S. HRG. 108–812

LETTING THE PEOPLE DECIDE: THE CONSTITUTIONAL AMENDMENT AUTHORIZING CONGRESS TO PROHIBIT THE PHYSICAL DESECRATION OF THE FLAG OF THE UNITED STATES

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

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LETTING THE PEOPLE DECIDE: THE CONSTITUTIONAL AMENDMENT AUTHORIZING CONGRESS TO PROHIBIT THE PHYSICAL DESECRATION OF THE FLAG OF THE UNITED STATES

WEDNESDAY, MARCH 10, 2004

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:13 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, Chairman of the Committee, presiding.

Present: Senators Hatch, Craig, Leahy, Feinstein, Feingold and Durbin.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. If we can have your attention, we will begin this hearing. Before we get started, I just want to take a moment to acknowledge a number of very special members in the audience.

We are honored to have the Utah delegation here, led by National Executive Committeeman Bill Cristoferson, who is also a very dear friend. So we are happy to have all of you here.

I would also like to mention another Utahan who traveled here for today's hearing, Mr. Paul Swenson. Paul is President and CEO of Colonial Flag and was generous enough to lend us a couple of huge flags that we had planned to hang in the hearing room. Unfortunately, we were not able to make arrangements to do that, but we appreciate Mr. Swenson's generosity and interest very much, and we are going to use those flags.

Rose Lee is the Board Chair of the Gold Star Wives.

Rose, can you stand? We are so happy to have you here. Welcome.

[Applause.]

Chairman HATCH. We would also like to welcome all the members of the American Legion and the Citizens Flag Alliance. Your support is the reason why we are here today and the reason that this very important measure is seriously being considered by the Congress, and I want to thank you all for your good work. So please keep it up.

Last, but certainly not least, we would like to welcome two distinguished members of the Knights of Columbus—Bill Mulvehill, Vice Supreme Master for Calvert Province, and Peter Jurvai, State

Secretary for the District of Columbia State Council. We are so honored to have you here as well.

[Applause.]

Chairman HATCH. We are honored to have all the other guests who are here and those who are here to testify, and we will talk about that in a minute.

I want to welcome everyone here today to this important hearing on S.J. Res. 4, the bipartisan proposed constitutional amendment to protect the American flag from acts of physical desecration. I have enjoyed working with all my Senate colleagues on this issue, and I look forward to hearing from today's witnesses.

In the past, this Committee has been fortunate to hear from a variety of witnesses who range from war veterans, Senators who were also war veterans, law professors, teachers and others from a variety of backgrounds. I can assure everyone that today's panel of witnesses will once again provide us with wisdom and insight that we in the Senate need when considering this very important topic and issue.

The American flag serves as the symbol of our great Nation. The flag represents, like nothing else can, the common bond shared by otherwise diverse people. As a sponsor and long-time supporter of this proposed constitutional amendment, I am pleased, but not surprised by the way Americans have been displaying the flag as a symbol of solidarity following the attacks of September 11th. In fact, many stores that sell American flags reported that following September 11th, they quickly sold out of flags and could not obtain replacements fast enough to replenish their stock.

From the dawn of our country's creation and continuing through this very moment, American soldiers have put their lives on the line to defend the flag and what it represents. My brother was one of them who was killed in the Second World War. I believe that we honor the sacrifices made by those who defended this country by protecting the flag in the manner it once enjoyed.

From the lyrics penned by Francis Scott Key which are sung in our National Anthem to the unfurling of the flag at the Pentagon following September 11th—that flag now hangs in the Smithsonian—our people have turned to the American flag as a symbol of national unity and pride during times of crisis, and especially these crises.

Whatever our differences of party, race, religion or socioeconomic status, the flag reminds us that we are very much one people, united in a shared destiny, bonded in a common faith in our Nation. Because our flag transcends our fellow citizens' differences and our diversity as a Nation, it symbolized the love of liberty and the love of country felt by us as an American people.

This symbolism stands in sharp contrast to the flags of those oppressive and totalitarian regimes such as Cuba, Nazi Germany, or even the former Soviet Union, which uniformly represented intolerance of free thought, oppression and coerced loyalty.

In 1861, President Abraham Lincoln called our young men to put their lives on the line to preserve the Union. When Union troops were beaten and demoralized, General Ulysses S. Grant ordered a detachment of men to make an early-morning attack on Lookout Mountain, in Tennessee. When the fog lifted from Lookout Moun-

tain, the rest of the Union troops saw the American flag flying and cheered with a new-found courage. This courage eventually led to a Nation of free men, not half slave and half free.

In 1941, President Franklin Roosevelt called on all Americans to fight the aggression of the Axis powers. After suffering numerous early defeats, the free world watched in awe as five Marines and one sailor raised the American flag on Iwo Jima after nearly 6,000 American soldiers gave all that they had, their lives, to achieve this victory. Their undaunted, courageous act, for which three of the six men died, inspired the Allied troops to obtain victory over fascism.

In 1990, President Bush called on our young men and women to go to the Mideast for Operation Desert Shield and Desert Storm. After an unprovoked attack by the terrorist dictator Saddam Hussein on the Kingdom of Kuwait, American troops wearing arm patches with the American flag on their shoulders led the way to victory. General Norman Schwarzkopf thanked the American people for their support and he stated this, quote, "The prophets of doom, the naysayers, the protesters and the flag-burners all said that you wouldn't stick by us, but we knew better. We knew you would never let us down. By golly, you didn't," unquote.

In 2001, the American flag was again called upon to inspire our men and women during time of war. For example, I am touched by the New York National Guard's dedication of an American flag to the memory of Staff Sergeant Jerome Dominguez. Sergeant Dominguez, also a full-time New York City police officer, lost his life serving his fellow citizens in the World Trade Center attacks.

The American flag dedicated to Sergeant Dominguez traveled to Bahrain with a team of his fellow 105th Security Forces when they participated in the overthrow of the Taliban during Operation Enduring Freedom. Later, this very flag was tasked with the solemn duty of overlooking several fallen military members during their final flight home after giving the ultimate sacrifice for their country during Operation Iraqi Freedom.

I will place into the record an article written by Staff Sergeant John Grassler documenting this wonderful commemoration.

We need to pass this flag amendment because in 1989, the Supreme Court abandoned 150 years of history and the intent of the First Amendment to embrace a philosophy that made no distinction between oral and written speech about the flag and extremist, disrespectful destruction of the flag.

This striking contradiction was amply described by Chief Justice Rehnquist, who wrote, quote, "The government may conscript men into the Armed Forces where they must fight and perhaps die for the flag, but the government may not prohibit the public burning of the banner under which they fight," unquote.

When Congress responded with a Federal flag protection statute, the Supreme Court used its new and changed interpretation of the First Amendment to strike it down by another five-to-four vote. It is now clear that a constitutional amendment is the only legal means to protect the flag. And anybody who continues to say we ought to pass legislation is just using that as an excuse to not face up to this problem. Thankfully, the Constitution provides a method for peaceful and law-abiding citizens to amend the Constitution, and it is time to let our fellow citizens speak on this issue.

Polls have shown that 80 percent of the American people want the opportunity to vote to protect the American flag. All 50 State legislatures have passed resolutions asking Congress to pass the amendment and send it to the States for consideration and ratification. Numerous organizations from the American Legion to the Women's War Veterans to the African-American Women's Clergy all support the flag protection amendment. We should not deprive the American public the right to express their view on this subject any longer.

If the Senate passes the flag amendment this year, the nationwide debate over State ratification will be one of the greatest public discussions in American history. It will encourage a deeper study of our Nation's history and our Nation's values. It will inspire our young people to understand and appreciate the heroic selflessness displayed during this and previous generations, and it will cause many Americans to renew their faith in and commitment to the ideals and values of America that are greater than anyone's personal self-interest.

I am grateful to those of you who are here to testify today on either side of this issue. This is a free country and we should be able to express ourselves freely. But we ought to protect the flag, and we ought to protect it from acts of physical desecration even though some would argue that urinating or defecating on the flag is some form of speech. I don't think that is so. I think it is offensive conduct that we ought to stand up against and do something about, and this is the opportunity for all of America to participate in a constitutional process that really makes sense.

[The prepared statement of Senator Hatch appears as a submission for the record.]

So with that, we will turn the time over to Senator Leahy, and then we will go to our witnesses.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you very much, Mr. Chairman. Our Committee is holding the latest in what has become a series of hearings on amending the Constitution. Of course, our Committee is the one that has the appropriate duty to do that.

This is the third constitutional amendment to which this Committee has devoted significant time for debate in the 108th Congress. It is actually one of 61 amendments introduced so far this session. I believe we have a chart here showing that. These are the 61 amendments to the Constitution that were introduced in this Congress alone. I think a number of members of this Committee are cosponsors of some of these.

Now, that is 61 in one Congress. There have been probably a couple thousand amendments to the Constitution introduced since I was elected to the Senate. There have actually been 11,000 amendments to the Constitution proposed since the 1st Congress. Had these all been adopted, the Constitution of the United States, instead of being something that you could put in your shirt pocket, would fill up the whole front of this Committee room just to print them all. And Americans probably would not have any real idea of what our rights are under the Constitution.

This is the second hearing in just a week's time in which we are debating a constitutional amendment during this election year that would, in this case, amend the Bill of Rights for the first time in our Nation's history.

Now, I know the flag amendment is an issue of particular importance to veterans, whether it is my young Marine son or any other veteran here. I know that opinions are on both sides of this issue. I have gotten voluminous letters and e-mails from veterans in favor of this amendment and voluminous letters and e-mails from veterans opposed to this amendment.

The one thing that we should all agree on is that this Nation has to be thankful for the service of these veterans to our Nation. No matter how we feel about this constitutional amendment, that is an area where we all agree.

I also heard from a number of veterans who asked me if this amendment coming up at this time, especially just before we have our budget votes, may be a distraction on behalf of the administration so we might not look at what it is doing directly for or to veterans. Some of these veterans have written to me and asked me if maybe the administration believes that veterans might be distracted from the fact that the administration is failing to meet their long-term health and related needs.

The reason I ask this is that I also serve on the Appropriations Committee, and I look at the budget from the Veterans Administration, and it tells me a lot about the Administration's priorities. Here is the President's budget for veterans. It doesn't maintain current services. It falls $1.2 billion below what the VA says it needs. It is $2.9 billion below what veterans have put together on the independent budget. Out-of-pocket expenses for veterans have skyrocketed 478 percent under this administration.

Even though Congress added $2.1 billion over the last 3 years over what the President requested, we still have a shortfall. In fact, it is interesting that when we have added the money to make up for the shortfalls in veterans benefits, this same administration has been very, very critical of the Congress for putting money in the veterans budget.

I mention this because the letters I receive tell me about the longer waits at the VA hospitals, the extra costs, the out-of-pocket expenses, and so on. And I wonder if at the same time we are debating the budget for the veterans—many of whom are in town today—this hearing is designed to distract us from the fact that our veterans' health care is being cut yet again.

Now, I respect the views of veterans on both sides of this issue, of course. But I want to note some of the veterans who have opposed it. Senator John Glenn, who is a combat veteran, wrote, "The flag is the Nation's most powerful and emotional symbol. It is our most sacred symbol. It is our most revered symbol. But it is a symbol. It symbolizes the freedoms that we have in this country, but it is not the freedoms themselves." Senator Glenn, who served with distinction in World War II and in the Korean War and, of course, as an astronaut and a member of this Senate, feels this way. Senator Bob Kerrey, who is only one of two Senators I have served with who were recipients of the Congressional Medal of Honor, also opposes the amendment.

They were invited to testify today, but they were given very short notice and were unable to change their schedules to do this. And the Committee was unable to rearrange its schedule to allow them, so I would ask that their statements be made part of the record.

Chairman HATCH. Without objection.

Senator LEAHY. Another veteran wrote to me, retired Four-Star General Colin Powell, now the Secretary of State in the Bush administration. He wrote in opposition to the proposed amendment. He said, "We are rightly outraged when anyone attacks or desecrates our flag. Few Americans do such things and when they do they are subject to the rightful condemnation of their fellow citizens. They may be destroying a piece of cloth, but they do no damage to our system of freedom which tolerates such desecration." Referring to the Constitution, General Powell continued, "I would not amend that great shield of democracy to hammer a few miscreants. The flag will still be flying proudly long after they have slunk away."

I would ask, Mr. Chairman, that Secretary Powell's letter be part of the record.

Chairman HATCH. Without objection.

Senator LEAHY. I know how offended any one of us gets when we see desecration of the flag. I remember during the Super Bowl halftime show the thing that offended me the most was when Kid Rock wore a flag as a pancho and then just tossed it away on the ground afterwards. In fact, my wife had to get me to stop shouting at the television when I watched that. There was a lot of publicity about something else at that halftime show. Frankly, I missed that and never saw that, but, boy, I saw that flag being flown out there and worn as a pancho.

I am certainly as patriotic a person as anybody, as is the President, but I know that he signed a flag at a campaign rally last summer. Under this amendment, that would be also inappropriate. But these acts are protected by the Constitution.

All of us agree that flag desecration is a despicable and reprehensible act, but the true question before us is not whether we agree with that. All of us agree it is contemptible. The issue before us is whether we should amend the Constitution of the United States, with all the risks that entails, and whether for the first time in our history we should narrow the freedoms ensured by the First Amendment.

As Supreme Court Justice Brennan wrote, "We can imagine no more appropriate response to burning a flag than waving one's own." That is exactly how the American people respond, a point demonstrated by the innate patriotism of Americans in response to events of the past years, as Chairman Hatch pointed out so eloquently a few minutes ago, with the sale of flags after 9/11.

But the Chairman did say this constitutional amendment is the only way to protect our flag. I disagree. At my home in Vermont, I live on a dirt road, a very rural, very picturesque area. All the neighbors know when the Leahys are home because the flag is flying, as it has for the 30 years I have been a Senator. That flag is protected by Vermont law, a State constitutional law.

If somebody came on my property and took that flag and desecrated it, and assuming there was much left of them after I fin-

ished with them, they could be prosecuted under Vermont law. If they did the same thing in Utah, they could be prosecuted under Utah law.

The flags in this room are all protected. If anybody desecrated one of these flags, the police officers here would arrest them. They could be prosecuted for defacing Federal property. There are laws that protect any flag that is flown at your home. If somebody came and desecrated your flag, they could be prosecuted for both trespass and destruction of your property.

What I am suggesting is that the thing we must protect the most is our sacred Constitution. When I go to countries where there are dictators they have to have all kinds of laws to protect themselves. You cannot criticize their president or their prime minister, or whomever. You can't criticize the symbols of their state or you will go to jail. They enact these laws to keep their people in line.

I love bragging about the fact that Americans can criticize anybody. I talk about people who have rallies to criticize me or anybody else, and that we Americans protect our flag. We protect it without laws to require doing so. We do it because we love the symbols of our country, and it makes me feel good to tell some of these dictators we don't need to do what they do; we don't need those kinds of protections.

Immediately after September 11th, the surge in patriotism made American flags such a hot commodity that several major flag manufacturers could not keep flags stocked on store shelves. We don't need to teach Americans how to respect the flag. The American people have shown they respect the flag.

In the neighborhood I live in when I am here in Washington during session, there are a number of homes owned by foreign embassies. The day after September 11th, Mr. Chairman, I walked down those streets and all those homes were flying both their national flag and the U.S. flag. I went by and left a hand-written note in every single one of their mailboxes thanking them for that.

Freedom of speech and the press is one of the magnificent bequests of earlier Americans to all the generations that follow. These rights are fragile and they need nurturing and protection by every new generation. The erosion of freedom can easily come when lawmakers succumb to the temptation to pander to shifting public passions, at the expense of the public's everlasting interest in preserving freedom. In any session of Congress, you do not have to look far to see this dynamic at work.

It may not be politically popular to defend against erosive efforts like this, but generations of Americans to come will thank us if we leave for them the same First Amendment that we ourselves inherited and so dearly treasure, the same First Amendment that generations before us tried to change and did not.

Mr. Chairman, I think you do us all a service in having this hearing. And while we may disagree on the basic thing, you know of my deep respect and affection for you.

[The prepared statement Senator Leahy appears as a submission for the record.]

Chairman HATCH. Well, thank you, Senator.

We will turn to Senator Craig and the rest of the Committee for short statements, and we will go back and forth.

Senator Craig.

STATEMENT OF HON. LARRY CRAIG, A U.S. SENATOR FROM THE STATE OF IDAHO

Senator CRAIG. Well, thank you very much, Mr. Chairman.

For those of you in the audience today who wonder why I am so far away from the dias, I am a junior on this Committee, so it is something to do with seniority. But I must say after Senator Leahy's comments, I am glad there is a little distance between us today because I do disagree with him on a variety of things. Of course, that is the beauty of the diversity that is demonstrated in this wonderful country of ours as we express our opinions on this issue.

The thing that frustrates me most, after the House has consistently spoken out in a resolution for a flag amendment, is that the Senate by its action is denying the people the opportunity to speak. There is a fundamental difference here. It is not our Constitution, not that of the United States Senate. The Constitution is a phenomenally valuable foundational law of this country designed by the people.

To deny all 50 States an opportunity to express that opinion, and a vast majority of the American people, I think is the wrong denial. I do believe it is time that we bring forth a constitutional amendment and send it to the States to allow the American people to express their opinion.

I do agree with the Chairman that that becomes a phenomenally healthy debate for all Americans, because I am one who believes that we must consistently remind our citizens of their rights and of their Constitution. I don't think it is something that just because you are born here, that action in itself imbues totally with a knowledge and understanding of those fundamentals. Healthy national debates reinstate that.

When we were celebrating the bicentennial of the Constitution, more young people learned once again about the value of that wonderful document than they had learned ever before. Why? Because it is not faddish anymore to teach it in our schools. Somehow, our schools get caught up in contemporary issues and fail in many instances to teach some of the foundational principles that this country was built upon.

So for a variety of reasons, including the most obvious, I think it is time that we send forth this amendment, not because the Senate has decided it should or should not happen, although that is one of our responsibilities and the method by which this Constitution is amended, but because the States have so loudly spoken and because I believe it our responsibility to allow the American people to be granted that opportunity to speak.

With that, Mr. Chairman, I have always felt that while the Supreme Court has a valuable role to play in this country, they are not given the right, if you will, to write the laws. That is our job and that is the job of the American people. That is why I strongly support this amendment.

Chairman HATCH. Well, thank you, Senator.

Senator CRAIG. Let me ask unanimous consent that my full statement be a part of the record.

Chairman HATCH. Without objection.

Senator CRAIG. And as somebody who is an active member of the Veterans Committee, we are going to plus-up veterans budgets again this year, as we did last year and the year before, and as we consistently did also during the Clinton years.

It is important, I think, for everybody to understand that while there was an element of partisan expression here this morning, the reality is that we will do exactly what we have historically done as a Senate both during the Clinton years and now the Bush years, and that is to plus-up veterans budgets.

I was at the Veterans Administration facility in my hometown now of Boise this past weekend, where there once were lines. By June, there will be no lines anymore. Why? Because we set that administrative process together to aggressively pursue and bring on people to resolve that problem, and we are doing it.

I would encourage all Senators to encourage their veterans facilities to do the same, because they have been granted the money to get it done and now it is an administrative problem, in my opinion, much more than it is a dollars-and-cents problem. We have been able to prove that in Idaho. There will be no waiting lists as of June of this year in Idaho and I am proud of that fact.

Thank you, Mr. Chairman.

[The prepared statement Senator Craig appears as a submission for the record.]

Chairman HATCH. Thank you, Senator Craig.

Senator Feingold.

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Thank you, Mr. Chairman, and I would like to welcome our witnesses today. As the Ranking Member pointed out, this is our second hearing in two weeks on a constitutional amendment. The amendment we discussed last week would for the first time write discrimination into our Constitution. This week, we are discussing an amendment that would for the first time amend the Bill of Rights.

Make no mistake, we are talking here today about amending the Constitution of the United States to permit the Government to criminalize conduct that, however misguided, is clearly expressive and is often undertaken as a form of political protest. Adopting this amendment would be a grave mistake.

It seems almost silly to say this, but given some of the written testimony of some of the witnesses today, I must say it anyway. Not a single Senator who opposes the proposed constitutional amendment, as I do, supports burning or otherwise showing disrespect to the flag, not a single one. None of us thinks it is okay to burn the flag. None of us views the flag as just a piece of cloth.

On those rare occasions when some malcontent defiles or burns our flag, I join every single person on this dais, whether they are way down there or right up here near the Chairman, and in this room and in this country, who condemns that action. At the same time, whatever the political cost, I will defend the right of Americans to express their views about their Government, however hate-

ful or spiteful or disrespectful, without fear of their Government putting them in jail for those views.

Mr. Chairman, America is not a nation of symbols. It is a nation of principles, and the most important principle of all, the principle that made this country the beacon of hope and inspiration for oppressed peoples throughout the world, is the right of free expression. This amendment, well-intentioned as it may be, threatens that right and therefore I must oppose it.

I respectfully disagree with the supporters of the amendment about the effect that this issue has on our children. We can send no better, no stronger, no more meaningful message to our children about the principles and values of this country than if we explain to them, as it was explained to me, that the beauty and the strength of this country is in its freedoms, not in its symbols.

When we uphold First Amendment freedoms, despite the efforts of misguided and despicable people who want to provoke our wrath, we really explain what America is really about. Our country and our people are far too strong to be threatened by those who would burn a flag. That is a lesson worth teaching our children.

Amending the First Amendment so we can bring the full wrath of the criminal law and the power of the state down on political dissenters will only encourage more people who want to grandstand their dissent and imagine themselves to be, in effect, martyrs for the cause.

We all know what will happen the minute this amendment goes into force—more flag-burnings and other despicable acts of disrespect to the flag, not fewer. Will the new law deter these acts? Of course not. Will the amendment make these acts any more despicable than they are today? Certainly not. Will it make us love the flag any more than we do today? Absolutely not.

It was just under 4 years ago, in 2000, another presidential election year, that the Senate rejected this constitutional amendment. I would be interested to hear from our witnesses what has changed in the last 4 years. Have we seen an alarming increase in the incidence of flag-burning? Has there been a marked decrease in patriotism or in the proud display of the flag on national holidays? Have the armed forces seen a huge drop in enlistment, or have soldiers faced disrespectful protests of the sacrifices that they and their families make? Of course not.

I would venture to say, Mr. Chairman, that outward displays of patriotism are on the rise since we last considered this amendment. We all know why that is. Our country was viciously attacked on September 11th and America responded. We didn't need a constitutional amendment to teach our citizens how to love their country. They showed us how to do it by hurling themselves into burning buildings to save their fellow citizens who were in danger, by standing in line for hours to give blood, by driving hundreds of miles to search through the rubble for survivors and help in clean-up efforts, by praying in their houses of worship for the victims of the attacks and their families. September 11th inspired our citizens to perform some of the most selfless acts of bravery and patriotism we have ever seen in our entire history. I believe that no constitutional amendment could ever match those acts as a demonstration of patriotism, or create them in the future.

Mr. Chairman, in 1999 our late colleague Senator John Chafee, one of this country's greatest war heroes at Guadalcanal and in the Korean War, testified against this amendment. He said, "We cannot mandate respect and pride in the flag. In fact...taking steps to require citizens to respect the flag sullies its significance and symbolism." Senator Chafee's words still bring us a brisk, cool wind of caution. What kind of symbol of freedom and liberty will our flag be if it has to be protected from protesters by a constitutional amendment?

Mr. Chairman, I do thank you for this hearing, but I will proudly defend the Constitution against this ill-advised effort to amend it. Thank you, Mr. Chairman.

[The prepared statement Senator Feingold appears as a submission for the record.]

Chairman HATCH. Thank you.

Senator Durbin is next.

STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Thank you very much, Mr. Chairman. I want to thank the veterans and representatives of veterans organizations, including the American Legion, who have joined us today. We thank you for your service to our Nation and your continuing effort to stand up for the values that you fought for and to stand up for veterans.

The issue of a constitutional amendment to prohibit flag desecration isn't easy. Even many veterans disagree. We will have testimony from one today who represents an organization of veterans who oppose this amendment.

Secretary of State Colin Powell, whom I respect very much, wrote a letter to this Committee in 1999 as a retired General and here is what he told us in relation to this amendment and the outrage we feel about those who desecrate the flag.

Former General and Secretary of State Colin Powell wrote and said, "I feel the same sense of outrage, but I step back from amending the Constitution to relieve that outrage. The First Amendment exists to ensure that freedom of speech and expression applies not just to that with which we agree or disagree, but also to that which we find outrageous. I would not amend that great shield of democracy to hammer a few miscreants. The flag will be flying proudly long after they have slunk away."

I believe Congress can honor veterans and the values they stand for in many ways. Last night, the United States Senate voted on an amendment to add $2.7 billion to this year's budget for veterans medical care. It would have provided this funding by reducing the tax cuts for millionaires from $140,000 a year to $112,000 a year, and the money would have gone to veterans health care. The amendment failed.

Many of the same Senators who proudly tell you that they are standing with veterans didn't stand with them on that roll call. Giving a veteran a flag is no substitute for giving our vets the quality health care they were promised. That promise was not kept last night on the Senate floor.

Today's hearing is the sixth that we have had in the Judiciary Committee at the full Committee or Subcommittee level on possible constitutional amendments during this Congress. This week's amendment relates to flag desecration, but many others have been considered.

This amendment is a strong argument for my proposal that Congress ban constitutional amendments during a presidential election year. The last time we voted on this issue was March 2000. The time before that would have just barely missed my deadline, December of 1995. I don't want to impugn anyone's political motives, but isn't it odd that we start thinking very seriously about debating constitutional amendments the closer we get to an election? It raises questions in my mind.

Our First Amendment rights are envied around the world. In fact, earlier this week we saw something really historic. The Iraqi people, struggling toward self-government, established their own constitution and protected within their constitution, this document of this new nation, the freedom of thought, conscience and expression. They learned from us, and thank God.

I believe flag desecration, although shameful and disgusting, is a form of political expression. By prohibiting it, this constitutional amendment would amend the Bill of Rights for the first time in the history of the United States.

Last night, the members of the Senate met at the Archives. We had a chance to once again see the document which guides our Nation, the Constitution—a rare bipartisan display, our families together seated for dinner just a few feet away from that magnificent document. That document, that piece of paper and the words on it are one of the few things that we have in common. All of us have sworn to uphold and defend that Constitution.

I, for one, approach the idea of amending that Constitution with extreme humility. I don't want to be in a position where I am supporting an amendment which doesn't stand the test of Thomas Jefferson and the test of the Bill of Rights and the test of the greatness of that document. We need to think long and hard every single time someone steps forward and says it is just another legal document, go ahead and change it.

No. I am sorry. That is not the way I view it. I will think long and hard before I change a single word in that Constitution, and it will have to meet some very high tests before we establish the need for that change.

The flag is a unique and sacred symbol. Senator Byrd, a man who carries the Constitution in his breast pocket every day that he has served in the U.S. Senate, a man who has stood up for it probably more than any of us ever will, said during the debate in the year 2000, quote, "We love that flag, but we must love the Constitution more. The Constitution is not just a symbol, it is the thing itself." I urge my colleagues to join me in opposing this amendment.

Thank you, Mr. Chairman.

Chairman HATCH. Thank you.

Senator Feinstein.

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you very much, Mr. Chairman, and thank you very much for holding this hearing.

I have supported this amendment for several years and I am an original cosponsor of the current resolution, S.J. 4, which proposes an amendment to the Constitution of the United States authorizing Congress to prohibit the physical desecration of the flag of the United States. This resolution would give Congress the opportunity to construct, deliberately and carefully, precise statutory language that clearly defines the contours of prohibited conduct.

Now, I know that amending the Constitution is serious business and I know that we need to tread carefully. But the Constitution, after all, is a living text. As originally conceived, it had no Bill of Rights. In all, it has been amended 27 times.

If the Constitution is democracy's sacred text, then our flag is our sacred symbol. In the words of Supreme Court Justice John Paul Stevens, it is a symbol of our freedom, of equal opportunity, of religious tolerance and of goodwill for other peoples who share our aspirations.

If the flag had no symbolic value, we would not get chills when we see it lowered to half-mast or draped over a coffin. Are there any of us who can forget that great Joe Rosenthal photograph of the six Marines hoisting that flag on the barren crag of Mount Surabachi, after the carnage at Iwo Jima where over 6,800 American soldiers were killed?

I remember seeing it on the front page of the San Francisco Chronicle. Joe Rosenthal was a photographer for the Chronicle. I remember seeing it as a small child and recognizing from that point on that the flag was something special.

I was again reminded of our flag's significance after the horrific attacks on the World Trade Center on September 11, 2001, when firefighters Dan McWilliams, George Johnson and Bill Eisengrein raised the American flag at Ground Zero. It symbolized an entire nation pulling together in the face of tragedy.

That photograph ran in thousands of newspapers, on the Internet, on network television, an image which will forever be identified with 9/11. It immediately drew comparisons to the photo of the Marines raising the flag at Iwo Jima during World War II. And to this day, those images remained etched deeply in the minds of so many Americans, and indeed so many people around the world.

Constitutional scholars as diverse as Chief Justices William Rehnquist and Earl Warren, and Associate Justices Stevens and Hugo Black, have vouched for the unique status of the national flag. In 1974, Byron White said, and I quote, "There would seem to be little question about the power of Congress to forbid the mutilation of the Lincoln Memorial, or to prevent overlaying it with words or other objects. The flag is in itself a monument subject to similar protection," end quote. I could not agree more with the opinion of Justice White.

Why, then, should it be permissible conduct to burn the flag, to desecrate it, to destroy this symbol, this emblem, this National monument? That is not my definition of free speech. For the first two centuries of this Nation's history, that was not the Supreme

Court's definition of free speech either. In fact, until the Court's 1989 decision in *Texas* v. *Johnson*, 48 of the 50 States had laws preventing burning or otherwise defacing our flag.

As I said at the outset, I don't take amending the Constitution lightly. But when the Supreme Court issued the Johnson decision and the subsequent *United States* v. *Eichman* decision, those of us who want to protect the flag were forced to find an alternate path.

In the *Johnson* case, the Supreme Court by a 5–4 vote struck down a State law prohibiting the desecration of American flags in a manner that would be offensive to others. The Court held that the prohibition amounted to a content-based regulation.

After the *Johnson* case was decided, Congress passed the Flag Protection Act of 1989. That Act prohibited all intentional acts of desecrating the American flag, and was therefore not a content-based prohibition of speech or expression. Nevertheless, another narrow majority of the Supreme Court Justices acted quickly to strike down that Federal statute, as well, ruling that it suffered the same flaw as the Texas statute in the Johnson decision, and was thus inconsistent with the First Amendment. That 5–4 decision makes today's discussion necessary.

I support S.J. Res. 4 because it offers a way to return the Nation's flag to the protected status it deserves. Because we are protecting our National symbol, it makes sense to me that members of Congress representing the Nation as a whole should craft the statute protecting our flag.

I also believe the amendment is consistent with free speech. I disagree with those who say we are making a choice between trampling on the flag and trampling on the First Amendment. Protecting the flag will not prevent people from expressing their ideas.

I support this amendment because I believe flag-burning is content, not speech, and can be regulated as such. But to my friends who would argue otherwise, I remind them that even the right to free speech is not unrestricted. For example, the government can prohibit someone from shouting "fire" in a crowded theater. Obscenity and false advertising are not protected under the First Amendment, and indecency over the broadcast media can be limited to certain times of day.

I recognize that by supporting a constitutional amendment on the flag, I am choosing a different course from many of my fellow Democrats in Congress, and quite frankly from many of my close friends for whom I have the greatest respect. But my support for this amendment reflects my broader belief that the time has come for the Nation to begin a major debate on our values. We need to ask ourselves what we hold dear. Is there anything upon which we will not cast our contempt?

There are mothers and fathers, wives, husbands and children who have received that knock on their front door and have been told their loved one has been killed in the line of duty. They have been given a flag on this occasion, a flag which helps preserve the memory of their loved one and which speaks to his or her courage. That flag is the symbol, the emblem, the national monument. Requiring people to stop defacing or burning the flag is a very small price to pay on behalf of millions of Americans for whom the flag has deep personal significance.

I would like to express my thanks to all who will be testifying today and I look forward to hearing your statements.

Thank you, Mr. Chairman.

Chairman HATCH. Well, thank you, Senator Feinstein, for your eloquent statement.

I am going to put several letters and statements of support into the record, without objection.

Senator LEAHY. Mr. Chairman, if I could also submit a number of letters.

Chairman HATCH. Without objection.

Now, we will turn to our witnesses. We have a remarkably distinguished line-up of witnesses today and we are pleased that each of you could be here to share your expertise and point of view with us.

Our first witness will be Hon. Daniel J. Bryant, if you will take your seat, General Bryant.

He is Assistant Attorney General for the Office of Legal Policy in the Department of Justice. Mr. Bryant needs no introduction to this Committee, so I will just mention that he was confirmed to his current post in October 2003. Prior to that, he served as Assistant Attorney General for Legislative Affairs.

We are really pleased to have you here, and I am, of course, pleased that the Bush administration supports S.J. Res. 4.

The second panel of witnesses will include General Patrick Brady, Chairman of the Citizens Flag Alliance. General Brady is undoubtedly one of the flag amendment's most passionate and articulate spokespeople. I appreciate all of his work, as well as the work of the dedicated members of the CFA, the Citizens Flag Alliance.

Next will be Lawrence J. Korb, who is Senior Fellow at the Center for American Progress, the Adjunct Senior Fellow at the Council on Foreign Relations, and senior adviser for the Center for Defense Information. From 1981 to 1985, he was Assistant Secretary of Defense for Manpower, Reserve Affairs, Installations and Logistics. He is a 23-year Navy and Vietnam War veteran.

So we appreciate your willingness, Larry, to testify here today.

We are probably going to have Mr. Andretti speak first, since he has to catch a plane. John Andretti is a native of Bethlehem, Pennsylvania, who has won major victories in Indy cars and sports cars, and is now a highly-respected NASCAR Nextel Cup Series driver for Dale Earnhardt, Inc. He is the nephew of the legendary Mario Andretti and the godson of renowned Indy car pilot A.J. Foyt.

I have read that Mr. Andretti is the first NASCAR driver to ever testify before the United States Senate.

Senator LEAHY. Mr. Chairman, if I could interrupt there, you say he has got to hurry to get a plane. The way Mr. Andretti drives and his uncle drives and all, why would he slow down to take an airplane?

[Laughter.]

Chairman HATCH. Well, I have a feeling he is going to be able to get to the airport on time. We will put it that way.

We want to thank you for sharing your experience and views with us.

Gary E. May is Associate Professor of Social Work at the University of Southern Indiana, in Evansville. He served in the Marines in the Vietnam War, where he was awarded the Bronze Star, the Purple Heart, Vietnam Campaign, Vietnam Service and National Defense Medals.

So it is a pleasure to see you here again.

Last, but certainly not least, we will hear from Professor Richard D. Parker, who is the Paul W. Williams Professor of Criminal Justice at the Harvard Law School. Professor Parker has been a great resource to the supporters of the flag amendment and I would like to thank him for that and for his testimony here today.

So with that, we will call on you, General Bryant, and then we will put the rest of our witnesses at the table.

STATEMENT OF DANIEL J. BRYANT, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. BRYANT. Thank you, Mr. Chairman, Senator Leahy, members of the Committee. Here on behalf of the administration, I would probably be well advised to not make an opening statement, but simply ask that Senator Feinstein's statement be entered into the record twice. That was an extraordinary statement and I was glad to hear it.

Mr. Chairman, I will make a shortened opening statement and simply ask that the full statement be entered into the record.

Mr. Chairman, distinguished members of the Committee, thank you for the opportunity to join you today to reiterate the administration's continuing support for a constitutional amendment authorizing Congress to protect the American flag from physical desecration. The President joins a majority of members from both Houses of Congress in supporting this constitutional amendment to protect and honor this singular symbol of the American democratic ideal.

Let me state at the outset that we do not believe that amending the Constitution is something to be undertaken lightly. Altering the Constitution is a weighty matter, but one that we believe is warranted to protect the unique, enduring symbol of our great Nation.

It is noteworthy that Americans overwhelming refer to the flag as the American flag, not the United States flag. In a simple way, this habit provides an insight, I think, into the way we as Americans associate with the flag. It is not simply the flag of a particular constitutional system, that of the United States. Rather, it is the flag of us as a people. Over the centuries, in war and in peace, it has become an integral part of our identity as Americans. The administration believes that the Congress should allow the American people to accord the flag, our flag, the respect and corresponding protection it deserves.

It is important to note that throughout most of our Nation's history, protecting the flag was permitted under the Constitution. Since the 1800's, protecting the flag peacefully coexisted with the Bill of Rights and a vigorous commitment to First Amendment-protected expression. Consequently, an amendment to restore that his-

toric understanding poses no threat to our constitutional tradition. Indeed, it would honor and strengthen that tradition.

There is no question that a great strength of our Constitution is that it has been a relatively fixed and stable document. This amendment would allow Congress to restore the fixed and stable understanding that we as a people can both protect our flag and maintain a zealous commitment to freedom of expression.

There can be no doubt that under the current interpretation of the First Amendment, as articulated by the Supreme Court in *Texas* v. *Johnson* and *U.S.* v. *Eichman*, physical desecration of the American flag in protest is protected speech. Since 1989, attempts by Congress and by State legislatures to pass statutes to protect the flag have been struck down by the United States Supreme Court. Against this backdrop, it is clear that the only way the flag can be protected is through an amendment such as the one proposed by S.J. Res. 4 currently before this Committee.

In closing, Mr. Chairman, S.J. Res. 4 is a simple measure providing in relevant part, quote, "The Congress shall have power to prohibit the physical desecration of the flag of the United States," close quote. It is important to note that the resolution itself does not prohibit the physical desecration of the flag, but merely provides that Congress may do so. This will allow the democratically-elected legislature to decide how best to protect the flag from desecration.

Furthermore, as with any resolution to amend the Constitution, by passing this resolution Congress is not itself amending the Constitution, but is simply providing the States an opportunity to deliberate and ultimately decide whether the Constitution should allow Congress to protect the American flag.

For more than a decade now, 49 States have petitioned the Congress for that opportunity. We hope that Congress heeds their call. James Madison wisely counseled that amending the Constitution should be reserved for great and extraordinary occasions. We believe that this is such an occasion.

Thank you, Mr. Chairman and members of the Committee.

Chairman HATCH. Well, thank you, Mr. Bryant.

Let me just ask a couple of questions, and hopefully we will all stay within a five-minute question period.

Each time the Senate has considered a constitutional amendment that would allow Congress to prohibit physical desecration of the flag, quite a few members of this body who voted against this amendment have argued that passing a new statute would suffice. I have always found that intriguing. They don't think we should pass a constitutional amendment because they believe that burning the flag with contempt and doing other contemptuous physical acts of desecration happens to be speech, and yet they will vote for a statute, which is amazing to me. It looks pretty political to me, not sincere. It probably won't surprise you that I disagree with their conclusion that you can pass a statute.

Given the Supreme Court's decisions in the *Johnson* and the *Eichman* cases, do you think that a so-called statutory alternative would survive scrutiny by the United States Supreme Court?

Mr. BRYANT. No, Mr. Chairman. Thank you for the question. I think one could have construed the first case, *Texas* v. *Johnson*, as

permitting a statute to be drafted that might pass muster under the various principles articulated in *Johnson*.

I think 1 year later, in *U.S.* v. *Eichman*, that potential for drafting a statute that would pass constitutional muster was taken off the table. *Eichman* came out and declared quite definitely that flag-burning is protected speech. So whereas *Johnson*, in effect, left the door open to a statute, *Eichman*, I think, very much closed that door.

Chairman HATCH. Now, you testified that the administration supports allowing the American people, through their representatives in the State legislatures, the opportunity to vote on whether to adopt an amendment that would allow for a prohibition on flag desecration.

As you know, the proposed amendment has passed the House of Representatives a number of times and is a very few votes away from passage in the Senate. In other words, we always have an overwhelming vote, but we have missed it by a few votes in the Senate. We have a new Senate now and I think we have an opportunity to maybe get it passed this year.

Is it the administration's view that it would be healthy for our democracy and for our system of federalism for the Senate to pass S.J. Res. 4 and put this matter in the hands of the people out there in the States?

Mr. BRYANT. Yes, thank you, Mr. Chairman. That is the position of the administration. It is the position of many in Congress. It is the position of the majority of States, and apparently a majority of the American people.

The Constitution wisely provided for the ability to amend the Constitution in its Article V. The American people, State legislatures and the Congress have used that mechanism 27 times. As Senator Leahy pointed out, some 11,000 resolutions proposing amendments to the Constitution have been offered over the course of our country's history; 27 have been taken by State legislatures and the Congress and have been promulgated as amendments.

It is telling to see how specific amendments were passed as a response to Supreme Court decisions. The 11th Amendment, the 13th Amendment, the 14th Amendment, the 16th Amendment all are examples of the people, the State legislatures and the Congress taking up their Article V opportunity to respond to Supreme Court decisions. We think that Article V and the opportunity that is enjoyed by the States and Congress to amend the Constitution brings a vital democratic legitimacy to the Constitution and to judicial review itself.

Chairman HATCH. Well, thank you. One last question. One of the most common reactions to the idea of the flag amendment is that we should not make anything illegal by way of a constitutional amendment. As you pointed out, however, my proposed amendment would not make anything illegal. It simply gives Congress the power to prohibit flag desecration if it chooses to do so. It is that simple. In other words, the elected representatives will make this decision, not five unelected Justices on the United States Supreme Court.

If the amendment were passed and ratified and Congress began the task of writing a law, would the administration provide tech-

nical support to ensure that any implementing legislation accomplishes what is desired and avoids any unintended consequences?

Mr. BRYANT. We would be pleased to, Mr. Chairman. We think the Congress did a very good job back in 1989 with the Flag Desecration Act, given the guidance that it had under *Texas* v. *Johnson*. Subsequently, when the Supreme Court decided in *U.S.* v. *Eichman*, it became clear that the statute drafted would not pass muster with the Supreme Court. But given the guidance it had at the time, we think the U.S. Congress did a good job.

We would be pleased now, on this side of *United States* v. *Eichman*, to continue to work with the Committee and the Congress to ensure that any language statutorily passed pursuant to an amendment avoided the various potential challenges that might arise.

Chairman HATCH. Well, thank you so much.

We will turn to Senator Leahy now.

Senator LEAHY. Thank you.

Mr. Bryant, one thing that we all agree on here is that we are all heartened by the news that Attorney General Ashcroft has come safely out of surgery. I have written to him and Mrs. Ashcroft, but please pass on the best wishes of everybody here for a speedy recovery, and we look forward to seeing him back up here.

Also, Mr. Chairman, I want to put in the record a statement by Senator Kohl.

Chairman HATCH. Without objection.

Senator LEAHY. Mr. Bryant, under current law, I assume there is no question in your mind that if somebody came up here suddenly and smashed the loud speaker system, which is Government property, they could be prosecuted for that. Is that correct?

Mr. BRYANT. Yes, sir.

Senator LEAHY. And the same would apply if they came up here and destroyed the flags which are here and are Government property. They could be prosecuted for that, could they not?

Mr. BRYANT. Yes, sir.

Senator LEAHY. I had used an earlier example of somebody who came on my property and destroyed my flag. The same thing. They could be prosecuted, could they not?

Mr. BRYANT. As I understand the hypothetical, yes, sir.

Senator LEAHY. Actually, the only flag-burning incidents I have seen in years and years have been in other countries where they opposed American policies, but this amendment would have no way of reaching them.

We have a lot of constitutional amendments up here. The President announced his support for a constitutional amendment regarding what is usually handled in State law, and that is marriage. It is now the administration's position that it supports a constitutional amendment on marriage and should not leave the issue to the States.

Does the administration support the language that was introduced in the House by Representative Musgrave and in the Senate by Senator Allard?

Mr. BRYANT. I don't know that the administration has taken a position at this point, Senator, other than the President indicating

in his statement some weeks back a number of principles that he would want to see embodied.

Senator LEAHY. Is the administration going to take a position on the wording of any proposal? Is the administration going to take a position on any of the constitutional amendments before us on marriage?

Mr. BRYANT. I expect the administration will be pleased to be working with the Congress on the text itself and would ultimately take a position as appropriate.

Senator LEAHY. That is not really my question. Is there text that the administration now supports on the question of marriage?

Mr. BRYANT. I am unaware that the administration is currently officially supporting any specific text. I do know that the administration is pleased to work with various members of Congress that have propounded text.

Senator LEAHY. But they haven't taken a position on any of the various proposals out there?

Mr. BRYANT. That is my understanding, Senator.

Senator LEAHY. Now, does the administration support having the States vote to amend the Constitution to encompass the language that is before us on flag-burning?

Mr. BRYANT. The administration supports the text of S.J. Res. 4, which language would, of course, if passed by the Congress by two-thirds vote of both Houses, have to go to the States and pass three-quarters of the States.

Senator LEAHY. Maybe I should break it down. The administration supports having the Congress provide the two-thirds vote to support the language now before us. Is that correct?

Mr. BRYANT. Yes, sir.

Senator LEAHY. Does the administration then support having the requisite number of States support it? Is that the administration's position?

Mr. BRYANT. It does. The administration presumably would be willing to work with the Congress, should it see fit to modify the text of S.J. Res. 4 in any respect such that it might then be in a position still to support modified language that might go to the States. I wouldn't want to foreclose that possibility.

Senator LEAHY. But currently it is the administration's position that they support this language and support having the Congress pass it with the requisite number and then the requisite number of States pass it.

Mr. BRYANT. That is my understanding.

Senator LEAHY. They do or they don't.

Mr. BRYANT. I understand them to support the text of the resolution.

Senator LEAHY. Mr. Chairman, I have other questions that I will introduce for the record. As I mentioned to you earlier, like so many Senators, I am supposed to be at three different hearings at once. I commend you for having this hearing.

Again, please pass on our best wishes to the Attorney General and tell him we look forward to seeing him back hale and hardy and up here.

Mr. BRYANT. Thank you, sir.

Mr. Chairman, if I might, before Senator Leahy leaves, with respect to the question of the flags in this room that are protected that we have had a chance briefly to discuss, I just wanted to follow up.

I think the policy question is, as I understand it, should the American flag have to borrow protection from the protected status of other protected items. It is the position of the proponents of this resolution that the American flag should benefit from an independent protected status and not simply be protected when it is on someone's private property or when it has been stolen as the private property of another individual.

Senator LEAHY. Is there anything else that has such protection in our Constitution, such stand-alone protection the way you described it?

Mr. BRYANT. I think the category that strikes me as being similar, though not identical, is that of our key landmarks, our key monuments. The Lincoln Memorial—

Senator LEAHY. Those are protected under very specific laws, laws that have been upheld constitutionally. Is there anything else in our Constitution that is given such unique constitutional stand-alone protection?

Mr. BRYANT. Other than the flag itself until 1989, I am not sure of another item.

Senator LEAHY. Thank you, Mr. Bryant, good to see you.

Mr. BRYANT. Thank you, sir.

Chairman HATCH. The Senator from Idaho.

Senator CRAIG. Only to thank Mr. Bryant for being here and stating as clearly as he has where the administration is on this issue. I think he has spoken the essence of what this Committee needs to react to, and that is our responsibility to allow the American people to speak out on this issue. I agree with the Senator from California that it really is time that this country once again engage in these kinds of historic debates. Certainly, this would provoke one and it would be extremely valuable for our country to have it.

Thank you for being here.

Mr. BRYANT. Thank you, sir.

Chairman HATCH. Senator Durbin.

Senator DURBIN. Thank you, Mr. Bryant. Please add my wishes to those of the other members of the Committee about the Attorney General. I understand he has been through a pretty tough week and we wish him the best and hope for his speedy recovery.

Mr. BRYANT. Thank you.

Senator DURBIN. I want to make sure I understand the administration's position. Two weeks ago, the President said he favored a constitutional amendment relative to same-sex marriage. Today, the testimony that you are presenting suggests that the administration supports a constitutional amendment on flag desecration.

What other constitutional amendments is the administration supporting?

Mr. BRYANT. Like administrations before it, it also supports a constitutional amendment in connection with victims rights. As you know, Senator, the support for that amendment goes back a number of administrations, as does support for this resolution before us

today. Support for this resolution, which would permit Congress to protect the flag against physical desecration, precedes this administration.

Senator DURBIN. Are there any other constitutional amendments that the administration is supporting?

Mr. BRYANT. None that I am aware of.

Senator DURBIN. Based on your argument that the States should have a chance to express their will, does the administration believe that the equal rights amendment should once again be submitted to the States for consideration?

Mr. BRYANT. I am not aware that the administration has addressed that issue, Senator.

Senator DURBIN. Has the administration taken a position on any constitutional amendment relative to *Roe* v. *Wade* or abortion?

Mr. BRYANT. I am not sure of the administration's discussion in connection with any such amendment, Senator.

Senator DURBIN. Mr. Bryant, a lot of people raised a question several weeks ago when the President proposed the constitutional amendment on same-sex marriage as to the position of Vice President Cheney, who during the course of his debate with Senator Lieberman said that he thought this issue should be decided by the States and that Federal action, he did not believe, was necessary.

Is that Vice President Cheney's position today or has he changed his position?

Mr. BRYANT. I could not speak to the Vice President's position today, Senator.

Senator DURBIN. Can you tell us whether Secretary of State Colin Powell, who opposed this amendment, has changed his position and now supports the administration's position?

Mr. BRYANT. Likewise, I am not in a position to know.

Senator DURBIN. Thank you very much, Mr. Bryant.

Mr. BRYANT. Thank you.

Chairman HATCH. Senator Feinstein.

Senator FEINSTEIN. Thanks very much, Mr. Chairman.

