The Revolutionary Communist Party and Flag Burning During Its Forgotten Years, 1974–1989

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Origins of the Controversy

Since 1989, the American political scene has been convulsed by repeated controversies concerning whether or not "desecrating" the American flag (generally defined as burning or otherwise physically damaging it) should be a criminal offense. The *immediate* background to these controversies is the 1989 Supreme Court ruling in *Texas v. Johnson* (subsequently reaffirmed and broadened by the Supreme Court's 1990 ruling in *U.S. v. Eichman*), which held that physical flag desecration for the purpose of expressing a political viewpoint is protected under the First Amendment. Ever since these rulings, an organized movement led by the American Legion has sought to amend the Constitution to overrule the Supreme Court and authorize the outlawing of flag desecration. The proposed constitutional amendment was defeated in 1989 and again in 1990 (it received majority backing in both houses of Congress, but not the required two-thirds support required for an amendment). Subsequently it was revived and passed the House by well over the needed two-thirds vote in 1995 and 1997; the proposal failed by three votes in the Senate in 1995 and was never voted on in the Senate before the 105th Congress adjourned, due to crush of other legislative business in late 1998 and especially due to the eclipsing of virtually all other issues in that year by the Monica Lewinsky affair. Amendment backers reintroduced the proposal in early 1999, and as of mid-June were expected to succeed easily once more in the House and were within two votes of victory in the Senate. Since 49 state legislatures have already petitioned Congress to endorse a flag desecration amendment, should Congress pass such an amendment it would almost certainly be ratified by the required three-fourths (38) of the 50 state legislatures and become the first-ever change in the First Amendment.

The *distant* origins of the flag desecration controversy date back to the turn of the century, when, in response to pressure from union veterans' organizations such as the Grand Army of the Republic and hereditary-patriotic organizations such as the Daughters of the American Revolution, the states began to outlaw flag desecration in response to their complaints that advertising, commercial, or otherwise unorthodox use of flags and flag imagery was demeaning the national symbol. Thus, an 1895 pamphlet issued by the proponents of the early movement to ban flag desecration

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declared that the "tender sentiment" properly associated with a "decent use" of the flag would be "dissipated" and "sadly marred when we see it shamefully misused" as a "costume to bedeck stilt walkers, circus clowns, prize fighters and variety players or gaiety girls".[1]

While the anti-flag desecration movement originally focused primarily on such alleged advertising and commercial misuse, a major new supposed threat to the flag quickly came to the fore, namely that allegedly posed by political dissidents, supposedly emanating especially from trade union members, immigrants, and political radicals who might use the flag to express symbolic political protest. Gradually after 1900, and especially after the twin 1917 developments of American intervention in World War I and the Bolshevik Revolution, the interest of flag patriots began to center almost exclusively on the alleged or potential use of the flag as a means of expressing political protest by such forces, who were all perceived as potential threats and dissidents, and who were often indiscriminately lumped together. For example, in a 1900 pamphlet, leading flag protection spokesman Charles Kingsbury Miller warned that the country had become the "international dumping ground" for "hundreds of thousands of the lowest class of immigrants" who swelled the "populace who abuse" the flag and posed a "menace to the nation", along with the "riotous elements of the labor organizations" and assorted and apparently interchangeable "Socialists, Anarchists, Nihilists, Populists, Tramps and Criminals".[2]

Despite such rhetoric, actual instances were very rare in which the flag was physically damaged (as opposed to being the subject of verbal attack or, in the eyes of the flag patriots, insufficient reverence) in order to express political dissent during the entire pre-Vietnam War era. For example, apparently the only protest flag burning between 1900 and 1965 involved an eccentric socialist-pacific New York clergyman, Bouck White, who acted in 1916 on the eve of his trial for distributing a caricature which allegedly demeaned the flag (under the New York state flag desecration law, White received separate maximum sentences of 30 days in jail and $100 fines for both offenses).[3]

As in New York, between 1897 and 1932 lobbying by flag patriots succeeded in obtaining passage of flag desecration laws in all of the other states, with a burst of 31 states acting between 1897 and 1905. Although the state laws varied somewhat, most outlawed attaching anything to or placing any marks on anything even remotely resembling the flag; using flag-like objects in any manner for advertising purposes; or physically or even *verbally* "desecrating" the flag in any way, including, typically, "publicly" mutilating, trampling, defacing, defiling, "defying" or casting "contempt", either "by words or act" upon it.[4]

The earliest state flag desecration laws were quickly and, at first, successfully challenged in local and state courts as illegally restricting property rights by adversely-affected commercial interests. However, in the 1907 case of *Halter v. Nebraska* the

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[1] National Flag Committee of the Society of Colonial Wars in the State of Illinois, *Misuse of the National Flag of the United States of America* (Chicago, 1895), 6.

[2] Charles Kingsbury Miller, *The Crime of a Century: Desecration of the American Flag* (1900), 1, 4-5.

[3] *New York Times* (hereafter NYT), 27 March, 2-3 June 1916; 3-8, 13-15 March 1917.

[4] For a detailed history of the flag desecration controversy in the United States during the pre-1989 period, see Robert Justin Goldstein, *Saving "Old Glory": The History of the American Flag Desecration Controversy* (Boulder, CO: Westview, 1995). For a collection of key documents concerning the flag desecration controversy, including the text of state flag desecration laws, see Goldstein, *Desecrating the American Flag: Key Documents from the Civil War to 1995* (Syracuse: Syracuse University Press, 1996).

U.S. Supreme Court upheld Nebraska's law in sweeping terms which made clear the futility of any further legal challenges for the foreseeable future. In a case involving selling bottles of "Stars and Stripes" beer with pictures of flags on the labels, the Court declared that the state was entitled to restrict property rights for the valid and indeed worthy purpose of fostering nationalism. Although the ruling did not address free speech rights (which had not, in any case, been raised by the defendants), the ruling was so broadly worded that the Court clearly would then have rejected any such attack on the state laws (especially since before 1925 the Court consistently refused to extend First Amendment rights at all to individuals who challenged *state*, as opposed to *federal*, laws).

From then until 1969, when the Supreme Court next considered a flag desecration case, the constitutionality of flag desecration laws was essentially considered beyond review by the lower courts. However, reflecting the shift in emphasis of the flag patriots, while pre-*Halter* flag desecration prosecutions almost invariably focused on commercial and advertising usage of the flag, post-*Halter* prosecutions overwhelmingly targeted those who were viewed as motivated by political dissent. Moreover, almost half of the approximately 45 politically-oriented flag desecration prosecutions and arrests which could be uncovered for the 1907–1964 period (out of a total of about 55 such arrests and prosecutions of all kinds) involved solely oral (as opposed to physical) disrespect for the flag. Unquestionably the most extreme penalty for flag desecration in American history was handed down under Montana's draconian 1918 law: E. V. Starr was sentenced during World War I to ten to twenty years at hard labor in the state penitentiary, along with a $500 fine, for refusing a mob's demands that he kiss the flag (a favorite wartime vigilante punishment for the allegedly disloyal) and for terming it "nothing but a piece of cotton" with "a little paint" and "some other marks" on it which "might be covered with microbes".[5]

While a growing emphasis on suppressing political dissent is clearly apparent in post-*Halter* flag desecration prosecutions, the new focus of the flag patriots also had periodic "spillover" effects upon the broader society which ever more clearly reflected the political intolerance that increasingly formed the heart of the movement and which became its major long-term legacy for American politics. Three of the greatest periods of domestic political tension in the United States between 1907 and 1945—World War I, the 1919–20 Red Scare, and the period leading up and including U.S. participation in World War II—reflected sentiments stirred up by flag patriots, such as the conception that the American flag was sacred, that any true American would gladly pay homage to it, and that no true American would give greater homage to any other flag, especially one associated with radicalism and "un-Americanisms". These led to widespread demands, often enforced by government authority, that went far beyond the command that the flag not be desecrated, to include also that the flag be kissed or saluted on demand and that no flag associated with radical political opposition even be displayed.

