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DESTROYING OR TREATING WITH INDIGNITY
THE FLAG OF THE UNITED STATES:

OKLA. STAT. tit. 21, §§372-75 (1971).

On February 17, 1971, the Thirty-third Legislature of Oklahoma approved an emergency measure which amended the existing state statute¹ concerning defilement of the United States flag. The new law² provides:

§372. Mutilation, treating with indignity or destroying flag—

Definitions

(a) Any person who shall contemptuously or maliciously tear down, burn, trample upon, mutilate, deface, defile, defy, treat with indignity, wantonly destroy, or cast contempt, either by word or act, upon any flag, standard, colors or ensign of the United States of America shall be guilty of a felony.

(b) The word "defile" as used in this section shall include public conduct which brings shame or disgrace upon any flag of the United States by its use for unpatriotic or profane purpose.

(c) The terms "flag," "standard," "colors," or "ensign" of the United States as used in this section shall include any picture, representation or part thereof which an average person would believe, upon seeing and without deliberation, to represent the flag, standard, colors or ensign of the United States of America.

SECTION 2. Severability

The provisions of this act are severable and if any part or provision hereof shall be held void the decision of the court so holding shall not affect or impair any of the remaining parts or provisions of this act.

¹ OKLA. STAT. tit. 21, §372 (Supp. 1970).

² Okla. Laws 1971, 1.

The 1971 Act added section 2 to the existing statute. This addition provided for the severability of any provisions of the Act in case they be held void. The severability provision was apparently added in recognition of various United States Supreme Court rulings which may make strict application of the statute unconstitutional. The Oklahoma Legislature seemed cognizant of this possibility, but made the provisions of the act severable rather than rewriting the statute.

This does not provide a workable standard for defining flag desecration, nor will it keep the Oklahoma statute from running afoul of constitutional standards. It appears the legislature has abrogated its responsibility in this area.

The power of a state to enact legislation for the protection of the American flag has long been recognized. In *Halter v. Nebraska*,³ the United States Supreme Court held that a Nebraska statute prohibiting the use of representations of the flag for advertising articles of merchandise was not repugnant to the United States Constitution. The opinion by Mr. Justice Harlan indicated that a state may exercise its power to "encourage patriotism and love of country among its people. . . . Therefore a state will be wanting in care for the well-being 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."⁴

More recently, the courts have concerned themselves with the aspects of protected symbolic speech that may be abridged under flag desecration statutes. This presents a balancing of interests between the individual's rights and the government's powers. The main difficulty is ascertaining what conduct of the individual is protected. Mr. Chief Justice Warren faced this problem in *United States v. O'Brien*,⁵ a case dealing with

³ 205 U.S. 34 (1907).

⁴ *Id.* at 42.

⁵ 391 U.S. 367 (1968).

the burning of selective service cards. In writing the opinion he stated:

We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. . . . This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.⁶

Despite the language of the *O'Brien* case, the Court's decision in *Street v. New York*⁷ makes it clear that a flag desecration statute such as Oklahoma's which provides a penalty for defiling the United States flag by either *word* or *act* may abridge a man's right to publicly express his opinion about the flag. In the *Street* case, the accused burned an American flag on a street corner after learning that civil rights leader James Meredith had been shot by a sniper in Mississippi. During the burning, a policeman heard the accused state: "If they did that to Meredith, we don't need an American flag" and "We don't need no damn flag." Street had been convicted under a New York statute making it a misdemeanor publicly to mutilate, deface, defile, or defy, trample upon or cast contempt upon, either by words or act any flag of the United States.⁸ In *Street*, the Court reversed the accused's conviction stating:

[W]e are unable to sustain a conviction that may have rested on a form of expression, however distasteful, which the Constitution tolerates and protects.⁹

The Court reached this decision after being "unable to say with certainty that appellant's words were not an inde-

⁶ *Id.* at 376.

⁷ 394 U.S. 576 (1969).

⁸ N.Y. PENAL LAW §1425 (16) (d) (1909) (superseded 1967 by N.Y. GEN. BUS. LAW §136 (d) (McKinney 1968)).

⁹ 394 U.S. at 594.

pendent cause of his conviction."¹⁰ It would appear that any attempt to convict under the Oklahoma statute would have the risk of this same danger, as it provides a penalty for desecrating the flag by either *word* or *act*. Thus, any conviction must be based predominantly on the accused's actions.

The *Street* Court found four governmental interests which might have been furthered by punishing the accused for his words:

- (1) to deter appellant from vocally inciting others to commit unlawful acts
- (2) to prevent appellant from uttering inflammatory words that would provoke others to retaliate against him
- (3) to protect the sensibilities of passers-by who might be shocked by appellant's words about the flag
- (4) to assure that appellant showed proper respect for the national emblem.¹¹

Despite these enumerated interests, a problem is foreseen any time an accused is tried under Oklahoma's statute when his conduct consists of both words and acts. In *Cowgill v. California*,¹² the Court dismissed the appeal of Cowgill from his conviction under a California statute¹³ for wearing a vest fashioned out of a cut-up American flag. In the Court's dismissal it stated:

The Court has, as yet, not established a test for determining at what point conduct becomes so intertwined with expression that it becomes necessary to weigh the state's interest in proscribing conduct

¹⁰ *Id.* at 589.

¹¹ *Id.* at 590-91.

¹² 274 Cal. App. 2d 923, 78 Cal. Rptr. 853 (1969), *appeal dismissed*, 396 U.S. 371 (1970).

¹³ CAL. MILITARY AND VETERANS CODE §614(d) (West 1954) (superseded 1970 by CAL. MILITARY AND VETERANS CODE §614 (West Supp. 1971)).

against the constitutionally protected interest in freedom of expression.¹⁴

California has seen fit to apply its statute to acts only, which is the same thing that the federal government has done.¹⁵ This seems to be a reasonable approach to the balancing of interests and one that the Oklahoma legislature might follow. If the Oklahoma statute applied to acts only and the terms used therein were more narrowly defined, the statute would seem to come closer to meeting the constitutional standards. As the court stated in *Hodsdon v. Buckson*:¹⁶

The danger of chilling the exercise of fundamental freedoms, especially those protected by the First Amendment, requires that when the conduct regulated approaches a protected zone, government regulate only with narrow specificity.¹⁷

The Oklahoma legislature should rewrite this statute so that it would protect the flag from acts of mutilation, but so that its provisions could not be arbitrarily applied to abridge an individual's right of free expression.

J. Richard Johnson, Jr.

¹⁴ 396 U.S. at 371.

¹⁵ 18 U.S.C. §700 (a) (Supp. IV 1968).

¹⁶ 310 F. Supp. 528 (D. Del. 1970).

¹⁷ *Id.* at 532.