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CONSTITUTIONAL AMENDMENT TO PROHIBIT PHYSICAL DESECRATION OF U.S. FLAG

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

R E P O R T

together with

MINORITY AND SUPPLEMENTAL VIEWS

[To accompany S.J. Res. 4]

The Committee on the Judiciary, to which was referred the joint resolution (S.J. Res. 4) to propose an amendment to the Constitution so that "Congress shall have power 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 Flag of the United States is both a legally described symbol of our Federal Government and its sovereignty, and an important wellspring of culture, loyalty, pride, unity and resolve. The dual roles in government and culture explain why the flag is a national resource and treasure worthy of protection.

The flag protection amendment is simple and narrow. It reads: "Congress shall have the power to prohibit the physical desecration of the flag of the United States." It does not make anything illegal. If it is enacted, the amendment would simply authorize—but not require—Congress to pass a law protecting the American flag. Such laws existed for 200 years prior to two Supreme Court decisions in 1989 and 1990, and those laws had been enforced by five other Supreme Court rulings and numerous state court cases. James Madison and Thomas Jefferson supported legal protections for the flag, and so did Supreme Court Justice Hugo Black, who was perhaps the leading exponent of First Amendment freedoms ever to sit on the Supreme Court.

All fifty states have passed resolutions calling on Congress to pass a flag amendment. The U.S. House of Representatives has passed the amendment in each of the last four consecutive sessions of Congress, including this one. President Bush supports it as well. Only the Senate—indeed only a handful of Senators—stands between S.J. Res. 4 and the state-by-state debate on ratification.

Some critics say that the flag amendment would offend the right to free speech as guaranteed by the First Amendment. But the proposed amendment would not affect anyone's ability to express any opinion whatsoever about the flag, the country, the government's actions or anything else. Americans will continue to have the right to express their views in public, in private, in newspapers, on the Internet, and through broadcast media. The fact is, acts of disrespect to the flag such as burning it and urinating on it add nothing whatsoever to any debate about our nation's polices, priorities, or direction. Desecrating the flag is not a right that Americans value. Throughout the Committee's consideration of S.J. Res. 4, no

one has stated that flag desecration is acceptable behavior. In fact, a number of Senators who voted against the measure made a point of labeling flag desecration reprehensible conduct.[1]

Moreover, the flag amendment is about much more than speech. Its passage and ratification would be an important demonstration that the American people still run the government, and not the other way around. The most basic question about the structure of our Federal Government is the balance of power among the three branches: executive, legislative, and judicial. For almost 200 years, the legislative branch had the power to make laws concerning physical desecration of the flag. That changed in 1989 and 1990 when the Supreme Court ruled that flag burning is "speech." The effect of that decision was a reallocation of power from Congress to the Supreme Court—which is now the only branch of government that can decide whether a flag desecration law can exist. An overwhelming number of Americans disagree with that result. By giving the discretion back to Congress, the flag amendment would restore the power of the people to determine flag desecration policy through their elected representatives.

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

II. Legislative History

On June 21, 1989, the United States 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 burned a flag at a political demonstration outside the Dallas, Texas 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 5–4 decision, the United States 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. Code Section 700(a). The Judiciary Committee held hearings on August 1, August 14, September 13,

[1] Transcript of Proceedings, Committee on the Judiciary, "Letting the People Decide: The Constitutional Amendment Authorizing Congress to Prohibit the Physical Desecration of the Flag of the United States," March 10, 2004 (hereinafter, "Hearing Transcript"), pp. 14, 21, 27.

and September 14 of 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 veterans' 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), 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. Code Section 700(a).

On October 5, 1989, the Senate passed H.R. 2978, which was enacted October 28, 1989. Under this statute, codified at U.S. 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. At the time, it was generally believed that the recently passed statute would survive constitutional scrutiny and an amendment was thus unnecessary.

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

On March 21, 1995, Senators Hatch and Howell Heflin (D–AL), 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 Judiciary 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. On February 4, 1998, Senator Hatch, along with Senator Max Cleland (D–GA), introduced S.J. Res. 40. The two senators were joined by an additional 53 original cosponsors in this effort, among those the Majority Leader, Senator 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; Professor Stephen B. Presser, Northwestern University School of Law, Chicago, Illinois; Professor Robert Justin Goldstein, Oakland University, Rochester, Michigan; Adrian Cronauer, Esquire, Burch and Cronauer, Washington, D.C.; Stan Tiner, Alabama Register, Mobile, Alabama; Patrick Brady, Chairman, Citizen's Flag Alliance, Sumner, Washington; Rose E. Lee, Former National President, Gold Star Wives of America, Arlington, Virginia; Mary Frost, President, Selective Learning Network, Kansas City, Missouri; Keith A. Kreul, Fennimore, Wisconsin; Francis J. Sweeney, Secretary/Treasurer, Steamfitters Local Union 449, Pittsburgh, Pennsylvania.

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 Gary G. Wetzel, Oak Creek, Wisconsin; Sean C. Stephenson, LaGrange, Illinois; John Schneider, Westlake, California; Tommy Lasorda, Los Angeles, California; Marvin Virgil Stenhammar, Ashville, North Carolina; Professor Richard D. Parker, Harvard University Law School; Clint Bolick, Esquire, Vice President and Director of Litigation, Institute for Justice, Washington, D.C.

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.

At the beginning of the 106th Congress, on March 17, 1999, Senators Hatch and Cleland introduced S.J. Res. 14, a constitutional amendment to permit Congress to enact legislation prohibiting the physical desecration of the American flag identical to S.J. Res. 40 from the previous Congress. Senators Hatch and Cleland were joined by an additional 55 original cosponsors in that effort.

On February 24, 1999, a resolution proposing an amendment identical to that proposed in S.J. Res. 14 was introduced in the House of Representatives as H.J. Res. 33 by Congressmen Randy Cunningham (R–CA) and John P. Murtha (D–PA) and 260 additional original cosponsors. H.J. Res. 33 was approved by the House of Representatives on June 24, 1999, by a vote of 305 to 124.

On April 20, 1999, the Senate Judiciary Committee held a hearing on S.J. Res. 14. The Committee heard testimony from retired Maj. Gen. Patrick Brady, chairman of the Citizens Flag Alliance, Sumner, WA; Maribeth Seely, fifth grade teacher, Branchville, NJ; Prof. Gary May, University of Southern Indiana, Newburgh, IN; Rev. Nathan Wilson, West Virginia Council of Churches, Charleston, WV; retired Lt. General Edward Baca, former chief, National Guard Bureau, Albuquerque, NM; and Professor Richard Parker, Williams Professor of Law, Harvard Law School, Cambridge, MA.

On April 21, 1999, the resolution was polled out of the subcommittee by a vote of 5 to 3, and referred to the full Judiciary Committee.

On April 28, 1999, the Judiciary Committee held a second hearing on S.J. Res. 14. The Committee heard testimony from Senator John Chafee of Rhode Island; Senator John McCain of Arizona; Senator Bob Kerrey of Nebraska; Senator Max Cleland of Georgia; Senator Chuck Hagel of Nebraska; former Senator John Glenn of Ohio; and Randolf Moss, Acting Assistant Attorney General of the Office of Legal Counsel, Department of Justice, Washington, DC.

The Committee took up the legislation on April 29, 1999, and voted 11 to 7 to report S.J. Res. 14 to the full Senate with a favorable recommendation. On March 29, 2000, cloture was invoked by a vote of 100 to 0, and then the measure failed to pass by a vote of 63 to 37.

During the 107th Congress, Senators Hatch and Cleland introduced S.J. Res. 7 on March 13, 2001. The measure, which was identical to the previous S.J. Res. 40, was referred to the Committee on the Judiciary. S.J. Res. 7 was referred to the Subcommittee on the Constitution on July 15, 2002. No action was taken on S.J. Res. 7.

At the beginning of the 108th Congress, on January 16, 2003, Senators Hatch and Diane Feinstein (D–CA) introduced S.J. Res. 4, a resolution identical to S.J. Res. 7 and the other most recent resolutions. On March 10, 2004, the Committee held a hearing on the measure. The Committee heard testimony from the Honorable Daniel J. Bryant, Assistant Attorney General for the Office of Legal Policy, Department of Justice; retired Major General Patrick Brady, Chairman of the Citizens Flag Alliance; Lawrence J. Korb, Senior Fellow at the Center for American Progress, Adjunct Senior Fellow at the Council on Foreign Relations, and Senior Adviser to the Center for Defense Information; John Andretti, a native of Bethlehem, Pennsylvania and a respected NASCAR Nextel Cup Series driver for Dale Earnhardt, Inc.; Gary E. May, Associate Pro-

fessor of Social Work at the University of Southern Indiana in Evansville; and Professor Richard D. Parker, the Paul W. Williams Professor of Criminal Justice at Harvard Law School.

S.J. Res. 4 was referred to the Subcommittee on the Constitution, Civil Rights and Property Rights, and the subcommittee approved the measure by a vote of 5 to 4 on June 2, 2004. On July 20, 2004, the full Committee voted to send S.J. Res. 4 to the floor with a favorable recommendation by a vote of 11 to 7.

III. Discussion

A. The flag in our culture

The American flag has a profound meaning to American culture that far exceeds its nominal significance as the item described by law as the symbol of our Federal government. It would be a Herculean task to list all of the published songs, poems, essays, stories, paintings and other creative works that reflect Americans' love of the flag, and it would be impossible to catalog all of the privately created objects, from quilts to mailboxes to letters and photographs, that display the private thoughts and emotions evoked by Old Glory.

1. The flag and the September 11, 2001 attacks

The horrible terrorist attacks of September 11, 2001 proved within hours that the American people—along with their friends around the globe—see the American flag as a signal of strength and purpose and freedom. By the close of business that day, the nation's largest retailer had sold 88,000 American flags, compared to 6,000 on that date in 2000.[2] Within two days, it sold out of its stock of 500,000 flags.[3] People around the world flew the American flag on September 11, 2001, and the days immediately thereafter. The tattered flag found amid the ruins of the World Trade Center became an icon of proud survival, not unlike the flag Francis Scott Key famously observed "was still there" in the morning after a night of shelling by British forces during the War of 1812. And the brilliant red, white and blue hanging over the blackened, charred wing of the Pentagon inspired many people around the globe by showing the United States would not surrender to the forces that tried to inflict great harm on our country. Americans, together with citizens of other countries who wished to express their sympathy and support for our country, turned to the flag as the unifying image of endurance and resolve. The killing of innocents did not create these feelings for the flag; it tapped them and brought them to the surface. The realization that our country was under attack stoked an emotional flame for the colors, design, history and meaning of the United States flag, demonstrating again that it is a national treasure worthy of protection.

One of the most moving tributes to the victims of the September 11 attacks was a display of over 3,000 flags—one for each victim—in Sandy, Utah in September 2002. Organized by Paul Swenson, the silent tribute was not only a fitting remembrance of the fallen, but also a wonderful demonstration of the power of the American flag. Each flag represented a human life. Together, they moved the

[2] Associated Press, September 13, 2001, Chuck Bartels.
[3] Associated Press, September 21, 2001, Anne D'innocenzio.

emotions of many. When a request was made for volunteers to help set up the flags, over 500 showed up, eager to work. There is simply no other item or object or symbol that can serve as a tribute, rally a community, and inspire the best in people as the American flag.

2. A powerful reminder of sacrifice

Untold millions of Americans have sacrificed in profound ways to build the United States into the world's beacon of hope and freedom of thought and opportunity. They have put their lives on the line and their plans on hold as they served in the armed forces; they have dedicated their creative energies to solving America's difficulties; they have paid taxes to enable America's defense and general welfare; they have foregone personal glory or riches in the name of community. All such sacrifices have strengthened our country and added to the cause of liberty, for which it was founded. Many Americans reflect upon their sacrifices, and those of others, when they see the American flag.

No transaction in America is more solemn than the moment in a military funeral when a folded flag is handed to a widow, or a mother, or a father, whose family member has fallen in the line of duty to our country. In return for the life of a loved one, too many Americans have received a flag, folded at a funeral, as a token of the selfless and total sacrifice that person, and that family, and those loved ones, have made in order to further America's well being. It is common for such folded flags to be displayed in a prominent place such as on a mantle above a fireplace or on a bookshelf. When Americans look at such flags, they feel the loss of the person it represents, and they feel the solace—often too little—that the person they miss died in an honorable way. The emotions woven into the fabric of such flags is far too profound to fade or unravel.

People who have such flags in their living rooms or family rooms certainly are excused if they find it difficult to look the other way at acts of flag desecration. An item that evokes so strongly the memory of a beloved individual should be treated with respect. Someone for whom the flag brings immediate memories of a departed loved one should not have to see a flag purposely humiliated by being torn, or burned, or urinated upon. The country that can require a person to give his or her life in furtherance of its interests overseas should not render itself powerless to protect its flag and those who are hurt by its abuse and humiliation here at home. Indeed, it is painfully ironic to most Americans that, although the government can fine a person for urinating on a public street, the Supreme Court has determined that the government cannot increase that fine by even a dollar if the act takes place on the cherished symbol of our country rather than the bare pavement.

3. The flag as a symbol in a culture of symbols

Perhaps one reason that some people see the flag as a mere symbol, unworthy of protection, is that American society is awash in symbols. Nearly every company, organization, group or club has a logo, design or other icon. Many of those are displayed on flags. Americans are accustomed to seeing corporate flags flying side-by-side with Old Glory, whether in front of buildings, in stores, or in car sales lots. Perhaps some Americans therefore think that the no-

tion of legal protections for the American flag is as absurd as the idea of federal law protecting commercial trademarked designs.

Our country's founders did not experience an overload of logos. The only flags they saw flying on poles were their country's, their state's, or a military banner. The flag on a ship meant sovereignty, and its removal was an act of war. A banner captured in war meant victory over the fighters who gave it up.

Today, a chief executive officer of a company with a flag would not tolerate seeing the logo desecrated. In fact, companies spend untold tens of millions of dollars per year protecting their trademarked logos and designs. If an employee were to desecrate a company flag, the employee would almost certainly face some sort of reprimand. No sensible director, officer or employee would put a company flag in the hands of someone who intended to desecrate it, and no such company official would defend the purposeful destruction of its symbol as an important means of communicating dissenting views about company policies or priorities.

Of course, it is not possible to trademark the American flag[4], and it would not be productive to do so. But it is useful to compare the kinds of protections that our senators, if they were CEOs of companies, would give to corporate logos, in contrast to the complete lack of protection that approximately one-third of our senators are willing to provide for the American flag. The civil law allows remedies against people who damage corporate symbols and logos. A company whose trademarked flag is misappropriated can recover "(1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action."[5] And the damages award can be up to three times the amount of actual loss.[6] This law is meant to be a powerful economic deterrent to anyone who would despoil a corporate trademark.

The overwhelming majority of American people understand and honor the difference between Old Glory and privately owned trademarks used in commerce. For example, as John Andretti testified before the Committee,[7] fans of NASCAR racing are accustomed to seeing many brightly colored corporate logos and several signal flags, each with a particular meaning. Even amid the excited confusion of a crowded stadium, however, fans display a reverence and solemnity toward the one banner that stands for our country's common values: the American flag. Such people have not allowed our modern commercial culture to make Old Glory appear to be just another emblem, or just another brand that a person may or may not prefer over a competing product. The American flag is different. It stands above all others as a cultural and governmental treasure. If the CEOs of our republic—its citizens—decide that the American flag should be protected by federal law, then the senators they elected should let them do it. A vote for S.J. Res. 4 is a vote for letting the American people decide, through their state legislatures, whether or not such legal protections should be restored.

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[4] 15 USCS § 1052(b) (2004).
[5] 15 USCS § 1117(b) (2004).
[6] 15 USCS § 1117(a) (2004).
[7] Hearing Transcript, pp. 59–64.

IV. The Flag in American Law

A. The Constitution's Framers

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 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 1600s, 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.

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

1. 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 United States man-of-war—the *George Washington*—to haul down its flag and replace it with that of Algiers. As Secretary of State under President 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 reparation * * * [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 First 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.

2. 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 1790s, the American flag was a neutral flag, and the law of trade made foreign ships desire to fly it.[8] As George Washington's Secretary of State, Jefferson instructed American consuls to punish "usurpation 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.

B. Statutory protection for the flag

Over the years, Congress and the States have recognized the devotion our diverse people have for the flag. They have enacted stat-

[8] 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.

utes that both promote respect for the flag and protect the flag from desecration.

1. Promotion of respect for the flag

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." 4 U.S.C. 4. 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.

In 1987, Congress chose to honor the flag by designating John Philip Sousa's "The Stars and Stripes Forever" as the national march (36 U.S.C. 304). Further, 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, and is not legally enforceable.