During World War I, hundreds of people suspected of political dissidence or merely of insufficiently enthusiastic patriotism, were, as in the *Starr* case, attacked by mobs which sought to compel them to kiss the flag, often while government officials

[5] The data in this paragraph are primarily based upon an examination of news stories indexed in *The New York Times* Index. On the Starr case, see *Ex Parte Starr*, 263 F. 145, 146-47 (1920).

looked the other way or joined in. Immediately thereafter, amid the absurdly exaggerated fears of an imminent communist revolution in the United States which marked the 1919–20 Red Scare, 32 states (and a number of cities such as New York and Los Angeles) expanded official requirements for acceptable behavior with regard to flags far beyond demands for proper reverence for the American flag to include outlawing even the *display* of flags—usually but not only defined as red flags—viewed as subversive. The requirement that the American flag be treated with utmost deference, while perceived opposition flags could not even be displayed, demonstrated with unusual clarity that by 1920 flag protection etiquette primarily focused on suppressing dissent.[6]

Following the outbreak of forced flag kissing during World War I and the epidemic of "red flag" laws passed during the 1919–20 Red Scare, a third period which highlighted the intolerance spawned by the flag protection movement occurred during the late 1930s and the early period of American participation in World War II. During this era, hundreds of American children who refused to salute the flag (overwhelmingly Jehovah's Witnesses who acted out of religious conviction) were expelled from school. Moreover, in scores of incidents, mobs, which often acted with official approval or assistance, physically attacked Witnesses because their opposition to saluting the flag was viewed as evidence of insufficient patriotism. By June 1940 school flag saluting disputes had developed in many states, and over 200 children had been expelled from school as a result.[7]

In short, the flag protection movement, which had originally sought to forbid "mainstream" commercial uses of the flag viewed as insufficiently reverential, ended up by primarily seeking to suppress political dissent and by spawning movements which demanded ritual obeisance to the flag from those who did not wish to give it, and which sought to forbid any display of allegedly "subversive" flags. Ironically, some of the worst and most undemocratic excesses spawned by the movement, namely the red flag and compulsory flag salute laws, resulted in Supreme Court decisions in 1931 and 1943 which established the basic legal building blocks which logically led the Court in 1989 and 1990 to strike down *all* laws outlawing flag desecration and thus spurred the most recent controversy.

In the 1931 case of *Stromberg v. California*, a red flag law prosecution and the first case in which the Supreme Court held that "symbolic speech" (as opposed to only written or spoken remarks) was at least sometimes entitled to First Amendment protection (as well as one of the first cases to extend the First Amendment to *state* restrictions on free speech), the Court effectively struck down red flag laws on the grounds that to forbid the display of emblems used to foster even "peaceful and orderly opposition" to government was an unconstitutional violation of the First Amendment. *Stromberg* clearly established the general principle that symbols such as flags could

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[6] On World War I, see H. C. Peterson and Gilbert Fite, *Opponents of War, 1917-18* (Seattle: University of Washington Press, 1957), 45-6, 152-53, 84. On red flag laws, see Robert Murray, Red Scare (New York: McGraw-Hill, 1955), 233-34; Zechariah Chafee, Free Speech in the United States (New York: Atheneum, 1969), 159-63, 362-66; Julian Jaffe, *Crusade Against Radicalism: New York During the Red Scare* (Port Washington, New York, 1972), 80-82; and especially Elmer Million, "Red Flags and the Flag", *Rocky Mountain Law Review*, 13 (1940-41), 47-60.

[7] In general, on the flag saluting controversy, see David Manwaring, *Render Unto Caesar: The Flag Salute Controversy* (Chicago: University of Chicago Press, 1962); and Leonard Stevens, *Salute! The Case of the Bible v. the Flag* (New York: Coward, McCann & Geoghegan, 1973).

legally be used to peacefully express political opposition and thus clearly contained the seeds of the 1989 *Johnson* ruling. In the 1943 case of *West Virginia Board of Education v. Barnette*, the Court, citing *Stromberg* among other precedents, struck down compulsory school flag salute and Pledge of Allegiance requirements on the grounds that a child required by state laws to attend public schools could not, without violating the First Amendment, be forced by public authorities "to utter what is not in his mind".[8]

Between 1945 and 1965, only a scattering of flag desecration prosecutions occurred and the entire issue virtually disappeared from American consciousness. However, flag desecration suddenly became a "burning" issue once again during the Vietnam War in response to flag burnings and other anti-war protests which used the flag in unorthodox ways. Literally hundreds of Americans were prosecuted for flag desecration between 1965 and 1975 under state laws, and, in a few cases, under a 1968 federal law which for the first time made flag desecration a federal crime. Most such prosecutions were for "wearing" flags or flag-like decor as items of clothing or for "superimposing" writing and pictures (especially the "peace sign") over the flag, rather than for flag burnings. Because lower court decisions were so contradictory and because the Supreme Court repeatedly failed to rule squarely on the fundamental First Amendment issues raised by flag desecration statutes between 1969 and 1989, the legal status of such laws was in a state of complete constitutional confusion until the Court's 1989–90 rulings. By far the harshest Vietnam-era flag desecration penalty was the four-year jail term given in 1970 to a Dallas teenager for burning a piece of flag-like bunting in a Dallas park.[9]

Much of the responsibility for the confusion in the lower courts over the flag desecration issue during the Vietnam War period, and indeed during the entire era leading up to the 1989 *Johnson* ruling, rests with the Supreme Court. While, beginning with the 1931 *Stromberg* red flag ruling, the Court had held that "symbolic speech" was protected under the First Amendment, at least in some cases and to some degree, the Court thereafter issued highly confusing signals as to exactly what constituted "symbolic speech" and what degree of protection it had. This was especially true with the flag desecration issue, as during the 1969–74 period the Court gave out a series of broad hints suggesting that it was very reluctant to uphold such convictions, while it repeatedly avoided frontally facing the fundamental First Amendment issue involved.

In the 1969 case of *Street v. New York*, the Court overturned a conviction resulting from a flag burning by a 5–4 vote on the extremely strained grounds that since Street had been charged under a provision of the New York flag desecration law which forbade casting "contempt" upon the flag by "words or acts", he might have been convicted for his *words* alone. Citing *Barnette*, the court held that any such purely speech-based conviction, in the absence of any evident threat to the peace or incitement to violence, infringed the First Amendment, which was held to include "the freedom to express publicly one's opinions about the flag, including those opinions which are defiant or contemptuous". Having overturned the conviction on these narrow grounds, the Court added that there was no "imperative" need to address the

[8] *Stromberg v. California*, 283 U.S. 359 (1931); *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 641-42 (1943).
[9] *Christian Science Monitor*, 15 March 1973; Deeds v. State, 474 S.W. 2d 718 (1971).

"broader" question of the constitutionality of laws banning *physical* flag desecration.[10] After *Street*, the Court overturned convictions by 6–3 votes in two 1974 flag desecration cases, *Goguen v. Smith* (wearing a flag patch on the seat of a pair of jeans), and *Spence v. Washington* (placing removable tape over a flag flown from a private home), but again by technical reasoning which completely avoided the First Amendment issue raised by banning physical flag desecration.[11]

Meanwhile, in the 1968 case of *U.S. v. O'Brien*, a ruling that would eventually prove of central importance to the 1989–90 flag desecration controversy, the Court upheld a conviction for burning a draft card to protest the Vietnam war.[12] Although the 1965 federal law invoked in the case had been clearly intended to suppress a particularly widely-publicized form of anti-war dissent, the Court upheld it on the highly dubious grounds that it was designed, *not* to hinder free expression, but simply to foster the effective functioning of the draft. The key point in *O'Brien*, as it potentially applied to flag desecration, appeared to be that if the government sought to ban peaceful symbolic expression out of *purely* suppressive motivations, the First Amendment would likely override such government action, whereas, if the government had a non-suppressive *purpose*, then flag desecration laws would likely be upheld.

The Johnson Case

With the end of the Vietnam War, the entire flag desecration controversy disappeared from national headlines until 1989, when the Supreme Court ruled in *Texas v. Johnson* that the First Amendment allowed flag burning. That case involved a flag burning which climaxed a demonstration on 22 August 1984 by about 100 protesters who had marched through downtown Dallas to object to the planned presidential renomination there of Ronald Reagan by the Republican National Convention. Gregory Lee Johnson was convicted for that flag burning under the Texas "venerated objects" (flag desecration) law, but his conviction was overturned by the Texas Court of Criminal Appeals on 20 April 1988 on First Amendment grounds and then appealed to the Supreme Court by Dallas County.

