

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

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

S.J. Res. 14

A BILL PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE
UNITED STATES AUTHORIZING CONGRESS TO PROHIBIT THE PHYS-
ICAL DESECRATION OF THE FLAG OF THE UNITED STATES

APRIL 20 AND APRIL 28, 1999

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**AN AMENDMENT TO THE CONSTITUTION OF
THE UNITED STATES, AUTHORIZING CON-
GRESS TO PROHIBIT THE PHYSICAL DESE-
CRATION OF THE FLAG OF THE UNITED
STATES**

TUESDAY, APRIL 20, 1999

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:05 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Ashcroft, Smith, Leahy, Kennedy, and Feingold.

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

The CHAIRMAN. Good morning. This morning we are going to hear testimony concerning Senate Joint Resolution 14, the Flag Protection Amendment. This amendment is very important because the subject matter—the American flag—touches each of us on this committee very deeply.

I apologize to the administration. They pulled their witness today because, as I understand it, they wanted him to be on a separate panel, and I think we should have accommodated him. So we will do that at the next hearing, and we will accommodate the administration's witness on a separate panel and do it the right way. So I apologize to the administration this morning.

Let me just say that many of the flags you see displayed have special stories. These flags in the front here, we have a flag carried by the Rainbow Division in World War I; we have a flag flown over the American base in Russia during World War I; we have a flag made by a POW in World War II; and we have the flag that American troops carried when they liberated Kuwait.

Americans paid a high price for these flags and for the ideas and the country that these flags symbolize.

Let me begin by emphasizing that every member of this committee is a patriotic American. Every member of this committee loves the freedoms established by our Constitution. And every member of this committee loves the American flag that symbolizes all of those freedoms.

Among the chief freedoms established by our Constitution and symbolized by the flag is the freedom of speech. Because our fore-

fathers were wise enough to realize that freedom to speak and write one's opinions for or against particular issues was crucial to a free and lasting Republic, they took a stand in favor of free speech. They amended the Constitution to provide that "Congress shall make no law * * * abridging the freedom of speech."

The American flag is the preeminent symbol of the broad freedoms established by our Constitution, including the freedom of speech. Throughout our history, the American flag has played a unique role in symbolizing not a partisan position on a particular issue, but the love of liberty and the love of country felt by the American people and by people all around this world.

The American people have expressed their love of liberty by the price that they have paid for it. We have sent our soldiers, sailors, airmen, and marines into harm's way from Gettysburg to Iwo Jima, to Desert Storm, to Kosovo—each time under the American flag. We celebrate our love of independence with parades featuring the American flag, and each morning our school children pledge allegiance to the American flag.

But the love of liberty does not reside merely on a battlefield, in a parade, or on a school yard. As Judge Learned Hand said, "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it."

The American flag symbolizes the love of liberty that Americans hold so dear in all of our hearts. It is the Government's special responsibility to foster and protect that love of liberty. When, however, the American Government itself sanctions the physical desecration of the American flag, it also sanctions the destruction of Americans' love and respect for liberties the flag stands for. The picture of the American Government sanctioning the destruction of its own preeminent symbol is worth a thousand shameful words. If the Government sanctions the destruction of the flag, the Government destroys, little by little, the love of liberty that the flag instills in us all.

Without the crucial love for liberty, the flag could become a mocking reminder of the freedoms that a people used to hold dear and a country that a people used to believe in.

Some say a statute would do the trick. I wish it would. In my view, however, it is clear that we can only protect the flag and its underlying liberties with a constitutional amendment that restores to the people's elected representatives that right to prohibit the physical desecration of the flag, while maintaining the right of each American to speak his or her opinions at a rally, to write his opinions to his or her newspaper, and to vote his or her opinions at the ballot box.

Before and after the ratification of the first amendment, the States prohibited the physical desecration of the American flag. With State enforcement, we had little need of Federal cases addressing the right of people to protect the flag from physical destruction and desecration, because that right was founded in State and common law and understood to be consistent with freedom of speech.

Then, in the 1989 case of *Texas v. Johnson*, a 5–4 vote of the Supreme Court broke with over 200 years of precedent allowing re-

strictions on destructive conduct. The narrowest majority extended free speech protection to a destructive conduct.

Shocked by this ill-advised decision, Congress enacted the Flag Protection Act of 1989. In fact, Senator Biden, then the chairman of the Judiciary Committee, played a lead role in this effort, and he and Senator Leahy supported the Act as a generally content-neutral and constitutional means of protecting the American flag. Several scholars opined that the Act would pass constitutional muster. Indeed, the statute would have passed muster under traditional first amendment jurisprudence. In *United States v. Eichman*, however, the Supreme Court struck down the Flag Protection Act of 1989, rejecting the statutory solution.

When presented with the option of protecting the flag with an amendment or with a statute, the Supreme Court has made a choice for us—made the choice for us, really. Proposed flag protection statutes could not begin to pass constitutional muster under the Supreme Court’s new precedent because the statute specifically targets the American flag for protection and relies on the “fighting words” doctrine for its validity. While there are very few persons who say that a statute is viable, the clear reality is that it is not. Thus, the only legally effective means of protecting the physical integrity of the American flag is a constitutional amendment.

The amendment I propose contains only 17 words: “The Congress shall have power to prohibit the physical desecration of the flag of the United States.”

This year, with a record total of 57 original cosponsors, Senator Cleland and I introduced the amendment as Senate Joint Resolution 14 on March 17. The amendment has already been called for by 49 States and has the support of nearly 80 percent of the American people.

The amendment, however, is not self-executing in the sense that it does not describe the specific types of physical destruction that will be prohibited. Instead, that task is left to Congress. Over 90 Members of the Senate, including the ranking member and Senator Biden, voted for the Flag Protection Act of 1989 because they believed it was clear and constitutional. So be it. The statute remains clear, and this amendment will make it constitutional.

I propose that we use the Flag Protection Act of 1989, now codified at 18 U.S.C. 700 as the implementing legislation for the Flag Protection Amendment. Although I did not support this bill in 1989 because I correctly believed it would be struck down under the new rule announced in *Texas v. Johnson*, 91 other Senators did.

Thus, all of the arguments in favor of that statute—its form of content neutrality with respect to particular issues, its narrowly tailored application, and its complete respect for the freedom of speech, both oral and written—can come to fruition if this amendment is ratified. I agree with my colleagues that we need not alter the Bill of Rights. Instead, we should restore its meaning as it existed for more than 200 years.

I know that members on both sides of the aisle have deep feelings on this issue, as do I. Freedom of speech is essential to the proper functioning of our democracy, and the love of that freedom, as symbolized by the American flag, is essential to the long-term survival of our democracy, at least in my opinion. By allowing the

American people to vote on this amendment, we will not only affirm the right to speak, write, and vote one's opinions, but also to protect the love of those freedoms that our forefathers died for.

Now, before I turn to Senator Leahy for his opening statement, I want to introduce some very special guests in the audience. We are very fortunate to have with us a number of recipients of this country's highest award for courage and bravery in the field of battle. As I call your name, gentlemen, please stand.

The members of the Medal of Honor recipients of the flag here with us today include: from the State of Washington, General Pat Brady, a distinguished Vietnam veteran, if you will stand and remain standing; from the State of New Mexico, Mr. Hiroshi Miyomura, a distinguished veteran of the Korean Conflict; from the State of West Virginia, Mr. Woody Williams, a distinguished veteran of the Battle of Iwo Jima; from the State of Colorado, Mr. Raymond Murphy, a distinguished veteran of the Korean Conflict; and from my own home State of Utah, Mr. George Whalen, a distinguished veteran of the Battle of Iwo Jima.

We are really honored to have all of you here today, and we are especially honored to have you support this amendment.

These bravest of Americans support this amendment to protect the physical integrity of this country's greatest symbol, and I think we owe these gentlemen a hand in gratitude for their service.

[Applause.]

The CHAIRMAN. At this point, I would like to enter into the record the statements of Senators Thurmond and Sessions.

[The prepared statements of Senators Thurmond and Sessions follow:]

PREPARED STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE
STATE OF SOUTH CAROLINA

Mr. Chairman: I am very pleased that we are considering S.J. Res. 14, the Constitutional amendment to protect the flag of the United States. I commend you, Mr. Chairman, for the leadership you have provided in our ongoing effort to enact this most essential amendment.

We have considered this issue in the Judiciary Committee and on the Senate Floor many times in the past decade. I have fought to achieve Constitutional protection for the flag ever since the Supreme Court first legitimized flag burning in the case of *Texas v. Johnson* in 1989.

In our history, the Congress has been very reluctant to amend the Constitution, and I agree with this approach. However, the Constitution provides for a method of amendment, and there are a few situations where an amendment is warranted. This is one of them.

Some have said we should not protect the flag because totalitarian regimes like China protect theirs. The United States is not the only democracy that has protected the flag. Others such as the Democratic Republics of Germany, Belgium, and Denmark protect the flag.

The only real argument against this amendment is that it interferes with an absolute interpretation of the free speech clause of the First Amendment. However, restrictions on speech already exist through Constitutional interpretation. In fact, before the Supreme Court ruled on this issue, the Federal government and the States believed that flag burning was not Constitutionally-protected speech. The Federal government and almost every state had laws prohibiting desecration that were thought to be valid before the Supreme Court ruled otherwise in 1989.

During moments of despair and crisis in our history, our people have turned to the flag as a symbol of National unity. It represents our values, ideals and proud heritage.

American soldiers have put their lives on the line to defend what the flag represents. We have a duty to honor their sacrifices by giving the flag the protection it once had, and clearly deserves today.

Flag burning is intolerable. We have no obligation to permit this nonsense. Have we focused so much on the rights of the individual that we have forgotten the rights of the people?

We cannot allow ourselves to be deterred in our efforts to protect the flag. I am firmly committed to this fight until we are successful.

PREPARED STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

I would like to begin by thanking the Chairman of this Committee, Senator Hatch, for calling this hearing today to discuss the legislation he has introduced which, if passed by two-thirds of the House and Senate and ratified by three-quarters of the States, would amend the United States Constitution so that Congress is expressly given the authority to prevent the physical desecration of the American flag. I am proud to be a cosponsor of this legislation, and I appreciate the impressive panel of witnesses that has assembled to discuss this issue.

At the outset, let me say that I do not take proposals to amend the Constitution lightly. I believe that one of the strengths of our Constitution is that it has been a relatively fixed and stable document since its ratification in 1789. I believe the fact that it has been amended only 27 times in its history is testament to the strength and clarity of vision our Founding Fathers had for this Republic. In fact the stability and consistency of our Constitution over time has, in my opinion, helped safeguard the rights and protections afforded to every citizen of this country. It is when Constitutions are made subject to sweeping change, whether through constant amendment or activist and excessive judicial interpretations, that rights begin to be jeopardized and the text of this grand governing document begins to lose its meaning.

This issue provides us with an important opportunity to use the legitimate and Constitutionally provided amendment process. The amendment process, for those who love the Constitution, is the way to change the document. It should not be changed simply by judicial re-interpretation of the words. As I see it, we are here today because of a striking judicial misinterpretation of the Constitution by the Supreme Court and only a Constitutional amendment can fix the problem. I believe that the United States Supreme Court, in reversing over 200 years of precedent, was wrong when in 1989 it decided by a 5-4 vote in the *Texas v. Johnson* case that the 1st Amendment granted Constitutional protection to those who wished to burn American flags. It is clearly a stretch to hold, as that court did, that the burning of the flag was conduct "sufficiently imbued with elements of communication" to implicate the first amendment. Rather, I think the dissenters in this case had it right. On this point the words of Chief Justice Rehnquist, writing in dissent, were especially eloquent. The Chief Justice wrote:

Far from being a case of "one picture being worth a thousand words," flag burning is the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea but to antagonize others. Only five years ago we said in *City Council of Los Angeles v. Taxpayers for Vincent* that "the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places." The Texas statute deprived Johnson of only one rather inarticulate symbolic form of protest—a form of protest that was profoundly offensive to many—and left him with a full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy. (491 U.S. 432)

Additionally, the Chief Justice pointed out the ultimate, tragic irony caused by the majorities decision. He wrote:

The Court decides that the American flag is just another symbol, about which not only must opinions pro and con be tolerated, but for which the most minimal public respect may not be enjoined. The government may conscript men into the Armed Forces where they must fight and perhaps die for the flag, but the government may not prohibit the public burning of the banner under which they fight.

I think that this is a somber point, and one upon which the members of this Committee should reflect. It has relevance not only for all of those who have bravely answered their countries call in the past, but also for all of those men and women who are, even as we speak, risking their lives in service to this country throughout the world.

Is this amendment necessary? I say. Yes, it is, for three reasons. First, good and decent Americans throughout this country care about this subject very deeply. Through their letters and phone calls they have urged Congress to enact measures to protect the flag. Second, this amendment will do no harm to our notions of free speech but will express our reverence for our unique symbol of freedom, the American flag. Finally, it will provide the people of the United States with the opportunity to use the legitimate and Constitutionally provided amendment process to express themselves, through State ratification, on this important issue.

That concludes my opening statement. I would like to express my thanks to all of the witnesses who will be testifying today, and I look forward to hearing your statements.

The CHAIRMAN. Now, we had planned to hear from the Department of Justice today. They informed us of their desire to provide testimony at today's hearing on Friday afternoon. I have been informed that, despite our effort to accommodate them by permitting them to testify first, they have pulled their witness, Acting Assistant Attorney General Randolph Moss. The Department believes that it should have its own panel, and we will grant that.

I would note that the Department's own written testimony concedes that the testimony they would have provided today is substantially similar to the testimony given in 1995. Nevertheless, I believe we need to hear from the Department of Justice. It is unfortunate that they could not make it today, and I fail to see why the Department really can't have Mr. Moss appear on the same panel with all of you, with leaders like General Brady, a Medal of Honor recipient. And setting aside the fact that the Department has testified on panels with other witnesses on several occasions over the years, I plan to accommodate the Department, if at all possible, by giving them another opportunity to testify before the committee because we will have a subsequent hearing so that Senator Glenn and other members of the Senate and House will be able to testify.

