



# WE DIDN'T START THE FIRE: THE UNKNOWN HISTORY OF FLAG DESECRATION IN AMERICA

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In the wake of the presidential election of 2016, college students at several campuses around the country posted online videos of themselves burning American flags.<sup>1</sup> In response, President-elect Donald J. Trump tweeted on Nov. 29, “Nobody should be allowed to burn the American flag—if they do, there must be consequences—perhaps loss of citizenship or year in jail!”<sup>2</sup>

Many in the media immediately pointed out that flag burning has been protected as “symbolic speech” since the 1980s.<sup>3</sup> However, flag desecration in the United States has a much more complicated history than most pundits, lawyers, and historians realize.

Most commentators are familiar with the landmark 1989 Supreme Court case *Texas v. Johnson*. In 1984, Gregory Lee Johnson of the Communist Youth Brigade set an American flag aflame during the Republican National Convention in Dallas. Standing nearby, other protesters shouted, “America, the red, white, and blue, we spit on you.” Out of the nearly 100 participants in the protest, Johnson was the only one charged under a Texas statute prohibiting desecration of a venerated object. The state claimed that it had an interest in preserving the U.S. flag “as a symbol of national unity” and that preventing “breaches of the peace” justified Johnson’s conviction. Johnson received a one-year prison sentence and a \$2,000 fine.

In a 5-4 decision, the Supreme Court overturned Johnson’s conviction, holding that the First Amendment’s free speech clause includes a right to burn the American flag. In the opinion of the Court, Justice William J. Brennan argued that “the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable” and that no “separate juridical category exists for the American flag alone.”<sup>4</sup>

*Texas v. Johnson* was the culmination of a long series of 20th-century cases, that expanded the meaning of the First Amendment, many of which dealt with flags. Most early cases involved state laws prohibiting the use of flags for commercial purposes. In 1903, for example, Nebraska made it a misdemeanor to display “any word, figure, mark, picture, design, drawing, or any advertisement, of any nature upon any flag” or to sell any object featuring the flag of the United States or the state of Nebraska. Moreover, the law punished those who “publicly mutilate, deface, defile, or defy, trample upon, or cast contempt, either by words or act” upon either flag.<sup>5</sup>

In 1907, in *Halter v. Nebraska*, the Supreme Court upheld the Nebraska law, finding that it was “promotive of the peace, order, and well-being of the people” and did not violate “rights secured by the Constitution of the United States.”<sup>6</sup> Over the ensuing years, several states enacted similar statutes.<sup>7</sup> As one trade magazine for bakers wryly observed when America got involved in World War I, “The present international crisis has created a situation fraught with danger for the unwary advertiser who desires to link up his appeal with the popular mood by the use of patriotic decorations.”<sup>8</sup>

During World War I, more than a dozen men and women faced fines and time in jail for violating state laws that prohibited desecrating or otherwise insulting the American flag.<sup>9</sup> Congress also prohibited certain actions in the Sedition Act of 1918, making it illegal to “utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about . . . the flag of the United States” in order to bring it “into contempt, scorn, contumely, or disrepute.” The act also prohibited “willfully display[ing] the flag of any foreign enemy.”<sup>10</sup>

In 1919, the Supreme Court upheld the constitutionality of the Sedition Act;<sup>11</sup> however, following World War I, the Court began to shift its jurisprudence in regard to flags. In 1931 in *Stromberg v. California*, the Court struck down a state law banning red flags (as symbols of Communism or anarchism), thus protecting certain forms of symbolic speech.<sup>12</sup> In 1940, the Court upheld a Pennsylvania law that required public school students to salute the flag while reciting the pledge of allegiance; however, the Court reversed itself just three years later in *West Virginia v. Barnette*. In the opinion of the Court, Justice Robert H. Jackson wrote, “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.”<sup>13</sup> The *Barnette* decision signaled a marked departure from the fierce protectiveness with which the courts had previously viewed the American flag.

By the late 1960s, the Vietnam War had provoked a surge of public protests and civil unrest, including an increase in flag desecration. During anti-draft protests in New York City on April 15, 1967, several individuals were photographed burning an American flag. The event sparked national outrage, especially since the incident led to no arrests.<sup>14</sup> In response, Congress passed the Flag Protection Act of 1968, expanding the ability of federal law enforcement to imprison or fine any person who “casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it.”<sup>15</sup>

In 1969, in *Street v. New York*, the Supreme Court overturned the state-level conviction of Vietnam veteran Sidney Street, who burned an American flag after the wounding of civil rights leader James Meredith in 1966. As the flag burned, Street said publicly that if the government allowed Meredith to be shot, “we don’t need no damned flag.”<sup>16</sup> The Court overturned Street’s conviction, holding that states cannot punish verbal disparagement of the American flag; however, the justices chose not to decide whether New York’s prohibition on flag burning violated the Constitution.

By the time *Texas v. Johnson* came before the Supreme Court in 1989, 48 states had laws on the books prohibiting various forms of flag desecration. The case did not divide the Court along conservative and liberal lines. Justices William J. Brennan, Thurgood Marshall, Harry Blackmun, Antonin Scalia, and Anthony Kennedy formed the majority, while Chief Justice William Rehnquist and Justices Byron White, Sandra Day O’Connor, and John Paul Stevens dissented.<sup>17</sup>

In separate dissents, Rehnquist and Stevens argued that the flag ought to be protected as a venerated symbol. Both opinions were rich in historical imagery and appeals to patriotism. Rehnquist recalled the 200 years during which “the American flag has occupied a unique position as the symbol of our nation.” This, he argued, “justifies a governmental prohibition against flag burning.”<sup>18</sup>

Stevens highlighted the flag’s essential place in American history, from Patrick Henry to Abraham Lincoln to the soldiers at Omaha

Beach. These extraordinary men, Stevens argued, were motivated by “ideas of liberty and equality” encapsulated in a flag “worthy of protection from unnecessary desecration.”<sup>19</sup> Rehnquist even cited poetry in support of his position, recounting the supposed heroic efforts of Barbara Frietchie to protect a Union flag during Robert E. Lee’s invasion of Maryland in 1862. According to both judges, the flag had attained a certain stature that accorded it more protection than other, ordinary symbols.