On 21 June 1989, the Supreme Court upheld the decision of the Texas Court of Criminal Appeals, ruling by a 5–4 vote that the Texas law had been unconstitutionally applied to Johnson in violation of his First Amendment rights. Finally facing squarely the legality of physical flag desecration, a question it had consistently avoided for 20 years, the Court held that "Texas's claimed interest in maintaining order was simply not implicated" since "no disturbance of the peace actually occurred or threatened to occur because of Johnson's burning of the flag", and that Texas' second asserted interest, "preserving the flag as a symbol of nationhood and national unity", was related "to the suppression of free expression", and therefore failed to meet the *O'Brien* test for upholding restrictions on symbolic expression. Instead, the Court continued, it must be subject to "the most exacting scrutiny", requiring a demonstration of a "compelling state interest", to justify overriding Johnson's first amendment rights. However, the Court continued, since Texas essentially wished to prevent citizens from conveying "harmful" messages, such an interest violated the "bedrock

[10] *Street v. New York*, 394 U.S. 576 (1969).
[11] *Smith v. Goguen*, 415 U.S. 566 (1974); *Spence v. Washington*, 418 U.S. 405 (1974).
[12] *U.S. v. O'Brien*, 391 U.S. 367, 376 (1968).

principle underlying the First Amendment, . . . that the Government may not prohibit expression of an idea simply because society finds the idea itself offensive or disagreeable". Citing its previous holding in *Street*, the Court declared flatly that Texas's attempt to distinguish between the "written or spoken words [at issue in *Street*] and nonverbal conduct . . . 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".[13]

The Supreme Court decision touched off what one newspaper termed a "firestorm of indignation" and what *Newsweek* termed "stunned outrage" across the United States.[14] Certainly no Supreme Court decision within recent memory was so quickly and overwhelmingly denounced by the American political establishment. Within a week of the ruling, President Bush proposed a constitutional amendment to overturn it and 172 members of the House and 43 Senators sponsored 39 separate resolutions calling for such an amendment. Democrats, fearful of political retribution if they were seen as "supporting" flag burning, overwhelmingly joined Republicans in blasting *Johnson*, and their Congressional leadership led what ultimately proved in 1989 to be a successful fight to enact a *statute* which could supposedly both more quickly circumvent *Johnson* than an *amendment* and simultaneously avoid officially "tampering" with the Bill of Rights. On 19 October, the constitutional amendment was killed, at least for 1989, when the Senate defeated it by a vote of 51 for and 48 against, far short of two-thirds vote required for approval; however, one major reason for this outcome was that in the meantime both houses of Congress had passed the Flag Protection Act (FPA) of 1989, which clearly aimed at the same result as the amendment. It provided penalties of up to one year in jail and a $1,000 fine for anyone who "knowingly mutilates, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States". By eliminating a provision of the 1968 federal flag desecration law which outlawed only incidents of physical flag desecration which sought to cast "contempt" upon the flag, the FPA, according to its supporters, would protect the flag against physical harm motivated by *any* reason, whether political dissent or sheer vandalism, and thus qualify for the relatively lenient *O'Brien* test as furthering the "substantial" government interest of protecting public veneration for the flag, but in a manner *not* targeted at the "suppression" of expression.[15]

However, on 11 June 1990, following a wave of protest flag burnings directed against the FPA, the Supreme Court struck down the 1989 law in a 5–4 decision in *U.S. v. Eichman*, which essentially followed the outlines of *Johnson*: it held that the government's interest in protecting the flag's "status as a symbol of our Nation and certain national ideals" was related "to the suppression of free expression" and could not justify "infringement on First Amendment rights".[16] The *Eichman* decision sparked an immediate renewal of calls by President Bush and others for a constitu-

[13] *Texas v. Johnson*, 491 U.S. 397 (1989).
[14] *Newsday*, 2 July 1989; *Newsweek*, 3 July 1989.
[15] For a detailed study of the 1989 flag desecration controversy, and especially on the congressional reaction, see Robert Justin Goldstein, *Burning the Flag: The Great 1989-1990 American Flag Desecration Controversy* (hereafter Goldstein, Burning) (Kent, Ohio: Kent State University Press, 1996), 113-231, which fully references the congressional debates, hearings and reports relevant to the dispute. The 1989 law was codified as the Flag Protection Act of 1989, Public Law No. 101-131, 103 Stat. 777 (amending 18 U.S.C. §700).
[16] *U.S. v. Eichman*, 496 U.S. 310 (1990). For the full legal history of the *Eichman* ruling, see Goldstein, Burning, 231-98; for 1990 congressional debate and the post-*Eichman* history of the flag desecration controversy up until early 1996, see, in the same source, 299-362, 372-412.

tional amendment to prohibit flag desecration. However, in a political atmosphere considerably less heated than that of 1989, no doubt partly resulting from public boredom with a "rerun" of the same controversy which had attracted massive attention only the year before, proponents of the amendment failed to obtain the needed two-thirds support in either house of Congress, although in each case they did win majority support (58–42 in the Senate and 254–177 in the House). However, spurred by Republican victories in the 1994 congressional elections, backers of the flag desecration amendment resurrected the issue and, as noted above, succeeded in the House, but not in the Senate, during the 104th and 105th Congresses, and have reintroduced the proposal in 1999.

The Revolutionary Communist Party

Although flag desecration as a significant controversy in the United States essentially disappeared between the end of the Vietnam War and the 1989 Supreme Court *Johnson* ruling, the Johnson flag burning was only one of a series of generally ignored flag burnings organized between 1979 and 1984 by a small Maoist organization, the Revolutionary Communist Party (RCP). The RCP has generally remained in obscurity, but its actions helped to lead to one of the most monumental controversies in American history over the meaning of freedom of speech—perhaps the most fundamental principle of the American constitution. Thus the 1979–1984 flag-burning activities of the RCP which resulted in the *Johnson* ruling merit examination.

Between 1974 and 1979, as American involvement in Vietnam ended and the intensity of domestic conflict associated with the war simultaneously evaporated, incidents of flag desecration virtually disappeared. However, between 1979 and 1984, at least eight flag burnings occurred, all of which, including the 1984 Dallas incident that led to the Supreme Court's 1989 *Johnson* decision, involved members or supporters of the RCP. Indeed, *all* but a handful of all flag desecration incidents reported in the United States between 1979 and 1989 appear to have involved RCP members. Among the few exceptions was a 1983 federal flag desecration charge against Larry Flynt, the notorious paraplegic editor of *Hustler*, a magazine widely viewed as pornographic, who was indicted for wearing a flag as a diaper during one of his many court appearances (an incident depicted in the widely-publicized 1996 film *The People v. Larry Flynt*). Another non-RCP flag desecration case of the 1980s involved three residents of Salem, Ohio, who, after tearing down a bracket which held four flags on the town's main street, were given the choice in 1983 of either leaving the United States for Russia (which they declined), or each making restitution for the flags, paying $250 fines, going to jail for five days, performing three days of community service, and repeating the Pledge of Allegiance on the City Hall lawn during each day of their jail sentences. Salem Mayor Robert Sell, who pronounced the sentences in mayor's court, explained afterwards that he "wanted to prove a point" and that he felt "all three of them got the message [presumably related to the superiority of American freedoms to those of Russia] very good".[17]

In contrast to these isolated non-RCP related incidents, the RCP engaged in a systematic campaign of flag burnings during the 1979–1984 period. The RCP emerged

[17] *Chicago Tribune* (hereafter *CT*), 26 April 1976, 6 July 1989; NYT, 24 March 1977.

in 1975 as a small Maoist sect which openly advocated violent revolution in the United States (and in virtually every other country around the world). However, in practice, it seems to have limited its activities to oral and written agitation, along with a series of "propaganda by the deed" incidents, which mostly involved petty vandalism, clashes with the police, and flag burnings. Many of these incidents appear to have been designed to provoke police forces into repressive overreactions—which generally the police were happy to provide—which could then become the grist for additional organizing and publicity.[18]

The RCP's origins dated to the ideological splits which helped to destroy the broad-based anti-Vietnam War movement led by Students for a Democratic Society after 1968. The dominant figure in the RCP since its formal creation in 1975 has been Bob Avakian, who is known within the RCP as "Chairman Avakian", an appellation clearly modeled on Chinese Communist reverence for "Chairman Mao". Avakian, the son of a prominent California judge and a former high-school football star, became a prominent anti-war activist in the San Francisco area during the 1960s, and emerged as a leader of the Maoist-oriented Bay Area Revolutionary Union (BARU) in 1969. After considerable internal turmoil of the sort endemic to ideological fringe groups, BARU was renamed in 1970 and again in 1975, when it became the Revolutionary Communist Party, with a primary focus on organizing workers in transportation and communications industries. Along with looking to what the RCP termed the "glorious achievements" of the so-called Great Proletarian Cultural Revolution of Mao Tse-Tung's China of the 1960s as a model, during 1969–1975 Avakian openly defended former Soviet dictator Joseph Stalin and, in apparent attempts to appeal to the white working class, actively opposed school busing of black students for the purpose of integration.