2. Protection for the flag: striking the balance

After a rash of flag desecrations arising from the presidential campaign of 1896, States began to prosecute the commercial use of the American flag, which was deemed disrespectful, as well as verbal and physical desecration of the flag.[9] While some of these older statutes were struck down by activist courts under the now-defunct *Lochner* rationale, dealing with substantive due process and economic legislation, the courts perceived no First Amendment problem with the statutes.[10]

The Supreme Court of the United States, at least with respect to the American flag, eschewed the *Lochner* rationale, and upheld a state flag protection statute in *Halter* v. *Nebraska,* 205 U.S. 34 (1907). The Nebraska statute viewed both commercial use of the flag and physical mutilation of the flag as equally repugnant forms of desecration. Chief Justice Harlan wrote for the Court:

> It is not, then, 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

[9] In *Rushtrat* v. *People,* 57 N.E. 41, 46 (Ill. 1900), and *People ex rel. McPike* v. *Van De Carr,* 86 N.Y.S. 644, 91 A.D. 20 (App. Div. 1904), the courts of Illinois and New York struck down statutes prohibiting the certain commercial or advertising uses of the national flag, but permitting other commercial uses. The courts held the statutes were unenforceable based on the implied constitutional right to choose and to carry on one's occupation without governmental interference and based on economic classifications made by the statutes. *Rushtrat,* 57 N.E. at 46; *McPike,* 86 N.Y.S. at 649–50.

This brand of conservative judicial activism, which was used to strike down pro-labor and other economic legislation, came to its fruition in *Lochner* v. *New York,* 198 U.S. 45 (1905). Since Lochner, however, the Supreme Court and the overwhelming majority of the state courts have since abandoned the activist judicial review of economic legislation. See, e.g., *West Coast Hotel Co.* v. *Parrish,* 300 U.S. 379 (1937).

[10] In *McPike,* 86 N.Y.S. at 648, the Supreme Court of New York, specifically upheld the portion of the statute that prohibited desecration or casting contempt upon the flag, in a non-commercial context, as a means of preventing breaches of the peace.

> 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.

Halter, 205 U.S. at 41, 42.

That the Court viewed commercial use of the flag as demeaning the integrity of the Nation's preeminent symbol is made clear by its statement, "Such [commercial] use tends to degrade and cheapen the flag in the estimation of the people, as well as to defeat the object of maintaining it as an emblem of national power and national honor." Id. at 42. Recognizing the importance of the flag to the Nation, the Supreme Court upheld Nebraska's statute that punished commercial and noncommercial desecration of the flag.

Holdings such as *Halter* precipitated the National Conference of Commissioners on Uniform State Laws to approve the Uniform Flag Act in 1917 which was similar to the statute approved in *Halter*.[11] Although the opinion dealt directly only with the commercial desecration portion of the statute, the Commissioners were of the opinion that *Halter* affirmed in all respects the validity of a statute that prohibited all disrespect for the flag, whether by commercial use or by casting contempt on the flag by word or act. Accordingly, the Commissioners drafted a similar model statute. A number of States soon adopted all or part of the Uniform Flag Act as their flag protection statute or as a supplement to previously existing statutes. These States included Arizona, Louisiana, Maine, Maryland, Michigan, Mississippi, New York, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont, Virginia, Washington, and Wisconsin.[12]

In 1968, in response to the Vietnam War protests, Congress added Federal protection to the long-established State flag protection statutes by enacting 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 one year, for anyone who "knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning or trampling upon it * * *."

Indeed, prior to 1989, Congress, along with 48 States and the District of Columbia, had regulated physical misuse of the American flag. These statutes recognized the vital Government interest at stake in preserving the preeminent symbol of our Nation's history and people and reflected a balancing of this interest against the interest of the actor in conveying a message through the par-

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[11] Section 3 of the Uniform Flag Act provided: "No person shall publicly mutilate, deface, defile, defy, trample upon, or by word or act cast contempt upon any such flag, standard, color, ensign or shield."

[12] By 1951, these statutes were found in the various state laws as follows: Arizona, A.C.A. 43.2401 (1939); Louisiana, R.S. 14:116, 14:117 (1950); Maine, R.S. c. 128 (1944); Maryland, Code Supp. 2159 (1947); Michigan, Comp. Laws 750.244–750.247, 750.566 (1948); Mississippi, Code 2159 (1942); New York, McKinney's Penal Law, 1425, subdi. 16; Pennsylvania, 18 P.S. 4211; Rhode Island, Gen. Laws c. 612, 38, 39 (1938); South Dakota, SDC 65.0601 to 65.0606; Tennessee, Williams' Code 102–107; Vermont, V.S. 8590–8605; Virginia, Code 18–354 to 18–360 (1950); Washington, Rem. Rev. Stat. 2675–1 to 2675–7; Wisconsin, St. 348.479–348.484 (1947).

ticular means of physically destroying the flag instead of through the traditional means of oral or written speech. On balance, these legislatures determined that the Government's interest prevailed.

3. Judicial application of flag protection statutes: respecting the balance

Even after the Supreme Court held that the First Amendment's free speech clause applied to the States, *Gitlow* v. *New York,* 268 U.S. 652 (1925), flag desecrations were punished. For example, in 1941, in *State* v. *Schlueter,* 23 A.2d 249 (N.J. 1941), the Supreme Court of New Jersey affirmed a conviction for physical desecration of the American flag. Likewise, in 1942, in *Johnson* v. *State,* 163 S.W.2d 153 (Ark. 1942), the Supreme Court of Arkansas affirmed a conviction for publicly exhibiting contempt for the flag. Of special significance, is the Arkansas court's refusal to accept the dissent's argument that free speech protections prevented prosecution of the defendant's desecration of the flag. Id. at 155–59 (Smith, C.J., dissenting). In *People* v. *Picking,* 42 N.E.2d 741 (N.Y.), cert. denied, 317 U.S. 632 (1942), the Supreme Court of New York affirmed a conviction for flag desecration and the Supreme Court of the United States denied certiorari review, allowing the conviction to stand. The results of these cases reflected the generally accepted legal tradition that punishment of flag desecration represented a balance of society's interest in protecting the flag and the actor's interest in choosing physical desecration as a means to convey a message instead of the traditional means of oral and written speech. The legislatures had struck the balance in favor of protecting society's interest, and the courts respected this balance.

In 1968, in *United States* v. *O'Brien,* 391 U.S. 367 (1968), the Supreme Court upheld a conviction for burning a draft card, even though the conduct was intended to convey a political message. The Court stated: "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." Id. at 376. The Court balanced society's interest in maintaining an effective draft system against the draft card burner's interest in conveying a message through the particular means of physically destroying a draft card instead of through the traditional means of oral or written speech.[13] On balance, the Court determined that the government's interest prevailed.[14] In 1969, in *Street* v. *New York,* 394 U.S. 576 (1969), the Court overturned a conviction of a defendant who burned a flag while speaking against the flag. The Court overturned the conviction on the narrow ground that the

[13] The four-part test announced in *O'Brien* was:

> [A] government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.

[14] In *Stromberg* v. *California,* 283 U.S. 359 (1931), and *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943), the Supreme Court had recognized, respectively, that a flag has communicative value and that school children could not be compelled to salute the flag in violation of their religious beliefs. These cases did not hold, however, that the Government's interest in preserving the preeminent symbol of our history and our people could not be balanced against an actor's interest in conveying a message through the particular means of physically destroying the flag instead of the traditional means of oral or written speech.

first amendment protected the defendant's verbal expression, but did not address the conduct of burning the flag. Id. at 579.[15] However, in 1971, in *Radich* v. *New York,* 401 U.S. 531 (1971), the Supreme Court affirmed, by an equally divided vote, a conviction based solely on an act of physical desecration of the flag under a New York statute that punished both words and acts of desecration. In so doing, the Supreme Court upheld the traditional balance between society's interest in protecting the flag and the actor's interest in choosing to convey a message by destructive means instead of by readily available oral or written means.

C. Judicial amendment of the Constitution: Restriking the balance

In 1974, in two decisions, the Supreme Court began to weaken the *O'Brien* decision with respect to the physical desecration of the American flag and to shift the balance away from the Government's interest in preserving the flag and toward the actor's interest in choosing destruction of the flag as a means to convey a message. In *Smith* v. *Goguen,* 415 U.S. 566, 581–82 (1974), the Court overturned a flag-desecration conviction, stating that the Massachusetts flag-desecration statute, which punished words and acts of desecration, was void for vagueness, but adding "[c]ertainly nothing prevents a legislature from defining with substantial specificity what constitutes forbidden treatment of United States flags."[16] The Court pointed to the Federal flag protection statute, which punished only acts of desecration, not words, as an example of a constitutional flag protection statute. Id. at 582 n.30. In *Spence* v. *Washington,* 418 U.S. 405 (1974), the Court broke with *O'Brien* by considering the communicative intent of the actor in desecrating his privately owned flag on private property, and issued a narrow, limited holding that the flag misuse statute, as applied to the particular defendant under the particular facts of the case, violated the First Amendment.[17] The Court, however, was unwilling to

[15] Chief Justice Warren, and Justices Black, White, and Fortas all dissented. Chief Justice Warren took the majority to task for avoiding the question of whether the conviction could be premised on the physical desecration of the flag and stated: "I believe that the States and the Federal Government do have the power to protect the flag from acts of desecration and disgrace." *Street* v. *New York,* 394 U.S. 576, 605 (1969) (Warren, C.J., dissenting). Justice Fortas agreed with Chief Justice Warren. Id. at 615 (Fortas, J., dissenting). Justice 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." Id. at 610 (Black, J., dissenting). Justice White also opined that the majority erred in avoiding the physical-desecration issue and stated that he would sustain a conviction for flag burning. Id. at 615 (White, J., dissenting).

[16] Justice White concurred in the judgment, but added "I would not question those statutes which proscribe mutilation, defacement, or burning of the flag or which otherwise protect its physical integrity, without regard to whether such conduct might provoke violence.' *Smith* v. *Goguen,* 415 U.S. 566, 587 (White, J., concurring the judgment). Then Associate Justice Rehnquist, joined by Chief Justice Burger, dissented, stating that he believed that the statute at issue passed constitutional muster under the *O'Brien* test and noting that the statute punished flag abuse regardless of whether a communicative intent existed and was thus unrelated to the suppression of free speech. Id. at 599 (Rehnquist, J., dissenting). Justice Blackmun also dissented, stating that the first amendment would not bar the defendant's conviction. Id. at 591 (Blackmun, J., dissenting).

[17] Chief Justice Burger dissented, stating:

> If the constitutional role of this Court were to strike down unwise laws or restrict unwise application of some laws, I could agree with the result reached by the Court. That is not our function, however, and it should be left to each State and ultimately to the common sense of its people to decide how the flag, as a symbol of national unity, should be protected.

Spence v. *Washington,* 418 U.S. 405, 416 (1974) (Burger, C.J., dissenting). Then Associate Justice Rehnquist, joined by Chief Justice Burger and Justice White, also dissented, stating:

state that there was no Government interest that outweighed the actor's interest in conveying a message through the particular means of physically destroying the flag instead of through the traditional means of oral or written speech.[18]

Nonetheless, there was a dramatic change in Supreme Court jurisprudence. This change was clearly illustrated by the *Radich* case, in which, during a 3-year time span, the Federal courts first affirmed and then overturned the exact same conviction, based on the intervening changes in Supreme Court jurisprudence. In 1971, the Supreme Court affirmed, by an equally divided Court, Radich's flag-desecration conviction under a statute that punished both words and acts of desecration. *Radich,* 401 U.S. 531. However, by 1974, after the Supreme Court handed down *Smith* v. *Goguen,* 415 U.S. 566, and *Spence* v. *Washington,* 418 U.S. 405, the district court overturned Radich's conviction in a habeas proceeding, citing *Goguen* and *Spence.*[19] *United States ex rel. Radich* v. *Criminal Court of the City of New York,* 385 F. Supp. 165 (S.D.N.Y. 1974).

As late as 1982, however, the Supreme Court denied certiorari review of a case involving a conviction for the physical desecration of a flag under the Federal statute that punished only acts, not words, of desecration. *Kime* v. *United States,* 459 U.S. 949 (1982). The certiorari denial, which allowed the flag desecration conviction to stand, came in spite of a strenuous dissent by Justice Brennan to provide absolute protection to the destructive conduct. Id. (Brennan, J., dissenting). The majority of the Supreme Court still refused to abandon completely the traditional balance of society's interest in protecting the flag and the individual's interest in conveying an idea through physically destructive means.

By 1989, however, the Court was prepared to completely abandon *Halter, O'Brien,* and *Radich* and to restrike the constitutional balance against the Government's interest and in favor of the flag desecrator's interest. In *Texas* v. *Johnson,* 491 U.S. 397 (1989), by a 5-to-4 vote, the Supreme Court overturned a conviction for the physical desecration of an American flag on the broad grounds that the government's interest in preserving the Nation's preeminent symbol did not outweigh the interest of the flag desecrator in choosing to convey a message through the particular means of physically destroying the flag instead of through the traditional means of oral or written speech. The Court effectively created for

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The statute under which appellant was convicted is no stranger to this Court, a virtually identical statute having been before the Court in *Halter* v. *Nebraska,* 205 U.S. 34 * * * (1907). In that case the Court held that the State of Nebraska could enforce its statute to prevent use of a flag representation on beer bottles, stating flatly that "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 * * *." The Court then continued: "Such use tends to degrade and cheapen the flag in the estimation of the people, as well as to defeat the object of maintaining it as an emblem of national power and national honor."

[18] A few lower courts, however, had begun to anticipate the trend in the Supreme Court's weakening of the traditional balance and had begun to strike down their State's flag desecration statutes. See, e.g., *People* v. *Vaughn,* 514 P.2d 1318 (Colo. 1973).

[19] After issuing its opinions in *Smith* v. *Gougen* and *Spence* v. *Washington,* the Supreme Court affirmed, without an opinion, a lower court's judgment that used the vagueness and overbreadth doctrines to strike down a portion of a New York statute that would have broadly prohibited use of representations of the flag as campaign buttons or posters. *Cahn* v. *Long Island Vietnam Moratorium Comm.,* 418 U.S. 906 (1974), aff'g 437 F.2d 344 (2d Cir. 1970). Prior to *Gougen* and *Spence,* the New York Court of Appeals had refused to apply the Second Circuit's holding in *Cahn* to strike down the desecration portion of the New York statute, holding instead, that photographs of a nude draped with a flag did not fall within the proscription of the flag desecration provision. *People* v. *Keough,* 290 N.E.2d 819 (N.Y. 1972).

Gregory Lee Johnson an absolute First Amendment right to burn and spit on the American flag.[20]

Justice Stevens's eloquent dissent, which called for retaining the traditional constitutional balance that had been controlling for decades, stated:

> 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." Respondent 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.

Johnson, 491 U.S. at 436–39 (Stevens, J., dissenting).

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." *Johnson,* 491 U.S. at 422 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist 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 response to this final step in a dramatic change in First Amendment jurisprudence, 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

[20] 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 protestor, 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, protestors chanted: "America, the red, white, and blue, we spit on you." Johnson was convicted of desecration of a venerated object in violation of sec. 42.09 (a)(3) of the Texas Penal Code which, among other things, made illegal the intentional or knowing desecration of a national flag. *Johnson,* 491 U.S. at 499–400.

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 actor's newly minted, so-called right to burn or otherwise physically mistreat the flag as part of expressive conduct. *Johnson,* 491 U.S. at 413–19. 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 be 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 a statute—indeed, the Court said so in *Johnson.*

Nonetheless, Congress did enact a facially neutral statute in 1989 (the Flag Protection Act of 1989) with an exception for the disposal of worn or soiled flags, as a response to the *Johnson* decision. Based on the new rule announced in *Johnson,* however, the Supreme Court promptly struck down the statute, by a 5-to-4 vote, in *United States* v. *Eichman,* 496 U.S. 400, 405–06 (1990).

Further, in *R.A.V.* v. *City of St. Paul,* 505 U.S. 377, 385 (1992), the Supreme Court made clear that its newly created, absolute protection for destructive conduct toward the flag is not affected by the "fighting words" doctrine where a statute specifically targets the destructive conduct toward the flag. Accordingly, with respect to the particular medium of the American flag, the Supreme Court will no longer balance society's interest in protecting the flag against the actor's interest in choosing to convey a message through the means of physically destroying the flag instead of through the traditional means of oral or written speech.

D. The need for a constitutional amendment

Amending the Constitution is a matter of extreme significance that should be avoided unless necessary. A federal statute would have been a preferable means of attaining protection for the flag. However, the Supreme Court has indicated definitively that a flag protection statute cannot be fashioned that would pass constitutional muster.

In the 1989 case, *Texas* v. *Johnson,* and in the 1990 case, *United States* v. *Eichman,* the Court concluded that burning or desecrating the flag is an act of speech, and that any legislative measure designed to protect the flag from desecration would be viewed as incompatible with the First Amendment. Although many scholars agree with the four Justices dissenting in *Johnson* and *Eichman* (Chief Justice William Rehnquist as well as Justices Stevens, White and O'Connor) who found statutory flag protection compatible with First Amendment freedoms, Supreme Court precedent and the current make-up of the Court strongly indicate that any statute designed to protect the flag is destined to fail. According to some, a so-called "fighting words" statute would avoid the *Johnson* and *Eichman* holdings by prohibiting flag desecration in the context of certain activities that are not "protected speech," such as incitement of violence. However, the Supreme Court said in *Johnson* and *Eichman* that the flag embodies certain determinate ideas and

messages that will be suppressed by any statutory attempt to prohibit flag desecration.