In citing John Greenleaf Whittier’s poem about Frietchie, Rehnquist referred to perhaps the least relevant—and least interesting—Civil War “precedent.” During the Civil War, individuals were tried under state statutes and in military courts for a variety of actions involving the flag, including cursing, spitting on, trampling, tearing apart, or removing American flags. Others were punished for raising rebel flags. And in at least two instances, Southern civilians and Union soldiers were tried before military courts for singing patriotic Confederate songs like “The Bonnie Blue Flag.”<sup>20</sup> Indeed, Civil War court-martial records and state court cases reveal that individuals during the Civil War were tried, imprisoned, and fined for a variety of flag-related offenses. The following cases, though not cited in Rehnquist’s *Texas v. Johnson* dissent, would have served his argument well; yet they have been largely forgotten for more than a century and a half.

### Removing the Flag

Removing a flag during the Civil War could cost a man his life. In January 1861, Union general John A. Dix, a veteran of the War of 1812, famously declared, “If anyone attempts to haul down the American flag, shoot him on the spot.” Dix’s memorable phrase became ubiquitous in the North, appearing on envelopes, in newspapers, and on penny-sized tokens that circulated widely throughout the Union. Political leaders soon followed suit. Perhaps most emphatically, the governor of Illinois told his constituents that if anyone attempted to tear down an American flag that they should “shoot him down as you would a dog and I will pardon you the offense.”<sup>21</sup>

These ideas went beyond mere rhetoric. Several men actually did die during the war for attempting to remove Union or Confederate flags from public places. On May 24, 1861, Col. Elmer Ellsworth of the 11th New York Volunteers tore down a Confederate flag at an inn in Alexandria, Va. In response, the hotel owner, James Jackson, shot and killed the 24-year-old colonel before being killed himself by one of Ellsworth’s comrades. President Lincoln personally knew Ellsworth and sent a condolence letter to his parents, praising the young colonel who “so gallantly gave his life.” Ellsworth’s parents wrote in response, “We trust he did not die in vain, but that his death will advance the cause in which he was engaged.”<sup>22</sup> Ellsworth became a national hero, and citizens throughout the North clamored for his autograph or relics related to his death.<sup>23</sup>

Two months after Ellsworth’s death, a soldier in the 2nd Iowa Volunteers shot and killed 19-year-old Donald McDonald for flying a Confederate flag in northern Missouri. An officer in the regiment later defended the assassination, saying boldly, “I have nothing to take back. Our business down there was to put down the rebel colors and of course we commenced as soon as we saw where the work commenced.... His flag came down and so did he.”<sup>24</sup>

Another man lost his life for removing an American flag from a government building in Louisiana. When Union ships arrived at New Orleans in April 1862, federal authorities ordered Mayor John T. Monroe to replace the state and Confederate flags flying above the

city’s public buildings with the Stars and Stripes. Monroe refused to follow this order. In response, a Union sailor climbed atop the New Orleans mint to hoist the American flag. An angry crowd quickly assembled, but the sailor told them that a nearby Union warship had its guns trained on the site should anyone come near the flag.

Despite this threat, 41-year-old William B. Mumford, a veteran of the Seminole and Mexican wars, boldly climbed up to the mint’s roof. A shot from the vessel quickly hit nearby, wounding him with shards of brick. But Mumford persevered in removing the flag as the people cheered from below. Mumford attempted to give the Union banner to Mayor Monroe, but before he could the boisterous crowd began shredding it to pieces. When Union forces learned of the incident, they decided it was necessary to “catch ... and then hang” Mumford. In May, he was arraigned before a military court and charged with “maliciously and willfully” tearing down and destroying the flag. The court quickly convicted him of an “overt act of treason” and sentenced him to death.

While standing on the gallows, Mumford delivered his final remarks to a crowd of New Orleans citizens. He had been motivated by patriotism and opposition to “Northern tyranny,” he told them. A few moments later, his lifeless body dangled in the breeze, leaving behind a wife and three children.<sup>25</sup>

Of course, not all people faced death for removing American flags. But even being accused of such an offense could have serious implications, so soldiers who faced such charges wanted to make sure that their names were cleared. In August 1862, Capt. John Mansfield of the 2nd Wisconsin Infantry requested a court of inquiry to examine allegations that he had ordered a shopkeeper to remove an American flag from a storefront in Fredericksburg, Va. He was accused of making the order so that the flag would not “disturb a secession woman who had already manifested her contempt for said flag.” (The woman had apparently stepped out into the street in a “dramatic way” to avoid passing under it.) Fortunately for Mansfield, the primary witness to the incident claimed not to know anything about it, so the court determined “that the charges are not worthy of receiving any further attention.” A few days later Mansfield was “honorably returned to duty.”<sup>26</sup>

Further north, the city of Baltimore was hotly divided during the Civil War. In April 1861, its Southern sympathizing police commissioners issued an order barring the display of any flags. One foreign observer noted that it was “wisely issued” since the police feared violent “disturbances.”<sup>27</sup> The order was rescinded about a week later, however, and thereafter, only Confederate flags were prohibited in the Monumental City.

