

RESOURCE GUIDE TO ACCOMPANY THE VIDEO PROGRAM:

You Be the Judge

A PRESENTATION OF:

The George H.W. Bush Presidential Library & Museum
Education Department



YOU BE THE JUDGE
Three Constitutional Supreme Court Cases to Decide
January 2022

I. Introduction

This enrichment program is aimed at getting students to analyze facts and to make judgments based on those facts in a respectful and tolerant manner. Through the presentation of three different Supreme Court cases decided during the presidency of George H.W. Bush (1989-1993), students are confronted with difficult decisions involving freedom of speech, the death penalty and freedom of religion.

To get the most out of this program it is suggested that the video be placed on “Pause” after the presentation of the facts and law applicable to each of the three cases. At that time, teachers and students can discuss the issues and then take a vote to determine how the students respond to the question, “What’s Your Verdict?” At that point, resume “Play” of the video to learn the actual verdict in each case.

The program was designed to be viewed in a forty-five-minute time period. The video presentation, itself, runs twenty-two minutes which allows about seven minutes per case for discussion and voting while the video is “paused.” If the class has more time available than the forty-five minutes, a lengthier discussion period is possible.

We hope that instructors and students find this to be an enjoyable as well as educational experience.

The three cases presented are summarized below and discussion issues are suggested for each one.

II. Texas v. Johnson: Is burning the U.S. flag protected “speech” under the First Amendment?

Gregory Lee Johnson burned a US flag on the sidewalk outside the hall where the 1984 Republican National Convention was being held. He was protesting the policies of the Reagan administration. He was arrested and charged with violating Texas’ anti-flag desecration statute.

Two primary issues presented by this case are: **(1)** Is the United States flag such a unique symbol of our country that the government can punish those who burn it for purpose of political protest? **(2)** Since burning the flag, in and of itself, does not actually involve *literal* speech (spoken words), are those who protest by burning the flag protected from government prosecution by the free speech provision of the First Amendment?

The relevant portion of the First Amendment that applies to this case is: “Congress shall make no law . . . abridging the freedom of speech . . . “

The Texas statute at issue in this case reads as follows:

A person commits an offense if he intentionally or knowingly desecrates: . . . (3) a state or national flag . . . For purposes of this section, “desecrate” means 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.

Discussion Issues:

Since Johnson's protest was directed at President Ronald Reagan's policy, one might ask, "Who was President Reagan's Vice-President?" It was George H.W. Bush.

Can "actions" (versus "words") be a form of speech protected under the First Amendment? This case says "yes," they can. It is considered "expressive speech."

Identify some instances where someone's "speech" might not be protected by the First Amendment? Yelling "fire" in a movie theater. Profane or obscene speech. False statements made about a person that damages the person's reputation.

If someone sprayed a Nazis swastika on the outside of the Lincoln Memorial, would that be considered protected speech under the First Amendment?

III. **Evans v. Muncy:** When the sole basis for a jury's sentencing a man to death (versus life imprisonment without parole) is found to no longer be a valid reason, should the prisoner's death sentence be commuted to life in prison without the possibility of parole?

Wilbert Lee Evans was found guilty of murder and given the death sentence by the jury. The jury's sole basis for sentencing Evans to death rather than to life imprisonment without the possibility of parole was their finding that, if allowed to live, Evans would pose a serious threat of future danger. While awaiting his execution date (ten years after first being placed on death row), Evans saved several prison guards and staff nurses during an inmate revolt in the prison. In addition, he was considered a "model" prisoner. Evans sought to have his death penalty commuted to life in prison without the possibility of parole in light of the fact that -- as even the State of Texas conceded -- the jury's prediction of "future dangerousness" was incorrect.

Discussion Issues:

What is the primary purpose of the death penalty?

Punishment?

Detering others from committing the same crime?

Incapacitation (removing the perpetrator permanently for the protection of society)?

Does it serve the purpose of the death penalty to put to death a convicted person who has "reformed" and become a model prisoner?

IV. **County of Allegheny v. American Civil Liberties Union:** Is there too much government involvement in religion when a county courthouse holiday display includes a manger scene and Menorah?

In 1982, the Pittsburgh, Pennsylvania county of Allegheny sought to recognize the December holidays by placing a large creche (manger scene) in the lobby of its courthouse at the foot of the Grand Staircase. No other holiday decorations were in proximity to the creche. In addition, the county placed a large Christmas tree and a Jewish Menorah immediately

outside the courthouse but still on public property. The American Civil Liberties Union and a group of county residents sued the county contending that the creche and Menorah were an improper government involvement in religion which violated the First Amendment.

The relevant portion of the First Amendment reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”

Discussion Issues:

The First Amendment prohibits *both* the government establishing a religion (giving it official recognition) *and* prohibiting the free exercise of religion. In this Allegheny case there seems to be an inherent conflict in that individual private groups paid for and set up the displays (free exercise of their religion?) yet since the displays were on government property might not the reasonable observer conclude that the government was giving both Christians and Jews official recognition?

Does a religious-based Jewish Menorah lose its religious symbolism when it is placed next to a Christmas tree?

Is it contrary to Christian belief to characterize a creche as a secular (non-religious) symbol of the holidays?

Is a Christmas tree a religious symbol? Afterall, we only decorate them during the Christmas season?

If the Menorah was not located next to a Christmas tree but was accompanied *only* by a sign that read: This Menorah is a symbol of the holidays and is not to be considered a religious symbol,” would the Menorah’s presence be a violation of the First Amendment?

V. About the Presenter:



Tom Borchert is a retired trial attorney. He has practiced law in Georgia, California, and the federal courts. He is a member of the Bar of the Supreme Court of the United States. Since retiring to Huntsville, Alabama in 2014 he has been a frequent speaker before adult and student groups with his “You Be the Judge” programs – including over the past several years in affiliation with George H.W. Bush Presidential Library and Museum. He is currently writing a book to be entitled, *Justice in Your Court: What Would It Look Like?* in which readers will be given the opportunity to decide 50 different real-life cases.