Moreover, federal courts have construed the "fighting words" doctrine so narrowly and have so often distinguished and refused to apply it, even in the most incendiary circumstances, as to render the doctrine nearly meaningless. In the Eichman case, for instance, the Supreme Court expressly excluded from the category of "fighting words" flag desecration in the context of a face-to-face confrontation during a political protest. 496 U.S. at 315. And the Supreme Court in the *Johnson* case refused to apply the "fighting words" doctrine, finding that public flag desecration at issue was "unlikely to result in a direct personal insult or an invitation to exchange fisticuffs." 491 U.S. at 409. The *Johnson* Court also emphasized that a federal "fighting words" statute is unnecessary because state statutes already on the books adequately cover disorderly conduct and breach of the peace in a manner sufficient to maintain public order. Id. at 410. Thus, if the government attempts to enforce a federal "fighting words" flag protection statute—assuming it were to become law—and the statute were challenged in court, the Supreme Court likely would find it invalid.

A "fighting words" bill or statute has several other weaknesses. First, it would reach only a tiny percentage of situations in which individuals desecrate the flag. In most cases, flag desecration does not involve face-to-face incitement or a challenge to specific persons. To illustrate this point, in one case, a Wisconsin youth, in the dead of night with no one around to detect him, defecated on the American flag and left it in a public place.

In response, in a June 1998 decision, the Wisconsin Supreme Court indicated that it was compelled by the *Johnson* and *Eichman* decisions to rule that such conduct is protected free speech and that the Wisconsin flag protection statute is unconstitutional. Indeed, in the several cases involving challenges to state flag protection statutes decided since the 1990 *Eichman* decision, state courts have ruled consistently with the Wisconsin Supreme Court.

Another concern is that the proscriptions in a "fighting words" bill would have the effect of promoting violence. This is so because actual violence would be a necessary precursor to successfully prosecuting a flag desecrator under the "fighting words" proposal. In other words, persons seeking to protect the flag would be compelled to violence or to breaching the peace in order to trigger the prohibitions and penalties in the bill. For all of these reasons, the Senate, during the 104th Congress and again during the 106th Congress, overwhelmingly defeated a "fighting words" bill.

Many, if not all, of the senators who support S.J. Res. 4 would prefer prohibiting flag desecration by statute if that were possible. But there is no conceivable way to enact a statute that would survive the analysis used in the *Johnson* and *Eichman* decisions. S.J. Res. 4 is the only means of returning to the Congress the authority to enact a flag protection statute and thereby returning the First Amendment to what it meant for nearly two centuries prior to the *Johnson* and *Eichman* decisions.

V. The Proposed Constitutional Amendment

A. What it says and what it means

The proposed constitutional amendment contained in S.J. Res. 4 is simple and straightforward. It reads: "Congress shall have the power to prohibit the physical desecration of the flag of the United States." These 17 words would not make anything illegal. Rather, if approved by the Senate and ratified by three-fourths of the states (the House of Representatives has already passed it), this amendment would simply restore the ability of Congress to fashion an appropriate statute, which would of course need to be passed by both houses and signed by the president.

Our free speech is not at issue. The proposed amendment would not affect anyone's ability to express any opinion whatsoever about the flag, the country, the government's policies or anything else. Americans will continue to have the right to express their views in public, in private, in newspapers, on the Internet, and through broadcast media. There will be no effect on anyone's ability to express himself; Acts of disrespect to the flag, such as burning it and urinating on it, add nothing whatsoever to any debate about our nation's polices, priorities or direction.

B. Several constitutional amendments were spurred by Supreme Court decisions

The flag amendment is certainly not the first time that Congress has attempted to overturn Supreme Court decisions. As a matter of fact, nearly a third of the amendments (five out of 17) that have been adopted since the passage of the Bill of Rights were in response to specific Supreme Court decisions.

The first time Congress overturned a Supreme Court decision with a constitutional amendment was in response to the Court's first major decision, *Chisholm* v. *Georgia* (1793). The Court ruled in favor of a British subject in a suit against the state of Georgia. Congress, responding to the ensuing public outcry, introduced an amendment that deprived the federal courts of jurisdiction in lawsuits brought against a state by a foreigner or a citizen of another state. The resulting Eleventh amendment was passed in 1798. Next came the *Dred Scott* decision in 1857. Its holding that blacks were not citizens nor could ever be considered citizens was explicitly overruled by the Fourteenth Amendment after the end of the Civil War. Later, the Supreme Court ruled that Congress did not have the power to levy income taxes in *Pollack* v. *Farmers' Loan and Trust* (1885). Immediately, an amendment giving Congress the power to levy income taxes was introduced. Although that measure was defeated at first, it was later passed by Congress in 1909, and ratified four years later as the 16th Amendment. Next, Congress passed the Nineteenth Amendment, giving women the right to vote. This Amendment overturned the Supreme Court's decision in *Minor* v. *Happersett* (1874). Finally, Congress passed the 24th Amendment, outlawing poll taxes, after the Supreme Court had ruled in *Breedlove* v. *Suttles* (1937) that the poll taxes were Constitutional and not an abridgment of rights under the Fourteenth, Fifteenth, and Nineteenth Amendments. It was ratified in 1964.

This history makes clear that, far from being an unusual legislative tactic, S.J. Res. 4 reflects a perfectly legitimate mechanism

under our system of government. Sending this amendment to the states is perfectly consistent with Congressional action in the past in responding to Supreme Court decisions. As Richard D. Parker of Harvard Law School explained:

> [I]t is the responsibility of the Congress under the separation of powers to prove a check to the Court, and the Article V process is an effect, and indeed the most effective way for the Congress to check this new assertion of judicial power. It has been done before, most recently with the 18-year-old-vote. It is especially appropriate when an amendment has the support of a substantial majority, sustained over time, when that amendment defends an established meaning of the Constitution, changed by the Justices, and when all the amendment does is empower the Congress to pass legislation.[21]

C. What the proposed amendment is not

Some critics of S.J. Res. 4 argue that the measure would amend the First Amendment to curtail important liberties, would disrespect the Constitution, and would somehow facilitate the adoption of measures that would abridge other constitutional rights. While such assertions might make for good speeches, they have no basis in fact.

1. No reduction in First Amendment rights

S.J. Res. 4 would allow the American people, through their state legislatures, to decide whether to ratify an amendment that grants Congress the power to prohibit physical desecration of the flag only. If adopted, the effect would be to overturn two Supreme Court decisions which have misconstrued the First Amendment with respect to flag desecration. S.J. Res. 4 would not amend or alter any other interpretation of the First Amendment. This is true for at least two reasons.

First, physical acts of desecration are conduct, not speech. The revolution in this area happened in 1989 when the Supreme Court struck down a state flag protection statute when 48 states and the District of Columbia had similar statutes. Flag protection statutes had been on the books for nearly a century when the Court decided to protect this despicable conduct under the First Amendment.

Congressional Research Service has published a report that compiles federal and state laws on the desecration and misuse of the flag of the United States. The District of Columbia and the states of Alaska and Wyoming are the only ones without statutes prohibiting flag desecration. In fact, before the *Johnson* and *Eichman* decisions, many of these state statutes were upheld by various state courts. One such example is *Monroe* v. *State Court of Fulton County* (571 F. Supp. 1023; DCND Georgia, 1983).

On writ for habeas corpus, the conviction of the defendant, Diane Monroe, under a Georgia anti-desecration statute, was upheld. The defendant was convicted for having burned the American flag during a demonstration against U.S. "involvement in Iranian affairs" which occurred outside the federal courthouse in Atlanta. The U.S. District Court refused to grant the writ of habeas corpus by apply-

[21] Hearing Transcript, p. 91.

ing the standard set out in the U.S. Supreme Court's test in the *Spence* case. The court determined that, under the circumstances under which the statute was enforced, the interests which the State of Georgia sought to further were not unrelated to the suppression of free expression but that the defendant's burning of the flag at the demonstration did not convey any information or ideas, nor did it identify the subject of her concern. Thus, there was deemed to have been an insufficient restriction of the defendant's freedom of expression to warrant invalidating her conviction.

Second, the First Amendment's guarantee of freedom of speech has never been deemed absolute. Libel is not protected under the First Amendment. Obscenity is not protected under the First Amendment. A person cannot blare out his or her political views at two o'clock in the morning in a residential neighborhood and claim First Amendment protection. Fighting words which provoke violence or breaches of the peace are not protected under the First Amendment. We can prohibit the physical desecration of the flag without circumscribing robust political debate.

In fact, the First Amendment has been amended a number of times by Congress, but much more often by the Supreme Court. Much like the Constitution itself, the First Amendment and the Bill of Rights is constantly being reviewed and applied to novel and modern situations. The meaning of the First Amendment changes according to the wishes of the Supreme Court—nine distinguished but un-elected jurists who have lifetime appointments. Over time, the Court has found restrictions on several types of speech to be consistent with the First Amendment.

For example, the Court has refused to privilege speech that 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). The court has refused to privilege speech that threatens certain tangible, diffuse harm, such as obscenity, which pollutes the moral environment. *Miller* v. *California,* 413 U.S. 15 (1973). The Court has also refused to privilege speech that criticizes official conduct, i.e., libel of a public official when the criticism is known to be false and damages the official's reputation. *New York Times* v. *Sullivan,* 367 U.S. 254 (1964). In that case, the Court held that such speech should be regulated since it is at odds with the premises of democratic government.

In each of these instances, the cry could have gone up that the Court was amending the First Amendment. However, time has shown that the constitutional order and freedom of speech have thrived in this country not in spite of, but because of, the laws regulating libel, slander, and pornography.

Likewise, the First Amendment will harmonize very well with the flag protection amendment. Legal protections for the flag and the First Amendment co-existed for nearly 200 years of our history. In fact, our dynamic, "ever-changing" First Amendment, throughout our history, has been remarkably constant where protecting our nation's flag is concerned. As this great amendment accommodated flag protection for nearly two centuries prior to 1989, so it can and should continue to accommodate such safeguards in the future.

Some people who think physical acts of flag desecration are "speech" nevertheless support legal protections. Some think that, even though such a restriction would indeed be a limitation of

rights, it is an insignificant one because an extraordinarily small number of Americans exercises or even values that right. In other words, it is a right that Americans overwhelmingly do not care to have. As John Andretti told the Committee:

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

Hearing Transcript, pp. 60–61. Still others say that the small sacrifice of rights is part of being a responsible citizen and member of the community. As it says on the Korean War Veterans Memorial in Washington, D.C., "freedom is not free." The American people have paid a very high price in lives and treasure to establish and protect a government that safeguards liberty. The small (indeed, negligible to most) sacrifice of giving up the right to perform vile acts to the American flag is, in comparison, a very small price to pay in return for the comfort so many Americans would take in knowing that our society finds desecration of the American flag at least as unacceptable as parking at an expired parking meter.

2. No disrespect in amending the Constitution

The Constitution itself establishes the process for its own amendment. The best use of Article V of the Constitution, which authorizes Constitutional amendments upon approval of two thirds of the Congress and ratification by three-fourths of the States, is to employ that process only when a great majority of citizens determines that its government—or one of its three branches—is not governing according to its will. The framers themselves realized that the Constitution was a living document and that the people, after proper reflection and deliberation, should have the power to amend the basic law of the land. The amendment process, far from subverting the Constitution, was an essential part of the Constitution from the beginning. Indeed, there would not be a First Amendment without Article V and the amendment process.

Some have asserted that Congress has considered too many possible amendments to the Constitution, as if thoughtful consideration were an affront to the document. Imagine if the "too many" argument had carried the day when the first 10 amendments were proposed—is 10 too many amendments in a two-year period?

It is interesting to note that those who decry the proposed amendment as a change to the Constitution do not say the same about the real change to the document: the Supreme Court's decisions in *Johnson* and *Eichman,* which overturned 200 years of legal principles. In comparison to such judicial fiat, the employment of the Constitution's Article V process is more respectful to the Framers' intent.

3. No slippery slope

Some opponents of the flag amendment complain that it sets us on a slippery slope to foreclosing our constitutional freedoms. But there is no "slippery slope" here. The flag protection amendment is limited to authorizing the Federal Government to prohibit physical

desecration of only the American flag. It does not serve as precedent for any other legislation or 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. 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 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.

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 or flying it at half staff on days other than on officially designated occasions. There is no way to construe the flag amendment to do anything other than allow the Congress to enact a statute authorizing punishment for acts of physical desecration to the flag of the United States.

D. Let the people decide

One purpose of Article V of the Constitution is to ensure that the American people offer their own voice in any amendments to that document. Although the Framers trusted representatives of the people—Congress and the president—with ordinary legislation, they designed Article V in a way that involves the American people much more directly with changes to the Constitution. It is therefore appropriate for senators to see their role not as final arbiters of the underlying merits of S.J. Res. 4, but rather as gatekeepers who are deciding whether to give the American people, through their state legislatures, the opportunity to consider and debate the flag amendment. There can be no doubt that the American people want that opportunity. All fifty states have passed resolutions calling on Congress to pass a flag amendment. The House of Representatives has passed the amendment in each of the last four consecutive sessions of Congress, including this one.

Senate passage of S.J. Res. 4 would give "We the People" their proper role in our democracy, and would restore our historical legal order. The most basic question about the structure of our federal government is the balance of power among the three branches: executive, legislative and judicial. For almost 200 years, the legislative branch had and exercised the power to make laws concerning flag desecration. That changed in 1989 and 1990 when the Supreme Court ruled that acts of physical flag desecration are "speech." The effect of those decisions was a reallocation of power from Congress to the Supreme Court, which is now the only branch of government that can decide whether a flag desecration law can

exist. An overwhelming number of Americans disagree with that result. By giving the people the opportunity, through State ratification, to restore Congress's authority in this area, the flag amendment would empower the people to determine flag desecration policy through their elected representatives. The Senate should give the people that power.

E. The ratification debate

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

Americans' understanding of their government, or lack thereof, has become a popular object of ridicule. It is difficult not to share that sentiment when reading the results of surveys aimed at testing such knowledge. For example, a recent survey[22] of fourth graders asked, "Which part of the government is responsible for passing laws?" Nearly three-quarters of the respondents got the wrong answer from the following list: "(A) The President; (B) The Supreme Court; (C) the Congress; (D) The State Department." On another survey, only 2 percent of eighth graders wrote an appropriate response to the question, "Explain why the framers of the Constitution established a system of checks and balances among the three branches of government."[23] That study also showed that fewer than one-third of fourth graders could identify the "document that contains the basic rules used to run the United States government" from this list: "(A) the Declaration of Independence; (B) Magna Carta; (C) the Mayflower Compact; (D) the Constitution." Such results demonstrate a serious lack of understanding about the fundamental workings of the United States government. A full public discussion about the flag amendment would necessarily raise awareness and encourage understanding of the different branches of government, the importance of checks and balances, and the meaning of the Constitution.

American children are also surprisingly unaware of the enormous sacrifices that brave Americans have made for them on the battlefield. Washington Post writer Jay Matthews pointed this out in an article printed just before the World War II Memorial was dedicated on May 29, 2004.[24] Based on interviews with 76 Washington-area high school students, Matthews found that only one-third of them could name even one World War II general, and only about half could name a World War II battle. In contrast, two-thirds of the students correctly stated what happened to Japanese Americans during the war, reflecting the fact that the internment camps are "a standard part of every area history curriculum." It is clear that America's young people would benefit from a greater

[22] National Center for Education Statistics, Institute of Education Sciences, U.S. Dept. of Education, 2001.
[23] National Center for Education Statistics, Institute of Education Sciences, U.S. Dept. of Education, 1994.
[24] Washington Post, May 28, 2004, B1.

focus on the nature of our freedom, its origin and meaning, and the tremendous price Americans have paid to obtain it. A nationwide debate over the flag amendment would provoke just that sort of discussion in the nation's classrooms, kitchens, workplaces, dormitories and legislatures. Everyone in the country would benefit from that debate.

VI. Vote of the Committee

On July 20, 2004, with a quorum present, by rollcall vote, the Committee on the Judiciary voted on a motion to report favorably S.J. Res. 4. The motion was adopted by a vote of 11 yeas and 7 nays, as follows:

Yeas: Senator Hatch, Senator Grassley, Senator Specter, Senator Kyl, Senator DeWine, Senator Sessions, Senator Graham, Senator Craig, Senator Chambliss, Senator Cornyn, Senator Feinstein.

Nays: Senator Leahy, Senator Kennedy, Senator Kohl, Senator Feingold, Senator Schumer, Senator Durbin, and Senator Edwards.

VII. Text of S.J. Res. 4

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States to grant Congress and the States the power 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 (two-thirds of each House concurring therein), 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 seven years from the date of its submission by the Congress:

"Article—

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

VIII. 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 legislation prohibiting flag desecration could impose additional costs on U.S. law enforcement agencies 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. S.J. Res. 4 would not affect direct spending or revenues.
>
> S.J. Res. 4 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Re-

> form Act and would impose no costs on state, local, or tribal governments. In order for the amendment to become part of the Constitution, three-fourths of the state legislatures would have to ratify the resolution within seven years of its submission to the states by Congress. However, no state would be required to take action on the resolution, either to reject it or approve it.

Congressional Budget Office, Cost Estimate, S.J. Res. 4, letter dated July 23, 2004.

IX. 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 4 will not have direct regulatory impact.

X. MINORITY VIEWS

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2. The Supreme Court protected unpopular speech connected to the flag long before *Johnson*.

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1. There is no consensus or clarity on the definition of "flag".

