109TH CONGRESS, 1st Session } HOUSE OF REPRESENTATIVES { REPORT 109–131

PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AUTHORIZING THE CONGRESS TO PROHIBIT THE PHYSICAL DESECRATION OF THE FLAG OF THE UNITED STATES

JUNE 14, 2005.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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

R E P O R T

together with

ADDITIONAL AND DISSENTING VIEWS

[To accompany H.J. Res. 10]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the joint resolution (H.J. Res. 10) proposing an amendment to the Constitution of the United States authorizing the Congress to prohibit the physical desecration of the flag of the United States, having considered the same, report favorably thereon without amendment and recommend that the joint resolution do pass.

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39–006

PURPOSE AND SUMMARY

House Joint Resolution 10 proposes to amend the Constitution of the United States to empower Congress to prohibit the physical desecration of the American flag. The proposed resolution states: "The Congress shall have power to prohibit the physical desecration of the flag of the United States." This proposed amendment, by itself, does not effectively prohibit the physical desecration of the flag. Rather, H.J. Res. 10 gives Congress the authority to legislate in this area and sets the boundaries by which Congress can enact legislation, if it so chooses, to prohibit such conduct. Congress and the States exercised such power in the past until the United States Supreme Court issued a 5–4 decision in *Texas v. Johnson*[1] in 1989, holding that flag burning is expressive conduct that is protected by the First Amendment. Prior to the *Johnson* ruling, 48 states and the Federal Government had outlawed such conduct. Today, all 50 states have passed resolutions calling on Congress to approve a constitutional amendment to protect the flag and to send it to the states for ratification. This proposed constitutional amendment has also engendered the consistent support of an overwhelming majority of the American public for over a decade.[2] Consistent with the wishes of the American public, H.J. Res. 10 will empower Congress to prohibit the physical desecration of the American flag.

BACKGROUND AND NEED FOR THE LEGISLATION

The flag of the United States of America is the most recognized symbol of freedom and democracy in the world today. It serves a unique role as the symbol of our country's values and the embodiment of the rights guaranteed to all Americans under the Constitution. It has led the way into battle, has been planted on the moon, and has draped the coffins of Americans who have sacrificed their lives for our country. The flag was raised by rescue workers at the World Trade Center and unfurled on the Pentagon following the tragic attacks of September 11, 2001. The United States flag is more than just a piece of cloth—it is a uniquely unifying symbol that epitomizes this great Nation and all for which it stands. Despite this, since 1994, over 119 incidents involving flag desecration were reported in the States, the District of Columbia, and Puerto Rico.

The movement to pass legislation prohibiting the desecration of the American flag began in the late 1800's, with all of the States having flag desecration laws on the books by 1932.[3] In 1968, the Federal Government passed its statute prohibiting such conduct.[4] By 1989, every State in the Union except Alaska and Wyoming outlawed such conduct. However, on June 21, 1989, the United States Supreme Court proscribed these laws in *Texas v. Johnson,*[5] holding in a 5–4 decision that the burning of an American flag as part of

[1] 491 U.S. 397 (1989).
[2] *See* Public Opinion Poll by Market Strategies, Inc. (Mar. 13, 2002) at http://www.cfa-inc.org/issues/poll2.htm (finding seventy-five percent of Americans support such an amendment).
[3] *Desecrating the American Flag: Key Documents of the Controversy From the Civil War to 1995* at xix (Robert Justin Goldstein ed., 1996).
[4] Pub. L. No. 90–381, 82 Stat. 291 (codified as amended at 18 U.S.C. § 700 (2003)).
[5] 491 U.S. 397 (1989).

a political demonstration was expressive conduct protected by the First Amendment to the United States Constitution.

In *Johnson,* Gregory Johnson was convicted of violating a Texas law prohibiting the desecration of a "venerated object" after he publicly burned a stolen American flag in a protest outside of the 1984 Republican National Convention in Dallas, Texas. The Texas law prohibited the intentional desecration of a national flag in a manner in which "the actor knows will seriously offend one or more persons likely to observe or discover his action."[6] His conviction was upheld by the Court of Appeals for the Fifth District of Texas but reversed by the Texas Court of Criminal Appeals. The United States Supreme Court subsequently affirmed the holding of the Texas Court of Criminal Appeals, finding that the act of burning an American flag during a protest rally was expressive conduct entitled to protection under the First Amendment.

Chief Justice Rehnquist filed a dissenting opinion in which Justices O'Connor and White joined.[7] Chief Justice Rehnquist noted the unique history of the American flag:

> The American flag, then, throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. It does not represent the views of any particular political party, and it does not represent any particular political philosophy. The flag is not simply another "idea" or "point of view" competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have. I cannot agree that the First Amendment invalidates the Act of Congress, and the laws of 48 of the 50 States, which make criminal the public burning of the flag.[8]

Chief Justice Rehnquist also found persuasive the opinions of former Chief Justice Earl Warren and former Justices Hugo Black and Abe Fortas, which had noted that the states and the Federal Government had the power to protect the flag from desecration and disgrace.[9]

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[6] Tex. Penal Code Ann. § 42.09 (1989), "Desecration of Venerated Object," provided as follows:

(a) A person commits an offense if he intentionally or knowingly desecrates:

(1) a public monument;

(2) a place of worship or burial; or

(3) a state or national flag.

(b) For purposes of this section, "desecrate" means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.

(c) An offense under this section is a Class A misdemeanor.

[7] Justice Stevens filed a separate dissenting opinion.

[8] *Johnson,* 491 U.S. at 429.

[9] In *Street v. New York,* 394 U.S. 576 (1969), these three Justices set forth their views on the government's regulation of acts of flag desecration. Former Chief Justice Earl Warren stated, "I believe that the States and the Federal Government do have power to protect the flag from acts of desecration and disgrace." *Id.* at 605 (Warren, C.J., dissenting). In a similar tone, former Justice Hugo Black noted in discussing New York's flag burning statute, "It passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American flag an offense." *Id.* at 610 (Black, J., dissenting). Finally, former Justice Abe Fortas remarked that "the States and the Federal Government have the power to protect the flag from acts of desecration in public. . . . [T]he flag is a special kind of personality. Its use is traditionally and universally subject to special rules and regulations. . . ." *Id.* at 615–17 (Fortas, J., dissenting).

In response to the *Johnson* decision, Congress approved the "Flag Protection Act of 1989"[10] in September 1989 by a vote of a 371–43 in the House and 91–9 in the Senate. The Act amended the Federal flag statute, 18 U.S.C. § 700, in an attempt to make it "content-neutral" so that it would pass constitutional muster. As stated in the House Judiciary Committee report, "the amended statute focuses exclusively on the conduct of the actor, irrespective of any expressive message he or she might be intending to convey."[11]

On June 11, 1990, in *United States v. Eichman,*[12] the United States Supreme Court, in another 5–4 decision, struck down the recently-enacted "Flag Protection Act of 1989," ruling that the Act infringed on expressive conduct protected by the First Amendment. Although the Federal Government conceded that flag burning constituted expressive conduct, it claimed that flag burning, like obscenity or "fighting words," was not fully protected by the First Amendment. The Federal Government also argued the Flag Protection Act was constitutional because, unlike the Texas statute struck down in *Johnson,* the Act was "content-neutral" and simply sought to protect the physical integrity of the flag rather than to suppress disagreeable communication.

Justice Brennan, writing for the majority, rejected the Federal Government's argument, noting that:

> Although the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted *interest* is "related 'to the suppression of free expression,'" 491 U.S., at 410, 109 S.Ct., at 2543, and concerned with the content of such expression. . . . [T]he mere destruction or disfigurement of a particular physical manifestation of the symbol, without more, does not diminish or otherwise affect the symbol itself in any way. . . . Rather, the Government's desire to preserve the flag as a symbol for certain national ideals is implicated "only when a person's treatment of the flag communicates [a] message" to others that is inconsistent with those ideals.[13]

Justice Stevens wrote a dissenting opinion in which Chief Justice Rehnquist, Justice White, and Justice O'Connor joined. He expressed agreement with the proposition expressed by the majority that "the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[14] He went on, however, to note that methods of expression may be prohibited under a number of circumstances and set forth the following standard:

> If (a) the prohibition is supported by a legitimate societal interest that is unrelated to suppression of the ideas the speaker desires to express; (b) the prohibition does not entail any interference with the speaker's freedom to express those ideas by other means; and (c) the interest in allowing the speaker complete freedom of choice among alternative methods of expres-

[10] Pub. L. No. 101–131, 103 Stat. 777.

[11] "Flag Protection Act of 1989" H. Rep. No. 101–231, 101st Cong., 1st Sess. 2 (1989). The Act became law without the President's signature on October 28, 1989.

[12] 496 U.S. 310 (1990).

[13] *Id.* at 315–16.

[14] *Id.* at 319.

> sion is less important than the societal interest supporting the prohibition.[15]

Justice Stevens believed that the statute at issue in this case satisfied each of these concerns and thus should have been held constitutional.

As the *Johnson* and *Eichman* decisions illustrate, a statutory remedy is not sufficient to correct the problem of flag desecration. Therefore, the only avenue remaining by which Congress can successfully defend the American flag from acts of desecration is through a constitutional amendment. The Framers of the Constitution understood that there would be times in our nation's history necessitating a change in the Constitution and hence provided the people with an amendment process embodied in Article V of the Constitution.[16] While there have been over 11,000 constitutional amendments proposed since the ratification of the Bill of Rights, there have been only 17 amendments actually approved and ratified to be included in the Constitution.[17] It is this process that is absolutely vital to maintaining the democratic legitimacy of the Constitution and of judicial review itself.

H.J. Res. 10 will effectuate the will of an overwhelming majority of the American public in a manner pursuant to the mechanisms of Article V of the Constitution and provide Congress with the power to prohibit the physical desecration of the flag. H.J. Res. 10 simply seeks to remove the physical flag as a mode of communication, without regard to the content of such speech or the particular viewpoint attempting to be expressed. As Justice Stevens noted in *Eichman:*

> It is, moreover, equally clear that the prohibition does not entail any interference with the speaker's freedom to express his or her ideas by other means. It may well be true that other means of expression may be less effective in drawing attention to those ideas, but that is not itself a sufficient reason for immunizing flag burning. Presumably a gigantic fireworks display or a parade of nude models in a public park might draw even more attention to a controversial message, but such methods of expression are nevertheless subject to regulation.[18]

Alternative means of expressing ideas are available to political protestors who would have otherwise desecrated a flag in order to express their message. Implementing legislation adopted pursuant to a flag protection amendment prohibiting the physical desecration of the flag would deprive an individual of only "one rather inarticulate symbolic form of protest" and leave that person with "a full panoply of other symbols and every conceivable form of verbal expression" to express whatever it is that one desires to express.[19] Such was the status quo in 48 states prior to the Johnson ruling in 1989. During this long period when flag desecration statutes

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[15] *Id.*

[16] *See* U.S. Const. art. V.

[17] *See Flag Protection Amendment: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary,* 108th Cong. (statement of Professor Richard D. Parker, Harvard Law School).

[18] *Eichman,* 496 U.S. at 322.

[19] *Johnson,* 491 U.S. at 432 (Rehnquist, C.J., dissenting).

were in effect, wide open debate flourished, as it has throughout America's history.

The dissenting opinions in *Johnson* and *Eichman* collectively provide an instructive analysis of why Congressional action prohibiting flag desecration serves a legitimate interest. For example, Justice Stevens' dissent in *Johnson* extolled the significant and legitimate interest in preserving the flag:

> [S]anctioning the public desecration of the flag will tarnish its value—both for those who cherish the ideas for which it waves and for those who desire to don the robes of martyrdom by burning it. That tarnish is not justified by the trivial burden on free expression occasioned by requiring that an available, alternative mode of expression—including uttering words critical of the flag, see *Street v. New York,* 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969)—be employed.[20]

Former Chief Justice John Marshall Harlan echoed these sentiments over half a century earlier when he stated that "love both of the common country and of the State will diminish in proportion as respect for the flag is weakened. Therefore a State will be wanting in care for the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige, and will be impatient if any disrespect is shown towards it."[21] Just as the Federal Government has a legitimate interest in preserving the quality of an important national asset, such as the Lincoln Memorial, from desecration, so too does the government have just as important an interest in prohibiting the desecration of the American flag.[22]

In *Eichman,* Justice Stevens, joined by Chief Justice Rehnquist, Justice White, and Justice O'Connor, began his dissent by noting the axiomatic First Amendment principle that "the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[23] However, Justice Stevens concluded that the Federal Government has a legitimate interest in protecting the intrinsic value of the American flag, because the flag, "in times of national crisis, inspires and motivates the average citizen to make personal sacrifices in order to achieve societal goals of overriding importance" and "at all times it serves as a reminder of the paramount importance of pursuing the ideas that characterize our society."[24]

H.J. Res. 10 would empower Congress to prohibit the physical desecration of the United States flag. The constitutional amendment itself does not prohibit flag desecration. Rather, it empowers Congress to enact legislation to prohibit the physical desecration of the American flag and establishes boundaries within which Congress may legislate to prosecute this conduct. Work on a statute will come at a later date, after three-fourths of the States ratify the amendment.

Though a proposed flag protection amendment failed to garner a two-thirds majority in the House in the 101st Congress, a flag protection amendment has passed the House in every Congress since

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[20] *Id.* at 437 (Stevens, J., dissenting).
[21] *Halter v. Nebraska,* 205 U.S. 34, 41–42 (1907).
[22] *Johnson,* 491 U.S. at 438–39 (Stevens, J., dissenting).
[23] *Eichman,* 496 U.S. at 319.
[24] *Id.*

the 104th. In the 105th, 106th, 107th, and 108th Congresses, language identical to H.J. Res. 10 passed the House by a two-thirds majority. In addition, *all 50 States* have passed resolutions calling on Congress to pass a flag protection amendment and send it to the States for ratification,[25] and dozens of surveys since 1989 evidence that 75—80 percent of Americans have consistently supported amending the Constitution to protect the flag.[26]

HEARINGS

The Committee on the Judiciary held no hearings on H.J. Res. 10 during the 109th Congress. However, hearings were held on identical language proposed in the 105th, 106th, and 108th Congresses.[27] Five hearings were also held on statutory and constitutional responses to the Supreme Court decision in *Texas v. Johnson* and the need for a flag protection amendment in the 101st and 104th Congresses.[28]

COMMITTEE CONSIDERATION

On May 25, 2005, the Committee met in open session and ordered favorably reported the joint resolution, H.J. Res. 10, without an amendment by a recorded vote of 17 yeas to 9 nays, a quorum being present.

VOTE OF THE COMMITTEE

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee notes that the following rollcall votes occurred during the Committee's consideration of H.J. Res. 10.

1. An amendment was offered by Mr. Scott to delete the word "desecration" and insert in its place the word "burning." The amendment was defeated by a rollcall vote of 11 ayes to 19 nays.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble		X	
Mr. Smith (Texas)		X	
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Chabot		X	
Mr. Lungren		X	
Mr. Jenkins		X	
Mr. Cannon		X	
Mr. Bachus			

[25] *See,* http://www.cfa-inc.org/about/flag amendl.htm.

[26] *See, e.g.,* Public Opinion Poll by Market Strategies, Inc. (Mar. 13, 2002) at http://www.cfa-inc.org/issues/poll2.htm (finding seventy-five percent of Americans support such an amendment).

[27] *H.J. Res. 54: Proposing an Amendment to the Constitution of the United States Authorizing Congress to Prohibit the Physical Desecration of the Flag of the United States: Hearing on H.J. Res. 54 Before the Subcomm. on the Constitution, House Comm. on the Judiciary,* 105th Cong. (Apr. 30, 1997); *Prohibit the Physical Desecration of the Flag of the United States: Hearing on H.J. Res. 33 Before the Subcomm. on the Constitution, House Comm. on the Judiciary,* 106th Cong. (Mar. 23, 1999); *Flag Protection Amendment: Hearing on H.J. Res. 4 Before the Subcomm. on the Constitution, House Comm. on the Judiciary,* 108th Cong. (May 7, 2003).

[28] *Statutory and Constitutional Responses to the Supreme Court decision in* Texas v. Johnson: *Hearings Before the Subcomm. on Civil and Constitutional Rights, House Comm. on the Judiciary,* 101st Cong. (July 13, 18, 19, and 20, 1989); *Hearing on Flag Desecration Before the Subcomm. on the Constitution, House Comm. on the Judiciary,* 104th Cong. (May 24, 1995).

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Inglis		X	
Mr. Hostettler		X	
Mr. Green		X	
Mr. Keller		X	
Mr. Issa		X	
Mr. Flake		X	
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Feeney		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Conyers	X		
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters			
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler			
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez	X		
Mr. Smith (Washington)			
Mr. Van Hollen	X		
Mr. Sensenbrenner, Chairman		X	
Total	11	19	

2. Final Passage. The motion to report favorably the joint resolution, H.J. Res. 10, was agreed to by a rollcall vote of 17 yeas to 9 nays.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble	X		
Mr. Smith (Texas)	X		
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Chabot	X		
Mr. Lungren	X		
Mr. Jenkins	X		
Mr. Cannon	X		
Mr. Bachus	X		
Mr. Inglis	X		
Mr. Hostettler			
Mr. Green	X		
Mr. Keller	X		
Mr. Issa	X		
Mr. Flake			
Mr. Pence			
Mr. Forbes			
Mr. King	X		
Mr. Feeney			
Mr. Franks	X		
Mr. Gohmert	X		
Mr. Conyers		X	

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Berman			
Mr. Boucher			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt			
Ms. Lofgren		X	
Ms. Jackson Lee		X	
Ms. Waters			
Mr. Meehan			
Mr. Delahunt			
Mr. Wexler			
Mr. Weiner		X	
Mr. Schiff		X	
Ms. Sánchez		X	
Mr. Smith (Washington)			
Mr. Van Hollen		X	
Mr. Sensenbrenner, Chairman	X		
Total	17	9	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the resolution, H.J.Res. 10, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 31, 2005.

Hon. F. JAMES SENSENBRENNER, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.J. Res. 10, proposing an amendment to the Constitution of the United States authorizing the Congress to prohibit the physical desecration of the flag of the United States.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Mark Grabowicz (for Federal costs), and Melissa Merrell (for the State and local impact).

Sincerely,

DOUGLAS HOLTZ-EAKIN.

Enclosure.

H.J. Res. 10—Proposing an amendment to the Constitution of the United States authorizing the Congress to prohibit the physical desecration of the flag of the United States.

H.J. Res. 10 would propose an amendment to the Constitution to allow the Congress to enact legislation that would prohibit physical desecration of the U.S. flag. The legislatures of three-fourths of the States would be required to ratify the proposed amendment within 7 years for the amendment to become effective. 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 estimates that any resulting costs would not be significant. H.J. Res. 10 would not affect direct spending or revenues.

H.J. Res. 10 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on State, local, or tribal governments. For the amendment to become part of the Constitution, three-fourths of the State legislatures would have to ratify the resolution, but no State would be required to take action on the resolution, either to reject it or approve it.

The CBO staff contacts for this estimate are Mark Grabowicz (for Federal costs), and Melissa Merrell (for the State and local impact). This estimate was approved by Robert A. Sunshine, Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.J. Res. 10 would amend the Constitution to provide that Congress has the power to prohibit the physical desecration of the flag.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article V of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

The following discussion describes the bill as reported by the Committee. H.J. Res. 10 states: "The Congress shall have power to prohibit the physical desecration of the flag of the Unites States." As interpreted by the Supreme Court, the First Amendment to the United States Constitution, which states that, "Congress shall make no law . . . abridging freedom of speech," limits the power

of Congress to prohibit the physical desecration of the flag. In light of the Supreme Court's interpretation, a constitutional amendment is the only alternative for proscribing the physical desecration of the flag. H.J. Res. 10 would empower Congress to pass legislation to prohibit the physical desecration of the flag of the United States.

This proposed constitutional amendment sets the parameters for future action by the Congress on this issue. After the amendment is ratified, the elected representatives of the people can decide whether to enact legislation prohibiting the physical desecration of the flag. Two key issues will need to be considered in enacting legislation to protect the flag from physical desecration. First, Congress must consider the meaning of "physical desecration." The amendment itself requires physical contact with the flag. Under this amendment, Congress could not punish mere words or gestures directed at the flag, regardless of how offensive they were. Webster's Ninth New Collegiate Dictionary defines "desecrate" as follows: "1: to violate the sanctity of: PROFANE 2: to treat irreverently or contemptuously often in a way that provokes outrage on the part of others." Black's Law Dictionary defines "desecrate" as "[t]o divest (a thing) of its sacred character; to defile or profane (a sacred thing)" and "flag desecration" as "the act of mutilating, defacing, burning, or flagrantly misusing a flag." Congress, under this constitutional amendment, could clearly prohibit burning, shredding, and similar defilement of the flag.

In any event, the word "desecration" was selected because of its broad nature in encompassing many actions against the flag. Such broad terms are commonly used in constitutional amendments; for example, "free exercise" in the First Amendment; "unreasonable searches and seizures" and "probable cause" in the Fourth Amendment; "due process" and "equal protection" in the Fourteenth Amendment. The use of broad terms in constitutional amendments, such as the word "desecration," are necessary to give Congress discretion when it moves to enact implementing legislation. Debate and discussion as to what forms of desecration should be outlawed, such as burning, will come at a later date in Congress. Otherwise, Congress would be restricted and unduly limited in achieving its objective and purpose in approving a constitutional amendment such as H.J. Res. 10.

Second, Congress will have to decide what representations of the flag of the United States are to be protected. As defined in the United States Code, "[t]he flag of the United States shall be thirteen horizontal stripes, alternate red and white; and the union of the flag shall be forty-eight stars, white in a blue field."[29] The resolution does not affect this definition. In enacting a statute, Congress will need to decide which representations of the flag are to be protected from physical desecration. For instance, the flag of the United States may be defined in this future authorizing statute as only a cloth, or other material readily capable of being waved or flown, with the characteristics of the official flag of the United States as described in 4 U.S.C. § 1. These details will be dealt with

[29] 4 U.S.C. § 1. "On the admission of a new State into the Union one star shall be added to the union of the flag; and such addition shall take effect on the fourth day of July then next succeeding such admission." 4 U.S.C. § 2.

in implementing legislation subsequent to the adoption and ratification of H.J. Res. 10.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of Rule XIII of the Rules of the House of Representatives, the Committee notes H.J. Res. 10 makes no changes to existing statutes.

MARKUP TRANSCRIPT

BUSINESS MEETING

WEDNESDAY, MAY 25, 2005

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:02 a.m., in Room 2138, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. [Chairman of the Committee] presiding.

Chairman SENSENBRENNER. The Committee will come to order. A working quorum is present.

[Intervening business.]

Chairman SENSENBRENNER. Pursuant to notice, I now call up H.J. Res. 10 proposing an amendment to the Constitution authorizing Congress to prohibit the physical desecration of the flag of the United States for purposes of markup and move its favorable recommendation to the House. Without objection, the joint resolution will be considered as read and open for amendment at any point.

[The resolution, H.J. Res. 10, follows:]

IA

109TH CONGRESS
1ST SESSION

H. J. RES. 10

Proposing an amendment to the Constitution of the United States authorizing the Congress to prohibit the physical desecration of the flag of the United States.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 25, 2005

Mr. CUNNINGHAM (for himself, Mr. MURTHA, Mr. BARTLETT of Maryland, Mr. BASS, Mr. BOEHLERT, Mr. BUYER, Mr. CROWLEY, Mr. DAVIS of Tennessee, Mr. DOOLITTLE, Mr. FERGUSON, Mr. GARRETT of New Jersey, Mr. GOODE, Mr. HEFLEY, Mr. HOLDEN, Mr. ISSA, Mrs. JOHNSON of Connecticut, Mr. KENNEDY of Minnesota, Mr. KING of Iowa, Mr. MCINTYRE, Mr. MENENDEZ, Mr. PITTS, Mr. RAMSTAD, Mr. ROGERS of Michigan, Mr. SIMMONS, Mr. SMITH of Texas, Mr. TANCREDO, Mr. TAYLOR of North Carolina, Mr. TAYLOR of Mississippi, Mr. WAMP, Mr. WICKER, Mr. WILSON of South Carolina, Mr. MCCAUL of Texas, Mrs. JO ANN DAVIS of Virginia, Mr. HUNTER, Mrs. CUBIN, Mr. KNOLLENBERG, Mr. MOLLOHAN, Mr. MCHUGH, Mr. WOLF, Mr. OTTER, Mr. ROYCE, Mr. GREEN of Wisconsin, Mrs. MCCARTHY, Mr. GIBBONS, Mr. HASTINGS of Washington, Mr. MCGOVERN, Mr. TERRY, and Mr. BRADLEY of New Hampshire) introduced the following resolution; which was referred to the Committee on the Judiciary

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JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States authorizing the Congress to prohibit the physical desecration of the flag of the United States.

1 *Resolved by the Senate and House of Representatives*
2 *of the United States of America in Congress assembled*
3 *(two-thirds of each House concurring therein),* That the fol-

lowing 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 after the date of its submission for ratification:

"ARTICLE —

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

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Chairman SENSENBRENNER. The chair recognizes the gentleman from Ohio, Mr. Chabot, the Chairman of the Subcommittee on the Constitution, for 5 minutes to explain the joint resolution.

Mr. CHABOT. Thank you, Mr. Chairman.

The flag of the United States is the most recognized and sacred symbol of freedom and democracy in the world. Whether in war atop the United States Capitol or sewn to the sleeves of our brave men and women sent into battle, the flag represents the values that all Americans hold dear. In the midst of the rubble and debris at Ground Zero, where the World Trade Center towers once stood, three New York City firefighters raised the flag to the top of the pole. The photographer who captured this shot said, "This was an important shot. It told of more than just death and destruction, it said something to me about the strength of the American people and of these firemen having to battle the unimaginable. It had drama, spirit, and courage in the face of disaster."

It is this symbolism and resilience that has made the flag the most beloved and cherished symbol in our Nation's history. Despite this, 119 incidents of flag desecration have been reported since 1994. The movement to pass legislation prohibiting the desecration of the American flag began in the late 1800's, with every State having a flag desecration law on the books by 1932. In 1968, the Federal Government passed its statute prohibiting such conduct. By 1989, every State in the Union except Alaska and Wyoming outlawed such conduct.