So, without objection, we will make the Department's testimony part of the record today, and let me just say that I am disappointed that they couldn't be here, but I think that was something that we should have remedied before now.

[The prepared statement of Mr. Moss follows:]

PREPARED STATEMENT OF RANDOLPH D. MOSS

Mr. Chairman, and Members of the Committee:*

As you know, in 1989 the Supreme Court held in *Texas v. Johnson*¹ that a State could not, consistent with the First Amendment, enforce a statute criminalizing flag desecration against a demonstrator who burned an American flag. In 1990, in *United States v. Eichman*,² the Court held that the First Amendment prohibited the conviction of demonstrators for flag burning under a federal statute that criminalized mutilating, defacing, or physically defiling an American flag.

For nine years, then, the flag has been left without any statutory protection against desecration. For nine years, one thing, and only one thing, has stood between the flag and its routine desecration: the fact that the flag, as a potent symbol of all that is best about our Country, is justly cherished and revered by nearly all Americans. Chairman Hatch has eloquently described the flag's status among the American people:

* In 1995, Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, provided substantially similar testimony to the Subcommittee on the Constitution, Federalism, and Property Rights of the United States Senate Judiciary Committee regarding S.J. Res. 31, A Bill Proposing an Amendment to the Constitution of the United States to Grant Congress and the States the Power to Prohibit the Physical Desecration of the Flag of the United States.

¹ 491 U.S. 397 (1989).

² 496 U.S. 310 (1990).

The American flag represents in a way nothing else can, the common bond shared by a very diverse people. Yet whatever our differences of party, politics, philosophy, race, religion, ethnic background, economic status, social status, or geographic region, we are united as Americans. That unity is symbolized by a unique emblem, the American flag.³

It is precisely because of the meaning the flag has for virtually all Americans that the last nine years have witnessed no outbreak of flag burning, but only a few isolated instances. If proof were needed, we have it now: with or without the threat of criminal penalties, the flag is amply protected by its unique stature as an embodiment of national unity and ideals.

It is against this background that one must assess the need for a constitutional amendment (S.J. Res. 14) that would provide Congress with the “power to prohibit,” and presumably impose criminal punishment for, the “physical desecration” of the American flag. Such an amendment would run counter to our traditional resistance, dating back to the time of the Founders, to resorting to the amendment process. Moreover, the amendment, if passed, would for the first time in our history limit the individual liberties protected by the Bill of Rights, adopted over two centuries ago. Whether other truly exigent circumstances justify altering the Bill of Rights is a question we can put to one side here. For you are asked to assume the risk inherent in crafting a first-time exception to the Bill of Rights in the absence of any meaningful evidence that the flag is in danger of losing its symbolic value. Moreover, the proposed amendment before you could create legislative power of uncertain dimension to override the First Amendment and other constitutional guarantees. For these reasons, the proposed amendment—and any other proposal to amend the Constitution in order to punish isolated acts of flag burning—should be rejected by this Congress.

I.

At the outset, and out of an abundance of caution, I would like to emphasize that the Administration’s view on the wisdom of the proposed amendment does not in any way reflect a lack of appreciation for the proper place of the flag in our national community. The President always has and always will condemn in the strongest of terms those who would denigrate the symbol of our Country’s highest ideals. The President’s record and statements reflect his long-standing commitment to protection of the American flag, and his profound abhorrence of flag burning and other forms of flag desecration.

To conclude that flag desecration is abhorrent and that it should be resoundingly and unequivocally condemned, however, is not to conclude that we should for the first time in our Nation’s history cut back on the individual liberties protected in the Bill of Rights. As James Madison observed at the founding, amending the Constitution should be reserved for “great and extraordinary occasions.”⁴ This caution takes on unique force, moreover, when we think of restricting the Bill of Rights, for its guarantees are premised on an unclouded sense of permanence, a sense that they are inalienable, a sense that we as a society are committed to the proposition that the fundamental protections of the Bills of Rights should be left alone. It is against this background that the Administration has concluded that the isolated incidents of flag desecration that have occurred since 1989 do not justify amending the Constitution in this significant respect.

II.

The text of the proposed amendment is short enough to quote in full: “The Congress shall have power to prohibit the physical desecration of the flag of the United States.”⁵ The scope of the amendment, however, is anything but clear, and it fails to state explicitly the degree to which it overrides other constitutional guarantees. Accordingly, even if it were appropriate to create an exception to the Bill of Rights in some limited manner, it is entirely unclear how much of the Bill of Rights the proposed amendment would trump.

By its terms, the proposed amendment does no more than confer affirmative power upon Congress to legislate with respect to the flag. Its wording is similar to the power-conferring clauses found in Article I, Section 8 of the Constitution: “Congress shall have power to lay and collect taxes,” for instance, or “Congress shall have power * * * to regulate commerce * * * among the several states.” Like those

³ 141 Cong. Rec. S4275 (daily ed. Mar. 21, 1995).

⁴ *The Federalist* No. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961).

⁵ S.J. Res. 14. See also H.J. Res. 33 (same).

powers, and all powers granted government by the Constitution, the authority given by the proposed amendment would seem to be limited by the Bill of Rights and the Fourteenth Amendment.

The text of the proposed amendment does not purport to exempt the exercise of the power conferred from the constraints of the First Amendment or any other constitutional guarantee of individual rights. Read literally, the amendment would not alter the result of the decisions in *Johnson* or *Eichman*, holding that the exercise of state and congressional power to protect the symbol of the flag is subject to First and Fourteenth Amendment limits. Instead, by its literal text, it would simply and unnecessarily make explicit the governmental power to legislate in this area that always has been assumed to exist.

To give the proposed amendment meaning, then, we must read into it, consistent with its sponsors' intent, at least some restriction on the First Amendment freedoms identified in the Supreme Court's flag decisions. It is profoundly difficult, however, to identify just how much of the First Amendment and the rest of the Bill of Rights is superseded by the amendment. Once we have departed, by necessity, from the proposed amendment's text, we are in uncharted territory, and faced with genuine uncertainty as to the extent to which the amendment will displace the protections enshrined in the Bill of Rights.

We do not know, for instance, whether the proposed amendments is intended, or would be interpreted, to authorize enactments that otherwise would violate the due process "void for vagueness" doctrine. In *Smith v. Goguen*,⁶ the Court reversed the conviction of a defendant who had sewn a small flag on the seat of his jeans, holding that a state statute making it a crime to "treat contemptuously" the flag was unconstitutionally vague. We cannot be certain that the vagueness doctrine applied in *Smith* would limit as well prosecutions brought under laws enacted pursuant to the proposed amendment.

Nor is this a matter of purely hypothetical interest, unlikely to have much practical import. The proposed amendment, after all, authorizes laws that prohibit "physical desecration" of the flag, and "desecration" is not a term that readily admits of objective definition. On the contrary, "desecrate" is defined to include such inherently subjective meanings as "profane" and even "treat contemptuously" itself. Thus, a statute tracking the language of the amendment and making it a crime to "physically desecrate" an American flag would suffer from the same defect as the statute at issue in *Smith*: it would "fail[] to draw reasonably clear lines between the kinds of nonceremonial treatment that are criminal and those that are not."⁷

The term "flag of the United States" is similarly "unbounded,"⁸ and by itself provides no guidance as to whether it reaches unofficial as well as official flags, or pictures or representations of flags created by artists as well as flags sold or distributed for traditional display. Indeed, testifying in favor of a similar amendment in 1989, then-Assistant Attorney General William Barr acknowledged that the word "flag" is so elastic that it can be stretched to cover everything from cloth banners with the characteristics of the official flag, as defined by statute,⁹ to "any picture or representation" of a flag, including "posters, murals, pictures, [and] buttons."¹⁰ And while a statute enacted pursuant to the amendment could attempt a limiting definition, it need not do so; the amendment would authorize as well a statute that simply prohibited desecration of "any flag of United States." Again, such a statute would implicate the vagueness doctrine applied in *Smith*, and raise in any enforcement action the question whether the empowering amendment overrides due process guarantees.

Even if we are prepared to assume, or the language of the amendment is modified to make clear, that the proposed amendment would operate on the First Amendment alone, important questions about the amendment's scope remain. Specifically, we still face the question whether the powers to be exercised under the amendment would be freed from all, or only some, First Amendment constraints, and, if the latter, how we will know which constraints remain applicable.

An example may help to illuminate the significance of this issue. In *R.A.V. v. City of St. Paul*,¹¹ decided in 1992, the Supreme Court held that even when the First Amendment permits regulation of an entire category of speech or expressive con-

⁶ 415 U.S. 566 (1974).

⁷ 415 U.S. at 574.

⁸ *Id.* at 575.

⁹ See 4 U.S.C. § 1.

¹⁰ *Measures to Protect the Physical Integrity of the American Flag: Hearings on S. 1338, H.R. 2978, and S.J. Res. 180 Before the Senate Comm. on the Judiciary, 101st Cong., 1st Sess. 82-85 (1989) ["1989 Hearings"].*

¹¹ 505 U.S. 377 (1992).

duct, it does not necessarily permit the government to regulate a subcategory of the otherwise proscribable speech on the basis of its particular message. A government acting pursuant to the proposed amendment would be able to prohibit *all* flag desecration,¹² but, if *R.A.V.* retains its force in this context, a government could not prohibit only those instances of flag desecration that communicated a particularly disfavored view. Statutes making it a crime—or an enhanced penalty offense—to “physically desecrate a flag of the United States in opposition to United States military actions,” for instance, would presumably remain impermissible.

This result obtains, of course, if and only if the proposed amendment is understood to confer powers that are limited by the *R.A.V.* principle. If, on the other hand, the proposed amendment overrides the whole of the First Amendment, or overrides some select though unidentified class of principles within which *R.A.V.* falls, then there remains no constitutional objection to the hypothetical statute posited above. This is a distinction that makes a difference, as I hope this example shows, and it should be immensely troubling to anyone considering the amendment that its text leaves us with no way of knowing whether the rule of *R.A.V.*—or any other First Amendment principle—would limit governmental action if the amendment became part of the Constitution.¹³

III.

I have real doubts about whether these interpretive concerns could be resolved fully by even the most artful of drafting. Any effort to constitutionalize an exception to the Bill of Rights necessarily will produce significant interpretive difficulties and uncertainty, as the courts attempt to reconcile a specific exception with the general principles that remain. But even assuming, for the moment, that all of the interpretive difficulties of this amendment could be cured, it would remain an ill-advised departure from a constitutional history marked by a deep reluctance to amend our most fundamental law. The Bill of Rights was ratified in 1791. Since that time, over two hundred years ago, we have not once amended the Bill of Rights. And this is no historical accident, nor a product only of the difficulty of the amendment process itself. Rather, our historic unwillingness to tamper with the Bill of Rights reflects a reverence for the Constitution that is both entirely appropriate and fundamentally at odds with turning that document into a forum for divisive political battles. Indeed, part of the unique force, security, and stature of our Bill of Rights derives from the widely-shared belief that it is permanent and enduring.

The Framers themselves understood that resort to the amendment process was to be sparing and reserved for “great and extraordinary occasions.”¹⁴ In *The Federalist Papers*, James Madison warned against using the amendment process as a device for correcting every perceived constitutional defect, particularly when public passions are inflamed. He stressed that “frequent appeals would, in great measure, deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability.”¹⁵

The proposed amendment cannot be reconciled with this fundamental and historic understanding of the integrity of the Constitution. I think perhaps Charles Fried, who served with distinction as Solicitor General under President Reagan, made the point best when he testified against a similar proposed amendment in 1990:

¹²Even a statute that prohibited all flag desecration would be in tension with the principle of *R.A.V.* Although a few acts done with a flag could be considered a “desecration” in all contexts, that would not be the case with burning, for example. Only some burnings could be prohibited by statutes adopted under the proposed amendment. Respectful burning of the flag will remain legal after the amendment’s adoption as before. See 36 U.S.C. § 176(k) (“The flag, when it is in such condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by burning.”) What may be prohibited is only that destruction of a flag that communicates a particular message, one of disrespect or contempt. The conclusion that a particular act of burning is a “desecration” may require in most instances consideration of the particular message being conveyed.

¹³Another proposed amendment, contained in H.J. Res. 5, provides: “The Congress and the States shall have power to prohibit the act of desecration of the flag of the United States and to set criminal penalties for that act.” Not only does the phrase “act of desecration” appear to be broader, and more vague, than the term “physical desecration” in S.J. Res. 14 and H.J. Res. 33, but H.J. Res. 5 also grant the power of prohibition to the fifty States and an uncertain number of local governments. That raises, of course, the interpretive question whether state legislatures acting under the amendment would remain bound by state constitutional free speech guarantees, or whether the proposed amendment would supersede state as well as federal constitutional provisions.

¹⁴*The Federalist* No. 49, at 314 (James Madison).

¹⁵See *id.* at 314–17. See also 1989 Hearings at 720–23 (statement of Professor Henry Paul Monaghan, Columbia University School of Law).

The flag, as all in this debate agree, symbolizes our nation, its history, its values. We love the flag because it symbolizes the United States; but we must love the Constitution even more, because the Constitution is not a symbol. It is the thing itself.¹⁶

IV.

Americans are free today to display the flag respectfully, to ignore it entirely, or to use it as an expression of protest or reproach. By overwhelming numbers, Americans have chosen the first option, and display the flag proudly. And what gives this gesture its unique symbolic meaning is the fact that the choice is freely made, uncoerced by the government. Were it otherwise—were, for instance, respectful treatment of the flag the only choice constitutionally available—then the respect paid the flag by millions of Americans would mean something different and perhaps something less.

The CHAIRMAN. With that, we will turn to Senator Leahy.