2. There is no consensus or clarity on the definition of "desecration".

3. Use of the word "desecration" in S.J. Res. 4 undermines the First Amendment religion clauses.

4. There is no consensus or clarity on the issue of content-neutrality.

5. The difficulties that attend a statutory approach to flag burning would remain even following a constitutional amendment.

F. Conclusion.

A. Introduction: To Honor Our Veterans and Our Nation's History, We Must Protect the Constitution

Flag burning is a despicable and reprehensible act. The issue before us, however, is not whether we agree with that truism—we do. Instead, the issue is whether we should amend the Constitution of the United States, with all the risks that entails, and narrow the precious freedoms ensured by the First Amendment for the first time in our history, so that the Federal government can prosecute the tiny handful of individuals who show contempt for the flag.

In voting on this proposed amendment, the Senate's role should reflect a sense of priorities appropriate to the gravity of our time. This amendment has already been defeated in the Senate four times in the last 15 years. No significant problem existed at the outset, and no new one has appeared since then. The real issues of our current situation—such extraordinary problems as war and terrorism, trade imbalance and domestic jobs and deficits—are far more pressing. It reflects a strange set of priorities to think our national interest is best served by rolling back the Bill of Rights.

The Senate last considered, and rejected, the proposed amendment in the year 2000, another presidential election year. Since that time, we have not seen an explosion of incidents of flag burning, a decrease in patriotic displays, or a marked reduction among young people in willingness to serve in the armed forces. To the contrary, the majority report itself describes how, in the wake of the terrorist attacks of September 11, 2001, the American people and their friends around the world flew the American flag as a unifying image of strength and purpose and freedom. The spontaneous rally around the American flag that followed the attacks makes it even more clear now than it was in 2000 that the monumental step of amending the Constitution to increase legal protections for the flag is unnecessary and ill-advised.

Proponents of this amendment rely heavily on the views of distinguished American veterans and war heroes who have expressed to this Committee their love of the flag and support for the amendment. Those who fought and sacrificed for our country deserve our respect. They appreciate the costs as well as the joys of freedom and democracy. But while proponents would like to portray the views of veterans as monolithic, many outstanding veterans oppose the amendment. They do so for a number of reasons.

Above all, they believe they fought for the freedoms and principles that make this country great, not just the symbols of those freedoms. To weaken the nation's freedoms in order to protect a particular symbol would trivialize and minimize their service.

General Colin L. Powell (USA, Ret.), Chairman of the Joint Chiefs of Staff during the 1991 Persian Gulf War and currently the Secretary of State, wrote to Senator Leahy on May 18, 1999, in opposition to the proposed flag protection amendment.[1] He wrote:

> We are rightfully outraged when anyone attacks or desecrates our flag. Few Americans do such things and when they do they are subject to the rightful condemnation of their fellow citizens. They may be destroying a piece of

[1] General Powell was not serving in the military or in the Executive Branch when he wrote the letter, the full text of which is reproduced as Appendix A to these views.

> cloth, but they do no damage to our system of freedom which tolerates such desecration. * * *
>
> I would not amend that great shield of democracy to hammer a few miscreants. The flag will still be flying proudly long after they have slunk away.

Former Senator John Glenn, who served this nation with special distinction in war and in peace, as well as in the far reaches of space, stated in a written submission to the Committee for its hearing on March 10, 2004:

> [I]t would be a hollow victory indeed if we preserved the symbol of our freedoms by chipping away at those fundamental freedoms themselves. Let the flag fully represent all the freedoms spelled out in the Bill of Rights, not a partial, watered-down version that alters its protections.
>
> The flag is the Nation's most powerful and emotional symbol. It is our most sacred symbol. And it is our most revered symbol. But it is a symbol. It symbolizes the freedoms that we have in this country, but it is not the freedoms themselves. That is why this debate is not between those who love the flag on the one hand and those who do not on the other. No matter how often some try to indicate otherwise, everyone on both sides of this debate loves and respects the flag. The question is how best to honor it and without taking the chance of defiling what it represents.
>
> Those who have made the ultimate sacrifice and died following that banner did not give up their lives for a red, white and blue piece of cloth. They died because they went into harm's way representing this country and because of their allegiance to the values, the rights, and principles represented by that flag.

Keith Kreul, an Army veteran and former National Commander of the American Legion, expressed a similar opinion in a statement he submitted to the Committee for its March 2004 hearing. He disputes the majority's view that the proposed amendment honors the flag:

> American veterans who have protected our banner in battle have not done so to protect a "golden calf." Instead, they carried the banner forward with reverence for what it represents—our beliefs and freedom for all. Therein lies the beauty of the flag.

Another veteran who expressed a similar view was Professor Gary May, who lost both his legs in combat while serving his country in Vietnam. Professor May testified at the March 2004 hearing:

> Freedom is what makes the United States of America strong and great, and freedom, including the right to dissent, is what has kept our democracy going for more than 200 years. And it is freedom that will continue to keep it strong for my children and the children of all the people like my father, late father in law, grandfather, brother, me, and others like us who served honorably and proudly for freedom.

> The pride and honor we feel is not in the flag per se. It's in the principles for which it stands and the people who have defended them. My pride and admiration is in our country, its people and its fundamental principles. I am grateful for the many heroes of our country—and especially those in my family. All the sacrifices of those who went before me would be for naught, if an amendment were added to the Constitution that cut back on our First Amendment rights for the first time in the history of our great nation.
>
> I love this country, its people and what it stands for. The last thing I want to give the future generations are fewer rights than I was privileged to have. My family and I served and fought for others to have such freedoms and I am opposed to any actions which would restrict my children and their children from having the same freedoms I enjoy.

Included in Professor May's prepared testimony was another statement to the same effect by World War II veteran Frances W. Lovett of Waverly, Ohio, who served with the Tenth Mountain Division and received the Bronze Star. Mr. Lovett wrote:

> The voice of dissent is a voice we need to hear—not stifle. Those who favor the proposed amendment say they do so in honor of the flag, but in proposing to unravel the First Amendment, they desecrate what the flag represents and what so many of my comrades died to defend.[2]

This is a radical suggestion—that our country's soldiers fight to protect the rights of the minority to do or say things that displease or even offend us. But America was founded on just such radical ideas.

General Powell observed in his May 1999 letter to Senator Leahy that "The First Amendment exists to insure that freedom of speech and expression applies not just to that with which we agree or disagree, but also that which we find outrageous." John Glenn echoed this observation in his March 2004 submission when he wrote that the First Amendment protects "[t]he liberty to worship, to think, to express ourselves freely, openly and completely, no matter how out of step those views may be with the opinions of the majority." Former Senator Bob Kerrey, a recipient of the Congressional Medal of Honor, also reminded the Committee, in written testimony submitted at this year's hearing, that "it is the right to speak the unpopular and objectionable that needs the most protecting by our government." Referring specifically to acts of flag burning, he added: "Patriotism calls upon us to be brave enough to endure and withstand such acts."

James Warner, a decorated Marine flyer who was a prisoner of the North Vietnamese from 1967 to 1973, made the same point in graphic terms in a *Washington Post* article dated July 11, 1989:

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[2] Professor May, who chairs a group called Veterans Defending the Bill of Rights, included similar statements by other veterans opposed to S.J. Res. 4 in a letter to the Committee dated March 10, 2004. The letter is reproduced as Appendix B to these views.

> I remember one interrogation where I was shown a photograph of some Americans protesting the war by burning a flag. "There," the officer said. "People in your country protest against your cause. That proves that you are wrong."
>
> "No." I said, "that proves that I am right. In my country we are not afraid of freedom, even if it means that people disagree with us." The officer was on his feet in an instant, his face purple with rage. He smashed his fist onto the table and screamed at me to shut up. While he was ranting I was astonished to see pain, compounded by fear, in his eyes. I have never forgotten that look, nor have I forgotten the satisfaction I felt at using his tool, the picture of the burning flag, against him. * * *
>
> We don't need to amend the Constitution in order to punish those who burn our flag. They burn the flag because they hate America and they are afraid of freedom. What better way to hurt them than with the subversive idea of freedom? * * * Don't be afraid of freedom, it is the best weapon we have.

Proponents of this amendment have argued that it will promote patriotism. Major General Patrick Brady (USA, Ret.), who heads a coalition of organizations that support the amendment called the Citizens Flag Alliance, has gone so far as to say, in his testimony this year before the Committee: "It should be obvious that demanding—indeed, forcing—patriotism is the bedrock of our freedom." But many veterans object to this attempt to, in effect, legislate patriotism, speaking in eloquent terms about the importance of respect and love for country coming from within a citizen or a soldier, not being imposed from without by the government.

Former Senator Bob Kerrey stated this view succinctly in his March 2004 submission: "[R]eal patriotism cannot be coerced. It must be a voluntary, unselfish, brave act to sacrifice for others." Keith Kreul also made the point in his March 2004 statement: "A patriot cannot be created by legislation. Patriotism must be nurtured in the family and educational process. It must come from the heartfelt emotion of true beliefs, credos and tenets."

Similarly, the late John Chafee, a distinguished member of this body and a highly decorated veteran of World War II and Korea, pointed out at our hearing on April 28, 1999, that just as forced patriotism is far less significant than voluntary patriotism, a symbol of that patriotism that is protected by law will be not more, but less worthy of respect and love: "We cannot mandate respect and pride in the flag. In fact, in my view taking steps to require citizens to respect the flag, sullies its symbolism and significance."

Veterans disagree about the proposed amendment, but they agree that Congress must do more for those who have served this country in uniform. Professor May, who has worked as a social worker in Veterans Administration hospitals and outpatient clinics, reminded the Committee in March 2004 of America's broken promises: "If we are truly serious about honoring the sacrifices of our military veterans, our efforts and attention would be better spent in understanding the full impact of military service and extending

services to the survivors and their families." Answering a follow-up written question from Senator Leahy, Professor May elaborated:

> There are numerous substantive needs of veterans and families that are going unmet or are being inadequately met. Funding for Department of Veterans Affairs medical care needs to be increased. * * * Compensation and benefits for service women/men need to be increased. * * * There are countless tangible things we can—and should—do if we wish to convey a sincere, credible message of caring about veterans and their sacrifices. Amending the Constitution is not among them.

Lieutenant General Robert G. Gard, Jr. (USA, Ret.) struck a similar note in a letter to the Chairman and Ranking Member of the Committee dated March 8, 2004. He wrote:

> [I]n an era of global conflict and threat, is [flag desecration] really the issue that should be taking up the valuable time of Congress? * * * On the home front, our military is receiving rhetorical laurels for its splendid achievements in Iraq, but our veterans are still fighting for richly deserved access to medical care, mental health services, adequate housing, disability assistance and other essential services. * * * But instead of addressing these issues, Congress is spending its time debating flag burning. For lawmakers unwilling to actually face the tough issues, this may provide an appealing smoke screen [that] allows politicians to be in favor of an empty patriotic gesture without doing anything substantive to assist veterans.

A 23-year Navy and Vietnam War veteran and Pentagon official in the Reagan Administration, Lawrence Korb, testified at the March 2004 hearing. He echoed General Gard's concerns and offered a number of steps Congress should take to address the very pressing needs of veterans:

> I would suggest that the Congress could help [veterans] much more by resisting the draconian measures advocated by the Bush administration that adversely impact our current and future veterans. * * *
>
> First, since coming into office the Bush administration has increased the out of pocket costs for veterans using VA's medical facilities by nearly 500%. * * *
>
> Second, the administration has fought tooth and nail to prevent disabled veterans who are also military retirees from getting "concurrent receipts" of both their retired and disability pays. * * *
>
> Third, the Bush Administration actively sought to reduce hostile fire pay and family separation pay while our troops were fighting wars in two countries. * * *
>
> Fourth, in what the Army Times has called an act of betrayal, the Department of Defense is considering closing commissaries and schools on military bases throughout our country.
>
> Fifth, the administration refuses to endorse Congressional proposals to allow Guard and reserve members to

> participate fully in the military's Tricare Health System. * * *
>
> Finally, in spite of the unprecedented strain being placed on the active duty Army and its reserve component, the administration continues to resist permanently adding 40,000 people to the active Army.

Even Major General Brady, a leading supporter of this amendment, frankly admitted, in response to a question from Senator Leahy following the Committee's April 1999 hearing, that "the most pressing issues facing our veterans" were not flag burnings, but rather "broken promises, especially health care."

It is time to honor our veterans with substance not symbolism. If the amount of time, effort, and money devoted to this amendment over the past 15 years had been directed toward improving services for veterans, those deserving Americans would be much better off.

We on the Judiciary Committee who oppose the flag amendment deplore any act of flag desecration and hold the flag in high regard. But we believe that this cherished emblem is best honored by preserving the freedoms for which it stands. We understand that the political pressure for this amendment is strong, but hope that the Senate will in the end heed the words of our former colleague, John Glenn, when he urged us to reject the amendment:

> [T]here is only one way to weaken the fabric of our Nation, a unique country that stands as a beacon before other Nations around this world. The way to weaken our Nation would be to erode the freedom that we all share. * * * We must not let those who revile our way of life trick us into diminishing our great gift, or even take a chance of diminishing our freedoms.

B. There Is No "Great and Extraordinary Occasion" Justifying the Proposed Amendmemt

1. The Constitution should be amended only under very compelling circumstances

James Madison, widely regarded as the Father of the Constitution, told posterity that constitutional amendments should be limited to "certain great and extraordinary occasions." It is distressing to find his advice so unheeded that there are now more than 70 proposed amendments pending before the 108th Congress. But it is reassuring to recall that since Madison spoke, although more than 11,000 amendments have been offered, only 27 have been adopted, and only 17 since the first ten amendments comprising the Bill of Rights were ratified in 1791. If we disregard the Eighteenth and Twenty-First Amendments, marking the beginning and end of Prohibition, we are left with only 15 amendments in over 200 years.

The proposed resolution is offered in direct response to the Supreme Court's 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 highest court. On at most five occasions in the history of this country has a constitutional amendment been adopt-

ed in response to a decision of the Supreme Court.[3] Significantly, these amendments either expanded the rights of Americans or involved the mechanics of government. The proposed amendment would be the first amendment to the Constitution that would infringe on the rights enjoyed by Americans under the Bill of Rights, defying the long-established principle that the Constitution is a limitation on government, not on individuals.

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 stated at a Committee markup on June 24, 1998:

> All of our freedoms, all of our liberties rest on the First Amendment. It is the granite of democracy. It is our bedrock. Without the right to speak out, all 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 or anybody else. You are stuck. Without the freedom to worship or not, unmolested, there is a gaping void at the very core of our life. * * *
>
> If some disaster were to sweep away all the monuments of this country, the Republic would survive just as strong as ever. But if some disaster * * * some failure of our souls were to sweep away the ideals of Washington and Jefferson and Lincoln, then not all the stone, not all the marble, not all the flags in the world would restore our greatness. Instead, they would be mocking reminders of what we had lost.

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.

Federalist No. 49 also warns against using the amendment process when "[t]he passions [and] not the reason, of the public, would sit in judgment."

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[3] The majority report claims (in Part V.B) that the Eleventh, Fourteenth, Sixteenth, Nineteenth, and Twenty-Fourth Amendments were passed in response to specific Supreme Court decisions. But the notion that Congress adopted the Nineteenth Amendment, giving women the right to vote, in response to the nearly 50-year old Supreme Court decision in *Minor* v. *Happersett,* 88 U.S. 162 (1874) (upholding state law confining right of suffrage to men) is a stretch; this change is properly credited to the work of the women's suffrage movement. Moreover, while the Fourteenth Amendment arguably was adopted in response to the Dred Scott decision, *Scott* v. *Sandford,* 60 U.S. (19 How.) 393 (1857), the introduction of the Black Codes following the Civil War likely was the true catalyst.

The horror with which the Framers might regard the more than 11,000 amendments offered in our history, or the more than 70 offered in the 108th Congress alone, no doubt is offset by the wisdom of the nation's elected representatives in adopting so few amendments since the Bill of Rights. An amendment to the Constitution to outlaw flag burning would be precisely the sort of act against which the Framers warned.

Common sense alone tells 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. The proposed amendment would be the first amendment ever passed to vindicate purely symbolic interests. Former Assistant Attorney General Walter Dellinger wrote the Committee on March 10, 2004:

> The unprecedented amendment before you would create legislative power of uncertain dimension to override the First Amendment and other constitutional guarantees. More fundamentally, it would run counter to our traditional resistance, dating back to the time of the Founders, to resorting to the amendment process. For these reasons, the proposed amendment—and any other proposal to amend the Constitution in order to punish a few isolated acts of flag burning—should be rejected by this Congress.

Rather than face the solemn responsibility of justifying an amendment to the Constitution, the majority report repeatedly suggests that Senators should abdicate their established role in voting on proposed constitutional amendments and instead view themselves simply as "gatekeepers," whose job is to determine whether there is enough popular support for an amendment to pass it on to the state legislatures. This argument is totally contrary to the conservative conception of amendment that our Constitution establishes. However many state legislatures may have expressed support for a flag amendment at one time or another, the Constitution intentionally makes it difficult to pass amendments because they are to be permanent and fundamental. Supermajorities are required in both houses of Congress as well as 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 independently exercise its responsibilities with the utmost care. The purpose of the painstaking and difficult process of amending the Constitution is to be conservative, securing a series of responsible, considered judgments along the way. If the institutions of government that are responsible for amending the Constitution start to defer to one another instead of acting independently—allowing themselves to be led by "[t]he passions [and] not the reason, of the public"—amendments will start coming quickly, easily, 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 any event, the proponents' suggestion is an

abdication of responsibility of our clear, established responsibility on this occasion—and that is enough.