Nearly two years later, in February 1863, a Union commander placed large American flags in several Baltimore churches. Upon hearing that some parishioners were not fond of seeing the Stars and Stripes, Maj. Gen. Robert C. Schenck issued an order on Feb. 8:

I understand that considerable disgust is excited in the view of a class of persons, who assemble at your rooms, in consequence of the American flag being displayed there. You will hereafter cause constantly to be displayed, in a conspicuous position, at the head of the hall, a large sized American flag until further orders.

The stewards of the Central, Chatsworth, and Biddle Street Methodist Episcopal churches wrote to the governor of Maryland

deploring Schenck's tactics and audacity. Schenck, according to the complaint, was depriving them "of the right and privilege of holding public worship, except upon conditions prescribed by military authority."<sup>28</sup> They therefore asked the state authorities for protection of their constitutional rights. But little could curtail Schenck's enthusiastic suppression of disloyalty in Baltimore. He also issued orders banning the sale of music or photographs that were in any way favorable toward the South. Only "national" and "loyal" songs were permitted to be sold.<sup>29</sup>

Confederate sympathizers in Baltimore loathed Gen. Schenck for his heavy-handed policies. One woman, Mary Sawyer, wrote a poem that execrated his order forcing the display of American flags in places of worship:

Your churches are unholy unless dressed in a flag  
And your Savior's Cross unholy unless it bears a rag,  
For a voice from Fort McHenry declares your creed extinct,  
And substitutes for Trinity, Abe Lincoln, Flag, and Schenck.<sup>30</sup>

Further to the west, John Hutchinson was peeved to find an American flag hanging from the window of his hotel room in Wheeling, Va.,<sup>31</sup> in May 1863. He removed the flag three times, but each time, Mrs. Breccourt—the hotel owner—replaced it. Outraged, he stormed downstairs to confront her. Hutchinson called the flag disgraceful, saying that he "would not wipe his feet with it" and had a mind to put up "a secesh flag in its stead." He left the room angrily and returned to find Mrs. Breccourt accompanied by a group of soldiers. Assuming a tone of defiance, he said he "would not be caught in the company of soldiers—that it was too disgraceful." He then taunted the soldiers, daring them to try to arrest him, which they gladly did.

The following morning, Hutchinson was brought before the provost marshal, to whom he said "the Yankee soldiers were all a set of God damned thieves and robbers" and that he "wished them all in hell." Digging himself into further trouble, he expressed his wishes for Confederate Gen. "Stonewall" Jackson to come and establish a Southern government. For these actions Hutchinson found himself before a Union military court, charged with publicly declaring sympathy for the South and offering insult to the American flag. In his defense, Hutchinson claimed that he had been "under the influence of liquor at the time" and that he remembered Mrs. Breccourt inciting him by calling him a "guilty secesh." Nevertheless, the court found Hutchinson guilty and sentenced him to 30 days of hard labor at Fort McHenry "with a ball and chain attached to his leg." At the completion of this term, he was sent beyond Union military lines.<sup>32</sup>

In December 1864, John Watkins of Baltimore County, Md., was tried before a military commission for stealing and destroying an American flag that hung on the home of local politician John Longnecker. During the trial, one witness testified that Watkins had bragged, "I tore John Longnecker's flag down ... he is getting a big salary and has got a little flag there!" For these indiscretions, Watkins was found guilty of "conduct tending to incite insurrection and encourage rebellion" and was sentenced to hard labor for three years.<sup>33</sup>

Flag removal incidents continued after Appomattox, including in some Northern states. In May 1865, for example, several students at

Dickinson College, in a "drunken frolic, tore down a national ensign" hanging outside the home of an Episcopal minister in Carlisle, Pa. This, along with other intoxicated deeds, resulted in several students' expulsion from Dickinson and landed them before a local magistrate.<sup>34</sup>

### Rebel Flags

Civil authorities in the North worked strenuously to keep symbols of disloyalty from public view. On July 3, 1861, the Connecticut legislature enacted a statute that prohibited the display of "any flag, or device, of the description used, or reputed to be used, by any rebels" or "public enemies of this state, or of the United States." The statute permitted constables, justices of the peace, and sheriffs to deem such flags a "nuisance" and to "seize and destroy" them. Anyone found violating this law would be guilty of a misdemeanor and could receive a \$100 fine and up to 30 days in prison. If that was not enough, the governor of Connecticut issued a proclamation two months later declaring that the public exhibition of "peace flags" would not be considered protected "speech" in his state.<sup>35</sup>

By late 1862, Kansas,<sup>36</sup> Maryland,<sup>37</sup> and Kentucky<sup>38</sup> had enacted similar legislation. In April 1863—after a thwarted attack by Confederate pirates in San Francisco—California enacted Connecticut's law verbatim, although with a \$300 fine and up to 60 days in jail.<sup>39</sup>

While these state laws were not vigorously enforced, several instances did result in arrests. Several Maryland citizens were indicted for "displaying a secession flag" on public highways in the state, but none appear to have been convicted.<sup>40</sup> Most famously, Hetty Cary was seen "flaunting a rebel flag in the faces of a New York regiment drilling in front of her father's residence" in Baltimore. Luckily for Cary, her beauty protected her from imprisonment. When asked if he would arrest her one officer replied, "a woman that beautiful can do as she pleases."<sup>41</sup>

Union military authorities also prosecuted civilians for displaying rebel flags. Two years after he'd raised a Confederate flag in Missouri on March 4, 1861 (the day Lincoln was inaugurated president), David Funk was charged with treason in a military tribunal. The prosecution accused Funk of "repeatedly" uttering "treasonable and incendiary language against the United States" and of discouraging enlistments in the Union army. One witness testified that Funk had said, "I am for the South, first, last, and all of the time, by God." While the military officers serving on the court believed that Funk was guilty of raising the flag and using treasonable language, they acquitted him based on a technicality (the officer who had convened the military commission did not have proper authority to do so).<sup>42</sup>