Thank you very much for your comment, Mr. Bryant. I appreciate it.

Mr. Chairman, I would like to submit for the record a story dated October 26 from the Washington Times. I don't think anybody should believe that flag desecration doesn't take place in this country. It does, and this is one such incident which took place in October when the American flag was burned on Constitution Avenue near 15th Street.

So I would like to be in the record, if I might. I will assume that is agreeable.

Mr. Bryant, on page 3 of your written statement you cite the language of the Flag Protection Act of 1968. You may not want to answer this, but do you believe that if the constitutional amendment were successful that this language could be reinstituted and would meet legal scrutiny?

Mr. BRYANT. It is a good question, Senator. I wouldn't want to give the definitive response today. Looking at the language of the 1968 Act, there are a number of terms that would require a close evaluation.

There is certainly no doubt, in our judgment, that a statute protecting the flag against physical desecration could be passed that would certainly withstand constitutional scrutiny. Whether or not the 1968 Act would, I would want to reserve judgment.

Senator FEINSTEIN. Then my next question would be would you be willing to draft a statute that you believe would meet legal scrutiny that we might be able to utilize in our discussions and debate on this subject?

Mr. BRYANT. We would, and were we to do that, Senator, working with the Committee, working with the Congress, an outstanding starting point would be the 1989 Act that passed with 91 votes in the Senate.

Senator FEINSTEIN. Could you refresh our memory? I didn't see it in your comments, but perhaps you do have it in your written comments. Do you?

Mr. BRYANT. Yes.

Senator FEINSTEIN. On what page?

Mr. BRYANT. Actually, I don't know if it is in the written comments. I have it and could provide it to you, and it is elegant in its simplicity. Unfortunately, *Eichman*, the subsequent Supreme Court case, struck it down on grounds not specific so much to its drafting, but more in connection with the objective it was seeking to accomplish. But it is still on the books, Senator. It is Title 18 of the United States Code, Section 700. So it is there even though it has been struck down pursuant to *Eichman*.

Senator FEINSTEIN. Well, if you would be willing to take a look at that, then, and if you would recommend any improvements, I certainly would like to have it, and I think the Committee ought to have it as well.

Mr. BRYANT. We would be pleased to. Senator, it has been pointed out to me that the text is contained in a footnote in the written statement. It might be footnote 8, and on the copy I have been provided it is page 3 of the statement.

Senator FEINSTEIN. Page 3 or 6?

Mr. BRYANT. See if there is a footnote that reads, quote, "Whoever knowingly mutilates, defaces, physically defiles, burns"—

Senator FEINSTEIN. Page 6. "...physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than 1 year, or both." Okay, so that is essentially the latest. So I think it would be very useful to have you take a good look at that, if you would, and get back to us if you recommend any changes or improvements.

Mr. BRYANT. Very good. We would be pleased to.

Senator FEINSTEIN. I know it is a long way off, but being prepared is not a bad idea either.

Thank you very much.

Mr. BRYANT. Thank you.

Senator FEINSTEIN. Thanks, Mr. Chairman.

Chairman HATCH. Thank you, General Bryant. We appreciate you being here and appreciate your eloquent remarks and the answers to the questions. We will appreciate any help you can give on this matter.

Mr. BRYANT. It will be a pleasure. Thank you, Mr. Chairman.

Chairman HATCH. And send our best wishes to Janet and her husband, the Attorney General. We are pulling for him and praying for him, and we hope everything is okay.

Mr. BRYANT. Thank you, sir.

Chairman HATCH. Great to have you here. We will let you go at this time.

Mr. BRYANT. Thank you.

[The prepared statement of Mr. Bryant appears as a submission for the record.]

Chairman HATCH. Let's have the five witnesses come to the table. I have introduced you already. They will put the name tags up. We are going to start with Mr. Andretti first, since he has to catch a plane, and then we will go to General Brady.

Mr. Andretti, if we could begin with you, we are so honored to have you here. We appreciate you taking time from what we know is a busy schedule, and I think it is a good thing that you are the first NASCAR driver to appear before the United States Senate. We know it is a little bit disconcerting to have to appear before the Senate, but we are grateful to have you here. It is not nearly as frightening as what you do on a day-by-day basis.

STATEMENT OF JOHN ANDRETTI, NASCAR NEXTEL CUP SERIES DRIVER, MOORESVILLE, NORTH CAROLINA

Mr. ANDRETTI. Much more frightening, believe me.

To get started, I would like to introduce a colleague of mine, Raleigh Hemling, who is the President of the United States Auto Club.

Chairman HATCH. It is great to have you with us.

Mr. ANDRETTI. Good morning. My name is John Andretti and I want to thank the members of the Judiciary Committee for holding this hearing, and thank you also for inviting me to talk on a matter that is of importance to me and the great majority of Americans, protecting their flag from acts of physical desecration.

By the end of World War II, my father's family had lost everything. He and his brother grew up in a relocation camp in eastern Italy, living there from the time they were 8 years old until they were 16. They came to the United States at that point, a land of freedom and opportunity, and I am proud to say they made the most of it.

Sometimes, he has a hard time describing it because of the emotion, but my father has told me, after seeing the flag of the United States first when liberated in his native Italy and later when liberated into a new life for him and his family, the flag of the United States represented goodness and freedom. That is a lesson he has taught to his children and a lesson I am teaching to mine.

Being a father of three, it is important for me to teach my children respect and honor, not only for individuals but also on a whole, and the flag is a means to that end. Our faith is our foundation, but there must be more and it must be tangible and it is found in the flag.

This is obviously not my environment. I am usually wearing a fire-retardant uniform emblazoned with the colors of my sponsors and talking about NASCAR racing. I am a race car driver and have

driven for more than 30 years, everything from carts to Indy cars and NASCAR race cars.

In fact, I hope every member of this Committee will come join us at a track sometime. Each one of you is very welcome. I know Senator Kyl and Senator Graham can tell you how great the fans are, and I know Senator Biden, Senator Edwards and Senator Sessions can tell you how much fun our races can be.

And they can tell you something about my bosses, the millions of people who follow motor sports in this country. When all is said and done, every driver in major league racing works for the fans, and when you work for someone, you get to know them. I have learned a lot about those fans, as well as my fellow competitors and those who run the sport. I feel I am representing a huge majority of them here today.

I am here because I fully believe in what General Brady and the Citizens Flag Alliance are about. I am very proud to be an American. Military or civilian, native or immigrant, the flag is our bond. I fly the flag at my home 24 hours a day. And, yes, it is lighted for all to see. I appreciate what the flag stands for and I know quite well what it means to the millions of Americans who follow motor sports racing. I think most of them would be surprised, if not outraged, to learn that today, in our country, it is legal to physically desecrate the flag of the United States.

There are those who say the flag is only a symbol, but symbols are important. Just as it was a symbol of freedom to my then 8-year-old father in Italy, and later a symbol of opportunity to him and his family as he entered this country for the first time, it had a message.

Race officials rely on symbols on flags to communicate with drivers during noisy racing action. Even with radios today, flags are still important and functional in racing. In quite the same way, our Nation's banner is important and functional and still sends a message. In NASCAR racing, you will see flags waved a lot, but there is one flag that gets waved by NASCAR fans more than any other, and that would be the red, white and blue of Old Glory.

Early in our Nation's history, the flag of the United States was something of a signal flag. Out in front of the troops, it signaled action by our military against the forces that would otherwise overrun us. It serves as a symbol of that very notion today as American troops defend our liberties and protect our interests around the world. Burning a flag, it seems to me, is a very profound signal that those who desecrate the flag have a total disregard for our military.

In 1967, Congress passed a Federal law that prohibited flag desecration right here in the District of Columbia. Congress passed that law because of the effect that flag desecration had on the morale of the troops then fighting in Vietnam. That law, now made invalid by the Supreme Court, was the last show of Congressional flag-related support for America's military men and women who are engaged in war. We should honor today's warriors and underpin morale by once again making it illegal to physically desecrate the flag.

I have to admit I have never seen the flag burned, other than on a television newscast. Those I work with and those I work for, NASCAR fans, aren't the kind of folks who take to this sort of

thing. Their flag is important to them. They respect it and they protect it.

I once heard a man say that the flag represents the freedom to burn it. I would disagree, and I think most Americans would, too. The flag is a symbol that represents all that our Nation is can be. It symbolizes what the people say it symbolizes, and the great majority certainly don't believe that includes the freedom to desecrate it.

As a sign to rally for a cause, there can be no greater symbol than our flag. We rally around it in times of crisis, whether a natural disaster or a global conflict. Our history bears that out. The September 11, 2001, attack on America is a prime example of what Americans feel for their flag and what they know it to be as a symbol of strength, determination and resolve for a free people to remain so.

The Citizens Flag Alliance and the American Legion have done a great deal of polling over the years. The figures are remarkable. Very consistently, they have shown that more than three of four Americans want their flag protected. Honestly, I am surprised the numbers aren't higher. I am sure they are higher among NASCAR fans, who are a pretty good representation of mainstream blue-collar and white-collar America.

Some look at the flag and just see a piece of cloth. That perception might be acceptable, but their understanding of the flag's value is lacking. The bits of fabric that make up the flag are only cloth, but when you pull them together in that recognized pattern, something happens. As the flag, it becomes a binding force that holds us together as one people, and those who would desecrate it are out to break that bond. Nothing tears down America more than burning the flag.

I am a businessman by profession and a race car driver by choice, but inside I am still something of a country boy from Bethlehem, Pennsylvania, where life is still pretty uncomplicated. To me, the need to protect the flag is easy to explain.

Events of late find us reflecting on values that we believe are important and necessary in a free society. One has the right to freely associate—a major values battle now being fought by the Boy Scouts of America. Another is the right to publicly invoke the name of God in a patriotic exercise—another major values battle being wage by the American Legion in their effort to keep the words "under God" in the Pledge of Allegiance to the Flag.

As a Nation, we are bound together by our shared beliefs in such values, and we are bound by tradition as Americans to pass along to younger generations the importance of upholding those values that are uniquely American.

One of the greatest tools for teaching values of respect, commitment, loyalty and patriotism is the flag of the United States. But how do you explain to a youngster that it is right and customary to respect our flag, but okay to burn it? I have three young children and I spend time with children all over the country because of my racing activities, and I have no way to explain that to them.

What we are about today and what we are here for is important to all, I know, but what carries forth from here today is of greater importance. We are considering more than just the flag here. We

are helping to assure that the flag that flies throughout the Nation is seen, treasured and honored everyday. You never know. It may give cause for a youngster to ask what the flag is for, what it means, or why it is important.

The answer for most of us should be easy. That flag is about values. It is about tradition, it is about America and the men and women who paid an awful price for what we have today. We honor and cherish members of our armed forces and veterans of military service when we honor and protect the flag.

Draping the flag over the coffin of a fallen soldier, placing a flag near a grave or hanging a flag from your house on Memorial Day are all ways we honor and express our appreciation for those who have fought and died defending America. When our laws sanction the physical desecration of the flag, the honor is diminished and the recognition is dulled.

There is importance to the flag as a symbol and one that has a noble function. In racing, your helmet is your trademark, and mine is red, white and blue, with the American flag as a theme. My work clothes are colorful reflections of my sponsors who support me. The flag has the same function for our men and women in uniform. For them, it is a reflection of the people who support them in their job of protecting all of us.

The American people deserve the backing of this body in their desire to protect the flag, and a constitutional amendment to return that right to the people is the only way. For those who still can't see the flag for all it is, or who hold concern for amending the Constitution, we say keep that concern. We respect your position, but please consider the desire of a great majority and move the flag amendment off of Capitol Hill and send it to the States for debate and ratification. Let the people decide.

Thank you.

Chairman HATCH. Well, thank you so much, Mr. Andretti. I will tell you, I am a fan, but I am going to be even more of a fan after hearing you testify. I appreciate you taking time to be with us today. I know I indicated that we would try to get you out of here by 11:30 so you can make your plane. So we will let you go at this time, with our gratitude that you took the time to come here and testify in this important hearing.

Mr. ANDRETTI. Well, I have, obviously, very profound feelings about it. I have a family that is important to me, and I am honored and privileged that I could come here.

Chairman HATCH. Well, thank you so much.

Mr. ANDRETTI. Thank you.

Chairman HATCH. We will let you go, then. Thanks for being here.

[Applause.]

[The prepared statement of Mr. Andretti appears as a submission for the record.]

Chairman HATCH. General Brady, why don't you take the center seat now so that you are all together?

We will turn to you, General Brady. We are so honored to have you here. You are one of the greatest heroes this country has ever known, and we know that you feel very deeply about this and we

are going to give you a chance to express yourself on this very important amendment.

STATEMENT OF PATRICK H. BRADY, CHAIRMAN OF THE BOARD, CITIZENS FLAG ALLIANCE, AND RECIPIENT, CONGRESSIONAL MEDAL OF HONOR, SUMNER, WASHINGTON

Mr. BRADY. Thank you, sir. On behalf of the Citizens Flag Alliance, we are deeply appreciative of you allowing us to testify.

We realize that there are good and great Americans on both sides of this issue, and there are some others who think it is just hokey; they think it is a waste of time. And it would, in fact, be a waste of time if all this fuss were about flag-burners or flag-burning itself. No matter how emotionally it affects most people, flag-burning is a petty act, surely done to attract attention, to attack our country, our traditions and our patriotism, but it is a petty act nonetheless.

So I want to make it clear from the beginning that our primary concern is not flag-burners. They are with us always. We will always have people who hate America. We agree with Colin Powell. But this is not about miscreants who burn the flag. Our concern is the Constitution and those miscreants who have amended the Constitution without the approval of the people by inserting flag-burning in the Bill of Rights. We are concerned with others who would deny the people the right to decide this issue.

The struggle for our flag has been long and fatiguing, but we are energized in this effort by our contract with patriotism—the oath that we took to protect and defend our Constitution, an oath that defines patriotism itself. All Americans take this same oath when they recite the Pledge of Allegiance, and that is the bottom line. By defending the right of the people to protect the flag, we are defending the Constitution.

The Supreme Court, we believe, made a mistake by calling flag-burning speech, and it is the duty of every American to correct any error by our Government. Flag desecration is not speech, and it desecrates our Constitution to say so. A review of the magnitude of great Americans who support this fact confirms it.

Baseball great Tommy Lasorda, who testified here, spoke for common sense and for common Americans, the dictionary and three out of four Americans when he said "speech is when you talk." Justice Hugo Black spoke for every Chief Justice of the United States and Justices on five Supreme Courts in the last century when he said, "It passes my belief that anything in the Federal Constitution bars...making the deliberate burning of the American flag an offense."

U.S. Representative John Murtha spoke for 70 percent of the Congress when he said, "Burning and desecration of the flag is not speech. It is an act, an act that inflicts insult, insult that strikes to the very core of who we are as Americans and why so many of us fought and died for this country."

General Norman Schwarzkopf spoke for our warriors when he said, "I regard legal protections for our flag as an absolute necessity and a matter of critical importance to our Nation."

We have heard from opponents of the flag amendment that our troops are actually fighting for the rights of flag-burners. Who

among them would stand before these men and women, or my daughter who has just returned from Iraq, and tell them that they are fighting and dying in the streets of Iraq so that Americans can burn the flag on the street corners of America?

You add to this mighty armada the legislatures of all 50 States and our President, and no reasonable person could deny that the Court made a mistake. By the way, James Madison, the author of the First Amendment, and Thomas Jefferson agreed that flag-burning was not speech.

The Framers intended to protect political speech, and that is the persuading power that moves people to the ballot box and those elected to the will of the people. Flag-burning is the persuading power of the mobs. What the communist, Gregory Johnson, said when he burned the flag:—"red, white and blue, we spit on you"—may not add to the political dialogue, but it is certainly protected by our Constitution. What he did when he burned the flag is not.

We could go on and on about that, but I think Walter Berns in his book, *Making Patriots*, said it very well. "The First Amendment," he said, "protects freedom of speech, not expression, and whereas all speech may be expression of a sort, not all expression is speech, and there is good reason why the framers of the First Amendment protected the one and not the other." The good reason is not difficult to see. The Constitution cannot pick and choose between actions that are speech and those that are not. Common sense tells us if the Framers meant expression, protection of the press and assembly would have been redundant.

But legalized flag-burning goes beyond desecration of our Constitution. It also desecrates our values as a people. Burning the flag is wrong, but what it teaches is worse. It teaches that the outrageous conduct of a minority is more important than the will of the majority. It teaches that our laws need not reflect our values, and it teaches disrespect for the values embedded in our Constitution which is embodied by our flag.

Yet, despite the enormity of evidence, we believe it is important to address the concerns of those who are confused and those who disagree on this issue, and we have done this in some detail.

First, those who say flag-burning is speech and should be protected by the Constitution, but say they want a statute to protect the flag. The Supreme Court has made it clear that this cannot happen, and it has been reinforced today. It has been tried.

It is important to know that the flag amendment does not protect the flag. It simply takes control of the flag away from the judges and returns it to the people, where they can protect, then, if they choose. Those who want a flag protection law can have it simply by voting for the flag amendment.

But how can those who say, as Senator Hatch has said, that flag desecration is speech, then support a law prohibiting flag desecration? To those who say the flag amendment would amend the Bill of Rights, we ask if the Supreme Court in 1989 had voted to protect the flag, would they then have amended the Bill of Rights?

To those who have difficulty defining the American flag and express concern over prosecuting people who burn bikinis embroidered with the flag or toilet paper marked with the flag, we ask

if they would put toilet paper or bikinis on the coffin of a veteran or on their own coffin.

For over 200 years, we have had laws defining flag desecration and our courts have had no problem defining a flag. Any fifth-grader knows what the American flag is. Many people say that the flag is precious to them, but oppose protection. We would ask them if they have anything that they love that is precious to them which they would not protect. Is there any other precious symbol in America that is not protected? Pat Boone said that is like saying he loves his mother, but it is okay to bat her around.

Some distrust the will of the majority, even fear a tyranny of the majority. They worry that the majority may exercise their will over a more virtuous minority. To them, we ask if the minority on the Court who voted to protect the flag was more virtuous than the majority who voted for flag-burners, or if the minority that voted for their opponent is more virtuous than the majority that voted for them.

Some have actually said that since dictators protect their flag, protecting our flag aligns us with dictators. We wonder how any American can compare Old Glory, designed by the father or our country, protected according to the will of a free people—how they can compare that to a hammer and sickle or a swastika, protected according to the will of a dictator. Jefferson and Madison believed our flag should be protected. Does that align them with Stalin or Hitler?

Some are concerned with the number of efforts to amend the Constitution. Why is there no concern when the courts amend the Constitution? They do it frequently and illegally. Why does the majority count only when it wears black robes and not when it wears working clothes?

Look what the majority in courts have done with pornography, with prayer, the Ten Commandments, the Pledge, with the Boy Scouts, with marriage. There have been over 11,000 attempts to amend the Constitution; only 27 have succeeded. The people take this responsibility very seriously.

An amendment that addresses the Bill of Rights could start a great debate and awaken the people as to what is being done to their Constitution. Once the people are aware, they will be outraged and they will act, and we have seen that outrage after the Super Bowl and the impact that that had on the moral midgets in the media. We saw the people's outrage in California. They fired their government, and I think that sent a message to all people in government. We need to send a message to the courts.

The flag amendment will energize the people and could help stop the slippery slope of constitutional desecration. The Constitution is too important to be left to the courts, and so is the flag. They both belong to the people and it is time for this body to let the people decide. If that flag is precious enough to cover the coffins of our dead warriors, it is precious enough to be protected.

Thank you, sir.

[The prepared statement of Mr. Brady appears as a submission for the record.]

Chairman HATCH. Thank you so much, General. It was an eloquent statement. I don't know that I have ever heard a more elo-

quent statement. I think Senator Feinstein's statement was very good to hear today, as well. But I appreciate that as somebody who naturally is the sponsor of this amendment.

But it is important to listen to the other side, as well, so we will turn to you now, Mr. Korb. We are grateful that you would take time from your busy schedule to be with us. We respect you and look forward to hearing your testimony.

STATEMENT OF LAWRENCE J. KORB, SENIOR FELLOW, CENTER FOR AMERICAN PROGRESS, ALEXANDRIA, VIRGINIA

Mr. KORB. Thank you very much, Mr. Chairman and members of the Committee. In the interest of time—we are running late—I would like to submit my statement for the record and make a few comments here.

Chairman HATCH. Without objection.

Mr. KORB. I am honored to be here with some genuine heroes like General Brady and Professor May, and I want to first address six points. Number one, I can understand why people want to have this amendment at this time because they want to show support for our veterans and for the men and women in our armed services.

But as has been pointed out earlier, if you want to do that, the first thing you have got to do is resist some of the very draconian measures that people are trying to put forward that will impact the veterans and our fighting men and women.

We have already talked about what is happening with veterans' medical care. I think the head of the VFW put it very well when he said the President's budget, when it comes to what is happening to medical care for our veterans, is a disgrace and a sham. I am happy that Senator Craig said that will be corrected. Senator Durbin mentioned it had been voted down, but I think it is important. It is not just this year. If you look at the President's budget for veterans' medical care budget over the next 5 years, it gets worse. So I think it is very important to stop that.

Second, we have got concurrent receipt. A man or woman who earns a military retirement, loses part of their retirement, if he or she has a disability. When the Congress tried to deal with this 2 years ago, Don Rumsfeld, the Secretary of Defense, said he would recommend to the President to veto the bill. Fortunately, the Congress didn't listen and did change it, but phased it in over 10 years. Why wait? All of the men and women over the years who have basically been short-changed—that is something you need to deal with.

Number three, the administration fought the Congressional increases in hostile fire pay and family separation pay. Can you imagine, at a time when we are at war, they are trying to roll back those benefits?

Fourth, in what the Army Times, the services' own newspaper, called an active betrayal in the midst of war, they are talking about closing commissaries and schools on military bases. Can you imagine if you are transferred around or you are serving overseas and your child cannot go to what you know is a good school?

Fifth, Tricare for our Guard and reserves. As we all know, when you change jobs, the most difficult thing that you have to deal with is getting a new health care plan. Well, if you are called up to ac-

tive duty, as many of them have been, on 48 hours' notice, you are sent overseas and your family is put into a new health care system. This is a tremendous problem.

Why not allow them to join the Tricare system so that when they get called up, as they have with increasing frequency, they don't have to change health care plans? Again, the Congress took some action in this area over the objections of the administration, but it ends this year. I would urge you to make it permanent.

And then, finally, in order to prevent back-to-back deployments particularly of Army people, the unnecessary and the too-frequent call-up of Guard and Reserves, we need to increase the size of the active Army by at least 40,000 or 50,000 people. If you do those things, I think you will do an awful lot to address the concerns of a lot of the men and women here.

Now, let me briefly turn to why I think this amendment doesn't make a great deal of sense. For those of us who serve the country as military, civilian, political appointees, civil service appointees, we did not think we were defending a piece of geography. It was a way of life, and I think this amendment basically diminishes our way of life, the things that we fought for. It is bad public policy.

I would like to associate myself with the comments of a man with whom I had the privilege of serving in the Reagan administration, now Secretary of State Powell—I think his letter said it all—and also with the late Senator Chafee, a person whom I had the privilege of voting for when I taught at the Navy War College in Newport, Rhode Island. It is simply bad public policy to do this. It will be the first time that we are passing an amendment to limit the freedoms given to us by the Bill of Rights.

The second problem is the proposed amendment is vague. As has already been pointed out here, you could be prosecuting people even for political ads.

Third, it has not been supported by several Congresses. We talk about the Supreme Court and how the issue has been decided in five-to-four decisions, *Texas* v. *Johnson* and *United States* v. *Eichman*. That doesn't change what the Court does because, remember, the Court made a decision of who will be President on a five-to-four basis. So by saying it was a narrow majority doesn't impact on what is the law of the land. And, sure, when you ask people, in the abstract, do you support this, they say fine. But when you tell them it is the first time we would have an amendment to limit the freedoms in the Bill of Rights, then that opinion changes.

Then, finally, as has been pointed out here, it is not necessary. The number of people who would be covered under this amendment is not very large. And as has been pointed out several times, you can be prosecuted under other statutes.

Thank you very much for listening to me.

[The prepared statement of Mr. Korb appears as a submission for the record.]

Chairman HATCH. Thank you, Mr. Korb.

Professor May, we will turn to you.

STATEMENT OF GARY E. MAY, ASSOCIATE PROFESSOR OF SOCIAL WORK, UNIVERSITY OF SOUTHERN INDIANA, EVANSVILLE, INDIANA

Mr. MAY. Thank you. Nearly afternoon, but still good morning. I am extremely flattered and humbled by your invitation and interest in listening to my thoughts and those of other veterans about the proposed amendment to the Constitution. I gladly accepted this invitation as yet another opportunity for me to be of service to my country.

As a Vietnam veteran who lives daily with the consequences of my service to my country and as the son of a World War II combat veteran and the grandson of a World War I combat veteran, I can attest to the fact that not all veterans wish to exchange fought-for freedoms for protecting a tangible symbol of those freedoms.

I joined the U.S. Marines while I was still in high school in 1967. This was a time of broadening public dissent and demonstration against our involvement in Vietnam. I joined the Marines, these protests notwithstanding, because I felt it was my duty to do so. During my service with K Company, 3rd Battalion, 27th Marines, following the Tet offensive in Vietnam in 1968, I sustained bilateral above-the-knee amputations as a result of a land mine explosion on April 12, 1968. My military awards include the Bronze Star with Combat V, Purple Heart with Star, Vietnam Campaign, Vietnam Service, and National Defense medals.

Over the past nearly 36 years, I have faced the vexing challenge of reconciling myself with the reality of my military history, and the lessons I have learned from it, and the popular portrayal of veterans as one-dimensional patriots, where death in combat is referred to as making the ultimate sacrifice, and the motivation for service and the definition of true patriotism is reduced to dedication to a piece of cloth.

I ask members of this Committee to think about why they love our country, to find the source of their own patriotism. Has that patriotism been forced upon you? Have you been coerced to love America? Are your convictions not your own?

A few years back, I mentioned the anniversary of my wounding to a colleague and asked her what she was doing those years ago. Somewhat reluctantly she said, "I was protesting the war in Vietnam." I was not offended. After all, our Nation was born out of political dissent. Preservation of the freedom of dissent, even if it means using revered icons of this democracy, is what helps me understand losing my legs.

The American flag stands for a long history of love and loss, of war and peace, of harmony and unrest. It also stands for the history of a nation unsatisfied with the status quo, of a nation always in search of a greater truth, a more perfect union. Surely, it does not stand for a nation where we jail those who peacefully disagree with us, regardless of the abhorrent nature of their disagreement.

As offensive and painful as flag-burning is to me, I still believe that those dissenting voices need to be heard. This country is unique and special because the minority, the unpopular, the dissenters and the downtrodden also have a voice and are allowed to be heard in whatever way they choose to express themselves that does not harm others.

Since 1999, the year I last testified before this Committee on this issue, over 2,400 veterans have written and joined my little group called Veterans Defending the Bill of Rights. Unlike most of the groups that support this amendment, we are solely organized in opposition to the amendment. Many of us are even members of the organizations that are listed as supporting the amendment.

We are here to make sure that it is clear that veterans do not all speak with one voice on this issue. A number of these combat veterans would have been more than willing to testify here today. I have included excerpts from some of their letters in my written testimony, and ask that members take the opportunity to listen to their voices.

In addition to my own military combat experience, I have been involved in veterans affairs in various capacities since 1974. I have yet to hear a veteran I have lived or worked with say that his or her service and sacrifice was in pursuit of protecting the flag. If we are truly serious about honoring the sacrifices of our military veterans, our efforts and attention would be better spent in understanding the full impact of military service and extending services to the survivors and their families.

Our record of service to veterans of all wars is not exemplary. I discuss some examples of this in my written statement. The spotty record in veterans services is more shameful when one considers that the impact of military service on one's family has gone mostly unnoticed by policymakers.

Is our collective interest better served by amending the Constitution to protect a piece of cloth than by helping spouses understand and cope with the consequences of their loved ones' horrible and still very real combat experiences? Are we turn to turn our backs on the needs of children whose lives have been negatively affected by their parents' military service? Is our obligation to protect the flag greater, more righteous or more just than our obligation to help veterans and their families? I think not.

Over the years, proponents of this amendment have argued that they are not advocating for the passage of this amendment over providing adequate support and services for our veterans. They say we can do both. I am asking when will we do both. I believe that it is time for Congress to pay more attention to the voices of ordinary veterans who know firsthand the implications of tyranny and denied freedoms. Our service is not honored by this onerous encroachment on constitutionally-guaranteed freedoms.

Thank you very much for your patience.

[The prepared statement of Mr. May appears as a submission for the record.]

Chairman HATCH. Thank you, Professor.

We will now turn to Professor Richard Parker, who is, of course, the Paul W. Williams Professor of Criminal Justice at Harvard Law School. We particularly appreciated your help.

By the way, for everybody here, this amendment does not do anything other than give the Congress the power, if it so chooses, to prohibit flag desecration. I might also add that I presume that it would take 60 votes in the Senate. So it would have to be a supermajority vote even if we passed this amendment.

One of the problems is that I think people are so afraid to let the American people do this because they know there will be overwhelming support for a statute. So my attitude is if the American people will do this, we ought to let them have that chance, and that is what this amendment is all about. This amendment doesn't put anybody in jail. It doesn't do anything but give Congress the power to prohibit flag desecration, if it so chooses.

Again, I will just reemphasize that five Justices on the Supreme Court overturned 49 States, and I am very concerned about that that we have the Constitution constantly amended by five Justices. I would give the people a chance to go with this.

Dr. Parker, let's turn to you.

STATEMENT OF RICHARD D. PARKER, WILLIAMS PROFESSOR OF LAW, HARVARD LAW SCHOOL, CAMBRIDGE, MASSACHUSETTS

Mr. PARKER. Thanks very much, Mr. Chairman. I am grateful to you and to the Committee for inviting me to be here today.

I have been involved in the discussion of this issue for 10 years now and what I will do right now is try to boil down my experience of the discussion into six points which it seems to me clarify what is at stake, and might clear up, as well, a great deal of confusion that has arisen in the past and to some extent today as well.

Point number one: The flag does not represent simply one point of view in competition with other points of view. That was the central mistake that the majority of the Supreme Court made in *Johnson* and *Eichman* in 1989 and 1990. The flag does not stand for any particular policy or any administration, or for the Government, or even for the armed services. It transcends, and at the same time underlies debates among differing points of view, differing policies, differing contestants for governmental power. It represents, as you said, Mr. Chairman, the Nation, the sovereign people, the idea of national community in which all citizens are members. That is point number one.

Number two, the flag and what it represents is a national resource of special importance to the summoning of political energy required for popular self-government, in general, and in particular it is a resource with special importance for the robustness of the freedom of speech.

It is even more especially important for the robust enjoyment of freedom of speech on the part of minorities and dissenters. Why is that? If you fly the flag, if you carry the flag as a speaker, particularly a member of a minority or a dissenter, you establish your membership in the political community and your right to get a hearing from other citizens. That is why the civil rights movement, in which I took part, prominently displayed the American flag at so many of its well-known demonstrations.

Thus, this amendment does not narrow freedom of speech, as I believe Senator Durbin suggested. Quite the opposite, it enhances the freedom of speech by strengthening its foundation. That is point number two.

Number three, this National resource, like any other, should be protected. The fact that it is a symbolic resource makes no difference. If anything, its nature as a symbolic resource renders it

more easily eroded and more in need of protection than a physical resource like the Grand Canyon or a particular building.

It should be protected precisely in order to protect the foundation of freedom of speech as a lived experience. Those who profess great concern for the freedom of speech should be supporters, in other words, of this amendment. And that is particularly true since this amendment is limited to physical acts, leaving everyone free to say and write and signal whatever message they please at any time. That is point number three.

Number four is a point that has been made by the Chairman. This amendment, however, does not in and of itself, as you said, Senator Hatch, protect the flag. It only empowers Congress to protect the flag. Thus, the arguments that come up time and again posing a series of hypothetical cases to ask whether they would be prohibited by this amendment are completely misguided.

This is not a criminal law being written here. What is at stake is the authority of Congress to write a law, and as the Chairman pointed out, and as Senator Feinstein, too, I believe, pointed out, would involve a great deal of debate and adjustment and fine-tuning. It might even require 60 votes.

Point number five: This amendment does not amend or change the Bill of Rights or the First Amendment. This is the most troubling red herring that is typically introduced into this debate over and over again. It restores the meaning of the freedom of speech that was taken for granted for two centuries. Those who respect the Constitution, those who go to the Archives, as Senator Durbin mentioned, with some awe with respect to the Constitution should be supporters of this amendment, not opponents.

The sixth point is that there are other constitutional values and principles at stake here, in addition to the protection of the freedom of speech by passing this amendment. Let me mention two.

First is the constitutional value more basic than any other to our Constitution and our system of Government; that is, popular sovereignty. The Constitution begins, as everyone knows, "We, the People." If the meaning of the Constitution is delegated and if that delegation is taken for granted, delegated to judges, the people cease to govern. Popular sovereignty is undermined. "We, the People," the first three words of the text, become a mockery.

The second value is the separation of powers. It was the assumption of the Framers, as you know, that each branch would check the other branch in the Federal Government, especially when another branch is seeking to extend its sway in substantial ways.

I think members of this Committee surely are familiar with what has happened with respect to the judiciary in the last, say, 15 years. Compare it with the Warren Court. The Warren Court, during its first period from 1953 to 1963, and its second period from 1963 to 1969, was a Court whose decisions, famous as they have been, were tethered to mainstream opinion in the country. It was a Court that acted in a gradualist fashion.

In the last 15 years, that is not the way the majority of the U.S. Supreme Court has been behaving, or many other courts. They have ceased to be tethered, perhaps even to care, about mainstream opinion in the country and they have ceased to proceed in a gradualist fashion.

So it is the responsibility of the Congress under the separation of powers to provide a check to the Court, and the Article V process is an effective, and indeed the most effective way for the Congress to check this new assertion of judicial power. It has been done before, most recently with the 18-year-old vote. It is especially appropriate when an amendment has the support of a substantial majority, sustained over time, when that amendment defends an established meaning of the Constitution, changed by the Justices, and when all the amendment does is empower Congress to pass legislation. Those four tests are all satisfied here.

There is no more effective way by which Congress can check the Court. I know this Committee spends a great deal of time and energy on confirming judges, and when a new Supreme Court Justice is nominated, I am sure the Committee will drop everything else and devote itself to that.

But it is a notorious fact that Congress cannot check the Court simply through the advise and consent process vis-a-vis appointments. The process of constitutional amendment, particularly so long as it adheres to the four conditions I mentioned, is the most effective way of doing so.

This is my last point. It might occur to you, what about a check on majority power? Isn't our system based on a fear of majoritarianism? And I ask you what institution is the most majoritarian institution in our Government. In what institution does a bare majority of one have the most sway? Not the Congress; certainly not the Senate, given its procedural rules; not the House. It is the Supreme Court that is the most majoritarian institution in our Government. One vote decides issues and can change the established meaning of the Constitution. Thus, we need the Congress to step in now and check that form of majority power.

[The prepared statement of Mr. Parker appears as a submission for the record.]

Chairman HATCH. Well, my thanks to each of you because this is an important issue and can't be trivialized, no matter whether you are for or against it. It is a constitutional amendment and it is important, but a couple of things are in order, I think.

Number one, for the veterans who have heard criticisms of this administration both from the dais and from witnesses, let me just point out the budget provides $70.4 billion in fiscal year 2005 for veterans programs. Now, that is an increase of $9 billion, or 15 percent. For discretionary spending alone, the budget assumes $30.5 billion, and that is an increase of $1.3 billion, or 4.4 percent, over last year. In light of a freeze on most non-homeland security discretionary spending, this is a significant increase.

The budget also proposes $29.1 billion for veterans medical care. It is never enough, I have to admit, and I wish we could do better. But that is an increase of $1.4 billion, or 5 percent, over 2004. It is important to note that spending for veterans medical care has doubled since 1993 and it has increased 42 percent since President Bush submitted his first budget in fiscal year 2001. That is a heck of a rise.

Now, it isn't enough, I admit, but we are constrained here by the fact that we don't have an awful lot of money to spend, especially

discretionary-wise. In the past three fiscal years, we have seen unprecedented increases in veterans medical care and other funding.

In the following fiscal years, Congress has provided the following increases in VA's medical budget: $1.1 billion in fiscal year 2002, a 5.4-percent increase; $2.4 billion in fiscal year 2003, an 11.3-percent increase; and $2.9 billion in fiscal year 2004, a 12.2-percent increase.

These increases stand in stark contrast to requests by the Clinton administration. In fiscal years 1998 and 1999, the Clinton administration proposed that the Veterans Health Administration budget be cut by $83.3 million and $16.3 million, respectively. In fiscal year 2000, the Clinton administration proposed that veterans medical care funding be frozen in place. Despite those proposed reductions, Congress increased it, and I was part of that.

Now, all I can say is that I don't think we should use this particular hearing to try to score political points one way or the other on veterans care. In all honesty, I wish we could do more, and I am one who I believe has always voted for more. We will never be able to do enough, it seems to me, to pay for the care our veterans who have given so much for our country.

But there is real effort to try and do what is right here and I don't think the administration should be blasted when they have participated in these kinds of increases. It has mainly been Congress that is doing this, but the administration certainly has signed the bills.

Mr. KORB. Senator, could I say something about that because I think this is a very critical issue?

Chairman HATCH. Let me just say I don't want to get into that here because that is not what we are discussing. But I would be happy to have you submit to the record anything that would help me to understand it better because if I am wrong on these figures, I would like to know, but I don't believe I am.

But the point is that we should do more. I wish we could do more. You made a good point, but to try to score political points on it, I think, is the wrong thing to do. There isn't anybody in the Senate who doesn't want to help veterans, not anybody. But we are all faced with a budget that is out of control, and one of the big reasons it is out of control is because of our homeland security concerns and anti-terrorism concerns. Those are big reasons.

But there is another reason. No matter what we do, there are liberals in the United States Senate who want to spend much, much more, even though we can't do it within any kind of decent budget restraints. Those of us who are more conservative in outlook are spending a lot more than we should and this is something we have got to get control over.

So we can all come in and ask for more and more, which everybody does in our society. All I can say is we are in a budget battle right now on the floor trying to keep the budget under control, and we will have amendment after amendment to spend and spend and spend. Last year, it was over $1 trillion if we hadn't had over 50 points of order that stopped that. There were some heroic figures on the floor who had to stand there and take abuse because they weren't spending enough.

We will never spend enough for some of the people in this body, especially the liberal community. No matter what you do, they will always want to spend more. But I just wanted to make it clear that there has been a real effort to try and treat veterans fairly.

Now, let me just say this. One of the things that really has bothered me through the years is how so many of these people have played politics with this issue by saying, oh, we shouldn't amend the First Amendment; this will be the first time we are ever doing that. Well, it was the Court that did that, and I think, General Brady, you made a very good statement on that.

But then they turn right around and vote for a statute to forbid desecration of the American flag. Well, now, why would they vote for a statute when they wouldn't vote for a constitutional amendment? They did it because they know the statute isn't going to make it, that the Supreme Court isn't going to allow a statute here, that it is going to have to be a constitutional amendment.

But why, if they are sincere in their fighting against constitutional amendments, would they vote for a statute against flag desecration? It seems to be me it is inconsistent, and I think anybody who thinks straight knows it is inconsistent. It is a phony political approach to try and always bring up a statute which they know can't make it through the Supreme Court.

Now, let me just ask you this, General Brady and Professor Parker. Some opponents of the flag amendment have stated that passing the amendment would make our country like the oppressive regimes in Cuba, Nazi Germany or the former Soviet Union. I would like you both to respond to that argument.

Mr. BRADY. Yes, sir, I heard that and I mentioned it, I think, briefly in my statement. It is incomprehensible for us to hear people in America compare a protected American flag, protected according to the will of the people, to a flag that is protected according to the will of a dictator. There is a great difference.

Our flag was designed by the father of our country, protected by the people. The swastika and the hammer and sickle were protected by despots, by dictators, by cold-blooded murderers. There is a whole lot of difference between our flag that stands for all the wonderful things it stands for and the Nazi flag that stands for the worst things of human nature.

Chairman HATCH. Professor Parker.

Mr. PARKER. I would, of course, agree with the General. The argument, to be blunt, is absurd. It is not even interesting, the argument to which you refer. What is interesting to me is why it is made so often. And not being in elective politics, I am probably not the best person to judge that.

Mr. MAY. Mr. Chairman, I would like to offer a comment that might clarify why such statements as that sometimes get made. On page 13 of Mr. Brady's written testimony, he says the will of the majority should define patriotism; the will of the majority should define patriotism. He goes on to ask, what are laws for, if not to force the unpatriotic to act patriotic?

Now, to me, this smacks of sort of dictatorship, or at least an espousal of a very clear and directed set of expectations that people should follow. That is offered as part of his argument in support of the proposed amendment, and I think it is that very kind of

rhetoric, and the possibility of what could result, that causes many of us to feel that the proposed amendment is a great departure from the beliefs and the values and the history of this country that we who fought to protect and serve. That is scary.

I do not draw comfort from Professor Parker's argument that we who might have concerns—and we all should—about freedoms that we enjoy under the Constitution should be rushing to support the amendment because it strengthens the foundation of the symbol that the flag represents. I think this kind of rhetoric undermines all of that and suggests a very heavy-handed approach to defining, implementing and enforcing consequences for departure from somebody's understanding of patriotism.

Chairman HATCH. I don't agree with that because basically what the General is arguing for is for a right of Congress to decide what to do in this matter and to let the people decide this, not five Justices on the Supreme Court. I think there is a real, real significant difference.

Now, you might take issue with some of the language, General, if you would care to respond.

Mr. BRADY. Yes. You have taken that, of course, out of context, but I do believe that patriotism should be defined by the majority of the people and not the majority on a court.

Chairman HATCH. That is a good point.

Mr. BRADY. I do believe that patriotism is not just love of country. A patriot is someone who will support and defend a country. That is the definition; that is the definitive part of it. And we certainly do force patriotism when we force our people to join the services, when we force our people to ration in time of war. Many things that are patriotic, causing people to support and defend the country, are, in fact, by law, forced.

So you would have to go through the whole thing there, Professor May, to get the full intent of what I am saying about patriotism. But the key point is that the majority must rule, the majority must determine what is patriotic, certainly not the majority on a court.

Chairman HATCH. My time is just about up.

Professor Parker, let me ask one other question of you. One of the most commonly used arguments against a flag amendment—and I am getting kind of sick of it—is that the Constitution is precious and should not be amended without a great deal of thought and good reason. In all honesty, I am very sympathetic with that view, and I believe personally that the Constitution is an inspired document. But I get a little tired of that being a major argument here.

Would you please explain why people who share my belief that we must protect the Constitution should support an anti-flag desecration amendment?

Mr. PARKER. Let me mention just two reasons, first, because the Court—and this is not the first time it has happened—may radically turn upside down the meaning of the precious Constitution. Thus, to defend that Constitution requires checking the Court's power.

Secondly, one of the most precious parts of the Constitution, its very keystone, is Article V involving amendment. It is that article

that makes operational the principle of popular sovereignty that we, the people, rule in this country.

Chairman HATCH. Well, thank you. My time is up.

Senator Durbin, we will turn to you.

Senator DURBIN. Thank you, Mr. Chairman. Mr. Chairman, the reason we are holding this hearing today is because so many veterans are in Washington, and that is an important reason. And I don't think it is unreasonably for Mr. Korb or others to raise veterans issues while our veterans have gathered here.

I oppose this amendment. When I meet with my veterans, some of them will say, Senator, we disagree with you on that. That is fair. That is what our system of Government is all about. But those of us who have raised other veterans issues hope that our veterans friends won't stop the conversation with this amendment.

I have yet to find a single veterans group come into my office and say, listen, we are just doing fine in funding veterans medical care, we have really done a great job, thank you very much, Senator—not a single one. Everyone comes in and says this isn't working, you have got to do more, you promised you would do more when we promised we would put our lives on the line.

So last night, when we had an amendment to put $2.7 billion back into veterans care and veterans hospitals, and paid for it by cutting the tax break for the wealthiest people in America from $140,000 a year to $112,000 a year so that money could go for veterans, it was defeated.

I hope that you will take a look at the roll call, and the Senators who come in to talk to you about how much they love the flag amendment—ask them why they voted against you last night. That is a reasonable request. You want to put me on the spot on this amendment? Fine. Put them on the spot for not voting for you when it comes to veterans health care. That is not unreasonable, and I think that is what Mr. Korb is saying.

There have been plenty of opportunities for those who say they love veterans and their issues to stand up for you, and time and time again they have not done it and they didn't do it last night.

And I will add one to your list, Mr. Korb. I passed the reserve security amendment on the floor of the Senate, which said that when it came to Guard and Reserve who are Federal employees, when they are activated—and now we know those activations are going for a longer and longer period of time—the Federal Government will make good on their salaries so that they won't face a financial hardship.

State and local governments and private businesses do that across America. The Federal Government does not. Ten percent of the Guard and Reserve are Federal employees. They are now over in Iraq and Afghanistan and all around the world, and many of them suffering serious economic hardship. It sounds like a reasonable amendment. Who could vote against that, that the Federal Government would stand behind activated Guard and Reserve?

I passed it on the floor 96 to 3. Pretty good. Then it got in the conference Committee and, with one exception, was defeated on a partisan roll call. They stripped it out of the bill and that protection is not there today. Can I ask you to please add to the veterans agenda, Guard and Reserve who are serving who are Federal Gov-

ernment employees? I don't think these are unreasonable issues, since the veterans are in town and care about the flag amendment, that they also care about other things. I hope they do.

I think frankly, too, to argue that the statute and the constitutional amendment are basically the same thing is just plain wrong. Let me tell you, I hope that I have developed some skill at writing legislation. But when it gets right down to it, I think the bottom line is we make mistakes. We pass statutes that need to be changed, and that is the way it should be. We should change them to make them right.

But when you put the language in the Constitution of the United States, it really reaches a different level. This isn't just another law. It is the highest law of the land, and we ought to take care and make certain that we do it as the last possible resort.

I would like maybe to ask Professor Parker or those who would like to comment on it—Professor, we have a statute which says that—and this is Title IV, Chapter 1, section 8—"The flag should never have placed upon it, nor on any part of it, nor attached to it, any mark, insignia, letter, word, figure, design, picture or drawing of any nature."

Are you familiar with that, Mr. Parker?

Mr. PARKER. Is that part of the flag code?

Senator DURBIN. Yes.

Mr. PARKER. It is much, much broader than the Flag Protection Act of 1989 that Senator Feinstein was discussing earlier.

Senator DURBIN. It certainly is.

Mr. PARKER. I agree with Mr. Bryant that the Act passed in the Senate, 91 to 9, in 1989 presents no problem. If the law you are describing carried with it criminal penalties, then I think there would be constitutional issues, although I haven't studied the precise language.

Senator DURBIN. Well, here is what I am trying to get to. We have put fairly general language in our statutes and even in this proposed constitutional amendment about what we are trying to do. Our statute said, "knowingly mutilate, deface, physically defile, burn, maintain on the floor or ground, or tramples upon." That was in the statute.

Mr. PARKER. Right.

Senator DURBIN. Now, the words "mutilate, deface, physically defile" are up for some interpretation. The flag code said it would include, as I have just read, "mark, insignia, letter, word, figure, design, picture, or drawing of any nature."

Here is the point I am trying to get to. If I take a flag and I spray-paint on that flag "death to America," have I defiled that flag?

Mr. PARKER. Under the Flag Protection Act of 1989?

Senator DURBIN. Just your opinion.

Mr. PARKER. I think it is certainly possible, yes.

Senator DURBIN. Now, let me ask you this question, if I might. If I take the spray paint and instead of putting "death to America," I put "God bless America," is that defiling the flag?

Mr. PARKER. Sure, although, you know, as—Senator, I am sorry. I don't know if you are a lawyer or not. You must be; you are on the Committee.

Senator DURBIN. Not necessarily every member is a lawyer. I happen to be a recovering one.

Mr. PARKER. So then as you know all too well, what lawyers is do is work with the ambiguity of words in the laws.

Senator DURBIN. I am trying to take this to a point, and you are consistent. If I spray-paint "death to America," it defiles the flag. If I spray-paint "God bless America," it defiles the flag. What if I spray-paint my name on the flag?

Mr. PARKER. Again, I was going to point out that in criminal law the intent is always important, as you know. The mens rea requirement is virtually considered essential to criminal law. So you would look at the intent, as we do under any criminal law.

Senator DURBIN. But isn't it a fact that is where the Supreme Court said we have got a problem here, trying to figure out what the intent in the mind was of the person?

Mr. PARKER. But then the whole criminal law would be—

Senator DURBIN. Well, let me tell you how far this goes. If you raise a question of whether my spray-painting my name on the American flag is defiling the flag, we have a photo here of the President of the United States signing his name to a flag. Do I think he defiled the flag? No, I don't. But, by definition, now we have got to take this to a prosecutor.

Do you see how, when we have to delve into the mind, how far you are going and what you mean as to whether we are defiling the flag, we start getting into questions of interpretation here? And my question to you and to all the panel is do you really want to put this in the Constitution? Do you want to use words in the Constitution that are going to lead us into all of these questions?

There are many patriotic people that are sitting in this audience wearing neckties made out of American flags, some wearing sweaters with American flags. I think you are just as patriotic as the next person, maybe more so. But is that defiling it to use it in a commercial way?

Mr. PARKER. It all would depend, as in any criminal law, on the intent. In the Act of 1989, the intent requirement was "knowingly." When someone does x, y or z vis-a-vis a flag, is he or she knowingly mutilating it or defacing it, or does he or she do it with a radically different intent? That is just what law is all about. There is no avoiding that.