However, in 1989, the United States Supreme Court, by the narrowest of margins, effectively invalidated all State and Federal laws that prohibited flag desecration. In a 5–4 opinion, the Court concluded that the burning of the American flag as part of a political demonstration was expressive conduct protected by the first amendment. Congress responded to the Supreme Court's decision almost instantaneously through bipartisan and overwhelming support, enacting the Flag Protection Act of 1989, which passed the House by a vote of 371 to 43 and the Senate by a vote of 91 to 9. However, in a 5–4 opinion the following year, the Supreme Court held the Flag Protection Act unconstitutional in *United States v. Eichman.* Because of these narrowly decided Supreme Court decisions, a constitutional amendment provides the only remaining option for the American public to restore protection to our Nation's most visible symbol. The Flag Protection Amendment would restore the authority of Congress to prohibit the physical desecration of the flag.

Some would argue that this proposed amendment would erode the first amendment protections that all Americans enjoy. I disagree with this assertion as do the majority of Americans. The Flag Protection Amendment is consistent with the first amendment while maintaining the flag as a national symbol and giving it the protection it deserves. The first amendment does not grant individuals unlimited rights to engage in any form of desired conduct under the cloak of free expression. For instance, burning a $10 bill and pushing over a tombstone are actions which can be utilized to express a particular political or social message, but are unquestionably illegal. In addition, the amendment proposed today does not contain any language that will prevent individuals from speaking

out against the United States, its policies, its people, its flag, or anything that these things represent.

This amendment simply prohibits acts of physical desecration of the Nation's most enduring and revered symbol, nothing more. The House of Representatives has passed the Flag Protection Amendment by more than the two-thirds majority vote needed in five separate Congresses; in four of these Congresses language identical to H.J. Res. 10 that we are considering today passed the House.

Though a flag protection amendment received majority support in the Senate on two separate occasions, it failed both times to garner the two-thirds majority by four votes.

All 50 States have passed resolutions calling on Congress to pass and send a flag protection amendment to the States for ratification, and 75 to 80 percent of Americans have consistently supported amending the Constitution to protect the flag.

Such overwhelming support by the American people sends a clear message to Congress that we must adhere to the wishes of the people and adopt this proposed amendment to the Constitution.

I yield back the balance of my time.

Mr. CONYERS. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Mr. Chairman, I rise in opposition to this measure before us. Because it's always tempting for Congress to show the Supreme Court in particular who's boss, and it has attempted to do so since 1989. We have two Supreme Court cases on this very same point. It was a concern about the tyranny of the majority that led the framers of the Constitution to create an independent judiciary free of political pressure to ensure the Legislative and Executive branches would honor the Bill of Rights. A constitutional amendment banning flag desecration really flies in the face of this very carefully balanced structure.

Now, the consideration of this measure today will show whether the Members of this Committee, the Judiciary Committee, have the strength to remain true to our forefathers' constitutional ideals and defend our citizens' right to express themselves even when we vehemently disagree with their method of expression. I deplore the desecration of the flag in any form. But I strongly oppose this resolution because it goes against the very ideals on which the country has been founded.

If we allow H.J. Res. 10 to go to the floor and be adopted, this will be the first time in the history of this country that the people's representatives voted to alter the Bill of Rights to limit freedom of speech. It's been said that the true test of any Nation's commitment to freedom of expression lies in its ability to protect unpopular expression, and that is the basis of my objection to this measure before us.

As Oliver Wendell Holmes said, "the Constitution protects not only freedom for the thought and expression we agree with, but freedom for the thought that we hate." And so by limiting the scope of the first amendment's free speech protections, I see us setting a most dangerous precedent. If we open the door to criminalizing constitutionally protected expression related to the flag, I predict it will be difficult to limit further efforts to censure speech. And once

we decide to limit freedom of speech, limitations on freedom of the press and freedom of religion, I fear, may not be far behind.

So join with me in rejecting H.J. Res. 10.

And I would return any time not used, Mr. Chairman.

Chairman SENSENBRENNER. Without objection, all Members' opening statements will be included in the record at this point.

Are there amendments?

Mr. NADLER. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from New York.

Mr. NADLER. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. NADLER. Thank you, Mr. Chairman.

Today we endure the Republican rite of spring—a proposed amendment to the Bill of Rights to restrict what it calls flag desecration.

Why spring? Because the calendar tells us that Memorial Day will soon be upon us. June 14 is Flag Day. And then we have July 4. Members need to send out a press release extolling the need to protect the flag as if the flag somehow needed Congress to protect it.

The flag is a symbol of our great Nation and the fundamental freedoms that have made this Nation great. If the flag needs protection at all, it is from Members of Congress and super-patriots who value the symbol more than they value the freedoms the flag represents. Quite frankly, the crass political use of the flag to question the patriotism of those who value our fundamental freedoms is a greater insult to those who died in the service of our Nation than is the burning of the flag.

I am certain that we will hear speeches and probably 30-second attack ads invoking the sacrifice of our troops in the field, invoking the destruction of the World Trade Center as a pretext for carving up the protection of free speech embodied in the first amendment and in the decisions of the United States Supreme Court. That is a shameful exploitation of the patriotism and courage of those fine and courageous people who died in the service of our country. It is the civic equivalent of taking the Lord's name in vain.

You want to honor the sacrifice of our troops? Protect the rights they fight for. Protect the rights of veterans. Don't let the Administration send our troops into harm's way without body armor or Humvee armor or the equipment they need to survive. Playing games with the Constitution does not honor them.

People have rights in this country that supersede public opinion, even strongly held public opinion. If we do not preserve those rights, then the flag will have been desecrated far beyond the capability of any individual with a cigarette lighter.

Let there be no doubt that this amendment is aimed at persecuting ideas. Current Federal law says that the preferred way to dispose of a tattered flag is to burn it. But there are those who would criminalize the same act of burning the flag if it is done to express political dissent. The same act would be a crime under this amendment if done for purposes of saying I disagree with whatever-I-disagree-with, as opposed to for some other reason. The same act. So what's really being criminalized is not the act, but the

expression of the idea. That's why the Supreme Court found it unconstitutional.

Current Federal law, which is constitutionally void, makes it a misdemeanor to use the flag for advertising or on packaging. How many Members of Congress, used car dealers, attendees at the Republican National Convention the last few times, fast food restaurants and other seemingly legitimate individuals and enterprises have engaged in this act, have used the flag for advertising or on packaging, have put them on slippers and clothes—an act which our laws define as flag desecration? This amendment would presumably make that law constitutional once more. If ratified, I think there are more than a few people who will have to redesign their campaign materials to stay out of the pokey.

As if this assault on the Bill of Rights is not enough, this Committee didn't even bother holding——

And let me say one other thing. We all see many times movies. In these movies we see actors dressed up as Nazi soldiers burning or trampling the flag. Do we arrest the actors? No, we don't' arrest the actors because we don't care about the act of burning the flag because we know they're not burning the flag to express a sentiment of dissent. They're burning the flag as play-acting. So it's the idea behind the burning of the flag that we seek to criminalize here. We're not going to arrest the actors because we don't care about the ideas they're expressing. And ideas are protected and ought to remain protected by the first amendment.

As if this assault on the Bill of Rights is not enough, this Committee didn't even bother holding a hearing on this constitutional amendment. The Subcommittee on the Constitution did not bother to hold a markup or to vote on it. This cavalier attitude toward the Bill of Rights is offensive and revealing: Why discuss it? Why look into it? It's only the Constitution. We're only talking about the rights of a few malcontents for whom even opponents of this amendment, many, have contempt. So who cares?

But we ought to care. This is our freedom of speech that is under assault here. People have died for this Nation and for the rights which this flag so proudly represents. Let us not do anything to diminish the freedoms, to diminish the way of life for which they made the ultimate sacrifice. That's what this constitutional amendment does—it limits the expression of ideas in the guise of flag desecration.

And to protect against what threat? How many—do we see an epidemic of flag desecrations? When was the last time we saw someone burn a flag? Maybe during the Vietnam War. Maybe once or twice in 1991 or a couple of years ago. What are we doing here? We have no huge threat to protect against, but we do threaten our free speech and the Bill of Rights. That's not what makes sense. I urge us not to pass this bill, and I thank you.

Chairman SENSENBRENNER. Are there amendments?

The gentleman from Virginia, Mr. Scott?

Mr. SCOTT. Mr. Chairman, I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to H.J. Res. 10, offered by Mr. Scott. Page 2, line 9, strike "desecration" and insert "burning."

[The amendment of Mr. Scott follows:]

AMENDMENT TO H.J. RES 10
OFFERED BY MR. SCOTT

Page 2, line 9, strike "desecration" and insert "burning".

Chairman SENSENBRENNER. The gentleman from Virginia is recognized for 5 minutes.

Mr. SCOTT. Mr. Chairman, my amendment would change the constitutional amendment to prohibit all flag burning. If we're going to mark up this bill without any hearings or Subcommittee deliberation, we should at least acknowledge the whole purpose of the underlying constitutional amendment is to stifle political expression that we find offensive. While I personally agree that we should respect the flag, I do not think it's appropriate to use the criminal code to enforce our views on those who disagree with us.

The Supreme Court has considered the restrictions on the Bill of Rights that are permissible by the Government. For example, under the first amendment, with respect to speech, time, place, and manner may generally be regulated while content may not. There are, of course, exceptions. Speech that creates an imminent threat of violence or threatens safety or patently offensive expressions with no redeeming social value, those may be restricted. But generally you cannot restrict content. The distinction is that you can restrict time, place, and manner, but not content.

So you can restrict the time, place, and manner of a protest or demonstration, what time it is held, where it's held, but you cannot restrict what people are marching or demonstrating about. You cannot ban a particular march or demonstration just because you disagree with the message, unless you decide to ban all marches. You cannot allow marches by the Republican Party but not the Democratic Party, and you cannot allow pro-war rallies but not anti-war rallies.

Some have referred to the underlying resolution as the anti-flag burning amendment and they speak about the necessity of this amendment to keep people from burning flags. But really, the only place you ever see a flag burned is in compliance with the Federal Code at flag ceremonies disposing of a worn-out flag. Ask any Boy Scout or member of the American Legion how to dispose of a worn-out flag and they'll tell you that you burn the flag at a respectful ceremony.

This proposed constitutional amendment is all about expression and all about prohibiting expression in violation of the spirit of the first amendment. By using the word "desecration," we are giving the Government officials power to decide that one can burn the flag if you're saying something nice and respectful, but you are a criminal if you burn the flag while saying something that insults the

local sheriff. This is an absurd distinction and is in direct contravention with the whole purpose of the first amendment.

Mr. Chairman, in addition to the violation of the spirit of the Bill of Rights, this amendment has practical problems, too. For example, what is a flag; can you desecrate a picture of the flag; can a flag with the wrong number of stripes or stars be desecrated? During the Vietnam War laws were passed prohibiting draft cards from being burned and protestors, with great flourish, would say that they're burning a draft card, and offend everybody, but then nobody would know whether it was actually a draft card or just a piece of paper. And what happens if you desecrate your own flag in private? Are you subject to the criminal prosecution if somebody finds out?

And Mr. Chairman, I feel compelled to comment on the suggestions that stealing and destroying somebody's personal property is protected if the personal property happens to be a flag. The law is clear. It is theft and destruction of personal people whether it is a flag or not. And if the burning is done in such a manner as to provoke a riot or breach of the peace, that would be a crime. Provoking riots and provoking breaches of the peace is a crime whether the flag is involved or not.

This legislation is aimed at criminalizing political speech, and we should not politicize speech you disagree with just because you have the votes.

In order to make this amendment consistent with the ideals of the first amendment's prohibition against limiting freedom of expression, I am proposing that we just ban all flag burning. My amendment has no content-based restrictions. It makes the underlying amendment content-neutral. All flag burning would be outlawed. The underlying resolution permits flag burning when you're saying something nice while you're burning the flag, but would criminalize burning the flag while you're saying something bad. If we really intend to ban flag burning, then let's ban flag burning, consistent with the ideals of the first amendment. What this amendment does is to take the content out of it.

And so, Mr. Chairman, I would ask unanimous consent to introduce for the record letters from several veterans groups, civil rights groups, legal organizations, as well as several individuals opposing this legislation. I ask unanimous consent for these letters to be entered into the record.

Chairman SENSENBRENNER. Without objection.

[The information follows:]

WASHINGTON LEGISLATIVE OFFICE
Gregory T. Nojeim
Acting Director

915 15th St., NW Washington, D.C. 20005 (202) 544-1681 Fax (202) 546-0738

May 23, 2005

Re: Oppose H.J. Res. 10, the Constitutional Amendment on Flag Desecration

Dear Representative:

We are writing to urge you protect free speech by opposing H.J. Res. 10, the constitutional amendment on flag desecration. As a member of the House, you are entrusted with the privilege and responsibility of defining, drafting and implementing the laws that protect our civil liberties. The upcoming vote on H.J. Res. 10 tests that leadership responsibility at its very core. We urge you to defend the fundamental liberties that our flag and other cherished symbols represent by opposing this amendment because it would cause needless injury to the Bill of Rights.

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

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

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

This amendment empowers Congress to prohibit desecration of the flag and punish those who injure a flag in a manner that shows contempt for the U.S. Government. That means that elected officials, law enforcement agents, and the courts will be asked to enforce that prohibition by deciding which use of an important national symbol is acceptable and which is not. When curators, salespersons, clothiers and political pundits all worry that their use of a flag—orally, symbolically, or physically—will subject them to civil or criminal sanctions, we will have reached a point of government regulation of thought and expression that so many think is un-American.

This amendment empowers Congress to determine that one valuable national symbol is sacred, but others are not. Would this Committee consider next an amendment to protect against the desecration of the Declaration of Independence or another to protect against the desecration of the Bible? H.J. Res. 10 gives Congress the power to prioritize that which is most sacred, that which is merely sacred, and that which is not—an entanglement that so many people, religious and not, have fought valiantly to avoid.

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

> Those 10 amendments to the Constitution we call the Bill of Rights have never been changed or altered by one iota, not by one word, not a single time in all of American history. There was not a single word changed in that Bill of Rights during Civil War. There was not a single change during any of our foreign wars, and not during recessions or depressions or panics. Not a single change when we were going through times of great emotion and anger like the Vietnam era, when flag after flag was burned or desecrated, far more often than they are today… I think there is only one way to weaken the fabric of our Nation, a unique country that stands as a beacon before other Nations around this world. The way to weaken our Nation would be to erode the freedom that we all share.

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

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

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

The very principle behind the inclusion of First Amendment in our Constitution was to protect the voices, views, beliefs and expression of the minority against the suppressive will and mob-mentality of the majority. It sets a very dangerous precedent to argue, as proponents of this

amendment do, that certain forms of speech should be restricted because the majority of veterans are offended and/or disagree with a particular form of speech.

The ACLU urges you to oppose this constitutional amendment. It would enshrine in the highest law of our land an unnecessary government power harmful to core liberties. Please do not hesitate to call Terri Schroeder at 202-675-2324 if you have any questions regarding this issue.

Sincerely,

Greg Nojeim

Gregory T. Nojeim
Acting Director

Terri A. Schroeder

Terri A. Schroeder
Senior Lobbyist

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February 4, 2003

United States House of Representatives
Washington, DC 20515

Dear Representative:

On behalf of the American Bar Association I urge you to oppose H. J. Res. 4, H. J. Res. 8, S. J. Res. 4 and other joint resolutions proposing to amend the Constitution in order to authorize Congress to prohibit the desecration of the flag of the United States.

For over 200 years, the American flag, in each of its changing forms, has stood as a symbol of what our forefathers fought to assure for future generations. It is the physical representation of both the rights enumerated in the Constitution and the blood shed to preserve those rights. A cherished symbol of hope, it flies even more proudly after terrible events, like those of September 11, 2001.

It is because of its strength as a symbol that some use the flag as a proxy for our country. They burn it, as if to burn in effigy the United States itself. The American Bar Association deplores such displays of wanton destruction. While we sympathize with the motivation of the sponsors of the congressional resolutions, we are opposed to their proposed remedy.

The principle is more important than the symbol: the principle of free speech in the First Amendment of the Constitution is more important than the symbol that represents it. While the flag flies as that symbol of our democracy, the First Amendment rests as part of the foundation on which that democracy was built. It is because the sight of a burning flag carries such meaning that those who wish to convey a message use it, and that those who are offended by that message oppose it. Desecration is not simply destruction, it is also an expression and, hence, speech.

Since the inception of our constitutional form of government over 200 years ago, the right to free speech has retained its place in the First Amendment: prominent, celebrated, honored and intact. We urge you to oppose amending the First Amendment for the first time in our history to prohibit desecration of the American flag.

Sincerely,

Robert D. Evans

INSTITUTE FOR JUSTICE

June 7, 2004

The Honorable Orrin G. Hatch
United States Senate Judiciary Committee
104 Hart Office Building
Washington, DC 20510

Dear Senator Hatch:

Your steadfast devotion to America's founding principles serves as an inspiration to countless people nationwide. Indeed, on the various occasions when we have had the opportunity to work with you, your unwavering commitment to the Constitution proved decisive. Thus, we were sorry to see your leadership on Senatorial attempts to outlaw the use of the American flag in protests if such use is deemed to desecrate the flag.

The most recent proposed constitutional amendment has the unavoidable potential for very open-ended and subjective definitions of desecration. It will yield inconsistent results in protecting the flag, but all too consistent results in stifling legitimate political dissent. We urge you to reconsider and to again courageously protect the principles of our founding, in this case, the principle of robust political speech.

Sincerely,

William H. Mellor
President and General Counsel

1717 Pennsylvania Avenue, NW Suite 200 Washington, DC 20006 (202) 955-1300 (202) 955-1329 Fax
e-mail: General@ij.org Home Page: www.ij.org

May 24, 2005

Dear Committee member,

On behalf of the more than 750,000 members and supporters of People For the American Way, we write to urge you to vote against H. J. Res. 10, the proposed constitutional amendment to ban flag desecration, when it comes before the Committee on May 25.

Freedom of expression is at the very heart of our democracy. At a time when we are working across the globe to secure the right of everyone to be free from totalitarian regimes, it is all the more important that we distinguish ourselves from countries that fear political dissent and imprison dissenters for expressing their views. We have never needed to coerce patriotism or respect for our national symbols in America. In fact, in the wake of the September 11th terrorist attacks, we have seen an outpouring of patriotic sentiment as well as support for the flag and public displays of the flag.

While most Americans find desecration of the flag offensive or distasteful, the strength of our nation lies in our ability to tolerate dissent and free speech even when—especially when—we disagree. We should not let a handful of offensive individuals cause us to surrender the very freedoms that make us a beacon of liberty for the rest of the world.

Others have said it far better than we can. In a 1999 letter, Colin Powell wrote "The First Amendment exists to insure that freedom of speech and expression applies not just to that with which we agree or disagree, but also that which we find outrageous. I would not amend that great shield of democracy to hammer a few miscreants. The flag will be flying proudly long after they have slunk away."

It is especially troubling that the Committee would seek to amend the U.S. Constitution and the First Amendment without even holding a hearing on the need for such an amendment. This betrays the obvious: the case for the flag desecration amendment on the merits, never strong to begin with, has only grown weaker over time. H. J. Res. 10 is an exercise in politics, not patriotism.

We urge you to protect our First Amendment freedoms by voting against H. J. Res. 10.

Sincerely,

Ralph G. Neas
President

Marge Baker
Director of Public Policy

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VETERANS DEFENDING THE BILL OF RIGHTS
P. O. Box 15, Newburgh, IN 47629

May 24, 2005

RE: Oppose H.J. Res. 10, the Flag Desecration Constitutional Amendment

Dear Representative:

My name is Gary May. I am writing to you today as the chair of a group called Veterans Defending the Bill of Rights to urge you to oppose H.J. Res. 10, the flag desecration constitutional amendment. I know you hear from some who say veterans 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 freedoms they fought to preserve.

I lost both 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 do. It offends me when I see the flag burned or treated disrespectfully. But, as offensive and painful as this is, I still believe that dissenting voices need to be heard, even if their methods cause offense.

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 for which 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 served before us would be for naught, if the Constitution were amended to 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 that represents these freedoms.

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

- "…to undertake to carve out an area of free speech and say that this or that is unpatriotic because it is offensive is a movement that will unravel our liberties and do grave damage to our nation's freedom. The ability to say by speech or dramatic acts what we feel or think is to be cherished not demeaned as unpatriotic…I hope you will hear my plea. Please do not tinker with the First Amendment."
  -Reverend Edgar Lockwood, Falmouth, Massachusetts, served as a naval officer engaged in more than ten combat campaigns in WWII.

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

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

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

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

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

- "I fought for freedom of expression not for a symbol. I fought for freedom of Speech. I did not fight for the flag, or motherhood, or apple pie. I fought so that my mortal enemy could declare at the top of his lungs that everything I held dear was utter drivel…I fought for unfettered expression of ideas. Mine and everybody else's."
  -Mr. John Kelley, East Concord, Vermont, lost his leg to a Viet Cong hand grenade while on Operation Sierra with the Fox Company 2nd Battalion 7th Marines in 1967.

I hope you will join me and the Veterans Defending the Bill of Rights in opposing H.J. Res. 10, the flag desecration constitutional amendment. We must not allow this "feel good" measure to restrict freedoms for which so many veterans sacrificed so much. I look forward to working with you.

Sincerely,

Gary E. May

Veterans for Common Sense
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phone 202-558-4553 fax 866-714-6762
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May 24, 2005

RE: Oppose the Flag Desecration Constitutional Amendment

Dear Representative:

We, the undersigned members of Veterans for Common Sense, write to urge you to oppose H.J. Res. 10, the proposed constitutional amendment to prohibit "desecration" of the flag. This proposed amendment is an attack on liberty, and a disturbing distraction from the real concerns of our nation's veterans.

Veterans for Common Sense (VCS) was founded on the principle that in an age when the majority of public servants have never served in uniform, the perspective of war veterans must play a key role in the public debate over national security issues in order to preserve the liberty veterans have fought and died to protect. VCS was formed in 2002 by war veterans who believe that we, the people of the United States of America, are most secure when our country is strong and responsibly engaged with the world. Three years later, our organization has over 12,000 members throughout the United States. Central to our mission is supporting United States servicemen and women, veterans and their families, and preserving American civil liberties as guaranteed in the U.S. Constitution and its amendments.

The United States is faced with a number of pressing concerns related to national security and the quality of life of veterans. We believe that the United States government and military has a responsibility to maintain and continue its work in Iraq so that the country comes out of this war as a stable, secure and sovereign nation where its people have the best opportunity for a decent and free life. The government also has a responsibility to ensure that United States servicemen and women come home safe.

Out of the 360,000 discharged veterans from Operation Iraqi Freedom and Operation Enduring Freedom, nearly one in four have already visited the Veterans Administration for physical injuries or mental health counseling. Our government has a duty and a responsibility to address both the traditional and non-traditional effects of war, including battlefield injuries, post-traumatic stress, and diseases resulting from vaccines and toxic exposures.

These concerns should be on the top of the congressional agenda this session. But instead of devoting its time and resources to resolving these urgent challenges, Congress apparently chooses to consider amending the Constitution to prohibit a form of nonviolent expression. We are dismayed by this choice.

We urge Congress to preserve American civil liberties as guaranteed in the United States Constitution and its amendments. When it comes to the measure under consideration, we believe that the supposed threat of a few incidents of flag burning does not justify the first ever amendment to the First Amendment. The ability to express nonviolent dissent to government policy is central to the American way of life, and we are loathe to amend away this fundamental liberty.

As veterans, we are indeed offended by those who burn or defile the flag. The flag is a cherished symbol of the freedoms we fought to defend, and we honor it as such. But we must not attempt to protect this symbol at a cost to the freedoms it represents. The Constitution of the United States has never been successfully amended to restrict liberty. To do so now would betray the promise and ideal of America.

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The proposed constitutional amendment to ban "desecration" of the flag threatens the civil liberties of Americans. Further, it distracts from the real world concerns of our active duty military personnel and veterans. Congress should not be in the business of undermining freedom of speech. During this time of war, we urge you to put this unnecessary and dangerous constitutional amendment aside, and instead focus on protecting our national security, insuring our servicemembers in harm's way have what they need to accomplish the mission, and that when they return home they get the best possible care. Again, please oppose H.J. Res. 10. If passed, it will undermine the Constitution that we swore to support and defend.