Confederate authorities similarly prohibited ownership or exhibition of American flags. Although Confederate records are far less complete than Union archives, one instance is known in which Confederate military authorities arrested people of German descent in March 1862 after they discovered several American flags folded in the cupboards of a German-American community organization in Richmond.<sup>43</sup>

### Insulting

During the Civil War, many Americans were angered by the restrictions placed on their civil liberties by Union military authorities. In July 1862, John Boogher of Missouri proclaimed publicly that "the residents of Missouri had no liberty of speech, no freedom of action, and were all controlled by military officers." On another occasion, he told a shopkeeper in St. Louis who was untangling his American flag

that he was “always fixing the dirty old flag.” These, among other anti-Union statements landed Boogher before a military tribunal, which found him guilty of disloyalty and violating his oath of allegiance to the United States. For these crimes, Boogher spent the rest of the war in an Illinois military prison at hard labor.<sup>44</sup>

Despite taking an oath of loyalty to the government of the United States, one former Confederate soldier could not help but show his disrespect and contempt for the American flag. After being captured as a prisoner of war, Thomas Mitchell joined the 52nd Missouri Enrolled Militia, a Union regiment, on April 28, 1864, as proof of his new allegiance. However, upon seeing a U.S. flag in his camp merely two days later, Mitchell exclaimed, “I will be God damned if I will fight under that flag; if it was a nigger stuck up there stark naked it might do them, but they are not fighting for that flag. I have been in the rebel army for three years, and I am a rebel yet, from top to toe.” A court-martial convicted Mitchell of violating his oath and sentenced him to be “imprisoned in some military prison for and during the war, at labor.”<sup>45</sup>

Some incidents involving insult to the flag were fueled by alcohol. On Feb. 6, 1864, an inebriated Pvt. Alfred Lambert caused a ruckus in Missouri, shouting to members of his company, “yes take the damned flag down and hang up an old s—t pot, it will be better than the G—d d—d old Stars and Stripes.” He was charged with “conduct prejudicial to good order and military discipline.” Witnesses testified on his behalf, verifying that he’d been drunk. And in his defense, Lambert stated, “I assure you, one and all, that I have always and ever shall look to the flag of the Union as the only flag that insures life and liberty on the Western Hemisphere.” Regardless, the court found Lambert guilty and sentenced him to be “confined at hard labor for the term of one month . . . and forfeit half his monthly pay” until the end of June.<sup>46</sup>

Further west, Thomas Richardson, a recruit in the 6th California Volunteers, was playing a game of cards on Christmas Eve 1863 when one of his comrades waved the flag over the table. Annoyed, Richardson blurted out that “that flag is not fit to wipe a man’s arse with, I have no respect for the American flag.” At his trial, Richardson claimed that he was drunk, but other witnesses testified that he had been sober. The court found him guilty and sentenced him to be dishonorably discharged from the Union army and confined at hard labor on Alcatraz Island for one year.<sup>47</sup>

Other cases also took place in the Union armies. Sgt. Joseph Isaacs of the 6th U.S. Volunteers was court-martialed for saying that “the lone star of the Confederacy was more admirable to him than the Stars and Stripes of the United States.”<sup>48</sup> Pvt. Frederick Foster of the 99th Pennsylvania was tried for saying, “If I could only get out of this scrape (meaning the service of the United States), I’ll be God damned if they might not shit on the Stars & Stripes for me.”<sup>49</sup> Out in California, Pvt. John Emory was court-martialed for saying that he would not fly an American flag on his property.<sup>50</sup> And Pvt. John Eyles, a military engineer, reportedly exclaimed that he “wished the North in Hell, and that the South would beat them, that he said he would not wipe is backsides on the Stars and Stripes, that he has said he wished he was back in England and then he would have a chance to fight against this bloody country.”<sup>51</sup> Of these three, only Eyles was acquitted. Isaacs was publicly drummed out of the service and lost all pay that was due him (he had also been found guilty of two other charges as well), while Foster lost half of his pay for two months.<sup>52</sup>

Women, too, were occasionally overheard making defamatory remarks about Old Glory. Ann Kilbaugh, a washerwoman in Baltimore, was charged with “conduct and the use of language tending to promote sedition and encourage rebellion” for verbally disparaging Union soldiers, the federal government, and women who carried “their damned old Union flag” in February 1864. She was found guilty of all charges and specifications (except her remark that Union soldiers were “black Republican nigger worshippers”) and was sentenced to six months in prison at hard labor. Noticing such an unusual sentence for a woman, Gen. Lew Wallace commuted Kilbaugh’s sentence to 30 days imprisonment.<sup>53</sup>

## Desecration

For some, merely insulting or removing the flag was not enough. In their minds, their disgust for the Union symbol required tearing, spitting, or other modes of destruction. Indeed, Southern sympathizers in the North knew that they could inflame their neighbors with rage by physically damaging an American flag. In Kentucky, one “young lady [tore] the American flag from its staff and whipe [sic] her feet on it,” wrote a bystander, while other people snatched a flag “from the hands of a child and [tore] it in rags.”<sup>54</sup> These sorts of actions were often met with consequences at the hands of Union forces.

