

# Whatever Happened to the Great 1989–90 American Flag Desecration Uproar?

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On 21 June 1989, the United States Supreme Court set off what one newspaper termed a “firestorm” of indignation. The Court ruled that a Texas law which outlawed “desecration” of the American flag had been unconstitutionally applied to take away the First Amendment liberties of Gregory Lee Johnson, who had been convicted under the statute for burning a flag to protest the renomination of President Ronald Reagan at the 1984 Republican National Convention in Dallas. Within a week of the Court’s ruling in *Texas v. Johnson*, both houses of Congress and President George Bush denounced it and over 200 Congressmen introduced 39 separate resolutions calling for a constitutional amendment to forbid flag desecration. The drive for a constitutional amendment, which was endorsed by Bush at a media extravaganza conducted at the Iwo Jima Memorial at Arlington National Cemetery in Virginia at the end of June, was temporarily derailed, after passions had died down somewhat, by the Senate’s failure to endorse such a measure by the required two-thirds vote in October 1989 (although 51 out of 99 voting Senators did support it). However, one major reason for the Senate defeat of the amendment was that both houses of Congress had, in the meantime, passed the Flag Protection Act (FPA) of 1989 in an attempt to circumvent the *Johnson* ruling by statute, based on the highly dubious argument that the Court’s decision was directed only to certain peculiarities of the Texas law invoked against Johnson and had not been meant to strike down flag desecration laws per se. This legal theory was quickly demolished by the Supreme Court in its June 1990 *U.S. v. Eichman* ruling, which made clear that the FPA or any other law which sought to outlaw flag desecration for the purpose of seeking to silence political dissent (as the Court held was the case with the FPA) could not survive First Amendment scrutiny. After another extensive and emotional Congressional debate, which took place in an atmosphere in which general public and media interest in the entire

flag desecration issue seemed to have significantly diminished from 1989, a second attempt to pass a flag desecration constitutional amendment, again enthusiastically endorsed by President Bush, was defeated in both houses of Congress in June 1990 (almost 60% of both Houses voted for the amendment, however, and it failed only because of the two-thirds requirement).<sup>1</sup>

Backers of the proposed constitutional amendment in 1989 and 1990 were extremely fervent and they frequently pointed to public opinion polls which suggested that about 70% of the general population supported their position.<sup>2</sup> If one were to believe the predictions of many of the amendment's proponents (often implicitly seconded by media accounts), the defeat of the amendment in June 1990 was bound to lead to the following developments: 1) the flag desecration controversy and, in particular, the dispute over the wisdom of an amendment would remain a "burning issue" for months and possibly years to follow and would become a central issue in the 1990 Congressional elections, with amendment opponents likely to suffer severe retribution at the polls; 2) until and unless an amendment was passed, Americans' love for the flag would be imperilled as they were forced to witness legally unfettered physical assaults upon the flag; and 3) such assaults would increase since, because they would now bear no legal penalty, anyone who wished to desecrate the flag would feel free to do so without incurring any reprisals. In fact, each of these intertwined predictions proved false during the four years following the defeat of the amendment. In practice, the entire flag desecration controversy faded away from media coverage and thus from public view with stunning completeness and rapidity after the defeat of the amendment; the flag desecration issue arose only in a handful of 1990 Congressional races and did not figure prominently in the defeat of even a single amendment opponent; the fervor of flag-waving which accompanied the Persian Gulf war of 1991 and a new burst of popular flag-based fashions in 1990–91 demonstrated that Americans' love for the flag was completely undiminished by the legalization of flag desecration; compared to the period in 1989–90 when the FPA temporarily made flag desecration illegal,

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<sup>1</sup>The "firestorm of indignation" characterization is drawn from *Nemdsay* (New York), (hereafter *NYN*), 2 July 1989. For a detailed summary of the 1989–90 controversy, see Robert Justin Goldstein, "The Great 1989–90 Flag Flap: An Historical, Political and Legal Analysis," *University of Miami Law Review*, 45 (Sept. 1990): 19–106. For the pre-1989 background to the American Flag Desecration Controversy, see Robert Justin Goldstein, *Saving "Old Glory": The History of the American Flag Desecration Controversy* (Boulder, Colo.: Westview, 1995).

<sup>2</sup>For example, see the *Newsweek* poll published 3 July 1989, reporting that 65% of the general public disagreed with the *Johnson* ruling and that 71% favored a constitutional amendment to overturn it.

flag desecration markedly decreased after the *Eichman* ruling again made such conduct legal; and finally, and perhaps most revealing of all concerning the continuing strong feeling about the flag and the reluctance of political officials to uphold the law, the handful of people who engaged in flag desecration, or acts which were viewed by others as flag desecration, after June 1990 continued to very often face legal reprisals, sometimes under obviously unconstitutional state laws which outlawed desecrating flags and sometimes under other legal or administrative pretexts.

## **The Flag Desecration Issue Suddenly Disappears: Post-June 1990**

With truly stunning rapidity and completeness, the entire flag desecration issue disappeared from the mass media and from apparent general public and political attention shortly after the Congressional defeat of the constitutional amendment in June 1990. Perhaps symbolic of this sudden loss of general interest was a bizarre development in the Louisiana legislature, where on 8 July the entire provisions of a bill originally designed to reduce the penalty for assault on flag-burners, from the usual six months in jail and a \$500 fine to only a fine of \$25, were stripped from the proposal by a legislative maneuver and replaced with language which imposed new restrictions on abortion. Although an angered Planned Parenthood spokeswoman spluttered, “Only in Louisiana could you have a flag-burning bill become an abortion bill,” this legislative twist clearly captured the sudden and dramatic general loss of interest concerning the entire flag desecration issue.<sup>3</sup>

The almost complete disappearance of the flag desecration controversy from general press, political, and public attention after June 1990 was especially surprising because literally for months Republican and veterans groups’ spokesmen and news stories had hammered home the twin themes that the issue would be a major focus in the 1990 Congressional elections and that any incumbent who voted against the amendment would pay dearly at the polls in November. Such predictions continued to be extremely common even after the defeat of the constitutional amendment in the House on 21 June. Thus, shortly after the vote assistant Republican House leader Gingrich declared that pressing for an amendment would become “a key campaign promise of every [Republican] candidate this fall,” and in a 29 June front page story headlined “GOP Strategists See the Flag Issue as a

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<sup>3</sup>*Ann Arbor News* (hereafter *AAN*), 9 July 1990; *New York Times* (hereafter *NYT*), 13 July 1990.

Sure-Fire Winner,” *The Christian Science Monitor* reported that Republicans were planning to “make flag burning a high-profile issue in dozens of Congressional races across the country” and that party officials were convinced that the issue was a “sure-fire winner” that “could help them in 20 to 30 closely-contested House races.” On the other hand, Brookings Institution Congressional specialist Thomas Mann predicted, far more accurately, that the issue would be at most “marginal” in a dozen races and, noting that in recent years incumbent House members who sought re-election had been successful almost 99% of the time, added that he “would be surprised if a single Democratic incumbent lost” due to voting against the flag amendment.<sup>4</sup>

One early indication that predictions that flag desecration would continue to be a hot political issue through the fall of 1990 would prove untrue came when David Souter, the nominated successor to Supreme Court Justice William Brennan, who had announced his retirement in the summer of 1990, was never asked about his views about flag desecration during his successful confirmation hearings in September 1990. During the 1990 Congressional campaigns, flag desecration in fact became a significant issue in only a handful of races; thus, *Congressional Quarterly* reported that the entire issue had proved to be “strictly flash-in-the-pan” and that “hardly a peep on the flag was heard” during the campaign. Although this latter comment was a slight exaggeration, in every instance of the handful of Congressional races where the issue was stressed — almost invariably by a Republican critic of an incumbent Democrat who had voted against the amendment — the candidate who stressed the issue lost. Furthermore, the Democratic Party as a whole clearly did not suffer from its Congressional leadership’s opposition to the flag desecration amendment, as overall the Party picked up about ten seats in the House and Senate, a typical performance for an off-year election by a party not holding the presidency.<sup>5</sup>

Among the 96% of all incumbent House members who ran for and won re-election in 1990 were about half-a-dozen who were faced with moderate-to-intense attacks upon their vote against the flag desecration amendment. For example, North Carolina Rep. Tim Valentine, who publicly announced he had changed his mind and decided to vote against the amendment during the climactic 21 June House vote, recalled in a December 1990 interview (with the present author) that his opponent in the state’s second district had “sent me a waffle and a flag” and “accused me of waffling” on the flag

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<sup>4</sup> *USA Today* (hereafter *USA*), 22 June 1990; *Boston Globe* (hereafter *BG*), 23 June 1990.

