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S.J. RES. 40 AND H.J. RES. 54—PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AUTHORIZING CONGRESS TO PROHIBIT THE PHYSICAL DESECRATION OF THE FLAG OF THE UNITED STATES

SEPTEMBER 1, 1998.—Ordered to be printed

Mr. HATCH, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany S.J. Res. 40 and H.J. Res. 54]

The Committee on the Judiciary, to which was referred the joint resolution (S.J. Res. 40 and H.J. Res. 54) proposing an amendment to the Constitution of the United States authorizing Congress to prohibit the physical desecration of the flag of the United States, having considered the same, reports favorably thereon, and recommends that the joint resolution do pass.

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I. SUMMARY

The purpose of Senate Joint Resolution 40 and its identical House companion measure House Joint Resolution 54 is to restore to Congress the authority to enact a statute protecting the flag of the United States from physical desecration. The resolution reads as follows: "The Congress shall have power to prohibit the physical desecration of the flag of the United States."

The American people revere the flag of the United States as a unique symbol of our Nation, representing our commonly held belief in liberty and justice. Regardless of our ethnic, racial, or religious diversity, the flag represents our oneness as a people. As Supreme Court Justice John Paul Stevens has written:

> [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 it is with the American flag. It 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 peoples who share our aspirations.

Texas v. *Johnson,* 491 U.S. at 437 (dissenting).

To this end, the Federal Government, the District of Columbia, and some 48 States adopted laws preventing physical desecration of the flag. In 1989, however, the Supreme Court broke with over 200 years of precedent and held that flag desecration as a means of public protest is an act of free expression protected by the first amendment. See *Texas* v. *Johnson,* 491 U.S. 397 (1989). That decision effectively invalidated the laws of 48 States and the District of Columbia protecting the flag from such abuse. Approximately 1 year later, in a 5-to-4 decision in *United States* v. *Eichman,* 496 U.S. 310 (1990), the Court struck down the Federal Flag Protection Act as being similarly inconsistent with the first amendment.

As a result, a widespread grassroots organization has called upon Congress to initiate proceedings to pave the way for the adoption of a constitutional amendment permitting Congress to protect the flag from physical desecration. This movement has developed because the flag represents the common political bond shared by this Nation's people. Whatever our differences of party, race, religion, ethnicity, economic status, or geographic region, we are united as Americans. That unity is symbolized by the American flag. As the visible embodiment of our Nation and its principles, values, and ideals, the flag has come to represent hope, opportunity, justice, and freedom, not merely to the people of this Nation, but to the people throughout the world.

The effort to enact S.J. Res. 40 is bipartisan. Senators Orrin G. Hatch (R–UT) and Max Cleland (D–GA) are the principal Senate cosponsors. S.J. Res. 40 has 61 sponsors, 51 Republicans and 10 Democrats. Congressman Gerald B. Solomon (R–NY) and William O. Lipinski (D–IL) are leading the effort in the House of Represent-

atives on H.J. Res. 54, the House counterpart to S.J. Res. 40. H.J. Res. 54 has 285 sponsors, 209 Republicans and 76 Democrats.

For the reasons set forth in this report, the Judiciary Committee reported S.J. Res. 40 and H.R. Res. 54 to the full Senate with a favorable recommendation, and urges that it be adopted.

II. LEGISLATIVE HISTORY

On June 21, 1989, the U.S. Supreme Court issued its decision in *Texas* v. *Johnson,* 491 U.S. 397 (1989). In that case, Gregory Johnson had been convicted of violating a Texas statute for knowingly desecrating an American flag. Johnson had burned a flag at a political demonstration outside the Dallas, TX, City Hall during the 1984 Republican National Convention. The Texas Court of Criminal Appeals reversed his conviction. *Johnson* v. *State,* 755 S.W.2d 92 (1988). In a 5-to-4 decision, the U.S. Supreme Court affirmed the reversal, holding that Johnson's burning of the flag was expressive conduct, a form of symbolic speech protected by the first amendment.

On July 18, 1989, following the Supreme Court's decision in *Johnson,* Senators Robert Dole, Alan Dixon, Strom Thurmond, and Howell Heflin, as principal cosponsors, introduced Senate Joint Resolution 180, a proposed amendment to the U.S. Constitution, which would have given Congress and the States power to prohibit the physical desecration of the American flag. On July 18, 1989, Senators Joseph Biden, William Roth, and William Cohen, as principal cosponsors, introduced S. 1338 (The Biden-Roth-Cohen Flag Protection Act of 1989), which proposed to amend the Federal flag desecration statute, 18 U.S.C. 700(a). The Judiciary Committee held hearings on August 1, August 14, September 13, and September 14, 1989, on the proposed legislation and constitutional amendment. Approximately 20 hours of testimony were received from 26 witnesses, including a broad range of constitutional scholars, historians, representatives of veteran's organizations, Members of the Senate, and attorneys from the Department of Justice. On September 21, 1989, the Judiciary Committee approved S. 1338 and ordered the bill favorably reported.

On September 12, 1989, the House of Representatives passed H.R. 2978 (the Flag Protection Act of 1989), and in order to protect the physical integrity of the flag of the United States. H.R. 2978 was similar to S. 1338 and also sought to amend 18 U.S.C. 700(a).

On October 5, 1989, the Senate passed H.R. 2978, which was enacted October 28, 1989. Under this statute, codified at United States Code, title 18, section 700(a), "(W)hoever 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." An exception was made for "conduct consisting of the disposal of a flag when it has become worn or soiled."

In the wake of the Flag Protection Act's passage on October 19, 1989, S.J. Res. 180, the proposed constitutional amendment, failed to obtain the necessary two-thirds vote of the full Senate, by vote of 51 to 48. It was generally believed that the statute would survive constitutional scrutiny and an amendment was thus unnecessary.

On June 11, 1990, the Supreme Court, however, in *United States* v. *Eichman,* 495 U.S. 928 (1990), held that the 1989 act, like the Texas statute struck down in *Texas* v. *Johnson,* violated the first amendment. *Eichman* involved individuals who knowingly set fire to several American flags on the steps of the U.S. Capitol while protesting American foreign policy, and other individuals who knowingly burned a U.S. flag in Seattle while protesting passage of the 1989 Flag Protection Act. According to the Court, the first amendment protected the conduct engaged in by these individuals.

Shortly after the Supreme Court's decision, the Senate Judiciary Committee held a hearing to consider what measures might be taken to protect the American flag. The Committee heard from eight witnesses, including representatives from the Justice Department.

As a result of those hearings, an amendment to the U.S. Constitution was introduced that would have given Congress and the States the power to prohibit the physical desecration of the flag (Senate Joint Resolution 332). On June 26, 1990, however, the proposed amendment failed to receive the necessary two-thirds vote of the full Senate, by a vote of 58 to 42.

Thus, on March 21, 1995, Senators Hatch and Heflin, as principal cosponsors, along with a bipartisan group of 53 additional cosponsors, introduced Senate Joint Resolution 31, another proposed amendment to the U.S. Constitution identical to that introduced in both 1989 and 1990.

On June 6, 1995, a hearing on S.J. Res. 31 was held by the Subcommittee on the Constitution, Federalism, and Property Rights of the Judiciary Committee.

On July 20, 1995, the Committee voted 12 to 6 to report favorably S.J. Res. 31. The House of Representatives voted 312 to 120 in favor of an identical resolution, H.J. Res. 79, on June 28, 1995. On December 12, 1995, however, S.J. Res. 31 failed to obtain the necessary two-thirds vote of the full Senate, by a vote of 63 to 36.

Efforts to protect the flag did not end there, however. On February 4, 1998, Senator Hatch, along with Senator Cleland, introduced S.J. Res. 40, the Senate's most recent effort to pass a constitutional amendment to permit Congress to enact legislation prohibiting the desecration of the American flag. The two Senators were joined by an additional 53 original cosponsors in this effort, among those the Majority Leader Trent Lott who explained that by introducing S.J. Res. 40, the Senate was beginning

> the process of restoration * * * and renewal * * *. We examine the events of recent years in the context of history in an effort to restore and renew our faith in this place we call America. The lynchpin of this process will be our restoration of what our flag—our American flag, the flag of these United States, the flag of what our Founders referred to as "We, the people"—means to us as a people, as citizens, as people united in the common cause of Freedom.

On February 13, 1997, a similar resolution, H.J. Res. 54, was introduced in the House of Representatives by Congressmen Gerald B. Solomon (R–NY) and William O. Lipinski (D–IL) and 283 other original cosponsors.

On March 25, 1998, the Subcommittee on the Constitution, Federalism, and Property Rights held a hearing on S.J. Res. 40. The Subcommittee heard testimony from Alan G. Lance, attorney general, State of Idaho; Bruce Fein, esquire; Roger Breske, member, Wisconsin State Senate; Prof. Stephen B. Presser, Northwestern University School of Law, Chicago, IL; Prof. Robert Justin Goldstein, Oakland University, Rochester, MI; Adrian Cronauer, esquire, Burch & Cronauer, Washington, DC; Stan Tiner, Alabama Register, Mobile, AL; Patrick Brady, chairman, Citizen's Flag Alliance, Sumner, WA; Rose E. Lee, former national president, Gold Star Wives of America, Arlington, VA; Mary Frost, president, Selective Learning Network, Kansas City, MO; Keith A. Kreul, Fennimore, WI; Francis J. Sweeney, secretary/treasurer, Steamfitters Local Union 449, Pittsburgh, PA.

On June 17, 1998, the resolution was polled out of the Subcommittee by a vote of 5 to 3, and referred to the full Judiciary Committee. The Committee took up the legislation on June 24, 1998, and voted 11 to 7 to report favorably S.J. Res. 40.

Following the full Committee vote, the Committee held a hearing on July 8, 1998. The Committee heard testimony from Mr. Gary G. Wetzel, Oak Creek, WI; Sean C. Stephenson, LaGrange, IL; John Schneider, Westlake, CA; Tommy Lasorda, Los Angeles, CA; Marvin Virgil Stenhammar, Ashville, NC; Prof. Richard D. Parker, Harvard University Law School; Mr. Clint Bolick, esquire, vice president and director of litigation, Institute for Justice, Washington, DC.

The House Committee on the Judiciary addressed a similar resolution, H.J. Res. 54, the prior year and favorably reported H.J. Res. 54 out on May 14, 1997, by a vote of 20 to 9. On June 12, 1997, the House of Representatives voted 310 to 114 in favor of H.J. Res. 54.

III. DISCUSSION

A. The Flag Is an Important Symbol of a Diverse Country

Throughout our history, the flag has acted as a unique symbol among our diverse people embodying our national unity and national ideals. Recently, President Clinton expressed this transcendent symbolism when he said:

> This Star Spangled Banner and all its successors have come to embody our country, what we think of as America. It may not be quite the same for every one of us who looks at it, but in the end we all pretty much come out where the framers did. We know we have a country founded on the then revolutionary idea that all of us are created equal, and equally entitled to life, liberty, and the pursuit of happiness; that this whole country was put together out of an understanding that no individual can maximize the pursuit of life, liberty, and the pursuit of happiness alone, and so we had to join together to reinforce each other's efforts.
>
> And then there was another great insight, which is that in the joining we couldn't repeat the mistakes of the mon-

> archies from which we fled, and give anyone absolute power over anyone else. And so we created this written constitution to say that, okay, we've got to join together, and some people have to be our representatives and they should be given authority to make certain decisions, but never unlimited and never forever.
>
> And I'd say that system has worked pretty well over the last 220-plus years. And that's what that flag embodies—at a moment when we could have lost it all, when the White House itself was burned, when a lot of people didn't think that we had such a good idea. And so, now it's standing there—a little worse for the wear—but quite ready to be restored. And in that sense, it is a metaphor for our country, which is always ready to be restored.

(Remarks at National Treasures Tour Kick-Off, National Museum for American History, Washington, DC, July 13, 1998.)

Our flag functions as a symbol of our country and our ideals not only for Americans, but even for people of other nations. On September 1, at this year's summer summit in Moscow, President Yeltsin of the Russian Federation presented President Clinton with a copy of our flag first presented by a U.S. congressional delegation to a group of Russian merchants in 1866, calling it "a symbol of friendship between our peoples."

1. FOUNDING FATHERS EQUATED THE AMERICAN FLAG WITH THE SOVEREIGNTY OF THE NATION

When the Constitution's Framers adopted the flag as the fledgling Nation's symbol in 1777, they understood the long history of law surrounding the flag as an emblem of national sovereignty. The Framers inherited from England a legal tradition of protecting flags as practical instruments affecting title to areas of land and water, rights of trade and citizenship, causes of war citable in international law, and similar matters of the utmost weight. Thus, the original intent and understanding regarding the flag's protection consisted of sovereignty concerns. The Framers understood that the flag they adopted and sought to protect, apart from being merely a patriotic or any other type of symbol, as an incident of sovereignty. By recognizing the sovereignty interest in the flag, which historically meant responding to violations of its physical integrity, the Framers sought treatment for the United States, at home and abroad, as a sovereign nation.

By pronouncements in the earliest years of the Republic, the Framers made clear that the flag, and its physical requirements, related to the existence and sovereignty of the Nation and in no way interfered with the rights established by the first amendment. The sovereignty interest in the flag's adoption was tied to concrete legal and historical factors which distinguished it sharply from any asserted ideology, patriotism, or viewpoint. The Framers, through their words and actions, demonstrated the historic core of consistency between flag protection and the first amendment. As the Supreme Court has explained:

> From the earliest periods in the history of the human race, banners, standards, and ensigns have been adopted.

> It is not then remarkable that the American people * * * early in their history, prescribed a flag as symbolical of the existence and sovereignty of the Nation.

Halter v. *Nebraska,* 205 U.S. 34, 41 (1907).

In America, the tradition that "insults to the flag * * * and indignities put upon it * * * [are] sometimes punished * * *" id., started with one of the earliest prosecutions in American history: *Endecott's Case.* In the 1600's, just as England had proceeded against those who failed to treat properly the flag, so Massachusetts colonists prosecuted, tried, and convicted a domestic defacer of the flag in 1634. The trial court concluded that defacing the flag was an act of rebellion.

Endecott's Case establishes a key historic point: from the earliest days of the legal system in America, the law deemed an individual to be engaging in a punishable act for defacing a flag, even domestically and in peacetime. Defacing the flag invaded a sovereign government interest, even when undertaken for reasons of protest. At the time, the colonists saw the need to punish the act in clear sovereignty terms: defacing the flag would be taken as an act of rebellion, even when unaccompanied by danger of violence or general revolt.

a. Intent of James Madison and Thomas Jefferson

The original intent of the Nation's Founders clearly indicates the importance of protecting the flag as an incident of American sovereignty.

i. James Madison

James Madison, as an original draftsman of the first amendment, was an authoritative source on sovereignty matters. In this regard, Madison consistently emphasized the legal significance of infractions on the physical integrity of the flag. On three different occasions, Madison recognized and sustained the legitimacy of the sovereignty interest in protecting the flag.

His earliest pronouncements concerned an incident in October 1800, when the Algerian ship *Dey of Algiers* forced a U.S. man-of-war—the *George Washington*—to haul down its flag and replace it with that of Algiers. As Secretary of State under Thomas Jefferson, Madison pronounced such a situation as a matter of international law, a dire invasion of sovereignty, which "on a fit occasion" might be "revived." Brief for the Speaker and Leadership Group of the U.S. House of Representatives, "Amicus Curiae," at 33, *United States* v. *Eichman,* 496 U.S. 310 (1990) (No. 89–1433) [hereinafter, Brief], citing II "American State Papers" 348 (Lowrie and Clarke, ed. 1982).

Madison continued his defense of the integrity of the flag when he pronounced an act of flag defacement in the streets of an American city to be a violation of law. Specifically, Mr. Madison pronounced a flag defacement in Philadelphia as actionable in court. As Judge Robert Bork described this historic pronouncement:

> The tearing down in Philadelphia in 1802 of the flag of the Spanish Minister "with the most aggravating insults,"

> was considered actionable in the Pennsylvania courts as a violation of the law of nations.

Brief at 34, citing 4 J. Moore, "Digest of International Law," 627 (1906) (quoting letter from Secretary of State Madison to Governor McKean (May 11, 1802)).

And, on June 22, 1807, when the British ship *Leopard* fired upon and ordered the lowering of an American frigate's (the *Chesapeake*) flag, Madison told the British Ambassador "that the attack on the *Chesapeake* was a detached, flagrant insult to the flag and sovereignty of the United States." Brief at 34, citing I. Brandt, "James Madison: Secretary of State 1800–1809," 413 (1953) (quoting British dispatch). A letter by Madison to Monroe stated Mr. Madison's view that "the indignity offered to the sovereignty and flag of the nation demands * * * an honorable separation * * * [such as] an entire abolition of impressments from vessels under the flag of the United States * * *" Brief at 35, citing letter from James Madison to James Monroe (July 6, 1807). Madison's statement suggests his belief that protecting the physical integrity of the flag ensured the protection of the Nation's sovereignty.

Madison did not conclude—as some defenders of the right to deface the flag contend—that the first amendment protected Americans' rights to tear down a flag or that defacing the flag was a form of expression protected by the first amendment. On the contrary, it would appear that Madison had an intimate familiarity with the significance of protecting the physical integrity of the flag, especially as such protection related to the first amendment, which he helped draft and move through the 1st Congress. He knew there had been no intent to withdraw the traditional physical protection from the flag.

Madison's pronouncements consistently emphasized that "insults" to the physical integrity of the flag continued to have the same legal significance in a variety of different contexts, abroad, at sea, and at home. To Madison, sovereignty entailed a relationship not only between nations and foreign entities, but between nations and domestic persons in wartime and peacetime.

ii. Thomas Jefferson

Like Madison, Thomas Jefferson sought to protect the sovereignty interest in the flag. Jefferson recognized its complete consistency with the Bill of Rights, and deemed abuse of that interest a serious matter of state, not the suppression of some form of protected expression. Thus, for Jefferson, the flag as an incident of sovereignty involved a concrete legal status with very practical advantages for the Nation and citizens, who obtained those advantages through protecting a flag from usurpation or indignities.

During the period of foreign war and blockades in the 1790's, the American flag was a neutral flag, and the law of trade made foreign ships desire to fly it.[1] As George Washington's Secretary of State, Jefferson instructed American consuls to punish "usurpation

[1] As it did in the time of Thomas Jefferson and James Madison, the flag continues to serve important sovereignty interests on the high seas. During the Persian Gulf War, for instance, foreign tankers in the gulf flew the American flag, so that an act of aggression against the tankers would be the equivalent of an attack against the United States and its sovereign interest in protecting allied vessels in wartime.

of our flag." Brief at 35, citing 9 "Writing of Thomas Jefferson," 49 (mem. ed. 1903). Jefferson stated "you will be pleased * * * to give no countenance to the usurpation of our flag * * * but rather to aid in detecting it * * *." Id.

To prevent invasion of the sovereignty interest in the flag, Jefferson did not consider the first amendment an impediment to a "systematic and severe" course of punishment for persons who violated the flag. Id. Jefferson recognized the sovereignty interest in the flag, considered protecting it and punishing its abusers highly important, even after adoption of the Bill of Rights.

Madison and Jefferson intended for the Government to be able to protect the flag consistent with the Bill of Rights. This was based upon their belief that obtaining sovereign treatment was distinct from an interest in protecting against the suppression of expression. Madison and Jefferson consistently demonstrated that they sought commerce, citizenship, and neutrality rights through the protection of the flag. They did not seek to suppress the expression of alternative "ideas," "messages," "views," or "meanings;" Madison and Jefferson would therefore have found such an interest anathema.

Thus, from the time of the *Endecott Case* to the present, protection of the flag has continued to serve the Framers' original intent, as an instrument and embodiment of this Nation's sovereignty. Those who both framed the first amendment and adopted the flag had an original purpose for the flag quite unrelated to control of expression. The Founders considered the protection of the flag as an incident of sovereignty, not a suppression of expression.

2. A SHORT HISTORY OF THE AMERICAN FLAG

a. Early colonial and revolutionary flags

Flags and banners have long been used as symbols to unify nations and political or religious movements. "Since time immemorial man has felt the need of some sign or symbol as a mark to distinguish himself, [and] his family or country * * *." (E.M.C. Barraclough and W.G. Crampton, "Flags of the World," p. 9, 1978). Flags have served that purpose since at least 1000 B.C. (Id.). The American flag is no exception.

Even before the Continental Congress adopted a flag for the United States, banners of different designs were used in the Colonies. For example, Pine Tree Flags were popular in the New England Colonies; the pine tree was regarded as symbolizing the hardiness of New Englanders. One such flag is widely believed to have been carried by American troops on June 17, 1775, at the Battle of Bunker Hill. Known as the "Bunker Hill Flag," its design had a blue field with a white canton bearing the red cross of St. George and a green pine tree. American naval vessels sailing off of New England sometimes used a flag with a white field with a pine tree at its center and the words "An Appeal to Heaven" emblazoned across the bottom.

The Moultrie "Liberty" Flag is believed to be the first distinctive flag of the American Revolution displayed in the South, in 1775. It had a blue field and a white crescent in an upper corner. Later, the word "Liberty" was added.

Colonel Christopher Gadsen of South Carolina designed one of the various Rattlesnake flags in 1775. It consisted of a yellow field with a coiled rattlesnake in the center, under which the words "Don't Tread on Me" were written. This banner proved to be an important symbol of the inchoate American Revolution.