In March 1862, “a finely dressed lady” in Nashville was observed “in the mire of the street to avoid passing under the flag that hung over the sidewalk. She even spat upon it as she passed,” remembered a Union soldier who witnessed the event. Unfortunately for her, the Union commander in Nashville happened to notice her actions. He quickly mounted his horse and followed her to her home. According to the soldier who watched all this, the general “thought the house would make a good hospital, and an hour later several ambulances laden with sick soldiers halted before it. The lady was directed to prepare some of her rooms immediately for their occupancy.”<sup>55</sup>

Some Southern civilians faced court-martial for similar actions. On March 25, 1863, in St. Joseph, Mo., George Reese jokingly held an American flag over the head of Thomas Frame, saying, “you can never say that you have not been under the United States flag.” But Frame didn’t see the humor in Reese’s gesture. Angrily snatching the flag from Reese, he promptly spat upon it, thereby, as his subsequent charges specified, “showing his contempt and disloyalty to the government of the United States.” Frame was found guilty and initially given a six-month sentence in a military prison at hard labor, which, luckily for him, was remitted on a technicality. However, he was still forced to pay a hefty \$2,000 bond to ensure his “future good behavior.”<sup>56</sup>

Hannah Martin of Missouri, who had two brothers serving in Gen. Sterling Price’s Confederate army, was charged with “disloyal conduct” for spitting on a U.S. flag at her Baptist church. Several witnesses corroborated the story and she was convicted by a military court and sentenced to be banished to the South. However, on account of her “youth and inexperience” and her “want of good sense and good manners,” her sentence was commuted and she was forced to post \$1,000 bond and take an oath of allegiance to the Union.<sup>57</sup>

Acts of flag desecration continued even after the war ended. Emma Latimer, “a schoolgirl” in Nashville, could hardly stand the sight of the U.S. flag and became enraged when four Union soldiers boarding at her father’s home raised a large ensign outside of their house on the first Fourth of July after Appomattox. (They had purposefully hung the flag where they did to provoke young Emma into tearing it down. According to the testimony at the trial, one had even

tried to bribe Emma to defile it.) In a fit of anger, she ran outside and tore it down before shouting that “if it is put up again I will tear it down and burn it up.” Brought before a military court on charges of disloyalty and uttering treasonable language, Latimer was found guilty and sentenced to 90 days in prison and a \$300 fine.

Upon reviewing the verdict, Gen. Richard W. Johnson ordered Latimer to be “released from confinement and restored to her parents, with attention to Solomon’s sage remark[,] ‘He that spareth the rod, spoileth the child.’” The general further admonished “Miss Lattimer [sic] to remember that it will not do to trifle with the sacred emblem of our nationality” and that “in spite of the opposition of all the schoolgirls in the South the ‘banner of glory and of beauty’ will still wave over the land of the free, and notwithstanding the united efforts of all the rebellious women in the country will continue to float, until time shall cease to be, upon every breeze[,] the pride and admiration of all thinking persons.”<sup>58</sup>

Latimer’s case garnered national attention in the press. One widely reprinted article from the *Nashville Daily Union* published the trial proceedings, including the closing argument delivered by Latimer’s attorney, William G. Brien. In it, Brien argued that Union authorities were using wartime exigencies to convict people of treason in military courts for actions that would never attain a conviction in a civil court:

To a person of active, perhaps, morbid imagination, this might appear a violent, spasmodic effort to charge treason by synonyms, and that there is now inaugurated a new and complete system of jurisprudence which is confined, in its wonderful wisdom, to the absolute *creation* of synonymous offenses, and the necessity of its existence arises out of the unfortunate silence of the Statutes, the common law and the constitution on all such offenses; and that this system has its own rules and forms of pleading and practice, and its own mode of adjudication and execution—that this is Civil War Law.<sup>59</sup>

Former Confederate President Jefferson Davis personally commended Brien for his poignantly written argument, and 44 years later, the attorney recalled, “I shall always regard [Latimer’s] case as one of the most remarkable of my legal career.”<sup>60</sup>

In September 1865, Emma Jones and Jane Byers, both English subjects, were prosecuted for trampling an American flag and dragging it in the dust in Charleston, S.C. On the night of Aug. 18, Byers, Jones, and a man named Oscar Van Tassel were eating dinner in a boarding house owned by Jones in Charleston. As the dinner concluded, Byers produced a small American flag she’d recently received as a gift. Seeing her drape it over her niece’s head before letting it drop to the ground, Van Tassel urged her to “take good care of the flag.” Byers laughed and replied, “go away with your old flag” and ran outdoors, followed by Jones.

The two ran into the street “rubbing [the flag] with both hands and then kicking it” and yelling to Van Tassel, “this is what I think of your flag, that is all I care for it.” Van Tassel chided them, saying that “had a United States officer or guard passed by, they would have taken the flag away from her.” Byers again laughed, saying, “they wouldn’t be so foolish as to do that.”

Unfortunately for the women, two soldiers in the 47th Pennsylvania Volunteers had witnessed their act and approached the house. Byers apologized, insisting that she had “just done it to tantalize a

friend,” but Jones interjected, saying, “what of it, if we did trample on your flag” and that she would “do it again.” The two soon found themselves before a military tribunal charged with disloyalty and insulting the American flag. Both were convicted and sentenced to a \$100 fine and imprisonment until they paid it. Luckily for Byers, the court and judge advocate had been improperly sworn in, so her conviction was overturned. Jones’ sentence, however, was approved and carried out.<sup>61</sup>

## Conclusion

Issues related to the U.S. and Confederate flags continue to roil American society. Just as flag desecration was in the news during the presidential nominating conventions in July 2016—and again after the November election—so too, public display of the Confederate flag continues to be controversial. A century and a half after Appomattox, new laws and regulations are being put in place to ban certain public displays of the Confederate banner. They differ from their 19th-century predecessors in two particular ways, however. During the Civil War several Northern states barred display of the Confederate flag because it was a symbol of treason; today it is restricted for a different reason—because it is now often viewed as a symbol of racism. In addition to being removed from Southern state capitols, it has also been eliminated from displays in the U.S. Capitol and at least one Northern state capitol.<sup>62</sup>

In June 2015, white supremacist Dylann Roof opened fire in a black church in Charleston, S.C., killing nine African-American worshippers at a Bible study. Roof’s social media presence flaunted his Confederate flag license plates, photos of him holding both a gun and the flag, Confederate heritage sites, and a 2,500-word manifesto explaining his motivations for the shooting.<sup>63</sup> In the wake of the massacre, thousands protested before the South Carolina state house, demanding the removal of the Confederate flag that flew in front of the building. South Carolina Gov. Nikki Haley signed a bill into law that took down the flag forever—despite opposition by many Southerners who argued that the Confederate flag was a symbol of the state’s history.