Sincerely,

BRIGADIER GENERAL (RET.) EVELYN FOOTE, ARMY, ACCOKEEK, MD * COLONEL DIANE KISTNER, AIR FORCE, CARLTON, GA * COLONEL COL. & MRS. JAMES P. GRAVES, USAR, RETIRED, ARMY, MARYVILLE, TN * COLONEL RUSSELL JORDAN JR., ARMY, SARASOTA, FL * COLONEL JOHN SINER, ARMY, BLOOMINGTON, IN * COLONEL NICHOLAS SZASZ, ARMY, DEWITT, MI * LIEUTENANT COLONEL PRESTON COLLINS, AIR FORCE, SATELLITE BEACH, FL * LIEUTENANT COLONEL ALLAN HASTINGS, AIR FORCE, WARNER ROBINS, GA * LIEUTENANT COLONEL ROGER HELBIG, AIR FORCE RESERVE, RICHMOND, CA * LIEUTENANT COLONEL DAVID GINSBERG, ARMY, ANN ARBOR, MI * LIEUTENANT COLONEL DONNA LIGHTFOOT, ARMY, AUSTIN, AR * LIEUTENANT COLONEL CHARLES MARTIN, ARMY, HENSLEY, AR * LIEUTENANT COLONEL GRETCHEN VANEK, ARMY, POCATELLO, ID * LIEUTENANT COLONEL BARCLAY HASTINGS, MARINE CORPS, COLUMBUS, OH * LIEUTENANT COLONEL ELIZABETH MCGILLICUDDY, USMC, LOCUST GROVE, VA * LIEUTENANT COMMANDER PHIL SCHOGGEN, NAVAL RESERVE, NASHVILLE, TN * LIEUTENANT COMMANDER JOHN BRENNAN, NAVY, WEED, CA * LIEUTENANT COMMANDER MARK BRYANT, NAVY, OZAWKIE, KS * LIEUTENANT COMMANDER JAMES F. DARGON, NAVY, WAREHAM, MA * LIEUTENANT COMMANDER HENRY KIELAROWSKI,, PHD, NAVY, SAN FRANCISCO, CA * LIEUTENANT COMMANDER MILTON LEAKE, NAVY, YORK, PA * LIEUTENANT COMMANDER ROBERT MEINTZER, NAVY, TUSCALOOSA, AL * LIEUTENANT COMMANDER JOHN SIMANTON, NAVY, SPOKANE, WA * MAJOR MARK S HEBERLEIN, DO, AIR FORCE, VIROQUA, WI * MAJOR ARTHUR JUDGE, AIR FORCE, NEWTON HIGHLANDS, MA * MAJOR SAMUEL SCHARFF, AIR FORCE, SEATTLE, WA * MAJOR JAMES STRADER, AIR FORCE, TUCSON, AZ * MAJOR DR. EUGENE D. BETIT, ARMY, ARLINGTON, VA * MAJOR ARTHUR DRONZKOWSKI, ARMY, STERLING HEIGHTS, MI * MAJOR GERALD FISHER, ARMY, BLUFFTON, IN * MAJOR SAM GOULD, ARMY, LOS ANGELES, CA * MAJOR DOUGLAS KINNEY, ARMY, OTEGO, NY * MAJOR RICHARD KROENING, ARMY, RENO , NV * MAJOR PAUL NAYLOR, ARMY, DURHAM, NC * MAJOR BURNET OLIVEROS, ARMY, HOUSTON, TX * MAJOR TOM TREADWAY, ARMY, ABITA SPRINGS, LA * MAJOR JAMES VAN OOT, ARMY, WEST GROVE, PA * MAJOR NANCY BELL, MARINE CORPS, LADY LAKE, FL * MAJOR JEFFREY HALLIN, USMC, SANTA ANA, CA * COMMANDER DAVID BAILEY, COAST GUARD, SEQUIM, WA * COMMANDER TOM ATCHISON, NAVY, RICHFIELD, MN * COMMANDER TED BAHN, NAVY, ANNA MARIA, FL * COMMANDER THEODORE A. CURTIN, NAVY, PLYMOUTH, MA * COMMANDER BRUCE GENEREUX, NAVY, VERO BEACH, FL * COMMANDER RICHARD GROSSCUP, NAVY, EUGENE, OR * COMMANDER JOHN KASO, NAVY, ALAMEDA, CA * COMMANDER A. GEORGE MERTZ, NAVY, PORTLAND, ME * COMMANDER ROBERT WOOD, NAVY, SHAKER HEIGHTS, OH * CAPTAIN PETER FOLTZ, NAVY, HERSHEY, PA * CAPTAIN CHUCK ROSCIAM, NAVY, JACKSONVILLE, FL * CAPTAIN ANDREW SCHOERKE, NAVY, SHAFTSBURY, VT * CAPTAIN ERIC MORTON, USMC, CARLSBAD, CA * CAPTAIN HUGH ANDERSON, AIR FORCE, KALAMAZOO, MI * CAPTAIN NEAL BOWYER, AIR FORCE, HURST, TX * CAPTAIN HERBERT COURSEN, AIR FORCE, BRUNSWICK , ME * CAPTAIN KARL FREDERICK, AIR FORCE, SEBASTOPOL, CA * CAPTAIN TIMOTHY HEBERLING, AIR FORCE, LEESBURG, VA * CAPTAIN CLAYTON HUBBS, AIR FORCE, AMHERST, MA * CAPTAIN JACK KELLY, AIR FORCE, ALBUQUERQUE, NM * CAPTAIN LANDON KIMBROUGH, AIR FORCE, PORT TOWNSEND, WA * CAPTAIN DAVID LENERS, AIR FORCE, DEWITT, IA * CAPTAIN ESTHER MASSIMINI, AIR FORCE, PHOENIX, AZ * CAPTAIN GREGG MATOUS, AIR FORCE, JUPITER, FL * CAPTAIN JAMES O'HALLORAN, AIR FORCE, SPOKANE, WA * CAPTAIN STUART B SKADDEN, AIR FORCE, HURLEY, NM * CAPTAIN BILL SOREM, AIR FORCE,

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Former Captain Jeremy Broussard (United States Army)

May 24, 2005

Representative F. James Sensenbrenner, Jr., Chairman
House Committee on the Judiciary
2449 Rayburn House Office Building
Washington, DC 20515-4905

Representative John Conyers, Jr., Ranking Minority Member
House Committee on the Judiciary
2426 Rayburn House Office Building
Washington, DC 20515-2214

Dear Representatives Sensenbrenner and Conyers,

I am honored by this chance to share my views on the proposed constitutional amendment to ban "desecration" of the flag of the United States. As a combat veteran of Operation Iraqi Freedom and a former Captain in the U.S. Army, I urge you to oppose this proposed amendment to the Constitution.

I joined the Army as a commissioned officer in 1999. In the spring of 2003, my artillery unit was among the first to enter Iraq. After major fighting ceased, my unit remained in southern Iraq to provide much-needed humanitarian support to Iraqi civilians in the cities of Karbala, Najaf, and surrounding areas. I am proud of my service in defense of my country and the people of Iraq.

During the fighting in Iraq, I saw friends of mine die in battle. Each of us suffered and sacrificed to provide freedom to the Iraqi people. With this in mind, I am profoundly disturbed by the apparent willingness of Congress to sacrifice our own freedoms here at home by amending the First Amendment for the first time ever. When the coalition forces entered Iraq, it was to topple a brutal and repressive dictatorship, one that did not hesitate to jail and torture its own citizens who protested against it. By amending the Constitution to ban a form of expression, Congress dishonors the legacy of servicemembers who fought and died in defense of freedom.

I am angered by the thought of those who might burn the U.S. flag in protest, but I defend their right to do so. Although the flag is a powerful symbol, it is not the reason that I or my fellow soldiers fought. We fought for liberty, and we fought to stay alive. To attempt to protect this piece of cloth, special as it is, at the expense of the Bill of Rights is a grave mistake.

I just finished my first year of law school at Howard University, where I completed a required course in Constitutional Law. This course confirmed what I already knew to be true: the American way of life, our liberties and freedoms, are based upon this nation's Constitution. Amending the Constitution to undermine the fundamental right to free

speech will do lasting harm. I urge Congress to oppose this proposed amendment, and instead to fight for the unfilled needs of current soldiers, returning veterans, and the families of those who lost their lives in battle.

Sincerely,

Former Captain Jeremy Broussard (United States Army)

March 10, 2004

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

Dear Senator:

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

I served in the Air Force for 22 years from 1956 to 1978 while stationed in Europe, Africa, Vietnam, Thailand, as well as the United States. As a fighter pilot, I was shot down in Vietnam and hospitalized for a year. I received a Bronze Star, a Purple Heart, 21 Air Medals, and several Foreign Awards. When I regained flight status in 1972 I served a second tour of combat duty in Thailand. Today I live on my ranch in Mason, Texas.

I feel this country is unique because those in the minority, the unpopular, the dissident also have a voice. The freedom of expression, even when it hurts, is the true test of our dedication to the principles embodied in Stars and Stripes. It offends me that people would use this amendment to try to cast aspersions on the patriotism and valor of those who oppose it. The pride and honor I feel is not in the flag per se. It is in the principles that it stands for and the people who have defended them.

I am grateful for the many heroes of our country. The sacrifices of those who went before us would be for naught if an amendment were added to the Constitution that reduced our First Amendment rights for the first time in the history of our nation. I write to you today to attest to the fact that many veterans do not wish to exchange those fought-for freedoms or confuse it with protecting a simple piece of cloth.

For this reason, I urge you to oppose amending the US Constitution.

Sincerely

Robert A. Cordes
USAF Maj. Ret.
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June 7, 2004

Senator Orrin Hatch
Senator Patrick Leahy
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Hatch and Ranking Member Leahy:

I am submitting this letter in opposition to S.J. Res. 4, a proposed amendment to the United States Constitution that would authorize Congress to prohibit physical desecration of the flag of the United States in circumstances that would violate the First Amendment as currently interpreted by the Supreme Court in Texas v. Johnson (1989) and United States v. Eichman (1990). I sympathize with sponsors of the amendment. The United States flag is for hundreds of millions a symbol of that last full measure of devotion that so many have given to preserve freedom and liberty for the living and those yet to be born.

Persons who would cast aspersion on the flag and its symbolic celebration of the Nation's ideals through physical desecration like Gregory Lee Johnson display infantile and dishonorable sentiments. They keenly relish exercising free speech to denigrate heroes who fought to safeguard the liberties they enjoy. Their ingratitude is more to be marveled at than imitated.

While I believe the Johnson and Eichman decisions were misguided, I do not believe a constitutional amendment would be a proper response. Flag desecrations when employed as "fighting words" or when intended and likely to incite a violation of law remain criminally punishable under the Supreme Court precedents in Chaplinsky v. New Hampshire (1942) and Brandenburg v. Ohio (1969).

Moreover, media infatuation with flag burning abated after Johnson and Eichman. Physical desecrations correspondingly plunged into triviality. In any

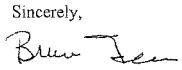
event, they are insufficiently menacing to the Nation's culture and values to warrant a constitutional amendment. And to deny that flag burning constitutes speech--such as burning the flag of Communist China to protest the Tiananmen Square massacre-- is to deny the undeniable.

Outside the Bill of Rights, amendments have generally been reserved for fundamental issues related to the structure and powers of government or participation in the political process. The major deviation was the ill-starred Prohibition Amendment, and we should learn from that example. To enshrine authority to punish flag desecrations in the Constitution would not only tend to trivialize the Nation's Charter, but encourage such juvenile temper tantrums by promising free speech martyrdom acclaimed by an easily beguiled media. An amendment is no more warranted than would be a revision to authorize the punishment of pornography or obscenity beyond the tight limits set by the Supreme Court in Miller v. California (1973) and New York v. Ferber (1982).

The United States Constitution has retained its public reverence substantially because of its succinctness and confinement to the lifeblood of the Nation's democratic dispensation. It will forfeit that reverence and accessibility to the ordinary citizen if it becomes cluttered with amendments overturning every wrong-headed Supreme Court decision. As Hamlet soliloquized: "Rightly to be great is not to stir without great argument...." Physical flag desecration is too insignificant to the public weal to justify stirring a constitutional amendment.

A more enlightened response would be a Congressional Medal of Honor to be awarded on Flag Day celebrating an individual who by words or deeds best exemplifies the courage, patriotism, and ideals customarily associated with the flag. Physical flag desecrations protected by the First Amendment are a type of speech where the best answer is more speech that exposes its emptiness, not enforced silence.

Sincerely,



Bruce Fein

March 8, 2004

Senator Orrin Hatch, Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510-6275

Senator Patrick Leahy, Ranking Minority Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510-6275

Dear Senators Hatch and Leahy,

I appreciate the opportunity to offer my views on the proposed Constitutional Amendment to ban Flag Desecration. I wish that my schedule had permitted me to attend the Senate Judiciary Committee's hearing. As a veteran with 31 years of service in the U.S. Army, including combat duty in both Korea and Vietnam, I believe that I may be able to offer a useful perspective on this controversial proposal.

I must admit that when I try to identify the most pressing issues facing veterans today, flag burning does not make my list. To be clear, I have no patience with those who defile our national standard. It is wrong, it is unpatriotic and it is deeply offensive to those of us who serve or have served in uniform. But, in a new era of global conflict and threat, is it really the issue that should be taking up the valuable time of Congress?

This month, the Defense Department is coordinating the largest troop rotation since World War II. The operation is so dangerous that Army truck drivers received special forces training in Kuwait, learning, for instance, how to fire accurately from the wheel while evading an enemy ambush.

This spring, Task Force 121, the unit that found Saddam Hussein, will launch a newly concerted campaign to capture Osama Bin Laden in the mountains of Afghanistan. The region in which it will be operating is one of the most forbidding in the world. Lying on the border with Pakistan, the area is fraught with hidden peril, so much so that the terrain itself played a big part in defeating the Soviet war machine in the 1980s.

On the home front, our military is receiving rhetorical laurels for its splendid achievements in Iraq, but our veterans are still fighting for richly deserved access to medical care, mental health services, adequate housing, disability assistance and other essential services. The President's 2005 budget cuts funding for veteran nursing home beds, reduces the number of people

dedicated to solving the federal backlog in processing disability claims, and forces veterans to pay a fee just to access their health care system. It is such an anemic measure that Edward S. Banas Sr., commander in chief of the Veterans of Foreign Wars, called it a "disgrace and a sham."

But, instead of addressing these issues, Congress is spending its time debating flag burning. For lawmakers unwilling to actually face the tough questions, this may provide an appealing smoke screen. At first blush, it sounds a patriotic note that they believe will appeal to veterans, but it requires no allocation of resources. And, I fear, it allows politicians to be in favor of an empty patriotic gesture without doing anything substantive to assist veterans.

Just as bad, however, this amendment also subverts the very principles for which the flag flies. The amendment wrongly answers the chicken and the egg debate – it assumes that America is special because of the flag, not that the flag is special because of America. It is the unparalleled amount of personal freedom and opportunity that makes America what it is. The important principles include the right to gather with whomever we want whenever we want; the right to worship however we like, regardless of prevailing religious winds; the right to be free from an invasive or meddlesome government; and, perhaps most important, the right to speak our minds, regardless of what anyone else thinks.

But, for the first time in our history, the Constitution would tell you what you cannot say, rather than what you can, if this amendment were to be enacted. It would create a class of non-violent expression -- abhorrent expression, yes, but non-violent – which is illegal and punishable by criminal sanction.

Worse, it would do so in a vague and undefined way, in which the decision as to what actions are criminal would have to be determined subjectively. For instance, would it be all right to neglect the flag on your car antenna and let it become soiled and weather-beaten? Or would that be desecration? Would it be okay to get wet in a flag-decorated bathing suit, or wear a flag T-shirt or cap?

And, what if personal animus or ambition got in the mix? Would you have a problem neighbor calling the police if during a barbecue your flag apron caught fire? Indeed, Secretary of State Colin Powell recognized this danger when he wrote in 1999, "I shudder to think of the legal morass we will create trying to implement the body of law that will emerge from such an amendment."

There is no question in my mind that it is unnecessary to enact this measure. But this is not to say that the flag is a trifle. It does not mean that veterans are not entitled to feeling outraged when they see somebody step on the banner that led them into battle. It does not mean that we should not revere and honor the flag, and remember the sacrifice of those who died to keep it on our flagpoles.

With all the other challenges and hardships facing those who served today, is this really an appropriate legislative initiative to occupy the valuable time of the Congress? No. Is it wise to silence dissent with the hydrogen bomb of a constitutional amendment? No.

True patriots face difficult choices head-on; they do not wrap themselves in the flag every time their electoral meal ticket comes due to be punched. I salute those in Congress who oppose this measure, and I salute those in Congress who are willing to deal with the really important issues facing veterans today.

Let's bring our men and women home safely, and make sure that they've got a roof over their heads, access to an education, health care when they get old, and support when reliving the traumas of their service. I pray that Congress will come out from behind the camouflage of this amendment and address more important issues.

Sincerely,

Lt. General Robert G. Gard, Jr. (USA, Ret.)

March 10, 2004

Senate Judiciary Committee
The United States Senate
Washington, DC 20510

Dear Chairman Hatch and Members of the Committee

A law to ban flag burning would be feel-good legislation, but counter-productive to the rights and freedoms of all Americans. I am a retired Navy veteran of WWII and Korea. I have two sons who were in the service during Viet Nam, one of whom was over there for 18 months. Our flag flies in front of our house every day and night (lighted).

The burning of our flag thoroughly disgusts me. But a law banning the burning of the flag plays right into the hands of the weirdos who are doing the burning. They are trying to make a statement that they hate the United States and/or our government. By banning the burning of the flag, we are empowering them by giving significance to their stupid act. Let them burn the flag and let us ignore them. Then their act carries no significance.

Many of our young men and women have given their lives defending our liberties and freedoms. Freedom of expression is one of the rights our ancestors fought and died for. So let the malcontents express themselves, as long as they do no physical harm to others. And let us (including the media) ignore them. Pretty soon, it wont mean anything if they burn the flag. They'll have to come up with something else to insult us. The greatness of our country will carry on, with our without the flag being burned.

While flag burning is rare, it can be a powerful and important form of free speech. In fact, the proposed constitutional amendment would do irreparable harm to our right to free speech and undermine our right to dissent. 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 millions of Americans have died to defend.

In America, we expect that our right to free speech is not abridged. We expect that our elected representatives act in good faith and prevent encroachments on our individual liberty. This measure would require that we categorize the First Amendment guarantees into acceptable and unacceptable forms of speech. If we go down this road, what next will be found unacceptable?

Again, I urge you to oppose this amendment. We cannot allow the promise of freedom enshrined in the flag to become an empty one.

William C. Ragsdale
2185 Keylime Drive
Titusville, FL 32780-3336
321/269-9610

March 8, 2004

Senate Judicial Committee
United States Senate
224 Dirksen
Washington, DC 20510

Committee Members,

As your constituent and as a military veteran, I urge you to oppose the constitutional amendment to ban physical desecration of the flag (SJ Res. 4). This legislation would undermine the very principles for which the American flag stands.

Thirty years ago I was a U.S. Army Military Police Sentry-Dog Handler stationed in the Republic of Korea. Back then Korea was an oppressive police state under President Park Chung Hee, a democracy in name only. A lot has happened in the past thirty years. Korea and the United States have both changed. Today Korea is a thriving democracy and the Korean people enjoy American-style civil liberties. While freedom has flourished in Korea, it has been under assault here in the United States and our civil liberties are in grave danger. One major threat to civil liberties that we face is SJ Res. 4.

While flag burning is rare, it can be a powerful and important form of free speech. In fact, the proposed constitutional amendment would do irreparable harm to our right to free speech and undermine our right to dissent. 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 millions of Americans have died to defend.

In America, we expect that our right to free speech is not abridged. We expect that our elected representatives act in good faith and prevent encroachments on our individual liberty. This measure would require that we categorize the First Amendment guarantees into acceptable and unacceptable forms of speech. If we go down this road, what will be found unacceptable next?

Again, I urge you to oppose SJ Res. 4. We cannot allow the promise of freedom enshrined in the flag to become an empty one.

Sincerely,
Steven E. Sanderson
242 E. North St. Apt. B
Hastings, MI 49058-1043
(269) 945-6423

Lt. General Claudia J. Kennedy (USA, Ret.)

May 24, 2005

Representative F. James Sensenbrenner, Jr., Chairman
House Committee on the Judiciary
2449 Rayburn House Office Building
Washington, DC 20515-4905

Representative John Conyers, Jr., Ranking Minority Member
House Committee on the Judiciary
2426 Rayburn House Office Building
Washington, DC 20515-2214

Dear Representatives Sensenbrenner and Conyers,

I understand you are considering the proposed constitutional amendment to prohibit "desecration" of the flag. Thank you for this opportunity to share my views on that measure. I believe firmly that true patriotism requires us to stand in defense of the freedoms upon which this great nation was built. I urge you to oppose the amendment.

After devoting most of my career to working in military intelligence, I was made Army Deputy Chief of Staff for Intelligence in 1997. I served in that position until my retirement in 2000. I am well acquainted with the many threats facing the United States, and I must say that flag burning does not begin to rise to a level of threat justifying the attention of this distinguished body. At a time of mounting danger to the United States and growing responsibilities for our military, I question the wisdom of directing such focus on this attempt to amend the nation's founding document.

Our military is engaged in active conflict in Iraq and Afghanistan. The threat of terrorist violence against US military and civilian installations around the world continues to be serious. And the development and potential testing of nuclear weapons by rogue states is as grave a concern for our intelligence and defense services as I have seen. The challenges to our security are many, and the responsibility of our nation and this Congress to meet them is great.

Here at home, the Veterans Administration is stretched thin providing services to our returning servicemembers. Our fighting men and women injured in combat need acute care now, and will require continuing treatment for years to come. Many disabled veterans will rely on VA benefits for the rest of their lives. Yet just last week, the House Appropriations Committee approved a VA funding bill that fails to adequately meet the needs of our veterans. Despite a net increase over last year's budget, the appropriation under funds the Veterans Health Administration and other programs. There are now more than 300,000 veterans of Operation Iraqi Freedom and Operation Enduring Freedom. Many of them are now or will soon be placing demands on the VA system, and I suggest that Congress would be wise to ensure that their needs are met.

Among these threats to our national security and to the health and well-being of our veterans, I do not count acts of flag desecration. It disturbs me that Congress is spending such time and energy attempting to amend the Constitution to prohibit "desecration" of the flag. Make no mistake, I abhor flag burning. But the issue simply does not rise to the level of a constitutional amendment.

Upon my retirement, I was presented with a United States flag. That flag will remain one of my most prized possessions for the rest of my life. The thought that some in this country would defile that great symbol of this nation offends me, and I condemn those who would express themselves through such crude speech. But at the same time, I must defend their right to do so. When I joined the Army in 1968, at the height of the Vietnam War, I swore to support and defend the Constitution of the United States, as do all members of the military. This proposed amendment is not only a dangerous distraction from the true concerns of our day, but an outright attack on the Constitution of the United States.

There is no rash of flag burning compelling consideration of this proposed amendment. Even if there were, I would oppose the measure. The Bill of Rights was intended to safeguard the right to peaceful protest, however offensive that protest might be. If passed, the proposed flag amendment would empower Congress to make it a crime to "desecrate" one's own flag in an act of nonviolent political speech. Countries like Cuba, Iran, and North Korea are known for jailing political protestors. The United States, with our distinguished history of constitutionally protected individual liberty, is not. I am offended by burning of the flag, but just because this form of expression causes offense to me and others does not mean that it should be banned.

I served in the United States Army, like my father before me, to defend fundamental American liberties. To begin the trend of amending the First Amendment each time a particular form of speech is found to be offensive sets a dangerous precedent, and undermines the very freedoms for which I and my fellow servicemembers served. In fact, this proposed amendment undermines the very principles for which the flag stands. To attempt to protect a symbol, the flag, at the expense of the freedoms it represents is misguided.

I believe the proposed flag amendment is ill-conceived and ultimately harmful. The right to nonviolent protest – even when it is deeply offensive – is fundamental to American democracy. Our Bill of Rights has never, in its 214 years, been successfully amended to take away a protected liberty. I implore you not to do so now. Please, do not waste the time of Congress on this dangerous measure. Rather, I ask you to address the true concerns of our day – the threats to our security and the pressing needs of our active military and returning veterans.

Sincerely,

Claudia J. Kennedy

Lt. General Claudia J. Kennedy (USA, Ret.)

Lieutenant General Kennedy is a 32-year veteran of the United States Army, and the highest-ranking woman ever to serve in that branch. She held a number of staff and command positions during her career, working chiefly in intelligence. General Kennedy was confirmed by the Senate for promotion to Lieutenant General and assigned to the position of Deputy Chief of Staff for Intelligence as of May 21, 1997. She retired from the U.S. Army in July, 2000.

Mr. SCOTT. I urge my colleagues to support the amendment.

I yield back.

Chairman SENSENBRENNER. The gentleman from Ohio, Mr. Chabot.

Mr. CHABOT. Move to strike the last word, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. CHABOT. Thank you. I rise in opposition to the amendment. I would first note that there has been some criticism raised by the other side that we didn't have a hearing this Congress. I would note that we had hearings in the Subcommittee on the Constitution in the 105th Congress, the 106th Congress, the 108th Congress, and we had complaints during those hearings by Members that

were saying here we go again, we're having another hearing on this. And had we had a hearing on it this time, we would have had that same complaint. So one cannot win in this particular instance.

Mr. NADLER. Would the gentleman yield?

Mr. CHABOT. I'd be happy to yield.

Mr. NADLER. It is true. You would have that complaint. We'd say it's unnecessary because it's an unnecessary and silly bill, but we still—but as little as I like to waste my time on such hearings, the fact is on a matter of such import we should have hearings.

Mr. CHABOT. Reclaiming my time. But, you know, you're damned if you do and you're damned if you don't. So we didn't this time, and got the criticism. And we appreciate the gentlemen's criticism, but I think they're inaccurate in their arguments.

Now, relative to this particular amendment and why it should be rejected, it should be rejected because, while prohibiting flag burning, the proposed amendment would still allow other types of defilement and defacement of the American flag. The word "desecration" was selected in order to assure that the flag would be protected from physical acts other than just burning. Black's Law Dictionary defines "flag desecration" as "the act of mutilating, defacing, burning, or flagrantly misusing a flag;" and "desecrate" as to "divest a thing of its sacred character; to defile or profane a sacred thing." And I would argue that our flag is a sacred thing. In contrast, "burning" means simply "affecting with or as if with heat," as defined in the Merriam-Webster Dictionary.

Limiting the amendment to only the burning of the flag rather than desecration would unduly limit the object and purpose of this resolution to give Congress the power to protect the flag from a range of physical acts of defilement or defacement. The word "desecration" was selected because of its broad nature in encompassing many actions against the flag. Such broad terms are commonly used in constitutional amendments. For example, "free exercise" in the first amendment. "Unreasonable searches and seizures" and "probable cause" in the fourth amendment. "Due process" and "equal protection" in the fourteenth amendment.

Thus, it's essential that we continue to use broad terms in constitutional amendment such as the word "desecration," in order to give Congress discretion when it moves to enact implementing legislation. Debate and discussion as to what forms of desecration should be outlawed, such as burning, will come at a later date in Congress.

Again, this particular resolution gives us the ability, it gives Congress the ability to get more specific in legislation later on. Right now, we don't have that right. The Supreme Court on two separate occasions has struck that down. They've given us no alternative. If you want to protect the flag, then you vote for this. If you don't care, then you vote the other way.

Mr. SCOTT. Will the gentleman yield?

Mr. CHABOT. I'll yield.

Mr. SCOTT. I would want to agree with you that the word "desecration" is a subjective term. But the point of this amendment is it takes the content and attitude out of it. Because if you burn the flag and say something nice, that would not be desecration. But if you burn the flag while you're saying something insulting, that would be desecration. The point of this amendment is to take the

content and attitude out of it. And if you're going to criminalize the act, criminalize the act—something objective and not depending on whether someone is insulted by the speech and message or not.

Mr. CHABOT. Reclaiming my time. I've been to a number of these ceremonies. I'm sure that many of the other gentlemen and gentleladies have been as well, when they have a helmet and they're putting in people that have died during the course of that year. There are many instances in which the ceremonies occur and it's clear—I mean, we're talking about defacement, defilement, desecration, and burning can be one of those things. We would get into the details of this later on. We've got to get past the other body's vote against this, though. We've had the votes here in the House; the problem has been over in the other body.

I yield back the balance of my time.

Mr. NADLER. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from New York, Mr. Nadler.

Mr. NADLER. Mr. Chairman, the gentleman from Ohio is quite correct. The word "desecration" is a broad term. He gave a number of definitions, including I think he said, "profane," "defame." These are terms derived, as is the word "desecration," from a religious context. And it's used in that context. He also said that "we're defining it broadly; the Constitution defines 'due process' broadly," et cetera. Quite correct. We define rights broadly. No one should be put in jail without due process; no one shall be deprived of freedom of speech without due process of law, et cetera. We define rights broadly.

We define crimes narrowly, because we don't want to overly restrict people's freedoms. One of the problems with this amendment—one of the problems—is that what does "desecration" mean? It means almost anything. And you give Congress the power to define it as almost anything. And not just physical. Under this amendment, Congress will clearly have the power, as you put it a moment ago, "desecration" means defamation, profanation, blasphemy generally, in religious terms. If someone said something not nice about the flag, you could make that criminal—without any physical act. There's nothing that says "physical" in here. You could say that anyone who defames the actions of the country might be read to be defaming the flag and therefore desecrating the flag. I can see a court holding that. I can see some congressmen voting for that. And that's one of the problems.

