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Cross-Burning Case Explores Free-Speech Controversy

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Smolla

Argues Before

Highest Court

Cross-burning
case explores
free-speech
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By John G. Douglass

A First Amendment advocate's greatest burden can be his own client. Those clients range from the offbeat to the dangerous, from pornographers to neo-Nazis. Yet in standing up for the disreputable client, the free speech advocate stands for one of our most cherished freedoms: "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." Texas v. Johnson, 491 U.S. 397, 414 (1989).



As one of the nation's leading First Amendment advocates, Allen Professor Rodney Smolla understands that burden as well as anyone. No doubt he felt it keenly at 10:31 a.m. on Dec. 11, 2002, when he rose before a packed gallery in the U.S. Supreme Court to argue that the First Amendment protects symbolic speech, even when the symbol is as repulsive as a Klansman's burning cross.

Virginia v. Black was Smolla's first oral argument before the Supreme Court, but his appearance on the national stage of First Amendment controversy was nothing new. Among academics, Smolla has long been



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regarded as a leading First Amendment voice. His publications include a widely-used casebook, top law review articles, plays, short stories, a forthcoming novel, and a nonfiction work that became the script for a popular movie. As a litigator of two decades experience, he has argued First Amendment appeals in dozens of state and federal courts around the nation. Early in his career, he had a knack for finding big First Amendment cases. These days, such cases find him.

Smolla first encountered the case of Barry Elton Black in September 1998. A month earlier, Black had led a Ku Klux Klan rally on a Carroll County farm, where he ignited a thirty-foot cross that was visible from a three-quarter mile stretch of public highway. Charged under a Virginia statute that makes

it a felony to burn a cross “with the intent of intimidating any person,” Black asked the Virginia Chapter of the American Civil Liberties Union to take his case. Along with Richmond criminal defense lawyer David Baugh, Smolla sat on an ACLU committee that considered the request. Baugh stepped forward to represent Black at trial, while Smolla agreed to handle any resulting appeals. Both Baugh and Smolla served *pro bono*. Smolla took the case partly out of admiration for Baugh, an African-American, who had the courage to represent a white racist in a highly visible case. And — as Smolla later remarked — he took the case to prove a point: “Freedom of speech only matters where the speech is unpopular.”

Over the course of three years, Smolla briefed and argued Black’s appeals, first to the Virginia Court of Appeals, then to the Supreme Court of Virginia, where the case was consolidated after oral argument with a separate appeal from Virginia Beach. In that case, two youths had been convicted under the same Virginia cross-burning statute for trying to burn a small wooden cross in the yard of an African-American neighbor. On Nov. 2, 2001, by the narrow margin of 4 to 3, the Supreme Court of Virginia reversed all three convictions.

The Virginia decision immediately attracted widespread attention. Many misunderstood its effect, wrongly concluding that it left law enforcement powerless to stop those who use the burning cross as a

tool of intimidation. In fact, the Virginia Supreme Court struck down the statute on a far more limited ground, holding that it violated the First Amendment because it singled out a particular form of symbolic speech — cross-burning — based solely on the speaker's point of view, while it left other forms of threatening speech untouched. Indeed, even as Virginia's attorney general sought to appeal the *Black* decision to the U.S. Supreme Court, the General Assembly enacted new legislation that avoided the First Amendment issue simply by making it a crime to burn "an object" for the purpose of intimidation.