On January 1, 1776, George Washington, then commander in chief of the Continental Army, ordered the raising of a flag with 13 alternating red and white stripes and the Union Jack in the canton at Prospect Hill, near Cambridge, MA. This flag was known as the Grand Union Flag. Inclusion of the Union Jack, however, did not prove popular, especially after the signing of the Declaration of Independence. The Nation needed a new banner to represent its independence.

b. The Betsy Ross story

Although the origin of the present flag's design is shrouded in the mists of history, one popular story has it that in the spring of 1776, Robert Morris, financier and patriot organizer, Col. George Ross of Delaware, and Gen. George Washington visited Mrs. Betsy Ross in her upholstery shop on Arch Street in Philadelphia. Her husband had died in a gunpowder explosion a few months earlier, after joining the Pennsylvania militia. They showed her a design of a flag on a piece of paper. After suggesting the stars have five rather than six points, she shortly produced a flag said to be the first "national" flag. This story was not made public until 1870, when her grandson read a paper to the Historical Society of Pennsylvania. Affidavits from some of her daughters, nieces, and grandchildren assert that she recounted the story to them many times before her death in 1836.

On June 14, 1777, the Marine Committee of the Second Continental Congress adopted a resolution that read:

> Resolved, that the flag of the United States be thirteen stripes, alternate red and white; that the union be thirteen stars, white in a blue field representing a new constellation.

Although the congressional resolution did not specify the arrangement of the stars, a circular pattern became popular. Indeed, one of the earliest known appearances of a flag reflecting this new constellation, occurred 2 months later at the Battle of Bennington. There, Lt. Col. Friedrich Baum commanded a unit of Hessian dragoons attached to the ill-fated army of British Gen. Johnny Burgoyne. The Hessians collided with troops under Gen. John Stark along the Walloomsac River in Vermont. On August 16, 1777, General Stark reportedly rallied his troops: "My men, yonder are the Hessians. They were bought for seven pounds and ten pence a man. Are you worth more? Prove it. Tonight, the American flag floats from yonder hill, or Molly Stark sleeps a widow!"

The Americans triumphed. This battle flag has 1 star in both upper corners of the blue canton, with 11 stars arranged in a semicircle over the numerals "76." The red and white stripes are in reverse order—seven white and six red stripes.

The Nation's flag was first honored by a foreign nation in February 1778, when the French Royal Navy exchanged 13 gun salutes

with Capt. John Paul Jones' *Ranger*. It is believed that Captain Jones' *Ranger* displayed the Stars and Stripes for the first time in the fledgling American Navy on July 2, 1777.

In 1791 Vermont was admitted to the Union, followed the next year by Kentucky. To address these additions to the Union, Congress adopted a new measure, in 1794, effective May 1, 1795, expanding the flag to 15 stars and 15 stripes, one for each State. The circular pattern of the stars was abandoned. This new flag flew as the official banner of our country from 1794 to 1818. In 1814, while aboard a British ship moored outside of Baltimore Harbor, Francis Scott Key wrote the Star Spangled Banner in tribute to the flag flying high above Fort McHenry.

By 1818, five additional States—Tennessee, Ohio, Louisiana, Indiana, and Mississippi—had entered the Union. Realizing that the flag would become too unwieldy if a stripe were added for each new State, it was suggested that the stripes return to 13 in number to represent the original 13 Colonies, and that a star be added to the blue field for each new State admitted to the Union.

Consequently, on April 14, 1818, President Monroe signed into law a bill providing "that the flag of the United States be 13 horizontal stripes, alternate red and white; that the union have 20 stars, white in a field of blue," and that upon admission of each new State into the Union one star be added to the Union of the flag on the Fourth of July following its date of admission. Thus marked the beginning of the most detailed legislative provision for the design of the national symbol.

c. Origins of the nickname "Old Glory"

The nickname "Old Glory" is said to have been given the flag by Capt. William Driver. Captain Driver first sailed as a cabin boy at age 14, from his hometown of Salem, MA. After several more voyages, he became master of the 110-ton brig, *Charles Doggett,* at age 21.

Driver's mother and other women of Salem made an American flag of cotton, 12 feet by 24 feet in size, as a birthday and farewell gift. They presented it to him during the outfitting of his ship. As the breeze unfurled the flag, and he was asked by its makers what he thought of the flag, he said, "God bless you, I'll call it Old Glory." Driver took this flag with him whenever he went to sea. He retired from sea duty in 1837 and settled in Nashville, TN, where he displayed the flag.

By the time of the Civil War, everyone in and around Nashville recognized Captain Driver's "Old Glory." Possession on any Union flag deep in Confederate territory meant real danger. And the Confederates were determined to find and destroy Driver's flag, but repeated searches revealed no trace of Driver's cherished banner.

It wasn't until February 25, 1862, when Union forces captured Nashville and raised a small American flag over the capitol, that "Old Glory" reappeared. Accompanied by Union soldiers, Captain Driver returned to his home and began unstitching his bedcover. Inside rested the original "Old Glory," where Driver had safely hidden it during the desperate days of war.

Gathering up the flag, Captain Driver, with soldiers of the Sixth Ohio Regiment, returned to the capitol of Nashville, and replaced the small flag which fluttered there with his "Old Glory."

3. CONGRESS AND THE FLAG

Congress has, over the years, recognized the devotion our diverse people have for the flag. During the Civil War, for example, Congress awarded the Medal of Honor to Union soldiers who rescued the flag from falling into Confederate hands.

In 1940, Congress declared the Star Spangled Banner to be our national anthem. And in 1949, Congress established June 14 as Flag Day—a day expressly set aside to remember and dwell upon the significance of the flag. Congress has also established "The Pledge of Allegiance to the Flag" and the manner of its recitation. The pledge states:

> I pledge allegiance to the flag, of the United States of America, and to the Republic for which it stands. One nation, under God, indivisible, with liberty and justice for all.

The pledge demonstrates the universal understanding that the flag represents the Nation and the ideals of its citizens. It is thus a transcendent symbol of unity and nationhood.

More recently, Congress has chosen fit to honor the flag by designating John Philip Sousa's "The Stars and Stripes Forever" as the national march in 1987.

Congress has not only established the design of the flag (4 U.S.C. 1 and 2), but also the manner of its proper display in the flag code (36 U.S.C. 173–179). The flag code is merely hortatory, however, is not legally enforceable.

Prior to the Supreme Court's pronouncements in *Eichman* and *Johnson,* Congress, along with 48 States and the District of Columbia, had regulated physical misuse of the American flag through laws that originated nearly a century ago.

In 1968, Congress enacted a nationwide flag desecration statute, codified at 18 U.S.C. 700(a). To avoid infringing upon freedom of speech, Congress limited the 1968 flag statute to *acts* of physical desecration. The language contained in the 1917 law applicable to the District of Columbia that made it a crime to "defy" or "cast contempt * * * *by word* or act" upon the American flag was omitted (emphasis supplied). The 1968 statute provided for a fine of not more than $1,000 or imprisonment for not more than 1 year, for anyone who "knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning or trampling upon it * * *."

These congressional and State actions reflect the people's devotion to the flag; Congress did not create the deep regard that Americans hold for their flag. Rather, these attempts to protect the flag merely reflect the will of the people.

4. THE SUPREME COURT AND THE FLAG

Until recently, the Supreme Court was similarly respectful of the flag and saw no conflict between the flag's protection and the first amendment. The Supreme Court's *Eichman* and *Johnson* decisions

broke with over 200 years of precedent. Indeed, Chief Justice Harlan wrote in *Halter* v. *Nebraska,* 205 U.S. 34 (1907):

> It is not * * * remarkable that the American people, acting through the legislative branch of the Government, early in their history, prescribed a flag as symbolical of the existence and sovereignty of the Nation.
>
> [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 towards it.

205 U.S. at 41, 42.

And Chief Justice Earl Warren, long recognized as a champion of individual liberty, penned: "I believe that the States and the Federal Government do have power to protect the flag from acts of desecration and disgrace." *Street* v. *New York,* 394 U.S. 576, 605 (1969).

Similarly, Justice Hugo Black, a well-known absolutist on Bill of Rights freedoms, observed in *Street* that: "It passes my belief that anything in the Federal Constitution bars * * * making the deliberate burning of the American flag an offense." 394 U.S. at 610.

Justice Byron White, in *Smith* v. *Goguen,* 415 U.S. 566 (1974), echoed Black's position when he wrote that:

> There is no doubt in my mind that it is well within the powers of Congress to adopt and prescribe a national flag and to protect the integrity of that flag * * * [T]he flag is an important symbol of nationhood and unity, created by the Nation and endowed with certain attributes.

415 U.S. 586–87.

Then Associate Justice William H. Rehnquist explained: "I see no reason why [the government] may not * * * create a * * * governmental interest in the flag by prohibiting even those who have purchased the physical object from impairing its physical integrity." *Street,* 415 U.S. at 603–04 (joined by Chief Justice Warren Burger).

The future Chief Justice further articulated his views in *Spence* v. *Washington,* 418 U.S. 405 (1974), in which he stated:

> The true nature of the State's interest in this case is not only one of preserving the physical integrity of the flag, but also one of preserving the flag as "an important symbol of nationhood and unity." Although the Court treats this important interest with studied inattention, it is hardly one of recent invention and has previously been accorded considerable respect by this Court.

418 U.S. at 421.

As Chief Justice Rehnquist reiterated his earlier views by stating in his *Texas* v. *Johnson,* 491 U.S. 397 (1989), dissent:

> The American flag * * * 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 par-

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

491 U.S. at 429.

Justice Paul Stevens added his voice to that of Chief Justice Rehnquist, declaring:

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

491 U.S. at 437.

And, in *United States* v. *Eichman,* 496 U.S. 310 (1990), Justice Stevens further noted:

> [I]t is now conceded that the Federal Government has a legitimate interest in protecting the symbolic value of the American flag. Obviously that value cannot be measured, or even described, with any precision. It has at least these two components: in times of national crisis, it inspires and motivates the average citizen to make personal sacrifices in order to achieve societal goals of overriding importance; at all times, it serves as a reminder of the paramount importance of pursuing the ideals that characterize our society.
>
> Thus, the Government may—indeed, it should—protect the symbolic value of the flag without regard to the specific content of the flag burner's speech * * *. It is, moreover, equally clear that the prohibition does not entail any interference with the speaker's freedom to express his or her ideals by other means. It may well be true that other means of expression may be less effective in drawing attention to those ideas, but that is not itself a sufficient reason for immunizing flag burning. Presumably a gigantic fireworks display or a parade of nude models in a public park might draw even more attention to a controversial message, but such methods of expression are nevertheless subject to regulation.

496 U.S. at 319–20, 321–22.

Thus, the Committee notes that many of this Nation's most important jurists have recognized not only the important role the flag plays in our Nation, but also that it can be protected from physical abuse without running afoul of the first amendment.

B. The Importance of the Flag to the American People

Although the Committee feels no need to expand upon the well-known reverence in which the American people hold their flag, it is important to listen to the voices of the American people down the generations of our history expressing their reverence for the flag. The following are but a few examples of the deep feelings invoked by the American flag in its people.

Richard Reeves, in a July 4, 1995, column in The Sun entitled, "A Fourth of July on the Oregon Trail," quoted from the diary of Enoch Conyers. Conyers was part of a wagon train pausing in Wyoming on the Oregon Trail, heading west, in 1852. These are excerpts from his diary:

> July 3—Several of the boys started out his morning for a hunt in the mountains for the purpose of obtaining some fresh meat, if possible, for our Fourth of July dinner. Those who remain in camp are helping the ladies in preparing the banquet. A number of wagon beds are being taken to pieces and formed into long tables.
>
> A little further on is a group of young ladies seated on the grass talking over the problem of manufacturing "Old Glory" to wave over our festivities. One lady brought forth a sheet. This gave the ladies an idea. Quick as thought, another brought a skirt for the red stripes. Another lady ran to her tent and brought forth a blue jacket, saying: "Here, take this, it will do for the field * * *."
>
> July 4—The day was ushered in with the booming of small arms, which was the best that we could do under the circumstances, so far away from civilization. Just before the sun made its appearance above the eastern horizon, we raised our 40-foot flagstaff with "Old Glory" nailed fast to the top * * *. Our company circled around the old flag and sang "The Star Spangled Banner." Then three rousing cheers and a tiger were given to "Old Glory" * * *.

The diary excerpts reflect not only the use of the flag's nickname before the Civil War, but also the popularity of "The Star Spangled Banner" nearly four decades after its composition by Francis Scott Key.

At a critical juncture in this Nation's history, Henry Ward Beecher delivered an address entitled, "The National Flag," in May 1861. In that address, when the youthful Nation was soon to be nearly torn-asunder by civil war, he attempted to touch upon the flag's meaning:

> A thoughtful mind, when it sees a nation's flag, sees not the flag, but the nation itself. And whatever may be its symbols, its insignia, he reads chiefly in the flag the government, the principles, the truths, the history, that belong to the nation that sets it forth * * *. When the united crosses of St. Andrew and St. George, on a fiery ground, set forth the banner of old England, we see not the cloth merely; there rises up before the mind the idea of that great monarchy.

> This nation has a banner, too, and * * * wherever it [has] streamed abroad men saw day break bursting on their eyes. For * * * the American flag has been a symbol of Liberty, and men rejoiced in it * * *.
>
> If one, then, asks me the meaning of our flag, I say to him, it means just what Concord and Lexington meant, what Bunker Hill meant; it means the whole glorious Revolutionary War, which was, in short, the rising up of a valiant young people against an old tyranny, to establish the most momentous doctrine that the world had ever known, or has since known—the right of men to their own selves and to their liberties.
>
> In solemn conclave our fathers had issued to the world that glorious manifesto, the Declaration of Independence. A little later, that the fundamental principles of liberty might have the best organization, they gave to this land our imperishable Constitution. Our flag means, then, all that our fathers meant in the Revolutionary War; all that the Declaration of Independence meant; it means all that the Constitution of our people, organizing for justice, for liberty, and for happiness, meant. Our flag carries American ideas, American history and American feelings. Beginning with the colonies, and coming down to our time in its sacred heraldry, in its glorious insignia, it has gathered and stored chiefly this supreme idea: Divine right of liberty in man. Every color means liberty; every thread means liberty; every form of star and beam or stripe of light means liberty; not lawlessness, not license; but organized institutional liberty—liberty through law, and laws for liberty!

Similarly, an early American missionary to a foreign land represented the feelings of Americans traveling abroad when he reported:

> I never knew that I was in reality an American, until I walked out one fine morning in Rotterdam along the wharf where many ships lay in the waters of the Rhine. Suddenly my eye caught a broad pendant floating in a gentle breeze over the stern of fine ship at mizzen half mast; and when I saw the wide spread eagle perched on her banner with the stripes and stars under which our fathers were led to conquest and victory, my heart leaped into my mouth, a flood of tears burst from my eyes, and before reflection could mature a sentence, my mouth involuntary gave birth to these words, "I am an American." To see the flag of one's country in a strange land, and floating upon strange waters, produces feelings which none can know except those who experience them. I can now say that I am an American. While at home in the warmth and fire of the American spirit law in silent slumber in my bosom; but the winds of foreign climes have fanned it into flame.

("History of the Church," vol. 4, ch. 22, pp. 387–388.)

The identification of the flag with the Nation and its ideals is also reflected in a poem written by Henry van Dyke during World War I:

AMERICA'S WELCOME HOME

Oh, gallantly they fared forth in khaki and in blue,
America's crusading host of warriors bold and true;
They battled for the right of men beside our brave Allies.
And now they're coming home to us with glory in their eyes.

Oh, it's home again, America for me!
Our hearts are turning home again and there we long to be,
In our beautiful big country beyond the ocean bars,
Where the air is full of sunlight and the flag is full of stars.

They bore our country's great word across the rolling sea,
"America swears brotherhood with all the just and free."
They wrote that word victorious on fields of mortal strife,
And many a valiant lad was proud to seal it with his life.

Oh, welcome home in Heaven's peace, dear spirits of the dead!
And welcome home ye living sons America hath bred!
The lords of war are beaten down, your glorious task is done;
You fought to make the whole world free, and the victory is won.

Now it's home again, and home again, our hearts are turning west,
Of all lands beneath the sun America is best.
We're going home to our own folks, beyond the ocean bars,
Where the air is full of sunlight and the flag is full of stars.

Wartime, not unsurprisingly, has always been a time for the Nation's people to rally around the flag. Perhaps no single moment in American history reflects the Nation's pride in its flag better than that of the victory at Iwo Jima. During World War II, American Marines engaged in fierce combat against Japanese forces on that small Pacific island. The Marines ascent up Mount Suribachi cost nearly 6,000 American lives. One of the most famous scenes of the war, captured on film and memorialized at the Iwo Jima Memorial in Arlington, VA, occurred when the Marines raised the American flag in victory atop Mount Suribachi. Planting the flag—the Nation's symbol of sovereignty and power—on that small, bloodstained island so far from home, gave America the reassurance that the war was nearly ended.

The heat of battle, however, is not the only circumstance in which Americans revere their flag. On July 24, 1969, American astronauts Neil Armstrong and Edwin "Buzz" Aldrin became the first human beings to walk on the Moon. To mark the moment, those great heros posted an American flag in the soil of that celestial body. In his own words, Astronaut Buzz Aldrin recalls the moment, "Neil suggested we proceed with the flag * * *. As hard as we tried, the telescope wouldn't fully extend. Thus the flag, which should have been flat, had its own unique permanent wave." ("Apollo Expeditions to the Moon," edited by Edgar M. Cortright, NASA SP; 350 Washington, DC, 1975.) The Citizens Flag Alliance, a grassroots organization consisting of over 100 groups ranging from the American Legion and the Knights of Columbus, to the Congressional Medal of Honor Society and the African-American Women's Clergy Association, approached Senators Hatch and Cleland to ask them to lead a bipartisan effort in the Senate to move the flag amendment. In furtherance of that effort the Committee held several hearings.

The Committee hearings demonstrate that reverence for the flag, even in these times of cynicism, has not waned. On March 25, 1998, before the Subcommittee on the Constitution, Federalism, and Property Rights, Prof. Stephen Presser of Northwestern University Law School summed up the importance of the flag to its citizens:

> Throughout American history, the flag has stood for the moral foundation, for the American common tradition of self-sacrifice and, in particular, for the sacrifices of the men and women who have given their lives fighting for our way of life. * * * The flag protection amendment is a gentle reminder to the Supreme Court and to American opinionmakers, legislators, and executives that there is something moral, something sacred, at the core of American society and that it deserves our respect and deference. It was this thought that the signers of the Declaration of Independence had in mind when they pledged their sacred honor to the effort for independence. A constitutional amendment which permits the American people once again to affirm the sacred status of their flag is a renewal of the Founders' pledge.

(Testimony of Prof. Stephen B. Presser, Mar. 25, 1998, at 44–45.)

Mr. Adrian Cronauer, esquire, a Vietnam veteran and former Armed Forces radio personality, testified:

> As a symbol of our Nation, the American flag represents all of us and all the values we hold sacred. When somebody desecrates our flag, they desecrate all that is valuable and desirable for ourselves and for our progeny. * * * I would like to point out something that that great intellect and patriot [Thomas Jefferson] said in a letter to James Madison. He said, "It is my principle that the will of the majority should always prevail. If they approve the proposed convention in all parts, I shall concur in it cheerfully, in hopes that they will amend it whenever they shall find it works wrong."
>
> An overwhelming number of Americans believe that it is working wrong in this case. It the overwhelming will of the people that we have the right to protect our flag, and I urge you gentlemen to allow us to do so by passing this amendment and sending it on to the States for ratification.

(Testimony of Mr. Adrian Cronauer, Mar. 25, 1998, at 58.)

General Patrick Brady, chairman of the board of the Citizen's Flag Alliance testified:

> The flag protection amendment is a perfect example of democracy at work, a majority of Americans exercising their right to rule. We are not trying to force the minority to respect the flag. We are asking the Government to let the people decide. The Constitution gives us the right to peacefully protest an action of the Nation, and that is what we are doing. It does not give us the right to violently protest the foundations of the Nation, and that is what the flag burners are doing.

> There are great and gifted Americans on both sides of this issue, and learned opinions, but there is only one fact. The American people want their flag rights returned. Whatever concerns some may have, I pray they will muster the courage to believe that just this once they may be wrong and the American public may be right. And I hope they can have the compassion to defer to those great blood donors to our freedom, many whose final earthly embrace was in the folds of Old Glory.

(Testimony of Maj. Gen. Patrick Brady, Mar. 25, 1998.)

Mrs. Rose E. Lee, former national president of the Gold Star Wives of America, an organization that represents 12,000 American women, who are widows of American servicemen killed in action or by service-connected activities or disabilities testified. In urging Congress to protect the flag she stated how important the flag was to her:

> The flag means something different to every American, but to Gold Star Wives it has the most personal of meanings. Twenty-six years ago, this flag that I hold covered the casket of my husband, Chew-Mon Lee. He was in the U.S. Army. He was a decorated soldier who was wounded in Korea. He received the Purple Heart with an Oak Leaf Cluster. He also was awarded the Distinguished Service Cross for service in Korea for extraordinary heroism in military operations against an armed enemy. He also served as a staff officer in Vietnam. He later died on active duty overseas in Taiwan and he is buried in Arlington National Cemetery.
>
> * * * * *
>
> When I received the beautiful American flag which the honor guard folded reverently in a triangle, it was a symbol of America. From the moment it was presented to me, it was America. It stood for freedom my husband fought for; it was those freedoms. That is why the flag is so precious to me. It conveys so much, and of all that I have of my husband, it represents all that anyone could ask of a country.

(Testimony of Mrs. Rose E. Lee, Mar. 25, 1998, at 91–92.)

