In the court's view, placing the burden on defense counsel to point out with specificity, to the satisfaction of the judge, that a presentence investigation should be ordered was clearly contrary to the statute. Under section 4-609 the burden is on the judge to show why an investigation should not be conducted. The trial judge's belief that the issue of cost was relevant to ordering an investigation had no basis in either the language or the history of the statute. *Nelson*, 315 Md. at 71-72, 553 A.2d at 671-72.

According to the court of appeals, the trial judge had required his own conditions to be met before a presentence investigation would be ordered: an initial investigation by defense counsel, the uncovering of a fact requiring additional explanation, and a finding that the fact to be explained was relevant to the imposition of a fair sentence. Thus, the trial court's denial of the presentence investigation was an abuse of discretion. The court of appeals reversed the judgment of the court of special appeals to the extent that the sentence imposed by the Circuit Court for Baltimore City was affirmed, and remanded the case for resentencing with the benefit of a presentence investigation report.

The decision in *Nelson* is an attempt to accommodate two significant interests: the interest in fair sentencing based on the best available information, and the interest in historic deference to judicial discretion. In holding that presentence investigations in serious noncapital cases are required, unless the judge provides adequate reasons to support a denial, the court severely restricted the trial judge's discretionary power in this area.

—Suzanne R. Cohn

***Texas v. Johnson*: FLAG-BURNING AS PROTEST PROTECTED WITHIN CONTEXT OF FIRST AMENDMENT**

In *Texas v. Johnson*, 491 U.S. ___, 109 S. Ct. 2533 (1989), the United States Supreme Court, in a 5-4 decision, held that the conviction of a protestor for burning an American flag as part of a political demonstration violated the first amendment to the United States Constitution.

The Republican National Convention was held in Dallas, Texas in 1984. A political demonstration took place in the

city streets during the convention. The demonstration was staged to protest the policies of the Reagan Administration, the nomination of President Reagan for reelection and the activities of several Dallas-based corporations. The protest culminated at the Dallas City Hall where Gregory Lee Johnson poured kerosene on an American flag and set it ablaze. Although the protestors chanted anti-American slogans over the burning flag, they did not threaten or injure any bystanders.

Johnson was charged and convicted under a Texas statute of desecrating a venerated object. His conviction was affirmed by the Court of Appeals for the Fifth District of Texas. However, the Texas Court of Criminal Appeals reversed, holding that Johnson's actions were the equivalent of symbolic speech and were protected by the first amendment. The state argued that two separate interests supported Johnson's conviction: "preserving the flag as a symbol of national unity and preventing breaches of the peace." *Johnson*, 109 S. Ct. at 2537.

The court of criminal appeals rejected the state's arguments on both points. It noted that although the Supreme Court had not yet decided whether a state could criminalize flag-burning to protect the symbolic value of the flag, a government could not impose upon its citizens beliefs or messages associated with a symbol of unity and that the first amendment protects differences of opinion with respect to such symbols. *Id.* The Texas court also believed that Johnson's conduct did not seriously threaten the status of the flag nor did it lessen the flag's symbolic value. *Id.*

Pertaining to the second interest, the court of criminal appeals noted that the desecration statute was not limited in scope to punishing only those acts that were likely to result in breaches of the peace and also pointed out that Johnson's actions, while offensive to most, were not likely to (and in fact did not) cause a breach of the peace. Additionally, the court noted that Texas had another statute that specifically addressed breaches of the peace, and if the state was truly interested in punishing Johnson for this reason it could have done so without punishing him for flag-burning. Since the court found the desecration statute to be unconstitutional as applied, it did not reach the issue of whether the statute was facially unconstitutional. *Id.* at 2537-38.

The United States Supreme Court also chose to resolve the case on an "as ap-

plied" basis. The Court reasoned that the desecration statute dealt with physical conduct pertaining to the flag, and, although it required "knowing" conduct, it was possible for such conduct to be non-expressive and, therefore, not protected by the first amendment. The statute would survive a facial attack in such cases.

In an opinion delivered by Justice Brennan, the Court decided whether Johnson's conduct was expressive conduct which would permit first amendment protection. *Johnson*, 109 S. Ct. at 2539. Central to this determination was whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Id.* (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)). The Court noted that it had previously recognized other types of expressive conduct involving the American flag. "[The Court has] had little difficulty identifying an expressive element in conduct relating to flags . . ." *Id.* at 2539. However, the Court continued to analyze this conduct in the context in which it occurred. *Id.* at 2540. Three factors led the Court to conclude that Johnson's conduct was " 'sufficiently imbued with elements of communication.' " *Id.* (quoting *Spence*, 418 U.S. at 409). First, Texas conceded at oral argument that Johnson's conduct was expressive. Second, the flag-burning occurred as part of a political demonstration. Third, Johnson stated at his trial that he meant his actions to be " 'a more powerful statement of symbolic speech . . . ' " *Johnson*, 109 S. Ct. at 2540 (quoting from the trial record). Thus, the Court agreed with the Texas Court of Criminal Appeals that Johnson's conduct was deserving of first amendment protection.