I would suggest that—and I'm going to offer an amendment in a moment, as soon as we draft it, that we add——

It says "physical." I'm sorry. I withdraw that. Never mind what I said about—but "physical desecration" still means any of the acts which, if done with ideas that people do not find objectionable, is not considered desecration. And that is the crux of the problem here. Any physical act which you can think of doing with a flag you would not criminalize if done without objectionable connecting ideas—objectionable to the authorities, that is. And that's the basic problem here, and that's why it's a gross violation of freedom of speech. That's why the Supreme Court struck it down and that's why we shouldn't amend the Constitution.

Chairman SENSENBRENNER. Does the gentleman yield back?

Mr. NADLER. Yes, I yield back.

Chairman SENSENBRENNER. The question is on the amendment.
Mr. CONYERS. Mr. Chairman?
Chairman SENSENBRENNER. The gentleman from Michigan.
Mr. CONYERS. I have a motion at the desk.
Chairman SENSENBRENNER. The clerk will report the motion.
Mr. CHABOT. Mr. Chairman, reserving the right to object.
Chairman SENSENBRENNER. The clerk will report the motion first.
The CLERK. Motion to postpone to a date certain by Mr. Conyers: I move that the consideration of H.J. Res. 10 be postponed until June 15, 2005.
Chairman SENSENBRENNER. The motion is non-debatable. The question is agreeing to the motion. Those in favor will say aye. Opposed, no?
The noes appear to have it.
Mr. CONYERS. May I have a record vote, Mr. Chairman?
Chairman SENSENBRENNER. Record vote is ordered.
The question is on the motion to postpone to a day certain offered by the gentleman from Michigan, Mr. Conyers. Those in favor of the motion will, as your names are called,l answer aye; those opposed will vote no.
The clerk will call the roll.
The CLERK. Mr. Hyde?
[No response.]
The CLERK. Mr. Coble?
[No response.]
The CLERK. Mr. Smith?
[No response.]
The CLERK. Mr. Gallegly?
[No response.]
The CLERK. Mr. Goodlatte?
[No response.]
The CLERK. Mr. Chabot?
Mr. CHABOT. No.
The CLERK. Mr. Chabot, no. Mr. Lungren?
Mr. LUNGREN. No.
The CLERK. Mr. Lungren, no. Mr. Jenkins?
Mr. JENKINS. No.
The CLERK. Mr. Jenkins, no. Mr. Cannon?
Mr. CANNON. No.
The CLERK. Mr. Cannon, no. Mr. Bachus?
[No response.]
The CLERK. Mr. Inglis?
Mr. INGLIS. No.
The CLERK. Mr. Inglis, no. Mr. Hostettler?
Mr. HOSTETTLER. No.
The CLERK. Mr. Hostettler, no. Mr. Green?
Mr. GREEN. No.
The CLERK. Mr. Green, no. Mr. Keller?
Mr. KELLER. No.
The CLERK. Mr. Keller, no. Mr. Issa?
Mr. ISSA. No.
The CLERK. Mr. Issa, no. Mr. Flake?
Mr. FLAKE. No.
The CLERK. Mr. Flake, no. Mr. Pence?

Mr. PENCE. No.
The CLERK. Mr. Pence, no. Mr. Forbes?
Mr. FORBES. No.
The CLERK. Mr. Forbes, no. Mr. King?
[No response.]
The CLERK. Mr. Feeney?
[No response.]
The CLERK. Mr. Franks?
Mr. FRANKS. No.
The CLERK. Mr. Franks, no. Mr. Gohmert?
Mr. GOHMERT. No.
The CLERK. Mr. Gohmert, no. Mr. Conyers?
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers, aye. Mr. Berman?
[No response.]
The CLERK. Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye. Mr. Scott?
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye. Mr. Watt?
[No response.]
The CLERK. Ms. Lofgren?
Ms. LOFGREN. Aye.
The CLERK. Ms. Lofgren, aye. Ms. Jackson Lee?
[No response.]
The CLERK. Ms. Waters?
Ms. WATERS. Aye.
The CLERK. Ms. Waters, aye. Mr. Meehan?
Mr. MEEHAN. Aye.
The CLERK. Mr. Meehan, aye. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
[No response.]
The CLERK. Mr. Weiner?
[No response.]
The CLERK. Mr. Schiff?
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye. Ms. Sánchez?
Ms. SÁNCHEZ. Aye.
The CLERK. Ms. Sánchez, aye. Mr. Smith?
[No response.]
The CLERK. Mr. Van Hollen?
Mr. VAN HOLLEN. Aye.
The CLERK. Mr. Van Hollen, aye. Mr. Chairman?
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.
Chairman SENSENBRENNER. Members who wish to cast or change their vote? The gentleman from Texas, Mr. Smith?
Mr. SMITH. I vote no, Mr. Chairman.
The CLERK. Mr. Smith, no.
Chairman SENSENBRENNER. The gentleman from California, Mr. Gallegly?
Mr. GALLEGLY. No.

The CLERK. Mr. Gallegly, no.

Chairman SENSENBRENNER. The gentleman from Florida, Mr. Feeney?

Mr. FEENEY. No.

The CLERK. Mr. Feeney, no.

Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Coble?

Mr. COBLE. No.

The CLERK. Mr. Coble, no.

Chairman SENSENBRENNER. The gentleman from Iowa, Mr. King?

Mr. KING. No.

The CLERK. Mr. King, no.

Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Watt?

Mr. WATT. Aye.

The CLERK. Mr. Watt, aye.

Chairman SENSENBRENNER. The gentleman from New York, Mr. Weiner?

Mr. WEINER. Aye.

The CLERK. Mr. Weiner, aye.

Chairman SENSENBRENNER. Further Members who wish to cast or change their vote?

The gentlewoman from Texas, Ms. Jackson Lee?

Ms. JACKSON LEE. How am I recorded?

The CLERK. Mr. Chairman, I don't have Ms. Jackson Lee recorded.

Ms. JACKSON LEE. Aye.

The CLERK. Ms. Jackson Lee, aye.

Chairman SENSENBRENNER. Further Members who wish to cast or change their vote? If not, the clerk will report.

The CLERK. Mr. Chairman, there are 12 ayes and 20 noes.

Chairman SENSENBRENNER. And the motion is not agreed to. The question recurs on the amendment offered by the gentleman——

Mr. CONYERS. Mr. Chairman, point of order.

Chairman SENSENBRENNER.—the gentleman from Virginia, Mr. Scott.

The gentleman from Michigan will state his point of order.

Mr. CONYERS. Mr. Chairman, my point of order is that the motion that I made is in fact debatable. And I make a point of order against your preventing us from having a discussion as to why I wanted to move it to June 15, 2005, which is simply because there have been no hearings. And the House rules, Clause 4, rule 16, provides that a motion of this nature may be subject to debate.

Chairman SENSENBRENNER. The chair was in error. Motions to postpone to a day certain are debatable motions. However, the point of order is moot because the motion has already been disposed of by a rollcall vote.

Mr. CONYERS. Well——

Chairman SENSENBRENNER. So the question does recur on the amendment offered——

Mr. NADLER. Mr. Chairman? Mr. Chairman?

Mr. Chairman?

Mr. Chairman, I move that further consideration of this bill be postponed to June 16.

Chairman SENSENBRENNER. Okay, the question is whether——

Mr. NADLER. And I ask—we are entitled to debate on that now. And I yield to the gentleman from Michigan.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. NADLER. Thank you. I yield to the distinguished Ranking Member.

Mr. CONYERS. Thank you, Mr. Nadler.

Ladies and gentlemen of the Committee, this is a very simple matter of process, namely that since there have been no hearings on this measure, to tell Members that there were hearings somewhere in the distant past and that therefore there are no further hearings necessary on a constitutional amendment to me offends the nature of the importance of the Committee and of amending the Constitution of the United States.

And so it was my intention to offer a motion that would set a date for such a hearing on or before June 15, 2005. That's all I'm trying to do.

Now we have a suggestion that we do it on June 16, which I support entirely. But it would seem that the least we could do is have hearings in which we bring in some other authorities rather than our 5 minutes of debate both pro and con, and examine this question more closely. The importance of amending the Constitution of the United States requires that we at least observe, on constitutional amendments, that we have had hearings. I think we should have hearings on all measures that we bring to the full Committee, but at least on a constitutional amendment.

And so I urge my colleagues on the other side of the aisle to use some sense of fairness in merely postponing this for a short while for us to have some current, up-to-date authorities come before our Subcommittee to deal with this very important question.

Mr. NADLER. Thank you. Reclaiming my time.

I agree with the distinguished Ranking Member. The fact is that it's all well and good to say we've had hearings in prior Congresses and maybe the testimony wouldn't change, but it is rather contemptuous of the Constitution to offer an amendment to the Constitution and not even have a single hearing on it, not even have a Subcommittee vote on it. Frankly, I don't know that there is any real—if anybody really cares about amending the Constitution for this purpose, as opposed to having the political advantages of talking about amending the Constitution. So maybe that's why we don't care about going through the proper forms, because it's not taken seriously as a real proposition.

Mr. WEINER. Will the gentleman yield?

Mr. NADLER. One moment.

I think that's a mistake, because one of these days, God forbid, it may actually be adopted and then that would be a serious harm to the freedom of this country, and it should not be done without proper consideration even if the motive is really only for transitory political gain. We're playing with fire here.

Who wanted me to yield?

Mr. WEINER. I did, Mr. Nadler.

Mr. NADLER. Oh, yes. I'll yield.

Mr. WEINER. You know, just echoing that point. There's another issue here of timing. The Senate is not going to pass this. The Senate hasn't in the past. So why don't, since you've been in the em-

barrassing situation with a Republican House, a Republican Senate, a Republican presidency, a Republican judiciary, why don't you let them go first this time? You've been passing this and having it stopped in the Senate. Apparently your powers of persuasion stop at the doors to this room. Perhaps these extra couple of weeks implicit in the Nadler motion and in the Conyers motion, maybe it will give you a chance to line up some of your troops in the other body, because they've shown no indication that they're prepared to walk off this cliff with you. Frankly, that's probably a good thing. Rarely do I wake up in the morning and thank my lucky stars for the other body, but in this case maybe in the 2 weeks extra that you'll have, you'll be able to work your remarkable powers of persuasion on them. And that might be something else that we can do with the additional time granted by the Nadler motion.

Mr. NADLER. Reclaiming my time.

I agree with the distinguished gentleman, except that I will say that I wake up every day thanking God for the existence of the other body.

Chairman SENSENBRENNER. Does the gentleman wish to yield back?

Mr. NADLER. Yes, I yield back.

Chairman SENSENBRENNER. The chair recognizes himself for 5 minutes in opposition to the motion.

The arguments that have been advanced by those who wish to delay this matter for a few weeks would have validity if there were new arguments that were advanced in opposition to this amendment. The fact is, there aren't. And having a hearing on this amendment will simply have everybody validating the arguments that have been made both pro and con in hearings that have been held before the Subcommittee in previous Congresses. If there were new arguments, I'd like to hear them. But since there aren't, we don't need to have another hearing. I think we should proceed. If we wish to vote against the amendment, that's our prerogative.

Mr. CONYERS. Will the Chairman yield?

Chairman SENSENBRENNER. If not, then we should support it. I yield to the gentleman from Michigan.

Mr. CONYERS. I thank the Chairman for yielding. I wish I knew as well as he did that there are no new arguments to be advanced. We don't know who the witnesses would be. I have no way of telling if there are new arguments or not. But furthermore, Mr. Chairman, with all due respect, I don't think a lot of Members remember what the old arguments are, much less what the new ones are going to be.

And I thank the gentleman for yielding.

Chairman SENSENBRENNER. Reclaiming my time.

There are hearing records that have been printed in the hearings in the past and we will be happy to distribute those to the Members that wish to read them.

I yield back the balance of my time.

The question is on the motion——

Mr. WEINER. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from New York, Mr. Weiner.

Mr. WEINER. I don't need 5 minutes. I just want to strike the last word for the purpose of making the argument that, you know,

frankly, part of what we could learn since the last time that we did this bill is perhaps this is not the burning, searing issue that you thought it was last year or the year before or the year before. Perhaps we'll hear some evidence that will persuade us that the problem of flag desecration has reached new epidemic proportions. Maybe those of us who are not convinced that this has been exactly the most riveting problem facing the country since September 11, maybe those of us who believe that actually there's been greater respect for the flag since September 11—more people displaying it, more people showing it deference, more people displaying it in a way that might run afoul of this constitutional amendment because of the way it hangs from their rearview mirror or hangs from their car bumper.

I think, frankly, as the years go by very often we do gain greater perspective on things. Sometimes we even find that amendments to the Constitution that we passed were not wise and we had to undo them. Sometimes we find with greater passage of time that cooler heads prevail and that maybe the political imperatives of gaining some traction on an issue are not nearly as important as having fidelity to the institution of the Constitution. Maybe the political posturing that sometimes seems like it's something valuable to do leading up to a presidential campaign, maybe it doesn't seem so ripe right now. That's the reason why you wait. This is a serious matter. It's not—it should not be seen as just another twig you throw on the fire of the political barnstorm.

I think that, frankly, being cautious and being deliberative, I think, shows respect to the weight of the issue that we're showing here. If you have another hearing, if you have other people come before us, if you have people testify, who knows—is it so preposterous that someone might be persuaded to change their mind on this issue? I don't think so. And I think that that's—frankly, very often we find ourselves in a situation in this Committee where it's evocative of Groundhog Day, that we're dealing with issues again and again and again and again. Sometimes just the pure drumbeat of the wisdom of the witnesses sometimes does have influence, and I think that we shouldn't dismiss it. Because if you take your argument to its logical extreme, we should just say why have hearings? There are books that have been printed, articles that have been published, let's just go and read them and let's just gather up all the votes at the end of the week and just vote them all without any hearings.

So I think that the Nadler motion offers some wisdom to us.

Mr. CONYERS. Would the gentleman yield?

Mr. WEINER. Certainly.

Mr. CONYERS. I thank him for raising the question that we should all have old copies of hearings distributed to all Members that want to find out what all the arguments have been over the years. I don't think that solves the question of the importance of hearings right now.

There is something else that occurred to me, Mr. Weiner, and that is the fact that Amnesty International has said that we have one of the worst human rights records in the world. And it seems to me that if we are to be held as the beacon of democracy, of constitutional order, it's very important that since 9/11 all of our acts are really being scrutinized internationally quite closely. I don't

think that we would upset the march of the leadership in the House, the Senate, and the Executive Branch if we were to hold hearings at the Subcommittee level and have some witnesses there.

In all fairness, this is a matter that is going to be examined around the world. As the leader of a democratic constitutional system of Government, as the one country that advocates order more than any other, it seems to me exceedingly important that this small detail, overlooked until now, be observed.

And I thank the gentleman for the time.

Mr. SCOTT. Would the gentleman yield?

Mr. WEINER. I have a few seconds, but I'll be glad to yield the final balance of my time to Mr. Scott.

Mr. SCOTT. I thank the gentleman for yielding.

I just wanted to remind the Committee what we're voting on: Page 2, line 9, strike "desecration," insert "burning," so that all flag burning will be illegal, not just flag burning that is insulting to the sheriff while it would be okay to burn the flag while you're saying something nice.

Chairman SENSENBRENNER. The time of the gentleman has expired.

The first question is on the motion offered by the gentleman from New York, Mr. Nadler, to postpone consideration until June 16. Those in favor will say aye; opposed, no.

The noes appear to have it.

A rollcall is ordered. The question is on the motion to postpone. Those in favor will, as your names are called, answer aye; those opposed, no. The clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. No.

The CLERK. Mr. Coble, no. Mr. Smith?

Mr. SMITH. No.

The CLERK. Mr. Smith, no. Mr. Gallegly?

Mr. GALLEGLY. No.

The CLERK. Mr. Gallegly, no. Mr. Goodlatte?

[No response.]

The CLERK. Mr. Chabot?

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no. Mr. Lungren?

Mr. LUNGREN. No.

The CLERK. Mr. Lungren, no. Mr. Jenkins?

Mr. JENKINS. No.

The CLERK. Mr. Jenkins, no. Mr. Cannon?

[No response.]

The CLERK. Mr. Bachus?

[No response.]

The CLERK. Mr. Inglis?

Mr. INGLIS. No.

The CLERK. Mr. Inglis, no. Mr. Hostettler?

Mr. HOSTETTLER. No.

The CLERK. Mr. Hostettler, no. Mr. Green?

[No response.].

The CLERK. Mr. Keller?

Mr. KELLER. No.

The CLERK. Mr. Keller, no. Mr. Issa?
[No response.]
The CLERK. Mr. Flake?
[No response.]
The CLERK. Mr. Pence?
[No response.]
The CLERK. Mr. Forbes?
Mr. FORBES. No.
The CLERK. Mr. Forbes, no. Mr. King?
Mr. KING. No.
The CLERK. Mr. King, no. Mr. Feeney?
[No response.]
The CLERK. Mr. Franks?
Mr. FRANKS. No.
The CLERK. Mr. Franks, no. Mr. Gohmert?
Mr. GOHMERT. No.
The CLERK. Mr. Gohmert, no. Mr. Conyers?
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers, aye. Mr. Berman?
[No response.]
The CLERK. Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye. Mr. Scott?
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye. Mr. Watt?
[No response.]
The CLERK. Ms. Lofgren?
Ms. LOFGREN. Aye.
The CLERK. Ms. Lofgren, aye. Ms. Jackson Lee?
Ms. JACKSON LEE. Aye.
The CLERK. Ms. Jackson Lee, aye. Ms. Waters?
[No response.]
The CLERK. Mr. Meehan?
Mr. MEEHAN. Aye.
The CLERK. Mr. Meehan, aye. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
[No response.]
The CLERK. Mr. Weiner?
Mr. WEINER. Aye.
The CLERK. Mr. Weiner, aye. Mr. Schiff?
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye. Ms. Sánchez?
Ms. SÁNCHEZ. Aye.
The CLERK. Ms. Sánchez, aye. Mr. Smith?
[No response.]
The CLERK. Mr. Van Hollen?
Mr. VAN HOLLEN. Aye.
The CLERK. Mr. Van Hollen, aye. Mr. Chairman?
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.
Chairman SENSENBRENNER. Further Members who wish to cast or change their votes? The gentleman from California, Mr. Issa?

Mr. ISSA. No.

The CLERK. Mr. Issa, no.

Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Watt?

Mr. WATT. Aye.

The CLERK. Mr. Watt, aye.

Chairman SENSENBRENNER. The gentleman from Florida, Mr. Feeney.

Mr. FEENEY. No.

The CLERK. Mr. Feeney, no.

Chairman SENSENBRENNER. The gentleman from Wisconsin, Mr. Green?

Mr. GREEN. No.

The CLERK. Mr. Green, no.

Chairman SENSENBRENNER. The gentleman from Utah, Mr. Cannon?

Mr. CANNON. No.

The CLERK. Mr. Cannon, no.

Chairman SENSENBRENNER. The gentleman from Arizona, Mr. Flake?

Mr. FLAKE. No.

The CLERK. Mr. Flake, no.

Chairman SENSENBRENNER. Further Members who wish to cast or change their votes? If not, the clerk will report.

The CLERK. Mr. Chairman, there are 11 ayes and 19 noes.

Chairman SENSENBRENNER. And the motion to postpone consideration until a date certain is not agreed to.

The question now occurs on the amendment offered by the gentleman from Virginia, Mr. Scott. Those in favor will say aye; opposed, no.

The noes appear to have it.

rollcall? The question is on agreeing to the Scott amendment. Those in favor will, as your names are called, answer aye; those opposed, no. The clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. No.

The CLERK. Mr. Coble, no. Mr. Smith?

Mr. SMITH. No.

The CLERK. Mr. Smith, no. Mr. Gallegly?

Mr. GALLEGLY. No.

The CLERK. Mr. Gallegly, no. Mr. Goodlatte?

[No response.]

The CLERK. Mr. Chabot?

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no. Mr. Lungren?

Mr. LUNGREN. No.

The CLERK. Mr. Lungren, no. Mr. Jenkins?

Mr. JENKINS. No.

The CLERK. Mr. Jenkins, no. Mr. Cannon?

Mr. CANNON. No.

The CLERK. Mr. Cannon, no. Mr. Bachus?

[No response.]

The CLERK. Mr. Inglis?

Mr. INGLIS. No.
The CLERK. Mr. Inglis, no. Mr. Hostettler?
Mr. HOSTETTLER. No.
The CLERK. Mr. Hostettler, no. Mr. Green?
Mr. GREEN. No.
The CLERK. Mr. Green, no. Mr. Keller?
Mr. KELLER. No.
The CLERK. Mr. Keller, no. Mr. Issa?
[No response.]
The CLERK. Mr. Flake?
Mr. FLAKE. No.
The CLERK. Mr. Flake, no. Mr. Pence?
[No response.]
The CLERK. Mr. Forbes?
Mr. FORBES. No.
The CLERK. Mr. Forbes, no. Mr. King?
Mr. KING. No.
The CLERK. Mr. King, no. Mr. Feeney?
[No response.]
The CLERK. Mr. Franks?
Mr. FRANKS. No.
The CLERK. Mr. Franks, no. Mr. Gohmert?
Mr. GOHMERT. No.
The CLERK. Mr. Gohmert, no. Mr. Conyers?
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers, aye. Mr. Berman?
[No response.]
The CLERK. Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye. Mr. Scott?
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye. Mr. Watt?
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye. Ms. Lofgren?
Ms. LOFGREN. Aye.
The CLERK. Ms. Lofgren, aye. Ms. Jackson Lee?
Ms. JACKSON LEE. Aye.
The CLERK. Ms. Jackson Lee, aye. Ms. Waters?
[No response.]
The CLERK. Mr. Meehan?
Mr. MEEHAN. Aye.
The CLERK. Mr. Meehan, aye. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
[No response.]
The CLERK. Mr. Weiner?
Mr. WEINER. Aye.
The CLERK. Mr. Weiner, aye. Mr. Schiff?
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye. Ms. Sánchez?
Ms. SÁNCHEZ. Aye.
The CLERK. Ms. Sánchez, aye. Mr. Smith?
[No response.]

The CLERK. Mr. Van Hollen?

Mr. VAN HOLLEN. Aye.

The CLERK. Mr. Van Hollen, aye. Mr. Chairman?

Chairman SENSENBRENNER. No.

The CLERK. Mr. Chairman, no.

Chairman SENSENBRENNER. Members who wish to cast or change their votes? The gentleman from California, Mr. Issa?

Mr. ISSA. No.

The CLERK. Mr. Issa, no.

Chairman SENSENBRENNER. The gentleman from Florida, Mr. Feeney.

Mr. FEENEY. No.

The CLERK. Mr. Feeney, no.

Chairman SENSENBRENNER. Further Members who wish to cast or change their vote? If not, the clerk will report.

The CLERK. Mr. Chairman, there are 11 ayes and 19 noes.

Chairman SENSENBRENNER. The gentlewoman from Texas, Ms. Jackson Lee?

The CLERK. Mr. Chairman, Ms. Jackson Lee is recorded as an aye.

Chairman SENSENBRENNER. The clerk will report.

The CLERK. Mr. Chairman, there are 11 ayes and 19 noes.

Chairman SENSENBRENNER. And the amendment is not agreed to. Are there further amendments?

The gentlewoman from——

Mr. CONYERS. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Could I ask unanimous consent to put the Amnesty International record of the United States in the record at this point?

Chairman SENSENBRENNER. Without objection.

Mr. CONYERS. Thank you.

Mr. KING. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentleman from Iowa seek recognition?

Mr. KING. Reserving my right to object, I wonder if the Ranking Member might yield to a question?

Mr. CONYERS. Of course. With pleasure, sir.

Mr. KING. With regard to the ranking of the United States by Amnesty International, could you inform this Committee as to what nation is ranked first and where the United States actually ranks in human rights?

Mr. CONYERS. I don't have it in this document. But if we were to have a hearing, I'd be happy to provide that information for you.

But that's the point that I'm putting it in the record, so you can read it and find out where we are. I don't know that this is specifically——

Mr. CHABOT. Would the gentleman yield?

Mr. KING. I would yield.

Mr. CHABOT. Could I ask the gentleman a question also. I think your statement was, Mr. Conyers, that according to that article the United States has one of the worst human rights records in the world. Is that correct, that it says that?

Mr. CONYERS. Yes, sir.

Mr. CHABOT. Because I find that statement, if it's contained in that report, an absurdity. And I just can't believe that—I don't believe it. It's hard for me to comprehend that any organization, even Amnesty International, could make that statement.

Do you believe that that statement is true, Mr. Conyers? And I have the utmost respect for you, so I think it's really a rather important issue.

Mr. CONYERS. Well, I do, too. That's why I'm trying to put it in the record. I mean, if it's incorrect, you read about it or I'll provide you with a copy——

Mr. CHABOT. Do you think it's correct, though, is my question.

Mr. CONYERS. Oh, yes. Of course. Everything I say I believe is correct.

Mr. CHABOT. So you believe that the United States is——

Mr. CONYERS. Has one of the worst records.

Mr. CHABOT.—has one of the worst records on human rights——

Mr. WEINER. Reserving the right to object.

Mr. CONYERS. I've already answered you once, but I'll do it again.

Mr. CHABOT. Okay. I'm surprised, but if—I'm surprised that you would say that.

Mr. CONYERS. Absolutely.

Mr. WEINER. Reserving the right to object.

Mr. KING. Reclaiming my time.

Chairman SENSENBRENNER. The time belongs to the gentleman from Iowa, Mr. King.

Mr. KING. Mr. Chairman, I'd ask unanimous consent to introduce some other information into the record with regard to the United States record with regard——

Chairman SENSENBRENNER. Well, the pending UC request, which you've reserved the right to object to, is for Mr. Conyers to introduce the Amnesty International report to which he has referred into the record.

Is there objection?

Mr. KING. Mr. Chairman, with regard to that lack——

Chairman SENSENBRENNER. The gentleman reserves the right to object.

Mr. KING. Mr. Chairman, I object.

Mr. LUNGREN. Mr. Chairman, I object.

Chairman SENSENBRENNER. The objection is heard. Are there further amendments?

Ms. LOFGREN. Mr. Chairman?

Chairman SENSENBRENNER. The gentlewoman from California, Ms. Lofgren.

Ms. LOFGREN. I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

Ms. LOFGREN. I would ask unanimous consent that the amendment be considered as read.

Mr. WEINER. Mr. Chairman, a point of order.

