

US president-elect says flag burners should be stripped of their citizenship

John Burton
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When he tweeted yesterday that “Nobody should be allowed to burn the American flag—if they do, there must be consequences—perhaps loss of citizenship or year in jail!,” United States president-elect Donald Trump put on full display his shocking disregard to the two constitutional provisions closely associated with fundamental democratic rights—the First and Fourteenth Amendments.

Trump’s authoritarian outburst was apparently triggered by the widespread demonstrations against his November 8 election, which included a flag burning at Hampshire College in Massachusetts, followed by the school’s well-publicized removal of its campus flag.

Professor David D. Cole of Georgetown University, who is soon to become the national legal director at the American Civil Liberties Union (ACLU), denounced Trump’s tweet as “beyond the pale.”

Three decades ago, Cole co-authored the Supreme Court brief on behalf of Gregory Johnson, a demonstrator convicted of burning an American flag outside the 1984 Republican National Convention in Dallas, Texas, during a protest against the Reagan administration.

Texas v. Johnson, decided in 1989, established what should seem obvious, that the First Amendment’s prohibition of laws “abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances” protects burning the American flag as an expression of political opposition to the US government and its policies.

“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable,” according to the ruling. The next year, in *United States v. Eichman*,

the Supreme Court held the “Flag Protection Act,” passed in response to *Texas v. Johnson*, unconstitutional as well.

Anthony Kennedy, the only Justice remaining on the Supreme Court from that period, a conservative, voted with the majority. So did the late arch-reactionary Justice Antonin Scalia, whom Trump has repeatedly praised as a “brilliant Supreme Court Justice, one of the best of all time.”

When pressed by CNN’s Chris Cuomo, Trump transition spokesperson Jason Miller doubled down on Trump’s call that “[F]lag burning should be illegal.”

“The President-elect is a very strong supporter of the First Amendment, but there’s a big difference between that and burning the American flag,” Miller said, in utter disregard for the Supreme Court’s responsibility to define the limits of governmental authority under the Constitution.

Under the separation of powers underlying the US constitutional scheme, *Texas v. Johnson* and *United States v. Eichman* establish precedents binding on all branches of government, including the incoming president, unless the Supreme Court itself chooses to reconsider and overrule the cases, a very rare occurrence because of the doctrine of *stare decisis* that favors legal continuity.

Even more revealing than Trump’s threat to criminalize political dissent is his offhand reference to stripping people of their US citizenship, which he bizarrely equated to a “year in jail.”

The denial and revocation of citizenship have reactionary historical antecedents.

The US Constitution did not protect US citizenship until after the Civil War, when the victorious North, then led by “radical Republicans” conscious of the necessity to restructure the fundamental relationship

between the federal and state governments and individuals, compelled the former Confederate states to ratify the Fourteenth Amendment as a condition of their readmission to the United States.

The first clause of the first sentence of the first section of the Fourteenth Amendment, which became effective in 1868, provides unequivocally that “[A]ll persons born or naturalized in the United States ... are citizens of the United States.”

The absolute recognition and protection of US citizenship was an express repudiation of the Supreme Court’s infamous 1857 decision in *Dred Scott v. Sandford*, which ruled that no “person of the African race can be a citizen of the United States, and become thereby entitled to a special privilege, by virtue of his title to that character, and which, under the Constitution, no one but a citizen can claim.”

In *Afroyim v. Rusk* (1967), the Supreme Court invalidated an immigration service ruling that stripped a naturalized US citizen of citizenship for voting in the Israeli election.

The decision states, “This undeniable purpose of the Fourteenth Amendment to make citizenship of Negroes permanent and secure would be frustrated by holding that the Government can rob a citizen of his citizenship without his consent by simply proceeding to act under an implied general power to regulate foreign affairs or some other power generally granted,” adding that “the framers of the Amendment ... wanted to put citizenship beyond the power of any governmental unit to destroy.”

Thus, *Afroyim* concludes that the Fourteenth Amendment protects “every citizen of this Nation against a congressional forcible destruction of his citizenship” and every citizen has “a constitutional right to remain a citizen ... unless he voluntarily relinquishes that citizenship.”

Trump’s recent tweet recalls his attack on birthright citizenship during his campaign that echoed Nazi measures, which began as early as July 1933, to strip Jews, Roma and “Afro-Germans” of their citizenship, setting the stage for the Holocaust.



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