Senator LEAHY. I think in all fairness the record should show that the Department has always—in the 25 years that I have been here, under both Republican and Democratic chairmen of the committee, and under Republican and Democratic administrations, the Department has always on issues, constitutional or otherwise, been allowed at their request to testify on their own. That has always been the procedure. The only person here in the room that has been here longer than I have is Senator Kennedy. I think he would say also, again, with both Republican and Democratic administrations, that has always been the procedure.

The other procedure, of course, is that if Members of the Senate wish to testify, they go first.

THE CHAIRMAN. We will abide by that.

Senator LEAHY. Then followed by Members of the House, and I am sorry that Senators who did want to testify this morning were told that it would not be convenient for them to. But I understand they are going to testify later, including one, Senator Kerrey of Nebraska, who is also a Medal of Honor winner, whom the Senate recognized earlier this year with a resolution, unanimously passed, commending his heroism.

We have Senators, one in favor of the amendment, one opposed, who had expected to testify today. I realize that we are utilizing extraordinary procedures, different than I have ever seen before. But I would also point out that it is up to the chairman, he can change those, and he has the absolute right to break the precedent.

I would also ask unanimous consent that a statement by Walter Cronkite, one by Keith Kreul, the past national commander of the American Legion, and one from the American Bar Association be included in the record at the appropriate point.

THE CHAIRMAN. Without objection, we will place them in the record.

[The above mentioned statements are located in the appendix.]

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

Senator LEAHY. We are being asked in the Senate again to amend the Constitution of the United States—to change the fundamental law that binds our Nation together. And I would hope and

¹⁶*Proposing an Amendment to the Constitution Authorizing the Congress and the States to Prohibit the Physical Desecration of the American Flag: Hearing Before the Senate Comm. on the Judiciary, 101st Cong., 2d Sess. 110 (1990).*

expect that we all appreciate that we are undertaking one of the gravest of our legislative responsibilities. I have often said that the two gravest things that a Member of the Senate or the House could do would be to vote either to go to war or to amend the Constitution. We are being asked to alter the inalienable rights of Americans, now and for future generations. And we are handling a most precious trust and one that is taken seriously by both those for and against this amendment. We should approach this task with dignity and decorum, with respect for differing points of view and with recognition of the patriotism of Americans on both sides of this question.

A few weeks ago, I traveled to Cuba, talked with the Cuban Government, the Cuban people on a range of issues, to find out if there is any way to break down the barriers that have divided our countries for half a century.

One of the issues I raised with President Castro was his deplorable record on human rights. The people of Cuba are still denied fundamental freedoms and rights that are recognized throughout the world, including the rights of free speech and an open press.

In fact, a few weeks before I arrived in Cuba, four human rights activists were convicted on charges of sedition and face lengthy jail terms. Their crime was criticizing Cuba's one-party system and calling for peaceful democratic change, something that would be allowed in any democratic nation in the world. For this, they were sentenced to prison terms ranging from 3½ to 5 years. And the trial, unlike trials in our constitutional systems, was held in virtual secrecy.

The trial of the four dissidents was just the most recent example of Cuba's ongoing campaign to stifle free speech and independent expression. In February, the Cuban National Assembly passed a law that threatens Cubans with penalties of up to 20 years for a broad range of activities, including possessing or disseminating subversive literature, usually defined as something that most of us would cherish, or collaborating with the U. S. Government or foreign media.

Cuba is also one of those countries that has, as part of these laws, a law making it a crime to offend or show contempt for its flag.

I spoke to Mr. Castro about his crackdown on dissidents and independent journalists and how it only serves to further alienate not only our countries but others. I explained how things work in the United States and that free expression is the hallmark of a free society. I have often said that the greatest part of our Constitution is our first amendment. It allows us to practice any religion we want, or none if we want. It allows us freedom of speech, and what this guarantees is diversity, and diversity guarantees always a democracy. You cannot force people to think alike by suppressing independent thought. You cannot force people to be patriotic by denying them the right to speak.

We should think about the human rights situation in Cuba—or China or Yugoslavia—as we consider whether, for the first time ever, we are going to restrict the rights enjoyed by Americans under the first amendment.

Supporters of this proposed amendment insist that we can draw the line at this amendment. I am not so sure. If we prohibit people from criticizing the Government by burning a flag, why not stop them from burning a cross, or a Bible, or a copy of the Constitution, which really lays out all our rights? And why not prohibit other forms of political expression?

Make no mistake about it: this proposal is directed at restricting political speech. We are being asked to say that it is OK for the U. S. Government to suppress at least some political expression because we find it offensive. And when governments like that of Cuba or China decide that certain forms of political expression are offensive and should be prohibited, when they prosecute their prodemocracy dissidents or jail journalists who criticize their leaders, what will we say then?

The United States is the most powerful country in the world in large measure because we are the most free. We are a world leader in the struggle for human rights, including the right to freedom of speech. This administration and past administrations, Democrat and Republican, have strongly criticized foreign governments that limit free speech, censor the press, and suppress other fundamental human rights. Are we setting an example here at home?

Americans respect their flag. No change to the Constitution is necessary to establish respect for the flag or for the values of freedom and responsibility that this Nation holds so dear. All of us here today respect the flag. And we will tomorrow, with or without this amendment. Certainly that is the way the people in Vermont—probably the most patriotic people I know—feel.

In all of the hearings, all of the debate that we have devoted to this topic over the past 8 or 9 years, not one single person has testified they respect the flag less because of the very rare occasion when a protester has burned it or sewed it in the seat of their pants, or misused it in a work of what they say is art, even though I have never been able to consider how using the American flag is part of art.

Not one single person has testified that they love our country less because Americans are free to express themselves in this manner. If our love of country or respect for its fundamental principles was so weak that it could be diminished by such an act, then I think we have cause for alarm. But we know it is not.

The truth is just the opposite. On those rare occasions when we see someone disrespect our flag, the overwhelming majority of Americans are reminded of how much we love that flag, how much we love our country, how much we cherish freedom. We are reminded of what unifies us and what this country stands for and the values it honors and fights for here and around the world.

I have no lack of faith in the American people and in their love and respect for the flag, this country, and others' rights of expression. We respect and love our country for what it is, not because we are told to respect it. And we do not love our country because we would be punished if we did not.

A constitutional amendment would do nothing to increase national unity.

Our Founders had greater faith. Thomas Jefferson, in his first inaugural address, given at a time when the Nation was bitterly

divided, spoke loud and clear for tolerating even the most extreme forms of political dissent. He said,

If there be any among us who would dissolve the Union or * * * change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left to combat it.

You know, this is not a case, as some have spoken of, of a question of whether we respect our veterans or not. To the contrary, it preserves the very freedoms that veterans fought to preserve. We should honor our veterans. In my view, we should start by answering Lincoln's call "to care for him who shall have borne the battle, and for his widow, and his orphan." We should honor our veterans with substance rather than symbols, because when it comes to crunch time for veterans' needs, too often of late veterans are denied their due.

Last year, the U.S. Senate voted to divert \$10.5 billion from critical veterans funding to help pay for extravagant highway spending programs. The Senate raided veterans' programs in the IRS reform legislation and again in the VA/HUD appropriations bill. If only a few more Senators had voted with those of us who were voting to support veterans, we could have prevailed and \$10.5 billion in funding for veterans would have been assured.

Ironically enough, the Senate will debate this constitutional amendment far more than we debated the \$10.5 billion raid on veterans benefits.

We have squandered a number of opportunities to increase funds in the VA medical care account. Hospitals are seeing more patients with less funding and staff, and it can take months for veterans to get a doctor's appointment. It is not mere symbolism to fund those hospitals. We can do the symbolic things, but we are not doing the actual things. We are doing the rhetoric and not the reality.

I saw this in Vermont where we had to fight to keep adequate funding for the only veterans hospital in the State.

We changed our immigration laws to expedite deportation proceedings by cutting back on procedural safeguards and judicial review. The zealotry of Congress and the White House to be tough on aliens has also snared American veterans, permanent residents who have spilled their blood for this country. As the INS prepares to deport them for even the most minuscule criminal offenses, I wonder how many of them are being deported carrying with them their Purple Hearts.

Our country's historic response to dissent is not to ban speech we find offensive. That is the response of weakness. The American people respond with strength, with responsible actions that demonstrate respect and allegiance, freely given.

Last year, when the Ku Klux Klan decided to hold a rally in Jasper, TX, where an African-American had been brutally tortured and murdered in a hate crime that shocked the conscience of us all, the good citizens of Jasper, led by their African-American mayor, let the Klan speak. They let them march; they let them wave American flags. The good citizens of Jasper rejected the Klan without suppressing their speech, and the Klan realized how they felt about them, and the Klan slithered out of town.

Last July 18, 1998, in Couer D'Alene, ID, white supremacists held a "100-Man flag parade." They marched carrying American flags and Nazi banners side by side. The local residents turned the tables on the demonstrators by raising \$1,001 for each minute of the white supremacists' march, and then they donated that money to human rights organizations. The positive examples of the good citizens from across this country show that our America, the America for which our soldiers and veterans have sacrificed so much over the last 200 years, remains strong.

It can be painful that the Klan and others try to associate themselves with the principles of our Nation by displaying the flag, but therein lies the greatness of America. All voices, however hateful and obnoxious, can be heard, but it is the strength of ordinary citizens, those who spontaneously sing "God Bless America" and the national anthem, that wins the debate. The first amendment works. Freedom works. And we should celebrate that, not erode it.

Thank you, Mr. Chairman. I will put my whole statement in the record.

The CHAIRMAN. We will put the whole statement in the record, without objection.

[The prepared statement of Senator Leahy follows:]

PREPARED STATEMENT OF SENATOR PATRICK J. LEAHY

The Senate is, again, being asked to amend the Constitution of the United States—to change the fundamental law that binds this nation together. I hope and expect that we all appreciate that we are undertaking one of the gravest of our legislative responsibilities. We are being asked to alter the inalienable rights of Americans, now and for future generations. We are handling a most precious trust. We would approach this task with dignity and decorum, with respect for differing points of view and with recognition of the patriotism of Americans on both sides of this question.

A few weeks ago I traveled to Cuba to begin a dialogue with the Cuban government and the Cuban people on a range of issues, with a view toward finding a way to break down the barriers that have divided our countries for half a century and that are no longer in the best interest of the United States.

One of the issues I raised with Castro was his deplorable record on human rights. The people of Cuba are still denied fundamental freedoms and rights that are recognized throughout the world, including the rights of free speech and an open press.

A few weeks before I arrived in Cuba, four human rights activists were convicted on charges of "sedition." Their "crime" was criticizing Cuba's one-party system and calling for peaceful democratic change. For this, they were sentenced to prison terms ranging from three-and-a-half to five years. And the trial was held in virtual secrecy.

The trial of the four dissidents was just the most recent example of Cuba's ongoing campaign to stifle free speech and independent expression. In February, the Cuban National Assembly passed a law that threatens Cubans with penalties of up to 20 years for a broad range of activities, including possessing or disseminating "subversive" literature, or "collaborating" with the United States government or foreign media.

Cuba also has a law making it a crime to offend or show contempt for the national flag.

I spoke to Castro about his crackdown on dissidents and independent journalists, and how it only serves to further alienate our countries. I explained how things work in the United States and that free expression is the hallmark of a free society. You cannot force people to think alike by suppressing independent thought. You cannot force people to be patriotic by denying them the right to speak.

We should think about the human rights situation in Cuba—in China—in Yugoslavia—as we consider whether, for the first time ever, we are going to restrict the rights enjoyed by Americans under the First Amendment.

Supporters of this proposed amendment insist that we can draw the line at this amendment. I am not so sure. If we prohibit people from criticizing the government

by burning a flag, why not stop them from burning a cross, or a bible, or a copy of the Constitution? Why not prohibit other forms of political expression?

Make no mistake about it: this proposal is directed at restricting political speech. We are being asked to say that it is okay for the United States government to suppress at least some political expression merely because we find it offensive. And when governments like that of Cuba or China decide that certain forms of political expression are offensive and should be prohibited, when they prosecute their pro-democracy dissidents or jail journalists who criticize their leaders, what will we say then? If it is okay for the United States to criminalize an unpopular form of political expression why should other countries not do the same with respect to expression they find offensive?

The United States is the most powerful country in the world in large measure because it is the most free. We are a world leader in the struggle for human rights, including the right to freedom of speech for all. This administration and past administrations, Democrat and Republican, have strongly criticized foreign governments that limit free speech, censor the press and suppress other fundamental human rights. If we succumb to the temptation of silencing those who express themselves in ways that we find repugnant, what example do we set for ourselves and others around the world?

Americans respect their flag. No change to the Constitution is necessary to establish respect for the flag or for the values of freedom and responsibility that this nation holds so dear. All of us here today respect the flag. We will tomorrow. And in all of the hearings, all of the debate that we have devoted to this topic over the past eight or nine years, not one single person has testified that they respect the flag less because a protester has burned it, sewed it in the seat of his pants, or misused it in a work of what they say is "art."

Not one single person has testified that they love our country less because Americans are free to express themselves in this manner, a way that is repugnant to many of us. If our love of country or respect for its fundamental principles was so weak that it could be diminished by such an act, that would be cause for alarm. We know that it is not.

The truth is just the opposite. On those rare occasions when we seen someone disrespect our flag the overwhelming majority of Americans are reminded of how much we love that flag, how much we love our country, how much we cherish freedom. We are reminded of what unifies us and what this country stands for and the values it honors and fights for here and around the world.

I have no lack of faith in the American people and in their love and respect for the flag, this country and others' rights of expression. We respect and love our country for what it is, not because we are told to respect it. We do not love our country because we would be punished if we did not.

A constitutional amendment would do nothing to increase actual national unity. If anything, it would erode our unity by eroding the Bill of Rights, which is the glue that binds us together as a nation.

The Founders had greater faith. Thomas Jefferson, in his first inaugural address, given at a time when the nation was bitterly divided, spoke loud and clear for tolerating even the most extreme forms of political dissent: "If there be any among us who would dissolve the Union or * * * change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left to combat it."