As the flag was lowered, some gathered by the statehouse cheered, while others mourned. One woman even wore the flag around her shoulders, arguing that the flag honored Confederate veterans. Other leaders and lawyers from the area saw the flag’s removal as progress. Hesh Epstein, a rabbi in the crowd, said, “In Judaism, symbols are always meant to move us to real actions, to be better people.... If this moves us to be more generous and kind and righteous, then we have something of value we’ve really accomplished.”<sup>64</sup>

South Carolina was not the only former Confederate state to place limits on state-sponsored display of the Confederate flag. In 2015, the U.S. Supreme Court upheld the Texas Department of Motor Vehicles’ refusal to offer specialty license plates featuring the Confederate flag, ruling that this was “government speech” and not “free speech.” In the opinion of the Court, Justice Stephen G. Breyer stated: “When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.”<sup>65</sup> *Walker v. Texas Division, Sons of Confederate Veterans Inc.* set the precedent that a state may prohibit the Confederate flag on certain state-issued materials. Following the Supreme Court’s decision, Virginia Gov. Terry McAuliffe similarly instructed his state’s authorities “to take steps” to remove the Confederate flag from Virginia state license plates.<sup>66</sup>

In many ways Chief Justice Rehnquist was correct when he asserted in *Texas v. Johnson* that “the flag has occupied a unique position as the symbol of our nation.” And yet, as the Court has decided in recent years, its uniqueness does not justify a governmental prohibition against flag burning or other forms of desecration. Nor, now, does the Confederate flag receive any special protection. The heated controversies these flags have sparked speak to their power as symbols. And while *Texas v. Johnson* seemed to largely resolve the issue of flag desecration from a legal standpoint, there is no sign that flags will cease to be at the center of national controversy any time soon. ☺



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## Endnotes

<sup>1</sup>See Jonah Engel Bromwich, *Hampshire College Draws Protests Over Removal of U.S. Flag*, N.Y. TIMES (Nov. 28, 2016), <http://www.nytimes.com/2016/11/28/us/hampshire-college-flag-veterans-protest.html>; Susan Svrluga & Alejandra Matos, *Student Protestors Burn American Flags at Confrontation Over Trump Victory*, WASH. POST (Nov. 9, 2016), [https://www.washingtonpost.com/news/grade-point/wp/2016/11/09/student-protesters-burn-american-flags-at-confrontation-over-trump-victory/?utm\\_term=.a4a2da896cad](https://www.washingtonpost.com/news/grade-point/wp/2016/11/09/student-protesters-burn-american-flags-at-confrontation-over-trump-victory/?utm_term=.a4a2da896cad).

<sup>2</sup>Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 29, 2016, 3:55 AM), <https://twitter.com/realdonaldtrump/status/803567993036754944>.

<sup>3</sup>Charlie Savage, *Trump Calls for Revoking Flag Burners' Citizenship. Court Rulings Forbid It*, N.Y. TIMES (Nov. 29, 2016), <http://www.nytimes.com/2016/11/29/us/politics/trump-flag-burners-citizenship-first-amendment.html>. Moreover, in 1957, the Supreme Court held that loss of citizenship violates the Eighth Amendment's prohibition on “cruel and unusual punishments.” See JONATHAN W. WHITE, EMANCIPATION, THE UNION ARMY, AND THE REELECTION OF ABRAHAM LINCOLN 129-152 (2014).

<sup>4</sup>*Texas v. Johnson*, 491 U.S. 397, 397-400 (1989).

<sup>5</sup>*An Act to Prevent and Punish the Desecration of the Flag of the United States*, Act of Aug. 1, 1903, in COBBEY'S COMPILED STATUTES OF NEBRASKA 359 (1907).

<sup>6</sup>*Halter v. Nebraska*, 205 U.S. 34, 45 (1907).

<sup>7</sup>Albert M. Rosenblatt, *Flag Desecration Statutes: History and Analysis*, 2 WASH. U. L. Q. 197 (1972).

<sup>8</sup>*Laws Against Using Flag in Advertising: Rigid Enforcement of Regulations Expected*, 6 CRACKER BAKER 35-38 (May 1917).

<sup>9</sup>David T. Prosser, *Desecration of the American Flag*, 3 IND. LEGAL FORUM 160-168 (1969).

<sup>10</sup>The Sedition Act was actually an amendment to the Espionage Act

of 1917. See *An Act To amend section three, title one, of the Act entitled “An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes,” approved June Fifteenth, nineteen hundred and seventeen, and for other purposes*, Act of May 16, 1918, 40 Stat. 553.

<sup>11</sup>*United States v. Schenck*, 249 U.S. 47 (1919); *United States v. Abrams*, 250 U.S. 616 (1919).

<sup>12</sup>*Stromberg v. California*, 283 U.S. 359 (1931).

<sup>13</sup>*Minersville Sch. Dist. v. Gogitis*, 310 U.S. 586 (1940); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

<sup>14</sup>Prosser, *supra* note 9, at 179-189.

<sup>15</sup>*An Act to Prohibit desecration of the flag, and for other purposes*, Act of July 5, 1968, 82 Stat. 291.

<sup>16</sup>*Street v. New York*, 394 U.S. 576 (1969).

<sup>17</sup>*Johnson*, 491 U.S. at 491.