Senator DURBIN. Well, I understand that, but the point I am trying to make to you is people think this is absolutely cut and dried; this is so easy. It isn't. There are areas here which are very difficult, and that is why many of us have some reluctance to say let's change the Bill of Rights, let's put an exception in the Bill of Rights, and we think that we can take a roller to this Rembrandt and come up with a much more beautiful painting. I am not one of them.

I would just say, in closing, Mr. Chairman—and I thank you for this—it is painful as an American sometimes to stand up for the rights of minorities and the right of dissent. They say things and do things which I despise. Sadly, that is one of the responsibilities of citizenship in this country to let people say things which we despise and know that they have the freedom to say them, realizing that we have enough strength in our values and our country to

withstand any such personal assault on what we consider to be the values of our country. I think that is what is at stake here.

Thank you.

Chairman HATCH. Well, thank you, Senator.

I just want to say to everybody here that there are lots of speeches that are outlawed by the law. This is a very important issue and there are two good sides to this issue. Now, I think one is far better than the other, no question about it, but there are legitimate arguments on both sides.

The vast majority of the American people would like to see this flag amendment passed. And it is a very simple thing. It just gives Congress the right to do something about it, if Congress so chooses, and it gives the American people the right to pick who the Congress happens to be at the time. It seems to me that is pretty democratic.

Naturally, as the author of the amendment, I am going to challenge you folks who want the amendment to get out there and work for it. We have always had over 60 votes for this amendment in the Senate, but we need 67. We have always lost by 2, 3 or 4 votes. We have a basically different Senate right now than we did the last time we tried to pass this amendment.

I, for one, hope that you will really get there and really work very, very hard and get this amendment passed. Then I think Professor May, Mr. Korb and others who are opponents, Senator Durbin and others, can do the democratically politically right thing that they think is right and fight against a statute that may be passed or may not be passed. I think that statute would go through the House like blazes. In the Senate, it probably would require 60 votes.

So it is not going to be an easy thing even if we pass this amendment. However, I think we would have the 60 votes. I think that is what the fear is, is that we will pass this amendment that gives the Congress the right, if it so chooses, to protect the flag, which was protected for almost 200 years before the *Johnson* case and the *Eichman* case and changed by the simple vote of five Justices on the Supreme Court.

The fact of the matter is that the people ought to have a say on this, and I think one of the greatest debates that will ever occur will be if this amendment will pass the Senate and the House and be submitted to the States. Everybody in this country will be able to hear the persuasive arguments on both sides and make up their own minds.

I am not quite sure what would happen. I believe 38 States would ratify this amendment within a year. But I could be wrong. I don't think so, but I could be wrong. But why not give the American people a chance to say it, rather than five Justices on the Supreme Court?

Somebody has brought up the marriage problem. Well, we had 4 justices, 4 to 3, in Massachusetts, determining under the Full Faith and Credit Clause how marriage should be recognized in all 50 States. Now, some think that we might be able to uphold and maintain the Defense of Marriage Act, which was adopted by at least 38 States—I believe 39 States. But there is a real question constitutionally whether that would be upheld under the Full Faith

and Credit Clause. Well, the fact of the matter is that we are going to have to face up to that problem as to what we do about that. But four activist judges up on the Massachusetts Supreme Court are going to impose their will upon every State in the Union to recognize Massachusetts same-sex marriages, whether the people want to do that or not.

These are important issues. I agree with Professor Parker that it shouldn't be five Justices on the Supreme court or a split decision on the court in Massachusetts determining what everybody has to adhere to in every State of the Union. That ought to be battled out and there ought to be some way that the American people can make a decision on this themselves so that there won't be the tremendous dislocation of social justice in our society that we have had since *Roe* v. *Wade* came down on a 7 to 2 decision, as I recall.

Now, I don't like judicial activism whether it is from the left or from the right. In fact, it is particularly reprehensible to me when it comes from the right because I think they ought to know better, but it is wrong either way. For those who argue that we are going to infringe on the First Amendment when, in fact, five Justices have set the tone for the whole country, rather than the American people—I think that is one of the most specious arguments I have ever heard.

Well, it is an important amendment. I personally appreciate all of you appearing. I respect the right to disagree here, and we have had some eloquence on the part of those who are opposed, as well as eloquence on the part of those who are in favor. I am just asking all of you as the sponsor of the amendment to get out there. Let's hustle and let's get this done this year, and then we won't have to have another one of these hearings, except for the statute. Then we can really have a democratic process to determine whether we can pass that statute.

I would put the statement of U.S. Senator John Cornyn, from Texas, into the record immediately following the statement of Senator Durbin at the front of the hearing.

With that, I want to thank you all for being here. I appreciate the efforts you have put in, and respect each and every one of you. For those who are on my side, let's go to work.

With that, we will adjourn until further notice.

[Whereupon, at 12:45 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Written Follow-Up Questions to Witnesses from Senator Patrick Leahy
Hearing of the Senate Committee on the Judiciary
"Letting the People Decide: The Constitutional Amendment Authorizing Congress To Prohibit Physical Desecration of the Flag of the United States"
March 10, 2004

QUESTIONS FOR JOHN ANDRETTI

1. Do you agree that the flag represents *all* Americans and that the flag should not be used for partisan political purposes?

There's no doubt that the flag of the United States is recognized globally as the symbol of the nation and its people. So, yes it does represent all Americans. But more important, it represents the things that have given the nation greatness, like the Declaration of Independence and the Constitution. Both documents give definition and identity to being an American, and the symbol attached to that identity is the flag. I fail to see how the flag could be used for partisan purposes, since most elected officials – Democrats, Republicans and others – are routinely photographed with Old Glory proudly displayed over their right shoulder. No one person or political party can say it's his or her flag. It belongs to all of us and all those who appreciate what it stands for, I think, should do their utmost to see that it is treated right. To do that, I don't believe is inappropriate, partisan or political.

2. Over the years, Senator Hatch and the Citizens Flag Alliance have brought a number of celebrities to testify on behalf of this and other versions of the flag amendment. In past years, we heard from Jon Schneider, an actor from the television program "The Dukes of Hazard" and Tommy Lasorda, a former major league baseball manager, among others. How did you come to testify before the Committee? Have you been active on this issue in the past?

As you probably know, I have something of a connection to Indianapolis. It is the center for both racing and the American Legion, where their national headquarters is located. The American Legion asked me if I would testify in support of the flag amendment. I agreed. From there, the Judiciary Committee formally invited me and, as I told reporters, I was there because I believe in the amendment and have a passion for our flag. Until that time, I was not active in a large way. But now that I'm aware of the Supreme Court's decision on flag desecration I am even more for the amendment. I have to say that I was a bit embarrassed that such a significant matter was taken for granted by me. I thought that the law already, or better yet, still protected the flag.

3. As someone knowledgeable about racing and cars and in a sport so popular across America, I wonder whether you are as concerned as I with reports that gasoline prices are at an all time high and likely to get higher. I worry that Americans are going to be burdened this summer with gas prices of $2.50 or even $3.00 per gallon in some parts of the country. What do you think about this issue, and what do you suggest we do to correct the problem? Would you support use of our strategic petroleum reserve? How would you suggest putting pressure on OPEC?

   In all due respect, this question focuses on an issue other than the flag amendment. Although there are many valid concerns among Americans, I am not sure where the connection is between the price of gas and protection of the flag. However, I am prepared to discuss the proposed amendment, to move it from Capitol Hill into the hands of the people for them to decide. The flag is of a nation, our nation, which makes it our flag and it is everything that the United States symbolizes. I would like to think this is the very thought that drives the millions of people who want to see the American flag protected. It certainly is for me.

Follow-Up Questions to Answers Submitted by John Andretti
from Senator Patrick Leahy
Hearing of the Senate Committee on the Judiciary
"Letting the People Decide: The Constitutional Amendment Authorizing Congress To Prohibit Physical Desecration of the Flag of the United States"

1. I do not believe you provided a complete answer as to how you came to testify before the Committee and to become involved on this issue. Please provide a more responsive answer to my original question: How did you come to testify before the Committee?

   After review of my initial response, I do believe that the question was answered appropriately and correctly. The American Legion inquired about my availability and interest to testify in support of protecting the flag. Information was provided and I agreed to testify. I again would restate what an honor and privilege it was to testify in support of the flag amendment but it was really just that simple.

2. Who helped you prepare your testimony and your answers to the written follow up questions? What help did they provide?

   In preparation of my testimony, I spoke with the Citizens Flag Alliance about the issue, my feelings for the flag, the flag's importance to me and my family. I also researched some additional information from other sources for accuracy. I then worked with the CFA on drafts for my approval and presentation to the Judiciary. The same is true for the follow up answers. I would assume my assistance, Senator Leahy, was similar to the data gathering and fact finding that you utilize in preparation of your opening remarks including your visual aides.

3. You refused to answer the third question I posed. Please respond to this question, which is reprinted below:

   > As someone knowledgeable about racing and cars and in a sport so popular across America, I wonder whether you are as concerned as I with reports that gasoline prices are at an all time high and likely to get higher. I worry that Americans are going to be burdened this summer with gas prices of $2.50 or even $3.00 per gallon in some parts of the country. What do you think about this issue, and what do you suggest we do to correct the problem? Would you support use of our strategic petroleum reserve? How would you suggest putting pressure on OPEC?

   My response does not reflect in any way that I am not as concerned as many Americans about many of the issues before the Senate today. However, in this forum, my response may only distract from the issue of the flag amendment. Therefore I am extending an invitation to Senator Leahy to contact me separately and would consider it a privilege to discuss or debate any of these concerns. I am also thrilled that Senator Leahy values my opinion to the extent of repeating the question. However, my voice may not be as strong on other issues as on the flag amendment simply because the majority of Americans want to protect the American Flag.

Written Follow-Up Questions to Witnesses from Senator Patrick Leahy
Hearing of the Senate Committee on the Judiciary
"Letting the People Decide: The Constitutional Amendment Authorizing Congress To Prohibit Physical Desecration of the Flag of the United States"
March 10, 2004

QUESTIONS FOR GENERAL BRADY

1. Do you agree that the flag represents *all* Americans and that the flag should not be used for partisan political purposes?

I will answer these questions but fail to see what they have to do with my testimony on the merits of our cause: Is flag desecration "speech?; did the Supreme Court make a mistake?; do we have a responsibility to correct the errors of the Court?; why do Members of Congress fear the democratic process and deny the people the right to decide the flag issue?; why does the majority count only when it wears black robes and not working clothes?; etc. I was a bit shocked to hear Senators using the flag hearings, an issue they said they took seriously, for partisan purposes on veterans issues. Many veterans were upset over their insensitivity in this matter.

It is important to know and teach our children that the flag represents the Constitution of all the American people – it is the physical embodiment of the values embedded in our Constitution. An attack on our flag is in fact an attack on our Constitution. The most partisan use of the flag I can think of is burning it. I am sure by the tone of your question that you do not want the flag used for partisan political purposes – there is no more partisan use of the flag than its desecration. A vote for the flag amendment will go a long way to stop this partisan use. As for other partisan purposes, many will only be partisan depending on who defines it. I am not sure that a politician should not be allowed to campaign in the presence of his flag, but flagrant abuse of the flag for political purpose should be condemned, e.g. flag desecration.

2. Did you understand why families of victims of the 9/11 attacks and firefighters were offended by the Bush campaign's use of a flag-draped coffin of a firefighter in its initial campaign ads?

I did not see it, but if the ad violated the flag code or was done in poor taste, I do understand, but if those "offended" are partisan or represent another person looking to be a victim, no. There can be not better motivator against terrorism than flag draped coffins and we need constant reminders of that threat.

3. In your opinion, what is the most pressing issue facing our veterans? As a Nation, do you think we are fully meeting those needs?

We have never fully met the needs of our veterans (as we have not fully met other needs of our people) – perhaps because there are fewer and fewer veterans in Congress, but I think we are getting better and the Congress is trying. Again, what has this to do with the right of the people to protect their flag? The most pressing issue of veterans and all of us is terrorism and what it does to our security and the resources required for all our needs.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 8, 2004

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your letter of March 19, 2004, with written questions for Assistant Attorney General Daniel J. Bryant of the Department's Office of Legal Policy, arising from the Committee's March 10, 2004, hearing, "Letting the People Decide: The Constitutional Amendment Authorizing Congress to Prohibit Physical Desecration of the Flag of the United States." Please find enclosed the responses of Mr. Bryant.

Please do not hesitate to contact us if we may be of additional assistance. The Office of Management and Budget has advised us that, from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

William E. Moschella
Assistant Attorney General

Enclosure

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

Responses of the Honorable Daniel Bryant,
Assistant Attorney General, Office of Legal Policy, Department of Justice
to Written Follow-Up Questions from Senator Patrick Leahy
Hearing of the Senate Committee on the Judiciary
"Letting the People Decide: The Constitutional Amendment Authorizing Congress to Prohibit Physical Desecration of the Flag of the United States

1. **I have been closely following the Department's attempts to subpoena abortion records. At least one federal judge has now ruled that the records could not be introduced, forcing the Department to drop its effort to subpoena records from six Planned Parenthood affiliated [sic]. Another federal judge said that the invasion would result in evidence that would provide "little, if any, probative value."**

   (a) What benefit would result if the government is allowed to destroy medical privacy and undermine the American people's faith in the confidentiality of their personal medical records?

   (b) How does the Department justify its demand for these records, a demand that is unprecedented as a governmental intrusion, especially given that the women whose records are sought are in no way a party to this litigation.

1(a), (b). Planned Parenthood of America, the National Abortion Federation, and several physicians in various United States district courts have challenged the constitutionality of the Partial Birth Abortion Ban Act of 2003. Central to the plaintiffs' case is their argument that the banned procedure is medically necessary to preserve a woman's health. In an apparent effort to provide a more concrete basis for this assertion, the plaintiffs (or doctors affiliated with them) submitted declarations in which they offer their own clinical experiences - instances in which they contend, on the basis of their own personal knowledge and references to specific (though unnamed) patients, that the banned procedure was appropriate for use in their practice. Because the Department of Justice has a duty to defend the constitutionality of Acts of Congress, and because the plaintiffs themselves put their own clinical experiences at issue as the centerpiece of their case, the Department subpoenaed those medical records, as the best available documentation of the plaintiffs' claimed clinical experience, in order to test their assertions that the banned procedure is medically necessary to preserve a woman's health. To ensure patient confidentiality, however, the Department suggested and the courts entered protective orders requiring that all patient-identifying information be redacted from the subpoenaed records, and that all such records, even in redacted form, be treated confidentially and filed under seal.

   (c) Do you disagree with Judge Hamilton's opinion that the medical records of the Planned Parenthood affiliates are protected by a constitutional right to informational privacy?

1(c). The Department disagrees with Judge Hamilton's opinion that the redacted medical records of the Planned Parenthood affiliates are protected by a constitutional right to informational

privacy. The right to medical privacy is not absolute, but is a qualified right subject to a balancing test, as held, for example, in Greenville Women's Clinic v. S.C. Dep't of Health, 317 F.3d 357, 367-68 (4th Cir. 2002); Doe v. S.E. Pa. Transp. Auth., 72 F.3d 1133, 1137-40 (3d Cir. 1995); In re American Tobacco, 880 F.2d 1520, 1530-31 (2d Cir. 1989); Gen. Motors v. OSHA, 636 F.2d 163, 164-66 (6th Cir. 1980). In accordance with these precedents, the Department believes that when the subpoenaed medical records are redacted to remove all information that might reveal the identity of the patient, then there is no infringement on any qualified constitutional right to medical privacy.

(d) In one of the cases, *National Abortion Federation v. Ashcroft*, the court found unpersuasive the government's argument that, "federal law governs this case and because federal common law does not recognize a physician-patient privilege, the medical records... must be disclosed subject to the subpoena." Nat'l Abortion Fed'n v. Ashcroft, No. 04 C 55, slip op. at 5 (N.D. Ill. Feb. 5, 2004). Does the Department stand by its argument that there is no physician-patient privilege?

1(d). The Department agrees with the conclusion of the United States Supreme Court that "[t]he physician-patient evidentiary privilege is unknown to the common law." Whalen v. Roe, 429 U.S. 589, 602 n.28 (1977). Every United States Court of Appeals that has considered the matter is in agreement with that position. Your question quotes an opposing view of the district court in National Abortion Federation v. Ashcroft. The Department appealed that holding to the United States Court of Appeals for the Seventh Circuit, which unanimously reversed the district court on that issue.

The above answers are discussed in greater detail in the Department's opening and reply briefs to the United States Court of Appeals in National Abortion Federation v. Ashcroft. Those briefs are available online at the court's website (www.ca7.uscourts.gov/briefs.htm) by entering the case's docket number (04-1379).

2. This Committee and the Senate as a whole have taken strong steps to protect our children from pornography, and we will continue to do everything possible to combat child pornography. As a former prosecutor, I want to see that law enforcement has effective tools for the identification and prosecution of the individuals who make, use, and traffic in this material. I am concerned that the Department might not be using those tools sufficiently.

(a) In 1999, Congress created a "duty to report" requirement mandating that Internet Service Providers register with a Cyber Tip Line to be used to report child pornography transmitted through an ISP. Although only a tiny percentage of ISPs has signed up for this tip line and despite the fact that this requirement is more than four years old, the Department informed me in December of 2003 that no regulations have been issued under this requirement. Why have final regulations taken more than four years to be implemented, and when will rules be issued?

The Department respectfully refers you to its response to your question number 4 posed to Deputy Assistant Attorney General John Malcolm following the United States Senate Judiciary Committee hearing on September 9, 2003, regarding "Pornography, Technology and Process: Problems and Solutions on Peer-to-Peer Networks," as well as the Department's response to your letter dated October 10, 2003, to the Attorney General, and the Department's response to your letter dated March 8, 2004, to the Attorney General.

As indicated in those responses, the Attorney General is authorized to designate the law enforcement agencies to which reports may be forwarded by the National Center for Missing and Exploited Children ("NCMEC"), but the statute does not authorize implementing regulations to impose duties on internet service providers ("ISPs"). *See* 42 U.S.C. § 13032(b)(2). Accordingly, the regulations can suggest, but not require, that ISPs report suspected violations in specific ways. The vast majority of large ISPs with whom the Department has consulted have indicated a desire to implement reporting in the manner most useful to NCMEC and the law enforcement community. The Department has been working with NCMEC, the Federal Bureau of Investigation, the Department of Homeland Security's Bureau of Immigration and Customs Enforcement, the United States Secret Service, the United States Postal Inspection Service, and the major ISPs to achieve consensus on the reporting protocols. This is a time-consuming process, particularly because of the technical constraints of both the individual ISPs and NCMEC that necessarily dictate the limits of any reporting protocol. The Attorney General published the initial designation of four law enforcement agencies to which NCMEC should forward reports on November 4, 2003. *See* 28 C.F.R. 81.11 *et seq*. As the Department gathers a consensus on a more comprehensive set of guidelines both for IPSs reporting to NCMEC and for NCMEC's reports to law enforcement, the Department will publish these operating guidelines. The Department appreciates the support of the ISPs in this endeavor and expects to be able to develop a consensus protocol.

(b) In October of 2003, I wrote to the Attorney General again to ask whether under existing law, the Department believed peer-to-peer networks would be required to register with the Cyber Tip Line. Five months have passed without a response. Does the Department believe that this "duty to report" requirement applies to peer-to-peer networks.

The Department responded to your October 10, 2003, letter on April 8, 2004. A copy of that letter is attached. In addition, the Department addressed this question in its response to your question number 3 posed to Deputy Assistant Attorney General John Malcolm following the United States Senate Judiciary Committee hearing on September 9, 2003, regarding "Pornography, Technology and Process: Problems and Solutions on Peer-to-Peer Networks," as well as in its response to your letter dated March 8, 2004, to the Attorney General.

As indicated in those responses, the term "network" in the P2P context generally does not connote a central authority with oversight over file sharing transactions, but rather simply means a series of individual computers sharing files with one another at any given moment. With respect to the manufacturers and distributors of software that allows file sharing, it is unclear whether those manufacturers and distributors have any specific knowledge of, involvement in, or control over this activity. They likely do not provide electronic communications services or

remote computing services, and, therefore, do not fall within the mandate of 42 U.S.C. § 13032. Moreover, even if P2P software were technologically capable of allowing its manufacturers to monitor the activities of their users, and even if the manufacturers qualified as providers of electronic communications services or remote computing services, 42 U.S.C. § 13032(e) specifically states that providers have no duty to monitor the content of their users' communications.

In that the "networks" in the P2P context generally consist of ordinary citizens trading files, those individuals also do not fall within the mandatory reporting statute. Nevertheless, citizens do report the presence of child pornography on the Internet to the National Center for Missing and Exploited Children's Cyber Tipline, though this is purely voluntary.

(c) I am concerned that the ability of Congress to address the issue of child pornography is being hampered by the Justice Department's unwillingness or inability to respond to questions in a timely manner. I am not the only Senator to have complained of long delays in receiving responses from this Justice Department. What steps is the Department taking to remedy this serious problem?

The Department apologizes for the delay in responding to your inquiries on the above-referenced matters and appreciates your frustration. In addition to your multiple letters on these topics, the Department received multiple letters from other Senators on these identical issues and therefore sought to develop a coordinated response. In addition, after responses were prepared, it became necessary to update the responses with new information, all of which resulted in the unfortunate delays in forwarding a response to you. Please be assured that the Department is fully willing and able to respond to your inquiries, and that any delay was inadvertently caused by our desire to provide the most accurate and up-to-date information available.

3. **With regard to a constitutional amendment on gay marriage, I asked you at the hearing which language the Administration supports, but I did not receive a clear response. Does the Administration support the language of the proposed amendment that has been introduced in the House by Representative Musgrave, H.J. Res. 56, and in the Senate by Senator Allard, S.J. Res. [30]? If not, what specific language does the Administration propose be added to the Constitution of the United States?**

On February 4, 2004, the President called upon Congress "to promptly pass, and to send to the States for ratification, an amendment to our Constitution defining and protecting marriage as a union of man and woman as husband and wife. The amendment should fully protect marriage, while leaving the State legislatures free to make their own choices in defining legal arrangements other than marriage." The Administration strongly supported passage of S.J. Res. 40.

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 8, 2004

The Honorable Patrick J. Leahy
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Leahy:

This letter is in response to your letters of September 3, 2003, October 10, 2003, and March 8, 2004, to the Attorney General. In your letters, you asked for the views of the Department of Justice (the "Department") regarding whether 42 U.S.C. § 13032 (the "Statute") is applicable to Internet Peer-to-Peer (P2P) networks. You also reiterated your concern that the Department has not yet issued regulations implementing the Statute.

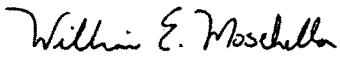
In response to the first issue, the term "network" in the P2P context generally does not connote a central authority with oversight over file sharing transactions, but rather, simply means a series of individual computers sharing files with one another at any given moment. As a result, it is unclear whether the distributors of the software that allows individuals to share files on their computers (such as KaZaA) have any specific knowledge of, involvement in, or control over this activity. So far as the Department is aware, these software distributors do not provide "electronic communications services" or "remote computing services" as those terms are statutorily defined, *see* 18 U.S.C. §§ 2510(15), 2711(2), and, therefore, do not fall within the mandate of the Statute. Moreover, even if P2P software were technologically capable of allowing its manufacturers to monitor the activities of their users, and even if the manufacturers qualified as providers of electronic communications services or remote computing services, the Statute specifically states that providers have no duty to monitor the content of their users' communications. *See* 42 U.S.C. § 13032(e).

In that the "networks" in the P2P context generally consist of ordinary citizens trading files, those individuals also do not fall within the mandatory reporting statute. Nevertheless, citizens do report the presence of child pornography on the Internet to the National Center for Missing and Exploited Children's ("NCMEC's") Cyber Tipline, though this is purely voluntary.

In regard to the second issue that you raise, the Attorney General is authorized to designate the law enforcement agencies to which reports may be forwarded by NCMEC, but the statute does not authorize implementing regulations to impose duties on Internet service providers ("ISPs"). *See* 42 U.S.C. § 13032(b)(2). Accordingly, the regulations can suggest, but not require, that ISPs report suspected violations in specific ways. The vast majority of large ISPs with whom the Department has consulted have indicated a desire to implement reporting in the manner most useful to NCMEC and the law enforcement community. The Department has been working with NCMEC, the Federal Bureau of Investigation, the Department of Homeland Security's Bureau of Immigration and Customs Enforcement, the United States Secret Service, the United States Postal Inspection Service, and the major ISPs to achieve consensus on the reporting protocols. This is a time-consuming process, particularly because of the technical constraints of both the individual ISPs and NCMEC, that necessarily dictate the limits of any reporting protocol. The Attorney General published the initial designation of four law enforcement agencies to which NCMEC should forward reports on November 4, 2003. *See* 28 C.F.R. 81.11 *et seq.* As the Department gathers a consensus on a more comprehensive set of guidelines both for IPSs reporting to NCMEC and for NCMEC's reports to law enforcement, the Department will publish these operating guidelines. The Department appreciates the support of the ISPs in this endeavor and expects to be able to develop a consensus protocol.

We trust that this information is helpful to you. Please feel free to call upon us if we may be of additional assistance.

Sincerely,



William E. Moschella
Assistant Attorney General

Written Follow-Up Questions to Witnesses from Senator Patrick Leahy
Hearing of the Senate Committee on the Judiciary
"Letting the People Decide: The Constitutional Amendment Authorizing Congress To Prohibit Physical Desecration of the Flag of the United States"
March 10, 2004

QUESTIONS FOR LAWRENCE KORB

1. *In your view, what is the most pressing issue facing our veterans? Is the Administration meeting those needs?*

The most pressing need for our veterans is to provide them much better health care. The administration's FY2005 budget falls at least $2.6 billion short of meeting their goal. As Edward S. Banas, Sr, VFW Commander in Chief, points out,

"This deplorable budget will do nothing to alleviate the many thousands of veterans who are waiting six months or more for basic health care appointments with VA. Instead, the budget seeks to drive veterans from the system by realigning funding, charging enrollment fees for access and more than doubling the prescription drug co-payment... What the administration is proposing for veterans is a shell game. Veterans are being asked to pay for their own health care to make up for shortages in the budget... To ask this nation's veterans to subsidize their health care is outrageous. They have already paid for their health care with their sweat and with their blood. This budget indefensibly will not meet the increasing health care needs of our veterans, nor will it lessen the many months they wait for disability benefits."[1]

2. *You described in your testimony the severe shortcomings in the President's budget request for FY05. Can you describe these problems in greater detail and comment on how the President's funding request compares to the recent past? For example, how does it compare to the past two years?*

The President's budget for FY2005 falls about $2.6 billion short of what is necessary to fully meet the demand for providing quality health care for our veterans. The FY2005 budget does not even maintain current services. To make up for the shortages in this budget, veterans are being asked to pay more and more for their health care in the form of higher enrollment fees and higher drug co-payments. These first-party collections in FY2005 will amount to $1.34 billion compared to $685 million in FY2003 and $792 million in FY2004.

3. *I support full concurrent receipt. I believe that military retirees who have earned their retirement pay and disability benefits should receive the full benefit of both. Why do you think the Administration opposes concurrent receipt so strongly? Why has it only accepted piecemeal changes to the policy?*

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[1] http://www.vfw.org/index.cfm?fa=news.newsDtl&did=1576

The administration opposes concurrent receipt because it would raise the amount of money that must be allocated to the military personnel account. Up to now, the Department of Veteran's Affairs has in effect subsidized the Pentagon budget because the Department of Defense could deduct the amount that a retiree with a disability receives from the VA from his or her military pension. Paying the full cost of the disabled retirees' pension out of the DoD budget would force the Pentagon to reduce expenditures in other areas, for example, ballistic missile defense.

4. *You and I both noted the almost 500% increase in out of pocket expenses for veterans since 2001. What do you believe is the direct cause of this increase?*

The direct cause of the nearly 500% increase in out-of-pocket expenses for veterans is the Bush administration's tax cuts. Primarily because of the three large tax cuts enacted since 2001, the deficit has ballooned to unprecedented levels. Because the VA's health budget is part of the federal budget's controllable or discretionary expenditures, it became a target for cuts. Increasing the out-of-pocket expenditures for veterans using the VA's health care system was one way to reduce overall federal outlays.

5. *Statistics compiled by the Citizens' Flag Alliance show that there have been just under 45 instances of flag desecration over the past five years, or less than nine instances per year throughout the United States. The group's data shows only 28 instances since September 11, 2001. In my statement, I mentioned the intense rise in popularity of the American flag after the horrific attacks of that day. Doesn't this show that social norms are adequate to deal with the "problem" that the Citizens Flag Alliance is trying to address? Should we amend the Constitution to address the occasional acts of people Colin Powell referred to as "miscreants" who we abhor but who, in Powell's words, "do no damage to our system of freedom"?*

Colin Powell, the current Secretary of State and former Chairman of the Joint Chiefs of Staff, is absolutely correct that we do not need a constitutional amendment to deal with the very small amount of "miscreants" who do no damage to our system of freedom by desecrating the flag. As the statistics compiled by the Citizens' Flag Alliance show, there have been less than nine instances of flag desecration per year over the past five years, hardly a large enough number to justify amending the Constitution.

Written Follow-Up Questions to Witnesses from Senator Patrick Leahy
Hearing of the Senate Committee on the Judiciary
"Letting the People Decide: The Constitutional Amendment Authorizing Congress To Prohibit Physical Desecration of the Flag of the United States"
March 10, 2004

QUESTIONS FOR PROFESSOR GARY MAY

1. Over 60 years ago, Supreme Court Justice Robert Jackson eloquently stated: "Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." Isn't flag desecration such a test of the strength of freedom in our country?

Freedom of expression, even on matters that have great emotional or other substantive importance must be preserved. To the extent that the flag represents such freedoms, it seems to be misguided to encroach on and unreasonably limit this freedom to preserve the symbol of the freedom. No one advocates flag desecration, but amending the Constitution to "protect" the flag—the symbol of the "existing order"—erodes the very freedoms lauded in the existing order.

2. Let us assume for the moment that the majority of Americans support this amendment. In his written submission to the Committee, Senator Bob Kerrey, recipient of the Congressional Medal of Honor, stated his belief that "the hard truth is that sometimes the opinion of the majority is wrong, and no matter how uncomfortable we become, creative democracy cannot survive without that lone patriot who is willing to stand, disagree, and tell us what we do not want to hear." Do you agree with Senator Kerrey's sentiment?

The image of Senator Kerrey's "lone patriot" standing to disagree is an image that I think we should all embrace. Sometimes the opinion of the majority is wrong. If we suppress the ability of "lone patriots" to disagree with the majority opinion, we have lost a major component of our identity as Americans. And, we will have lost what those of us who served this country in combat have fought to preserve.

The Citizen's Flag Alliance testimony asserts that the majority should define patriotism and that laws should make the unpatriotic act patriotic. This is chilling and very disturbing to me. In the CFAs world, the "lone patriot" who disagrees with the majority and tells us what we don't want to hear is a criminal to be silenced. This is not the world or the way of life that my family and I and Veterans Defending the Bill of Rights members fought to implement.

3. While I understand that people can and do disagree about this issue, what if, as supporters of this Amendment claim, the majority of veterans *do* support the flag desecration amendment? Should we then pass it?

I would argue that the very principle behind the inclusion of the First Amendment in our Constitution was to protect the voices, views, beliefs and expression of the minority against the oppressive will and mob-mentality of the majority. It sets a very dangerous precedent to argue, as proponents of this amendment do, that certain forms of speech should be restricted because the majority of veterans are offended and/or disagree with a particular form of speech. Proponents argue that Senators "should not hold this amendment up," they should send it to the states and let the majority decide. They argue that this is why the amendment process exists as it does. I would argue that Senators are not simply conduits or rubber stamps put in power to bend to the will of the majority whenever the majority finds itself offended. Members of the Senate also have a duty to uphold and protect the integrity of the Constitution of the United States and the constitutional rights of all citizens, including those with whom we disagree. The Senate plays a unique role in this process for a reason. We look to the Senate as a place of reasoned thinking, certainly a part of the political machinery of this country, but somewhat buffered, we hope, from the political whims of its citizenry.

I do not think it would be wise to pass this proposal to amend the Constitution. It has been my experience in talking with veterans that they all express support for the flag. But, when the discussion turns to the cost of "protecting" the flag, they are of a different mind. The distinction needs to be made between we veterans who oppose the proposal to amend the Constitution and those few people who might actually advocate desecrating the flag. Neither Veterans Defending the Bill of Rights members nor other veterans I know would ever advocate desecrating the flag, but we do think that the right to dissent, in forms that are not harmful to others, MUST be preserved, regardless of characterizations of majority opinion.

4. What *should* we do for veterans?

There are numerous substantive needs of veterans and families that are going unmet or are being inadequately met. Funding for Department of Veterans Affairs medical care needs to be increased. Additional flexibility is needed to permit veterans in areas that are not served by DVA facilities to obtain needed medical care in their local communities. We need to understand more and do more to address the family consequences of military service and the changing circumstances of military service. The large numbers of National Guardsmen and Reservists currently serving on active duty present unique challenges for their families and communities. Compensation and benefits for service women/men need to be increased. In the private sector, employers need to be made aware of their obligation to their employees who have been called to duty upon their return.

There are countless tangible things we can—and should—do if we wish to convey a sincere, credible message of caring about veterans and their sacrifices. Amending the Constitution is not among them. Restricting freedoms that these men/women fought, bled and died to preserve in the name of honoring them or respecting their wishes is a cruel hoax. Let's not muffle the next "lone patriot" who tells us what we don't want to hear but need to hear.

March 26, 2004

The Honorable Orrin Hatch
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Hatch:

Thank you for your letter of March 19 enclosing questions posed to me by Senator Leahy. I trust my response does not come too late. I received your letter only today.

I'll answer Sentator Leahy's questions in order:

(1)(a) In the past, there has been a good deal of discussion of one statute that Congress not only might enact, but actually has enacted -- overwhelmingly -- to protect the flag against physical desecration. It is the Flag Protection Act of 1989. Of course, pursuant to a constitutional grant of authority it may, as it chooses, enact legislation pressing toward the limits of the authority given it or stopping well short of such limits -- or it may pass no legislation at all. Within this grant of authority, like every other, Congress has very broad discretion. It may not, however, do at least two sorts of things: First, it may not enact a statute that it is not authorized to enact by the Constitution. Thus, under the proposed amendment, it may not, for example, outlaw words spoken with respect to the flag; its power reaches only "physical" desecration. Second, it may not prohibit acts of physical desecration in a way that violates other constitutional provisions with which the proposed amendment must be accommodated. Thus it may not discriminate among such acts in terms of the particular group involved or in terms of the particular point of view expressed by them or motivating them. Because the purpose of the proposed amendment is to restore the historic meaning of the First Amendment (before five Justices "amended" it in Johnson and Eichman) it follows that the hypothetical statute you suggest would be invalid.

(1)(b) It also follows that, under the proposed amendment, Congress could prohibit conspiracies and attempts only to the extent that it can do so generally and already to effectuate powers granted to it under the Constitution.

(2) Yes I do. The proposed amendment authorizes Congress, and only Congress, to enact legislation.

(3)(a) Under the Flag Protection Act of 1989, the prosecution would have to prove beyond a reasonable doubt that what a defendant burned was in fact a "flag of the United States" and that the defendant knew that is what it was. A jury would decide issues of fact regarding the object that was burned and the defendant's state of mind. Under any law of any sort about anything, such issues of fact may and do arise. (Think, for instance, of laws prohibiting the destruction of currency.) We generally trust our system of

criminal justice, and especially our juries backed up by our trial and appellate courts, to make fair and wise decisions about such issues. The fact that such issues arise never counts as an argument that a law will have no "practical effect" or that, to avoid the normal run of case-by-case issues, we should have no law at all.

(3)(b) No, the proposed amendment would only allow Congress, if it chooses, to prohibit physical desecration of a "flag of the United States" -- not "any item intended to be perceived as a flag."

I hope these responses are of some assistance to the Committee.

Sincerely,

Richard D. Parker
Williams Professor of Law

SUBMISSIONS FOR THE RECORD

STATEMENT

of

DENNIS W. ARCHER

PRESIDENT, AMERICAN BAR ASSOCIATION

before the

Committee on the Judiciary

of the

UNITED STATES SENATE

on the subject of

A Constitutional Amendment

to Authorize Congress to Prohibit Flag Desecration

March 10, 2004

The American Bar Association appreciates this opportunity to express its opposition to S.J.Res. 4, proposing a constitutional amendment authorizing Congress to prohibit physical desecration of the flag, and requests that this statement be made part of the March 10, 2004, hearing record of the Senate Judiciary Committee.

The proposed constitutional amendment seeks to reverse the Supreme Court's 1989 decision in Texas v. Johnson, 491 U.S. 397, and authorize Congress to criminalize peaceful acts of political expression. The Senate has considered and rejected similar constitutional amendments on several occasions over the past 14 years. We urge you again to resist the emotional appeals of those who argue that protecting the flag from desecration through adoption of a constitutional amendment is the only patriotic course of action. The proposed amendment, which would curtail the protection of individual liberties afforded by the Bill of Rights (a document that has not been changed in its 213 years of existence), should be rejected as bad constitutional policy and bad law. At best, the proposal is a diversion from the real issues facing the country; at worst, it marks a profound and unwelcome change in our society and culture by conveying the message that we fear, rather than cherish, our freedom of speech.

Advocates of the proposed amendment to ban flag desecration rightly remind us that the American flag serves as the preeminent symbol of our great Nation. It represents a uniting bond among our diverse population, and it symbolizes our unequivocal commitment to freedom and democracy. But we

must not forget that what we salute when we rise in its honor is not the bunting, but the ideals of the Constitution for which it stands -- including freedom of expression and the right to express dissenting views regarding Government actions through our writings, speech or other expressive conduct. In attempting to protect the flag against offensive but peaceful political expressions, this proposed amendment diminishes the very freedoms the flag represents.

The exceedingly rigid idea embodied in this proposed amendment -- that some object must be made so sacrosanct that it is reserved for only governmentally approved uses -- promotes the cloth used to make the symbol at the expense of the freedoms it represents. We celebrate the American flag as a symbol of freedom that is unparalleled throughout the world. It would be tragic to turn that symbol against freedom.

Rather than protecting patriotism, this amendment would dishonor it. The millions of men and women who have put themselves in harm's way in the service of our nation -- whether it be in the two World Wars, in the Persian Gulf during Operation Desert Storm, or in Iraq today -- did so to ensure that the rights guaranteed in the Constitution will be available to ourselves and our progeny and in the hope that the bedrock principles of democracy will take hold in other troubled parts of the world.

Amendment supporters argue that the Supreme Court abandoned history and the intent of the First Amendment and erred in Texas v. Johnson because it made no distinction between oral and written speech about the flag and disrespectful destruction of the flag. According to this line of reasoning,

expressions of disagreement that are akin to written expressions are protected by the First Amendment but disrespectful desecration is not. This assertion contradicts both American history and legal precedent. Since its founding, our Nation has thrived on the vigor of free speech and robust dissent not only through the spoken or written word, but through peaceful acts of political protest, however repugnant they may be to some. A band of patriots dumping tea into Boston Harbor, a single student standing before a tank in Tiananmen Square, an African-American woman refusing to give up her seat on a bus -- each conveyed a powerful message without requiring a single word. Indeed, political dissent has often most powerfully been expressed through peaceful expressions of protest. And, the strength of our constitutional republic is that the government may not prohibit such expressions simply because the majority finds the means of that expression offensive.

Former Supreme Court Justice Robert Jackson described this essential characteristic of the First Amendment's guarantee of freedom of speech in West Virginia State Board of Education v. Barnette, a flag salute case that dates back to 1943:

> [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

Those who support the proposed flag amendment try to minimize its corrosive effect on freedom of speech and expression by stating that it does not stifle political dissent because a multitude of other forms of expression are permitted and that restrictions on freedom of speech already exist and have not

jeopardized our democracy. Both arguments are specious. It is true that there are alternative forms of expression, but the First Amendment jealously guards the right to express our views about our government or laws *in the manner of our choice*, so long as that choice is through peaceful words or conduct; and it forbids the Government from requiring that "designated symbols be used to communicate only a limited set of messages."

Similarly, it is true that there are existing limitations on speech, but they serve a different purpose than what is proposed here. Limitations have been placed on speech that incites violence, induces illegal acts, causes harm to persons by defaming them, or aids the enemy in times of war. Indeed, offensive acts, including flag burning, committed for the purpose of inciting to riot or otherwise causing a breach of the peace or with the knowledge that there is an imminent danger that the offensive act will have that effect, is currently punishable. In fact, close to two-thirds of the 44 incidents of flag burning from 1989 to present noted on the Citizen's Flag Alliance website (www.cfa-inc.org/issues/issues.htm) involved criminal activity that was already punishable under existing law. In contrast, the proposed flag desecration amendment seeks to punish peaceful, symbolic protests that violate no laws: it would, for the first time in our Nation's history, restrict non-violent criticism of our government or its laws and symbols.

Finally, advocates of this amendment contend that the measure is needed to instill in our citizens a sense of respect for the flag and for what it represents. We respectfully disagree. Americans do not need a constitutional amendment to

compel patriotism. Our flag is a symbol of our cherished values, not a value unto itself. Respect for our flag resides in the hearts and minds of the American public, as the outpouring of patriotism after the events of 9/11 so strongly affirms. The act of a handful of demonstrators will never change the respect our flag is given at home and throughout the world as a symbol of our Nation's adherence to the constitutional promises of freedom and democracy. If anything, the protection our government affords the offensive actions of a demonstrator underscores that we serve and live in a nation whose greatness is derived from its adherence to democratic principles

We believe that the Supreme Court made the right decision in Texas v. Johnson, in which the majority eloquently explained why the First Amendment's stalwart protection of peaceful protest -- even protest involving flag desecration -- in the end strengthens our nation and advances freedom:

> *The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong...[B]ecause it is our flag involved, one's response to the flag burner may exploit the uniquely persuasive power of the flag itself. We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by -- as one witness did here -- according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.*

"We do not consecrate the flag by punishing its desecration." These eloquent and powerful words should be remembered whenever we are confronted with a choice between preserving our fundamental First Amendment

speech rights and protecting the flag's cloth from acts of destruction. When we desecrate the Constitution to protect the physical flag, we do a disservice to both.

The ABA unequivocally agrees that the flag is a revered symbol that evokes our deepest, most personal feelings about our nation's greatness. But America is not so weak that it must demand patriotism from its citizens by amending the Constitution to prohibit flag desecration. Neither our institutions nor the flag can be destroyed by the peaceful exercise of First Amendment freedoms. The American flag will survive the rare eruptions of flag burning, but it will not survive if the very freedoms it protects are eroded through passage of a misguided constitutional amendment.

We urge the Senate Judiciary Committee to reject once and for all the flag desecration amendment and preserve and defend our First Amendment rights.

WASHINGTON LEGISLATIVE OFFICE
Laura W. Murphy
Director

1333 H Street, NW Washington, D.C. 20005 (202) 544-1681 Fax (202) 546-0738

March 4, 2004

Re: Oppose S.J. Res. 4, the Constitutional Amendment on Flag Desecration

Dear Senator:

We are writing to urge you protect free speech by opposing S.J. Res. 4, the constitutional amendment on flag desecration. As a member of the Senate Judiciary Committee, you are entrusted with the privilege and responsibility of defining, drafting and implementing the laws that protect our civil liberties. The upcoming hearing and on S.J. Res. 4 tests that leadership responsibility at its very core. We urge you to defend the fundamental liberties that our flag and other cherished symbols represent by opposing this amendment because it would cause needless injury to the Bill of Rights.

Some members of Congress assert that all veterans favor this amendment. However, veterans themselves are divided in their expressions of patriotism. While some veterans want their litmus test of patriotism enforced on others through this amendment, many others, such as those represented by Veterans Defending the Bill of Rights, ask that you take the long view of liberty. They urge you to vote to reinforce the truth that our Bill of Rights, unaltered for more than 200 years, is greater than the sum of its parts, and that the inappropriate rendering of the First Amendment by this amendment to punish a rare and expressive act tatters the whole fabric of the Bill of Rights.

A well-known and highly regarded veteran, Secretary of State Colin L. Powell, in his capacity as a retired general, voiced his opposition to flag amendment last year while the Senate was considering the amendment. He said:

> I understand how strongly so many of my fellow veterans and citizens feel about the flag and I understand the powerful sentiment in state legislatures for such an amendment. I feel the same sense of outrage. But I step back from amending the Constitution to relieve that outrage. The First Amendment exists to insure that freedom of speech and expression applies not just to that with which we agree or disagree, but also that which we find outrageous. *I would not amend that great shield of democracy to hammer a few miscreants. The flag will be flying proudly long after they have slunk away.* [emphasis supplied]

This amendment empowers Congress to prohibit desecration of the flag and punish those who injure a flag in a manner that shows contempt for the U.S. Government. That means that elected officials, law enforcement agents, and the courts will be asked to enforce that prohibition by deciding which use of an important national symbol is acceptable and which is not. When

curators, salespersons, clothiers and political pundits all worry that their use of a flag—orally, representationally, or physically—will subject them to civil or criminal sanctions, we will have reached a point of Government regulation of thought and expression that so many think is un-American.

This amendment empowers Congress to determine that one valuable national symbol is sacred, but others are not. Would this Committee consider next an amendment to protect against the desecration of the Declaration of Independence? Another to protect against the desecration of the Bible? S.J. Res. 4 gives Congress the power to prioritize that which is most sacred, that which is merely sacred, and that which is not—an entanglement that so many people, religious and not, have fought valiantly to avoid.

If enacted, this would mark the first time an amendment altered the carefully balanced Bill of Rights. In opposing this very amendment last year, another veteran, Senator John Glenn, reminded us:

> Those 10 amendments to the Constitution we call the Bill of Rights have never been changed or altered by one iota, by one word, not a single time in all of American history… There was not a single word of change during any of our foreign wars, and not during recessions or depressions or panics… Not a single change… [during] times of great emotion and anger like the Vietnam era, when flag after flag was burned or desecrated, far more often than they are today… Do we want to take a chance on reducing our freedom of speech?

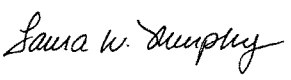
Senator Byrd, in deciding to oppose this amendment said on the Senate floor, "[T]he flag is the symbol of all we hold near and dear. That flag is the symbol of our Nation's history. That flag is the symbol of our nation's values. We love that flag. But we must love the Constitution more. For the Constitution is not just a symbol, it is the thing itself!"

And finally, a little more than ten years ago, Supreme Court Justices Brennan and Scalia agreed on a tenet of freedom the articulation of which we cannot improve:

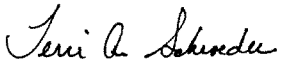
> If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable… *Punishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering.* (United States v. Eichman, 1990).

The ACLU urges you to oppose this constitutional amendment. It would enshrine in the highest law of our land an unnecessary government power harmful to core liberties.

Sincerely,



Laura W. Murphy
Director



Terri A. Schroeder
Legislative Analyst

★ WASHINGTON OFFICE ★ 1608 "K" STREET, N.W. ★ WASHINGTON, D.C. 20006 ★
(202) 263-2986 ★

March 8, 2004

The Honorable Orrin G. Hatch
United States Senate
Washington, DC 20510

Dear Sen. Hatch:

We, the men and women of The American Legion Family, are eternally grateful for your sponsorship of Senate Joint Res. 4, a flag-protection constitutional amendment, on which the Senate Judiciary Committee will hold a hearing on Wednesday.

The American people in your state and nationwide have spoken on this issue through numerous polls, their state legislatures and majorities in both houses of Congress who have voted in favor of the amendment. The overwhelming support of the people reflects that our cause is morally and constitutionally just.

As you continue to fight in favor of the will of the people, rest assured that the men and women of The American Legion, the American Legion Auxiliary and the Sons of The American Legion, in Utah and across our great nation, stand with you.

Sincerely,

JOHN BRIDDEN National Commander The American Legion	KATHERINE MORRIS National President The American Legion Auxiliary	NEAL C. WARNKEN National Commander Sons of The American Legion

THE AMERICAN LEGION

DEPARTMENT OF NEW YORK

10TH DISTRICT

NASSAU **SUFFOLK** **QUEENS**

March 4, 2004

The Honorable Charles E. Schumer
The Honorable Hillary R. Clinton
United States Senate
Washington, DC 20510

Dear Honorable Senators:

On behalf of the 23,000+ Legionnaires of the Tenth District (Nassau, Suffolk, & Queens Counties), New York American Legion, we respectfully request that you become a co-sponsor, and/or vote for

SJR 4 - The U.S. Flag Protection Amendment

The current Flag Amendment of the 108th Congress was re-introduced by Senators Orrin Hatch (R-UT), and Dianne Feinstein (D-CA). The Senators request that your staff contact either one of their offices to join on as a co-sponsor for SJR 4. Honorable Senators of our Great Empire State of New York, we ask that you re-consider your uncommitted position, and sign onto SJR 4 as co-sponsors! The fact that SJR 4 was re-introduced in the 108th Congress on January 16, 2003 reflects the will of the majority of the citizens of this great country of ours! Especially since the young men and women of our Armed Forces are once again, engaged in a fight against global terrorism, and for freedom and the American way of life! As both sides of the aisle agree, the war on terrorism will be a long, tedious one. We must show these fine young men and women that we are behind their valiant efforts to drive the scourge of terrorism from the face of the earth. They wear the uniform of the American Fighting Person. Let us support them, as they carry our country's colors to the fray, by forming a truly bi-partisan majority in the defense of our nation's flag, as Senators Hatch and Feinstein have done as co-sponsors of SJR 4. There is no room for partisan politics when it concerns the one symbol that binds us all as "Americans"! *"Let The People Decide"!*

Honorable Senators, *"PHYSICAL DESECRATION IS NOT FREE SPEECH"!* Over 80% of the citizens of our great country, and all 50 states including our great Empire State of New York have sent resolutions to their Congressional Delegations instructing them to pass the Flag Amendment. How can anyone overlook these statistics? It is time to *"Let The People Decide"* this issue, by supporting it and return it to the states for the people to decide! The people have the right to seek redress against the Supreme Court's decision of 1989 through a Constitutional Amendment! This is our right, and we will continue to pursue its passage until it is returned to the states for ratification. If you feel that Our Constitution should not be amended, would you have voted against the passage of the 19th Amendment (Women's right to vote)?