The deep feelings invoked by the flag are demonstrated by the fact that 49 State legislatures have called for a constitutional amendment on flag desecration. According to Prof. Stephen B. Presser, no other amendment in the Nation's history has received such strong support in State legislatures.

On July 8, 1998, the Committee on the Judiciary held a hearing and heard testimony from still more witnesses who wanted to voice their support of S.J. Res. 40. The Committee heard from Mr. Gary Wetzel, a Vietnam veteran, who was awarded the Medal of Honor. Mr. Wetzel told the Committee that he was testifying before Congress on behalf of the flag amendment because he wanted to help preserve the flag for the Nation's children.

> Young people are our Nation's most precious asset, and I have a special concern for those who live in the inner city. When I talk to these kids about what it means to be a good citizen, I speak of yesterday's sacrifices. I tell them of citizens from our history, and I knew many, who gave their lives for their home, their family, their country; yes, even the flag.
>
> * * * * *
>
> Indeed, our children are our greatest treasure and sometimes our best teachers. Please listen to the words of Noelle Ann Meyer, a senior at River Falls Senior High School in Roberts, WI, who wrote, "The American flag symbolizes a nation that President Lincoln described as the 'last, best hope on earth.' Most Americans know that the flag is more than just a fabric with colors. When it passes in parades, people stand taller; when youngsters look at it and recite the Pledge of Allegiance, they see more than just a banner hanging on a stick. When it covers a casket, it is our country's way of honoring a loved one or friend * * *. So it is with our flag, as it stands proud, that we pledge to protect it, a right of the people * * * the right thing to do."

(Testimony of Mr. Gary G. Wetzel, July 8, 1998, at 18–19.)

Sean Stephenson, a 19-year-old political science major at DePaul University told the Committee how he felt America's youth viewed flag burning:

> * * * I feel that, for instance, when I talk amongst my peers that a lot of them, to be honest, are shocked. They already thought that the flag was protected. They didn't even realize that *Texas* v. *Johnson* was going on. And when I told them that you can now burn the flag and it is legal, they were shocked and they couldn't even believe it. And we sat around talking and I was thinking to myself, you know, we live in a society that we want to say, well, I can do this, well, I can do this. And it gets to the point where everything has been tugged and twisted and pulled to the point where there is nothing sacred left. There is nothing that you can point to and say we cherish that, we as a country cherish that.

(Testimony of Mr. Sean Stephenson, July 8, 1998, at 61–62.)

Expressing similar feelings, entertainer and actor John Schneider testified that:

> Burning the flag communicates no tangible idea other than pure hatred. I believe it is a hate crime, attacking the very foundation of our unity and our community. Allowing flag desecration to continue is about legitimizing violence and moral wrong in real life before the eyes of our children, without parental warnings or viewer discretion.
>
> Thomas Paine once warned his countrymen that a long habit of not thinking a thing wrong gives it a superficial appearance of being right, and I will give that same warn-

> ing today. If we ignore the fact that desecration of our flag is wrong, a fact that was recognized throughout our Nation's history up until the last nine years, it will not be wrong in the eyes of our children or in the eyes of our children's children.
>
> Abraham Lincoln said that in America our rights stop at doing that which is wrong, and I have always believed that each of us is entitled to express opinions as we feel necessary. But flag desecrators go beyond the bounds of decency and civility. They are no longer fellow citizens expressing opinions, but violent thieves attempting to steal our Nation's soul. They are stealing from our children by demonstrating to them that it is okay to betray the duties and responsibilities that come with being a citizen of this country. We have seen too much good in our people, we have had too many dreams come true and worked too hard to get where we are to protect our children from these thieves.
>
> * * * * *
>
> If our flag can be tossed to the ground and tread upon like a common rag, then perhaps we have reached this point and all of our grandfathers were merely sentimental old fools born into an age not as enlightened as ours, an age where enlightenment is argued to be found in the flickering light of a burning flag. Well, you can call me sentimental, but I will not be caught in that flickering light.

(Testimony of Actor John Schneider, July 8, 1998, at 34–35.)

Later during questioning by Senator Feingold as to whether constitutional protection should be extended to a copy of the Constitution or a copy of the Declaration of Independence, Mr. Schneider responded:

> I believe that the flag is * * * the embodiment of us, of what we are, of what we have been and what we will hopefully become. So if you will, the desecration of the flag of the United States of America is akin to walking out in the street and punching someone in the nose, but a very big and very important someone. The flag of the United States represents and embodies all of us, my son, your son, my grandfather, my father. So there is a difference between a document and a tangible embodiment of a people.

(Id. at 56–57.)

Additional witnesses appeared before the full Committee to voice their thoughts on flag burning. For example, Tommy Lasorda, a U.S. Army veteran, and still better known as the general manager and vice president of the Los Angeles Dodgers, recounted a powerful story describing how he witnessed a flag burning during a major league baseball game in 1976. Mr. Lasorda passionately described:

> [o]ne of the men stooped to his knees, unscrewed a cap to a can of lighter fluid and soaked the American flag with

> it. We all watched dumbstruck as the man pulled out a match and tried to light the American flag to burn it. To the astonishment of the protesters, the fans and those of us on the field, all-star outfielder Rick Monday ran at the protesters, grabbed the burning flag and ran toward the dugout as I screamed at the protesters from the third base coaching box.
>
> The fans immediately got on their feet to recognize Monday's heroic act, and without any prompting that I can remember, the whole crowd stood and began to fill the stadium with an impromptu rendition of "God Bless America." * * * Today, the flag-burning incident is still shown in highlights, and everyone who saw the incident then and now knows the protesters were doing something terrible, offensive and wrong.

(Testimony of Mr. Tommy Lasorda, July 8, 1998, at 40–41.)

Mr. Marvin Stenhammar, a Vietnam veteran appeared as a witness in opposition to the flag amendment. After close questioning by Chairman Hatch as to why the amendment should not be passed and turned over to the people of the United States to decide, acknowledged that he would support the will of the people: "I would certainly support the will of the people. I mean, that is what democracy is all about." (Testimony of Mr. Marvin Stenhammar, July 8, 1998, at 79.)

The Committee also heard from a constitutional scholar, Prof. Richard Parker, Harvard University Law School. Mr. Parker told the Committee that "crazy people who desecrate the flag can't ruin the flag as a symbol. It is only we who can do that by failing to respond, by remaining passive, by remaining silent." He went on to say, "the point of this amendment is to restore the prior meaning of the Constitution, not to change it * * *" (Testimony of Prof. Richard Parker, July 8, 1998, at 92, 94.)

C. A Constitutional Amendment is the Only Legal Means of Protecting the Flag From Physical Desecration

A constitutional amendment is the sole means by which power can be restored to the people, through their elected representatives, enabling them to enact legal protection for the flag. The Supreme Court has given the American people and their elected representatives no choice but to amend the Constitution.

In *Texas* v. *Johnson,* Gregory Lee Johnson participated in a political demonstration at the 1984 Republican National Convention, protesting policies of the Reagan administration and certain Dallas-based corporations. Johnson was given an American flag from a fellow protester, who had taken it from a flagpole. At Dallas City Hall, Johnson unfurled the American flag, poured kerosene on it, and burned it. While the flag burned, protesters chanted: "America, the red, white, and blue, we spit on you."

Johnson was convicted of desecration of a venerated object in violation of section 42.09(a)(3) of the Texas penal code which, inter alia, made illegal the intentional or knowing desecration of a national flag.

By a 5-to-4 vote, however, the Supreme Court held that Johnson's conviction was inconsistent with the first amendment. The first amendment has been held to be applicable to State action by virtue of the 14th amendment's due process clause. The Supreme Court acknowledged that "Johnson was convicted of flag desecration for burning the flag, rather than for uttering insulting words." 491 U.S. at 402 (footnote omitted). And the *Johnson* majority concluded that "Johnson's burning of the flag was conduct 'sufficiently imbued with elements of communication' to implicate the First Amendment." Id. at 406 (citation omitted). Generally, if expressive conduct is being regulated by government for reasons unrelated to the suppression of expression, the Government need meet a less stringent standard and thus has a freer hand than if the Government is seeking to regulate expression itself. Id. at 406, 407. However, the Court determined that a State's "interest in preserving the flag as a symbol of nationhood and national unity * * * is related to expression in the case of Johnson's burning of the flag." Thus, the more stringent test—"the most exacting scrutiny"—must be applied to Texas' conviction of Johnson (Id. at 410 [citation omitted].)

As a result, "Texas argues that its interest in preserving the flag as a symbol of nationhood and national unity survives this close analysis." Id. at 413. The *Johnson* majority nevertheless disagreed:

> [N]othing in our precedents suggests that a state may foster its own view of the flag by prohibiting expressive conduct relating to it * * *. If we were to hold that a state may forbid flag burning wherever it is likely to endanger the flag's symbolic role, but allow it whenever burning a flag promotes that role—as where, for example, a person ceremoniously burns a dirty flag—we would be saying that when it comes to impairing that flag's physical integrity the flag itself may be used as a symbol—as a substitute for the written or spoken word or a "short cut from mind to mind"—only in one direction * * *. We never before have held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents * * *.
>
> There is, moreover, no indication—either in the text of the Constitution or in our cases interpreting it—that a separate juridical category exists for the American flag alone * * *.

Id. at 415–417.

In dissent, Justice Stevens noted that the question whether a State or the Federal Government "has the power to prohibit the public desecration of the American flag * * * is unique." Id. at 436 (Stevens, J., dissenting). Justice Stevens continued:

> * * * [I]n my judgment rules that apply to a host of other symbols, such as state flags, armbands, or various privately promoted emblems of political or commercial identity, are not necessarily controlling. Even if flag burning could be considered just another species of symbolic speech under the logical application of the rules that the Court has developed in its interpretation of the First Amendment

in other contexts, this case has an intangible dimension that makes those rules inapplicable.

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

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

The value of the flag as a symbol cannot be measured. Even so, I have no doubt that the interest in preserving that value for the future is both significant and legitimate. Conceivably that value will be enhanced by the Court's conclusion that our national commitment to free expression is so strong that even the United States as ultimate guarantor of that freedom is without power to prohibit the desecration of its unique symbol. But I am unpersuaded. The creation of a federal right to post bulletin boards and graffiti on the Washington Monument might enlarge the market for free expression, but at a cost I would not pay. Similarly, in my considered judgment, sanctioning the public desecration of the flag will tarnish its value—both for those who cherish the ideas for which it waves and for those who desire to don the robes of martyrdom by burning it. That tarnish is not justified by the trivial burden on free expression occasioned by requiring that an available, alternative mode of expression—including uttering words critical of the flag, see *Street* v. *New York,* 394 U.S. 576 (1969)—be employed.

It is appropriate to emphasize certain propositions that are not implicated by this case. The statutory prohibition of flag desecration does not "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein," *West Virginia Board of Education* v. *Barnette,* 409 U.S. 624, 642 (1943). The statute does not compel any conduct or any profession of respect for any idea or any symbol.

* * * * *

The Court is * * * quite wrong in blandly asserting that respondent "was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values." Re-

> spondent was prosecuted because of the method he chose to express his dissatisfaction with those policies. Had he chosen to spray-paint—or perhaps convey with a motion picture projector—his message of dissatisfaction on the facade of the Lincoln Memorial, there would be no question about the power of the Government to prohibit his means of expression. The prohibition would be supported by the legitimate interest in preserving the quality of an important national asset. Though the asset at stake in this case is intangible, given its unique value, the same interest supports a prohibition on the desecration of the American flag.

Id. at 436–39.

The majority opinion, by contrast, was unable to appreciate the uniqueness of the flag:

> To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries. Could the government on this theory prohibit the burning of state flags? Of copies of the Presidential seal? Of the Constitution? In evaluating these choices under the First Amendment, how would we decide which symbols were sufficiently special to warrant this unique status? To do so, we would be forced to consult our own political preferences, and, impose them on the citizenry, in the very way that the First Amendment forbids us to do.

Id. at 417.

The American flag as mere "designated symbol?" The American flag as indistinguishable from a State flag, a copy of the Presidential seal, or a copy of the Constitution? The Court could have recognized the obvious uniqueness of the American flag, as all four dissenters did. The law need not be utterly divorced from common sense and understanding on this point. The proposed amendment does no more than return us to this common understanding and commonsense point of view, as most recently expressed by 49 State legislatures.

As Chief Justice Rehnquist, for himself and Justices White and O'Connor, stated in dissent: "For more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here." Id. at 422. Rebuking the *Johnson* majority, he continued later in his dissent:

> The uniquely deep awe and respect for our flag felt by virtually all of us are bundled off under the rubric of "designated symbols," that the First Amendment prohibits the government from "establishing." But the government has not "established" this feeling; 200 years of history have done that. The government is simply recognizing as a fact the profound regard for the American flag created by that history when it enacts statutes prohibiting the disrespectful public burning of the flag.

Id. at 434.

In an earlier case, Justice White wrote: "One need not explain fully a phenomenon to recognize its existence and in this case to concede that the flag is an important symbol of nationhood and unity, created by the Nation and endowed with certain attributes * * *. *Smith* v. *Goguen,* 415 U.S. 566 at 587 (White, J., concurring).

Following the Supreme Court's decision in *Texas* v. *Johnson,* there was a thoughtful debate over whether a so-called facially content neutral flag protection statute would survive the Supreme Court's scrutiny. Legal scholars and many commentators were divided over this question. A number of Members of Congress did not believe any such statute could survive the majority's analysis in *Johnson,* even aside from whether a facially content neutral flag protection statute is desirable as a matter of sound public policy. The *Johnson* majority declared that the government's asserted interest in preserving the flag as a national symbol was insufficient to overcome the majorities newly minted "right" to burn or otherwise physically mistreat the flag as part of expressive conduct. Nevertheless, it cannot be denied that the principal, if not the only purpose, in enacting a facially content neutral statute is to protect the symbolic value of the flag. Indeed, one underlying purpose of any statutory effort to respond to *Johnson* would by to prohibit "expressive" conduct that physically desecrates the flag. Further, a facially neutral statute which did not permit an exception for disposal of a worn or soiled American flag by burning—which is the preferred way of doing so—would lead to highly undesirable results. Yet such an exception necessarily undermines the purported neutrality of such statute—indeed, the Court said so in *Johnson.*

Congress did enact a facially neutral statute in 1989 with an exception for disposal of worn or soiled flags, as a response to the *Johnson* decision. The Supreme Court promptly struck it down 5 to 4:

> Although the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the government's asserted *interest* is "related to the suppression of free expression," and concerned with the content of such expression. The Government's interest in protecting the "physical integrity" of a privately owned flag rests upon a perceived need to preserve the flag's status as a symbol of our Nation and certain national ideas * * *.

United States v. *Eichman,* 496 U.S. 400, at 405, 406 (citations omitted; emphasis in original).

A statutory response to the *Johnson* and *Eichman* decisions is thus clearly not a realistic option, even though a narrow 5-to-4 majority of the Supreme Court erred in *Texas* v. *Johnson* and repeated its error in *United States* v. *Eichman.* The Clinton administration agrees *Texas* v. *Johnson* was wrongly decided, even though he opposes any constitutional amendment on flag protection. (Testimony of Assistant Attorney General for Legal Counsel Walter Dellinger, June 6, 1995, Tr. at 54, 66.)

Unfortunately, we live in a time where standards have eroded. Civility and mutual respect are in decline. Nothing is immune from

being reduced to the commonplace. Absolutes are distrusted. Values are considered relative. Rights are cherished and constantly expanded, but responsibilities are shirked or scorned. Americans, however, seek to instill in our children a pride in their country that will serve as a basis for good citizenship and a devotion to improving the United States of America and adhering to its best interests as they can see them. It remains the hope of America that all people of diverse backgrounds will unite as Americans, under one flag, as one people. Although our citizens ask their children to pledge allegiance to the flag, *Johnson* and *Eichman* dictate that we must tell them the same flag is unworthy of legal protection when it is treated in the most vile, disrespectful, and contemptuous manner.

At the same time, our country grows more and more diverse. Many of our people revel in their particular cultures and diverse national origins, and properly so. Others are alienated from their fellow citizens and from government altogether. But we have no monarchy, no "state" religion, no elite class—hereditary or otherwise—"representing" the Nation. We have the flag.

The American flag is the one symbol that unites a very diverse people in a way nothing else can, in peace and in war. Despite our differences of party, politics, philosophy, religion, ethnic background, economic status, social status, or geographic region, the American flag forms a unique, common bond among us. Many do not realize that failure to protect the flag inevitably weakens this bond. The flag stands above all or our differences. The American people's desire for the legal protection of their beloved flag draws support across all of the lines that otherwise divide us.

It is not possible to express fully all of the reasons the flag deserves such protection. As then-Justice Rehnquist wrote in 1974: "The significance of the flag, and the deep emotional feelings it arouses in a large part of our citizenry, cannot be fully expressed in the two dimensions of a lawyer's brief or of a judicial opinion." *Smith* v. *Goguen,* 415 U.S. 566 at 602 (1974) (Rehnquist, J., dissenting). The same is true of a congressional committee report.

1. ANALYSIS OF S. 982, THE FLAG PROTECTION AND FREE SPEECH ACT OF 1997

Legislation is pending in the Senate—the Flag Protection and Free Speech Act of 1997, S. 982, to provide statutory protections for the flag based on the "fighting words" doctrine. A virtually identical bill was introduced in 1995, which the Senate Committee on the Judiciary, in its report on pending flag protection proposals, dismissed as "not a viable option." Nonetheless, prior to voting on the constitutional amendment in 1995, the full Senate gave specific consideration to the bill, and rejected it by a substantial majority.

Even if the proposed flag protection act were somehow to become law, the Supreme Court, based on its holdings in *Texas* v. *Johnson,* 491 U.S. 397 (1989) and *United States* v. *Eichman,* 496 U.S. 310 (1990), inevitably would strike the law down as unconstitutional. These holdings also make clear that the "fighting words" doctrine, as construed by the Supreme Court, will not save the bill from constitutional invalidation. Moreover, the proposed bill fails on public policy grounds, by providing only limited legal protection for the

flag of the United States and actually promoting violence instead of deterring it.

Moreover, this statute would doubtless be found unconstitutional under the same analysis that struck the statute at issue in *Eichman.* In response to *Texas* v. *Johnson,* which held the Texas flag protection statute unconstitutional, Congress enacted what it thought was a narrowly crafted, "content neutral" flag protection statute, only to have the statute invalidated a year later in the *United States* v. *Eichman* case.[2] The majority's interpretation of the first amendment in these two cases was perfectly clear: While Government may "encourage" respect for the flag, it may not, under color of law, single out the flag for protection.

In both *Johnson* and *Eichman,* the Court affirmed that expressive conduct, be it burning a draft card or the American flag, will be afforded less exacting constitutional scrutiny than pure speech. The Court also established that its primary concern in examining expressive conduct is whether "the government interest [in proscribing the conduct] is unrelated to the suppression of free expression." *United States* v. *Eichman,* 496 U.S. 310, 314 (1990), quoting *United States* v. *O'Brien,* 391 U.S. 367, 377 (1968). In both cases, the Court recognized the Government's interest to be protecting the flag as a symbol of "nationhood and national unity." *Eichman,* 496 U.S. at 314. The Court definitively concluded in *Eichman,* however, that even though the Federal statute "contains no explicit content-based limitation * * * the Government's asserted interest is related to the suppression of free expression." Id. at 315. According to the Court, the Government's desire to protect the flag "is implicated only when a person's treatment of the flag communicates a message to others." Id. at 316. In other words, the majority of the Court believes the flag represents certain determinate ideas and that *any* law specifically protecting the flag, by prohibiting damage or destruction of the flag, will be per se invalid.

Similarly, the proposed statute is contrary to the principles the Court articulated in the *Johnson* and *Eichman* decisions. The bill is designed to protect the flag as the "unique symbol of national unity * * * and the values of liberty, justice and equality." S. 982, 105th Cong., 2d sess., sec. 2(a)(1) (1998). As discussed above, however, the Court has specifically decided to condemn the goal of singling out the flag and the values it represents for protection.[3]

In addition, in the *Johnson* case, the Court specifically refuted the argument that a public flag burning at an anti-Government protest fit within the extremely narrow class of "fighting words"

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[2] In *Eichman,* the Supreme Court rejected the Government's attempt to distinguish between the content-neutral Federal statute, which criminalized flag destruction regardless of "the actor's motive, his intended message, or the likely effect of his conduct on onlookers" and the Texas statute at issue in *Johnson,* which regulated speech content by expressly prohibiting acts of physical desecration "that the actor knows will seriously offend onlookers." 496 U.S. at 315. According to the Court, in either instance, the Government's interest "is related to the suppression of free expression." Id.

[3] In a 1995 Congressional Research Service (CRS) analysis of Senator McConnell's 1995 flag protection statute, CRS predicted that the legislation would pass constitutional muster because "nothing in the legislation draws a distinction between approved or disapproved expression that is communicated by the action committed with or on the flag." John R. Luckey, American Law Division, Congressional Research Service, "Analysis of S. 1335, the Flag Protection and Free Speech Act of 1995," at 3 (Nov. 8, 1995). The Court, however, made perfectly clear in *Johnson* and *Eichman,* that, because the flag represents certain determinate ideas, *any* law specifically protecting the flag, regardless of its content neutrality, will be unconstitutional—see e.g., the content-neutral statute invalidated in the *Eichman* case.

that "are likely to provoke the average person to retaliation, and thereby cause a breach of the peace." 491 U.S. at 409, citing *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 574 (1942). According to the Court, no reasonable onlooker would have regarded the flag desecration "as a direct personal insult or an invitation to fisticuffs." Id. The Court concluded that, because "Texas already has a statute specifically prohibiting breaches of the peace * * * Texas need not punish flag desecration in order to keep the peace." Id. at 410. Indeed, the *Chaplinsky* "fighting words" doctrine is so rarely, if ever, followed and so often distinguished that it is extremely unlikely to save the proposed bill from constitutional infirmity.