In the mid 1970s, the arrest of the Maoist "gang of four" in China and China's abandonment of the Cultural Revolution policies (which the West viewed as a chaotic, brutal wave of massive, indiscriminate terrorism and purges directed against all traces of western influence) provoked a crisis within the RCP which paralyzed the organization in 1977–78. This crisis ended when the RCP attacked the new Chinese government of Deng Xiao Ping as a revisionist and "fascist bourgeois dictatorship" that had abandoned true communist ideals; among other crimes attributed to the Deng regime by Avakian were the "decadent" unbannings of western classical music, Shakespeare, and Rembrandt.

The RCP's denunciation of the Deng regime led to the loss of about one-third of the party's 1977 membership of about 2,000. It also inaugurated a period of greatly increased public activity, in which the RCP identified itself with a wide variety of political postures which seemed deliberately designed to repel mass public opinion in the United States in an apparent strategy of appealing to deeply alienated urban and minority youth. Thus, the RCP supported the Iranian students who seized the American embassy in Teheran in November 1979, and attacked virtually every existing regime in the world, including the Marxist Sandinistas in Nicaragua, as sellout revisionists. In a 1979 speech and interview in Los Angeles, Avakian, predicted that when the inevitable "millions strong" revolution came, every "bloodsucking,

[18] For general information on the RCP, see Harvey Klehr, *Far Left of Center: The American Radical Left Today* (New Brunswick, NJ.: Transaction, 1968), 92-96; George Vickers, "A Guide to the Sectarian Left", *The Nation*, 17 May 1980, 596; Los Angeles Times (hereafter *LAT*), 19 August 1979; A. Belden Fields, *Trotskyism and Maoism: Theory and Practice in France and the United States* (New York: Praeger, 1988).

bootlicking" American capitalist would be shot, along with "hired thugs and killers, like the police" and "the leaders of this country". He asked a crowd of 300, "How many of you would gladly smash that color TV of yours over the head of a pig in order to make revolution?". In the 1990s, RCP membership, which has officially remained secret, is believed to be no more than 1,000 nationwide, with much of the party's activity centered around its newspaper, *Revolutionary Worker (RW)*, with a claimed circulation of about 10,000, and around party bookstores which operate in about 15 cities.[19]

As part of its attempts to attract the most alienated members of American society, RCP strategy since 1979, and especially during the 1979–1984 period, periodically focused on attracting publicity through provocative public actions (and repressive police reactions) in the hopes of creating so-called "revolutionary sparks" intended to lead to expanded membership and organizational activity. For example, on 24 January 1979, five RCP members were arrested for smashing windows at and vandalizing the Chinese liaison office in Washington, DC to protest the forthcoming visit of Chinese leader Deng; during Deng's visit to the White House a few days later, 400 RCP members chanting "Death to Deng Xiao Ping" threw bottles, bricks, nails, sticks, and metal weights at police, leading to a police response with clubs and horses. The five-minute outburst resulted in over 50 injuries on both sides and led to 78 arrests. Avakian, who declared that Deng was "a scurrilous traitor to the thoughts of Chairman Mao" and "a puking dog who deserves worse than death", was among 17 RCP members ultimately charged with multiple felonies; he fled to France to escape what he deemed political persecution, remaining there even after the charges were eventually dismissed.[20]

During a two-month period in early 1980, during which the RCP focused on organizing May Day demonstrations, about 400 RCP members were arrested in clashes with police in several cities. For example, in March, RCP members briefly mounted a red flag on top of the Alamo in San Antonio, resulting in the conviction of five of them for disorderly conduct, while about 80 party members were arrested in connection with fights with police and bystanders during rowdy May Day demonstrations in Los Angeles, Chicago, Atlanta, Oakland, and New York. In April 1983, 27 RCP members were arrested for seizing a microphone and disrupting a meeting of the Los Angeles City Council; shortly afterwards club-swinging Los Angeles police arrested 22 more RCP members during a May Day demonstration. During demonstrations involving RCP members at both major party conventions in 1984, about 400 people were arrested for blocking streets and sidewalks and engaging in petty vandalism (including Gregory Lee Johnson, who was originally arrested in Dallas for disorderly conduct, a charge later dismissed and replaced with the flag desecration charge that would make him famous five years later).[21]

While RCP actions were often illegal and sometimes clearly involved violence, there seems little doubt that at least some of the resulting violence and arrests were due to excessive and sometimes completely needless reactions from police angered

[19] LAT, 19 August 1979.

[20] Klehr, p. 94; NYT, 25, 30 January 1979; *Washington Post* (hereafter *WP*), 30-31 January, 16 November 1979, 22 October 1980; LAT, 19 August 1979.

[21] *Revolutionary Worker* (hereafter *RW*), 11 April, 5 May 1980; NYT, 2 May, 18, 22 June 1980; *Detroit News* (hereafter *DN*), 2 May 1980; *Detroit Free Press* (hereafter *DFP*), 2 May 1980; *CT*, 2 May 1980; LAT, 1-2 May 1980, 21 April, 2 May 1983, 12 June 1990; *WP*, 17, 20 July, 23 August 1984.

by the party's political views. In Los Angeles, after police authorities refused to grant the RCP a permit for a 1980 May Day street parade and protesters peacefully marched on sidewalks instead, as was legal without a permit, the police nonetheless stopped the protest and attempted to disperse the marchers. Violent clashes suddenly erupted, 20 people were hurt and 28 arrests were made. When Los Angeles police broke up the RCP's rowdy but peaceful 1983 May Day demonstration, a police spokesman declared that the party's offenses had included using a bullhorn and "various traffic violations, like walking against the light".[22]

In Chicago, the ACLU and two other civil liberties groups charged in April 1980 that police had repeatedly arrested RCP members for peaceful activities such as distributing party literature, with court dates invariably set for 1 May in an attempt to disrupt the planned May Day protest. In Detroit, 12 RCP members were arrested for disorderly conduct in July 1980 simply for joining in a Fourth of July parade while bearing banners with slogans such as "Down with the American Flag" and "Down with American and Soviet War Moves". In Greensboro, North Carolina, and Atlanta during 1979–81, RCP activists were arrested for using loudspeakers without authorization at demonstrations at public housing projects and, in Greensboro, RCP members were also arrested for selling newspapers without a permit and for trespassing when picketing a clothing manufacturer. Although some RCP demonstrations at the 1984 Democratic convention in San Francisco were disruptive, RCP members were also among 90 protesters charged with the felony offense of conspiring to commit the misdemeanor of blocking a sidewalk, solely because they had gathered peacefully in front of a building. San Francisco police handled some of the protesters so roughly that an ACLU spokesman complained that the police were using "batons as baseball bats and demonstrators' heads and arms and legs as the ball". Perhaps the most bizarre repression directed against the RCP came in Beckley, West Virginia, in March 1980 where police arrested more than a dozen members under the state's clearly unconstitutional red flag law after RCP demonstrators were pummeled by bystanders waving American flags.[23]

In late 1979, apparently inspired by the burning of American flags by the Iranian students who took Americans hostage in Tehran, the *RW* began to glorify flag burning, a tactic soon adopted by party activists. Thus, in its 7 December 1979 issue, the *RW* published a large picture of a flag burning in Cleveland on Veteran's Day, and shortly thereafter it began promoting a pamphlet by Avakian with a large cover picture of a flag burning at the American embassy in Iran. On 1 February 1980 the *RW* published pictures of miniature "flag burning kits"—consisting of a pack of matches, a small paper flag, and an RCP button—that had been distributed during a protest in Berkeley on January 26; the paper urged its readers to "burn the flag, then pin it proudly on your chest".

