

**S B**

**333**



# American Civil Liberties Union

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Alaska Civil Liberties Union -Legislative Committee-217 Second St. #204-Juneau, Alaska 99801

## POSITION PAPER ON SB 333

**THE ALASKA CIVIL LIBERTIES UNION OPPOSES ANY FORM OF LEGISLATION BANNING FLAG DESECRATION. SUCH LEGISLATION IS AN UNCONSTITUTIONAL INFRINGEMENT OF ONE OF OUR MOST VALUABLE FIRST AMENDMENT FREEDOMS, THE RIGHT TO CRITICIZE THE GOVERNMENT.**

Every legislative session seems to produce one bill that is totally offensive to civil liberties. This year, a very strong contender for the most obnoxious bill, without question, is the flag desecration bill, SB 333.

The American flag flies the proudest and strongest in the world precisely because the government does not mandate that its citizens revere it. Reverence by force is nothing more than obedience. There are only a handful of citizens who would consider burning a flag. Yet our tolerance for these few makes the rest of us free. In choosing to grant our flag respect, we exercise exactly the same rights that Gregory Johnson did when he contemptuously burned the symbol of America's liberty. A government which thinks that it can order people to respect it, rather than earning their respect, is doomed to fail.

Lest anyone question the power of the flag as a symbolic impetus for government change, it is worth recalling the powerful images we recently witnessed of thousands of Rumanian citizens carrying flags from the centers of which the hammer and sickle of communism had been torn. We happen to agree with their symbolic statement that the yoke of oppression represented by that flag should be lifted, and so we view the action they took against their flag with approval. We cannot have it both ways. The people of Rumania earned their freedom by dissent and protest. The values they expressed by their symbolic use of the flag are the very values this legislation would suppress.

This is a cynical and hypocritical bill. Flag burning is not exactly a rampant social problem in Alaska, certainly not one which deserves the level of effort that the legislature has put into this bill. There are much worse problems to worry about. We do predict that if the bill passes, it will incite many incidents of flag burning. The legislation is exactly the kind of repressive, oppressive government action that invites protest.

The legislation arises from a hysterical response to a decision of the United States Supreme Court affirming our most basic liberty, the freedom to criticize government. It is hard to understand how the self-appointed defenders of our

flag, (and presumably of our freedom), can justify such a basic infringement on the First Amendment. We would like to quote from that decision:

" . . . According to Texas, if one physically treats the flag in such a way that would tend to cast doubt on the idea that nationhood and national unity are the flag's referents, or that national unity actually exists, the message conveyed is a harmful one and therefor may be prohibited. . . If there is a bedrock principle underlying the First Amendment, it is that Government may not prohibit the expression of an idea simply because Society finds the idea itself offensive or disagreeable. "

The idea that the First Amendment needs fixing is a dangerous fallacy. If our liberty perishes, it will bleed to death from nicks and cuts inflicted by those who will not tolerate dissent. A pathetic group of radicals, so at a loss for words that they burn flags, poses no comparable threat to our freedom.

This bill will put Alaska in the ignominious company of countries like the Soviet Union, Iran, China and other nations which routinely put people in prison for expression of ideas with which the government disagrees. If we travel down this road, our freedom to tell the government to go to hell will depend on the whims of politicians playing for a political advantage.

Without question the most basic civil liberty, in the absence of which all other liberties are defenseless, is the right to criticize the government. If we cannot criticize government, we cannot change it and we cannot prevent its abuses. We know from our painful experiences with McCarthyism and Vietnam the pitfalls of the "America right or wrong" philosophy. The most important way in which we can celebrate our liberty is to allow even the most obnoxious protesters to present their ideas for consideration. As Senator Dellenger of Nebraska, a man who lost a leg fighting for his country in Vietnam put it, legislation like this is actually an ultimate victory for flag burners, making America "look just a little silly, and a little less brave and little less free."

10441 Birch Road  
Anchorage, AK 99516

February 4, 1990

Hon. Jay Kerttula  
Alaska Senate  
Juneau, Alaska

9 17 1990

188

Matt

Dear Sen. Kerttula:

In regard to S.B. 333 which would make a crime of flag burning, I'd like to suggest another provision to what I understand is being proposed.

The worst of abuses to our flag seems to me to be to use it for commercial purposes, as in the case of making it part of a garment to be sold -- like "Pepsi" or "Coke" garments -- or advertising the flag to sell a product, like showing the upraised arm of the Statue of Liberty to advertise an underarm deodorant.

I have no quarrel with someone trying to make a buck, but using our flag for that purpose seems to me to be its ultimate degradation. At least burning the flag reflects the expression of the political rights our tradition holds sacred ...

If we must have such a bill, let's make sure it covers all the bases.

Respectfully,

*Charles Konigsberg*  
Charles Konigsberg

FISCAL NOTE

REQUEST:

Revision Date: \_\_\_\_\_ Agency Affected: Public Safety  
 Title: Public Destruction of U.S. or BRU: Alaska State Troopers  
Alaska Flags  
 Sponsor: Senator Kerttula, etc. Component: Detachments  
 Requestor: Senate Judiciary

EXPENDITURES/REVENUES: (Thousands of Dollars) (Inflation not included)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
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REVENUE	-0-	-0-	-0-	-0-	-0-	-0-
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FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER/PROG RCPT						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact anticipated.

Prepared by: Francis C. Allan  
 Division: Alaska State Troopers

Phone: 269-5691  
 Date: 01/12/90

Approved by Commissioner: S.A.H. Arthur English  
 Agency: Department of Public Safety

Date: 1-12-90  
 Page 1 of 1

*MAA*  
1/12/90

MEMORANDUM

November 20, 1989

SUBJECT: Desecration of certain flags  
(Work Order No. 6-1551)

TO: Senator Jalmar M. Kerttula

FROM: Richard A. Bradley  
Legislative Counsel

I have prepared for you a bill regarding the issue of flag burning. I have given the question some thought over the past few months. Recently, when the office received a CSG "Backgrounder" on flag desecration, I thought that you might be interested in it; a copy is enclosed.

The information is useful and, I think, generally accurate but one significant aspect of the analysis is in error and it is a common error concerning Texas v. Johnson, U.S., 57 U.S.L.W. 4770, one that I did not catch until recently. CSG makes the suggestion that with the Johnson ruling, "the Texas law became unconstitutional, as did the provisions in forty-seven other states . . . ."

A careful reading of the Johnson case suggests that the Court did not declare the law unconstitutional; in fact, in the Johnson case and three of the cases that prefigured the Johnson case in the U.S. Supreme Court, the Court has not declared the underlying subject law unconstitutional. It is not the law but the conduct involving speech or communication protected by the First Amendment that requires that the conviction be reversed. In footnote 3 of the Johnson opinion, Justice Brennan notes:

Although Johnson has raised a facial challenge to Texas' flag-desecration statute, we choose to resolve this case on the basis of his claim that the statute as applied to him violates the First Amendment. Section 42.09 regulates only physical conduct with respect to the flag, not the written or spoken word, and although one violates the statute only if one "knows" that one's

physical treatment of the flag "will seriously offend one or more persons likely to observe or discover his action," Tex. Penal Code Ann. Sec. 42.09(b) (1989), this fact does not necessarily mean that the statute applies only to expressive conduct protected by the First Amendment. \* \* \* A tired person might, for example, drag the flag through the mud, knowing that this conduct is likely to offend others, and yet have no thought of expressing any idea; . . ." (Emphasis in original.)

Johnson was thus consistent with the earlier cases where the Court reverses the conviction but does not seek to invalidate the law. In Street v. New York, 394 U.S. 576 (1969), the appellant was charged with violating a statute that made it a misdemeanor to "publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon, either by words or act, [any flag of the United States]". The defendant was also charged with (and acquitted of) disorderly conduct. After hearing on the radio that James Meredith was shot in Mississippi, appellant took a flag he owned to the streets and burned it, saying: "If they can do that to Meredith, we don't need a flag."

[W]e hold that [the law] was unconstitutionally applied in appellant's case because it permitted him to be punished merely for speaking defiant or contemptuous words about the American flag.

\* \* \*

The State argues that appellant's words were at most used to establish his unlawful intent in burning the flag. However, after a careful examination of the comparatively brief trial record, we find ourselves unable to say with certainty that appellant's words were not an independent cause for his conviction. While it is true that at trial greater emphasis was placed on appellant's action in burning the flag than upon his words, a police officer did testify to the utterance of the words. The state never announced that it was relying exclusively upon the burning. 394 U.S. at 589 - 590.

In Smith v. Goguen, 415 U.S. 566 (1973), the Supreme Court addressed the wearing of the flag. "Appellant wore a small cloth version of the United States flag sewn to the seat of his trousers. The flag was approximately four by six inches and was displayed to the left rear of Goguen's blue jeans. On January 30, 1970, two police officers saw Goguen bedecked in that fashion." He was charged with violating a law that provides: "Whoever publicly mutilates, tramples upon, defaces, or treats contemptuously the flag of the United States, whether the flag is public or private property, shall be punished . . . ."

The phrase relied upon in the state court conviction was "treats contemptuously". He was convicted and sentence to prison; the U.S. District Court granted habeas corpus because of the constitutional issues involved.

The Supreme Court said:

[W]e see the force of the District Court's observation that the flag has become "an object of youth fashion and high camp." 343 F.Supp, at 164. As both courts below noted, casual treatment of the flag in many contexts has become a wide-spread contemporary phenomenon. Id. at 164, 167; 471 F.2d at 96. Flag wearing in a day of relaxed clothing styles may simply be an adornment or a ploy to attract attention. \* \* \* Yet in a time of widely varying attitudes and tastes for displaying something as ubiquitous as the United States flag or representations of it, it could hardly be the purpose of the Massachusetts Legislature to make criminal every informal use of the flag. 415 U.S. at 573 - 574.

The language at issue is void for vagueness as applied to Goguen because it subjected him to criminal liability under a standard so indefinite that police, court, and jury were free to react to nothing more than their preferences for treatment of the flag.

One other case is useful to review.

Spence v. Washington, 418 U.S. 405 (1974) involved the display of a flag with material attached. The appellant displayed a United States flag that he owned upside down from a window of his apartment. Affixed to both surfaces of the flag was a large peace symbol, the circle enclosing a trident. The symbol was formed from tape that could be

SENATOR JAIMAR KERTTUIA  
Page 4  
November 20, 1989

removed without permanently damaging the flag. There was no crowd; police officers came to the apartment. Appellant stated " I suppose you are here about the flag. I didn't know there was anything wrong with it. I will take it down." The appellant was convicted under a Washington statute that forbade the exhibit of the U.S. flag "to which is attached or superimposed figures, symbols, or other extraneous material."

The Supreme Court reversed the state court conviction: "as applied to appellant's activity, the Washington statute impermissibly infringed protected expression."

In this case, appellant's activity was roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy, also issues of great public moment. \* \* \* A flag bearing a peace symbol and displayed upside down might be interpreted as nothing more than bizarre behavior, but it would have been difficult for the great majority of citizens to miss the drift of appellant's point at the time he made it. It may be noted, further, that this was not an act of mindless nihilism. Rather it was a pointed expression of anguish by appellant about the then-current domestic and foreign affairs of his government. An intent to convey a particularized message was present. \* \* \* The statute is nonetheless unconstitutional as applied to appellant's activity.

And for the reasons suggested, any questions that I may have raised about the constitutionality of the bill have been alleviated; I believe that the bill would be constitutional.

If I may be of further assistance, please advise.

RAB:lmb:ml  
L8/053

Enclosure



078902

# Backgrounder

States Information Center  
The Council of State Governments  
Iron Works Pike  
P.O. Box 11910  
Lexington, KY 40578  
(606) 252-2291

**Date:** July, 1989  
**Topic:** FLAG DESECRATION LAWS  
**Infokey:** State Government  
(NT) Symbols and Awards

## BURNING "OLD GLORY" FLAG DESECRATION

The United States flag and state flags are endearing symbols of our country's freedoms and heritage. The June 21 ruling by the United States Supreme Court in Texas v. Johnson has left some Americans feeling that these symbols and the freedoms they represent are at odds with one another. This ruling affects the states because many have laws prohibiting desecrating the U.S. flag, the state flag, or both. At issue is respect for the flag and limits on free expression. Desecrating our national flag is the ultimate political gesture to some, a punishable crime to others.

### Anybody Got A Match?

At the 1984 Republican National Convention in Dallas, a group of activists demonstrated against the policies of the Reagan Administration and several Dallas-based corporations. As a part of this demonstration, one of the protesters burned the U.S. flag.<sup>1</sup> Local police officials arrested the protester for violating a Texas statute prohibiting desecration of the national flag. He was subsequently convicted of the crime in the Texas judicial system.

The demonstrator and his attorneys contend, however, that burning the national flag is the expression of an idea, and that such expressions are protected by the First Amendment to the Constitution. The case was eventually appealed to the United States Supreme Court, and by a 5-4 decision the Court agreed that the protester should not have been convicted of a crime.

The Court's majority ruled that burning the U.S. flag is indeed a form of expression protected by the First Amendment. In outlining the majority opinion, Justice Brennan wrote, "We do not consecrate the flag by punishing its desecration,<sup>2</sup> for in doing so we dilute the freedom that the cherished emblem represents."

With this ruling the Texas law became unconstitutional, as did provisions of similar statutes in forty-seven other states. (Alaska and Wyoming are the only

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\*This CSG Backgrounder was compiled by Gary Deaton, Research Assistant, States Information Center, The Council of State Governments.

**Note:** *Backgrounder* information is the latest available at the time of publication, but for updates, you should contact the appropriate state or federal agency directly. This material does not represent the position of The Council of State Governments. Information is included based on relevance to the topic. Some material, as noted, is copyrighted and may not be reproduced further without permission of the original publisher. Contact the States Information Center or the writer at CSG.

## CSG Backgrounder -- Flag Desecration Laws

states without such prohibitions)<sup>3</sup> (See table). As one federal official put it, "demonstrators may roll Old Glory and fire her up like a Marlboro if they want."<sup>4</sup>

### State Flags

Currently, forty-two states have laws prohibiting the desecration of the state flag. For example, Illinois law states:

Any person who publicly mutilates, defaces, defiles or defies, tramples or casts contempt upon, whether by words or act, any such flag, standard, color or ensign shall be guilty of a Class 4 felony.

In this statute, flag is defined as being the United States flag or the flag of the state. Most states use the same statute to include the national and state flag. However, six states (Delaware, Hawaii, Indiana, North Dakota, Oklahoma and Rhode Island) have laws concerning the national flag, but not the flag of the state. For example, Delaware law reads:

A person is guilty of desecration if he intentionally defaces, damages, pollutes, or otherwise physically mistreats...the national flag.

Although violations are considered a felony in Illinois, the majority of states consider it a misdemeanor. Such is the case in New Hampshire, where:

A person is guilty of a misdemeanor if he:...  
IV. Purposely or knowingly mutilates or defiles any such flag...

### A Constitutional Amendment and Other Federal Action

The federal government has enacted numerous laws regulating misuse of the American flag. However, the most commonly referred to is Title 18 U.S.C. Section 700(a) which provides:

Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than \$1000 or imprisoned for not more than one year, or both.

Public opinion and politicians alike have voiced opposition to the Supreme Court's decision. Government officials are calling for action to circumvent the ruling, including a constitutional amendment to prohibit desecrating the national flag.

President Bush and Republican leaders have proposed an amendment which reads:

## CSG Backgrounder -- Flag Desecration Laws

The Congress and the states shall have the power to prohibit the physical desecration of the flag of the United States.

For the amendment to become a part of the Constitution it would have to be approved by two-thirds majorities in each house of Congress, and ratified by thirty-eight states. Thus, the legislatures of the states would play an important role in determining the future of such an amendment.

Most analysts assume that if the proposed amendment were to be approved by Congress, it would quickly be ratified by the states. However, some state officials have shown concern that the amendment in its present form may still leave the flags of the states subject to the Supreme Court ruling. Thus, it has been suggested that the words "or any state" be added to the end of the amendment.

Senate Leader Robert Dole is sponsoring a bill (S607) to broaden the definition of desecrating the American flag to include knowingly displaying it on the floor or ground. The bill passed the Senate and is pending in the House Judiciary Subcommittee on Civil and Constitutional Rights.

"On June 23 the Senate adopted an amendment to child-care legislation that rewrites the federal anti-desecration law in an effort to reverse the court's ruling." On June 22 the Senate also passed S Res 151 "expressing its profound disappointment" with the court decision.

### Conclusion

The flag desecration controversy is being debated at the federal, state, and local levels. Some say that restricting flag desecration only serves to publicize and legitimize the actions of people who use this form of protest... perhaps encouraging more of the behavior. Others believe that the unique symbolism of the flag demands protection. And finally, some believe that while the act itself is significant (whether punishable or not), this behavior is not widespread enough to be a problem. For the moment, the court decision imparts a new perspective on this old argument.

### NOTES

1. Biskupic, Joan, "Flag-Burning, 'Dial-a-Porn' Acts Struck Down by Justices," Congressional Quarterly, June 24, 1989, p.1547.
2. Ibid, p.1548.
3. Ibid, p.1547.
4. Hoffman, David, "Calling Flag Burning Wrong, Bush Urges Speedy Approval of Amendment," The Washington Post, July 1, 1989, p.A4.
5. Ibid.
6. Biskupic, "Flag Burning", CQ, 1989, p.1548.

CSG Backgrounder -- Flag Desecration Laws

7. Ibid.

8. Ibid.

Price -- \$5.00  
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The Council of State Governments

TABLE 1 Statutory Citations of Flag Desecration Laws

State	State Flag	United States Flag
Alabama	13A-11-12	*
Alaska	-----	-----
Arizona	13-3703	*
Arkansas	5-51-207	*
California	Mil. & Vet. 614	*
Colorado	18-11-204	*
Connecticut	53-258a	*
Delaware	-----	11-1331
Florida	256.051	*
Georgia	50-3-9	*
Hawaii	-----	711-1107
Idaho	18-3401	*
Illinois	1-3351	*
Indiana	-----	35-45-1-4
Iowa	32.1	*
Kansas	21-4114	*
Kentucky	525.110	*
Louisiana	14-116	*
Maine	1-254	*
Maryland	27-87	*
Massachusetts	264.5	*
Michigan	750.246	*
Minnesota	609.40	*
Mississippi	97-7-39	*
Missouri	578.095	*
Montana	45-8-215	*
Nebraska	28-928	*
Nevada	201.290	*
New Hampshire	646.1	*
New Jersey	2C:33-9	*
New Mexico	30-21-4	*
New York	Gen B 136	*
North Carolina	14-381	*
North Dakota	-----	12.1-07-02
Ohio	2927.11	*
Oklahoma	-----	21-372
Oregon	166.075	*
Pennsylvania	18-2103	*
Rhode Island	-----	11-15-2
South Carolina	16-17-220	*
South Dakota	22-9-1	*
Tennessee	39-5-843	*
Texas	Penal Code 42.09	*
Utah	76-9-601	*
Vermont	13-1903	*
Virginia	18.2-488	*
Washington	9.86.030	*
West Virginia	61-1-8	*
Wisconsin	946.05	*
Wyoming	-----	-----

----- indicates that there is no statute of this type.

\* Statute concerning the U.S. flag and state flag is the same.

TABLE 1 Statutory Citations of Flag Desecration Laws

State	State Flag	United States Flag
Alabama	13A-11-12	*
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Arkansas	5-51-207	*
California	Mil. & Vet. 614	*
Colorado	18-11-204	*
Connecticut	53-258a	*
Delaware	-----	11-1331
Florida	256.051	*
Georgia	50-3-9	*
Hawaii	-----	711-1107
Idaho	18-3401	*
Illinois	1-3351	*
Indiana	-----	35-45-1-4
Iowa	32.1	*
Kansas	21-4114	*
Kentucky	525.110	*
Louisiana	14-116	*
Maine	1-254	*
Maryland	27-87	*
Massachusetts	264.5	*
Michigan	750.246	*
Minnesota	609.40	*
Mississippi	97-7-39	*
Missouri	578.095	*
Montana	45-8-215	*
Nebraska	28-928	*
Nevada	201.290	*
New Hampshire	646.1	*
New Jersey	2C:33-9	*
New Mexico	30-21-4	*
New York	Gen B 136	*
North Carolina	14-381	*
North Dakota	-----	12.1-07-02
Ohio	2927.11	*
Oklahoma	-----	21-372
Oregon	166.075	*
Pennsylvania	18-2103	*
Rhode Island	-----	11-15-2
South Carolina	16-17-220	*
South Dakota	22-9-1	*
Tennessee	39-5-843	*
Texas	Penal Code 42.09	*
Utah	76-9-601	*
Vermont	13-1903	*
Virginia	18.2-488	*
Washington	9.86.030	*
West Virginia	61-1-8	*
Wisconsin	946.05	*
Wyoming	-----	-----

----- indicates that there is no statute of this type.

\* Statute concerning the U.S. flag and state flag is the same.

**FISCAL NOTE**

**REQUEST:**

Revision Date: \_\_\_\_\_  
Title: "An Act relating to public  
desecration of the flag of the U.S...."  
Sponsor: Senator Kerttula  
Requestor: Senator Kerttula

Agency Affected: Department of Law  
BRU: Prosecution  
Components: All

**EXPENDITURES/REVENUES: (Thousands of Dollars)**

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

**FUNDING: (Thousands of Dollars)**

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

**POSITIONS:**

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

**ANALYSIS :** (Attach a separate page if necessary)

Please see the attached analysis.

*Richard I. Pegues*

Prepared by: Richard I. Pegues, Director  
Division: Administrative Services

Phone: 465-3672  
Date: January 12, 1990

Approved by Commissioner: Richard I. Pegues / FOM  
Douglas B. Bailly, Attorney General Date: January 12, 1990  
Agency: Department of Law

Distribution (by preparer):

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# CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. SSSB 333

This bill adds a new section to AS 11.76, which would make intentional public desecration of the flag of the United States or of the state a class B misdemeanor. The bill defines desecration as an instance when, within 100 feet of a displayed flag of the United States or of the state, a person defaces, damages, or otherwise physically mistreats the flag of the United States or of the state.

The department does not believe the bill will have a fiscal impact because flag desecration occurs so rarely in Alaska. Where it does occur, it is usually an isolated incident involving an individual making a political or social statement. In other words, this is not a situation where some widespread social activity is being criminalized.

To the extent that someone might test the proposed law, in view of the United States Supreme Court's decision in Texas v. Johnson, only one prosecution and one appeal would probably occur. This additional work can be handled by existing staff and, consequently, there will not be a fiscal impact on the Department of Law.

BY SEN. KERTTULA, Kelly, Faiks

1 IN THE SENATE

2 SPONSOR SUBSTITUTE FOR SENATE BILL NO. 333

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the public desecration of the  
7 flag of the United States or of the state; and pro-  
8 viding for an effective date."

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

10 \* Section 1. AS 11.76 is amended by adding a new section to read:

11 Sec. 11.76.150. PUBLIC DESECRATION OF A FLAG. (a) A person  
12 commits the crime of public desecration of a flag who intentionally  
13 desecrates the flag of the United States or of the state.

14 (b) A person desecrates the flag of the United States or of the  
15 state when, ~~within 100 feet of a displayed flag of the United States~~  
16 ~~or of the state,~~ <sup>maintaining it in its original condition,</sup> the person defaces, damages, or otherwise physically  
17 mistreats the flag of the United States or of the state.

18 (c) Desecration of the flag of the United States or of the state  
19 is a ~~class B~~ misdemeanor <sup>punishable by 100 hours of community service</sup>

20 \* Sec. 2. This Act takes effect immediately under AS 01.10.070(c).

"Flag" means any flag of the US or of the State, or any part thereof, made of ~~cloth~~ fabric, of any size, in a form that is commonly displayed as a

This section does not prohibit

RECEIVED

JAN 29 1990

JAN FAIKS  
SENATE OFFICE

SPONSOR STATEMENT

SENATE BILL 333

JANUARY 16, 1990

I introduced Senate Bill 333 in response to many Alaskans concern with last summer's flag desecration activities. A large number of my constituents believe that the public mistreatment of a flag is not a permissible way of expressing a political viewpoint, but is instead a criminal act.

Sponsor Substitute for Senate Bill 333 would make it a class B misdemeanor for anyone to desecrate a flag within 100 feet of a displayed flag of the United States or Alaska.

The original version of Senate Bill 333 would have made it a felony to mistreat a flag in a way that the person knows will seriously offend someone. Legislative Counsel issued an opinion in support of the constitutionality of this bill. However, I had the sponsor substitute for Senate Bill 333 drafted in response to concerns expressed by others. The concern was that even if the original bill was constitutional as it was written, any arrests under that bill would be unconstitutional since how does a policeman determine that a person knew his conduct was going to seriously offend someone? It is difficult to legislate subjective perceptions of conduct.

I think Sponsor Substitute for Senate Bill 333 is a rational way to meet both the concerns of those Alaskans who believe that desecration of a flag should be a crime and the constitutional concerns. With the sponsor substitute, we would apply an objective standard of conduct, rather than the subjective standard of the original version of the bill. Alaskans would know exactly what kind of conduct is illegal. It also makes good sense that we should legislate against conduct which has the potential for inciting violence, and the public desecration of a flag within 100 feet of a displayed flag which is often in a public area certainly has the potential of inciting violence.

  
Senator Jay Kerttula

Section 1. AS 11.61.100 is amended to read:

Sec. 11.61.100. RIOT. (a) A person commits the crime of riot if, while participating with five or more others, the person engages in tumultuous and violent conduct in a public place and thereby causes, or creates a substantial risk of causing damage to property or physical injury to a person; or

(b) with intent to incite or produce imminent violent conduct, the person publicly desecrates the flag of the United States or of the state under circumstances likely to incite or produce imminent violent conduct.

(c) Riot is a class C felony.

Section 2. AS 11.76 is amended by adding a new section to read:

Sec. 11.76.150. DESECRATION OF A FLAG. (a) A person commits the crime of desecration of a flag who knowingly desecrates the flag of the United States or of the state.

(b) This section does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled.

(c) Desecration of the flag of the United States or of the state is a class B misdemeanor punishable by 100 hours of community service; for purposes of this paragraph, "community service" has the meaning given in AS 33.30.901.

Section 3. 11.31.430 is amended to read:

Sec. 11.81.430. JUSTIFICATION: USE OF FORCE, SPECIAL RELATIONSHIPS. (a) The use of force upon another person that would otherwise constitute an offense is justified under any of the following circumstances:

(1) When and to the extent reasonably necessary and appropriate to prevent the desecration of the flag of the United States or of the state, a private person may use reasonable and appropriate nondeadly force;  
(renumber subsequent sections accordingly)

Section 4. 11.81.900 is amended to read:

Sec. 11.81.900. DEFINITIONS. (a) For purposes of this title, unless the context requires otherwise,

(15) "desecrate" means to deface, damage, (maintain upon the floor or ground) or otherwise mistreat physically;

(22) "flag" means any flag of the United States or of the state, or any part thereof, made of fabric, of any size, in a form that is commonly displayed upon a flagstaff or stick;

(renumber sections accordingly)

THIS IS THE STANDARD THAT THE U.S SUPREME COURT HAS SET FOR LAWS RESTRICTING FREE SPEECH

"KNOWINGLY" RATHER THAN "INTENTIONALLY" SINCE THIS IS CONDUCT, NOT A RESULT.

NEW

NEW PENALTY

NEW

DEFINITIONS MOVED FROM 11.81.40 TO 11.81.900 SINCE THEY APPLY TO 3 DIFFERENT SECTIONS

NEW

Draft Judiciary CS - SB 333

NEW

Section 1. AS 11.61.100 is amended to read:

Sec. 11.61.100. RIOT. (a) A person commits the crime of riot if, while participating with five or more others, the person engages in tumultuous and violent conduct in a public place and thereby causes, or creates a substantial risk of causing damage to property or physical injury to a person; or

THIS IS THE STANDARD  
USED BY THE U.S.  
SUPREME COURT  
TO TEST LAWS  
RESTRICTING SPEECH

(b) with intent to incite or produce imminent violent conduct, the person desecrates the flag of the United States or of the state under circumstances likely to incite or produce imminent violent conduct.

(c) Riot is a class C felony.

Section 2. AS 11.76 is amended by adding a new section to read:

REVISED

Sec. 11.76.150. DESECRATION OF A FLAG. (a) A person commits the crime of desecration of a flag who intentionally desecrates the flag of the United States or of the state.