Chairman SENSENBRENNER. The clerk will report——

Mr. WEINER. Mr. Chairman, a point of order.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to H.J. Res. 10, offered by Ms. Lofgren of California. Page 2, line 8, insert at the beginning, "Section 1.". Page 2, after line 9——

Mr. WEINER. Mr. Chairman, point of order.

Chairman SENSENBRENNER. A point of order is reserved on the amendment. Without objection, the amendment is considered as read.

[The amendment of Ms. Lofgren follows:]

AMENDMENT TO H.J. RES. 10

OFFERED BY MS. ZOE LOFGREN OF CALIFORNIA

Page 2, line 8, insert at the beginning "SECTION 1.".

Page 2, after line 9, insert the following:

1 SEC. 2.

2 This article shall not take effect until the date on which

3 Congress by law ensures that the veteran's benefits prom-

4 ised to an individual in connection with that individual's

5 enlistment or induction in the Armed Forces cannot, after

6 that enlistment or induction, be diminished.

Chairman SENSENBRENNER. The gentlewoman from California, Ms. Lofgren——

Mr. WEINER. Mr. Chairman, I have a point of order.

Chairman SENSENBRENNER.—will be recognized for 5 minutes.

A point of order has been reserved. It has not been made. The gentlewoman from California, Ms. Lofgren, is recognized for 5 minutes.

Mr. WEINER. Mr. Chairman, I have a point of order.

Chairman SENSENBRENNER. The gentleman will state his point of order.

Mr. WEINER. Mr. Chairman, my point of order is this. Does not the Ranking Member, if not authorized by unanimous consent to introduce materials into the record, is he not then permitted to do so by a simple vote of the Committee?

Chairman SENSENBRENNER. The parliamentarian is looking in the rules on that.

Mr. WEINER. And if I could further on my point of order, you know, it is——

Chairman SENSENBRENNER. What I will tell the gentleman from New York is that gentleman from Michigan asked unanimous consent to insert material into the record. The gentleman from California, Mr. Lungren, objected. And as a result of the objection, the unanimous consent request of the gentleman from Michigan has failed.

Mr. WEINER. This much I understand. My point of order revolves around the rights of every Member and the custom in this Committee to permit Members to put things into the record regardless of whether Members on either side agree with them. And the fact that it is customary at the end of a hearing for the Chairman to say, as a point of general proceedings, that Members have unanimous consent of five legislative days to insert material. And I believe that if that objection is upheld, then we have to consider it to be an objection at the end of the record as well, where you're——

Chairman SENSENBRENNER. Well, if the gentleman from New York will yield, we have never asked in this Committee general leave for Members to insert material into the record. And in fact, the House rules, what they do do is give every Member a right to file additional supplemental, minority, or dissenting views to bills that have been reported. And the chair makes that statement routinely on behalf of all Members following the reporting of a bill. But what is put into dissenting views is up to those who wish to submit the dissenting views, and one does not need unanimous consent in order to put dissenting views or supplemental views into the record.

Mr. WEINER. I'm still waiting on the ruling on my point of order.

Mr. CONYERS. Would the gentleman yield?

Mr. WEINER. I don't know if I have any time to yield, but certainly.

Mr. CONYERS. I thank you for yielding, because obviously, after your point of order, I'm going to make a motion that this record of Amnesty International be inserted in the record at this point.

Chairman SENSENBRENNER. The chair is prepared to rule on the point of order that has been raised by the gentleman from New York. The gentleman from Michigan, Mr. Conyers, should he wish, can make a motion to include the material from Amnesty International, or other material, into the record.

Mr. WEINER. Thank you, Mr. Chairman.

Ms. LOFGREN. Mr. Chairman?

Chairman SENSENBRENNER. Okay, we are now at recognizing the gentlewoman from California for 5 minutes. Since we do have two votes, the chair will recess the Committee until 1 o'clock. We have this bill and two other bills that we would like to get done today. The chair would implore Members to return promptly at 1 o'clock.

The Committee stands recessed.

[Whereupon, the Committee was recessed from 11:40 a.m until 1:12 p.m.]

Chairman SENSENBRENNER. The Committee will be in order. A working quorum is present.

The gentleman from Michigan.

Mr. CONYERS. Mr. Chairman, I ask unanimous consent to include a report from Amnesty International in our proceedings in terms of the gun manufacturers and gun dealers, the bill before the Committee. And it deals with our human rights record.

Chairman SENSENBRENNER. Without objection.
[The information follows:]

Annual Report

Selective U.S. Prosecutions in Torture Scandal Underscore International Obligation to Investigate U.S. Officials, Charges Amnesty International

Impunity Imperils Eradication of Cruel Treatment

(Washington, DC)—At the launch of its 2005 Annual Report, Amnesty International called on foreign governments to uphold their obligations under international law by investigating U.S. officials implicated in the development or implementation of interrogation techniques that constitute torture or cruel, inhuman or degrading treatment. While the U.S. government has failed to conduct a genuinely independent and comprehensive investigation, the officials implicated in these crimes are nonetheless subject to investigation and possible arrest by other nations while traveling abroad, the organization said.

The human rights organization warned that at least one dozen former or current U.S. officials are vulnerable to this action. The individuals, who, to date, have either dodged investigation or escaped sanction, include those at the highest levels of government, such as President Bush and Secretary of Defense Rumsfeld, as well as Attorney General Gonzales and former CIA Director George Tenet. They also include government lawyers who advocated or approved setting aside critical protections against torture or recommended interrogation methods that constitute torture or cruel, inhuman or degrading treatment, as well as military officers who implemented those decisions. While the United States bears primary responsibility for investigating these acts, research by Amnesty International establishes that more than 125 countries have legislation permitting investigation of serious crimes committed outside their borders.

"Tolerance for torture and ill-treatment, signaled by a failure to investigate and prosecute those responsible, is the most effective encouragement for it to spread and grow. Like a virus, the techniques used by the United States will multiply and spread unless those who plotted their use are held accountable," said Dr. William F. Schulz, Executive Director of Amnesty International USA. "The U.S. government's response to the torture scandal amounts to a whitewash of senior officials' involvement and responsibility. Those who conducted the abusive interrogations must be held to account, but so too must those who schemed to authorize those actions, sometimes from the comfort of government buildings. If the United States permits the architects of torture policy to get off scot-free, then other nations should step into the breach."

The Geneva Conventions and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) place a legally binding obligation on states that have ratified them to exercise universal jurisdiction over persons accused of grave breaches of the Geneva Conventions and torture or to extradite the suspects to a country that will. Therefore, if anyone

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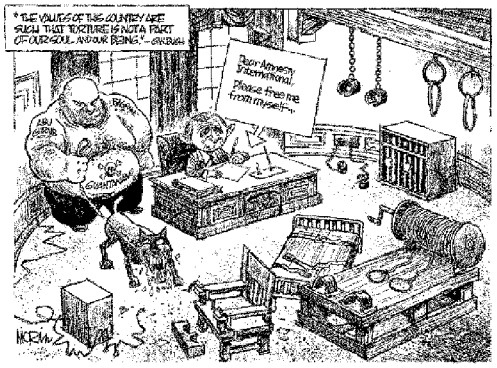
A high resolution version of Jim Morin's cartoon on this page is available to media outlets. To receive a copy, send an email request to media@amnestyusa.org.

suspected of involvement in the U.S. torture scandal visits or transits though foreign territories, governments could take legal steps to ensure that such individuals are investigated and charged with applicable crimes.

Certain crimes, including torture and other grave breaches of the Geneva Conventions, are so serious that they amount to an offense against the whole of humanity and therefore all states have a responsibility to investigate and prosecute people responsible for these crimes. This principle applies wherever those suspected of the crimes happen to be, whatever their nationality or position, regardless of where the crime was committed and the nationality of the victims, and no matter how much time has elapsed since the commission of the crime. One of the best-known applications of this principle was the October 16, 1998, arrest in London of Augusto Pinochet, in connection with torture and "disappearances" in Chile at a time when he was president of that country.

Although approximately 125 members of the U.S. armed forces have either been court-martialed or received non-judicial punishment or other administrative action, to date no one in the extended chain of command, including those who formulated policies on the treatment and interrogation of prisoners, has been held accountable.



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Amnesty International Report 2005

During 2004, the human rights of ordinary men, women and children were disregarded or grossly abused in every corner of the globe. Economic interests, political hypocrisy and socially orchestrated discrimination continued to fan the flames of conflict around the world. The "war on terror" appeared more effective in eroding international human rights principles than in countering international "terrorism". The millions of women who suffered gender-based violence in the home, in the community or in war zones were largely ignored. The economic, social and cultural rights of marginalized communities were almost entirely neglected.

This **Amnesty International Report**, which covers 149 countries, highlights the failure of national governments and international organizations to deal with human rights violations, and calls for greater international accountability.

The report also acknowledges the opportunities for positive change that emerged in 2004, often spearheaded by human rights activists and civil society groups. Calls to reform the UN human rights machinery grew in strength, and there were vibrant campaigns to make corporations more accountable, strengthen international justice, control the arms trade and stop violence against women.

Whether in a high profile conflict or a forgotten crisis, Amnesty International campaigns for justice and freedom for all and seeks to galvanize public support to build a better world.

Human rights are not only a promise unfulfilled, they are a promise betrayed
A message from Irene Khan, AI's Secretary General

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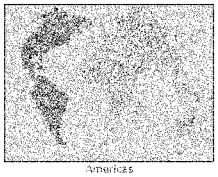

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Respect for human rights remained an illusion for many as governments across the Americas failed to comply with their commitments to uphold fundamental human rights. Widespread torture, unlawful killings by police and arbitrary detention persisted. The US-led "war on terror" continued to undermine human rights in the name of security, despite growing international outrage at evidence of US war crimes, including torture, against detainees.

Democratic institutions and the rule of law were at risk throughout much of Latin America. Political instability – fuelled by corruption, organized crime, economic disparities and social unrest – resulted in several attempts to bring down governments. Most were by constitutional means but some, as in Haiti, by-passed the democratic process.

Political armed groups and criminal gangs, principally those engaged in drug trafficking, had an increasing impact on people's fundamental rights. Poverty and discrimination affected millions of people, particularly the most vulnerable groups – women, children, indigenous people and Afro-descendant communities.

Positive developments were seen in the vigorous campaigns maintained by human rights defenders, who held both governments and armed groups to account, in defiance of harassment and persecution. Courts in several countries gave rulings that brought closer the prospect of bringing to trial military and political leaders responsible for massive human rights violations in previous decades.

National security and the 'war on terror'

The blatant disregard for international human rights and humanitarian law in the "war on terror" continued to make a mockery of President George Bush's claims that the USA was the global champion of human rights. Images of detainees in US custody tortured in Abu Ghraib prison in Iraq shocked the world. War crimes in Iraq, and mounting evidence of the torture and ill-treatment of detainees in US custody in other countries, sent an unequivocal message to the world that human rights may be sacrificed ostensibly in the name of security.

President Bush's refusal to apply the Geneva Conventions to those captured during the international armed conflict in Afghanistan and transferred to the US naval base at Guantánamo Bay, Cuba, was challenged by a judicial decision in November. The ruling resulted in the suspension of trials by military commission in Guantánamo, and the government immediately lodged an appeal. The US administration's treatment of detainees in the "war on terror" continued to display a marked ambivalence to the opinion of expert bodies such as the International Committee of the Red Cross and even of its own highest judicial body. Six months after the Supreme Court ruled that the federal courts had jurisdiction over the Guantánamo detainees, none had appeared in court. Detainees reportedly considered of high intelligence value remained in secret detention in undisclosed locations. In some cases their situation amounted to "disappearance".

The "war on terror" and the "war on drugs" increasingly merged, and dominated US relations with Latin America and the Caribbean. Following the US elections in November, the Bush administration encouraged governments in the region to give a greater role to the military in public order and internal security operations. The blurring of military and police roles resulted in governments such as those in Brazil, Guatemala, Honduras, Mexico and Paraguay deploying military forces to deal with crime and social unrest.

The US doubled the ceiling on the number of US personnel deployed in Colombia in counter-insurgency and counter-narcotics operations. The Colombian government in turn persisted in redefining the country's 40-year internal conflict as part of the international "war on terror".

Conflict, crime and instability

Civilians continued to be the principal victims of political violence. The human rights situation in Colombia remained critical, its civilians targeted by all sides in the conflict: the security forces, army-backed paramilitaries and armed opposition groups. Despite an agreed ceasefire and demobilization of some combatants, paramilitary forces were again responsible for widespread abuses. Security policies introduced by the government drew civilians further into the conflict.

Further evidence of spill-over from Colombia's internal war was seen in neighbouring countries. Frequent border skirmishes were reported in Venezuela and Ecuador, where the number of Colombians seeking refuge grew.

Political polarization and instability continued to affect Venezuela for much of the year. Levels of violence and protests diminished briefly after a referendum failed to unseat President Hugo Chávez, but the death of a high-profile special prosecutor in a car bombing raised fears of renewed political violence.

Long-standing instability in Haiti reached crisis levels after a military uprising toppled the government of President Jean Bertrand Aristide. Political violence and widespread human rights violations persisted, despite the presence of a UN military and police force. The severe loss of life and structural damage caused by a hurricane in September exacerbated instability and the breakdown of the rule of law, hampering distribution of international aid.

In a report on Guatemala, the UN warned that failure to bring about effective social, economic and political reforms could promote conflict.

Public protests against violent crime, particularly kidnapping, spread throughout Latin America. Crime levels remained high in Mexican and Brazilian cities, and in parts of Central America where poverty combined with the easy availability of weapons and the legacy of civil wars. Governments responded with tougher legislation, which sometimes violated constitutional and human rights safeguards. Vigilantism and mob lynchings of suspected criminals were reported in countries including Guatemala, Mexico and Peru, where confidence in the security forces continued to evaporate.

Impunity for human rights violations

Despite setbacks, efforts across the region to combat impunity for gross human rights violations in previous decades continued to gain momentum.

A series of rulings and actions based on international jurisdiction showed that military and security chiefs whose forces were responsible for human rights violations could no longer escape trial. An Argentine court issued an international warrant for the arrest of former Paraguayan President Alfredo Stroessner for his alleged involvement in human rights violations committed under Operation Cóndor, a joint plan to eliminate opponents by military governments of the 1970s and 1980s in Argentina, Bolivia, Brazil, Chile, Paraguay and Uruguay. Spain's Supreme Court confirmed that the Spanish justice system had jurisdiction to try former Argentine navy officer Adolfo Scilingo for human rights violations under the military government of 1976-83. More than 20 years after the alleged crimes, a former Honduran intelligence chief faced a civil action in the US courts brought by relatives of Hondurans tortured and killed in the 1980s.

National courts also made significant, if slow, progress in shedding light on past human rights violations. The Chilean Supreme Court lifted former President Augusto Pinochet's immunity from prosecution, allowing proceedings to be opened against him for human rights violations during Operation Cóndor.

In Brazil, the Supreme Court ordered the federal government to open files on the military operations against armed opposition groups in the region of Araguaia, state of Pará, during the military dictatorship. These may enable relatives finally to locate the bodies of victims of military actions.

Military and police courts continued to claim jurisdiction, despite recommendations by international human rights bodies. In Bolivia, the military initially rejected a Constitutional Court ruling that officers charged with offences against civilians should be tried in civilian courts. In Peru and Colombia, cases of human rights violations continued to be transferred to military courts in spite of rulings by the respective Constitutional Courts that they had jurisdiction only over offences committed "in the line of duty". In Ecuador, police courts still claimed jurisdiction in cases involving abuses by police agents although the authorities had given assurances that they would be heard by civilian courts.

Trial before civilian courts was no guarantee of justice, however. In Colombia, against all the evidence, charges were withdrawn against former General Rito Alejo del Río, indicted for forming illegal paramilitary groups responsible for human rights violations in the 1990s.

The USA continued to pressure governments throughout the region to sign unlawful immunity agreements shielding US personnel from surrender to the International Criminal Court. Of 12 countries that had refused to sign, 10 had some military aid suspended as a result. In November the US Congress threatened to cut off development aid to countries that refused to sign.

Death penalty

The USA continued to flout international human rights standards by inflicting the death penalty on child offenders, people with mental disabilities, defendants without access to effective legal representation, and foreign nationals denied their consular rights. In 2004, 59 executions were carried out by a capital justice system characterized by arbitrariness, discrimination and error. Scheduled executions of a number of child offenders were stayed pending a Supreme Court ruling on the case of a death row prisoner aged 17 at the time of the crime.

No judicial executions were carried out in the Caribbean, but the Judicial Committee of the Privy Council – the final court of appeal for most of the English-speaking Caribbean – reopened the possibility of a resumption of executions in Trinidad and Tobago by overturning a decision that the mandatory death penalty was unconstitutional. It ruled that mandatory death sentences for capital murder violated the Jamaican Constitution, and ordered new sentencing hearings for Jamaica's death row inmates. It also ruled that the mandatory death penalty was constitutional in Barbados.

Economic, social and cultural rights

Economic indicators improved in Latin America after a prolonged period of stagnation. However, growth was insufficient to significantly affect poverty levels. Extreme disparities in wealth, and in access to basic rights such as education, health, water and electricity, continued. Inequalities were persistently driven by race and ethnicity, particularly for indigenous and Afro-descendant peoples, who are among the poorest in the region.

According to a UN study on the spread of HIV/AIDs, the Caribbean is the second most affected region in the world. Social attitudes such as homophobia and stigmatization are cited by the UN among factors contributing to the spread of the epidemic.

Severe political violence and instability in Haiti exacerbated the long-standing denial of basic rights, including access to health services as the breakdown in health provision reached crisis proportions.

Disputes over land and labour conditions on plantations continued to fuel protracted conflicts and human rights violations in countries such as Bolivia, Brazil, Chile, Guatemala and Paraguay. Both protesters and police officers were killed as claims for access to land by landless peasant families brought them into conflict with large landowners backed by the security forces or hired gunmen.

By the end of 2004, Central American governments and the Dominican Republic had approved a free trade agreement with the USA. Civil society groups raised concerns about the lack of guarantees on labour rights, on protection of the environment and on continued access to affordable medicines. In December, 12 South American countries signed an agreement to create a political and economic regional bloc.

Violence against women

Women and girls remained at serious risk of human rights violations across the Americas. The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women – which marked its 10th anniversary – had received more ratifications than any other treaty on human rights in the region. Only Canada and the USA had failed to ratify. However, its provisions were largely ignored by governments across the region, and gender-related violence against women remained endemic in the home and the community.

A UN report on the state of the world's cities stated that Latin America had the highest risk of all types of sexual victimization, with approximately 70 per cent of reported incidents described as rapes, attempted rapes or indecent assaults. Despite efforts by the Mexican authorities, there were further killings of women in the state of Chihuahua, and the horrific brutality that characterized killings of women in Guatemala gave cause for growing international concern.

Women were particularly vulnerable in situations of conflict. In Colombia, all parties to the conflict subjected women and girls to sexual violence, including rape and genital mutilation. They were targeted to sow terror, wreak revenge on adversaries and accumulate "trophies of war".

There was a growing awareness of the impact of people trafficking in the Americas on human rights, particularly of women and girls. According to a study by the Organization of American States, over 100,000 men, women and children were "trafficked" across Latin America and the Caribbean each year, 80 per cent of them women and most for the purposes of sexual exploitation.

Human rights defenders

Human rights activists across the Americas campaigned vigorously to hold governments and armed groups to their obligations to respect international and domestic human rights standards.

Women's rights activists were acclaimed in Colombia for their work for thousands of innocent victims of conflict and for the meaningful involvement of women in peace negotiations and the political process. Indigenous activists in Ecuador championed their community's rights to defend their livelihoods during disputes over the extraction of natural resources. Despite public hostility and prejudice, the work of Jamaican and Honduran sexual rights activists to promote equal rights and HIV/AIDS prevention was increasingly recognized and supported by human rights organizations at the international level.

The difficulties and dangers faced by activists in the Americas ranged from intimidation and restrictions on travel, to unfounded accusations of "terrorist" links or other violent activities, arbitrary detention, false criminal charges, and even death. Activists working locally on rural poverty and development, often in isolated areas, and journalists covering issues such as corruption were killed in Brazil, Colombia, Guatemala and Mexico.

On the international stage, governments gave commitments to support the work of human rights activists. However, some undermined the integrity of these pledges by tolerating slanderous statements by high-ranking government officials against those working for human rights. Appeals by women's rights activists for the authorities to examine their concerns and proposals seriously were frequently dismissed
or ignored.

Only one government, Brazil, responded to a request by both the UN Special Representative on Human Rights Defenders and by AI for governments to draft, publish and make operational plans to implement the UN Declaration on Human Rights Defenders.

Regional initiatives

During the European Union/Latin America and Caribbean Summit in May, AI highlighted its concerns about the use of the judicial system to persecute human rights defenders. Delegates from AI's International Secretariat and from AI sections in the region attended the Americas Regional Social Forum in Quito, Ecuador, in August. In the same month, AI also participated in the III Human Rights Defenders Consultation in São Paulo, Brazil.

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Covering events from January - December 2004

Hundreds of detainees continued to be held without charge or trial at the US naval base in Guantánamo Bay, Cuba. Thousands of people were detained during US military and security operations in Iraq and Afghanistan and routinely denied access to their families and lawyers.

Military investigations were initiated or conducted into allegations of torture and ill-treatment of detainees by US personnel in Abu Ghraib prison in Iraq and into reports of deaths in custody and ill-treatment by US forces elsewhere in Iraq, and in Afghanistan and Guantánamo. Evidence came to light that the US administration had sanctioned interrogation techniques that violated the UN Convention against Torture. Pre-trial military commission hearings opened in Guantánamo but were suspended pending a US court ruling.

In the USA, more than 40 people died after being struck by police tasers, raising concern about the safety of such weapons. The death penalty continued to be imposed and carried out.

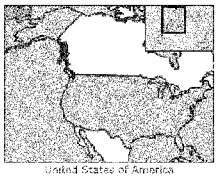
International Criminal Court

The US government intensified its efforts to curtail the power of the International Criminal Court (ICC). In December, Congress approved a provision in a government spending bill mandating the withholding of certain economic assistance to governments that refuse to grant immunity for US nationals before the ICC.

Guantánamo Bay

By the end of the year, more than 500 detainees of around 35 nationalities continued to be held without charge or trial at the US naval base in Guantánamo Bay on grounds of possible links to al-Qa'ida or the former Taleban government of Afghanistan. While at least 10 more detainees were transferred to the base from Afghanistan during the year, more than 100 others were transferred to their home countries for continued detention or release. At least three child detainees were among those released, but at least two other people who were under 18 at the time of their detention were believed to remain in Guantánamo by the end of the year. Neither the identities nor the precise numbers of detainees held in Guantánamo were provided by the Department of Defense, fuelling concern that individual detainees could be transferred to and from the base without appearing in official statistics.

In a landmark decision, the US Supreme Court ruled in June that the US federal courts had jurisdiction over the Guantánamo detainees. However, the administration tried to keep any review of the detainees' cases as far from a judicial process as possible. The Combatant Status Review Tribunal (CSRT), an administrative review body consisting of panels of three military officers, was established to determine whether the detainees were "enemy combatants". The detainees were not provided with lawyers to assist them in this process and secret evidence could be used against them. Many detainees boycotted the process, which by the end of the year had determined that more than 200 detainees were "enemy combatants" and two were not and could be released. The authorities also announced that all detainees confirmed as "enemy combatants" would have a yearly review of their cases before an Administrative Review Board (ARB) to determine if they should still be held. Again, detainees would not have access to legal counsel or to secret evidence. Both the CSRT and the ARB could draw on evidence extracted under torture or other coercion. In December, the Pentagon announced that it



United States of America

UNITED STATES OF AMERICA
Head of state and government: George W. Bush
Death penalty: retentionist
International Criminal Court: signed
UN Women's Convention: signed
Optional Protocol to UN Women's Convention: not signed

Further information

USA: Dead wrong - the case of Nanon Williams, child offender facing execution on flawed evidence
(AI Index: AMR 51/002/2004)

USA: "Where is the compassion?" - The imminent execution of Scott Panetti, mentally ill offender
(AI Index: AMR 51/011/2004)

USA: Another Texas injustice - the case of Kelsey Patterson, mentally ill man facing execution
(AI Index: AMR 51/047/2004)

USA: Osvaldo Torres, Mexican national denied consular rights, scheduled to die
(AI Index: AMR 51/057/2004)

USA: Undermining security -

had conducted its first ARB.

The government informed the detainees that they could file habeas corpus petitions in federal court, giving them the address of the District Court in Washington DC. However, it also argued in the same court that the detainees had no basis under constitutional or international law to challenge the lawfulness of their detention. By the end of the year, six months after the Supreme Court ruling, no detainee had had the lawfulness of his detention judicially reviewed.

Detentions in Afghanistan and Iraq

In August, the Independent Panel to Review Department of Defense Detention Operations, appointed by Secretary of Defense Donald Rumsfeld following the publication of photographs of torture and ill-treatment committed by US personnel in Abu Ghraib prison in Iraq (see below), reported that since the invasions of Afghanistan and Iraq, about 50,000 people had been detained during US military and security operations.

US forces operated some 25 detention facilities in Afghanistan and 17 in Iraq (see below). Detainees were routinely denied access to lawyers and families. In Afghanistan, the International Committee of the Red Cross (ICRC) had access only to some detainees in Bagram and Kandahar air bases.

Detentions in undisclosed locations

A number of detainees, reported to be those considered by the US authorities to have high intelligence value, were alleged to remain in secret detention in undisclosed locations. In some cases, their situation amounted to "disappearance". Some individuals were believed to have been held in secret locations for as long as three years. The refusal or failure of the US authorities to clarify the whereabouts or status of the detainees, leaving them outside the protection of the law for a prolonged period, clearly violated the standards of the UN Declaration on the Protection of All Persons from Enforced Disappearance.

Allegations that the US authorities were involved in the secret transfer of detainees between countries, exposing detainees to the risk of torture and ill-treatment, continued.

Military commissions

By the end of the year, 15 detainees were subject to the 2001 Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism. Detainees named under the Military Order can be detained without charge or trial or tried before a military commission. Military commissions are executive bodies, not independent or impartial courts, with the power to hand down death sentences; there is no right of appeal against their decisions to any court.

Four of the 15 – Yemeni nationals Ali Hamza Ahmed Sulayman al Bahlul and Salim Ahmed Hamdan; Australian national David Hicks; and Ibrahim Ahmed Mahmoud al Qosi of Sudan – were charged with conspiracy to commit war crimes and other offences. The first pre-trial hearings were held for these four detainees in August.