Presumably acting at least partly under such inspiration, RCP members were implicated in at least eight flag burnings in the United States between 1979 and 1984, with the last such incident the 22 August 1984 Dallas flag burning for which Gregory Lee Johnson was charged. Possibly because these incidents were not part of any general

[22] *LAT*, 30 April, 1, 2, 7 May, 13 June, 3 July 1980, 12 December 1982, 2 May 1983.
[23] CT, 25 April 1980; *DN*, 5 July 1980; *Greensboro Daily News* (hereafter *GDN*), 19 October 1982; *Atlanta Constitution* (hereafter *AC*), 2 May 1980; LAT, 17, 19 July, 1984; *WP*, 19 July 1984; *The Nation*, 19 April 1980, p. 452; *DN*, 18 March 1980.

wave of flag desecration such as that associated with Vietnam, because none of them occurred in major media centers such as New York, Chicago, or Los Angeles, and because none of them led to a substantive Supreme Court decision until the 1989 *Johnson* ruling, they generally attracted only local media coverage and were for the most part completely ignored by the mass media and by Congress. Most Americans were undoubtedly completely unaware of them.

The St. Louis Incident

The first two RCP-associated flag burnings of this period occurred two days apart in late 1979: before a jeering crowd of students at Washington University (WU) in St. Louis on 27 November and in front of a federal courthouse in Atlanta on 29 November. In both cases, the demonstrators demanded that the deposed and exiled Shah of Iran be returned to his homeland for trial and that there be no American military intervention to rescue the hostages held in Tehran. The demonstrators in both cities displayed signs reading, "U. S. Imperialism, Keep Your Bloody Hands off Iran", a slogan also inscribed on the banner hoisted to replace an American flag that had been stolen from a nearby federal office building shortly before the St. Louis protest.[24]

Two men, Alan Kandel, a former WU student and a member of the RCP's youth group, the Revolutionary Communist Youth Brigade (RCYB), and Richard Bangert, a member of a veterans group apparently under strong RCP influence, were arrested by federal authorities in connection with the St. Louis incident, not for flag desecration, but rather for allegedly having stolen the missing flag and for destroying government property by burning it. United States Attorney Robert Klingeland explained that his office was "taking it easy on the guys" by charging them with misdemeanors less serious than a federal charge of flag desecration (although in fact the potential penalties were identical for Kandel, who was charged only with property destruction, and higher for Bangert, who was also charged with stealing federal property).

Klingeland declared, "We did not consider it a free speech matter," because "you can't go around stealing from the federal government in the name of free speech". However, he conceded that the government spent "thousands" of dollars trying the case in order to prosecute the theft of a $59 flag. Allen Harris, the defendants' attorney, maintained that the government had declined to charge his clients with flag desecration simply to avoid dealing with free speech issues, and, in a 1992 interview, declared that the prosecution unquestionably was a "political" case brought for flag burning, although he conceded that the U.S. attorney "probably pulled one of the smartest things he ever pulled" by not charging the pair with flag desecration. Harris recalled, "I got more publicity from these two misdemeanor prosecutions then from any felonies, even murders, that I ever tried".[25]

Because both the stealing and destruction charges hinged upon whether or not the flag burned at WU had earlier been stolen from the federal government, most of the prosecution case consisted of testimony from three witnesses who identified Bangert as having stolen the government flag and of evidence submitted by two other witnesses—the president of a flag company and an expert in textile fabrics—who iden-

[24] *St. Louis Globe-Democrat* (hereafter *SGD*), 28 November 1979; *AC*, 30 November 1979.
[25] Both St. Louis papers provided extensive coverage of the case; for example, see *SGD*, 28 November 1979; *St. Louis Post-Dispatch* (hereafter *SP*), 29 November 1979, 27 March 1980.

tified the ashes of the destroyed flag as being from the stolen government flag (evidence at the trial indicated that at least two flags were present at the WU demonstration and that only one was burned). The two defendants had been shown on television burning a flag and both admitted doing so, but they maintained they had not stolen the flag they had burned and did not know that it was government-owned. In closing arguments, prosecuting attorney Edward Dowd declared that the defendants had burned the flag as the "centerpiece" of an attempt to "show contempt for the government of the United States", while Harris characterized his clients as "dissidents" and "rebels" who were "doing what their conscience dictated", but had not knowingly burned a government flag. The jury found both men guilty, and on 25 March 1990 U.S. District Judge John Nangle gave a maximum sentence of one year in prison and a $1,000 fine to Kandel (identical to the maximum federal flag desecration penalty) and a total sentence of 18 months in jail and a $2,000 fine to Bangert.[26]

Nangle declared that the harsh sentences had "nothing to do" with the defendants' political views but only punished them for "blatant" property destruction and for being "liars" in court. However, Bangert declared after the sentencing that, "It was the political statement that we made that was on trial, not us", and Kandel agreed, declaring that the sentences were a message from the government to the "masses" telling them, "We'll get you" if they "even think of going up against the government war plan". The executive director of the St. Louis branch of the ACLU agreed that the trial had strong political overtones, arguing that the defendants had been "treated more harshly than if they had broken a window in a federal building or set fire to a chair, because the flag is a symbol and because of who they are". Similarly, the *St. Louis Post-Dispatch*, the city's "liberal" paper, argued that the harsh sentences for theft and destruction of a $59 flag indicated that the authorities feared that one flag burning would "somehow steal the loyalty of Americans" and demonstrated a lack of understanding of the "right to protest". On the other hand, the conservative *St. Louis Globe-Democrat* termed the flag burning a "disgraceful" act committed by communists "with yellow stripes down their back" who deserved the "maximum punishment".[27]

In September 1980 the St. Louis case was heard on appeal by a three-judge panel of the Eighth Federal Circuit Court of Appeals. Prosecuting Attorney Dowd maintained that the defendants had been sentenced "not for their political beliefs" but because they engaged in "wanton destruction of government property", while Harris argued that federal authorities had failed to prove that his clients knew they were burning a government flag and had engaged in procedural irregularities in connection with prosecution witnesses' identification of Bangert as the alleged flag stealer. While a brief in support of Harris filed by the St. Louis ACLU maintained that the defendants had been "treated differently" from others who might steal "$59 of government property", the nature of the formal charges made it virtually impossible for Harris to ask the court to focus on First Amendment issues. On 1 April 1981 the appeals panel upheld the convictions of both defendants, focusing its decision almost entirely on technical issues, while curtly rejecting the ACLU's argument that the judge had been affected by any "consideration of political beliefs" in sentencing

[26] *SGD*, 12-13 March 1980; *SP*, 13, 26 March 1980.
[27] *SGD*, 27-28 March 1980; *SP*, 14, 27 March 1980.

Bangert and Kandel.[28]

As he prepared to go to jail a month later, Bangert declared, "We were supporting the actions of oppressed nations such as Iran in standing up to countries like the United States that push imperialism. I would have done the flag burning again because ideas that are wrong need to be challenged. I don't think we could have burned enough American flags". He added, sarcastically, "I think $3,000 in fines is a pretty good return on a $59 flag", and maintained that the prison term "really reflects" the insecurity of a government which "supposedly doesn't have political prisoners". Bangert and Kandel were spared their jail terms for another five months, as they were allowed to remain free on bail while Harris appealed to the Supreme Court. However, when on 5 October 1981 the high court refused to grant *certiorari* (thus declining to review the case), their legal appeals were exhausted; they began serving their sentence three weeks later. In a 1992 interview, Harris said he had lost track of Bangert, but that Kandel, ironically, eventually became a corporate attorney in St. Louis (Kandel declined to comment on the 1989 *Johnson* case when contacted by the press at his law firm).[29]

The Atlanta Incident

The 29 November 1979 Atlanta flag burning, which, from a legal standpoint, would become the most important flag burning case of the entire post-Vietnam/pre-*Johnson* period, led to the arrests of Diane Monroe, an American member of the RCP, and Ahmad Talebi-Negad, an Iranian. Apparently because a minor scuffle broke out before the flag was burned when a bystander tried to seize the flag, Monroe and Talebi-Negad were originally charged with—in addition to flag desecration—unlawful assembly, creating a public disturbance, and reckless conduct (the police also detained the bystander but filed no charges against him). During their trial on 17 September 1980, both defendants testified that they did not burn the flag, but three police officers and a local attorney contradicted them. Monroe wore a T-shirt during the trial reading, "Death to the Shah", while prosecutor Donald English asked the jury to consider what would have happened to the defendants if they had burned a flag in Russia or Iran. In an 1992 interview, Stephanie Kearns, who represented the defendants without charge on behalf of the ACLU, recalled that her clients wanted to stress their political motivations during the trial, but that she felt this "wasn't going to fly", because "there's no way a one-day trial can change people's view towards the political system" and therefore she attempted to focus on a "plain old-fashioned they didn't see us burn the flag" approach.[30]