2. There is no epidemic of flag burnings crippling the country

Flag burning is rare. That simple fact—undisputed in the majority report—has been proven consistently in the course of hearings and debates over the various proposals offered 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, who has written several books on flag desecration,[4] testified before the Constitution subcommittee on March 25, 1998. He then reported that there had been only about 200 documented incidents of flag burning in the entire history of the country, representing less than one per year.

The incidence of flag burning has increased a bit over the past decade, precipitated at least in part by efforts to overturn the *Johnson* ruling by constitutional amendment. See infra Part X.B.3. But even the leading lobbying group in support of S.J. Res. 4, the Citizens Flag Alliance, can document only a relatively small number of "flag desecration acts" since 1994, generally amounting to less than ten a year, nationwide. And as we discuss below (in Part X.B.4), most of these incidents were punishable even without S.J. Res. 4.

In light of these figures, proponents of this amendment have been driven to declare that it is appropriate regardless of the number of flag desecrations. While we agree that even one incident of flag burning merits 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 restrict the liberties of Americans with a narrowing amendment to the Bill of Rights.

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. As John Glenn observed at our hearing on April 28, 1999, the proposed amendment is "a solution looking for a problem."

Senator Glenn's observation finds unintended support from some of the principal proponents of S.J. Res. 4. Asked at our hearing on April 28, 1999, what the penalty should be for burning an American flag, Citizens Flag Alliance Chairman Patrick Brady responded:

> I would handle it like a traffic ticket. The individual who received the ticket for burning the flag * * * could pay the fine or he could * * * go to school. * * * I would send them to a class, and I would tell them this is what the flag means to the people of America, this is what it means to veterans, and that would be it.

At the same hearing, Lieutenant General Edward Baca (USA, Ret.) agreed that flag burning should be a misdemeanor offense, and a

[4] See Flag Burning and Free Speech: The Case of Texas v. Johnson (2000); Burning the Flag: The Great 1989–1990 American Flag Desecration Controversy (1996); Saving "Old Glory": The History of the American Flag Desecration Controversy (1995).

third pro-amendment witness, Professor Richard Parker, opined that "a jail term is probably not reasonable."

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 stated at the time by Keith Kreul, past National Commander of the American Legion, "It is a radical approach to a near nonexistent dilemma akin to atom bombing a sleeping city because a felon may be in the vicinity."

The approach is all the more radical given its admitted limitations. The majority report acknowledges (in Part V.C.1) that the proposed 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." Yet such acts may be as offensive, and as deserving public censure, as some of the acts of "physical desecration" that may be covered by the proposed amendment.

3. Outlawing flag desecration could increase rather than decrease such conduct

One of the principal incitements to flag burning appears, from all of the evidence, to be the very efforts to make it illegal. That is because outlawing flag burning in a highly publicized way, or attempting to do so, tends to assure flag burners of the very attention they crave, lending national visibility to their crackpot causes and offensive behavior. The majority asserts (in Part V.E) that passage of the amendment would result in "one of the greatest public discussions in American history" and offer a sort of nationwide civics lesson for America's youth. Quite apart from the improbability of this vision—if the post-9/11 challenges to American freedom and the war in Iraq are not enough to get young people thinking, even the most lively debate among state legislators is unlikely to do that—history tells us that the most likely result of passing this amendment would be a marked increase in flag desecrations.

According to Professor Goldstein, there were more than twice as many flag burning incidents between 1989—when the Supreme Court's ruling in *Johnson* made flag burning a front-page issue—and March 1998—when he testified—than in the entire history of the American republic to that point. Professor Goldstein established that the number of incidents peaked between June 1989 and June 1990, when the first attempts were made to overturn *Johnson* by amending the Constitution. The only comparable period was in 1968, after Congress—responding to numerous public flag burnings protesting the war in Vietnam—passed the first Federal flag protection act.

Based on past experience, then, focusing attention on flag burning with a highly publicized election-year debate on the proposed constitutional amendment will likely lead to another spike in the number of flags-burning incidents. Actually passing S.J. Res. 4 would likely spur an unprecedented wave of incidents, as well as increase the variety of distasteful acts involving the flag which no doubt would be committed to test the vague and uncertain boundaries of any new law.

If we want to stop people from burning the flag, the most effective way would be to stop daring them to do it. Passage of the proposed amendment—and the ensuing ratification debates—would do just the opposite.

4. Existing legal and social sanctions are adequate to deter and punish flag desecration

There is a huge misunderstanding underlying the push for a flag protection amendment. On April 29, 1999, Senator Feingold explained during a Committee markup on the amendment:

> The American people have been * * * bamboozled into believing that you can walk across the street, grab an American flag off of somebody's building and burn it, and that is protected. That is not the case.

The states and the Federal Government can prohibit and punish most acts of physical destruction of a flag, and do so with more than a citation or a compulsory class on respect. No one has the right to steal a flag or to defile a flag belonging to another. Burning a flag, even one's own flag, will not shield a violent or disorderly protester from arrest. The First Amendment protects speech, expressive conduct, and peaceful demonstration. It is not a sanctuary for thieves, vandals, or hooligans.

The Citizens Flag Alliance (<www.cfa-inc.org>) has been tracking "flag desecration acts" since 1994, presumably to demonstrate that a constitutional amendment is needed. In fact, however, CFA's list demonstrates just the opposite—that most instances of flag desecration are linked to other behavior that violates existing laws—including laws relating to theft, vandalism, destruction of property, breach of the peace, and arson—and are therefore punishable regardless of any message that the flag desecrator might be trying to send.

For example, CFA's only entry to date for the year 2004 involves serial flag burnings occurring during a three-week period in Montpelier, Vermont:

> June 19–July 7, 2004, Montpelier, VT: Police reported at least five American flags were found burned in public places and several residents reported their flags missing. Two mutilated flags were wrapped around an Ethan Allen statue at the Statehouse. A flag was found placed on a church's Virgin Mary statue and set on fire. A flag was also found in the rosebushes of another church. A flag with the stars burned out and the phrase "Stop the Corruption" was found draped on a building. A nursing home reported its American flag had been burned on its pole.

As Senator Leahy noted at the Committee markup on July 20, 2004, these were outrageous acts, intended to outrage, but there is no reason to believe that acts like these cannot or will not be prosecuted under Vermont and other states' laws prohibiting unlawful mischief, theft, and destruction of property. In this instance, officials have also indicated that it may be possible to prosecute the perpetrators under Vermont's hate crimes law. See "Vandals strike

a Montpelier shrine," Channel 3 News, WCAX–TV Burlington, Vermont, June 30, 2004.

CFA's list includes other incidents in which flag desecrators can or have been prosecuted.[5] For example:

> April 12, 2003, Ashland, OR: Ashland police arrested two men who burned an American flag at a peace rally, saying the fire posed a danger to other protesters and people nearby. The men were charged with disorderly conduct and reckless endangerment. ("Burning flag a safety risk, police say," Associated Press, April 13, 2003.)
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> March 31, 2003, Maytown, PA: A former U.S. marine called police after learning that his American flag was burning. Two months later, the police arrested a juvenile and charged her with criminal mischief. ("Confusing the issue," Intelligencer Journal, June 6, 2003.)
>
> September 16, 2002, Bellefontaine, OH: A Bellefontaine man was observed removing courthouse flags from their holders and throwing them to the ground. He fled when police arrived, but was located several blocks away from the courthouse and arrested on charges that included criminal mischief. (Bellefontaine Examiner, September 16, 2002.)
>
> September 11, 2002, Ann Arbor, MI: Two boys, ages 15 and 16, were arrested for allegedly setting a flag on fire at the University of Michigan. The boys ran away but were arrested when they returned to the scene. They were charged with setting a fire on campus. ("Teens arrested after lighting American flag on fire," Associated Press, September 11, 2002)
>
> October 30, 2001, Langley, VA: An 18-year old college student allegedly set off a brush fire by burning an American flag. The blaze spread over four acres of woodland in northern Virginia. The student was arrested on charges that included setting a fire capable of spreading, a felony that carries a maximum sentence of five years in prison. ("Flag-burning complicates Va. arson case," Washington Post, November 2, 2001.)
>
> September 10, 1998, Boulder, CO: A city flag was set on fire while atop a very tall flagpole. The Boulder police had no doubt they could arrest the arsonist, because "burning someone's else's flag—in this case the city's—is definitely against the law." ("Flag arsonist sought," Denver Post, September 11, 1998.)
>
> August 7, 1998, Minersville, PA: Two cemeteries were vandalized; the vandalism included the burning of American flags on veterans' graves. A 19-year old was arrested, along with four juveniles, and charged with institutional vandalism, criminal mischief, attempted burglary, trespassing, criminal conspiracy, and corruption of minors. ("Man jailed in vandalism spree," The Harrisburg Patriot, August 20, 1998.)

[5] CFA's list also suggests that a large percentage of flag desecration acts are perpetrated by misguided teenagers.

July 4, 1997, Springfield, IL: A man celebrated the Fourth of July by cutting the rope on the Federal Building flag pole and hauling down the flag. The man was arrested and jailed on charges of theft and criminal damage to government property. ("One man celebrates by stealing," The State Journal-Register (Springfield, IL), July 9, 1997.)

May 26–June 9, 1997, Wallingford, CT: Flags hanging from downtown homes and porches were set on fire at night, endangering residents and damaging property. Several teenagers were arrested in connection with these incidents, charged with reckless burning, conspiracy to commit reckless burning, and criminal attempt to commit reckless burning. ("Second teen accused in Wallingford flag burnings," The Hartford Courant, September 4, 1997.)

April 1, 1997, Buffalo, NY: The starting goalie for the Buffalo Bandits, having just won a playoff-clinching game, climbed over a fence at the naval park and tore down the American flag, breaking the flagpole. Charged with criminal trespass and criminal mischief, the man eventually pled guilty and paid a fine. ("Bandits goalie pleads guilty in naval park case," Buffalo News, October 24, 1997.)

No constitutional amendment was needed to protect the people of Ashland, Maytown, Bellefontaine, Ann Arbor, Langley, Boulder, Minersville, Springfield, Wallingford, or Buffalo. Their state laws performed that function quite well.

Similarly, no constitutional amendment was necessary to punish Gregory Lee Johnson, the defendant in the Supreme Court's 1989 case. Johnson accepted stolen private property (a flag) and destroyed it by setting it on fire in a busy public place. 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; instead, the only criminal offense with which Johnson was charged was "desecration of a venerated object." The Supreme Court, while holding that Johnson's conviction for that offense could not stand, emphasized that its opinion "should [not] be taken to suggest that one is free to steal a flag so long as one later uses it to communicate an idea." 491 U.S. at 412 n.8.

In earlier debates over the amendment, much was made of a Wisconsin youth, Matthew Janssen, then 18, who stole a number of flags and defecated on one, and whose conviction for flag desecration under an old, pre-*Johnson* statute, was eventually overturned. See *Wisconsin* v. *Janssen*, 219 Wis.2d 362 (1998). 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 hours of community service. Perhaps more important, he was ostracized, and had to face 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 at the subcommittee hearing on March 25, 1998:

> Isn't this the ideal case to demonstrate that there is no need to amend the First Amendment? This young man was punished both 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?

Senator Breske responded, "He probably should have got a little more." But "a little more" is no reason to amend the United States Constitution.

5. Existing constitutional limitations on free expression are applicable to acts of flag desecration

The decision of the Supreme Court in *Johnson* did not give carte blanche to protesters to burn flags however, whenever, and wherever they please, even for expressive purposes. The First Amendment leaves room for Congress and the states to regulate in this area, just as it permits reasonable restrictions on 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, 447 (1969), and limits also can be placed on "fighting words," those likely to provoke the average person to whom they are addressed to retaliation. *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 574 (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 government's authority 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 remain 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, it will provoke ordinary citizens to violence.

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 may plague legislative drafters if this amendment is adopted, however (see infra Part X.E), and the American people would be far better served if the proponents of S.J. Res. 4 addressed this difficult task squarely and honestly at the outset by proposing a carefully crafted statute rather than toying with the Constitution.

On March 30, 2004, Senator Byron Dorgan and others introduced the Flag Protection Act of 2004, S. 2259, to provide for the max-

imum protection against the use of the flag to promote violence, while respecting the liberties that it symbolizes. This bill would ensure that incidents of deliberately confrontational flag burning are punished with stiff fines and even jail time. Experts at the Congressional Research Service and several constitutional scholars have opined that S.2259 respects the First Amendment and would be upheld by the courts. See Congressional Record, March 30, 2004, at S3368–S3369. We believe that Congress should consider this statutory alternative, and that the Court should address it, before we again take up a constitutional amendment on this issue.

C. The Proposed Amendment Would Diminish the Rights We Currently Enjoy Under the First Amendment

1. The proposed amendment would restrict free expression

The proposed amendment unquestionably would restrict rights currently enjoyed by Americans under the First Amendment. Indeed, that is its purpose. The majority report's claim (in Part V.C.1) that the proposed amendment would not reduce First Amendment rights—that it would, in fact, "harmonize very well with" the First Amendment—does not bear scrutiny.

The majority report's lead argument for why the proposed amendment is consistent with the First Amendment is that "physical acts of desecration are conduct, not speech" (Part V.C.1). In support of this argument, the majority cites one 21-year old district court decision that was patently out of line with the mainstream and—unmentioned by the majority—promptly reversed. See *Monroe* v. *State Court of Fulton County,* 739 F.2d 568 (11th Cir. 1984), reversing 571 F. Supp. 1023 (N. Ga. 1983). As discussed further below (in Part X.D.2), the would-be distinction between conduct and speech has been repeatedly rejected—including in cases involving the flag—because it is so obviously unrealistic and unworkable.

Bruce Fein, former Justice Department Deputy Attorney General during the Reagan Administration, remarked in a June 7, 2004 letter opposing S.J. Res. 4: "[T]o deny that flag burning constitutes speech—such as burning the flag of Communist China to protest the Tiananmen Square massacre—is to deny the undeniable." Would the majority claim that peaceful picketing is not speech within the First Amendment, or that a silent vigil is not speech, or the familiar politician's thumbs-up? The examples are truly endless. Expressive conduct is speech, and because the flag serves as a symbol, use of the flag symbolically is expressive. Indeed, the State of Texas conceded this point when arguing the *Johnson* case before the Supreme Court, see 491 U.S. at 405, as did the United States the following year when arguing *Eichman,* see 496 U.S. at 315.

Professor Goldstein explained the expressive aspect of flag desecration in his 1995 book, Saving "Old Glory":

> [A]ll forms of communication, including oral and written speech, are ultimately "symbolic" (since letters and words have no meaning, by themselves, but only represent other things) and they all involve conduct—opening one's mouth, printing and circulating a book, and so on. Unless flag desecration results in burning down a building or blocking

> a public street, it is, in practice, just as "purely" symbolic and purely expressive as are other forms of communication and therefore deserves equal protection. If the argument that only "pure" speech and writing are protected by the principles of constitutional democracy was accepted, then people who use sign language would have no rights, and neither would actors, dancers, musicians, painters, movie producers, or anyone else who communicated in any other way.

Goldstein, Saving "Old Glory," at xii-xiii.

As Professor Goldstein notes, the conduct/expression distinction is meaningful under the First Amendment only in the sense that the behavior in question can cause harm to real interests that the government can protect. For instance, burning a flag causes harm to the owner's property interest in that flag: people label that which causes this real, tangible harm as the "conduct" element in the behavior. It is precisely such 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 desecration is "conduct" does not support the amendment at all—quite the contrary. To the extent that desecration is "conduct," it can already be regulated. The whole point of the amendment is to regulate "expression" (or, the "expressive" element in the behavior) when it does not cause real, tangible harm, but is only offensive. Invoking illusory distinctions like conduct-versus-expression does not change that reality.

The majority report next attempts to salvage the system of censorship that the amendment would inevitably establish by noting that "the First Amendment's guarantee of freedom of speech has never been deemed absolute" (Part V.C.1). But the majority report's examples—"fighting words," libel, and obscenity—are not exceptions to the First Amendment that somehow invite another exception. Indeed, the logic of "we already have some exceptions, so why not one more?" highlights one of the central dangers posed by this amendment. As discussed further below (in Part X.C.4), if we have a flag desecration amendment for the Stars and Stripes, why not one for state flags, or the presidential seal, or the Constitution itself? The majority concedes that unless it is treated as utterly unique, the proposed flag desecration amendment leads down a slippery slope of censorship. But the majority's misuse of analogies to the very narrow categories of unprotected speech that have been recognized, and even to corporate symbols,[6] undermine the very uniqueness on which its case rests.

