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IMPLICATIONS OF TEXAS V. JOHNSON ON MILITARY PRACTICE

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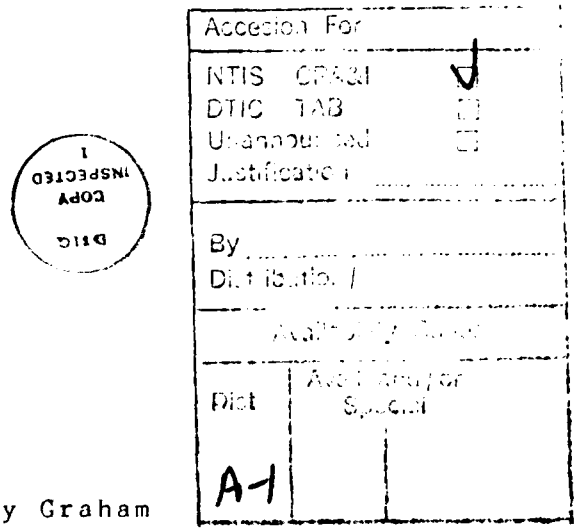

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This research report entitled "The Implications of Texas V. Johnson On Military Practice" is presented as a competent treatment of the subject, worthy of publication. The United States Air Force Academy vouches for the quality of the research, without necessarily endorsing the opinions and conclusions of the author.

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Dated

INTRODUCTION

Texas v. Johnson[1], in which the United States Supreme court held that flag burning is a form of speech protected by the First Amendment, is one of the more controversial opinions of recent years. It has prompted federal legislation[2] as well as a proposed Constitutional amendment[3], both to overrule its holding. An analysis of Supreme Court precedents

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1 491 U.S. ____, 105 L. Ed. 2d 342 (1989).

2 S. J. Res. 179, 100th Cong., 1st Sess., 135 Cong Rec. S 8087 (daily ed., July 18, 1989).

Section 1. SHORT TITLE

This Act may be cited as the "Biden-Roth-Cohen Flag Protection Act of 1989."

Section 2. AMENDMENT TO TITLE 18

Subsection (a) of Section 700 of Title 18, United States Code, is amended as follows: (a) Whoever knowingly mutilates, defaces, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined not more than $1000 or imprisoned for not more than one year, or both.

This act was held unconstitutional in United States v. Eichman, 496 U.S. ____, 110 L. Ed. 2d 287 (1990). Although this case is subsequent to Johnson, its reasoning is not so thoroughly developed. Johnson is the Court's most detailed explication of the First Amendment protections afforded flag burning.

3 S 1338, 100th Cong., 1st Sess., 135 Cong. Rec. S 8090 (daily ed. July 18, 1989).

The Congress of the United States and the several states have the power to prohibit and punish the desecrating, mutilating, defacing, defiling, or burning of any flag of the United States.

reveals, however, that the case is not a radical departure from the already considerable body of law concerning symbolic speech. After surveying these precedents this note will examine the Court's reasoning in Johnson and consider what effect this case may have upon military law.

FACTS

Respondent, Gregory Lee Johnson, participated in a political demonstration during the Republican National Convention in Dallas in 1984. The purpose of the demonstration was to criticize the policies of the Reagan administration as well as of "certain Dallas based corporations."[4] Toward the end of the protest, in front of Dallas City Hall, the respondent unfurled an American flag and set it on fire, while the demonstrators chanted, "America, the red, white, and blue, we spit on you."[5] The respondent was charged under Texas Penal Code Ann. Sec. 42.09(A)(3), which states

> A person commits an offense if he intentionally or knowingly desecrates...a state or national flag.

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4 Johnson at 350.

5 Id.

Subsection (b) defines desecration as

> to deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.

The respondent was sentenced to one year in prison and fined $2000.00. The Texas Court of Criminal Appeals reversed on the ground that the respondent's conviction violated the First Amendment. The Supreme Court granted certiorari and affirmed the decision of the Court of Criminal Appeals.