Both defendants were convicted by a jury after 15 minutes of deliberation, and were sentenced by Judge Nick Lambros to maximum terms of a year in jail under the Georgia flag desecration law. Lambros noted that the sentence could also result in Talebi-Negad's deportation, unless the court recommended against it, "which this court is not going to do". Following the sentencing, a RCP spokesman declared that the flag "should be burned and it will burn", but that the trial had been a "political railroad job" sponsored by "the rulers of this country" who wanted "people not only to kiss the flag but to die for it". Both defendants were quickly released on $5,000

[28] *U.S. v. Bangert*, 645 F. 2d 1297, 1309 (1981); *SP*, 14 September 1980, 2 April 1981.
[29] *SP*, 26 May 1981, 5, 25 October 1981, 23 June 1989; *Bangert v. U.S.*, 454 U.S. 860 (1981).
[30] *Atlanta Journal* (hereafter *AJ*), 30 November 1979, 18 September 1990; *AC*, 30 November 1979.

appeals bonds, but only after Talebi-Negad was beaten by jail inmates, and required about five stitches to close a split lip. According to Fulton County jail commander Lt. Clifford Hufatler, Talebi-Negad "was probably running his mouth about what he had done, and one of those patriotic Americans, maybe some World War II veteran, just busted his lip".[31]

On 5 October 1982 the Georgia Supreme Court upheld the convictions. While the court conceded that the defendants had intended to "convey a message of displeasure" with American foreign policy, it held that this did not "necessarily" provide them with First Amendment protection because the people of Georgia and the United States had a "unique and compelling interest in protecting the flag as the symbol of our nation". The court argued that this interest was not designed to block the communication of "unacceptable ideas" even if the effects of the state law might "collaterally restrict the symbolic statement" which some might wish to make, because the purpose of the law was not to suppress dissent but to ban "deliberate acts of physical destruction and desecration of the flag". The court further argued that the Monroe case was different than the 1974 Supreme Court's *Spence* case because in *Spence* the defendant had not permanently damaged the flag and had displayed his temporarily altered flag only on his own property.[32]

On 21 September 1983 the U.S. District Court for the Northern District of Georgia upheld the conviction of Monroe, who had begun serving her sentence five months earlier when the district court denied a stay of sentence during her appeal (meanwhile, according to a 1992 interview with attorney Kearns, co-defendant Talebi-Negad fled, thereby forfeiting bond). The federal court upheld the constitutionality of the Georgia law in a highly ambiguous decision which seemed to largely rely on a different rationale than that invoked by the Georgia Supreme Court. The federal court held that since the flag involved was the national flag, Georgia's interest in protecting its symbolic value could only be held to be "material, but not substantial", and was constitutionally dubious because it was not "unrelated to suppression of free expression" and was possibly aimed at preventing a "vivid, sensational means of conveying" dissent. On the other hand, the federal court seemed to say that Georgia's less-than-overwhelming interest in protecting the flag's symbolic value still overrode Monroe's free speech rights because her act "denigrates the flag as a symbol to a much greater degree than does passive misuse" of the *Spence* type, and in any case Monroe's rights were "not served in any meaningful way" because merely burning a flag "did not convey any information or ideas" or "even identify the subject of her concern". In the end, the federal court seemed to base its decision on grounds that were never even referred to by the Georgia Supreme Court. The federal court held that Georgia had a separate valid, "important", and non-suppressive interest in outlawing flag desecration unrelated to the flag's symbolic value, because Monroe's conduct of "igniting an American flag during a public political demonstration was likely to cause a breach of the peace". The fact that no such breach had occurred was "irrelevant", the federal court declared.[33]

On 20 August 1984, only two days before Gregory Lee Johnson was arrested for burning a flag in Dallas during the Republican National Convention, a three-judge

[31] *AJ*, 18 September 1990; *AC*, 18-19 September 1990.
[32] *Monroe v. State*, 295 S.E.2d 512, 514, 515 (1982).
[33] *Monroe v. State Court of Fulton County*, 571 F. Supp. 1023, 1027, 1028, 1029 (1983)

panel of the Eleventh Circuit Federal Court of Appeals unanimously overturned Monroe's conviction. It declared that Georgia's flag desecration law had been unconstitutionally applied to her, in the first federal appeals court ever to reach such a decision in a flag burning case on fundamental free speech grounds, using reasoning which foreshadowed the 1989 *Johnson* ruling. In contrast to the federal district court, the appeals court held that Monroe's flag burning, conducted during a public demonstration protesting American foreign policy, was presumptively protected by the First Amendment. Furthermore, the court held that neither of Georgia's proclaimed interests, that of protecting the symbolic value of the flag and of preventing breaches of the peace, were "unrelated to the suppression of free speech", and that neither of them were "so substantial" as to justifying depriving Monroe of her First Amendment rights. With regard to the symbolic value of the flag, the court cited the Supreme Court's 1943 decision in the *Barnette* compulsory flag salute case and asserted that there was "no significant difference" between government attempts to "compel the expression of respect" for the flag and government attempts to "prevent the expression of disrespect". The court noted that in the 1969 *Street* case the Supreme Court had held this to be true with regard to state attempts to outlaw verbal disrespect for the flag, and argued that "governmental regulation of nonverbal expression should be subject to the same limitations under the first amendment". With regard to the breach of the peace issue, the court held that in the Monroe case the state had failed to demonstrate either any "clear and present danger" of the "likelihood and imminence of public unrest" as was required for upholding convictions in political speech-related prosecutions in a 1969 Supreme Court ruling (*Brandenburg v. Ohio*) decision or the sort of direct personal insults ("fighting words") invoked in a 1942 ruling (*Chaplinsky v. New Hampshire*).[34]

The ruling did Monroe no good, as by then she had already served out her jail term. According to lawyer Kearn's recollection in 1992, "She had a wonderful attitude about it. She saw it as a political cause from beginning to end and saw time in jail as an opportunity to educate the inmates. I never heard a bitter word from her about it. When she lost her fight to stay out of jail, she was there in the morning with her toothbrush".

The Kent State Incident

During the interval between Monroe's flag burning in November 1979 and her original conviction in September 1980, four additional RCP-associated flag burnings occurred. The first took place on 7 February 1980, during a demonstration at Kent State University in Ohio organized by a non-RCP student group to protest the resumption of draft registration. While the student group had planned a burning of imitation draft cards, they were upstaged and upset when a flag was unexpectedly burned and local media published and televised pictures of the incident. The Kent State student newspaper also was clearly distressed over the flag burning, lamenting that the widespread news coverage of the event was making the University once again "looked at as a center of radicalism and extremism", no doubt a reference to the infamous 1970 killings of four students by Ohio National Guardsmen during an anti-Vietnam War protest that indelibly associated Kent State with both protest and repres-

[34] *Monroe v. State Court of Fulton County*, 739. F.2d 568, 5720 574, 575 (1984).

sion. One day after the flag burning, Paul Blumberg, a non-student RCP member and unemployed dry cleaner, was arrested after being identified from news photos. He was tried and convicted on 23 April 1980 by a Portage County jury under Ohio's "desecration" law, which outlawed physically mistreating the American flag, as well as public monuments, places of worship, and "any other object of reverence". Before Blumberg's trial commenced, RCP members demonstrated outside the courthouse chanting, "We won't fight for the national flag. We're gonna burn that bloody rag".[35]

Blumberg's lawyer, Terry Gilbert, brought to the stand Gib Shanley, a local sports reporter, who testified that he had burned an Iranian flag during his television newscast to "make a statement", to establish that Blumberg had also engaged in an act of political expression. Another witness was an Iranian student, who testified that disrespectful treatment of the Iranian flag would bother him "a lot". Blumberg, who wore to court a red arm band and a T-shirt bearing the slogan "International Workers Day", admitted burning the flag, but defended his action as a means of provoking thought and awakening people to "the fact that we are being marched closer and closer every day off to war". He testified that behind the flag "are the most violent people in history" and that if people were shocked by his action "that's better than the shock of another war". The RCP, he testified, believed in a "classless society where others don't make decisions about who should live and who should die".[36]