As Justice Louis Brandeis observed, "those who won our independence eschewed silence coerced by law—the argument of force in its worst form." Our faith in free speech is grounded ultimately in a confidence that the truth will prevail over falsehood.

We should honor our veterans. In my view we should start by answering Lincoln's call "to care for him who shall have borne the battle, and for his widow, and his orphan." We should honor our veterans with substance rather than symbols. When it comes to crunch time for veterans' needs, too often of late veterans are denied their due. Last year the Senate voted to divert \$10.5 billion from critical veterans funding to help pay for extravagant highway spending programs. The Senate raided veterans' programs in the IRS reform legislation and, again, in the VA/HUD Appropriations Bill. If only a few more Senators had voted with us to support veterans, we could have prevailed and \$10.5 billion in funding for veterans would have been assured.

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

It is estimated that a third of all homeless people in this country are American veterans. Many of those people may be suffering from post-traumatic stress disorder or other illnesses relating to their military service.

We all know that with the end of the Cold War, military bases are closing. Military retirees who relied on the base hospitals for space-available free medical care are losing access to care. Many service members retired near military bases specifically so that they could enjoy the free medical care we promised them, but now they have to find health care in an inhospitable marketplace.

I saw this in Vermont recently, where we have had to fight to keep adequate funding for the only veteran's hospital in the state. It has been on the verge of closing down the in-patient surgery service, which would mean that many elderly Vermont and New Hampshire veterans would be forced to travel to Boston for medical care, and many of them just cannot.

This sort of thing is happening all across the country. For the last three years, the health care funding for veterans has been flat, while costs have risen dramatically. We could give military retirees access to the Federal Employee Health Benefit program that all other federal employees, including Senators, enjoy. The Senate has not done so.

Instead, in 1996, we changed the immigration laws to expedite deportation proceedings by cutting back on procedural safeguards and judicial review. The zealotry of Congress and the White House to be tough on aliens has snared American veterans, permanent residents who have spilled their blood for this country. As the INS prepares to deport them for even the most minuscule criminal offenses, we have not even been kind enough to thank them for their service with a hearing to listen to their circumstances. I heard yesterday that we may be obtaining some semblance of justice for one of those former servicemen, and I am honored if my intervention played a part in that matter for the Ramirez family.

If we fail to meet the concrete needs of American veterans and try to push them aside with symbolic gestures, we will have failed in our duty not only to our veterans, but to our country as well.

Our country's historic response to dissent is not to ban speech that we find offensive. That is the response of weakness. The American people respond with strength, with responsible actions that demonstrate respect and allegiance, freely given.

Last year, when the Ku Klux Klan decided to hold a rally in Jasper, Texas, where an African American had been brutally tortured and murdered in a hate crime that shocked the conscience of us all, the good citizens of Jasper, led by their African American mayor, let the Klan speak. They let them march, and they even let them wave American flags. The good citizens of Jasper rejected the Klan without suppressing their speech and the Klan slithered out of town.

Last July 18, 1998, in Couer D' Alene, Idaho, white supremacists held a "100-Man flag parade" and marched carrying American flags and Nazi banners side by side. The local residents turned the tables on the demonstrators by raising \$1,001 for each minute of the white supremacists' march, money for donations to human rights organizations. The positive examples of the good citizens from across this country show that our America, the America for which our soldiers and veterans have sacrificed so much over the last 200 years, remains strong.

It can be painful that the Klan and others try to associate themselves with the principles of our nation by displaying the flag, but therein lies part of the greatness of America. All voices, however hateful and obnoxious, can be heard, but it is the strength of ordinary citizens, those who spontaneously sing "God Bless America" that wins the debate. The First Amendment works. Freedom works. We should celebrate it, not erode it.

The CHAIRMAN. It has been brought to my attention we have another Medal of Honor winner in our audience. Would Rudolfo Hernandez stand, please? [Applause.]

Senator LEAHY. Mr. Chairman, if I could just interject—oh, I am sorry. You wanted to say something.

The CHAIRMAN. Rudolfo is a distinguished veteran of the Korean Conflict. Let me just mention, since I failed to mention him the first time around, let me just mention what Rudolfo did.

His platoon, in defense of positions on hill 420, came under ruthless attack by numerically superior and fanatical hostile forces accompanied by heavy artillery, mortar, and machine gun fire which inflicted numerous casualties on the platoon. His comrades were

forced to withdraw due to lack of ammunition, but Corporal Hernandez, though wounded in an exchange of grenades, continued to deliver deadly fire into the ranks of the on-rushing assailants until a ruptured cartridge rendered his rifle inoperative.

Immediately leaving his position, Corporal Hernandez rushed the enemy, armed only with a rifle and bayonet. Fearlessly engaging the foe, he killed six of the enemy before falling unconscious from grenade, bayonet, and bullet wounds, but his heroic action momentarily halted the enemy advance and enabled his unit to counter-attack and retake the lost ground.

The indomitable fighting spirit, outstanding courage, and tenacious devotion to duty clearly demonstrated by Corporal Hernandez reflect the highest credit upon himself, the infantry, and the U.S. Army. So we are really proud to have you here, Corporal. [Applause.]

Senator LEAHY. Mr. Chairman, I was just going to say before, one of the most cherished memories I have is the 40th anniversary of D-Day. President Reagan was going to be in Normandy, and he asked then-Majority Leader Senator Bob Dole, our good friend, and I to lead a delegation to represent him in Italy for the celebrations. On our plane were several Congressional Medal of Honor winners. I don't recall all the things that happened during the various celebrations. As you know, you have been at those various things. They become almost a blur going from place to place. I remember virtually every second of the time spent in the airplane with the Medal of Honor winners, both over and back. I made a lot of notes on them, and Senator Dole has visited with some of them since. They were kind enough to give me a set of cuff links and a pin with the symbol of the Congressional Medal of Honor. I have kept those in a special place. I would never wear them because I feel that is something only those who have earned it should wear. But I thought what an honor it was to be there with them.

It was an extraordinary, extraordinary time, and you probably have heard Bob talk about that trip.

The CHAIRMAN. Yes.

Senator LEAHY. I know it meant a lot to him, too.

The CHAIRMAN. Well, thank you, Senator.

We will turn to the chairman of the Constitution Subcommittee, Senator Ashcroft, and then I am going to turn to Senator Feingold, who is the ranking member, for the final comments from the dais here. And then we are going to turn to our witnesses.

STATEMENT OF HON. JOHN ASHCROFT, A U.S. SENATOR FROM THE STATE OF MISSOURI

Senator ASHCROFT. Thank you and good morning. I want to thank Chairman Hatch for holding this hearing and thank him for his leadership on what I consider to be this important issue.

We plan to mark up the proposed flag amendment in subcommittee tomorrow. Of course, this is the full committee. And this morning's hearing should set the stage for that markup by providing an opportunity to examine our Nation's history, which is rather substantial, of safeguarding the flag and give us an opportunity to discuss the necessity of continuing to protect the flag in the years ahead.

In exploring the wisdom of amending the Constitution to protect the flag, it is important to begin with the rich role that the flag has played in our country's history. Throughout our history, the flag has held a special place in the hearts and minds of Americans. Although its appearance has changed, reflecting the growth of the Nation, its meaning has not changed. The flag represents no particular perspective, political agenda, or religious belief; rather, it symbolizes an ideal, not just for Americans but for all people who honor the great American experiment. It represents both the shared ideal of freedom and the continuing struggle for this precious liberty.

In the words of the Chief Justice of the United States in his dissenting opinion in *Texas v. Johnson*, and I am quoting now,

The American flag throughout more than 200 years of our history has come to be the visible symbol embodying our Nation. 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.

Not only has the flag played an important role in our Nation's history, but we also have a long tradition of protecting the flag from desecration. The first laws providing special protections for the flag date back over 100 years, and there are earlier reported incidents in which desecration of the flag was treated as an act of war or treason. Many of the other protective State laws were based on the Uniform Flag Act of 1917.

None of the sponsors of these laws that previously have protected our flag felt that the laws ran afoul of the first amendment. Indeed, the Supreme Court itself upheld the Nebraska statute preventing commercial use of the flag in 1907 in *Halter v. Nebraska*. By the time of the Supreme Court's decision in *Texas v. Johnson*, 48 of the 50 States made burning the flag a criminal offense.

Now, this long tradition of flag protection is important for at least two reasons. First, it demonstrates that citizens of this country have long thought it important to incorporate respect for the flag into the governing law. Second, it makes it awfully difficult for me to believe that this legislative practice, which dates back a full century, somehow violated the Constitution all along. However, a majority of the Supreme Court reached that conclusion, finding both State and Federal flag protection statutes to be incompatible with the first amendment.

Now, this proposed amendment would restore the people's will and capacity to protect the flag, and it would reaffirm a power Congress enjoyed until the beginning of this decade. I do not believe this action threatens the important values of the first amendment. As Justice Stevens noted in his dissent in *Texas v. Johnson*, and I am quoting, "The concept of desecration does not turn on the substance of the message the actor intends to convey but, rather, on whether those who view the act will take serious offense."

Likewise, the act of desecrating the flag does not have any content in and of itself. The act takes meaning and expresses conduct only in the context of the true speech which accompanies the act, and that speech would remain unregulated.

Nor can I accept the notion that in protecting our Nation's symbol we are somehow undermining the first amendment as it is applied in other contexts. The flag is wholly unique, with no rightful or similar comparison. An amendment protecting the flag from desecration will provide no aid or comfort in any future campaigns to restrict speech. The best evidence of this truth is that limits on flag desecration coexisted with our precious first amendment liberties for nearly a century before the Supreme Court's decision in *Texas v. Johnson*.

Despite these arguments, the Supreme Court discarded the judgment of the State and Federal legislative bodies which all found protection of the flag to be consistent with the Constitution. The question before us now is whether to let that decision of the Supreme Court stand or whether we should exercise the power given to us by the Constitution to allow the people a chance to restore their will.

I would just add this note here. The Senate is not being asked to amend the Constitution. The Congress cannot amend the Constitution. Only the people of this country, through their States in ratifying proposed amendments, can do so. And we are simply being asked to exercise the power given to us by the Constitution to allow the people, through their States, to have that opportunity.

I look forward to this opportunity to explore these issues, to hear more about our Nation's history and traditions, and it is my hope that all of us can walk away from this hearing with a greater understanding of this issue and a recognition of a need, a serious need to protect the legacy and freedom that the U.S. flag represents.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.
Senator Feingold.

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

Senator FEINGOLD. Thank you, Mr. Chairman. I want to welcome our witnesses. I thank them for coming. And I am going to keep my remarks brief so we can get on to the witnesses whom all of us would like to hear.

I do want to just take a moment to underline a few points, Mr. Chairman. I want to thank you for your and your staff's cooperation on scheduling this hearing and the two markups very much.

The CHAIRMAN. I want to thank you. You have been very easy to work with on this, and we appreciate your cooperation.

Senator FEINGOLD. This hearing and the whole issue of the flag amendment are not only about the flag. They are also about the first amendment and our precious right of free speech. We are not here to discuss whether flag burning is a good idea—it is obviously just the opposite—or whether the flag is worthy of respect. It always is.

We are here to discuss whether for the first time in our history we should amend the first amendment to allow the Government to criminalize conduct that is clearly expressive and that is often undertaken as a form of political protest.

It seems almost silly to have to say this, but given some of the political ads that have been running on this issue, I believe I must. Not a single Senator who opposes the proposed constitutional amendment, as I do, supports burning or otherwise showing disrespect to the flag. Not a single one. There has never been such a Senator. I don't believe there ever will be. None of us think it is OK to burn the flag. On those rare occasions when some malcontent defiles or burns our flag, I join everyone on this dais and in this room and in this country who condemns that action.

At the same time, whatever the political cost, I will defend the right of Americans to express their views about their Government, however hateful or spiteful or disrespectful, without the fear of their Government putting them in jail for those views. America is not a Nation of symbols. It is a Nation of principles. And the most important principle of all, the principle that I think has made this country a beacon of hope and inspiration for oppressed peoples throughout the world, is the right of free expression. This amendment, well-intentioned as it may be, threatens that right and, therefore, I must oppose it.

The first amendment to the Constitution has survived and flourished for over 200 years of our history, and we have not deviated from it even in the darkest moments of our history. Through civil war, foreign wars, or domestic turmoil, we have never gone the constitutional amendment route to try to deal with a problem that has to do with the Bill of Rights and a decision of the U.S. Supreme Court. That is very significant. It is not that we don't react to Supreme Court decisions. It is that this particular mechanism is unprecedented and troubling. Amending the Bill of Rights of the U.S. Constitution is not the proper response.

The principle of free expression is perhaps what separates this country most clearly from oppressive regimes around the world, as Senator Leahy so eloquently expressed. Let's not start tinkering with it now, even to protect a symbol as important and meaningful as the American flag.

Mr. Chairman, before I yield, I want to ask consent to enter into the record of this hearing the guidelines developed by Citizens for the Constitution for when and how the Constitution should be amended. Citizens for the Constitution is a nonpartisan organization of former public officials, constitutional scholars, and other prominent Americans who urge restraint in the consideration of proposals to amend the Constitution.

I hope that the Senate will continue to exercise restraint when it votes later this year on this particular amendment, and I thank you again, Mr. Chairman, and look forward to hearing from the witnesses.

The CHAIRMAN. Thank you. And, without objection, we will put that in the record.

[The guidelines follow:]

CITIZENS FOR THE CONSTITUTION

“GREAT AND EXTRAORDINARY OCCASIONS”: DEVELOPING GUIDELINES FOR CONSTITUTIONAL CHANGE ¹*Introduction*

When the Constitution’s framers met in Philadelphia, they decided to steer a middle course between establishing a constitution that was so fluid as to provide no protection against the vicissitudes of ordinary politics and one that was so rigid as to provide no mechanism for orderly change. An important part of the compromise they fashioned was embodied in Article V.