The proposed statute also fails to achieve its stated ends. In addition to the constitutional flaws discussed above, the proposed statutory "fix" fails on public policy grounds. The stated purpose of the legislation is to provide "maximum protection" for the flag, yet the coverage of the bill is extremely limited. It would criminalize flag desecration that either is likely to "produce imminent violence or a breach of the peace" or when the flag is property of the United States or another citizen, provided the behavior occurs on Federal land.

In most cases of flag desecration, however, the flag is the property of the individual desecrating it, and in very few cases does flag desecration occur on Federal land or involve the kind of face-to-face incitement the legislation proposes to reach. Indeed, as discussed above, the Supreme Court in the *Johnson* case refused to apply the "fighting words" doctrine in the context of a public flag burning, finding the action unlikely to result in a "direct personal insult or an invitation to exchange fisticuffs." 491 U.S. 397, 409 (1989). Moreover, as the Court emphasized in the *Johnson* case, there are already Federal and State laws criminalizing the conduct—i.e. theft and breaches of the peace.

While enacting appropriate statutory protections for the flag is indeed preferable, the Supreme Court's decisions have resulted in the current predicament that such protections are not constitutionally possible.

D. S.J. Res. 40 Is An Appropriate Constitutional Remedy

1. S.J. RES. 40 DOES NOT "TRUMP" THE FIRST AMENDMENT OR OTHERWISE LIMIT FREE SPEECH

Contrary to certain claims, S.J. Res. 40 neither undermines the first amendment, nor does it limit free speech, properly understood. The proposed amendment would not prevent anyone from saying anything or engaging in protected activity. The amendment merely affords Congress the power to protect the flag. In and of itself, the amendment contains not limitation on speech of any kind.

By the same token, not everything arguably construed as "speech" enjoys first amendment protection. Until two recent, very narrow 5-to-4 decisions by the Supreme Court in *Texas* v. *Johnson,* 491 U.S. 397 (1989) and in *United States* v. *Eichman,* 496 U.S. 310 (1990), punishing flag desecration had been viewed as compatible with both the letter and spirit of the first amendment. This compatibility was consistent with the views of the Framers of the Con-

stitution, who strongly supported government actions to prohibit flag desecration.

Such leading proponents of individual rights as former Supreme Court Chief Justice Earl Warren, Justice Abe Fortas and Justice Hugo Black each have opined that the Nation could, consistent with the first amendment, prosecute physical desecration of the flag. As Justice Black, perhaps the leading exponent of first amendment freedoms ever to sit on the Supreme Court stated: "It passes my belief that anything in the Federal Constitution bars * * * making the deliberate burning of the American flag an offense." *Street* v. *New York,* 394 U.S. 576, 610 (1969). Former Chief Justice Earl Warren stated, "I believe that the States and the Federal Government do have power to protect the flag from acts of desecration and disgrace." Id. at 605.

This tradition and precedent is rooted in the principle that flag desecration is *expressive conduct* as distinguished from *actual speech.* Expressive conduct, be it burning a draft card or a flag, is afforded a lower level of constitutional protection than actual speech. A statute passed under the proposed amendment would not make it unlawful to say anything, no matter how repugnant the statement might be. What will be proscribed, consistent with first amendment case law, is certain conduct.

The Supreme Court has accepted the premise that certain "expressive" acts are entitled to first amendment protection, based upon the principle that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. *Texas* v. *Johnson,* 491 U.S. 397, 414 (1989). On the other hand, not all activity with an allegedly expressive component will be afforded first amendment protection. Someone who desires, for instance, to protest wildlife conservation laws could not, in the name of free speech, kill bald eagles. Nor could an individual break down the doors of the State Department merely because he disagreed with the Nation's foreign policy. The Court has said that certain modes of expression may be prohibited if: (1) the prohibition is supported by a legitimate government interest unrelated to suppression of the ideas the speaker desires to express; (2) the prohibition does not interfere with the speaker's freedom to express those ideas by other means; and (3) the interest in allowing the speaker complete freedom among all possible modes of expression is less important than the societal interest supporting the prohibition. *United States* v. *O'Brien,* 391 U.S. 367, 377 (1968).

Applying these principles, the Supreme Court upheld a statute prohibiting the destruction of draft cards against a first amendment challenge. Id. The Court stated that the prohibition served a legitimate purpose—facilitating draft induction in time of national crisis—that was unrelated to the suppression of the speaker's ideas, since the law prohibited the conduct regardless of the message sought to be conveyed by destruction of the draft card. The prohibition also did not preclude other forms of expression or protest, and the Court held that the smooth functioning of the Selective Service System outweighed the need to extend first amendment protections to the act itself. Id.

This reasoning is consistent with that of the *Eichman* dissenters. Chief Justice Rehnquist and Justices O'Connor, Stevens, and White

stated that Congress could prohibit flag desecration consistent with first amendment protections.

The dissenters reasoned as follows: First, the Federal Government has a legitimate interest in protecting the intrinsic value of the American flag, which, "in times of national crisis, inspires and motivates the average citizen to make personal sacrifices in order to achieve societal goals of overriding importance * * * and serves as a reminder of the paramount importance of pursuing the ideals that characterize our society." 496 U.S. at 319. According to the dissent, the Government's interest in preserving the value of the flag "is unrelated to the suppression of the ideas that flag burners are trying to express" and is "essentially the same regardless of which of many different ideas may have motivated a particular act." Id. at 320.

Nor, reasoned the dissenters, does the prohibition entail any interference with the speaker's freedom to express his or her ideas by other means. According to the dissent, while other means of expression may be less effective in drawing attention to the speaker's message, this is not itself a sufficient reason for immunizing flag desecration. Id. at 322. "Presumably a gigantic fireworks display or a parade of nude models in a public park might draw even more attention to a controversial message, but such methods of expression are nevertheless subject to regulation." Id. Moreover, although the value of the individual's choice is "unquestionably a matter of great importance," tolerance of flag burning will "tarnish that value." Id. at 322.

Thus, S.J. Res. 40 would not reduce our freedoms under the Bill of Rights. Rather than posing a fundamental threat to our constitutional freedoms, the proposed amendment would nurture liberty. The Bill of Rights is a listing of the great freedoms our citizens enjoy. It is not a license to engage in any type of behavior one can imagine. The proposed amendment affirms the most basic condition of our freedom: our bond to one another in our creation of national unity. The amendment would leave it to individuals, in numerous other ways, to express their views. But the amendment affirms that there is some commitment to others, beyond mere obedience to the formal rule of law, that must be respected. It affirms that, without some aspiration to national unity, there might be no law, no constitution, no freedoms such as those guaranteed in the Bill of Rights.

In addition, the amendment would be interpreted in light of the existing amendments and other constitutional provisions. When the 14th amendment was proposed, it could have been argued that Congress' power to enforce the equal protection clause might be used to undermine the first amendment right of free association. However, courts have been able to harmonize the 1st and 14th amendments. Likewise, the 9th and 10th amendments have been reassessed in light of other constitutional provisions. The same would be true with a flag protection amendment. Experience justifies confidence that the courts would interpret the terms "physical desecration" and "flag of the United States" in light of general values of free speech.

The proposed amendment is not intended to—and does not—discriminate against specific messages or points of view. Those who

desecrate the flag may be doing so to communicate any number of messages. They may be protesting a government policy or inactivity, or simply destroying the flag to get media attention. Laws enacted under the proposed amendment would apply to all such activity, whatever the message.

This is a narrowly drawn amendment proposal, tailored to control a narrow area of the law. It would supersede two Supreme Court cases decided by 5-to-4 majorities. It is not self-executing, and thus would require an implementing statute. Moreover, S.J. Res. 40 is even more narrowly tailored than the proposal considered during the 104th Congress. In contrast to that amendment proposal, S.J. Res. 40 would authorize only Congress—not the States—to pass a statute to protect the flag from acts of physical desecration.

Finally, among all the various forms of expression, only one can be regulated under the amendment: *desecration.* That regulation, moreover, could extend no further than a ban on one, and only one, extreme instance of this: *physical* desecration. Experience justifies confidence in our judicial system to distinguish between the numerous legitimate forms of communication and the act of physically desecrating a flag.

The Supreme Court has made clear that not only may the Government sometimes regulate the content of speech, sometimes it *should* do so in order to protect the system of freedom of speech in general. The Supreme Court has affirmed this principle in several instances, refusing, for instance, to privilege speech that:

- First, is likely to incite an immediate, violent response, such as face-to-face fighting words likely to cause a breach of the peace, *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942); or words likely to incite a riot, *Feiner* v. *New York,* 340 U.S. 315 (1951).
- Second, threatens certain tangible, diffuse harm, such as obscenity, which pollutes the moral environment, *Miller* v. *California,* 413 U.S. 15 (1973); *Roth* v. *United States,* 354 U.S. 476 (1957).
- Third, criticizes official conduct—i.e. libel—of a public official, when the criticism is known to be false and damages the official's reputation. In this instance, the Court held that such speech *should* be regulated since it is at odds with the premises of democratic government, *New York Times* v. *Sullivan,* 367 U.S. 254, 270 (1964).

The Court has said that utterances, such as those set out above, "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 572 (1942).

As a consequence, there is no basis for the assertion that the amendment "trumps" or supersedes other parts of the Constitution. Such an assertion is a scare tactic. Nothing in the text of the amendment provides a basis for that fear. Opponents to the flag amendment raise this concern by citing two cases. The first is *Smith* v. *Goguen,* 415 U.S. 566 (1974), a case involving the void-

for-vagueness doctrine of the due-process clause of the 14th amendment. But there is no basis at all to suggest S.J. Res. 40 trumps the due-process clause of the 5th and 14th amendments. Nothing in the amendment suggests that result. Nor does this case suggest that flag statutes enacted pursuant to S.J. Res. 40 would not be subject to, or unable to withstand, due-process scrutiny.

In *Smith* v. *Goguen,* the Court found a portion of a Massachusetts law void because it was unconstitutionally vague. The Court, however, did not reach first amendment issues. The Massachusetts statute made illegal publicly mutilating, trampling upon, defacing, or *treating contemptuously* the flag of the United States. The phrase "treats contemptuously" was the offending unconstitutionally vague phrase.

Yet, in the very same opinion, the Court noted: "Certainly nothing prevents a legislature from defining with substantial specificity what constitutes forbidden treatment of United States flags. The federal flag desecration statute * * * reflects a congressional purpose to do just that * * * [That statute reaches] only acts that physically damage the flag." 415 U.S. at 582. The Court then quoted the Federal statute, as a flag statute surviving a due process, void-for-vagueness claim: "Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it."

In other words, legislation under the flag amendment is subject to the void-for-vagueness doctrine. But that doctrine allows Congress and the States to prohibit contemptuous or disrespectful treatment of the flag so long as there is substantial specificity in spelling out what that treatment is—be it by burning, mutilating, defacing, trampling, and so on.

This amendment authorizes the very same language the Court cited from the Federal statute. *Smith* v. *Goguen* is not affected by this amendment, and casting contempt on the flag by physical acts survives a due-process vagueness challenge under that decision.

Opponents raise similar concerns about the Supreme Court's decision in *R.A.V.* v. *St. Paul,* 112 S. Ct. 2538 (1992). The Committee, however, finds concern about S.J. Res. 40 in light of *R.A.V.* to be misplaced. Congress and the States are not authorized by the flag protection amendment to enact statutes banning physical flag desecration *only* by advocates of particular points of view. That is, for example, a legislature could not ban burning the flag by those who condemn an increase in military spending, but not ban such desecration by those who seek to protest what they believe to be inadequate military spending. See *R.A.V.* v. *City of St. Paul* [112 S. Ct. 2538 (1992)].

The judiciary has already determined that the first amendment does not protect libel. *R.A.V.* says: "* * * the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government." [112 S. Ct. at 2543]. Similarly, S.J. Res. 40, if ratified, will establish that the Constitution does not protect physical desecration of the flag. Congress and the States, having created power in the Government to proscribe flag desecration, *R.A.V.* then only requires that the Government not discriminate among flag desecrators based on the points of view they seek to dramatize by their particular physical

desecration. Similarly, governments could not ban physical desecration of the flags by members of one race but not ban it when committed by members of other races, per the 5th and 14th amendments.

As further indication of the lack of merit to the administration's criticism that the flag amendment might supersede other parts of the Bill of Rights, consider the 16th amendment. It too is one sentence: "The Congress shall have power to lay and collect taxes on income, from whatever source derived, without any regard to any census or enumeration."

This language, ratified in 1913, is remarkably similar to the flag amendment in that it says, without more, that a legislative body, "shall have power" to do something. Do the critics of S.J. Res. 40 doubt the applicability of the fourth and eighth amendments to legislation enacted under the income tax amendment? The Committee assumes not.

2. CONGRESS HAS A COMPELLING INTEREST IN PROTECTING THE FLAG

The Government's legitimate interest in protecting the flag has three main components:

a. Preserving the values embodied by the flag

Protecting the flag from physical desecration preserves the values of liberty, equality, and personal responsibility that Americans have passionately defended and debated throughout our history and which the flag uniquely embodies. It is commonly accepted today that the traditional values upon which our Nation was founded, and which find tangible expression in our respect for the flag, are essential to the smooth functioning of a free society. Flag protection highlights and enhances these values and thus helps to preserve freedom and democratic government.

b. Enhancing national unity

The Government has a fundamental interest in protecting the most basic condition of freedom: our bond to one another in our aspiration for national unity. With traditional unifying elements of American language, culture, and heritage fraying, the flag remains a single unifying embodiment of our unceasing struggle for liberty and equality and our basic commitment to others. The flag affirms that without some desire for national unity, a free people and constitutional government cannot long endure.

c. Protecting an incident of our national sovereignty

Finally, the flag is an important incident of our national sovereignty. The United States—like many other nations—displays the flag to signify national ownership and protection. By pronouncements in the earliest years of the Republic, the Framers of the Constitution made clear that the flag, and its physical requirements, related to the existence and sovereignty of the Nation and that insults to the flag were matters of great national concern that warranted strict punitive action. James Madison, for instance, stated that desecration of the flag is "a dire invasion of sovereignty." Letter from Secretary of State James Madison to Pennsylvania Governor McKean (May 11, 1802). Thomas Jefferson, moreover,

considered violation of the flag worthy of "systematic and severe course of punishment." Writings of Thomas Jefferson 49 (mem. ed. 1903).

3. S.J. RES. 40 WILL RESTORE TO CONGRESS THE POWER TO ENACT A STATUTE PROHIBITING THE PHYSICAL DESECRATION OF THE AMERICAN FLAG

Some critics of S.J. Res. 40 suggest that passage is unnecessary because "governmental power to legislate in this area * * * always has been assumed to exist." (Id. at 4). The Committee finds it odd that some continue to advocate that Congress currently possess, notwithstanding *Johnson* and *Eichman,* the legislative power that the Supreme Court so decisively and permanently prevented it from exercising in those two very cases.

Indeed, the Supreme Court in *Texas* v. *Johnson* stated, "There is * * * no indication—either in the text of the Constitution or in our cases interpreting it—that a separate juridical category exists for the American flag alone." (491 U.S. at 417). Simply put, this amendment creates that "separate juridical category" for the flag in the Constitution's text, and grants the power to prohibit physical desecration of the flag the Supreme Court took away in 1989. Indeed, any other interpretation of the amendment renders it meaningless.

Similarly, on July 8, 1998, Professor Parker told the Committee that Congress could not remedy flag desecration by statute:

> I think it is as clear as anything can be in law that the answer to that is no, sir. Because the crux of the Court's decision was this idea that the flag represents just one point of view on a level and in competition with others and that government therefore may not take sides in favor of the flag, it is simply impermissible to pass any statute which specifically protects the flag. Of course, there are already statutes prohibiting certain acts, but you may not pass a statute according to the Court, that specifically protects the flag.
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> * * * * *
>
> Any statute which specifically focused on the flag and protected it as a symbol embodying certain value of national community would be seen by the Supreme Court, I think mistakenly, as not content-neutral. There is unfortunately simply no way out. I think it is to Congress' great credit that Congress tried the statutory route and immediately was slapped down by the same 5-to-4 majority of the Justices.

(Testimony of Prof. Richard Parker, July 8, 1998, at 106–107.)

4. THE TERMS "PHYSICAL DESECRATION" AND "FLAG OF THE UNITED STATES" ARE PRECISE ENOUGH FOR INCLUSION IN THE CONSTITUTION

The proposed amendment is not self-executing, so a statute would need to be enacted under the amendment that, presumably, would define terms, set penalties and further define actions that would be proscribed. Moreover, judges, law enforcement officials

and juries would interpret and refine the law in this area, similar to the development of any new area of the law. Prior to the *Texas* v. *Johnson* decision, 48 States had laws prohibiting flag desecration, and the history of prosecutions in this area does not suggest abuse by prosecutors or any other sector of the judicial system. See e.g., *State* v. *Royal,* 113 N.H. 224, 229, 305 A.2d 676, 680 (1973); *State* v. *Mitchell,* 32 Ohio App. 2d 16, 30, 288 N.E.2d 216, 226 (1972); *State* v. *Waterman,* 190 N.W.2d 809, 811–812 (Iowa 1971). In the case of a statute adopted under the proposed amendment, the judicial system would interpret "physical desecration" and "flag of the United States" in light of general values of free speech. These are the types of terms that raise issues of fact and degree, context and intent, comparable to questions that courts resolve, year in and year out, under practically every other constitutional provision. Experience justifies confidence in our judicial system with respect to answering these questions.

The Senate in the 105th Congress should not subject S.J. Res. 40, which authorizes legislation protecting the American flag, to a higher standard than the Framers subjected the terms of the Constitution and the Bill of Rights in the Philadelphia Convention and in the First Congress. The terms of the flag protection amendment are at least as precise, if not more so, than such terms as "unreasonable searches and seizures"; "probable cause"; "speedy * * * trial"; "excessive bail"; "excessive fines"; "cruel and unusual punishment"; "due process of law"; "just compensation"—all terms from the Bill of Rights. Similarly, the 39th Congress was not deterred from the inclusion of the term "equal protection of the laws" in the 14th amendment by concerns of alleged vagueness. None of these terms are self-executing. All have been eventually explicated by the judiciary. Moreover, we should not lose sight of the fact that all the flag protection amendment does is authorize Congress to enact implementing legislation. Congress will implement the flag protection amendment with the specificity of statutory language which itself, as mentioned earlier, will be subject to constitutional requirements.

Second, the Committee does not consider ambiguous the word "desecrate," which in turn is modified by the word "physically." The term "desecrate" means to treat with contempt, to treat with disrespect, to treat with profanity, or to violate the sanctity of something. The Committee does not believe these terms are too difficult for our legislatures and courts to comprehend. Congress had no difficulty in utilizing its constitutional power to legislate sensibly on this subject in 1968. Legislative bodies will define what treatment they believe constitutes desecration. Accidental acts are not reachable. As Professor Parker testified:

> It's useful to keep in mind that this word—like any number of others in the constitutional text—is a term of art. It has no religious connotation. The Constitution of Massachusetts, for instance, provides that the right to jury trial "must be held sacred" [Constitution of the Commonwealth of Massachusetts, pt. I, art. 15], and no one reads that as a theological mandate. The question for courts interpreting the proposed amendment would be: what sorts of physical treatment of the flag are so grossly contemptuous of it as to count as "desecration?" This is the type

> of question—raising issues of the fact and degree, context, and purpose—that the courts resolve year in and year out under the constitutional provisions. Thus, there is nothing radical or extreme about the flag amendment—unless it is the rhetoric igniting and fueling all kinds of fears purveyed by some of its opponents.

Furthermore, the flag protection amendment does not authorize legislation which prohibits displaying or carrying the flag at meetings or marches of any group—be they Nazis, Marxists, or anyone else. The amendment does not authorize legislation prohibiting derogatory comments about the flag or cursing the flag, nor does it authorize a prohibition on shaking one's fist at the flag or making obscene gestures at the flag, whether or not such gestures are accompanied by words. The amendment does not authorize legislation penalizing carrying or displaying the flag upside down as a signal of distress of flying it at half mast on days other than on officially designated occasions.

Significantly, the flag protection amendment does not disturb Congress' power alone to determine the design of the flag of the United States. Congress has that authority under Title 4, U.S.C. 1 and 2. Assuming that the amendment is ratified, Congress is still free to change the design of the flag, but no State now or in the future will be able to determine the design of the American flag.

5. POSSIBLE EXAMPLES OF LEGISLATION IMPLEMENTING S.J. RES. 40

While the Committee does not believe that congressional consideration of a constitutional amendment empowering Congress and the States is the appropriate time to discuss the details of implementing legislation, the Committee notes two of the possible legislative models.

For example, the term "flag of the United States" could be defined at the narrowest as just a cloth or other substance or material readily able to be flown, waved, or displayed with the characteristics as set out in the United States Code sections mentioned earlier. The flag, of such characteristics and material, could also be defined to be of any size of dimensions. That would be up to legislative bodies to determine.

Another possible definition available to Congress would be to include in the definition of the flag something a reasonable person would perceive to be a flag of the United States meeting the design set forth in the United States Code, and capable of being waved, flown, or displayed, regardless of whether it is precisely identical to that design. Thus, under such a definition, for example, physically desecrating a flag with 48 stars, or 12 or 14 stripes, could be covered. Congress may wish to use such a definition because the reasons we would ban burning, defacing, or mutilating an American flag obtained when the flag being burned or mutilated has 48 stars, for example, and people cannot readily tell the difference between it and a 50-star flag. When examining these two flags closely, they look indistinguishable. For example, it may be possible that the defendants in the *Johnson* and *Eichman* cases may have burned flags with less than 50 stars or 13 stripes.