<sup>5</sup> *Congressional Quarterly*, 24 Nov. 1990, p. 3911; *NYT*, 8 Nov. 1990.

desecration issue, but added that “we ate” the waffle and the attack on his vote “petered out after the first burst of that sort of thing,” during which he “caught hell” for a while. “But I don’t think it turned out to be a major issue in the end,” Valentine added. “I got 75% of the vote.”<sup>6</sup>

Democratic assistant House majority whip David Bonior, who was ultimately re-elected with 66% in 1990 (compared to 54% in 1988) in the blue-collar twelfth Congressional district of Michigan, faced opposition from Republican Jim Dingeman, who campaigned by handing out small flags bearing a small flyer reading, “Protecting our flag. Jim Dingeman for Congress.” In an interview (with the present author) conducted shortly after the election, Bonior said that Dingeman’s literature had suggested that he (Bonior) “supported” flag-burning but that he felt that he had successfully defused the issue by expressing “outrage” over such assertions and by telling constituents that:

I had served my country in the military for four years, loved the flag and that for which it stood and got no bigger pleasure than in giving flags to civic groups and schools. I then mentioned that basically we were talking about amending the Constitution, but more than that, one of the most sacred documents in civil liberties known to western civilization. I tried to explain in an emotional way how many of my constituents, relatives, and ancestors in eastern Europe had been fighting for those rights. I think when you lay it out in those terms, the contrast worked to the extent that you could mitigate the damage on an emotional issue like this.

In the 22nd Illinois Congressional district, Rep. Glenn Poshard, who had originally supported the amendment in 1989, won re-election in 1990

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<sup>6</sup>Voting statistics in this and the following paragraphs are drawn from *The World Almanac of U.S. Politics, 1991–93 Edition* (New York: Pharos Books, 1991). According to a 1993 article published after the text of this article was completed, a post-1990 election survey of the administrative assistants to 60 House Democrats who voted against the constitutional amendment indicated that such votes were raised as issues by Republican Congressional candidates in about 20 cases; however, the survey does not indicate whether the constitutional amendment controversy was only raised in passing or became an important theme. As indicated in the text, the present author’s research suggests that the flag desecration question became a major issue in only a handful of cases and that voting against the amendment did not cost even a single Democratic Congressman his seat (this latter conclusion is confirmed in the 1993 article). See Edward Lascher, Steven Kelman, and Thomas Kane, “Policy Views, Constituency Pressure and Congressional Action on Flag Burning,” *Public Choice* 76 (1993): 79–102.

with 84% of the vote against a Republican challenger (who technically ran as an independent after missing the Republican filing deadline) who made Poshard's vote against the amendment a central focus of his campaign. In an interview conducted three weeks after the 6 November 1990 election, Poshard recalled that his opponent "ran almost exclusively" on the flag desecration issue but that his conservative Congressional district, which he described as "part of the Bible belt," "came almost full circle" on the subject after a "pretty sound debate" on the controversy which persisted for about six months. Although at first, Poshard related, he was deluged with "thousands of letters literally from a broad cross section" of his constituents which denounced his vote, eventually "the public mood and opinion began to change" as increasing numbers of voters were convinced by his argument that "love is only real, respect is only real, if we in effect have the right not to respect and not to love." Poshard added that during the entire 1990 campaign he was faced with participating in parades during which onlookers had been just furnished by his opponent with flags and literature attacking him for his vote. He related, "When I came through for these parades these people were defiantly waving the flag in my face with these flyers and that got to be pretty hard, it got to the point where my wife wouldn't go to parades with me."

During the four years following the 1990 Congressional elections, the flag desecration controversy showed no signs of resurfacing as a significant national issue (although, as discussed below, it did lead to a number of heated local disputes and prosecutions) and members of all three branches of the national government displayed little interest in reviving it. The issue virtually disappeared from Congressional discussion and President Bush made no public attempt to resurrect the flag desecration issue after mid-1990. During his unsuccessful bid for re-election in 1992, for example, Bush referred to the controversy only once and then simply to praise his opponent, Bill Clinton, for an American Legion speech in which Clinton had expressed pride in successfully sponsoring anti-flag desecration legislation modeled on the FPA in 1989 as governor of Arkansas.<sup>7</sup>

In decisions which were barely reported in the national news media, the Supreme Court also firmly refused to re-open or reconsider its 1989–90 flag-burning rulings in October 1992 and again in March 1994 when (in cases discussed further below) it refused to hear appeals from lower court rulings which had struck down flag desecration-related convictions on the basis of Supreme Court precedents. The Court refused to consider the appeals even

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<sup>7</sup> *Washington Post* (hereafter *WP*), 26–27 Aug. 1992.

though only four votes were required to hear them and all four dissenting members of the *Johnson* and *Eichman* Supreme Courts were still serving. An unusually direct and public clue that the Court's reluctance to reopen the issue was a conscious and politically-influenced one was offered by Justice Stevens, the author of dissents in both flag desecration cases, who bluntly told the American Bar Association in August 1990 that the Court and the nation would have better served if the Court had not taken up the flag-burning issue to begin with. Referring to the *Johnson* ruling, he declared, "That's one case that seemed to me at the time we never should have taken and had we just allowed the state court judgment [by the Texas Court of Criminal Appeals overturning Gregory Lee Johnson's 1984 Dallas flag desecration conviction] to stand in the case and not felt it necessary to review, an awful lot of ink would have been saved in the last couple of years — a lot of ink and a lot of heartache saved."<sup>8</sup>

During the four years following the Congressional defeat of the constitutional amendment in June 1990, the only significant effort to keep the drive for an amendment alive was undertaken by the American Legion. Shortly after the 1990 defeat of the amendment, the Legion organized a drive to obtain, by May 1991, resolutions in support of an amendment from at least 38 legislatures, the minimum that would be required to ratify an amendment if passed by both houses of Congress. However, although such legislative resolutions merely amounted to non-binding requests for Congressional action, by mid-1991 only 22 legislatures had complied with the Legion's request. Although by early 1995 the Legion campaign had succeeded in obtaining resolutions of support from 45 legislatures, at least as of February 1995 there were no signs that that the drive, by then entitled the Citizens Flag Alliance (CFA) and claiming the support of over 90 organizations representing over 25 million members, had made any progress in reviving flag desecration as an issue of general public or political interest. Thus, in late 1994, the CFA referred to its campaign to revive the issue of a flag desecration constitutional amendment as "The Quiet Revolution," and American Legion national commander William Detweiler conceded in October 1994 that, "at this point, many [politicians] are riding the fence or are unaware of America's desire for an amendment to protect the flag. We have to pin the politicians down on their stand on this issue. . . They'll get the message eventually."<sup>9</sup> (Given the overwhelming Republican support for a flag amendment in 1989–90, their

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<sup>8</sup>*Chicago Tribune*, 8 Aug. 1990.

<sup>9</sup>On the Legion campaign and the CFA, see articles about the drive for a flag amendment in the *American Legion* magazine for Apr., July, and Oct. 1994 and the CFA pamphlet published in late 1994, "Protecting the United States Flag: A Historical Prospectus."

success in winning both houses of Congress in the 1994 elections clearly increases the likelihood of the issue being revived on Capitol Hill, but, at least in the immediate aftermath of the elections in late 1994 and early 1995, no Republican leader publicly urged such action, although there was much talk about the need for urgent action on other symbolic issues, including constitutional amendments to require a balanced federal budget and to authorize prayers in the public schools.)

Especially revealing concerning the lessened flag amendment fervor after 1990 was the fact that Legion-sponsored resolutions were actually defeated in at least three state legislative chambers and that in many others 20% of more of state legislators voted against them, whereas in the immediate aftermath of the *Johnson* ruling in 1989 apparently no state legislative chamber which actually took up such a resolution defeated it and typically no more than a handful of legislators then voted against them. What was apparently the first defeat of a Legion-type resolution came by a 20–18 vote in the Virginia Senate on 21 February 1991, the very day that American ground forces were introduced into the Persian Gulf War against Iraq. Subsequently, such resolutions were defeated in April 1991 in both the Nebraska Senate and the Kansas House (it should be added that eventually the Legion did succeed in obtaining passage of flag resolutions in the Virginia and Nebraska Senates and in the Kansas House). In many other legislative houses where Legion-style resolutions passed after 1990 they did so only in the face of vigorous and substantial opposition. For example, 20% or more of legislators opposed such resolutions during the first half of 1991 in the Arkansas, Michigan, and Ohio Senates and in the North Dakota and Oregon Houses. In the North Dakota House, Democratic Rep. Bruce Anderson, who voted against a Legion-style resolution which passed by a 79–26 vote, declared that while it is “abhorrent to watch someone burn the flag,” that the issue is not “about the flag, it is about liberty. The flag is what we stand for, and what we stand for is liberty.”<sup>10</sup>

Exactly why the flag desecration issue went away so quickly and completely, at least as a national issue, can only be explained in a tentative and speculative manner, but most likely its rapid disappearance reflected a combination of the same factors which resulted in the comparative diminishment of interest in the issue in 1990 as compared to 1989 plus the additional ingredient of developments in the second half of 1990 which directed media,