The old Articles of Confederation could not be amended without the consent of every state—a system that was widely recognized as impractical, producing stalemate and division. Accordingly, Article V provided for somewhat greater flexibility: the new Constitution could be amended by a proposal adopted by two-thirds of both Houses of Congress or by a convention called by two-thirds of the states, followed in each case by approval of three-fourths of the states.²

In the ratification debate that ensued, Article V played an important role. The new, more flexible amendment process served to reassure potential opponents who favored adding a bill of rights, or who worried more generally that the document might ultimately prove deficient in unanticipated ways. It also reassured the Constitution’s supporters by making it more unlikely that a second constitutional convention would be called to undo the work of the first.

Precisely because the legal constraints on the amendment process had been loosened somewhat from those contained in the old Articles, many of the framers also believed that the legal constraints should be supplemented by self-restraint. Although the new system made it legally possible to change our foundational document even when there was opposition, the framers believed that even dominant majorities should hesitate before using this power. As James Madison, a principal author of both the Constitution and the Bill of Rights, argued in *Federalist* 49, the constitutional road to amendment should be “marked out and kept open,” but should be used only “for certain great and extraordinary occasions.”

For the first two centuries of our history, this reliance on self-restraint has functioned well. Although more than 11,000 proposed constitutional amendments have been introduced in Congress, only thirty-three received the requisite congressional supermajorities, and only twenty-seven have been ratified by the states. The most significant of these amendments, accounting for half of the total, were proposed during two extraordinary periods in American history—the period of the original framing, which produced the Bill of Rights,³ and the Civil War period, which produced the Reconstruction amendments. Aside from these amendments, the Constitution has been changed only thirteen times.

Most of these thirteen amendments either expanded the franchise or addressed issues relating to presidential tenure. Only four amendments have ever overturned decisions of the Supreme Court, and the only amendments not falling within these categories—the Prohibition Amendments—also provide the only example of the repeal of a previously enacted amendment.⁴

In recent years, however, there have been troubling indications that this system of self-restraint may be breaking down. To be sure, no newly proposed amendment has been adopted since 1971. Nonetheless, there has been a sudden rash of proposed amendments that have moved further along in the process than ever before and that, if enacted, would revise fundamental principles of governance such as free speech and religious liberty, the criminal justice protections contained in the Bill of Rights, and the methods by which Congress exercises the power of the purse. Within

¹Uncorrected draft manuscript.

²Article V provides: The Congress whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

³The Twenty-seventh Amendment, relating to changes in congressional compensation, was part of the original package of amendments proposed by the first Congress, but was not ratified by the states until 1992.

⁴A list and brief description of all twenty-seven ratified amendments, grouped according to category, is attached as an appendix.

the past few years, six proposed constitutional amendments—concerning a balanced budget, term limits, flag desecration, campaign finance, religious freedom, and procedures for imposing new taxes—have reached the floor of the Senate, the House, or both bodies. Two of these—the balanced budget amendment and the flag desecration amendment—passed the House, and a version of the balanced budget amendment twice failed to win Senate passage by a single vote. Still other, sweeping new amendments—including a “victim’s rights” amendment, an amendment redefining United States citizenship, and even an amendment to ease the requirements for future amendments—have considerable political support.

There are many explanations for this new interest in amending the Constitution. Some Republicans, in control of both Houses of Congress for the first time in several generations, want to seize the opportunity to implement changes that many of them have long favored. Some Democrats, frustrated by a political system they view as fundamentally corrupted by large campaign contributions, want to revisit the relationship between money and speech. Some members of both parties have blamed what they consider to be the Supreme Court’s judicial activism for effectively revising the Constitution, thereby necessitating resort to the amendment process to restore the document’s original meaning.⁵ There may well be merit to each of these views. Unfortunately, however, very little attention has been devoted to the wisdom of engaging in constitutional change, even to advance popular and legitimate policy outcomes. We believe that the plethora of proposed amendments strongly suggests that the principle of self-restraint that has marked our amending practices for the past two centuries may be in danger of being forgotten.

There are several good reasons for attempting to reaffirm this self-restraint.

- Restraint is important because constitutional amendments bind not only our own generation but future generations as well. Constitutional amendments may entrench policies or practices that seem wise now, but that end up not working in practice or that reflect values that cease to be widely shared. Contested policy questions should generally be subject to reexamination in light of the experience and knowledge available to future generations. Enshrining a particular answer to these questions in the Constitution obstructs that opportunity. Our experience with three previously proposed amendments, one that was adopted and later repealed, and two others that moved far along in the process but were not adopted, serve to illustrate these points:

First, when the Prohibition Amendment was adopted in 1919, many Americans thought that it embodied sensible social policy. Yet within a short time, there was broad agreement that the experiment had failed, in part because enforcing it proved enormously expensive in terms of dollars and social cost. Had prohibition advocates been content to implement their policy by legislation, those laws could have been readily modified or repealed when the problems became apparent. Instead, the country had to undergo the arduous and time-consuming process of amending the Constitution to undo the first change. This is an experience we should be eager not to repeat.

The second example might have had far more serious consequences. On the eve of the Civil War, both Houses of Congress adopted an amendment that would have guaranteed the property interest of slaveholders in their slaves and would have forever prohibited repeal of the amendment. Fortunately, the proposed amendment was overtaken by events and never ratified by the states. Had it become law, the result would have been a constitutional calamity.

Finally, in our own time, there is the failed effort to add to the Constitution an equal rights amendment, prohibiting denial or abridgment of rights on account of sex. Within three months of congressional passage in 1972, twenty states had ratified the amendment. Thereafter, the process slowed, and even though Congress extended the deadline, supporters ultimately fell short of the three-fourths of the states necessary for ratification. The struggle for and against ratification produced much dissension and consumed a great deal of political energy. Yet today, even some of the amendment’s former supporters would concede that it may not have been necessary. Moreover, the amendment would have added to the Constitution a controversial and broadly worded provision of uncertain and contested meaning, with the Supreme Court given the unenviable job of providing it content. Instead

⁵ Issues concerning the appropriate techniques of constitutional interpretation are beyond the scope of this project. Some, but by no means all, of our members believe that, in some cases, the Supreme Court has inappropriately “amended” the Constitution through a strained reading of its text. We believe that it is entirely appropriate for Congress to respond to what it perceives as erroneous constitutional interpretation by passing corrective amendments. However, we also believe that, even in the face of perceived judicial overreaching, Congress should not compound the problem by responding with poorly drafted or ill-considered amendments.

of years of judicial wrangling concerning its application, we have seen Congress pass ordinary legislation, and the Court engage in the familiar process of explicating existing constitutional and statutory text, to achieve many of the goals of the amendment's proponents. This process has been more sensitive and flexible, while also less contentious and divisive, than what we could have expected had the amendment become law.

- Restraint is also important in order to preserve the Constitution as a symbol of our nation's democratic system and of its cherished diversity. In a pluralistic democracy, in which people have many different religious faiths and divergent political views, maintaining this symbol is of central importance. The Constitution's unifying force would be destroyed if it came to be seen as embodying the views of any temporarily dominant group. It would be a cardinal mistake to amend the Constitution so as to effectively "read out" of our foundational charter any segment of our society.

- The Constitution's symbolic significance might also be damaged if it were changed to add the detailed specificity of an ordinary statute in order to control political outcomes. The Constitution's brevity and generality serve to differentiate it from ordinary law and so allow groups that disagree about what ordinary law should be to coalesce around the broad principles it embodies.

- Finally, restraint is necessary because proposed amendments to the Constitution often put on the table fundamental issues about our character as a nation, thereby bringing to the fore the most divisive questions on the political agenda. Two centuries ago, James Madison warned of the "danger of disturbing the public tranquility by interesting too strongly the public passions" through proposed constitutional change. It is not only wrong to trivialize the Constitution by cluttering it with measures embodying no more than ordinary policy; it is also a mistake to reopen basic questions of governance lightly. Occasional debates about fundamental matters can be cleansing and edifying, but no country can afford to argue about these issues continuously. Our ability to function as a pluralistic democracy depends upon putting ultimate issues to one side for much of the time, so as to focus on the quotidian questions of ordinary politics. As Madison argued shortly after the Constitution's drafting, changes in basic constitutional structure are "experiments * * * of too ticklish a nature to be unnecessarily multiplied."

None of this is to suggest that the Constitution should never be amended or that its basic structural outlines are above criticism. There have been times in our history when arguments for restraint have been counterbalanced by the compelling need for reform. Some individuals may believe that this is such a time, at least with regard to particular issues, and if they do, there is nothing illegitimate about urging constitutional change.

Some constitutional amendments are designed to remedy perceived judicial misinterpretations of the Constitution. Some earlier amendments—for example, the Eleventh Amendment establishing state sovereign immunity and the Sixteenth Amendment authorizing an income tax—fall into this category. There is nothing *per se* illegitimate about amendments of this sort, although here, as elsewhere, their supporters need to think carefully about the precise legal effect of the amendment in question and about how it will interact with other, well-established principles of constitutional law.

More generally, advocates of amendments of any kind should focus not only on the desirability of the proposed change, but also on the costs imposed by attempts to achieve that change through the amendment process as contrasted with other alternatives. In the Guidelines that follow, we propose some general questions that, we hope, participants in debates about constitutional change will ask themselves. We do not pretend that the answers to these questions will always be dispositive or that the Guidelines can be mechanically applied. If the circumstances were extraordinary enough, all of these warnings might be overcome. Nor do we imagine that the Guidelines alone are capable of resolving all disputes about currently pending proposals for constitutional change. We ourselves are divided about some of these proposed amendments, and no general Guidelines can determine the ultimate trade-offs among the benefits and costs of change in individual cases.⁶

Instead, our hope is that the Guidelines will draw attention to some aspects of the amending process that have been ignored too frequently, will provoke discussion of when resort to the amending process is appropriate, and will suggest an approach that ensures that all relevant concerns are fully debated. At the very moment when this country was about to embark on the violent overthrow of a prior, unjust con-

⁶As an organization, we generally take no position on the merits of proposed amendments. We have made a single exception in the case of an amendment that would itself make the amendment process less arduous. This proposal runs afoul of our core commitment to restraint, and we strongly oppose it.

stitutional order, even Thomas Jefferson, more friendly to constitutional amendments than many of the founders, warned that “governments long established should not be changed for light and transient causes.” In the calmer times in which we live, there is all the more reason to insist on something more before overturning a constitutional order that has functioned effectively for the past two centuries. The Guidelines that follow attempt to raise questions about whether such causes exist and how we should respond to them.

GUIDELINES FOR CONSTITUTIONAL AMENDMENTS

1. Does the proposed amendment address matters that are of more than immediate concern and that are likely to be recognized as of abiding importance by subsequent generations?
2. Does the proposed amendment make our system more politically responsive or protect individual rights?
3. Are there significant practical or legal obstacles to the achievement of the objectives of the proposed amendment by other means?
4. Is the proposed amendment consistent with related constitutional doctrine that the amendment leaves intact?
5. Does the proposed amendment embody enforceable, and not purely aspirational, standards?
6. Have proponents of the proposed amendment attempted to think through and articulate the consequences of their proposal, including the ways in which the amendment would interact with other constitutional provisions and principles?
7. Has there been full and fair debate on the merits of the proposed amendment?
8. Has Congress provided for a nonextendable deadline for ratification by the states so as to ensure that there is a contemporaneous consensus by Congress and the states that the proposed amendment is desirable?

COMMENTARY ON THE GUIDELINES

The following commentary explains each of the Guidelines and illustrates how each might be applied in the context of some previous and pending proposals for constitutional amendment. It is significant that the Guidelines are written in the form of questions to think about, rather than commands to be obeyed. The Guidelines alone cannot determine whether any amendments should be adopted or rejected. Instead, most of the Guidelines are designed to raise concerns that those considering amendments might want to weigh against the perceived desirability of the changes embodied in the amendments. The last three Guidelines—concerning the need to articulate consequences, the fairness of the procedure, and the requirement of a nonextendable deadline—are in a somewhat different category. Although each of the other concerns might be overcome if one were sufficiently committed to the merits of a proposed amendment, it is hard to imagine the circumstances under which adopting an amendment would be appropriate without an articulation of its consequences, a full and fair debate, and measures designed to assure that it reflects a contemporary consensus.

1. *Does the proposed amendment address matters that are of more than immediate concern and that are likely to be recognized as a abiding importance by subsequent generations?*

James Madison, one of the principal architects of Article V of the Constitution, which contains the procedures for amendment, cautioned against making the Constitution “too mutable” by making constitutional amendment too easy. Hence his insistence that any constitutional amendment command not only majority, but supermajority, support. Implicit in Madison’s caution is the view that stability is a key virtue of our Constitution and that excessive “Mutability” would undercut one of the main reasons for having a constitution in the first place. As Chief Justice John Marshall observed in *McCulloch v. Maryland*, the Constitution was “intended to endure for ages to come.” Similarly, in his prophetic dissent in *Lochner v. New York*, Justice Oliver Wendell Holmes cautioned that the Constitution ought not be read to “embody a particular economic theory” that might be fashionable in a particular generation. It is crucial to our constitutional enterprise to preserve public confidence—over succeeding generations—in the stability of the basic constitutional structure.

Thus, the Constitution should not be amended solely on the basis of short-term political considerations. Of course, no one can be certain whether future generations will come to see a policy as merely evanescent or as truly fundamental. Still, legislators have an obligation to do their best to avoid amendments that are no more than part of a momentary political bargain, likely to become obsolete as the social and political premises underlying their passage wither or collapse.

To be enduring, constitutional amendments should usually be cast, like the Constitution itself, in general terms. Both powers and rights are set forth in our basic document in broad and open-ended language. To quote Marshall in *McCulloch* again, an enduring Constitution “requires that only its great outlines should be marked,” with its “minor ingredients” determined later through judicial interpretation in each succeeding generation. Of course, sometimes specificity will be necessary, as in changing the date of the presidential inauguration. But in general, the nature of our Constitution is violated if amendments are too specific in the sense that they reflect only the immediate concerns of one generation, or if they set forth specifics more appropriate in an implementing statute.