During closing arguments, prosecutor William Carrell maintained that the case was "not about Mr. Blumberg's political belief", as he had "every right to say what he wanted", but rather was about "how he said what he had to say" and "what that speech is likely to provoke". Gilbert argued that there was no difference under Ohio law between Blumberg's action and that of Shanley, since both had mistreated a "reverent" object. Yet, he noted, Shanley had not been prosecuted, and asked, "Does the law only apply when a 'good' flag is burned?". Judge Thomas Carnes told the jury that Blumberg's action might be considered a form of political expression, but that if it could "reasonably be expected to produce a disorderly response, then you must find him guilty". Despite the fact that no evidence was introduced that any disorders had occurred at the February rally, Blumberg was convicted and was sentenced by Carnes to a month in prison and a $200 fine, well below the maximum penalty of 90 days in jail and a $750 fine. After his conviction, Blumberg proclaimed, "I'm proud of what I did", and declared, "Any hardships I have to face because of this action is nothing compared to the crimes committed by this country".

Blumberg's sentence was suspended to give him time to appeal, but on 22 July 1981 the Court of Appeals for the Eleventh District of Ohio upheld his conviction. The appeals court conceded that Blumberg's flag burning was a "form of speech", but rejected Blumberg's claims that the Ohio law was unconstitutionally vague or over broad or that as applied it violated his First Amendment rights. The court especially relied upon the Supreme Court's refusal in 1975 to consider an appeal from a flag burning conviction in the case of *Farrell v. Iowa* on the grounds that no "substantial federal question" was involved. It noted approvingly that the Iowa Supreme Court's decision upholding Farrell's conviction, which the Supreme Court had refused to review, had referred to the state's interests in protecting both the peace and the flag's

[35] *Akron Beacon-Journal* (hereafter *ABJ*), 8 February 1980; *Cleveland Plain Dealer* (hereafter *CPD*), 9, 15 February, 24 April 1980; *Daily Kent State*, 8, 12 February 1980.
[36] *ABJ*, *CPD* (both 24 April 1980).

symbolic value, and distinguished the *Farrell* case from *Spence* on the grounds that Spence had neither permanently damaged his flag nor displayed it in a public place, therefore avoiding any threat to the peace. In a 1992 interview, Blumberg's lawyer, Terry Gilbert, recalled that Blumberg decided not to appeal his case further and went to jail after the appeals court decision.[37]

The Greensboro Incident

At least three additional RCP-associated flag burning incidents occurred during the first half of 1980, but only one of them definitely led to a flag desecration prosecution—a flag burning outside the federal courthouse in Greensboro, North Carolina, on 27 March 1980 to protest, among other things, the prosecution of Avakian in connection with the January 1979 RCP protest against Deng Xiao Ping's visit to Washington, DC. Two RCP members, Teresa Kime and Donald Bonwell, were tried under the 1968 federal flag desecration law for the Greensboro burning, which was heavily photographed and covered in the local press. They were convicted by a jury on 17 July 1980 and then sentenced to 8 months in jail by federal magistrate Herman Smith. During the trial, Smith, over the vehement objections of defense lawyers Michael Patrick and John Kernodle, excluded any evidence or argument bearing on the First Amendment in general and on the context of the flag burning in particular, including oral statements made at the demonstration, even though the federal law required authorities to prove that flag desecrations prosecuted under it be done to cast "contempt" upon the flag. On appeal, the convictions were upheld by the U.S. District Court for the Middle District of North Carolina on 12 June 1981 and by the U.S. Fourth Circuit Court of Appeals on 28 January 1982. Kime and Bonwell went to jail after the Supreme Court denied *certiorari* on 18 October 1982. Kernodle, their lawyer, later recalled that his clients had an "absolute belief that they were right" and were "resolved to serve the sentence" if need be, as part of their dedication to an organization "that was committed to provocative and disruptive political tactics".[38]

Revolutionary Communist party member Teresa Kime burns an American Flag in Greensboro, North Carolina, on 27 March 1980. This photograph, by Joe Rodriguez, was originally published in the Greensboro Record on 28 March 1980 and was reprinted on 18 October 1982 after the Supreme Court refused to review Kime's conviction under the 1968 federal flag desecration law. Kime and her companion went to jail for eight months.

[37] *Ohio v. Blumberg*, Ohio Court of Appeals, Eleventh District, Portage County, Case No. 1035, 22 July 1981 (unpublished).

[38] The Greensboro press provided extensive coverage of the arrest and trial. For example, see *GDN*, 28 March, 1 May, 17-18 June, 22 July 1980; *Greensboro News and Record* (hereafter *GNR*), 23 June 1980; *U.S. v. Kime*, Cr-80-95-G, U.S. District Court for the Middle District of North Carolina, 12 June 1981 (unpublished); *U.S. v. Kime*, No. 81-5160 (L), U.S. Court of Appeals for the Fourth Circuit, 28 January 1982 (unpublished); *U.S. v. Kime*, 459 U.S. 949 (1982).

In appealing the convictions, Kernodle and Patrick heavily stressed many of the arguments about the First Amendment and the deficiencies of the 1968 federal law which later would lead the Supreme Court to strike down the similar Texas flag desecration law in 1989. In their brief on appeal before the Fourth Circuit, Patrick and Kernodle argued that the federal law was unconstitutional because flag desecration was a form of symbolic expression "akin to pure speech and entitled to First Amendment protection". Further, they maintained that the law's "contempt" provision "makes clear that this statute punished only destruction" designed to express dissenting views, especially since the federal flag code explicitly authorized burning worn-out flags, thereby establishing that the mere act of flag burning "itself is not contemptuous" and that therefore the government's interest in the 1968 law could only be to suppress "public display of defiance and contempt for a national symbol". Because the law required showing intent to cast "contempt", they added, the judge's determination to keep the purposes of the demonstration "a total mystery" had simultaneously made it impossible for a jury to convict them of such a purpose and unfairly crippled the defense, as it could not demonstrate that the point of the flag burning had in fact been to express the defendants' "political views and not contempt for the flag". In asking the Supreme Court to grant *certiorari*, Patrick and Kernodle referred to recent disturbances in Poland, in which Polish and Soviet flags had been burned, not "to cast contempt on the flag itself, but as a means of expressing disagreement with the policies of the government with which flag is identified" and to protest "the restrictions on liberties which in this country we would be expect to be protected by the First Amendment".[39]

While in 1989 and 1990 the Supreme Court would endorse the key arguments made by Patrick and Kernodle, in the early 1980s these arguments proved unavailing. In rejecting their first appeal, U.S. District Court Judge Hiram Ward declared that the 1968 federal law had been "narrowly drawn" to avoid infringement on First Amendment rights; that Magistrate Smith had done an "admirable job of ensuring that defendants received a fair trial", because by excluding evidence about the context of the demonstration he had protected them from information that "would have prejudiced" their case; and that in any case it was difficult to imagine a flag burning for any purpose "other than casting contempt" unless it was "done inadvertently or to dispose" of a worn flag, possibilities never suggested by the defense.

In upholding Ward's decision and refusing to grant *certiorari*, respectively, neither the Fourth Circuit Court nor the Supreme Court gave any explanation of their actions, but presumably the Supreme Court accepted the arguments made against reviewing the case by U.S. Solicitor General Rex Lee. He argued that even if flag burning were presumed to be a form of "expressive conduct under the First Amendment", the 1968 federal law furthered "an important governmental interest" of preserving the symbolic value of the flag that overrode any First Amendment concerns. Furthermore, this interest was "wholly unrelated to suppression of free speech", as was clearly demonstrated by the fact that the defendants could still "express their views in many ways without the necessity of burning the American

[39] Brief of Appellants, *Kime v. U.S.*, Nos. 81-5160 (L) and 81-5161, in the U.S. Court of Appeals, Fourth Circuit, 28 September 1981, pp. 7, 10, 11, 12, 21, 31.

flag". Lee also maintained that the exclusion of contextual evidence about the flag burning was proper, because such evidence "would have created a risk" that a conviction might be based on constitutionally protected expression in violation of the Supreme Court's 1969 *Street* decision.[40]

The Supreme Court's 18 October 1982 refusal to grant *certiorari* in the *Kime* case by a vote of 8–1 attracted considerable press attention, which made the Greensboro flag burning the best-known flag desecration case between the Vietnam War and the Supreme Court's *Johnson* ruling exactly seven years later. The reason for this press attention was that, while generally when the Supreme Court refuses to grant *certiorari* no explanation is offered nor are any dissents issued, in the *Kime* case Justice William Brennan issued a blistering dissent that largely prefigured his opinions for the majority in 1989 and 1990 which struck down flag desecration laws in the *Johnson* and *Eichman* cases.