We thank you for your time, and we look forward to your reply of support for SJR 4, and The American Legion Family looks forward to meeting with you at our National Organization's Annual Washington Conference, from March 7 to 10, 2004.

God Bless You, Our Families, Our Flag, and God Bless America! *"One Nation Under God"!*

Respectfully yours,

John N. Severa

John N. Severa
Legislative Chairman
Tenth District, New York American Legion
69-45 Manse Street
Forest Hills, NY 11375

c.c.- The Honorable Bill Frist MD, United States Senate Majority Leader
The Honorable Thomas Daschle, United States Senate Minority Leader
R. Pedro – Department Adjutant, Department of NY, American Legion
A. Minei – Department Treasurer, Department of NY, American Legion
A. Swanson – District Commander, Tenth District NY, American Legion
S. Robertson – Director, National Legislative Commission, American Legion
J. Tipping – Vice Chairman, National Legislative Council, American Legion
J. DePersis – Chairman, Department Legislative Committee, Dept. of NY American Legion
P. Holowecki – Chairman, Nassau County Legislative Committee, Dept. of NY American Legion
H. Jackson – Chairman, Suffolk County Legislative Committee, Dept. of NY American Legion

AMERICAN LEGION
Department of Arizona

"For God and Country"

March 8, 2004

VIA FACSIMILE - (202) 224-2207
Senator Jon Kyl
730 Heart Center Office Building
Washington, D.C. 20510

RE: S.J. Res 4

Dear Senator Kyl:

The American Legion Department of Arizona strongly urges you to support S.J. Res. 4 "Letting the People Decide: The Constitutional Amendment Authorizing Congress to Prohibit Physical Desecration of the Flag of the United States." We have been told that the Senate Committee on the Judiciary will hold a hearing on Wednesday, March 10, 2004 at 10:00 a.m.

We want to thank you for your past support of this resolution and strongly encourage you to continue to support this proposed Constitutional Amendment.

I want to thank you for your friendship and will look forward to seeing you at your breakfast later this month in Scottsdale, Arizona.

Sincerely yours,

Neal S. Sundeen

NSS/sf
cc: The American Legion
Washington National Office
Fax: (202) 8610-2785

4701 N. 19th Avenue, Suite 200 • Phoenix, AZ 85015-3227
(602) 264-7706 • FAX (602) 264-0029

FROM : VACLAV Sr FAX NO. : Mar. 06 2004 04:39PM P1

The American Legion

For God and Country

DEPARTMENT OF ILLINOIS
P.O. Box 2910, Bloomington, Illinois 61702-2910
2720 E. Lincoln Street, Bloomington, Illinois 61704-6010

March 6, 2004

To: Chairman Judiciary Committee
Ref: S.J. Res, 4

Dear Sirs

As American Legion commander of the 18th Dist the State of Delinois, I and my Home Post #155 Manteno Illinois do with no reservations completly support Bill S.J. Res, 4 and urge the complete support and passage of this important issue.

I thank you knowing you well do what is right.
Respectly Don Vaclav
18th Dist Commander

FROM : FAX NO. : 6315890733 Mar. 08 2004 10:17AM P1

NATIONAL HEADQUARTERS
AMERICAN MERCHANT MARINE VETERANS

Serving America in Peace and War

Bohemia, NY. 3/7/04

Senator Orrin Hatch
SH-104, Washington, DC.

Honorable Sir;

On behalf of my fellow American Merchant Marine Veterans , I am sending this letter in support of the flag protection amendment (SJ Res 4) .

We wish you success in your course of action to see this amendment passed.

Sincrely;

Henry Cap.
National President.
AMMV

MAILING ADDRESS: P.O. BOX 151205 • CAPE CORAL, FL 33915-1205
OFFICE ADDRESS: 1323 LAFAYETTE STREET, SUITE H • CAPE CORAL, FL 33904 • PHONE: 239-549-1010 • FAX: 239-549-1990

SERVING
WITH
PRIDE

AMVETS

NATIONAL
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4647 Forbes Boulevard
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20706-4380
TELEPHONE: 301-459-9600
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E-MAIL: amvets@amvets.org

March 5, 2004

The Honorable Orrin Hatch
United States Senate
104 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Hatch:

On behalf of the nationwide membership of AMVETS (American Veterans), I write to thank you for your sponsorship of S.J. Res. 4, the Flag protection amendment, and to encourage your expeditious consideration of this measure by the Senate Judiciary Committee.

As you and the majority of Americans understand, our nation's Flag is much more than a piece of cloth or mere symbol. It is a direct reflection of all our nation embodies and holds dear. With our nation at war, our Flag becomes an even more poignant reminder of our character and national unity. It is the prayerful wish of AMVETS that the Members of your Committee will forward this amendment on to the full Senate, so it can be approved and reach the States for ratification.

Again, I urge your speedy action and offer you my personal thanks for all you have done for our nation's veterans and their families. With your contributions and unwavering leadership, AMVETS knows that we are ready to make the right choice and protect our flag.

Together we make a difference,

S. John Sisler
National Commander

Statement by

JOHN ANDRETTI
NASCAR Nextel Cup Series Driver

to the

Committee on the Judiciary
The United States Senate

On

Senate Joint Resolution 4

"Letting the People Decide:
The Constitutional Amendment Authorizing Congress
to Prohibit Physical Desecration of the Flag of
the United States."

March 10, 2004

Good morning. My name is John Andretti. I want to thank the members of the Judiciary Committee for holding this hearing. And thank you, also, for inviting me to talk on a matter that is of importance to me and the great majority of Americans – protecting their flag from acts of physical desecration.

By the end of World War II, my father's family had lost everything. He and his brother grew up in a relocation camp in eastern Italy, living there from the time they were eight years old until they were 16. They came to the United States at that point, a land of freedom and opportunity. And I am proud to say they made the most of it.

Sometimes he has a hard time describing it because of the emotion, but my father has told me about seeing that flag of the United States – first when liberated in his native Italy and, later, when "liberated" into a new life for him and his family. The flag of the United States represented goodness and freedom, and that is a lesson he taught to his children – and a lesson I am teaching to my children.

Being the father of three it is very important for me to teach my children respect and honor, not only for individuals, but also on a whole, and the flag is a means to that end. Our faith is our foundation, but there must be more, and it must be tangible, and it is found in the flag.

This is obviously not my environment. I usually am wearing a fire-retardant uniform emblazoned with the colors of my sponsors and talking about NASCAR racing. I am a racecar driver, and have driven for more than 30 years – everything from karts to Indy cars to NASCAR stock cars. In fact, I hope every member of this committee will come join us at the track sometime – each one of you is very welcome. I know Senator Kyl and Senator Graham can tell you how great the fans are, and I know Senator Biden, Senator Edwards and Senator Sessions can tell you how much fun our races can be.

And they can tell you something about my bosses – the millions of people who follow motor sports in this country. When it is all said and done, every driver in major league racing works for the fans and, when you work for someone, you get to know them

I've learned a lot about those fans, as well as my fellow competitors and those who run our sport. I feel I am representing a huge majority of them here today. I am here because I fully believe in what Gen. Brady and the Citizens Flag Alliance are about.

I am very proud to be an American. Military or civilian, native or immigrant, the flag is our bond.

I fly the flag at my home, 24 hours a day. And, yes, it is lighted for all to see. I appreciate what the flag stands for and I know quite well what it means to the millions of Americans who follow motor sport racing. I think most of them would be surprised – if not, outraged – to learn that today, in our country, it is legal to physically desecrate the flag of the United States.

There are those who say the flag is only a symbol, but symbols are important. Just as it was a symbol of freedom to my then eight-year-old father in Italy and, later, a symbol of opportunity to him and his family as he entered this country for the first time, it had a message.

Race officials rely on symbols, on flags, to communicate with drivers during noisy racing action. Even with radios today, flags are still important and functional in racing. And in quite the same way, our nation's banner is important and functional, and still sends a message.

In NASCAR racing, you'll see flags waved a lot. But there is one flag that gets waved by NASCAR fans more than any other. And that would be the red, white and blue of Old Glory.

Early in our nation's history, the flag of the United States was something of a signal flag. Out in front of the troops, it signaled action by our military against the forces that might otherwise overrun us. It serves as a symbol of that very notion today as American troops defend our liberties and protect our interests around the world.

And burning a flag, it seems to me, is a very profound signal that those who desecrate the flag have total disregard for our military.

In 1967 Congress passed a federal law that prohibited flag desecration right here in the District of Columbia. Congress passed that law because of the effect that flag desecration had on the morale of the troops then fighting in Vietnam. That law, now made invalid by the Supreme Court, was the last show of Congressional flag-related support for America's military men and women who are engaged in war. We should honor today's warriors and underpin morale by once again making it illegal to physically desecrate the flag.

I have to admit, I've never seen the flag burned, other than on a television newscast. Those I work with and those I work for – NASCAR fans – aren't the kind of folks who take to this sort of thing. Their flag is important to them, they respect it and they protect it.

I once heard a man say that the flag represents the freedom to burn it. I would disagree, and I think most Americans would, too.

The flag is a symbol that represents all that our Nation is and can be. It symbolizes what the people say it symbolizes and the great majority certainly don't believe that includes the freedom to desecrate it.

As a sign to rally for a cause, there can be no greater symbol than our flag. We rally around it in times of crisis, whether a natural disaster or a global conflict. Our history bears that out. The September 11th 2001 attack on America is a prime example of what Americans feel for their flag, and what they know it to be as a symbol of strength, determination and resolve for a free people to remain so.

The Citizens Flag Alliance and The American Legion have done a great deal of polling over the years. The figures are remarkable. Very consistently they have shown that more than three of four Americans want their flag protected. Honestly, I'm surprised the numbers aren't higher. I'm sure they are higher among NASCAR fans who are a pretty good representation of mainstream, blue collar and white collar America.

Some look at the flag and see just a piece of cloth. That perception might be acceptable, but their understanding of the flag's value is lacking. The bits of fabric that make up the flag are only cloth, but when you pull them together in that recognized pattern, something happens. As the flag, it becomes a binding force that holds us together as one people, and those who would desecrate it are out to break that bond. Nothing tears down America more than burning the flag.

I'm a businessman by profession and a racecar driver by choice. But inside, I'm still something of a country boy from Bethlehem, Pennsylvania where life is still pretty uncomplicated. To me, the need to protect the flag is easy to explain.

Events of late find us reflecting on the values that we believe are important and necessary in a free society. One is the right to freely associate – a major values battle now being fought by the Boy Scouts of America. One other is the right to publicly invoke the name of God in a patriotic exercise – another major values battle being waged by The American Legion in their efforts to keep the words "under God" in the Pledge of Allegiance to the flag.

As a nation we are bound together by our shared beliefs in such values. And we are bound by tradition as Americans to pass along to younger generations the importance of upholding those values that are uniquely American. One of the greatest tools for teaching values of respect, commitment, loyalty and patriotism is the Flag of the United States. But how do you explain to a youngster that it's right and customary to respect our flag, but okay

to burn it? I have three young children, and I spend time with children all over the country because of my racing activities, and I have no way to explain that to them.

What we are about today, what we are here for is important to all, I know. But what carries forth from here today is of greater importance. We are considering more than the just the flag here. We are helping to assure that the flag that flies throughout the nation is seen, treasured, and honored every day. You never know, it may give cause for a youngster to ask what the flag is for, what it means, or why it is important.

The answers, for most of us, should be easy. That flag is about values. It's about tradition. It's about America and the men and women who paid an awful price for what we have today.

We honor and cherish members of the Armed Forces and veterans of military service when we honor and protect the flag. Draping the flag over the coffin of a fallen soldier, placing a flag near a grave, or hanging a flag on your house on Memorial Day are all ways we honor and express our appreciation for those who have fought and died defending America. When our laws sanction the physical desecration of the flag the honor is diminished and the recognition is dulled.

There is importance to the flag as a symbol and one that has a noble function. In racing, your helmet is your trademark and mine is red, white and blue with the American flag as the theme. My "work clothes" are colorful reflections of the sponsors who support me. The flag has the same function for our men and women in uniform. For them, it is a reflection of the people who support them in their job of protecting all of us.

The American people deserve the backing of this body in their desire to protect the flag, and a constitutional amendment to return that right to the people is the only way.

For those who still can't see the flag for all that it is, or who hold concern for amending the Constitution we say, keep that concern. We respect your position, but please, please

consider the desire of the great majority and move the flag amendment off of Capitol Hill and send it to the states for debate and ratification. Let the people decide.

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Testimony of

Maj. Gen. Patrick H. Brady, US Army (Ret.)
Chairman of the Board

The Citizens Flag Alliance, Inc.
Indianapolis, Indiana

before the

Judiciary Committee
of the
United States Senate
on

Senate Joint Resolution 4

The Hatch-Feinstein Flag Protection Constitutional Amendment

March 10, 2004

The Citizens Flag Alliance, Inc.

My name is Pat Brady. On behalf of the Citizens Flag Alliance, I thank you for hearing us.

The Citizens Flag Alliance, Inc., is a coalition of organizations that have come together for one purpose: the passage of a constitutional amendment that will return to the people the right to protect their flag.

More than 140 organizations make up the CFA, with collective membership around 20 million. Drawing its strength from grassroots activism, the CFA is organized in every state.

Membership is open to and includes fraternal, ethnic, civic, veteran organizations, corporations, and businesses by application. Everyone who donates to the CFA, or signs a petition supporting passage of the amendment, becomes an individual member. Although it is hoped that member organizations would donate to the CFA as funds are available, there is no fee to belong, but it is expected that:

- member organizations will have the endorsement of their governing body;
- will promote the campaign to return to the people the right to protect the flag among their members and the general public;
- will allow the publication of their name as a member organization of the CFA; and
- will participate in legislative activities and grassroots lobbying of The Citizens Flag Alliance, Inc.

In 1989 the Supreme Court, in response to a flag burning by a communist, amended the Constitution by inserting flag burning into the Bill of Rights. Their decision took away a fundamental right of the American people, a right we possessed since our birth as a nation, the right to protect our flag. We believe that decision was an egregious error and distorted our Constitution. We do not believe the freedom to burn the American flag is a legacy of the freedoms bestowed on us by Madison and Jefferson and Washington and the other architects of our Constitution. To distort the work of these great men unable to defend themselves, to put flag burning side by side with pornography as protected speech, is outrageous.

We believe that some elements in our society seek to amend the Constitution through the courts out of the bright light of the public square where they would surely fail. The ACLU has said they are the guardians of the Constitution and that their hope for their agenda is through the courts. We believe that our hope is in the Constitution as defined by our Founding Fathers and that we the people are the guardians of the Constitution. One judge said the Constitution is what

the courts say it is! We believe the Constitution is what the Founding Fathers said it was and it cannot be amended without the will of the people.

President Lincoln warned, "If the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court ... the people will have ceased to be their own rulers." Abraham Lincoln also warned, "Don't interfere with anything in the Constitution. That must be maintained, for it is the only safeguard of our liberties."

The Courts are interfering with the Constitution; they are systematically amending it in violation of the Constitution itself. A few of many examples: They have declared the Pledge and the display of the Decalogue unconstitutional, overthrowing our right to acknowledge God as defined in the Declaration and protected by the First Amendment; they are proselytizing sodomy and promiscuity, redefining marriage, protecting child pornography and imposing racial quotas. Whatever one may think of the issues involved, these actions are not sanctioned for the courts to decide by the Constitution – they belong to the people to decide.

Many Americans have raised their right hand and sworn an oath to protect and defend the Constitution from all enemies, both foreign and domestic. We believe that all Americans who put their right hand over their heart and recite the Pledge take that same oath. Both the oath and the pledge are taken in the presence of Old Glory to emphasize that our flag is the symbol of our Constitution. We believe that we the people must exercise our right to rule by insuring that the Court's decision on flag burning is not irrevocably fixed.

We believe that legalizing flag burning, in addition to disfiguring the Constitution, also raises values issues and questions the kind of people we have been and want to be. We believe that our laws should reflect our values. Flag burning is not a value of the American people.

We believe the highest form of patriotism is service to our children and a premier worth of respect for the flag is the values it teaches our children, the values embedded in our Constitution as embodied by Old Glory. We agree with Pearl Buck who describes how precious a symbol the flag is to the treasure that is our children and how important it is to their development. She said, "Children are our national treasure. With what measure we mete to them in their childhood, they will mete to our nation in their lifetime." We believe our children should be raised as patriots full of respect for the flag and the constitutional values it represents. How can they respect something they are free to burn?

We believe symbols are indispensable in a democracy. They have been called the natural speech of the soul. Our gratitude for the great bounty that is America is expressed through symbols: grave stones, obelisks, walls and the greatest of all symbols, Old Glory. The word "symbol" is from the Greek meaning a half token, which when united with its other half identified the owner. It is meant to recognize something far more elaborate than itself. That something, the other half token of the flag, is the Constitution and we the people are the owners. September 11 reminded all Americans of what veterans have always known: the unifying, comforting and inspirational magic of Old Glory, its unique and indispensable value to our society.

Thomas Jefferson said, "Democracy is cumbersome, slow and inefficient, but in time the voice of the people will be heard and their latent wisdom will prevail." We believe that all Americans, once they realize that our Constitution was never intended to include flag burning, will be outraged, energized and mobilized against those who deliberately or inadvertently despoil that cherished document. We believe that if we persevere, eventually the voice of the people will be heard and our Constitution will be restored. The courts are forcing us to accept flag burning. We are not trying to force the people to love Old Glory. We are trying to force the courts to restore the truth to our Constitution.

We believe our battle for our flag is a battle for our Constitution. Our concern is not those who desecrate the flag; our concern is those who desecrate our Constitution by calling flag burning "speech." If we did not act on our belief, and correct the errors of the Court, we would violate our oath and our pledge. We would be cowards not worthy of the sweat and blood and tears of those who gave us our Constitution and all we have. We could not face the greatest generation, or the silent generations; we could not face our children; we could not face ourselves. This is a sacred debt to our Founders, to America's nobility – our veterans – to our patriots and to America's future.

History of the Fight to Return to the People the Right to Protect Old Glory

Organizations of The Citizens Flag Alliance, Inc. have, since 1989, stood side-by-side in the battle to secure a flag amendment. Below are highlights of the campaign.

Forty-eight states and the federal government had flag-protection laws on the books during the summer of 1984 when Gregory Johnson (a leader of the Revolutionary Communist Youth Brigade) participated in an anti-America demonstration in Dallas, Texas. As the demonstrators marched from the site of the Republican National Convention to the steps of the Dallas City Hall, they defaced buildings with spray paint, turned over potted plants, stole an American flag from a Dallas bank, and generally made nuisances of themselves.

Then, as Texans watched in outrage and anger, Johnson torched the flag. While engaging in this offensive conduct, he chanted, "America, the red, white and blue . . . we spit on you." The Dallas police arrested Johnson. He was not arrested for anything he said about our government, our leaders, or our flag. He was arrested, charged, tried and convicted of desecration of a venerated object in violation of a Texas statute.

Five years later the U.S. Supreme Court heard the case. On June 21, 1989, in a 5-4 decision, the court ruled that Johnson had been denied his rights under the free speech provisions of the First Amendment. *Texas v. Johnson*, by one vote, took away the right of the people to protect the flag of our nation from intentional, public, physical desecration, a right we enjoyed since our birth as a nation.

JUNE 21, 1989 – By a 5-4 vote, the Supreme Court rules in *Texas v. Johnson* that burning the American flag is free speech protected under the First Amendment. This invalidates flag protection statutes in 48 states and in Washington, DC.

JULY-AUGUST 1989 – The American Legion and American Legion Auxiliary launch a petition drive to collect one million signatures of Americans demanding a flag amendment that will return to the people the right to protect the flag. The goal is reached within 60 days and the petitions are presented to Congress.

SEPTEMBER 5, 1989 – Delegates to The American Legion National Convention in Baltimore unanimously approve a resolution seeking adoption and ratification of a constitutional amendment that would return to the people the right to protect the flag. In the months that ensue, The Knights of Columbus, The Benevolent and Protective Order of Elks, the Scottish Rite of Freemasonry, the Veterans of Foreign Wars and many other organizations pass similar resolutions at their national meetings.

OCTOBER 12, 1989 – House and Senate adopt House Resolution 2978, the "Flag Protection Act of 1989,"
a federal statute, to protect the flag.

OCTOBER 28, 1989 – HR 2978 becomes Public Law 101-131 and U.S. Flags are burned on the steps of the U.S. Capitol to protest enactment of the law.

FEBRUARY - MARCH 1990 – Federal judges in Seattle and Washington, DC rule PL 101-131, the Flag Protection Act of 1989, unconstitutional.
JUNE 11, 1990 – U.S. Supreme Court, in *U.S. v. Eichman*, rules PL 101-131 unconstitutional.

JUNE 21, 1990 – By a vote of 254-177, the House fails to obtain the two-thirds majority required to pass a constitutional amendment that would return to the people the right to protect the flag.

JUNE 26, 1990 – By a vote of 58-42, the Senate fails to obtain two-thirds majority for the flag amendment.

FOR THE REMAINDER OF 1990 – The American Legion focuses on memorializing resolution campaigns in the states. The non-binding resolutions urge the Congress to adopt an amendment allowing "Congress and the states" to enact and enforce flag-protection laws.

AUGUST 25, 1992 – Presidential candidate Bill Clinton tells The American Legion National Convention delegates in Chicago that he opposes flag burning and leaves the impression that he would support a flag-protection constitutional amendment that would return to the people the right to protect the flag. "In 1989, when the flag burning controversy arose, I joined with The American Legion in taking steps to react. I signed legislation outlawing flag burning or defacing the flag, but I also wanted to stop flag burning before it starts. So, together with The American Legion, we established one of the finest flag education programs in the country. Volunteers of

The American Legion and other veterans groups launched an all-out assault on our grade schools, instilling in our young students the deep patriotism which gives us a lump in our throat and a stir in our hearts when we see Old Glory go up the flag pole. I am proud of my record in support of our veterans."

THROUGHOUT 1992 AND 1993 – Memorializing resolution campaign gains steam. By the end of 1993, 35 state legislatures have approved resolutions. Gallup Organization polls show overwhelming public support for an amendment that would return to the people the right to protect the flag.

MAY 1994 –The American Legion approves a resolution authorizing the funding of The Citizens Flag Alliance, Inc. (CFA). CFA is chartered in Virginia as a 501(c) 4 corporation. To promote the flag amendment and flag education, the CFA seeks membership of other civic, social, veterans and fraternal organizations. The CFA organizes in all 50 states and the membership grows to 112 member organizations by December 1995.

AUGUST 24-26, 1994 – CFA convenes a constitutional scholars' forum at Williamsburg, VA to determine the underlying merit and political viability of the many options available to prevent the public dishonoring of the American Flag. Prof. Arthur Miller of Harvard University School of Law moderates the forum that is attended by scholars from the nation's finest legal institutions, advocacy groups and public policy research organizations. To ensure an accurate breadth of ideological input, the forum is evenly divided between scholars supporting and opposing a flag amendment.

MARCH 21, 1995 – Senators Orrin Hatch (R-Utah) and Howell Heflin (D-Ala.) introduce Senate Joint Resolution 31, calling for a constitutional amendment that reads "The Congress and the states shall have power to prohibit the physical desecration of the flag of the United States." Representatives Gerald Solomon (R-N.Y.) and G. V. "Sonny" Montgomery (D-Miss.) introduce HJR 79, the same resolution, in the House of Representatives.
JUNE 6, 1995 – Assistant Attorney General for Legal Counsel Walter Dellinger testifies before Senate Judiciary Committee and says President Clinton opposes the flag amendment that would return to the people the right to protect the flag.

JUNE 28, 1995 – HJR 79 clears House 312-120,
22 votes more than the 290 needed to pass the flag amendment.

JULY 20, 1995 – SJR 31 passes Senate Judiciary
Committee, 12-6.

AUGUST 1995 – Fifty-six Senators are co-sponsors
of SJR 31.

DECEMBER 12, 1995 – Senate rejects SJR 31 by a vote of 63-36; the amendment fails by 3 votes.

JANUARY 1996 – CFA launches nationwide campaign
to tell citizens how their lawmakers voted on the flag amendment.

MARCH - NOVEMBER 1996 – CFA launches massive "Get Out the Vote" and public information effort. The nationwide campaign includes press events, voter registration and voter education drives.

NOVEMBER 1996 – Flag amendment supporters capture 25 of the 34 Senate seats and 290 plus House seats. The Citizens Flag Alliance reaffirms its flag amendment commitment.

FEBRUARY 13, 1997 – Reps. Gerald Solomon (R-N.Y.) and William O. Lipinski (D-Ill.) introduce into the 105th Congress House Joint Resolution 54, the flag amendment. CFA officials vigorously encourage member organizations and individuals to persuade their representatives to become co-sponsors.

APRIL 30, 1997 – The U.S. House of Representatives Judiciary Subcommittee on the Constitution holds hearing on HJR 54. Those testifying in favor of the amendment include Maribeth Seely, an elementary teacher from New Jersey; Francis Sweeney, Steamfitters Union, Pittsburgh, Pa.; Carol Van Kirk, member of the American Legion Auxiliary of Nebraska; Alan Lance, Idaho Attorney General; Harvard Law Professor Richard Parker; Major General Patrick H. Brady, Medal of Honor Recipient; and the Honorable Robert Zukowski, Wisconsin State Legislature.

JUNE 12, 1997 – HJR 54 passes House 310-114,
20 votes more than needed.

AUGUST 1997 – The so-called Citizens for the Constitution is formed to, in their words, "call attention to the adverse effects of fast-paced constitutional tinkering." They begin by creating eight "standards," which they claim are intended to address when and how the Constitution should be amended. They lobby Congress to adopt these standards that will govern how the amendment process should, in their opinion, unfold. (Note: Citizens for the Constitution has since dissolved.)

FEBRUARY 4, 1998 – Sens. Orrin Hatch (R-Utah) and Max Cleland (D-Ga.) introduce into the 105th Congress SJR 40 that reads "The Congress shall have power to prohibit the physical desecration of the flag of the United States." The amendment has 61 co-sponsors.
JULY 8, 1998 – Senate Judiciary Committee holds hearings on SJR 40. Those testifying in favor of the amendment that would return to the people the right to protect the flag include Tommy Lasorda, John Schneider and Harvard Law Professor Richard Parker.

OCTOBER 7, 1998 – Sen. Majority Leader Trent Lott brings SJR 40 to the floor of the U.S. Senate asking unanimous consent to proceed to debate and vote. Sens. Robert Kerrey (D-Neb.) and Patrick Leahy (D-Vt.) object to consideration of the resolution, citing lack of time to sufficiently debate the amendment. With that, the measure is lost in the 105th Congress.

NOVEMBER 4, 1998 – Election analysis indicates the CFA is a step closer to passage of the flag amendment in the U.S. Senate in the 106th Congress. Newly elected Senators who support the flag amendment include Sens. Blanche Lambert Lincoln (D-Ark.), Peter Fitzgerald (R-Ill.) and George Voinovich (R-Ohio). All three Senators replace incumbents who were on record as "no" votes, thus enhancing the amendment's chance for passage in the Senate.

FEBRUARY 24, 1999 - Reps. Randy "Duke" Cunningham (R-Calif.) and John Murtha (D-Pa.) introduce HJR 33, a constitutional amendment that reads, "The Congress shall have power to prohibit the physical desecration of the flag of the United States."

MARCH 17, 1999 – Sens. Orrin Hatch (R-Utah) and Max Cleland (D-Ga.) introduce SJR 14. The amendment has 54 co-sponsors. In all, 64 Senators pledge their support of the flag amendment.
MARCH 23, 1999 - House Judiciary Subcommittee holds hearings on HJR 33. Witnesses testifying in favor of the amendment that would return to the people the right to protect the flag include Stephen Presser, Professor of Law at Northwestern University School of Law; Maj. Gen. Patrick H. Brady, USA (Ret.), Medal of Honor recipient and Chairman of the Board of The Citizens Flag Alliance, Inc.; Stephan Ross, a holocaust survivor who was liberated from Dachau by the U.S. Army; former Miss America, Shawntel Smith; and Bishop Carlton Pearson, the presiding Bishop for more than 500 churches and ministries throughout the Azusa Interdenominational Fellowship.

JUNE 24, 1999 - The U.S. House of Representatives passes HJR 33, 305-124, 15 votes more than needed for passage of a constitutional amendment.

MARCH 29, 2000 – SJR 14, the flag amendment, falls four short of the necessary 67 votes (63-37) in the United States Senate. The Citizens Flag Alliance notes deep disappointment in two Senators [Robert Byrd
(D-W. Va.) and Richard Bryan (D-Nev.)] whose support was withdrawn without notice at the last minute.

MARCH 13, 2001 – Reps. Randy Cunningham (R-Calif.) and John Murtha (D-Pa.) introduce HJR 36. Sens. Orrin Hatch (R-Utah) and Max Cleland (D-Ga.) introduce SJR 7.

JULY 17, 2001 – The flag amendment, HJR 36 passes the House, 298-125, for the fourth time in consecutive Congresses.
JANUARY 10, 2002 – The Vermont State legislature becomes the 50th state to pass a Memorial Resolution that calls on Congress to pass the flag amendment.

MARCH 13, 2002 – Results of polling, done to determine support for the amendment and released at a Washington, DC press conference, reveal a "new" group of strong supporters of the flag amendment. With 75 percent favoring the amendment that would return to the people the right to protect the flag, 18-24 year olds are the second most supportive – and "new" – age group. Only those respondents 65 and older are more pro flag at 85 percent.

JANUARY-DECEMBER 2002 – A change in Senate leadership gives amendment opponents control over the destiny of the measure. It is held hostage through the Second Session of the 107th Congress and never allowed on the floor.

DECEMBER 2002 – Results of the November mid-term elections reveals that more than 300 Representatives and 64 Senators who support the right of the people to protect the flag will take seats in the 108th Congress.

JANUARY 7, 2003 – On the opening day of the 108th Congress, flag amendment chief co-sponsors John Murtha (D-Pa.) and Randy "Duke" Cunningham (R-Calif.) introduced HJR 4 that states, "The Congress shall have power to prohibit the physical desecration of the flag of the United States." Twenty-four colleagues joined them as cosponsors. The following week, on Jan. 15, Sens. Orrin Hatch (R-Utah) and Dianne Feinstein (D-Calif.) introduced an identical measure in the Senate. In addition to the two chief cosponsors, SJR 4 enjoys co-sponsorship from 41 other Senators.

MAY 7, 2003 - House Judiciary Subcommittee holds hearings on HJR 4. Witnesses testifying in favor of the flag amendment include Dr. Richard Parker, Professor of Law at Harvard Law School; Maj. Gen. Patrick H. Brady, USA (Ret.), Medal of Honor recipient and Chairman of the Board of The Citizens Flag Alliance, Inc.; and Lieutenant Antonio J. Scannella, New York/New Jersey Port Authority Police Department.

JUNE 3, 2003 – HJR 4, in a 300-125 vote, sails easily through the US House of Representatives for the fifth time in eight years. SJ Res. 4 is pending action by the Senate with 64 supporters of record, 57 of which are cosponsors.

Fact and Fiction on The Right of the People to Protect Old Glory

FICTION: *Burning the American flag is protected "speech" as defined by the First Amendment to the Constitution.*

FACT: Flag burning is not speech as defined by our Founding Fathers in the First Amendment, which reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

James Madison, who wrote the First Amendment, condemned flag burning as a crime. Thomas Jefferson agreed with Madison and made clear in his writings that "speech" in the First Amendment meant the spoken word, not expressive conduct. To say otherwise made freedom "of the press" a redundancy. In fact, the words "expression" and "expressive conduct" are not in the Bill of Rights, and for good reason. Activist judges have added them to the Constitution in order to promote their own political agenda.

Since our birth as a nation, we the people have exercised our right to protect our flag. This right has been confirmed by every Chief Justice of the United States and Justices on five Courts in the last century who denied that flag burning was "speech." This fact is also confirmed by current constitutional experts, 70 percent of the Congress, the legislatures of all 50 states and more than three out of four Americans.

FICTION: *The flag amendment would amend the Bill of Rights for the first time.*

FACT: The Supreme Court amended the Bill of Rights in 1989 when they erroneously called flag burning protected speech and took away our freedom to protect our flag. And they did so without the consent of we the people, an act forbidden by the Constitution. The flag amendment is an exercise of the true ownership of we the people over our Constitution. The flag amendment restores the Bill of Rights to the meaning intended by the Founders. The flag amendment takes ownership of our flag back from the Court and returns it to the people where it belongs and where it resided since our birth as a nation. Our question to those who spout this fiction: If the Supreme Court in 1989 had voted to protect the flag, would they then have amended the Bill of Rights?

FICTION: *The flag can be protected by law without the amendment.*

FACT: The Supreme Court has made it clear that it will strike down any effort to protect the flag by statute, and did so in 1990. Most lawmakers know this and have also struck down efforts by their colleagues to hide behind flag protection statutes. The fact is that the only way to protect the flag is by statute, but it must come after the passage of the flag amendment. The flag amendment by itself changes nothing, but requires follow-on legislation to return to the people the right to protect the flag.

FICTION: *The Supreme Court is the final word on the Constitution.*

FACT: The people have the final word on the Constitution. The Supreme Court has boasted that it speaks before all others and has actually contended that it is important to accept their unconstitutional decisions rather than undermine their legitimacy.

The Founders in their wisdom put Article V in the Constitution to protect us from such arrogance. It protects us, too, from the constitutional and cultural pirates who seek to amend the Constitution in the dim light of the courts, away from the bright democratic light of the public square and without the consent of the people. Article V is designed to ensure that the people rule. It protects us from the tyranny of a minority on the courts, or anywhere else, who attack our Constitution. Those who would deny the right of the people to protect their flag tell us that the majority counts when it wears black robes but not when it wears working clothes. The Constitution itself is the result of the opinion of the majority and so is the Bill of Rights. The Founders feared minority rule, which is why they broke from the monarchy. The Constitution is the strongest historical statement against minority rule.

FICTION: *Flag burnings are rare and not important enough to justify changing the Constitution*

to punish a few miscreants.

FACT: First, there have been hundreds of flag desecrations since the Supreme Court's 1989 decision. Second, the flag amendment does not change the Constitution, but restores it. In America the frequency of an evil has nothing to do with laws against that evil. Shouting "fire" in a crowded theatre or speaking of weapons in an airport are rare occurrences, but we have laws against them and we should. It is important to understand that those who would restore the right of the people to protect the flag are not concerned with punishing miscreants who desecrate it. They are not the problem. The problem is from those miscreants who desecrate the Constitution by calling flag burning "speech." We are not amending the Constitution only to protect the flag. We are doing it primarily to protect the Constitution.

FICTION: *If the flag is my property, I can do with it as I wish, as with any of my property.*
FACT: There are so many governmental restrictions on private property that one can't even formulate a general rule about private property. For instance, you can own your automobile, but how you use it is strictly regulated. Most states even require that you have periodic safety inspections, pay property taxes on it, and wear a seatbelt when operating it. The same is true for privately owned firearms and controlled drugs.

You can own the lot that your home sets on, but you can't use the property for any purpose you want that doesn't comply with zoning ordinances. The same is true for U.S. currency, your own mailbox, and military uniforms and decorations. You can own a billboard, but what you can display on it is regulated. And the same is true with the flag. Justice Byron White said each flag is the property of all the people. Our society has always believed that a citizen could purchase a flag, but ownership remained with the people. And possession of a flag carried with it a responsibility or duty to treat it with dignity and respect.

FICTION: *It is impossible to enforce flag protection, as it is impossible to legally define "desecration" or "flag."*

FACT: For most of our history we have had laws defining flag desecration and our courts had no problem until the Supreme Court mis-defined flag desecration as "speech." Any fifth grade child knows the difference between an American flag and a flag-embroidered bikini or toilet paper with a printed flag replica.

For those who feign concern over prosecution for burning flag-marked bikinis or toilet paper, and can't discern the two from a flag, we ask: Would you put toilet paper or a bikini on the coffin of a veteran or their own coffin, or raise them from a flagpole during retreat? This is not only a non-issue, it is nonsense.

FICTION: *The flag symbolizes my freedom to burn it.*

FACT: On the one hand they are saying the flag is a rag to be burned with impunity. And on the other hand they are saying it represents our freedoms. Can't have it both ways. The truth is our flag embodies the values embedded in our Constitution. The word "symbol" is from the Greek word meaning a half-token, which when united with its other half identified the owner. It is meant to recognize something far more elaborate than itself. The other half of the token of the flag is the

Constitution and it identifies its owners, the people. There is nothing in the Constitution that authorizes flag burning and the people are fighting to defeat this fiction.

More Medals of Honor, our nation's highest military award, have been awarded for flag protection than for any other act. Some actually died just to keep the flag from touching the ground. Are those who propose this fiction saying that our soldiers who died on America's battlefields to keep dictators and tyrants from defiling our flag did so in order that it could be burned on the streets of America? Who would say this to our warriors?

Supreme Court Justice Felix Frankfurter said, "We live by symbols." Symbols are vital in a democracy. How can one separate ideals from the symbols that house them? It is like separating a person from his soul. Symbols are precious in our lives and our country and all our precious symbols are protected, except our most precious symbol – Old Glory.

FICTION: *Dictators protect their flag; protecting our flag aligns us with dictators.*
FACT: What American could ever compare Old Glory, designed by the father of our country and protected according to the will of a free people, to the hammer and sickle, or swastika, protected according to the will of a despot?

Madison and Jefferson believed our flag should be protected. Does that align them with Stalin and Hitler? Someone said, "Under majority rule, heads are counted; under minority rule, heads are cracked." It is vital that the will of the majority rule. In a democracy it is the wisdom of the majority that protects us from the tyranny of the minority whether the minority be dictators or those who compare the will of the majority to the will of dictators. How would one say a pledge to a dictator's flag: "I pledge allegiance to the flag of the Communist party and to the totalitarian government for which it stands, one dictatorship, without a god, with oppression and injustice for all"?

The people who compare those that would protect Old Glory with dictators live in a values vacuum and are certainly lost to the ideals of the Founders. But worse, they are distorting the Constitution to achieve their political agenda.

Consider: The California Supreme Court, in breaking new ground on free speech, has ruled that courts may legally ban the use of racial slurs on the job, a ruling promoted and supported by the ACLU. The ACLU said the decision was appropriate and did not represent a threat to freedom of speech. They opined that it is not a novel idea to say that the courts are able to enjoin illegal activity, even when part of that illegal activity involves speech. Really? Burning the flag was illegal in Texas when the courts decided it was speech. The ACLU went on to say that "even though the First Amendment protects speech, it does not protect the right to make terrorist threats, commit fraud, threaten someone, or commit extortion." Nor does it protect flag-burning. That statement mirrors the CFA's argument for the flag amendment.

On flag burning, the ACLU remains hypocritical and has continually stressed that an essential aspect of freedom of expression is the right to choose precisely the manner in which one's ideas are conveyed, even if - indeed, especially if - the manner chosen is deliberately provocative or offensive. What else are racial slurs? The ACLU is enthralled with Justice Harlan's words: "It is often true that one man's vulgarity is another's lyric." A racial slur is not a lyric and neither is flag-burning. Neither should be protected by the First Amendment.

FICTION: *Patriotism should not be forced.*

FACT: The leftist elite in America are fond of finding good in conduct the majority finds evil or offensive. For example, the ACLU defends flag desecration and pedophilic solicitation of our children on the Internet as "free speech." Not surprisingly, these elite typically find evil in good – patriotism for example.

Patriots are those who love, support and defend their country. "Support and defend" are the operative words. Love is difficult to pin down, but best known by its fruits. To understand the love of a patriot, it is important to understand that sacrifice is best defined as love in action. Those who willingly sacrifice – that is, support and defend – do so out of love. But the love of a patriot is not blind. Just as it is impossible to care for anyone and not correct them, one cannot care for America and not seek to correct its errors.

We must guarantee that dissent and debate are robust, but never damage or be directed against our Constitution, the foundation of our freedoms. It is the wisdom of the people, ultimately the majority of an informed active people, which is our protection from tyranny. The will of the majority should define patriotism, not the will of an elite minority.

"Country" is easily defined as the people, our neighbors, the land, and our leaders. One need not love his neighbors, but he may not harm them. That is against the law. One may not love the land, but he may not pollute it. Is protecting our people and our land forcing patriotism? Yes it is. Is it forcing patriotism to draft citizens to give their life in war to protect and defend their country? It certainly is. Is it forcing patriotism to force our citizens to ration in time of war to support the effort? You bet it is. We may not love our leaders but we are obliged to obey their laws. Is it forcing patriotism to force obedience to the law? What are laws for if not to force the unpatriotic to act patriotic? Patriots, good citizens, don't need laws. Any person who accepts the protection and prosperity of a nation ought to be obedient to the laws of that nation and willing to support and defend it in peace and at war.

No one has a right to control what anyone thinks, believes or loves, but we have every right, indeed an obligation, to control how citizens act.

It is insane to say that a free people cannot control conduct (i.e. flag burning), and that it is unpatriotic to do so. It should be obvious that demanding -- indeed, forcing -- patriotism is the bedrock of our freedom. It should also be clear that patriotism is the lifeblood of any nation. No nation can survive if its people refuse to support and defend it.

FICTION: *The flag amendment would start a slippery slope toward other amendments and restrictions on desecrating of other things, such as copies of the Constitution.*

FACT: Laws protecting the flag existed since our birth as a nation and promoted no other amendments. Each amendment must stand on its own merit. In fact, there have been over 11,000 attempts to amend the Constitution and the people have allowed it only 27 times. They take this responsibility very seriously.

It is important to remember the difference between a copy of the Constitution and our flag. While many would object to the burning of a copy of the Constitution, few would want a law against it. But no one would say it is OK to burn the **original** Constitution, which is heavily protected. The difference in burning a copy of the Constitution and a flag is that each flag is an **original**; there are no copies.

The slippery slope that the elite really fear is that the flag amendment will be the first step by the people to rescue their Constitution from the elite in the courtrooms, the classrooms, the cloakrooms and the newsrooms and return it to the living rooms where it belongs.

Statements by Prominent Americans in Support of the Flag Amendment

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

Chief Justice William H. Rehnquist, Texas v. Johnson, 1989

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

Chief Justice William H. Rehnquist, Texas v. Johnson, 1989

"It passes my belief that anything in the Federal Constitution bars . . . making the deliberate burning of the America flag an offense."

Associate Justice Hugo Black, Street v. New York, 1969

"This flag means more than association and reward. It is the symbol of our national unity, our national endeavor, our national aspiration. It tells you of the struggle for independence, of union preserved, of liberty and union one and inseparable, of the sacrifices of brave men and women to whom the ideals and honor of this nation have been dearer than life."

Associate Justice Charles Evans Hughes, 1916

"I believe that the States and the Federal Government

do have power to protect the flag
from acts of desecration and disgrace."

Chief Justice Earl Warren, Street v. New York, 1969

"The flag is a special kind of personality. Its use is traditionally and universally subject to special rules and regulations . . . The States and the Federal Government have the power to protect the flag from acts of desecration."

Associate Justice Abe Fortas, Street v. New York, 1969

"[L]ove both of the common country and of the State will diminish in proportion as respect for the flag is weakened. Therefore, a State will be wanting in care for the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige, and will be impatient if any disrespect is shown toward it."

Associate Justice John Harlan, Halter v. Nebraska, 1907

"In my considered judgment, sanctioning the public desecration of the flag will tarnish its value – both for those who cherish the ideals for which it waves and for those who desire to don the robes of martyrdom by burning it. That tarnish is not justified by the trivial burden on free expression occasioned by requiring that an available, alternative mode of expression — including uttering words critical of the flag... be employed."

Associate Justice John Paul Stevens, Texas v. Johnson, 1989

"Burning and destruction of the flag is not speech.
It is an act. An act that inflicts insult – insult that strikes at the very core of who we are as Americans and why
so many of us fought, and many died, for this country.
No, this is not a debate about free speech.
Our flag stands for free speech and always will."

U.S. Rep. John Murtha (D-Pa.)

"Flag burning is not free speech. It is an act of hatred
and nihilism. It is not a call for reform. It is a disgrace.
The right to dissent does not include the right to desecrate. To desecrate the flag crosses a line of ugliness."

U.S. Rep. Chris Smith (R-N.J.)

"The Supreme Court made a mistake [on flag desecration], is not absolute and we should

never kow-tow to any other branch of government regardless of their decision."

US Rep. Bill Pascrell (D-N.J.)

"I regard legal protections for our flag as an absolute necessity and a matter of critical importance to our nation. The American flag, far from being a mere symbol or a piece of cloth, is an embodiment of our hopes, freedoms and unity. The flag is our national identity."

General Norman Schwarzkopf, USA (Ret.)
In a letter to Sen. John Edwards (D-N.C.), et al, April 1999

"The First Amendment protects freedom of speech,
not expression, and, whereas all speech may be expression of a sort, not all expression is speech, and there is
good reason why the framers of the First Amendment protected the one and not the other."

Walter Berns, Making Patriots, p.139

"We are told that the freedom of speech includes the freedom to desecrate the flag. But setting a flag afire is no more speech than vandalizing a cemetery, or scrawling slogans on a church or synagogue, or spray-painting a national monument – all of which are acts properly forbidden by the laws of a civilized country. Not to mention simple public decency." "Because the law is a great teacher, one thing it needs to teach in a less-and-less civil society is a little respect."

Paul Greenberg, Pulitzer Prize winning journalist

"Speech is when you talk."

Baseball great, Tommy Lasorda

Entertainer and recording artist ***Pat Boone***,
another supporter of a flag amendment, once suggested
to those who say they love the flag, but do nothing to prevent its desecration,
"It's like saying you love your mother,
but it's okay to slap her around."

"The flag speaks. The only inanimate object that speaks. It says what it is and what it stands for. When draped
on a coffin it says, 'Herein is someone honorably dead.' There are happy flags, e.g., Halloween. There are proud flags, example: organizations and corporations. All flags so far mentioned are colorful with symbolism. There is a flag without color. Awesomely powerful. It is white. It says we surrender – the saddest negative speech. By its power it

stops the creation of death. I saw the white flag. Stopped our guns. Watched the retrieval of the wounded. Our flag is beautiful, proud, serene, untiring, always there. It speaks, our flag is the ultimate voice."

Jim Burt, Medal of Honor Recipient

"Burning a flag is not speech and should not fall under First Amendment protection."

Judge Robert Bork, Supreme Court nominee

"Why is flag burning protected speech and prayer is not? What is said when you burn a flag? If speech can be
other than verbal, why isn't flying the flag speech?
And burning the flag an assault on speech?"

***Major General Patrick H. Brady**, USA (Ret.)*
Medal of Honor Recipient
The American Legion Magazine, *May 1999*

The American values we share are a legacy most of us want to pass on to our children and grandchildren. These American values have their basis in our Declaration of Independence and our Constitution. The Flag of the United States symbolizes these values.

Throughout our history, that flag has inspired defenders of our freedoms to press on to the goal, to achieve great deeds when nothing less would suffice. The mere sight of Old Glory waving majestically reminded them of America, their home – a home and a flag worth defending.

Immigrants to Ellis Island and San Francisco knew its meaning. It was not the flag of their king or of their fathers. It was their flag…and it would be the flag of their children. It would be respected, as a symbol of hope, not despair; a symbol of freedom, not oppression.

Our patriots understand how precious free speech is and they would die for it. Many have. What they would not understand is how desecrating the flag is speech. And they know how precious the Constitution is. It was written in their blood.

What are children being taught about love of country? What are they being taught about the greatness of America? How many of them will start each school day pledging their allegiance to our flag, as most of us did? How many of them will learn the proper way to respect the flag, and what it means and why patriotism is important? And what of those who grow up learning that the flag is just one symbol among many, just one point of view, not deserving of any special recognition, dignity or respect? How will they reconcile the idea that we prove our love for our nation's flag by allowing those who hate America to desecrate it without penalty?

The greatest tragedy in flag mutilation is the disrespect it teaches our children, disrespect for the values it embodies, and disrespect to those who have sacrificed for those values. Disrespect is the genesis of hate, it provokes the dissolution of our unity, a unity which has only one symbol – the flag.

You cannot separate the values issue from our children and what kind of world we want to leave them. Our values are formed, theirs are not. The flag is our greatest teaching aid for values and for patriotism.

In a culture that glorifies the repugnant, how can we expect the youth of America to share our sense of reverence for the flag? How can we expect our young people to feel true allegiance to something the Supreme Court says can be defiled, defaced and desecrated?

The flag represents the core of what we have been; burning the flag represents what we are becoming. Waving the flag has ignited the flame of patriotism in the hearts of countless Americans; burning the flag will put that fire out.

America is ruled today, not by what the Founders put in the Constitution, but what the Courts are finding there. And much of what the Courts are finding there is the agenda of a small minority of elitists, most of whom were raised on a different playing field than the rest of us, who

never served on a battlefield, and who are convinced they know what is best for America.