The choice of how to define what to cover under the term "flag of the United States" should be left up to the sensible judgment of the American people, as it had been for 200 years before the *Johnson* decision.

6. PARADE OF HORRIBLES ARE AN ILLUSION

As to the parade of horribles opponents invoke in opposition to the amendment, there is a straightforward answer. For many years, 48 States and Federal Government had flag protection statutes on the books. Yet, there were no insuperable problems of administration, enforcement, or adjudication under those statutes.

Testing the hypotheticals posed by opponents of this amendment, such as the status of bathing suits, paper cups, and napkins, each bearing a picture of the flag, against the history of enforcement of flag desecration statutes, renders these hypotheticals no basis for opposing the amendment. This is especially true in light of a string of judicial decisions since these statutes were first enacted: extending the first amendment's free speech protection against the actions of the States; requiring substantial specificity in what is made illegal; and effectively prohibiting discrimination between desecrators based on viewpoint. It is also especially true in light of the universal understanding that words alone casting contempt on the flag cannot be actionable under the flag protection amendment.

The Committee believes, moreover, that States and Congress will legislate with care, and with the specificity required by the Constitution. There certainly is a greater awareness of concerns raised by opponents of legal protection of the flag from physical desecration—however exaggerated many of the hypotheticals are—than existed at the time most of the 49 pre-1989 statutes were enacted.

Reliance on the parade of horribles to oppose the amendment would reflect the Senate's fundamental distrust of the people and of Congress itself, to enact reasonable flag protection statutes.

As Prof. Richard Parker stated:

> Finally, the slippery slope argument—pass this amendment and who knows what will come next—suggests either a stunning lack of confidence in the Congress itself, which is empowered to act by this amendment, or a failure to understand how hard it is to amend the Constitution. Eleven thousand amendments have been proposed, 27 have been ratified. The slope is uphill, not downhill.

(Testimony of Richard Parker, before the U.S. Senate Judiciary Committee, July 8, 1998.)

The Committee is mindful that it is the Constitution we are proposing to amend, not a code of statutes. Drafting the language of a flag protection amendment too narrowly runs a serious risk of thwarting the American people's ability to legislate protection of their flag from the range of acts or conduct which might physically misuse, or cast contempt physically on, the flag. Thus, a constitutional amendment so specific as to authorize, for example, the prohibition of burning or trampling the flag leaves the American people powerless to prohibit the defacing or mutilating of the flag. No supporter of protecting the American flag from physical desecration wishes to amend the Constitution *twice* to achieve that purpose.

7. THE FLAG PROTECTION AMENDMENT IS NO PRECEDENT WHATSOEVER FOR ANY OTHER CONSTITUTIONAL AMENDMENT OR STATUTE

There is no "slippery slope" here, as well. The flag protection amendment is limited to authorizing States and the Federal Government to prohibit physical desecration of only the American flag. It serves as no precedent for any other legislation of constitutional amendment on any other subject or mode of conduct, precisely because the flag is unique. Moreover, the difficulty in amending the Constitution serves as a powerful check on any effort to reach other conduct, let alone speech, which the Supreme Court has determined is protected by the first amendment.

It is not the "thought we hate" which this amendment would allow Congress and the States to prohibit, but rather, one narrow method of dramatizing a viewpoint—one form of conduct. No speech, and no conduct other than physical desecration of the American flag, can be regulated under legislation authorized by the amendment.

Some critics of the amendment ask, is our flag so fragile as to require legal protection? The Committee has explained why it believes our national symbol should be legally protected. The better question is—is our freedom of expression so fragile in this country as to be unable to withstand the withdrawal of the flag from physical desecration? Of course not. Unpopular ideas have many avenues of expression, including the use of marches, rallies, picketing, leaflets, placards, bullhorns, and so very much more.

8. THE AMERICAN FLAG DESERVES LEGAL PROTECTION REGARDLESS OF THE NUMBER OF FLAG DESECRATIONS IN RECENT YEARS

Opponents of this resolution counter that in light of the very few isolated instances of flag desecration, the flag is amply protected by its unique stature as an embodiment of national unity and ideals.

The Committee does not believe there is some threshold of flag desecrations during a specified time period necessary before triggering congressional action. Certainly, critics of the amendment cite no such threshold. If it is right to empower the American people to protect the American flag, it is right regardless of the number of such desecrations. And no one can predict the number of such desecrations which may be attempted or performed in the future.

9. A "CONTENT NEUTRAL" CONSTITUTION AMENDMENT IS WHOLLY INAPPROPRIATE

A few critics of S.J. Res. 40 believe that *all* physical impairment of the integrity of the flag, such as by burning or mutilating, must be made illegal or no such misuse of the flag should be illegal. This "all or nothing" approach flies in the face of nearly a century of legislative protection of the flag. It is also wholly impractical.

In order to be truly "content neutral," it has been argued, such an amendment must have no exceptions, *even for the disposal of a worn or soiled flag.* Once such an exception is allowed, the veneer of content neutrality is stripped away. If such an exception is not permitted, however, and burning a worn or soiled flag for disposal purposes is made illegal, the American people would be subjected

to the unacceptable choice of letting worn or soiled flags literally accumulate, or breaking the law by disposing of them in a manner already designated by Congress in the flag code: "The flag, when it is in such condition that it is no longer a fitting emblem shown for display, should be destroyed in a dignified way, preferably by burning." 36 U.S.C. 176(k). While the flag code is legally unenforceable, the flag code represents a traditional and commonly held view of proper disposal of flags no longer fit for display—one followed by the National Park Service, for example (The Sun, July 4, 1995).

The threshold question that must be answered by proponents of this suggestion is whether anyone *really* wants a "neutral" flag protection statute. Does anyone *really* want to protect the physical integrity of all American flags, regardless of the circumstances surrounding the prohibited conduct? Certainly, the constitutional scholars suggesting a "neutral" flag protection amendment do not, for they advance the idea only as a lesser evil than the Flag Protection Amendment. Nor are supporters of the proposed Flag Protection Amendment likely to be persuaded that a "neutral" alternative would be preferable. The problem is that a genuinely "neutral" flag protection measure is not practical or effective.

The act of burning an American flag is not inherently evil. Indeed, the Boy Scouts of America have long held that an American flag, "when worn beyond repair" should be destroyed "in a dignified way by burning." Boy Scout Handbook at 422 (9th ed.). Similarly, Congress had prescribed [such disposal for flags no longer fit for display]. Nor is the respectful disposition of an old flag the only occasion on which burning a flag might be entirely proper. The old soldier whose last wish is to be cremated with a prized American flag fast against his breast would be deserving of respect and admiration, rather than condemnation.

In contrast, the defendant in *Johnson* engaged in plainly offensive conduct not simply because he burned an American flag, but because of the manner in which he burned it. Yet, a truly neutral flag protection statute would require us to be blind to the distinction between the conduct of Gregory Lee Johnson and his comrades and the conduct of a Boy Scout troop reverently burning an old and worn American flag. It would also reach other forms of conduct that honor, rather than desecrate, the flag. If, rather than burning an American flag, Gregory Lee Johnson and his colleagues had heaped dirt upon it in some sort of anti-American burial ritual, their conduct would undoubtedly have violated not only the Texas flag desecration statute, but a "neutral" flag protection statute as well. A "neutral" flag protection statute, however, would also have reached and punished the conduct of the unidentified patriot who gathered up Johnson's charred flag and buried it in his backyard.

Moreover, not only would a "neutral" flag protection statute prohibit conduct that should be praised rather than punished, it would fail to prohibit an infinite variety of public conduct that casts contempt upon the flag. Such a statute would prohibit only conduct that compromises the physical integrity of the flag. Conduct that is not physically destructive of the flag, no matter how openly offensive and disrespectful it may be would presumably not be reached. Thus, affixing an American flag to the seat of one's pants

or simulating vulgar acts with a flag would not come within such a prohibition.

Thus, a "neutral" flag protection statute is at once too broad, since it would prohibit conduct that no one wants to prohibit, and too narrow, since it would permit conduct that few people want to permit. The proposal therefore simply does not mesh with the public sentiment that animated the passage of 48 State flag desecration statutes and a similar measure by the Federal Government, that led to the prosecution of Gregory Lee Johnson under the Texas flag desecration law, that provoked the extraordinary public outcry at the Supreme Court's reversal of Johnson's conviction, and that inspired this hearing.

A content neutral amendment would forbid an American combat veteran from taking an American flag flown in battle and having printed on it the name of his unit and location of specific battles, in honor of his unit, the service his fellow soldiers, and the memory of the lost.

The Committee does wish to empower Congress to prohibit the contemptuous or disrespectful physical treatment of the flag. The Committee does *not* wish to compel Congress to penalize respectful treatment of the flag. A constitutional amendment that would treat the placing of the name of a military unit on a flag as the equivalent of placing the words "Down with the fascist Federal Government" or racist remarks on the flag is *not* what the popular movement for protecting the flag is all about. The Committee respectfully submits that such an approach ignores distinctions well understood by tens of millions of Americans. Moreover, a constitutional amendment equating the ceremonial, reverential disposal of a worn American flag by burning, with the contemptuous burning of the flag to dramatize this or that viewpoint is as impractical as it is over broad.

Moreover, never in the 204 years of the first amendment has the free-speech clause been construed as totally "content neutral." Whether freedom of speech is, in fact, robust and wide-open does not depend solely, or even primarily, on case-by-case adjudication by the courts. It depends most of all on conditions of culture. First, it depends on the willingness and capacity of people to express themselves energetically and effectively in public. Second, it depends on acceptance as well as tolerance, official and unofficial, of an extremely wide range of viewpoints and modes of expression. And third, it depends on adherence to very basic parameters that, like constitutional provisions in general, help structure democratic life the better to release its energies.

Indeed, despite talk of "content-neutrality," the following principle of constitutional law is very clear: Government sometimes may sanction you for speaking because of the way the *content* of what you say affects other people. The Supreme Court understands the principle to rule out speech that threatens to cause imminent tangible harm: face-to-face fighting words, incitement to violation of law, shouting "fire" in a crowded theater. And it does not stop there. It understands the principle, also, to rule out speech that threatens certain intangible, even diffuse, harms. It has, for instance, described obscenity as pollution of the moral "environment." But what about "political" speech critical of the Government? Isn't

there a bright line protecting that, at least so long as no imminent physical harm is threatened? The answer is: No. The Court has made clear, for instance, that statements criticizing official conduct of a public official may be sanctioned if they are known to be false and damage the reputation of the official. There has been no outcry against this rule. It was set forth by the Warren Court—in an opinion by Justice Brennan, the very opinion that established freedom of speech as "robust and wide-open." [*New York Times* v. *Sullivan,* 376 U.S. 254 (1964)]. It has been reaffirmed ever since.

IV. VOTE OF THE COMMITTEE

On June 24, 1998, with a quorum present, by rollcall vote, the Committee on the Judiciary voted on a motion to report favorably S.J. Res. 40. The motion was adopted by a vote of 11 yeas and 7 nays, as follows:

Yeas	Nays
Hatch	Leahy
Thurmond	Kennedy
Grassley	Biden
Specter	Kohl
Thompson	Feingold
Kyl	Durbin
DeWine	Torricelli
Ashcroft	
Abraham	
Sessions	
Feinstein	

V. TEXT OF S.J. RES. 40

JOINT RESOLUTION proposing an amendment to the Constitution of the United States authorizing Congress to prohibit the physical desecration of the flag of the United States

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within 7 years after the date of its submission for ratification:

"Article —

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

VI. COST ESTIMATE

The Congressional Budget Office has supplied the Committee with the following report estimating the proposed amendment's potential costs:

> By itself, this resolution would have no impact on the federal budget. If the proposed amendment to the Constitution is approved by the states, then any future legisla-

> tion prohibiting flag desecration could impose additional costs on U.S. law enforcement and the court system to the extent that cases involving desecration of the flag are pursued and prosecuted. However, CBO does not expect any resulting costs to be significant. Because enactment of S.J. Res. 40 would not affect direct spending or receipts, pay-as-you-go procedures would apply.

(Congressional Budget Office, "Cost Estimate, S.J. Res. 40," letter dated June 29, 1998.)

VII. REGULATORY IMPACT STATEMENT

Pursuant to paragraph 11(b), rule XXVI of the Standing Rules of the Senate, the Committee, after due consideration, concludes that Senate Joint Resolution 40 will not have direct regulatory impact.

VIII. MINORITY VIEWS OF SENATORS LEAHY, KENNEDY, KOHL, FEINGOLD, DURBIN, AND TORRICELLI

I. INTRODUCTION

A. THE FLAG OF THE UNITED STATES IS A SOURCE OF PRIDE FOR THE ENTIRE NATION

The central fact that keeps re-emerging from the hearings and debate on this issue is the deep love with which nearly all Americans regard the flag, and the utter revulsion with which we regard those who would, for instance, burn the flag with contempt. Discussion of the flag evokes a flood of often highly personal memories of the flag and those who have fought and died to defend the freedom and the nation for which it stands. We recall with deep pride the youth of this country who have given their lives to bring the freedoms that we take for granted to other countries less blessed with liberty.

All agree that we should honor their sacrifice. The central question before the Congress now is not whether we respect their sacrifice. It is whether we will honor their sacrifice by upholding the freedom for which they fought or whether we will diminish that freedom in a symbolic gesture.

This is the rare occasion that tests our conception of who we are as Americans. Are we a people who have the confidence and courage to tolerate the statement of contempt for something we hold dear? Or are we so insecure that we must silence those whose contempt would anger or frighten us? Justice Robert Jackson gave us the answer in words that have served us well for over half a century now:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or deed their faith therein.

B. ISOLATED FLAG BURNINGS DO NOT DIMINISH THE UNWAVERING RESPECT AMERICANS HOLD FOR THE UNITED STATES FLAG

Not one person has testified that they respect the flag less because a protester has burned it, sewed it in the seat of his pants, or misused it in a work of "art.". Not one person has testified that they love our country less because Americans are free to express themselves in this way. There is not one single indication that any act of flag-burning has lessened the respect that any American has for the flag or for our country. In fact, as Professor Robert Justin Goldstein observed, "the main result of incidents of flag desecration is to boost feelings of patriotism."

The notion propounded by the Majority Report that our national unity is threatened by flag burning is at once nonsensical and insulting. The Majority Report urges that (1) a system of free speech requires a community, (2) that a community requires a unifying symbol, (3) that the flag is our unifying symbol, so that (4) we must punish flag protestors in order to have free speech. By the same "logic," there has been no free speech in America since the *Johnson* decision and that there can be no free speech between us and Canadians, for example, who do not share our flag. This is nonsense. In fact, the American community that underlies the free speech we enjoy can be found deep in the bedrock of our shared history, and not in any one symbol.

Our respect for the flag, for this country and for our abundant freedoms is far too strong to be shaken by the occasional acts of hooligans. When the rare individual burns a flag, it does not diminish the respect for the flag or for our country. It would be pathetic if our love of country or respect for its fundamental principles was so weak that it could be diminished by such an act. We know that it is not.

By the same token, an amendment to the Constitution can do nothing to increase our respect for the flag or for our country. Senator Feingold quoted Keith Kreul, a former national commander of the American Legion:

> While all good Americans are appalled by flag desecrations, we must keep our perspective and not initiate an action that results in a dangerous precedent. A patriot cannot be created by legislation. Patriotism must be nurtured in the family and in the educational process. Attempts to bestow honor by government decree upon the flag are an idle myth and must not prevail.

(Transcript June 24, 1998, at 15.) We respect and love our country for what it is, not because we are told to respect it. We do not love our country because we would be punished if we did not.

C. THE SACRIFICES OF AMERICAN VETERANS TRANSCEND MERE SYMBOLS

Nor can the sacrifice and achievement of the brave soldiers who gave their lives for the freedom the flag represents be honored or increased by a constitutional amendment. To believe so is to diminish their sacrifice. Abraham Lincoln said it best:

> But in a larger sense, we cannot dedicate, we cannot consecrate, we cannot hallow this ground. The brave men, living and dead who struggled here have consecrated it far above our poor power to add or detract. The world will little note nor long remember what we say here, but it can never forget what they did here. It is for us the living rather to be dedicated here to the unfinished work which they who fought here have thus far so nobly advanced. It is rather for us to be here dedicated to the great task remaining before us—that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion—that we here highly resolve that these dead shall not have died in vain, that this na-

> tion under God shall have a new birth of freedom, and that government of the people, by the people, for the people shall not perish from the earth.

It was not for a flag that those soldiers fought and died, it was for the freedom that Lincoln so eloquently proclaimed. Nothing that we do can further exalt their sacrifice. Nothing that any protester can do can diminish it.

Senator Leahy underlined the difference between symbols of our freedom and that freedom itself:

> The truly precious part of that legacy does not lie in outward things—in monuments or statues or even flags. All that these tangible things can do is remind us of what is precious. The truly precious thing is our liberty. The thing of value is our freedom.
>
> If some disaster were to sweep away all of the monuments in this country, the Republic would survive, just as strong as ever.
>
> But if some other disaster, some failure of our souls, were to sweep away the ideals of Washington, Jefferson and Lincoln, then not all of the stone, not all of the marble, not all of the flags in this world would restore our greatness. Instead, they would be mocking reminders of what we had lost.

It is our freedom, including most especially our freedom of speech, that we should devote our energies to protecting. It is more important to honor our veterans with substance rather than symbols.

D. WE BEST HONOR OUR VETERANS BY HONORING OUR PROMISES TO THEM

We dishonor our veterans when we fail "to care for him who shall have borne the battle, and for his widow, and his orphan." It is thus with ineffable sadness that we note a pattern on the part of many to deny veterans their due. We note the Senate's vote during the debate on the Intermodal Surface Transportation Efficiency Act of 1998 (ISTEA) to shift $10.5 billion worth of critical veterans funding in order to help pay for extravagant highway spending programs. The Senate revisited this raid on veterans' programs three times, in the budget resolution, in the IRS Reform legislation, and in the VA/HUD Appropriations Bill. All three times, too many Senators voted against the veterans. If only a few more of those who now beat their chests about symbolic actions had voted for the veterans, the necessary $10.5 billion in funding for veterans would have been assured.

The Senate has had numerous opportunities to increase the funds in the Veteran Administration's medical care account. Hospitals are seeing more patients with less funding and staff, and it can take months to get a doctor's appointment. It is not mere symbolism to fund those hospitals.

Since the end of the Cold War, as military bases close, military retirees who relied on the base hospitals for space-available free medical care are losing access to that care. Many of those service members retired near military bases specifically so that they could enjoy the free medical care they were promised, but now have to

find health care in the marketplace. We could give military retirees access to the Federal Employee Health Benefit (FEHB) program that all other federal employees, including Senators, enjoy. If we truly wish to honor our veterans, we should give them more than symbols, more than "mocking reminders" of what we deny them.

II. There is No Evidence To Justify Amending the Bill of Rights for the First Time in Our Nation's History

A. THE CONSTITUTION SHOULD BE AMENDED ONLY UNDER VERY LIMITED CIRCUMSTANCES

James Madison, a great Framer of the Constitution, told posterity that amendments should be limited to "certain great and extraordinary occasions." It is distressing to find his advice so unheeded that there are more than 100 proposed constitutional amendments pending before the 105th Congress, but reassuring to recall that since Madison spoke, although some 11,000 amendments have been offered, only 17 have been adopted since the adoption of the Bill of Rights.

Senate Joint Resolution 40 is offered in direct response to Supreme Court decisions in *Texas* v. *Johnson,* 491 U.S. 397 (1989) and *United States* v. *Eichman,* 496 U.S. 310 (1990). In our system of carefully balanced powers, it is most unusual to overturn decisions of the Nation's arbiter. On at most four occasions in the history of this country has a constitutional amendment been adopted in response to a decision of the Supreme Court.[1] Significantly, two of these Amendments, the Fourteenth and Twenty-Sixth, expanded the rights of Americans, while two involved the mechanics of government. Senate Joint Resolution 40 would be the first amendment to the Constitution that would infringe on the rights enjoyed by Americans pursuant to the Bill of Rights.

Worse, the infringement would fall on the First Amendment, the cornerstone and foundation of all of our rights, of which we must be especially protective. As Senator Leahy said:

> All of our freedoms, all of our liberties rest on the First Amendment. It is the granite of democracy, our bedrock. Without the right to speak out all of our other rights are only so much paper. Without the right to assemble and petition, you literally cannot fight City Hall, let alone the State legislature or the Congress or the IRS. You're stuck. Without the freedom to worship or not, unmolested, there is a gaping void at the very core of life.

We should observe special caution in approaching limits on the First Amendment. This unprecedented use of the Constitution of the United States to limit rather than expand the liberties of ordi-

[1] *Chisholm* v. *Georgia,* 2 Dall. 419 (1793) prompted the adoption of the Eleventh Amendment bar to suits in federal courts against States by citizens of other States or by citizens or subjects of foreign jurisdictions. In 1868, the Fourteenth Amendment arguably was adopted in response to the Dred Scott decision, *Scott* v. *Sanford,* 19 How. 393 (1857), although the introduction of the Black Codes following the Civil War likely was the true catalyst. In 1913, the Sixteenth Amendment was adopted to permit Congress to levy a tax on incomes after the Court's decision in *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U.S. 429 (1895). Finally, the Twenty-Sixth Amendment was a response to the decision in *Oregon* v. *Mitchell,* 400 U.S. 112 (1970) that Congress lacked the power under Article I to lower the voting age to 18 in State as well as federal elections.

nary Americans defies the long established principle that the Constitution is a limitation on government and not on individuals.