On 8 November, US District Court Judge James Robertson presiding over Salim Hamdan's habeas corpus appeal issued an order stating that Salim Hamdan could not be tried by military commission as charged. Judge Robertson ordered that unless and until a "competent tribunal", as required under Article 5 of the Third Geneva Convention, determined that Salim Hamdan was not entitled to prisoner of war status, he could only be tried by court-martial under the USA's Uniform Code of Military Justice.

Judge Robertson held that even if Salim Hamdan was found not to have prisoner of war status by a "competent tribunal" which satisfied the requirements of the Third Geneva Convention (which the judge said neither presidential nor CSRT determinations would satisfy), his trial before the military commission would be unlawful because of military commission rules permitting the exclusion of the defendant from certain sessions and the withholding of certain classified or "protected" evidence from him. Military commission proceedings were still suspended at the end of the year, with the government having appealed against Judge Robertson's ruling.

Torture and ill-treatment of detainees outside the USA

Violations of human dignity, the rule of law and the National Security Strategy in "war on terror" detentions
(AI Index: AMR 51/061/2004)

USA: An open letter to President George W. Bush on the question of torture and cruel, inhuman or degrading treatment
(AI Index: AMR 51/078/2004)

USA: Appealing for justice – Supreme Court hears arguments against the detention of Yaser Esam Hamdi and José Padilla
(AI Index: AMR 51/065/2004)

USA: Restoring the rule of law – the right of Guantánamo detainees to judicial review of the lawfulness of their detention
(AI Index: AMR 51/093/2004)

USA: A deepening stain on US justice
(AI Index: AMR 51/130/2004)

USA: Human dignity denied – torture and accountability in the "war on terror"
(AI Index: AMR 51/145/2004)

USA: Guantánamo: Military commissions – Amnesty International observer's notes, No. 3 – Proceedings suspended following order by US federal judge
(AI Index: AMR 51/157/2004)

USA: Excessive and lethal force? Amnesty International's concerns about deaths and ill-treatment involving police use of tasers
(AI Index: AMR 51/139/2004)

USA: Proclamations are not enough, double standards must end – more than words needed this Human Rights Day
(AI Index: AMR 51/171/2004)

All AI documents on United States of America

Photographic evidence of the torture and ill-treatment of detainees in Abu Ghraib prison in Iraq by US soldiers became public in late April, causing widespread national and international concern. President Bush and other officials immediately asserted that the problem was restricted to Abu Ghraib and a few wayward soldiers.

On 22 June, after the leaking of earlier government documents relating to the "war on terror" suggesting that torture and ill-treatment had been envisaged, the administration took the step of declassifying selected documents to "set the record straight". However, the released documents showed that the administration had sanctioned interrogation techniques that violated the UN Convention against Torture and that the President had stated in a central policy memorandum dated 7 February 2002 that, although the USA's values "call for us to treat detainees humanely", there are some "who are not legally entitled to such treatment". The documents discussed, among other things, ways in which US agents could avoid the international prohibition on torture and other cruel, inhuman or degrading treatment, including by arguing that the President could override international and national laws prohibiting such treatment. These and other documents also indicated that President Bush's decision not to apply the Geneva Conventions to detainees captured in Afghanistan followed advice from his legal counsel, Alberto Gonzales, that this would free up US interrogators in the "war on terror" and make future prosecutions of US agents for war crimes less likely. Following the presidential elections in November, President Bush nominated Alberto Gonzales to the post of Attorney General in his new administration.

On 30 December, shortly before Alberto Gonzales' nomination hearings in the Senate, the Justice Department replaced one of its most controversial memorandums on torture, dated August 2002. Although the new memorandum was an improvement on its predecessor, much of the original version lived on in a Pentagon Working Group Report on Detainee Interrogations in the Global War on Terrorism, dated 4 April 2003, which remained operational at the end of the year.

A February report by the ICRC on abuses by Coalition forces in Iraq, which in some cases were judged to be "tantamount to torture", was also leaked as was the report of an investigation by US Army Major General Antonio Taguba. The Taguba report had found "numerous incidents of sadistic, blatant, and wanton criminal abuses" against detainees in Abu Ghraib prison between October and December 2003. It had also found that US agents in Abu Ghraib had hidden a number of detainees from the ICRC, referred to as "ghost detainees". It was later revealed that one of these detainees had died in custody, one of several such deaths that were revealed during the year where torture or ill-treatment was thought to be a contributory factor.

During the year, the authorities initiated various criminal investigations and prosecutions against individual soldiers as well as investigations and reviews into interrogation and detention policies and practices. The investigations found that there had been "approximately 300 recorded cases of alleged abuse in Afghanistan, Guantánamo and Iraq." On 9 September, Major Paul Kern, who oversaw one of the military investigations, told the Senate Armed Services Committee that there may have been as many as 100 cases of "ghost detainees" in US custody in Iraq. Secretary of Defense Rumsfeld admitted to having authorized the Central Intelligence Agency (CIA) to keep at least one detainee off any prison register.

However, there was concern that most of the investigations consisted of the military investigating itself, and did not have the power to carry the investigation into the highest levels of government. The activities of the CIA in Iraq and elsewhere, for example, remained largely shrouded in secrecy. No investigation dealt with the USA's alleged involvement in secret transfers between countries and any torture or ill-treatment that may have ensued. Many documents remained classified. AI called for a full commission of inquiry into all aspects of the USA's "war on terror" and interrogation and detention policies and practices.

During the year, released detainees alleged that they had been tortured or ill-treated while in US custody in Afghanistan and Guantánamo. Evidence also emerged that others, including Federal Bureau of Investigation (FBI) agents and the ICRC, had found that such abuses had been committed against detainees.

Detentions of 'enemy combatants' in the USA

In June the US Supreme Court ruled that Yaser Esam Hamdi, a US citizen held for more than two years in military custody without charge or trial as an "enemy combatant", was entitled to due process and habeas corpus review of his detention by the US courts. His case was remanded for further proceedings before the lower courts. While the latter were pending, he was released from US custody in October and transferred to Saudi Arabia, under conditions agreed between his lawyers and the US government. These included renouncing his US citizenship and undertaking not to leave Saudi Arabia for five years and never to travel to Afghanistan, Iraq, Israel, Pakistan or Syria.

José Padilla, a US national, and Ali-Saleh Kahlah Al-Marri, a Qatari national, remained detained without charge or trial as "enemy combatants". José Padilla had filed a similar petition to Yaser Hamdi before the US Supreme Court but the Court rejected his petition on the grounds that his appeal had been filed in the wrong jurisdiction. The case was pending a rehearing in South Carolina, where he was detained in a military prison at the end of 2004.

Prisoners of conscience

Conscientious objectors Staff Sergeant Camilo Mejía Castillo and Sergeant Abdullah William Webster were imprisoned; they were prisoners of conscience. Both men remained in prison at the end of the year.

Staff Sergeant Camilo Mejía Castillo was sentenced to one year's imprisonment for desertion after he refused to return to his unit

in Iraq on moral grounds relating to his misgivings about the legality of the war and the conduct of US troops towards Iraqi civilians and prisoners. His trial in May went ahead despite a pending decision by the army on his application for conscientious objector status.

In June, Sergeant Abdullah William Webster, who had served in the US army since 1985, was sentenced to 14 months' imprisonment and loss of salary and benefits for refusing to participate in the war in Iraq on the basis of his religious beliefs. He had been ordered to deploy to Iraq despite submitting an application to be reassigned to non-combatant services. His application for conscientious objector status was refused on the ground that his objection was not to war in general but to a particular war.

Refugees, migrants and asylum-seekers

In November, National Public Radio (NPR) reported allegations of abuse of immigration detainees held at three New Jersey jails, including Passaic Jail and Hudson County Correctional Center. They included claims that two prisoners were beaten while handcuffed and that others were bitten by guard dogs. AI had reported on similar abuses in 2003. Most of the alleged victims in the NPR report were deported before investigations could be completed. The Department of Homeland Security said it was reviewing various contract detention facilities but did not confirm which jails were covered in the review.

Ill-treatment and excessive use of force by law enforcement officials

There were reports of ill-treatment and deaths in custody involving "new generation" tasers: powerful dart-firing electroshock weapons deployed or trialled by more than 5,000 US police and correctional agencies. More than 40 people died after being struck by US police tasers, bringing to more than 70 the total number of such deaths reported since 2001. While coroners generally attributed cause of death to factors such as drug intoxication, in at least five cases they found the taser played a role.

Most of the people who died were unarmed men who did not appear to pose a serious threat when they were electroshocked. Many were subjected to multiple shocks and some to additional force such as pepper spray or dangerous restraint holds, including hogtying (placing someone face-down with their hands and feet bound together from behind).

There were reports that tasers were used by officers routinely to shock people who were mentally disturbed or simply refused to obey commands. Children and the elderly were among those shocked. In most such cases, the officers involved were cleared of wrongdoing. In some departments tasers had become the most common force tool used by officers against a wide range of suspects.

AI reiterated its call on the US authorities to suspend use and transfers of tasers and other stun weapons pending a rigorous, independent inquiry into their use and effects.

Death penalty

In 2004, 59 people were executed, bringing to 944 the total number of prisoners put to death since the US Supreme Court lifted a moratorium on executions in 1976. Texas accounted for 23 of the year's executions, and 336 of all the executions in the USA since 1976. Five people were released from death row in 2004 on grounds of innocence, bringing to 117 the total number of such cases since 1973.

Eight people prosecuted in the Texas jurisdiction of Harris County were executed during the year, despite concern around the reliability of forensic evidence processed through the Houston Police Department (HPD) crime laboratory where serious problems had been uncovered in 2003. In October, a judge on the Texas Court of Criminal Appeals said that there should be "a moratorium on all executions in cases where convictions were based on evidence from the HPD crime lab until the reliability of the evidence has been verified". His was the only dissenting voice when the Court denied death row inmate Dominique Green's request for a stay of execution on the basis of concern around the accuracy of the HPD's ballistics work in his case, and the discovery of 280 boxes of mislabelled evidence that could affect thousands of criminal cases. Dominique Green was executed on 26 October.

The USA continued to contravene international law by using the death penalty against child offenders – people who were under 18 at the time of the crime. Around 70 child offenders remained on death row during the year, more than a third of them in Texas.

- In January, the US Supreme Court agreed to hear an appeal from the State of Missouri in the case of Christopher Simmons, who was 17 years old at the time of the crime. The Missouri Supreme Court had overturned his death sentence in 2003 on the grounds that a national consensus had evolved against the execution of child offenders. The scheduled executions of a number of child offenders were stayed pending the US Supreme Court's ruling, which was expected in early 2005.

- On 31 March, the International Court of Justice (ICJ) handed down its judgement following a lawsuit brought by Mexico on behalf of its nationals arrested, denied their consular rights, and sentenced to death in the USA. The ICJ found that the USA had violated its international obligations under the Vienna Convention on Consular Relations and that it must provide effective judicial review and reconsideration of the impact of the violations on the cases of the foreign nationals involved. The ICJ noted with "great concern" that an execution date had been set for Osvaldo Torres Aguilera, one of the

Mexican nationals named in the lawsuit. Osvaldo Torres' execution was subsequently commuted by the governor of Oklahoma following an appeal for clemency from the President of Mexico and a recommendation for commutation from the state clemency board. On 10 December, the US Supreme Court agreed to hear the appeal of José Medellin, a Mexican national on death row in Texas, to determine what effect US courts should give to the ICJ ruling. The case was due to be considered during 2005.

Prisoners with histories of serious mental illness continued to be sentenced to death and executed.

- Charles Singleton was executed in Arkansas on 6 January. At times on death row, his mental illness had been so acute that he had been forcibly medicated.
- Kelsey Patterson, diagnosed as suffering from paranoid schizophrenia, was executed in Texas on 18 May. The Texas governor rejected a recommendation for clemency from the state Board of Pardons and Paroles in his case.
- On 5 August James Hubbard was executed in Alabama. He was 74 years old – the oldest person to be put to death in the USA since 1977 – and had been on death row for more than a quarter of a century. James Hubbard was reported to suffer from dementia which sometimes led him to forget who he was and why he was on death row.

AI country visits

AI delegates visited Yemen in April and spoke with relatives of detainees from the Gulf region held in Guantánamo Bay. An AI delegate attended pre-trial military commission hearings in Guantánamo Bay in August and November.

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Amnesty International

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Amnesty International Takes Aim at U.S.

Amnesty International Takes Aim at U.S., Calling Guantanamo Bay 'The Gulag of Our Time'

By PAISLEY DODDS

The Associated Press

May. 25, 2005 - Amnesty International branded the U.S. prison camp at Guantanamo Bay a human rights failure Wednesday, calling it "the gulag of our time" as it released a report that offers stinging criticism of the United States and its detention centers around the world.

The 308-page report accused the United States of shirking its responsibility to set the bar for human rights protections and said Washington has instead created a new lexicon for abuse and torture. Amnesty International called for the camp to be closed.

"Attempts to dilute the absolute ban on torture through new policies and quasi-management speak, such as 'environmental manipulation, stress positions and sensory manipulation,' was one of the most damaging assaults on global values," the annual report said.

Some 540 prisoners from about 40 countries are being held at the U.S. detention center in Cuba. More than 200 others have been released, though some have been jailed in their countries; many have been held for three years without charge.

"Guantanamo has become the gulag of our time," Amnesty Secretary General Irene Khan said.

A spokesman for the Department of Defense declined to comment on the report, saying he had not seen it. But Navy Lt. Cmdr. Joe Carpenter said the U.S. government continues to be a leader in human rights, treating detainees humanely and investigating all claims of abuse.

At least 10 cases of abuse or mistreatment have been documented and investigated at Guantanamo. Several other cases are pending.

"During the year, released detainees alleged that they had been tortured or ill-treated while in U.S. custody in Afghanistan and Guantanamo. Evidence also emerged that others, including Federal Bureau of Investigation agents and the International Committee of the Red Cross, had found that such abuses had been committed against detainees," the report said.

The Geneva-based ICRC is the only independent group to have access to the Guantanamo detainees. Amnesty has been refused access to the prison camp, although it was allowed to watch the pretrial hearings for the military commissions. The commissions, which could try 15 prisoners facing charges, were stalled by a U.S. court's decision that is under appeal.

"There's a myth going around that there's some kind of rule of law being applied," said Rob Freer, an Amnesty official who specializes in detention issues.

Amnesty acknowledged the human rights deficiencies came with a rash of terrorist actions, including the televised beheadings of captives in Iraq.

Still, the group said, governments forgot many victims in the fight against terrorism.

Khan singled out Sudan as one of the worst human rights violations of last year, saying that not only had the Sudanese government turned its back on its own people, but that the United Nations and the African Union acted too late to help.

She also said the African Union needed to do more about speaking out against human rights abuses in Africa, singling out Zimbabwe. She talked about human rights failures being compounded by big business' complicity.

Amnesty's report also pointed to Haiti, saying human rights violators were allowed to regain positions of power after armed rebels and former soldiers ousted former President Jean-Bertrand Aristide last year.

Amnesty said Congo's government offered no effective response to the systematic rape of tens of thousands of women and children and warned of a downward spiral of lawlessness and instability in Afghanistan.

In Asia, the report said violence and discrimination against women was rampant last year, ranging from acid attacks for unpaid dowries in Bangladesh to forced abortion in China, rape by soldiers in Nepal and domestic beatings in Australia.

Amnesty also said the ouster of the conservative Islamic Taliban regime in 2001 by U.S.-led forces did little to bring relief to women.

In the western Herat region, Amnesty reported that hundreds of women had set fire to themselves to escape violence in the home or forced marriage.

"Fear of abductions by armed groups forced women to restrict their movements outside the home," Amnesty said. Even within families, "extreme restrictions" on women's behavior and high levels of violence persisted, it said.

While criticizing the detention mission at Guantanamo, Amnesty said one sign of hope was the U.S. Supreme Court's decision in June that let prisoners challenge the basis of their detention. It also said it was encouraging that Britain's high court lords ruled on the indefinite detention without charge or trial of "terrorist suspects."

"The challenge for the human rights movement is to harness the power of civil society and push governments to deliver on their human rights promises," Khan said.

On the Net:

Amnesty International: http://www.amnesty.org

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Amnesty International Blast U.S. And Others On Human Rights

Amnesty International Blast U.S. And Others On Human Rights

May 25, 2005 11:25 a.m. EST

London, England (AHN) – Watchdog group Amnesty International says human rights around the world are heading backwards with America as one of the worst offenders.

Amnesty officials say governments worldwide are following the lead of the United States using the rule of law to take away more and more individual rights.

In the Amnesty International 2005 annual report, Secretary General Irene Khan says, "The USA as the unrivalled political, military and economic hyper-power sets the tone for governmental behavior worldwide. When the most powerful country in the world thumbs its nose at the rule of law and human rights, it grants a license to others to commit abuse with impunity."

Amnesty cites photos taken in the Abu Ghraib Iraqi prison scandal it says were never adequately investigated along with the detention of "enemy combatants" in Cuba.

Khan says, "The detention facility at Guantanamo Bay has become the gulag of our times, entrenching the practice of arbitrary and indefinite detention in violation of international law."

In addition, she also points to Washington's attempts to circumvent its own ban on the use of torture.

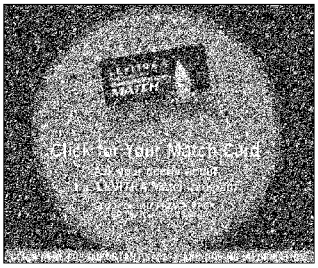
Speaking of the Bush Administration, the report says, "During his first term in office, the USA proved to be far from the global human rights champion it proclaimed itself to be."

However, the United States is not the only nation under scrutiny.

Officials say, "The human rights abuses in Iraq and Afghanistan were far from being the only negative repercussions of the response to the terrible events of Sept. 11, 2001. Since that day, the framework of international human rights standards has been attacked and undermined by both governments and armed groups."

The report contends the increasingly blurred distinction between the war on terror and the global drug war prompting governments in Latin America to use military response to combat crimes traditionally handled by police.

Asia is also criticized for its treatment of it citizens, especially women



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and children.

Officials say Africa remains embroiled in civil wars and political conflict. Amnesty calls the failure of the global community to do anything to end the slaughter in Darfur region of the Sudan shameful.

Khan also blasts the United Nations saying, "The U.N. Commission of Human Rights has become a forum for horse-trading on human rights. Last year the Commission dropped Iraq from scrutiny, could not agree on action on Chechnya, Nepal or Zimbabwe and was silent on Guantanamo Bay."

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Amnesty International slams U.S. in annual human rights report

By PAISLEY DODDS
Associated Press

LONDON -- Amnesty International branded the U.S. prison camp in Guantanamo Bay a human rights failure Wednesday, releasing a 308-page report that offers stinging criticism of the United States and its detention centers around the world.

As a superpower, the United States has shirked its responsibility to set the bar for human rights protections and has instead created a new lexicon for abuse and torture, Amnesty Secretary General Irene Khan said for the London-based group's annual report launch.

"The United States ... sets the tone for governmental behavior worldwide," Khan said.

"Attempts to dilute the absolute ban on torture through new policies and quasi-management speak, such as 'environmental manipulation, stress positions and sensory manipulation,' was one of the most damaging assaults on global values."

Some 540 prisoners from about 40 countries are currently being held at the U.S. prison camp in Guantanamo Bay, Cuba. More than 200 others have been released, though some are now jailed in their countries; many have been held for three years without charge.

The U.S. government says it continues to be a leader in human rights, treating detainees humanely and investigating all claims of abuse, according to Navy Lt. Cmdr. Joe Carpenter, a spokesman for the Department of Defense. He had not seen the report and declined comment on it.

At least 10 cases of abuse or mistreatment have been documented and investigated at Guantanamo. There are several other cases that are pending.

"During the year, released detainees alleged that they had been tortured or ill-treated while in U.S. custody in Afghanistan and Guantanamo. Evidence also emerged that others, including Federal Bureau of Investigation agents and the International Committee of the Red Cross, had found that such abuses had been committed against detainees," the report said.

The Geneva-based ICRC is the only independent group to have access to the Guantanamo detainees. Amnesty has been refused access to the prison camp, although it was allowed to watch the pretrial hearings for the military commissions. The commissions, which could try 15 prisoners facing charges, were stalled by a U.S. court's decision that is under appeal.

"There's a myth going around that there's some kind of rule of law being applied," said Rob Freer, an Amnesty official who specializes in detention issues.

Amnesty acknowledged the human rights deficiencies came with a rash of terrorist actions, including the televised beheadings of captives in Iraq.

Still, the group said, governments forgot many victims in the fight against terrorism.

onthenet
Amnesty International Report 2005

The Sudanese government generated a human rights catastrophe while the international community did too

little too late to address the crisis, Amnesty said. The group also pointed to Haiti, where human rights violators were allowed to regain positions of power after armed rebels and former soldiers ousted former President Jean-Bertrand Aristide last year.

Amnesty said in the Democratic Republic of Congo, there was no effective response to the systematic rape of tens of thousands of women and children, and in Afghanistan, a downward spiral of lawlessness and instability had shaken the country once again.

While criticizing the U.S. detention mission at Guantanamo, Amnesty said one sign of hope was the U.S. Supreme Court's decision in June that allowed prisoners to challenge the basis of their detention. It also said it was encouraging that Britain's high court lords ruled on the indefinite detention without charge or trial of "terrorist suspects."

"The challenge for the human rights movement is to harness the power of civil society and push governments to deliver on their human rights promises," said Khan.

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Amnesty International takes aim at U-S in annual human rights report

LONDON The Amnesty International human rights report out today lists the U-S as a top offender.

The annual report says the Guantanamo Bay prison in Cuba for suspected militants has become "the gulag of our time."

The human rights group acknowledges the provocation of such terrorist acts as hostage beheadings in Iraq. But it says instead of setting a high standard for the world to follow, the U-S has diluted what's supposed to be an absolute ban on torture. It says the U-S has developed such euphemisms as "environmental manipulation, stress positions and sensory manipulation."

The Bush administration has yet to react specifically to the Amnesty International report, although a Pentagon spokesman says the U-S treats prisoners humanely and continues to be a leader in human rights.

The report also singles out human rights violations in places like Sudan, Zimbabwe and Haiti. And it says Afghanistan is again being shaken by a downward spiral of lawlessness and instability

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Chairman SENSENBRENNER. Pending when the Committee recessed was an amendment that was offered by the gentlewoman from California, Ms. Lofgren, on which the gentleman from Ohio, Mr. Chabot, had reserved a point of order. The amendment by the gentlewoman from California was considered as read and open for amendment at any point.

The chair recognizes the gentlewoman from California for 5 minutes.

Ms. LOFGREN. Thank you, Mr. Chairman.

This, as Members have pointed out, is an amendment that has been considered by this Committee on numerous occasions. But I think all of us, especially after 9/11, have, if possible, an even stronger feeling about our nation's flag. And I think all of us, when we walk over to the Capitol, and for me especially at night, when you see our flag, it really does something to our hearts about what this country stands for and how committed each and every one of us is to our country and to the freedoms that our flag stands for.

One of those freedoms is freedom of speech. And one of the things that has made our country strong and free is the proposition that Americans are free to express their opinions even when we don't agree with those opinions. And as has been mentioned by other Members, the amendment before us would be, if adopted, the first time that the first amendment to the Constitution of the United States had been altered by an amendment. I think that we would make a mistake to amend the first amendment. That's why our soldiers go off and fight for our country, to keep our freedoms down through the lines.

But I think there's another reason why this amendment has been offered, and that's to divert attention from something that we can do something about, and that's making sure that our veterans get what they are entitled to for the efforts they have made for their country. My amendment would make sure that this article would not take effect until Congress, by law, ensures that the veterans benefits promised to an individual in connection with that individual's enlistment or induction in the armed services cannot, after that enlistment or induction, be diminished.

Now, why is that important? Veterans are getting a raw deal today, and I think we all know it. In the Veterans Affairs Committee, the budget resolution we've adopted, the Veterans Committee is required to identify $155 million in benefit cuts in the next year, or $798 million in cuts to veterans benefits over the next 5 years. We know that while there was a small increase in some accounts, the need for care far exceeds what the Congress is providing. In fact, patient resources, without collections, have increased about 13 percent, but the number of patients has increased by 25 percent, leaving a 13 to 14 percent gap. And maybe that's one of the reasons why, according to the American Legion, I believe, 30,000 veterans are waiting 6 months or longer for an appoint at a veterans hospital. And the budget that we have adopted will not change that.

Now, when we take a look at what the budget does, this 13 to 14 percent gap in what we're funding and what veterans need also includes a co-payment that is going to double or triple what veterans are required to pay as a co-payment for their monthly supply of prescription drugs. And under the proposed budget, the Veterans

of Foreign Wars estimates that as many as 220,000 men and women veterans could lose benefits. In fact, the American Legion's national commander said this: No active-duty servicemember in harm's way should ever have to question the Nation's commitment to veterans. This is the wrong message at the wrong time to the wrong constituency.

And Thomas Corey, the national president of the Vietnam Veterans of America, said, and I quote: It does a disservice to those who donned the uniform to defend the rights, the principles and freedoms that we hold dear.

Last year, in a budget that was actually better than the one this year, then-VFW Commander Edward Banas, Sr. complained the funding package is a disgrace and a sham. To ask this Nation's veterans to subsidize their health care is outrageous. They have already paid for health care with their sweat and their blood.

I believe that symbols are important. But action—action to make sure that the veterans, the men and women who join and put their lives on the line; action to make sure that they get what they deserve—is what this Congress ought to do.

I strongly urge the Committee to adopt this amendment.

Chairman SENSENBRENNER. The time of the gentlewoman has expired. Does the gentleman from Ohio, Mr. Chabot, insist on his point of order?

Mr. CHABOT. The gentleman will state his point of order.

Mr. CHABOT. Mr. Chairman, I make a point of order that the amendment is not germane under House rules, as it does not relate to the underlying purpose of the resolution and attaches additional criteria to the ratification process. In addition, I would note that it's further not germane because the substance of the amendment is not within the jurisdiction of this Committee, but rather is within the jurisdiction of the Veterans Affairs Committee.

I yield back.

Ms. LOFGREN. On the point of order, Mr. Chairman.

Chairman SENSENBRENNER. The gentlewoman from California.

Ms. LOFGREN. I very much disagree. This Committee has exclusive jurisdiction over constitutional amendments. A constitutional amendment to provide that veterans of this country should get what they were promised by way of health care and benefits would not go to the Veterans Affairs Committee. All constitutional amendments go to the House Judiciary Committee. So I would urge that we adopt this amendment to the amendment and that we not duck this issue. This is important and we need to vote to adopt it and to move forward.

So I strongly believe that this is both germane and certainly more than appropriate.

I yield back.

Chairman SENSENBRENNER. The chair is prepared to rule. The gentleman from Ohio has made a point of order in which he argues that the amendment is not germane, one, because it deals with a different issue than the underlying bill, and secondly that, if it was a stand-alone provision, it would not be in the jurisdiction of the Committee.