NEW

(b) In a prosecution under (a) of this section, it is an affirmative defense that the conduct consisted of the disposal of a flag because it was worn or soiled.

(c) Desecration of the flag of the United States or of the state is a class B misdemeanor.

REVISED  
PENALTY

(d) Upon conviction under this section the court shall impose a sentence of 100 hours of community work if the person has not previously been convicted in this or another jurisdiction under this section, AS 11.61.100(b), or another law or ordinance with substantially similar elements.

Section 3. 11.81.900 is amended to read:

Sec. 11.81.900. DEFINITIONS. (a) For purposes of this title, unless the context requires otherwise,

\* \* \*

REVISED

(15) "desecrate" means to deface, damage, physically defile, burn, use as a floor or ground covering, or trample;

\* \* \*

NEW

(22) "flag" means any flag of the United States or of the state, or any part thereof, made of fabric, of any size, in a form that is commonly displayed upon a pole, staff or stick;

\* \* \*

(renumber sections accordingly)

AS 11.81 is amended by adding a new section to read:

Sec. 11.81.435. Justification: Use of force to prevent the desecration of the flag. When and to the extent reasonably necessary and appropriate to prevent the desecration of the flag of the United States or of the state, a person may use reasonable and appropriate nondeadly force.

PROPOSED JUDICIARY CS - SSSB 333

The proposed Judiciary CS makes the following changes to SSSB 333:

*Tolson*  
*Johnson*  
*Braden*  
*DeLo*

Section 1: The CS adds a new section 1, which expands current AS 11.61.100 relating to riot. It provides that a person commits the crime of riot if, with the intent to incite or produce imminent violent conduct, the person desecrates the flag under circumstances likely to incite or produce imminent violent conduct. Note that the person must actually intend to produce imminent violence by his or her actions, and that the actions must be taken under circumstances likely to produce such conduct. This is the standard set by the U.S. Supreme Court for laws that have the effect of restricting speech. The First Amendment does not give a person the right to intentionally attempt to incite imminent violence under circumstances likely to do so.

Section 2: This section corresponds to section 1 of SSSB 333. It amends that section in three major ways: first, it provides an affirmative defense to charges of flag desecration if the conduct consisted of the disposal of a flag because it had become worn or soiled. Second, it provides that a first offender shall be given a sentence consisting of 100 hours of community service. A person convicted of subsequent acts of flag desecration would face a maximum sentence of up to 90 days in jail or a \$1000 fine. Third, it deletes the requirement that the desecration take place publicly within 100 feet of a displayed flag.

Section 3: This section contains definitions. "Desecrate," is defined in a way similar to the definition contained in the new federal flag desecration law. Only specified acts are prohibited; the phrase "or otherwise physically mistreats" contained in the SSSB 333 definition has been deleted for being overly vague.

"Flag" is defined in a way to include only those objects that are ordinarily thought of as flags; the definition clearly excludes items such as patches, reproductions of flags in a non-fabric medium such as pictures or cakes, or flag clothing.

6-1551H  
Bradley  
2/6/90

Original sponsor(s): SEN. KERTTULA, Kelly, Faiks

1 IN THE SENATE BY THE JUDICIARY COMMITTEE  
2 CS FOR SPONSOR SUBSTITUTE FOR SENATE BILL NO. 333 (Judiciary)  
3 IN THE LEGISLATURE OF THE STATE OF ALASKA  
4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the desecration of the flag of  
7 the United States or of the state; and providing for  
8 an effective date."

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

10 \* Section 1. AS 11.61.100(a) is amended to read:

11 Sec. 11.61.100. RIOT. (a) A person commits the crime of riot  
12 if,

13 (1) while participating with five or more others, the  
14 person engages in tumultuous and violent conduct in a public place and  
15 thereby causes, or creates a substantial risk of causing damage to  
16 property or physical injury to a person; or

17 (2) with intent to incite or produce imminent violent  
18 conduct, the person desecrates the flag of the United States or of the  
19 state under circumstances likely to incite or produce imminent violent  
20 conduct.

21 \* Sec. 2. AS 11.76 is amended by adding a new section to read:

22 Sec. 11.76.150. DESECRATION OF A FLAG. (a) A person commits  
23 the crime of desecration of a flag who intentionally and desecrates  
24 the flag of the United States or of the state.

25 (b) In a prosecution under (a) of this section, it is an affir-  
26 mative defense that the conduct consisted of the disposal of a flag  
27 because it was worn or soiled.

28 (c) Desecration of the flag of the United States or of the state  
29 is a class B misdemeanor.

1 (d) Upon conviction under this section the court shall impose a  
 2 sentence of 100 hours of community work if the person has not previ-  
 3 ously been convicted in this or another jurisdiction under this sec-  
 4 tion, AS 11.61.100(a)(2), or another law or ordinance with substan-  
 5 tially similar elements.

6 \* Sec. 3. AS 11.81.900(b) is amended by adding new paragraphs to read:

7 (58) "desecrate" means to deface, damage, physically defile,  
 8 burn, use as a floor or ground covering, sit upon, or trample;

9 (59) "flag" means a flag of the United States or of the  
 10 state, or a part of the flag, made of fabric, of any size, in a form  
 11 that is commonly displayed upon a pole, staff, or stick.

12 \* Sec. 4. This Act takes effect immediately under AS 01.10.070(c).  
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BY SEN. KERTTULA, Kelly, Faiks

1 IN THE SENATE

2 SPONSOR SUBSTITUTE FOR SENATE BILL NO. 333

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the public desecration of the  
7 flag of the United States or of the state; and pro-  
8 viding for an effective date."

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

10 \* Section 1. AS 11.76 is amended by adding a new section to read:

11 Sec. 11.76.150. PUBLIC DESECRATION OF A FLAG. (a) A person  
12 commits the crime of public desecration of a flag who intentionally  
13 desecrates the flag of the United States or of the state.

14 (b) A person desecrates the flag of the United States or of the  
15 state when, within 100 feet of a displayed flag of the United States  
16 or of the state, the person defaces, damages, or otherwise physically  
17 mistreats the flag of the United States or of the state.

18 (c) Desecration of the flag of the United States or of the state  
19 is a class B misdemeanor.

20 \* Sec. 2. This Act takes effect immediately under AS 01.10.070(c).

*Define flag to be a flag*

6-1551H  
Bradley  
2/21/90

Original sponsor(s): SEN. KERTTULA, Kelly, Faiks

1 IN THE SENATE BY THE JUDICIARY COMMITTEE  
 2 CS FOR SPONSOR SUBSTITUTE FOR SENATE BILL NO. 333 (Judiciary)  
 3 IN THE LEGISLATURE OF THE STATE OF ALASKA  
 4 SIXTEENTH LEGISLATURE - SECOND SESSION  
 5 A BILL

6 For an Act entitled: "An Act relating to the <sup>misuse</sup>~~desecration~~ of the flag of  
 7 the United States or of the state; and providing for  
 8 an effective date."

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

10 \* Section 1. AS 11.61.100(a) is amended to read:

11 Sec. 11.61.100. RIOT. (a) A person commits the crime of riot  
 12 if,

13 (1) while participating with five or more others, the  
 14 person engages in tumultuous and violent conduct in a public place and  
 15 thereby causes, or creates a substantial risk of causing damage to  
 16 property or physical injury to a person; or

17 (2) with intent to incite or produce imminent violent  
 18 conduct, the person <sup>misuses</sup>~~desecrates~~ the flag of the United States or of the  
 19 state under circumstances likely to incite or produce imminent violent  
 20 conduct.

21 \* Sec. 2. AS 11.76 is amended by adding a new section to read:

22 Sec. 11.76.150. <sup>MISUSE</sup>~~DESECRATION~~ OF A FLAG. (a) A person commits  
 23 the crime of <sup>misuse</sup>~~desecration~~ of a flag who intentionally <sup>misuses</sup>~~desecrates~~ the  
 24 flag of the United States or of the state.

25 (b) In a prosecution under (a) of this section, it is an affir-  
 26 mative defense that the conduct consisted of the disposal of a flag  
 27 because it was worn or soiled.

28 (c) <sup>Misuse</sup>~~Desecration~~ of the flag of the United States or of the state  
 29 is a class B misdemeanor.

1 (d) Upon conviction under this section the court shall impose  
2 only a sentence of up to 100 hours of community work if the person has  
3 not previously been convicted in this or another jurisdiction under  
4 this section, AS 11.61.100(a)(2), or another law or ordinance with  
5 substantially similar elements.

6 \* Sec. 3. AS 11.81.900(b) is amended by adding new paragraphs to read:

7 (58) "<sup>Misuse</sup>~~desecrate~~" means to deface, damage, physically defile,  
8 burn, use as a floor or ground covering, sit upon, or trample;

9 (59) "flag" means a flag of the United States or of the  
10 state, or a part of the flag, made of fabric, of any size, in a form  
11 that is commonly displayed upon a pole, staff, or stick.

12 \* Sec. 4. When the Department of Law evaluates a specific case for  
13 prosecution under AS 11.61.100(a)(2) as amended in sec. 1 of this Act or  
14 under AS 11.76.150 as added in sec. 2 of this Act, it shall consider the  
15 standards for the review of such laws established by the United States  
16 Supreme Court.

17 \* Sec. 5. This Act takes effect immediately under AS 01.10.070(c).  
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6-1551H  
Bradley  
2/21/90

Original sponsor(s): SEN. KERTTULA, Kelly, Faiks

1 IN THE SENATE BY THE JUDICIARY COMMITTEE

2 CS FOR SPONSOR SUBSTITUTE FOR SENATE BILL NO. 333 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE .. SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the desecration of the flag of  
7 the United States or of the state; and providing for  
8 an effective date."

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

10 \* Section 1. AS 11.61.100(a) is amended to read:

11 Sec. 11.61.100. RIOT. (a) A person commits the crime of riot  
12 if,

13 (1) while participating with five or more others, the  
14 person engages in tumultuous and violent conduct in a public place and  
15 thereby causes, or creates a substantial risk of causing damage to  
16 property or physical injury to a person; or

17 (2) with intent to incite or produce imminent violent  
18 conduct, the person desecrates the flag of the United States or of the  
19 state under circumstances likely to incite or produce imminent violent  
20 conduct.

21 \* Sec. 2. AS 11.76 is amended by adding a new section to read:

22 Sec. 11.76.150. DESECRATION OF A FLAG. (a) A person commits  
23 the crime of desecration of a flag who intentionally desecrates the  
24 flag of the United States or of the state.

25 (b) In a prosecution under (a) of this section, it is an affir-  
26 mative defense that the conduct consisted of the disposal of a flag  
27 because it was worn or soiled.

28 (c) Desecration of the flag of the United States or of the state  
29 is a class B misdemeanor.

1 (d) Upon conviction under this section the court shall impose  
2 only a sentence of up to 100 hours of community work if the person has  
3 not previously been convicted in this or another jurisdiction under  
4 this section, AS 11.61.100(a)(2), or another law or ordinance with  
5 substantially similar elements.

6 \* Sec. 3. AS 11.81.900(b) is amended by adding new paragraphs to read:

7 (58) "desecrate" means to deface, damage, physically defile,  
8 burn, use as a floor or ground covering, sit upon, or trample;

9 (59) "flag" means a flag of the United States or of the  
10 state, or a part of the flag, made of fabric, of any size, in a form  
11 that is commonly displayed upon a pole, staff, or stick.

12 \* Sec. 4. When the Department of Law evaluates a specific case for  
13 prosecution under AS 11.61.100(a)(2) as amended in sec. 1 of this Act or  
14 under AS 11.76.150 as added in sec. 2 of this Act, it shall consider the  
15 standards for the review of such laws established by the United States  
16 Supreme Court.

17 \* Sec. 5. This Act takes effect immediately under AS 01.10.070(c).  
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STATE OF ALASKA  
THE LEGISLATURE

POUCH Y STATE CAPITOL  
JUNEAU ALASKA 99801  
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

January 11, 1990


RECEIVED

JAN 11 1990

JAN FAIKS  
SENATE OFFICE

SUBJECT: Desecration of certain flags  
(SSSB 333)

TO: Senator Jan Faiks

FROM: Richard A. Bradley  
Legislative Counsel 

You have asked that I comment briefly on the issues arising under the flag desecration case decided by the U.S. Supreme Court last summer.

One common error concerning Texas v. Johnson, U.S., 57 U.S.L.W. 4770, is that, with the Johnson ruling, the Texas law became unconstitutional, as did the provisions in forty-seven other states.

A careful reading of the Johnson case suggests that the Court did not declare the law unconstitutional; in fact, in the Johnson case and three of the cases that prefigured the Johnson case in the U.S. Supreme Court, the Court has not declared the underlying subject law unconstitutional. It is not the law but the conduct involving speech or communication protected by the First Amendment that requires that the conviction be reversed. In footnote 3 of the Johnson opinion, Justice Brennan notes:

Although Johnson has raised a facial challenge to Texas' flag-desecration statute, we choose to resolve this case on the basis of his claim that the statute as applied to him violates the First Amendment. Section 42.09 regulates only physical conduct with respect to the flag, not the written or spoken word, and although one violates the statute only if one "knows" that one's physical treatment of the flag "will seriously offend one or more persons likely to observe or discover his action," Tex. Penal Code Ann. Sec. 42.09(b) (1989), this fact does not necessarily mean that the statute applies only to expressive conduct protected by the

Senator Jan Faiks  
Page 2  
January 11, 1990

First Amendment. \* \* \* A tired person might, for example, drag the flag through the mud, knowing that this conduct is likely to offend others, and yet have no thought of expressing any idea; . . ." (Emphasis in original.)

Johnson was thus consistent with the earlier cases where the Court reverses the conviction but does not seek to invalidate the law. See Street v. New York, 394 U.S. 576 (1969), Smith v. Goguen, 415 U.S. 566 (1973), and Spence v. Washington, 418 U.S. 405 (1974)

SSSB 333 is constitutional.

You will note, of course, that while the laws remain constitutional, it will continue to be difficult to obtain convictions for their violation when speech or action affected by First Amendment claims are involved.

If I may be of further assistance, please advise.

RAB:lmb  
L9/037

STATE OF ALASKA  
THE LEGISLATURE

POUCHY STATE CAPITOL  
JUNEAU ALASKA 99801  
907 465 3800


LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M

February 21, 1990

SUBJECT: Desecration of flags  
(Work Order No. 6-S333)

TO: Senator Jan Faiks  
Chair, Senate Judiciary Committee

FROM: Richard A. Bradley  
Legislative Counsel 

While Chris requested the amendment as "temporary law," it seemed that the ideas should be incorporated into permanent law. Because of Chris' specific request that it be drafted as "temporary law," we have provided it to the committee as requested.

Although we provided the language of Sec. 11.76.150(d) to you in an earlier draft, we believe that a comment should be made on it. The language was ambiguous; it failed to address where the subsection fits into the sentencing: Is (d) additional to or in place of the normal "class B misdemeanor" penalties for the first offender? The draft now addresses that question.

If I may be of further assistance, please advise.

RAB:pl  
WKP2/070

Enclosure

FW

PM-Flag Case, 1st Ld-Writethru, 049,580

Flag-Burning Statute Suffers Another Setback

EDS: CORRECTS spelling of Kunstler in last three grafs

By JAMES ROWLEY=

Associated Press Writers

WASHINGTON (AP) — Opponents of a new federal law making it a crime to burn the American flag scored another victory when a second federal judge ruled that the statute runs afoul of the Constitution.

But Monday's ruling by U.S. District Judge June Green here also gives proponents of a constitutional amendment to ban flag burning more political ammunition for their cause.

President Bush endorsed the amendment route to undo last year's Supreme Court ruling that struck down a Texas flag-burning law, saying he was unsure that the statute Congress passed instead would survive court challenges.

So far, Bush and other supporters of a constitutional amendment have been proven correct.

For the second time in three weeks, the law was held unconstitutional by a federal jurist and flag-burning charges were dismissed against protesters.

The ruling by Judge Green and a similar one Feb. 21 by U.S. District Judge Dana R. Rothstein in Seattle set the stage for another fight in the Supreme Court over the issue.

The Justice Department has already filed a notice of its intention to appeal the Seattle ruling. Spokesman David Runkel said department officials had not seen the most recent decision but would seek high-court review if it were similar to the Seattle ruling.

The law provides for direct appeal of district-court rulings to the Supreme Court. Such rulings have legal effect only in the geographical area covered by the district court.

In Monday's decision, Green held that flag burning is a form of political speech protected by the First Amendment. She rejected the Justice Department's contention that the law was enacted to protect the flag, not regulate speech.

"However compelling the government may see its interests, they cannot justify restrictions on speech which shake the very cornerstone of the First Amendment," the judge wrote.

"For in protecting the flag for those who wish to wave it in support of these causes, but preventing the defendants from burning it in opposition, the government has created a regulation which cannot be justified without reference to the content of the defendants' message," she wrote.

Green dismissed flag-burning charges against Shawn D. Eichmann, David G. Blalock and Scott W. Tyler. The three were arrested last Oct. 30 after they set several flags on fire during a protest outside the U.S. Capitol.

Conviction under the law carries a one-year sentence.

"The right to dissent is sometimes an albatross which burdens our society with its offensive sounds. Yet, political dissent lies at the heart of the First Amendment's protection," Green wrote.

It "would not be needed if the persons who exercise their right of free expression by word and action were all pleasing, lovable persons with whom the rest of the citizens agreed," she said.

"The First Amendment, of course, makes no invidious exceptions. It provides protection for everyone, including the defendants."

William Kunstler, a New York attorney who handled both the Washington and Seattle cases for the Center for Constitutional Rights, hailed the ruling, saying: "We have knocked out an offensive statute in the area of the First Amendment."

But Kunstler predicted that there would be a long fight over passage of a constitutional amendment if both the Washington and Seattle rulings are upheld by the Supreme Court.

"We passed phase one, we are going into phase two," Kunstler said. "If we win, we go into phase three, which is this horrible amendment, which the president is sitting back and licking his chops

ra

^PM-Flag Burning, 2nd Ld - Writethru, a0474,0690

^Law Against Flag-Burning Unconstitutional, Judge Rules

^Eds: RECASTS lead to reflect that law is not overturned nationally by a district judge's ruling. SUBS grafs 16-18 bgng 'House Speaker' with 3 grafs to UPDATE with Sen. Mitchell commencing, adds background on charges of destruction of government property.

^By KATIA BLACKBURN=

^Associated Press Writer=

SEATTLE (AP) - A federal judge declared unconstitutional a law passed by Congress to prohibit flag desecration, ruling that Americans' right to burn their flag must be protected as energetically as their right to wave it.

Prosecutors said the challenge to the Flag Protection Act of 1989 may be appealed directly to the U.S. Supreme Court.

In dismissing flag burning charges against four people, U.S. District Judge Barbara Rothstein on Wednesday ruled that the new federal law is unconstitutional.

"In order for the flag to endure as a symbol of freedom in this nation, we must protect with equal vigor the right to destroy it and the right to wave it," she said.

Mark Haggerty, Jennifer Campbell, Darius Strong and Carlos Garza were charged with burning a U.S. flag outside a Seattle post office shortly after midnight on Oct. 28, the day the flag protection law went into effect.

After the ruling, Strong set a flag on fire on the steps of the U.S. Courthouse and spat on it as it burned.

He released a statement, with Garza and Campbell, that called the ruling a "real victory for righteous people everywhere."

The case is the first constitutional challenge to the law, according to David Cole of the Center for Constitutional Rights in New York, which represented the four defendants.

Assistant U.S. Attorney Mark Bartlett said the U.S. Attorney's office, the Department of Justice and the Solicitor General will decide whether to appeal directly to the Supreme Court, an avenue provided for in the law, or to try the four demonstrators on another charge.

The center planned to argue the same issue today in a district court in Washington, D.C., in a case involving three people who burned flags on the steps of the Capitol, Cole said.

He predicted both cases would end up before the Supreme Court.

Congress passed the new law after the Supreme Court last June overturned a Texas flag-burning conviction against Gregory Lee Johnson. Johnson, who burned a flag at the 1984 Republican National Convention, was among the spectators at a Feb. 14 hearing before Rothstein.

Rothstein cited the Johnson case in her decision, saying it supported the conclusion that Congress is outlawing certain forms of expression under the Flag Protection Act.

"The principle underlying the Supreme Court's decision last summer was that the government can't compel people under penalty of imprisonment to be patriotic and Rothstein's decision recognizes that Congress' new law does exactly that," said Cole, who called the decision "wonderful."

The legislation prohibiting flag desecration was pushed by Democratic congressional leadership in opposition to a Republican plan for a constitutional amendment.

Senate Majority Leader George Mitchell, D-Maine, said in Washington today, "I wouldn't get too worked up about a district court ruling. It's what we all expected." The only significance to the ruling, he added, is "getting it (the issue) in a posture where it now will go ... directly to the Supreme Court."

The four defendants had pleaded innocent and moved to have the flag desecration charges dismissed on grounds the act violates the First Amendment.

Each of the four also was charged with one count of destruction of U.S. government property, as the demonstration escalated from the burning of small paper flags to burning a flag on the post office flagpole. Rothstein was asked only to dismiss the desecration charges and that is what she did in holding the law unconstitutional.

The flag desecration and destruction of property counts each carry a maximum penalty of one year in prison and a \$100,000 fine.

Prosecutors were meeting to decide whether to take the remaining count of property destruction to trial or take the issue directly to the Supreme Court.

ap-ag-02-22-90 0746ast

PUBLIC LAW 101-131 [H.R. 2978]; October 28, 1989

FLAG PROTECTION ACT OF 1989

An Act to amend section 700 of title 18, United States Code, to protect the physical integrity of the flag.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Flag Protection Act of 1989".

SEC. 2. CRIMINAL PENALTIES WITH RESPECT TO THE PHYSICAL INTEGRITY OF THE UNITED STATES FLAG.

(a) IN GENERAL.—Subsection (a) of section 700 of title 18, United States Code, is amended to read as follows:

"(a)(1) Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.

"(2) This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled."

(b) DEFINITION.—Section 700(b) of title 18, United States Code, is amended to read as follows:

"(b) As used in this section, the term 'flag of the United States' means any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed."

SEC. 3. EXPEDITED REVIEW OF CONSTITUTIONAL ISSUES.

Section 700 of title 18, United States Code, is amended by adding at the end the following:

"(d)(1) An appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order issued by a United States district court ruling upon the constitutionality of subsection (a).

"(2) The Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal and advance on the docket and expedite to the greatest extent possible."

Approved October 28, 1989.

Care for Handicapped Children (U.S.C. 5117) is amended by and inserting the following: "Primary Child Care for Children Act of 1986'."

shall take effect October 1, of this Act, whichever occurs

tion and Labor).

ended, in lieu of S. 1454. part.

TEXAS, Petitioner

v

GREGORY LEE JOHNSON

491 US —, 105 L Ed 2d 342, 109 S Ct —

[No. 88-155]

Argued March 21, 1989. Decided June 21, 1989.

**Decision:** Conviction of protester for burning American flag as part of political demonstration held to violate Federal Constitution's First Amendment.

## SUMMARY

While the 1984 Republican National Convention was taking place in Dallas, Texas, a group of people staged a political demonstration in Dallas to protest the policies of the President of the United States, who was being nominated by the Convention for re-election, and of certain Dallas-based corporations. During the course of that demonstration, one of the protesters (1) accepted an American flag handed to him by a fellow protester, who had taken the flag from a pole outside one of the targeted buildings, (2) doused the flag with kerosene, and (3) set the flag on fire. While the flag burned, the protesters chanted, "America, the red, white, and blue, we spit on you." The protester who allegedly had burned the flag was subsequently prosecuted in a Texas trial court for that act and was convicted of violating a state statute which (1) prohibited the desecration of, among other things, a state or national flag, and (2) defined desecration as the physical mistreatment of such objects in a way which the actor knows will seriously offend one or more persons likely to observe or discover the act. Several witnesses testified that they had been seriously offended by the flag burning. The defendant protester appealed his conviction on the ground, among others, that the application of the state statute violated his right to freedom of speech under the Federal Constitution's First Amendment. In affirming the conviction, the Court of Appeals for the Fifth District of Texas at Dallas ruled that the defendant protester's flag burning constituted symbolic speech requiring First Amendment scrutiny, but concluded that the desecration statute nevertheless could be upheld as a legitimate and constitutional means of (1)

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protecting the public peace, because acts of flag desecration are, of themselves, so inherently inflammatory that the state may act to prevent breaches of the peace, and (2) realizing the state's legitimate and substantial interest in protecting the flag as a symbol of national unity (706 SW2d 120). The Court of Criminal Appeals of Texas, however, held that the desecration statute as applied violated the defendant protester's First Amendment rights, because the statute (1) was too broad for First Amendment purposes as it related to breaches of the peace, and (2) was not adequately supported by the state's purported interest in preserving a symbol of unity; therefore, the court reversed the decisions below and remanded the case to the trial court with instructions to dismiss the information (755 SW2d 92).

On certiorari, the United States Supreme Court affirmed. In an opinion by BRENNAN, J., joined by MARSHALL, BLACKMUN, SCALIA, and KENNEDY, JJ., it was held that ~~the conviction of the defendant-protester was inconsistent with the First Amendment under the particular circumstances presented,~~ because (1) the protester's conduct was sufficiently imbued with elements of communication to implicate the First Amendment, given that this flag burning was the culmination of a political demonstration and that the state conceded that the protester's conduct was expressive; (2) the state's interest in preventing breaches of the peace was not implicated on the record in this case, since (a) no disturbance of the peace actually occurred or threatened to occur because of the flag burning, (b) it cannot be presumed that an audience which takes serious offense at a particular expression is necessarily likely to disturb the peace, and (c) the flag burning does not fall within the small class of "fighting words" that are likely to provoke the average person to retaliation and thereby cause a breach of the peace; and (3) the state's asserted interest in preserving the flag as a symbol of nationhood and national unity does not justify the conviction, since (a) the attempted restriction on expression is content-based, and thus subject to the most exacting scrutiny, given that the flag-desecration statute is aimed not at protecting the physical integrity of the flag in all circumstances, but only against impairments that would cause serious offense to others, and is aimed at protecting onlookers from being offended by the ideas expressed by the prohibited activity, and (b) although the state has a legitimate interest in encouraging proper treatment of the flag, it may not foster its own view of the flag by prohibiting expressive conduct relating to it and by criminally punishing a person for burning the flag as a means of political protest.

KENNEDY, J., concurred, expressing the view that the First Amendment compels the result reached in this case, regardless of how distasteful that result may be to the Justices who announce it, because the defendant protester's acts were speech in both the technical and the fundamental meaning of the Federal Constitution.

REHNQUIST, Ch. J., joined by WHITE and O'CONNOR, JJ., dissented, expressing the view that (1) the Texas statute is not invalid under the First Amendment as applied in this case, because (a) the American flag has come to be the visible symbol embodying our nation and is not simply another

idea or point of view competing for recognition in the marketplace of ideas, and (b) the public burning of the American flag in this case was no essential part of any exposition of ideas and had a tendency to incite a breach of the peace, for flag burning is the equivalent of an inarticulate grunt or roar that is most likely to be indulged in not to express any particular idea, but to antagonize others, and the statute thus deprived the defendant protester of only one rather inarticulate symbolic form of protest—a form of protest that was profoundly offensive to many—and left him with a full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy; and (2) the statute is not unconstitutionally vague or overbroad.

STEVENS, J., dissented, expressing the view that (1) sanctioning the desecration of the flag will tarnish its value as a national symbol, a tarnish which is not justified by the trivial burden on free expression that is occasioned by requiring that alternative modes of expression be employed; (2) the flag-desecration statute does not prescribe orthodox views or compel any conduct or expression of respect for any idea or symbol; and (3) the defendant protester in this case was prosecuted not for his criticism of government policies, but for the method he chose to express those views, and a prohibition against that method is supported by a legitimate interest in preserving the quality of an important national asset.