In Federalist No. 43, James Madison wrote that the Constitution establishes a balanced system for amendment, guarding "equally against that extreme facility, which would render the Constitution too mutable, and that extreme difficulty, which might perpetuate its discovered faults." The concern of the Framers that amendments would come too frequently is profoundly conservative, in the best sense of that word, as expressed in Federalist No. 49.

> [A]s every appeal to the people would carry an implication of some defect in government, frequent appeals would, in great measure, deprive the government of that veneration which time bestows on everything and without which perhaps the wisest and freest governments would not possess the requisite stability.

The horror with which the Framers might regard the 11,000 amendments offered in our history, or the more than 100 offered in the 105th Congress alone, no doubt is offset by the wisdom of the Nation's and States' elected representatives in refusing to adopt more than 17 amendments since the Bill of Rights. An amendment to the Constitution under the present circumstances would be precisely the sort of act against which the Framers warned us. Common sense is enough to tell us that this is not a "great and extraordinary" occasion that justifies invoking the awesome power of amending our fundamental charter. Constitutional amendments are for resolving the profound and structural issues of government. Even if there were a problem of flag desecration in this country, amending the Constitution would still be a totally disproportionate response. To propose an amendment when in fact there is no problem betrays a woeful and unworthy loss of perspective.

Rather than face the solemn responsibility of justifying an amendment to the Constitution, the proponents of Senate Joint Resolution 40 have suggested that Members of the Senate abdicate their responsibility to exercise their judgment and simply pass the buck to the State legislatures. This argument is totally contrary to the conservative conception of amendment that our Constitution establishes. The Constitution intentionally makes it difficult to pass amendments because they are to be permanent and fundamental. Supermajorities are required in both Houses and among the ratifying States: no amendment should pass unless every one of these levels of government overwhelmingly supports it. Our system is undermined if each institution of government does not exercise independent judgment. The whole intention is to be conservative, by securing a series of responsible, considered judgments along the way. If the institutions of government with responsibility for amending the Constitution start deferring to each other instead of acting independently, amendments will start coming quick, easy, and impulsively. While the Majority Report denies that passage of this amendment will create a "slippery slope" for future thoughtless amendments, that is precisely what they invite by such an abdication of responsibility.

In support of this unsound argument, the Majority Report uses a statement by MSGT. Marvin Stenhammer in a way that is so unfair to this disabled combat veteran that we must correct the record here. The Majority Report takes out of context part of MSGT. Stenhammer's response to what the Majority euphemistically describes as "close questioning by Chairman Hatch," and what certainly was unusual questioning to be directed at an American soldier. While quotation out of context may not be as unusual as it should be, it is especially inappropriate treatment of a layperson, a veteran of foreign wars who has come to the Congress to petition for the redress of grievances and to preserve and protect the rights we enjoy under the Constitution.

MSGT. Stenhammar is a permanently disabled veteran, a paratrooper who has served the United States in harm's way on four continents. In addition to his combat service, MSGT. Stenhammar often was assigned to assist in nation-building, in the training of foreign soldiers and nationals in "liberty, justice, the ideals of the Bill of Rights and the ideals that America truly stands for." (Testimony at 46.) He takes those ideals seriously. His opportunity to observe foreign lands where peaceful protest is not allowed has made him cherish our own rights under the First Amendment, and has made him a "true conservative, Jeffersonian, democrat, and libertarian." (Stenhammar Testimony at 47.)

In response to an earlier question from Senator Grassley about leaving the issue to the popular will, MSGT. Stenhammar observed:

> There were over 30 States in the United States whose conservatives and/or lobbyists urged those State legislatures to pass a beat-up-a-flag-burner amendment so that * * * it would be a $5 or $10 fine if you punched somebody out for burning a flag. I just can't imagine that in America, with all that that means, that we would go so far as not to allow people to peacefully protest.

In response to the "close" questioning by the Chairman, MSGT. Stenhammar did reply, and as quoted in the Majority Report, "I would certainly support the will of the people. I mean, that is what democracy is all about." MSGT. Stenhammar continued, after an interruption by Chairman Hatch failed to cut him off, with his full response, which the Majority Report does not quote:

> But I would caution that two great Founders said that majority rules, but only in a society of fools, and that when passion governs, passion always governs poorly. We need to take a deep breath and use our brain on this issue and remove our sentimental values of this great symbol and really think from our head, what does this actually say.
>
> I mean, I can't stress enough that, you know, I mean in Asheville, North Carolina—it is a great town, but twice a year the Klan marches through downtown, and once or twice a year they burn crosses. Why are we going to protect that and yet not protect people who are peacefully protesting by burning a flag?

(Stenhammar Testimony at 79–80) The question was left hanging, without response. There was no more close questioning of MSGT. Stenhammar.

B. THE PROPONENTS HAVE FAILED TO PROVIDE ANY EVIDENCE THAT INCIDENTS OF FLAG BURNING JUSTIFY AN AMENDMENT TO THE CONSTITUTION

Flag burning is rare.

That simple fact keeps re-emerging from the hearings of various proposals over the years to prohibit the practice. There is no crisis to which we should respond with an amendment to our fundamental law. Professor Robert Justin Goldstein, the author of the leading historical studies of flag-burning, testified that there had been about 200 flag burning incidents in the entire history of the country, or less than one per year. Indeed, the principal incitement to flag burning appears, from all of the evidence, to be the very efforts to make it illegal. Based on past experience, then, an amendment such as that proposed actually will lead to an increase in the number of flag-burning incidents, as well as an increase in the variety of distasteful acts involving the flag which no doubt will be committed to test the vague and uncertain boundaries of any new law.

As Professor Goldstein noted, "We've had more than twice as many flag burnings since this became a front page issue in 1989 than in the entire history of the American republic." Professor Goldstein has established that the number of incidents peaked during the period after the 1989 Flag Protection Act was in effect, and that the rate of incidents has more than tripled since the current effort to amend the Constitution was initiated. Even with the increase brought on by the agitation for bans on flag burning, the actual number of incidents remains exceedingly low. These facts are undisputed.

While even one incident of flag burning certainly merits our condemnation and scorn, it just as certainly does not create a reason to amend our Constitution. It does not call on this Congress to be the first Congress in the history of the United States to limit the rights of Americans with a narrowing amendment to the Bill of Rights.

C. THE PROPONENTS HAVE FAILED TO STATE A CLEAR COURSE OF ACTION THAT CAN ONLY BE PUT IN PLACE BY A CONSTITUTIONAL AMENDMENT

To be more than the emptiest of promises, this Amendment will require some enforcement scheme, a specific statute that would outlaw certain acts as flag desecration, and permit other acts. The substance of this statute will determine just what this amendment will accomplish. The proponents of Senate Joint Resolution 40 assiduously have avoided a frank discussion of such substance.

As if to emphasize the purely symbolic nature of Senate Joint Resolution 40, its proponents have failed to explain or suggest a credible system of punishment. The list of nations that do punish flag desecration is not inspiring: Nazi Germany, Cuba, China, Iran, and Iraq set the tone. As Senator Feingold noted, penalties range from one year of imprisonment in Cuba to 10 years in Iran to life imprisonment at forced labor in Haiti. In the United States, the

State of Montana has provided, and actually has imposed, a sentence of 10 to 20 years at hard labor for refusing to kiss a flag, and for orally belittling it. Ex Parte *Starr,* 263 Federal Reporter 145, 146–7 (1920).

The current proponents of Senate Joint Resolution 40 appear anxious to distance themselves from these regimes and their draconian punishments. Major General Patrick Brady of the Citizens Flag Alliance, noting that 40 States have laws treating flag-burning as a misdemeanor, told the Subcommittee on the Constitution, Federalism, and Property Rights:

> To those who say we are trying to make felons of flag burners, not true. If it were up to me, I would handle it as a ticket. Send them to class and teach them how vital respect is in a society as diverse as we are.

(Statement of Maj. Gen. Patrick Brady, March 25, 1998, page 7.) The notion that we should amend the Constitution of the United States and carve out an exception to the fundamental freedom of the First Amendment in order to issue a ticket and send someone to a class on "respect" takes one's breath away. As Bruce Fein observed about amending the Constitution, "It is a matter of prudence and judgment and degree." (March 25, 1998 Transcript, page 34.) To amend the Constitution in order to issue tickets and lectures is to abandon utterly all prudence, judgment and degree.

The issue of punishment is a serious issue. It should be discussed openly and frankly by any body deliberating over an amendment to the Constitution. The deliberate evasion of this issue by proponents of Senate Joint Resolution 40 raises profound questions as to the rationale for this proposal.

D. EXISTING LEGAL AND SOCIAL SANCTIONS ARE ADEQUATE TO DETER AND PUNISH FLAG BURNING

In fact, the rare incident of flag burning generally can be punished under existing law, and with more than a fine and a compulsory class on respect. Indeed, these immature, repulsive acts usually are linked to other behavior that violates the law entirely separately from any message that the flag-burner is trying to send. Gregory Lee Johnson accepted stolen private property (a flag) and destroyed it by setting a fire in a busy public place.[2] The State of Texas could have prosecuted Johnson for possession of stolen property, destruction of private property, and other crimes which the State routinely punishes without regard to speech.

With the extreme rarity of actual incidents of flag-burning, much was made in the hearings of a Wisconsin youth, Matthew Janssen, then 18, who stole a number of flags and defecated on one, and whose prosecution for flag-burning under an old, pre-*Johnson* statute, was overturned under the rule of *Johnson.* That does not mean, however, that Janssen went unpunished for his despicable act. In fact, he was prosecuted successfully for the message-neutral crimes he committed, and sentenced to nine months in jail and 350

[2] The Majority Report notes, at 60–61, that an "unidentified patriot" gathered up the remains of the burnt flag and buried it in his back yard. We are pleased to identify and give full credit to Korean War veteran Daniel Walker for this quietly gallant act. See Goldstein, "Burning the Flag," 33 (1966).

hours of community service. Perhaps more important, he was ostracized, and had to go about his community with the shame of his act before him at all times. No fine, no class on respect, and no martyrdom at the hands of the central government could equal the punishment Janssen received. Senator Feingold raised the question with Wisconsin State Senator Roger Breske:

> Isn't this the ideal case to demonstrate that there is no need to amend the First Amendment? This young man was punished by the State and by his community through harsh social sanctions, as well as criminal sanctions. This punishment was so severe that the young man publicly apologized and admitted that his actions were abominable. If this is the case, what else can be gained by amending the Bill of Rights?

(March 25, 1998 Transcript at 74.) Senator Breske responded, "He probably should have got a little more."

"A little more" is no reason to amend the Constitution of the United States.

III. Senate Joint Resolution 40 Is an Unprecedented Restriction on the Bill of Rights

A. The First Amendment, as the Cornerstone of Individual Freedom in This Nation, Protects Above All That Expression With Which Society Disagrees or Finds Objectionable

Ultimately, the debate over Senate Joint Resolution 40 and the earlier attempts to amend the Constitution to ban certain flag-burning turns on the scope we think proper to give to speech which deeply offends us. It turns on how free our speech should be.

One opponent, Bruce Fein, made clear the basis of his opposition to any restriction on the freedom of speech.

> President Thomas Jefferson voiced the spirit of my opposition to the amendment in his first inaugural address when the nation was bitterly divided. That giant among the Founding Fathers lectured on the prudence of tolerating even the most extreme forms of political dissent: "If there be any among us who would dissolve the Union or * * * change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left to combat it."

Mr. Fein also cited, as an example of the Enlightenment spirit of the Framers that undergirds the First Amendment, Voltaire's "Promethean" statement, "I disapprove of what you say, but I will defend to death your right to say it."

The Nation's faith in free speech is grounded ultimately in a confidence that the truth will prevail over falsehood, a faith that has sustained our thought since Milton wrote his "Areopagitica" in 1644.

> [T]hough all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let

> her and falsehood grapple, whoever knew truth put to the worse in a free and open encounter?

B. THE AMERICAN PEOPLE CAN AND DO ANSWER UNPOPULAR SPEECH WITH TOLERANCE, CREATIVITY AND STRENGTH

The lesson of Milton is practiced every day in America. Flag-burning is not the only form of expression that is utterly abhorrent to the large majority of Americans. The instinctive answer of the American people, however, is not trying to ban speech that we find offensive. That is the response of weakness. As Justice Louis Brandeis observed, "those who won our independence eschewed silence coerced by law—the argument of force in its worst form."

The American people respond with strength. The Majority Report argues that requiring respect for the flag among everyone will or does unify us. It is clear, though, that the rare occasions of flag desecration have not subverted the unity the rest of us feel and cannot subvert our sense of unity. More fundamentally, respect cannot be coerced. It can only be given voluntarily. Some may find it more comfortable to silence dissenting voices, but coerced silence can only create disrespect and disunity. What unifies our country is the voluntary sharing of ideals and commitments. We can do our share toward that end not by enforcing conformity but by responding with responsible actions that will justify respect and allegiance, freely given. That is exactly how the American people respond.

Senator Feingold pointed to the example of Appleton, Wisconsin, when each year 20,000 to 30,000 Americans join in the largest Flag Day parade in the Nation. Senator Durbin cited the example of the people of Springfield, Illinois, who faced the prospect of a Ku Klux Klan rally.

> For each minute that the Klan rally goes on, each of us pledges a certain amount of money to be given to B'nai B'rith and to the NAACP and other organizations. So the longer they go on, the more money is being [raised] in defense of the values of America. I think that is what America is all about.

(Transcript of June 24, 1998 at page 23.) Recently, in Jasper, Texas, an African American was brutally tortured and murdered, apparently on account of his race. The Ku Klux Klan decided to hold a rally in Jasper because of the murder. Even in all of their pain over the incident, the good citizens of Jasper, led by their African American mayor, let the Klan speak. They let them march, and they even let them wave American flags. The good citizens of Jasper quietly spurned the Klan, and the Klan slithered out of town.

Again, on July 18, 1998, in Couer D'Alene, Idaho, white supremacists obtained a permit for a "100-Man flag parade" and marched carrying American flags and Nazi banners side by side. As in Springfield the local residents turned "Lemons into Lemonade," and raised $1,001 for each minute of the white supremacists' march, money for donations to human rights organizations. A few citizens loudly spoke back to the marchers, but most simply stayed away. Steve Meyer, owner of The Bookseller made it a point to keep his store open, and observed that "Nazis were burning books in the 1930s, and I don't want them closing stores in the '90s."

The positive examples of the citizens of Wisconsin, Illinois, Texas, and Idaho show the America for which soldiers have fought and died. This is the strength and unity that no statute, no amendment can compel or embellish.

A similar example of a powerful response to flag burning that protects the speech of everyone is cited, curiously, in the Majority Report. Curiously, because the act was committed prior to the *Johnson* and *Eichman* decisions when statutory sanctions were in full play, the act did not actually involve the burning of any flag, and the act ultimately appears to have been punished by ordinary, content-neutral laws which survive *Johnson.* The incident was the center of the testimony of Los Angeles Dodger General Manager Tommy Lasorda. In 1976, a father and son ran onto the field during a baseball game at Dodger Stadium and attempted to set fire to a flag. Contrary to the Majority Report's assertion, the attempt was unsuccessful and the flag was never burned, and the protestors appear to have been punished with stiff fines under the content neutral laws against running onto playing fields. Significantly, the crowd was in no way demoralized by the attempt, nor was their love for the flag or for our country diminished in the least. Far from it. As Mr. Lasorda accurately recounted:

> The fans immediately got on their feet * * * and without any prompting that I can remember the whole crowd stood and began to fill the stadium with an impromptu rendition of "God Bless America."

(Testimony of Mr. Tommy Lasorda, July 8, 1998 at 40–41.) That was an answer on which Congress can never improve.

It is by such positive and creative acts, that we best answer offensive speech. "The proposed Amendment, in contrast," observed Bruce Fein, "would be an act of negation, not an act of affirmation. It smacks too much of the petty tyranny of the discredited Alien and Sedition Act of 1798." (March 25, 1998 Statement of Bruce Fein at page 3.)

It can be painful that the Klan and others try to associate themselves with the principles of our Nation by displaying the flag. It can be painful to see the crudeness and poverty of understanding of those who try to burn the flag. Stan Tiner spoke of

> The political factions and sects that fly the American flag over their own various causes—the communists to the Birchers, to David Koresh and his followers—all seeking to imply that their particular brand of Americanism is the one true and righteous brand.
>
> In a curious way, they are right. America is all of these things, or at least a haven for freedom, where all kinds of thinking can occur, and where free people can speak their minds without fear of state police.

(Statement of Stan Tiner, March 25 1998 at page 3.) Therein lies part of the greatness of America. All voices, however hateful and obnoxious, can be heard, but it is the quiet nobility of the ordinary citizens of Appleton, Springfield, Jasper, and Couer D'Alene, and the spontaneous singing of "God Bless America" that wins the debate. The First Amendment works.

C. SENATE JOINT RESOLUTION 40 WOULD DIMINISH THE RIGHTS WE CURRENTLY ENJOY UNDER THE FIRST AMENDMENT

Senate Joint Resolution 40 unquestionably would restrict rights currently enjoyed by Americans under the First Amendment. Indeed, that is its sole purpose.

The denial that Senate Joint Resolution 40 would restrict speech is strained. Indeed, even when proponents urge that they only seek to bar conduct and not speech, they cannot help pointing to the underlying role of speech in their effort to stop flag burning. In his March 25 statement, Professor Presser, could not describe the "conduct" of Gregory Lee Johnson without quoting the offensive words Johnson chanted as he burned the flag. It was, to Professor Presser as to all of us, the words that made the conduct especially offensive. Similarly, the Majority Report makes clear, at 61–2, that they would make it a crime to write some words on a flag but not others, depending on whether the message was currently popular. One proponent from academia, Professor Richard Parker, indicated that a flag-burning in a film would depend on the content of the film, or the message that the actors and producers intended to send. (Responses of Prof. Richard Parker to written questions.) Indeed, the Majority Report has a full section at pages 59–63, specifically attacking the notion, fundamental to the First Amendment and fundamental to a free people, that the government should maintain neutrality as to the content or message of political speech.

Similarly, the proposed amendment differs radically from appropriate time, place and manner regulation of speech. Time, place and manner regulations are legislative techniques for promoting rather than suppressing speech. They are used to sort out on an equitable basis the competition for opportunities for speech. One may be required to get a permit to hold a parade lest competing parades collide with each other, or one may be required to post notices on bulletin boards in order to have an orderly, effective system of communication. If, as in Senate Joint Resolution 40 scheme, a regulation eliminates a particular channel of expression—if no one can parade or if the required bulletin boards are inaccessible—the regulation is an invalid limitation on speech.

In discussing its rejection of a content-neutral approach, the Majority Report effectively concedes it cannot describe the acts of flag burning or desecration that should be punished without referring to the speaker's ideas as well as physical movements. Their own examples illustrate that non-verbal behavior often can and is intended to communicate, and their labored effort to distinguish flag-burning as "conduct" rather than "speech" is unsuccessful. Expression and conduct are inevitably intertwined, so that a would-be distinction between them is not workable. Occasions on which courts have talked in terms of this distinction can be reduced to something that is workable, namely, whether the behavior in question causes harm to real interests that the government can protect. For instance, the "conduct" element of burning a flag might be that which causes harm to the owner's property interest in that flag. It is precisely these harm-causing, "conduct" elements of flag desecration that can already be prohibited, and that routinely and effectively are in fact punished by the courts. The argument that dese-

cration is "conduct" does not support the amendment at all. To the extent desecration is "conduct" it can already be regulated; the Majority Report itself makes clear that the whole point of the amendment is to regulate "expression" and not "conduct".

The fact that such expression is protected by the First Amendment is affirmed not only by the decisions of the Supreme Court in *Johnson* and *Eichman,* but by a long history of constitutional jurisprudence. Proponents of Senate Joint Resolution 40 have been unable to identify any Supreme Court precedent upholding a ban on disrespectful use of the flag against a First Amendment challenge because, quite simply, there is none. There quite simply is no decision of the Supreme Court in the entire history of the United States that upholds a criminal conviction for flag burning or other tampering with the flag against a First Amendment challenge.

D. THERE IS NO HISTORY OF SUPREME COURT ACCEPTANCE OF LIMITATIONS ON THE FIRST AMENDMENT FOR PEACEFUL PROTESTS INVOLVING FLAG BURNING

The strained efforts of the Majority Report to manufacture such a history underline just how wrong they are in their characterization of American legal history. The Report states, at page 3 and again at page 18, that the Supreme Court "broke with over 200 years of precedent" when it decided *Johnson.* The "precedents" cited by the Majority Report in every case lack any relationship to First Amendment issues.[3]

The Majority Report mentions *Endecott's Case,* a 1634 action of the Massachusetts Bay Colony in which "a domestic defacer of the flag" was prosecuted. In that case, John Endecott cut the cross of St. George from a English flag in apparent protest against the tyranny of Charles I and Bishop Laud. At the time, the Bay Colony offered no First Amendment rights. Freedom of speech was denied, as were freedom of assembly and freedom from the establishment of religion. Indeed, there were no written or even customary laws at this date: punishment was imposed by then-governor Winthrop and his allies in accordance with their view of morality and Scripture ("Thou shalt not suffer a witch to live.")[4] The use of such a prosecution under such circumstances as evidence of "the "historic core of consistency between flag protection and the First Amendment" as claimed by the Majority Report at 9, indicates a conception of the First Amendment that can only be described as bizarre. It should be inconceivable that the actions of the British colonial government repressing American patriots should be the model and

[3] Professor Richard Parker, one apparent academic source of the claim of 200 years of jurisprudence, was specifically asked to identify the cases on which he relied for his claim. Prof. Parker identified no relevant cases at all before 1969, and only was able to cite dicta from four cases in which flag desecration convictions actually were overturned by the Supreme Court. Oddly, Prof. Parker does not even mention *Stromberg* v. *California,* 283 U.S. 359 (1931), *West Virginia Board of Education* v. *Barnett,* U.S. (1943), or even *Minersville School District* v. *Gobitis,* 310 U.S. 586 (1940). At most, the cases cited by Prof. Parker affirm the possibility that Congress could devise a content-neutral flag statute, including appropriately specific standards and terms, without any need to amend the Constitution.