The chair agrees with the gentlewoman from California and disagrees with the gentleman from Ohio on the second point. All constitutional amendments are within the jurisdiction of the Judiciary

Committee irrespective of subject. However, the chair agrees with the gentleman from Ohio that the amendment is not germane for the first part of his argument, in that it deals with a different topic than the underlying joint resolution.

Therefore, the chair sustains the point of order of the gentleman from Ohio.

Are there further amendments?

Ms. LOFGREN. Mr. Chairman, I challenge the chair's ruling.

Chairman SENSENBRENNER. The gentlewoman from California appeals the decision of the chair. The gentleman from North Carolina moves to table the appeal.

Those in favor of tabling the appeal of the decision of the chair will, as your names are called, answer aye; those opposed, no. The clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. Aye.

The CLERK. Mr. Coble, aye. Mr. Smith?

Mr. SMITH. Aye.

The CLERK. Mr. Smith, aye. Mr. Gallegly?

Mr. GALLEGLY. Aye.

The CLERK. Mr. Gallegly, aye. Mr. Goodlatte?

[No response.]

The CLERK. Mr. Chabot?

Mr. CHABOT. Aye.

The CLERK. Mr. Chabot, aye. Mr. Lungren?

Mr. LUNGREN. Aye.

The CLERK. Mr. Lungren, aye. Mr. Jenkins?

Mr. JENKINS. Aye.

The CLERK. Mr. Jenkins, aye. Mr. Cannon?

Mr. CANNON. Aye.

The CLERK. Mr. Cannon, aye. Mr. Bachus?

[No response.]

The CLERK. Mr. Inglis?

Mr. INGLIS. Aye.

The CLERK. Mr. Inglis, aye. Mr. Hostettler?

Mr. HOSTETTLER. Aye.

The CLERK. Mr. Hostettler, aye. Mr. Green?

[No response.]

The CLERK. Mr. Keller?

Mr. KELLER. Aye.

The CLERK. Mr. Keller, aye. Mr. Issa?

Mr. ISSA. Aye.

The CLERK. Mr. Issa, aye. Mr. Flake?

[No response.]

The CLERK. Mr. Pence?

[No response.]

The CLERK. Mr. Forbes?

[No response.]

The CLERK. Mr. King?

Mr. KING. Aye.

The CLERK. Mr. King, aye. Mr. Feeney?

[No response.]

The CLERK. Mr. Franks?

Mr. FRANKS. Aye.
The CLERK. Mr. Franks, aye. Mr. Gohmert?
Mr. GOHMERT. Aye.
The CLERK. Mr. Gohmert, aye. Mr. Conyers?
Mr. CONYERS. No.
The CLERK. Mr. Conyers, no. Mr. Berman?
[No response.]
The CLERK. Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
Mr. NADLER. No.
The CLERK. Mr. Nadler, no. Mr. Scott?
[No response.]
The CLERK. Mr. Watt?
[No response.]
The CLERK. Ms. Lofgren?
Ms. LOFGREN. No.
The CLERK. Ms. Lofgren, no. Ms. Jackson Lee?
[No response.]
The CLERK. Ms. Waters?
[No response.]
The CLERK. Mr. Meehan?
[No response.]
The CLERK. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
[No response.]
The CLERK. Mr. Weiner?
Mr. WEINER. No.
The CLERK. Mr. Weiner, no. Mr. Schiff?
Mr. SCHIFF. No.
The CLERK. Mr. Schiff, no. Ms. Sánchez?
Ms. SÁNCHEZ. No.
The CLERK. Ms. Sánchez, no. Mr. Smith?
[No response.]
The CLERK. Mr. Van Hollen?
Mr. VAN HOLLEN. No.
The CLERK. Mr. Van Hollen, no. Mr. Chairman?
Chairman SENSENBRENNER. Aye.
The CLERK. Mr. Chairman, aye.
Chairman SENSENBRENNER. Further Members who wish to cast or change their vote? The gentleman from Virginia, Mr. Goodlatte?
Mr. GOODLATTE. Aye.
The CLERK. Mr. Goodlatte, aye.
Chairman SENSENBRENNER. The gentleman from Wisconsin, Mr. Green?
Mr. GREEN. Aye.
The CLERK. Mr. Green, aye.
Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Scott?
Mr. SCOTT. No.
The CLERK. Mr. Scott, no.
Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Watt?
Mr. WATT. No.

The CLERK. Mr. Watt, no.

Chairman SENSENBRENNER. Further Members who wish to cast or change their vote? If not, the clerk will report.

The CLERK. Mr. Chairman, there are 17 ayes and 9 noes.

Chairman SENSENBRENNER. And the motion to table the appeal from the decision of the chair is agreed to.

Are there further amendments?

Ms. LOFGREN. Mr. Chairman?

Chairman SENSENBRENNER. The gentlewoman from California, Ms. Lofgren.

Ms. LOFGREN. I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to H.J. Res. 10, offered by Ms. Lofgren of California. Page 2, strike lines 8 and 9, and insert the following: Every flag of the United States manufactured in or imported into the United States after the effective date of this amendment must be manufactured out of flame-resistant material.

Amend the title so as to read, "Joint Resolution Proposing an Amendment to the Constitution of the United States Requiring Every Flag of the United States to be Manufactured Out of Flame-Resistant Material."

Chairman SENSENBRENNER. The gentlewoman from California is recognized for 5 minutes.

[The amendment follows:]

AMENDMENT TO H. J. RES. 10

OFFERED BY MS. ZOE LOFGREN OF CALIFORNIA

Page 2, strike lines 8 and 9 and insert the following: "Every flag of the United States manufactured in, or imported into, the United States after the effective date of this amendment must be manufactured out of flame-resistant material.".

Amend the title so as to read: "Joint resolution proposing an amendment to the Constitution of the United States requiring every flag of the United States to be manufactured out of flame-resistant material."

Ms. LOFGREN. Mr. Chairman, this is actually the other side of the coin of Mr. Scott's amendment. As I said in the discussion of the prior amendment, who loves our flag is not the question here today. I love our flag. And I am sure that the proponents of the constitutional amendment love our flag. The question is how to protect our Constitution, and can we also do something to protect the symbol of freedom that our flag is.

As many of you know from my efforts on the Intellectual Property Subcommittee, I am a person who believes in technology. And I believe that when there are technological measures that can be taken that disturb in no way the freedoms that we have, that that is a better remedy than going about amending the first amendment to the Constitution.

Now, I don't want to see people burning our flag. And if this amendment were passed, that would not be possible. Our flag could not be burned. And I would like to see that because it really burns me up and makes me mad to see people who would abuse our flag and burn our flag. So I think this is a much better approach to preventing that kind of misbehavior while still making sure that we do nothing to disturb the first amendment to the Constitution. And after all, as Mr. Scott pointed out in his earlier amendment in the morning, what we're talking about is the content of action, not the action itself.

So I don't want to unduly prolong this debate. I think this is meritorious.

Mr. GALLEGLY. Would the gentlelady yield?

Ms. LOFGREN. I would yield, Mr. Gallegly.

Mr. GALLEGLY. I appreciate the spirit in which you have introduced this amendment. But the amendment that you are talking about has to do with desecrating the flag. And obviously, as much as I'm appalled by anyone that would burn the flag, I'm equally as appalled at anyone that would desecrate the flag in other ways. So I think that the real issue here is desecrating the flag, not only the terrible act of burning the flag. So I——

Ms. LOFGREN. Reclaiming my time. If the gentleman is offering a friendly amendment to the amendment that would add making the flag stain-resistant, I would accept that friendly amendment.

Mr. GALLEGLY. If the gentlelady would further yield, would you agree to make it a capital offense in the case that someone decided to——

Ms. LOFGREN. That would be up to Congress in later——

Mr. GALLEGLY. I would yield back.

Ms. LOFGREN. I actually retain the time. This is a constitutional amendment that would be part of the enabling legislation. I would say, as the Member probably knows, I am not an opponent of the death penalty in every case and I have voted for the death penalty in appropriate cases. Whether this would be such a case is something that we should have hearings on.

Unless there is further discussion, I would yield back.

Chairman SENSENBRENNER. The question is on the amendment offered by the gentlewoman from California. Those in favor will say aye; opposed, no.

The chair believes the noes have it. The noes have it and the amendment is not agreed to.

Are there further amendments?

If there are no further amendments, a reporting quorum is present. The question occurs on the motion to report H.J. Res. 10 favorably. All in favor will say aye; opposed, no.

The ayes appear to have it.

Mr. CONYERS. Record vote.

Chairman SENSENBRENNER. A record vote is requested. Those in favor of the motion to report H.J. Res. 10 favorably will, as your names are called, answer aye; those opposed, no. The clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. Aye.

The CLERK. Mr. Coble, aye. Mr. Smith?

Mr. SMITH. Aye.

The CLERK. Mr. Smith, aye. Mr. Gallegly?

Mr. GALLEGLY. Aye.

The CLERK. Mr. Gallegly, aye. Mr. Goodlatte?

[No response.]

The CLERK. Mr. Chabot?

Mr. CHABOT. Aye.

The CLERK. Mr. Chabot, aye. Mr. Lungren?

Mr. LUNGREN. Aye.

The CLERK. Mr. Lungren, aye. Mr. Jenkins?
Mr. JENKINS. Aye.
The CLERK. Mr. Jenkins, aye. Mr. Cannon?
Mr. CANNON. Aye.
The CLERK. Mr. Cannon, aye. Mr. Bachus?
[No response.]
The CLERK. Mr. Inglis?
Mr. INGLIS. Aye.
The CLERK. Mr. Inglis, aye. Mr. Hostettler?
[No response.]
The CLERK. Mr. Green?
Mr. GREEN. Aye.
The CLERK. Mr. Green, aye. Mr. Keller?
Mr. KELLER. Aye.
The CLERK. Mr. Keller, aye. Mr. Issa?
Mr. ISSA. Aye.
The CLERK. Mr. Issa, aye. Mr. Flake?
[No response.]
The CLERK. Mr. Pence?
[No response.]
The CLERK. Mr. Forbes?
[No response.]
The CLERK. Mr. King?
Mr. KING. Aye.
The CLERK. Mr. King, aye. Mr. Feeney?
[No response.]
The CLERK. Mr. Franks?
Mr. FRANKS. Aye.
The CLERK. Mr. Franks, aye. Mr. Gohmert?
Mr. GOHMERT. Aye.
The CLERK. Mr. Gohmert, aye. Mr. Conyers?
Mr. CONYERS. No.
The CLERK. Mr. Conyers, no. Mr. Berman?
[No response.]
The CLERK. Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
Mr. NADLER. No.
The CLERK. Mr. Nadler, no. Mr. Scott?
Mr. SCOTT. No.
The CLERK. Mr. Scott, no. Mr. Watt?
[No response.]
The CLERK. Ms. Lofgren?
Ms. LOFGREN. No.
The CLERK. Ms. Lofgren, no. Ms. Jackson Lee?
Ms. JACKSON LEE. No.
The CLERK. Ms. Jackson Lee, no. Ms. Waters?
[No response.]
The CLERK. Mr. Meehan?
[No response.]
The CLERK. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
[No response.]
The CLERK. Mr. Weiner?

[No response.]

The CLERK. Mr. Schiff?

[No response.]

The CLERK. Ms. Sánchez?

Ms. SÁNCHEZ. No.

The CLERK. Ms. Sánchez, no. Mr. Smith?

[No response.]

The CLERK. Mr. Van Hollen?

Mr. VAN HOLLEN. No.

The CLERK. Mr. Van Hollen, no. Mr. Chairman?

Chairman SENSENBRENNER. Aye.

The CLERK. Mr. Chairman, aye.

Chairman SENSENBRENNER. Are there further Members who wish to cast or change their vote? The gentleman from New York, Mr. Weiner?

Mr. WEINER. How am I recorded?

The CLERK. Mr. Chairman, Mr. Weiner is not recorded.

Mr. WEINER. No.

The CLERK. Mr. Weiner, no.

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Goodlatte?

Mr. GOODLATTE. Aye.

The CLERK. Mr. Goodlatte, aye.

Chairman SENSENBRENNER. The gentleman from Alabama, Mr. Bachus?

Mr. BACHUS. Aye.

The CLERK. Mr. Bachus, aye.

Chairman SENSENBRENNER. The gentleman from California, Mr. Schiff?

Mr. SCHIFF. No.

The CLERK. Mr. Schiff, no.

Chairman SENSENBRENNER. Further Members who wish to cast or change their vote? If not, the clerk will report.

The CLERK. Mr. Chairman, there are 17 ayes and 9 noes.

Chairman SENSENBRENNER. And the motion to report favorably is agreed to. Without objection, the staff is directed to make any technical and conforming changes and all Members will be given 2 days, as provided by the House rules, and wish to submit additional dissenting, supplemental, or minority views.

[Intervening business.]

Chairman SENSENBRENNER. The Chair would like to thank the Members and staff for their patience. We have completed a very ambitious agenda today. There will be no markup tomorrow because the agenda has been completed, and the Committee stands adjourned.

[Whereupon, at 3:43 p.m., the Committee was adjourned.]

ADDITIONAL VIEWS

The American flag serves a unique role as the symbol of our country's values and the embodiment of the rights guaranteed to all Americans under the United States Constitution—the supreme law of the land and the ultimate guardian of human rights in the United States. The protection of fundamental human rights was central to the purpose of our founding document, which serves as the longest-enduring written charter of government and a model of self-governance that has inspired the world. The United States stands as a bulwark against the tyranny that has marred human history, and as a beacon that inspires other peoples and nations. America is a catalyst for human freedom and liberty. In World War II, America's soldiers liberated millions and restored light to a darkened continent. During the Cold War, the United States gave voice to millions who aspired toward human dignity, freedom and liberty. Today, the struggle for freedom continues, and the United States continues to lead the effort to advance this noble cause. The United States Constitution has inspired and served as a model for numerous national constitutions and international (and regional) human rights norms.[1]

Despite this fact, at the Committee on the Judiciary's markup of H.J. Res. 10, the "Flag Protection Amendment," Ranking Member Conyers stated, "Amnesty International has said that we have one of the worst human rights records in the world." Mr. Chabot, Chairman of the House Constitution Subcommittee, asked for clarification, stating, "I think your statement was, Mr. Conyers, that according to that article the United States has one of the worst human rights records in the world." Mr. Chabot then asked Ranking Member Conyers, "Do you think it's correct[?]" to which Ranking Member Conyers replied, "Oh yes. Of course. Everything I say I believe is correct." Mr. Chabot then repeated the question, asking if Ranking Member Conyers believed that the United States has one of the worst human rights records in the world. Ranking Member Conyers stated, "Absolutely." Ranking Member Conyers was referring to Amnesty International Report 2005.[2] Amnesty International, however, does not "presume[] to rank governments or countries, nor desire[] to single out any regime or group of regimes as 'the worst on earth.'"[3]

In sharp contrast to Ranking Member Conyers' belief, Freedom House, a widely-respected, non-partisan, and broadly-based non-profit organization, consistently rates the United States in its Freedom in the World survey in the "most free" category. The United

[1] Louis Henkin, Gerald L. Neuman, Diane F. Orentlicher, & David W. Leebron, HUMAN RIGHTS 119 (Foundation Press 1999).

[2] *See* http://web.amnesty.org/library/Index/ENGPOL100012005 (Amnesty International Report 2005).

[3] Http://nobelprize.org/peace/laureates/1977/amnesty-lecture.html (Amnesty International—Nobel Lecture).

States also receives the highest rating in its commitment to respecting political rights and civil liberties.[4] The survey rates the rights and freedoms enjoyed by individuals and does not equate constitutional guarantees of human rights with the actual realization of these rights by citizens of countries it ranks.[5] Both laws and actual practices are factored into the rating decisions.[6] According to the survey, political rights enable people to participate freely in the political process, including the right to vote, compete for public office, and elect representatives who have a decisive impact on public policies and are accountable to the electorate.[7] Civil liberties allow for the freedoms of expression and belief, associational and organizational rights, rule of law, and personal autonomy without interference from the state.[8] The rule of law analysis encompasses the degree to which a country provides protection from police terror, unjustified imprisonment, exile, or torture.[9] The survey rates countries on both political rights and civil liberties, rating them on a scale of 1 to 7 with 1 representing the most free and 7 the least free.[10] The United States consistently receives a rating of 1 on both political rights and civil liberties.[11]

According to Louis Henkin, a highly respected and often-cited professor of human rights law:

> The United States has the oldest continuing commitment to "constitutionalism," including a commitment to individual rights and to the bill of rights as supreme constitutional law. It also has a long—perhaps the longest—history of constitutional government, including institutions to monitor and enforce respect for human rights. The international human rights movement, born during the Second World War, owes much to the example of the United States, and U.S. constitutional rights have been a principal source for international human rights law and a principal model for constitutional rights in the many new constitutions of old and new countries in the second half of the Twentieth Century.[12]

There is a broad, bipartisan, and long-standing consensus in the United States that the protection of human rights helps secure peace, deter aggression, promote the rule of law, combat crime and corruption, strengthen democracies, and prevent humanitarian crises.[13] Consequently, a central goal of U.S. foreign policy has been the promotion of respect of human rights. The United States Department of State Bureau of Democracy, Human Rights, and Labor compiles a 5,000 page annual report regarding the status of internationally-recognized human rights, which it transmits to Con-

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[4] *See* http://www.freedomhouse.org/ratings/allscore04.xls (Freedom in the World Country Ratings 1972–2003).

[5] Http://www.freedomhouse.org/research/freeworld/2004/methodology.htm (Freedom in the World 2004: Survey Methodology).

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *See* http://www.freedomhouse.org/research/freeworld/2005/table2005.pdf (Freedom in the World 2005 Table of Independent Countries Comparative Measures of Freedom).

[11] *See* http://www.freedomhouse.org/ratings/allscore04.xls (Freedom in the World Country Ratings 1972–2003).

[12] Henkin, *supra* note 1, at 119.

[13] *See* http://www.state.gov/g/drl/hr/ (U.S. Department of State Bureau of Democracy, Human Rights, and Labor: Human Rights).

gress.[14] As this report indicates, the United States' commitment to human rights extends beyond her own citizens to those of other countries. This commitment has most recently been manifested in America's liberation of Afghanistan and Iraq from totalitarian regimes. The struggle for human liberty continues on other fronts, and America will continue to lead this fight.

The American flag symbolizes America's enduring commitment to these values and merits protection from desecration. The flag has united America in times of crisis and continues to serve as an international symbol of freedom to those who must have it. As he had throughout his political life, in his Farewell Address, President Reagan evoked an image of America as a "shining city upon a hill" that has inspired the hopes and aspirations of all of mankind. Near the end of his address, President Reagan asked, "And how stands the city on this winter night?" He then answered by stating: "After 200 years, two centuries, she still stands strong and true on the granite ridge, and her glow has held steady no matter what storm. And she's still a beacon, still a magnet for all who must have freedom, for all the pilgrims from all the lost places who are hurtling through the darkness toward home."

This is the America that the signatories below saw then, and see still.

F. JAMES SENSENBRENNER, JR.
LAMAR SMITH.
ELTON GALLEGLY.
STEVE CHABOT.
DANIEL E. LUNGREN.
WILLIAM L. JENKINS.
CHRIS CANNON.
BOB INGLIS.
JOHN N. HOSTETTLER.
MARK GREEN.
RIC KELLER.
DARRELL ISSA.
MIKE PENCE.
J. RANDY FORBES.
STEVE KING.

[14] *See* http://www.state.gov/g/drl/rls/hrrpt/2004/index.htm (U.S. Department of State Bureau of Democracy, Human Rights, and Labor: Human Rights).

DISSENTING VIEWS

H.J. Res. 10, the so-called "Flag Protection Amendment," would mark the first time in our nation's history that the Constitution has ever been amended in order to curtail an existing right. In this instance, the proposed amendment would narrow the scope of the First Amendment's protection of free expression by allowing Congress to enact legislation prohibiting "physical desecration" of the flag of the United States. This dangerous and unnecessary assault on our fundamental liberties would set a terrible precedent. For the reasons set out below, we respectfully dissent.

BACKGROUND

This Constitutional amendment is a response to a pair of Supreme Court decisions, *Texas v. Johnson,* 491 U.S. 397 (1989) and *United States v. Eichman,* 496 U.S. 310 (1990), in which the Court held that state and Federal Government efforts to prohibit physical "desecration" of the flag by statute were content-based political speech restrictions and imposed unconstitutional limitations on that speech.[1]

The first flag desecration statutes originated in the States in the late 19th century after supporters failed to obtain Federal legislation prohibiting commercial or political "misuse" of the flag. During the period between 1897 and 1932, flag desecration statutes were enacted in every state. These statutes outlawed the use of the flag for a number of purposes, including commercial advertising, marking the flag for political, commercial or other purposes, or publicly mutilating, trampling, defacing, defiling or casting contempt, by words or action, upon the flag.[2]

Congress remained relatively silent on the issue throughout that period, approving the first Federal flag desecration law in 1968 in the aftermath of a highly publicized Central Park flag burning incident in protest against the Vietnam War. The 1968 Federal law made it illegal to "knowingly" cast "contempt" upon "any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it."[3] The law imposed a penalty of up to $1,000 in fines and/or 1 year in prison.

Shortly after passage of the 1968 law, the Supreme Court considered three notable cases concerning the flag; however, none of these decisions directly addressed the flag burning issue. In *Street v. New York,*[4] the Court ruled that New York could not convict a person for making verbal remarks disparaging the flag. In 1972,

[1] The proposed amendment reads, in its relevant part, "The Congress shall have power to prohibit the physical desecration of the flag of the United States." H.J. Res. 10 109th Cong. (2005).

[2] Most of these statutes were eventually struck down as unconstitutional in a series of lower court decisions, usually on the grounds of vagueness.

[3] Pub. L. 90–381, Sec. 1, 82 Stat. 291 (1989) (18 U.S.C. 700).

[4] 394 U.S. 576 (1969).

the Court ruled in *Smith v. Goguen,*[5] that Massachusetts could not prosecute a person for wearing a small cloth replica of the flag on the seat of his pants based on a state law making it a crime to publicly treat the U.S. flag with "contempt." The Court ruled that the law was unconstitutionally vague. In *Spence v. Washington,*[6] the Court overturned a Washington state "improper use" flag law, which, among other things, barred placing any marks or designs upon the flag or displaying such altered flags in public view. These decisions intimated, but did not expressly hold, that flag burning for political purposes constituted protected activity under the First Amendment.

In 1989, the Supreme Court addressed directly whether a flag burning statute violates the First Amendment in *Texas v. Johnson.*[7] The Court determined that the First Amendment protects those citizens who burn the U.S. flag in political protest from prosecution. In that case, Gregory Johnson was arrested for burning the U.S. flag in violation of Texas' "Venerated Objects" law[8] during a demonstration outside of the Republican National Convention in Dallas. The Texas statute outlawed "intentionally or knowingly" desecrating a "national flag." According to the statute, the term "desecrate" was defined to mean "to deface, damage or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action."[9] The Court of Appeals for the Fifth District of Texas upheld Johnson's conviction.[10] Texas' highest criminal court, the Court of Criminal Appeals, reversed the lower court decision, holding that the Texas law had been unconstitutionally applied to Johnson in violation of his First Amendment rights.[11]

The Supreme Court affirmed the Texas Court of Criminal Appeals ruling. The Court found that Johnson's conduct constituted symbolic expression which was both intentional and overtly apparent. The Court determined that, since Johnson's guilt depended on the communicative aspect of his expressive conduct, and was restricted because of the content of the message he conveyed, the Texas statute was "content-based" and subject to "the most exacting scrutiny test" outlined in *Boos v. Barry.*[12] Further, the Court stated that, although the government has an interest in encouraging proper treatment of the flag, it may not criminally punish a person for burning a flag as a means of political protest.[13] The Court determined that the Texas statute was designed to prevent citizens from conveying "harmful" messages, reflecting a government interest that violated the First Amendment principle that government may not prohibit expression of an idea simply because it finds the idea itself offensive or disagreeable.[14]

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[5] 415 U.S. 566 (1974).
[6] 418 U.S. 405 (1974).
[7] 491 U.S. 397 (1989).
[8] Tex. Penal Code Ann. §42.09(a)(3) (1989).
[9] Tex. Penal Code Ann. §42.09(b) (1989).
[10] 706 S.W. 2d 120 (1986).
[11] 755 S.W. 2d 92 (1988).
[12] 485 U.S. 312 (1988).
[13] The Court ruled that Texas' proffered interest of preventing breaches of the peace was not implicated and that its interest in preserving the flag as a symbol of nationhood and national unity was related to the suppression of expression.
[14] Certain uses of the flag are misdemeanors under 4 U.S.C. 3, punishable by a fine of not more than $100 or imprisonment of not more than thirty days or both. Acts criminalized under

In response to the *Johnson* ruling, Congress took steps to amend the 1968 statute to make it "content neutral" by passing the "Flag Protection Act of 1989."[15] The Act prohibited flag desecration under all circumstances by removing the statutory requirement that the conduct cast contempt upon the flag. The statute also defined the term "flag" in an effort to avoid any latent First Amendment vagueness problems.[16] Following passage of the Act, a wave of the flag burnings took place in over a dozen cities. The first Bush administration decided to test the Flag Protection Act by bringing criminal charges against protesters who participated in two incidents, one in Seattle and the other in Washington, DC[17] In both cases, the Federal district courts relied on *Johnson,* striking down the 1989 law as unconstitutional when applied to political protesters.

The Supreme Court accepted jurisdiction of these cases (consolidated as *U.S. v. Eichman,* 496 U.S. 310 (1990)) and, in a 5–4 decision, upheld the lower Federal court rulings and struck down the Flag Protection Act of 1989.[18] Again, the Court ruled that the government's stated interest in protecting the status of the flag "as a symbol of our Nation and certain national ideals" was related to "the suppression of free expression" that gave rise to an infringement of First Amendment rights. The Court acknowledged that the 1989 law, unlike the Texas statute in Johnson, contained no content-based limitations on the scope of protected conduct. However, the Court determined, the Federal statute was subject to strict scrutiny because it could not be enforced without reference to the message of the "speaker."

Since the *Eichman* decision, Congress repeatedly considered and rejected a proposed Constitutional amendment specifying that "the Congress and the states have the power to prohibit the physical desecration of the flag of the United States."