<sup>18</sup>*Id.* at 422 (Rehnquist, C.J., dissenting).

<sup>19</sup>*Id.* at 439 (Stevens, J., dissenting).

<sup>20</sup>See generally Record Group 153 (Records of the Office of the Judge Advocate General of the Army), Entry 15 (Court-Martial Case Files), Files M.M. 171 and M.M. 3550., National Archives, Washington, D.C. [hereinafter General Courts-Martial Records No.].

<sup>21</sup>Token and envelope in the collection of Jonathan W. White; STEPHEN D. ENGLE, GATHERING TO SAVE A NATION: LINCOLN AND THE UNION'S WAR GOVERNORS 199 (2016).

<sup>22</sup>Letter from Abraham Lincoln to Ephraim D. and Phoebe Ellsworth (May 25, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 385-86 (Roy P. Basler et al., eds., 1953); Letter from Ephraim D. Ellsworth to Lincoln (June 19, 1861), in DEAR MR. LINCOLN, LETTERS TO THE PRESIDENT 245 (Harold Holzer, ed., 1993).

<sup>23</sup>Souvenir pieces of the step from the Marshall House where Ellsworth was killed are on display at Pennypacker Mills in Schwenksville, Pa. See also letter from J. B. Andrew to Mr. Dorlan (June 1, 1861), in ELDRIDGE COLLECTION (on file with the Huntington Library).

<sup>24</sup>CHRISTOPHER PHILLIPS, THE RIVERS RAN BACKWARDS: THE CIVIL WAR AND THE REMAKING OF THE AMERICAN MIDDLE BORDER 149 (2016).

<sup>25</sup>Robert Broadwater, *William B. Mumford Became a Southern Hero for Defying Union Sailors in New Orleans*, 18 AMERICA'S CIVIL WAR 20 (2005). Augustus Merkle was found not guilty when he was tried by a military court for assisting Mumford. See General Courts-Martial Records No. K.K. 629.

<sup>26</sup>See General Courts-Martial Records No. L.L. 3334.

<sup>27</sup>Letter from Frederic Bernal to Lord John Russell (April 29, 1861), in RECORDS OF THE FOREIGN OFFICE (on file with the National Archives of the United Kingdom).

<sup>28</sup>EDWARD MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA, DURING THE GREAT REBELLION 526-527 (1865).

<sup>29</sup>John M. Buck et al. to Augustus Bradford (March 3, 1863), in *Governor's Miscellaneous Papers* (S1274) (on file in the Maryland State Archives); J. THOMAS SCHARF, 3 HISTORY OF MARYLAND FROM THE EARLIEST PERIOD TO THE PRESENT DAY 526-529 (1879); HENRY MAY, SPEECHES OF HON. HENRY MAY, OF MARYLAND, DELIVERED IN THE HOUSE OF REPRESENTATIVES, AT THE THIRD SESSION OF THE THIRTY-SEVENTH CONGRESS 45 (1863).

<sup>30</sup>THOMAS LOWRY, CONFEDERATE HEROINES: 120 SOUTHERN WOMEN CONVICTED BY UNION MILITARY JUSTICE 69 (2006).