To illustrate this point, contrast the experience of the state constitutions with our sparse tradition of federal constitutional amendments. While the federal Constitution has been amended only twenty-seven times in more than two hundred years, the fifty state constitutions have had a total in excess of six thousand amendments added to them.⁷ Many are the products of interest group politics and are characteristic of ordinary legislation. State constitutions thus suffer from what Marshall called “the prolixity of a legal code”—a vice he praised the federal Constitution for avoiding.⁸

Even when amendments are not overly detailed, they may be inappropriate because they focus on matters of only short-term concern. For example, consider various proposals that seek to carve specific new exceptions out of the broad concept of freedom of speech set forth in the First Amendment. The proposed flag desecration amendment would rewrite the Constitution to say that while the government generally may not prohibit speech based on dislike of its message, it may do so in the case of flag desecraters. The proposed campaign finance amendment would alter the First Amendment to say that the quantity of speech may never be diminished—except in modern election campaigns.

Each of these amendments is a response to contemporary political pressures. Future generations, like Americans today, can easily perceive the broad purposes and enduring legacies underlying the majestic generalities of our original guarantee of freedom of speech: the quest for truth, for self-government, and for individual liberty. But future generations may not understand, let alone revere, the motivations behind a flag desecration or campaign finance amendment. Such particularized amendments may instead be perceived as the political victory of one faction in a particular historical moment. Flag desecration is not an immortal form of political protest; we cannot know whether political dissidents will have the slightest interest in this gesture generations from now. Similarly, the campaign tactics used by candidates today might change in ways that we cannot now imagine as we enter an age of instantaneous global communication over new electronic and digital media. Thus, there may be legitimate questions about the enduring nature of the perceived problem, as well as about the proposed solution.

In general, we should not embed in the Constitution one generation’s highly particular response to problems that a later generation might view as ephemeral. To add such transient amendments to the Constitution trivializes and undermines popular respect for a document that was intended to endure for the ages.

2. Does the proposed amendment make our system more politically responsive or protect individual rights?

Of the twenty-seven amendments to the Constitution, seventeen either protect the rights of vulnerable individuals or extend the franchise to new groups. With the notable exception of the failed Prohibition Amendment, none of the amendments simply entrenches a substantive policy favored by a current majority.

There are good reasons for this overwhelming emphasis either on individual rights or on democratic participation. In a constitutional democracy, most policy questions should be decided by elected officials, responsible to the people who will be affected by the policies in question. It follows that the Constitution’s main thrust should be to ensure that our political system is more, rather than less, democratic. Many amendments serve this function. For example, the Fifteenth, Seventeenth, Nineteenth, Twenty-third, Twenty-fourth, and Twenty-sixth Amendments all broaden the franchise.

Of course, the Constitution is also designed to shield vulnerable individuals from majority domination, whether temporary or permanent. Hence, many amendments

⁷ Council of State Governments, *The Book of the States*, 1998–99 ed. (Lexington, KY: Council of State Governments, 1998).

⁸ It may be that differences between the state and federal governments justify more detailed constitutions on the state level. Detailed constitutional structures that might work well at the state level might work poorly at the federal level.

guarantee minority rights. For example, the First Amendment protects the rights of religious and political minorities; the Fifth Amendment protects the rights of property holders whose property might be seized by legislative majorities without compensation or due process; the Fourth, Fifth, Sixth, and Eighth Amendments all protect the rights of criminal defendants, who were deemed especially vulnerable to majority hatred and overreaching; and the Thirteenth, Fourteenth, and Fifteenth Amendments were all motivated by the desire to protect former slaves.

There is an obvious tension between the twin goals of majority rule and protection for individuals, and this Guideline does not seek to resolve it. On some occasions, it is important to provide constitutional guarantees for individuals against government overreaching; yet on others, it is equally important to allow majorities to have their way. Although the protection of individual rights is a central aim of the Constitution, it is not the only aim, and it is emphatically not true that every group that comprises less than a majority is entitled to constitutional protection because of its minority status.

One need not determine when majority rule should trump minority rights to see the problem with amendments that do more than entrench majority preferences against future change. Amendments of this sort can be justified by neither majoritarianism nor a commitment to individual rights. On the one hand, they restrict the scope of democratic participation by future generations. On the other, they entrench the will of a current majority as against minority dissenters.

Amendments of this sort should not be confused with power-granting amendments. To make possible ordinary legislation, favored by a current majority, it is sometimes necessary to enact amendments that eliminate constitutional barriers to its passage. For example, the Sixteenth Amendment eliminated a constitutional obstacle to the enactment of a federal income tax, and the Fourteenth Amendment eliminated federalism objections to civil rights legislation. Such amendments may be legitimate when they widen the scope of democratic participation, although, as noted above, they may also raise difficult issues regarding the appropriate trade-off between majority control and minority rights.

In contrast, amendments that merely entrench majority social or economic preferences against future change make the system less rather than more democratic. They narrow the space for future democratic deliberation and sometimes trammel the rights of vulnerable individuals. It is a perversion of the Constitution's great purposes to use the amendment process as a substitute for ordinary legislative processes that are fully available to groups proposing popular changes and will be equally available to future majorities that may take a different view.

This Guideline raises important questions concerning a number of proposed constitutional amendments. Consider first the "victims rights" amendment, which would grant a number of rights in the trial process to the victims of crime. Congress should ask whether crime victims are a "discrete and insular minority" requiring constitutional protection against overreaching majorities or whether they can be protected through ordinary political means. Congress should also ask whether it is appropriate to create rights for them that are virtually immune from future revision.

The balanced budget amendment poses a close question under this Guideline. On the one hand, the amendment can be defended as democracy-enhancing by protecting the interests of future generations, or by counterbalancing the power of narrow interest groups that have succeeded in gaining a disproportionate share of the public fisc for themselves. On the other hand, these gains are achieved at the cost of dramatically shrinking the area of democratic participation. Discussions of economic theory and the size of the federal budget deficit are central to democratic politics. Americans' views concerning the propriety of deficit financing have changed dramatically over time, and there is no reason to think that this evolutionary process has come to a sudden end. Locking in a currently popular position against future change, including perhaps turning the problem of remedies over to unelected federal judges, would significantly alter the democratic thrust of the Constitution and obstruct the ability of future generations to make their own economic judgments.

Finally, consider the flag desecration amendment. In form, the amendment is power granting: it opens previously closed space for democratic decisionmaking without requiring any particular result. In general, such power-granting amendments pose no problems under this Guideline. Yet the flag desecration amendment grants power to the behest of an already dominant majority and at the expense of an extremely unpopular and utterly powerless minority. True, current constitutional doctrine prevents the majority from working its will with regard to one particular matter—the criminalization of flag desecration. But the majority on this issue has considerable power and is hardly disabled from expressing its views in a wide variety of other fora. Granting to the majority the power to prohibit an overwhelmingly

unpopular form of expression may serve to entrench currently popular views, at the expense of an unpopular minority, without providing any real gains in terms of democratic participation.

3. *Are there significant practical or legal obstacles to the achievement of the objectives of the proposed amendment by other means?*

The force of the Constitution depends on our ability to see it as something that stands above the outside of day-to-day politics. The very idea of a constitution turns on the separation of the legal and the political realms. The Constitution sets up the framework of government. It also sets forth fundamental political ideals—equality, representation, and individual liberties—that limit the actions of a temporary majority. This is our higher law. All the rest is left to day-to-day politics. Those who lose in the short run of ordinary politics obey the winners out of respect for the long-run rules and boundaries set forth in the Constitution. Without such respect for the constitutional framework, the peaceful operation or ordinary politics would degenerate into fractious war.

Accordingly, the Constitution should not be amended to solve problems that can be addressed through other means, including federal or state legislation or state constitutional amendments. An amendment that is perceived as a surrogate for ordinary legislation or executive action breaks down the boundary between law and politics that is so important to maintaining broad respect for the Constitution. And the more the Constitution is filled with specific directives, the more it resembles ordinary legislation. And the more the Constitution looks like ordinary legislation, the less it looks like a fundamental charter of government, and the less people will respect it.

A second reason for forgoing constitutional amendments when their objectives can be otherwise achieved is the greater flexibility that political solutions have to respond to changing circumstances over time.⁹ Amendments that embody a specific and perhaps controversial social or economic policy allow one generation to tie the hands of another, entrenching approaches that ought to be more easily revisable by future generations in light of their own circumstances. Such amendments convert the Constitution from a framework for governing into a statement of contemporary public policy.

For these reasons, advocates of a constitutional amendment should consider whether they have exhausted every other means of political redress before they seek to solve a problem by amending the Constitution. If other action under our existing constitutional framework is capable of achieving an objective, then writing that objective into the Constitution is unnecessary and will clutter that basic document, reducing popular respect. One might wonder why anyone would resort to the difficult and time-consuming effort to secure a constitutional amendment if the same goals could be accomplished by ordinary political means. Unfortunately, some now believe that a legislator is not serious about a proposal unless he or she is willing to amend the Constitution. Experience has also demonstrated that the amendment process (and even the mere sponsorship of an amendment, if the sponsor suspects that actual passage is unlikely) can be a tempting way to make symbolic or political points or to prevent future change in policy despite the availability of nonconstitutional means to achieve current public policy objectives.

For example, our experience with the failed equal rights amendment suggests the virtues of using ordinary political means to effect desired change. Today, many of the objectives of the amendment's proponents have been achieved without resort to the divisive and unnecessary amendment process.

The proposed victims' rights amendment raises troubling questions under this Guideline. Witnesses testifying in Congress on behalf of the federal amendment point to the success of state amendments as reason to enact a federal counterpart. But the passage of the state amendments arguably cuts just the other way: for the most part, states are capable of changing their own law of criminal procedure in order to accommodate crime victims, without the necessity of federal constitutional intervention. While state amendments cannot affect victims' rights in federal courts, Congress has considerable power to furnish such protections through ordinary legislation. Indeed, it did so in March 1997 with Public Law 105-6 (codified as 18 U.S.C. § 3510), which allowed the victims of the Oklahoma City bombing to attend trial proceedings. If this generation's political process is capable of solving a problem one way, then future generations' political processes should be free to adjust that solution over time without the rigid constraints of a constitutional amendment.

This Guideline does not caution against resort to constitutional change when there are significant legal or practical obstacles to ordinary legislation. Consider in

⁹This reason also relates to a separate set of concerns outlined in Guideline Two.

this regard the proposed flag desecration amendment. After the Supreme Court invalidated a state statute prohibiting flag desecration, Congress responded by attempting to draft a federal statute that proscribed desecration without violating the Court's interpretation of the First Amendment. This effort to exhaust nonconstitutional means is precisely the course of conduct this Guideline recommends. Now that the Supreme Court has also invalidated the federal statute, use of the amendment process in this context would fully comport with this Guideline unless a different statute could be devised that would pass constitutional muster.

Closer questions arise when there are practical rather than legal obstacles to ordinary legislation. The balanced budget amendment provides an interesting example. On the one hand, experience prior to 1997 suggested that there might have been insurmountable practical difficulties in dealing with budgetary problems through ordinary legislation, that interest group politics would inevitably stymie efforts to cut expenditures through the ordinary budget process, and the perhaps interest group politics could be transcended only by use of a general, constitutional standard. To the extent that this was true, utilization of the constitutional amendment process might well have been justified under this Guideline.

On the other hand, a constitutional amendment is a far cruder instrument than is congressional or presidential action to address the issue of federal spending, for it lacks the flexibility to permit tailoring fiscal policy to the nation's changing economic needs. There are no formal legal barriers to solving the problem through existing legislative and executive means, and recent success in achieving budgetary balance suggests that it is sometimes a mistake to overestimate the practical obstacles to change. This example counsels caution before resort to the amendment process in any context.

In any event, advocates of constitutional change should be certain that they have exhausted other means before resorting to the amendment process. Our history counsels that the federal Constitution should continue to be altered sparingly and only as a last resort. Only amendments that are absolutely necessary should be proposed and enacted. And amendments are not necessary when there are no legal or practical barriers to pursuing solutions to problems through existing political means.

4. Is the proposed amendment consistent with related constitutional doctrine that the amendment leaves intact?

Because the Constitution gains much of its force from its cohesiveness as a whole, it is vital to ask whether an amendment would be consistent with constitutional doctrine that it would leave untouched. Does the amendment create an anomaly in the law? Such an anomaly is especially likely to occur when the proposed amendment is offered to overrule a Supreme Court decision, although the danger exists in other circumstances as well.

To be sure, every amendment changes constitutional doctrine. That is, after all, the function amendments serve. A difficulty occurs only when the change has the unintended consequence of failing to mesh with aspects of constitutional doctrine that remain unchanged.

This problem does not arise when whole areas of constitutional law are reformulated. For example, the Sixteenth Amendment, permitting Congress to enact an income tax, was necessitated by the Court's ruling in *Pollock v. Farmers Loan & Trust Co.* that a specific limitation on the taxing power in the Constitution precluded a tax on income. That provision was grounded in our history as colonies and in concerns among slaveholding states that the federal government would impose a "direct tax" on slaves. With passage of the Thirteenth Amendment, ending slavery, the tax limitation itself became anomalous, and a constitutional amendment was deemed necessary to remove the anomaly. The Sixteenth Amendment reflected a repudiation of the original decision of the framers in light of changed circumstances, which is precisely the kind of broad change in policy for which the amendment process was designed. It does not follow, however, that an amendment must always overrule an entire body of law in order to comport with this Guideline. Although the *Dred Scott* decision, which struck down the federal government's attempts to restrict slavery, was embedded in the law of property, Congress did not revisit all of property law when it enacted the Thirteenth Amendment, and its failure to do so in no way damaged the coherence of constitutional doctrine.

In contrast, some proposed amendments make changes that are difficult to reconcile with underlying legal doctrine that the amendments leave undisturbed. This problem arises most often when framers of amendments focus narrowly on specific outcomes without also thinking more broadly about general legal principles.