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<sup>10</sup>For this and the following paragraph, see *Bismarck Tribune*, 19 Mar. 1991; *Richmond Times-Dispatch*, 22 Feb. 1990; *Cleveland Plain Dealer* (hereafter *CPD*), 16 May 1991; *Detroit Free Press* (hereafter *DFP*), 11 Feb. 1992; *Oregon Statesman Journal*, 16 Mar. 1991; Documents in Author’s Possession (hereafter *DAP*).

political, and public interest in new directions. Among the factors which contributed to diminished interest and/or support for banning flag desecration in 1990 compared to the previous year, and which continued to move currents in the same direction after June 1990, were the “re-run” (or put more plainly, the boredom) factor; the growing sense that the issue had been seized upon primarily for partisan ends by Republicans; the symbolic power of the Constitution as a countervailing icon to the flag, since, with the striking down of the FPA, the only means of banning flag desecration required amending the Bill of Rights; the growing consensus that more substantive issues demanded attention and that flag desecration was a purely symbolic concern; and the sense that flag desecration, at least as it had been widely used in eastern Europe during the popular uprisings of late 1989 that helped bring about the downfall of the communist regimes there, could actually serve a positive function. After June 1990, these continuing factors in lowering flag-amendment fervor were very significantly supplemented by a shift in attention to at least three highly substantive concerns that, unlike flag desecration, directly affected many Americans in the course of their daily lives: increasing indications that the country was slipping into a recession; growing concern over the budget deficit and adverse reaction to President Bush’s abandonment, during the summer of 1990, of his highly publicized 1988 campaign pledge never to raise taxes; and, above all during the last third of 1990, growing indications that the United States was about to go to war in response to the August invasion of Kuwait by Iraq. Compared to these continuing and growing crises, which did (or conceivably could) cost Americans higher taxes, their jobs, or even their lives, concern about flag desecration, which had already been rapidly diminishing, soon virtually completely faded away as a matter of significant media, public, or political attention.

## **Flag Fashion and Flag Waving Fervor, 1990–91**

While the flag desecration issue disappeared as a national issue after June 1990, during the subsequent year there was plenty of evidence that the legalization of flag desecration in no way diminished Americans’ love for the flag, contrary to many assertions and predictions made by those who disagreed with the Supreme Court’s rulings. During the second half of 1990 and especially during the Gulf War fervor of early 1991, flag fashions, flag sales, and flag displays attained extraordinary popularity, perhaps unprecedented in American history. Ironically, many of the flag fashions and the patriotic

Gulf War flag displays unquestionably would have violated flag desecration laws had they still been in effect — in fact, very similar sorts of clothing and displays had led to numerous prosecutions during the Vietnam War, when they were viewed as ridiculing the flag, instead of being patriotic. As the *Seattle Times* reported in a June 1991 story about the wave of flag fashions and displays, “What was then desecration is now decoration.” Similarly, *Time* magazine, in reporting in July 1990 on the rapid sales of \$57.50 New Glory flag shirts at New York’s fashionable Saks Fifth Avenue store, noted that “the shirt’s success might have surprised [former Yippie leader] Abbie Hoffman” since he was “once charged with flag desecration for wearing a shirt like Saks’ best-seller.”<sup>11</sup>

The increasing popularity of flag fashions, which was already apparent in 1989 and early 1990, became ever more clear in late 1990 and 1991 as clothing designers introduced a seemingly endless number of flag-oriented lines. Commenting on the fashion phenomenon in its lead editorial published on 4 July 1990, two weeks after the 1990 defeat of the constitutional amendment, the *New York Times* noted that, “Fashion watchers aren’t sure why, but American are immersed in flag chic. Beyond shirts, stores offer flag-motif bikinis, shorts, tube tops, socks, scarves, sweaters and evening gowns.” As the prospects for American military intervention in the Persian Gulf mounted in late 1990 and then became a reality in early 1991, flag fashions attained ever greater popularity, leading several New York City stores even to open special “flag boutiques” which gathered together in one convenient place all of their flag-oriented merchandise. Thus, Macy’s established special flag merchandise areas which sold objects ranging from a \$5 flag-decorated tie rack to \$1,600 flag jewelry, with items priced in-between including boxer shorts, headbands, and nightshirts, not to mention jeans with flag patches of the sort that had regularly led to flag desecration prosecutions 20 years earlier.<sup>12</sup>

The Gulf War also sent flag sales rocketing from levels that had already been stimulated by the flag-burning controversy. On 4 July 1990, two weeks after the defeat of the flag desecration constitutional amendment in Congress, the owner of the Capital Flag Company of Oklahoma declared, “This year has been our biggest so far [for flag sales].” A few days after American planes began bombing Iraq in mid-January 1991, a spokesman at the Annin Flag Company in Roseland, New Jersey (the site of presidential candidate George Bush’s famous flag factory visit during the 1988 campaign)

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<sup>11</sup>*Seattle Times*, 14 June 1991; *Time*, 9 July 1990.

<sup>12</sup>*NYT*, 20 Jan., 11 Feb. 1991; *Advertising Age*, 11 Feb. 1991.

reported that telephone orders had jumped from 400 a day to over 1,000 a day and that “every [flag] retailer I have talked to says they are swamped.” In mid-February, the spokesman declared that, “We had good inventories when the fighting began three weeks ago, but that’s been wiped out and now we’re working on a five- or six-week backlog of orders.” He added that the demand was “unprecedented in more than 30 years since the change in the number of stars when Alaska and Hawaii were admitted to the Union.”<sup>13</sup>

Along with an explosion of flag fashions and flag sales, the early 1991 period of the Gulf War and its immediate aftermath also witnessed a massive increase in general flag displays. On 9 March, the *New York Times* published a huge and compelling front-page photograph which captured the enormous prominence and emotionalism of the flag displays which accompanied the war: against the backdrop of a huge flag, a black soldier returning from the Gulf was pictured being hugged by his daughter while he grasped a small flag in his hand that almost seemed to be part of the embrace. Another large *New York Times* photograph, published on 15 June, perhaps best captured the fact that many flag displays associated with Gulf War patriotism would clearly have been illegal under the FPA and many state flag desecration laws: it depicted a huge flag, which weighed seven tons and was larger than a football field, being displayed quite literally on the grounds of the Washington Monument in celebration of Flag Day and the American victory in the Gulf. Although the flag was clearly placed on the ground because there was no other feasible way to display it, it would have been banned under the FPA provision which outlawed maintaining flags on the ground.

Numerous other Gulf War patriotic flag displays also would have raised serious legal questions had flag desecration laws still been in effect. For example, the 1 February 1991 *Ann Arbor News* contained a huge picture of a flag at Deerfield High School in Michigan with the slogan, written across the stripes of the flag, “DEERFIELD SUPPORTS OUR TROOPS,” and so covered with yellow ribbons designed to express support from American soldiers in the Gulf that they covered virtually all of the flag’s stars and thus clearly “defaced” the flag. Among the scores of other unorthodox Gulf War displays which might well have raised legal questions had flag desecration laws remained in effect was a huge “living flag” created by 3,600 people wearing colored T-shirts in San Diego (what if someone of them moved or wore the wrong color?); a flag created out of colored lightbulbs (what if some burned out?); and a flag painted on the windows of a college dormitory (what

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<sup>13</sup>*Tulsa World*, 4 July 1990; *DFP*, 14 Jan. 1991; *NYT*, 31 Jan., 12 Feb. 1991.

if the window was opened or broken?).<sup>14</sup>

In contravention of the voluntary 1942 Congressional flag code and many state flag desecration laws in effect before 1989, many athletic teams initiated the practice during the buildup to and the outbreak of the Gulf War of wearing flag patches on their uniforms (indeed, so did American troops who served in the Gulf War, in the 1990 Panama invasion, and in Somalia in 1992–94, despite the obvious risk that such flags would be “defaced” by dirt and blood, among other substances). As *Sports Illustrated* noted in its 25 February 1991 issue:

There is hardly a pro or college team in the land that hasn’t made some symbolic gesture in support of the U.S. forces. Flag decals and patches are everywhere, from the helmets of NFL (National Football League) players to the backboards of NBA (National Basketball Association) arenas, from the shoes of a high school wrestler to the jersey of Waad Hirmez, the Iraqi-born soccer star of the San Diego Sockers.

In some cases, as with respect to college teams who almost uniformly began wearing flag patches, the practice was in clear violation of National Collegiate Athletic Association rules barring wearing any decorations on uniforms; similarly, during the Gulf War the New York City Police Department and even the United Parcel Service modified their rules concerning uniforms to allow employees to wear small flag pins, and several colleges, including Cornell University and the University of Maryland, waived ordinary regulations barring the display of flags from student dormitories. As an official at Cornell explained, “In light of the situation in the Persian Gulf, it is clear that banning American or other flags is not something any of us feels comfortable doing.”<sup>15</sup>

In many other instances (not associated with the Gulf War) during the post-*Eichman* period flags were also used in unorthodox ways which might have raised legal questions had flag desecration laws remained intact. For example, on 1 September 1992, the *New York Times* published a front-page photograph depicting a flag being used in emergency conditions to hold up a glucose bag being used to treat a survivor of Hurricane Andrew in Florida. Pop star Madonna urged young people to vote in 1990 by appearing in an MTV video wearing only red underwear and wrapped in a flag, while promising that “if you don’t vote, you’re going to get a spankie.” The

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<sup>14</sup>*AAN*, 30 Jan., 11, 12, 13, Feb. 1991.