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### HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

**Constitutional Law §§ 934, 935, 960; Evidence § 419 — free speech — flag burning — provoking public disturbance — presumption**

1a-1i. The conviction of a protester for burning an American flag, in violation of a state statute which prohibits the desecration of the flag and which defines desecration as physical mistreatment which the actor knows will seriously offend one or more persons likely to observe or discover the action, is inconsistent with the free speech guarantee of the Federal Constitution's First Amendment under the particular circumstances presented, where (1) the protester's conduct is sufficiently imbued with elements of communication to implicate the First Amendment, given that this flag burning was the culmination of a political demonstration protesting the policies of a President of the United States who was then being nominated for re-election in the city where the demonstration occurred, and the policies of various corporations based in

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12 Am Jur 2d, Breach of Peace and Disorderly Conduct § 8;  
16A Am Jur 2d, Constitutional Law §§ 507-511, 513, 514,  
516; 35 Am Jur 2d, Flag §§ 3-5

USCS, Constitution, Amendment 1

US L Ed Digest, Constitutional Law §§ 934, 935, 960

Index to Annotations, Breach of Peace and Disorderly Conduct; Fighting Words; Flags; Freedom of Speech and Press

**VERALEX®**: Cases and annotations referred to herein can be further researched through the VERALEX electronic retrieval system's two services, Auto-Cite® and SHOWME®. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references. Use SHOWME to display the full text of cases and annotations.

#### ANNOTATION REFERENCES

Supreme Court's view as to the protection or lack of protection, under the Federal Constitution, of the utterance of "fighting words." 39 L Ed 2d 925.

Constitutionality of statutes, ordinances, or administrative provisions prohibiting defiance, disrespect, mutilation, or misuse of American flag. 22 L Ed 2d 972.

The Supreme Court and the right of free speech and press. 93 L Ed 1151, 2 L Ed 2d 1706, 11 L Ed 2d 1116, 16 L Ed 2d 1053, 21 L Ed 2d 976.

What constitutes violation of flag desecration statutes. 41 ALR3d 502.

that city, and given that the state conceded that the protester's conduct was expressive; (2) the interest in preventing breaches of the peace, asserted by the state as justifying the individual's conviction, is not implicated on the record in this case, because (a) no disturbance of the peace actually occurred or threatened to occur because of the flag burning, (b) the only evidence as to onlookers' reactions was the testimony of several persons who were seriously offended by the flag burning, (c) it cannot be presumed that an audience which takes serious offense at a particular expression is necessarily likely to disturb the peace, and (d) the flag burning does not fall within the small class of "fighting words" that are likely to provoke the average person to retaliation and thereby cause a breach of the peace; and (3) the state's asserted interest in preserving the flag as a symbol of nationhood and national unity does not justify the protester's conviction, since (a) the attempted restriction on expression is content-based, and thus subject to the most exacting scrutiny, given that the flag-desecration statute is aimed not at protecting the physical integrity of the flag in all circumstances, but only against impairments that would cause serious offense to others, and is aimed at protecting onlookers from being offended by the ideas expressed by the prohibited activity, and (b) although the state has a legitimate interest in encouraging proper treatment of the flag, it may not foster its own view of the flag by prohibiting expressive conduct relating to it and by criminally punishing a person for burning the flag as a means of political protest. (Rehnquist, Ch. J., and White,

O'Connor, and Stevens, JJ., dissented from this holding.)

Appeal § 1600; Constitutional Law § 960; Trial § 288 — free speech — flag burning — related speech — instruction on aiding and abetting — reversible error

2a, 2b. Although the jury, in the state court prosecution of a protester for burning the American flag—in violation of a state statute which makes it a crime to desecrate the flag, but does not on its face permit conviction for remarks critical of the flag or its referents—was instructed in accordance with the state's law of parties that a person is criminally responsible for an act committed by another if he or she solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense with the intent of promoting or assisting the commission of the offense, this instruction could not have led the jury, in violation of the individual's rights under the Federal Constitution's First Amendment, to convict the protester solely for his words in leading chants denouncing the flag while it burned, where (1) this instruction was offered by the prosecution, because the individual's defense was that he was not the person who had burned the flag in question, (2) the instruction does not permit a conviction merely for the pejorative nature of the individual's words, and (3) the words themselves—"America, the red, white, and blue, we spit on you"—do not encourage the burning of the flag as the instruction seems to require; given the additional fact that the bulk of the prosecutor's argument, which mentioned that the individual had led this chant, was premised on the individual's culpability as a sole actor, it is too unlikely that the jury

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convicted the individual on the basis of this alternative theory for the conviction to be reversed on this ground.

**Appeal § 732 — United States Supreme Court — review of state court decision — validity of state statute**

3a, 3b. Although an individual who has been convicted in a state court of desecrating the American flag by burning it raises a claim that the state statute under which he was convicted violates on its face the free speech provisions of the Federal Constitution's First Amendment, the United States Supreme Court, in reviewing the individual's conviction on certiorari, will address only the alternative claim that the statute violates the First Amendment as applied to political expression like that engaged in by the individual—who allegedly burned the flag, to the accompaniment of the chant "America, the red, white, and blue, we spit on you," in the course of a demonstration protesting the policies of the incumbent President of the United States, who was then being nominated for a second term in the city where the demonstration was held, and of various corporations based in that city—because (1) although one violates the statute, according to its terms, only if one knows that one's physical mistreatment of the flag will seriously offend one or more persons likely to observe or discover this action, this does not necessarily mean that the statute applies only to expressive conduct protected by the First Amendment; (2) the prosecution of a person who had not engaged in expressive conduct would pose a different case; and (3) the case can be disposed of on narrower grounds.

**Constitutional Law § 934 — free speech — regulation of expressive conduct**

4. Under the Federal Constitution's First Amendment, the government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word, but it may not proscribe particular conduct because that conduct has expressive elements; a law directed at the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires; in short, it is not simply the verbal or nonverbal nature of the expression, but the governmental interest at stake, that helps to determine whether a restriction on that expression is valid.

**Appeal § 1662 — effect of decision on other grounds**

5a, 5b. The United States Supreme Court—in reviewing on certiorari the state court criminal conviction of an individual who is charged with desecrating an American flag by burning it and who claims that his act was expressive conduct protected by the Federal Constitution's First Amendment—need not consider the individual's argument that the state's interest in preventing breaches of the peace, asserted as justifying the conviction, is related to the suppression of free expression in that the violent reaction to flag burnings feared by the state would be the result of the message conveyed by them, where the Supreme Court finds that this interest is not implicated on the particular facts of the case.

**Constitutional Law § 934 — free speech — prosecution for expressive conduct**

6. Under the Federal Constitu-

tion's First Amendment, where a court is confronted with a case of prosecution for the expression of an idea through activity, the court must examine with particular care the interests advanced to support the prosecution.

**Constitutional Law §§ 935, 960 — free speech — flag burning — audience reaction**

7a, 7b. For purposes of the free speech clause of the Federal Constitution's First Amendment, there is no distinction of constitutional significance between (1) a state flag-desecration statute which is violated only when one physically mistreats the American flag in a way that he or she "knows" will offend others—so that a conviction for flag burning under that statute purportedly does not depend on onlookers' actual reactions, but on the actor's intent—and (2) a statute which depends on actual audience reaction.

**Constitutional Law § 935 — free speech — offensiveness**

8. Under the Federal Constitu-

tion's First Amendment, the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.

**Constitutional Law §§ 925, 961 — freedom of speech and religion**

9. Under the Federal Constitution, no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

**Constitutional Law § 934 — free speech — regulation — mode of expression**

10. The rule, under the Federal Constitution's First Amendment, that the government may not prohibit expression simply because it disagrees with its message, is not dependent on the particular mode in which one chooses to express an idea.

**SYLLABUS BY REPORTER OF DECISIONS**

During the 1984 Republican National Convention, respondent Johnson participated in a political demonstration to protest the policies of the Reagan administration and some Dallas-based corporations. After a march through the city streets, Johnson burned an American flag while protesters chanted. No one was physically injured or threatened with injury, although several witnesses were seriously offended by the flag-burning. Johnson was convicted of desecration of a venerated object in violation of a Texas statute, and a state court of appeals affirmed. However, the Texas Court of Criminal Appeals reversed, holding that the

State, consistent with the First Amendment, could not punish Johnson for burning the flag in these circumstances. The court first found that Johnson's burning of the flag was expressive conduct protected by the First Amendment. The court concluded that the State could not criminally sanction flag desecration in order to preserve the flag as a symbol of national unity. It also held that the statute did not meet the State's goal of preventing breaches of the peace, since it was not drawn narrowly enough to encompass only those flag-burnings that would likely result in a serious disturbance, and since the flag-burning in this case

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did not threaten such a reaction. Further, it stressed that another Texas statute prohibited breaches of the peace and could be used to prevent disturbances without punishing this flag desecration.

*Held:* Johnson's conviction for flag desecration is inconsistent with the First Amendment.

(a) Under the circumstances, Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment. The State conceded that the conduct was expressive. Occurring as it did at the end of a demonstration coinciding with the Republican National Convention, the expressive, overtly political nature of the conduct was both intentional and overwhelmingly apparent.

(b) Texas has not asserted an interest in support of Johnson's conviction that is unrelated to the suppression of expression and would therefore permit application of the test set forth in *United States v O'Brien*, 391 US 367, 20 L Ed 2d 672, 88 S Ct 1673, whereby an important governmental interest in regulating non-speech can justify incidental limitations on First Amendment freedoms when speech and nonspeech elements are combined in the same course of conduct. An interest in preventing breaches of the peace is not implicated on this record. Expression may not be prohibited on the basis that an audience that takes serious offense to the expression may disturb the peace, since the Government cannot assume that every expression of a provocative idea will incite a riot but must look to the actual circumstances surrounding the expression. Johnson's expression of dissatisfaction with the Federal Government's policies also does not fall within the class of "fighting

words" likely to be seen as a direct personal insult or an invitation to exchange fisticuffs. This Court's holding does not forbid a State to prevent "imminent lawless action" and, in fact, Texas has a law specifically prohibiting breaches of the peace. Texas' interest in preserving the flag as a symbol of nationhood and national unity is related to expression in this case and, thus, falls outside the O'Brien test.

(c) The latter interest does not justify Johnson's conviction. The restriction on Johnson's political expression is content-based, since the Texas statute is not aimed at protecting the physical integrity of the flag in all circumstances, but is designed to protect it from intentional and knowing abuse that causes serious offense to others. It is therefore subject to "the most exacting scrutiny." *Boos v Barry*, 485 US 312, 99 L Ed 2d 333, 108 S Ct 1157. The Government may not prohibit the verbal or nonverbal expression of an idea merely because society finds the idea offensive or disagreeable, even where our flag is involved. Nor may a State foster its own view of the flag by prohibiting expressive conduct relating to it, since the Government may not permit designated symbols to be used to communicate a limited set of messages. Moreover, this Court will not create an exception to these principles protected by the First Amendment for the American flag alone.

755 SW2d 92, affirmed.

Brennan, J., delivered the opinion of the Court, in which Marshall, Blackmun, Scalia, and Kennedy, JJ., joined. Kennedy, J., filed a concurring opinion. Rehnquist, C.J., filed a dissenting opinion, in which White and O'Connor, JJ., joined. Stevens, J., filed a dissenting opinion.

## APPEARANCES OF COUNSEL

Kathi Alyce Drew argued the cause for petitioner.

William M. Kunstler argued the cause for respondent.

## OPINION OF THE COURT

Justice Brennan delivered the opinion of the Court.

[1a] After publicly burning an American flag as a means of political protest, Gregory Lee Johnson was convicted of desecrating a flag in violation of Texas law. This case presents the question whether his conviction is consistent with the First Amendment. We hold that it is not.

## I

While the Republican National Convention was taking place in Dallas in 1984, respondent Johnson participated in a political demonstration dubbed the "Republican War Chest Tour." As explained in literature distributed by the demonstrators and in speeches made by them, the purpose of this event was to protest the policies of the Reagan administration and of certain Dallas-based corporations. The demonstrators marched through the Dallas streets, chanting political slogans and stopping at several corporate locations to stage "die-ins" intended to dramatize the consequences of nuclear war. On several occasions they spray-painted the walls of buildings and overturned potted plants, but Johnson himself took no part in

such activities. He did, however, accept an American flag handed to him by a fellow protestor who had taken it from a flag pole outside one of the targeted buildings.

The demonstration ended in front of Dallas City Hall, where Johnson unfurled the American flag, doused it with kerosene, and set it on fire. While the flag burned, the protestors chanted, "America, the red, white, and blue, we spit on you." After the demonstrators dispersed, a witness to the flag-burning collected the flag's remains and buried them in his backyard. No one was physically injured or threatened with injury, though several witnesses testified that they had been seriously offended by the flag-burning.

Of the approximately 100 demonstrators, Johnson alone was charged with a crime. The only criminal offense with which he was charged was the desecration of a venerated object in violation of Tex Penal Code Ann § 42.09 (a)(3) (1989).<sup>1</sup> After a trial, he was convicted, sentenced to one year in prison and fined \$2,000. The Court of Appeals for the Fifth District of Texas at Dallas affirmed Johnson's conviction, 706 SW2d 120 (1986), but the Texas Court of Criminal Appeals reversed, 755 SW2d 92

1. Tex Penal Code Ann § 42.09 (1989) provides in full:

"§ 42.09. Desecration of Venerated Object

"(a) A person commits an offense if he intentionally or knowingly desecrates:

"(1) a public monument;

"(2) a place of worship or burial; or

"(3) a state or national flag.

"(b) For purposes of this section, 'desecrate' means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.

"(c) An offense under this section is a Class A misdemeanor."

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(1988), holding that the State could not, consistent with the First Amendment, punish Johnson for burning the flag in these circumstances.

The Court of Criminal Appeals began by recognizing that Johnson's conduct was symbolic speech protected by the First Amendment: "Given the context of an organized demonstration, speeches, slogans, and the distribution of literature, anyone who observed appellant's act would have understood the message that appellant intended to convey. The act for which appellant was convicted was clearly 'speech' contemplated by the First Amendment." *Id.*, at 95. To justify Johnson's conviction for engaging in symbolic speech, the State asserted two interests: preserving the flag as a symbol of national unity and preventing breaches of the peace. The Court of Criminal Appeals held that neither interest supported his conviction.

Acknowledging that this Court had not yet decided whether the Government may criminally sanction flag desecration in order to preserve the flag's symbolic value, the Texas court nevertheless concluded that our decision in *West Virginia Board of Education v Barnette*, 319 US 624, 87 L Ed 1628, 63 S Ct 1178, 147 ALR 674 (1943), suggested that furthering this interest by curtailing speech was impermissible. "Recognizing that the right to differ is the centerpiece of our First Amendment freedoms," the court explained, "a government cannot mandate by fiat a feeling of unity in its citizens. Therefore, that very same government cannot carve out a symbol of unity and prescribe a set of approved messages to be associated

with that symbol when it cannot mandate the status or feeling the symbol purports to represent." 755 SW2d, at 97. Noting that the State had not shown that the flag was in "grave and immediate danger," *Barnette*, supra, at 639, 87 L Ed 1628, 63 S Ct 1178, 147 ALR 674, of being stripped of its symbolic value, the Texas court also decided that the flag's special status was not endangered by Johnson's conduct. 755 SW2d, at 97.

As to the State's goal of preventing breaches of the peace, the court concluded that the flag-desecration statute was not drawn narrowly enough to encompass only those flag-burnings that were likely to result in a serious disturbance of the peace. And in fact, the court emphasized, the flag burning in this particular case did not threaten such a reaction. "'Serious offense' occurred," the court admitted, "but there was no breach of peace nor does the record reflect that the situation was potentially explosive. One cannot equate 'serious offense' with incitement to breach the peace." *Id.*, at 96. The court also stressed that another Texas statute, *Tex Penal Code Ann* § 42.01 (1989), prohibited breaches of the peace. Citing *Boos v Barry*, 485 US 312, 99 L Ed 2d 333, 108 S Ct 1157 (1988), the court decided that § 42.01 demonstrated Texas' ability to prevent disturbances of the peace without punishing this flag desecration. 755 SW2d, at 96.

Because it reversed Johnson's conviction on the ground that § 42.09 was unconstitutional as applied to him, the state court did not address Johnson's argument that the statute was, on its face, unconstitutionally vague and overbroad. We granted

certiorari, 488 US —, 102 L Ed 2d 245, 109 S Ct 257 (1988). and now affirm.

## II

[2a, 3a] Johnson was convicted of flag desecration for burning the flag rather than for uttering insulting words.<sup>2</sup> This fact somewhat complicates our consideration of his conviction under the First Amendment. We must first determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction. See, e.g., *Spence v Washington*, 418 US 405, 409-411, 41 L Ed 2d 842, 94 S Ct

2727 (1974). If his conduct was expressive, we next decide whether the State's regulation is related to the suppression of free expression. See, e.g., *United States v O'Brien*, 391 US 367, 377, 20 L Ed 2d 672, 88 S Ct 1673 (1968); *Spence*, supra, at 414, n 8, 41 L Ed 2d 842, 94 S Ct 2727. If the State's regulation is not related to expression, then the less stringent standard we announced in *United States v O'Brien* for regulations of noncommunicative conduct controls. See *O'Brien*, supra, at 377, 20 L Ed 2d 672, 88 S Ct 1673. If it is, then we are outside of *O'Brien's* test, and we must ask whether this interest justifies Johnson's conviction under a more demanding standard.<sup>3</sup> See

2. [2b] Because the prosecutor's closing argument observed that Johnson had led the protestors in chants denouncing the flag while it burned, Johnson suggests that he may have been convicted for uttering critical words rather than for burning the flag. Brief for Respondent 33-34. He relies on *Street v New York*, 394 US 576, 578, 22 L Ed 2d 572, 89 S Ct 1354 (1969), in which we reversed a conviction obtained under a New York statute that prohibited publicly defying or casting contempt on the flag "either by words or act" because we were persuaded that the defendant may have been convicted for his words alone. Unlike the law we faced in *Street*, however, the Texas flag-desecration statute does not on its face permit conviction for remarks critical of the flag, as Johnson himself admits. See Brief for Respondent 34. Nor was the jury in this case told that it could convict Johnson of flag desecration if it found only that he had uttered words critical of the flag and its referents.

Johnson emphasizes, though, that the jury was instructed—according to Texas' law of parties—that "a person is criminally responsible for an offense committed by the conduct of another if acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense." Brief for Respondent 2, n 2, quoting 1 Record 49. The State offered this instruction because Johnson's defense was that he was not the person who had burned the flag. Johnson did

not object to this instruction at trial, and although he challenged it on direct appeal, he did so only on the ground that there was insufficient evidence to support it. 706 SW2d 120, 124 (Tex App 1986). It is only in this Court that Johnson has argued that the law-of-parties instruction might have led the jury to convict him for his words alone. Even if we were to find that this argument is properly raised here, however, we would conclude that it has no merit in these circumstances. The instruction would not have permitted a conviction merely for the pejorative nature of Johnson's words, and those words themselves did not encourage the burning of the flag as the instruction seems to require. Given the additional fact that "the bulk of the State's argument was premised on Johnson's culpability as a sole actor," *ibid.*, we find it too unlikely that the jury convicted Johnson on the basis of this alternative theory to consider reversing his conviction on this ground.

3. [3b] Although Johnson has raised a facial challenge to Texas' flag-desecration statute, we choose to resolve this case on the basis of his claim that the statute as applied to him violates the First Amendment. Section 42.09 regulates only physical conduct with respect to the flag, not the written or spoken word, and although one violates the statute only if one "knows" that one's physical treatment of the flag "will seriously offend one or more persons likely to observe or discover his action," Tex Penal Code Ann § 42.09(b) (1989), this fact does not necessarily mean that the

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Spence, *supra*, at 411, 41 L Ed 2d 842, 94 S Ct 2727. A third possibility is that the State's asserted interest is simply not implicated on these facts, and in that event the interest drops out of the picture. See 418 US, at 414, n 8, 41 L Ed 2d 842, 94 S Ct 2727.

The First Amendment literally forbids the abridgement only of "speech," but we have long recognized that its protection does not end at the spoken or written word. While we have rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," *United States v O'Brien*, *supra*, at 376, 20 L Ed 2d 672, 88 S Ct 1673, we have acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." Spence, *supra*, at 409, 41 L Ed 2d 842, 94 S Ct 2727.

In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." 418 US, at 410-411, 41 L Ed 2d 842, 94 S Ct 2727. Hence, we have recog-

nized the expressive nature of students' wearing of black armbands to protest American military involvement in Vietnam, *Tinker v Des Moines Independent Community School Dist.* 393 US 503, 505, 21 L Ed 2d 731, 89 S Ct 733, 49 Ohio Ops 2d 222 (1969); of a sit-in by blacks in a "whites only" area to protest segregation, *Brown v Louisiana*, 383 US 131, 141-142, 15 L Ed 2d 637, 86 S Ct 719 (1966); of the wearing of American military uniforms in a dramatic presentation criticizing American involvement in Vietnam, *Schacht v United States*, 398 US 58, 26 L Ed 2d 44, 90 S Ct 1555 (1970); and of picketing about a wide variety of causes, see, e.g., *Food Employees v Logan Valley Plaza, Inc.* 391 US 308, 313-314, 20 L Ed 2d 603, 88 S Ct 1601, 45 Ohio Ops 2d 181 (1963); *United States v Grace*, 461 US 171, 176, 75 L Ed 2d 736, 103 S Ct 1702 (1983).

Especially pertinent to this case are our decisions recognizing the communicative nature of conduct relating to flags. Attaching a peace sign to the flag, Spence, *supra*, at 409-410, 41 L Ed 2d 842, 94 S Ct 2727; saluting the flag, *Barnette*, 319 US, at 632, 87 L Ed 1628, 63 S Ct 1178, 147 ALR 674; and displaying a red flag, *Stromberg v California*, 283 US 359, 368-369, 75 L Ed 1117, 51 S Ct 532, 73 ALR 1484 (1931), we have held, all may find shelter under the

statute applies only to *expressive* conduct protected by the First Amendment. Cf. *Smith v Goguen*, 415 US 566, 588, 39 L Ed 2d 605, 94 S Ct 1242 (1974) (White, J., concurring in judgment) (statute prohibiting "contemptuous" treatment of flag encompasses only expressive conduct). A tired person might, for example, drag a flag through the mud, knowing that this conduct is likely to offend others, and yet have no thought of expressing any idea; neither the language nor the Texas

courts' interpretations of the statute preclude the possibility that such a person would be prosecuted for flag desecration. Because the prosecution of a person who had not engaged in expressive conduct would pose a different case, and because we are capable of disposing of this case on narrower grounds, we address only Johnson's claim that § 42.09 as applied to political expression like his violates the First Amendment.

First Amendment. See also *Smith v Goguen*, 415 US 566, 588, 39 L Ed 2d 605, 94 S Ct 1242 (1974) (White, J., concurring in judgment) (treating flag "contemptuously" by wearing pants with small flag sewn into their seat is expressive conduct). That we have had little difficulty identifying an expressive element in conduct relating to flags should not be surprising. The very purpose of a national flag is to serve as a symbol of our country; it is, one might say, "the one visible manifestation of two hundred years of nationhood." *Id.*, at 603, 39 L Ed 2d 605, 94 S Ct 1242 (Rehnquist, J., dissenting). Thus, we have observed:

"[T]he flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design." *Barnette*, supra, at 632, 87 L Ed 1628, 63 S Ct 1178, 147 ALR 674.

Pregnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in "America."

We have not automatically concluded, however, that any action taken with respect to our flag is expressive. Instead, in characterizing such action for First Amendment purposes, we have considered the context in which it occurred. In *Spence*, for example, we emphasized that *Spence's* taping of a peace sign

to his flag was "roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy." 418 US, at 410, 41 L Ed 2d 842, 94 S Ct 2727. The State of Washington had conceded, in fact, that *Spence's* conduct was a form of communication, and we stated that "the State's concession is inevitable on this record." *Id.*, at 409, 41 L Ed 2d 842, 94 S Ct 2727.

[1b] The State of Texas conceded for purposes of its oral argument in this case that *Johnson's* conduct was expressive conduct, *Tr of Oral Arg 4*, and this concession seems to us as prudent as was Washington's in *Spence*. *Johnson* burned an American flag as part—indeed, as the culmination—of a political demonstration that coincided with the convening of the Republican Party and its renomination of Ronald Reagan for President. The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent. At his trial, *Johnson* explained his reasons for burning the flag as follows: "The American Flag was burned as Ronald Reagan was being renominated as President. And a more powerful statement of symbolic speech, whether you agree with it or not, couldn't have been made at that time. It's quite a just position [juxtaposition]. We had new patriotism and no patriotism." 5 Record 656. In these circumstances, *Johnson's* burning of the flag was conduct "sufficiently imbued with elements of communication," *Spence*, 418 US, at 409, 41 L Ed 2d 842, 94 S Ct 2727, to implicate the First Amendment.

### III

[4] The Government generally has

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a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. See *O'Brien*, 391 US at 376-377, 20 L Ed 2d 672, 88 S Ct 1673; *Clark v Community for Creative Non-Violence*, 468 US 288, 293, 82 L Ed 2d 221, 104 S Ct 3065 (1984); *Dallas v Stanglin*, 490 US —, —, 104 L Ed 2d 18, 109 S Ct 1591 (1989). It may not, however, proscribe particular conduct because it has expressive elements. "[W]hat might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate basis for singling out that conduct for proscription. A law directed at the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires." *Community for Creative Non-Violence v Watt*, 227 US App DC 19, 55-56, 703 F2d 586, 622-623 (1983) (Scalia, J., dissenting), rev'd sub nom. *Clark v Community for Creative Non-Violence*, 468 US 288, 82 L Ed 2d 221, 104 S Ct 3065 (1984) (emphasis in original). It is, in short, not simply the verbal or nonverbal nature of the expression, but the governmental interest at stake, that helps to determine whether a restriction on that expression is valid.

Thus, although we have recognized that where "'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms," *O'Brien*, supra, at 376, 20 L Ed 2d 672, 88 S Ct 1673, we have

limited the applicability of *O'Brien's* relatively lenient standard to those cases in which "the governmental interest is unrelated to the suppression of free expression." *Id.*, at 377, 20 L Ed 2d 672, 88 S Ct 1673; see also *Spence*, 418 US, at 414, n 8, 41 L Ed 2d 842, 94 S Ct 2727. In stating, moreover, that *O'Brien's* test "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions," *Clark*, supra, at 298, 82 L Ed 2d 221, 104 S Ct 3065, we have highlighted the requirement that the governmental interest in question be unconnected to expression in order to come under *O'Brien's* less demanding rule.

[1c] In order to decide whether *O'Brien's* test applies here, therefore, we must decide whether Texas has asserted an interest in support of Johnson's conviction that is unrelated to the suppression of expression. If we find that an interest asserted by the State is simply not implicated on the facts before us, we need not ask whether *O'Brien's* test applies. See *Spence*, supra, at 414, n 8, 41 L Ed 2d 842, 94 S Ct 2727. The State offers two separate interests to justify this conviction: preventing breaches of the peace, and preserving the flag as a symbol of nationhood and national unity. We hold that the first interest is not implicated on this record and that the second is related to the suppression of expression.

A

[1d, 5a] Texas claims that its interest in preventing breaches of the peace justifies Johnson's conviction

for flag desecration.<sup>4</sup> However, no disturbance of the peace actually occurred or threatened to occur because of Johnson's burning of the flag. Although the State stresses the disruptive behavior of the protestors during their march toward City Hall, Brief for Petitioner 34-36, it admits that "no actual breach of the peace occurred at the time of the flagburning or in response to the flagburning." *Id.*, at 34. The State's emphasis on the protestors' disorderly actions prior to arriving at City Hall is not only somewhat surprising given that no charges were brought on the basis of this conduct, but it also fails to show that a disturbance of the peace was a likely reaction to *Johnson's* conduct. The only evidence offered by the State at trial to show the reaction to Johnson's actions was the testimony of several persons who had been seriously offended by the flag-burning. *Id.*, at 6-7.

The State's position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis.<sup>5</sup> Our precedents do not countenance such a presumption. On the contrary, they recognize that a prin-

cipal "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v Chicago*, 337 US 1, 4, 93 L Ed 1131, 69 S Ct 894 (1949). See also *Cox v Louisiana*, 379 US 536, 551, 13 L Ed 2d 471, 85 S Ct 453 (1965); *Tinker v Des Moines Independent School Dist.* 393 US, at 508-509, 21 L Ed 2d 731, 89 S Ct 733, 49 Ohio Ops 2d 222; *Coates v Cincinnati*, 402 US 611, 615, 29 L Ed 2d 214, 91 S Ct 1686, 58 Ohio Ops 2d 481 (1971); *Hustler Magazine, Inc. v Falwell*, 485 US 46, 55-56, 99 L Ed 2d 41, 108 S Ct 876 (1988). It would be odd indeed to conclude *both* that "if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection," *FCC v Pacifica Foundation*, 438 US 726, 745, 57 L Ed 2d 1073, 98 S Ct 3026 (1978) (opinion of Stevens, J.), *and* that the Government may ban the expression of certain disagreeable ideas on the unsupported presumption that their very disagreeableness will provoke violence.