SYMBOLIC ACTS

It is a settled point of law that acts can be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments."[6] Provided that the actor possesses "an intent to convey a particularized message" and that the likelihood is great that the message will be understood

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6 Spence v. Washington, 418 U.S. 405 at 409 (1974).

by viewers,[7] a symbolic act stands on almost equal constitutional footing with vocal utterances.[8] As a consequence, the Supreme Court has recognized First Amendment protection for such activity as the wearing of black arm bands by high school students as a means of anti-war protest[9] and the wearing of American military uniforms by actors in an anti-war play.[10] In the latter case, the Court held 10 USC Sec. 722 (f), which authorizes actors to wear military uniforms in theatrical productions, to be unconstitutional to the extent that it forbad the wearing of uniforms in productions discrediting the armed forces.[11]

It is equally well settled that to display or salute a flag is an example of a communicative or symbolic act. As the Supreme Court stated in West Virginia Board of Education v. Barnette,[12]

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7 Id. at 410-11.

8 Almost, but not quite. States have a freer hand in restricting symbolic speech. See, e.g., United States v. O'Brien, 391 U.S. 367 (1968).

9 Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

10 Schacht v. United States, 398 U.S. 58 (1970).

11 Id. at 63-64.

12 319 U.S. 624 (1943).

> There is no doubt that [flag saluting] is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of [the] flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind[13].

As a consequence, the court ruled that a state may not compel flag saluting as part of its civics curriculum. To do so would be to force an "individual to communicate...by sign his acceptance of the political ideas [the flag] bespeaks."[14] In Spence v. Washington,[15] the Court upheld the right of a defendant to display an American flag to which a peace sign had been affixed. While acknowledging that the states may forbid the mishandling of a flag which is public property, the Court held that in this case the defendant's display of a privately owned flag communicated his opposition to the Vietnam War by means of symbolism which included not only the flag itself but

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13 Id. at 632.

14 Id. at 633.

15 See note 6, supra.

the superimposed peace sign as well.[16] Likewise, Smith v. Goguen[17] involved a defendant prosecuted for sewing a flag on the seat of his trousers. The Court struck down the statute under which the defendant was convicted for being impermissibly vague without specifically addressing the question of symbolic speech.[18] However, in a concurring opinion, Justice White stated

> to convict on this basis is to convict not to protect the physical integrity or to protect against acts interfering with the proper use of the flag, but to punish for communicating ideas about the flag unacceptable to the controlling majority of the legislature.[19]

Despite the above the Court has recognized certain circumstances under which a state may legitimately control speech both vocal and symbolic. Consistent

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16 Spence at 410.

17 415 U.S. 566 (1974).

18 Id. at 581-82.

19 Id. at 588.

with Brandenburg v. Ohio,[20] for example, states may suppress speech which constitutes an "incitement to imminent lawlessness."[21] The court upheld a similar principle in an earlier case, Stromberg v. California,[22] in which a defendant was convicted under California Penal Code 403a, which forbad the "display of a flag or symbol representing opposition to organized government or serving as a stimulus to anarchy or in support of seditious propaganda."[23] The Court upheld the second and third clauses against constitutional attack, asserting that a "state may punish utterances inciting to violence or threatening the overthrow of the government by unlawful means."[24] Melton v. Young[25] reached a similar conclusion regarding a school's right to suspend a student for refusing to remove a confederate flag from his clothing. In that case, the flag had caused racial turmoil, resulting in actually

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20 395 U.S. 444 (1969).

21 Id. at 448-49. Other unprotected classes of speech are fighting words, defamation, and obscenity. See, e.g., Chaplinsky v. New Hampshire, 315 U.S. 568 at 572 (1941).

22 283 U.S. 359 (1931).

23 Id. at 370.

24 Id. at 368-69

25 465 F. 2d 1332 (6th Cir 1972).

closing the school.[26] Tinker v. Des Moines Independent Community School District,[27] though holding that the wearing of arm bands is protected speech, contains dicta that "[student conduct] which materially disrupts class work or involves substantial disorder or invasion of the rights of others is not immunized by the constitutional guarantee of freedom of speech."[28] Finally, under United States v. O'Brien,[29] a state may restrict symbolic acts when so doing furthers a governmental interest unrelated to the suppression of free expression and so long as the restriction is no greater than is essential to the furtherance of the interest.[30] Applying this test, the Court supported the right of the government to prosecute draft card burners, in furtherance of Selective Service System objectives, despite the defendant's communicative intent in destroying the draft cards.

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26 Id. at 1333.