<sup>15</sup>*NYT*, 3, 4 Mar. 1991; *AAN*, 12 Feb. 1991; *Time*, 25 Feb. 1991.

Committee for National Health Insurance repeatedly advertised its calls for health reform in the *New York Times* by showing a flag cut into 10 different pieces, each of which was labeled with a perceived problem in the existing health care system. American tennis player David Wheaton was depicted in a prominent photograph published in the 2 July 1991 *New York Times* wearing a flag headband to stop sweat from interfering with his vision, while numerous American athletes who participated in the 1992 Olympics wore skimpy uniforms decorated with flag colors and designs or celebrated their victories by wearing flags as capes or shawls. Gay activists protesting lack of funding to combat AIDS regularly replaced the field of stars with skulls and crossbones in the early 1990s. Even President Bush was involved in acts that almost certainly would have violated most pre-1989 flag desecration laws: in February 1992, he gave visiting Russian President Boris Yeltsin a pair of Texas cowboy boots and a silver belt buckle adorned with Russian and American flags; and in October 1992, during the election campaign, he was photographed wearing a flag-decorated jacket, as well as being greeted by cheerleaders wearing skimpy flag-design halter tops and shorts.<sup>16</sup>

## **Flag Desecration in the Post-*Eichman* Era (Mid-1990 to Late 1994)**

Perhaps the most widespread assumption or prediction made by those who opposed the Supreme Court's 1989–90 rulings legalizing flag desecration was that flag-burnings and similar incidents would increase and that the perpetrators of such acts would henceforth go unpunished. In fact, these predictions quickly proved just as wrong as did predictions that flag desecration would remain a burning issue after Congress defeated the constitutional amendment in 1990, and that its legalization would diminish Americans' love for the flag. During the four years following the June 1990 *Eichman* ruling, only about two dozen instances of what could be broadly construed as flag desecration for the purpose of expressing political protest (as opposed to expressing patriotism) were reported in the general press, about the same number of such incidents reported during the fewer than eight months when flag desecration was technically illegal under the FPA between late October 1989 and mid-June 1990. Furthermore, fully half of these incidents occurred as protests against two highly unusual events: the American buildup and entry into the Persian Gulf War during the fall/winter of 1990–91 and the acquittal in April 1992 of Los Angeles police accused of beating black

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<sup>16</sup>*NYT*, 19 Apr., 21 Oct. 1992; *AAN*, 2, 23 Feb., 3, 8, 9, Aug., 11 Oct. 1992.

motorist Rodney King. One of the most famous opponents of flag desecration, Supreme Court Chief Justice William Rehnquist, was one of the few people who quite accurately predicted the results of the Supreme Court rulings from which he bitterly dissented. In an unusual public comment before a meeting of lawyers and judges in August 1990, Rehnquist declared, "There are not many people in this country who have burned flags, but now that it has finally been established as legal, there will be far fewer."<sup>17</sup>

If predictions that flag-burnings would escalate in the wake of the *Eichman* ruling and the defeat of the constitutional amendment proved highly inaccurate, this also proved to be the case with the eminently logical expectation that those who engaged in flag desecration after 1990 would not suffer legal or other penalties. In fact, of the two dozen broadly-construed political protest flag desecration incidents reported in the general press after mid-1990, almost half led to arrests and another 25% led to various types of non-criminal reprisals and/or threats. In at least four cases, flag desecrators were prosecuted under flag desecration laws which had clearly been rendered unconstitutional by the Supreme Court's 1989-90 rulings, while in another half-dozen cases other, often highly dubious, charges were brought, although the real "crime" appears to have been flag desecration. In almost all of these cases the charges were eventually either dropped or those charged were acquitted, but the message that flag desecration would continue to bear a heavy legal cost had still been delivered.

Apparently the only post-*Eichman* incident in which an explicit flag desecration prosecution ultimately (if almost certainly unconstitutionally) led to a conviction came in a 1991 case in Cortland, Ohio. On the morning of 10 July, a man named Tracy McLellan, who was wearing a coonskin cap, was arrested by local police after he was observed tearing a flag from a church flagpole and attempting to sprinkle gasoline on it. Several hours after his arrest, McLellan, who, according to his mother had been diagnosed as schizophrenic, was sentenced to 14 days in jail by Trumbull County Court Judge George Gessner on charges of theft, disorderly conduct, criminal trespass, and flag desecration.<sup>18</sup>

In contrast to the Ohio case, in Texas, Midland County District Attorney Mark Dettman was unsuccessful at every legal step, all the way up to the United States Supreme Court, in attempting to prosecute Robert Lynn Jimenez for flag desecration under the 1989 Texas law modeled on the federal FPA and designed to circumvent the *Johnson* ruling. Jimenez was arrested

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<sup>17</sup> *Miami Review*, 8 Aug. 1990.

<sup>18</sup> *Warren (Ohio) Tribune-Chronicle*, 11 July 1991; DAP.

in February 1990, while the FPA was still in effect, for allegedly writing and painting obscenities and “satanic” symbols on Texas and American flags. Legal proceedings formally began against Jimenez in March 1991, after the *Eichman* ruling struck down the FPA and almost certainly invalidated the Texas law also.<sup>19</sup>

At Jimenez’s pre-trial hearing in Midland County Court on 15 March 1991, Prosecutor Dettman effectively conceded that the 1989 Texas law was unconstitutional under the *Eichman* and *Johnson* rulings, but he noted that they had both been written by “Justice Brennan, who is no longer on the Court” and declared that since the “composition of the Supreme Court has changed” it was impossible to “guess as to how the Court might rule if this case was before it now.” In response, Midland County Court Judge James Fitz-Gerald declared, “I’m required, as far as I know, to follow the Supreme Court’s decisions” and, without hearing any evidence in the case, he dismissed the prosecution on the grounds that the 1989 Texas law was in fact unconstitutional, at least as applied to Jimenez.

Subsequently, a three-judge panel of the Eighth District Texas Court of Appeals rejected Dettman’s appeal from Fitz-Gerald’s dismissal of the Jimenez prosecution, and the Texas Court of Criminal Appeals and the United States Supreme Court both refused to hear further appeals. Quite extraordinarily, Texas Eighth District Appeals Court Chief Justice Max Osborn made clear in his opinion that the ruling reflected only that the court was “bound” to follow the Supreme Court precedents, stated that he personally agreed with Justice Stevens’ dissents in *Johnson* and *Eichman* from “a slim majority of the Court,” and, noting that two judges in the Supreme Court majority (Brennan and Marshall) no longer sat on the Court, effectively urged Dettman to appeal from his (Osborn’s) own opinion, since with the change in the Supreme Court’s composition “this [Appeals] Court’s decision to affirm the trial court’s dismissal could be reversed.”

In addition to the Ohio and Texas cases just discussed, two additional, truly bizarre post-*Eichman* flag desecration prosecutions originated in Pennsylvania and in Alabama. In Youngsville, Pennsylvania, Mark Cox was arrested in June 1991, after a quarrel with his fiancée during which he allegedly ripped down several American flags from a bridge display and threw them at her and subsequently allegedly slapped a woman passing by who had chastised him and slapped him for tossing the flags. After pleading guilty to charges of harassment of the passerby and insult to the state and national

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<sup>19</sup>For information in this and the following paragraphs on the Jimenez case, see *Dallas Times-Herald*, 9 Mar. 1990; *Dallas Morning News*, 14 Oct. 1992; *State v. Jimenez*, 828 S.W.2d 455 (1992); 113 S.Ct. 317 (1992); DAP.

flags, in the expectation that he would only be fined, Cox was instead ordered in November 1991, by Warren County Judge Robert Wolfe, to pay a \$500 fine, to serve a jail term of 9-to-23½ months, to undergo alcohol counseling, and to read and write a book report about *Man Without a Country*, a fictionalized account about a man who, after denouncing the United States, was banished and required to spend the rest of his life without a homeland aboard ships on the high seas. Judge Wolfe told Cox that he would read the book report to determine if writing it “rehabilitates your attitude towards the flag.” In response to the sentence, Cox’s mother lamented, “It’s not right. There’s murders, there’s rapers out there, then there’s Mark.” Cox served a total of almost four weeks in jail before he was released on parole while he appealed.<sup>20</sup>

Warren County officials eventually agreed to drop the flag insult allegations after a Pennsylvania appeals court overturned his convictions in late 1992, without ruling on their substance, on the grounds that Cox had not been given adequate legal assistance and advice at his original trial. Assistant District Attorney Joseph Barnhart related in a November 1992 interview (with the present author) that after the appeals court ruling county officials decided to drop the flag insult charge “because we’d lose” if it was pursued, given the Supreme Court’s precedents, and because the county could not afford the costs of pursuing such an appeal.