In our hearts, we all know it's wrong to desecrate our flag. All of the opposition starts every speech by talking about how much they love our flag, and about how they would never burn it, but they can't quite see their way clear to protecting it. But have we considered this – to do nothing when the flag is desecrated is not simply to let violence bear it away – but it's to join the mob, to aid and abet by our silence, to give barbarism our permission. To allow the legal desecration of our flag is to condone the general disintegration of society – to participate in the devaluing of the world's foremost symbol of freedom.

The flag amendment is about holding the line on respect, on the values that many risked our lives to preserve. We live in a society that respects little and honors less. The great majority of us can trace most of today's ills to a breakdown in respect … for laws, for traditions, for people, for the things held dear.

The flag burners are not the enemies to our Constitution. It is those who call flag burning "speech," who seek to control our Constitution, who are the real enemies.

According to Webster's Dictionary, "speech" is "the act of expressing thoughts, feelings, or perceptions by articulation of words; something spoken; vocal communication, conversation."

Our courts wrongly tell us that prayer is not protected speech, but pornography is; they will not allow the Bible or the Ten Commandments in our schools. The Supreme Court prohibits any demonstration on its steps, but allows Old Glory to be burned on our streets.

Abraham Lincoln once asked how many legs would a dog have if you called his tail a leg. The answer is four. The Supreme Court counted the tail when it said burning the flag was "speech." They were wrong. Desecration of the flag is clearly conduct. However, what concerns us most is not those who defile our flag, but those who defile our Constitution by calling flag burning speech.

Returning to the people the right to protect the flag is not about free speech. It is not about tinkering with the Constitution. It is not about toleration of those with different views. It is about the kind of people we are. It is about different kinds of people wresting for the soul of America. It is about a minority who fear the democratic process and show disdain for the Founding Fathers who wanted the majority of the people to control the Constitution – through their representatives, if possible; through the amendment process, if necessary.

The issue no longer centers on the wisdom of protecting the flag, but on whether or not the people should have the freedom to protect their flag. The amendment itself does not provide protection; it merely provides an avenue for protection, if that is the will of "We the People."

To argue against flag protection as a reason not to pass the amendment is to argue against the American people having the right to decide the issue for themselves. And if not the people, who

would we have decide the issue? Is not our government based on trusting the collective wisdom of the people? Did not Thomas Jefferson say: "It is my principle that the will of the majority should always prevail"?

The fight to protect the flag is not on the battlefield, but at the ballot box. When Americans go to the polls they'll help decide the fate of the flag by choosing members of Congress and state legislatures who will vote for a constitutional amendment that will return to the people the right to protect the flag.

Failure to protect our flag by law is not a celebration of liberty; it is the celebration of evil. A great nation cannot preserve its greatness by turning a blind eye and a deaf ear to that which is wrong, to that which is destructive, to that which is immoral and evil.

The Constitution is too important to be left to the Courts and so is the flag. They both belong to the people and it is time for this body to let the people decide.

STATEMENT

BY

MSGT (RET.) MORGAN D. BROWN
MANAGER, LEGISLATIVE AFFAIRS
AIR FORCE SERGEANTS ASSOCIATION

FOR THE

SENATE JUDICIARY COMMITTEE
ON SENATE JOINT RESOLUTION 4

MARCH 10, 2004

DISCLOSURE OF FEDERAL GRANTS OR CONTRACTS

The Air Force Sergeants Association does not currently receive, nor has the association ever received, any federal money for grants or contracts. All of the association's activities and services are accomplished completely free of any federal funding.

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A participating organization in The Military Coalition

Mr. Chairman and distinguished committee members, on behalf of the 135,000 members of the Air Force Sergeants Association, thank you for this opportunity to offer our views on the increasingly important flag protection amendment under consideration here today.

AFSA represents the hundreds of thousands of active duty, Guard, Reserve, retired, and veteran enlisted Air Force members and their families. During our visits to Air Force bases throughout the world, members often express their concern over the need to protect the flag and, at the same time, to have a role in deciding the laws governing that protection. For enlisted military members, whose work is characterized by dedicated sacrifice, the flag is a reminder of why they serve. For those stationed overseas, it is a symbol of America, seen every day. For all military members, the flag represents the principles for which they are prepared to sacrifice.

Numerous polls have shown that 3 out of every 4 Americans (76 percent) believe they should have the right to decide the question of flag protection through the constitutional amendment process. To date, all 50 state legislatures have passed memorializing resolutions asking Congress to pass an amendment and send it back to the states for ratification. In June of last year, the House passed (for the fifth time) House Joint Resolution 4, a constitutional amendment to protect the American Flag from acts of physical desecration.

The time has come for the Senate to act on their own flag protection amendment. Senate Joint Resolution 4 would give the American people the opportunity they desire to protect their flag through law. S.J. Res. 4 would send to the people a very simple directive--That Congress shall have power to prohibit the physical desecration of the flag of the United States.

The 135,000 members of the Air Force Sergeants Association urge you to support this resolution. These Americans, perhaps more than any others, have a vested interest in that they put their lives on the line under the banner of this sacred symbol of greatness and sovereignty. Military members serve so they can protect this country, putting their lives on the line if necessary, and they revere our nation's most visible symbol--Old Glory. It is the one hallowed symbol all patriots hold sacred. Most importantly, the flag plays a central role in ceremonies that honor those who have fought, suffered and died. They know full well this very flag may drape their coffins as a result of their unselfish service. Denying protection and, thereby allowing desecration, of this important symbol of sacrifice insults the memories of those who are honored in these ceremonies. The American people, especially those in the military, deserve the opportunity to make the decision if they want to put flag protection into the law. Through their sacrifice and dedication, those who have served have earned your support in giving them the ability to make this decision.

All members of the 108th Congress should support this resolution in order to put this important decision in the hands of the people. If congressional representatives truly represent the will of the people, there should be no delay in acting upon the wishes of the people by allowing them to rule on this question. The personal feelings and opinions of elected representatives on this issue should be subordinated to opinions held by those to whom the elected officials are responsible--those who own the process. Supreme Court Justice John Paul Stevens once wrote: "A country's flag is a symbol of more than nationhood and national unity. It also signifies the ideas that characterize the society that has chosen that emblem as well as the special history that has animated the growth and power of those ideas. So, too, the American flag is more than a proud symbol of the courage, the determination, and the gifts of a nation that transformed 13 fledgling colonies into a world power. It is a symbol of freedom, of equal opportunity, of religious tolerance, and of goodwill for other people who share our aspirations."

Mr. Chairman and committee members, once again, we urge your full support of S.J. Res. 4. Some questions of governance and law are of such importance to a people that they deserve the opportunity to speak directly to those issues. This is one such question. We thank you for this opportunity to present our views on this important matter. As always, AFSA is ready to support you on matters of mutual concern.

Testimony of Daniel J. Bryant
Assistant Attorney General for the Office of Legal Policy
United States Department of Justice
before
The United States Senate
Committee on the Judiciary

March 10, 2004

Letting the People Decide: The Constitutional Amendment Authorizing Congress to Prohibit Physical Desecration of the Flag of the United States

Good morning, Mr. Chairman and distinguished members of the Committee. Thank you for the opportunity to join you today to reiterate the Administration's continuing support for a constitutional amendment authorizing Congress to protect the American flag from physical desecration. The President joins a majority of Members of both Houses of Congress in supporting this constitutional amendment to protect and honor this great symbol of the American democratic ideal.

Let me state at the outset that we do not believe that amending the Constitution is something to be undertaken lightly. Altering the Constitution is a weighty matter, but one that we believe is warranted to protect the unique, enduring symbol of our great Nation.

It is noteworthy that Americans overwhelmingly refer to the flag as the "American flag," not the "United States flag." In a simple way, this tendency provides an insight, I think, into the way we as Americans associate with the flag. It's not simply the flag of a particular constitutional system, that of the United States. More than that, it's the flag of us as a people.

Over the centuries, it has become an integral part of who we are as Americans.

Accordingly, the Administration believes that the Congress should allow the American people, through their elected representatives, to accord the flag – our flag – the respect and corresponding protection it deserves.

There can be no doubt that under the current interpretation of the First Amendment, physical desecration of the American flag in protest is protected speech. Attempts by Congress and by state legislatures to pass statutes to protect the flag have been struck down by the United States Supreme Court. Against this backdrop, it is clear that the only way the flag can be protected is through an amendment such as the one proposed by S.J. Res. 4, currently before you.

S.J. Res. 4 is a simple measure, providing in relevant part: "The Congress shall have power to prohibit the physical desecration of the flag of the United States." There are two noteworthy features in connection with this resolution. First, it does not itself prohibit the physical desecration of the flag, but merely provides that Congress may do so. This will allow the democratically elected legislature to decide whether and how to protect the flag from desecration. Second, as with any resolution to amend the Constitution, by passing this resolution, Congress is not itself amending the Constitution but is simply providing the states an opportunity to deliberate and ultimately decide whether the Constitution should allow Congress to protect the United States flag.

Many Americans find it strange that federal law protects symbols such as the bald eagle and our currency from destruction but does not protect the flag. This perverse result did not occur because Congress and state legislatures have not tried to protect the flag. Over thirty-five years ago, Congress attempted to protect the flag by passing the Flag Protection Act of 1968 (1968 Act).[1] This congressional action was in response to the television broadcasting of multiple images of flag desecration at a time when young American soldiers were sacrificing their lives in Vietnam. The Act prohibited any person from " knowingly cast[ing] contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it." Forty-eight states followed suit, and passed state legislation prohibiting the desecration of the flag. For twenty years following passage of the 1968 Act, lower federal courts heard constitutional challenges to it and upheld the statute as a valid exercise of congressional authority.

In *Joyce v. U.S.*, for example, the U.S. Court of Appeals for the D.C. Circuit held that the statute proscribed only conduct, was thus not aimed at the suppression of speech, and only imposed "the smallest restraints on 'communication.'"[2] The Ninth Circuit also upheld the statute, finding that Article I, § 8, of the Constitution authorized Congress to prohibit the burning of the flag, and that the statute did not violate free speech rights.[3] The Fourth Circuit similarly

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[1] Pub. L. 90-381, § 1, 82 Stat. 291.

[2] 454 F.2d 971, 990 (D.C. Cir. 1971).

[3] *U.S. v. Crosson,* 462 F.2d 96 (9th Cir. 1972).

upheld the statute, without written opinion, against a constitutional challenge.[4] In each of those cases, the United States Supreme Court refused to hear an appeal.

The Supreme Court also declined to decide the facial constitutionality of several state statutes banning flag desecration. In several challenges by protestors convicted of flag desecration under state law, the Court avoided the First Amendment question about flag burning by holding for the protestors on case-specific grounds. For example, in *Smith v. Goguen*, the Court declined to reach the question of whether a Massachusetts statute that subjected to criminal liability anyone who publicly "mutilates, tramples upon, defaces or treats contemptuously the flag of the United States" violated the First Amendment.[5] Instead, the Court ruled in favor of the appellant, who was convicted for wearing an American flag on the seat of his pants, on the ground that the words "treats contemptuously" were too vague and did not provide the appellant with enough notice of what type of conduct was prohibited.[6]

Fifteen years later, in *Texas v. Johnson*, the Supreme Court found that a state statute prohibiting desecration of the United States flag violated the First Amendment as applied to a man convicted for burning a flag during a demonstration outside of the 1984 Republican

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[4] *Kime v. U.S.*, 673 F.2d 1318 (4th Cir. 1982).

[5] 415 U.S. 566 (1974).

[6] *See also Street v. New York*, 394 U.S. 576 (1969) (finding a New York provision unconstitutional as applied because it permitted prosecution for both acts of desecration and negative words about the flag); *Spence v. Washington*, 418 U.S. 405 (1975) (holding that under the facts of the case the state's interests in preventing breaches of the peace and protecting the integrity of the flag did not warrant the conviction of appellant).

Convention.[7] Although the Court declined to rule the statute facially unconstitutional, in practical terms the decision rendered invalid the 1968 Act and similar provisions in forty-eight states that prohibited the desecration of the flag as part of a public demonstration.

Recognizing that the *Johnson* decision effectively invalidated the 1968 Act, Congress passed the Flag Protection Act of 1989 (1989 Act).[8] Unlike the 1968 Act, the 1989 Act did not require that the offender cast contempt upon the flag, focusing not on desecration of the flag but instead on protecting its physical integrity. Congress believed that with this distinction, the Act was no longer aimed at expression and hence should be judged by the less exacting standard of review enunciated in *U.S. v. O'Brien* rather than strict scrutiny.[9] The Supreme Court disagreed, and held in *U.S. v. Eichman* that the 1989 Act's prohibitions were still aimed at the suppression of expression and that the Act was unconstitutional on its face.[10]

Since the *Eichman* decision, every Congress has considered a constitutional amendment that would grant to Congress the power to enact legislation to protect the United States flag from physical desecration. However, although the House has passed such an amendment in five of the past Congresses, including a bill identical to the one before the Senate that passed the House on

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[7] 491 U.S. 397 (1989).

[8] "Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both." Pub. L. 101-131, 103 Stat. 777.

[9] 391 U.S. 367 (1968).

[10] 496 U.S. 310 (1990).

June 3, 2003, by a vote of 300 to 125, such an amendment has never been approved by the full Congress and sent to the states for ratification.

The Administration believes that this Congress should allow the ultimate decision of whether to amend the Constitution to lie with the individual states by passing this resolution and sending the amendment to them for ratification. At one time, all but two states attempted to protect the flag by passing state provisions. With Supreme Court precedent definitively answering in the negative the question of whether such statutes pass constitutional muster, the Nation must now decide if what is needed is an amendment to the Constitution allowing Congress to protect the flag. Congress should allow this decision, whether to protect a flag that has such undeniable symbolic value of all that this Nation has been through, and all that makes it great, to rest with the fifty states represented by that flag.

Thank you once again for allowing me to appear before you today to discuss this very important issue.

STATEMENT OF
THOMAS L. BURNS
NATIONAL EXECUTIVE COMMITTEEMAN
DEPARTMENT OF DELAWARE
THE AMERICAN LEGION
PRESENTED TO THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ON
SENATE JOINT RESOLUTION 4

MARCH 10, 2004

Mr. Chairman and Members of the Committee, as the National Executive Committeeman for The American Legion's Department of Delaware, thank you for holding this hearing on S.J. Res. 4, a proposed constitutional amendment to prohibit the physical desecration of the flag of the United States.

The CFA represents over 20 million Americans and 145 diverse, community-based organizations, such as the Elks, The American Legion and the Grange just to mention a few. Their common goal is to have Congress pass a proposed constitutional amendment to protect "Old Glory." Unlike other proposed constitutional amendments recently debated in Congress, S.J. Res. 4 was truly initiated through a national grassroots effort. For this reason, I hope you pass this measure and let the people decide.

The movement to protect the American flag from physical desecration is about responsibility and respect. More importantly, it is about the democratic process and about "We the People" having a say in how we want to be governed. America's Founding Fathers created a form of government that placed the ultimate power of this nation in the hearts, hands and minds of common, everyday people. Passing this amendment will be a true exercise of the democratic process.

Last Congress, a similar measure, H.J. Res. 36 passed the House of Representatives by a vote of 298-125. Unfortunately, its counterpart, S.J. Res. 7, was not even considered by the full Senate. This movement will not go away. In June of last year, the House of Representatives again responded to the American people and passed H. J. Res. 4 by a vote of 300-125. A constitutional amendment to protect the flag from physical desecration is the only way to address the Supreme Court's 1989 decision in *Texas v. Johnson*. The American people have no other recourse.

When the Supreme Court made their controversial decision to protect flag desecration as an expression of free speech, the American people took exception to the ruling. As a result, 50 state legislatures passed memorial resolutions tasking Congress to send a flag amendment to the States for ratification. The State of Delaware is one of those states.

Furthermore, the people of Delaware know the difference between free speech and unacceptable behavior. Physical desecration of the flag is unacceptable behavior no matter how often it occurs. Pirating on the seas and treason are still punishable crimes, despite the fact neither offense has happened in years.

I have heard all of the arguments against the flag amendment and I respect their opinions, but I cannot accept them at face value. I have seen the American flag on too many caskets of fine men and women who served their country with honor and dignity. I have seen too many widows and widowers, sons and daughters, accept that neatly folded flag in memory of their deceased loved one's service to a grateful nation. I have seen children beam with pride after learning to say the Pledge of Allegiance. I have seen young men and women march into battle knowing some of them would returned wrapped in that banner.

There's an old saying, "He who does not stand for something, will fall for anything." For some people, accepting the Supreme Court's ruling is easy, but for the vast majority of Americans, they know in their hearts the ruling is wrong. These citizens are taking a stand to say loud and clear, a change must be made to restore the laws that prohibit blatant, willful, and wanton acts of misconduct. The sad part of this Court's ruling is the infringement on the rights of the vast majority who view such conduct as deplorable and have no legal power to stop it, except Article V of the U.S. Constitution. Thirty-six Senators, in a nation of 280,000,000 people, are thwarting the will of the vast majority by not sending this amendment to the states for ratification.

Polls taken in nationwide reveal at least 75 percent of those surveyed favor flag protection; and 80 percent say the people should have the right to decide the question of flag protection. For over 100 years, state laws prohibited flag desecration. The U.S. Supreme Court's 1989 decision in *Texas v. Johnson* invalidated flag laws in 48 states and the District of Columbia. Even Congress took exception to the Supreme Court's ruling and responded by passing the Flag Protection Act of 1989. Unfortunately, the Supreme Court also declared this measure unconstitutional in 1990.

Members of this Committee, the Senate has a responsibility to pass S.J. Res. 4 and allow the American people to have a say in how they want to be governed. Make a trip to Delaware and ask a farmer, a Native American, a veteran, a schoolteacher, a businessman or a minister if the physical desecration of the

American flag is freedom of speech or misconduct. I believe the answer will be unanimous. Let the people decide.

Thank you for allowing me to participate in this hearing and taking a stand for the national symbol of strength, unity and justice. I request that this statement be included in the official record of this hearing.

of Virginia

"...an apolitical, non-partisan confederation of American organizations and individuals who wish to protect the United States Flag from public intentional physical desecration."

Our Patriot Flag

We are here because we choose to be. Whether born in the United States or immigrated to the United States it is by choice. All Americans are free to leave any time they choose. Our flag is recognized all around the world. It is liked by some and hated by many others but it stands alone for America's freedom.

The flag is our most patriotic symbol and is recognized through out the year. Since 1776 we have put our men and women in harms way and our flag has always led them. Our flag has seen a number of changes over the years but it has always stood for freedom. We have fought tyrants and evil men all over this world and the one thing we look for is our flag flying proudly above us.

The following is the reason I am writing this article. Our flag has been torn to shreds, kicked around the streets, burned and even spit on but it always rises again. For well over a decade now there are citizen and veteran groups trying to get congress to let the citizens of the United States decide to ratify the Constitution so we can protect the flag from physical desecration. An amendment to the Constitution would show the rest of the world how much we value our flag. Remember we protect the Bald Eagle from desecration, we preserve our National Anthem from desecration and we protect our Liberty Bell from desecration. **We need to protect our flag from physical desecration.**

We were attacked on 9/11 and after the smoke cleared we saw firemen raising our flag, to me and I am sure to most of us this was very inspiring. Now our young men and women are returning from far away lands and I know some are returning in caskets with the flag draped over it. This is all done out of respect and patriotism for those who have given their lives for our country.

With all this being said (and I want to think unknowingly) our citizens are desecrating our flag. After 9/11 the flag that those firemen raised at the World Trade Center went around the world with citizens names written on the flag. Recently I saw a casket draped with the flag and it also had writing on it. I am sure that there are more instances that have happened that I am not aware of.

Our flag is meant to stand tall and show the rest of the world that we are free. When we fly the flag or drape it over a casket it needs to be done with respect. Writing on the flag is not paying respect to the flag. Our flag wants to show how beautiful it is by letting us see its blue field, white stars and red and white stripes. This is the manner in which we should look at our flag and this is how we should show respect for our flag.

For God Country and Flag
Kenneth Knight
Chairman
Citizens Flag Alliance of Virginia

STATEMENT OF
JOHN P. "JAKE" COMER
PAST NATIONAL COMMANDER
1987-88
THE AMERICAN LEGION
TO THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ON
SENATE JOINT RESOLUTION 4

MARCH 10, 2004

Mr. Chairman and distinguished Members of the Committee, once again the grassroots of America brings to your attention an issue that continues to disturb the vast majority of people who still believe the 1989 United States Supreme Court 5-4 decision in *Texas v. Johnson* was wrong.

The Citizens Flag Alliance (CFA) is a diverse, national coalition of 145 grassroots organizations, with a membership of over 20 million Americans, which came together seeking a constitutional amendment to protect the American flag. The CFA's 50 State Chairmen, who volunteer countless hours of time, energy and effort, will not allow this issue to just "fade away." Massachusetts is just one of the 50 state legislatures to pass a memorial resolution asking Congress to send to them such a constitutional amendment for ratification. The amendment simply reads: *The Congress shall have power to prohibit the physical desecration of the Flag of the United States.*

I honestly believe most Americans see this issue as not so much about rights, but about values. Most Americans cherish the flag and what it represents. It is on behalf of these Americans the effort continues. Make no mistake about it; this is truly a grassroots movement. The average American is outraged by this Court ruling and wants it fixed. National polls consistently reflect that 75 percent of the American people surveyed (this percent holds true in a state poll in Massachusetts) favor a constitutional amendment to protect the flag.

America is a government of *We the people*. It is not a government of its branches. Congress, the President and the Supreme Court serve only as trusted agents. Historically, this triad has worked well, but not perfectly. These trusted agents are responsible for their actions. The system of checks and balances was designed to ensure that no one branch of government is beyond reproach. Clearly, *Texas v. Johnson* warrants a redress of grievances by *We the people* and the attention of lawmakers.

The Court's job is to interpret the United States Constitution. It is the job of *We the people* to correct the Court when its interpretation is so dramatically inconsistent with the belief of the citizenry. The Founding Fathers knew the document was not perfect and crafted Article V to make necessary adjustments. The same process that give African Americans, women, and 18-year olds the right to vote.

Amending this Nation's most precious document is a very serious matter. By design, Article V is, justifiably, a laborious process. In the 104th Congress, a proposed constitutional amendment in the House of Representatives passed with a super majority (312-120). When the proposed amendment moved to the Senate, the late Senator Paul Simon of Illinois stood on the Capitol grounds at a press conference held by the American Bar Association and warned his colleagues that if they passed the pending flag amendment and sent it to the States, it would be the fastest ratified amendment in American history. Senator Simon and 35 of his colleagues were successful in defeating that constitutional amendment proposal. The deafening voice of the American people was temporarily silenced by just 3 votes.

Here we are in the 108th Congress faced with a very similar situation; however, there are many new faces in the Senate. Twenty-one of your colleagues have never voted in this Chamber on this amendment. Since that vote, many things have happened – some good – some not so good. But grassroots support for this amendment has not waned. Many Americans believe the horrible events surrounding 9-11 and the subsequent War on Terrorism have increased individual awareness of the need for this amendment.

Nowhere does the Constitution grant absolute freedom of speech. Each person is held accountable for actions that violate the personal freedoms of others. Slander and libel are clearly punishable. Plagiarism is illegal.

The Federal Communications Commission has the power to assess fines for violations of the public airways. The United States Capitol and the United States Supreme Court have punishable offenses for unauthorized assembly and demonstrations on its grounds, even if the act is an exercise of free speech.

When the Citizens Flag Alliance held a rally in Washington, DC, on the Capitol grounds several years ago, it had to obtain a permit for a parade and a permit for a press conference. Yet, when a group chose to physically desecrate flags on the steps of that Capitol to challenge the Flag Protection Act of 1989, a federal statute passed by Congress in an attempt to correct *Texas v. Johnson*, the law was ruled unconstitutional. In 1996, a teenager in Wisconsin lowered an American flag from the flagpole at a public golf course, defecated on the flag, and then placed the flag on the steps of the clubhouse. This conduct is clearly an act of delinquency rather than freedom of speech, but the state's flag desecration law was ruled unconstitutional and he was exonerated of that particular charge.

Massachusetts has witnessed its share of flag desecration cases in recent years. On May 5, 2001, in Lawrence, a desecrated American flag was found lying on the front steps of City Hall. It is believed that vandals removed the flag from its pole across from City Hall and wrote anti-capitalist and racist slogans and an expletive on it. There were also burn marks on the flag.

Five months later, on October 18, Amherst College students were stunned moments after a pro-America rally involving more than 100 people ended when several protesters emerged from the crowd to set fire to a US flag. Ten demonstrators doused two flags with lighter fluid and set them on fire. Then, five members of the group spread a larger flag on the ground and stood on it while chanting anti-American slogans.

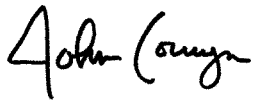
Seven months later, on Memorial Day 2002, in Braintree, Jose Santos awoke to find his US flag crumpled and burned on his front porch. Mr. Santos called police to report what he described as a "sad and very unpatriotic act" on a day when Americans are supposed to be remembering the sacrifices made for their freedom.

The actions of these individuals can hardly be called an expression of speech; it is behavior of the ugliest kind and should not be tolerated. A person cannot physical desecrate Old Glory with their tongue. Letting the American people have the final say on this issue seems so logical and democratic. Clearly, a flag constitutional amendment has the support of the vast majority of Americans. If former Senator Simon's prognosis is accurate, that it would be the fastest ratified amendment in our history, why should the American people be denied an opportunity to decide the ultimate fate of this issue? If this is truly a government *of the people, by the people and for the people*, the amendment process surely demonstrates democracy-in-action.

In the First Session of the 108th Congress, the House of Representatives continued their support of an amendment by a super-majority vote of 300 - 125 in passing House Joint Resolution 4. I encourage this Committee to echo the voice of the House, as well as the voices American people, and forward S.J. Res. 4 to the Senate with your positive recommendation.

Mr. Chairman, I realize that any 5-4 decision by the U.S. Supreme Court is wide open for honest and robust debate. I believe that the final arbitrator of this issue should be We the people – the governed. I would ask the Senators -- including my own -- that have voted against this narrowly crafted proposed constitutional amendment, to reconsider their votes and allow its to go to the states for ratification.

I request that my written testimony be added to the official record of this hearing.



STATEMENT OF U.S. SENATOR JOHN CORNYN (R-TX)

Committee on the Judiciary
United States Senate

Letting the People Decide: The Constitutional Amendment Authorizing Congress to Prohibit Physical Desecration of the Flag of the United States

Wednesday, March 10, 2004, 10:00 a.m., Dirksen Senate Office Building Room 106

Mr. Chairman, thank you for convening today's hearing to consider Senate Joint Resolution 4, a constitutional amendment to give Congress the ability to prohibit the physical desecration of the United States flag. I am pleased to be one of the bipartisan group of original co-sponsors of Senate Joint Resolution 4.

The United States Constitution must never be amended casually. At the same time, as members of Congress, we must never forget our role in the democratic process. In the vast majority of circumstances, we are able to discharge our duties through the introduction, consideration, and enactment of statutes. In certain circumstances, however, statutes are not enough. On certain occasions, a constitutional amendment may be the only mechanism available to the American people and their representatives in Congress to participate in self-government.

The constitutional amendment process fulfills the spirit of the Founders. Indeed, when our Founders drafted the Constitution, they purposefully included a built-in procedure for amendment in Article V. After all, our Founders firmly believed, to quote George Washington, the President of the Constitutional Convention, that "[t]he warmest friends and the best supporters the Constitution has do not contend that it is free from imperfections. . . . The People . . . can, as they will have the advantage of experience on their Side, decide with as much propriety on the alterations and amendment which are necessary."

Protection of the United States flag meets the standard for a constitutional amendment. Indeed, a constitutional amendment is the *only* means available to the American people for protecting the U.S. flag. In light of the U.S. Supreme Court decisions in *Texas v. Johnson* (1989) and *United States v. Eichman* (1990), the only way to ensure that the American people have the opportunity to protect the United States flag against physical desecration is a constitutional amendment. We have ratified numerous constitutional amendments as a democratic response to judicial decisions – including the 11th, 14th, 16th, 19th, 24th and 26th amendments.

The United States flag is different from other symbols of our nation. It is not merely an expression of patriotism. When a member of our armed services is killed in battle, the U.S. government solemnly provides the family with a U.S. flag. To thousands of military families, the U.S. flag uniquely represents the nation for which their loved ones have fought and died. As General Norman Schwartzkopf has written: "The flag remains the single, preeminent connection among all Americans. It represents our basic commitment to each other and to our country."

The American people have the right to determine whether to take steps to protect the United States flag against physical desecration. Approval of Senate Joint Resolution 4 would simply give the American people that right. Senate Joint Resolution 4 alone would not regulate conduct – it would simply give Congress the power to determine whether to prohibit desecration of the U.S. flag.

Some critics scoff at the notion that we might amend our Constitution in order to protect the American flag – just as some critics scoff at the notion that we might amend our Constitution in order to protect the traditional institution of marriage. Such detractors of democracy believe in government under the rule of judges. I believe in government of the people, by the people, and for the people. Senate Joint Resolution 4 returns the business of government to the people, by restoring to the democratic process the power to protect the most powerful symbol of our democracy, the United States flag.

Statement of Senator Larry Craig

Senate Judiciary Committee
hearing on
"Letting the People Decide: The Constitutional Amendment Authorizing Congress to Prohibit Physical Desecration of the Flag of the United States."

10:00 a.m., Wednesday, March 10, 2004
SD 106

Since 1989, the U.S. House of Representatives has passed five resolutions proposing a constitutional amendment to permit Congress to prohibit the physical desecration of the American flag. I urge my fellow Senators to follow suit with S. J. Res. 4.

There is healthy debate about flag desecration, and in particular, flag burning. Some have called it a nonissue, however. They argue that a relatively low incidence of flag burning justifies taking away people's right to govern such misdeeds through their elected representatives. That argument is irresponsible. It boils the issue down to numbers at the expense of its merits.

Flag desecration is not a constitutional issue for the courts. It is a political one that belongs to the people. And until as late as 1984, the Supreme Court of the United States agreed. Chief Justice Warren, in 1969, wrote that the States and the federal government . . . have the power to protect the flag from acts of desecration and disgrace . . . [I]t is difficult for me to imagine that, had the Court faced this issue, it would have concluded otherwise." In the Supreme Court's 1989 *Texas v. Johnson* decision, however, it did. Despite an earlier ruling that "the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places," the Court in *Texas v. Johnson* extended traditional First Amendment protection of *speech* to *conduct* and allowed for desecration of the American flag.

Laws protecting the United States flag do not cut away at the freedom of

speech guaranteed in the First Amendment. As Chief Justice Rehnquist noted in his dissent in *Texas v. Johnson*, "the Texas statute deprived Johnson of only one rather inarticulate ***symbolic*** form of protest–a form of protest that was profoundly offensive to many–and left him with a full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy." Congress made its support for this position clear upon passage of the Flag Protection Act of 1989, which prohibited desecration of the flag. The next year, the Supreme Court struck this Act down as unconstitutional in *United States v. Eichman*. This was the second time in two years that the Court denied American citizens the right to protect the flag through the lawmaking process: In *Texas v. Johnson*, the Supreme Court told the State of Texas that it could not punish a man for burning a flag in violation of state law, and in *United States v. Eichman*, the Court told Congress that its legislative efforts to protect the flag were unconstitutional. It is time now, however, for the Supreme Court's First Amendment jurisprudence to return to its proper and originally-intended constitutional bounds.

The Desecration of Flag Resolution, a constitutional amendment permitting Congress to prohibit the physical desecration of the American flag, is the only way to achieve this. If passed by the Senate, the legislatures of three-fourths of the States must ratify the article in order for it to become an amendment to the Constitution. The ultimate decision on flag desecration is therefore left where it belongs–with the States. And the States have spoken. The legislatures of all fifty states have passed resolutions calling upon Congress to pass a constitutional amendment to protect the flag and

send it back to the States for ratification. The U.S. House of Representatives, in passing the Desecration of Flag Resolution last June, has therefore done its job. The States are prepared to do theirs. I urge my colleagues to do ours.

Some critics in the Senate say that the issue is too old. And indeed it is. The American flag flew over a salvaged union of free states at the end of the Civil War. At Iwo Jima, six soldiers raised the flag atop Mt. Suribachi; the ascent cost 6000 lives. The flag was raised from the ashes at Ground Zero. It was waved by Iraqis at U.S. Marines as they entered Nasiriyah in April of last year.

True to our history and the observations of Francis Scott Key, we've given proof that we are still here. We've raised the flag. I ask my fellow Senators not to trivialize the event by flying, raising, and waving the American flag while refusing to protect it.

Czech Catholic Union

A LEGAL RESERVE FRATERNAL BENEFIT SOCIETY

MARY ANN MAHONEY
President

Executive Office:
5349 DOLLOFF ROAD
CLEVELAND, OHIO 44127
(216) 341-0444
(216) 341-0711 Fax

March 5, 2004

Senator Orrin Hatch
SH-104
Washington, DC 20510

Dear Senator Hatch:

Please be advised that all the Officers, Directors and Members of the Czech Catholic Union are supporting the flag-protection amendment (SJ Res4), hearing being held March 10, 2004.

With kindest regards, we are

Sincerely,

Elsie T. Malec
Secretary-Treasurer

Mary Ann Mahoney
President

Members of the National Fraternal Congress of America

Testimony Before the United States Senate Judiciary Committee
on

A Proposed Flag Desecration Constitutional Amendment

Walter Dellinger[1]

March 10, 2004

Mr. Chairman, and Members of the Committee:

As you are aware, in 1989 the Supreme Court held in Texas v. Johnson[2] that a state could not, consistent with the First Amendment, enforce a statute criminalizing flag desecration against a demonstrator who burned an American flag. In 1990, in United States v. Eichman,[3] the Court held that the First Amendment prohibited the conviction of demonstrators for flag burning under a federal statute that criminalized mutilating, defacing, or physically defiling an American flag.

For fourteen years, then, the flag has been left without any statutory protection against symbolic desecration. For fourteen years, one thing, and only one thing, has stood between the flag and its routine desecration: the fact that the flag, as a potent symbol of all that is best about our country, is justly cherished and revered by nearly all Americans. Senator Hatch has eloquently described the flag's status among the American people:

> The American flag represents in a way nothing else can, the common bond shared by a very diverse people. Yet whatever our differences of party, politics, philosophy, race, religion, ethnic background, economic status, social status, or geographic region, we are united as Americans. That unity is symbolized by a unique emblem, the American flag.[4]

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[1] Walter Dellinger is the Douglas B. Maggs Professor of Law at Duke University and a partner at O'Melveny & Myers, LLP. Mr. Dellinger presented similar testimony on this issue while serving as Assistant Attorney General in the Office of Legal Counsel at the United States Department of Justice.
[2] 491 U.S. 397 (1989).
[3] 496 U.S. 310 (1990).
[4] 141 Cong. Rec. 54275 (daily ed. Mar. 21, 1995).

It is precisely because of the meaning the flag has for virtually all Americans that the last fourteen years have witnessed no outbreak of flag burning, but only a few isolated instances, immediately and roundly condemned. If proof were needed, we have it now: with or without the threat of criminal penalties, the flag is amply protected by its unique stature as an embodiment of national unity and ideals.

It is against this background that one must assess the need for a proposed constitutional amendment (S.J. Res. 4) that would permit the criminal punishment of those who "physically desecrate" the American flag. The amendment, if adopted, would for the first time in our history alter the Bill of Rights adopted over two centuries ago. Whether in the future some set of truly exigent circumstances might justify tampering with the Bill of Rights is a question we can put to one side here. For you are asked to assume the risk inherent in a first-time edit of the Bill of Rights in the absence of any meaningful evidence that the flag is in danger of losing its symbolic value. The unprecedented amendment before you would create legislative power of uncertain dimension to override the First Amendment and other constitutional guarantees. More fundamentally, it would run counter to our traditional resistance, dating back to the time of the Founders, to resorting to the amendment process. For these reasons, the proposed amendment - and any other proposal to amend the Constitution in order to punish a few isolated acts of flag burning - should be rejected by this Congress.

I.

The text of the proposed amendment is short enough to quote in full: "The Congress and the States shall have power to prohibit the physical desecration of the flag of the United States." The scope of the amendment, however, is anything but clear. Because the proposed amendment fails to state explicitly the degree to which it overrides other constitutional guarantees, it is entirely unclear how much of the Bill of Rights it would trump.

By its terms, the proposed amendment does no more than confer affirmative power upon Congress and the states to legislate with respect to the flag. Its wording is similar to the power-conferring clauses found in Article I, Section 8 of the Constitution: "Congress shall have power to lay and collect taxes," for instance, or "Congress shall have power . . . to regulate commerce . . . among the several states." Like those powers, and all powers granted government by the Constitution, the authority given by the proposed amendment would seem to be limited by the Bill of Rights and the Fourteenth Amendment.

The text of the proposed amendment does not purport to exempt the exercise of the power conferred from the constraints of the First Amendment or any other constitutional guarantee of individual rights. Read literally, the amendment would not alter the result of the decisions in Eichman or Johnson, holding that the exercise of congressional and state power to protect the symbol of the flag is subject to First and Fourteenth Amendment limits. Rather, by its literal text, it would simply and unnecessarily make explicit the governmental power to legislate in this area that always has been assumed to exist.

To give the amendment meaning, then, we must read into it, consistent with its sponsors' intent, at least some restriction on the First Amendment freedoms identified in the Supreme Court's flag decisions. What is difficult, and profoundly so, is identifying just how much of the First Amendment and the rest of the Bill of Rights is superseded by the amendment. Once we have departed, by necessity, from the amendment's text, we are in uncharted territory, and faced with genuine uncertainty as to the extent to which the amendment will displace the protections enshrined in the Bill of Rights.

We do not know, for instance, whether the proposed amendment is intended, or would be interpreted, to authorize enactments that otherwise would violate the due process "void for vagueness" doctrine. In Smith v. Goguen,[5] the Court reversed the conviction of a defendant who had sewn a small flag on the seat of his jeans, holding that a state statute making it a crime to "treat contemptuously" the flag was unconstitutionally vague. We cannot be certain that the vagueness doctrine applied in Smith would limit as well prosecutions brought under laws enacted pursuant to the proposed amendment.

Nor is this a matter of purely hypothetical interest, unlikely to have much practical import. The amendment, after all, authorizes laws that prohibit "physical desecration" of the flag, and "desecration" is not a term that readily admits of objective definition. On the contrary, "desecrate" is defined to include such inherently subjective meanings as "profane" and even "treat contemptuously" itself. Thus, a statute tracking the language of the amendment and making it a crime to "physically desecrate" an American flag would suffer from the same defect as the statute at issue in Smith: it would "fail[] to draw reasonably clear lines between the kinds of nonceremonial treatment that are criminal and those that are not."[6]

The term "flag of the United States" is similarly "unbounded,[7] and by itself provides no guidance as to whether it reaches unofficial as well as official flags, or pictures or representations of flags created by artists as well as flags sold or distributed for traditional display. Indeed, testifying in favor of a similar amendment in 1989, then-Assistant Attorney General William Barr acknowledged that the word "flag" is so elastic that it can be stretched to cover everything from cloth banners with the characteristics of the official flag, as defined by statute,[8] to "any

[5] 415 U.S. 566 (1974).
[6] 415 U.S. at 574.
[7] Id. at 575.
[8] See 4 U.S.C. § 1.

picture or representation" of a flag, including "posters, murals, pictures, [and] buttons"[9] And while a statute enacted pursuant to the amendment could attempt a limiting definition, it need not do so; the amendment would authorize as well a statute that simply prohibited desecration of "any flag of the United States." Again, such a statute would implicate the vagueness doctrine applied in Smith, and raise in any enforcement action the question whether the empowering amendment overrides due process guarantees.

Even if we are prepared to assume that the proposed amendment would operate on the First Amendment alone, important questions about the amendment's scope remain. Specifically, we still face the question whether the powers to be exercised under the amendment would be freed from all, or only some, First Amendment constraints, and, if the latter, how we will know which constraints remain applicable.

An example may help to illuminate the significance of this issue. In R.A.V. v. City of St. Paul,[10] decided in 1992, the Supreme Court held that even when the First Amendment permits regulation of an entire category of speech or expressive conduct, it does not necessarily permit the government to regulate a subcategory of the otherwise proscribable speech on the basis of its particular message. A government acting pursuant to the proposed amendment would be able to prohibit all flag desecration,[11] to but, if R.A.V. retains its force in this context, a government could not prohibit only those instances of flag desecration that communicated a particularly

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[9] Measures to Protect the Physical Integrity of the American Flag: Hearings on S. 1338, H.R. 2978, and S.J. Res. 180 Before the Senate Comm. on the Judiciary, 101st Cong., 1st Sess. 82-85 (1989) ["1989 Hearings"].
[10] 112 S. Ct. 2538 (1992).
[11] Even a statute that prohibited all flag desecration would be in tension with the principle of R.A.V. Although a few acts done with a flag could be considered a "desecration" in all contexts, that would not be the case with burning, for example. Only some burnings could be prohibited by statutes adopted under the proposed amendment. Respectful burning of the flag will remain legal after the amendment's adoption as before. See 36 U.S.C. § 176(k) ("The flag, when it is in such condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by burning. "). What may be prohibited is only that destruction of a flag that communicates a particular message, one of disrespect or contempt. The conclusion that a particular act of burning is a "desecration" may require in most instances consideration of the particular message being conveyed.

disfavored view; statutes making it a crime - or an enhanced penalty offense - to "physically desecrate a flag of the United States in opposition to United States military actions," for instance, would presumably remain impermissible.

This result obtains, of course, if and only if the proposed amendment is understood to confer powers that are limited by the R.A.V. principle. If, on the other hand, the proposed amendment overrides the whole of the First Amendment, or overrides some select though unidentified class of principles within which R.A.V. falls, then there remains no constitutional objection to the hypothetical statute posited above. This is a distinction that makes a difference, as I hope this example shows, and it should be immensely troubling to anyone considering the amendment that its text leaves us with no way of knowing whether the rule of R.A.V. -- or any other First Amendment principle - would limit governmental action if the amendment became part of the Constitution.

I will make only one last point with respect to the uncertain scope of the proposed amendment. It is possible that conferral of an undelineated power to cut into the Bill of Rights might be of lesser concern if Congress alone were so empowered. But it must be remembered that the amendment at issue here also grants the same power to fifty different states and an uncertain number of local governments. That raises, of course, the interpretive question of whether state legislatures acting under the amendment would remain bound by state constitutional free speech guarantees, or whether the proposed amendment would supersede state as well as federal constitutional provisions. On a more practical level, it increases, by at least fifty times, the risk that unduly restrictive or arbitrary legislation may be enacted at some point in the near or distant future, and it virtually guarantees a patchwork of very different state

responses. Under these circumstances, Congress has a special obligation to make clear the dimensions of the power the amendment would confer.

II.

I have real doubts about whether these interpretive concerns could be resolved fully by even the most artful of drafting. In my view, any effort to constitutionalize an "exception" to the Bill of Rights necessarily will produce significant interpretive difficulties and uncertainty, as the courts attempt to reconcile a specific exception with the general principles that remain.[12] But even assuming, for the moment, that all of the interpretive difficulties of this amendment could be cured, it would remain an ill-advised departure from a constitutional history marked by a deep reluctance to amend our most fundamental law.

The Bill of Rights was ratified in 1792. Since that time, over two hundred years ago, the Bill of Rights has never once been amended. And this is no historical accident, nor a product only of the difficulty of the amendment process itself. Rather, our historic unwillingness to tamper with the Bill of Rights reflects a reverence for the Constitution that is both entirely appropriate and fundamentally at odds with turning that document into a forum for divisive political battles.

The Framers themselves understood that resort to the amendment process was to be sparing and reserved for "great and extraordinary occasions."[13] In The Federalist Papers, James Madison warned against using the amendment process as a device for correcting every perceived constitutional defect - a practice that could not help but undermine the role of the Supreme Court.[14] Of particular interest here, Madison objected especially to amendment on issues that

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[12] For an earlier discussion of this problem in the context of a proposed Silent Prayer Amendment, see Walter Dellinger, The Sound of Silence: An Epistle on Prayer and the Constitution, 95 Yale L.J. 1631, 1644-45 (1986).
[13] The Federalist No. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961).
[14] See id. at 314.

inflamed public passion, fearing that such actions might threaten "the constitutional equilibrium of the government."[15] The proposed amendment cannot be reconciled with this fundamental and historic understanding of the integrity of the Constitution. I think perhaps Charles Fried, who served with distinction as Solicitor General under President Reagan, made the point best when he testified against a similar proposed amendment in 1990:

> The flag, as all in this debate agree, symbolizes our nation, its history, its values. We love the flag because it symbolizes the United States; but we must love the Constitution even more, because the Constitution is not a symbol. It is the thing itself.[16]

III.

We come to this discussion at a time when peace among ourselves seems threatened, and national unity an elusive goal. The unity we seek, however, should be of the kind that is freely chosen, because that is the only kind that matters and the only kind that will endure. Americans are free today to display the flag respectfully, to ignore it entirely, or to use it as an expression of protest or reproach. By overwhelming numbers, Americans have chosen the first option, and display the flag proudly. And what gives this gesture its unique symbolic meaning is the fact that the choice is freely made, uncoerced by the government. Were it otherwise - were, for instance, respectful treatment of the flag the only choice constitutionally available - then the respect paid the flag by millions of Americans would mean something different and perhaps something less.

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[15] Id. at 315-17. See also 1989 Hearings at 720-23 (statement of Professor Henry Paul Monaghan, Columbia University School of Law).

[16] Proposing an Amendment to the Constitution Authorizing the Congress and the States to Prohibit the Physical Desecration of the American Flag: Hearing Before the Senate Comm. on the Judiciary, 101st Cong., 2d Sess. 110 (1990).

A Fraternal Organization
Sanford Elks Lodge No. 1679
BENEVOLENT AND PROTECTIVE ORDER OF ELKS
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919-776-3660

Elks Care - Elks Share

Fax Message (202) -861-2785
March 3, 2004
Steve Robertson, Legislative Division Director
The American Legion National Headquarters
Washington, DC 20510

Honorable Orrin Hatch, Senator
SH-104
Washington, DC 20510

Dear Senator Hatch,

At our 1994 Elks National Convention a resolution was resoundingly passed by the delegates assembled which states that "Our Order Supports Action which will encourage a Constitutional Amendment preventing Desecration of the Flag of the United States of America".

The North Carolina State Elks Association is comprised of 37 Lodges, which have more than 13,000 members. Our membership feels very strongly that this Constitutional Amendment to protect our Flag is the correct and only way to protect our Flag. The Elks of North Carolina are today committed along side the 1+ million-members of our Benevolent and Protective Order of Elks organization for the passage of this amendment.

On behalf of the 644 members and officers of Sanford Elks Lodge No. 1679 we support the flag-protection amendment (SJ RES 4).

Sincerely,

Steve Gunter, II
Exalted Ruler
Sanford Elks Lodge #1679

News From:

U.S. Senator
Russ Feingold

506 Hart Senate Office Building
Washington, D.C. 20510-4904
(202) 224-5323

http://www.senate.gov/~feingold

Contact: **Trevor Miller**
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Statement of U.S. Senator Russ Feingold
At the Senate Judiciary Hearing on the Constitutional Amendment Authorizing Congress to Prohibit Physical Desecration of the Flag of the United States

March 10, 2004

Thank you Mr. Chairman. I want to welcome our witnesses today. This is our second hearing in two weeks on a constitutional amendment. The amendment we discussed last week would for the first time write discrimination into our Constitution. This week we are discussing an amendment that would, for the first time, amend the Bill of Rights. Make no mistake, we are talking here today about amending the Constitution of the United States to permit the government to criminalize conduct that, however misguided, is clearly expressive, and is often undertaken as a form of political protest. Adopting this amendment would be a grave mistake.

It seems almost silly to say this, but given some of the written testimony of the witnesses today, I must say it anyway. Not a single Senator who opposes the proposed constitutional amendment, as I do, supports burning or otherwise showing disrespect to the flag. Not a single one. None of us think it's "OK" to burn the flag. None of us view the flag as "just a piece of cloth." On those rare occasions when some malcontent defiles or burns our flag, I join everyone on this dias, and in this room, and in this country, who condemns that action.

At the same time, whatever the political cost, I will defend the right of Americans to express their views about their government, however hateful or spiteful or disrespectful, without fear of their government putting them in jail for those views. America is not a nation of symbols, it is a nation of principles. And the most important principle of all, the principle that has made this country the beacon of hope and inspiration for oppressed peoples throughout the world, is the right of free expression. This amendment, well-intentioned as it may be, threatens that right, and I must oppose it.

I respectfully disagree with the supporters of the amendment about the effect that this issue has on our children. We can send no better, no stronger, no more meaningful message to our children about the principles and the values of this country than if we explain to them that the

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beauty and the strength of this country is in its freedoms, not in its symbols. When we uphold First Amendment freedoms despite the efforts of misguided and despicable people who want to provoke our wrath, we explain what America is *really* about. Our country and our people are far too strong to be threatened by those who burn the flag. That is a lesson worth teaching our children.

Amending the First Amendment so we can bring the full wrath of the criminal law and the power of the state down on political dissenters will only encourage more people who want to grandstand their dissent and imagine themselves "martyrs for the cause." We all know what will happen the minute this amendment goes into force – more flag burnings and other despicable acts of disrespect to the flag, not fewer. Will the new law deter these acts? Of course not. Will the amendment make these acts any more despicable than they are today? Certainly not. Will it make us love the flag any more than we do today? Absolutely not.

