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POLEMICS & EXCHANGES

On Federalism and Flag-Burning

The Supreme Court, in the case of *Johnson* v. *Texas*, arrogated to the federal government the power to decide that all states must allow the public burning of the federal government's flag. This decision clearly contradicted both the near-unanimous understanding of previous Supreme Court justices, including such constitutional nihilists as Chief Justice Earl Warren and Justice Hugo Black, and the much-maligned "original understanding" of the issue.

Regarding the "original understanding," two of the three leading Federalist delegates to the Virginia ratification convention, Governor Edmund Randolph and George Nicholas (James Madison's chief spokesman), explicitly told their fellow delegates that the instrument by which they proposed to ratify the Constitution would leave future Virginians the power to reclaim their entire delegation of authority to the new government in the event that the federal government undertook to intervene in speech-related matters in any way. James Madison and John Marshall, two of the other four members of the committee that reported the ratification instrument, sat mute through this explication—thus signaling their assent.

Stephen B. Presser (*Cultural Revolutions*, June) suggests that the proper response to decisions such as *Johnson* is not nullification or secession, but granting new powers to the federal legislature. That is exactly what his proposed amendment, which would give Congress alone the states' pre-*Johnson* power to ban public disrespect of the flag, would do. Surely, this is rewarding the fox for raiding the henhouse! Under Article III, Section 2, of the Constitution, Congress already can divest the Supreme Court of effective power in this area by simply stripping it of jurisdiction over appeals in cases involving the flag; the federal legislature should not be granted a new quantum of the states' reserved sovereignty for failing to check judicial legislation.

There is another—and better—reason not to endorse a "flag desecration [sic] amendment": The flag is not sacred. I can think of dozens of things one might hold sacred: Orthodox icons, the Holy Bible, the Cross of Christ, relics of the saints, the writings of the Fathers of the Church, collections of the lives of the saints, etc. To have only one thing, and that the symbol of the federal government, recognized as "holy" by the federal government is really too much. It is simple blasphemy, as is any reference to "desecration" of the federal flag.

I am sure that Dr. Presser is animated by the best motives. Seeing yet more overreaching by the federal judiciary, he thinks, "Why not start to fence the judges in here?" I answer: Why not simply defend the states' reserved right to legislate exclusively in all matters such as this?

—*K.R. Constantine Gutzman*
Charlottesville, VA

Dr. Presser Replies:

K.R. Constantine Gutzman's points are well taken, and I agree that the growth of the federal leviathan and the diminishment of the constitutionally guaranteed powers of the states are important issues which ought to be addressed. Nevertheless, I part company with him over the suggestion that passage of the Flag Protection Amendment would exacerbate the problem. He appears to believe that passing the amendment would give Congress a power to regulate speech which it did not before possess, but the point is that flag desecration is not speech, never has been, and never will be. He is correct that, before the 1989 *Johnson* decision, the states—as well as the federal government—had laws against flag desecration; the amendment would only restore the federal government's power in this regard. Like him, I would favor a measure that restored the pre-1989 powers of the states as well, but I'm willing to settle for this particular amendment at this time.

Passage of the Flag Protection Amendment would reward the efforts of the 49 state legislatures which have petitioned Congress, and the amendment would, in the end, have to be ratified by the state legislatures, acting for the people of their states. The measure is a reaffirmation of grassroots popular sovereignty, and it would be brought into the Constitution ultimately by the actions of the states, so I see the amendment as a reinforcement of the people's power to control their Con-

stitution through their state governments.

A more delicate matter is Gutzman's assertion that "the flag is not sacred." The pieces of cloth themselves are not sacred, of course, but what the flag represents to many Americans—the sacrifice of the lives and limbs of loved ones to preserve American liberty—is surely sacred, in the same sense that the signers of the Declaration pledged their "sacred" honor. No society that has ever survived has not held some aspects of nationhood sacred, and about 80 percent of the American people, led by their veterans organizations, seem to be showing this by their support for the amendment.

Finally, I appreciate Gutzman's suggestion that those of us who support the amendment are "animated by the best motives," in particular reigning in an overreaching federal judiciary. While Gutzman sees the Flag Protection Amendment as "rewarding the fox for raiding the henhouse," I see it rather as using the federal government for an appropriate purpose—to restore a liberty lost to the American people to preserve and protect the national symbol and properly to glorify the sacrifice of those who fought for our way of life. An important aspect of that way of life, which Gutzman and I would both agree the Bill of Rights was designed to protect, was self-government, principally through state and local bodies. We would also both agree that the federal courts have, of late, often failed to understand this, as they have often failed to understand that in our society responsibility (and self-government) are as fundamentally important as individual rights. I am not yet ready to see nullification or secession as the preferred means of bringing the federal courts back to where they should be, and I think, for now, that the people should have an opportunity to take back their Constitution through amendment. That was the original plan of Washington, Hamilton, Madison, and Jay, after all—that the Constitution ought to be preserved and protected by amendment—and we honor their memory by making the effort.