The landscape of First Amendment law is mapped in broad strokes, and Virginia's decision fell into a troubled no-man's land. The U.S. Supreme Court had struck down a Minnesota cross-burning statute 10 years earlier in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), but that opinion left more questions than answers. In 10 years, courts in four states had invalidated cross-burning statutes, while three state supreme courts had upheld them. When the Supreme Court granted certiorari in *Virginia v. Black*, the stage was set to settle that controversy. And the case carried much broader First Amendment implications. The line between true threats and intimidating conduct — which the law can punish — on the one hand, and obnoxious or hateful speech — which the First Amendment protects — on the other, has never been a simple line to draw. Symbolic speech — like a burning American flag, a burning draft card or a burning cross — only magnifies the line-drawing problem. Symbols are powerful rhetorical devices, but they can be ambiguous. And the use of a symbol blurs any easy distinc-

tion between speech and conduct. Given the high stakes, it was not surprising when 15 states filed amicus briefs in support of Virginia's statute, while First Amendment interest groups as diverse as the Thomas Jefferson Center for the Protection of Free Expression and the Rutherford Institute filed briefs urging the Court to strike down the cross-burning statute. The Solicitor General of the United States filed an amicus brief as well, largely to protect the government's ability to prosecute cross burning under federal civil rights statutes.

In a case of such national note, preparation for oral argument is not a solitary affair. With the aid of colleagues around the country, Smolla organized a series of "mootings." Before he faced the real court, Smolla was grilled five times by panels featuring retired federal judges, former Supreme Court clerks and noted academics. Closer to home, University law faculty joined Smolla's students in the moot courtroom to play roles as Supreme Court justices, peppering Smolla with tough questions. Undergraduates participated too, in a student forum at the Jepson School. There, Smolla learned that non-lawyers were moved more by the terrifying symbolism of the burning cross than by the niceties of First Amendment line-drawing.

A lunchtime debate with the law school's John Marshall scholars was especially productive. Smolla presented one of the government's most compelling arguments: that cross-burning could be outlawed because a burning cross is, by definition, a threat of violence, and real threats can be punished without violating the First Amendment. A student responded with a hypothetical. What if, the student asked, a terrorist group invented a symbol which it used solely as a

calling card before acts of violence? What if, years later, a dissident political group adopted the same symbol for the purpose of shocking audiences and calling attention to its political message?

The point was subtle but significant. Symbols are not static. One generation's threat may be another's political manifesto. To outlaw the symbol itself, for all time, is to ignore the reality that symbols, like spoken words, can change meaning over time. Smolla liked the argument, and it became part of his arsenal for December 11. He would need it, and more.

The early morning of December 11 brought an ice storm to Washington, D.C., enough to convince Richmonders to try Amtrak, rather than I-95. The Washington press corps arrived in taxicabs, with badges announcing their pedigrees in large print — ABC, CBS, CNN, *Los Angeles Times* — as they crammed through the metal detectors at the court's north entrance. The reporters had the luxury of a cup of coffee in the pressroom, where a sign occupying most of a wall read: "Amendment I: Congress shall make no law...abridging the freedom of speech, or of the press." It was an omen, perhaps, but one never seen by counsel, who shook off their overcoats then headed up marble steps and through the immense oak doors that separate the Great Hall from the Supreme Court Chamber.

The room was beginning to fill as Smolla took the respondent's seat just to the left of counsel's podium. Ten feet in front of him rose the court's bench, polished mahogany spreading 60 feet from side to side to accommodate nine black leather chairs. It seemed designed to leave counsel surrounded, unable to see justices at one end while responding to a question from the other flank. Today, that effect would be magnified by the absence of Chief Justice William Rehnquist, whose recuperation from surgery would leave the advocates standing before an empty seat, with four black robes looming on either side. The gavel sounded at 10:02 a.m.

The argument began routinely enough. Virginia's state solicitor, William Hurd, seized the opening moment to argue that the Virginia statute was aimed at threaten-

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ing conduct, not at the content of the cross-burner's obnoxious message.

"Our statute," Hurd argued, "does not ban all cross-burning, only cross-burning used to threaten bodily harm." Justice Sandra Day O'Connor turned the argument into a trap, pointing out a "troublesome" passage in the statute that allowed juries to infer an "intent to intimidate" from the act of cross-burning alone. Her question set the tone for the next 15 minutes, which occupied Hurd largely in a technical debate over inferences and jury instructions. As Hurd sat down, it seemed that the court might be headed toward a narrow decision, striking down the "inferred intent" part of the statute and avoiding the main First Amendment issues.