It was just under four years ago, in 2000, another Presidential election year, that the Senate rejected this constitutional amendment. I would like to hear from our witnesses what has changed in the last four years. Have we seen an alarming increase in incidents of flag burning? Has there been a marked decrease in patriotism or the proud display of the flag on national holidays? Have the armed forces seen a huge drop in enlistment or have soldiers faced disrespectful protests of the sacrifices they and their families make? Of course not.

I venture to say, Mr. President, that outward displays of patriotism are on the rise since we last considered this amendment. We all know why that is. Our country was attacked on September 11th. And America responded. We didn't need a constitutional amendment to teach our citizens how to love their country. They showed *us* how to do it by hurling themselves into burning buildings to save their fellow citizens who were in danger, by standing in line for hours to give blood, by driving hundreds of miles to search through the rubble for survivors and help in cleanup efforts, by praying in their houses of worship for the victims of the attacks and their families. September 11th inspired our citizens to perform some of the most selfless acts of bravery and patriotism we have seen in our entire history. No constitutional amendment could ever match those acts as a demonstration of patriotism, or create them in the future.

In 1999, the late Senator John Chafee, one of this country's greatest war heroes at Gaudalcanal and in the Korean War, testified against this amendment. He said: "[W]e cannot mandate respect and pride in the flag. In fact, ... taking steps to require citizens to respect the flag, sullies its significance and symbolism." Senator Chafee's words still bring to us a brisk, cool wind of caution. What kind of symbol of freedom and liberty will our flag be if it has to be protected from protesters by a constitutional amendment? Mr. Chairman, I will proudly defend our Constitution against this ill-advised effort to amend it. Thank you.

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TESTIMONY OF
WILLIAM J. FLANAGAN
NATIONAL EXECUTIVE COMMITTEEMAN
DEPARTMENT COMMANDER, THE AMERICAN LEGION
STATE OF ILLINOIS
TO THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ON
SENATE JOINT RESOLUTION 4

MARCH 10, 2004

Chairman Hatch and Members of the Committee on the Judiciary, I am honored to submit this testimony in regard to S.J. Res. 4, a constitutional amendment to protect the flag from physical desecration. Thank you for holding these hearings and providing this opportunity.

As the Illinois State National Executive Committeeman of The American Legion, I can attest to the tenor of the people of the state of Illinois as it regards the effort to pass a constitutional amendment to protect the flag. Without question, the vast majority of the people in Illinois favor this action.

I have heard lawmakers say "nobody's burning American flags." That's not exactly right. Since physical desecration of Old Glory is legal, flag burning incidents aren't considered newsworthy. Unfortunately, flags have been physically desecrated in Berwyn, Evanston, Chicago Heights, Galesburg, Oak Lawn, Chicago, Aurora and Springfield. The statement of one of the boys caught in Aurora when he indicated it was his right to protest can sum up the reason for these tragedies. In Appleton, Wisconsin, a teenager took great pride in physically desecrating flags, especially when he chose to defecate on an American flag and left it on the steps of the clubhouse at a local golf course. During the Super Bowl half-time show, an

entertainer wore the American flag as a prop and then, disrespectfully, dropped it on the stage floor in front of millions of spectators.

The boys in Aurora were simply burning a flag in the middle of a parking lot. What were they protesting? In Appleton, nobody was at the golf course. What was his message? Kid Rock had a microphone, center stage, and the spotlight. What was his message? America can ill afford to continue to condone such reprehensible and wanton misconduct in the name of freedom of speech.

The real victims of flag desecration are our children, the next generation of citizens. The greatest tragedy in flag mutilation is the disrespect it teaches our children – disrespect for the values it embodies, disrespect for those who have sacrificed for those values, and disrespect for the judicial process. Disrespect is the genesis of hate, it provokes the dissolution of national unity – a unity that has only one symbol – the flag.

The physical desecration of the flag of the United States is not speech, but rather conduct. Prior to the 1989 Supreme Court 5-4 decision (Texas vs. Johnson), anyone could desecrate Old Glory with your words, written or oral; however, physical desecration was prohibited. When challenged, previous Courts saw no conflict between freedom of speech and the right of states or the Federal government to prohibit the physical desecration of the American flag. Immediately after the 1989 ruling, the Senate voted 99-0 that the Court had erred.

The brightest minds in Congress crafted a Federal statute to prohibit the physical desecration of the flag. Although it passed with overwhelming support, the Supreme Court ruled the Flag Protection Act of 1989 unconstitutional by the same 5-4 margin. This sent a loud and clear message to lawmakers; if you want to protect the flag against acts of physical desecration, clarify the United States Constitution.

The flag became the national symbol of America because of actions taken by Congress and the President, upheld by the Supreme Court. Congress and the President, upheld by the Supreme Court, codified the Flag Code. Now, the vast majority, are asking Congress to help restore its power to prohibit the physical desecration of Old Glory. Clearly the Flag Protection Act of 1989 did nit accomplish that goal. Only ratification of this proposed constitutional amendment would reverse Texas v. Johnson.

Mr. Chairman, 50 state legislatures stand ready to address this issue through the ratification process. Nothing is guaranteed except one thing – the American people would make the final decision concerning protection of the American flag from acts of physical desecration. Thank you for this opportunity to testify.

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8 March 2004

The Honorable Orrin Hatch
United States Senate
104 Hart Senate Office Building
Washington, DC 20510

Dear Senator Hatch:

FRA strongly endorses your proposal (S.J. Res 7), to add an amendment to the United States Constitution prohibiting the physical desecration of our Nation's flag. Many men and women who serve and have served in the armed services feel deeply about the honor and dignity of the United States flag, and the physical desecration of this symbol for democracy and freedom is an affront to them and the memory of those who died in the service of this Nation.

FRA salutes your leadership in addressing this issue, and stands ready to assist you and your staff to ensure passage of this important legislation.

Sincerely,

JOSEPH L. BARNES
National Executive Secretary

JLB:ms:teg

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March 9, 2004

Senator Orrin Hatch
SH-104
Washington, DC 20510

Dear Senator Hatch:

Fox Associates, as a member of The Citizens Flag Alliance, Inc., and as a company operating in a venue where we have major contact each day with marketers interested in patriotism and a value-system which honors the American flag, requests your support for SJR 4.

Speaking as an aside, and I am a strong Republican ... but I think if we can address an constitutional amendment on qualifications for marriage, then we surely ought to be able to find the impetus to deal with this legislation protecting the flag.

Thank you very much for your consideration.

Sincerely,

Marlys Fox

Marlys Fox

March 8, 2004

Senator Orrin Hatch, Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510-6275

Senator Patrick Leahy, Ranking Minority Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510-6275

Dear Senators Hatch and Leahy,

I appreciate the opportunity to offer my views on the proposed Constitutional Amendment to ban Flag Desecration. I wish that my schedule had permitted me to attend the Senate Judiciary Committee's hearing. As a veteran with 31 years of service in the U.S. Army, including combat duty in both Korea and Vietnam, I believe that I may be able to offer a useful perspective on this controversial proposal.

I must admit that when I try to identify the most pressing issues facing veterans today, flag burning does not make my list. To be clear, I have no patience with those who defile our national standard. It is wrong, it is unpatriotic and it is deeply offensive to those of us who serve or have served in uniform. But, in a new era of global conflict and threat, is it really the issue that should be taking up the valuable time of Congress?

This month, the Defense Department is coordinating the largest troop rotation since World War II. The operation is so dangerous that Army truck drivers received special forces training in Kuwait, learning, for instance, how to fire accurately from the wheel while evading an enemy ambush.

This spring, Task Force 121, the unit that found Saddam Hussein, will launch a newly concerted campaign to capture Osama Bin Laden in the mountains of Afghanistan. The region in which it will be operating is one of the most forbidding in the world. Lying on the border with Pakistan, the area is fraught with hidden peril, so much so that the terrain itself played a big part in defeating the Soviet war machine in the 1980s.

On the home front, our military is receiving rhetorical laurels for its splendid achievements in Iraq, but our veterans are still fighting for richly deserved access to medical care, mental health services, adequate housing, disability assistance and other essential services. The President's 2005 budget cuts funding for veteran nursing home beds, reduces the number of people

dedicated to solving the federal backlog in processing disability claims, and forces veterans to pay a fee just to access their health care system. It is such an anemic measure that Edward S. Banas Sr., commander in chief of the Veterans of Foreign Wars, called it a "disgrace and a sham."

But, instead of addressing these issues, Congress is spending its time debating flag burning. For lawmakers unwilling to actually face the tough questions, this may provide an appealing smoke screen. At first blush, it sounds a patriotic note that they believe will appeal to veterans, but it requires no allocation of resources. And, I fear, it allows politicians to be in favor of an empty patriotic gesture without doing anything substantive to assist veterans.

Just as bad, however, this amendment also subverts the very principles for which the flag flies. The amendment wrongly answers the chicken and the egg debate – it assumes that America is special because of the flag, not that the flag is special because of America. It is the unparalleled amount of personal freedom and opportunity that makes America what it is. The important principles include the right to gather with whomever we want whenever we want; the right to worship however we like, regardless of prevailing religious winds; the right to be free from an invasive or meddlesome government; and, perhaps most important, the right to speak our minds, regardless of what anyone else thinks.

But, for the first time in our history, the Constitution would tell you what you cannot say, rather than what you can, if this amendment were to be enacted. It would create a class of non-violent expression – abhorrent expression, yes, but non-violent – which is illegal and punishable by criminal sanction.

Worse, it would do so in a vague and undefined way, in which the decision as to what actions are criminal would have to be determined subjectively. For instance, would it be all right to neglect the flag on your car antenna and let it become soiled and weather-beaten? Or would that be desecration? Would it be okay to get wet in a flag-decorated bathing suit, or wear a flag T-shirt or cap?

And, what if personal animus or ambition got in the mix? Would you have a problem neighbor calling the police if during a barbecue your flag apron caught fire? Indeed, Secretary of State Colin Powell recognized this danger when he wrote in 1999, "I shudder to think of the legal morass we will create trying to implement the body of law that will emerge from such an amendment."

There is no question in my mind that it is unnecessary to enact this measure. But this is not to say that the flag is a trifle. It does not mean that veterans are not entitled to feeling outraged when they see somebody step on the banner that led them into battle. It does not mean that we should not revere and honor the flag, and remember the sacrifice of those who died to keep it on our flagpoles.

With all the other challenges and hardships facing those who served today, is this really an appropriate legislative initiative to occupy the valuable time of the Congress? No. Is it wise to silence dissent with the hydrogen bomb of a constitutional amendment? No.

True patriots face difficult choices head-on; they do not wrap themselves in the flag every time their electoral meal ticket comes due to be punched. I salute those in Congress who oppose this measure, and I salute those in Congress who are willing to deal with the really important issues facing veterans today.

Let's bring our men and women home safely, and make sure that they've got a roof over their heads, access to an education, health care when they get old, and support when reliving the traumas of their service. I pray that Congress will come out from behind the camouflage of this amendment and address more important issues.

Sincerely,

Lt. General Robert G. Gard, Jr. (USA, Ret.)

Written Testimony of
Senator John Glenn
The John Glenn Institute for Public Service and Public Policy
The Ohio State University
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Hearing of the Senate Committee on the Judiciary
"Letting the People Decide: The Constitutional Amendment Authorizing Congress to Prohibit Physical Desecration of the Flag of the United States"
March 10, 2004

Thank you Mr. Chairman, Senator Leahy, and distinguished members of the Committee. It is an honor to have the opportunity to submit testimony for today's hearing of the Judiciary Committee. I had the privilege of testifying in person before the Committee on April 28, 1999, my first appearance before the Senate since my retirement earlier that year. I regret that I was unable to accept the invitation to appear in person at today's hearing, but due to the short notice of the hearing, and a prior commitment to meet with the NASA Advisory Board, it was simply impossible to rearrange my schedule. I thank you for accepting my written statement and request that you submit it to the hearing record.

As a former member of the Senate Armed Services Committee, I worked very hard to protect the security interests of the Nation and to protect the interests of those who serve in our armed forces. I want to extend to the men and women serving in Iraq, Afghanistan, and other locations my heartfelt support and my prayer that peace will come soon.

The Committee has before it today for consideration the question of a constitutional amendment to permit Congress to enact legislation prohibiting the physical desecration of the American flag.

Like most Americans, I have very, very strong feelings about our flag. Like most Americans I have a gut reaction in opposition to anyone who would dare to demean, deface, or desecrate the flag of the United States. But also like most Americans, I am concerned about any effort to amend the Constitution and the Bill of Rights.

I have watched as those who expressed qualms or doubts or reservations about this amendment run the risk of being smeared, of being labeled as unpatriotic or as a friend of flag burners. I can assure you that I am neither. Many of us feel uncomfortable talking about issues that involve such private and personal emotions. We do not wear our emotions on our sleeves, especially when it comes to how we feel about the flag and about patriotism. We do not parade around those things that are sacred to us.

We all love the flag and no one more than I do. I fought hard for this flag through two wars and while representing the country in the space program. I am both honored and proud that few people in this Nation have been able to take our flag where I took it. The first thing I selected to take on my trips to space was a flag. I took along little silk flags so that I could give them to my children, and they remain among my children's most cherished possessions to this day.

For those who served in the armed services, we risked our lives because we believed it was our duty to defend our Nation. I can tell you that in combat you do not start out thinking about the philosophy of our Nation. When you start a run on a ground position from the air, through antiaircraft, or lead a patrol where people are getting shot, you do not think about such philosophical thoughts. It is survival that holds your attention. But every last fiber in our flag stands for someone who has given his or her life to defend what it stands for. Many of us have as many friends in Arlington Cemetery, bearing silent witness to our flag, as we have bearing public witness to it in the world of the living. Maybe that is why I have so little patience, and even less sympathy, for those pathetic and insensitive few who would demean and defile our Nation's greatest symbol of sacrifice. They deserve harsh censure.

But, in what I view as their demented ways, they also have my pity because they cannot, apparently, feel the pride and the exhilaration that comes from being called to a purpose larger than one's own self. They cannot feel the pride in our Nation and what it stands for; the pride in a Nation whose very strength rests in a guarantee of freedom of expression for every single person, whether that person agrees with the majority, or not. It is a guarantee that some misguided souls exploit for their own egotistical, self-centered purposes.

I believe that the members of this committee have a special responsibility to recognize that it would be a hollow victory indeed if we preserved the symbol of our freedoms by chipping away at fundamental themselves. Let the flag fully represent all the freedoms spelled out in the Bill of Rights, not a partial, watered-down version that alters its protections.

The flag is the Nation's most powerful and emotional symbol. It is our most sacred symbol. And it is our most revered symbol. But it is a symbol. It symbolizes the freedoms that we have in this country, but it is not the freedoms themselves. That is why this debate is not between those who love the flag on the one hand and those who do not on the other. No matter how often some try to indicate otherwise, everyone on both sides of this debate loves and respects the flag. The question is how best to honor it and without taking the chance of defiling what it represents.

Those who have made the ultimate sacrifice and died following that banner did not give up their lives for a red, white and blue piece of cloth. They died because they went into harm's way representing this country and because of their allegiance to the values, the rights, and principles represented by that flag. Without a doubt, the most important of

those values, rights, and principles is individual liberty: The liberty to worship, to think, to express ourselves freely, openly and completely, no matter how out of step those views may be with the opinions of the majority. In that first amendment to the Constitution we talk about freedom of speech, religion, of the press and the right to assemble.

The Bill of Rights was not included in the Constitution. The Bill of Rights was added after the Constitution was passed. Some states refused to ratify the Constitution because. it did not have a Bill of Rights defining the basic human rights that they wanted this count to stand for. James Madison worked to add a Bill of Rights when the Constitution was already in existence.

The Congress passed the first 10 amendments known today as the Bill of Rights. Freedom of speech, freedom of religion, freedom of the press, and freedom of assembly are protected in the first amendment.

That commitment to freedom is encapsulated and encoded in our Bill of Rights, which is perhaps the most envied and imitated document anywhere in this world. The Bill of Rights is what makes our country unique. It is what has made us a shining beacon of hope, liberty and inspiration to oppressed peoples around the world for over 200 years. In short, it is what makes America, America.

Those 10 amendments to the Constitution we call the Bill of Rights have never been changed or altered by one iota, not by one word, not a single time in all of American history. There was not a single word changed in that Bill of Rights during Civil War. There was not a single change during any of our foreign wars, and not during recessions or depressions or panics. Not a single change when we were going through times of great emotion and anger like the Vietnam era, when flag after flag was burned or desecrated, far more often than they are today. Even during all that time, our first amendment remained unchanged and unchallenged.

The amendment under consideration today goes directly to the issue of freedom of speech. We are talking here about freedom of expression. The Supreme Court has held on two separate occasions that no matter how great the majority, under our Bill Rights the minority has the right of expression. That expression is protected by freedom of speech. Do we want to take a chance on reducing our freedom of speech? What about freedom the press? Do we want there to be even a small chance that our ability to assemble peaceably could be restricted? And do we want to take a chance that we would not be able to petition on government for redress of grievances? Those are the things that are covered in that first amendment, known as the Bill of Rights.

I think there is only one way to weaken the fabric of our Nation, a unique country that stands as a beacon before other Nations around this world. The way to weaken our Nation would be to erode the freedom that we all share.

To say that we should restrict the type of speech or expression that would outrage a majority of listeners or move them to violence is to say that we will tolerate only those

kinds of expression that the majority agrees with, or at least does not disagree with too much. That would do nothing less than gut the first amendment.

There is an argument that flag desecration is an act rather than a form of speech or expression that is protected by the first amendment? I believe that argument is a bit specious. Anybody burning a flag in protest is clearly saying something. They are making a statement by their body language, and their action makes a statement that may speak far, far louder than any words they may be willing to utter on such an occasion. They convey a message, just the same way that people who picket, or march in protest, or use other forms of symbolic speech express themselves. Indeed, if we did not view flag burning as something we find offensive and repugnant, we surely would not be debating the right of individuals to take such action.

Let me say a word about something that needs further discussion, something we should consider very carefully. I refer to the practical problems with this amendment. Let us say that the Congress passes it, the States pass it, it becomes an amendment, and we change the Constitution. Then what a nightmare we would have enforcing it.

If Congress and the States are allowed to prohibit the physical desecration of the flag, how precisely do we define the "flag"? We do not have an official flag, as such, with an exact size, type, kind of ink, dyes, or fabric. So does this amendment refer to only manufactured flags of cloth or nylon of a certain size or description, such as the ones we fly over the Capitol? Does it refer to the small paper flags on a stick we hand out to children at political rallies or stick in a cupcake at a banquet? Those flags are often tossed on the floor or in a garbage can at conclusion of event. How about during the 1976 bicentennial when vendors were selling flag bikini swimsuits for women and boxer shorts for men?

Remember that the proper way to destroy a flag that is old or has become soiled is to burn it. But what if you do it in protest? What was the intent? Every lawyer will tell you that the toughest thing to prove is intent.

I do not know what the courts would do in a case like that. We could present all kinds of examples of how this amendment would be very difficult to administer, and it would be subject to 50 different interpretations. I might be able to do something in Ohio, but if I drive across the Ohio River to Kentucky, West Virginia, or Pennsylvania, the same activity might be illegal.

This amendment should be defeated. The dangers from it far outweigh any threat to the flag. I simply do not believe that flag desecration is a major problem for this country that requires an amendment to the Constitution of the United States of America.
Our most revered symbol stands for freedom but is not freedom itself. We must not let those who revile our way of life trick us into diminishing our great gift, or even take a chance of diminishing our freedoms.

# # # #

Gold Star Wives of America, Inc.

540 N. Lombardy St. • Arlington, VA 22203-1060 • (703) 527-7706

March 5, 2004

The Honorable Orrin G. Hatch
Chairman, Senate Judiciary Committee
United States Senate
Washington, DC 20510

Dear Chairman Hatch:

I'm writing on behalf of members of Gold Star Wives of America, Inc. to indeed thank you for your support of the Constitutional Amendment authorizing Congress to prohibit physical desecration of the flag of the United States. We also thank you for holding hearings on this issue next week.

We members of Gold Star Wives continue to oppose the legalization of desecration of the United States flag. It hurts us to see such actions. We say physical desecration of the United States flag is not free speech, but plainly ugly physical action that we can't understand. Protecting the United States flag is what our late husbands died for. We believe they did not die for the right to destroy the flag. They saluted the flag whenever it passed them by. Why would they die for the right to destroy it when they honored it so reverently? Why would their caskets be covered by a United States flag?

We Gold Star Wives believe it's about time that we take a good hard look at the values of our country. We've all noticed the morals in our country going downhill. We say it's about time that we instill values back, and that can begin with protecting the United States flag from physical desecration.

Sincerely,

Rose Lee

Rose Lee
Past National President
and Past Chairman of the Board

News Release

JUDICIARY COMMITTEE

United States Senate • Senator Orrin Hatch, Chairman

March 10, 2004 Contact: Margarita Tapia, 202/224-5225

Statement of Chairman Orrin G. Hatch
before the United States Senate Committee on the Judiciary
Hearing on

"LETTING THE PEOPLE DECIDE: THE CONSTITUTIONAL AMENDMENT AUTHORIZING CONGRESS TO PROHIBIT PHYSICAL DESECRATION OF THE FLAG OF THE UNITED STATES"

Good morning. I want to welcome everyone to today's important hearing on S.J. Res. 4, the bi-partisan proposed constitutional amendment to protect the American flag from acts of physical desecration. I have enjoyed working with all of my Senate colleagues on this issue and I look forward to hearing from today's witnesses.

In the past, this Committee has been fortunate to hear from a variety of witnesses who have ranged from war veterans, Senators (who were also war veterans), law professors, teachers and others from a variety of backgrounds. I can assure everyone that today's panel of witnesses will once again provide us with wisdom and insight that we in the Senate need when considering this very important issue.

The American flag serves as a symbol of our great Nation. The flag represents, in a way that nothing else can, the common bond shared by an otherwise diverse people. As a sponsor and long-time supporter of this proposed constitutional amendment, I am very pleased, but not surprised by the way Americans have been displaying the flag as a symbol of solidarity following the attacks of September 11. In fact, many stores that sell American flags reported that, following September 11th, they quickly sold out of flags and could not obtain replacements fast enough to replenish their stock.

From the dawn of our country's creation and continuing through this very moment, American soldiers have put their lives on the line to defend the flag and what it represents. I believe that we honor the sacrifices made by those who have defended this country by protecting the flag in the manner it once enjoyed. From the lyrics penned by Francis Scott Key which are sung in our National Anthem, to the unfurling of the flag at the Pentagon following September 11th (which now hangs in the Smithsonian),our people have turned to the American flag as a symbol of National unity and pride during times of crisis.

Whatever our differences of party, race, religion, or socio-economic status, the flag reminds us that we are very much one people, united in a shared destiny, bonded in a common faith in our nation. Because our flag transcends our fellow citizens' differences and our diversity as a nation, it symbolizes the love of liberty and love of country felt by the American people. This symbolism stands in sharp contrast to the flags of those oppressive and totalitarian regimes

such as Cuba, Nazi Germany, or the Soviet Union which uniformly represent intolerance of free thought, oppression, and coerced loyalty.

In 1861, President Abraham Lincoln called our young men to put their lives on the line to preserve the Union. When Union troops were beaten and demoralized, General Ulysses Grant ordered a detachment of men to make an early morning attack on Lookout Mountain in Tennessee. When the fog lifted from Lookout Mountain, the rest of the Union troops saw the American flag flying and cheered with a newfound courage. This courage eventually led to a nation of free men--not half-free and half-slave.

In 1941, President Franklin Roosevelt called on all Americans to fight the aggression of the Axis powers. After suffering numerous early defeats, the free world watched in awe as five Marines and one sailor raised the American flag on Iwo Jima after nearly 6000 American soldiers gave their life to achieve this victory. Their undaunted, courageous act, for which three of the six men died, inspired the Allied troops to attain victory over fascism.

In 1990, President Bush called on our young men and women to go to the Mideast for Operations Desert Shield and Desert Storm. After an unprovoked attack by the terrorist dictator Saddam Hussein on the Kingdom of Kuwait, American troops, wearing arm patches with the American flag on their shoulders, led the way to victory. General Norman Schwarzkopf thanked the American people for their support, stating:

"The prophets of doom, the naysayers, the protesters and the flag-burners all said that you wouldn't stick by us, but we knew better. We knew you'd never let us down. By golly, you didn't."

And, in 2001 the American flag was again called upon to inspire our men and women during time of war. For example, I am touched by the New York National Guard's dedication of an American flag to the memory of staff sergeant Jerome Dominguez. Sergeant Dominguez, also a full time New York City police officer, lost his life serving his fellow citizens in World Trade Center attacks. The American flag dedicated to Sergeant Dominguez traveled to Bahrain with a team of his fellow 105th Security Forces when they participated in the overthrow of the Taliban during Operation Enduring Freedom. Later, this very flag was tasked with the solemn duty of overlooking several fallen military members during their final flight home after giving the ultimate sacrifice for their country during Operation Iraqi Freedom. I will place into the record an article written by Staff Sergeant John Grassler documenting this wonderful commemoration.

We need to pass the Flag Amendment because in 1989, the Supreme Court abandoned the history and intent of the First Amendment to embrace a philosophy that made no distinction between oral and written speech about the flag, and extremist, disrespectful destruction of the flag. This striking contradiction was aptly described by Chief Justice Rehnquist who wrote: "[T]he government may conscript men into the Armed Forces where they must fight and perhaps die for the flag, but the government may not prohibit the public burning of the banner under which they fight." When Congress responded with a federal flag protection statute, the Supreme

Court used its new and changed interpretation of the First Amendment to strike it down by another five-to-four vote.

It is now clear that a Constitutional Amendment is the only legal means to protect the flag. Thankfully, the Constitution provides a method for peaceful and law abiding citizens to amend the constitution, and it is time to let our fellow citizens speak on this issue.

Polls have shown that 80 percent of the American people want the opportunity to vote to protect their flag. All 50 state legislatures have passed resolutions asking Congress to pass the Amendment and send it to the states for consideration and ratification. Numerous organizations from the American Legion to the Women's War Veterans to the African-American Women's clergy all support the flag protection amendment. We should not deprive the American public the right to express their view on this subject any longer.

If the Senate passes the flag amendment this year, the nationwide debate over state ratification will be one of the greatest public discussions in American history. It will encourage a deeper study of our nation's history and values. It will inspire our young people to understand and appreciate the heroic selflessness displayed during this and previous generations. And it will cause many Americans to renew their faith in – and commitment to – the ideals and values of America that are greater than anyone's personal self interest.

# # #

CHARTERED BY
THE CONGRESS OF THE
UNITED STATES

MARCH 2, 1907 A.D.

FRATERNAL LIFE INSURANCE
FOUNDED IN 1896

PHONE: (202) 328-2630
FAX: (202) 328-7984

HUNGARIAN REFORMED FEDERATION *of* AMERICA

2001 Massachusetts Avenue, NW
Washington, D.C. 20036-1011

March 9, 2004

Senator Orrin Hatch
Hart Office Building, SH-104
2nd & C Streets, NE
Washington, DC 20510

Dear Senator Hatch:

The Hungarian Reformed Federation of America, a fraternal life insurance society founded in 1896, extends its sincere appreciation to you for sponsoring SJR 4, the Flag Protection Amendment.

Please know that we stand solidly behind passage of the measure by the U.S. Senate. We believe that the United States Flag is a precious symbol of all that made this country the beacon of freedom to the world. Desecrating it is not speech but clearly an act of hatred against America and all that it stands for.

We urge your committee to send it to the floor for swift passage.

Again, thank you for your personal commitment in returning our flag to the protected status it richly deserves.

Sincerely yours,

Rev. Stefan M. Torok
President/CEO

Internet: www.hrfa.org E-mail: hrfa@hrfa.org Toll-Free No.: 1-888-KOSSUTH (567-7884)

Testimony of

President Bob Kerrey
New School University

Former US Senator (1989-2001)

Before the Senate Committee on the Judiciary

on the Proposed Flag Desecration Constitutional Amendment

March 10, 2004

The 17 words contained in the amendment before you would make it constitutional for Congress to pass a law giving the government the power to prohibit the physical desecration of the flag of the United States of America.

I have deep respect for the purpose of this amendment and for those, like the American Legion, who have pushed this issue so hard. These patriots have helped young Americans understand that freedom is not free. However, in spite of this respect, I continue to regretfully and fervently say, "no."

I say "no" because the unintended consequences of these 17 words and the laws that will be enacted later will be far worse than the consequences of us witnessing the occasional and shocking desecration of this great symbol of liberty and freedom. The consequences will be that our law enforcement community and our courts will be asked to spend their time and our money enforcing and protecting us from one more non-violent and -- in this case -- non-destructive act.

I regard this as a serious matter. The efforts to protect us from those who desecrate the flag will require the training of police officers in procedures about how, when, and where to respond to complaints. We pass the laws, but others must implement and enforce them. They will receive complaints about neighbors and friends of people who desecrate the flag. The police will have to respond to each and every one of these. This amendment and related laws will give the power of the government to local law enforcement agencies, allowing them to decide when some individual is desecrating the flag.

I say "no" to this amendment also because the frequency of such acts of desecration are so rare that they do not warrant even the law enforcement training that a constitutional amendment would dictate. In my sixty years, I can count on one hand the number of times I have witnessed, either in person or on television, someone burning the American flag. Indeed, it has been more than a decade since the U.S. Supreme Court unanimously decided that our constitution regards such acts as speech, protected by the most powerful 45 words in the English language: the first amendment to that constitution.

These 45 words protect the rights of citizens to speak, to assemble, to practice their religious beliefs, to publish their opinions, and to petition their government to redress grievances. Make no mistake and do not delude yourself: the proposed amendment does just the opposite. Rather than expanding freedom, this amendment would limit speech, including that which a majority of Americans believes is distasteful and offensive.

I say "no" because real patriotism cannot be coerced. It must be a voluntary, unselfish, brave act to sacrifice for others. And when Americans feel coercion, especially from their government,

they tend to rebel. So none of us should be surprised by the premise that one unintended consequence of enacting this law will be an increased occurrence of flag desecration.

Such a law is reasonable only if we forget that it is the right to speak the unpopular and objectionable that needs the most protecting by our government. In my sixteen years of experience as an elected representative of the people the opinions that most impressed and moved me were those spoken by the minority. When the consequences included disapproval by friends and associates, what was said was often what needed to be said most of all. For the hard truth is that sometimes the opinion of the majority is wrong, and no matter how uncomfortable we become, creative democracy cannot survive without that lone patriot who is willing to stand, disagree, and tell us what we do not want to hear.

Furthermore, in an era of political correctness, when the fear of 30-second attack ads has homogenized and sterilized our language, ridding it of many distasteful truths, this amendment takes us in the opposite direction of that envisioned by our Founding Fathers whose words and deeds bravely challenged the status quo.

Mr. Chairman, the last time that this committee held a hearing on this proposed amendment, I purchased and gave the gift of an American Flag to the committee. I did so because I believed then, as I do now, that all members of this committee are patriots who love this country and that you are all moved by what the flag represents. I bought that flag because every time I look at the American flag, I am reminded of the patriotism of many, whose defense of it and the cause of freedom has produced widows --widows who hold this flag to their bosom as if it were the living body of their loved one.

The American flag says more about what it means to be an American than a thousands words spoken by me.

Mr. Chairman, current law protects this flag. If anyone chooses to desecrate it they will face prosecution by our government. The law prohibits such acts of malicious vandalism.

The law also protects me and allows me to give a speech born of my anger or anguish and set a flag that I own aflame. Do we really want to pass a law making a criminal of a citizen despondent over a war or something else they see going wrong in their country? Do we really want a law that says the police will go out and arrest them and put them in jail? I hope not. Patriotism calls upon us to be brave enough to endure and withstand such acts.

I sincerely and respectfully thank the members of the committee for their patriotism, and all of those who hold views different from mine.

Thank you.

Statement of Senator Herb Kohl
"Letting the People Decide: The Constitutional Amendment Authorizing Congress to Prohibit Physical Desecration of the Flag of the United States"
March 10, 2004

Thank you, Mr. Chairman, for scheduling this important hearing. Though I oppose amending the constitution to prohibit flag desecration, I am glad to have the opportunity to take part in this debate.

Millions of Americans have fought and died for our country. They fought for each of us, and for the very freedoms we hold dear. In fact, they are doing so today, in Afghanistan and Iraq. They do so because they love their country, and for that, we will all be forever indebted. But we would be doing them a disservice if we amended the Constitution to place limits on one of the most important freedoms they have given their lives for – the freedom of speech.

Those of us who speak out against this amendment, or who may vote against it, are not doing so because we advocate flag desecration, or because we seek to diminish what the flag symbolizes. In fact, the opposite is true. We do not condone or encourage flag desecration. Those acts are despicable. Yet, that alone does not mean a constitutional amendment is necessary. The First Amendment has long stood for the important principle that our government should not seek to tell people how to say something any more than it should tell them what to say, no matter how strongly we may disagree.

All Americans have the right to voice their opinions, regardless of how unpopular those opinions may be. The First Amendment has protected this right for more than two hundred years. Even unpopular speech has value. In some cases, a minority of Americans have used their voices to spark much needed change in this country. In others, such as flag desecration, unpopular speech further enhances our feelings of patriotism. These rights, no matter how disagreeable on their face, are worth protecting.

The debate over this amendment began fifteen years ago, when the *Johnson* case was decided. The Court held that the right to desecrate an American flag as a method of speech is protected by the First Amendment. In those fifteen years, we have not seen a surge in flag burnings in our streets or on our courthouse steps. And we have not seen the strong feelings Americans have for their freedom, or the flag itself, diminish in any way. If anything those feelings have become stronger. This was particularly true after the terrorist attacks of September

11th, when more Americans than ever before began flying flags outside their homes and placing flag stickers on their cars.

The Bill of Rights should be amended only in the most limited circumstances. Amending it to preserve something that is not in jeopardy could set a precedent for censoring other forms of legitimate speech. Those who commit these acts only make the rest of us value our flag and our freedoms and those who have given their lives to protect them even more. Our flag and the principles it represents will survive any ill-conceived desecration by a few protesters. A Constitutional amendment is unnecessary because the strength of the American people and their unwavering support for our national symbol will make sure of that.

Testimony of Lawrence J. Korb
Senior Fellow at the Center for American Progress
before the Senate Judiciary Committee

March 10, 2004

Mr. Chairman and Members of the Committee, I appreciate this invitation to appear before the Senate Judiciary Committee to testify against the proposal to amend the Constitution to give Congress the power to prohibit the physical desecration of the flag of the United States.

Although I am employed by the Center for American Progress and have part time affiliations with the Center for Defense Information and the Council on Foreign Relations, I am speaking for myself.

As a 23-year navy and Vietnam veteran, as a former official in the Reagan Defense Department, as a former professor at the Navy War College and the Coast Guard Academy, as a second generation American, as a lifelong Republican, and as a long time member of the American Legion, I revere the flag and that "for which it stands." As much as any citizen, I still get a lump in my throat when I see the flag raised or lowered. Nonetheless, I am unalterably opposed to S.J. Res. 4.

As I understand it, one of the main goals of passing the amendment at this time is to show support for those currently serving in the armed forces in the war against terrorists with a global reach, as well as our veterans of previous wars, I would suggest that the Congress could help them much more by resisting the draconian measures advocated by the Bush administration that adversely impact our current and future veterans. Let me mention but a few:

First, since coming into office the Bush administration has increased the out of pocket costs for veterans using VA's medical facilities by nearly 500%. Veterans are paying more than $1 billion a year to the VA for medical care than they were in 2001.

Second, the administration has fought tooth and nail to prevent disabled veterans who are also military retirees from getting "concurrent receipts" of both their retired and disability pays. Were it not for the Congress, disabled military retirees would still be getting shortchanged. As it is, they will have to wait until 2010 until this system is completely changed.

Third, the Bush administration actively sought to reduce hostile fire pay and family separation pay while our troops were fighting wars in two countries and our troops were spending an unprecedented amount of time away from their home bases.

Fourth, in what the Army Times has called an act of betrayal, the Department of Defense is considering closing commissaries and schools on military bases throughout our country.

Fifth, the administration refuses to endorse Congressional proposals to allow Guard and reserve members to participate fully in the military's Tricare Health System. Thanks to the efforts of the Congress, there have been some temporary moves in this direction, but it needs to be done on a permanent basis. Not only is it the right thing to do, but it will help retain those reservists who have been called up more frequently and for longer periods than the norm.

Finally, in spite of the unprecedented strain being placed on the active duty Army and its reserve component, the administration continues to resist permanently adding 40,000 people to the active Army.

Mr. Chairman and members of the Committee, if you are concerned about those who have and are serving in our Armed forces, you will deal with these six issues promptly. They need this much more than a constitutional amendment that infringes on our freedom of speech. But having said that let me give you my reasons for opposing the amendment.

First, during my years of military and civilian service during the cold war, I believed I was working to uphold democracy against the totalitarianism of Soviet Communist expansionism. I did not believe then, nor do I believe now, that I was defending just a piece of geography, but a way of life. If this amendment becomes a part of our Constitution, this way of life will be diminished. America will be less free and more like the former Soviet Union, present-day China, Iraq under Saddam Hussein, or Afghanistan under the Taliban.

Second, the proposed amendment is bad public policy. During our 212 years of history, the Bill of Rights has never been restricted by a constitutional amendment. If ratified by the Congress and the states, this amendment would be the first in our history to cut back on the First Amendment's guarantee of that freedom of expression that is so necessary to ensure the vigorous debate and dissent that is imperative to prevent the abuse of power in our democracy. This amendment could set a dangerous precedent for limiting our other fundamental freedoms. We must be especially careful about limiting our freedoms at this time in our history. We all know that in the aftermath of September 11, 2001, there was a tendency to overreact and characterize those who criticized the Bush National Security Strategy as unpatriotic.

Third, the amendment is poorly drafted. It is phrased in such broad and vague language that it can and will have unintended consequences. These could include censorship of images of the flag in works of art, advertising, or commerce. Moreover, the amendment would permit indictments and prosecutions not only of protestors, but individuals who purchase these works of art, or who use advertisements that desecrate the flag. This could happen even though these consumers intend no disrespect.

Fourth, the people, the Supreme Court, and previous Congresses do not support the basis for this amendment. Although some opinion polls indicate that a majority of Americans support the amendment in the abstract, opinion polls also demonstrate that the majority of Americans reject such an amendment when they discover that it would be the first amendment in our history to restrict our First Amendment freedoms. The highest court in the land has twice ruled that destruction of the flag for political purposes, although highly offensive to almost all Americans is undeniably a political statement and a political expression. *See Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310 (1990). The Court has held that it is a bedrock principle underlying the First Amendment that the government may not prohibit the expression of an idea simply because society finds the idea offensive and disagreeable. *See Texas*, 491 U.S. at 414. Furthermore, four times in the past 14 years the Congress has rejected this amendment, most recently in March, 2000.

Fifth, the amendment is unnecessary to punish most incidences of flag burning or mutilations. Desecrating a flag belonging to the government or a non-consenting individual is punishable under existing statutes. *See* 4 U.S.C.A. §§ 1-10 (1998) (The Federal Flag Code). Moreover, flag desecration performed for the purpose of breaching the peace or with knowledge that it will produce an immediate danger is already punishable consistent with the First Amendment.

Finally, flag burning is exceedingly rare in this country. Since the Supreme Court's 1990 flag decision in *United States v. Eichman*, there have been less than 70 burning incidents.

In conclusion, I think that the motives of the sponsors and supporters of this amendment are beyond reproach. Indeed I understand why they and so many Americans have such a strong reaction to the idea of flag desecration. But, for the reasons I mentioned above, I believe they are wrong and that the Congress should focus more on the immediate needs of our troops and veterans.

TESTIMONY OF
DAVID A. KORTH
NATIONAL EXECUTIVE COMMITTEEMAN
DEPARTMENT OF WISCONSIN
THE AMERICAN LEGION
TO THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ON
SENATE JOINT RESOLUTION 4

MARCH 10, 2004

Mr. Chairman and members of the Judiciary Committee, I appreciate you holding these hearings on this important issue and for providing me this opportunity to submit written testimony in support of S.J. Res. 4. As the National Executive Committeeman of The American Legion's Department of Wisconsin, I deem it a great privilege.

Since 1989, The American Legion and 140 other organizations have united their efforts for a single cause – a proposed constitutional amendment you and your colleagues are considering today, S.J. Res. 4. It seems that there are a number of social issues being address these days that call attention to a number of judicial decisions. Whether it be same sex marriages, several incidents during the recent Super Bowl half-time show, or comments and antics in radio broadcasts, there will be a great deal of discussion about the First Amendment rights. I believe that is good because, quite frankly, I believe many individuals have not fully accepted the responsibility that accompanies exercising any constitutional freedoms.

Some have criticized this proposed constitutional amendment because it would restrict freedom of speech. This proposed constitutional amendment does not restrict freedom of speech; however, it does allow Congress to return some degree of individual accountability for wanton misconduct. We are a society of laws – many originating out of this body. Once you and your colleagues agree on legislation, it is sent to the President for his actions. Then the checks and balances move to the next step – judicial review. But Mr. Chairman, that is not the end of the process. The First Amendment provides for those of us who must live under that law the constitutional right to question any law enacted.

Article V provides for two methods of amending the constitution. Obviously, The American Legion and the CFA wisely selected this process over the constitutional convention approach. This venue only involves a supermajority of the House, the Senate, and the American people. I place a great deal of faith in the wisdom of the electorate.

In 1989, Senator Biden was convinced that he could draft flag protection legislation that would pass constitutional muster. The Flag Protection Act of 1989 passed by more than a supermajority in both chambers, but unfortunately, Senator Biden and many of his colleagues were wrong. The Supreme Court returned the same 5-4 decision that the Flag Protection Act of 1989 was also unconstitutional. In fact, few of the Senators that voted against that bill voted because they felt the proposed statute was unconstitutional and preferred the proposed constitutional amendment instead.

Although former Presidents Madison and Jefferson fervently believed that common discourse was essential to democracy, both held the flag in high esteem. They deemed usurpation of the flag as an indignity demanding justice. On July 6, 1807 in a letter to James Monroe, Madison wrote: "The indignity offered to the sovereignty and flag of the nation demands...an honorable reparation...(such as) an entire abolition of impressments from vessels under the flag of the United States..." Likewise, Jefferson, then Secretary of State under George Washington, instructed consuls to punish "usurpation of our flag."

If they were here today, Madison and Jefferson would join with the CFA to reinstate the protection of the flag. However, I sincerely doubt that the Supreme Court in 1807 would have ruled as the Supreme Court did in 1989. The 5-4 ***Texas vs. Johnson*** decision altered the principles of the First Amendment upheld by six previous decisions of their predecessors. That decision set into motion the effort of the American people to correct the error of the Court.

Some have questioned the frequency of such bizarre and abnormal behavior; however, that is a frivolous argument. Public laws are based on legality not frequency. It is either right or wrong to physically desecrate the flag. Although physical desecration has never been widespread in our society, the number of incidents continues, except it is now legal. Even the young man in Appleton that decided to defecate on an American flag used a bodily function to exercise his newly granted constitutional right to physically desecrate Old Glory.

Some try to trivialize the debate on this issue with a seemingly endless list of flag etiquette references – T-shirts, pants, purses, paper plates, slippers and the like – questioning just what is a flag. Ask any sixth grader. They'll tell you what a flag is. In doubt? Ask someone to salute the flag on that T-shirt, or pledge their allegiance to that paper plate. You'll be laughed at, if not ridiculed. For the ultimate test simply ask yourself "would I place that object on a coffin of a deceased veteran to represent the thanks of a grateful nation?"

The amendment currently being considered by the Senate in S.J. Res. 4 simply says: "The Congress shall have power to prohibit the physical desecration of the flag of the United States." This measure has the support of 80 percent of the American people, 50 state legislatures (including Wisconsin), the House of Representatives (passed by super majority votes in 1995, 1997, 1999, 2001 and 2003) and 64 supporters in the Senate. What keeps the issue from the American people are 36 Senators opposed to this proposed constitutional amendment. While we cannot change their minds on this issue, we would certainly hope that just three of them would change their vote and let the people decide this issue which has so much overwhelming support.

Finally, as a veteran, I do not appreciate those, especially non-veterans, who insist on telling me why I served in the armed forces. When I raised my hand, it was to protect and defend the Constitutional of the United States that prohibited the physical desecration of the flag of the United States. Five Supreme Court Justices changed that not Congress, the President, nor me. I served to protect freedom, not the right to physically desecrate the Star Spangle Banner. In this veteran's eyes, only an enemy physically desecrates your flag.

Mr. Chairman, flying a nation's flag inverted (upside down) is not physical desecration, but rather an international symbol of distress. My point is simply, there are so many ways to communicate concern short of the physical desecration of Old Glory.

I have heard the story about "pouring hot coffee into a saucer to let it cool." Ladies and gentlemen, the passion behind this proposed constitutional amendment has had 14 years to cool. It is time to let the American people vote on this issue.

KEITH A. KREUL

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THE AMENDMENT MYTH

Thank you for allowing me to submit this statement for the record in opposition to S.J.Res.4. I am a veteran who proudly served my country in the U.S. Army from 1951 to 1953 and in the Army reserves from 1953 to 1962. In 1983, I was elected to serve as National Commander of the American Legion, a post I was honored to hold for a one-year term through 1984.

An amendment is a radical approach to a near nonexistent dilemma. Our flag is a beautiful and inspiring banner representing freedom and justice for all Americans. It is freely displayed and cannot be protected by government, but only by us, the people. Each citizen can gaze upon it, and it can mean what our heartfelt patriotic beliefs tell us, individually. When the flag is not accorded proper consideration under the flag code, it rightly upsets patriotic Americans. An amendment, however, does not protect the banner from misuse as claimed by proponents. Rather, the amendment authorizes Congress to enact laws dictating the punishment of citizens interpreted to have committed an act of physical desecration upon a banner proscribed to be the flag. In truth, the flag has rarely been abused.

Federally enacted laws will require Federal Court action for violations. Charges and court actions will necessarily include a finite definition of physical desecration and, yes, a finite definition of the flag itself raising a multitude of legal questions. Will the banner need to meet size requirements? Will the manner in which it is flown be important? Will the small flags on a tooth pick utilized for patriotic events on cakes still be a flag? Must the banner be permanently disfigured in order to be considered to have been desecrated? Will commercial advertising and flag display for commercial purpose be affected? Will artists' displays be scrutinized for 'propriety'? What is physical

desecration? Will citizens still own their flag? These questions may appear trivial; however, if a citizen is charged, justice must be rendered, and finite definitions through unending litigation of the broad ranging amendment will be required from the Courts.

A federal definition of flag desecration is unwise and unnecessary when flag burners can be prosecuted under existing criminal law. The Supreme Court case of Johnson vs. Texas came to the forefront when the Texas District Attorney brought charges under a Texas statute forbidding acts of desecration of the flag. The flag that Johnson burned was the property of a bank from which the banner had been removed. The District Attorney and all citizens would have been served if charges of theft, destruction of stolen property and vandalism had been filed. Johnson would have been locally convicted and punished for the act. Amendment advocates imply that the court decision permits detractors to mutilate or burn the flag to exercise their freedom of expression. That is false, insofar as the Supreme Court did not find that flag burners could not be prosecuted for theft, vandalism, or even burning without public permit. Indeed, flag burners can and often are prosecuted for such acts.

This is born out in the example of a 1997 case in Appleton, Wisconsin, an example of local justice under existing law. In that case, the perpetrator was charged with theft and vandalism. Those charges resulted in a nine-month jail term, cost of restitution and 350 hours of community service. In addition, the young man recognized the public outrage and issued an apology in the local news media expressing regret for his misdeed. Justice was rendered by the local authorities without involving the Federal courts.

I am further concerned that in attempting to amend the Constitution in the name of protecting a symbol, the flag, we follow in the path of numerous repressive regimes around the world. In Eastern Europe following WWII, the Soviet Union placed the "hammer and sickle" in the flags of surrogate nations and enforced its protection by Government edict. Fifty years later we applauded the patriotic heroes that rebelled as they slashed and burned those flags. Adolph Hitler's popularity soared in prewar Germany as he flaunted their colorful banner with the prominent swastika and ordered its respect by German and captured Nations' citizenry. Today, the Nations of Cuba, China, Iran, and

Libya typify tyrannical Governments that *protect* their country's banner but not freedoms for their people.

Polling results are frequently cited in support of the amendment. I am suspicious of such polls, given that in my experience most people that I know oppose flag burning but also oppose tampering with the Constitution. However, even assuming that the polls are correct, the will of the majority cannot be used as a valid argument to undermine the rights of a minority. Supreme Court Justice Scalia correctly states "A Bill of Rights that means only what the majority wants it to mean is no Bill of Rights at all". The Preamble of The American Legion is recited by Legionnaires at all Post, County, District, Department and National meetings. Two phrases in that renowned document are "*to combat the autocracy of both the classes and the masses*" and "*to make right the master of might*". It is doubtful the Legion founders that scribed those phrases would be supporting the proposed amendment.

Finally, as a Christian, I am concerned that an amendment "*prohibiting desecration of the flag*" will create the banner as a new deity for our citizens. The dictionary defines desecration as "an act to divest of sacred or hallowed character or office". I presume "physical desecration" is the performance of an act of divestiture upon the icon. This Nation, however, was not founded on devotion to symbolic idols. It was founded on principles, beliefs and ideals, which are expressed in the Constitution and its Bill of Rights ratified in 1789. It appears that after 214 successful and glorious years we are in danger of knuckling under the pressure of modern lobbying techniques and pursuing pseudo patriotism, i.e., revering the icon and not the creed for which it stands. The situation is reminiscent of when Moses was upon the mountain and those awaiting his return became impatient and reverted to the idolization of the golden calf. American veterans that have protected our banner in battle have not fought to protect a golden calf. Instead, they carried the banner forward with reverence for what the flag stands for, our beliefs and freedom for all. Therein, lies the beauty of our flag.