Thus, we have not permitted the Government to assume that every

4. [5b] Relying on our decision in *Boos v Barry*, 486 US 312, 99 L Ed 2d 333, 108 S Ct 1157 (1988), Johnson argues that this state interest is related to the suppression of free expression within the meaning of *United States v O'Brien*, 391 US 367, 20 L Ed 2d 672, 88 S Ct 1673 (1968). He reasons that the violent reaction to flag-burnings feared by Texas would be the result of the message conveyed by them, and that this fact connects the State's interest to the suppression of expression. Brief for Respondent 12, n 11. This view has found some favor in the lower courts. See *Monroe v State Court of Fulton County*, 739 F2d 568, 574-575 (CA11 1984).

Johnson's theory may overread *Boos* insofar as it suggests that a desire to prevent a violent audience reaction is "related to expression" in the same way that a desire to prevent an audience from being offended is "related to expression." Because we find that the State's interest in preventing breaches of the peace is not implicated on these facts, however, we need not venture further into this area.

5. There is, of course, a tension between this argument and the State's claim that one need not actually cause serious offense in order to violate § 42.09. See Brief for Petitioner 44.

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expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression, asking whether the expression "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v Ohio*, 395 US 444, 447, 23 L Ed 2d 430, 89 S Ct 1827, 48 Ohio Ops 2d 320 (1969) (reviewing circumstances surrounding rally and speeches by Ku Klux Klan). To accept Texas' arguments that it need only demonstrate "the potential for a breach of the peace," Brief for Petitioner 37, and that every flag-burning necessarily possesses that potential, would be to eviscerate our holding in *Brandenburg*. This we decline to do.

Nor does Johnson's expressive conduct fall within that small class of "fighting words" that are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Chaplinsky v New Hampshire*, 315 US 568, 574, 86 L Ed 1031, 62 S Ct 766 (1942). No reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs. See *id.*, at 572-573, 86 L Ed 1031, 62 S Ct 766; *Cantwell v Connecticut*, 310 US 296, 309, 84 L Ed 1213, 60 S Ct 900, 128 ALR 1352 (1940); *FCC v Pacifica Foundation*, *supra*, at 745, 57 L Ed 2d 1073, 98 S Ct 3026 (opinion of Stevens, J.).

We thus conclude that the State's interest in maintaining order is not implicated on these facts. The State need not worry that our holding will disable it from preserving the peace. We do not suggest that the First

Amendment forbids a State to prevent "imminent lawless action." *Brandenburg*, *supra*, at 447, 23 L Ed 2d 430, 89 S Ct 1827, 48 Ohio Ops 2d 320. And, in fact, Texas already has a statute specifically prohibiting breaches of the peace, *Tex Penal Code Ann* § 42.01 (1989), which tends to confirm that Texas need not punish this flag desecration in order to keep the peace. See *Boos v Barry*, 485 US, at 327-329, 99 L Ed 2d 333, 108 S Ct 1157.

### B

The State also asserts an interest in preserving the flag as a symbol of nationhood and national unity. In *Spence*, we acknowledged that the Government's interest in preserving the flag's special symbolic value "is directly related to expression in the context of activity" such as affixing a peace symbol to a flag. 418 US, at 414, n 8, 41 L Ed 2d 842, 94 S Ct 2727. We are equally persuaded that this interest is related to expression in the case of Johnson's burning of the flag. The State, apparently, is concerned that such conduct will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not in fact exist: that is, we do not enjoy unity as a Nation. These concerns blossom only when a person's treatment of the flag communicates some message, and thus are related "to the suppression of free expression" within the meaning of *O'Brien*. We are thus outside of *O'Brien's* test altogether.

### IV

It remains to consider whether the

State's interest in preserving the flag as a symbol of nationhood and national unity justifies Johnson's conviction.

[1e, 6] As in *Spence*, "[w]e are confronted with a case of prosecution for the expression of an idea through activity," and "[a]ccordingly, we must examine with particular care the interests advanced by [petitioner] to support its prosecution." 418 US, at 411, 41 L Ed 2d 842, 94 S Ct 2727. Johnson was not, we add, prosecuted for the expression of just any idea; he was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values. See, e.g., *Boos v Barry*, supra, at 318, 99 L Ed 2d 333, 108 S Ct 1157; *Frisby v Schultz*, 487 US —, —, 101 L Ed 2d 420, 108 S Ct 2495 (1988).

Moreover, Johnson was prosecuted because he knew that his politically charged expression would cause "serious offense." If he had burned the flag as a means of disposing of it because it was dirty or torn, he would not have been convicted of flag desecration under this Texas

law: federal law designates burning as the preferred means of disposing of a flag "when it is in such condition that it is no longer a fitting emblem for display," 36 USC § 176(k) [36 USCS § 176(k)], and Texas has no quarrel with this means of disposal. Brief for Petitioner 45. The Texas law is thus not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others.<sup>6</sup> Texas concedes as much: "Section 42.09(b) reaches only those severe acts of physical abuse of the flag carried out in a way likely to be offensive. The statute mandates intentional or knowing abuse, that is, the kind of mistreatment that is not innocent, but rather is intentionally designed to seriously offend other individuals." *Id.*, at 44.

[1f, 7a] Whether Johnson's treatment of the flag violated Texas law thus depended on the likely communicative impact of his expressive conduct.<sup>7</sup> Our decision in *Boos v Barry*, supra, tells us that this restriction on Johnson's expression is

6. Cf. *Smith v Goguen*, 415 US, at 590-591, 39 L Ed 2d 505, 94 S Ct 1242 (Blackmun, J., dissenting) (emphasizing that lower court appeared to have construed state statute so as to protect physical integrity of the flag in all circumstances); *id.*, at 597-598, 39 L Ed 2d 605, 94 S Ct 1242 (Rehnquist, J., dissenting) (same).

7. [1g, 7b] Texas suggests that Johnson's conviction did not depend on the onlookers' reaction to the flag-burning because § 42.09 is violated only when a person physically mistreats the flag in a way that he "knows will seriously offend one or more persons likely to observe or discover his action." Tex Penal Code Ann § 42.09(b) (1969) (emphasis added). "The 'serious offense' language of the statute," Texas argues, "refers to an individual's intent and to the manner in which the con-

duct is effectuated, not to the reaction of the crowd." Brief for Petitioner 44. If the statute were aimed only at the actor's intent and not at the communicative impact of his actions, however, there would be little reason for the law to be triggered only when an audience is "likely" to be present. At Johnson's trial, indeed, the State itself seems not to have seen the distinction between knowledge and actual communicative impact that it now stresses; it proved the element of knowledge by offering the testimony of persons who had in fact been seriously offended by Johnson's conduct. *Id.*, at 6-7. In any event, we find the distinction between Texas' statute and one dependent on actual audience reaction too precious to be of constitutional significance. Both kinds of statutes clearly are aimed at protecting onlookers from being offended by the ideas expressed by the prohibited activity.

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content-based. In *Boos*, we considered the constitutionality of a law prohibiting "the display of any sign within 50 feet of a foreign embassy if that sign tends to bring that foreign government into 'public odium' or 'public disrepute.'" *Id.*, at 315, 99 L Ed 2d 333, 108 S Ct 1157. Rejecting the argument that the law was content-neutral because it was justified by "our international law obligation to shield diplomats from speech that offends their dignity," *id.*, at 320, 99 L Ed 2d 333, 108 S Ct 1157, we held that a "[t]he emotive impact of speech on its audience is not a 'secondary effect' " unrelated to the content of the expression itself. *Id.*, at 321, 99 L Ed 2d 333, 108 S Ct 1157, (plurality opinion); see also *id.*, at 334, 99 L Ed 2d 333, 108 S Ct 1157, (Brennan, J., concurring in part and concurring in judgment).

According to the principles announced in *Boos*, Johnson's political expression was restricted because of the content of the message he conveyed. We must therefore subject the State's asserted interest in preserving the special symbolic character of the flag to "the most exacting scrutiny." *Boos v Barry*, 485 US, at 321, 99 L Ed 2d 333, 108 S Ct 1157.<sup>8</sup>

Texas argues that its interest in

preserving the flag as a symbol of nationhood and national unity survives this close analysis. Quoting extensively from the writings of this Court chronicling the flag's historic and symbolic role in our society, the State emphasizes the "'special place' " reserved for the flag in our Nation. Brief for Petitioner 22, quoting *Smith v Goguen*, 415 US, at 601, 39 L Ed 2d 605, 94 S Ct 1242 (Rehnquist, J., dissenting). The State's argument is not that it has an interest simply in maintaining the flag as a symbol of *something*, no matter what it symbolizes; indeed, if that were the State's position, it would be difficult to see how that interest is endangered by highly symbolic conduct such as Johnson's. Rather, the State's claim is that it has an interest in preserving the flag as a symbol of *nationhood* and *national unity*, a symbol with a determinate range of meanings. Brief for Petitioner 20-24. According to Texas, if one physically treats the flag in a way that would tend to cast doubt on either the idea that nationhood and national unity are the flag's referents or that national unity actually exists, the message conveyed thereby is a harmful one and therefore may be prohibited.<sup>9</sup>

8. Our inquiry is, of course, bounded by the particular facts of this case and by the statute under which Johnson was convicted. There was no evidence that Johnson himself stole the flag he burned, Tr of Oral Arg 17, nor did the prosecution or the arguments urged in support of it depend on the theory that the flag was stolen. *Ibid.* Thus, our analysis does not rely on the way in which the flag was acquired, and nothing in our opinion should be taken to suggest that one is free to steal a flag so long as one later uses it to communicate an idea. We also emphasize that Johnson was prosecuted *only* for flag desecration—not for trespass, disorderly conduct, or arson.

9. Texas claims that "Texas is not endors-

ing, protecting, avowing or prohibiting any particular philosophy." Brief for Petitioner 29. If Texas means to suggest that its asserted interest does not prefer Democrats over Socialists, or Republicans over Democrats, for example, then it is beside the point, for Johnson does not rely on such an argument. He argues instead that the State's desire to maintain the flag as a symbol of nationhood and national unity assumes that there is only one proper view of the flag. Thus, if Texas means to argue that its interest does not prefer *any* viewpoint over another, it is mistaken; surely one's attitude towards the flag and its referents is a viewpoint.

[8] 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. See, e. g., *Hustler Magazine v Falwell*, 485 US, at 55-56, 99 L Ed 2d 41, 108 S Ct 876; *City Council of Los Angeles v Taxpayers for Vincent*, 466 US 789, 804, 80 L Ed 2d 772, 104 S Ct 2118 (1984); *Bolger v Youngs Drug Products Corp.* 463 US 60, 65, 72, 77 L Ed 2d 469, 103 S Ct 2875 (1983); *Carey v Brown*, 447 US 455, 462-463, 65 L Ed 2d 263, 100 S Ct 2286 (1980); *FCC v Pacifica Foundation*, 438 US, at 745-746, 57 L Ed 2d 1073, 98 S Ct 3026; *Young v American Mini Theatres, Inc.* 427 US 50, 63-65, 67-68, 49 L Ed 2d 310, 96 S Ct 2440 (1976) (plurality opinion); *Buckley v Valeo*, 424 US 1, 16-17, 46 L Ed 2d 659, 96 S Ct 612 (1976); *Grayned v Rockford*, 408 US 104, 115, 33 L Ed 2d 222, 92 S Ct 2294 (1972); *Police Dept. of Chicago v Mosley*, 408 US 92, 95, 33 L Ed 2d 212, 92 S Ct 2286 (1972); *Bachellar v Maryland*, 397 US 564, 567, 25 L Ed 2d 570, 90 S Ct 1312, 52 Ohio Ops 2d 200 (1970); *O'Brien*, 391 US, at 382, 20 L Ed 2d 672, 88 S Ct 1673; *Brown v Louisiana*, 383 US, at 142-143, 15 L Ed 2d 637, 86 S Ct 719; *Stromberg v California*, 283 US, at 368-369, 75 L Ed 1117, 51 S Ct 532, 73 ALR 1484.

We have not recognized an exception to this principle even where our flag has been involved. In *Street v New York*, 394 US 576, 22 L Ed 2d 572, 89 S Ct 1354 (1969), we held that a State may not criminally punish a person for uttering words critical of the flag. Rejecting the argument that the conviction could be sustained on the ground that Street had "failed to show the respect for

our national symbol which may properly be demanded of every citizen," we concluded that "the constitutionally guaranteed 'freedom to be intellectually . . . diverse or even contrary,' and the 'right to differ as to things that touch the heart of the existing order,' encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous." *Id.*, at 593, 22 L Ed 2d 572, 89 S Ct 1354, quoting *Barnette*, 319 US, at 642, 87 L Ed 1628, 63 S Ct 1178, 147 ALR 674. Nor may the Government, we have held, compel conduct that would evince respect for the flag. "To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." *Id.*, at 634, 87 L Ed 1628, 63 S Ct 1178, 147 ALR 674.

[9] In holding in *Barnette* that the Constitution did not leave this course open to the Government, Justice Jackson described one of our society's defining principles in words deserving of their frequent repetition: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.*, at 642, 87 L Ed 1628, 63 S Ct 1178, 147 ALR 674. In *Spence*, we held that the same interest asserted by Texas here was insufficient to support a criminal conviction under a flag-misuse statute for the taping of a peace sign to an American flag. "Given the protected character of [Spence's] expres-

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sion and in light of the fact that no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts," we held, "the conviction must be invalidated." 418 US, at 416, 41 L Ed 2d 842, 94 S Ct 2727. See also *Goguen*, 415 US, at 588, 39 L Ed 2d 605, 94 S Ct 1242 (White, J., concurring in judgment) (to convict person who had sewn a flag onto the seat of his pants for "contemptuous" treatment of the flag would be "[t]o convict not to protect the physical integrity or to protect against acts interfering with the proper use of the flag, but to punish for communicating ideas unacceptable to the controlling majority in the legislature").

[1h] In short, nothing in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct relating to it.<sup>10</sup> To bring its argument outside our precedents, Texas attempts to convince us that even if its interest in preserving the flag's symbolic role does not allow it to prohibit words or

some expressive conduct critical of the flag, it does permit it to forbid the outright destruction of the flag. The State's argument cannot depend here on the distinction between written or spoken words and nonverbal conduct. That distinction, we have shown, is of no moment where the nonverbal conduct is expressive, as it is here, and where the regulation of that conduct is related to expression, as it is here. See *supra*, at ———, 105 L Ed 2d 352. In addition, both *Barnette* and *Spence* involved expressive conduct, not only verbal communication, and both found that conduct protected.

[10] Texas' focus on the precise nature of Johnson's expression, moreover, misses the point of our prior decisions: their enduring lesson, that the Government may not prohibit expression simply because it disagrees with its message, is not dependent on the particular mode in which one chooses to express an idea.<sup>11</sup> If we were to hold that a State may forbid flag-burning wherever it is likely to endanger the

10. Our decision in *Halter v Nebraska*, 205 US 34, 51 L Ed 696, 27 S Ct 419 (1907), addressing the validity of a state law prohibiting certain commercial uses of the flag, is not to the contrary. That case was decided "nearly 20 years before the Court concluded that the First Amendment applies to the States by virtue of the Fourteenth Amendment." *Spence v Washington*, 418 US 405, 413, n 7, 41 L Ed 2d 842, 94 S Ct 2727 (1974). More important, as we continually emphasized in *Halter* itself, that case involved purely commercial rather than political speech. 205 US, at 38, 41, 42, 45, 51 L Ed 696, 27 S Ct 419.

Nor does *San Francisco Arts & Athletics v Olympic Committee*, 483 US 522, 524, 97 L Ed 2d 427, 107 S Ct 2971 (1987), addressing the validity of Congress' decision to "authoriz[e] the United States Olympic Committee to prohibit certain commercial and promotional uses of the word 'Olympic,'" relied upon by

the dissent, *post*, at —, 105 L Ed 2d 370, even begin to tell us whether the Government may criminally punish physical conduct towards the flag engaged in as a means of political protest.

11. The dissent appears to believe that Johnson's conduct may be prohibited and, indeed, criminally sanctioned, because "his act . . . conveyed nothing that could not have been conveyed and was not conveyed just as forcefully in a dozen different ways." *Post*, at —, 105 L Ed 2d 371. Not only does this assertion sit uneasily next to the dissent's quite correct reminder that the flag occupies a unique position in our society—which demonstrates that messages conveyed without use of the flag are not "just as forceful[]" as those conveyed with it—but it also ignores the fact that, in *Spence*, *supra*, we "rejected summarily" this very claim. See 418 US, at 411, n 4, 41 L Ed 2d 842, 94 S Ct 2727.

flag's symbolic role, but allow it wherever burning a flag promotes that role—as where, for example, a person ceremoniously burns a dirty flag—we would be saying that when it comes to impairing the flag's physical integrity, the flag itself may be used as a symbol—as a substitute for the written or spoken word or a “short cut from mind to mind” only in one direction. We would be permitting a State to “prescribe what shall be orthodox” by saying that one may burn the flag to convey one's attitude toward it and its referents only if one does not endanger the flag's representation of nationhood and national unity.

We never before have held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents. Indeed, in *Schacht v United States*, we invalidated a federal statute permitting an actor portraying a member of one of our armed forces to “wear the uniform of that armed force if the portrayal does not tend to discredit that armed force.” 398 US, at 60, 26 L Ed 2d 44, 90 S Ct 1555, quoting 10 USC § 772(f) [10 USCS § 772(f)]. This proviso, we held, “which leaves Americans free to praise the war in Vietnam but can send persons like Schacht to prison for opposing it, cannot survive in a country which has the First Amendment.” *Id.*, at 63, 26 L Ed 2d 44, 90 S Ct 1555.

We perceive no basis on which to hold that the principle underlying our decision in *Schacht* does not apply to this case. To conclude that the Government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible bounda-

ries. Could the Government, on this theory, prohibit the burning of state flags? Of copies of the Presidential seal? Of the Constitution? In evaluating these choices under the First Amendment, how would we decide which symbols were sufficiently special to warrant this unique status? To do so, we would be forced to consult our own political preferences, and impose them on the citizenry, in the very way that the First Amendment forbids us to do. See *Carey v Brown*, 447 US, at 466-467, 65 L Ed 2d 263, 100 S Ct 2286.

There is, moreover, no indication—either in the text of the Constitution or in our cases interpreting it—that a separate juridical category exists for the American flag alone. Indeed, we would not be surprised to learn that the persons who framed our Constitution and wrote the Amendment that we now construe were not known for their reverence for the Union Jack. The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole—such as the principle that discrimination on the basis of race is odious and destructive—will go unquestioned in the marketplace of ideas. See *Brandenburg v Ohio*, 395 US 444, 23 L Ed 2d 430, 89 S Ct 1827, 48 Ohio Ops 2d 320 (1969). We decline, therefore, to create for the flag an exception to the joust of principles protected by the First Amendment.

[11] It is not the State's ends, but its means, to which we object. It cannot be gainsaid that there is a special place reserved for the flag in this Nation, and thus we do not doubt that the Government has a legitimate interest in making efforts to “preserv[e] the national flag as an

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unalloyed symbol of our country." Spence, 418 US, at 412, 41 L Ed 2d 842, 94 S Ct 2727. We reject the suggestion, urged at oral argument by counsel for Johnson, that the Government lacks "any state interest whatsoever" in regulating the manner in which the flag may be displayed. Tr of Oral Arg 38. Congress has, for example, enacted precatory regulations describing the proper treatment of the flag, see 36 USC §§ 173-177 [36 USCS §§ 173-177], and we cast no doubt on the legitimacy of its interest in making such recommendations. To say that the Government has an interest in encouraging proper treatment of the flag, however, is not to say that it may criminally punish a person for burning a flag as a means of political protest. "National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement." *Barnette*, 319 US, at 640, 87 L Ed 1628, 63 S Ct 1178, 147 ALR 674.

We are fortified in today's conclusion by our conviction that forbidding criminal punishment for conduct such as Johnson's will not endanger the special role played by our flag or the feelings it inspires. To paraphrase Justice Holmes, we submit that nobody can suppose that this one gesture of an unknown man will change our Nation's attitude towards its flag. See *Abrams v United States*, 250 US 616, 628, 63 L Ed 1173, 40 S Ct 17 (1919) (Holmes, J., dissenting). Indeed, Texas' argument that the burning of an American flag "is an act having a high likelihood to cause a breach of the peace," Brief for Petitioner 31,

quoting *Sutherland v DeWulf*, 323 F Supp 740, 745 (SD Ill 1971) (citation omitted), and its statute's implicit assumption that physical mistreatment of the flag will lead to "serious offense," tend to confirm that the flag's special role is not in danger; if it were, no one would riot or take offense because a flag had been burned.

We are tempted to say, in fact, that the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength. Indeed, one of the proudest images of our flag, the one immortalized in our own national anthem, is of the bombardment it survived at Fort McHenry. It is the Nation's resilience, not its rigidity, that Texas sees reflected in the flag—and it is that resilience that we reassert today.

The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong. "To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced si-

lence." *Whitney v California*, 274 US 357, 377, 71 L Ed 1095, 47 S Ct 641 (1927) (Brandeis, J., concurring). And, precisely because it is our flag that is involved, one's response to the flag-burner may exploit the uniquely persuasive power of the flag itself. We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag-burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by—as one witness here did—according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the

freedom that this cherished emblem represents.

## V

Johnson was convicted for engaging in expressive conduct. The State's interest in preventing breaches of the peace does not support his conviction because Johnson's conduct did not threaten to disturb the peace. Nor does the State's interest in preserving the flag as a symbol of nationhood and national unity justify his criminal conviction for engaging in political expression. The judgment of the Texas Court of Criminal Appeals is therefore affirmed.

## SEPARATE OPINIONS

Justice Kennedy, concurring.

I write not to qualify the words Justice Brennan chooses so well, for he says with power all that is necessary to explain our ruling. I join his opinion without reservation, but with a keen sense that this case, like others before us from time to time, exacts its personal toll. This prompts me to add to our pages these few remarks.

The case before us illustrates better than most that the judicial power is often difficult in its exercise. We cannot here ask another branch to share responsibility, as when the argument is made that a statute is flawed or incomplete. For we are presented with a clear and simple statute to be judged against a pure command of the Constitution. The outcome can be laid at no door but ours.

The hard fact is that sometimes we must make decisions we do not like. We make them because they

are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases.

Our colleagues in dissent advance powerful arguments why respondent may be convicted for his expression, reminding us that among those who will be dismayed by our holding will be some who have had the singular honor of carrying the flag in battle. And I agree that the flag holds a lonely place of honor in an age when absolutes are distrusted and simple truths are burdened by unneeded apologetics.

With all respect to those views, I do not believe the Constitution gives us the right to rule as the dissenting members of the Court urge, however

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painful this judgment is to announce. Though symbols often are what we ourselves make of them, the flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit. The case here today forces recognition of the costs to which those beliefs commit us. It is poignant but fundamental that the flag protects those who hold it in contempt.

For all the record shows, this respondent was not a philosopher and perhaps did not even possess the ability to comprehend how repellent his statements must be to the Republic itself. But whether or not he could appreciate the enormity of the offense he gave, the fact remains that his acts were speech, in both the technical and the fundamental meaning of the Constitution. So I agree with the Court that he must go free.

Chief Justice Rehnquist, with whom Justice White and Justice O'Connor join, dissenting.

In holding this Texas statute unconstitutional, the Court ignores Justice Holmes' familiar aphorism that "a page of history is worth a volume of logic." *New York Trust Co. v Eisner*, 256 US 345, 349, 65 L Ed 963, 41 S Ct 506, 16 ALR 660 (1921). For more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here.

At the time of the American Revolution, the flag served to unify the Thirteen Colonies at home, while obtaining recognition of national sovereignty abroad. Ralph Waldo

Emerson's *Concord Hymn* describes the first skirmishes of the Revolutionary War in these lines:

"By the rude bridge that  
arched the flood Their flag  
to April's breeze unfurled,  
"Here once the embattled farm-  
ers stood And fired the  
shot heard round the  
world."

During that time, there were many colonial and regimental flags, adorned with such symbols as pine trees, beavers, anchors, and rattle snakes, bearing slogans such as "Liberty or Death," "Hope," "An Appeal to Heaven," and "Don't Tread on Me." The first distinctive flag of the Colonies was the "Grand Union Flag"—with 13 stripes and a British flag in the left corner—which was flown for the first time on January 2, 1776, by troops of the Continental Army around Boston. By June 14, 1777, after we declared our independence from England, the Continental Congress resolved:

"That the flag of the thirteen United States be thirteen stripes, alternate red and white: that the union be thirteen stars, white in a blue field, representing a new constellation." 8 *Journal of the Continental Congress 1774-1789*, p 464 (Ford Ed 1907).

One immediate result of the flag's adoption was that American vessels harassing British shipping sailed under an authorized national flag. Without such a flag, the British could treat captured seamen as pirates and hang them summarily; with a national flag, such seamen were treated as prisoners of war.

During the War of 1812, British naval forces sailed up Chesapeake

Bay and marched overland to sack and burn the city of Washington. They then sailed up the Patapsco River to invest the city of Baltimore, but to do so it was first necessary to reduce Fort McHenry in Baltimore Harbor. Francis Scott Key, a Washington lawyer, had been granted permission by the British to board one of their warships to negotiate the release of an American who had been taken prisoner. That night, waiting anxiously on the British ship, Key watched the British fleet firing on Fort McHenry. Finally, at daybreak, he saw the fort's American flag still flying; the British attack had failed. Intensely moved, he began to scribble on the back of an envelope the poem that became our national anthem:

"Oh! say can you see by the  
dawn's early light,  
What so proudly we hailed at  
the twilight's last gleam-  
ing?  
Whose broad stripes and bright  
stars, thro' the perilous  
fight,  
O'er the ramparts we watched  
were so gallantly stream-  
ing?  
And the rockets' red glare, the  
bombs bursting in air,  
Gave proof thro' the night that  
our flag was still there.  
Oh! say does that star-spangled  
banner yet wave  
O'er the land of the free and  
the home of the brave?"

The American flag played a central role in our Nation's most tragic conflict, when the North fought against the South. The lowering of the American flag at Fort Sumter was viewed as the start of the war. G. Preble, *History of the Flag of the United States of America* 453 (1880).

The Southern States, to formalize their separation from the Union, adopted the "Stars and Bars" of the Confederacy. The Union troops marched to the sound of "Yes We'll Rally Round The Flag Boys, We'll Rally Once Again." President Abraham Lincoln refused proposals to remove from the American flag the stars representing the rebel States, because he considered the conflict not a war between two nations but an attack by 11 States against the National Government. *Id.*, at 411. By war's end, the American flag again flew over "an indestructible union, composed of indestructible states." *Texas v White*, 7 Wall 700, 725, 19 L Ed 227 (1869).

One of the great stories of the Civil War is told in John Greenleaf Whittier's poem, *Barbara Frietchie*:

"Up from the meadows rich  
with corn,  
Clear in the cool September  
morn,  
"The clustered spires of Freder-  
ick stand  
Green-walled by the hills of  
Maryland.  
"Round about them orchards  
sweep,  
Appie and pear tree fruited  
deep,  
"Fair as the garden of the Lord  
To the eyes of the famished  
rebel horde,  
"On that pleasant morn of the  
early fall  
When Lee marched over the  
mountain wall;  
"Over the mountains winding  
down,  
Horse and foot, into Frederick  
town.  
"Forty flags with their silver  
stars,

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Forty flags with their crimson bars,

"Flapped in the morning wind: the sun

Of noon looked down, and saw not one.

"Up rose old Barbara Frietchie then,

Bowed with her fourscore years and ten;

'Bravest of all in Frederick town,

She took up the flag the men hauled down,

"In her attic-window the staff she set,

To show that one heart was loyal yet.