In another case with a similar flavor to the Cox affair, Barry Carpenter was convicted of flag desecration in Russellville, Alabama in early 1991 after police arrested him while he was distributing leaflets opposed to the Persian Gulf War outside the local post office. Carpenter was originally detained for “littering,” desecrating a monument — the post office (!) — for chalking anti-war slogans on the post office sidewalk, and endangering the welfare of his child (by getting himself arrested and therefore leaving no one to care for her) and was only subsequently charged with flag desecration when the police discovered a flag in Carpenter’s coat pocket, which was alleged to be soiled and in a very “disorderly” and “wadded” condition. After two appeals, Carpenter’s conviction was thrown out on the grounds that the applicable state law required that acts of illegal flag desecration had to be performed in “public.” Subsequently Carpenter won an out-of-court settlement after he sued Russellville officials for a variety of offenses, including false imprisonment and malicious prosecution.<sup>21</sup>

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<sup>20</sup>For information on Cox case in this and the following paragraph, see *Warren (Pa.) Times-Observer*, 9 Nov. 1991, 16 Jan. 1992, 1 Oct. 1992; *Harrisburg Patriot*, 24 Nov. 1991; DAP.

<sup>21</sup>AP, 12 Feb. 1991; *Carpenter v. State*, 597 So.2d 737 (1992); DAP.

In addition to the four cases just discussed in which alleged flag desecrators were tried under state flag desecration laws which were almost certainly unconstitutional after the *Eichman* ruling, in half a dozen additional post-*Eichman* cases civilians were arrested under other charges, such as arson or inciting to riot, which in most cases appear to have been pretexts for punishing them for acts of flag desecration. Apparently in only one of these cases, plus one case involving a soldier tried under the Uniform Code of Military Justice, did a conviction ultimately result, as in the others the charges appear to have been dropped or the cases were ultimately dismissed in the courts.

Among the latter cases, disturbing the peace charges originally brought against two anti-Gulf War protesters involved in a flag-burning in St. Louis on 24 March 1991 were dropped after they filed a complaint alleging false arrest and complaining that police had stood by while they were assaulted by hostile onlookers. In Oberlin, Ohio, two protesters who had burned a flag in January 1990 to denounce the American invasion of Panama were acquitted of charges of receiving stolen property (the flag) and criminal damage to someone else's property at a trial held in August 1990; they had been investigated in the meantime by the FBI for violation of the FPA, but the investigation was dropped when the FPA was struck down by the Supreme Court in June 1990 and the new charges were alleged for the first time in early July. Although a man testified at the trial that he recognized the flag from a newspaper photograph of the flag-burning as one stolen from his home in October 1989, police conceded that they could not prove that the defendants had either stolen the flag or knew it was stolen. The defendants' lawyer, Terry Gilbert, who at one point during the trial was threatened with a contempt of court citation by the judge, declared that the prosecution was motivated by a desire to punish his clients for "expressing their political beliefs" and amounted to an attempt "to get around the law and use other opportunities to prosecute them."<sup>22</sup>

In Los Angeles, police arrested five members of the Maoist-oriented Revolutionary Communist Youth Brigade (or RCYB, the same organization to which Gregory Lee Johnson, the 1984 Dallas flagburner, belonged) for arson, inciting a riot, and resisting arrest on 8 July 1990 after they were attacked in MacArthur Park by onlooking Veterans of Foreign Wars (VFW) members who succeeded in grabbing away from them flags that they were attempting to burn. VFW member Jimmie McAllister, who led the assault on the RCYB members, told reporters, "I got three Purple Hearts for defending

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<sup>22</sup>*St. Louis Post-Dispatch* (hereafter *SLPD*), 25, 26 Mar. 1991; *CPD*, 26 Jan. 1990; *Oberlin Review*, 7 Sept. 1990; *Elyria (Ohio) Chronicle-Telegram*, 8 Jan., 7 July, 28, 29 Aug. 1990; *In These Times*, 21 Feb. 1990; DAP.

the flag in Vietnam and I'm not going to stand by and let them burn it." More than a dozen Los Angeles police stood by while the melee occurred; they rejected RCYB demands to arrest the VFW members while defending their arrests of the flag-burners on the grounds that municipal codes banned burning anything in the park. Repeated attempts to obtain information from the Los Angeles Police Department concerning the ultimate disposition of this case proved unsuccessful, which suggests that in all likelihood the case was not pursued.<sup>23</sup>

In New York City, charges of violating a municipal ordinance which outlawed setting a fire on any city property, brought against a man named Donald Payne, who was alleged to have burned a flag on three separate occasions in July 1990 outside a city courthouse during a highly-publicized trial, were ordered dropped by a Manhattan Criminal Court judge in January 1991, on the grounds that his acts posed no threat to the peace or public safety and were a form of political speech protected by the Supreme Court's flag desecration rulings. She added, "If flag burning is a protected form of expression, individuals must be able to engage in this act in a location [such as on city property outside a courthouse when people were present] where other people are likely to see it." Because the city did not allege that Payne had been disorderly, had blocked traffic or otherwise threatened any possible government interest in "preventing a public disturbance," Richter continued, "it appears that the primary interest" in prosecuting him was to "suppress the defendant's politically charged acts of burning the flag," a motivation which violated the Supreme Court's ruling in *Johnson* as "inconsistent with the First Amendment."<sup>24</sup>

In a Cleveland case, Cheryl Lessin, a member of the Revolutionary Communist Party (RCP, the parent organization of the RCYB) was charged with a felony count of inciting to riot during a flag-burning protest rally on 10 August 1990 against American policy leading up to the Persian Gulf War. She was convicted by a jury on 29 October 1990 and sentenced to a year in prison two months later based on the testimony of two Cleveland police officers who stated that they had arrived at the rally after receiving a radio report of a flag-burning and had seen Lessin run through a crowd of bystanders shoving people, throwing punches, and shouting obscenities. However, others present during the entire protest, including Lessin, a bystander, and a newspaper reporter, all testified that they had not seen her engage in any conduct other than burning the flag and harshly criticizing American foreign

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<sup>23</sup> *Los Angeles Times* (hereafter *LAT*), 9 July 1990.

<sup>24</sup> *New York Law Journal*, 17 Jan. 1991.

policy and that the situation at the rally was not disorderly. Furthermore, one of the officers admitted in court that he had ordered Lessin's arrest with the words, "She admitted burning the flag, arrest her."<sup>25</sup>

Lessin's lawyer, Terry Gilbert (who had also represented the Oberlin defendants), charged that the case was "totally vindictive" and a "political prosecution" which attempted to punish her solely "because she burned the flag" and that Cleveland prosecutors had "cooked up the inciting to violence charge to get around" the Supreme Court's flag desecration rulings and to "suppress the right of free speech." However, Assistant Cuyahoga County Prosecutor George Lonjak, who tried the case, rejected such charges, declaring that "you cannot do everything you want under the premise that it's a right to free speech" and that Lessin had "burned the flag to incite the crowd" and by a combination of the flag burning and inflammatory words had "created a situation where somebody could have been hurt real bad."

In April 1992, an Ohio appeals court upheld Lessin's conviction by a 2–1 vote. However, on 27 October 1993, almost three years to the day from her original conviction, Lessin finally won a legal victory when the Ohio Supreme Court overturned her conviction by a 4–3 vote on the technical grounds that Judge Cleary had failed to adequately instruct the original jury that her "disgraceful and irreverent action" in burning the flag was a constitutionally protected form of free speech that could not by itself be construed as proof that Lessin had incited violence, and that therefore it was "impossible to say with any degree of certainty that her burning of the United States flag was disregarded by the jury in reaching its verdict." On 21 March 1994, the United States Supreme Court refused Ohio's request to consider an appeal from this ruling, and Cleveland officials subsequently decided not to exercise the option of retrying the case with amended jury instructions which the Ohio Supreme Court had left open to them.

Of all of the post-*Eichman* flag desecration incidents which led to arrests under other charges, only two led to convictions which still stood as of mid-1994. Of these, one was a case involving Samuel Wilson, a soldier who was convicted by a court martial acting under the Uniform Code of Military Justice for disobeying a lawful order and dereliction of duty for blowing his nose on a flag. Wilson's conviction and sentence, which included a bad-conduct discharge, confinement, and forfeiture of pay for four months and reduction in rank, was upheld in September 1991 by the U.S. Army Court of Military Review. The Court in effect held that, while soldiers enjoyed

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<sup>25</sup>For information in this and the following paragraphs on the Lessin case, see *CPD*, 11, 31 Aug., 23, 30 Oct., 12 Nov., 9 Dec. 1990; 24 Apr. 1992; 28 Oct. 1993; 22 Mar., 23 Apr. 1994; *State v. Lessin*, 620 *N.E.2d* 72 (1993).