The Court proceeded with an analysis of the state's asserted interests in support of Johnson's conviction. In *United States v. O'Brien*, 391 U.S. 367 (1968), the Court held that " 'a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms . . . ' " *Johnson*, 109 S. Ct. at 2540, (quoting *O'Brien*, 391 U.S. at 376)). The *O'Brien* test requires the interests to be " 'unrelated to the suppression of free expression.' " *Id.* (quoting *O'Brien*, 391 U.S. at 377)).

In determining the applicability of the *O'Brien* test, the Court first considered the issue of the state's interest in prevent-

ing breaches of the peace. The Court held that the facts on the record did not support this interest. The Court agreed with the court of criminal appeals that Johnson's conduct was not likely to have caused a breach of the peace. It asserted that the state had improperly concluded that actions which might seriously offend others would always lead to breaches of the peace. *Johnson*, 109 S. Ct. at 2541-42.

The Court expressed that the free speech protected by the first amendment is not just that which is agreeable or inoffensive. The primary " 'function of free speech . . . is to invite dispute. It may . . . best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger.' " *Id.* at 2541 (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)). The Court further explained that Johnson's conduct was not an invitation to fight and was not likely to have caused such a result. *Id.* at 2542.

Concurrent with the court of criminal appeals, the Court noted that a separate statute for breaches of the peace existed and could have been used by the state to protect its asserted interest. *Id.*

Next, the Court considered the state's second interest, preserving the flag as a symbol of national unity. The Court noted that in *Spence*, the State of Washington wished to prohibit affixing a peace symbol to the flag. An analogy was made to Johnson's conduct, that Texas' interest, like Washington's, was related to prohibiting such expressive conduct. Therefore, the Court reasoned that this also could not be a justifiable incidental limitation under *O'Brien*. *Id.*

Although the Court held the *O'Brien* test inapplicable, it noted that where a governmental interest was related to expression, a "more demanding standard" for justification of first amendment limitations may be applied. *Johnson*, 109 S. Ct. at 2539. The Court opined that the desecration statute was designed to protect others from being offended by the proscribed conduct. This interpretation of the statute meant that Johnson's conduct was being restricted because of its content. *Id.* at 2543. Therefore, the state's interest in preserving the symbolic value of the flag was subject to " 'the most exacting scrutiny.' " *Id.* (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)).

Regardless, the state maintained that any message conveyed by physical treatment of the flag which threatens the concepts that the flag embodies, namely, nationhood and national unity, is harmful and may be prohibited by a state. *Id.*

at 2544. The Court rejected this argument and reiterated its rationale from other "flag cases," that the Constitution guarantees freedom to espouse contrary opinions, including those concerning the nation's fundamental principles and the American flag. *Id.* at 2544-46. Consequently, a government may not promote certain ideas and actions concerning the flag and prohibit others. *Id.*

Brennan concluded by stating that the decision would enhance the symbolic value of the flag. By consistent application of the freedoms guaranteed by the Constitution and embodied in the flag, the Court believed that "toleration of criticism such as Johnson's is a sign and source of our strength." *Id.* at 2547. He suggested that the most effective counter to one who defiles the flag is to demonstrate reverence for it. "We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents." *Id.* at 2547-48.

Justice Kennedy, anticipating the negative reaction to the Court's decision, voiced the emotional concerns that were not present in the majority opinion. In a concurring opinion, he noted that the results are sometimes hard to take, but nevertheless, "are right, right in the sense that the law and the Constitution, as we see them, compel the result." *Johnson* 109 S. Ct. at 2548.

Chief Justice Rehnquist, in a dissent joined by Justices White and O'Connor, noted the historical significance of the flag throughout the nation's existence. Moreover, he highlighted the many federal and state statutes regarding proper treatment and display of the flag. His dissent, along with Justice Stevens' dissent, emphasized that the flag's revered place has been established by history, and "the government is simply recognizing as a fact the profound regard for the American flag created by that history" through government regulation. *Johnson*, 109 S. Ct. at 2555. The dissent also stated that the Court should be extremely wary of placing limits on legislative majorities. *Id.*

Thus, the Supreme Court refused to carve an exception for the American flag from the protection of the first amendment. Following its reasoning from other "flag cases," the Court broadened the doctrine of free speech. When done as a form of protest, the Court considers flag-burning to constitute expressive conduct. Persons who choose to express themselves in this manner will be afforded the protection guaranteed by the first amendment.

—Brian M. Kurtyka

A LETTER TO ALUMNI FROM THE LAW LIBRARY

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