"Up the street came the rebel tread,

Stonewall Jackson riding ahead.

"Under his slouched hat left and right

He glanced; the old flag met his sight.

"'Halt!'—the dust-brown ranks stood fast.

'Fire!'—out blazed the rifle-blast.

"It shivered the window, pane and sash;

It rent the banner with seam and gash.

"Quick, as it fell, from the broken staff

Dame Barbara snatched the silken scarf.

"She leaned far out on the window-sill,

And shook it forth with a royal will.

"'Shoot if you must, this old grey head,

But spare your country's flag,' she said.

"A shade of sadness, a blush of shame,

Over the face of the leader came;

"The nobler nature within him stirred

To life at that woman's deed and word;

"'Who touches a hair of yon grey head

Dies like a dog! March on! he said.

"All day long through Frederick street

Sounded the tread of marching feet:

"All day long that free flag tost

Over the heads of the rebel host.

"Ever its torn folds rose and fell

On the loyal winds that loved it well;

"And through the hill-gaps sunset light

Shone over it with a warm good-night.

"Barbara Frietchie's work is o'er,

And the rebel rides on his raids no more.

"Honor to her! and let a tear fall,

For her sake, on Stonewall's bier.

"Over Barbara Frietchie's grave,

Flag of Freedom and Union, wave!

"Peace and order and beauty draw

Round thy symbol of light and law;

"And ever the stars above look down

On thy stars below in Frederick town!"

In the First and Second World Wars, thousands of our countrymen died on foreign soil fighting for the American cause. At Iwo Jima in the Second World War, United States

Marines fought hand-to-hand against thousands of Japanese. By the time the Marines reached the top of Mount Suribachi, they raised a piece of pipe upright and from one end fluttered a flag. That ascent had cost nearly 6,000 American lives. The Iwo Jima Memorial in Arlington National Cemetery memorializes that event. President Franklin Roosevelt authorized the use of the flag on labels, packages, cartons, and containers intended for export as lend-lease aid, in order to inform people in other countries of the United States' assistance. Presidential Proclamation No. 2605, 58 Stat 1126.

During the Korean War, the successful amphibious landing of American troops at Inchon was marked by the raising of an American flag within an hour of the event. Impetus for the enactment of the Federal Flag Desecration Statute in 1967 came from the impact of flag burnings in the United States on troop morale in Vietnam. Representative L. Mendel Rivers, then chairman of the House Armed Services Committee, testified that, "The burning of the flag . . . has caused my mail to increase 100 percent from the boys in Vietnam, writing me and asking me what is going on in America." Hearings Desecration of the Flag, on HR 271 before Subcommittees No. 4 of the House Committee on the Judiciary, 90th Cong, 1st Sess 189, (1967). Representative Charles Wiggins stated: "The public act of desecration of our flag tends to undermine the morale of American troops. That this finding is true can be attested by many Members who have received correspondence from servicemen expressing their shock and disgust of such conduct." 113 Cong Rec 16459 (1967).

The flag symbolizes the Nation in peace as well as in war. It signifies our national presence on battleships, airplanes, military installations, and public buildings from the United States Capitol to the thousands of county courthouses and city halls throughout the country. Two flags are prominently placed in our courtroom. Countless flags are placed by the graves of loved ones each year on what was first called Decoration Day, and is now called Memorial Day. The flag is traditionally placed on the casket of deceased members of the Armed Forces, and it is later given to the deceased's family. 10 USC §§ 1481, 1482 [10 USCS §§ 1481, 1482]. Congress has provided that the flag be flown at half-staff upon the death of the President, Vice President, and other government officials "as a mark of respect to their memory." 36 USC § 175(m) [36 USCS § 175(m)]. The flag identifies United States merchant ships, 22 USC § 454 [22 USCS § 454], and "[t]he laws of the Union protect our commerce wherever the flag of the country may float." *United States v Guthrie*, 17 How 284, 309, 15 L Ed 102 (1855).

No other American symbol has been as universally honored as the flag. In 1931, Congress declared "The Star Spangled Banner" to be our national anthem. 36 USC § 170 [36 USCS § 170]. In 1949, Congress declared June 14th to be Flag Day. § 157. In 1987, John Philip Sousa's "The Stars and Stripes Forever" was designated as the national march. Pub L 101-186, 101 Stat 1286. Congress has also established "The Pledge of Allegiance to the Flag" and the manner of its deliverance. 36 USC § 172 [36 USCS § 172]. The flag has appeared as the principal symbol on approximately 33 United

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States postal stamps and in the design of at least 43 more, more times than any other symbol. United States Postal Service, Definitive Mint Set 15 (1988).

Both Congress and the States have enacted numerous laws regulating misuse of the American flag. Until 1967, Congress left the regulation of misuse of the flag up to the States. Now, however, Title 18 USC § 700(a) [18 USCS § 700(a)], provides that:

"Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than \$1,000 or imprisoned for not more than one year, or both."

Congress has also prescribed, inter alia, detailed rules for the design of the flag, 4 USC § 1 [4 USCS § 1], the time and occasion of flag's display, 36 USC § 174 [36 USCS § 174], the position and manner of its display, § 175, respect for the flag, § 176, and conduct during hoisting, lowering and passing of the flag, § 177. With the exception of Alaska and Wyo-

ming, all of the States now have statutes prohibiting the burning of the flag.<sup>1</sup> Most of the state statutes are patterned after the Uniform Flag Act of 1917, which in § 3 provides: "No person shall publicly mutilate, deface, defile, defy, trample upon, or by word or act cast contempt upon any such flag, standard, color, ensign or shield." Proceedings of National Conference of Commissioners on Uniform State Laws 323-324 (1917). Most were passed by the States at about the time of World War I. Rosenblatt, Flag Desecration Statutes: History and Analysis, 1972 Wash U L Q 193, 197.

The American flag, then, throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. It does not represent the views of any particular political party, and it does not represent any particular political philosophy. The flag is not simply another "idea" or "point of view" competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs

1. See Ala Code § 13A-11-12 (1982); Ariz Rev Stat Ann § 13-3703 (1978); Ark Code Ann § 5-51-207 (1987); Cal Mil & Vet Code Ann § 614 (West 1988); Colo Rev Stat § 18-11-204 (1986); Conn Gen Stat § 53-258a (1985); Del Code Ann, Tit 11, § 1331 (1987); Fla Stat § 256.05-256.051 (1975); Fla Stat § 876.52 (1976); Ga Code Ann § 50-3-9 (1986); Haw Rev Stat § 711-1107 (1988); Idaho Code § 18-3401 (1987); Ill Rev Stat, ch 1, ¶¶ 3307, 3351 (1980); Ind Code § 35-45-1-4 (1986); Iowa Code § 32.1 (1978 and Supp 1989); Kan Stat Ann § 21-4114 (1988); Ky Rev Stat Ann § 525.110 (Michie Supp 1988); La Rev Stat Ann § 14:116 (West 1986); Me Rev Stat Ann, Tit 1, § 254 (1979); Md Ann Code, Art 27, § 83 (1988); Mass Gen Laws § 264, 5 (1980); Mich Comp Laws § 750.246 (1968); Minn Stat § 609.40 (1987); Miss Code Ann § 97-7-39 (1973); Mo Rev Stat § 578.095

(Supp 1989); Mont Code Ann § 45-8-215 (1987); Neb Rev Stat § 28-928 (1985); Nev Rev Stat § 201.290 (1986); NH Rev Stat Ann § 646.1 (1986); NJ Stat Ann § 2C:33-9 (West 1982); NM Stat Ann § 30-2.-4 (1984); NY Gen Bus Law 136 (McKinney 1988); NC Gen Stat § 14-381 (1986); ND Cent Code § 12.1-07-02 (1985); Ohio Rev Code Ann § 2927.11 (1987); Okla Stat, Tit 21, § 372 (1983); Ore Rev Stat § 166.075 (1987); 18 Pa Cons Stat § 2102 (1983); RI Gen Laws § 11-15-2 (1981); SC Code §§ 16-17-220, 16-17-230 (1985) and Supp 1988; SD Codified Laws § 22-9-1 (1988); Tenn Code Ann §§ 39-5-843, 39-5-847 (1982); Tex Penal Code Ann § 42.09 (1974); Utah Code Ann § 76-9-601 (1978); Vt Stat Ann, Tit 13, § 1903 (1974); Va Code § 18.2-488 (1988); Wash Rev Code § 9.86.030 (1988); W Va Code § 61-1-8 (1989); Wis Stat § 946.05 (1981).

they may have. I cannot agree that the First Amendment invalidates the Act of Congress, and the laws of 48 of the 50 States, which make criminal the public burning of the flag.

More than 80 years ago in *Halter v Nebraska*, 205 US 34, 51 L Ed 696, 27 S Ct 419 (1907), this Court upheld the constitutionality of a Nebraska statute that forbade the use of representations of the American flag for advertising purposes upon articles of merchandise. The Court there said:

"For that flag every true American has not simply an appreciation but a deep affection. . . . Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot." *Id.*, at 41, 51 L Ed 696, 27 S Ct 419.

Only two Terms ago, in *San Francisco Arts & Athletics, Inc. v United States Olympic Committee*, 483 US 522, 97 L Ed 2d 427, 107 S Ct 2971 (1987), the Court held that Congress could grant exclusive use of the word "Olympic" to the United States Olympic Committee. The Court thought that this "restrictio[n] on expressive speech properly [was] characterized as incidental to the primary congressional purpose of encouraging and rewarding the USOC's activities." *Id.*, at 536, 97 L Ed 2d 427, 107 S Ct 2971. As the Court stated, "when a word [or symbol] acquires value 'as the result of organization and the expenditure of labor, skill, and money' by an entity, that entity constitutionally may obtain a limited property right in the word [or symbol]." *Id.*, at 532, 97 L

Ed 2d 427, 107 S Ct 2971, quoting *International News Service v Associated Press*, 248 US 215, 239, 63 L Ed 211, 39 S Ct 68, 2 ALR 293 (1918). Surely Congress or the States may recognize a similar interest in the flag.

But the Court insists that the Texas statute prohibiting the public burning of the American flag infringes on respondent Johnson's freedom of expression. Such freedom, of course, is not absolute. See *Schenck v United States*, 249 US 47, 63 L Ed 470, 38 S Ct 247 (1919). In *Chaplinsky v New Hampshire*, 315 US 568, 86 L Ed 1031, 62 S Ct 766 (1942), a unanimous Court said:

"Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.*, at 571-572, 86 L Ed 1031, 62 S Ct 766 (footnotes omitted).

The Court upheld Chaplinsky's conviction under a state statute that

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made it unlawful to "address any offensive, derisive or annoying word to any person who is lawfully in any street or other public place." *Id.*, at 569, 86 L Ed 1031, 62 S Ct 766. Chaplinsky had told a local Marshal, "You are a God damned racketeer" and a "damned Fascist and the whole government of Rochester are Fascists or agents of Fascists." *Ibid.*

Here it may equally well be said that the public burning of the American flag by Johnson was no essential part of any exposition of ideas, and at the same time it had a tendency to incite a breach of the peace. Johnson was free to make any verbal denunciation of the flag that he wished; indeed, he was free to burn the flag in private. He could publicly burn other symbols of the Government or effigies of political leaders. He did lead a march through the streets of Dallas, and conducted a rally in front of the Dallas City Hall. He engaged in a "die-in" to protest nuclear weapons. He shouted out various slogans during the march, including: "Reagan, Mondale which will it be? Either one means World War III"; "Ronald Reagan, killer of the hour, Perfect example of US power"; and "red, white and blue, we spit on you, you stand for plunder, you will go under." Brief for Respondent 3. For none of these acts was he arrested or prosecuted; it was only when he proceeded to burn publicly an American flag stolen from its rightful owner that he violated the Texas statute.

The Court could not, and did not, say that Chaplinsky's utterances were not expressive phrases—they clearly and succinctly conveyed an extremely low opinion of the addressee. The same may be said of Johnson's public burning of the flag in

this case; it obviously did convey Johnson's bitter dislike of his country. But his act, like Chaplinsky's provocative words, conveyed nothing that could not have been conveyed and was not conveyed just as forcefully in a dozen different ways. As with "fighting words," so with flag burning, for purposes of the First Amendment: It is "no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed" by the public interest in avoiding a probable breach of the peace. The highest courts of several States have upheld state statutes prohibiting the public burning of the flag on the grounds that it is so inherently inflammatory that it may cause a breach of public order. See, e. g., *State v Royal*, 113 NH 224, 229, 305 A2d 676, 680 (1973); *State v Waterman*, 190 NW2d 809, 811-812 (Iowa 1971); see also *State v Mitchell*, 32 Ohio App 2d 16, 30, 288 NE2d 216, 226 (1972).

The result of the Texas statute is obviously to deny one in Johnson's frame of mind one of many means of "symbolic speech." Far from being a case of "one picture being worth a thousand words," flag burning is the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others. Only five years ago we said in *Los Angeles City Council v Taxpayers for Vincent*, 466 US 789, 812, 80 L Ed 2d 772, 104 S Ct 2118 (1984), that "the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places." The Texas statute deprived Johnson of only one

rather inarticulate symbolic form of protest—a form of protest that was profoundly offensive to many—and left him with a full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy. Thus, in no way can it be said that Texas is punishing him because his hearers—or any other group of people—were profoundly opposed to the message that he sought to convey. Such opposition is no proper basis for restricting speech or expression under the First Amendment. It was Johnson's use of this particular symbol, and not the idea that he sought to convey by it or by his many other expressions, for which he was punished.

Our prior cases dealing with flag desecration statutes have left open the question that the Court resolves today. In *Street v New York*, 394 US 576, 579, 22 L Ed 2d 572, 89 S Ct 1354 (1969), the defendant burned a flag in the street, shouting "We don't need no damned flag" and, "[i]f they let that happen to Meredith we don't need an American flag." The Court ruled that since the defendant might have been convicted solely on the basis of his words, the conviction could not stand, but it expressly reserved the question of whether a defendant could constitutionally be convicted for burning the flag. *Id.*, at 581, 22 L Ed 2d 572, 89 S Ct 1354.

Chief Justice Warren, in dissent, stated: "I believe that the States and Federal Government do have the power to protect the flag from acts of desecration and disgrace. . . . [I]t is difficult for me to imagine that, had the Court faced this issue, it would have concluded otherwise." *Id.*, at 605, 22 L Ed 2d 572, 89 S Ct 1354 (Warren, C. J., dissenting). Justices

Black and Fortas also expressed their personal view that a prohibition on flag burning did not violate the Constitution. See *id.*, at 610, 22 L Ed 2d 572, 89 S Ct 1354 (Black, J., dissenting) ("It passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American Flag an offense"); *id.*, at 615-617, 22 L Ed 2d 572, 89 S Ct 1354 (Fortas, J., dissenting) ("[T]he States and the Federal Government have the power to protect the flag from acts of desecration committed in public. . . . [T]he flag is a special kind of personality. Its use is traditionally and universally subject to special rules and regulation. . . . A person may 'own' a flag, but ownership is subject to special burdens and responsibilities. A flag may be property, in a sense; but it is property burdened with peculiar obligations and restrictions. Certainly . . . these special conditions are not per se arbitrary or beyond governmental power under our Constitution").

In *Spence v Washington*, 418 US 405, 41 L Ed 2d 842, 94 S Ct 2727 (1974), the Court reversed the conviction of a college student who displayed the flag with a peace symbol affixed to it by means of removable black tape from the window of his apartment. Unlike the instant case, there was no risk of a breach of the peace, no one other than the arresting officers saw the flag, and the defendant owned the flag in question. The Court concluded that the student's conduct was protected under the First Amendment, because "no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts." *Id.*, at 415, 41 L Ed 2d 842, 94 S Ct 2727.

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The Court was careful to note, however, that the defendant "was not charged under the desecration statute, nor did he permanently disfigure the flag or destroy it." *Ibid.*

In another related case, *Smith v Goguen*, 415 US 566, 39 L Ed 2d 605, 94 S Ct 1242 (1974), the appellee, who wore a small flag on the seat of his trousers, was convicted under a Massachusetts flag-misuse statute that subjected to criminal liability anyone who "publicly . . . treats contemptuously the flag of the United States." *Id.*, at 568-569, 39 L Ed 2d 605, 94 S Ct 1242. The Court affirmed the lower court's reversal of appellee's conviction, because the phrase "treats contemptuously" was unconstitutionally broad and vague. *Id.*, at 576, 39 L Ed 2d 605, 94 S Ct 1242. The Court was again careful to point out that "[c]ertainly nothing prevents a legislature from defining with substantial specificity what constitutes forbidden treatment of United States flags." *Id.*, at 581-582, 39 L Ed 2d 605, 94 S Ct 1242. See also *id.*, at 587, 39 L Ed 2d 605, 94 S Ct 1242. (White, J., concurring in judgment) ("The flag is a national property, and the Nation may regulate those who would make, imitate, sell, possess, or use it. I would not question those statutes which proscribe mutilation, defacement, or burning of the flag or which otherwise protect its physical integrity, without regard to whether such conduct might provoke violence. . . . There would seem to be little question about the power of Congress to forbid the mutilation of the Lincoln Memorial. . . . The flag is itself a monument, subject to similar protection"); *id.*, at 591, 39 L Ed 2d 605, 94 S Ct 1242 (Blackmun, J., dissenting) ("Goguen's punishment was constitu-

tionally permissible for harming the physical integrity of the flag by wearing it affixed to the seat of his pants"). But the Court today will have none of this. The uniquely deep awe and respect for our flag felt by virtually all of us are huddled off under the rubric of "designated symbols," ante at —, 105 L Ed 2d 362, that the First Amendment prohibits the government from "establishing." But the government has not "established" this feeling; 200 years of history have done that. The government is simply recognizing as a fact the profound regard for the American flag created by that history when it enacts statutes prohibiting the disrespectful public burning of the flag.

The Court concludes its opinion with a regrettably patronizing civics lecture, presumably addressed to the Members of both Houses of Congress, the members of the 48 state legislatures that enacted prohibitions against flag burning, and the troops fighting under that flag in Vietnam who objected to its being burned: "The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong." Ante, at — —, 105 L Ed 2d 363. The Court's role as the final expositor of the Constitution is well established, but its role as a platonic guardian admonishing those responsible to public opinion as if they were truant school children has no similar place in our system of government. The cry of "no taxation without representation" animated those who revolted against the English Crown to found our Nation—the idea that those who submitted to government should have some say as to what

kind of laws would be passed. Surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people—whether it be murder, embezzlement, pollution, or flag burning.

Our Constitution wisely places limits on powers of legislative majorities to act, but the declaration of such limits by this Court "is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case." *Fletcher v Peck*, 6 Cranch 87, 128, 3 L Ed 162 (1810) (Marshall, C. J.). Uncritical extension of constitutional protection to the burning of the flag risks the frustration of the very purpose for which organized governments are instituted. The Court decides that the American flag is just another symbol, about which not only must opinions pro and con be tolerated, but for which the most minimal public respect may not be enjoined. The government may conscript men into the Armed Forces where they must fight and perhaps die for the flag, but the government may not prohibit the public burning of the banner under which they fight. I would

uphold the Texas statute as applied in this case.<sup>2</sup>

Justice Stevens, dissenting.

As the Court analyzes this case, it presents the question whether the State of Texas, or indeed the Federal Government, has the power to prohibit the public desecration of the American flag. The question is unique. In my judgment rules that apply to a host of other symbols, such as state flags, armoands, or various privately promoted emblems of political or commercial identity, are not necessarily controlling. Even if flag burning could be considered just another species of symbolic speech under the logical application of the rules that the Court has developed in its interpretation of the First Amendment in other contexts, this case has an intangible dimension that makes those rules inapplicable.

A country's flag is a symbol of more than "nationhood and national unity." Ante, at —, —, —, —, —, —, 105 L Ed 2d 355, 357, 358, 359, 362, 363. It also signifies the ideas that characterize the society that has chosen that emblem as well as the special history that has animated the growth and

2. In holding that the Texas statute as applied to Johnson violates the First Amendment, the Court does not consider Johnson's claims that the statute is unconstitutional, vague or overbroad. Brief for Respondent 24, 30. I think those claims are without merit. In *New York State Club Assn. v City of New York*, 487 US —, —, 101 L Ed 2d 1, 108 S Ct 2225 (1988), we stated that a facial challenge is only proper under the First Amendment when a statute can never be applied in a permissible manner or when, even if it may be validly applied to a particular defendant, it is so broad as to reach the protected speech of third parties. While Tex Penal Code Ann § 42.09 (1989) "may not satisfy those intent on

finding that at any cost, [it is] set out in terms of the ordinary person exercising common sense can sufficiently understand and comply with." *CSC v Letter Carriers*, 413 US 548, 579, 37 L Ed 2d 796, 93 S Ct 2880 (1973). By defining "desecrate" as "deface," "damage" or otherwise "physically mistreat" in a manner that the actor knows will "seriously offend" others, § 42.09 only prohibits flagrant acts of physical abuse and destruction of the flag of the sort at issue here—soaking a flag with lighter fluid and igniting it in public—and not any of the examples of improper flag etiquette cited in Respondent's brief.

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power of those ideas. The fleurs-de-lis and the tricolor both symbolized "nationhood and national unity," but they had vastly different meanings. The message conveyed by some flags—the swastika, for example—may survive long after it has outlived its usefulness as a symbol of regimented unity in a particular nation.

So it is with the American flag. It is more than a proud symbol of the courage, the determination, and the gifts of nature that transformed 13 fledgling Colonies into a world power. It is a symbol of freedom, of equal opportunity, of religious tolerance, and of goodwill for other peoples who share our aspirations. The symbol carries its message to dissidents both at home and abroad who may have no interest at all in our national unity or survival.

The value of the flag as a symbol cannot be measured. Even so, I have no doubt that the interest in preserving that value for the future is both significant and legitimate. Conceivably that value will be enhanced by the Court's conclusion that our national commitment to free expression is so strong that even the United States as ultimate guarantor of that freedom is without power to prohibit the desecration of its unique symbol. But I am unpersuaded. The creation of a federal right to post bulletin boards and graffiti on the Washington Monument might enlarge the market for free expression, but at a cost I would not pay. Similarly, in my considered judgment, sanctioning the public desecration of the flag will tarnish its value—both for those who cherish the ideas for which it waves and for those who desire to don the robes of martyrdom by burning it. That tarnish is

not justified by the trivial burden on free expression occasioned by requiring that an available, alternative mode of expression—including uttering words critical of the flag, see *Street v New York*, 394 US 576, 22 L Ed 2d 572, 89 S Ct 1354 (1969)—be employed.

It is appropriate to emphasize certain propositions that are not implicated by this case. The statutory prohibition of flag desecration does not "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Board of Education v Barnette*, 319 US 624, 642, 87 L Ed 1628, 63 S Ct 1178, 147 ALR 674 (1943). The statute does not compel any conduct or any profession of respect for any idea or any symbol.

Nor does the statute violate "the government's paramount obligation of neutrality in its regulation of protected communication." *Young v American Mini Theatres, Inc.* 427 US 50, 70, 49 L Ed 2d 310, 96 S Ct 2440 (1976) (plurality opinion). The content of respondent's message has no relevance whatsoever to the case. The concept of "desecration" does not turn on the substance of the message the actor intends to convey, but rather on whether those who view the act will take serious offense. Accordingly, one intending to convey a message of respect for the flag by burning it in a public square might nonetheless be guilty of desecration if he knows that others—perhaps simply because they misperceive the intended message—will be seriously offended. Indeed, even if the actor knows that all possible witnesses will understand that he intends to send a message of respect,

he might still be guilty of desecration if he also knows that this understanding does not lessen the offense taken by some of those witnesses. Thus, this is not a case in which the fact that "it is the speaker's opinion that gives offense" provides a special "reason for according it constitutional protection," *FCC v Pacifica Foundation*, 438 US 726, 745, 57 L Ed 2d 1073, 98 S Ct 3026 (1978) (plurality opinion). The case has nothing to do with "disagreeable ideas," see ante, at —, 105 L Ed 2d 356. It involves disagreeable conduct that, in my opinion, diminishes the value of an important national asset.

The Court is therefore quite wrong in blandly asserting that respondent "was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values." Ante, at —, 105 L Ed 2d 353. Respondent was prosecuted because of the method he chose to express his dissatisfaction with those policies. Had he chosen to spray paint—or perhaps convey with a motion picture projector—his message

of dissatisfaction on the facade of the Lincoln Memorial, there would be no question about the power of the Government to prohibit his means of expression. The prohibition would be supported by the legitimate interest in preserving the quality of an important national asset. Though the asset at stake in this case is intangible, given its unique value, the same interest supports a prohibition on the desecration of the American flag.\*

The ideas of liberty and equality have been an irresistible force in motivating leaders like Patrick Henry, Susan B. Anthony, and Abraham Lincoln, schoolteachers like Nathan Hale and Booker T. Washington, the Philippine Scouts who fought at Bataan, and the soldiers who scaled the bluff at Omaha Beach. If those ideas are worth fighting for—and our history demonstrates that they are—it cannot be true that the flag that uniquely symbolizes their power is not itself worthy of protection from unnecessary desecration.

I respectfully dissent.

\*The Court suggests that a prohibition against flag desecration is not content-neutral because this form of symbolic speech is only used by persons who are critical of the flag or the ideas it represents. In making this suggestion the Court does not pause to consider the far-reaching consequences of its introduction of disparate impact analysis into our First Amendment jurisprudence. It seems obvious that a prohibition against the desecration of a gravesite is content-neutral even if it denies some protesters the right to make a symbolic statement by extinguishing the flame in Arlington Cemetery where John F. Kennedy is buried while permitting others to salute the

flame by bowing their heads. Few would doubt that a protester who extinguishes the flame has desecrated the gravesite, regardless of whether he prefaces that act with a speech explaining that his purpose is to express deep admiration or unmitigated scorn for the late President. Likewise, few would claim that the protester who bows his head has desecrated the gravesite, even if he make clear that his purpose is to show disrespect. In such a case, as in a flag burning case, the prohibition against desecration has absolutely nothing to do with the content of the message that the symbolic speech is intended to convey.

1972. Act July 11, 1972, P. L. 92-347, § 3(c), 86 Stat. 459, added item 715.

1973. Act Nov. 3, 1973, P. L. 93-147, § 1(b), 87 Stat. 555, substituted item 712 for former item 712, which read: "Misuse of names by collecting agencies or private detective agencies to indicate Federal agency".

1974. Act June 22, 1974, P. L. 93-318, § 8, 88 Stat. 245, added item 711a.

### § 700. Desecration of the flag of the United States; penalties

(a) Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than \$1,000 or imprisoned for not more than one year, or both.

(b) The term "flag of the United States" as used in this section, shall include any flag, standard, colors, ensign, or any picture or representation of either, or of any part or parts of either, made of any substance or represented on any substance, of any size evidently purporting to be either of said flag, standard, colors, or ensign of the United States of America, or a picture or a representation of either, upon which shall be shown the colors, the stars and the stripes, in any number of either thereof, or of any part or parts of either, by which the average person seeing the same without deliberation may believe the same to represent the flag, standards, colors, or ensign of the United States of America.

(c) Nothing in this section shall be construed as indicating an intent on the part of Congress to deprive any State, territory, possession, or the Commonwealth of Puerto Rico of jurisdiction over any offense over which it would have jurisdiction in the absence of this section. CR

(Added July 5, 1968, P. L. 90-381, § 1, 82 Stat. 291.)

#### CROSS REFERENCES

Penalty for mutilation or use of flag for advertising purposes, 4 USCS § 3.

United States defined, 18 USCS § 5.

Use of official insignia, 18 USCS § 701.

Use of great seal of the United States, 18 USCS § 713.

#### RESEARCH GUIDE

##### Annotations:

Constitutionality of statutes, ordinances, or administrative provisions prohibiting definance, disrespect, mutilation, or misuse of American flag. 22 L Ed 2d 972.

What constitutes violation of flag desecration statutes. 41 ALR3d 502.