The proposed flag desecration and campaign finance amendments illustrate this difficulty. The Supreme Court's flag desecration decisions, although commanding

only 5–4 majorities, were consistent with several lines of the Court’s well-established First Amendment decisions. In those cases, the Court had recognized both that some forms of conduct are primarily symbolic speech, and hence are entitled to full First Amendment protection, and that laws designed to suppress a particular point of view are almost never permissible, especially when the speech is a form of protest against the very government that is seeking to prohibit the activity.

If an amendment were enacted to permit the government to criminalize flag desecration, it would create the first exception to the First Amendment by specifically allowing government to censor only one type of message—one that expressed an antigovernment point of view.¹⁰ This result is difficult to reconcile with other principles that the amendment’s drafters would apparently leave intact. One wonders, for example, whether the amendment would permit legislation outlawing only those flag burnings intended as protest against incumbent officeholders.

Similarly, the campaign finance amendment presents at least two sets of anomalies in First Amendment jurisprudence. The amendment would overrule that portion of *Buckley v. Valeo*¹¹ that struck down a limitation on the amount of money that candidates for elected office can spend, either from lawfully raised contributions or from their own personal funds. The theory of the *Buckley* decision is that money is the means by which candidates amplify their messages to the electorate and that placing limits on spending is equivalent to a limit on speech, which violates the First Amendment, particularly in the context of an election.

The proposed amendment would allow Congress and the states to set limits on the amount a candidate could spend on elections, but would not alter the law regarding governmental attempts to control the amounts spent on other types of speech. If the amendment were narrowly construed to apply only to express advocacy for or against a candidate, it would have the effect of shifting money to issue advocacy, which is often not so subtly designed to achieve the same ends—election of a particular candidate. For example, the advertisements against cuts in Medicare and Social Security in the 1996 campaign were plainly efforts to aid Democratic candidates, and those against certain abortion procedures were intended to aid Republican candidates. On the other hand, if the amendment were broadly construed, it would have the anomalous effect of placing a greater limit on speech in the context of elections than in the context of commercial products or cultural matters, a result that is difficult to square with the core notion of what the First Amendment is intended to protect.

One of the underlying reasons for the result in *Buckley* is the fear that statutory spending limits would be set by incumbents, who would make those limits so low that challengers would, as a practical matter, be unable to succeed. But the amendment would allow legislatures to set “reasonable” spending limits. The Court would therefore find itself in the anomalous and unenviable position of deciding whether the amounts chosen by incumbents, or perhaps by state ballot initiatives, met the new constitutional standard, instead of doing what it does in all other First Amendment cases: forbidding the government from setting any limits on the amount of speech, whether reasonable or not.

5. *Does the proposed amendment embody enforceable, and not purely aspirational, standards?*

The United States Constitution is not a theoretical enterprise. It is a legal document that spells out a coherent approach to government power and processes while also guaranteeing our most fundamental rights. More than two centuries of experience underscore the wisdom of continuing that approach. The addition of purely aspirational statements, designed solely for symbolic effect, would lead interest groups to attempt to write their own special concerns into the Constitution.

It follows that advocates of amendments should think carefully about how the amendments will be enforced. In *Common Sense*, Thomas Paine expressed the revolutionary notion that was the founding wisdom of our nation: in America, “the law is King.” Everyone, regardless of social station or political rank, must follow the law. A provision susceptible of being ignored because no one can require its observance permits the kind of executive or legislative lawlessness that our founders wished to

¹⁰It might also create exceptions to other First Amendment doctrines, such as the prohibitions on prior restraint, overbreadth, and vagueness. Whether it would in fact have this effect is far from clear, however, because there has been remarkably little substantive discussion of the ramifications of the amendment. This problem is addressed more fully in the commentary to Guideline Six.

¹¹We intend neither endorsement nor disapproval of the Supreme Court’s decision in *Buckley v. Valeo*. Some of our members believe it was wrongly decided; others believe that it was rightly decided. We take no position on the merits of the case but intend only to discuss the effects on existing constitutional law of proposed amendments that address the *Buckley* decision.

prevent. A provision that may be willfully ignored when those charged with observing it find the result inconvenient or undesirable undermines the rule of law, the government's own legitimacy, and the Constitution's special stature in our society.

The proposals for a balanced budget amendment illustrate the need to think carefully about means of enforcement. The amendment itself does not specifically set forth the means by which it would be enforced. A Congress that has had difficulty reaching a balanced budget without a constitutional amendment might have similar difficulties if it was not subject to a judicial or presidential check. Without such a check, a balanced budget amendment might be nothing more than an aspirational standard.

Of course, most existing constitutional amendments are also silent regarding the means of enforcement. Since *Marbury v. Madison*, however, there has been a presumption that judicial enforcement will generally be available. If its proponents intend and the courts find the balanced budget amendment to be similarly enforceable, it raises no issues under this Guideline. But it is not clear that the proponents so intend. Granting to courts the right to determine when outlays exceed receipts and to devise the appropriate remedy for such a constitutional violation would arguably constitute an unprecedented expansion of judicial power. If proponents of the amendment do not intend these consequences, there is a risk that the amendment will be purely aspirational or that it will be enforced in ways they might find objectionable.

Questions also arise about other means of enforcement. Could the President refuse to spend money in order to remedy a looming unconstitutional deficit? The practice, known as impoundment, is generally thought to be unavailable to the President unless specifically authorized by Congress. However, an official from the Department of Justice testified in hearings before the Senate Judiciary Committee that, if the amendment were enacted, the President would be duty-bound to impound money or take other appropriate action to prevent an unbalanced budget.¹² Moreover, in such event, and absent some controlling statute, the choice of which programs to cut and in which amounts would be entirely up to the President.

6. *Have proponents of the proposed amendment attempted to think through and articulate the consequences of their proposal, including the ways in which the amendment would interact with other constitutional provisions and principles?*

When the original Constitution was drafted, the delegates to the Constitutional Convention regarded the new document as a unified package. Much energy was directed to considering how the various parts of the Constitution would interact with each other and to the political philosophy expressed by the documents as a whole. The amendment process is necessarily much more ad hoc. Consequently, proponents of new amendments need to be especially careful to think through the legal ramifications of their proposals, considering, for example, how their proposals might shift the balance of shared and separated powers among the branches of the federal government or affect the distribution of responsibilities between the federal and state governments. They should also explore how their proposals mesh with the Constitution's fundamental commitment to popular sovereignty and to the guarantees of liberty, justice, and equality.

Consider an example: a proposed textual limitation on some forms of free speech might provide a rationale for limiting other speech. The campaign finance proposal would authorize Congress and the states to place limits on political campaign spending. While purportedly aimed at limiting the influence of wealthy donors, the amendment might establish as constitutional law that the government could ration core political speech to serve a variety of legitimate government interests. If the amendment were broadly construed, not only could a legislature then act to equalize participation in political debate by limiting spending, but it could also curtail expenditures relevant to a particular issue in order to secure greater equality in the discussion of that issue.

Moreover, even though its sponsors do not intend to impose financial limits on the press, the proposed amendment itself contains no such restriction. Certainly, the value of a newspaper endorsement, at least equivalent to the cost of a similarly sized and placed advertisement, could easily violate an expenditures limit. Traditional jurisprudence treats freedom of the press no more expansively than freedom of speech. Rather than maintain the uninhibited, robust, and wide-open dialogue that the Constitution presently guarantees, the proposed amendment arguably permits the rationing of speech in amounts that satisfy the most frequent targets of campaign criticism—current officeholders, who would have a self-interest in limiting

¹²U.S. Congress, Senate, Hearing before the Judiciary Committee on S.J. Res. 1 (testimony of Assistant Attorney General Walter Dellinger), 104th Cong., 1st sess., January 5, 1995.

the speech of those who disagree with them. It is also not unreasonable to anticipate that officeholders would attempt to apply such restrictions to a wide range of press commentary, or to other areas where wealth or access enhance the speech opportunities of their political opponents—on the theory of equalizing speech opportunities. The result would be yet another advantage for incumbents, who already enjoy advantages due to higher name recognition, greater free media opportunities as officeholders, and a well-developed fund-raising network.¹³

The failed attempt to add an amendment to the Constitution expressly prohibiting gender discrimination provides another example. Proponents of the equal rights amendment were never able to satisfy some who questioned the specific legal effects of the amendment. Questions were raised, for instance, about whether the amendment would completely prohibit the government from making gender distinctions in assigning troops to combat or individuals to military missions. This failure to explain its legal implications caused many to doubt the wisdom of the amendment

7. Has there been full and fair debate on the merits of the proposed amendment?

The requirement that amendments must be approved by supermajorities make it more difficult to amend the Constitution than to enact an ordinary law. In theory, this requirement should produce a more deliberate process, which, in turn, should mean that the issues are more fully ventilated in Congress. Unfortunately, reality does not always comport with theory. The result is that the process becomes more like voting to approve a symbol than deciding whether to enact a binding amendment to our basic charter. Congress should thus adopt procedures to ensure that full consideration is given to all proposals to amend the Constitution before votes are taken either in committee or on the floor.

For most amendments, there are two types of questions: the policy questions, which include whether the basic idea is sound and whether the amendment is the type of change that belongs in the Constitution, and the operational questions, including whether there are problems in the way that the amendment will work in practice. If the answer to either part of the policy inquiry is “no,” then the operational questions need not be asked. Even when there is a tentative “yes” to the policy questions, the answer may become “no” when the operational problems are recognized. Thus, in general, it is appropriate that Congress hold at least two sets of hearings, one for each set of issues. At each, both the prime hearing time (normally at the start of the day) and overall hearing time should be equally divided between proponents and opponents.

The balanced budget amendment illustrates this need for dual-track consideration. Proponents and opponents of the amendment have debated the policy questions at length. These include whether the existing statutory avenues have failed, whether Social Security and perhaps other programs should be excluded, and whether minorities in one House should be given the absolute power to block both tax increases and increases in the debt ceiling.

Unfortunately, there has been less consideration of operational questions. For example, how is the amendment to be enforced? How would the exception for declarations of war be triggered? Would the use of cash receipts and disbursements be subject to evasion, and would it lead to uneconomical decisions, such as to enter into leases rather than purchases for federal property in order to bring the budget into balance for the current year?

Similarly, campaign finance proposals illustrate the need for a two-track approach. Most of the debate in Congress concerning constitutional reform of campaign finance practices has centered on the “big picture” issues. Members of Congress deserve praise for their efforts to come to grips with these issues. They have debated whether First Amendment rights are necessarily in tension with the integrity of our political campaigns, whether the First Amendment should be amended at all, and whether spending large amounts of money in campaigns is bad. However, members have spent relatively little time considering operational problems created by ambiguity in the language of a proposed amendment. For example, what are “reasonable” limits and who would determine them? What effect would the amendment have on issue advocacy and educational and “get out the vote” efforts of parties and civic groups?

These examples demonstrate that careful deliberation by congressional committees is essential. Committees should not move proposed amendments too quickly, and they should ensure that modifications to proposed amendments receive full consideration and a vote before they reach the floor, with a committee report explaining the options considered and the reasons for their adoption or rejection. Perhaps a two-thirds committee vote should be required to send a proposed constitutional

¹³The difficulties discussed here overlap with those set forth in Guideline Four.

amendment to the floor, thereby mirroring the requirement for final passage. If two-thirds of those who are most knowledgeable about a proposed constitutional amendment do not support it, the amendment probably should never be considered by the full House or Senate.

Although the relevant committees may have the greatest expertise regarding a proposed constitutional amendment, because its enactment will have far-reaching impact, floor debates should not be cut short even if there has been previous floor debate on an amendment in the current or a previous Congress. There should be opportunities for full discussion and votes on additions, deletions, and modifications to the reported language. The flag desecration amendment's handling highlights the need for safeguards. At the end of the 105th Congress, the Senate Majority Leader sought unanimous consent for consideration of the amendment, with a two-hour limit on debate equally divided between proponents and opponents and with no amendments or motions in order.

To ensure that floor votes are taken only on language that has been previously scrutinized, each House should adopt rules requiring that only changes to a proposed constitutional amendment that have been specifically considered in committee be eligible for adoption on the floor, with one exception: votes on clarifying language should be permitted with the consent of the committee chair and ranking member, or by a waiver of the rules passed by a supermajority vote. Otherwise, substantive changes not previously considered, but approved by a majority vote on the floor, should be referred back to committee for such further proceedings, consideration, and possible modification as needed to ensure that they have been thoroughly evaluated, followed by a second vote on the floor.

8. *Has Congress provided for a nonextendable deadline for ratification by the states so as to ensure that there is a contemporaneous consensus by Congress and the states that the proposed amendment is desirable?*

The Constitution should be amended only when there is a contemporaneous consensus to do so. If the ratification process is lengthy, ultimate approval by three-quarters of the states may no longer reflect such a consensus. Accordingly, there should be a nonextendable time limit for the ratification of all amendments, similar to the seven-year period that has been included in most recent proposed amendments.

If extensions are permitted at all, they should be adopted by the same two-thirds vote that approved the amendment originally. Moreover, states that ratified the amendment during the initial time period should be allowed to rescind their approvals, thereby assuring a continuing consensus.

Congress's decision to extend the ratification period for the equal rights amendment on the eve of the expiration of the allotted time illustrates the problems that this Guideline addresses. Although many states ratified the amendment in the period immediately after initial congressional approval, there had been a shift in public opinion by the time that Congress extended the deadline. It was therefore far from clear that the legislatures in all the ratifying states would have approved the amendment if it had been presented to them again after the ratification extension. The perception that the amendment might be adopted despite the absence of a contemporary consensus supporting it contributed to the divisiveness that characterized the campaign for its adoption.

APPENDIX—A COMPENDIUM OF CONSTITUTIONAL AMENDMENTS

I. THE ORIGINAL AMENDMENTS

Amendment I (1791). Prohibits establishment of religion; guarantees freedom of religion, speech, press, and assembly.