27 See note 9, supra.

28 Tinker at 513.

29 See note 8, supra.

30 O'Brien at 377.

RATIONALE IN TEXAS V. JOHNSON

Applying this body of law to the case at bar, the Court had little difficulty concluding that the respondent's act was symbolic speech. In fact, Texas conceded the issue.[31] In light of the flag burning having coincided with the Republican National Convention, "the expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent."[32] Citing Spence v. Washington, the Court asserted that the respondent's act "was conduct 'sufficiently imbued with elements of communication'...to implicate the First Amendment."[33]

The Court then addressed in two parts the substance of the constitutional issue. The first was whether, under O'Brien, the state could advance an interest in respondent's prosecution which was unrelated to the suppression of free expression.[34] If it could, the Court would apply O'Brien to determine whether the restriction was any greater than was essential to

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31 Johnson at 354.

32 Id.

33 Id.

34 Id. at 355.

further the interest.[35] If, however, there was no governmental interest unrelated to the suppression of free expression, the court would apply "the most exacting scrutiny" to Johnson's prosecution in weighing the state's interests in preserving the symbolic value of the flag against the respondent's interest in freedom of speech.[36]

Concerning the first part of the Court's analysis, Texas advanced two interests which it contended were unrelated to the suppression of free expression and therefore fell within the ambit of O'Brien. One was that of preventing breaches of the peace and the other was in fact that of preserving the symbolic value of the flag. The Court rejected the former interest, reasoning that merely because a statement has the potential to cause a breach of the peace is no excuse for suppressing it. Any number of constitutionally protected communications possess some potential for inspiring public disorder. Consistent with Brandenburg, Texas would have to establish that respondent's deeds went beyond mere potential and amounted to an incitement to imminent lawlessness. Because the flag burning constituted no such incitement, the Court determined

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35 Id.

36 Id. at 359.

that Texas's interest in preventing a breach of the peace was not implicated on the facts.[37]

The Court also dismissed Texas's second interest, that of preserving the flag as a symbol of nationhood and national unity. The Court reasoned that the symbolic value of the flag can be diluted only when the flag is used as a tool of expression. That is, only if the flag is used to communicate ideas inconsistent with the values it embodies can it lose is symbolic force. If, for example, one uses a flag in an attack on the idea of democracy, that flag's value as a democratic symbol could be diluted in a sense that it would not be were the flag employed to inspire patriotism. Consequently, Texas's interest in preserving the symbolic value of the flag can be vindicated only through suppressing "anti-democratic" or "anti-American" communication. It is thus directly related to a suppression of free expression, and, therefore, the O'Brien test is inapplicable.[38]

Having so concluded, the Court turned to the second part of its analysis, whether Texas's interest in the symbolic value of the flag justified its direct effect

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37 Id. at 356.

38 Id. at 357.

on the respondent's interest in free expression. In order to resolve this issue the Court had to determine if the prosecution were "content-based," relying on its recent decision in Boos v. Barry.[39] In that case, the Court struck down a District of Columbia statute which forbad displaying a sign within 500 feet of any foreign embassy which would tend to bring the foreign government into public odium or disrepute.[40] The court held this law to be content-based because is could be enforced only against those who expressed criticism of the foreign government, leaving undisturbed those who might rally in support.[41] Being content-based, the law would have to pass "the most exacting scrutiny" to survive. That is, the state would have to establish that the restriction served a "compelling state interest" and that it was narrowly drawn toward that end.[42] Under this scrutiny the Court concluded that the government's interest in protecting the dignity of

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39 485 U.S. ____, 99 L. Ed. 2d 333 (1988).

40 Id.

41 Id. at 345.

42 Id.

diplomatic personnel did not outweigh the defendant's right to free speech.[43]

Turning to the facts in Johnson, the Court began its analysis with the assertion that the respondent was prosecuted for expressing an idea. Nor was it just any idea; rather, "he was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment..."[44] In the eyes of the court the prosecution was therefore content-based.

This particular basis for the conclusion is tenuous, implying that but for the respondent's dissatisfaction with the policies of the current administration, he would not have been prosecuted. The Court was correct to observe that government "may not prohibit expression simply because it disagrees with its message."[45] However, one can imagine a prosecution under Texas's statute for flag burning in support of an idea which the state might not disagree with--for example, burning it is criticism of those who oppose the current political order in Texas.

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43 Id. at 350.