The offensive-utterance aspect of Section 250.8 obviously implicates constitutional concerns. On the one hand, it could be argued that the state's authority to suppress disruptive speech ought to be broader than it might otherwise be because of the need to balance the actor's freedom of speech against the equally cherished freedoms of those who are meeting. The guarantees of free exercise of religion and the right to assemble and petition for redress of grievances would be rendered meaningless if outsiders could disrupt and prevent meetings devoted to those purposes.<sup>15</sup> On the other hand, it seems exceedingly doubtful that the state can prohibit speech in a public place merely because its content would outrage the sensibilities of persons there assembled. Insofar as this section purports to reach beyond conduct that is itself disorderly to punish offensive communication, its constitutionality must be judged doubtful.<sup>16</sup> The better course may be to rely on disorderly conduct statutes to reach persons who prevent the meeting from going forward and to deal with persons who merely say objectionable things by ejection. Perhaps because of doubts as to its constitutionality, only a few states have adopted provisions derived from this aspect of the Model Code offense.<sup>17</sup>

### § 250.9 Desecration of Venerated Objects \*

A person commits a misdemeanor if he purposely desecrates any public monument or structure, or place of worship or burial, or if he purposely desecrates the national flag or any other object of veneration by the public or a substantial segment thereof in any public place. "Desecrate" means defacing, damaging, polluting or otherwise physically mistreating in a way that the actor knows will outrage the sensibilities of persons likely to observe or discover his action.

<sup>15</sup> See *In re Kay*, 1 Cal.3d 930, 83 Cal.Rptr. 686, 464 P.2d 142 (1970).

<sup>16</sup> For a detailed discussion of constitutional precedents regarding the punishment of offensive speech, see Section 250.2 Comment 4 *supra*.

<sup>17</sup> E. g., Ariz. § 13-2904(3); Colo. § 18-9-108(1); Ky. § 525.150(1); N.J. § 2C:33-8; Ohio § 2917.12(A)(2); Tex. § 42.05(a); Utah § 76-9-103(1).

\*History. Presented to the Institute as Section 250.4 of Tentative Draft No. 13 and considered at the May 1961 meeting. See ALI Proceedings 203-04 (1961). Approved by the Institute at the May 1961 meeting. See ALI Proceedings 204 (1961). Presented again to the Institute in the Proposed Official Draft and again approved at the May 1962 meeting. See ALI Proceedings 226-27 (1962). Detailed commentary was originally included in Tentative Draft No. 13 at 39 (1961).

Several states have enacted statutes that follow closely this aspect of the Model Code offense.<sup>11</sup> Colorado altered the formulation to proscribe only those acts that significantly obstruct or interfere with a meeting.<sup>12</sup> Most revisions, however, continue to punish disruption of a meeting under disorderly conduct provisions.<sup>13</sup>

(b) *Offensive Utterance.* Section 250.8 also applies to one who, with purpose to prevent or disrupt a lawful meeting, "makes any utterance, gesture or display designed to outrage the sensibilities of the group." The import of this provision is best revealed by comparison to Section 250.2(1)(b) of the Model Code, which declares guilty of disorderly conduct one who "makes unreasonable noise or offensively coarse utterance, gesture or display, or addresses abusive language to any person present." In addition to increasing the authorized sanction for disruptive conduct, Section 250.8 extends liability to an offensive utterance that is not unreasonably loud, especially coarse, or personally abusive. Examples might include atheistic speeches to a meeting of the devout, anti-Irish taunts to a St. Patrick's Day gathering, or any other statements designed to flout the sentiments of a lawful gathering so outrageously as to support an inference of a purpose to disrupt. It is important to emphasize that not every disturbance or interruption is condemned. The actor must have a purpose to prevent or obstruct the proceedings. This means that Section 250.8 would not reach some violations of decorum that have been punished under existing statutes—*e. g.*, smoking a cigar and wearing one's hat at a Salvation Army service after a request to desist.<sup>14</sup> In such situations, reliance would be placed on the right to eject the unwelcome person, with prosecution for assault or disorderly conduct if he resisted.

<sup>11</sup> See, *e. g.*, Ind. § 35-45-1-3; Iowa § 723.4; Ky. § 525.150; N.J. § 2C:33-8; Ohio § 2917.12; Pa. tit. 18, § 5508; Utah § 76-9-103; Wash. § 9A.84.030.

<sup>12</sup> Colo. § 18-9-108.

<sup>13</sup> See, *e. g.*, Ala. § 13A-11-7(a)(4); Ariz. § 13-2904(A)(4); Ark. § 41-2908(1)(d); Conn. § 53a-182(a)(4); Del. tit. 11, § 1301(1)(c); Kan. § 21-4101(b); N.Y. § 240.20(4); Ore. § 166.025(d); S.D. § 22-13-1(3); Tex. § 42.05.

<sup>14</sup> *Hull v. State*, 120 Ind. 153, 22 N.E. 117 (1889); *cf. Hunt v. State*, 3 Tex. App. 116 (1877) (conviction for cracking and eating nuts during religious services); *Friedlander v. State*, 7 Tex.App. 204 (1879) (laughing, talking, and groaning during religious services and a prayer). See also *Douglass v. Barber*, 18 R.I. 459, 28 A. 805 (1894) (locking school door); *Winnard v. State*, 30 S.W. 555 (Tex.Crim.App.1895) (causing dog to go yelping into church).

Comment †

1. *Background.* Section 250.9 deals with the purposeful desecration of venerated objects. These include, but are not limited to, public monuments, places of worship or burial, and the national flag. Prior legislation was usually less comprehensive. Several jurisdictions had, and still have, laws prohibiting the destruction or disturbance of a tomb, monument, or other structure in a cemetery.<sup>1</sup> The bulk of prior legislation, however, dealt with flag desecration, and this is also the area of greatest contemporary controversy.

A large number of flag desecration statutes in force at the time the Model Code was drafted were based on the Uniform Flag Act.<sup>2</sup> This proposed legislation was approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association in 1917.<sup>3</sup> The Commissioners' prefatory note describes the original impetus for flag desecration laws and the evils at which early legislation was aimed:

Flag legislation arose from the condition of things in 1896, in which it was found that the American Flag was being used for a variety of purposes. During the Presidential campaign preceding the election of 1896, the flag was used as a political emblem by all the political parties. Flying from the staff or across the street, party-tickets were annexed to it by the several political parties.

In the excitement and anger generated at that time the flag so used was torn down and torn in pieces and trampled in the dust. These outrages occurred in all sections of the

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† Except where otherwise noted, the abbreviated citation of statutes refers enactments prior to November 1, 1978. However, the subsequently enacted New Jersey statute has been included throughout. As used in an abbreviated citation, the symbol (p) refers to a proposed code for the indicated jurisdiction. A full explanation of all abbreviated citations appears at p. XXXIX *supra*.

<sup>1</sup> Alas. § 11.40.460; Ark. § 41-2916(c); Cal. Health & Safety Code § 8101; D.C. § 22-3114; Fla. § 872.02; Idaho § 18-7027; Ill. ch. 21, § 15; Kan. § 21-4115; La. § 14:101; Md. art. 27, § 267; Mass. ch. 272, §§ 73 to 75; Mich. § 750.387; Miss. § 97-29-25; Mo. § 214.110; Nev. §§ 206.190, 452.280; N.M. § 40A-12-3; N.C. §§ 14-148, -150.1; Okla. tit. 21, § 1167; R.I. § 11-20-2; S. C. §§ 16-17-590, -600; Tenn. § 39-2101; Va. § 18.2-127; Vt. tit. 13, § 3766; Wash. § 68.48.010.

<sup>2</sup> 9B Uniform Laws Ann. 48-49 (1931).

<sup>3</sup> *Id.*

country. This demonstrated that there was lurking among the people a spirit of political excitement in which was lacking a decent respect and reverence for our National emblem. At this time also a spirit of commercialism had been rampant and nothing was sacred, not even the Flag, from uses of advertising merchandise.

The American Flag Association was the first to take up this matter and it held a meeting in the city of New York, July 15th, 1897, which was attended by representatives of nearly all the patriotic societies of the United States. Since 1897 legislation to preserve the flag from desecrating uses has been obtained in nearly all of the States.<sup>4</sup>

Constitutional challenges to these early statutes seem to have centered on claims of business interests desiring to make commercial use of a representation of the national flag. A few state courts found flag legislation vulnerable to attack from such quarters,<sup>5</sup> but the Supreme Court cut short this line of objection with its 1907 decision in *Halter v. Nebraska*.<sup>6</sup> Nebraska had convicted a brewer for displaying on his beer bottles a representation of the flag. He challenged the statute as violative of his rights under the fourteenth amendment, but the Court upheld the law with only one dissent.<sup>7</sup> The *Halter* decision seemed to settle the constitutionality of flag laws, at least as they applied to commercial exploitation, and to clear the way for proposal of the Uniform Flag Act in 1917.

The Uniform Act has had so substantial an impact on subsequent legislation that it warrants rather full treatment. Section 1 of the Act provides that the statute applies to any "flag, standard, color, ensign or shield" of the United States or of the state of enactment and any "copy, picture or representation thereof."<sup>8</sup> Sections 2 and 3 then set forth the operative prohibitions:

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<sup>4</sup> *Id.*

<sup>5</sup> *See, e. g., Ruhstrat v. People*, 185 Ill. 133, 57 N.E. 41 (1900); *People v. Van De Carr*, 91 App.Div. 20, 86 N.Y.S. 644, *aff'd* 178 N.Y. 425, 70 N.E. 965 (1904).

<sup>6</sup> 205 U.S. 34 (1907).

<sup>7</sup> Mr. Justice Peckham dissented without opinion.

<sup>8</sup> Section 1 of the Act reads in full as follows:

*Definition.* The words flag, standard, color, ensign or shield, as used in this act, shall include any flag, standard, color, ensign or shield, or copy, picture or representation thereof, made of any substance or represented or produced thereon, and of any size, evidently purporting to be

§ 250.9 OFFENSES AGAINST PUBLIC ORDER Art. 250

§ 2. Desecration. No person shall, in any manner, for exhibition or display:

(a) place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this state, or authorized by any law of the United States or of this state; or

(b) expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such work, figure, mark, picture, design, drawing or advertisement; or

(c) expose to public view for sale, manufacture, or otherwise, or to sell, give or have in possession for sale, for gift or for use for any purpose, any substance, being an article of merchandise, or receptacle, or thing for holding or carrying merchandise, upon or to which shall have been produced or attached any such flag, standard, color, ensign or shield, in order to advertise, call attention to, decorate, mark or distinguish such article or substance.

§ 3. Mutilation. No person shall publicly mutilate, deface, defile, defy, trample upon, or by word or act cast contempt upon any such flag, standard, color, ensign or shield.

It is worth emphasizing that Section 2 of the Uniform Act is addressed primarily to commercial misuse but is not expressly limited to that context and that Section 3 of the Act explicitly covers casting contempt on the flag "by word or act." As is discussed more fully in Comment 3 below, these features of the Uniform Act may be significant in assessing its constitutionality. Whether or not they are constitutional, statutes based on the Uniform Act now exist in some 22 American jurisdictions.<sup>9</sup>

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such flag, standard, ensign, or shield of the United States or of this state, or copy, picture or representation thereof.

<sup>9</sup> Ariz. § 13-3703; Idaho § 18-3401; Ill. ch. 56½, § 6; Kan. § 21-4114; La. § 14:116; Me. tit. 1, § 253; Md. art. 27, §§ 82, 83; Mich. §§ 750.245, .246; Minn. § 609.40; Miss. § 97-7-39; Mont. § 94-7-502; N.Y. General Business Law § 136; Pa. tit. 18, § 2102; R.I. § 11-15-2; Tenn. §§ 39-1602, -1603; Utah § 76-9-601; Vt. tit. 13, §§ 1902, 1903; Va. §§ 18.2-487, -488; Wash. §§ 9.86-020, .030; W.Va. § 61-1-8; Wis. §§ 946.05, .06.

A more recent model for state legislation is the federal flag desecration statute. First passed in 1968, the federal law punishes anyone who "knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it . . . ." <sup>10</sup> This statute is similar to the Model Code provision in that it requires physical abuse and thus stops short of punishing mere verbal profanation. Several states have enacted statutes patterned after the federal law,<sup>11</sup> and two additional states have combined some version of the federal statute with Section 2 of the Uniform Act.<sup>12</sup>

2. *The Model Code Formulation.* Section 250.9 marks a significant departure from prior law. For one thing, it generalizes earlier statutes, which typically covered only abuse of the flag or defilement of burial markers, into a comprehensive ban against desecration of venerated objects. Public monuments or structures, places of worship or burial, and the national flag are all mentioned expressly, but the list is not exclusive. The section also applies to the desecration of "any other object of veneration by the public or a substantial segment thereof." This formulation eliminates undesirable gaps in coverage and extends the law to reach defilement of objects, such as items of religious practice, that may be venerated only by particular groups. This expansive approach of the Model Code has been followed by a number of recent revision efforts and proposed codes.<sup>13</sup>

Another departure from prior law lies in the explicit requirement that the desecration be purposeful. Many earlier statutes, including the Uniform Act, failed to specify the required state of mind. Section 250.9 limits penal liability to the case where the actor intends to desecrate and where he is aware that the object involved is a public monument or structure, a place of worship or burial, the national flag, or other object of veneration.<sup>14</sup> Fur-

<sup>10</sup> 18 U.S.C. § 700.

<sup>11</sup> Cal. Military & Veterans Code § 614; Ind. § 35-27-7-1; N.D. § 12.1-07-02; S.D. § 22-9-1.

<sup>12</sup> Utah § 76-9-601; Wash. § 9.86.030.

<sup>13</sup> See, e. g., Colo. § 18-9-113; Del. tit. 11, § 1331; Haw. § 711-1107; Kan. § 21-4111; Ky. § 525.110; N.J. § 2C:33-9; Pa. tit. 18, § 5509; Mass. (p) ch. 269, § 9; Mich. (p) § 5555; Vt. (p) § 2.44.5. But see Fla. § 876.52; Ga. § 26-2803; Ind. § 34-45-1-4; N.D. § 12.1-07-02; S.D. § 22-9-1.

<sup>14</sup> Section 2.02(4) *supra* applies the stated requirement of purpose to all material elements of the offense, and Section 2.02(2)(a)(ii) specifies that purpose with respect to an attendant circumstance of the actor's conduct means knowledge.

thermore, the critical verb "desecrates" is defined to mean conduct of a sort "that the actor knows will outrage the sensibilities of persons likely to observe or discover his action." This phrase qualifies all of the activities of desecration listed in the offense. The actor must not only treat a venerated object improperly; he must realize that doing so will constitute an affront to a substantial part of the public. Thus, for example, a person who elects to dispose of his flag by burning does not become liable for this offense unless he is aware that, given the circumstances, his conduct will outrage public sensibilities. Many new revisions or proposals follow the Model Code in requiring that the desecration be purposeful or intentional.<sup>15</sup>

This essential rationale for the offense—to prevent outrage to popular sensibilities—is also reflected in the Model Code requirement that the desecration be public. This is implicit in the coverage of public monuments or structures and places of worship or burial. Where, however, the desecration can be accomplished privately, as in the case of the national flag and other venerated objects, the prohibition applies only if the act is done "in any public place." Several recently revised codes or proposed codes follow the Model Code on this point.<sup>16</sup>

Finally, Section 250.9 differs markedly from prior flag legislation. As has been noted in passing, the Model Code offense does not cover verbal profanation but requires actual physical abuse. This limitation contrasts with the explicit reach of the Uniform Flag Act to cover casting contempt "by word or act." Moreover, the Model Code offense is also unlike both the Uniform Act and other early legislation in not prohibiting commercial misuse. Whatever may have been true in 1897 or 1917, it is scarcely realistic today to regard commercial exploitation of the national emblem or colors as a serious affront to popular sensibilities. Indeed, those engaged in business or profit have every incentive to avoid antagonizing the public, and presumably they endeavor to do so. In any event, if regulation of this sort of activity is to be undertaken, it belongs outside the penal code. Several re-

<sup>15</sup> See, e. g., Colo. § 18-9-113; Del. tit. 11, § 1331; Kan. § 21-4111; Ky. § 525.110; Me. tit. 17A, § 507; N.J. § 2C:33-9; Pa. tit. 18, § 5509; S.D. § 22-9-1; Mass. (p) ch. 269, § 9; Mich. (p) § 5555; Tenn. (p) § 2509; Vt. (p) § 2.44.5. But see Haw. § 35-45-1-4 (knowing); Wash. § 9.86.030 (knowing).

<sup>16</sup> See, e. g., Colo. § 18-9-113; Del. tit. 11, § 1331; Fla. § 876.52; Haw. § 711-1107; Ind. § 35-45-1-4; Kan. § 21-4111; Ky. § 525.110; Me. tit. 17A, § 507; Minn. § 609.40; Miss. § 97-7-39; N.J. § 2C:33-9; N.D. § 12.1-07-02; Pa. tit. 18, §§ 2102, 5509; S.D. § 22-9-1; Wash. § 9.86.030; Mich. (p) § 5555; Tenn. (p) § 2509; Vt. (p) § 2.44.5.

cently revised codes have followed the Model Code in reaching only physical abuse.<sup>17</sup>

3. *Constitutional Concerns.* Desecration of venerated objects will often be undertaken for its communicative impact. Defilement of something that others hold dear is a convenient and vivid way of expressing opposition to their beliefs and values. To the extent that penal proscription of such activity inhibits such expression, it implicates the first amendment guarantee of freedom of speech. This problem is not acute where the object desecrated actually belongs to the government. Few would argue a constitutional right to defile public monuments or to deface public buildings. The same holds true where the object involved is the property of a private citizen who withholds consent for the action taken. No protestor has a constitutional right, for example, to mistreat another's church or place of burial. The difficulty becomes acute, however, where the desecration of a venerated object occurs with the consent of its owner. In such a case, the only state interest justifying criminal punishment is directly derivative from the communicative aspects of the actor's conduct. Under these circumstances, prohibiting desecration comes perilously close to suppressing expression.

The paradigmatic case of this sort is desecration or misuse of a flag or representation thereof. Subsequent to promulgation of the Model Code in 1962, the Supreme Court has handed down three decisions in this area. Taken together, these precedents indicate far more doubt about the constitutionality of this section than reasonably could have been anticipated at the time of its drafting.

*Street v. New York*<sup>18</sup> was decided in 1969. The statute involved permitted punishment for uttering words contemptuous of the flag.<sup>19</sup> The defendant had publicly burned an American flag and stated that "We don't need no damn flag."<sup>20</sup> The Court reversed the conviction on the ground that it could not tell whether liability rested on the act of burning or on verbal expression. *Street* made plain that verbal abuse of the flag could

<sup>17</sup> See, e. g., Colo. § 18-9-113; Del. tit. 11, § 1331; Fla. § 876.52; Haw. § 711-1107; Ind. § 35-45-1-4; Kan. § 21-4111; Me. tit. 17A, § 507; N.J. § 2C:33-9; S.D. § 22-9-1; Mass. (p) ch. 269, § 9; Mich. (p) § 5555; Tenn. (p) § 2509; Vt. (p) § 2.44.5.

<sup>18</sup> 394 U.S. 576 (1969).

<sup>19</sup> N.Y. Gen. Bus. Law § 136.

<sup>20</sup> 394 U.S. at 579.

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not be punished but did not resolve the constitutional status of flag burning or other acts of desecration.

Five years later the Supreme Court decided two additional cases on flag abuse. *Smith v. Goguen*<sup>21</sup> invalidated a Massachusetts law punishing one who "treats contemptuously the flag of the United States."<sup>22</sup> The statute had not been sufficiently narrowed by construction, and the Court therefore found it void for vagueness. Finally, in *Spence v. Washington*<sup>23</sup> the Court reversed a conviction under a statute based on the Uniform Flag Act.<sup>24</sup> The defendant had affixed a peace symbol to a United States flag in protest against American military activities in Cambodia. The Court emphasized that the flag was privately owned, that it was displayed on private property, and that the protest involved no risk of breach of the peace. On the basis of these factors, the Court held that the defendant's conduct was a constitutionally protected form of expression.

*Street*, *Smith*, and *Spence* suggest the invalidity of many current statutes on flag desecration. *Street* marks the unconstitutionality of statutes, such as the Uniform Act, that make it an offense "by word or act" to cast contempt on the flag.<sup>25</sup> *Smith* suggests the invalidity of an additional group of statutes, namely those that deal in such vague generalities as "to treat contemptuously."<sup>26</sup> Section 250.9, however, is subject to neither of these infirmities. Unlike the statute in *Street*, this section expressly requires physical mistreatment, and unlike the statute in *Smith*, it spells out the proscribed conduct with considerable specificity.

The problem with Section 250.9 arises from *Spence v. Washington*. Although that decision is carefully qualified to leave unresolved the scope of a state's power to punish unorthodox flag use, the Court did hold that desecration of a privately

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<sup>21</sup> 415 U.S. 566 (1974).

<sup>22</sup> Mass. ch. 264, § 5.

<sup>23</sup> 418 U.S. 405 (1974).

<sup>24</sup> Wash. § 9.86.020.

<sup>25</sup> Ark. § 41-2971; Ill. ch. 56 $\frac{1}{4}$ , § 6; La. § 14:116; Me. tit. 1, § 254; Md. art. 27, § 83; Mich. § 750.246; Miss. § 97-7-39; N.Y. General Business Law § 136; Okla. tit. 21, § 372; Tenn. § 39-1603; Vt. tit. 13, § 1903; W.Va. § 61-1-8. Several other statutes, although not using this particular language, seem also to run afoul of the *Street* decision. See Nev. § 201.290; N.M. § 40A-21-4; Pa. tit. 18, § 2102; R.I. § 11-15-2.

<sup>26</sup> See Ariz. § 13-3703; Mass. ch. 264, § 5; Minn. § 609.40; Mont. § 94-7-502; Wis. § 946.05.

owned flag on private premises in circumstances not productive of breach of the peace is constitutionally protected. At the very least, this decision calls into doubt the constitutionality of Section 250.9 insofar as it applies to privately owned flags.<sup>27</sup> Subsequent decisions in the lower courts have followed *Spence* in treating flag ownership as an important factor in determining the scope of first amendment protection.<sup>28</sup> Neither the Model Code provision nor any statute currently in force makes a distinction in those terms,<sup>29</sup> a fact which suggests that all of these laws may be susceptible to constitutionally impermissible application.

Indeed, *Spence* might be taken to indicate the invalidity of all laws against desecration of privately owned flags were it not for the case of *People v. Sutherland*.<sup>30</sup> The defendants in that case were convicted of public flag burning. They appealed their conviction, and the Supreme Court vacated and remanded for reconsideration in light of *Smith* and *Spence*. The state court reconsidered and reaffirmed the conviction. *Spence* was distinguished on the ground that it revealed no governmental interest unrelated to the suppression of expression,<sup>31</sup> whereas the record in *Sutherland* supported the government action as appropriate to prevent a breach of the peace and to preserve public order.<sup>32</sup> The Supreme Court dismissed the resulting appeal for want of a substantial federal question,<sup>33</sup> leaving the implication that dese-

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<sup>27</sup> The Court in *Spence* explicitly recognized that "the State or National Governments constitutionally may forbid anyone from mishandling in any manner a flag that is public property." 418 U.S. at 409.

<sup>28</sup> E. g., *Cline v. Rockingham County Superior Court*, 502 F.2d 789, 791 (1st Cir. 1974) ("the crucial point is that the flag belonged to him (defendant) and not to the government. Thus, as the Supreme Court said in *Spence*, the important interest of protecting public property from misuse is not at issue here"); *State v. Kool*, 212 N.W.2d 518 (Iowa 1973).

<sup>29</sup> Some statutes, however, expressly apply both to publicly owned and privately owned flags. See, e. g., Alas. § 11.60.220; Conn. § 53-258a; Mass. ch. 264, § 5; Nev. § 201.290.

<sup>30</sup> 9 Ill.App.3d 824, 292 N.E.2d 746 (1973), vacated and remanded sub. nom. *Sutherland v. Illinois*, 418 U.S. 907 (1974), redecided sub. nom. *People v. Sutherland*, 29 Ill.App.3d 199, 329 N.E.2d 820 (1975), appeal dismissed for want of a substantial federal question sub. nom. *Sutherland v. Illinois*, 425 U.S. 947 (1976).

<sup>31</sup> See *United States v. O'Brien*, 391 U.S. 367 (1968).

<sup>32</sup> 29 Ill.App.3d at 201, 329 N.E.2d at 821.

<sup>33</sup> 425 U.S. 947 (1976).

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eration of privately owned flags may be punished in at least some contexts. The ultimate delineation of what those contexts might be awaits further decisions. Meanwhile, the most that can be said is that the application of Section 250.9 to flag desecration with the consent of the owner is at best doubtful.<sup>34</sup>

§ 250.10 Abuse of Corpse \*

Except as authorized by law, a person who treats a corpse in a way that he knows would outrage ordinary family sensibilities commits a misdemeanor.

Comment †

1. *Background.* The common law regarded indecent treatment of a corpse as an indictable offense.<sup>1</sup> It covered such matters as dissection or other mutilation,<sup>2</sup> unauthorized disinterment or removal,<sup>3</sup> and sale of a corpse.<sup>4</sup> Some crime of this

<sup>34</sup> See generally Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv.L.Rev. 1482 (1975); Note, 50 Wash.L.Rev. 169 (1974).

\* *History.* Presented to the Institute as Section 250.5 of Tentative Draft No. 13 and considered at the May 1961 meeting. See ALI Proceedings 203-04 (1961). Approved by the Institute at the May 1961 meeting. See ALI Proceedings 204 (1961). Presented again to the Institute in the Proposed Official Draft and again approved at the May 1962 meeting. See ALI Proceedings 226-27 (1962). Detailed commentary was originally included in Tentative Draft No. 13 at 40 (1961).

† Except where otherwise noted, the abbreviated citation of statutes refers to enactments prior to November 1, 1978. However, the subsequently enacted New Jersey statute has been included throughout. As used in an abbreviated citation, the symbol (p) refers to a proposed code for the indicated jurisdiction. A full explanation of all abbreviated citations appears at p. XXXIX *supra*.

<sup>1</sup> *Baker v. State*, 215 Ark. 851, 223 S.W.2d 809 (1949); *State v. Bradbury*, 136 Me. 347, 351, 9 A.2d 657, 659 (1939) ("any disposal of a dead body which is contrary to common decency is an offense at common law"). See also R. Perkins, *Criminal Law* 398-99 (2d ed. 1969).

<sup>2</sup> *King v. Lynn*, 168 Eng.Rep. 350 (1789); *Queen v. Price*, 12 Q.B.D. 247 (1884).

<sup>3</sup> *Regina v. Sharpe*, 169 Eng.Rep. 959 (1857); *People v. Baumgartner*, 135 Cal. 72, 66 P. 974 (1901); *Mills v. Carolina Cemetery Park Corp.*, 242 N.C. 20, 86 S.E.2d 893 (1955).

<sup>4</sup> See *Rex v. Duffin and Marshall*, 168 Eng.Rep. 847, 848 n.(b) (1818), which discusses *Rex v. Giles*, in which the court held that disposing of a dead human body for gain or profit was an indictable offense.

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*Paternal line.* A similar line of descent traced through the father.

**Descent cast.** The devolving of realty upon the heir on the death of his ancestor intestate.

Another name for what was formerly called a "descent which tolls entry." When a person had acquired land by disseisin, abatement, or intrusion, and died seised of the land, the descent of it to his heir took away or tolled the real owner's right of entry, so that he could only recover the land by an action.

**Describe.** To narrate, express, explain, set forth, relate, recount, narrate, depict, delineate, portray. Of land, to give the metes and bounds.

**Description.** A delineation or account of a particular subject by the recital of its characteristic accidents and qualities.

A written enumeration of items composing an estate, or of its condition, or of titles or documents; like an inventory, but with more particularity, and without involving the idea of an appraisalment.

An exact written account of an article, mechanical device, or process which is the subject of an application for a patent.

A method of pointing out a particular person by referring to his relationship to some other person or his character as an officer, trustee, executor, etc.

That part of a conveyance, advertisement of sale, etc., which identifies the land or premises intended to be affected.

A fair portrayal of the chief features of the proposed law in words of plain meaning, so that it can be understood by the persons entitled to vote. *Sawyer Stores v. Mitchell*, 103 Mont. 148, 62 P.2d 342, 348.

That part of affidavit for search warrant describing the place to be searched.

For description of criminal suspect, see *Lineup*. See also *Identification*.

**Descriptio personæ** /dəskripsh(ɪ)əw pərsəʊniy/. Lat. Description of the person. By this is meant a word or phrase used merely for the purpose of identifying or pointing out the person intended, and not as an intimation that the language in connection with which it occurs is to apply to him only in the official or technical character which might appear to be indicated by the word. *Forrester v. Cantley*, 227 Mo. App. 325, 51 S.W.2d 550, 551.