I. THE AMENDMENT WAS NOT SUBJECT TO EVEN PRO FORMA HEARINGS

Historically, Congress has treated the Constitutional amendment process as a remedy of last resort. Although numerous amendments to the Constitution have been proposed, it has been a power

existing Federal law include: using the flag in "advertising of any nature," or any person who "shall manufacture, sell expose for sale, or to pubic view, or give away or use for an purpose, any article or substance being an article of merchandise or a receptacle for merchandise or article or thing for carrying or transporting merchandise, upon which shall have been printed, painted, attached or otherwise placed a presentation of any such flag, standard, colors, or ensign, to advertise, call attention to, decorate, mark, or distinguish the article or substance on which so placed. . . ." Although not enforceable under current precedents, these restrictions would become fully enforceable against businesses, individuals and any Member of Congress using the flag in a campaign ad, should the amendment be ratified. A formal representation of the exact flag is not required. The existing statute includes in the definition of "flag," "any picture or representation of either, or 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 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. . . ."

[15] Pub. L. No. 101–131 (1989).

[16] The Flag Protection Act of 1989 defined "flag" as "any flag of the United States, or any part thereof, make of any substance, of any size, in a form that is commonly displayed." 18 U.S.C. 700.

[17] The Washington, DC, protest occurred on the steps of the Capitol.

[18] *U.S. v. Eichman,* 496 U.S. 310 (1990) (consolidating No. 89–1433, *U.S. v. Eichman,* 731 F.Supp. 1123 (D.D.C. 1990), and *U.S. v. Haggerty,* 731 F.Supp. (W.D.WA. 1990)).

used rarely and with great care. Over more than 200 years, our Constitution has been amended only 27 times. If ratified, H.J. Res. 10 would, for the first time in our Nation's history, modify the Bill of Rights to limit freedom of expression.

Notwithstanding the gravity of the issue, the majority has decided that this unprecedented departure from our nation's constitutional heritage does not even merit the otherwise *pro forma* hearings that have become the rule since the 107th Congress.

The Committee did not hold a single hearing on this momentous question. The Subcommittee on the Constitution held neither a hearing nor a markup. This reckless disregard for the future of our Bill of Rights is nothing less that a complete abdication of the Committee's core duty under Rule X of the Rules of the House, and the oath every member takes on assuming office to "support and defend the Constitution of the United States against all enemies, foreign and domestic; [to] bear true faith and allegiance to the same . . . and [to] well and faithfully discharge the duties of the office on which I am about to enter. . . ."[19]

In an effort to give the Committee the opportunity of at least one hearing on this momentous issue, Mr. Conyers made a motion to postpone further consideration of the proposed amendment until June 15, 2005. Due to an erroneous ruling by the Committee's Parliamentarian, the Chairman called a vote of the Committee without debate on the motion. The motion was defeated on a party line vote of 12 Ayes and 20 Nays. Mr. Nadler then offered a motion to postpone further consideration until June 16, 2005. Following debate, the motion was defeated on a party line vote of 11 Ayes and 19 Nays.

We believe that it is irresponsible to amend the Bill of Rights without a hearing, even if, as the Chairman believes, "having a hearing on this amendment will simply have everybody validating the arguments that have been made both pro and con in hearings that have been held before the subcommittee in previous Congresses. If there were new arguments, I'd like to hear them. But since there aren't, we don't need to have another hearing."[20] We do not share the Chairman's confidence that there is nothing to learn from a hearing. It is our job to approach important questions with open minds and seek information, not to shun it. It is certainly inappropriate for the majority to prejudge a question of this importance.

In fact, the Committee received numerous written comments in opposition to the proposed amendment. These comments were made a part of the record during the markup. We sincerely doubt any member had the opportunity to review, much less consider, these helpful comments before voting.[21]

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[19] 5 U.S.C. 3331.

[20] H.Rpt. No. 109–_____at _____ (2005)(Statement of Rep. F. James Sensenbrenner).

[21] Letter from Gregory T. Nojeim, Acting Director, and Terri A. Schroeder, Senior Lobbyist, *American Civil Liberties Union,* to Members of the U.S. House of Representatives (May 23, 2005); Letter from Gary E. May, *Veterans Defending the Bill of Rights,* to Members of the U.S. House of Representatives (May 24, 2005); Letter from *Veterans for Common Sense,* to Members of the U.S. House of Representatives (May 24, 2005); Letter from former Captain Jeremy Broussard (U.S. Army) to Rep. F. James Sensenbrenner, Jr., and Rep. John Conyers, Jr. (May 24, 2005); Letter from Maj. Robert A. Cordes (USAF, Ret.) to Members of the U.S. Senate (March 10, 2004); Letter from Bruce Fein, Esq. to Sen. Orrin Hatch and Sen. Patrick Leahy (June 7, 2004); Letter from Lt. Gen. Robert G. Gard, Jr. (U.S. Army, Ret.) to Sen. Orrin Hatch and Sen. Patrick Leahy (March 8, 2004); Letter from William C. Ragsdale (U.S. Navy, Ret.) to

II. THE PROPOSED AMENDMENT WOULD ABRIDGE FREE EXPRESSION

Proponents of the amendment argue that desecration of the flag should not be considered speech within the meaning of First Amendment. Yet it is precisely the expressive content of acts involving the flag that the amendment would target. Indeed, it appears that proponents of the amendment sometimes wish to have it both ways. For example, an amendment offered by Rep. Scott replacing the word "desecration" with the word "burning" was rejected precisely because it would have prohibited the destruction of a flag in a purely content neutral manner.[22] As Chairman Chabot observed:

> Limiting the amendment to only the burning of the flag rather than desecration would unduly limit the object and purpose of this resolution to give Congress the power to protect the flag from a range of physical acts of defilement or defacement. The word "desecration" was selected to give Congress the power to protect the flag from a range of physical acts of defilement or defacement. The word "desecration" was selected because of its broad nature encompassing many actions against the flag.[23]

That the criminal sanctions against flag burning in the *Johnson* case, and the ones the sponsors of this amendment would presumably seek to enact upon its adoption, are directly related to the expressive content of the act are clear. Current law prescribes that "[t]he flag, when it is in such condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by burning."[24] It is clear then, that prohibitions against flag burning or "physical desecration" are fundamentally content-based. Burning a flag to demonstrate respect or patriotism is prescribed by current law. Should the proposed amendment pass, burning the flag to convey a political viewpoint of dissent or anger at the United States would become a crime.

The Framers of the Constitution saw dissent and its protection as an affirmative social good.[25] Limits on the manner of form of dissent must inevitably translate into limits on the content of the dissent itself. Limitations on the use of the flag in political demonstrations ultimately undermines the freedoms the flag represents.

There can be no doubt that "symbolic speech" relating to the flag falls squarely within the ambit of traditionally protected speech. Our nation was borne in the dramatic symbolic speech of the Bos-

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Sen. Orrin Hatch and Sen. Patrick Leahy (March 10, 2004); Letter from Steven E. Sanderson (U.S. Army veteran) to Members of the Senate Committee on the Judiciary (March 8, 2004); Letter from Lt. Gen. Claudia J. Kennedy (USA, Ret.) to Rep. F. James Sensenbrenner, Jr., and Rep. John Conyers, Jr. (May 24, 2005).

[22] The term "desecration" itself is highly revealing. Webster's New World Dictionary defines "desecrate" as "to violate the sacredness of," and in turn defines "sacred" as "consecrated to a god or God; holy; or having to do with religion." Proponents of the amendment use similar language in defending the proposal.

[23] H.Rpt. No. 109–_____ at _____ (2005) (statement of Rep. Chabot).

[24] 4 U.S.C. 8(k).

[25] "[T]hose who are resentful because their interests are not accorded fair weight, and who may be doubly resentful because they have not even had a chance to present those interests, may seek to attain by radical changes in existing institutions what they have failed to get from the institutions themselves. Thus liberty of expression, though often productive of divisiveness, may contribute to social stability." Kent Greenwalt, *Speech and Crime,* Am. B. Found. Res. J. 645, 672–3 (1980).

ton Tea Party. Moreover, our courts have long recognized that expressive speech associated with the flag is protected speech under the First Amendment.

Beginning in 1931 with *Stromberg v. California*[26] and continuing through the mid-1970's with *Smith v. Goguen*[27] and *Spence v. Washington,*[28] the Supreme Court has consistently recognized that flag-related expression is entitled to constitutional protection. Indeed, by the time Gregory Johnson was prosecuted for burning a U.S. flag outside of the Republican Convention in Dallas, the State of Texas readily acknowledged that Johnson's conduct constituted "symbolic speech" subject to protection under the First Amendment.[29] Those who seek to justify H.J. Res. 10 on the grounds that flag desecration does not constitute "speech" are therefore denying decades of well understood law.[30]

While we deplore the burning of an American flag in hatred, we recognize that it is our allowance of this conduct that reinforces the strength of the Constitution. As one Federal court wrote in a 1974 flag burning case, "[T]he flag and that which it symbolizes is dear to us, but not so cherished as those high moral, legal, and ethical precepts which our Constitution teaches."[31]

The genius of the Constitution lies in its indifference to a particular individual's cause. The fact that flag burners are able to take refuge in the First Amendment means that every citizen can be assured that the Bill of Rights will be available to protect his or her rights and liberties should the need arise.

H.J. Res. 10 will also open the door to selective prosecution based purely on political beliefs. When John Peter Zenger was charged with "seditious libel" in the very first case involving freedom of speech on American soil, his lawyer, James Alexander warned:

> The abuses of freedom of speech are the excrescences of Liberty. They ought to be suppressed; but whom dare we commit the care of doing it? An evil Magistrate, entrusted with power to punish Words, is armed with a Weapon the most destructive and terrible. Under the pretense of pruning the exuberant branches, he frequently destroys the tree.[32]

The history of the prosecution of flag desecration in this country bears out these very warnings. The overwhelming majority of flag desecration cases have been brought against political dissenters, while commercial and other forms of flag desecration have been al-

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[26] 283 U.S. 359 (1931) (State statute prohibiting the display of a 'red flag' overturned). Absent this decision, a State could theoretically have prevented its citizens from displaying the U.S. flag.

[27] 415 U.S. 94 (1972).

[28] 418 U.S. 405 (1974) (overturning convictions involving wearing a flag patch and attaching a peace sign to a flag).

[29] *Texas v. Johnson,* 491 U.S. at 397.

[30] See also, Note, *The Supreme Court—Leading Cases,* 103 Harv. L. Rev. 137, 152 (1989) ("the majority opinion [in Johnson] is a relatively straightforward application of traditional first amendment jurisprudence"); Sheldon H. Nahmod, *The Sacred Flag and the First Amendment,* 66 Ind. L.J. 511, 547 (1991) ("*Johnson* is an easy case if well-established first amendment principles are applied to it"). Survey results show that the majority of Americans who initially indicate support for a flag protection amendment oppose it once they understand its impact on the Bill of Rights. In a 1995 Peter Hart poll, 64 percent of registered voters surveyed said they were in favor of such an amendment, but when asked if they would oppose or favor such an amendment if they knew it would be the first in our Nation's history to restrict freedom of speech and freedom of political protest, support plummeted from 64 percent to 38 percent.

[31] *U.S. ex rel Radich v. Criminal Court of N.Y.,* 385 F. Supp. 165, 184 (1974).

[32] PHILADELPHIA GAZETTE, Nov. 17, 1737, quoted in Levy, *Legacy of Suppression* 135 (1960).

most completely ignored. An article in *Art in America* points out that during the Vietnam War period, those arrested for flag desecration were "invariably critics of national policy, while 'patriots' who tamper with the flag [were] overlooked."[33] Whitney Smith, director of the Flag Research Center has further observed that commercial misuse of the flag was "more extensive than its misuse by leftists or students, but this is overlooked because the business interests are part of the establishment."[34]

Almost as significant as the damage H.J. Res. 10 would do to our own Constitution is the harm it will inflict on our international standing in the area of human rights. To illustrate, when the former Soviet Union adopted legislation in 1989 making it a criminal offense to "discredit" a public official, Communist officials sought to defend the legislation by relying on, among other things, the United States Flag desecration statute.[35] Demonstrators who cut the communist symbols from the center of the East German and Romanian flags prior to the fall of the Iron Curtain committed crimes against their country's laws similar to the this Act. Americans justifiably applauded these brave actions as political speech, understanding the injustice of the laws of those regimes. If we are to maintain our moral stature in matters of human rights, it is essential that we remain fully open to unpopular dissent, regardless of the form it takes.[36] By adopting H.J. Res 10 we will be unwittingly encouraging other countries to enact and enforce other more restrictive limitations on speech, while impairing our own standing to protest such actions.

III. AMENDING THE CONSTITUTION TO LIMIT THE BILL OF RIGHTS SETS A DANGEROUS PRECEDENT

Adoption of H.J. Res. 10 will also create a number of dangerous precedents in our legal system. The Resolution will encourage further departures from the First Amendment and diminish respect for our Constitution. As President Reagan's Solicitor General Charles Fried testified in 1990:

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

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[33] *See* Robert J. Goldstein, *Two Centuries of Flagburning in the United States,* 163 Flag Bull. 65, 154 (1995).

[34] *Id.*

[35] Rotunda, *Treatise on Constitutional Law: Substance and Procedure* §20.49 at 352 (2d ed. 1992).

[36] *See Hearing on H.J. Res. 54, Proposing an Amendment to the Constitution of the United States Before the Subcomm. on the Constitution of the House Comm. on the Judiciary,* 105th Cong., 2nd Sess. (April 30, 1997) [hereinafter *1997 House Judiciary Hearings*] (statement of PEN American Center, Feb. 5, 1997) ("To allow for the prosecution of [flag burners] would be to dilute what has hitherto been prized by Americans everywhere as a cornerstone of our democracy. The right to free speech enjoys more protection in our country than perhaps any other country in the world.").

> says that only this once let's make 2 + 2 = 5 does not know what it is to count.[37]

Amending the Constitution, particularly concerning issues which inflame public passion, represents a clear and present danger to our core liberties.[38] Conservative legal scholar Bruce Fein emphasized this concern when he testified before the Subcommittee at 1995 House Judiciary hearings:

> While I believe the *Johnson* and *Eichman* decisions were misguided, I do not believe a Constitutional amendment would be a proper response. . . . To enshrine authority to punish flag desecrations in the Constitution would not only tend to trivialize the Nation's Charter, but encourage such juvenile temper tantrums in the hopes of receiving free speech martyrdom by an easily beguiled media. . . . It will lose that reverence and accessibility to the ordinary citizen if it becomes cluttered with amendments overturning every wrong-headed Supreme Court decision.[39]

Professor Norman Dorsen also points out in his testimony, "not including the Bill of Rights, which was ratified in 1791 as part of the original pact leading to the Constitution, only 17 amendments have been added to it, and very few of these reversed constitutional decisions of the Supreme Court. To depart from this tradition now . . . would be an extraordinary act that could lead to unpredictable mischief in coming years."[40]

IV. FLAG BURNING RARELY OCCURS

H.J. Res. 10 responds to a perceived problem—flag burning—that is all but nonexistent in American life today. Studies indicate that in all of American history from the adoption of the United States flag in 1777 through the *Texas v. Johnson*[41] decision in 1989 there were only 45 reported incidents of flag burning.[42] Experience with prior efforts to criminalize flag desecration indicates that imposing such penalties have actually instigated flag burning.[43]

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[37] *Measures to Protect the American Flag, 1990: Hearing Before the Senate Comm. on the Judiciary,* 101st Cong. (June 21, 1990) (statement of Charles Fried at 113).

[38] Legal philosopher Lon Fuller also highlighted this very problem over four decades ago: "We should resist the temptation to clutter up [the Constitution with amendments relating to substantive matters. In that way we avoid] . . . the obvious unwisdom of trying to solve tomorrow's problems today. But [we also escape the] more insidious danger of the weakening effect [such amendments] have on the moral force of the Constitution itself." L. Fuller, *American Legal Philosophy at Mid-Century,* 6 J.L. Ed. 457, 465 (1954), as cited in *Proposed Flag Desecration Amendment 1995: Hearing Before the Subcomm. on Constitution of the Senate Comm. on the Judiciary,* 104th Cong. (June 6, 1995) [hereinafter, 1995 *Senate Judiciary Hearings*] (statement of Gene R. Nichol).

[39] *See Proposing an amendment to the Constitution of the United States authorizing the Congress and the States to prohibit the physical desecration of the flag of the United States, 1995: Hearing on H.J. Res. 79, Before the Subcomm. on Constitution of the House Comm. on the Judiciary,* 104th Cong.(1995) [hereinafter, *1995 House Judiciary Hearings*] (statement of Bruce Fein, at 1).

[40] *See 1997 House Judiciary Hearings, supra* note 35 (statement of Professor Norman Dorsen, New York University School of Law).

[41] *See supra* at 3–5.

[42] Robert J. Goldstein, *Two Centuries of Flagburning in the United States,* 163 Flag Bull. 65 (1995).

[43] In his extensive survey of the history of American flag desecration law, Robert Goldstein writes that "[a]lthough the purpose of the [Flag Protection Act adopted by Congress in 1968] was to supposedly end flag burnings, its immediate impact was to spur perhaps the largest single wave of such incidents in American history." Robert J. Goldstein, *Saving "Old Glory": The History of the American Flag Desecration Controversy* 215 (1995).

In addition to the relative infrequency of flag burning, proponents of the measure cast the current state of the law as though Congress is impotent to protect the flag. However, even witnesses who disagree with the Supreme Court rulings in *Johnson* and *Eichman* have stated that the impact of those cases was not so broad. In 1995, Bruce Fein stated as much in subcommittee hearings: "Flag desecrations when employed as 'fighting words' or when intended and likely to incite a violation of law remain criminally punishable under the Supreme Court precedents in *Chaplinsky v. New Hampshire* and *Brandenburg v. Ohio.*"[44]

V. THIS AMENDMENT IS THE WRONG WAY TO HONOR OUR VETERANS

It is a mistake to argue that this amendment honors the courage and sacrifice of our veterans. While we condemn those who would dishonor our nation's flag, we believe that rather than protecting the flag, H.J. Res. 10 will merely serve to dishonor the Constitution and to betray the very ideals for which so many veterans fought, and for which so many members of our armed forces made the ultimate sacrifice. General Colin L. Powell echoed this sentiment:

> The First Amendment exists to insure that freedom of speech and expression applies not just to that with which we agree or disagree, but also that which we find outrageous. I would not amend that great shield of democracy to hammer a few miscreants. The flag will be flying proudly long after they have slunk away.[45]

Jim Warner, a Vietnam veteran and prisoner of the North Vietnamese from October 1967 to March 1973, has written:

> The fact is, the principles for which we fought, for which our comrades died, are advancing everywhere upon the Earth, while the principles against which we fought are everywhere discredited and rejected. The flag burners have lost, and their defeat is the most fitting and thorough rebuke of their principles which the human could devise. Why do we need to do more? An act intended merely as an insult is not worthy of our fallen comrades. It is the sort of thing our enemies did to us, but we are not them, and we must conform to a different standard. . . . Now, when the justice of our principles is everywhere vindicated, the cause of human liberty demands that this amendment be rejected. Rejecting this amendment would not mean that we agree with those who burned our flag, or even that they have been forgiven. It would, instead, tell the world that freedom of expression means freedom, even for those expressions we find repugnant.[46]

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[44] *1995 House Judiciary Hearings, supra* note 39 (statement of Bruce Fein at 1–2).

[45] Letter from General Colin L. Powell to Hon. Patrick Leahy, May 18, 1999.

[46] *See 1997 House Judiciary Hearings, supra* note 35 (statement of Jim Warner). These thoughts are echoed by Terry Anderson, a former U.S. Marine Staff Sergeant and Vietnam veteran who was held hostage in Lebanon. In testimony submitted at the same hearing, he wrote that "[H.J. Res. 54] is an extremely unwise restriction of every American's Constitutional rights. The Supreme Court has repeatedly held that the First Amendment protects symbolic acts under its guarantee of free speech. Burning or otherwise damaging a flag is offensive to many (including me), but it harms no one and is so obviously an act of political speech that I'm amazed anyone could disagree with the Court." (*Id.* statement of Terry Anderson).

There are many ways Congress can honor veterans. First and foremost, we can ensure that programs designed to protect them and provide them with much needed assistance are properly funded. During the Full Committee markup of H.J. Res. 10 on May 25, 2005, Ms. Lofgren offered an amendment that would have provided for such proper programming and funding. Ms. Lofgren proposed that H.J. Res. 10 would not take effect until Congress guaranteed that veteran's benefits promised to an individual in connection with that individual's enlistment or induction in the Armed Forces could not be diminished after enlistment or induction. Unfortunately, this Committee, with this Administration and the Republican majority, have chosen to honor veterans with symbolic legislation, rather than tending to the needs of our veterans, our service men and women in the field, and their families.

Yet this year's budget short-changes our veterans in vital areas such as health care. The President's proposed budget, providing $31.4 billion for appropriated veterans' programs, is a staggering $338 million below the amount that the Congressional Budget Office estimates is needed to maintain services at the 2005 level. As the Disabled American Veterans observed:

> The Administration's budget for fiscal year (FY) 2006 seeks only $27.8 billion in appropriations for veterans' medical care. This amounts to only a 0.4%—or less than one-half of 1 percent—increase over the FY 2005 appropriation in nominal, or constant, dollars, and therefore would be a reduction below the FY 2005 appropriation of $27.7 billion adjusted for inflation. The Administration's budget would tighten funding for veterans' medical care at a time when an influx of new veterans from the wars in Iraq and Afghanistan will place substantial new demands upon a system already unable to meet its mission. With the FY 2005 appropriation, the Department of Veterans Affairs (VA) had to maintain a freeze on new enrollments of lower priority group veterans seeking medical care, and even with that freeze, VA medical facilities across the Nation are already experiencing shortfalls in FY 2005 funding. These shortfalls prevent the hiring of new health care employees and new equipment purchases. The Independent Budget, coauthored by the Disabled American Veterans, AMVETS, the Paralyzed Veterans of America, and Veterans of Foreign Wars, estimates that Congress must appropriate $31.2 billion for veterans' medical care in FY 2006 just to maintain current service levels.[47]

Rep. David Obey attempted to add an additional $2.6 billion to the FY 2006 Military Quality of Life and Veterans Affairs bill,[48] but his amendment was rejected by the Appropriations Committee. As Rep. Obey argued:

> We also have a moral obligation to point out at every opportunity that the reason why veterans will not be receiving the health care they deserve is because of the misbegotten, ill-ad-

[47] Disabled American Veterans, *To Maintain Essential Services for Veterans, Congress Must Provide Adequate Funding,* (visited June 3, 2005) <http://www.dav.org/voters/legislative—talking—points.html>.

[48] H.R. 2528, 109th Congress (2005).

> vised budget that the Republican Congress passed just a few short weeks ago. That budget, which only one Republican member of the Appropriations Committee opposed, is the reason that veterans will not receive the health care that they were promised and that they deserve.[49]

CONCLUSION

Adoption of H.J. Res. 10 will undermine our commitment to freedom of expression and do real damage to the constitutional system established by our forefathers. If we amend the Constitution to outlaw flag desecration, we will be joining ranks with countries such as China, Iran and the former Soviet Union.[50] We believe we have come too far as a nation to risk jeopardizing our commitment to freedom in such a fruitless endeavor to legislate patriotism. As the Court wrote in *West Virginia State Board of Education v. Barnette:*

> [The] ultimate futility of . . . attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition as a means to religious and dynastic unity, the Siberian exiles as a means of Russian unity, down to the last failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.[51]

If we adopt H.J. Res. 10, we will be denigrating the vision of Madison and Jefferson. If we tamper with our Constitution, we will have turned the flag, an emblem of unity and freedom, into a symbol of intolerance. We will not go on record as supporting a proposal which will do what no foreign power and no flag burner has been able to do—limit the freedom of expression of the American people.

AMENDMENTS OFFERED AT MARKUP

During the markup three amendments were offered by Democratic members:

1. Scott Amendment

Description of Amendment: The amendment that would have replaced the word "desecration" with the word "burning" in order to make the proposed amendment neutral with respect to a person's expressive intent.

Vote on Amendment: The amendment was rejected on a party line vote of 11 ayes and 19 nays. Voting aye: Mr. Conyers, Mr. Nadler, Mr. Scott, Mr. Watt, Ms. Lofgren, Ms. Jackson Lee, Mr. Meehan, Mr. Weiner, Mr. Schiff, Ms. Sanchez, and Mr. Van Hollen. Voting Nay: Mr. Coble, Mr. Smith, Mr. Gallegly, Mr. Chabot, Mr. Lungren, Mr. Jenkins, Mr. Cannon, Mr. Inglis, Mr. Hostettler, Mr. Green, Mr. Keller, Mr. Issa, Mr. Flake, Mr. Forbes, Mr. King, Mr. Feeney, Mr. Franks, Mr. Gohmert, and Chairman Sensenbrenner.

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[49] H.Rpt. No. 109–94, at 95–96 (2005).
[50] Roman Rolinick, *Flag Amendment would put U.S. with Iran,* China, UPI (July 1, 1989).
[51] 319 U.S. at 641.

2. Lofgren Amendment

Description of Amendment: The amendment would have specified that the constitutional amendment would not take effect until the date on which Congress by law ensures that the veteran's benefits promised to an individual in connection with that individual's enlistment or induction in the Armed Forces cannot, after that enlistment or induction, be diminished.

Vote on Amendment: Chairman Sensenbrenner sustained an objection to the amendment on the ground that it was not germane to the legislation. A motion to table an appeal of the ruling of the Chair was adopted on a party line vote of 17 ayes and 9 nays. Voting Aye: Mr. Coble, Mr. Smith, Mr. Gallegly, Mr. Goodlatte, Mr. Chabot, Mr. Lungren, Mr. Jenkins, Mr. Cannon, Mr. Inglis, Mr. Hostettler, Mr. Green, Mr. Keller, Mr. Issa, Mr. King, Mr. Franks, Mr. Gohmert, and Chairman Sensenbrenner. Voting Nay: Mr. Conyers, Mr. Nadler, Mr. Scott, Mr. Watt, Ms. Lofgren, Mr. Weiner, Mr. Schiff, Ms. Sanchez, and Mr. Van Hollen.

3. Lofgren Amendment

Description of Amendment: The amendment that would have substituted new language requiring that every flag of the United States manufactured in, or imported into, the United States after the effective date of the amendment must be manufactured out of flame-resistant material.

Vote on Amendment: The Amendment was defeated by a voice vote.

JOHN CONYERS, JR.
HOWARD L. BERMAN.
RICK BOUCHER.
JERROLD NADLER.
ROBERT C. SCOTT.
MELVIN L. WATT.
ZOE LOFGREN.
SHEILA JACKSON LEE.
MAXINE WATERS.
MARTIN T. MEEHAN.
WILLIAM D. DELAHUNT.
ROBERT WEXLER.
ANTHONY D. WEINER.
LINDA T. SÁNCHEZ.
CHRIS VAN HOLLEN.

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