U.S. Deputy Solicitor General Michael Dreeben spoke next.

"Virginia has singled out cross-burning with the intent to intimidate because it is a particularly threatening form of such conduct." Dreeben never had to finish the point.

Justice Clarence Thomas, who rarely speaks during oral argument, finished it for him. "We had almost 100 years of lynching and activity in the South by the...Ku Klux Klan...and the cross was a symbol of that reign of terror." In a courtroom stunned to silence by the passionate words and the personal tone of the court's lone African-American, Thomas continued, "It is unlike any symbol in our society. There was no other purpose to the cross...It was intended to cause fear and to terrorize a population." In an instant, the tone of the argument had changed and its significance had exploded. The case was no longer about intricate distinctions posed by statutory language. History, Thomas had suggested, can make a symbol so dangerous that the government can simply remove it from public sight. A huge stack of First Amendment chips had

just been thrust on the table. And now it was 10:31 a.m.

Smolla stepped to the podium without notes, knowing he would have no time to look at them. The next 30 minutes would be the most intense of his career as an advocate, and he wanted to focus on the justices. He was less than a full sentence into the argument when Justice Antonin Scalia picked up on Thomas' theme, comparing a burning cross to a brandished firearm. Justice David H. Souter joined in, "How does your argument account for the fact that the cross has acquired a potency... at least equal to that of a gun?" Scalia piled on, "If you were a black man at night, you'd rather see a man with a rifle than see a burning cross on your front lawn."

Struggling to defuse the emotion of the moment, Smolla responded in a measured tone, "I totally accept the history that Justice Thomas has recounted." Then he redirected the argument.

"As powerful as all of those points are, there's not a single interest that society seeks to protect [by banning cross-burning] that cannot be vindicated...as well...by content-neutral alternatives." The tactic worked, at least momentarily, as the discussion shifted to the court's decision in *R.A.V.* But as his time wound down, Smolla sensed he had to confront the history of cross-burning head on. He turned to the hypothetical he had vetted weeks earlier with the John Marshall scholars.

"Even if at a given moment in time you could take some symbol and freeze it and say...this symbol always seems associated with violence..." Smolla began. Justice Stephen G. Breyer interrupted Smolla in mid-sentence while nodding, "You have a very interesting point."

The exchange offered Smolla a moment's opening to drive home his theme. Yes, his-

torically cross-burning has been about intimidation. But it can also convey ideas. While the government may punish threats of violence that may accompany cross burning, Smolla argued, it must do so without punishing the political and social message of the cross-burner, no matter how offensive and hateful the content of that message.

Moments after the argument ended, pundits stood in the icy rain on the courthouse steps, recounting Justice Thomas' passionate speech and speculating that it signaled the court's willingness to ban cross-burning. Surrounded by staff members, Virginia Attorney General Jerry Kilgore spoke to a television audience about "freedom from fear." Smolla faced the cameras alone and responded, "The point of the First Amendment is that we protect even the ideas that most of us find reprehensible."

Oral arguments are an imperfect window into the Supreme Court's decision-making process. The court's final word will come later this spring. When the courtroom drama ended in *Virginia v. Black*, only one thing was clear: defending free speech is not for the faint of heart. In the court's basement cafeteria, Smolla had less than an hour to unwind before appearing for a panel discussion with the National Association of Attorneys General. His afternoon was already filled with scheduled interviews and talk show appearances, and his cell phone was crowded with requests for more. A friend asked what it felt like to argue before the high court. "Like walking into a buzz saw," Smolla quipped. "But I'd do it again tomorrow."

In all likelihood, he will.

John G. Douglass was a lawyer in private practice and a federal prosecutor before joining the law school faculty.