In wills, it sometimes happens that the word heir is used as a *descriptio personæ*. A legacy "to the eldest son" of A would be a designation of the person.

**Descriptive.** Containing a description; serving or aiming to describe; having the quality of representing. *Sawyer Stores v. Mitchell*, 103 Mont. 148, 62 P.2d 342, 348. See also *Identification*.

If trademark imparts information directly, it is "descriptive"; if it stands for an idea which requires some operation of the imagination connected with the goods, it is "suggestive"; the information imparted may concern a characteristic, quality or ingredient of the product. *Union Carbide Corp. v. Ever-Ready, Inc.*, C.A.III., 531 F.2d 366, 378.

**De scutagio habendo** /diy skyuwtéjyiw həbëndow/. Writ for having (or to have) escuage or scutage. A writ which anciently lay against tenants by knight-service, to compel them to serve in the king's wars or send substitutes or to pay escuage; that is a sum of money. The same writ lay for one who had already served in the king's army, or paid a fine instead, against those who held of him by knight-service, to recover his escuage or scutage.

**De se bene gere.ado** /diy siy biyniy jərëndow/. For behaving himself well; for his good behavior.

**Desecrate.** To violate sanctity of, to profane, or to put to unworthy use. A person commits a misdemeanor if he purposely desecrates any public monument or structure, or place of worship or burial, or if he purposely desecrates the national flag or any other object of veneration by the public or a substantial segment thereof in any public place. Offense consists of defacing, damaging, polluting or otherwise physically mistreating in a way that the actor knows will outrage the sensibilities of persons likely to observe or discover his action. Model Penal Code, § 250.9. See also *Deface*; *Defile*.

**De secta ad molendinum** /diy sēkta æd mələndənəm/. Of suit to a mill. An old English writ which lay to compel one to continue his custom (of grinding) at a mill. 3 Bl.Comm. 235.

**Desegregation.** The judicial mandate eliminating color of a person as a basis for disqualification to attend the school of his or her choice or to work at place of employment of his or her choice. See *Brown decision*; *Discrimination*.

**Desert.** To leave or quit with an intention to cause a permanent separation; to forsake utterly; to abandon. It is essentially willful in nature.

**Desertion.** The act by which a person abandons and forsakes, without justification, or unauthorized, a station or condition of public, social, or family life, renouncing its responsibilities and evading its duties. A willful abandonment of an employment or duty in violation of a legal or moral obligation.

Criminal desertion is a husband's or wife's abandonment or willful failure without just cause to provide for the care, protection or support of a spouse who is in ill health or necessitous circumstances.

See also *Abandonment*; *Desertion and nonsupport*; *Non-support*.

**Adoption.** As used in statute providing that parental consent to adoption is not required when parent has willfully deserted child evinces settled purpose to forego, abandon, or desert all parental duties and parental rights in child. *Moody v. Voorhies*, 257 Or. 105, 475 P.2d 579, 581.

**Constructive desertion.** That arising where an existing cohabitation is put an end to by misconduct of one of the parties, provided such misconduct is itself a ground for divorce. For example, where one spouse, by his or her words, conduct, demeanor, and attitude produces an intolerable condition which forces the other spouse to withdraw from the joint habitation to a more peaceful one. *West v. West*, 264 Ky. 826, 95 S.W.2d 789, 790.

## Flag Burning

# The Debate Is Rekindled

BY RORIE SHERMAN

National Law Journal Staff Reporter

**IMMEDIATELY** after the new federal flag-burning law went into effect Oct. 28, the debate over the sanctity of Old Glory vs. free speech rights was reignited.

• In Washington, D.C., several flag burners were arrested Oct. 30 while destroying three flags and shouting, "Burn, baby, burn." This first test case of The Flag Protection Law of 1989 is winging its way to the U.S. Supreme Court.

• In Illinois, the state Legislature passed its own flag statute and a Cook County Circuit Court judge struck down a Chicago ordinance prohibiting flag desecration.

• In Seattle, a crowd cheered when a group of Vietnam veterans torched 1,000 American flags. In a separate incident, FBI agents watched while a dozen University of Washington students also burned flags. No arrests were made.

In the Washington, D.C., incident, however, four protesters were arrested but charges against one, Gregory "Joey" Johnson, were dropped. Mr. Johnson's 1984 arrest for flag burning at the Republican National Convention in Dallas led to a case that went to the U.S. Supreme Court, which last term overturned Texas' anti-flag defamation law. *Texas v. Johnson*, 57 U.S.L.W. 4770. The federal flag protection law was passed as a result of the political uproar that erupted after the high court's decision.

Under a provision of this new law, the current cases against the other three D.C. flag burners will go directly to the U.S. Supreme Court.

The legal community is divided over whether the

*Continued on page 33*



AP/Wide World Photos

**FREE SPEECH?** Chicago artist 'Dread Scott' Tyler was one of four people recently arrested by police on the steps of the U.S. Capitol after setting fire to Old Glory.

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## Handbook of and Transactions

for volunteer legal projects. Their partic-  
ipation in the school's brand-new  
pro bono program has surprised their  
dean and cheered those concerned that  
law students think only of wage-earn-  
ing ways to use their education.

While South Carolina isn't the only  
school grooming pro bono lawyers, its  
program bucks the curious trend of  
using coercion to introduce students to  
volunteer work. Tulane University  
School of Law, which launched its  
mandatory pro bono program in Sep-  
tember 1988 (NLJ, 3-14-88), has been  
the model for other efforts, including  
the University of Pennsylvania Law  
School, which began a program this  
year. At least two other schools, Valpa-  
raiso University School of Law and  
Florida State University College of  
Law, have approved mandatory pro  
bono programs.

It was word of the Tulane program  
that encouraged South Carolina Dean  
John E. Montgomery to create his own  
plan. But Dean Montgomery, in choos-  
ing the optional approach, hoped to  
hitch his students to the state bar's un-  
usually active pro bono program. "Our  
primary motivating factor was to cre-  
ate a culture in law school that would  
support what the bar is going to do" in  
its pro bono efforts, he says.

The variety of pro bono projects  
fielded by South Carolina's practicing  
lawyers may be contributing to the  
success of the school's non-mandatory  
program, says Tulane Dean John Rob-  
ert Kramer.

To offset diminishing referrals from  
local sources, Tulane has had to hire  
poverty law practitioners to train and  
supervise students' pro bono work.  
"We've had to act as intermediaries" to  
create sufficient opportunities for stu-  
dents, he says.

In South Carolina, the state's sole  
law school sits within the state capital  
and six blocks from its bar headquar-

recruit volunteers and choose projects.  
He also launched the program among  
first-year students who, although anx-  
ious about time management, lack the  
part-time job pressures or general ap-  
athy prevalent among their more se-  
nior classmates.

Pamela D. Robinson, who directs the  
pro bono program, extols its "Chinese  
menu" of volunteer opportunities suit-  
ed to first-year skills, including arbi-  
tration work for the Better Business  
Bureau and guardian ad litem service  
for child abuse and neglect cases.

When Hurricane Hugo struck, law-  
yers offering free legal advice were  
able to enlist South Carolina student  
volunteers for research on pressing  
property issues. Some students can opt  
out of library work and contribute  
physical labor for Habitat for Human-  
ity, the national organization that re-  
habilitates housing stock; others can  
contribute title searches for the group.  
Lest students become too enamored of  
their volunteer efforts, they are coun-  
seled to spend only three to five hours  
per week on their pro bono tasks.

While the participation of first-year  
law students in non-mandatory legal  
work has been reward enough for  
school officials, South Carolina faculty  
seem even more pleased by a concur-  
rent event: the formation of a public  
interest research group at the school.  
Perhaps South Carolina's gentle per-  
suasion is creating interest in public  
service work "we might not have oth-  
erwise seen," Dean Montgomery says.



**SOVIET SCHOLARS.** In January,  
Emory University Law School will  
host Prof. Igor Ivanovich Lukashuk of  
the Institute of State and Law of the  
USSR Academy of Sciences, a scholar  
who will launch the Visiting Professor-

# New Flag Law Test Case Wings Its Way to Court

*Continued from page 3*

high court will find the new federal statute constitutional. If found unconstitutional, most expect renewed calls for a constitutional amendment banning flag burning.

When considering the flag law, Congress heard a great deal of testimony from legal scholars about whether it was possible in the wake of *Johnson* to craft a statute that does not violate the First Amendment.

Prof. Walter E. Dellinger III of Duke University School of Law says the new law comes close to satisfying the Supreme Court's requirements.

According to Professor Dellinger, the high court indicated in the *Johnson* decision that it would approve a law that protects the physical integrity of the flag while not examining the intentions of the burners. The Texas flag law that *Johnson* struck down made it a crime to take actions involving the flag that were offensive to others, a definition of which inherently requires a court to look at motivation.

To the extent that the federal law throws a blanket ban on flag burning, he says, it will withstand constitutional challenge. But the court may sever a provision making it a crime to "physically defile" the flag that the Senate added just before passing the act, he says. "Even [the *Johnson*] majority would have trouble swallowing a provision of the statute that uses the word 'defile'... [which] seems to remove any fig leaf of neutrality."

Charles J. Cooper, former head of the office of legal counsel in the Department of Justice and now a partner in Washington, D.C.'s McGuire, Woods, Battle & Boothe, disagrees with Professor Dellinger's reasoning.

## Careful Wording

According to Mr. Cooper, no amount of careful wording could ever hide the intention of such laws — to punish those who treat the flag contemptuously — especially when it makes exceptions, as the present federal law does, for the "disposal of a flag when it has

become worn or soiled." If the American people want to allow Boy Scouts to burn old flags "with love and respect in a disposal ceremony" while "prohibiting characters like Gregory Johnson from burning the flag with contempt," he says, "a constitutional amendment is absolutely necessary."

But it is unclear, says Professor Dellinger, how such an amendment would mesh with the First Amendment.

## Illinois Statute

While debate continues on the federal level, there has been much ado in Illinois about local flag-burning laws.

The state Legislature passed a law that, like the federal statute, prohibits the mutilation, defacement or defilement of or trampling on the American flag. In the hopes of making this law comply with *Johnson*, the Illinois lawmakers tried to avoid discussing motivation by striking the words "casts contempt upon" from the list of proscribed flag-related acts.

Political fury in the Land of Lincoln

over the lack of respect being shown the federal flag was sparked by a student exhibit of a flag on the floor at Chicago's School of the Art Institute. Scott "Dread Scott" Tyler, the 24-year-old artist responsible for the exhibit that encouraged viewers to walk on the flag, is one of the three D.C. flag burners whose cases now will go before the U.S. Supreme Court.

Because of Mr. Tyler's controversial exhibit in Chicago, he also was one of 10 artists involved in the case that led Cook County Circuit Court Judge Kenneth Gillis on Oct. 31 to declare the city's flag ordinance unconstitutional. *City of Chicago v. Aubin*, 89 CH 8763.

The city ordinance, passed March 31, made it a misdemeanor to knowingly "mutilate, deface, defile or defy, trample, or cast contempt upon by offensive touching or laying upon the ground or floor" a U.S. or foreign flag.

"This well-meant, but far reaching, measure... is illustrative of why laws of this nature must be carefully considered," said Judge Gillis.

## Iowa Law Chosen In Strict-Liability Action

IOWA LAW concerning strict liability, negligence, and willful and wanton conduct and damages applied to an action by a Canadian resident injured in Canada by a hay baler manufactured in Iowa, the U.S. District Court for the District of Colorado held Oct 10.

In *Kozoway v. Massey-Ferguson Inc.*, 1989 WL 120366, James Kozoway lost both his arms above the elbow in a Massey-Ferguson hay baler while he was operating the machine on his family's farm in Alberta, Canada. Mr. Kozoway is, and was at the time of the accident, a resident and citizen of the Province of Alberta. The hay baler was manufactured for the defendant Massey-Ferguson, a Maryland corporation, by Vermeer Manufacturing Co., an Iowa corporation. It was ordered by Massey-Ferguson Industries Ltd., a Canadian corporation, and shipped directly to a Canadian dealership for sale in Canada.

Mr. Kozoway argued that either Colorado or Iowa law applied, but expressed no preference between them. The defendant, however, contended that the law of Alberta was applicable.

to his right arm which, plaintiff alleged, was negligently inflicted while he was under general anesthesia during cardiac surgery.

During the instruction conference, Mr. Robnett indicated his intent to argue an adverse inference regarding the failure to testify of two physicians identified as experts by the hospital in its response to interrogatories. The hospital objected on the ground that the testimony was equally available to both parties.

The court stated that Mr. Robnett knew of the existence of the witnesses and was aware of the content of their testimony, and held that the trial court did not err in precluding him from making a negative inference during closing argument.

## Torts

# Update

protect architects and other contractors who submit plans to the consumer and does not shield the manufacturers of supplies to builders, the U.S. District Court for the District of North Dakota held Oct. 17.

In *Hebron Public School District v. United States Gypsum Co.*, 1989 WL 123170, a public school district brought suit against United States Gypsum Co. charging that some asbestos-containing ceiling tiles manufactured by United States Gypsum had caused damage.

Hebron, after an eight-day trial, submitted its case to the jury on five different causes of action. These included: negligence, strict tort liability, breach of implied warranty of merchantability, breach of implied warranty of fit-

## Subsequent Call No Basis For Solatium Award

A TELEPHONE call by an admiral to a patient's widow informing her that the physician who performed surgery that caused the patient's death was being court-martialed in connection with the surgery was not an aggravating circumstance justifying a solatium award in the widow's medical malpractice action, the 4th U.S. Circuit Court of Appeals held Oct. 23.

In *Grubb v. U.S.*, 1989 WL 124244, the widow of a deceased retired military officer claimed that her husband died as a proximate result of negligence during a heart operation performed at Bethesda Naval Hospital. She sought a solatium award, based on a phone call she received from an admiral at the hospital informing her that the surgeon who performed the operation on her husband was being court-martialed for manslaughter for his death and advising her to retain an attorney, saying it was "the cruelest thing that anybody could ever do to somebody."

The high court reasoned that it was difficult to understand how Mrs. Grubb was so taken aback or shocked by the



Vol. 25, No. 9  
September 1, 1989

A Legislative Analysis Service  
of the Governmental Affairs Office

**Chauvin assumes ABA presidency**

**Delegates approve wide range of policies**

The ABA House of Delegates, meeting Aug. 8 and 9 at the Annual Meeting in Honolulu, approved numerous policy recommendations highlighted by a resolution opposing a constitutional amendment concerning desecration of the American flag.

The delegates also deferred action on a proposal to create a new system for responding in federal courts to the litigation that can arise as a result of plane crashes, toxic spills and other mass torts.

In addition to House of Delegates action, the leadership of the association changed as the presidential gavel was passed from Robert D. Raven to L. Stanley Chauvin Jr. (see article, page 5).

Ethics was a major topic of discussion at the meeting. Sen. Warren G. Rudman (R-N.H.), in his speech to the Opening Assembly Aug. 6, said,

"We must return the ethics debate to the real issue: standards of behavior in government service. We must not rush to judgment or automatically impugn motives and integrity. It is wrong to ruin reputations on technicalities."

Richard J. Phelan, special outside counsel to the House Committee on Standards of Official Conduct, advised: "We, as lawyers, must keep the fire of ethics and integrity alive, notwithstanding the pressure to grow to 1,000-person law firms, to increase profits, to bill 2,600-hour years, and the never-ending drive for the best and brightest associates and the most

lucrative law business." Phelan, who spoke at a prayer breakfast Aug. 6, headed the investigation into the affairs of former House Speaker James C. Wright Jr.

Legislative resolutions approved by the House of Delegates include the following:

**Administrative Law**

*Judicial Review.* This resolution from the Section of Administrative Law and Regulatory Practice recommends an amendment to Section 703 of the Administrative Procedures Act to simplify the forms of proceeding  
*see "Annual Meeting," page 4*

**ABA cites constitutional grounds in opposing flag-desecration bills**

The ABA will oppose Congressional efforts this month to criminalize the desecration of the American flag, either through enactment of federal legislation or by adoption of a constitutional amendment to allow the federal government and the states to make desecration of the flag a crime.

Both House and Senate are expected to consider flag-protection measures after members return Sept. 6 from their August recess.

The push for such legislation is in response to the June 21 U.S. Supreme Court ruling in *Texas v.*

*Johnson*, in which a Texas statute was ruled unconstitutional because it violated the First Amendment right to freedom of expression.

The statute defined the following as a misdemeanor: to intentionally or knowingly desecrate, among other things, a state or national flag in a way "that the actor knows will seriously offend one or more persons likely to observe or discover his action."

During the 1984 Republican National Convention in Dallas, Gregory Lee Johnson, a demonstrator against Reagan Administration policies and

*see "Congress," page 6*



L. Stanley Chauvin Jr.

**INSIDE:**

AIDS victims included in disabilities bill .....	3	House approves 13 appropriations measures .....	7
Efforts renewed to enact product liability law .....	3		
Chauvin assumes ABA presidency .....	5		
Grand jury secrecy loosened by S&L statute .....	6		
Congress continues McCarran-Ferguson debate .....	7		

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# Congress plans action on flag protection

from page 1

certain corporations' nuclear arms activities, burned an American flag and was arrested and convicted on a misdemeanor charge. The state asserted two interests in supporting conviction: preventing breaches of the peace by those seriously offended by such conduct, and preserving the flag as a symbol of nationhood and unity.

However, the Supreme Court concurred with the Texas Court of Criminal Appeals that no breach of peace occurred or was even threatened. The court also held that a "bedrock principle" underlying the First Amendment is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive and disagreeable. The justices further held that the government could not require that "designated symbols be used to

communicate a limited set of messages."

Congressional reaction to the Supreme Court decision was swift. More than 50 proposals were introduced to either amend the Constitution or enact federal legislation making flag desecration a crime.

In the House, the Judiciary Committee approved H.R. 2978, a bill sponsored by committee Chairman Jack Brooks (D-Texas). The bill, expected to reach the House floor this month, would amend 18 U.S.C. 700, which currently states that it is a crime to cast contempt upon the U.S. flag. According to Brooks, H.R. 2978 would protect the physical integrity of the flag in all circumstances regardless of the motive or political message of the actor.

H.R. 2978 provides that "whoever knowingly mutilates, defaces, burns, or tramples upon any flag of the United States shall be fined . . . or imprisoned for not more than one year,

or both."

In approving the bill, the committee bypassed attempts for a Constitutional amendment on the matter, an idea promoted by the Bush Administration and expected to be brought up again on the House floor.

Meanwhile, the Senate Judiciary Committee is holding a series of hearings on the issue. Earlier, language of a bill introduced by Senate Minority Leader Robert J. Dole (R-Kan.) was approved as part of S. 5, child-care legislation passed by the Senate June 23. Dole's proposal would strike the wording in current law that makes desecration of the flag illegal only when committed by someone who "casts contempt" on the flag.

The ABA believes that attempts to amend the Constitution are "an unwarranted infringement on freedom of speech and expression and a dangerous precedent for the future," and attempts at federal legislation are "not only futile but irresponsible." ■

## Annual Meeting

from page 5

### Labor Law

**Unemployment Compensation.** A Section of Labor and Employment Law resolution approved by the delegates recommends the establishment of an experimental project to determine whether improved access to justice can be established in the unemployment compensation system.

**Mixed Cases.** Another approved recommendation from the section urges Congress to amend Title 5, Section 7702 of the Equal Employment Opportunity Act to provide for more timely processing of mixed cases involving the Equal Employment Opportunity Commission and the Merit Systems Protection Board.

### Military Law

**Military Judges.** The delegates accepted a resolution from the Standing Committee on Military Law recommending that Article 67 of the Uniform Code of Military Justice be amended to provide that a judge of the U.S. Court of Military Appeals who is not reappointed to the court shall become a senior judge except where there is cause for his non-appointment. The resolution also calls for an effective system for utilizing senior judges of the court. ■

## S&L bailout law permits limited disclosure of grand jury materials

The Financial Institutions Reform, Recovery and Enforcement Act, signed into law Aug. 9, permits specified government personnel to obtain grand jury information concerning banking law violations.

Specifically, the measure, Public Law 101-73 (H.R. 1278), permits disclosure for use in investigating and litigating bank fraud cases in two contexts: to financial institution regulatory agency personnel upon a showing of "substantial need" and pursuant to a court order; and to Justice Department civil attorneys without court order.

As introduced, both House and Senate versions of the banking bill contained provisions to permit government personnel meeting a "substantial need" test to be granted access to grand jury material relating to "any matter within the jurisdiction of such department or agency."

The ABA had opposed the grand jury secrecy provision as first proposed because it would have made "grand jury records automatically

and routinely available throughout the government for any civil litigative and investigative purposes."

The House bill, however, was modified after Rep. Charles E. Schumer (D-N.Y.) authored compromise language to limit disclosure to bank fraud cases and maintain the then existing requirement for court approval based on a showing of "particularized need," a higher standard than the adopted "substantial need."

Under the "substantial need" test, the court could consider the burden on the government in duplicating the grand jury investigation, a factor not considered under the "particularized need" standard. However, review under the "substantial need" standard would require a greater showing than mere convenience to the government.

In reconciling the differences between the two versions, the conference committee adopted the House language limiting the disclosure to bank fraud cases but lowering the standard for court approval to "substantial need." ■

# HOUSE JOINT RESOLUTION N

July 13, 1989, Introduced by Reps. London, Emmons, DeMars, Varga, Sikkema, Middaugh, Nye, Wartner, Stopczynski, Runco, Giese, Martin, Rocca, Pridnia, Bender, Camp, Bankes, Pandall, Stacey, DeLange, Gnodtke, Jaye, Weeks, Maynard, Bartnik and Owen and referred to the Committee on House Oversight.

A joint resolution ratifying the proposed amendment to the constitution of the United States relating to the physical desecration of the Flag of the United States.

Resolved by the Senate and the House of Representatives of the state of Michigan, That whereas the one hundred and first Congress of the United States of America, at its session, in both houses, by a constitutional majority of two-thirds of both houses has made the following proposition to amend the constitution of the United States:

1 "JOINT RESOLUTION

2 Whereas the Flag of the United States of America is a  
3 national symbol of such stature that it must be kept inviolate;

4 Whereas the physical desecration of the Flag should not be  
5 considered constitutionally protected speech; and

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TVD

HOUSE JOINT RESOLUTION N



# HOUSE JOINT RESOLUTION M

July 13, 1989, Introduced by Reps. Owen, DeMars, Scott and Maynard and referred to the Committee on House Oversight.

A joint resolution proposing an amendment to the state constitution of 1963, by adding section 9 to article III, to prohibit the physical desecration of the flag of the United States.

Resolved by the Senate and House of Representatives of the state of Michigan, That the following amendment to the state constitution of 1963, to prohibit the physical desecration of the flag of the United States, is proposed, agreed to, and submitted to the people of the state:

HOUSE JOINT RESOLUTION M

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## ARTICLE III

SEC. 9. A PERSON SHALL NOT PHYSICALLY DESECRATE THE FLAG OF THE UNITED STATES. THE LEGISLATURE SHALL PROVIDE BY LAW FOR THE IMPLEMENTATION OF THIS SECTION.

Resolved further, That the foregoing amendment shall be submitted to the people of the state at the next general election in the manner provided by law.



# Congress plans action on flag protection

from page 1

certain corporations' nuclear arms activities, burned an American flag and was arrested and convicted on a misdemeanor charge. The state asserted two interests in supporting conviction: preventing breaches of the peace by those seriously offended by such conduct, and preserving the flag as a symbol of nationhood and unity.

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## Law fails to protect flag in Wyo.

By The Associated Press

CHEYENNE — An apparent legislative oversight in the early 1950s made Wyoming one of just two states where burning the U.S. flag is not illegal, and Gov. Mike Sullivan and the legislature would like to right that omission.

The concern comes at a time when free-speech advocates are opposing President Bush's suggestion to amend the U.S. Constitution to protect the flag.

Bush's proposal followed the recent U.S. Supreme Court ruling that burning the flag is a constitutionally protected form of political protest.

Wyoming once had a law banning desecration of the flag that carried a fine of up to \$250 and a possible prison sentence of one year. However, during recodification of the state's criminal code in 1982 the statute was dropped, leaving Wyoming and Alaska as the only states where it's legal to burn the U.S. flag.

"Somehow or another they didn't include in our offenses . . . the desecration of the flag section that was there," said Assistant Attorney General Hugh Kenny.

In 1983, according to Kenny, the state adopted the U.S. Flag Code, but it doesn't carry any criminal penalties for desecration.

Ironically, the lawyer said, the state code still contains language "that says any desecration of the state flag is treated the same way we treat desecration of the U.S. flag, but the statute that it was referring to apparently got dropped."

Sullivan learned of Wyoming's standing from a recent newspaper article, and was surprised.

"I had not known it before having seen that article, and it seems to be something we should correct."

Sullivan added that he doesn't think protecting the flag would conflict with the First Amendment.

"I think there are some things that deserve protection, and I don't see protecting the flag and its symbol as contrary to the First Amendment," he said.

"I don't agree with the (Supreme) court's decision. As far as a constitutional amendment, it seems to me it's worth undertaking that step."

State Rep. H.L. Jensen, D-Jackson, was one of several legislators who wasn't aware that Wyoming's flag desecration law had been dropped from the books.

"I did not have the slightest idea. Of course, I don't think anybody thought it was necessary to put the law on the books," he added.

# ll Counts

money," said the prosecutor Smith. "It doesn't matter how well known you are, you can't do that to the American people."

### 'A Sad Time'

Religious leaders expressed their dismay over the spectacle surrounding the trial and the messages it conveys.

"It's a sad time for all of us in the Christian work," said Arthur L. Carter, executive director of the National Council on Financial Abuse and Neglect. "All Christian organizations have been hurt by this in some way."

After the verdict was announced, the court heard around whether Judge Parker would send Mr. Bakker to jail.

Mr. Carter, a second prosecutor in the case, declined to comment on Mr. Bakker's punishment, other than to say that a fine or probation is appropriate in this case.

Mr. Carter, whose nickname is "Bob," is known for his wit and there is widespread speculation Mr. Bakker could survive his term.

Mr. Carter's supporters, who were in numbers during the 24-day trial, expressed their disappointment over the verdict. But they said Mr. Bakker would survive his term.

"I'd have Jesus, he could not have had Bea Martin, a longtime employee of the Bakkers', lost his Christianity. He's more of a Lord than he's ever been. He's more compassionate. He even has more prosecutors. He's praying for him."

### Years of Tumult

Mr. Bakker capped two and a half years of tumult in the world of television that began when Mr. Bakker moved from his ministry on television to 87, after revelations about his encounter with a former secretary, Jessica Hahn, and his use of ministry money to buy her a house.

It was sex that began the tumult, money that was at its core, the furor was a reflection of the public's taste for luxury, but it was the frantic battle for dollars in a world of television evangelism.

Mr. Bakker acknowledged the tumult when he testified, "I never get away from the fact that you have to raise funds every week, the next month, the next year."

Mr. Bakker built a \$180 million emerald and a 2,300-acre Christian retreat and resort, Heritage Park, S.C., and the largest satellite network devoted to religious programming in 1988. It took in \$129 million in 1988.



Tammy Faye Bakker broke into a hymn outside the Federal courthouse in Charlotte, N.C., after the conviction of her husband. With her was Mr. Bakker's lawyer, George T. Davis.

## Senate Votes to Outlaw Flag Burning

By ROBIN TONER  
Special to The New York Times

WASHINGTON, Oct. 5 — The Senate today approved legislation intended to outlaw flag burning and other forms of flag desecration, setting the stage for a battle later this month over a proposed constitutional amendment to accomplish the same purpose.

Many Democrats hope the legislation, approved by a vote of 91 to 9, will take the edge off the drive for an amendment barring flag burning, which critics say would involve needless tinkering with the Bill of Rights. Such an amendment has the backing of President Bush, the Republican leadership in Congress, and many rank-and-file Democrats.

The White House has given no indication that it will veto the legislation, but has repeatedly reaffirmed its preference for an amendment.

### Some Adjustments Are Made

The House has already passed a version of the bill and is soon expected to give final approval to the legislation passed by the Senate, which made some adjustments to the House bill.