44 Johnson at 358.

45 Id. at 361.

It might have been preferable if the court had reasoned along the following lines: as determined through the Court's O'Brien analysis, the Texas statute will only be enforced if the respondent has engaged in a form of communication. As a practical matter, only those ideas susceptible of being communicated through the burning of a flag are offensive. Therefore, the statute is content-based insofar as it will only affect offensive as opposed to benign speech. Of course, such reasoning would have required the Court to examine the statute on its face rather than merely as applied to the respondent. However, it is submitted that such an approach would have been more satisfactory.

Nevertheless, having concluded that the prosecution was "content-based," the Court proceeded to employ the Boos standard in weighing the competing interests of Texas and the respondent. In doing so, the Court quoted Spence, in which it had previously balanced a state's interest in preserving the symbolic value of the flag against a defendant's right of free expression. In striking down Spence's conviction, the Court had stated,

> Given the protected character of [Spence's] expression and in light of the fact that no interest the state may have in preserving the physical integrity of a privately owned flag

was significantly impaired on these facts..the conviction must be invalidated.[46]

The Court applied a similar reasoning in Johnson. If a state may not protect the integrity of a flag by preventing someone from attaching a peace sign to it, neither could Texas advance a similar interest by preventing the respondent from destroying a flag.[47] The difference between the two situations is only a matter of degree.

> If we were to hold that a state may forbid flag burning wherever it is likely to endanger the flag's symbolic role, but allow it whenever burning a flag promotes that role--we would be saying that when it comes to impairing the flag's physical integrity, the flag itself may be used as a symbol--as a substitute for the written or spoken word or as a "short cut from mind to mind"--only in one direction.[48]

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46 Id.

47 Id. at 361-62.

48 Id. at 362.

The Court held that this course would be to dictate the content of political speech.[49] Relying on Schacht, supra, the Court recognized no basis for restricting the "messages" which could be relayed through the use of the flag; to hold otherwise, it contended, would be tantamount to the Court imposing its political philosophy upon the nation.[50]

APPLICABILITY OF TEXAS V. JOHNSON TO MILITARY LAW

While Johnson may have announced a general principle that flag burning can be protected speech, it is clear that constitutional rights for civilians are not necessarily coextensive with those of military personnel. As the Supreme Court stated in Brown v. Glines,[51]

> While members of the military services are entitled to the protections of the First Amendment, "the different character of the

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49 Id.

50 Id.

51 444 U.S. 348 (1980).

military community and of the military mission requires a different application of these principles."[52]

The watershed case in this area of the law is Parker v. Levy,[53] in which an Army captain was prosecuted under Articles 133 and 134, UCMJ, for making statements in opposition to the Vietnam war, the gist of which was that black soldiers should refuse to fight.[54]

In upholding Levy's conviction the Supreme Court observed that the military community differs from the civilian in that the primary responsibility of the military is to be ready to fight a war if need be.[55] As a consequence, the military has developed a jurisprudence, separate from that governing the civilian sector, which regulates "a much larger segment of

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52 Id. at 354.

53 417 U.S. 733 (1974).

54 "I would refuse to go to Vietnam if ordered to do so. I don't see why any colored soldier would go to Vietnam: they should refuse to fight because they are discriminated against and denied freedom in the United States...If I was a colored soldier I would refuse to go to Vietnam..." Id. at 736.

55 Id. at 743.

activities" of the military community.[56] Regarding the First Amendment, the need for discipline renders "permissible within the military that which would be constitutionally impermissible outside it." Article 134, for example, which would be overbroad if applied to a civilian, is permissible to sustain the higher disciplinary requirements of the armed forces.[57]

Parker relied on an earlier CMA case, United States v. Gray,[58] in which the accused was convicted for making disloyal statements in violation of Article 134. The statements consisted of criticisms of the United States constitution, United States policy in Vietnam, the NCO corps, and other aspects of military life, none of which would likely pass muster under Brandenburg as incitements to imminent lawlessness.

> Have you ever read the constitution of the United States. IT'S A FARCE. Everything that is printed there is contradicted by amendments. is [sic] this fair to the US

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56 Id. at 744, 749.

57 Id. at 760.

58 42 C.M.R. 255 (1970).