[4] This regime presently banished Roger Williams (1635) for urging religious liberty, and Anne Hutchinson (1638) and Rev. Roger Wheelright (1637) over doctrinal differences. Endecott went on to serve a total of 18 years as governor of the Bay Colony. Hawke, "The Colonial Experience," 143–146, 689.

precedent for what the Senate should do now. Yet that, amazingly, is the logic of the proposed amendment.

Endecott's Case is, of course, properly seen as an example of the tyranny against which the Founders rightly rebelled, and Endecott's "desecration" as a very early step on the long movement toward independence from England. The case also is an early analog to a similar "desecration" of the English flag by George Washington to create the first flag of the Continental Army: On taking command of the army on July 3, 1775, Washington took an English flag and, after removing both the cross of St. George and the cross of St. Andrew, sewed six white stripes onto the remaining red field. By this "desecration," George Washington created the 13 red and white stripes that remain to this day. Hart, "The Story of the American Flag," 58 Am. L.Rev. 161, 167 (1924). We frankly are astonished that the Majority Report would cast aspersions on, in Patrick Henry's phrase, such gauntlets cast in the face of tyranny.

The other examples cited by the Majority Report are less bizarre, but indicate a similar complete irrelevance to freedom of speech and the First Amendment. The Majority Report cites, at 10–11, a characterization by former Judge Robert Bork regarding Madison's opinion that the tearing down of the flag of the Spanish minister in Philadelphia in 1802 was actionable as part of its 200 years of history. The characterization is misleading. The incident refers, of course, to assaults on the property (a Spanish flag) within a foreign embassy, and the view that such assaults as entering uninvited into the ambassadorial residence, destruction of a painting, or destruction of a flag are equivalent to attacks on the foreign minister. There is no distinction between destroying a flag and destroying a painting or other property. 4 Moore, "Digest of International Law," 627 (1906). The section cited deals with "Protection of Diplomatic Officers" and has nothing to do either with peaceful protest, the flag of the United States or the decisions in *Johnson* and *Eichman.* Indeed, destruction of another's property, whether a flag or otherwise, remains a crime throughout the United States.

The Majority Report, at 10–11, misses the point again when it cites Madison for the unremarkable proposition that for a foreign ship to menace a ship of the United States, fire upon a ship of the United States, and to force it to haul down the colors is a "dire invasion of sovereignty," Majority report at 10–11, misses the point. The harm comes from firing upon a United States military vessel, and the treatment of the flag, to the extent that it can be isolated from the grievous physical coercion of American sailors involved in lowering it, simply added insult to a great injury. If the British had simply shot at United States servicemen, and left the flag alone, Madison would not have shrugged his shoulders and let the matter pass. Again, the example has nothing whatsoever to do with peaceful protest or the First Amendment. The United States can and does still strike back against those who attack Americans at home and abroad; *Johnson* and *Eichman* had no effect on that principle.

Equally unrelated is the citation of a letter from Jefferson cited at page 12 of the Majority Report, dealing with the use of the United States flag by foreign ships to avoid English sanctions against trade with France during the 1790s. Jefferson was simply writing to our Consul at Canton, China to urge him to cooperate

with other nations to detect such smugglers flying under false colors. Lipscomb, ed., 9 "Writings of Thomas Jefferson" 49–50 (1903). This is mere international cooperation. It has nothing to do with peaceful protest, with freedom of expression, or the First Amendment. The United States can and does still cooperate with other nations and limit the use of its flag; *Johnson* and *Eichman* had no effect on that principle.

In its search for "200 years of precedent," the Majority leaps from foreign policy over a century to cite the decision in *Halter* v. *Nebraska,* 205 U.S. 34 (1907), in which the Supreme Court upheld a state law banning images of the flag on bottles of Stars and Stripes beer. Again, the citation is far off target. The defendants did not raise a First Amendment claim in *Halter,* and the Court did not consider the First Amendment in any way. Until 1925, the Court did not apply the First Amendment to actions of the States, as opposed to the federal government. The decision had nothing to do with peaceful protest, with freedom of expression, or with the First Amendment.

Again, there simply is no instance in the entire history of the United States in which the Supreme Court has upheld against a First Amendment challenge a conviction for flag tampering. On the contrary, the roots of the *Johnson* and *Eichman* decisions lie deep in American jurisprudence.

E. THERE WAS A LONG HISTORY OF SUPREME COURT JURISPRUDENCE PROTECTING UNPOPULAR SPEECH CONNECTED TO THE FLAG PRIOR TO JOHNSON AND EICHMAN

The Supreme Court squarely held as early as 1931 that laws forbidding the display of certain flags (here, the red flag) violated the First Amendment. *Stromberg* v. *California,* 283 U.S. 359 (1931). The *Stromberg* decision made clear, as have many other decisions, that the First Amendment protects expressive conduct (waving a flag) as well as written or spoken speech. Although the Court briefly allowed the expulsion from American classrooms of young children who, as Jehovah's Witnesses, were forbidden by their Faith from pledging allegiance to the flag, *Minersville School District* v. *Gobitis*, U.S. (1940), the Court quickly reconsidered and removed the stain that *Gobitis* had placed on the First Amendment with its decision in *West Virginia Board of Education* v. *Barnett*, 319 U.S. 624 (1943).[5] There, Justice Jackson wrote:

> The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually

[5] The aftermath of the decision in *Gobitis* offers a sober warning to those who think government restrictions on unpopular speech strengthen the social fabric.

> The *Gobitis* decision, along with the American entry into the war in December 1941, helped to foster a new wave of expulsions of [Jehovah's] Witnesses' children [from public schools] and a large and often extremely violent eruption of harassment, beatings and arrests of adult Witnesses. The American Civil Liberties Union (ACLU) reported that between May and October 1940, almost fifteen hundred Witnesses became the victims of mob violence in 355 communities in forty-four states and that no religious organization had suffered such persecution "since the days of the Mormons."

Goldstein, "Burning the Flag," p. 9, Kent, Ohio, 1996.

> and spiritually diverse or even contrary will disintegrate the social organization * * *.

Id., at 641–642. The *Barnette* decision, like that in *Stromberg,* assured protection for expressive conduct (remaining seated) as well as written or spoken speech.

Following the decision in *Barnette,* the Supreme court consistently overturned convictions under flag desecration statutes in *Street* v. *New York,* 394 U.S. 576 (1969)(flag burned to protest shooting of James Meredith), *Smith* v. *Goguen,* 415 U.S. 566 (1974) (flag patch on pants seat), and *Spence* v. *Washington,* 408 U.S. 404 (1974) (peace symbol taped to flag). Certainly, each of these convictions was overturned with appropriate distaste for the conduct at issue, and the decisions tend to be narrowly framed. Nonetheless, by the time *Johnson* was decided, the direction of the law was plain.

The mainstream nature of the *Johnson* interpretation is underlined by the fact that, according to Professor Stephen Presser, a proponent of the amendment, a similar case would now command a 7–2 majority of the Supreme Court, and not just the 5–4 majority of *Johnson* and *Eichman.*

Senate Joint Resolution 40, moreover, would not overturn only *Johnson* and *Eichman.* If effectively implemented, it also would overturn *Street* v. *New York, Smith* v. *Goguen* and *Spence* v. *Washington,* each of which involved a physical act that could fall within a statutory definition of desecration. The Resolution thus would overturn decades of consistent interpretation of the first amendment, and certainly would cast a shadow over other flag-related decisions, such as *West Virginia Board of Education* v. *Barnett*. By excepting certain unpopular speech from first amendment protection, the Resolution would have severe implications for free speech jurisprudence in general.

F. FREEDOM OF SPEECH IS INDIVISIBLE

For Congress to limit expression because of its offensive content is to strike at the heart of the first amendment. As American Bar Association president Jerome Shestack advised the Committee,

> Since its founding, this 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. The Boston Tea Party, civil rights sit-ins, public demonstrations, and in this instance, flag burning are all examples, some laudable, some not, which have served to test the true meaning of freedom of speech and expression and to affirm that this hallowed principle is protected, not prosecuted. The spirit of the first Amendment's guarantee of freedom of speech is captured in Justice Jackson's words in *West Virginia State Board of Education* v. *Barnette*, a flag salute case:
>
> > [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The text of its substance is the right to differ as to things that touch the heart of the existing order.

To restrict speech and political expression to only those areas that Congress approves is to limit, as China now does, the freedom of

worship to only those churches of which that government approves. That is not freedom at all. As Charles Fried, Solicitor General under President Reagan, testified in 1990:

> Principles are not things you can safely violate "just this once." Can we not just this once do an injustice, just this once betray the spirit of liberty, just this once break faith with the traditions of free expression that have been the glory of this Nation? Not safely; not without endangering our immortal soul as a nation. The man who says you can make an exception to a principle, does not know what a principle is; just as the man who says that only this once let's make 2+2=5 does not know what it is to count.

Measures to Protect the American Flag, Hearing before the Senate Comm. on the Judiciary, 101st Cong., 2d Sess. (June 21, 1990) (statement of Charles Fried at 113).

The Washington Post observed in a July 5, 1998 editorial,

> it would, in effect, turn the "no" in the hallowed phrase "Congress shall make no law" into an "almost no"—which is a singular erosion of the principle for which the First Amendment stands. This principle has survived and enriched this country through periods in which unfettered expression caused great political stresses. Why should it be compromised now to prevent Americans from burning flags that they weren't planning to ignite in the first place?

The proponents of Senate Joint Resolution 40 have much to learn from the people of Appleton, Springfield, Jasper and Couer D'Alene.

G. EXISTING CONSTITUTIONAL LIMITATIONS ON FREEDOM OF EXPRESSION ARE APPLICABLE TO INSTANCES OF FLAG BURNING

The decision of the Supreme Court in *Johnson* did not give carte blanche to protesters to burn flags whenever they please. The First Amendment principles under which *Johnson* was decided leave ample room for Congress and the States to regulate flag burning, just as they may reasonably limit other forms of expression on a content-neutral basis. For example, expression that is directed to inciting or producing "imminent lawless action" may be limited under *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969), and limits also can be placed on "fighting words", those likely to spark an average citizen to fight where there is an actual incitement to fight, and the statute is not simply an excuse to repress unpopular speech. *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942). The fact that these circumstances were not present in *Johnson*—it appears that those most likely to be incited by the conduct wisely had ignored the demonstration altogether, as did most other people—does not limit the authority of Congress and the States to respond to imminent violence. As the Supreme Court noted in *Johnson*,

> The state need not worry that our holding will disable it from preserving the peace. We do not suggest that the first Amendment forbids a State to prevent "imminent lawless action."

491 U.S. at 410. States are free to prevent acts of violence. What a State cannot do is apply prior restraint on certain views by assuming that, because the speech is so offensive to some, that it will provoke ordinary citizens to violence.

In response to a question from Senator Hatch as to the power of Congress to ban flag burning, as well as other fires, on the Mall in Washington, D.C., Reagan Justice Department official Bruce Fein explained:

> Of course, there are time, place and manner limits, as your question insinuates, just as it is quite permissible to punish someone who steals a flag and burns it or otherwise destroys it. That is theft of someone's property. And if someone dumps property in a public place where it is prohibited, you are prohibiting the dumping of the property, you are not prohibiting [speech] * * * Time, place and manner limits would apply to flag burning as it applies to any other speech.

As explained above, the nature of this form of protest is such that it will contain discrete acts (such as theft) that can be punished under laws that in no way limit First Amendment rights.

Established principles of First Amendment jurisprudence also provide room, albeit limited, for Congress to enact legislation protecting the flag, so long as that legislation is sufficiently specific to avoid the problem of vagueness and satisfy the Fifth Amendment due process clause, and so long as it is sufficiently content-neutral to satisfy the First Amendment. We do not suggest that this is an easy task. The same problems will plague legislative drafters if this amendment is adopted, however, and the American people would be far better served if the proponents of Senate Joint Resolution 40 addressed this difficult task squarely and honestly at the outset by proposing a carefully crafted statute, rather than toying with the Constitution.

IV. Senate Joint Resolution 40 Is Vague and its Effect on the Constitutional Rights of Americans Is Uncertain

A. There is no consensus or clarity on the definition of a flag

Just as the proponents have avoided any discussion of an enforcement scheme for the proposed amendment, they have failed to offer a clear statement of just what conduct they propose to prohibit, or to advise the American people of the actions for which they may be imprisoned. Instead, they have asked that we trust to the wisdom of future Congresses. The American people deserve more from their Congress before they alter the Constitution of the United States.

Far from offering any consensus, the proponents of this amendment have displayed a striking range of disagreement over what they intended to stop. Senator Feinstein attempted a clear and careful definition of a flag to include only the "official" flag itself.

> I know people have made undergarments out of flags. They have made neckties out of flags. But once that pattern is in the form of a flag and able to hang as a rep-

> resentation of out Nation, I really think it takes on a whole different connotation * * *. [T]he flag is so precise that if one were to change the colors, the orientation of the stripes or the location of the field of stars, it would actually no longer be an American flag.

(June 24, 1998 Transcript at 16–17.) The definition of Senator Feinstein thus would permit a wide range of activities that involved burning, or worse, of "substitute" flags, items with 51 stars, with 12 or 14 stripes, or with a purple field, even under circumstances clearly intended to communicate the most bitter disrespect for this Nation and for its flag. Even this definition leaves essential questions unanswered, and the issue of what would make a flag "official" still would force Americans to act at their peril. Must the flag be of cloth? Must it be of a certain size, or would it include child's-size flags such as are used at many patriotic outings?

The Majority report equivocates on this issue, passing the buck to "the states and Congress." See pages 56–57. Meanwhile, the House Report on the companion to Senate Joint Resolution 40 is directly contrary to Senator Feinstein's interpretation.

> a "flag" could be anything that a reasonable person would perceive to be a flag of the United States even if it were not precisely identical to the flag as defined by statute. This would allow states and the Congress to prevent a situation whereby a representation of a United States flag with forty-nine stars or twelve red and white stripes was burned in order to circumvent the statutory prohibition.

H. Rep. 105–121. Expansive definitions of the flag have been used regularly in statutes that have prohibited flag-burning. The Wisconsin statute, for example, defined "flag" as

> anything which is or purports to be the Stars and Stripes, the United States shield, the United States coat of arms, * * * or a copy, picture, or representation of any of them.

Wis. Stat. Section 946.05(2).

The Uniform Flag Statute defines flag to include:

> any flag, standard, color, ensign or shield, or copy, picture or representation thereof, made of any substance or represented or produced thereon, and of any size, evidently purporting to be such flag * * * of the United States * * * or a copy, picture or representation thereof.

Under Senate Joint Resolution 40, Congress could prohibit "desecration" of any of these; and, indeed, a protester certainly could offend the sensibilities of all of us by an act of desecration of any of these. The Majority Report expresses shock, shock at the idea that Congress might be less than wise in formulating any definition of the flag. The very fact of wide disagreement among the proponents of Senate Joint Resolution 40 shows the compelling need for a clear statement to the American people as to what conduct they intend to criminalize, if they can in fact create such a definition. The examples cited by the Majority Report, as discussed below, show that

the Majority does indeed contemplate serious limitations on American freedom.

B. THERE IS NO CONSENSUS OR CLARITY TO THE DEFINITION OF DESECRATION AND IT INEVITABLY WILL PROHIBIT MUCH INNOCENT EXPRESSION

Just as there is no clear definition of a flag, definition of "desecration" will invite a literally infinite catalogue of possible disputes. The Uniform Flag Statute, while separately banning "mutilation" of the flag, defined "desecration" to include:

> (a) place or cause to placed any word, figure, mark picture, design, drawing or advertisement of any nature on any flag * * *; or
>
> (b) expose to view any such flag * * * upon which shall have been printed, painted or otherwise produced, or to which shall have been attached * * * any word, figure, mark, picture, design, drawing or advertisement; or
>
> (c) expose to public view for sale, * * * or to sell, give or have in possession for sale * * * an article of merchandise, upon which shall have been produced or attached any such flag * * * In order to advertise, call attention to, decorate, mark or distinguish such article or substance.

We presume that the Majority does not consider the Uniform Flag Act to be "silly" or an unreasonable guide. Each of its prohibited behaviors involves a physical act of desecration, and Congress likely could adopt such a Statute under the proposed constitutional amendment. The scope of such a ban would affect significantly not only speech, but also American commerce and life. The cover of the Washington Post "Home" section of July 2, 1998, included a photograph of picnic equipment with a flag motif: disposable "flags," within the meaning of most statutes, and certain, indeed designed, to be soiled with food and thrown into the trash—in other words to be desecrated. Are we to amend the Constitution to prohibit such picnic trivia? Are we to amend the Constitution and punish people who soil, crumple and burn pictures of the flag? If a protestor, chanting the words that Gregory Lee Johnson spoke, "Red white and blue, we spit on you," burned not a flag but an image of a flag, would anyone fail to be offended?

John Schneider, who testified in favor of Senate Joint Resolution 40, observed that if someone did "purposeful" harm to a flag lapel pin, "they have desecrated the flag and that [should be] a punishable offense just as if they had harmed any other United States flag intentionally." (Response of Mr. John Schneider to written questions.)

Mr. Schneider captured the difficulty of defining the essential terms of the proposed amendment when, having included lapel pins in his definition of a flag, he recommended against allowing representations of the flag on tissues or underwear, but would allow shirts or jackets representing the flag. "These are just clothing and not really the 'Flag.' I'm not certain why this is true but it falls under the category of being right because it is." (Emphasis in original) (Response to written questions.) Another proponent of the amendment, Professor Richard Parker, on the other hand, considers this view to be "wacky," and would not prohibit even the dis-

play of a photograph of the flag indelicately touching a nude male, which has been prosecuted in this country. (Responses of Prof. Richard Parker to written questions.)

Stan Tiner observed that the worst offenders against the flag are committed by the "well-intentioned, or perhaps simply thoughtless person[s]" who, for example, place hundreds of small flags around a city to honor America and then leave them to the wind and weather.

The fact is that the proposed amendment is not in the least limited to flag burning. It prohibits desecration, and the core idea of desecration will persist in any implementing statute: the diversion of a sacred object to a secular use. People wrap flags around themselves or around manikins and the like in political marches. It is a step from there to wearing a flag like a shawl. People pin flags up in storefront displays. People use flags in what they consider to be artistic presentations, make paintings of flags and use flag images. A venerable African American quilt maker uses bits of flags in her work. Flags are used in movies and plays in all kinds of dramatic ways. Any of these uses may have political or cultural overtones that offend someone. All of them are nonconforming, nonceremonial uses of flags. It is inevitable that a great range of expressive behavior will be inhibited, silenced, or punished under the implementation of the amendment. All of this will be expression that was hitherto protected, and much of it will be behavior that most people consider innocent or acceptable. In short, the amendment will create havoc for free expression for the purpose of solving no real problem.

The spiraling complexity and escalating censorship the amendment will create is all too clearly illustrated in the ways one of its key proponents believes it will have to be implemented. Mr. Schneider envisions a major educational campaign, including classes for Americans (we hope voluntary) as a result of this Amendment:

> Clearly, with regard to protocol, it will be necessary to educate a new generation on how the flag is to be taken care of in times of war and peace. It will be necessary to educate a new generation on the ceremony required to raise, lower, respect and retire the flag as well."

This may be well-intentioned, but it illustrates how the proposed amendment is likely to spiral off into very troublesome directions. Mr. Schneider also envisions a system of permits, apparently to determine any circumstances under which a flag might permissibly be burned, as in a motion picture dramatizing historical events. "If Congress decides that the burning of a flag is necessary in order to make a film in which this act is depicted as a heinous act, then they should have the right to approve of the event." Such permits thus would depend on the message and content of the film. The burgeoning scope of the amendment perceived by its supporters is underlined in the Majority Report, at 57: "The Committee believes, moreover, that *states and* Congress will legislate with care," (emphasis supplied) and looks to improvements in "most of the 49 pre–1989 statutes." See also page 58, "The flag protection amendment is limited to allowing the *states and* the federal government * * *." (Emphasis supplied.) While the text of the proposed amendment

gives power to "Congress," the Majority lets slip that there also will be a legislative role for the States. The Majority Report should state clearly the intended scope of their amendment.

The most powerful example of the vagueness and mischief of this amendment came from Senator Durbin, who noted that many people would consider it desecration to sit on a flag. Each of us certainly can imagine circumstances in which such conduct would be an outrage, and, indeed, the Majority Report, at 61, stresses that affixing a flag to the seat of one's pants should be prosecuted. Senator Durbin then pointed out that in one of our greatest and most moving monuments to freedom, the Lincoln Memorial, Abraham Lincoln sits—on the American flag.