The legislation is intended to circumvent a Supreme Court ruling in June that flag burning is a protected expression of free speech.

To satisfy the First Amendment concerns of the Court, an effort was made to confine the legislation to the act of flag burning rather than the political message of the burners.

### Stage is set for a battle over amending the Constitution.

Many supporters of a constitutional amendment say that the effort is doomed to failure and that the measure will not pass muster with the Supreme Court.

### Two Paths Are Killed

Democratic leaders tried today to beat back two efforts by Republicans to amend the measure with language that some Democrats feared would raise constitutional problems. One effort involved a prohibition on "physically defiling" the flag. An attempt to kill that part of the bill failed by a vote of 31 to 69, with several Democrats switching their votes when it was clear that the amendment would survive.

The Democratic leadership, led by Senator Joseph R. Biden Jr., chairman of the Senate Judiciary Committee, succeeded in killing the other amendment. That measure, proposed by Senator Bob Dole, the Republican leader, would have stipulated that the legislation ban public acts of flag desecration. It was killed by a vote of 53 to 47.

A measure asking for a constitutional amendment to outlaw flag burning is expected to come to the Senate floor the week of Oct. 10. Approval would require the support of two-thirds of the senators present and voting.

Democrats who oppose the measure are now conducting a head count to measure their forces.

### The Way the Parties Split

The nine senators voting against the measure today fell into two categories. Six of them support neither a statute nor a constitutional amendment: two Republicans, John H. Chafee of Rhode Island and Gordon Humphrey of New Hampshire, and four Democrats, Edward M. Kennedy of Massachusetts, Bob Kerrey of Nebraska, Howard Metzenbaum of Ohio and Daniel Patrick Moynihan of New York.

Three other Senators, all Republicans, voted against the legislation and voiced a preference for a constitutional amendment: Mr. Dole, Charles E. Grassley of Iowa and Orrin G. Hatch of Utah. Many senators who voted for the legislation have indicated they also support an amendment.

The Senate spent a day and a half on the flag-burning measure this week, even as it struggled with an array of budget and other legislation piling up. George J. Mitchell, the Senate Majority Leader, told reporters today that he "regretted" that the Senate spent so much time on the flag measure this week but said it was out of his control.

Mail Subscriptions: 800-631-2500

TREASON AND DISLOYAL ACTS

R.S. 14:116

Ch. 1

Note 1

(2) Expose to public view any flag, upon which has been printed or otherwise produced, or to which shall have been attached any such word, mark, design, or advertisement; or

(3) Expose to public view, or have in possession for sale or any other purpose, any article of merchandise, or thing for holding or carrying merchandise, upon or to which shall have been produced or attached any flag, in order to advertise, call attention to or decorate such article; or

(4) Publicly mutilate, defile, or by word or act cast contempt upon any flag.

The word "flag" as used herein shall mean any duly authorized flag, shield, standard, color or ensign of the United States, the State of Louisiana, or the Confederate States of America, or any copy thereof.

Whoever commits the crime of flag desecration shall be fined not more than one hundred dollars, or imprisoned for not more than ninety days or both

Amended by Acts 1960, No. 544, § 1.

Reporter's Comment

See Reporter's Comment, R.S. 14:117.

History and Source of Law

Source

Acts 1942, No. 43, § 1, Art. 116.

The 1960 amendment added to the definition of "flag", standard, color, ensign and Confederate States of America.

Cross References

Display of federal and state flags, see R.S. 49:152, 49:153.

Library References

States 6-23.

C.I.S. States § 39.

United States 6-54.

C.J.S. United States § 8.

C.I.S. Flags §

United States Code Annotated

Display and use of flag, see 36 U.S.C.A. § 171 et seq.

United States Supreme Court

Contemptuous treatment of flag, see Smith v. Goguen, 1974, 94 S.Ct. 1242, 415 U.S. 566, 39 L.Ed.2d 605; Spence v. State of Wash., 1974, 94 S.Ct. 2727, 418 U.S. 405, 41 L.Ed.2d 842.

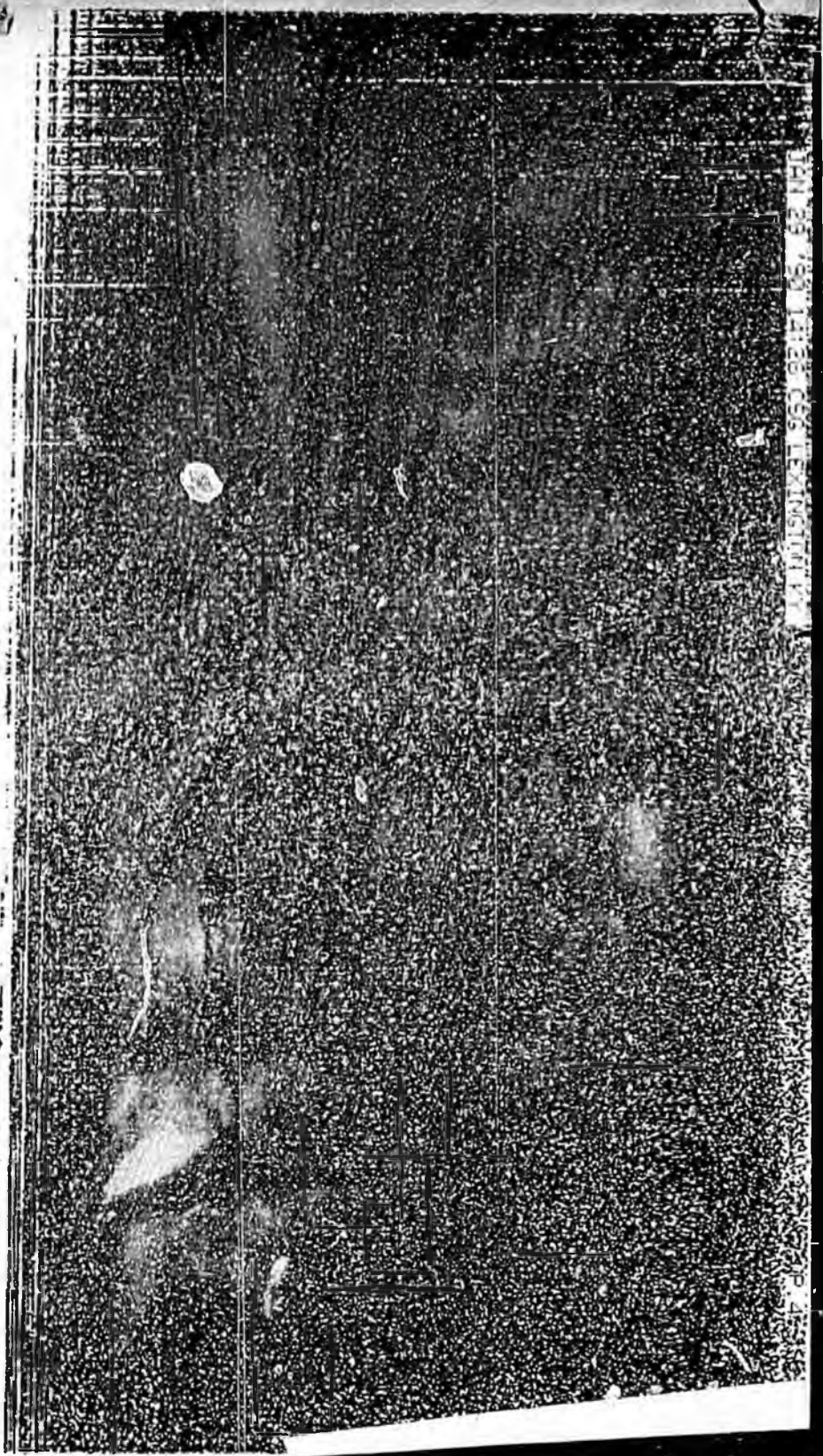
Notes of Decisions

In general 2  
Validity 1

prosecuted was unconstitutionally broad and vague, were not entitled to have their pending state criminal prosecutions enjoined, and merits of their claim would not be considered. *Ferrante v. Garrison, D.C. 1972, 348 F.Supp. 133.*

1. Validity

Plaintiffs, who made no allegations of bad faith, harassment, or any other special circumstances, but who simply alleged that this section under which they were being



CHAPTER 646

OFFENSES AGAINST THE FLAG

- 646:1 Misuse of Flag.
- 646:2 Wrongful Display of Flag.

LIBRARY REFERENCES

West Key Number	A1.R
United States $\leftrightarrow$ 5%	What constitutes violation of flag desecration statutes. 41 A1.R3d 502.
CJS	
Flags § 2.	
United States § 8	

646:1 Misuse of Flag. A person is guilty of a misdemeanor if he:

- I. Purposely places any unauthorized inscription or other thing upon any flag of the United States or of any state of the United States; or
- II. Knowingly exhibits any such flag knowing the inscription or other thing to be unauthorized; or
- III. For purposes of advertising a product or service for sale or free distribution, affixes a representation of the flag of the United States or of a state of the United States to such product or on any display whereon such product or service is advertised; or
- IV. Purposely or knowingly mutilates or defiles any such flag; or
- V. Having been presented with a flag in behalf of this state and using such flag in violation of this section, refuses to comply with a request by the governor that such flag be returned.

HISTORY

Source. 1971, 518:1, eff. Nov. 1, 1973.

CROSS REFERENCES

Classification of crimes, see RSA 625:9.  
Sentences, see RSA 651.

ANNOTATIONS

1. Cited  
Cited in *Royal v. Superior Court*, 397 F. Supp. 260 (D.N.H. 1975); *Royal v. Superior Court*, 631 F.2d 1081 (1st Cir. 1976), certiorari denied, 429 U.S. 867, 97 S.Ct. 178, 50 L.Ed.2d 147 (1976).

646:2 Wrongful Display of Flag. A person is guilty of a misdemeanor if:

- I. Knowing that he is not authorized by an appropriate federal, state, county or municipal official he displays the flag of any foreign country upon any state, county, or municipal building; or
- II. He displays the flag of the United Nations on the property of the state, a county, a municipality or any institution of learning in any manner other than along with and subordinated to the flag of the United States.

MINN.

**Subdivision 1. Definition.** In this section "flag" means anything which is or purports to be the Stars and Stripes, the United States shield, the United States coat of arms, the Minnesota state flag, or a copy, picture, or representation of any of them.

**Subd. 2. Acts prohibited.** Whoever does any of the following is guilty of a misdemeanor:

(1) Intentionally and publicly mutilates, defiles, or casts contempt upon the flag; or

(2) Places on or attaches to the flag any word, mark, design, or advertisement not properly a part of such flag or exposes to public view a flag, so altered; or

(3) Manufactures or exposes to public view an article of merchandise or a wrapper or receptacle for merchandise upon which the flag is depicted; or

(4) Uses the flag for commercial advertising purposes.

**Subd. 3. Exceptions.** This section does not apply to flags depicted on written or printed documents or periodicals or on stationery, ornaments, pictures, or jewelry, provided there are not unauthorized words or designs on such flags and provided the flag is not connected with any advertisement.  
Laws 1963, c. 753. Amended by Laws 1971, c. 23, § 45, eff. March 6, 1971.

**Advisory Committee Comment**

This will supersede Minn.St. § 614.36. The recommended section follows substantially Wisconsin St. 946.06, which in turn adopted the substance of the uniform act on the subject.

Clause (4) of Subd. 2 does not prevent the giving away of flags to customers of a business enterprise as a patriotic gesture.

Reference to the use by the Red Cross of a flag by placing the names of donors thereon, now appearing in Minn.St. § 614.36, has not been included. U.S.Code, Tit. 36, §§ 170 and 171 and subsequent sections prescribe the formalities, the use, and displaying of the flag on various occasions.

Minn.St. § 614.34 prohibits the display in the state of a red or black flag. A similar California statute was held unconstitutional in *Stromberg v. California*, 1931, 51 S.Ct. 532, 283 U.S. 359, 75 L.Ed. 1117, on the ground that it violated the right of free speech. Its repeal is recommended.

**Historical Note**

**Derivation:**

Minn.St.1961, §§ 614.34, 614.36  
St.1927, §§ 10509 to 10513.  
Gen.St.1923, §§ 10509 to 10513.  
Laws 1919, c. 46, §§ 1 to 4.  
Laws 1919, c. 431, § 1.  
Gen.St.1913, § 9012.

Rev.Laws 1905, § 50.  
Laws 1892, c. 163.

The 1971 amendatory act substituted the specified penalty of misdemeanor for a former penalty of imprisonment for not more than 90 days or a fine of not more than \$100.

**Cross References**

Misdemeanor, penalty when not otherwise provided, see § 609.03.

946.04 Repealed by L. 1977, c. 173, § 117, eff. June 1, 1978

**Historical Note**

The repealed section, relating to the display of sedition flags or emblems, was derived from:

L. 1919, c. 369.  
S. 1919, § 457.00

L. 1925, c. 4.  
S. 1925, § 348.485.  
L. 1936, c. 696, § 1.  
S. 1936, § 946.04.

**946.05 Flag desecration**

(1) Whoever intentionally and publicly mutilates, defiles, or casts contempt upon the flag is guilty of a Class E felony.

(2) In this section "flag" means anything which is or purports to be the Stars and Stripes, the United States shield, the United States coat of arms, the Wisconsin state flag, or a copy, picture, or representation of any of them.

**Historical Note**

**Source:**

L. 1919, c. 143, § 2.  
S. 1919, §§ 457.51, 457.51, 457.51.  
L. 1925, c. 4.  
S. 1925, §§ 348.48, 348.482, 348.483.

L. 1935, c. 696, § 1.  
S. 1935, § 946.05.  
L. 1967, c. 241, eff. Dec. 22, 1967.  
L. 1977, c. 173, § 118, eff. June 1, 1978.

**Law Review Commentaries**

Development of crimes requiring no criminal intent. William J. Sloan, 26 Marquette L.Rev. 92 (1942)

Necessity of criminal intent for crime of conspiracy. (1936) 10 Wis.L.Rev. 526

**Library References**

United States C.S. 2.

C.L.S. Flags § 2.

**United States Supreme Court**

Flag statute and free speech, see Spence v. State of Washington, 1974, 91 S.Ct. 2727, 418 U.S. 405, 41 L.Ed.2d 842.

Flag statute unconstitutionally vague, see Smith v. Goguen, 1974, 91 S.Ct. 1242, 415 U.S. 566, 39 L.Ed.2d 605.

**946.06 Improper use of the flag**

(1) Whoever intentionally does any of the following is guilty of Class A misdemeanor

(a) Places on or attaches to the flag any word, mark, design, or advertisement not properly a part of such flag; or

(b) Exposes to public view a flag upon which has been placed or attached a word, mark, design, or advertisement not properly a part of such flag; or

## § 1326. Smoking on trolleys and buses.

(a) Whoever in any trackless trolley coach, or gasoline or diesel-engine-propelled bus being used as a public conveyance for carrying passengers within this State, smokes or carries a lighted cigarette, cigar or pipe shall be fined not less than \$5 nor more than \$25.

(b) Justices of the peace shall have jurisdiction of offenses under this section. (60 Del. Laws, c. 66, § 1.)

## § 1331. Desecration; class A misdemeanor.

A person is guilty of desecration if he intentionally defaces, damages, pollutes or otherwise physically mistreats any public monument or structure, any place of worship, the national flag or any other object of veneration by the public or a substantial segment thereof, in a public place and in a way in which the actor knows will outrage the sensibilities of persons likely to observe or discover his actions.

Desecration is a class A misdemeanor (11 Del. C. 1953, § 1331; 58 Del. Laws, c. 497, § 1; 65 Del. Laws, c. 463, § 1.)

Effect of amendment. — 65 Del. Laws, c. 463, following "worship" near the middle of the first 463, effective July 8, 1965, deleted "or burial" paragraph.

## § 1332. Abusing a corpse; class A misdemeanor.

A person is guilty of abusing a corpse when, except as authorized by law, he treats a corpse in a way that a reasonable man knows would outrage ordinary family sensibilities.

Abusing a corpse is a class A misdemeanor. (11 Del. C. 1953, § 1332; 58 Del. Laws, c. 497, § 1.)

## § 1335. Violation of privacy; class A misdemeanor.

(a) A person is guilty of violation of privacy when, except as authorized by law, he:

(1) Trespasses on property intending to subject anyone to spying or other surveillance in a private place; or

(2) Installs in any private place, without consent of the person or persons entitled to privacy there, any device for observing, photographing, recording, amplifying or broadcasting sounds or events in that place or uses any such unauthorized installation; or

(3) Installs or uses outside a private place any device for hearing, recording, amplifying or broadcasting sounds originating in that place which would not ordinarily be audible or comprehensible outside, without the consent of the person or persons entitled to privacy there; or

(4) Intercepts without the consent of all parties thereto a message by telephone, telegraph, letter or other means of communicating privately, including private conversation; or

Symbols & Awards

3305. Flags in village square and supervised public parks

In addition to the buildings and grounds described in this Act in and upon which the United States national flag shall be displayed, a flag shall also be displayed and flown each day of the week from each city or village hall and village square, and at the principal entrance to all supervised public parks.

Laws 1897, p. 229, § 3, added by Laws 1967, p. 2052, § 1, eff. July 26, 1967.

Library References

States ↪ 28.

C.J.S. States § 147.

3306. Expense for flags—Manner of payment

The flags used by any and all state institutions, as provided for in this act, shall be paid for out of the funds appropriated for the running expenses of said institutions, the same as other necessary supplies are bought and paid for, and the flags for use over court houses and public school buildings are hereby declared to be necessary supplies, and may be paid for out of the public funds of the respective counties or school districts.

Laws 1897, p. 229, § 4, eff. July 1, 1897.

3307. Penalty for injuring any flag, flag-staff, or pole

Any person or persons who shall wilfully injure, deface or destroy any flag, flag-staff or pole, or adjustments attached thereto, erected and arranged for the purpose of carrying out the requirements of this act, shall be deemed guilty of a petty offense and fined not less than one (1) dollar nor more than fifteen (15) dollars.

Laws 1897, p. 229, § 5, eff. July 1, 1897. Amended by P.A. 77-2446, § 1, eff. Jan. 1, 1973.

Historical Note

P.A. 77-2446 substituted "petty offense and" for "misdemeanor and, upon conviction, shall be".

The amendment by P.A. 77-2446 conformed penalties under this paragraph with the Unified Code of Corrections, sec. ch. 35, § 1001-1-1 et seq.

Section 2 of P.A. 77-2446 provided an effective date of January 1, 1973.

Library References

Disorderly Conduct ↪ 1.  
Malicious Mischief ↪ 1, 12.

C.J.S. Disorderly Conduct § 1(1) et seq.  
C.J.S. Malicious Mischief §§ 1 to 5, 12.

DESECRATION OF FLAGS

3351. Desecration, mutilation or improper use—Penalty

Any person who (a) for exhibition or display, places or causes to be placed any word, figure, mark, picture, design, drawing, or any advertisement of any nature, upon any flag, standard, color or ensign of the United States or State flag of this State or ensign, (b) exposes or causes to be exposed to public view any such flag, standard, color or ensign, upon which has been printed, painted or otherwise placed, or to which has been attached, appended, affixed, or annexed, any word, figure, mark, picture, design or drawing or any advertisement of any nature, or (c) exposes to public view, manufactures, sells, exposes for sale, gives away, or has in possession for sale or to give away or for use for any purpose, any article or substance, being an article of merchandise, or a receptacle of merchandise or article or thing for carrying or transporting merchandise upon which has been printed, painted, attached, or otherwise placed a representation of any such flag, standard, color, or ensign, to advertise, call attention to, decorate, mark or distinguish the article or substance on which so placed, shall be guilty of a Class C misdemeanor!

Any person who publicly mutilates, defaces, defiles or defies, tramples or casts contempt upon, whether by words or act, any such flag, standard, color or ensign shall be guilty of a Class 4 felony.

Laws 1907, p. 351, § 1, eff. July 1, 1907. Amended by Laws 1968, p. 173, § 1, eff. Aug. 20, 1968; P.A. 77-2447, § 1, eff. Jan. 1, 1973.

Historical Note

The 1968 amendment added the second paragraph.

A violation under the first paragraph became a "Class C misdemeanor" under P.A. 77-2447, punishment having previously been by a fine of from \$10 to \$100 and costs or by imprisonment for not more than 30 days, or both.

The amendment by P.A. 77-2447 conformed penalties under this paragraph with the Unified Code of Corrections, sec. ch. 35, § 1001-1-1 et seq.

Section 2 of P.A. 77-2447 provided an effective date of January 1, 1973.

Title of Act:

The same amendment made a violation of the second paragraph a "Class 4 felony"; punishment having previously been by a fine of from \$1000 to \$5000 or by imprisonment of from one to five years, or both.

An Act to prevent and punish the desecration, mutilation or improper use of the flag of the United States of America. Laws 1907, p. 351, approved May 26, 1907, eff. July 1, 1907.

Library References

Disorderly Conduct ↪ 1.  
United States ↪ 634.

C.J.S. Disorderly Conduct § 1(1) et seq.  
C.J.S. United States § 8.

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**TREASON, RIOT, DISORDERLY CONDUCT AND RELATED OFFENSES**

**166.005 Treason.** (1) A person commits the crime of treason if the person levies war against the State of Oregon or adheres to its enemies, giving them aid and comfort.

(2) No person shall be convicted of treason unless upon the testimony of two witnesses to the same overt act or upon confession in open court.

(3) A person convicted of treason shall be punished by imprisonment for life. [1971 c.743 §217]

166.010 [Repealed by 1971 c.743 §432]

**166.015 Riot.** (1) A person commits the crime of riot if while participating with five or more other persons the person engages in tumultuous and violent conduct and thereby intentionally or recklessly creates a grave risk of causing public alarm.

(2) Riot is a Class C felony. [1971 c.743 §213]

166.020 [Repealed by 1971 c.743 §432]

**166.025 Disorderly conduct.** (1) A person commits the crime of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, the person:

(a) Engages in fighting or in violent, tumultuous or threatening behavior; or

(b) Makes unreasonable noise; or

(c) Disturbs any lawful assembly of persons without lawful authority; or

(d) Obstructs vehicular or pedestrian traffic on a public way; or

(e) Congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or

(f) Initiates or circulates a report, knowing it to be false, concerning an alleged or impending fire, explosion, crime, catastrophe or other emergency; or

(g) Created a hazardous or physically offensive condition by any act which the person is not licensed or privileged to do.

(2) Disorderly conduct is a Class B misdemeanor. [1971 c.743 §220; 1983 c.546 §5]

166.030 [Repealed by 1971 c.743 §432]

166.035 [1971 c.743 §221; repealed by 1973 c.716 §2]

166.040 [Repealed by 1971 c.743 §432]

166.045 [1971 c.743 §222; repealed by 1983 c.546 §3]

166.050 [Repealed by 1971 c.743 §432]

166.080 [Amended by 1933 c.436 §1; 1961 c.503 §1; repealed by 1971 c.743 §432]

**166.085 Harassment.** (1) A person commits the crime of harassment if the person intentionally:

(a) Harasses or annoys another person by:

(A) Subjecting such other person to offensive physical contact; or

(B) Publicly insulting such other person by abusive words or gestures in a manner intended and likely to provoke a violent response;

(b) Subjects another to alarm by conveying a false report, known by the conveyor to be false, concerning death or serious physical injury to a person, which report reasonably would be expected to cause alarm; or

(c) Subjects another to alarm by conveying a telephonic or written threat to inflict serious physical injury on that person or to commit a felony involving the person or property of that person or any member of that person's family, which threat reasonably would be expected to cause alarm.

(2) A person is criminally liable for harassment if the person knowingly permits any telephone under the person's control to be used in violation of subsection (i) of this section.

(3) Harassment is a Class B misdemeanor. [1971 c.743 §223; 1981 c.468 §1; 1985 c.498 §1; 1987 c.506 §3]

**166.075 Abuse of venerated objects.** (1) A person commits the crime of abuse of venerated objects if the person intentionally abuses a public monument or structure, a place of worship or burial, or the national or state flag

(2) As used in this section and ORS 166.085, "abuse" means to deface, damage, defile or otherwise physically mistreat in a manner likely to outrage public sensibilities.

(3) Abuse of venerated objects is a Class C misdemeanor. [1971 c.743 §224]

**166.085 Abuse of corpse.** (1) A person commits the crime of abuse of corpse if, except as otherwise authorized by law, the person intentionally:

(a) Abuses a corpse; or

(b) Disinter, removes or carries away a corpse.

(2) Abuse of corpse is a Class C felony.

(3) As used in this section, "abuse of corpse" includes treatment of a corpse by any person in a manner not recognized by generally accepted standards of the community or treatment by a professional person in a manner not generally

## CHAPTER 33—EMBLEMS, INSIGNIA AND NAMES

Sec.

- 700. Desecration of the flag of the United States; penalties.
- 701. Official badges, identification cards, other insignia.
- 702. Uniform of armed forces and Public Health Service.
- 703. Uniform of friendly nation.
- 704. Military medals or decorations.
- 705. Badge or medal of veterans' organizations.
- 706. Red Cross.
- 707. 4-H Club emblem fraudulently used.
- 708. Swiss Confederation coat of arms.
- 709. False advertising or misuse of names to indicate Federal agency.
- 710. Cremation urns for military use.
- 711. "Smokey Bear" character or name.
- 711a. "Woody Owl" character, name, or slogan.
- 712. Misuse of names, words, emblems, or insignia.
- 713. Use of likenesses of the great seal of the United States, and of the seals of the President and Vice President.
- 714. "Johnny Horizon" character or name.
- 715. "The Golden Eagle Insignia".

### Historical Note

1974 Amendment. Pub.L. 93-318, § 8, June 22, 1974, 88 Stat. 245, added item 711a.

1973 Amendment. Pub.L. 93-147, § 1(b), Nov. 3, 1973, 87 Stat. 555, substituted "Misuse of names, words, emblems, or insignia" for "Misuse of names by collecting agencies to indicate Federal agency" in item 712.

1972 Amendment. Pub.L. 92-317, § 3(c), July 11, 1972, 86 Stat. 402, added item 715.

1971 Amendment. Pub.L. 91-651, § 2, Jan. 5, 1971, 84 Stat. 1911, added ", and of the seals of the President and Vice President" following "United States" in item 713.

1970 Amendment. Pub.L. 91-110, § 4, Sept. 25, 1970, 84 Stat. 541, added item 714.

1968 Amendment. Pub.L. 90-381, § 2, July 5, 1968, 82 Stat. 291, added item 700.

1960 Amendment. Pub.L. 86-807, § 1(b), Nov. 11, 1960, 80 Stat. 1525, added item 713.

1959 Amendment. Pub.L. 86-201, § 3, Sept. 21, 1959, 73 Stat. 570, added item 712.

1952 Amendment. Act May 23, 1952, c. 327, § 2, 66 Stat. 62, added item 711.

1950 Amendment. Act Sept. 28, 1950, c. 1002, § 1(a), 64 Stat. 1077, added item 710.

1949 Amendment. Act May 24, 1949, c. 139, § 14, 63 Stat. 61 inserted "Uniform of armed forces and Public Health Services" in lieu of enumerating the specific branches for item 702.

### § 700. Desecration of the flag of the United States; penalties

(a) Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than \$1,000 or imprisoned for not more than one year, or both.

(b) The term "flag of the United States" shall include any flag, standard, colors, ensign, representation of either, or of any part or part substance or represented on any substance, or reporting to be either of said flag, standard, United States of America, or a picture or a upon which shall be shown the colors, the star number of either thereof, or of any part or the average person seeing the same without the same to represent the flag, standards, United States of America.

(c) Nothing in this section shall be construed on the part of Congress to deprive any sion, or the Commonwealth of Puerto Rico of, fense over which it would have jurisdiction in tion.

Added Pub.L. 90-381, § 1, July 5, 1968, 82 Stat.

### Historical Note

Legislative History. For legislative 1968 U.S. Code history and purpose of Pub.L. 90-381, see 2507.

### Cross References

Penalty for mutilation or use of flag for advertising purposes, 4, Flag and Seal, Sent of Government, and the Stat

### Library References

United States 6-5½.

C.J.S. Flag  
C.J.S. United

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1. Constitutionality  
This section is not an attempt to interfere with free speech and does not place any restriction on U.S.C.A. Const. Amend. 1 freedoms greater than is essential to the furtherance of the national interest. U. S. v. Crosson, C.A. Ariz. 1072, 462 F.2d

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