> people? I believe not. Why set [sic] back and take these unjust rules and do nothing about it. If you do nothing will change.[59]

A second, undoubtedly ghostwritten, statement included the following:

> Most NCOs have gotten their rank from extended service and unquestioning obedience, rather than from ability...we often see him as our real enemy because of his constant harassing. The Marines, the military in general, are teaching men to respond like animals, to kill without question and without cause.[60]

In addition, the First Amendment proscription against the imposition of a prior restraint does not invalidate Air Force Regulation 35-15, which requires prior approval by a base commander before petitions can be circulated on base.[61] "Speech likely to interfere with the vital prerequisites for military

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59 Id. at 261.

60 Id.

61 Brown v. Glines, note 5, supra.

effectiveness...can be excluded from a military base."[62]

As these cases indicate, speech by members of the armed forces which subvert military discipline will not be subjected to an Brandenburg-type analysis as would statements by civilians. Due to the unique requirements of the military community, First Amendment freedoms may be curtailed to ensure mission effectiveness.[63]

In light of the above, it is unlikely that Texas v. Johnson will have a significant effect on military law. There is no reason to conclude that symbolic speech disloyal to the United states would be accorded greater deference in military courts than is accorded vocal speech. Were a military member, identified as such, to desecrate a flag in a manner similar to that of the respondent in Johnson, Parker v. Levy would undoubtedly permit his court-martial under Articles 133 or 134 or both, depending on whether or not he was an officer. Such acts as those of the respondent, performed with the intent to promote disloyalty among the forces, would be

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62 Id. at 355.

63 See also: United States v. Priest, 46 C.M.R. 368 (1971); United States v. Kate, 50 C.M.R. 19 (1974); United States v. Jones, 4 M.J. 589 (C.G.M.R. 1988); United States v. Stuckey, 10 M.J. 347 (C.M.A. 1981); United States v. Heard, 12 M.J. 563 (A.C.M.R. 1981)..

to the prejudice of good order and discipline.[64] In addition, were the offender an officer, such conduct would satisfy the elements of Article 133.[65] Even flag burning by a military member which was not part and parcel of an anti-American demonstration but which the accused knows will give serious offense might be prosecuted as disorderly conduct, which the Manual for Courts-Martial defines as "any disturbance of a contentious or turbulent nature."[66] Therefore, except to the extent that flag burning is, in all likelihood,

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64 10 U.S.C. Sec. 934. A sample specification for flag burning might read as follows: In that Airman Basic John Doe, 10th Squadron, United States Air Force, did, at XYZ Air Force Base, CO, on or about 1 January 1990, burn a United States flag in the presence of other members of the United States armed forces, with the intent to promote disloyalty among them, which act was disloyal to the United States. This specification is adapted from that prescribed for disloyal statements. The offense focuses both upon the disloyal quality of the statement, meaning that the speaker disavows allegiance to the United States as a political entity, and that the statement be made with the specific intent of promoting disloyalty. Para 72 (b)(c), Manual for Courts-Martial (1984). See also 10 U.S.C. Sec. 892, failure to obey a lawful general order or regulation. AFR 110-2, a punitive regulation, forbids an Air Force member from engaging in partisan political activity. In appropriate circumstances this also could be a basis for military prosecution for flag burning. Paragraph 2-a defines "partisan political activity" as "[a]ctivity supporting or relating to candidates who represent, or issues specifically identified with, national or state political parties or associated or ancillary organizations."

65 10 U.S.C. Sec. 933.

66 Para 73(c)(2), Manual for Courts-Martial (1984). There are circumstances, of course, in which an act of flag burning would not satisfy the elements of

no longer punishable via the Assimilative Crimes Act[67] it is still an offense in the United States armed forces despite the ruling in Johnson.

CONCLUSION

Texas v. Johnson's interpretation of flag burning as falling within the ambit of the First Amendment is generally consistent with existing Supreme court precedents on symbolic speech. Despite difficulties generated by the Court's attempt to hold the state unconstitutional merely as applied to the respondent, the case is not a radical break with the past. It is unlikely to affect military practice, however, due to the restriction that military discipline imposes on a member's exercise of First Amendment rights.

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disorderly conduct. The effect of the burning must be to prejudice good order and discipline or to bring discredit upon the armed forces. Arguably an act of flag burning by one out of uniform, who does not identify himself as a member of the military, and which is not part of a partisan political activity (see note 64 supra) would not be punishable as disorderly conduct. See, e.g., U.S. v. Davis, 26 M.J. 445 at 448 (CMA 1988).

67 18 U.S.C. Sec. 13 (1958, amended 1988).