The real lesson of "non-absolutism" is just the opposite of what the majority argues. "Fighting words," libel, and obscenity are time-honed, carefully-crafted applications of the First Amendment. Far from supporting a flag exception to the First Amendment, they teach us that speech is to be free except in the most extraordinary

[6] The majority report appears to argue (in Part III.A.3) that those who support the protection of corporate symbols that are provided by federal trademark law should also support the proposed amendment. In doing so, the majority ignores the fact that trademark law is limited by the First Amendment right of free speech. Courts have consistently held that trademark and related laws do not prohibit parodies and other forms of social commentary, regardless of whether they cause offense. See, e.g., *Mattel, Inc.* v. *Walking Mountain Productions,* 353 F.3d 792, 806–807 (9th Cir. 2003) (parodic use of Barbie trademark non-infringing fair use).

circumstances and subject to the most extraordinary legal protections. Punishment of speech is limited to only those specific occasions when it is proved to be immediately harmful to concrete, important interests or rights far beyond symbolism and offensiveness.[7] The "disrespect" or "contempt" for the flag that supposedly would justify the proposed amendment does not remotely meet any of the traditional safeguarding requirements.

Finally, the majority report tries to minimize the proposed amendment's corrosive effect on the First Amendment by arguing (in Part V.C.3) that there are other ways, besides flag burning, for disaffected Americans to express their views. But in a free enterprise society and under the First Amendment, people must have the right to decide just how they are going to promote their views. As the American Bar Association wrote in a statement it submitted for this year's hearing, opposing S.J. Res. 4: "[T]he First Amendment jealously guards the right to express our views about our government or laws in the manner of our choice, so long as that choice is through peaceful words or conduct."

In sum, the proposed amendment would create a regime of discrimination and suppression of speech of all kinds that would be utterly at odds with the First Amendment and American tradition.

2. The First Amendment protects above all the right to speak the unpopular and objectionable

Ultimately, the debate over S.J. Res. 4 and the earlier attempts to amend the Constitution to ban flag desecration turns on the scope we think proper to give to speech that deeply offends us. But for Congress to limit expression because of its offensive content is to strike at the heart of the First Amendment. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson,* 491 U.S. at 414. Indeed, it is the right to speak the offensive and disagreeable that needs the most protecting.

Justice Holmes wrote that the most imperative principle of our Constitution was that it protects not just freedom for the thought and expression we agree with, but "freedom for the thought that we hate." *United States* v. *Schwimmer,* 279 U.S. 644, 654 (1929). "[W]e should be eternally vigilant," he taught us, "against attempts to check the expression of opinions that we loathe. * * *" *Abrams* v. *United States,* 250 U.S. 616, 630 (1919). Justice Robert Jackson echoed this thought in *West Virginia Bd. of Educ.* v. *Barnette,* 319

[7] "Fighting words" are punishable only if the court determines that on the facts of the particular case, there was what used to be called a "clear and present danger" of violence. The whole concept is actually and intentionally calculated to protect as much speech as possible by requiring, for each instance of speech, a judicial finding of immediate threat to the important government interest in avoiding violence. See, e.g., *Edwards* v. *South Carolina,* 372 U.S. 229, 235–236 (1963). The law of libel of a public official is intentionally designed to maximize speech by imposing stringent limits on when it can be punished. It requires not only that the speech in fact damage the official's reputation and not only that the statements be false, but also (which the majority report crucially omits) that the statements be made with "actual malice," that is, with the specific intent to harm the victim's reputation through a knowingly or recklessly false statement. That the speaker has actual malice must be found on the particular facts of each case of speech. See *New York Times* v. *Sullivan,* 376 U.S. 254, 279–288 (1964). Even obscenity, which appears to be a category that is not "speech" within the First Amendment, requires the application of similar case-by-case stringent safeguards to insure that only actually obscene speech is punished and that speech with social value is kept within the protection of the First Amendment. See *Miller* v. *California,* 413 U.S. 15, 24 (1973).

U.S. 624, 642 (1943), 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 test of its substance is the right to differ as to things that touch the heart of the existing order."

At the subcommittee hearing on March 25, 1998, conservative constitutional scholar Bruce Fein cited President Thomas Jefferson's first inaugural address, when the nation was bitterly divided. That giant among the Founders 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 that undergirds the First Amendment, Voltaire's famous statement, "I disapprove of what you say, but I will defend to death your right to say it."

John Glenn stated the argument in more colloquial terms in a written submission to the Committee dated March 10, 2004:

> To say that we should restrict the type of speech or expression that would outrage a majority of listeners or move them to violence is to say that we will tolerate only those kinds of expression that the majority agrees with, or at least does not disagree with too much. That would do nothing less than gut the first amendment.

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 free speech philosopher Alexander Meiklejohn cautioned, "To be afraid of ideas, any ideas, is to be unfit for self-government." Alexander Meiklejohn, Freedom of Speech and Its Relation to Self-Government 27 (1948).

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 the truth put to the worse in a free and open encounter.

John Milton, Areopagitica, A Speech for the Liberty of Unlicensed Printing to the Parliament of England (1644).

3. 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. Justice Louis Brandeis observed, "Those who won our independence * * * eschewed silence coerced by law—the argument of force in its worst form."

Whitney v. *California,* 274 U.S. 357, 375–376 (1927) (Brandeis, J., concurring).

The American people respond with strength. Americans have always understood that, for the greater good, they can ignore offensive views, tolerate them, or respond to them with more speech. In a confident, mature citizenry, that, not outlawing them, is the American way.

Proponents of this amendment contend that requiring respect for the flag will enhance national unity, but the rare occasions of flag desecration have not, and cannot, subvert our sense of unity. Our institutions are not threatened by the exercise of First Amendment freedoms.

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 resentment, disrespect and disunity. As Justice Jackson wrote in *Barnette,* 319 U.S. at 640–642:

> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. * * * Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard. * * *
>
> 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.

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.

Immediately following September 11, 2001, Americans all around the country began to fly flags outside their homes and businesses, to wear flag pins on their lapels, and to place flag stickers on their automobiles. This surge in patriotism made American flags such a hot commodity that several major flag manufacturers could not keep flags stocked on store shelves. Within days of the attacks, the nation's largest retailer had sold 450,000 flags, compared with 26,000 during the same period in 2000. "Oh, say can you see any flags on the shelves?" The San Francisco Chronicle, September 19, 2001. By late October 2001, the demand for flags was so great that manufacturers were back-ordered up to six weeks, according to the National Flag Foundation in Pittsburgh, Pennsylvania. "Demand outstrips supply," Albuquerque Journal, October 28, 2001.

This expression of national pride was spontaneous, and consisted of individual Americans taking conscious acts of patriotism. No one in the government decreed that Americans must purchase and fly flags. There was no official direction stating that Americans should wear clothing and accessories with flag designs, but these have been wildly popular as well.

Expressions of patriotism after September 11 went well beyond the proud display of the flag. As Senator Feingold stated at the Committee markup on July 20, 2004:

> We didn't need a constitutional amendment to teach Americans how to love their country. They showed us how to do it by hurling themselves into burning buildings to save their fellow citizens who were in danger, by standing in line for hours to give blood, by driving hundreds of miles to search through the rubble for survivors and to help in cleanup efforts, by praying in their houses of worship for the victims of the attacks and their families.
>
> September 11th inspired our citizens to perform some of the most selfless acts of bravery and patriotism we have seen in our entire history. No constitutional amendment could ever match those acts as a demonstration of patriotism, or create them in the future.

Justice Brennan wrote in *Johnson,* "We can imagine no more appropriate response to burning a flag than waving one's own." 491 U.S. at 420. That is exactly how the American people respond. Justice Brennan described the aftermath of Gregory Lee Johnson's contemptible act in 1984, when he burned a flag at a political demonstration in Dallas, Texas, in front of City Hall. "After the demonstrators dispersed, a witness to the flag burning collected the flag's remains and buried them in his backyard." Id. at 399.[8]

At the Committee's business meeting on June 24, 1998, Senator Feingold pointed to the example of Appleton, Wisconsin, where 18–year old Matthew Janssen committed a particularly repugnant act of flag desecration, and where each year, 20,000 to 30,000 Americans join in the largest Flag Day parade in the nation. Similarly, 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 Ku Klux 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, the more money is being [raised] in defense of the values of America. I think that is what America is all about.

On July 18, 1998, in Coeur 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, observing that "Nazis were burning books in the 1930s, and I don't want them closing stores in the '90s."

The same year, an African American was brutally tortured and murdered in Jasper, Texas, apparently on account of his race. The Ku Klux Klan decided to hold a rally in Jasper because of the mur-

[8] 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, at 33.

der. 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.

The positive examples of the citizens of Wisconsin, Illinois, Idaho, and Texas 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 was given, ironically, by the proponents' star witness in the 105th Congress. The incident was the center of the July 8, 1998 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. The attempt was unsuccessful (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 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."

That was an answer on which Congress cannot improve.[9]

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. Vietnam veteran Stan Tiner told the Constitution subcommittee on March 25, 1998, 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 righteous brand." He concluded:

> [I]n 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 people can speak freely their minds without fear.

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, Coeur D'Alene, and Jaspar, the spontaneous singing of "God Bless America" at a baseball game, and the overwhelming display of patriotism after September 11, 2001, that wins the debate. The First Amendment works.

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[9] The Citizens Flag Alliance website describes other gallant responses by Americans to acts of flag desecration. In some instances, flag desecrators have been stopped in the act and even placed under citizen's arrest. CFA also documents several instances in which citizens have been moved to donate their own personal flags to replace those that were destroyed.

4. The proposed amendment would set a dangerous precedent for future amendments to the Bill of Rights

Supporters of S.J. Res. 4 argue that the flag is a special case—that its adoption would not open the floodgates to other amendments. We are not so sure. Already, scores of constitutional amendments are proposed each year, many of which would alter the Bill of Rights. Some of these proposed amendments command significant support, including support from sponsors of the current proposal. Establishing a precedent that the First Amendment can be restricted by constitutional amendment would give supporters of other restrictive amendments ammunition and momentum, and weaken public respect and support for safeguarding the enduring principles in our Bill of Rights.

Charles Fried, Solicitor General under President Reagan, cautioned us in June 1990 that it is dangerous to make exceptions in matters of principle:

> 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.

The late Senator Chafee also took a dim view of the consequences of the proposed amendment when he asked the Committee, in April 1999, "What will be next?":

> Will we next see a constitutional amendment demanding the standing to attention when the national anthem is played? Will there be a list of worthy documents and symbolic objects for which desecration is constitutionally prohibited? Should there be a Constitutional Amendment to protect the Bible? What about other religious symbols such as the crucifix or the Menorah; what about the Constitution, itself? Surely, the Constitution embodies the same significance as the flag!

Even if we could draw the line after one restrictive amendment, the damage would be done. John Glenn stated in his March 2004 submission that "The Bill of Rights * * * is what has made [the United States] a shining beacon of hope, liberty and inspiration to oppressed peoples around the world for over 200 years. In short, it is what makes America, America." The proposed amendment would dim that beacon, as Lawrence Korb described in his March 2004 statement:

> During my years of military service and civilian service during the Cold War, I believed I was working to uphold democracy against the totalitarianism of Soviet Communist expansionism. I did not believe then, nor do I believe now, that I was defending just a piece of geography, but a way of life. If this amendment becomes part of the Constitution, this way of life will be diminished. American

> will be less free and more like the former Soviet Union, present-day China, Iraq under Saddam Hussein, or Afghanistan under the Taliban.

The First Amendment boldly proclaims that "Congress shall make no law * * * abridging the freedom of speech." The proposed amendment would turn the "no" into an "almost no"—a singular erosion of the principle for which the First Amendment stands. Perhaps that is why a substantial majority of Americans do not support the proposed constitutional amendment once they know of its unprecedented impact on the First Amendment.[10]

D. THE *JOHNSON* DECISION WAS CONSISTENT WITH GENERATIONS OF CONSTITUTIONAL DOCTRINE

1. The Supreme Court has never accepted limitations on the First Amendment for peaceful protests involving flag desecration

In beating the drum for the first amendment to the First Amendment, the majority report perpetuates another myth that has been fueling the flag protection movement since 1989, namely, that the Supreme Court's decision in *Johnson* broke with "generally accepted legal tradition" (Part IV.B.3), worked a "dramatic change" in First Amendment jurisprudence (Part IV.C), and "overturned 200 years of legal principles (Part V.C.2). There quite simply is no legal tradition of upholding bans on flag desecration against First Amendment challenges—just the opposite is true. The strained efforts of the majority to manufacture such a tradition underscore just how wrong it is in its characterization of American legal history.

a. Endecott's Case

The majority report begins (in Part IV.A) with *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 an 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.")[11] It is remarkable that the actions of the British colonial government repressing American patriots should be the model and precedent

[10] While proponents of S.J. Res. 4 purport to be responding to a groundswell of support by the American people for constitutional protection of their flag, recent polling data does not bear this out. A June 2004 survey by the First Amendment Center shows that a majority of Americans—53 percent—oppose amending the Constitution to prohibit burning or desecrating the American flag. Moreover, of the 45 percent of Americans who said they supported such an amendment, 16 percent reversed themselves and said that the Constitution should not be amended when informed that, if the amendment were approved, it would be the first time any of the freedoms in the First Amendment had been amended in over 200 years. See State of the First Amendment 2004 survey, available at <http://www.firstamendmentcenter.org.>

[11] This same regime presently banished Roger Williams (1635) for urging religious liberty, and Anne Hutchinson (1638) and Rev. Roger Wheelright (1637) over doctrinal differences. Hawke, The Colonial Experience, 143–146, 689 (1966).

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.[12]

b. James Madison and Thomas Jefferson

The next examples cited by the majority report (in Part IV.A.1) are also completely irrelevant to freedom of speech and the First Amendment. The majority report cites as part of its "legal tradition" a characterization by former Judge Robert Bork regarding James Madison's opinion that the tearing down of the flag of the Spanish minister in Philadelphia in 1802 was actionable. The characterization is misleading. The incident refers, of course, to assaults on property (a Spanish flag) within a foreign embassy, and to 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. 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 decision in *Johnson*. Indeed, destruction of another's property, whether a flag or otherwise, remains a crime throughout the United States.

The majority report 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 force it to haul down the colors is a "dire invasion of sovereignty." The harm comes from firing upon a United States military vessel; the treatment of the flag, to the extent that it could 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, surely Madison would not have shrugged his shoulders and let the matter pass. Again, the example has nothing whatever 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* had no effect on that principle.

[12] The debate over *Endecott*'s case was joined in earlier reports on the proposed amendment. See S. Rpt. 98, 106th Cong., 2d Sess., 15–16 & n.2 (2000) (majority); id. at 55–56 (minority), and S. Rpt. 298, 105th Cong., 2d Sess. 7, 9 (1998) (majority); id. at 56–57 (minority). While the majority revised its views in other respects, it failed to strike or justify its bizarre reliance on *Endecott*'s case.

Equally unrelated is the majority's citation (in Part IV.A.2) of a letter from Thomas Jefferson dealing with the use of the U.S. flag by foreign ships to avoid English sanctions against trade with France during the 1790s. Jefferson was writing to our Consul in 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 has nothing to do with peaceful protest, freedom of expression, or the First Amendment. The United States can and does still cooperate with other nations to limit the use of its flag; *Johnson* had no effect on that principle.

The suggestion that our Founders viewed flag desecration as a heinous offense clearly worthy of severe penalties falls flat when we notice that the Constitution never mentions either the flag or flag desecration, and that Congress did not pass a federal flag desecration law until 1968.

C. Statutory protection for the flag

In its search for supportive "legal tradition," the majority (in Part IV.B.2) leaps from 18th century foreign policy over a century to the adoption of the first flag protection legislation. As Professor Goldstein describes in his scholarly history of the flag protection movement, an extensive campaign engineered in the late 19th century by various veterans groups led to the adoption of flag desecration laws in every state, beginning in 1897. While the flag protection movement was successful in obtaining passage of the state flag protection laws, however, in early cases where those laws were challenged, they were overwhelmingly invalidated. See Goldstein, Saving "Old Glory," ch. 1.

Curiously, the majority report cites these early statutes and the decisions invalidating them as evidence of a centuries-old tradition supporting flag protection. In fact, this history reveals that efforts to iconize and afford legal protection to the flag are quite recent, and that such efforts have always been controversial and often unsuccessful.

The majority report relies heavily on *Halter* v. *Nebraska,* 205 U.S. 34 (1907), in which the Supreme Court upheld a Nebraska statute forbidding the use of representations of the flag for purposes of advertisement. The citation is far off target. The defendants in *Halter,* who were convicted of using the flag as an advertisement on a bottle of beer, challenged the Nebraska statute on three grounds: (1) as infringing their personal liberty guaranteed by the Fourteenth Amendment; (2) as depriving them of privileges impliedly guaranteed by the Constitution to citizens of the United States; and (3) as unduly discriminating and partial in its character. Id. at 39. The defendants did not challenge the statute on free speech grounds, nor did the Court give any consideration to First Amendment issues. Indeed, *Halter* was decided nearly 20 years before the Supreme Court concluded that the First Amendment right of free speech applied to the states by virtue of the Fourteenth Amendment (*Gitlow* v. *New York,* 268 U.S. 652 (1925)), and nearly 70 years before the Court extended First Amendment protection to commercial speech, such as the beer advertisement at

issue in *Halter* (V*irginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Counsel, Inc.,* 425 U.S. 748 (1976)).