BORIS YELTSIN, so the conventional wisdom goes, is an impulsive Slavic peasant whose motives are as inscrutable as the enigma that is Russia. Some, probably most, observers also think Yeltsin is crazy. Not crazy like the holy fools of old Russia or the smug suits who make NATO policy. No, Yeltsin is simply considered senile or losing his mind to alcoholic dementia. Neither view is quite right, as the unexpected and shocking—to the neatly pressed pretty boys and girls of NATO and CNN—dash of Russian troops into Kosovo in June demonstrated. The Russian *blitzkrieg* short-circuited the talks on Russia's projected "role" in Kosovo by forcing the issue: Russia would take part in the "peacekeeping" mission on her own terms, remaining—*de facto* if not *de jure*—outside the NATO command structure.

CNN, the wire service of the New World Order, was apoplectic, and the "Iron Lady" of the State Department was so mad she was quaking in her combat boots. The West had expected Russia to play along: After all, that was part of the deal. Viktor Chernomyrdin, the stalking horse of oligarch-in-chief Boris Berezovsky, had supposedly boosted his chances of becoming Boris I's anointed successor by pressuring Milosevic to cave in and allow NATO to occupy Kosovo, which made Chernomyrdin's pal Al Gore happy. In return, the allegedly non-political IMF would cough up more money to the Kremlin kleptocracy, buying it time to calculate how to hang on to power after Yeltsin's departure in 2000. They should have known better.

Russian media boasted that the move into Kosovo had saved the nation's collective face, preserved Russia as a great power, and shown the West that the Balkans lie within Moscow's sphere of influence. NATO could just forget becoming policeman—or mugger—of the world. What remained unclear, however, was just who gave the order for the 200 Russian airborne troops to move into Kosovo. Both Chernomyrdin and the Foreign Ministry had clearly been out of the loop on this one. Did the generals make the decision on their own? Or was one pickled lobe of Yeltsin's brain—the one that translates his uncommonly strong will to power into the intrigues he is justly known for—still working? A few observers claimed (correctly, in my view) that the fading Yeltsin was still functioning, albeit for brief periods, and will be dragged kicking and screaming—if not in a body bag—from the Kremlin. Boris I does not intend for anybody, especially Chernomyrdin, Berezovsky, Gore, and "friend Bill," to forget just who is the boss in Russia and grandmaster of the post-Cold War Great Game, deal or no deal.

Sergei Kurginyan, a nutty theater director and sometime political strategist for Gorbachev, the "patriotic" anti-Yeltsin coalition, and Berezovsky, had warned against counting Yeltsin out of the game. In a rambling, semi-coherent, and extremely Russian essay (he is a Russified Armenian) published in the newspaper *Slovo* in May, Kurginyan slammed the "myth" of Yeltsin's total incapacity and predicted that the president still had a few surprises in store for both the West and the "family," the parasitic collection of courtiers, oligarchs, and relatives who make up what Russian journalists call the "collective Yeltsin." Yeltsin, wrote Kurginyan, is a self-absorbed "political animal" who operates in the postmodern realm beyond good and evil. "With unerring reactions with respect to his own interests, absolutely blinkered with respect to anything else" and a "ferocity" in battle that his opponents cannot match, the postmodern "political animal" does not need to work "18 hours a day" but only a few hours a week to read the tea leaves and plot his next move.

The model for understanding Yeltsin and Kremlin politics is not—as Yeltsin would like the West to believe—Konrad Adenauer and post-war Germany, but Russia in the period bridging the end of the Great Patriotic War and the rise of Khruschev. Then, an aging and ailing "political animal" clung to power until his death, leaving his country with no apparent successor, tense relations with the West, and in a state of demographic, economic, and social disaster. Hatching plots until the end, his hapless victims seldom knew what hit them. Trusting nobody, the political animal's will to power remained his only companion, the only voice his fading mind could still hear.

—Denis Petrov

THE U.S. SUPREME COURT ended its October 1998 term on June 23, the earliest closing date in 30 years. Anthony Lewis, writing in the *New York Times*, declared that the term "showed us a phenomenon that this country has not seen for more than 60 years: a band of radical judicial activists determined to impose on the Constitution their notion of a proper system of government." The *Wall Street Journal* observed blandly that the Court was engaged in "an important effort to restore the balance between state power and federal power" and that "the Constitution doesn't permit Congress to order the states around willy-nilly." Who got it right?

The three decisions that had set off Mr. Lewis concerned whether states are immune from suit by aggrieved individuals, pursuant to the ancient doctrine of "sovereign immunity." The Court had ruled that they were. Sovereign immunity for the states was clearly a part of our jurisprudence at the time of the Constitution, and a cautious return to that doctrine should really set off no alarms. It is not as if we don't have enough litigation clogging our courts already, and there are other means of redress available, through state or federal legislation or administrative action, or through court actions brought by the federal government. The *Wall Street Journal* has the better of the argument.

In general, the October 1998 term was a good one for believers in the rule of law, although too many decisions were by slim five to four majorities. It is hardly reassuring that the future of constitutional government in our republic rests on the discretion of Sandra Day O'Connor, the justice who most frequently shifts between the bloc of "conservatives" (Rehnquist, Scalia, Thomas, and Kennedy), and the bloc of "liberals" (Stevens, Souter, Breyer, and Ginsburg). Justice O'Connor was with the conservatives on the three key state sovereign immunity decisions, but still voted with the liberals to reverse a lower federal court and declare that state school districts could be sued for failing to prevent elementary school students from sexually harassing each other. Only Justice O'Connor knows how these positions can be reconciled.

Even so, Justice O'Connor wrote a fine majority opinion in a case rejecting the Clinton administration's plan to use statistical sampling when conducting the