First Amendment rights, including the right of symbolic expression, the *Johnson* and *Eichman* rulings did not fully apply to them because military needs “may warrant regulation of conduct that would not be justified in the civilian community,” in particular because “military necessity, including the fundamental necessity for discipline, can be a compelling government interest warranting the limitation of the right of freedom of speech.”<sup>26</sup>



Shawn Eichman at a New York demonstration that will result in a conviction for federal felony arson for attempted flag burning.

The only civilian flag desecration case prosecuted under other charges during the post-*Eichman* period which resulted in a conviction still standing as of mid-1994 resulted from a highly convoluted prosecution which stemmed from a New York City protest against the American buildup to the Persian Gulf War and which, ironically, involved the same Shawn Eichman involved in the earlier landmark Supreme Court decision which bore her name. On 11 September 1990, Eichman and her fellow protester and fellow RCP supporter Joe Urgo were arrested while standing on top of a military recruiting center in Times Square, after they had climbed the building with

<sup>26</sup> *U.S. v. Wilson*, 33 M.J. 797 (1991).

a ladder, dripped motor oil and red-dyed corn syrup (to simulate blood) on the building in order to suggest that the United States was willing to spill blood to protect its oil interests in the Middle East, and attempted to burn the American flag that was flying over the building (according to the protesters, it would not catch fire because it was so caked with soot from flying in the polluted air of downtown New York). Federal officials at first charged the two protesters with arson for seeking to burn down the recruiting center, but subsequently conceded that they lacked evidence to support the charge, a felony carrying a possible 10-year jail term, perhaps because the federal judge who presided over their preliminary arraignment noted that if they had wanted to burn the building down it would have made more sense to “throw something at the building from a passing car rather than stand on top.”<sup>27</sup>

Although the original charge of arson was dropped, on 1 November 1990 a grand jury indicated Eichman and Uργο for depredation to federal property, reckless endangerment, and burglary, with the latter count a felony with a possible penalty of seven years in prison. After Judge Sand ruled on 1 February 1991 that the burglary allegation was improper because no evidence existed that the protesters had sought to actually enter the recruitment building, on 14 February 1991 the federal government obtained from a grand jury a superseding indictment which replaced the burglary count with an allegation of federal felony arson for seeking to burn the federally-owned flag (under the federal arson statute invoked, the same 10-year maximum penalty applied either for attempting to burn a federal flag or for attempting to burn down a federal building).

Eichman and Uργο were convicted by a jury on 23 March 1991, on the charges of arson and depredation, but acquitted on the charge of reckless endangerment. On 4 June, Judge Sand sentenced Eichman and Uργο to two years probation and 200 hours of community service, an extremely light sentence which may have been partly influenced by an unusual letter he was sent by one of the jurors. The letter stated, “Not one of us [jurors] who chose to voice an opinion on the subject believes” that the case would ever have been brought to trial “if it were not for the action involving the flag. No matter how the government couches the language, the case seems pretty obviously a flag burning case.” On 13 February 1992 a three-judge panel of the Second Circuit U.S. Court of Appeals unanimously upheld the

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<sup>27</sup>For information in this and the following paragraphs on the Eichman-Uργο case, see *NYN*, 12 Sept., 7 Oct. 1990, 26 Mar., 5 June 1991; *Downtown* (New York City), 26 Sept. 1990, 23 Jan. 1991; *Rockland County (N.Y.) Journal-News*, 23 Dec. 1990; *U.S. v. Eichman*, 756 F. Supp. 143 (1991); *U.S. v. Eichman*, 957 F.2d 145 (1992).

convictions, which, according to a February 1994 interview (with the present author) with defense attorney William Kunstler, were not appealed further because it “would have been fruitless and a waste of time and money given the present composition” of the Supreme Court, especially given the relatively lenient sentence given Eichman and Urgo.

In addition to the approximately 10 post-*Eichman* arrests or prosecutions of individuals involved in alleged incidents of flag desecration, in a number of other incidents persons involved in perceived flag desecration during the post-June 1990 period suffered a variety of forms of extra-legal harassment or persecution although they were not formally arrested or prosecuted. In at least four instances, for example, art exhibits involving alleged flag desecration touched off controversies and/or threats or actual incidents of physical reprisals.<sup>28</sup>

The most serious of these post-*Eichman* flag art exhibit controversies substantially contributed to the demise of one of Alaska’s leading art galleries, the 21-year-old Visual Arts Center (VAC) of Anchorage. As part of a Spring 1992 art exhibit on what ultimately turned out to be the highly ironic theme of censored art, the VAC included a reprisal of “Dread” Scott Tyler’s infamous “flag on the floor” exhibit which had sparked a major controversy when it was displayed in Chicago in early 1989. On several occasions, veterans picked the flag up off the floor or physically removed it from the gallery, leading in one case to the arrest of two veterans for larceny. Although the VAC was already in serious financial trouble at the time of the exhibit, the Tyler controversy proved the final blow to the gallery, when in its wake the mayor of Anchorage announced that he would cut off further city funding for VAC and the gallery’s landlord called in overdue rentals and evicted a number of artists who had studios in the building’s basement.<sup>29</sup>

In addition to controversies over flag art, in two instances during the height of Persian Gulf War fervor, opposition to the widespread display of flag patches and pins led to non-prosecutory reprisals against perceived political dissidents. In one highly-publicized case, Seton Hall University basketball player Marco Lokar, an Italian citizen, resigned from his team and left for home with his pregnant wife in February 1991, after he was repeatedly booed by fans and received threats because he refused to wear the flag patch that his teammates all wore. A somewhat similar Gulf War incident erupted when Warren County, New York defense lawyer Kurt Mausert won Queensbury Town Justice Michael Muller’s agreement in February 1991 to have a county

<sup>28</sup>For example, see *LAT*, 6, 15 Oct. 1990; *SLDP*, 6 Nov. 1990; *CPD*, 14 Nov. 1991.

<sup>29</sup>*Anchorage Daily News*, 19, 24 May 1992; *Anchorage Times*, 20, 22 May 1992; *Artweek*, 3 Dec. 1992, p. 3; *Art in America*, Mar. 1993, p. 136; *Artnews*, Mar. 1993, p. 35.

prosecutor remove a flag pin he was wearing in court on the grounds that it might prejudice the jury against Mausert's client. State Supreme Court Justice John Dier quickly overturned the ruling and in addition ordered that Mausert be banned from the ranks of lawyers henceforth allowed to defend indigent clients in Warren County and that a judicial review be conducted of Justice Muller. In announcing his ruling to a raucous ovation from a crowd of flag-pin wearing spectators, Dier declared, "I find it very difficult to understand that anyone who is a citizen of this country could object to another citizen of this country wearing an American flag pin. And especially today with the situation as it exists in the Middle East." In February 1992, a panel of New York state's highest court, the Appellate division, overruled Dier, held that Justice Muller had acted properly, and additionally held that Dier had no authority to order reprisals against Mausert.<sup>30</sup>

In another flag incident which sparked extra-legal reprisals and which occurred during the peak of Gulf War fervor, nine high school students at the somewhat-misnamed Baltimore City College were briefly suspended for burning a flag in a courtyard outside the school's cafeteria in January 1991. According to Principal Joseph Antenson, the students were suspended "because of unauthorized activity that could endanger the safety of students, not because of the flag burning." However, a school department spokesman added that no flag-burning protest would have been approved even if the students had sought authorization for one.<sup>31</sup>

In another Persian Gulf War period (although apparently non-political) school flag-burning incident, University of Wisconsin at River Falls (UWRF) lecturer Jeffrey Gerson became the center of a storm when he burned a flag on 11 March 1991 during an American politics class. According to Gerson, he burned the flag as a "teaching tool" and as a "pedagogical" rather than a "personal act," during a class discussion of Supreme Court rulings on flag desecration. "I thought, what better way to put a fire under the students and get them thinking than to go out and actually burn a flag," Gerson explained. In a written statement issued on 11 March UWRF chancellor Gary Thibadeau termed Gerson, who had been teaching for 10 years, a "faculty member with little teaching experience" who had exercised "extraordinarily bad judgement" and used "offensive and insensitive" teaching methods.<sup>32</sup>

Aside from Thibadeau's comments, Gerson immediately became the subject of verbal threats and the focus of criticism from students and the

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<sup>30</sup> *NYT*, 14 Feb., 23 Mar. 1991, 18 Feb. 1992; *WP*, 14 Feb. 1991.

<sup>31</sup> *Baltimore Sun*, 18 Jan. 1991.

