

Texas v. Johnson / Excerpts from the Dissenting Opinion—Answer Key

The following are excerpts from Chief Justice Rehnquist's dissenting opinion:

For more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here.

The American flag . . . throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. It does not represent the views of any particular political party, and it does not represent any particular political philosophy. The flag is not simply another “idea” or “point of view” competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have. I cannot agree that the First Amendment invalidates the Act of Congress, and the laws of 48 of the 50 States, which make criminal the public burning of the flag.

The result of the Texas statute is obviously to deny one in Johnson's frame of mind one of many means of “symbolic speech.” Far from being a case of “one picture being worth a thousand words,” flag burning is the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others The Texas statute deprived Johnson of only one rather inarticulate symbolic form of protest—a form of protest that was profoundly offensive to many—and left him with a full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy. Thus, in no way can it be said that Texas is punishing him because his hearers-or any other group of people-were profoundly opposed to the message that he sought to convey. Such opposition is no proper basis for restricting speech or expression under the First Amendment. It was Johnson's use of this particular symbol, and not the idea that he sought to convey by it or by his many other expressions, for which he was punished.

Uncritical extension of constitutional protection to the burning of the flag risks the frustration of the very purpose for which organized governments are instituted. The Court decides that the American flag is just another symbol, about which not only must opinions pro and con be tolerated, but for which the most minimal public respect may not be enjoined. The government may conscript men into the Armed Forces where they must fight and perhaps die for the flag, but the government may not prohibit the public burning of the banner under which they fight. I would uphold the Texas statute as applied in this case.

Questions to Consider

1. Chief Justice Rehnquist agrees with the majority that expression may not be punished because of the negative reaction of people who observe that expression. What does he say is the real justification for anti-flag burning laws and why Johnson was punished?

Chief Justice Rehnquist asserts that because the flag is the symbol of our nation and its citizens the government should be allowed to prohibit its destruction. He contends it was not the idea Johnson sought to convey that he was punished for but rather his particular use in burning the flag to express that idea.

2. In Chief Justice Rehnquist's opinion, how was the unique status that the flag enjoys established?

Chief Justice Rehnquist asserts because the flag does not represent any particular political philosophy millions of Americans revere it regardless of their deeply held values or beliefs. The unique status it enjoys was established because it does not represent any particular viewpoint or philosophy.

3. What point is Chief Justice Rehnquist trying to make about flag burning when he mentions that the government may send young men into battle to die for the flag, but may not prohibit the public burning of the flag? Do you agree or disagree with this argument? Explain.

When Justice Rehnquist says that the government may send young men into battle to die for the flag, but it may not prohibit the public burning of the flag, he is saying that if the symbol is that important that people will die for it, the government should be able to protect it. Opinions will vary. Some students will agree, saying that we need to maintain national unity in the face of outside threats and that if Mr. Johnson can be ordered to serve his country he can be told not to tarnish his country's symbol. Others will disagree, saying that when people go off to fight in a war, they are defending our country—not the symbol of our country—and the ideals for which it stands, including freedom of speech. If we do not allow people to burn the flag, we will be squelching freedom of speech, which is worse than destroying a symbol.