A patriot cannot be created by legislation, true patriotism must be nurtured in the family and educational process. It must come from the heartfelt emotion of righteous beliefs, credos and tenets.

Our beautiful flag represents those beliefs, credos and tenets that are outlined by the Constitution of the United States of America. Will an amendment accomplish a purpose or will it bring further confusion and discontentment diminishing the beauty the flag has today as it hangs free from its standard, revered by we, the people, not ordered by Government edict? Since Betsy Ross stitched the first flag, it has been the people's flag. Our respect for it does not need Government intervention.

Teaching in the home and in our schools of the principles embodied by our Constitution and Bill of Rights requires responsibility and sacrifice. Government cannot and should not attempt to do for us, the people, what we, the people, can do for ourselves. We must not delegate to law enforcement our responsibility of citizenship lest we endanger precious freedoms. Respect for our beautiful flag can only come from the hearts of the people.

# # # #

LA BOUTIQUE NATIONALE

des Huit Chapeaux et Quarante Femmes
Subsidiary of the American Legion Auxiliary

Marge Sheridan
Le Chapeau National
P.O. Box 3151
Coeur d'Alene, ID 83816-2519
Phone: 208 769 2025
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March 8, 2004

Senator Orrin Hatch
SH – 104
Washington, D.C. 20510

Senator Hatch,

I am writing on behalf of the nearly 14,000 Partners (members) of the Eight and Forty, a subsidiary organization of the American Legion Auxiliary.

We believe that the flag of our country deserves protection from physical desecration. Therefore, we ask for your support of SJR 4.

Thank you for your consideration.

Yours in Service,

Marge Sheridan, Le Chapeau National

U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693 VERMONT

Statement of Senator Patrick Leahy
Senate Committee on the Judiciary Hearing:
"Letting the People Decide: The Constitutional Amendment Authorizing Congress To Prohibit Physical Desecration of the Flag of the United States"
March 10, 2004

Today our Committee is holding the latest in what has become a series of hearings on amending the Constitution. It would seem that members of the majority are obsessed with rewriting the Constitution. This is the third constitutional amendment to which this Committee has devoted significant time for debate in the 108th Congress, and this is the second hearing in only a week's time to debate a constitutional amendment during this election year, seeking to limit rather than expand the rights of the American people. This proposal is one of 61 amendments introduced so far this session. Let me repeat that number: Sixty-one amendments to the Constitution introduced in this Congress alone, and over 11,000 since the 1st Congress was convened. Can you imagine what the constitution would look like if all of these amendments were adopted? The amendment we consider today would artificially create division among the American people, and the timing raises concerns with many that the Constitution is being misused for partisan purposes.

SKEWED PRIORITIES, WITH TIME RUNNING OUT

All of this comes at a time when there already are many, many pressing demands on this Committee's time. There is a serious lack of ongoing and meaningful congressional oversight in connection with the war on terrorism. The Senate Judiciary Committee has not fulfilled its responsibility to ensure the rights of the American people, and the government's accountability to the American people, by providing vigorous oversight of the most insular and unilateral Administration in memory.

VETERANS' BUDGET PRIORITIES IGNORED

I know that the flag amendment is an issue of particular importance to veterans, whose opinions rest on both sides of the question, and I know that there are distinguished veterans on our panel and many more present in the audience today. We thank each of you for your service to the Nation, and we welcome you here. And I would note that advocates for the neglected needs of veterans can't help but wonder if this hearing is one more smokescreen for what the Administration is *not* doing to fulfill its duties to veterans. By focusing attention on this amendment, some are wondering if the

Administration believes that veterans might be distracted from the fact that it is failing to meet their long-term health and related needs.

As a member of the Appropriations Committee, I know that where you put your resources tells a lot about your priorities. Take a look at this chart. The Bush Administration's budget has simply failed to honor our veterans, especially when it comes to medical care.

The President's budget request this year fails to maintain even the current level of services. Secretary of Veterans Affairs Principi recently testified that his department asked the White House for an additional $1.2 billion. Needless to say, he was denied.

But Secretary Principi was not the only one ignored by the President's budget request. This request is almost $3 billion less than what Veterans groups -- like the American Legion, the Veterans of Foreign Wars, and the Vietnam Veterans of America -- recommended in The Independent Budget. These organizations know what it will take to meet veterans' needs.

It is sad to say, but this is nothing new. For the past three years, Congress has had to add more than $2.1 billion to the President's budget request just to fill gaps in basic services. If we had done as the President asked, veterans' medical care would be in even worse shape.

At the same time the Administration has been short-changing the budget, out-of-pocket expenses to veterans have skyrocketed. Under the Bush Administration, these expenses are projected to rise by an incredible 478 percent. On top of this, certain Priority 8 veterans are blocked from VA health care altogether, while others cannot receive treatment unless they pay a ridiculously high co-payment.

I could go on and on describing the claims backlog, the longer waits, and the cuts in service. The bottom line is that the Administration's rhetoric towards veterans simply does not match its real priorities.

I hope that Republicans and Democrats will join together this year to make helping our veterans the priority that it needs to be.

CYNICISM AND SYMBOLIC POLITICS

The flag is an important symbol of all that makes America great. But the cynical use of symbolic politics in an election year will not address the very real needs of veterans that are being left unmet by this Administration.

We saw the same kind of manipulation last week when the President's reelection campaign began to run television ads exploiting the September 11 attacks for political advantage. There was an immediate outcry of disgust from victims' families and New York City firefighters who had believed the President when he said that he had "no ambition whatsoever" to use 9/11 or national security as a political issue. On Friday, an

organization of victims' and firefighters called for the campaign to stop running the ads, but the President turned them down.

And so, in the midst of manipulative electioneering, this hearing is opportunistically convened to debate a proposed amendment that has already been the subject of extensive review in past years by this Committee and days of debate on the Senate floor.

COUNSEL FROM COMBAT VETERANS JOHN GLENN AND BOB KERREY

I understand that many veterans support the flag desecration amendment, and I respect their views. We must not forget that there also are many veterans who oppose it. Even after the intensity of the emotions after September 11th and wars in Afghanistan and Iraq, many veterans still believe that they fought for what the flag stands for, not for the symbol itself. Senator John Glenn, a combat veteran, wrote, "The flag is the Nation's most powerful and emotional symbol. It is our most sacred symbol. And it is our most revered symbol. But it is a symbol. It symbolizes the freedoms that we have in this country, but it is not the freedoms themselves."

Senator Glenn was invited to testify today but had a longstanding commitment to attend NASA meetings. Senator Bob Kerrey, recipient of the Congressional Medal of Honor, wanted to testify, but he was unable to rearrange his schedule on such short notice. I asked the Chairman to schedule this hearing so that our former colleagues could appear in person, as they have in the past, in opposition to the amendment. The Chairman declined this request to work cooperatively to find a mutually convenient date when these witnesses in opposition to the proposed constitutional amendment could be here. Our friends and former colleagues, Senator Glenn and Senator Kerrey, have submitted written testimony. I ask that their statements be made part of the record of this hearing.

COLIN POWELL'S ADVICE

A few years ago we heard from another outstanding American in opposition to this proposed amendment. He was a General, who had headed the Joint Chiefs of Staff, and now he serves as our Secretary of State. Colin Powell wrote this to me in May 1999: "We are rightly outraged when anyone attacks or desecrates our flag," he wrote. "Few Americans do such things and when they do they are subject to the rightful condemnation of their fellow citizens. They may be destroying a piece of cloth, but they do no damage to our system of freedom which tolerates such desecration." Referring to the Constitution, General Powell continued, "I would not amend that great shield of democracy to hammer a few miscreants. The flag will still be flying proudly long after they have slunk away." Let me repeat General Powell's concluding line: "The flag will still be flying proudly long after they have slunk away."

I was deeply offended when, during the Super Bowl halftime show, Kid Rock wore a flag as a poncho and then tossed it away, presumably allowing it to land on the ground. I rose out of my chair in disgust when I saw that. To me, that was more offensive than the

highly publicized, split-second "wardrobe malfunction." But though I abhor what he did, I recognize that any protest or statement he was trying to make in wearing the flag is protected by the First Amendment.

Sometimes, individuals deface the flag or violate the rules for its care without intending to offend. For example, President Bush was captured on film signing a hand-held flag at a campaign rally last summer. Appropriate or not, these acts are protected by our Constitution, and they are not punishable by Congress.

CHANGE 1ST AMENDMENT FOR THE FIRST TIME?

Flag desecration is a despicable and reprehensible act. But the true question before us is not whether we agree with that – all of us on this dais agree that it is contemptible. Instead, the issue before us is whether we should amend the Constitution of the United States, with all the risks that entails, and whether, for the first time in our history, we should narrow the precious freedoms ensured by the First Amendment. Should we amend the First Amendment so that the Federal Government can prosecute the miniscule number of Americans who show contempt for the flag? Such a monumental step is unwarranted and unwise.

Justice Brennan wrote, "We can imagine no more appropriate response to burning a flag than waving one's own." That is exactly how the American people respond, a point demonstrated by the innate patriotism of Americans in response to events of the past years.

PATRIOTISM DOESN'T COME BY DECREE

Immediately after September 11th, Americans everywhere began to fly flags outside their homes and businesses, to wear flag pins on their lapels, and to put flag stickers on their cars. This surge in patriotism made American flags such a hot commodity that several major flag manufacturers could not keep flags stocked on store shelves. Within one week of those attacks, demand for American flags was 20 times higher than was typical for that time of year, according to the National Flag Foundation in Pittsburgh. During that same week, Wal-Mart sold 450,000 flags. Within days of the terrorist attacks, K-Mart sold 200,000 flags.

This outpouring of patriotism was spontaneous, and it was the sum total of millions of individual Americans, acting on their own, not under government decree. The government did not order Americans to buy and fly the American flag.

Supporters of this constitutional amendment seem to believe that Americans need a lesson in how to respect the flag and that they need rules punishable by law to enforce that lesson. I disagree, and the American people have already proven them wrong. The American people do not need a lesson in cherishing and honoring our flag and the Republic for which it stands. That may be necessary in Saddam Hussein's Iraq or in Stalin's Soviet Union or in Castro's Cuba. But not in America.

Respect cannot be coerced or compelled. It can only be given voluntarily. Some may find it more comfortable to silence dissenting voices, but coerced silence can only create resentment, disrespect, and disunity. In America, you don't stamp out a bad idea by repressing it. You stamp it out with a better idea.

My better idea is to fly the flag, not because the law tells me to; not because there is something that says this is what I have to do to show respect. I fly the flag because, as an American, I want to. The extraordinary display of patriotism we have witnessed in recent years is evidence that the American people do not need laws and penalties to cherish the flag that we all love.

THE FREEDOMS FOR WHICH IT STANDS

Our flag is a cherished symbol. Even more important than the flag itself are the freedoms for which it stands, including the freedom to express unpopular speech or ideas -- even extremely unpopular ideas.

Freedom of speech and of the press is one of the magnificent bequests of earlier Americans to all the generations that follow. These rights are a fragile thing, needing nurturing and protection by each new generation. The erosion of freedom can easily come when lawmakers succumb to the temptation to pander to shifting public passions, at the expense of the public's everlasting interest in preserving freedom. In any session of Congress you do not have to look far to see this dynamic at work. It may not be politically popular to defend against erosive efforts like this, but generations of Americans to come will thank us if we leave for them the same First Amendment that we ourselves inherited and so dearly treasured.

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TESTIMONY OF GARY E. MAY
Associate Professor of Social Work
University of Southern Indiana
Evansville, Indiana

on the
Proposed Constitutional Amendment
to Ban Flag Desecration

before the
Senate Judiciary Committee

March 10, 2004

Good morning. I am extremely flattered and humbled by your invitation and interest in listening to my thoughts and those of other veterans about the proposed amendment to the Constitution. I gladly accepted the invitation as yet another opportunity for me to be of service to my country.

As a Vietnam veteran who lives daily with the consequences of my service to my country, and as the son of a WWII combat veteran, and the grandson of a WWI combat veteran, I can attest to the fact that not all veterans wish to exchange fought-for freedoms for protecting a tangible symbol of these freedoms. I oppose this amendment because it does not support the freedom of expression and the right to dissent.

This is among the core principles under our Constitution that my family and I served to support and defend. It would be the ultimate irony for us to have placed ourselves in harm's way and for my family to sacrifice to gain other nations' freedoms and not to protect our freedom here at home.

My late father in law, Robert E. Speer, endured horrible, prolonged combat as a member of Merrill's Marauders. My older brother, Edward C. May, saw duty with the Army in Korea during the Vietnam era.

I barely knew my grandfather who died when I was young. I do know that he saw combat while serving in the Army during WWI. His service included his being gassed. He never received any government benefits. My father didn't know all of the details of his father's service, but he has no recall of grandpa referring to the flag as a reason for his service and sacrifice. After the war, he returned to his Winslow, Indiana home and worked to provide for his family.

My Father, Charles W. May, who died nearly two year ago, was a WWII Army combat veteran who served in the European Theater of Operations from 1944 to 1946. He saw

combat with Battery "B" 500th Armored Field Artillery Battalion, 14th Armored Division. The flag or its protection was not a powerful motivating force for himself or any of his fellow combatants. It was the fight for freedom that really mattered.

I joined the U.S. Marine Corps while still in high school in 1967. This was a time of broadening public dissent and demonstration against our involvement in Vietnam. I joined the Marines, these protests notwithstanding because I felt that it was my duty to do so. I felt duty-bound to answer President Kennedy's challenge to "ask not what your country can do for you; ask what you can do for your country". My country was asking me to serve in Vietnam, ostensibly because people there were being arbitrarily denied the freedoms we enjoy as Americans.

During my service with K Company, 3rd Battalion, 27 Marines following the Tet Offensive of 1968 in Vietnam, I sustained bilateral above the knee amputations as a result of a landmine explosion on April 12, 1968. My military awards include the Bronze Star, with combat "V", Purple Heart, with star, Vietnam Campaign, Vietnam Service, and National Defense medals.

Upon my return from Vietnam, I enrolled at the University of Evansville where there were occasional student protests of the war. I felt a strong identity with these protesters, because I too, felt that the war was wrong and that that feeling demanded expression—after all, this is what I had served to protect.

I graduated with a Bachelor of Arts in Sociology. I earned my Master of Science in Social Work degree from the University of Tennessee in 1974. I am married to the former Peggy Speer of Haubstadt, Indiana. We have two children, Andrea, a middle school teacher in Indianapolis, and Alex, a supermarket manager.

Over the last 36 years, I have faced the vexing challenge of reconciling myself with the reality of my military history and the lessons I have learned from it and the popular portrayal of veterans as one dimensional patriots, whose patriotism MUST take the form of intolerance, narrow-mindedness, euphemisms, and reductionism—where death in combat is referred to as "making the ultimate sacrifice" and the motivation for service and the definition of true patriotism is reduced to dedication to a piece of cloth.

I ask members of the committee to think about why they love our country, to find the source of their own patriotism. Has that patriotism been forced upon you? Have you been coerced to love America? Are your convictions not your own?

A few years back, I mentioned the anniversary of my wounding to a colleague and asked her what she was doing in 1968. Somewhat reluctantly, she said "I was protesting the war in Vietnam." I was not offended. After all, our nation was born out of political dissent. Preservation of the freedom to dissent, even if it means using revered icons of this democracy, is what helps me understand losing my legs.

The American flag stands for a long history of love and loss, of war and peace, of harmony and unrest. But it also stands for the history of a nation unsatisfied with the status quo, of a nation always in search of a greater truth, a more perfect union. Surely it does not stand for a nation where we jail those who peacefully disagree with us, regardless of the abhorrent nature of their disagreement.

The strength of our nation is found in its diversity. This strength was achieved through the exercise of our First Amendment right to freedom of expression—no matter how repugnant or offensive the expression might be. Achieving that strength has not been easy—it's been a struggle, a struggle lived by some very important men in my life and me.

Since 1999, the year I last testified before this committee on this issue, over 2,400 veterans have written and joined my little group called Veteran's Defending the Bill of Rights. Unlike most of the groups that support this amendment, we are solely organized in opposition to this amendment. Many of us are even members of the organizations that are listed as supporting the amendment. We are here to make sure that it is clear that veterans do not all speak with one voice on this issue. A number of these combat veterans would have been more than willing to testify against this amendment today. I do not have time or space to include them all, but I have included excerpts from some of their letters below and ask that members take the opportunity to listen to their voices.

Frances W. Lovett of Waverly, OH writes:

"I am a veteran of WWII serving from September 1942 to December 1945. I secured the three letters of recommendation necessary for enlistment in the Tenth Mountain Division and remained with the Division throughout my length of service. I fought through the campaign in Italy, received the Bronze Star medal with two oak leaf clusters and was given an honorable discharge, with a service-connected disability. I believe that I served my country then, rather than serving government officials, as seems to be the case today.

While flag burning is rare, it is nonetheless a form of free speech, the right to dissent and to voice that dissent, however offensive the exercise of that right may seem. The voice of dissent is a voice we need to hear—not stifle. Those who favor the proposed amendment say they do so in honor of the flag, but in proposing to unravel the First Amendment, they desecrate what the flag represents and what so many of my comrades died to defend."

W.C. Ragsdale, a retired Navy veteran and father of two Vietnam veterans from Titusville, Florida asked that I share his thoughts with you today. Here is what he had to say:

"A law to ban flag burning would be feel-good legislation, but counter productive to the rights and freedoms of all Americans. I am a retired Navy veteran of WWII and Korea. I have two sons who were in the service during Viet Nam, one of whom was over there for 18 months. Our flag flies from the front of our house day and night (lighted).

The burning of our flag thoroughly disgusts me. But a law banning the burning of the flag plays right into the hands of the weirdoes who are doing the burning.... By banning the burning of the flag, we are empowering them by giving significance to their stupid act. Let them burn the flag and let us ignore them. Then their act carries no significance.

Many of our young men and women have given their lives defending our liberties and freedoms. Freedom of expression is one of the rights our ancestors fought and died for. So, let the malcontents express themselves, as long as they do no physical harm to others. And let us (including the media) ignore them."

Bob Cordes from Mason, Texas also cares deeply about this issue. Here are his thoughts:

"... I am a veteran and member of the group called Veterans Defending the Bill of Rights to urge you to oppose S.J. Res. 4, the flag desecration constitutional amendment. I know you hear from many veterans who support this amendment, but you should also know that there are many veterans that have faithfully served our nation who strongly believe that amending the Constitution to ban flag desecration is the antithesis of what they fought to preserve.

I served in the Air Force for 22 years from 1956 to 1978 while stationed in Europe, Africa, Vietnam, Thailand, as well as the United States. As a fighter pilot, I was shot down in Vietnam and hospitalized for a year. I received a Bronze Star, a Purple Heart, 21 Air Medals, and several Foreign Awards. When I regained flight status in 1972 I served a second tour of combat duty in Thailand. Today I live on my ranch in Mason, Texas."

Steven F. Sanderson of Hastings, MI offers this view:

"...I urge you to oppose the constitutional amendment to ban physical desecration of the flag. This legislation would undermine the very principles for which the American flag stands.

Thirty years ago I was a U.S. Military Police Sentry Dog-Handler stationed in the Republic of Korea. Back then Korea was an oppressive police state under President Park Chung Hee, a democracy in name only. A lot has happened in the past thirty years. Korea and the United States have both changed. Today Korea is a thriving democracy and the Korean people enjoy American-style civil liberties. While freedom has flourished in Korea, it is under assault here in the United States and our civil liberties are in grave danger."

James E. Lubbock of St. Louis, Missouri wrote in a letter to this very committee:

"Service to our country, not flag waving, is the best way to demonstrate patriotism:

From the Revolutionary War, through Vietnam, members of my family have volunteered for service in every conflict on the United States except for the Korean War. Stephen

Hopkins, my direct ancestor and a member of the Continental Congress signed the Declaration of Independence. His grandson-in-law, Creighton Winans, enlisted in Washington's forces as a private during the Revolution and emerged a captain. We had relatives who hosted the Marquis de Lafayette during the War of 1812. Our ancestors in Texas participated in the Mexican War and our ancestors—including a Union General and several distinguished Confederates—fought on both sides of the Civil War. My great-uncle was in the Spanish American War. My father enlisted in WWI and served in France. I enlisted in WWII and served in the Philippines. Our younger son enlisted in the Vietnamese War on the day after his graduation from high school. My oldest son volunteered his draft, served in Vietnam and was awarded the Bronze Star and the Army Commendation medal.

We respect the flag, but every tin-pot dictatorship in history has had a flag; only the United States has had a peerless Bill of Rights that has guided us through the changes – culturally, politically, economically, and militarily – for more than 200 years. It doesn't make sense to damage the Bill of Rights by opening it to change when we have not touched it since it was written. Why start now?

Let's not alter the Bill of Rights to save the flag. We should respect the flag, but we should all cherish the Bill of Rights much, much more."

The Reverend Edgar Lockwood of Massachusetts adds his perspective:

"I am distressed to hear that the Congress is closer than ever to passing an amendment to the constitution which would prohibit the physical desecration of the United States flag.

I served in the US Naval Reserve on active duty from July, 1942 until January 1946. I served on a destroyer of the Pacific Fleet, as the communications officer and as the Executive Officer of the USS Cony (DD508). We were engaged in more than ten combat campaigns. I was awarded a commendation from Admiral Barbey, Commandant of the Seventh Fleet for excellence in my communication work. I saw eight of my shipmates killed in battle and sixteen wounded in one engagement off the Treasury Islands. I have defended my country in war and in waging peace.

I understand very well the pride we have in our flag as a symbol of our nation and in our tradition of free speech and the ability to speak openly in public no matter whether our words are considered unpatriotic or not. I do not think that burning our flag is a good thing to do. Nevertheless to undertake to carve out an area of free speech and say that this or that is unpatriotic because it is offensive is a movement that will unravel our liberties and do grave damage to our nation's freedom. The ability to say by speech or dramatic acts what we feel or think is to be cherished not demeaned as unpatriotic… I hope you will hear my plea. Please do not tinker with the First Amendment".

Many other veterans, such as WWII veterans Barbara Schnuer and her husband Sy Schnuer, of Lunenberg, MA and Janet Walsh, an Army Nurse Corps Vietnam veteran from Medford, NJ, express similar opinions. We should not ignore the judgment and the

voices of ALL who have risked paying the ultimate price to protect the freedoms and liberties that the flag so effectively symbolizes. Are our voices and our beliefs any less valuable?

In addition to my own military combat experience, I have been involved in veteran's affairs as a clinical social worker, program manager, board member, and advocate since 1974. I have yet to hear a veteran I have lived or worked with say that his/her service and sacrifice was in pursuit of protecting the flag. When confronted with the horrific demands of combat, most of us who are honest say we fought to stay alive. Combatants do not return home awestruck by the flag. Putting the pretty face of protecting the flag on the unforgettable, unspeakable, abominations of combat seems to trivialize what my fellow veterans and I experienced. This depiction is particularly problematic in light of the current events.

As offensive and painful as flag burning is to me, I still believe that those dissenting voices need to be heard. This country is unique and special because the minority, the unpopular, the dissenters and the downtrodden, also have a voice and are allowed to be heard in whatever way they choose to express themselves that does not harm others. The freedom of expression, even when it hurts, is the truest test of our dedication to the belief that we have that right.

Free expression, especially the right to dissent with the policies of the government, is one important element, if not the cornerstone of our form of government that has greatly enhanced its stability, prosperity, and strength of our country. This freedom of expression is under serious attack today. The smothering, oppressive responses to publicly expressed misgivings about our incursion into Iraq and ad hominem attacks against those who dare to express them are alarming. "Supporting our troops" does not mean suspending critical analysis and muffling public debate and discourse.

Freedom is what makes the United States of America strong and great, and freedom, including the right to dissent, is what has kept our democracy going for more than 200 years. And it is freedom that will continue to keep it strong for my children and the children of all the people like my father, late father in law, grandfather, brother, me, and others like us who served honorably and proudly for freedom.

The pride and honor we feel is not in the flag per se. It is in the principles for which it stands and the people who have defended them. My pride and admiration is in our country, its people and its fundamental principles. I am grateful for the many heroes of our country—and especially those in my family. All the sacrifices of those who went before me would be for naught, if an amendment were added to the Constitution that cut back on our First Amendment rights for the first time in the history of our great nation.

I love this country, its people and what it stands for. The last thing I want to give the future generations are fewer rights than I was privileged to have. My family and I served and fought for others to have such freedoms and I am opposed to any actions that would restrict my children and their children from having the same freedoms I enjoy.

The proposed amendment will apparently prohibit yet to be defined abuses of the flag which are deemed offensive. Who shall write the definition? Will destroying the flag in the interest of registering strong objection to a military excursion violate the law? What about reducing this revered icon to a lampshade? Would the inclusion of a flag in a wall hanging violate the law? What if used as a curtain? Who decides?

If one peruses the pages of the periodicals of the traditional veterans' organizations, many of which apparently support this amendment, one will observe many uses of this revered symbol. Do those who object to a flag motif in clothing have recourse under the proposed amendment? If the flag can be worn on the uniform shoulder by safety and law enforcement personnel, is it permissible for it to be worn on underclothing? Who will check?

The proposal seems unenforceable. It raises the specter of the "flag police," whose duties would include searching out violations and bringing offenders to the bar of justice. That this is defended in the name of freedom and in the memory of valiant sacrifices by millions of this country's veterans is duplicitous and cynical.

If we are truly serious about honoring the sacrifices of our military veterans, our efforts and attention would be better spent in understanding the full impact of military service and extending services to the survivors and their families. Our record of service to veterans of all wars is not exemplary. In May 1932, in the midst of the Great Depression, WWI veterans had to march on this Capitol to obtain their promised bonuses. WWII veterans were unknowingly exposed to radiation during atomic testing. Korean veterans, perhaps more than any living U.S. veterans, have been forgotten. Vietnam veterans are still battling to obtain needed treatment for their exposure to life-threatening herbicides and withheld support upon their return. In my area, businesses and churches were soliciting donations to support the families of U.S. troops in Iraq. The list goes on . . .

The spotty record in veteran's services is more shameful when one considers that the impact of military service on one's family has gone mostly unnoticed by policy makers. The dimensions of this impact and the responses of funded programs nationwide are chronicled in The Legacy of Vietnam Veterans and Their Families, Survivors of War: Catalysts for Change (1995. Rhoades, D.K., Leaveck, M.R. & Hudson, J.C., eds. Agent Orange Class Assistance Program. Government Printing Office). In this volume, Congressman Lane Evans opines that:

> "Although the government's legal obligation extends primarily to veterans, I believe the government also has a strong moral obligation to provide services to those family members who are affected by the veteran's experiences. Services should be offered to children with congenital disorders whose conditions are related to their parent's military service. Counseling should be offered to the family members of veterans with psychological or substance abuse problems related to their military service. By providing appropriate services and benefits, through either government or community-based organizations, the government

> would admit its responsibility and offer the assistance that some veterans and their families desperately need." (p. ix)

The programs that were supported by the Agent Orange Class Assistance Program were later represented by Veterans Families of America, an organization whose member agencies demonstrated effectiveness in meeting veteran family needs, but whose continuation was ended due to lack of funding. I proudly served as a member of the board of Veterans Families of America.

Is our collective interest better served by amending the Constitution to protect a piece of cloth than by helping spouses understand and cope with the consequences of their loved ones' horrible and still very real combat experiences? Are we to turn our backs on the needs of children whose lives have been affected by their parent's military service? The Agent Orange Benefits Act of 1996 was a good start, but we shouldn't stop there. Veterans of Gulf War I are still left languishing, uncertain if their service exposed them to insidious health threatening contaminants. Does our obligation to our current combatants extend beyond labeling them heroes? Is our obligation to protect the flag greater, more righteous, more just, and more moral, than our obligation to help veterans and their families? I think not.

Over the years, proponents of this amendment have argued that they are not advocating for the passage of this amendment over providing adequate support and services for our veterans. They say we can do both. I am asking. When? When will we do both?

I respectfully submit that this assault on First Amendment freedoms in the name of protecting anything is incorrect and unjust. This amendment would create a chilling environment for political protest. The powerful anger that is elicited at the sight of flag burning is a measure of the love and respect most of us have for the flag.

Prohibiting this powerful symbolic discourse would stifle legitimate political dissent. If it is to be truly representative of our cherished freedoms, the flag itself must be available as a vehicle to express these freedoms.

This is among the freedoms for which I fought and gave part of my body. This is a part of the legacy I want to leave for my children. This is among the freedoms my grandfather was defending in WWI. It is among the freedoms my father and late father in law defended during their combat service during WWII. It is among the freedoms that the veterans whose voices you heard through me earlier in my testimony fought to preserve and extend.

I believe that it is time for congress to pay more attention to the voices of ordinary veterans who know first hand the implications of tyranny and denied freedoms. Our service is not honored by this onerous encroachment on constitutionally guaranteed freedoms.

Thank you.

VETERANS DEFENDING THE BILL OF RIGHTS
P. O. Box 15, Newburgh, IN 47629

March 10, 2004

RE: Oppose S.J. Res. 4, the Flag Desecration Constitutional Amendment

Dear Senator:

My name is Gary May and I am writing to you today as the chair of a group called Veterans Defending the Bill of Rights to urge you to oppose S.J. Res. 4, the flag desecration constitutional amendment. I know you hear from many veterans who support this amendment, but you should also know that there are many veterans that have faithfully served our nation who strongly believe that amending the Constitution to ban flag desecration is the antithesis of what they fought to preserve.

I lost both of my legs in combat while serving in the U.S. Marine Corps in Vietnam. I challenge anyone to find someone who loves this country, its people and what it stands for more than I. It offends me when I see the flag burned or treated disrespectfully. But, as offensive and painful as this is, I still believe that those dissenting voices need to be heard.

This country is unique and special because the minority, the unpopular, the dissident also have a voice. The freedom of expression, even when it hurts the most, is the truest test of our dedication to the principles that our flag represents.

In addition to my military combat experience, I have been involved in veterans' affairs as a clinical social worker, program manager, board member of numerous veterans organizations, and advocated on their behalf since 1974. Through all of my work in veterans' affairs, I have yet to hear a veteran say that his or her service and sacrifice was in pursuit of protecting the flag.

When confronted with the horrific demands of combat, the simple fact is that most of us fought to stay alive. The pride and honor we feel is not in the flag per se. It's in the principles that it stands for and the people who have defended them.

I am grateful for the many heroes of our country. All the sacrifices of those who went before us would be for naught, if an amendment were added to the Constitution that cut back on our First Amendment rights for the first time in the history of our great nation. I write to you today to attest to the fact that many veterans do not wish to exchange fought-for freedoms for protecting a tangible object.

To illustrate my point, here is what some of the Veterans Defending the Bill of Rights have said about this amendment:

- "...to undertake to carve out an area of free speech and say that this or that is unpatriotic because it is offensive is a movement that will unravel our liberties and do grave damage to our nation's freedom. The ability to say by speech or dramatic acts what we feel or think is to be cherished not demeaned as unpatriotic...I hope you will hear my plea. Please do not tinker with the First Amendment."
  -Reverend Edgar Lockwood, Falmouth, Massachusetts, served as a naval officer engaged in more than ten combat campaigns in WWII.

- "My military service was not about protecting the flag; it was about protecting the freedoms behind it. The flag amendment curtails free speech and expression in a way that should frighten us all."
  -Brady Bustany, West Hollywood, California, served in the Air Force during the Gulf War.

- "The first amendment to our constitution is the simplest and clearest official guarantee of freedom ever made by a sovereign people to itself. The so-called 'flag protection amendment' would be a bureaucratic hamstringing of a noble act. Let us reject in the name of liberty for which so many have sacrificed, the call to ban flag desecration. Let us, rather, allow the first amendment, untrammeled and unfettered by this proposed constitutional red tape, to continue be the same guarantor of our liberty for the next two centuries (at least) that is has been for the last two."
  -State Delegate John Doyle, Hampshire County, West Virginia served as an infantry officer in Vietnam.

- "As a twenty two year veteran, combat experience, shot up, shot down, hospitalized more than a year, Purple Heart recipient, with all the proper medals and badges I take very strong exception to anyone who says that burning the flag isn't a way of expressing yourself. In my mind this is clearly covered in Amendment I to the Constitution – and should not be 'abridged'."
  -Mr. Bob Cordes, Mason, Texas was an Air Force fighter pilot shot down in Vietnam. He served for 22 years from 1956 to 1978.

- "Service to our country, not flag waving, is the best way to demonstrate patriotism."
  -Mr. Jim Lubbock, St. Louis, Missouri, served with the Army in the Phillipines during WWII. His two sons fought in Vietnam, and members of his family have volunteered for every United States conflict from the American Revolution through Vietnam with the exception of Korea. His direct ancestor, Stephen Hopkins, signed the Declaration of Independence.

- "The burning of our flag thoroughly disgusts me. But a law banning the burning of the flag plays right into the hands of the weirdoes who are doing the burning.... By banning the burning of the flag, we are empowering them by giving significance to their stupid act. Let them burn the flag and let us ignore them. Then their act carries no significance."
  -Mr. William Ragsdale, Titusville, Florida, an engineer who worked in the space industry for over 30 years, retired from the US Naval Reserve in 1984 with the rank of Commander, having served in the Navy for over forty years including active duty in both WWII and the Korean War. He has two sons who served in Vietnam.

- "I fought for freedom of expression not for a symbol. I fought for freedom of Speech. I did not fight for the flag, or motherhood, or apple pie. I fought so that my mortal enemy could declare at the top of his lungs that everything I held dear was utter drivel...I fought for unfettered expression of ideas. Mine and everybody else's."
  -Mr. John Kelley, East Concord, Vermont, lost his leg to a Viet Cong hand grenade while on Operation Sierra with the Fox Company 2nd Battalion 7th Marines in 1967.

I hope you will join me and the Veterans Defending the Bill of Rights in opposing S.J. Res. 4, the flag desecration constitutional amendment.

Sincerely,

Gary E. May

INSTITUTE FOR JUSTICE

May 2, 2003

The Honorable Orrin Hatch
United States Senate
131 Russell Senate Building
Washington, DC 20510

Dear Senator Hatch:

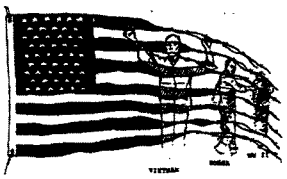
Your steadfast devotion to America's founding principles serves as an inspiration to countless people nationwide. Indeed, on the various occasions when we have had the opportunity to work with you, your unwavering commitment to the Constitution proved decisive. Thus we were sorry to see your leadership on Senatorial attempts to outlaw the use of the American flag in protests if such use is deemed to desecrate the flag.

The most recent proposed constitutional amendment has the unavoidable potential for very open-ended and subjective definitions of desecration. It will yield inconsistent results in protecting the flag, but all too consistent results in stifling legitimate political dissent. We urge you to reconsider and to again courageously protect the principles of our founding, in this case, the principle of robust political speech.

Sincerely,

William H. Mellor
President and General Counsel

1717 Pennsylvania Avenue, NW Suite 200 Washington, DC 20006 (202) 955-1300 (202) 955-1329 Fax
e-mail: General@ij.org Home Page: www.ij.org



POWs - MIAs

NATIONAL ALLIANCE OF FAMILIES
FOR THE RETURN OF AMERICA'S MISSING SERVICEMEN
WORLD WAR II • KOREAN WAR • COLD WAR • VIETNAM WAR • PERSIAN GULF

MARCH 8, 2004

CHAIRMAN ORRIN G. HATCH
JUDICIARY CONGRESSIONAL COMMITTEE
224 Dirksen Building
Washington D.C. 20510 FAX: 202/ 224-9102

Dear Chairman Hatch:

The Board of Directors of the National Alliance of Families for the Return of America's Missing Servicemen and Women would like to commend you for introducing S.J. Res 4 – the Hatch – Feinstein Flag – Protection Amendment.

And championing the opportunity to have America's citizens testify in support of the American Flag before the Judicial Committee Hearing on the Flag Issue on March 10, 2004.

We appreciate and support your statement: "No other symbol of our bi-partisan national ideals - has flown over the Battlefields, Cemeteries, Football Fields, and School Yards of America. No other symbol has lifted the hearts of ordinary men and women seeking Liberty around the world. No other symbol has been paid for with so much Blood of our Countrymen." Our POW/MIA Families know this well and will not forget!

Thank you for your continued support.

Yours truly,

D. ALFOND

Dolores Apodaca Alfond, National Chairperson

P. O. BOX 40327, BELLEVUE, WASHINGTON 98015-4327
TEL/FAX: 425/881-1499 • WEB SITE: http://www.nationalalliance.org

NAUS

NATIONAL ASSOCIATION FOR UNIFORMED SERVICES

5535 Hempstead Way • Springfield, VA 22151-4094
E-mail: naus@naus.org • Website: www.naus.org
Tel: 703-750-1342 • Toll Free: 1-800-842-3451 • Fax: 703-354-4380
"The Servicemember's Voice In Government"
Established 1968

SOCIETY OF MILITARY WIDOWS

8 March 2004

The Honorable Orrin Hatch
Chairman, Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

The members and supporters of the National Association For Uniformed Services (NAUS), which is member association of the Citizens Flag Alliance, thank you for introducing SJ Res 4, that proposes an amendment to the Constitution of the United States authorizing Congress to prohibit the physical desecration of the flag of the United States. We also thank you for holding a hearing on this issue on 10 March 2004.

Most of the members of this association have either served with honor and distinction while fighting the nation's hot wars and the winning of the Cold War; all done under the banner of the United States Flag; or, as the spouses of the servicemembers were the "glue that held families during times of deployments".

Day after day, we see surviving spouses of our brave service men and women, while during their times of sadness, receive with great pride, the folded United States Flag, as their loved ones are put to their final rest.

The Flag, under which so many have served and sacrificed needs protection from those who would desecrate it and dishonor the embodiment of this nation's sovereignty.

Sincerely,

Richard D. Murray
RICHARD D. MURRAY
Major General, US Air Force (Retired)
President

* * ** **

The National Association for Uniformed Services (NAUS) was founded in 1968 to support legislation to uphold the security of the United States, sustain the morale of the Armed Forces, and provide fair and equitable consideration for all members of the uniformed services: active, reserve, National Guard, veteran, retired, and their spouses, widows and widowers. The Society of Military Widows (SMW) became affiliated with NAUS in 1984. Our nation-wide membership is now over 158,000 with over 500,000 additional family member and supporter voters. NAUS is the only association to represent all grades, ranks, components, and branches of the uniformed services: Army, Air Force, Navy, Marines, Coast Guard, Public Health Service, and National Oceanic and Atmospheric Administration, their families and survivors.

MAR-04-2004 16:41 FROM-NATIONAL GRANGE 202-3471091 T-059 P.002/002 F-010

National Grange
of the Order of Patrons of Husbandry
1616 H Street N.W., Washington, D.C., 20006-4999
Tel: (202) 628-3507 FAX: (202) 347-1091 www.nationalgrange.org

March 4, 2004

The Honorable Orrin Hatch
United States Senate
104 Hart Senate Office Building
Washington, DC 20510

Dear Senator Hatch:

On behalf of the nearly 300,000 National Grange members, I ask that you please support the Flag Protection Amendment (SJR 4). We believe that Congress should have power to effect laws that will prohibit the physical desecration of the U.S. flag.

The National Grange's policy statement on the protection of the U.S. flag is as follows:

The National Grange opposes the desecration of the American flag, with the act of desecration being classified as a federal felony and the penalty being strictly enforced with no exception. If this law is not upheld, we urge Congress to pass a constitutional amendment that will ban the desecration of the American Flag.

Thank you for your time and consideration.

Sincerely,

Leroy Watson, Legislative Director
National Grange of the Order of Husbandry

03/05/2004 11:27 FAX 5023151776 W WIEDMAN NSSAR 02

The National Society of the Sons of the American Revolution

INSTITUTED JULY 4, 1876 ORGANIZED APRIL 30, 1889

March 4, 2004

The Honorable Orrin Hatch
United States Senate
104 Hart Senate Office Building
Washington, DC 20510

RE: Senate Joint Resolution 4

Dear Senator Hatch:

I want to convey my appreciation to you and your colleagues for your support for Senate Joint Resolution 4. The proposed flag amendment that empowers Congress to prevent flag desecration is needed at this time in our country. The National Society of the Sons of the American Revolution support efforts that assist citizens, both new and established, in understanding the value of our flag. We also support its reverence, and consider it intolerable to allow such desecration of the flag to occur.

The flag is representative of our democratic society that is revered by other countries around the world. As a cherished symbol, all acts that would damage or diminish its presence in our society should be prevented. We are harmed when differing viewpoints are allowed to destroy this symbol of our freedom. Our ancestors sacrificed their lives in many cases to secure our freedom. This freedom is costly, and we as a country should preserve our very symbols. We pledge our allegiance to this flag at civic clubs, schools and meetings, because we believe in our nation and our heritage.

I, on behalf of all 27,554 members of the National Society ask your continued support for the flag amendment. Thank you for your tireless efforts to preserve our freedom and for your service to our country.

Respectfully yours,

Raymond C. Musgrave J.D.
President General 2003-2004
The National Society

National Headquarters • 1000 South Fourth Street • Louisville, KY 40203 • (502) 589-1776 • Fax: (502) 589-1671
www.sar.org

STATEMENT OF

ROBERT F. NEVILLE

NATIONAL EXECUTIVE COMMITTEEMAN
DEPARTMENT OF NEW YORK
THE AMERICAN LEGION
TO THE
COMMITTEE ON THE JUDICIARY
U. S. SENATE
ON
SENATE JOINT RESOLUTION 4

MARCH 10, 2004

Mr. Chairman and members of the Committee, it is an honor to submit testimony to this committee regarding S.J. Res. 4, a proposed constitutional amendment to prohibit the physical desecration of the American flag. The amendment reads: ***The Congress shall have power to prohibit the physical desecration of the Flag of the United States.***

The Citizens Flag Alliance (CFA) is a national coalition of 145 grassroots organizations, which have come together to persuade Congress to pass a proposed constitutional amendment to protect "Old Glory." CFA represents more than 20 million concerned American citizens from all walks of life.

The movement to protect the American flag from physical desecration is about values. It is about right and wrong. More importantly, it is about the democratic process and about "We the People" having a say in how we want to be governed.

In 1989, the United States Supreme Court's 5-4 decision meant that the only way to protect the American flag is through a constitutional amendment. Texas v. Johnson invalidated flag desecration laws in 48 States and the District of Columbia. New York was one of those 48 States. The citizens of New York recognized a need for that law and lived under that law for many years without feeling that anyone's First Amendment rights were being curtailed. Even Congress voiced "profound disappointment" and "concern" over the Supreme Court's decision. In fact, Congress tried to correct the Court's ruling by passing a federal statute, the Flag Protection Act of 1989 (Public Law 101-131). Less than a year following its enactment, the Court ruled the new law unconstitutional.

The Flag of the United States of America is a national treasure that deserves to be protected. It is the one unifying symbol for a nation of immigrants. This issue is truly a grassroots issue. Gallup surveys indicate 78 percent of Americans favor flag protection and 82 percent say the people should have the right to decide the question of flag protection through the ratification process.

Last Congress, a similar measure, H.J. Res. 36, passed in the House of Representatives by a vote of 298 - 125. Unfortunately, the effort failed in the Senate because the measure was not brought to the Senate floor prior to adjournment. But this is an issue that will not go away, because it is not a fleeting passion and flag desecration is not behavior that people will learn to tolerate. This issue cuts deep into the fundamental principles of honor, respect, faith and loyalty. Our Founding Fathers knew that the Constitution was not a perfect document and that changes would need to be made.

Last June, H.J. Res. 4 passed in the House by a vote of 300 - 125 in response to 50 state legislatures, representing 100 percent of the population, who have passed Memorial Resolutions petitioning Congress to send an amendment to the states for ratification. On March 29, 1994, the New York State Assembly passed a memorial resolution calling on Congress to let the people decide. The measure passed the legislature with overwhelming support.

Freedom of speech is not absolute. The list of exceptions is rather lengthy and clearly demonstrates that a distinct difference can and has been made in various kinds of speech. Disturbing the peace, yelling "FIRE" in a crowded theater, libel, slander and conveying a threat are all limitations placed on speech because each crosses the line of acceptable, reasonable, tolerable conduct. Once that line is crossed, it becomes illegal conduct; willful, wanton misconduct, therefore, has boundaries upheld by the Supreme Court. This amendment would include the American flag within those boundaries already clearly established by the Court. The physical desecration of an American flag crosses that line in the minds, hearts and souls of the vast majority of American citizens.

The men and women of the 10th Mountain Division have participated in nearly every major military operation since Desert Storm. Regretfully, too many have returned to the United States in flag-draped caskets. In turn, Old Glory is presented to their loved ones on behalf of a grateful nation. That alone is reason enough to protect the flag of the United States from acts of physical desecration. The American flag plays a critical role in the military culture. In fact, several American heroes were awarded the Medal of Honor for their actions as the color bearer in combat. Unarmed men responsible for carrying the Star Spangle Banner into combat. To read their citations leaves one asking the same question we ask today – where do we continue get such men and women?

We have never had a generation of service members raised when the American flag was not protected by Federal statute against acts of physical desecration. Organizations, like The American Legion, continue to conduct flag education classes in schools across the country. Yet, we continue to see legal acts of physical desecration more frequently. The Super Bowl's recent half-time show performance by Kid Rock comes to mind. The opening ceremony was so moving that it brought many to tears – especially the honor paid to the memories of the Space Shuttle crew and service members that paid the ultimate sacrifice for their country. I am still trying to figure out the message Kid Rock was trying to transmit by wearing the American flag as a poncho, then piling the flag on the stage floor next to the drummer. He had a microphone, yet he sang a song that had absolutely nothing to do with the American flag. Senators, is that really the freedom of speech that warrants protection?

The young man who chose to defecate on the American flag in Appleton, Wisconsin, was protected by the Court's decision. The young man in Oklahoma that used the American flag as a rag to wipe off the motor oil on his dipstick is protected by the Court's 5-4 decision. Then there was the young man in Michigan that felt the need to put the American flag down the front of his pants, pull it through his crotch, and out the back of his jeans to exercise his freedom of speech. I got their message – utter contempt for America and everything it stands for – including the First Amendment.

There are Members of this Committee that have voted against this proposed constitutional amendment. I respect their right to disagree with me on this issue. I simply ask that they re-evaluate the remarks of Chief Justice Warren, Justice Black, and Justice Fortas in *Street vs. New York* (1969). I do not believe any of you would challenge their reputations as constitutional scholars, especially concerning the First Amendment. Their views on the right of the states and the Federal government to prohibit the physical desecration of the flag of the United States were crystal clear.

During a debate on this issue, I heard a lawmaker state that totalitarian nations have flag desecration laws, why would anyone want the United States Constitution to look like a dictatorship? That is exactly the point of this campaign. In a totalitarian society, only a few determine the laws without the consent of the governed. The U.S. Constitution, particularly the First Amendment, allows the governed to a redress of grievances. Article V provides a vehicle for the governed to voice its concern with the decision of elected or appointed officials.

Mr. Chairman, with your leadership and the support of this Committee, it is my hope the Senate will now prove to the American people their voice has been heard loud and clear. The American flag is more than just a piece of cloth; it is the fabric of this nation.

105TH AIRLIFT WING
NEW YORK AIR NATIONAL GUARD

Flag travels world in honor of fallen friend

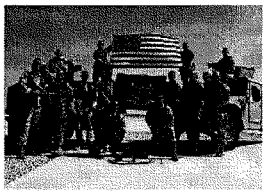
By SSgt. John Gassler, 105th Public Affairs

For some people, the American flag is a symbol of freedom. For others, the flag represents our democracy and liberty. To members of the 105th Security Forces Squadron, however, an American flag that has been traveling the world with them is a solemn reminder of a friend who lost his life in the line of duty on Sept. 11.

"Everyone in our squadron misses Jerome Dominguez, and it's been difficult to put his loss behind us. But one-way we felt it would be appropriate to honor and remember him was to dedicate an American flag in his name. So far, that flag has traveled with the squadron on numerous deployments around the world. We fly it for him, a true American hero," said SMSgt. Ken Haverlan, 105th Security Forces manager.

The idea of dedicating a flag in Jerome's name wasn't something that happened overnight. It was an idea that wasn't even though of until about a year ago, when MSgt. Barry O'Neill, 105th Security Forces supply sergeant, had a rousing revelation.

"I came up with the idea for the flag when I thought of an old military tradition, where towns would create a flag, or dedicate an American flag, for soldiers heading out to war. This was exceptionally popular during the Civil War, when towns with whole groups of people left home to fight. In combat, such units carried the flag until the bitter end. When it finally returned home, it was be bathed in glory," said MSgt. O'Neill.



A flag that was purchased through the Federal Supply System, only about a year ago, already has a rich history despite its youth. To date, the flag has seen many parts of the world only a rare few ever get to visit. Its first stop was to Bahrain, where a team of 105th Security Forces members deployed to support "Operation Enduring Freedom."

According to MSgt. O'Neill, the flag went to Bahrain with about 13 squadron members. While it was there, it was flown in a KC-135R Stratotanker over the skies of Afghanistan. After that, it went on a second deployment to Kuwait, and flew in an A-10 Thunderbolt II that made a routine sweep over Iraq during an "Operation Southern Watch" mission.

"The flag has been to many remote and interesting places, but one of the more special missions it went on was to MacDill AFB, where it was flown over U.S. Central Command for an entire duty day. That's something rare that doesn't happen often. So, it was really great that we had a chance to display it in such a unique place," said MSgt. O'Neill.