<sup>32</sup> *Eau Claire Leader-Telegram*, 12, 13, 14, 15, Mar., 25 Apr. 1991; *River Falls Journal*, 21 Mar. 1991.

subject of numerous phone calls and letters from protesting Wisconsin citizens. This counter-reaction culminated on 14 March when a large group of students marched to a building where Gerson was teaching a class and was rumored to be planning to burn another flag. In a near-mob scene, the student protesters, some of whom carried flags and fire extinguishers, were asked to leave the building, but then gathered outside the windows of Gerson's classroom, where they loudly sang the national anthem, recited the Pledge of Allegiance, and chanted "U.S.A." and "can [fire] Gerson." A month later, Gerson, who was teaching on a one-year contract, was informed that he would not be rehired for the following year. In an interview in April 1992, Political Science chairman Richard Brynildsen declared that the decision not to rehire Gerson had already been made before the flag-burning incident occurred and was related to a redefinition of Gerson's teaching position, but he conceded that he could "probably not convince a lot of people of this."



Two of the most bizarre of the post-*Eichman* flag desecration controversies which did not involve government prosecutions nonetheless involved prolonged legal proceedings in which perceived flag desecrators won court battles against what they argued were attempts to discriminate against them. In one of these cases, the Old Glory Condom Corporation, which billed its products as "Condoms with a Conscience," sought to register as a trademark with the U.S. Patent Office a flag-like image in the shape of an unfurled condom bearing the slogan "Worn with Pride, Country-Wide" which decorated the exterior packaging of its condoms (the condoms themselves were completely ordinary latex condoms in single colors of red, white, or blue, with no flags on them). Along with the flag design, the condom packaging featured an "Old Glory Pledge" which promised to donate a portion of all profits to AIDS research and which declared, "We believe it is patriotic to protect and save lives."<sup>33</sup>

Patent attorney Rachel Blue, acting on behalf of the Patent Office, rejected the request to register the trademark on 30 May 1991 on the grounds that it included "immoral or scandalous matter" that "would be perceived as a disparagement of the American flag" and that would "scandalize or shock" the general public, which would be "offended" by the use of "a sacro-

<sup>33</sup>For information in this and the following paragraphs on the Old Glory Condom Corporation controversy, see *Cape Cod Times*, 28 Nov. 1991; *BG*, 27 Oct. 1991; *WP*, 20 May 1992, 9 Mar. 1993; DAP.

sanct symbol” associated with “courage and patriotism” to promote items “associated with sex.” The legal basis for the ruling was an arcane and rarely-enforced provision in the patent laws which banned trademark registrations which consisted of “immoral, deceptive or scandalous matter,” which might disparage or bring into “contempt” persons, “institutions, beliefs or national symbols.” In refusing to register the trademark, Blue rejected the contention of the Old Glory company that there was “nothing immoral or scandalous with regard to the manufacture, sale or use of condoms” which themselves were not imprinted with depictions of the flag and that it was in fact the “patriotic duty of all sexually active Americans to enter into the battle” against AIDS by means such as using condoms.

In January 1992, Old Glory lodged an appeal with the Patent Office’s Trademark Trial and Appeal Board on the grounds that the denial amounted to a violation of its free speech rights “based solely on the political content” of its logo. According to the Old Glory brief, this fact was especially evidenced by past trademark registrations both of over 1,000 trademarks based on flag designs and of thousands of condom products, many of which bore racy names such as “Sexplorer,” “Love Gasket,” and “Rough Rider.” The brief maintained that these facts demonstrated that Blue had denied registration solely because she felt that the logo “sends the ‘wrong’ political message about this country’s pre-eminent political symbol” and that the Trademark Office objects only to “those marks that appear to contradict the flag’s ‘sacrosanct’ place in our political culture.”

Following a public hearing in May 1992, the Patent Appeal Board overruled the refusal to register the logo in March 1993. The Board declared that the flag-condom logo was “in no way” scandalous, pointed out that trademark registration of designs using the flag had been “sufficiently common that there can be no justification for refusing registration” and even applauded Old Glory for its evident “seriousness of purpose” in expressing the view “that the use of condoms is a patriotic act.”

Perhaps the most bizarre and prolonged post-*Eichman* flag desecration controversy involved a dispute over a mural depicting a burning flag at Elk Grove High School in Elk Grove, California, which consumed about three years of contention, including months of litigation, prolonged debates by the local school board, and the suspension from school of almost 50 students. The furor originated in the fall of 1991, when school officials invited student organizations to brighten up the school’s walls (“Everything looked so blah,” explained Principal Paula Duncan) by painting them with murals reflecting their groups’ interests. A wide variety of murals subsequently graced the school’s walls without eliciting any objections from school officials, even

though some of them included potentially controversial contents, including a mural from the African-American Club which portrayed black militants such as Malcolm X and Communist leader Angela Davis.

However, when students of the Model United Nations/Junior Statesmen Club (MUN/JS), which frequently sponsored programs related to public affairs and current events, proposed a mural designed to celebrate the Bill of Rights by depicting a burning flag along with textual references to civil liberties, including the *Johnson* case, Principal Duncan refused to authorize it on the grounds that, as she stated publicly in February 1993, a mural on school walls could “easily be perceived as an endorsement of flag burning” and “many people in our community — and students as well — will find a mural depicting our flag in flames to be offensive.”<sup>34</sup>

During more than a year of negotiations with Duncan, the students repeatedly offered to modify their proposal while retaining the burning flag, but Duncan told them that no mural with a burning flag would be allowed. The students thereupon appealed to school district administrators and ultimately to the local school board, which formally supported Duncan in February 1993 by voting 6–0 to uphold her authority to forbid the mural. Board Chairman Kay Albiani declared, “We’re all part of a community and we need to look carefully at how we project our schools and our image.” Ironically, the students who proposed the mural repeatedly declared that they were seeking to celebrate American freedoms rather than to support flag burning, and in fact often sounded as though they were seeking to teach their superiors a basic lesson in American civics. Thus, MUN/JS member Jackie Limbo explained, “Putting up this mural shows patriotism. We love the rights that were given to us. We want to show others that they have these rights too.”

In April 1993 the ACLU filed suit on behalf of eight students in Sacramento County Superior Court to force Elk Grove officials to allow the mural on the grounds that the ban violated the students’ free expression rights. On 19 May, Sacramento County Superior Court Judge Ronald Robie granted the students a preliminary injunction forbidding Elk Grove school officials from further blocking the mural, on the grounds that it constituted “student speech and expression” that was protected by provisions of the California Education Code. In announcing his ruling, Judge Robie explicitly noted that the school had not objected to other murals with controversial content and

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<sup>34</sup>For information in this and the following paragraphs on the Elk Grove mural controversy, see *Sacramento Bee*, 12, 17 Feb., 17 Apr., 4 July, 3 Sept., 15 Oct. 1993, 3, 8, 23, 24 Feb. 1994; *Elk Grove Citizen*, 21, 30 Apr., 21 May 1993, 9, 25 Feb., 10 Aug. 1994; *ACLU News* (Northern California), July–Aug. 1993, p. 6.

therefore to ban the flag-burning mural would amount to imposing political censorship in a forum (the school's walls) which had been established as a protected area for expression. "Instead of giving the students a printing press, the school gave them a wall," he noted, adding that it was a "sad commentary on an extraordinary experiment" that school officials had created such an open arena for expression and then banned a mural which had been designed to celebrate freedom of expression.

Elk Grove school officials, who had already spent over \$22,000 in legal fees in fighting the mural, immediately announced that they would appeal Robie's decision. On 2 September 1993, however, a three-judge California Appeals Court panel upheld Judge Robie's ruling without comment, whereupon school officials announced that they would not drop further legal efforts (which by then had cost the school district \$37,000) to block the mural. Although the mural was finally painted by the students in September 1993, two years after it was first proposed, in February 1994 the Elk Grove Unified School District Board adopted by a 5–2 vote a new policy which banned all permanent murals in the schools as of July 1994.

The new policy even required ending the traditional graduating class practice of painting their year on the roof of the gymnasium (i.e. "Class of 1994"), as Elk Grove Superintendent Robert Trigg told the Board that "according to our attorneys, we have only two choices: allow NO murals or ALL murals." Board member Grian Myers, who supported the mural ban, declared, "I don't know of any household anywhere where the children of that house are allowed the freedom to paint that house in any way they want even over the objections of the parents. . . . Our schools are no different." However, the mural ban was adopted over anguished protests from numerous parents, teachers, and students. For example, Elk Grove teacher Eleanor Kuechler-Van Acker warned that the new policy would teach students to "follow the rules unless and until you lose, then change the rules. It would teach them the powerful always win." Similarly, Elk Grove teacher and MUN/JS advisor David Hill asked the board, "What would students learn from white-washed walls? That freedom was taken away from them, a freedom guaranteed by the Constitution."

The day after the Board promulgated its new policy, about 100 Elk Grove High School students left classes to protest it. Forty-seven students who refused orders by Principal Duncan to return to school within three minutes were each suspended from school for three days. The mural was painted over in a few minutes on 5 August 1994, after having diminished the "blahness" of the school's walls for less than a year.

