

A Constitutional “Red Flag”: Symbol or Speech?

Chief Judge Ann Bailey Smith

“It’s never an insult to be called what somebody thinks is a bad name. It just shows you how poor that person is, it doesn’t hurt you.”

From “*To Kill a Mockingbird*” by Harper Lee

An American flag flown upside down, a Supreme Court Justice and a crude insult have been in the news as the result of a *Washington Post* story which was only recently brought to light concerning an event that occurred between the January 6, 2021 attack on the United States Capitol and the inauguration of President Biden. An upside-down American flag at the Alexandria, Va., home of United States Supreme Court Justice Samuel Alito was photographed and questions were raised. When confronted with this photograph, Justice Alito told reporters in an e-mail that this was his wife’s doing (vaguely reminiscent of the Adam and Eve biblical story); she was upset over a yard sign in her neighbor’s yard that was demeaning to then-President Trump, and the neighbor had called his wife a bad name. This resulted in his wife flying the United States flag upside down. Justice Alito also stated that his wife, Martha-Ann Alito, has First Amendment rights while Mrs. Alito explained that the upside-down flag is an international sign of distress.

This incident, along with a flag flown at the Alitos’ vacation home in New Jersey which reads “Appeal to Heaven,” has raised the issue of recusal in light of cases pending before the United States Supreme Court where former President Trump is a defendant. It has been reported that upside down American flags and Appeal to Heaven flags were carried by some of those who attacked the Capitol on January 6, 2021. Justice Alito says that he was unaware that the Appeal to Heaven flag had any connection with the effort to overturn the 2020 presidential election.

With the Fourth of July holiday upon us, where the Stars and Stripes are proudly displayed throughout this country, I thought it would be interesting to look at some laws and cases that concern the American flag.

In 1903, Nebraska enacted “An Act to Prevent and Punish the Desecration of the Flag of the United States,” which criminalized using the flag of the United States “to sell, expose for sale, or have in possession for sale, any article of merchandise upon which shall have been printed or placed, for purposes of advertisement, a representation of the flag of the United States.” In this instance, the American flag was displayed on a can of “Stars and Stripes” beer and the two men who used the flag to advertise their beer were convicted in violation of the act and fined \$50. The case was eventually appealed to the United States Supreme Court with Justice John Marshall Harlan writing the opinion for the Court, which upheld the conviction in *Halter v. Nebraska*, 205 U.S. 34 (1907). In the opinion, Justice Harlan states: “Therefore a state will be wanting in care for the wellbeing of its people if it ignores the fact that they regard the flag as a symbol of their country’s power and prestige, and will be impatient if any open disrespect is shown towards it.”

In 1942, Congress enacted the Flag Code Resolution (Public Law 77-623) to codify existing rules and customs pertaining to the use of the American flag. There was, however, no penalty provided for violating any of its provisions. Section 4 (a) reads that “The flag should never be displayed with the union (the blue part of the flag with the stars) down save as a signal of distress.” Most typically this would invoke an American ship at sea facing peril.

In the 1960s, the burning of the American flag as a means of political protest prompted nearly every state in the nation to enact or enforce existing laws against desecrating the flag. In 1989, the United States Supreme Court held that Gregory Johnson’s burning of the American flag during a political demonstration in opposition to former President Ronald Reagan being re-nominated at the Republican National Convention in Dallas was expressive conduct protected by the First Amendment. The State of Texas, in arguing to uphold Johnson’s conviction for desecrating the flag stated that Texas had an interest in preserving the American flag as a symbol of nationhood and national unity. The Court noted that Texas agreed with federal law that the proper method of disposing of a flag that is tattered or torn is to burn it, so Texas cannot say it’s okay in that circumstance but not okay when a person burns the flag as a matter of protest. Justice Brennan, in writing for the 5-4 majority, stated:

And, precisely because it is our flag that is involved, one’s response to the flag burner may exploit the uniquely persuasive power of the flag itself. We can imagine no more appropriate response to burning a flag than waving one’s own, no better way to counter a flag burner’s message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by... according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we

dilute the freedom that this cherished emblem represents. *Texas v. Johnson*, 491 U.S. 397, 419-420 (1989).

The American flag is the most recognized symbol of the United States. As it represents the land of the free, the flag is used, and sometimes abused, in protest. As of the writing of this article, Justice Alito has stated that he will not recuse from cases involving former President Trump.

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In other news, our own Judge Susan Gibson was acknowledged in the credits of author Kim Michele Richardson’s book “*The Book Woman’s Daughter*,” which is a sequel to her highly acclaimed novel “*The Book Woman of Troublesome Creek*.” Ms. Richardson is a Kentucky author who writes about life in Appalachia. Judge Gibson contributed legal research to some of the themes addressed in the sequel. A well-deserved shout out to Judge Gibson for assisting in making this book such a success.

And, finally, I want to acknowledge the 53 years of service that the Louisville Metro Public Defender’s Office has provided to our community. As of July 1, per legislative enactment, the Public Defender’s Office will be under the direction of the Department of Public Advocacy as one of its branch offices. During its more than five decades in existence, the Public Defender’s Office had only three leaders: Colonel Paul Tobin, Dan Goyette and Leo Smith, who were dedicated to providing indigent criminal defendants with the best legal representation that money can’t buy. So many excellent attorneys have come from that office over the years that I couldn’t even begin to name names. This community, our legal profession and the courts of Jefferson County owe a debt of gratitude to the Louisville Metro Public Defender’s Office for its excellent representation of those accused of crimes who could not afford to retain private counsel.

Chief Judge Ann Bailey Smith presides in Division 13 of Jefferson Circuit Court. ■



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