Similarly inapposite is the majority's remark (in Part.IV.B.2) that the *Lochner*-era courts that struck down early state flag protection statutes around the turn of the 20th century "perceived no First Amendment problem with the statutes." Like the Supreme Court in *Halter*, those courts did not consider the First Amendment implications of the statutes—nor could they have—because the First Amendment was not held to apply against the states until the mid–1920s. *Gitlow*, 268 U.S. at 666.

The majority report rounds out its historical survey (in Part IV.B.3) by citing three state court cases, all decided shortly after the attack on Pearl Harbor, in which flag-related convictions were upheld. In two of those cases—*State* v. *Schleuter,* 23 A.2d 249 (N.J. 1941), and *People* v. *Picking,* 42 N.E.2d 741 (N.Y. 1942)—the courts did not deal with the constitutional validity of the criminal statutes, as no constitutional contentions were advanced.[13] Indeed, the New Jersey Supreme Court distinguished *Schleuter* on this very ground, when, 32 years later, it struck down New Jersey's flag protection statute as unconstitutional. See *State* v. *Zimmelman,* 301 A.2d 129, 284 (N.J. 1973).

The third case cited by the majority—*Johnson* v. *State,* 163 S.W.2d 153 (Ark. 1942)—did not involve the physical desecration of a flag. Indeed, the flag at issue was never even touched. The defendant in *Johnson* went to the local Welfare Commissary to procure commodities for himself, his wife, and his eight children. The head of the Commissary, who testified that he was "sworn not to give to anyone who wasn't a loyal American citizen" (id. at 155) asked the defendant to salute the flag. The defendant, who had religious objections to saluting the flag (id. at 154), refused. According to two witnesses, the defendant also exhibited contempt for the flag by saying that it meant nothing to him and was only a "rag." Based on this statement, which the defendant denied having made, the Arkansas Supreme Court affirmed the conviction. Id. at 154. The case provides no support for S.J. Res. 4, the purported purpose of which is to protect the physical integrity of the flag, while retaining full protections for oral and written speech.[14]

One additional state court conviction discussed later in the majority report (in Part V.C.1) is particularly off base. The majority report cites to the district court decision in *Monroe* v. *State Court of Fulton County,* 571 F. Supp. 1023 (N. Ga. 1983), in which a defendant who burned the American flag to protest U.S. involvement in Iranian affairs was denied habeas corpus. What the majority report neglects to mention is that this decision was promptly reversed on the ground that the defendant's conduct constituted speech and symbolic expression within the purview of the First Amendment. See 739 F.2d 568 (11th Cir. 1984).

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[13] *Picking,* like *Halter,* involved a commercial use of the flag—it was painted on the sides of an automobile under four loudspeakers and the words "Travel America"—and the commercial speech doctrine did not yet exist.

[14] *Johnson* was decided during the brief period between *Minersville Sch. Dist.* v. *Gobitis,* 310 U.S. 586 (1940)—in which the Supreme Court refused to enjoin enforcement of a compulsory flag salute law—and *West Virginia Bd. of Educ.* v. *Barnett,* 319 U.S. 624 (1943), which overruled Gobitis and enjoined such enforcement. These cases are discussed infra, in Part X.D.2.

The majority report also cites (in Part IV.C) two Supreme Court cases in which convictions for flag desecration were upheld against First Amendment challenges. The first citation is to the Supreme Court's denial of certiorari in *Kime* v. *United States,* 459 U.S. 949 (1982), which is of no precedential value. See Teague v. Lane, 489 U.S. 288, 296 (1989) ("The 'variety of considerations [that] underlie denials of the writ,' counsels against according denials of certiorari any precedential value"; citation omitted). The second, involving an art dealer who sold "constructions" composed in part of U.S. flags, was a one-sentence per curiam opinion, affirming the judgment below by an equally divided Court. *Radich* v. *New York,* 401 U.S. 531 (1971). There was no actual adjudication of the constitutional claim, and the conviction eventually was set aside by a federal district court applying established principles of Supreme Court First Amendment jurisprudence. *United States* v. *Radich,* 385 F. Supp. 165 (S.D.N.Y. 1974).[15]

Disregarded or discounted in the majority report are the many decisions that go the other way. During the Vietnam era in particular, numerous courts were called upon to determine the relationship between statutes prohibiting acts of flag desecration and the First Amendment's guarantee of freedom of speech. In case after case, courts overturned flag desecration convictions on a variety of First Amendment and other grounds, rejecting the alleged state interest in protecting the symbolic integrity of the flag. See Goldstein, Saving "Old Glory," at 139–151.[16] By 1974, flag desecration laws had been struck down as unconstitutional in whole or part in eight states. Id. at 148.

2. The Supreme Court protected unpopular speech connected to the flag long before Johnson

Far more significant in the real legal tradition is the fact that, in the nearly 80 years that it has applied the First Amendment to the states, a majority of the Supreme Court has never upheld a conviction for anything amounting to flag desecration. Contrary to the majority report's claim, the roots of the *Johnson* decision lie deep in American jurisprudence. As former Solicitor General Charles Fried testified on June 21, 1990, the year after *Johnson* was decided:

> The [*Johnson*] decision was not some aberration, some momentary quirk of the Justices. Generations of constitutional doctrine led naturally and directly to the Supreme Court's decision in that case. * * * If you want to unravel [our constitutional] jurisprudence so as to keep it from covering flag-burning you would have to unravel decades of doctrine, scores of cases.

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[15] A final Supreme Court decision cited by the majority, *United States* v. *O'Brien,* 391 U.S. 367 (1968), had nothing to do with flag desecration, but rather involved a conviction for burning a draft card. In upholding this conviction, the Court emphasized that the government's important interest in assuring the continuing availability of issued draft cards was unrelated to the suppression of free expression. Id. at 377. By contrast, the governmental interest in preserving the flag as a symbol of national unity is related to the suppression of expression. See *Texas* v. *Johnson,* 491 U.S. at 406–410.

[16] Professor Goldstein discusses, for example, *Long Island Vietnam Moratorium Comm.* v. *Cahn,* 437 F.2d 344 (2d Cir. 1970) (flag emblem with peace symbol superimposed), aff'd, 418 U.S. 907 (1974); People v. Keough, 31 N.Y.2d 281 (1972) (photograph of nude draped with flag); *People* v. *Vaughan,* 183 Colo. 40 (Colo. 1973) (flag patch worn on trousers).

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 Sch. Dist.* v. *Gobitis,* 310 U.S. 586 (1940), the Court quickly reconsidered and removed the stain that *Gobitis* had placed on the First Amendment with its decision in *West Virginia Bd. of Educ.* v. *Barnette,* 319 U.S. 624 (1943).[17] 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 and spiritually diverse or even contrary will disintegrate the social organization.

Id. at 641. The *Barnette* decision, like *Stromberg*, assured protection for expressive conduct (remaining seated during class flag salute) 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), *Spence* v. *Washington,* 408 U.S. 404 (1974) (peace symbol taped to flag), and *Smith* v. *Goguen,* 415 U.S. 566 (1974) (flag patch on pants seat).[18] Certainly, each of these convictions was overturned with appropriate distaste for the conduct at issue, and the decisions were narrowly framed. Nonetheless, by the time *Johnson* was decided, the direction of the law was plain.

The proposed amendment would overturn *Johnson* and its successor case, *United States* v. *Eichman,* but its effect on First Amendment jurisprudence would not end there. If effectively implemented, S.J. Res. 4 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 amendment thus would overturn decades of consistent in-

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[17] The aftermath of the decision in *Gobitis* offers a sober warning to those who think government restrictions on unpopular speech strengthen the social fabric and "unify" the country:

> [The *Gobitis*] ruling, along with American entry into the war in December 1941, helped to foster a new wave of expulsions of child [Jehovah's] Witnesses [from public schools] and a large and often extremely violent eruption of harassment, beatings, and arrests of adult Witnesses, with the refusal to salute the flag clearly the major, and now seemingly officially endorsed, "crime." The American Civil Liberties Union reported that, between May and October 1940, almost 1,500 Witnesses were the victims of mob violence in 355 communities in 44 states, and that no religious organization had suffered such persecution "since the days of the Mormons."

Goldstein, Saving "Old Glory," at 94.

[18] The majority erroneously asserts (in Part IV.C) that the Court in *Smith* "pointed to the Federal flag protection statute * * * as an example of a constitutional flag protection statute." In fact, the Court simply noted that the Federal statute "reflects a congressional purpose" to define with specificity what constitutes forbidden treatment of United States flags, in order to avoid invalidation on grounds of vagueness. 415 U.S. at 581–582 & n.30.

terpretation of the First Amendment, and certainly would cast a shadow over other flag-related decisions, such as *Barnett*.

In addition, the proposed amendment could work great mischief in areas far removed from flags. It could put pressure on the principle, fundamental to the First Amendment, that content-based regulations are presumptively invalid. See infra Part X.E.4. It could also be seized on as a basis for treating mere offensiveness as an interest that may justify government censorship.

In sum, by excepting certain unpopular speech from First Amendment protection, S.J. Res. 4 would have severe implications for free speech jurisprudence in general.

E. The Proposed Amendment is Vague and Its Effect on Civil Liberties Uncertain

1. There is no consensus or clarity on the definition of "flag"

The proponents of S.J. Res. 4 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.[19] The American people deserve more from their Congress, this Congress, before they alter the Constitution of the United States.

Testifying in support of an earlier but similar version of the proposed amendment on August 1, 1989, then-Assistant Attorney General William Barr acknowledged that its key term—"flag"—is so elastic that it can be stretched to permit "any number of" definitions. He noted three: first, the flag can be defined narrowly as a cloth or cloth-like banner with the characteristics of the official Flag of the United States as described by statute and Executive Order; second, it can be defined more broadly to cover "anything that a reasonable person would perceive to be a Flag of the United States * * * whether or not it is precisely identical to the Flag"; and third, it can be defined expansively to include "any Flag, portion of a Flag, or any picture or representation of a Flag * * * such as posters, murals, pictures, [and] buttons."

Far from offering any consensus, the proponents of this amendment have displayed a striking range of disagreement over what they intend to stop. During Committee consideration of the proposed amendment six years ago, on June 24, 1998, Senator Feinstein appeared to endorse a relatively narrow, objective definition of "flag":

> 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 representation of our 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.

[19] Unlike earlier proposals for a constitutional amendment prohibiting flag desecration, S.J. Res. 4 may be implemented by Congress only, not by the states.

By contrast, the 1997 House Report on a proposed flag amendment identical to S.J. Res. 4 offered a broader, subjective definition covering "anything that a reasonable person would perceive to be a flag of the United States." H. Rpt. 121, 105th Cong., 1st Sess. 8–9 (1997). The majority report leaves this critical issue unaddressed.

Expansive definitions have been used regularly in statutes prohibiting flag burning. For example, the Uniform Flag Law of 1917 defined "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." National Conference of Commissioners on Uniform. State Laws, Proceedings of the Twenty-Seventh Annual Meeting, 323–24 (1917). Similarly, the 1968 Federal Flag Desecration Law used this definition:

> [A]ny flag, standard, colors, ensign, or any picture representation of either or of any part or parts of either, made of any substance or represented on any substance, of any size evidently purporting to be either of said flag, standard, colors, or ensign of the United States of America, or a picture or a representation of either, upon which shall be shown the colors, the stars and the stripes, in any number of either thereof, or of any part or parts of either, by which the average person seeing the same without deliberation may believe the same to represent the flag, standard, colors, or ensign of the United States of America.

The proposed amendment could empower Congress to 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.

On the other hand, courts could interpret the amendment narrowly, permitting Congress to prohibit physical desecration only of the official "Flag of the United States" and not of items intended to be perceived as such or of mere depictions. In that case, the purpose and effectiveness of the amendment could be evaded without great effort, as for example by persons who burned a flag that varied slightly from the official design of the U.S. flag or who, upon being charged with flag burning, simply claimed that this is what they had done. The ability to raise the factual defense that it was not the U.S. flag that was burned but simply a piece of cloth that was meant to look like the flag would mean that successful prosecutions would depend, as now, on the applicability of other laws, including laws against theft, vandalism and public disturbance.

Senator Feingold told the Committee in April 1999 about his own experience at a Capitol Hill restaurant, where the menu is a very large representation of the American flag. He was eating his dinner, when a big commotion erupted on the other side of the restaurant:

> We turned to see a woman frantically trying to put out a fire that had started when her oversized American flag menu had gotten too close to the small candle on the table. It caught on fire. * * * This thing looks exactly like an American flag, in size, in color, representation. I hope she

> wasn't arguing about Kosovo because somebody might want somebody to look at it.

Are we to amend the Constitution and punish people who burn pictures of the flag? On the other hand, are we to leave unrestricted a wide range of activities that involve 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? 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?

The proposed amendment is only 17 words long. It is not too much to ask that the proponents explain what they mean by those words before, not after, the amendment is put to a vote, so that the public has a clear understanding as to what conduct they intend to criminalize.

2. There is no consensus or clarity on the definition of "desecration"

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

> (a) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag * * *;
>
> (b) Expose to public 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 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 Law 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.

For example, it is not uncommon for Americans to celebrate the Fourth of July with a backyard barbecue, using paper cups and plates decorated with a flag motif. Such disposable "flags" are 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?

To take another example, after the terrorist atrocities of September 11, 2001, Americans wrote in indelible marker messages of grief and support all over flags. Among countless examples of this, a famous one was a huge flag that had flown at the World Trade Center; hundreds of people wrote messages on it and it was then sent to our troops in Afghanistan. See "Ground Zero flag being sent to Marine unit in Afghanistan," Associated Press, November 26, 2001; see also "Writing on flag upsets veteran: Man says Ground

Zero flag should be destroyed," Charleston Gazette, November 30, 2001. Similarly, President Bush himself has been photographed signing his autograph on American flags. See "He signed what?" The Fort Worth Star-Telegram, August 4, 2003. Senator Feingold pointed to another example during the 2000 floor debate on this amendment: On July 10, 1999, the day that the U.S. Women's Soccer team won a thrilling sudden death victory in the final of the Women's World Cup, an excited and patriotic group of fans unfurled a flag for the TV cameras with the words "Thanks Girls!" written on it with some type of chalk or marker. See Congressional Record, March 28, 2000, at S1797.

These are unquestionably acts of physical desecration. The Uniform Flag Law prohibits placing any word or other marks on a flag, and supporters of the proposed amendment have regularly cited writing on flags as a desecration. Writing on the flag also runs afoul of the Federal Flag Code, which states that the flag "should never have placed upon it, nor on any part of it, nor attached to it any mark, insignia, letter, word, figure, design, picture, or drawing of any nature." 4 U.S.C. § 8.

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.

Testifying before the Committee in opposition to the proposed amendment on April 28, 1999, the late Senator John Chafee gave two examples of the amendment's hidden pitfalls:

> In my State of Rhode Island, there is a highly-prized work of art at the Rhode Island School of Design. It is a hooked rug, carefully and conscientiously made by patriotic American women some 100 plus years ago, and its design is the American flag. These women made it as a symbol of their national pride; yet it is a rug—which by definition is to be walked on! Is that "desecration?" Should those patriotic craftswomen have gone to jail?
>
> The handbook of the Boy Scouts of America, of which more than 34 million copies have been printed since 1910, instructs young boys to "Clean the flag if it becomes soiled. Mend it if it is torn. When worn beyond repair, destroy it in a dignified way, preferably by burning." With the passage of this proposal, would we put thousands of patriotic young Scouts in jail?

Perhaps the most powerful example of the vagueness and mischief of this amendment came from Senator Durbin, who noted at the Committee markup on June 24, 1998, that many people would

consider it desecration to sit on a flag. Certainly, each of us can imagine circumstances in which such conduct would be an outrage. 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.

3. Use of the word "desecration" in S.J. Res. 4 undermines the First Amendment religion clauses

Numerous religious leaders and people of faith have expressed concern with the proposed constitutional amendment. Reverend Nathan Wilson, head of the West Virginia Council of Churches, stated the problem quite plainly when he testified before the Committee on April 20, 1999: "Desecration of an object is possible only if the object is recognized as sacred." In our constitutional system, the government should not be in the business of defining for its people what is sacred.

This is not simply a matter of semantics. It goes right to the heart of the significance of the government, under force of this amendment, giving an exalted status to an object, even an object as important and worthy of respect as the American flag. As over 140 religious leaders wrote to the Committee, in a letter dated April 29, 1999:

> Although we represent diverse faiths, it is unique to religious traditions to teach what is sacred and what is not. No government should arrogate to itself the right to declare "holy" and capable of "desecration" that which is not associated with the divine. To do so is to mandate idolatry for people of faith by government fiat. Our First Amendment has guaranteed to people of faith or to those with no faith that the government would not be arbiter of the sacred.

In light of this criticism, the flag amendment threatens not only our freedom of political expression but also our freedom of religious expression. In this country, our private religious institutions, not the government, determine what is sacred. That principle underlies both the Establishment and the Free Exercise Clauses of the First Amendment. The proposed amendment gives a sacred status to the flag. As much as we love the flag, that is not a power that our government was granted by the framers of the Constitution, nor should it ever have that power.

Professor Cass Sunstein made this point in his subcommittee testimony on June 6, 1995:

> [The word "desecration"] intermingles the flag with the divine—an intermingling that is in serious tension with the existing constitutional structure, in particular with the religion clauses. Under our system, the state is not identified with a religion. Under our system, there is no such thing as blasphemy law. At least for purposes of federal law, the nation is not "sacred." "Desecration" is therefore an inappropriate word to apply to destruction of the flag.