What are some of the lessons to be learned from the post-1990 develop-

ments related to the 1989–90 flag desecration controversy discussed above? First, the eruption of flag desecration as a burning national public issue in 1989 and its sudden disappearance from the national stage after 1990 underline the extraordinary influence of the news media in framing both the public agenda and the public’s perception of what represents “reality.” Flag desecration has never been common in the United States and it has never posed any real threat to the nation’s security or to its patriotism. Yet by focusing enormous attention on the flag controversy in 1989 (certainly helped along by politicians) and then essentially ignoring flag desecration incidents and prosecutions after mid-1990, the media originally falsely suggested flag desecration was a matter of real importance to the nation; then, having itself lost interest in the issue (reflecting the typically short attention span of the news media and its frequent failure to follow up stories which, for a short period, have been a virtual obsession), the media equally falsely suggested that after 1990 it was no longer of any significance to anyone (no doubt much to the frustration, equally, of the American Legion and of protesters who found themselves unconstitutionally prosecuted or harassed for flag desecration, both of whom wished to keep the issue alive for very different reasons but were unable to obtain news coverage). Furthermore, by essentially failing to cover incidents of flag desecration and prosecutions after mid-1990, the news media inevitably and incorrectly led the average citizen to believe that either such incidents were no longer occurring or that, if they were, they were no longer newsworthy since they were legally protected, and, by implication, no longer prosecuted, under Supreme Court rulings.

A second set of lessons to be learned from post-1990 flag desecration developments concern the extraordinary discretion exercised by local law enforcement officials, which effectively gives them the power to ignore court rulings, including even those of the Supreme Court, when they wish to do so, and especially when the national news media fail to cover such events. For all practical purposes, the freedom to exercise rights which the Supreme Court has declared are protected by the First Amendment clearly depends, in practice, on the attitudes of local police and judicial officials (as discussed above, numerous flag desecrators continued to face prosecution and harassment after mid-1990, yet, in the fall of 1990 and summer of 1994, respectively, the San Francisco Art Institute and the Cleveland Center for Contemporary Art held extensive exhibitions of “flag art,” including numerous examples of “desecrated flags,” without encountering any problems whatsoever).<sup>35</sup>

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<sup>35</sup>San Francisco Art Institute, “1990 Annual Exhibition: Flag,” 28 Aug.–29 Sept. 1990; Cleveland Center for Contemporary Art, “Old Glory: The American Flag in Contemporary

Finally, the development of the 1989–1994 flag desecration furor, considered within the context of earlier, similar controversies in American history (which became particularly intense during the 1895–1920 and Vietnam War periods), suggests that flag desecration is an issue which has in the past and will in the future go through cycles of increasing and decreasing public interest but is unlikely to ever disappear. The flag is the pre-eminent symbol of American national identity, and it is therefore not surprising, in a country which has frequently exhibited considerable confusion and insecurity about itself and its self-definition, that recurrently, and especially during periods of increased national insecurity and confusion, national frustrations are often focused on those who effectively pour salt into open wounds by assaulting the flag. The 1895–1920 period was marked by enormous tensions and confusion about American national identity related to the rapid increase in foreign immigration, fears of radicalism, and a massive and rapid growth in American industrialization and urbanization. The Vietnam War period was another time of enormous national insecurity, as controversy over the War divided the nation to an extent probably unseen since the Civil War. And the economic difficulties and frustrations of the post-Vietnam War period, marked by stagnant or declining standards of living for most Americans, the end of America's unchallenged international economic supremacy, and perceived threats to American jobs by foreign competition abroad and increasing immigration at home, have also created a fertile climate for targetting flag desecrators, who are likely to be seen as symbolically insulting Americans who already feel threatened. While flag desecration may have temporarily disappeared as a national public issue in the post-1990 period, all of the ingredients are present for the re-emergence of this controversy at any time.

## **Epilogue: 14 December 1995**

After this essay was originally completed in early 1995, the prediction in its last sentence quite suddenly became a reality, as the drive for a flag desecration amendment re-emerged as a major public issue and, was barely defeated in the Senate in December 1995 after being endorsed by the House of Representatives in late June. The revived amendment drive did not reflect any new burst of flag burnings, which, according to the Congressional Reference Service, dropped from 20 in 1991–92 to a grand total of three in 1993–94, but rather the Republican congressional election victory in November 1994 and consequent greater conservative mood in Congress, the success of the

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Art," Exhibit 14 June–14 Aug. 1994.

American Legion backed CFA (discussed above) in obtaining resolutions of support for an amendment by mid-1995 from 49 state legislatures, and especially the continued uncertainties and anxieties of the American public as the general state of their social and economic conditions showed no signs of significant improvement. For example, in October 1995, Fordham University scholars reported that, based on 16 different measures, America's social health had dropped, on a scale of 0 to 100, from 78 to 41 between 1973 and 1993, and that in the latter year could be found the lowest scores ever reported for six measures, including children in poverty, average weekly earnings adjusted for inflation, and the gap between rich and poor Americans; thus, inflation-adjusted median wages for full-time male workers fell from \$34,000 to \$30,400 between 1973 and 1993. The director of the study, Dr. Marc Miringoff, reported that it "tells us a great deal about why people are upset. Behind these numbers, there's a lot of insecurity, a lot of frustration."<sup>36</sup>

During the summer of 1995, under the prodding of the CFA and the Republican Congressional leadership, both House and Senate judiciary committees held hearings on proposals for a flag desecration constitutional amendment for the first time in five years. Following the hearings, both judiciary committees recommended passage of the amendment, and on 28 June the House of Representatives endorsed the amendment, which authorized Congress and the states to "prohibit the physical desecration" of the flag by a vote of 312–120; this vote was well over the required two-thirds majority and an increase of 58 votes compared to those voting for the failed amendment in 1990. The amendment was defeated in the Senate, however, on 12 December, with 63 senators voting for it and 36 against, thereby falling three votes short of the required two-thirds majority (although five more than the 58 votes garnered for the amendment in 1990). Had the amendment been endorsed by both Houses of Congress, ratification by the required 38 state legislatures would have been a virtual certainty, since 49 legislatures had already petitioned Congress in support of such an amendment.<sup>37</sup>

Especially given the paucity of recent flag burnings, no doubt the most important impetuses behind the renewed 1995 amendment drive were the general American insecurities and fears discussed above, as well as the desire of amendment backers to make a clear symbolic statement expressing their rejection of the general, national trend they perceived towards moral and social disintegration. In short, just as the flag is the primary symbol of

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<sup>36</sup>DAP; *NYT*, 15 Oct. 1995.

<sup>37</sup>The progress of the amendment can be traced in the *NYT*: 26 May, 7, 8, 29 June, 21 July 1995.

American identity, the perceived need to outlaw flag disintegration reflected a sense by its supporters that the country was undergoing a national identity crisis and that *something* had to be done to remedy it.

Amendment proponents frequently publicly supported it in terms that clearly support this analysis. For example, at a 7 June House Judiciary Committee (HJC) subcommittee meeting, Representative James Sensenbrenner (R-Wisc.) declared that the flag was the “one unifying symbol of the nation” and that it should be protected just as the British barred slander against the Queen “since we don’t have a queen here.” At the same meeting, HJC Chairman Henry Hyde (R-Ill.) termed the amendment “an effort by mainstream Americans to reassert community standards” and declared that the flag desecration issue was less about “the flag itself” than about “a popular protest against the vulgarization of our society.” In Congressional testimony Northwestern University Law Prof. Stephen Presser said the amendment would allow the American people to establish a “baseline of decency, civility, responsibility and order” and to “reconstruct a dangerously fractured sense of community.” In a 27 June *Denver Post* column, Ken Hamblin supported the amendment because “enough is enough,” because liberals such as those who opposed the amendment were responsible for a “corrosive impact” on “American morality and the principles of basic decency and respect” and that unless their “senseless and irrational” agenda was halted liberals would “rip up ever floor board, pull every nail and unglue every ideal that has been responsible for forging the United States into the most powerful nation in the history of the world.”<sup>38</sup>

William Detweiler, national commander of the American Legion, the spearhead of the renewed amendment drive, urged support for it in an 11 February letter to the *Washington Post* because “Americans today harbor real doubts about what we stand for as a nation and who we are as a people”; while conceding that the amendment might be viewed by some as a “corny idea” and that it “won’t even erase all the doubts Americans have about the future” or even “send the stock market into a rally,” Detweiler maintained, “It’s a start.” In testimony before a Senate Judiciary subcommittee on 6 June, Detweiler declared that the Amendment would “clarify the importance of patriotism as an American value” and send “a clear message that unacceptable, anti-social conduct that is inarticulate and repugnant need not be tolerated.” He made crystal clear that the American Legion sought more to make a symbolic statement about perceived threats to American unity and patriotism than to prevent any real threat to the flag by declaring that the Legion regarded flag

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<sup>38</sup> *NYT*, 8 June 1995; Citizens Flag Alliance *Highlights*, 1, 14 June 1995.

burning as “a problem even if no one ever burns another flag.”<sup>39</sup>

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<sup>39</sup> Associated Press, 6 June 1995; *St. Louis Post-Dispatch*, 7 June 1995.