C. THE DIFFICULTY THAT ATTENDS A STATUTORY APPROACH TO FLAG BURNING WOULD REMAIN EVEN AFTER A CONSTITUTIONAL AMENDMENT

The Majority Report argues, unconvincingly, that no statutory alternative is available to address the issue of flag burning. In fact, the same problems that complicate the drafting of such a statute, and specifically of affording Americans the specificity demanded by the Due Process Clause of the Fifth Amendment, also attend the proposed amendment.

The Majority Report notes that the Due Process Clause requires that criminal statutes be sufficiently specific that citizens can be on notice to match their behavior to the law. The Due Process Clause forbids situations such as that in the Majority's *Endecott's Case,* where the law was whatever the magistrate determined it to be. The Majority Report notes, at 49, that in *Smith* v. *Goguen* the phrase "treats contemptuously" in a Massachusetts statute was held to be unconstitutionally vague where it was not linked to specific acts (mutilating, defacing, etc.). The Majority are clear, however, that they propose to "empower Congress to prohibit the contemptuous or disrespectful physical treatment of the flag," Majority Report at 61, with no specific boundaries as to such treatment. Indeed, they seek to criminalize the specific conduct the Supreme Court protected in *Smith* v. *Goguen.* See Majority Report at 61. The Majority report thus clearly points to a statute which is unconstitutionally vague in violation of the Due Process Clause of the Fifth Amendment, and which likely would be overturned, just as were the statutes in *Johnson* and *Eichman.*

The Majority Report would prohibit some but not all writing on the flag: It would be criminal to write words critical of the government on a flag, but not to write the name of a military unit. One can only guess whether it would constitute desecration to write on a flag, as part of a political statement, the names of the rare military units which were engaged in despicable acts either on behalf of the government (*e.g.,* General DeWitt's Western Defense Command and Fourth Army, which enforced the internment of Japanese-Americans) or at their own initiative (*e.g.,* My Lai and Wounded Knee.) It is not clear whether veterans could be punished for reverentially burning flags with the names of their units to protest the broken promises of Congress to provide them with health and other care, but instead spend those funds on pork barrel highway projects. One can imagine that in many cases it would be "legal"

to affix a picture of George Washington to a flag, but illegal to affix a picture of Richard Nixon, or other recent presidents. The Majority insists that it would be illegal to affix a flag to the seat of one's pants, but it is not at all clear why. Does the criminality lie in the physical desecration by sewing, which in many cases would capture highly pro-government or patriotic citizens, as in the case of flags sewn on many police officers' sleeves? Or does the criminality lie in the proximity of the flag to the rear end, as in the statue of Lincoln in the Memorial the Nation has built to him?

None of these situations or ten thousand other situations is clear although, under the Fifth Amendment, each case must be clear. Citizens must know in advance what specific conduct will be punished by the state. There is no freedom for a people who can, as in the Majority-cited *Endecott's Case,* lose their liberty because their political beliefs offend a court's sensibilities, where one's guilt depends not on whether one burned a flag "but on the manner in which he burned it." Majority Report at 60. Professor Parker, an academic proponent of the amendment, quotes Justice Felix Frankfurter, horribly out of context, that constitutional law "gather[s] meaning from experience." (Response of Prof. Richard Parker to written questions.) For a criminal provision to gather meaning from experience is to make law *ex post facto,* to apply the rule of *Endecott's Case.* This is intolerable in a free society. What the Majority Report seeks is some sort of statute that quite clearly violates the Due Process Clause of the Fifth Amendment. They cannot have such a statute unless Senate Joint Resolution 40 is to ride roughshod over not only the First Amendment, but the Fifth Amendment as well. The difficulty in drafting a statue that does not conflict with the Bill of Rights will remain even if the amendment is adopted.

A statute enforcing this amendment either would be found unconstitutional for vagueness, or else capture as criminals hundreds of well-meaning American citizens and businesses whose patriotism is beyond question. The Majority Report indirectly acknowledges as much in blithely claiming that its language is just as clear as "such terms as 'unreasonable searches and seizures;' 'probable cause;' 'speedy * * * trial;' 'excessive bail;' 'excessive fines;' 'cruel and unusual punishment;' 'due process of law;' and 'just compensation* * *.'" Of course, these terms have required and continue to require literally thousands and thousands of cases for their interpretation. We tolerate, and even embrace their generality because in each and every case the terms protect our liberty and limit the ability of government to search, seize, hold and punish American citizens: The question always is whether they extend additional protection to us. An open-ended criminal statute is another matter entirely. The question then would be whether we dare to speak in pursuance of our rights. Vagueness is absolutely intolerable where it frightens people into silence and empowers government to search, seize, hold and punish American citizens.

The impulse to punish ideas which permeates the Majority Report leads only to endless entanglement. Even with the large increase in the number of flag burnings that can be expected if this amendment is adopted, and even without the inventiveness in mistreatment of the flag that can be predicted, there will be no end

to the litigation under any statute. The amendment would demean rather than protect the flag.

As Senator Leahy observed,

> Do we really want to open a constitutional can of worms, and invite a parade of hairsplitting court cases over whether burning a picture of the flag or putting the flag on the uniforms of our Olympic team or stepping on a lapel pin amounts to desecration? The biggest threat to the dignity of the flag may be our efforts to protect it.

V. CONCLUSION

There is no need to amend the Constitution. The flag has a secure place in our hearts. The occasional insult to the flag does nothing to diminish our respect for it; rather, it only reminds of our love for the flag, for our country, and our freedom to speak, think and worship as we please. The laws against everyday hooliganism allow ample scope for States to jail those who need to be jailed regardless of their message or cause, but the punishment meted out by the law is nothing compared to the condemnation and ostracization by their fellow citizens that flag burners face.

Even more precious than the flag, however, are the freedoms that it represents. Our soldiers fought not for a flag but for freedom, freedom for Americans and for others across the globe. It would be the cruelest irony if, in a misguided effort to honor the symbol of that freedom, we were to undermine the most precious of our freedoms, the freedoms of the First Amendment. Senate Joint Resolution 40 would do just that.

This amendment is a wrong-headed response to a crisis that does not exist. It would be an unprecedented limitation on the freedom Americans enjoy under the First Amendment, and would do nothing to bolster respect for the flag. Respect for the flag flows from the freedoms we enjoy and from the sacrifices of those who have protected and spread that freedom. Freedom is what we should cherish. Freedom is what we should protect.

We respectfully urge that Senate Joint Resolution 40 not be approved by the Senate.

PATRICK LEAHY.
TED KENNEDY.
HERB KOHL.
RUSS FEINGOLD.
DICK DURBIN.
ROBERT TORRICELLI.

IX. MINORITY VIEWS OF SENATOR BIDEN

I. The Flag Deserves Protection

Nothing symbolizes what we might call our "national spirit" like the flag. In times of crisis, it inspires us to do more. In times of tranquility, it moves us to do better. At all times, it unifies us in the face of our diversity and our differences.

After the Supreme Court handed down its decision in *Texas* v. *Johnson,* 491 U.S. 397 (1989), invalidating the conviction of flag burner Gregory Johnson, I joined the overwhelming majority of my colleagues in a call to action. Notwithstanding my instinctive first amendment passions, I felt then—as I do now—that the flag is special and uniquely deserving of legal protection. I believe that we should protect the flag as the singular and unifying symbol of a diverse people in need—in urgent need, sometimes—of common ground. Like many Americans, I can see in my mind's eye the picture painted by American Legion National Commander William Detweiler:

> We are a nation born of immigrants, many of whom came to America with only scant knowledge of our heritage and our history. Whether they docked at Ellis Island eighty years ago or landed in Miami yesterday, one of the first sights they beheld was Old Glory waving proudly in the air. It was the embodiment of all of their hopes for a better tomorrow. Although it was not the flag of their fathers, they knew it would be the flag of their children, and of their children's children.

(Written statement of William Detweiler, June 6, 1995 at 5.)

The flag, as Justice Stevens wrote in his *Texas* v. *Johnson* dissent, symbolizes more than nationhood and national unity.

> It also signifies the ideas that characterize the society that has chosen [it] as well as the special history that has animated the growth and power of those ideas. * * * [The flag] is a symbol of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations.

491 U.S. at 396–97 (Stevens, J., dissenting).

All of the views expressed in this report—majority and minority—evidence respect and love for the flag. But this shared sentiment does not end the debate over a constitutional amendment; it marks only where it begins. For this is not a debate between those who love the flag and those who don't, or between patriots and rogues. It's a debate about the proper balance to be struck between our respect for the flag and our commitment to the Constitution's bedrock values.

In seeking to protect the flag, we must not trample on the very rights that give meaning to the concept of freedom Americans treasure. As we contemplate adding a 28th amendment to the Constitution, we must not lose sight of the first amendment and its guiding principles. I believe that we can protect the flag while not doing damage to core free speech values—by prohibiting all abuse of the flag without regard to the message intended by the abuser.

Unfortunately, S.J. Res. 40 does not take this approach. Instead, as outlined in detail below, the amendment seeks to protect the flag by impinging on first amendment rights in a way never before permitted in our Nation. Thus, I cannot support this constitutional amendment—even as I add my voice to the many voices on the pages of the majority report—all of us trying to put to words the shiver we get when we see the flag—our flag—flying high and proud.

I believe that there is a way to protect the flag and *not* do violence to the core first amendment value of viewpoint neutrality—by prohibiting all abuse of the flag without regard to the message intended by the abuser.

II. Any Effort To Protect the Flag Should Be Viewpoint Neutral

At the heart of the First Amendment lies a very basic notion: the government cannot muzzle a speaker because it dislikes what he has to say, or discriminate between your speech and mine because it agrees with me but not with you. That sort of viewpoint discrimination is most importantly what the first amendment forbids. As the Supreme Court has said:

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. * * * The essence of * * * forbidden censorship is content control. *Police Dept. of Chicago* v. *Mosley,* 408 U.S. 92, 95–96 (1972); see also *FCC* v. *Pacifica Foundation,* 438 U.S. 726, 745 (1978) ("[I]t is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas").

The Supreme Court forcefully reiterated its intolerance for viewpoint discrimination in *Rosenberger* v. *University of Virginia,* 515 U.S. 819 (1995):

> In the realm of private speech or expression, government regulation may not favor one speaker over another. * * * When the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.

It was in this spirit—to protect the flag while not doing violence to the core first amendment principle of viewpoint neutrality—that I wrote The Flag Protection Act in 1989. The Act aimed to safeguard the physical integrity of the flag across the board—by making it a Federal crime (without regard to the actor's motive) to mutilate, deface, physically defile, burn, maintain on the floor or ground or trample on an American flag. An exception was carved

out for disposing of the flag when it became worn or soiled.[1] The statute focused solely and exclusively on the conduct of the actor—regardless of any idea she might have been trying to convey, regardless of whether she meant to cast contempt on the flag, and regardless of whether anyone was offended by her actions.

The statute was written that way because, in my view, the government's interest in preserving the flag is the same regardless of the particular idea that may have motivated any given act of burning or mutilation. Our interest in the flag is in the flag itself—as the symbol of our identity as Americans. The flag's unique place in our national life means that we should preserve it against *all* manner of destruction. It matters not whether the flag burner means to protest a war, praise a war—or start a barbecue. It is the flag as treasured symbol—not as vehicle for disagreeable speech—that should be protected.

As Professor Tribe testified in support of the Act:

> "The sentiment reflected in a law designed to protect a physical symbol may often be a sentiment of *sympathy* for what the symbol embodies and represents, not a sentiment of *censorship* of what the symbol-destroyer expresses."
>
> (Written statement of Laurence H. Tribe, August 1, 1989 at 5.)

Regrettably, in my view, the Supreme Court, by a 5-to-4 vote, struck down The Flag Protection Act in *U.S.* v. *Eichmann,* 496 U.S. 310 (1990), which brings us to where we are today: face to face with the prospect of adding a 28th amendment to the Constitution. And though I here part company with many of my liberal friends—believing as I do that the flag is worthy of constitutional protection—I nevertheless must oppose S.J. Res. 40. I oppose this constitutional amendment because, in my view, it puts the flag on a collision course with the Bill of Rights.

III. S.J. Res. 31 Is Fundamentally Flawed

A. THE AMENDMENT IS NOT VIEWPOINT NEUTRAL

The proposed amendment gives Congress the power to prohibit the physical "desecration" of the flag. Contrary to the suggestion of the majority, it is not the ambiguity of the word, but its generally accepted meaning, that I find so troublesome. Although the amendment itself does not hazard a definition, the majority report does: desecrate means to treat with contempt, to treat with disrespect, to treat with profanity, or to violate the sanctity of something. Report at 57. See also Webster's New Collegiate Dictionary ("to violate the sanctity of: PROFANE; to treat irreverently or contemptuously"); Black's Law Dictionary ("to violate sanctity of, to profane, or to put to unworthy use").

[1] The majority report would have us believe that viewpoint neutrality is sacrificed by a law which excepts disposal of a worn or soiled flag. Not so. The governmental interest at stake here is in the flag as we all know it—intact and worthy of display. When a flag has come to the end of its life, our interest is no longer in its preservation—and so allowing for its customary disposal in no way detracts from the viewpoint neutrality that we should impose upon its destruction during its life. At the end of its days, a flag is no longer the flag that we aim to protect.

That word—desecration—is so value laden that it gives the Government license to do what the first amendment most fundamentally prohibits: to discriminate between speech it likes and speech it doesn't like. For to determine whether an action "desecrates," we must first make a value judgment about what message the actor is trying to communicate. Does he mean to profane the flag? Does her action treat the flag irreverently or contemptuously? Is the flag being put to an unworthy use? When we make those kinds of value judgments, we are not making the act of flag burning the crime—we are making the message behind the act the crime.

That is the crux of my objection to this amendment—it makes not the act, but its message, the crime. And in so doing, it gives the Congress and the States nearly unbounded authority to criminalize expressive conduct that the Government may find offensive, annoying or just plain wrong-headed. As Prof. Michael E. Parrish noted:

> The proposed [amendment] flies squarely in the face of the libertarian-egalitarian tradition of constitutional amendments in this country. It does not secure or enhance individual freedom; it seeks to restrict it. It does not limit governmental authority; on the contrary, it unleashes it. It does not promote equality or justice; it invites Congress and the state legislatures to punish those forms of expression and conduct which offend the sentiments of the majority. This, the First Amendment forbids.

(Written statement of Prof. Michael E. Parrish, August 14, 1989 at 5.)

Professor Cass R. Sunstein put it simply: one of the problems with the word "desecration" is that it "conspicuously calls for criminalization of protest activity—of criticism of the government—rather than protecting the flag in a more neutral manner." (Written statement of Prof. Cass R. Sunstein, June 6, 1995 at 6.)

In a rather striking passage, the majority report seems to suggest that the amendment would require viewpoint neutrality in both its implementation and enforcement. See Report at 52 (suggesting that amendment will be governed by *R.A.V.* v. *City of St. Paul,* 112 S.Ct. 2538 (1992), which (as report concedes) "requires that the government not discriminate among flag desecrators based on the points of view they seek to dramatize by their particular physical desecration"); id. at 53.

The majority's suggestion is belied, however, not only by the amendments considerable legislative history, but by the majority report itself. Indeed, the chief proponents of the proposed amendment have been unapologetic on the point—arguing that neutrality is neither desirable nor sufficient, and pointing to the amendments lack of neutrality as one of its most appealing features.

For example, when the Judiciary Committee held an extensive set of 4-day hearings on the amendment in 1989, Assistant Attorney General William Barr testified that the measure "would permit the legislatures to focus on the kind of conduct that is *really offensive*." (Testimony of William P. Barr, August 1, 1989 at 128) (emphasis added). Mr. Barr testified that the amendment would give the Congress and states "wide latitude to prohibit that conduct to-

ward the flag that they believe deserved proscription" (written statement of William P. Barr, August 1, 1989 at 13); that there are "an infinite number of forms of desecration" (id. at 17); and that States would have "substantial discretion" in fashioning flag laws (id. at 20).

When the Committee once again convened hearings in 1990, after the *Eichmann* decision, the Bush administration was no less candid. At those hearings, Acting Assistant Attorney General Michael Luttig testified that the amendment would give the Government the latitude to punish actions "only as intended to cast contempt upon the flag." (Testimony of Michael Luttig, June 21, 1990 at 25.) Indeed, I specifically asked Mr. Luttig whether it would be permissible under the amendment to pass laws discriminating between different types of expression. His response was nothing if not frank: "That is correct," he said. "You could punish that desecration which you thought was intended to be disrespectful toward the flag and not that [which] in your judgment does not." Id.

The majority report also underscores the point: viewpoint neutrality is neither a goal nor an attribute of the proposed amendment:

> The Committee does wish to empower Congress and the States to prohibit the contemptuous or disrespectful physical treatment of the flag. The Committee does not wish to compel Congress and the States to penalize respectful treatment of the flag.

(Report at 39) (emphasis in original).

Former Assistant Attorney General Charles J. Cooper testified similarly:

> I submit that public sentiment is not "neutral"; it is not indifferent to the circumstances surrounding conduct relating to the flag. If such conduct is dignified and respectful, I daresay that the American people and their elected representatives do not want to prohibit it; if such conduct is disrespectful and contemptuous of the flag, I believe that they do.

(Testimony of Charles J. Cooper, June 6, 1995).

I do not challenge for a moment the factual accuracy of Mr. Coopers testimony: all of us, instinctively, are probably more inclined to punish acts of flag desecration that we consider disrespectful than those we consider dignified. But that, I believe, misses the basic constitutional point—indeed, the genius of the first amendment. Here in America, the majority by and large does not get to choose what can and cannot be said by the minority—or by anyone else, for that matter. And the Government, more importantly, is constitutionally restrained from deciding what speech is "good" and what "bad."[2] But that is precisely what the proponents of the

[2] The majority rightly points out that the First Amendment's free speech guarantee is not absolute: obscenity, fighting words, libel, words that incite imminent lawlessness, and commercial speech are all circumscribed to varying degrees. But the point is this: those are entire categories of speech that the Court has accorded less than full protection—either because they are harmful in and of themselves, lacking entirely in scientific, literary, political or artistic value, or false. At no time has the Court given the green light to viewpoint discrimination within a given cat-

amendment say that it would—should—do. They would have a flag emblazoned with the slogan "government is great" treated differently than one that says "government is rotten." See Report at 65 (arguing that a properly drafted amendment would treat placing the words "Down with the fascist Federal Government" on a flag differently from placing the name of a military unit on a flag). That, I believe, takes us down an unchartered and very perilous path.

As Professor Tribe stated:

> The proponents of [the] amendment work themselves into a posture where they are advocating what * * * not any of the conservative Justices of the Court have ever said we ought to be able to do: censoring the viewpoint being expressed through a particular act.

(Testimony of Laurence H. Tribe, August 1, 1989 at 160.)

Under this amendment, the State could send to jail the fringe artist displaying the flag on the floor of an art museum—while giving its blessing to the veteran who displays the flag on the ground at a war memorial. The State could arrest the widow who burns the flag to protest the war that took her husband's life—while smiling on the widow who burns the flag in loving memory of her fallen loved one. And the State could prosecute the black veteran who neatly sews a black, green, and red flag on one side of the flag to demonstrate unity and pride in his African-American heritage—while allowing another veteran to sew together the Delaware State flag and the American flag.

I respectfully submit that the proposed amendment, which endorses—and indeed encourages—this type of viewpoint discrimination exacts too high a constitutional price for the protection of the flag. Again, Professor Tribe:

> [O]ne of the most profound principles for which our flag stands—a principle at the core of the First Amendment—is that government must never prohibit verbal or symbolic expression simply because society detests the particular idea or emotion expressed * * *

(Written statement of Laurence H. Tribe, August 1, 1989 at 2.)

Or as Justice Jackson so memorably put it in the flag salute case of 1943:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. * * * If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

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egory—and said, for instance, that pro-American fighting words are permissible where their anti-American counterparts are not, or that it's OK to libel Republicans but not Democrats.

Board of Education v. *Barnette,* 319 U.S. 624, 638, 642 (1943).

Justice Holmes said it this way:

> [I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.

U.S. v. *Schwimmer,* 279 U.S. 644, 654–5 (1929) (Holmes, J., dissenting).

What it boils down to is this: the amendment allows the Government to pick and choose—to make flag burning illegal only in certain situations, involving only certain circumstances, and only if carried out by certain people. This discrimination is precisely—and most profoundly—what the first amendment forbids. Any amendment that works such discrimination does not protect the flag. It censors speech.[3]

III. Conclusion

I agree that we should honor the flag. We should hold it high in our hearts and in our laws. I believe that we should have a single, national standard which protects the flag against all manner of destruction and mutilation.

But we should not, in our effort to honor the flag, dishonor the Constitution in the process. And that, I believe, is what this amendment asks us to do. By giving the States the power to criminalize the physical "desecration" of the flag, it gives them each a license to discriminate between speech they like and speech they don't. For desecration—like beauty—is in the eyes of the beholder.

"A regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view," wrote the Supreme Court, "is the purest example" of a law abridging the freedom of speech. *Consolidated Edison C.* v. *Public Serv. Comm'n,* 447 U.S. 530, 546 (1980). S.J. Res. 31 is a textbook example of the sort of provision the Court warned against. We should heed the warning and reject the amendment.

JOE BIDEN.

[3] The majority report contends that the amendment will simply restore to the States the power they had before the Supreme Court handed down *Texas* v. *Johnson* in 1989—and that the states will exercise their power appropriately. Both as a matter of law and perception, however, the States will have much more latitude under the amendment. Prior to *Johnson,* the States acted within what they believed were the first amendment's boundaries. With this new amendment in hand, the States would not be thus constrained.

X. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee finds no changes in existing law caused by passage of Senate Joint Resolution 40.

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