Another constitutional scholar, Professor Robert Cole, echoed this concern in a letter to the Committee dated April 28, 1999:

> It is no accident that the proposed amendment prohibits "desecration," the core meaning of which is to convert a sacred object to a secular use. But flags are secular objects; they are political emblems to be loved if one chooses but not to be sanctified. It is a dangerous confusion of the political with the sacred to think in terms of sanctifying our national flags, or even subconsciously to do so.

Professor Cole concluded, "For the sake of religious faith at least as much as for the neutrality of government, the sacred must be reserved for things having to do with the divine."

4. There is no consensus or clarity on the issue of content-neutrality

Censorship on the basis of beliefs—referred to in the case law as content or viewpoint discrimination—is a classic evil that the First Amendment is designed to prevent. "[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." *Police Dept. of Chicago* v. *Mosley,* 408 U.S. 92, 95 (1972). Even when the First Amendment permits regulation of an entire category of speech or expressive conduct, it does not necessarily permit the government to regulate a subcategory of the otherwise proscribable speech on the basis of its message. *R.A.V.* v. *City of St. Paul,* 505 U.S. 377 (1992).

Proponents of S.J. Res. 4 have demonstrated an alarming ambivalence whether it would permit Congress to restrict flag-related expression on the basis of its content. This year's majority report is silent on the question, although it clearly assumes that only beliefs and values that are disapproved of by the majority of Americans—it refers to them as "disrespect" or "contempt" for the flag—constitute desecration. Earlier majority reports took starkly inconsistent positions. The report in the 106th Congress insisted that the amendment "is not intended to—and would not—discriminate against specific messages or points of view, and is thus 'content neutral' to that extent." S. Rpt. 98, 106th Cong., 2d Sess. (2000). By contrast, the report in the 105th Congress included a full section entitled "A 'Content Neutral' Constitutional Amendment is Wholly Inappropriate," specifically attacking the notion, central 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. S. Rpt. 298, 105th Cong., 2d Sess. 39–42 (1998).

At the Committee hearing on April 20, 1999, Senator Leahy asked the majority's principal academic witness, Professor Richard Parker, whether Congress could pass legislation under the proposed amendment that outlawed only those flag burnings intended as a protest against incumbent officeholders. Professor Parker replied, "There is a clear answer there. That would be a violation of the First Amendment." But if a flag amendment is adopted, would basic First Amendment principles like the *R.A.V.* rule continue to apply to flag-related speech?

The late Senator John Chafee discussed the dangers of content-based restrictions in his statement for the Committee's April 1999 hearings. He asked whether the amendment's proponents intended "that when some bearded, untidy protestor burns an American flag

outside a convention hall, he should go to jail—but three blocks away, a Boy Scout burns the flag in a dignified manner, he will go free?" If so, he said, then we are getting into "a messy area indeed."

We share Senator Chafee's concern that in real life, the amendment and its implementing statute—even if facially neutral and non-discriminatory—would be enforced on the basis of content. History tells us that police and prosecutors would select for punishment those flag desecrators whom they, or their constituents, found insufficiently respectful, patriotic, or conformist. See Goldstein, Flag Burning and Free Speech, at 24–30 (describing how prosecutions under early flag desecration laws were invariably directed against perceived political dissidents, such as anti-war protestors). Physical desecration in the service of views that are approved by the authorities or the mainstream, like those following September 11 (see supra, Part X.E.2), would not be prosecuted.

However enforced, content-neutral legislation prohibiting flag desecration would work another kind of mischief. Such legislation—if it survived vagueness and overbreadth challenges (assuming such challenges could be brought)[20]—would inevitably inhibit or silence a great range of expressive behavior, much of which most people consider benign or even beneficial. In short, the amendment would create havoc for free expression for the purpose of solving no real problem.

5. The difficulties that attend a statutory approach to flag burning would remain even after a constitutional amendment

Proponents of S.J. Res. 4 argue, unconvincingly, that no statutory alternative is available to address the issue of flag burning. As noted above (in Part X.B.5), one statutory alternative has already been proposed in this Congress. Beyond that, however, 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.

As the Supreme Court wrote in *Smith* v. *Goguen,* 415 U.S. 566, 572–573 (1974), discussed in the majority report (in Part IV.C), the due process doctrine of vagueness incorporates notions of fair notice or warning:

> [I]t requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent "arbitrary and discriminatory enforcement." Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts.

[20] Acting Assistant Attorney General Randolf Moss, who testified for the Clinton Administration against the proposed amendment on April 28, 1999, noted that it would be "profoundly difficult" to identify just how much constitutional doctrine the amendment would supersede. We do not know, for instance, whether the amendment is intended, or would be interpreted, to authorize implementing legislation that otherwise would violate the due process "void for vagueness" doctrine, or the First Amendment "overbreadth" doctrine.

Where vague statutory language permits selective law enforcement, there is a denial of due process.

A statute enforcing this amendment either would be found unconstitutional for vagueness or else, as demonstrated above, silence or capture as criminals hundreds of well-meaning American citizens and businesses whose patriotism is beyond question. Proponents have argued that its language is at least as clear as other constitutional text such as "unreasonable searches and seizures," "probable cause," "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.

But more important, 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. There is no suggestion that it would enlarge our freedoms; the question, rather, would be whether we dare to speak in pursuance of our rights. Vagueness is intolerable when it frightens people into silence and empowers government to search, seize, hold and punish American citizens.

The impulse to punish ideas that permeates the majority report leads only to endless entanglement. Even with the large increase in the number of flag burnings that could be expected if this amendment were adopted, and even without the inventiveness in mistreatment of the flag and near-flags that could be predicted, there would be no end to the litigation under any statute. The amendment, the ensuing litigation, and the inevitable erratic pattern of results, would demean rather than protect the flag.

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 athletes or stepping on a lapel pin amounts to desecration? The biggest threat to the dignity of the flag may be such efforts to construct an impermeable legal barrier to protect it.

F. 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 us of our love for the flag, for our country, and for 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 have 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.

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 S.J. Res. 4 not be approved by the Senate.

PATRICK LEAHY.
TED KENNEDY.
HERB KOHL.
RUSSELL D. FEINGOLD.
CHARLES SCHUMER.
DICK DURBIN.

XI. SUPPLEMENTAL VIEW OF SENATOR EDWARD M. KENNEDY

Since the majority states, in Section IV. C. 1 of its views, that there would be "no reduction in First Amendment rights," they should have no objection to an amendment to the resolution so stating, and I recommend consideration and addition of such an amendment before the resolution is considered on the Senate floor.

TED KENNEDY.

APPENDIX A

GENERAL COLIN L. POWELL, USA (RET),
Alexandria, VA, May 18, 1999.

Hon. PATRICK LEAHY,
U.S. Senate,
Washington, DC.

DEAR SENATOR LEAHY: Thank you for your recent letter asking my views on the proposed flag protection amendment.

I love our flag, our Constitution and our country with a love that has no bounds. I defended all three for 35 years as a soldier and was willing to give my life in their defense.

Americans revere their flag as a symbol of the Nation. Indeed, it is because of that reverence that the amendment is under consideration. Few countries in the world would think of amending their Constitution for the purpose of protecting such a symbol.

We are rightfully outraged when anyone attacks or desecrates our flag. Few Americans do such things and when they do they are subject to the rightful condemnation of their fellow citizens. They may be destroying a piece of cloth, but they do no damage to our system of freedom which tolerates such desecration.

If they are destroying a flag that belongs to someone else, that's a prosecutable crime. If it is a flag they own, I really don't want to amend the Constitution to prosecute someone for foolishly desecrating their own property. We should condemn them and pity them instead.

I understand how strongly so many of my fellow veterans and citizens feel about the flag and I understand the powerful sentiment in state legislatures for such an amendment. I feel the same sense of outrage. But I step back from amending the Constitution to relieve that outrage. The First Amendment exists to insure that freedom of speech and expression applies not just to that with which we agree or disagree, but also that which we find outrageous.

I would not amend that great shield of democracy to hammer a few miscreants. The flag will still be flying proudly long after they have slunk away.

Finally, I shudder to think of the legal morass we will create trying to implement the body of law that will emerge from such an amendment.

If I were a member of Congress, I would not vote for the proposed amendment and would fully understand and respect the views of those who would. For or against, we all love our flag with equal devotion.

Sincerely,

COLIN L. POWELL.

P.S. The attached 1989 article by a Vietnam POW gave me further inspiration for my position.

WHEN THEY BURNED THE FLAG BACK HOME

(By James H. Warner)

THOUGHTS OF A FORMER POW

In March of 1973, when we were released from a prisoner of war camp in North Vietnam, we were flown to Clark Air Force base in the Philippines. As I stepped out of the aircraft I looked up and saw the flag. I caught my breath, then, as tears filled my eyes, I saluted it. I never loved my country more than at that moment. Although I have received the Silver Star Medal and two Purple Hearts, they were nothing compared with the gratitude I felt then for having been allowed to serve the cause of freedom.

Because the mere sight of the flag meant so much to me when I saw it for the first time after 5½ years, it hurts me to see other Americans willfully desecrate it. But I have been in a Communist prison where I looked into the pit of hell. I cannot compromise on freedom. It hurts to see the flag burned, but I part company with those who want to punish the flag burners. Let me explain myself.

Early in the imprisonment the Communists told us that we did not have to stay there. If we would only admit we were wrong, if we would only apologize, we could be released early. If we did not, we would be punished. A handful accepted, most did not. In our minds, early release under those conditions would amount to a betrayal, of our comrades of our country and of our flag.

Because we would not say the words they wanted us to say, they made our lives wretched. Most of us were tortured, and some of my comrades died. I was tortured for most of the summer of 1969. I developed beriberi from malnutrition. I had long bouts of dysentery. I was infested with intestinal parasites. I spent 13 months in solitary confinement. Was our cause worth all of this? Yes, it was worth all this and more.

Rose Wilder Lane, in her magnificent book "The Discovery of Freedom," said there are two fundamental truths that men must know in order to be free. They must know that all men are brothers, and they must know that all men are born free. Once men accept these two ideas, they will never accept bondage. The power of these ideas explains why it was illegal to teach slaves to read.

One can teach these ideas, even in a Communist prison camp. Marxists believe that ideas are merely the product of material conditions; change those material conditions, and one will change the ideas they produce. They tried to "re-educate" us. If we could show them that we would not abandon our belief in fundamental principles, then we could prove the falseness of their doctrine. We could subvert them by teaching them about freedom through our example. We could show them the power of ideas.

I did not appreciate this power before I was a prisoner of war. I remember one interrogation where I was shown a photograph of some Americans protesting the war by burning a flag. "There," the officer said. "People in your country protest against your cause. That proves that you are wrong."

"No," I said, "That proves that I am right. In my country we are not afraid of freedom, even if it means that people disagree with us." The officer was on his feet in an instant, his face purple with rage. He smashed his fist onto the table and screamed at me to shut up. While he was ranting I was astonished to see pain, compounded by fear, in his eyes. I have never forgotten that look, nor have I forgotten the satisfaction I felt at using his tool, the picture of the burning flag, against him.

Aneurin Bevan, former official of the British Labor Party, was once asked by Nikita Khrushchev how the British definition of democracy differed from the Soviet view. Bevan responded, forcefully, that if Khrushchev really wanted to know the difference, he should read the funeral oration of Pericles.

In that speech, recorded in the Second Book of Thucydides' "History of the Peloponnesian War," Pericles contrasted democratic Athens with totalitarian Sparta. Unlike the Spartans, he said, the Athenians did not fear freedom. Rather, they viewed freedom as the very source of their strength. As it was for Athens, so it is for America—our freedom is not to be feared, for our freedom is our strength.

We don't need to amend the Constitution in order to punish those who burn our flag. They burn the flag because they hate America and they are afraid of freedom. What better way to hurt them than with the subversive idea of freedom? Spread freedom. The flag in Dallas was burned to protest the nomination of Ronald Reagan, and he told us how to spread the idea of freedom when he said that we should turn American into "a city shining on a hill, a light to all nations." Don't be afraid of freedom, it is the best weapon we have.

APPENDIX B

VETERANS DEFENDING THE BILL OF RIGHTS,
Newburgh, IN, March 10, 2004.

Re oppose S.J. Res. 4, the Flag Desecration Constitutional Amendment.

DEAR SENATOR: My name is Gary May and I am writing to you today as the chair of a group called Veterans Defending the Bill of Rights to urge you to oppose S.J. Res. 4, the flag desecration constitutional amendment. I know you hear from many veterans who support this amendment, but you should also know that there are many veterans that have faithfully served our nation who strongly believe that amending the Constitution to ban flag desecration is the antithesis of what they fought to preserve.

I lost both of my legs in combat while serving in the U.S. Marine Corps in Vietnam. I challenge anyone to find someone who loves this country, its people and what it stands for more than I. It offends me when I see the flag burned or treated disrespectfully. But, as offensive and painful as this is, I still believe that those dissenting voices need to be heard.

This country is unique and special because the minority, the unpopular, the dissident also have a voice. The freedom of expression, even when it hurts the most, is the truest test of our dedication to the principles that our flag represents.

In addition to my military combat experience, I have been involved in veterans' affairs as a clinical social worker, program manager, board member of numerous veterans organizations, and advocated on their behalf since 1974. Through all of my work in veterans' affairs, I have yet to hear a veteran say that his or her service and sacrifice was in pursuit of protecting the flag.

When confronted with the horrific demands of combat, the simple fact is that most of us fought to stay alive. The pride and honor we feel is not in the flag per se. It's in the principles that it stands for and the people who have defended them.

I am grateful for the many heroes of our country. All the sacrifices of those who went before us would be for naught, if an amendment were added to the Constitution that cut back on our First Amendment rights for the first time in the history of our great nation. I write to you today to attest to the fact that many veterans do not wish to exchange fought-for freedoms for protecting a tangible object.

To illustrate my point, here is what some of the Veterans Defending the Bill of Rights have said about this amendment:

• * * * to undertake to carve out an area of free speech and say that this or that is unpatriotic because it is offensive is a movement that will unravel our liberties and do grave damage to our

nation's freedom. The ability to say by speech or dramatic acts what we feel or think is to be cherished not demeaned as unpatriotic * * * I hope you will hear my pleas. Please do not tinker with the First Amendment.—*Reverend Edgar Lockwood, Falmouth, Massachusetts, served as a naval officer engaged in more than ten combat campaigns in WWII.*

• My military service was not about protecting the flag; it was about protecting the freedoms behind it. The flag amendment curtails free speech and expression in a way that should frighten us all.—*Brady Bustany, West Hollywood, California, served in the Air Force during the Gulf War.*

• The first amendment to our constitution is the simplest and clearest official guarantee of freedom ever made by a sovereign people to itself. The so-called 'flag protection amendment' would be a bureaucratic hamstringing of a noble act. Let us reject in the name of liberty for which so many have sacrificed, the call to ban flag desecration. Let us, rather, allow the first amendment, untrammeled and unfettered by this proposed constitutional red tape, to continue to be the same guarantor of our liberty for the next two centuries (at least) that is has been for the last two.—*State Delegate John Doyle, Hampshire County, West Virginia served as an infantry officer in Vietnam.*

• As a twenty two year veteran, combat experience, shot up, shot down, hospitalized more than a year, Purple Heart recipient, with all the proper medals and badges I take very strong exception to anyone who says that burning the flag isn't a way of expressing yourself. In my mind this is clearly covered in Amendment I to the Constitution—and should not be "abridged".—*Mr. Bob Cordes, Maston, Texas was an Air Force fighter pilot show down in Vietnam. He served for 22 years from 1956 to 1978.*

• Service to our country, not flag waving, is the best way to demonstrate patriotism.—*Mr. Jim Lubbock, St. Louis, Missouri, served with the Army in the Phillipines during WWII. His two sons fought in Vietnam, and members of his family have volunteered for every United States conflict from the American Revolution through Vietnam with the exception of Korea. His direct ancestor, Stephen Hopkins, signed the Declaration of Independence.*

• The burning of our flag thoroughly disgusts me. But a law banning the burning of the flag pays right into the hands of the weirdoes who are doing the burning. * * * By banning the burning of the flag, we are empowering them by giving significance to their stupid act. Let them burn the flag and let us ignore them. Then their acts carries no significance.—*Mr. William Ragsdale, Titusville, Florida, an engineer who worked in the space industry for over 30 years, retired from the US Naval Reserve in 1984 with the rank of Commander, having served in the Navy for over forty years including active duty in both WWII and the Korean War. He has two sons who served in Vietnam.*

• I fought for freedom of expression not for a symbol. I fought for freedom of Speech. I did not fight for the flag, or motherhood, or apple pie. I fought so that my mortal enemy could declare at the top of his lungs that everything I held dear was utter drivel * * * I fought for unfettered expression of ideas. Mine and everybody else's.—*Mr. John Kelley, East Concord, Vermont, lost his leg to a*

Viet Cong hand grenade while on Operation Sierra with the Fox Company 2nd Battalion 7th Marines in 1967.

I hope you will join me and the Veterans Defending the Bill of Rights in opposing S.J. Res. 4, the flag desecration constitutional amendment.

Sincerely,

GARY E. MAY.

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