- <sup>31</sup>Wheeling didn't become part of West Virginia until a month later when, on June 20, leaders in the northwestern part of Virginia, which had seceded in 1861, created the new state of West Virginia.
- <sup>32</sup>General Courts-Martial Records No. M.M. 740. For another case involving the removal of a flag at a Missouri hotel, *see* No. N.N. 8.
- <sup>33</sup>General Courts-Martial Records No. N.N. 3156. For other cases involving civilians who stole or tore down American flags, *see* Nos. M.M. 501, M.M. 2190, N.N. 1147, N.N. 1264, N.N. 1475, N.N. 3848.
- <sup>34</sup>Letter from Singleton Ashenfelter to Samuel W. Pennypacker (May 14, 1865), *in* SAMUEL W. PENNYPACKER PAPERS, *supra* note 23.
- <sup>35</sup>*An Act in Addition to "An Act Concerning Crimes and Punishments,"* Act of July 3, 1861, in PUBLIC ACTS, PASSED BY THE GENERAL ASSEMBLY OF THE STATE OF CONNECTICUT, MAY SESSION, 1861, 100-101 (1861); Samuel G. Buckingham, *THE LIFE OF WILLIAM A. BUCKINGHAM, WAR GOVERNOR OF CONNECTICUT* 185 (1894).
- <sup>36</sup>*An Act Defining and Providing for the Punishment of Certain Crimes Therein Named,* Act of May 21, 1861, in GENERAL LAWS OF THE STATE OF KANSAS, IN FORCE AT THE CLOSE OF THE SESSION OF THE LEGISLATURE ENDING MARCH 6TH, 1862, TO WHICH IS APPENDED THE CONSTITUTION OF THE UNITED STATES, TREATY OF CESSION, ORGANIC ACT, CONSTITUTION OF THE STATE OF KANSAS, AND THE ACT OF ADMISSION 346-347 (1862).
- <sup>37</sup>*An Act to Amend Section Two Hundred and Two of Article Thirty of the Code of Public General Laws, Relating to Crimes and Punishments, by Defining Treason, and Providing for the Punishment of Treason and Other Kindred Offences,* Act of March 6, 1862, in LAWS OF THE STATE OF MARYLAND, MADE AND PASSED AT A SESSION OF THE GENERAL ASSEMBLY BEGUN AND HELD AT THE CITY OF ANNAPOLIS ON THE THIRD DAY OF DECEMBER, 1861, AND ENDED ON THE TENTH DAY OF MARCH, 1862 250-254 (1862).
- <sup>38</sup>*An Act to amend the penal laws,* Act of Aug. 28, 1862, in ACTS OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF KENTUCKY 261 (1863).
- <sup>39</sup>*An Act supplementary to an Act entitled an Act concerning Crimes and Punishments, passed April sixteenth, one thousand eight hundred and fifty,* Act of April 20, 1863, in STATUTES OF CALIFORNIA, PASSED AT THE FOURTEENTH SESSION OF THE LEGISLATURE, 1863: BEGUN ON MONDAY, THE FIFTH DAY OF JANUARY, AND ENDED ON MONDAY, THE TWENTY-SEVENTH DAY OF APRIL 350 (1863).
- <sup>40</sup>*See, for example, State v. Isaac Strayhorn,* indicted July 25, 1862 (case no. 9, July and Oct. terms); *State v. Clinton Sentman,* indicted July 25, 1862 (case no. 10, July and Oct. terms); *State v. Comegys Semans,* presentment in July 1862 term (case no. 28, July and Oct. terms), in CRIMINAL DOCKETS, CECIL COUNTY CIRCUIT COURT RECORDS (Maryland State Archives).
- <sup>41</sup>Waller Griggs, *A HIDDEN HISTORY OF RICHMOND* 13 (2012). According to some news reports Cary was actually arrested. *See* ALEXANDRIA GAZETTE, Dec. 19, 1862. For another Maryland case, *see* General Courts-Martial Records No. N.N. 3708.
- <sup>42</sup>General Courts-Martial Records No. N.N. 100. For other Missourians who were tried for displaying, raising, waving or possessing Confederate flags, *see* Nos. I.I. 931, I.I. 999, L.L. 2611, L.L. 2617.
- <sup>43</sup>MARK E. NEELY JR., *SOUTHERN RIGHTS: POLITICAL PRISONERS AND THE MYTH OF CONFEDERATE CONSTITUTIONALISM* 149 (1999).
- <sup>44</sup>General Courts-Martial Records No. N.N. 387.
- <sup>45</sup>General Courts-Martial Records No. N.N. 2196.
- <sup>46</sup>General Courts-Martial Records No. L.L. 1739.
- <sup>47</sup>General Courts-Martial Records No. L.L. 1650. For a case in which a Louisianan said, "And now I am going to wipe my ass with it," when he saw someone with an American flag, *see* No. M.M. 499.
- <sup>48</sup>General Courts-Martial Records No. M.M. 3668.
- <sup>49</sup>General Courts-Martial Records No. L.L. 266.
- <sup>50</sup>General Courts-Martial Records No. K.K. 884.
- <sup>51</sup>General Courts-Martial Records No. I.I. 915.
- <sup>52</sup>*See supra* notes 46-48.
- <sup>53</sup>General Courts-Martial Records No. N.N. 3030.
- <sup>54</sup>PHILLIPS, *supra* note 24, at 181.
- <sup>55</sup>WILBUR F. HINMAN, *THE STORY OF THE SHERMAN BRIGADE* 114 (1897). For another instance of a girl crossing a street to avoid walking under a Union flag, *see* General Courts-Martial Records No. M.M. 3347.
- <sup>56</sup>General Courts-Martial Records No. L.L. 563. For a Missourian who participated in the destruction of a Union flag, *see* No. L.L. 938.
- <sup>57</sup>LOWRY, *supra* note 31, at 10-12, 34-35.
- <sup>58</sup>General Courts-Martial Records No. M.M. 2887.
- <sup>59</sup>*Trial of Miss Emma Latimer,* NASHVILLE DAILY UNION, Sept. 16, 1865, available at <http://chroniclingamerica.loc.gov/lccn/sn83025718/1865-09-16/ed-1/seq-3>.
- <sup>60</sup>*Defended Miss Emma Latimer; Gen. Brien Tells Story of the Famous Trial,* TENNESSEAN, July 21, 1909.
- <sup>61</sup>General Courts-Martial Records No. M.M. 2827.
- <sup>62</sup>James Forman, *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 YALE L.J. 505 (1991); Deborah Barfield Berry, *Confederate Emblem Removed at U.S. Capitol*, USA TODAY (April 21, 2016, 12:32 PM), <http://www.usatoday.com/story/news/politics/2016/04/21/confederate-flag-removed-us-capitol-tunnel/83337106>; Wallace McKelvey, *Confederate Flag, a Symbol of Hate and History, Removed from Pa. State Capitol*, PENNLIVE (June 15, 2016, 2:25 PM), [http://www.pennlive.com/politics/index.ssf/2016/06/confederate\\_flag\\_pa\\_capitol.html](http://www.pennlive.com/politics/index.ssf/2016/06/confederate_flag_pa_capitol.html). Recently a number of advocates for removing Confederate monuments from public spaces have argued that they are symbols of treason.
- <sup>63</sup>Frances Robles, *Dylann Roof Photos and a Manifesto Are Posted on Website*, N.Y. TIMES (June 20, 2015), <http://www.nytimes.com/2015/06/21/us/dylann-storm-roof-photos-website-charleston-church-shooting.html>.
- <sup>64</sup>Richard Fausset & Alan Blinder, *Era Ends as South Carolina Lowers Confederate Flag*, N.Y. TIMES (July 10, 2015), <http://www.nytimes.com/2015/07/11/us/south-carolina-confederate-flag.html>. In January 2017, Roof was sentenced to be executed.
- <sup>65</sup>*Walker v. Tex. Div., Sons of Confederate Veterans Inc.*, 576 U.S. \_\_\_ at 6, 135 S.Ct. 2239, 192 L.Ed. 273 (2015).
- <sup>66</sup>Scott Wise & Joe St. George, *Governor Orders Confederate Flag Removed From Virginia State License Plates*, CBS 6 NEWS (June 23, 2015, 10:31 AM), <http://wtvr.com/2015/06/23/confederate-flag-removed-virginia-license-plates>.