Another interesting mission the flag has traveled on, and its most recent, was with one of our own 137th aircrews from Stewart. In late March of this year, it was shipped out on a Dover C-5 to Ramstein AFB, and while there made additional rounds to places like Spain and Kyrgyzstan. Homeward bound to Stewart, however, the aircrew picked up some precious cargo, 12 caskets containing fallen military members from "Operation Iraqi Freedom." Some of the deceased were POWs captured with PFC Jessica Lynch, the others were soldiers killed in action.

"We happened to be the next C-5 headed back to Dover AFB, so we were tasked with bringing home the bodies of those fallen heroes. It wasn't planned that way, it was just how the chips fell," said Lt Col. Theodore Lemieux, one of the 137th pilots on the mission.

As fate would have it, though, Jerome's flag was destined to be more involved in that mission than just being carted along for the ride; it was displayed in the C-5 cargo compartment to overlook the caskets on their way home.

"There weren't any flags draped over the caskets for the flight home, and everyone on the crew felt it would be a good idea to hang Jerome's flag in the plane as a way to honor those fallen soldiers. In one sense, it was like Jerome's spirit was watching over them, escorting them home. It was a somber flight, nobody spoke excessively, and we were focused and respectful until every casket was taken off the plane," said Lt Col. Lemieux.

Back home and sealed in a protective plastic case, Jerome's flag sits and waits for the next mission or deployment it can be sent on. "That flag will travel everywhere we go. We want to keep Jerome's name alive, and for everyone who joins the squadron to know the hero and friend Jerome was. We want to see it flown everywhere, and we will never forget," said MSgt. Dave Pritchard, 105th Security Forces flight sergeant.

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DMNA:NYANG:105:News:flag
ULR: http://www.dmna.state.ny.us/nyang/105/news/flag.htm
Latest Update: 29 Jan 04

ORCHARD LAKE SCHOOLS
SS. Cyril & Methodius Seminary • St. Mary's College • St. Mary's Preparatory
Orchard Lake, Michigan 48324-1623 • (248) 683-0500 • Fax (248) 682-6821
Office of the Chancellor

March 3, 2004

Dear Senator Hatch,

Thank you for all that you have done, are doing, and we know, will do to assist our beloved country in passing legislation respecting our country's flag.

Only determined individuals as yourself are the mainstay of this effort that is taking so much energy and time, but which is so noble a cause.

You have our undying gratitude. We hope that with your support and leadership the cause will be crowned with success for the love of Old Glory.

May God bless and be with you.

Gratefully yours in the Lord,

Stanley E. Milewski

Rev. Msgr. Stanley E. Milewski
Chancellor Emeritus

sem

STATEMENT OF RICHARD D. PARKER

WILLIAMS PROFESSOR OF LAW

HARVARD LAW SCHOOL

"LETTING THE PEOPLE DECIDE: THE CONSTITUTIONAL AMENDMENT AUTHORIZING CONGRESS TO PROHIBIT PHYSICAL DESECRATION OF THE FLAG OF THE UNITED STATES"

BEFORE THE COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

MARCH 10, 2004

Statement of Professor Richard D. Parker:

Whether Congress is empowered, if it chooses, to protect the American flag from physical desecration has been debated for well over a decade. The debate has evolved over time but, by now, a pattern in the argument is clear. Today, I would like to analyze that pattern.

Consistently, the overwhelming majority of Americans have supported flag protection. Consistently, lopsided majorities in Congress have supported it too. In 1989, the House of Representatives voted 371-43 and the Senate 91-9 in favor of legislation to protect the flag. Since that route was definitively blocked by a narrow vote on the Supreme Court in 1990, over two thirds of the House and nearly two-thirds of the Senate have supported a constitutional amendment to correct the Court's mistake and, so, permit the majority to rule on this specific question. Up to 80% of the American people have consistently supported the amendment.

In a democracy, the burden should normally be on those who would block majority rule -- in this case, a minority of the Congress, influential interest groups and most of the media, along with the five Justices who outvoted the other four -- to justify their opposition. They have not been reluctant to do so. Indeed, they have been stunningly aggressive. No less stunning has been their unresponsiveness to (and even their seeming disinterest in) the arguments of the popular and congressional majority. What I am going to do is focus on the pattern of their self-justification.

I am going to speak frankly, not just as a law professor, but as an active Democrat. For a disproportionate share of the congressional, interest group and media opposition has been alligned with the Democratic Party. What has pained me, in the course of my involvement with this issue, are attitudes toward our democracy revealed in the structure of the argument against the flag amendment by so many of my fellow Democrats -- attitudes that would have seemed odd years ago, when I worked for Senator Robert Kennedy, but that now seem to be taken for granted.

I. Arguments About (Supposed) Effects of the Constitutional Amendment: Trivialization and Exaggeration

The central focus of argument against the flag amendment involves the (supposedly) likely effects of its ratification. Typically, these effects are -- at one and the same time -- trivialized and exaggerated. Two general features of the argument stand out: its peculiar obtuseness and the puzzling disdain it exudes for the Congress and for the millions of proponents of the amendment.

A. Trivialization

(1) The "What, Me Worry?" Argument. The first trivialization of the amendment's effects is the repeated claim that there is simply no problem for it to address. There are, it is said, few incidents of flag desecration nowadays; and those few involve marginal malcontents who may simply be ignored. The American people's love of the flag, the argument continues, cannot be disturbed by such events. It concludes that, in any event, the flag is "just a symbol" and that the amendment's proponents had better apply their energy to -- and stop diverting the attention of Congress from -- other, "really important" matters.

What is striking about this argument is not just its condescension to the amendment's supporters and to the Congress which, it implies, cannot walk and chew gum at the same time. Even more striking is its smug refusal to recognize the point of the amendment. The point is not how often the flag has been burned or urinated on or who has been burning it and urinating on it. Rather, the point has to do with our response -- especially our official response -- to those events. In this case, the key response has been that of the Court and, since 1990, of the Congress. When we are told, officially, that the flag represents just "one point of view" on a par, and in competition, with that of flag desecrators and that flag desecration should not just be tolerated, but protected and even celebrated as free speech; when we get more and more used to acts of desecration; then, "love" of the flag, our unique symbol of national community, is bound gradually to

wither -- along with other norms of community and responsibility whose withering in recent decades is well known.

To describe what is at stake as "just a symbol" is thus obtuse. The Court's 5-4 decision was not "just a symbol." It was an action of a powerful arm of government, and it had concrete effects. To be sure, its broader signficance involved values that are themselves invisible. The issue it purported to resolve is, at bottom, an issue of principle. But would any of us talk of it as "just an issue of principle" and so trivialize it? Surely, the vast majority of members of Congress would hesitate to talk that way. They, after all, voted for a statute to protect the flag. Hence, I would have hoped that the "What, Me Worry?" argument is not one we would hear from them.

(2) The "Wacky Hypotheticals" Argument. The second familiar way of trivializing the amendment's effects is to imagine all sorts of bizarre applications of a law that (supposedly) might be enacted under the amendment. This line of argument purports to play with the terms "flag" and "physically desecrate." Often, the imagined application involves damage to an image (a photo or a depiction) of a flag, especially on clothing -- frequently, on a bikini or on underwear. And, often, it involves disrespectful words or gestures directed at an actual flag or the display of flags in certain commercial settings -- a favorite hypothetical setting is a used car lot. This line of argument is regularly offered with a snicker and sometimes gets a laugh.

Its obtuseness should be clear. The proposed amendment refers to a "flag" not an "image of a flag." And words or gestures or the flying of a flag can hardly amount to "physical desecration." In the Flag Protection Act of 1989, Congress explicitly defined a "flag" as taking a form "that is commonly displayed." And it applied only to one who "knowingly mutilates, defaces, physically defiles, burns, maintains on the ground, or tramples" a flag. Why would anyone presume that, under the proposed constitutional amendment, Congress would less careful and specific?

That question uncovers the attitude beneath the "Wacky Hypotheticals" argument. For the mocking spirit of the argument suggests disdain not only for people who advocate protection of the American flag. It also depends on an assumption that Congress itself is as wacky -- as frivolous and as mean-spirited -- as many of the hypotheticals themselves. What's more, it depends on an assumption that, in America,

law enforcement officials, courts and juries are no less wacky. If the Constitution as a whole had been inspired by so extreme a disdain for our institutions and our people, could its provisions granting powers to government have been written, much less ratified?

B. Exaggeration

(1) The "Save the Constitution" Argument. Having trivialized the effects of the proposed amendment, its opponents turn to exaggerating those effects. First, they exaggerate the (supposed) effects of "amending the First Amendment." This might, they insist, lead to more amendments that, eventually, might unravel the Bill of Rights and constitutional government altogether. The argument concludes with a ringing insistence that the people and their elected representatives must not "tinker" or "tamper" or "fool around" with the Constitution.

The claim that the debate is about "amending the First Amendment" sows deep confusion. The truth is that the proposed amendment would not alter "the First Amendment" in the slightest. The First Amendment does not itself forbid protection of the flag. Indeed, for almost two centuries, it was understood to permit flag protection. A 5-4 majority of the Court altered this interpretation, only fifteen years ago. That very narrow decision is all that would be altered by the proposed amendment. The debate thus is about a measure that would restore to the First Amendment its long-standing meaning, preserving the Amendment from recent "tampering."

Adding to the confusion is the bizarre claim that one amendment, restoring the historical understanding of freedom of speech, will somehow lead down a slippery slope to a slew of others undermining the Bill of Rights or the whole Constitution. A restorative amendment is not, after all, the same thing as an undermining amendment. What's more, the process of amendment is no downhill slide. More than 11,000 amendments have been proposed. Only 27 -- including the Bill of Rights -- have been ratified. If there is a "slope", it plainly runs uphill. The scare rhetoric, then, isn't only obtuse. It also manifests disdain for the Congress to which it is addressed.

The greatest disdain manifested by this line of argument, however, is for the Constitution and for constitutional democracy -- which it purports to defend. Article

V of the Constitution specifically provides for amendment. The use of the amendment process to correct mistaken Court decisions -- as it has been used several times before -- is vital to maintaining the democratic legitimacy of the Constitution and of judicial review itself. To describe the flag amendment as "tinkering with the Bill of Rights" -- when all it does, in fact, is correct a historically aberrant 5-4 decision that turned on the vote of one person appointed to office for life -- is to exalt a small, unelected, tenured elite at the expense of the principle and practice of constitutional democracy.

(2) The "Censorship" Argument. The second exaggeration of (supposed) effects of the proposed amendment portrays it as inviting censorship. If Congress prohibits individuals from trashing the American flag, opponents say, it will stifle the freedom of speech. In particular, they continue, it will suffocate expression of "unpopular" or "minority" points of view. It will thereby discriminate, they conclude, in favor of a competing point of view. This line of argument is, essentially, the one adopted by a 5-4 majority of the Court.

It is, however, mistaken. The argument ignores, first of all, the limited scope of laws that the amendment would authorize. Such laws would block no message. They would leave untouched a vast variety of opportunities for self-expression. Indeed, they would even allow expression of contempt for the flag by words -- and by deeds short of the "physical" desecration of a flag. Obviously, there must be some limit on permissible conduct. This is so even when the conduct is, in some way, expressive. What's important is this: Plenty of leeway would remain, beyond that narrow limit, for the enjoyment of robust freedom of speech by all.

Secondly, the argument that such laws would impose a limit that discriminates among "competing points of view" misrepresents the nature of the American flag. Our flag does not stand for one "point of view." Ours is not like the flag of Nazi Germany or the Soviet Union -- although opponents of the proposed amendment typically make just that comparison. The American flag doesn't stand for one government or one party or one party platform. Instead, it stands for an aspiration to national community despite -- and transcending -- our differences and our diversity. It doesn't "compete against" contending viewpoints. Rather, it overarches and sponsors their contention. The 5-4 majority on the Court misunderstood the unique nature of our

flag. A purpose of the flag amendment is to affirm this uniqueness and, so, correct that mistake.

Thirdly -- and most importantly -- opponents obtusely ignore the fact that a primary effect of the amendment would be precisely the opposite of the one "predicted" by their scare rhetoric. Far from "censoring" unpopular and minority viewpoints, the amendment would tend to enhance opportunity for effective expression of those viewpoints. A robust system of free speech depends, after all, on maintaining a sense of community. It depends on some agreement that, despite our differences, we are "one," that the problem of any American is "our" problem. Without this much community, why listen to anyone else? Why not just see who can yell loudest? Or push hardest? It is thus for minority and unpopular viewpoints that the aspiration to -- and respect for the unique symbol of -- national community is thus most important. It helps them get a hearing. The civil rights movement understood this. That is why it displayed the American flag so prominently and so proudly in its great marches of the 1960's.

If we become accustomed to cumulative acts of burning, trampling and urinating on the flag, all under cover of the Supreme Court, where will that leave the next Martin Luther King? Indeed, where will it leave the system of free speech as a whole? As the word goes forth that nothing is sacred, that the aspiration to community is just a "point of view" competing with others, and that any hope of being noticed (if not of getting a hearing) depends on behaving more and more outrageously, won't we tend to trash not just the flag, but the freedom of speech itself? Opponents of the proposed amendment imagine themselves as champions of a theory of free speech -- but their argument is based in a strange disdain for it in practice.

I am, no doubt, preaching to the choir. The Senate voted 91-9 for a flag protection law. Most Senators, therefore, rejected the "censorship" argument in 1989. Now -- with the Court absolutely barring such a law on the mistaken ground that any specific protection of the flag discriminates among competing "points of view" -- Senators who support protection of the American flag simply have no alternative but to support the proposed constitutional amendment.

II. Argument About (Supposed) Sources of Support for the Amendment

Most opponents of the amendment don't confine themselves to misrepresenting its effects. Repeatedly, they supplement those arguments with ad hominem, disparaging claims about its supporters as well. Again, they combine strategies of trivialization and exaggeration. What's remarkable is that they seem to assume their generalizations will go unchallenged. They seem to take for granted a denigrating portrayal of others -- as well as their own entitlement to denigrate.

The denigration is not exactly overt. It often takes the form of descriptive nouns and verbs, adjectives and adverbs, woven into apparently reasonable sentences. By now, we're so used to these terms of derision that we may not notice them or, worse, take them as signs of "wisdom."

The trivializing portrayal of supporters tends to include references to the (supposedly) "simple" or "emotional" nature of their views -- which, in turn, are trivialized as mere "feelings." It's often asserted that they are behaving "frivolously." (Only the opponents, according to themselves, are "thoughtful" people.) Elected officials who back the amendment are said to be "pandering" or "cynical" or taking the "easy" course. (Only opponents, according to themselves, are "courageous" or "honest.") The patriotism of supporters is dismissed as "flag-waving."

The (negatively) exaggerated portrayal tends to include references to the (supposedly) "heated" or "aggressive" or "intolerant" nature of support for the amendment. (Only the opponents, according to themselves, are "deliberative," "restrained" and "respectful of others.") The goal, of course, is to suggest (not so subtly) that the supporters are fanatics or bullies -- that they are like a mob that must be stopped before they overwhelm law, order and reason.

A familiar argument fusing trivialization and exaggeration -- a Washington Post editorial of April 24, 1998 is typical -- lumps the flag amendment's supporters with supporters of a great variety of other recently proposed amendments. It smears the former by equating them to others who advocate very different measures more readily belittled as silly or feared as dangerous. There is a name for this sort of argument.

It is guilt-by-association. (But then the opponents of the flag amendment, according to themselves, would never employ such rhetoric, would they?)

This is odd. These "thoughtful" people seem to be in the habit of making descriptive generalizations that are not just obtuse but false -- not just disdainful but insulting. Why?

III. Ignoring Counter-Argument

Part of the answer, I believe, is that opponents of the flag amendment are in another habit. It is the habit of not really listening to the other views. Not listening makes it easier to caricature those views. And, in turn, the caricature of those views makes it easier not to listen to them.

Anyone who's been involved with this issue -- on either side -- over the years, and who's had an opportunity to see every reference to it in the media across the country, can describe one repeating pattern. Most of the time, the issue is not mentioned. Then, in the weeks before one or another congressional consideration of it, there comes a cascade of editorials and commentary -- about 90% hostile to and professing alarm about the amendment. Supporters can describe the other aspect of the pattern: most of the media simply will not disseminate disagreement with that point of view. Speaking from my experience, I can tell you that only a few newspapers have been willing to publish brief responses to what they assume is the one "enlightened" view -- their own.

There is an irony here. Those most alarmed about (supposed) discrimination against the views of people who burn or urinate on the American flag are themselves in the habit of discriminating against the views others who favor protecting the flag. Warning of a (supposed) dampening of robust debate, they dampen robust debate -- and they do it in good conscience and with no conscious intent to apply a double standard. What explains such puzzling behavior?

IV. The Value of Public Patriotism

I've characterized the question presented by the flag amendment as involving the value of "community" at the national level. But most opponents seem disinclined to accept that formulation. The question for them seems to involve something they imagine to be narrower than community. For them, the question seems to involve the value of "patriotism." Beneath much of the opposition is, I think, an uneasiness about patriotism as a public value.

I know: Every opponent of the flag amendment insists that he or she is a patriot, that he or she "loves the flag" and, personally, would defend one with life and limb. I don't doubt their sincerity. But I trust I'll be forgiven if I also try to understand the actual behavior of opponents and the language they use to describe the amendment and its source of support. I trust I'll be forgiven if I try to understand all this in terms of a distinction that I think they make between "personal" and "public" patriotism.

I believe that many opponents of the amendment have come to see patriotism as a strictly personal matter -- much like religious faith. As such, they affirm its value. But they are, I believe, uneasy about public patriotism. If the uneasiness were focused only on government coercion of patriotism (a coerced flag salute, for example) few would differ. But it is focused, also, on its protection by government (that's what the flag amendment is about), and to some degree it may extend to governmental subsidization and facilitation of public patriotism as well.

For the implicit comparison made by opponents of the flag amendment between patriotism and religious faith carries consequences with it. Two main assumptions lead them to oppose even minor sorts of government assistance to religion. First, there is the assumption that religion is not just deeply personal, but deeply emotional and potentially explosive as well, and that any entanglement of government with religion may therefore produce dangerous conflict and official oppression of freedom and diversity. Second, there is the assumption that, in an increasingly secular age, religious faith is not really terribly relevant to good "governance" anyway -- that is, unless "religion" is defined to encompass a wide range of currently accepted secular values.

The same kinds of assumptions underlie both the "exaggeration" and the "trivialization" arguments made by opponents of the flag amendment. First, they imagine that public patriotism taps into raw emotions that threaten to cause conflict and official oppression. Thus they insist that the proposed amendment endangers constitutionalism and freedom. Second, they imagine public patriotism as narrowly militaristic and old-fashioned. In an age of "multiculturalism," on one hand, and of "globalism," on the other, what need is there for it in government and in public life? When the amendment's opponents do affirm the public value of the flag, moreover, they tend to do so by defining "the flag" to stand simply for "the freedom to burn it."

These assumptions and these arguments are perverse. So, too, is the underlying equation of patriotism to religion. For public patriotism is surely basic to motivating broad participation in, and commitment to, our democracy. Far from endangering freedom and political order, it is essential to the effective enjoyment of freedom and maintenance of the legitimacy of government. If national projects, civilian or military, are to be undertaken -- if our inherited ideals of liberty and equality are to be realized through concentrated national effort -- public patriotism simply has to be valued; its unique symbol should, therefore, be protected.

Let me speak, finally, as a Democrat: When I was growing up, Democrats knew all this. My own hero, Senator Robert Kennedy, would never have doubted the value of public patriotism. He would never have dismissed it as trivial, dangerous or "right wing." I believe that he would have voted -- as his son did in 1995 and 1997 -- to restore to the First Amendment the meaning it had, in effect, for two centuries of our history. That belief encourages me to see this as a truly nonpartisan effort, deserving fully bipartisan support. And, so, it encourages me to urge the United States Senate to permit consideration of the proposed amendment by representatives of the people in the states, submitting this matter to the great democratic process established by Article V of the Constitution.

March 9, 2004

The Honorable Orrin Hatch, Chairman
The Honorable Patrick Leahy, Ranking Member
Senate Committee on the Judiciary
Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Hatch, Senator Leahy, Members of the Committee

On behalf of the more than 600,000 members and supporters of People For the American Way, we write in opposition to S. J. Res 4, which would amend the U.S. Constitution to authorize Congress to prohibit the physical desecration of the American flag. We believe that amending the Bill of Rights to censor unpopular speech dishonors the flag and the freedoms that it represents.

Freedom of expression is at the very heart of our democracy. At a time when we are working across the globe to secure the right of everyone to be free from totalitarian regimes, it is all the more important that we distinguish ourselves from countries that fear political dissent and imprison dissenters for expressing their views. In contrast, banning flag desecration would put America in the unwelcome league of repressive regimes such as The People's Republic of China, the former Soviet Union, Cuba, and Saddam Hussein's Iraq, all of which do (or did) imprison their citizens for desecrating their national flags.

While most Americans find desecration of the flag offensive and distasteful, the unique strength of our nation lies in our ability to tolerate dissent and free speech even when—especially when—we disagree.

Former Vietnam POW and U.S. Marine Corp Major James Warner wrote eloquently about this difference in an article for The Retired Officer magazine in which he described an exchange in a Viet Cong prison with one of his captors:

> "I remember one interrogation where I was shown a photograph of some Americans protesting the war by burning a flag. 'There,' the officer said, 'People in your country protest against your cause. That proves you are wrong.' 'No,' I said, 'That proves that I'm right. In my country we are not afraid of freedom, even if it means that people disagree with us.' The officer was on his feet in an instant, his face purple with rage...While he was ranting I was astonished to see pain compounded by fear in his eyes."

Unlike totalitarian regimes, we have never needed to coerce patriotism or respect for our national symbols in America. In fact, in the wake of the September 11th terrorist attacks, we

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have seen an outpouring of patriotic sentiment as well as support for the flag and public displays of the flag.

Proponents of the flag desecration amendment have tried to inflate the number of unpunished incidents of flag desecration as well as obscure the amendment's impact on free expression in those rare cases where it does occur. These arguments are demonstrably false based on the very examples and statistics constantly cited by pro-amendment organizations and individuals.

First, proponents of the Amendment argue that the amendment is necessary because flag desecration cannot be punished under current law. This is simply not the case. Of the 122 incidents of flag desecration identified by the Citizens Flag Alliance (CFA) on their website (www.cfa-inc.org/issues/burnings.htm), at least two-thirds (76) involved crimes that are already covered by local criminal statutes—including theft, vandalism, destruction of property, trespassing, disorderly conduct or public disturbance. In many of the very cases that CFA cites, for example, an arrest was made on multiple charges. But even this understates the case. At least some of the remaining incidents cited, some of which are clearly acts of political expression, may still involve conduct that violates the law – such as creating a disturbance or violating local fire codes.

Second, these statistics highlight the rarity of flag desecration, incidents of political expression which are protected by the First Amendment. Analysis of the incidents cited by CFA show, at most, only 34 of the 122 incidents could be considered acts of political expression – the behavior targeted by the proposed amendment. Therefore, it is only those extremely rare incidents of political speech —only about two per year between 1989 and 2003 —that lead proponents to conclude that we need to pass a constitutional amendment restricting our Bill of Rights.

Third, while flag desecration is very rare, there is no question that on occasion it is done to express a point of view, as the proponents' own materials make clear. The few incidents they cite which clearly are protected speech actually illustrate why our First Amendment protection for free expression is so important. The following are two examples taken verbatim from CFA's website which illustrate this point:

- October 7, 1996, Fort Smith, AR: a flag bearing a swastika and the word 'abortion' was displayed hanging upside down outside a house here. The home's owner said he had displayed the upside-down flag as a statement protesting the failure to overturn President Clinton's veto of a bill that would have outlawed partial-birth abortions.

- January 24, 2001, Harrisonburg, VA: More than 300 people watched as two students at James Madison University burned the American flag on the school commons. The flag burning was largely in response to the inauguration of President George W. Bush. The flag never became engulfed in flames, although it did catch fire for a short time.

While many would disagree with the sentiments these individuals were trying to communicate, it's clear that they are political statements. Proponents of the amendment

cannot have it both ways. They cannot cite examples of political speech as incidents they would like to ban, while simultaneously claiming they are not trying to bar certain political expression.

Finally, proponents of the Constitutional amendment try to minimize the dramatic impact of their proposal on First Amendment rights by arguing that for over 200 years flag protection statutes were constitutional under the First Amendment, until the Supreme Court allegedly changed that in the 1989 *Texas v. Johnson* case. However, this argument is riddled with inaccuracies, both as to the history of flag desecration statutes and the decades of Supreme Court case law that naturally led to the *Johnson* and 1990 *U.S. v. Eichman* decisions.

The First Amendment was not applied to judge the constitutionality of state laws until 1925 (in the U.S. Supreme Court case of Gitlow v. New York), so the first flag statutes were not and could not have been challenged under the First Amendment. In fact, the first state flag statute itself was not even enacted until 1897, and the first federal flag statute was not enacted by Congress until 1968. After 1925, when federal courts first began to apply the First Amendment to state flag statutes, the U.S. Supreme Court repeatedly and consistently struck down convictions under different flag statutes for the same fundamental First Amendment principles cited in its 1989 and 1990 flag rulings. The 1989 and 1990 flag rulings directly cite and rely upon this unbroken chain of legal precedent. Contrary to amendment proponents' claims, if the Supreme Court had *not* struck down the convictions in the 1989 and 1990 flag cases, involving non-verbal, peaceful use of the flag as a form of political protest, it would have been a radical departure from well-established, fundamental First Amendment law.

Surrendering to a handful of offensive individuals by limiting the very freedoms that make us a beacon of liberty for the rest of the world does not honor the flag. In a letter sent to Senator Patrick Leahy in May 1999, General Colin Powell, now Secretary of State, wrote "The First Amendment exists to insure that freedom of speech and expression applies not just to that with which we agree or disagree, but also that which we find outrageous. I would not amend that great shield of democracy to hammer a few miscreants. The flag will be flying proudly long after they have slunk away."

We urge you to protect our First Amendment freedoms by rejecting S. J. Res 4.

Sincerely,

Ralph G. Neas
President

Marge Baker
Director, Public Policy

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March 8, 2004

The Honorable Orrin G. Hatch
U.S. Senator
SH-104
Washington, D.C. 20510

Dear Senator Hatch:

We wish to thank you for your leadership and support you at this hearing of the Senate Judiciary Committee on the Flag Protection Amendment (SJ RES 4).

The Polish American Congress represents millions of Polish Americans assembled in societies such as our fraternal, volunteer, educational, patriotic, veteran, social and church organizations throughout the United States. Fifteen of our national organizations have been members of the Citizens' Flag Alliance since its inception.

As Polish Americans we have been an especially hard-working, tax-paying, family-loving, patriotic people who have provided great value to this society of which we are an integral and outstanding part. Each Flag Day we remind each other that our Nation was built upon liberty – and that unity is developed through community societies such as ours.

We fully support the Bill of Rights and particularly the right of free speech. But physical abuse of our Nation's flag has nothing to do with free speech. We want to protect the United States' flag from purposeful acts of mutilation, defacement, trampling or burning. A physical act should not be confused with speech. This is why we have joined you, Senator, in this sacred mission and are represented here today.

Respectfully,

Edward J. Moskal
President

SERVING THE INTERESTS OF POLISH AMERICANS SINCE 1944

Sent By: PRCUA (Home Office); 773 278 4595; Mar-3-04 3:51PM; Page 2/2

A Legal Reserve Fraternal Benefit Society

Polish Roman Catholic Union of America

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Wallace M. Ozog, FICF
National President

March 3, 2004

The Honorable Orrin G. Hatch
United States Senate
104 Hart Office Building
Washington, DC 20510

Dear Senator Hatch:

On behalf of the members of the Polish Roman Catholic Union of America, I am writing this letter in an effort to show support for the Flag Protection Amendment.

In order to show respect for all those who fight and have fought for our country, as well as, all those who have died fighting for the values of the United States of America, Congress must prohibit the physical desecration of the American flag. The Flag Protection Amendment, if added to the U.S. Constitution, will guarantee the American flag the respect and protection it deserves.

The Polish Roman Catholic Union of America fully supports the passing of the Flag Protection Amendment.

Fraternally yours,

Wallace M. Ozog
National President

GENERAL COLIN L. POWELL, USA (RET)
909 NORTH WASHINGTON STREET, SUITE 767
ALEXANDRIA, VIRGINIA 22314

May 18, 1999

The Honorable Patrick Leahy
United States Senate
Washington, DC 10510-4502

Dear Senator Leahy,

Thank you for your recent letter asking my views on the proposed flag protection amendment.

I love our flag, our Constitution and our country with a love that has no bounds. I defended all three for 35 years as a soldier and was willing to give my life in their defense.

Americans revere their flag as a symbol of the Nation. Indeed, it is because of that reverence that the amendment is under consideration. Few countries in the world would think of amending their Constitution for the purpose of protecting such a symbol.

We are rightfully outraged when anyone attacks or desecrates our flag. Few Americans do such things and when they do they are subject to the rightful condemnation of their fellow citizens. They may be destroying a piece of cloth, but they do no damage to our system of freedom which tolerates such desecration.

If they are destroying a flag that belongs to someone else, that's a prosecutable crime. If it is a flag they own, I really don't want to amend the Constitution to prosecute someone for foolishly desecrating their own property. We should condemn them and pity them instead.

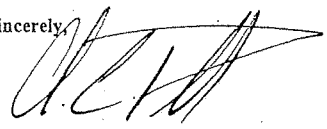
I understand how strongly so many of my fellow veterans and citizens feel about the flag and I understand the powerful sentiment in state legislatures for such an amendment. I feel the same sense of outrage. But I step back from amending the Constitution to relieve that outrage. The First Amendment exists to insure that freedom of speech and expression applies not just to that with which we agree or disagree, but also that which we find outrageous.

I would not amend that great shield of democracy to hammer a few miscreants. The flag will still be flying proudly long after they have slunk away.

Finally, I shudder to think of the legal morass we will create trying to implement the body of law that will emerge from such an amendment.

If I were a member of Congress, I would not vote for the proposed amendment and would fully understand and respect the views of those who would. For or against, we all love our flag with equal devotion.

Sincerely,



THE SENIORS COALITION

Working for a Responsible America

To
Name: Steve Robertson

Fax: (202) 861-2785

From
Name: Chris Williams

Phone: (703) 426-4480 Date: 3/9/04

Fax: (703) 239-1985 Pages (including this sheet): 2

Comments:

Dear Steve:

Attached please find The Seniors Coalition's letter concerning the Senate Judiciary Committee's hearing on a the flag amendment issue. As a member organization of the Citizens Flag Alliance, we wholeheartedly offer our support for the proposed amendment in order to protect the rights, values, and freedoms that the "Greatest Generation" fought to protect.

I will most likely send a member of our staff to the hearing tomorrow morning to represent TSC. I will also look into sending our national spokesperson, Flora Green, to the hearing as well, as she is a close friend of Chairman Hatch's. If you need a senior citizen to speak to the media or to members of the Committee about the issue, please let me know, and I will work to arrange Ms. Green's schedule to accommodate your needs.

If you should need any further assistance to build support for this important issue, please do not hesitate to contact me at the number or e-mail address listed below.

Sincerely,

Chris Williams
Director of Public Affairs
Phone: (703) 426-4480
e-mail: cwilliams@senior.org

TESTIMONY OF
RAY G. SMITH
PAST NATIONAL COMMANDER
THE AMERICAN LEGION
TO THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ON
SENATE JOINT RESOLUTION 4

MARCH 10, 2004

Mr. Chairman, and members of the subcommittee, it gives me great pleasure to submit testimony to this distinguished body regarding such an important issue to me and other residents of the State of North Carolina. I wish to personally thank you and Senator Feinstein for introducing S.J. Res. 4. I am pleased that Senator Dole is listed among those who cosponsored S.J. Res. 4. I am also pleased to report the House of Representatives companion bill, H. J. Res. 4, was supported by nine of the thirteen Representatives from North Carolina in the overwhelming majority vote of 300-125. I would hope that Senator Edwards, after traveling across the United States as a presidential candidate, will reconsider his position and vote to allow the average citizen to have a say in this debate.

S.J. Res. 4 currently has 57 co-sponsors. The only common personality traits among these co-sponsors and supporters are that they are Members of the United States Congress and Americans. You see, this is not a veterans' issue, a political issue, a religious issue, a racial issue, or a budgetary issue; it is an American issue. This proposed initiative would amend the Constitution to allow Congress to pass laws, if it chose to, prohibiting acts of physical desecration of the American Flag. The wording of the amendment is quite simple: *The Congress shall have power to prohibit the physical desecration of the flag of the United States*.

Every Member of Congress who I have heard address this issue since 1989, starts off by saying how much he or she deplores the acts of physical desecration of the national banner. Every amendment opponent from the American Civil Liberties Union (ACLU) and the American Bar Association (ABA) that I have heard address this issue has said the same thing. The only people I haven't heard in a public forum are those who actually physically desecrate the flag of the United

States. Representatives from the ACLU or their legal counsel normally speak on their behalf. I just find it ironic that when given the opportunity to "speak" someone else does it for them.

An overwhelming majority of the American people abhor these acts of flag desecration, and have expressed their desire to see an amendment to the Constitution to put an end to these unconscionable, but "legal" acts. Gallup surveys indicate that 78 percent of the American people favor flag protection, and 82 percent say the people should have the right to decide the question of flag protection through ratification.

Local state lawmakers have responded by passing memorial resolutions in all 50 state legislatures petitioning Congress to send the amendment to the States. In 1994, the North Carolina General Assembly passed this measure. It was hard work, but dedication, perseverance and commitment paid off. We faced each setback with optimism and renewed determinism. Those who predicted failure severely underestimated our fortitude. Unmistakably, this is a true values issue; therefore, making compromise is an unacceptable option.

The Citizens Flag Alliance has brought together so many wonderful organizations for this singular cause. I would be remiss if I didn't take time to praise the hard work and dedication of all of these community-based organizations, especially the Benevolent and Protective Order of Elks, who I've worked closely with, and The American Legion. Since its inception, the Citizens Flag Alliance has gathered millions of signatures nationwide on petitions in favor of the proposed amendment. This clearly shows that the majority of Americans are in favor of protecting this important symbol of respect and reverence.

The majority of the Citizens Flag Alliance organizations deal with youth, America's most valuable resource. Preparing these young minds to assume the leadership roles of tomorrow is an important challenge not taken lightly. If each Committee Member ran through the list of organizations, I am confident you would recognize at least one organization that had a positive impact in your childhood. It may have been The American Legion's Boys Nation that gave a young William Jefferson Clinton the opportunity to shake hands with the late President John F. Kennedy in the Rose Garden. This campaign is a living civics class about democracy. It is about the role each branch of the government and the role of its citizenry. This is a government of We the people; Congress, the Court and the President only serve as its trustees.

Since the U.S. Supreme Court decided in **Texas v. Johnson** and **United States v. Eichman** split decisions (5-4), that state and federal laws prohibiting the physical desecration of the American flag were deemed a violation of free speech rights, Congress is the only government body where concerned Americans can properly seek a redress of these Court decisions.

On the campaign trail, a candidate for President of the United States was asked by a reporter what he would do if he saw someone physically desecrating an American flag. He response was very similar to the response I hear from many Americans, that they would take the flag away from the individual and punch the person in the nose. There is something wrong when an honorable person's "gut" instinct tells him to take actions that would deny a person's constitutional right.

I am from a small town in North Carolina. I consider myself a community leader, a law-abiding citizen, a taxpayer, and a churchgoer. I try to be tolerant of others, especially those with whom I disagree, but I don't think that I could simply walk away from someone burning the flag of the United States. Yet, knowing the consequences of "following my heart," I would still try to rescue Old Glory.

Mr. Chairman, amending the Constitution is a three-step process. The House of Representatives is the first step. Passage in the Senate is the second step. The final and most important step belongs to "We the people" in 38 States. Trust me, if Congress completes their two steps, the final step will be completed very, very quickly.

Thank you for allowing this small voice, from the State of North Carolina, an opportunity to be heard.

STATEMENT OF
DONALD T. TETREAULT
NATIONAL EXECUTIVE COMMITTEEMAN
STATE OF VERMONT
THE AMERICAN LEGION
TO THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ON SENATE JOINT RESOLUTION 4

MARCH 10, 2004

Chairman Hatch and Members of this Committee, thank you for holding this hearing on S.J. Res. 4, a proposed constitutional amendment to protect the American flag from physical desecration. As the current National Executive Committeeman for The American Legion Department of Vermont and as an American, it is an honor to submit testimony.

I will never forget how I felt when I first heard about the flag desecration incident that occurred in Glover, Vermont. *The Times Argus* of Barre reported that vandals were responsible for turning the Westlook Cemetery into "a bathroom facility," using American flags there as "toilet paper" and dismantling or smashing 40 headstones. The fact that the physical desecration of Old Glory was constitutionally protected was a pretty hard pill to swallow. I took this incident very personally, because those flags came off the graves of fellow veterans, men and women who placed love of country above self. Those men and women once served this nation honorably and with dignity.

I understand that Congress cannot mandate honesty, loyalty, ethics, morality, or patriotism, but surely Congress can legislate against what is dishonest, disloyal, unethical, immoral, and unpatriotic. For many years, states and the Federal government had statutes that protected Old Glory from acts of physical desecration. Even First Amendment purists such as former Chief Justice Earl Warren, Justice Hugo Black, and Justice Abe Fortas opined that there was no conflict between free speech and the right of states and the Federal government to protect Old Glory from acts of physical desecration (**Street v. NY**, 1969). I would appreciate those Senators that have voted against this proposed constitutional amendment to explain or share their insight as to exactly what Justices Warren, Black, and Fortas didn't understand or misinterpreted.

This issue is highly sensitive to many, many Americans. That is why this issue continues to resurface each Congress. Those that understand the democratic process know that this is a government designed to serve the people, not dictate to the people. Should Congress, the White House, or the Supreme Court become the final authority on laws, this nation is in peril. I am deeply concerned with how many people are convinced that what they believe really doesn't matter to their elected officials. I attribute that sense of hopelessness as the prime reason behind voter apathy and low voter turnout. Congress, the White House, and the Supreme Court should be alarmed by the low voter participation. American can ill afford a disengaged citizenry.

Personally, I am very proud of those actively in pursuit of this proposed constitutional amendment. They represent the true believers that America is still a government of the people, by the people, and for the people. All 50 state legislatures have passed memorial resolutions dealing with this issue. I am proud to say Vermont was the 50th state to achieve this goal. I cannot recall any time in recent history that all 50 states agreed on an issue – protect the flag of the United States from acts of physical desecration. Isn't it a shame that, for over a decade, the House continues to hear the message loud and clear, but in the Senate, the message is muted?

Mr. Chairman and distinguished Members of the Committee, thank you for your service to America. Thank you for holding this hearing. Thank you for listening to both sides of the argument. Your job is now to decide the fate of this resolution. Kill it again or let it go to the states where my constituents can decide, just like they have asked.

Kill it and it will resurface on the campaign trail and again next Congress in a phoenix-like fashion. Pass it and all 50 states will determine the fate of Old Glory through the ratification process just like the Bill of Rights and the other adopted or rejected amendments.

Thank you for allowing my testimony to be submitted in the record of this hearing.

03/05/2004 13:40 3176329365 PAGE 01

PHONE (317) 834-1804 FAX (317) 832-9365
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March 5, 2004

Sen. Orrin Hatch
Hart Office Building, SH-104
2nd & Sts., NE
Washington DC

Dear Senator Hatch:

The Forty and Eight extends our sincere appreciation to you for sponsoring SJR 4, the Flag Protection Amendment.

Please know that we stand solidly behind passage of the measure by the U.S. Senate. We believe that the United States Flag is a precious symbol of all that made this country the beacon of freedom to the world. Desecrating it is not speech but clearly an act of hatred against America and all that it stands for.

We urge your committee to send it to the floor for swift passage. Again, thank you for your personal commitment in returning our flag to the protected status it so richly deserves.

Sincerely,

David R. Rabius

David R. Rabius
Correspondant National

THE FORTY & EIGHT

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Veterans Groups Critical of Bush's VA Budget

Dismay Over Higher Fees and Staff Cuts Could Be Boon for Democratic Nominee

By Edward Walsh
Special to The Washington Post
Wednesday, March 3, 2004; Page A25

Military veterans have already played a prominent role in the 2004 presidential campaign, helping to propel one of their own -- Sen. John F. Kerry of Massachusetts -- close to the Democratic nomination. If he is the nominee, Kerry is counting on strong support from his fellow veterans in the general election battle against President Bush.

And Kerry may be getting an unintended boost from the Bush administration's proposed budget for the Department of Veterans Affairs in the next fiscal year.

After three years of mostly cordial relations with the administration, leaders of veterans' organizations and a union that represents VA workers are voicing strong criticism of Bush's fiscal 2005 budget plan. They assert that the budget would only worsen the backlog in processing disability claims, reduce the number of VA nursing home beds just as the number of veterans who need long-term care is swelling and force some veterans to pay a fee simply to gain access to the VA health care system.

In a statement issued shortly after the budget was released, Edward S. Banas Sr., commander in chief of the Veterans of Foreign Wars, called the VA's health care spending proposal "a disgrace and a sham."

VA officials reply that spending for health care will increase under the budget, but that tough choices had to be made because of the soaring budget deficit and limits on spending.

According to John Gage, president of the American Federation of Government Employees, the VA is calling for a reduction of 540 full-time jobs in the Veterans Benefits Administration, which handles disability, pension and other claims by veterans.

"VBA is under such pressure to get the caseload down, and now they are going to cut the staff," he said. "These things don't make sense on their face."

Mark Catlett, the VA's principal deputy assistant secretary for management, said only 35 of the jobs that would be eliminated through attrition involve employees who process disability claims, in which the backlog problem is most severe. He said the elimination of many of the jobs would be the result of a consolidation of the department's pension processing functions.

Catlett said the lower staffing levels proposed in the budget assume an increase in productivity by VA employees.

"We clearly have a responsibility to get more productive," he said.

The more contentious issue involves the VA's sprawling health care system. The budget calls for spending $29.5 billion for veterans' health care in the fiscal year that begins Oct. 1, a 4.2 percent increase over current spending.

But critics in the veterans' organizations say the budget would effectively cut health care spending because about $2.4 billion of the total would not come from congressional appropriations but from fees and other charges collected from third parties and from veterans themselves.

Under the budget, some veterans would have to pay $250 a year to use the VA health care system; their co-payments for a 30-day supply of a prescription drug would also more than double, from $7 to $15. The proposed changes would affect only the veterans with no service-related health problems whose relative high income places them in the two lowest priority classifications.

VA officials estimate that the new "user fee" would produce about $268 million a year and that the higher pharmacy co-payment would add about $135 million a year in revenue. They also project that these higher costs will prompt about 200,000 of the affected veterans to drop out of the system and get their health care elsewhere.

John McNeill, deputy director of the VFW, credited the Bush administration with increasing the VA's health care budget during the last few years. But, he added, "just as they are getting close [to the needed level of spending], this proposal retrogrades everything. It doesn't even take care of the inflation factor."

Linda Bennett, AFGE's legislative director, was equally critical of the proposed cuts in nursing home care, which she said would reduce the number of full-time VA nursing home beds to 37 percent below the level set in law by Congress in 1998. She said the VA has been trying to move more veterans into state-run nursing homes and "non-institutional" settings, such as home health care programs.

"I look at it as a signal that the VA would like to get out of the business of taking care of veterans in their old age," Bennett said.

But Catlett said long-term care at home is usually "better and preferred" to a nursing home, and that the VA is directly or indirectly providing long-term care to more veterans than ever.

"We're trying to get the right balance," he said. "There will always be VA nursing homes."

Catlett also said the user fee and higher co-payments for the lowest priority veterans would help the department pay for its core mission -- to care for low-income veterans, especially those with service-related health problems.

Last year, Congress rejected a similar proposal for a user fee and higher co-payments and may do so again. But the congressional debate will almost certainly become embroiled in presidential politics as Bush and his Democratic opponent vie for the allegiance of veterans.

Bob Wallace, executive director of the VFW's Washington office, said that even veterans who would not be affected by the budget proposals "hear that their comrades are affected by it, and it bothers them."

Whether that will hurt Bush in the fall is not clear, but American Legion National Commander John Brieden said, "This sure doesn't help him. The PR on this is not good. I expect the Democrats, whether

it's Kerry or whoever, to beat Bush over the head with this."

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The Washington Times

October 26, 2003, Sunday, Final Edition

SECTION: METROPOLITAN; Pg. A09

LENGTH: 877 words

HEADLINE: Demonstrators march against Iraq occupation; Activists

BYLINE: By Denise Barnes and Judith Person, THE WASHINGTON TIMES

BODY:

Busloads of antiwar demonstrators from a hundred American cities rallied in the District yesterday, calling for an end to the U.S.-led occupation of Iraq and demanding an immediate withdrawal of American troops.

Protesters from Maine and Colorado beat drums and chanted "Bring them home and impeach Bush" as they marched past the White House and the Justice Department yesterday afternoon. Many carried homemade placards that read, "Never Prouder to be a Non-Republican" and "Bush Lied - Americans Died."

Some donned fanciful costumes to underscore their views.

Dr. Alan Meyers, a pediatrician from Boston, came to the rally dressed as a missile. The protest, he said, showed the world "that Americans are dead set against what the Bush administration is up to - at home and abroad - and especially in Iraq."

"We never should have gone into Iraq in the first place," he said. "[The invasion] was based on a pack of lies."

The antiwar rally, which took place at the Mall, was the first major demonstration since May 1, when Mr. Bush declared an end to major combat in Iraq.

Organizers said the time was right to hold the rally and march because Americans were becoming increasingly suspicious of Mr. Bush's Iraq policy.

No weapons of mass destruction have been found in Iraq, they argue, and troop casualties are rising. So far, 108 have been killed by hostile fire since May 1. A total of 347 U.S. soldiers and Marines have died from hostile fire, accidents and other causes since Operation Iraqi Freedom began in March.

Organizers estimated that 100,000 people turned out for the demonstration, but police at the scene put the number much lower, from 10,000 to 20,000. U.S. Park Police no longer issue official crowd estimates, so the size of the protest

could not be verified.

International ANSWER [Act Now to Stop War and End Racism] and United for Peace and Justice, which brought together about 600 groups, held similar demonstrations in San Francisco yesterday.

Mr. Bush was spending the weekend at Camp David in Maryland.

About 100 people held a simultaneous counterdemonstration on the other side of the Mall, near the Capitol.

The D.C. chapter of Free Republic, an independent conservative group, gathered to show support for Mr. Bush and the troops in Iraq. The group gathered under a banner that read, "God bless our soldiers' liberation the world of one tyrant at a time."

"I don't think [International ANSWER] should be the only loud, obnoxious voice here," said Mike Gregory, who traveled from New Hampshire to show his support for Mr. Bush's policies in Iraq.

Mark Walker, who had just returned from a military tour of Kuwait, said protests don't hurt the morale of military personnel as long as counterdemonstrations are held at the same time. "What hurts the morale is when the media only reports the negative," he said.

A moment of confrontation occurred when a dozen or more counterdemonstrators used bullhorns to shout at the antiwar protesters. They carried signs saying "Trust Jesus" and "God Hates You." Police on horses stood between the groups.

Before the march, peace activists and representatives of various interest groups criticized Mr. Bush's policies in Iraq.

Fernando de Solar Suarez, the father of a Marine who was killed in Iraq shortly after the war began, said the United States doesn't need any more deaths. "President Bush - wrongly called president - has lied to the entire world about this war," said Mr. Suarez, whose son Jesus was killed in action.

The Rev. Graylan Hagler of Plymouth Congregational Church in the District said the war was "built on a lie."

"We're standing up here today in D.C. ... We are the people. We understand the war was built on a lie," he told the protesters, who cheered. "It's time now to bring the troops home. It's time to send Bush packing back to Texas."

Former U.S. Attorney General Ramsey Clark told the crowd that the greatest threat to peace and security are Mr. Bush's policies, not terrorism. "This president made us international outlaws. Even in Australia, we can't go there without being jeered," he said as the protesters applauded. "What we've done in Afghanistan and Iraq is the greatest crime known."

Protester Zak Fayer can't vote yet, but the 16-year-old from New Jersey said he felt that it was important for him to attend the rally and march. The 10th-grader who attends Eastern High School in Voorhees, N.J., said he's politically active in school and predicts that Mr. Bush will not be

re-elected.

"We should have never have been in Iraq. It's an illegal war," Zak said. "But, people coming together today will make a difference. The people's voice should be stronger than the White House's voice."

A group of about 300 military family members with Military Families Speak Out [MFSO] also joined the antiwar demonstrators.

"I don't think there is any reason for war," said Anne Alvallee, 44, of Massachusetts. She said she is a pacifist and that her father fought in Normandy during World War II.

As an organization, MFSO is opposed to the U.S.-led invasion and occupation of Iraq. Members gathered under a banner that said: "Military families say bring them home now!"

GRAPHIC: Antiwar demonstrator Steve Segare [right] confronted counterprotester Ruben Israel as thousands descended on the Mall to protest the war in Iraq and the U.S. occupation. [Photo by Damon Scheleur/The Washington Times] ; Counterprotester Jon Alvarez of Syracuse, N.Y., was among about 200 people who turned out to show their support for the U.S. effort in Iraq. [Photo by Bert V. Goulait/The Washington Times] ; Demonstrators **burned the American flag** on Constitution Avenue near 15th Street NW yesterday during antiwar protests. The rally started at the Washington Monument and continued as a march along Constitution Avenue. [Photo by Astrid Riecken/The Washington Times]

LOAD-DATE: October 27, 2003