Brennan wrote that, if the Court agreed to consider the case, he was "sure" that his colleagues would be persuaded that the defendants' conviction "violated their First Amendment rights" and that the 1968 federal flag desecration law disregarded the "vital constitutional principle forbidding government censorship of unpopular political views". Brennan argued that it was evident that the defendants "were making a statement of political protest", while the government's professed interest in preserving the flag's symbolic value simply amounted to a wish to unconstitutionally suppress their dissent. Brennan noted that the government's desire to preserve the symbolic value of the flag had been held by the Supreme Court in the 1974 *Spence* case to be "directly related to expression", and that the government had advanced no non-suppressive "interest other than enforcing respect for the flag" in the 1968 law, since it claimed "no aesthetic or property interest in protecting a mere aggregation of stripes and stars for its own sake", and did not assert any other interest such as preserving the peace or preventing arson. Brennan maintained therefore that, under the Court's 1968 *O'Brien* rule, since the defendants were engaged in expressive conduct and their actions "impaired no non-speech-related governmental interest", it was "entirely irrelevant what specific physical medium" they chose for their expression, and that the case was governed by the 1969 *Street* decision protecting the right to express even "defiant or contemptuous" views about the flag".[41]

Delivering what he clearly regarded as the *coup de grâce*, Brennan added that, in any case, the law was "flagrantly unconstitutional on its face" because its "contempt" provision required violators to "intend to engage in political expression—and not just any political expression, but only that espousing a particular, unpopular point of view". This, Brennan ironically noted, made the statute so "narrowly drawn" that "everything it might possibly prohibit is constitutionally protected expression", because one "literally cannot violate it" without "espousing unpopular political views", a requirement that "constitutes overt content-based censorship, pure and simple" which "goes to the heart of what the First Amendment prohibits". Indeed, Brennan pointed out, unlike a law which "simply outlawed any public burning or mutilation of the flag, regardless of the expressive intent or nonintent of the actor"—a mea-

[40] *U.S. v. Kime*, Cr-80-95-G (see footnote 38, above), pp. 23, 30; Brief for the U.S., *Kime v. U.S.*, No. 81-6773, U.S. Supreme Court, 4, 5, 6 (unpublished). See *WP*, *LAT*, *NYT*, *GDN*, all for 19 October 1982.
[41] *U.S. v. Kime*, 459 U.S. 949, 950, 953, 954, 956 (1982).

sure which he made clear would still be illegal as targeting expression—the federal statute left one free to engage in flag desecration for any reason, "except for the purpose of stating a contemptuous political message about the flag and what it stands for".[42]

The Supreme Court's refusal to hear the *Kime* case perhaps attracted the most attention in Greensboro, where both newspapers wrote editorials sharply critical of the Court. The *Greensboro News and Observer* prophetically concluded that a majority of the Court simply had "no appetite" for opening the way for political dissenters to "desecrate the flag with impunity", but that "in time, the Court can hardly avoid facing up to deciding the constitutionality of a law that appears directed only against flag-burners who are engaged in political dissent". The *Greensboro Daily News* wrote that the flag was "honored and well-kept" across the country and that "rag-tag radicals" would not "diminish what the flag stands for" by publicly destroying one flag, even if their action was "immature, irrelevant and downright disgusting", and that the Supreme Court, in a "curious and regrettable" action, had essentially decided to "protect only the symbol of the country—the flag, and not the essence of it—freedom and free speech".[43]

After the Supreme Court's 1989 *Johnson* decision (which, if issued seven years earlier would have spared Kime and Bonwell, as well as other convicted RCP flag burners, from prison) reporters were unable to locate the flag burners, but interviewed some of the key legal actors in the *Kime* case. Magistrate Smith declared that he was "terribly upset" about the *Johnson* ruling, and "hell, yes", he would again send flag burners to jail. "I would do it this morning", Smith proclaimed, adding, "How can you send a person off to fight for the flag and allow it to be desecrated?". John Kernodle, one of the defense lawyers, noted that Brennan's *Kime* dissent provided a "good forecast" of the *Johnson* decision, while recalling that he had met people who favored the death penalty for flag desecrators. "If that view had prevailed," Kernodle noted, "we would now be talking about two people who were put to death by an action that the Supreme Court later said was a legal right".[44]

The Last Incidents

In addition to the Blumberg and Kime flag burnings of early 1980, two additional RCP- related flag burnings occurred during this period. On 14 March 1980 a small band of RCP members chanting, "No work, no school, to hell with the white man's rule", invaded a high school in Washington, DC, burned a flag, and threw a red liquid on classroom walls. They were pelted with food and garbage by students, and six protesters were arrested by police and originally charged with flag desecration, unlawful entry, and inciting destruction of government property. No information on the ultimate resolution of this incident could be obtained. In Detroit, during a May Day march, RCP members threw paint at two schools, were pelted with rocks and bottles by students at another school, and burned at least two flags. Although about 40 people were arrested, all of the charges were for disorderly conduct and apparently no flag desecration prosecutions ensued.[45]

The last of the pre-*Johnson* RCP-associated flag burnings of the 1979–1984 period occurred during a 1981 RCP May Day demonstration against American foreign

[42] *Ibid*, 954, 955, 956.
[43] *Greensboro News and Observer*, *GDN* (both for 23 October 1982).
[44] *GNR*, 23 June 1989.
[45] *WP*, 15 March 1980; *DFP*, *DN* (both for 2 May 1980).

policy held at a housing project in Atlanta. Seven RCP members, including Michael Bowles, were found guilty of flag desecration by a jury on 19 April 1982 under the Georgia state law, for burning a box of small paper flags, after the judge rejected defense claims that the law violated the First Amendment and that the paper flags were not real flags (although one of the arresting police testified that he would not have arrested the defendants if they had burned postage stamps with flag pictures on them). The defendants were each given the maximum sentence of a year in jail and a $1,000 fine, as the judge declared that the flag was a symbol that he respected and "that demands respect from everyone who is going to live under it". On 20 October 1983 the *Bowles* convictions were upheld by a state appeals court decision handed down a month after a federal district court had upheld the *Monroe* convictions and ten months before a federal appeals court reversed that decision on appeal. In the *Bowles* case, the Georgia appeals court, relying heavily on the Georgia Supreme Court decision in *Monroe*, rejected all constitutional challenges to the state law, as well as rejecting defense claims that the paper flags were not "official" United States flags.[46]

Subsequently both the Georgia and United States Supreme Courts refused to hear appeals from the Georgia appeals ruling in the *Bowles* case and the defendants began serving their jail terms on 2 March 1984. However, when on 20 August 1984 the Eleventh Federal Circuit Court of Appeals overturned Monroe's conviction on fundamental First Amendment grounds, it provided an opening for Bowles' lawyer, J. M. Raffauf, to seek relief via a *habeas corpus* motion. On 25 April 1985 the Court unanimously overturned all convictions in the *Bowles* case on the basis of its *Monroe* decision, by which time all of the defendants had already served their sentences (although they had not yet paid the fines). In an 1992 interview, Raffauf, who had represented the defendants without charge on behalf of the ACLU, recalled that some of the RCP members expressed their thanks by helping him to "scrape the paint off my house" one day. Raffauf, who had written for "underground" newspapers in Atlanta during the 1960s, also recalled that among the RCP members and supporters he met there at about the time of the Bowles trial was a then-obscure young man named Gregory Lee Johnson.[47]

[46] *Bowles v. State*, S.E.2d 250, 252 (1983).
[47] *Bowles v. Georgia*, 465 U.S. 1112 (1984); *AJ*, 7, 20 March 1984; *Bowles v. Jones*, 758 F.2d 1479 (1985).