Amendment II (1791). Prohibits infringement of the right of the people to keep and bear arms.

Amendment III (1791). Prohibits the quartering of soldiers in any house during times of peace without consent of owner or during time of war in manner not prescribed by law.

Amendment IV (1791). Guarantees security against unreasonable searches and seizures; requires that warrants be particular and be issued only on probable cause supported by oath or affirmation.

Amendment V (1791). Requires presentment to grand jury for infamous crimes; prohibits double jeopardy; prohibits compelled self-incrimination; guarantees due process of law; requires that property be taken only for public use and that owner be justly compensated when taken.

Amendment VI (1791). Guarantees right to speedy and public trial by impartial jury, compulsory process, and counsel in criminal prosecutions.

Amendment VII (1791). Guarantees right to jury trial in suits at common law where value in controversy exceeds twenty dollars.

Amendment VIII (1791). Prohibits excessive bail or fines; prohibits cruel and unusual punishment.

Amendment IX (1791). Guarantees unenumerated rights that are retained by the people.

Amendment X (1791). Reserves to the states or the people rights not delegated to the United States by the Constitution.

Amendment XXVII (1992).¹ Provides that no law changing compensation for members of Congress shall take effect until after next House election.

II. RECONSTRUCTION AMENDMENTS

Amendment XIII (1865). Prohibits slavery; authorizes congressional enforcement of Amendment's provisions.

Amendment XIV (1868). Defines U.S. and state citizenship and prohibits state abridgment of privileges and immunities of U.S. citizens; guarantees due process of law and equal protection of law against state infringement; requires reduction of representation in Congress when right to vote infringed; prohibits public officers who participate in rebellion from holding public office; prohibits questioning of public debt; makes void any debt incurred in aid of rebellion against the United States; authorizes congressional enforcement of Amendment's provisions.

Amendment XV (1870). Prohibits abridgment of the right to vote on account of race; authorizes congressional enforcement of Amendment's provisions.

III. OTHER AMENDMENTS

A. Extensions of the Franchise

Amendment XVII (1913). Provides for popular election of Senators.

Amendment XIX (1920). Prohibits denial of right to vote on account of sex; authorizes congressional enforcement of the Amendment's provisions.

Amendment XXIII (1961). Grants right to vote in presidential elections to citizens of the District of Columbia; authorizes congressional enforcement of the Amendment's provisions.

Amendment XXIV (1964). Prohibits poll taxes for federal elections; authorizes congressional enforcement of the Amendment's provisions.

Amendment XXVI (1971). Prohibits denying right to vote on account of age to citizens over eighteen; authorizes congressional enforcement of the Amendment's provisions.

[Note: two reconstruction amendments also relate to the franchise:

Amendment XIV (1868). Requires reduction in representation in Congress for states that deny the right to vote to male citizens over the age of twenty-one.

Amendment XV (1870). Prohibits denying the right to vote on account of race, color, or previous condition of servitude.]

B. Regulation of Election and Tenure of President

Amendment XII (1804). Provides for separate electoral college voting for President and Vice President.

Amendment XX (1933). Provides that presidential term ends on January 20; provides rules covering situations where President-elect or Vice President-elect dies before inauguration.

Amendment XXII (1951). Prohibits President from serving more than two terms.

Amendment XXV (1967). Provides that in case of removal or death of President, Vice President shall become President; provides mechanism for filling vacancies in office of Vice President; provides mechanism for dealing with Presidential disability.

C. Amendments Overruling Supreme Court Decisions

Amendment XI (1798). Prohibits suits in U.S. courts against state by citizen of another state (overruling *Chisholm v. Georgia*, 2 U.S. [2 Dall.] 419 [1793]).

Amendment XVI (1913). Authorizes income tax (overruling *Pollock v. Farmers Loan & Trust Co.*, 157 U.S. 429 [1895]).

[Note: two other amendments, one a Reconstruction amendment and one dealing with the right of eighteen-year-olds to vote—listed above under extending the franchise—also overruled Supreme Court decisions:

¹Although this amendment was part of the original package sent to the states by the first Congress in 1791, it was not ratified until 1992.

Amendment XIV (1868). Grants U.S. citizenship to all persons born or naturalized in the United States (overruling *Dred Scott v. Sandford*, 60 U.S. [19 How.] 393 [1857]).

Amendment XXVI (1971). Prohibits abridgment of right to vote on account of age for citizens who are eighteen and over (overruling *Oregon v. Mitchell*, 400 U.S. 112 [1971]).]

D. The Prohibition Amendments

Amendment XVIII (1919). Establishes Prohibition; grants to Congress and the states concurrent power to enforce the Amendment's provisions.

Amendment XXI (1933). Repeals Prohibition; prohibits importation of intoxicating liquors into a state in violation of the laws of that state.

The CHAIRMAN. We are pleased to have with us today Prof. Richard Parker of the Harvard University School of Law. Professor Parker has worked with this committee for many years on this amendment, and we are very grateful to him.

Next we have Gen. Pat Brady, whom I just introduced and who is chairman of the Citizens Flag Alliance. We really appreciate having you here, General Brady, and appreciate the service you have given to our country.

We also have Mr. Gary May, a distinguished Vietnam veteran and a professor of sociology at Southern Indiana University. Happy to have you with us, Mr. May.

Next we have Maribeth Seely, an elementary school teacher from New Jersey, who will enlighten us today about how school children feel about the American flag.

We are also pleased to have Rev. Nathan Wilson of the West Virginia Council of Churches. Reverend, we are happy to have you with us.

And we have retired Lt. Gen. Edward Baca from New Mexico, who has a special flag and a special story for us today.

So, Professor Parker, we will begin with you, and then we will just go across the table.

PANEL CONSISTING OF RICHARD D. PARKER, WILLIAMS PROFESSOR OF LAW, HARVARD LAW SCHOOL, CAMBRIDGE, MA; PATRICK H. BRADY, CHAIRMAN, BOARD OF DIRECTORS, CITIZENS FLAG ALLIANCE, AND MEDAL OF HONOR RECIPIENT, SUMNER, WA; GARY E. MAY, ASSOCIATE PROFESSOR OF SOCIAL WORK, UNIVERSITY OF SOUTHERN INDIANA, EVANSVILLE, IN; MARIBETH SEELY, FIFTH GRADE TEACHER, SANDYSTONE-WALPACK SCHOOL, BRANCHVILLE, NJ; REV. NATHAN D. WILSON, EXECUTIVE DIRECTOR, WEST VIRGINIA COUNCIL OF CHURCHES, CHARLESTON, WV; AND EDWARD D. BACA, FORMER CHIEF, NATIONAL GUARD BUREAU, ALBUQUERQUE, NM

STATEMENT OF RICHARD D. PARKER

Mr. PARKER. Thank you very much, Mr. Chairman. Thanks for inviting me today.

As both you and Senator Leahy said, most adult Americans support this amendment. They have supported it overwhelmingly for 10 years, along with 49 of the State legislatures which petitioned Congress. This support has been sustained in the face of virtually uniform opposition from the big media and from various elite groups like law professors, from which I come.

This is a popular cause. It is a people's cause, and this is a test of whether such a cause against such elite opposition can still succeed in America. It is a test of Article V of the Constitution, which is a keystone of the Constitution, for the fact is that our Constitution at its foundation rests upon democracy, not on people wearing black robes.

This is not just a popular amendment; it is an important amendment. That is because it is a restorative amendment—not a transformative amendment, a restorative amendment in two ways:

First, it restores the traditional and intended meaning of the first amendment, a meaning that was changed, amended, if you like, by five members of the Supreme Court. It is an effort to preserve what Mr. Moss says in his statement submitted today to you is so important, which is permanence in the meaning of the Constitution. This amendment seeks to preserve the permanence of the meaning of the first amendment that was changed by the Supreme Court majority.

Second, it is a restorative amendment in restoring to Congress authority to protect and preserve a vital national resource. Now, this resource, to be sure, is invisible. It can't be measured in dollars and cents. But it is not a matter of mere symbolism, as has been suggested. It is a matter of values and of principles. It has to do with respect for the aspiration to national community in the United States of America.

This matter of principle is vital because, without preserving this basic respect for this basic ideal, the exercise of liberty eventually will wither. Liberty that does not rest on a foundation of community rests on sand. It is also vital in that any great national project, not just military projects but domestic reform projects, like the civil rights legislation and movement of the 1960's, depends on the preservation of community.

Now, the fact I believe we all know is that this value, this principle, is now eroding. What is the evidence of that? Because it is invisible, I probably can't point to concrete evidence. But I do believe we do all know it. Senator Bob Kerrey said to this committee a few years ago that there is a tidal mud, I think he described it—I have remembered that ever since—of decay in the country.

But I ask you, if the next President were to repeat the words of President Kennedy at his inaugural—Ask not what your country can do for you; ask what you can do for your country—would the response today be what it was then?

Now, fast forward to the year 2025. What would the response be then? Can we be sure? What is causing this erosion is not a few acts of a few malcontents. I agree with that. What is causing the erosion is a decision by five members of the Supreme Court that legitimated disrespect for the flag, that wrapped it in the mantle of the first amendment. And what is further producing erosion is our failure to respond, to stand up for principle. Thereby we are further legitimating and causing young people in this country to become used to disrespect for the flag.

By the year 2025, there may not be many people left who remember what respect for this ideal of national unity ever involved. So this issue is an issue that has to do with future generations, not

immediate gratification but the future of the United States of America.

Now, is there a cost involved here? I don't have time now to speak to this question, but I would be happy to respond to your questions about it. There is a great deal of scare rhetoric that surrounds this proposed amendment. There is a great deal in the statement that Mr. Moss submitted to you.

Any significant legislative proposal or certainly any constitutional amendment is subject to such claims. But I ask you to think about them coolly, because most of them—indeed, I believe all of them turn out to be empty. And I know there are absolutists who will say there is no freedom unless anything goes, that, as was said earlier, the most extreme forms of dissent, quote-unquote, must be allowed. But I would suggest to you that the American people know and I believe the Senate knows that extremism is not only a virtue and that moderation is not necessarily a vice.

I agree with the chairman that there is no alternative. There is no statutory alternative. And, again, I would be happy to respond to your questions on that point.

Let me conclude by saying that I think this is a great test and a great opportunity. I appeal to the Senate to send this proposed amendment to the State legislatures and let the constitutional process work. Let article V of the Constitution work. Let the people decide.

Thank you very much.

[The prepared statement of Mr. Parker follows:]

PREPARED STATEMENT OF RICHARD D. PARKER

Whether Congress should be permitted, if it chooses, to protect the American flag from physical desecration has been debated for almost a decade. The debate has evolved over time but, by now, a pattern in the argument is clear. Today, I would like to analyze that pattern.

Consistently, the overwhelming majority of Americans have supported flag protection. Consistently, lopsided majorities in Congress have supported it too. In 1989, Senators voted 91-9 and Representatives 371-43 in favor of legislation to protect the flag. Since that route was definitively blocked by a narrow vote on the Supreme Court in 1990, over two-thirds of the House and nearly two-thirds of the Senate have supported a constitutional amendment to correct the Court's mistake and, so, permit the majority to rule on this specific question. Up to 80 percent of the American people have consistently supported the amendment.

In a democracy, the burden should normally be on those who would block majority rule—in this case, a minority of the Congress, influential interest groups and most of the media, along with the five Justices who outvoted the other four—to justify their opposition. They have not been reluctant to do so. Indeed, they have been stunningly aggressive. No less stunning has been their unresponsiveness to (and even their seeming disinterest in) the arguments of the popular and congressional majority. What I am going to do is focus on the pattern of their self-justification.

I am going to speak frankly, not just as a law professor, but as an active Democrat. For a disproportionate share of the congressional, interest group and media opposition has been aligned with the Democratic Party. What has pained me, in the course of my involvement with this issue, are attitudes toward our democracy revealed in the structure of the argument against the flag amendment by so many of my fellow Democrats—attitudes that would have seemed odd thirty years ago, when I worked for Senator Robert Kennedy, but that now seem to be taken for granted.

I. ARGUMENTS ABOUT (SUPPOSED) EFFECTS OF THE CONSTITUTIONAL AMENDMENT:
TRIVIALIZATION AND EXAGGERATION

The central focus of argument against the flag amendment involves the (supposedly) likely effects of its ratification. Typically, these effects are—at one and the

same time—trivialized and exaggerated. Two general features of the argument stand out: its peculiar obtuseness and the puzzling disdain it exudes for the Congress and for the millions of proponents of the amendment.

A. Trivialization

(1) *The “What, Me Worry?” Argument.* The first trivialization of the amendment’s effects is the repeated claim that there is simply no problem for it to address. There are, it is said, few incidents of flag desecration nowadays; and those few involve marginal malcontents who may simply be ignored. The American people’s love of the flag, the argument continues, cannot be disturbed by such events. It concludes that, in any event, the flag is “just a symbol” and that the amendment’s proponents had better apply their energy to—and stop diverting the attention of Congress from—other, “really important” matters.

What is striking about this argument is not just its condescension to the amendment’s supporters and to the Congress which, it implies, cannot walk and chew gum at the same time. Even more striking is its smug refusal to recognize the point of the amendment. The point is not how often the flag has been burned or urinated on (about 60 times over the last four years, in fact) or who has been burning it and urinating on it. Rather, the point has to do with our response—especially *our official response*—to those events. In this case, the key response has been that of the Court and, since 1990, of the Congress. When we are told, officially, that the flag represents just “one point of view” on a par, and in competition, with that of flag desecrators and that flag desecration should not just be tolerated, but protected and even celebrated as free speech; when we get more and more used to acts of desecration; then, “love” of the flag, our unique symbol of national unity, is bound gradually to wither—along with other norms of community and responsibility whose withering in recent decades is well known.

To describe what is at stake as “just a symbol” is thus obtuse. The Court’s 5–4 decision was not “just a symbol.” It was an action of a powerful arm of government, and it had concrete effects. To be sure, its broader significance involved values that are themselves invisible. The issue it purported to resolve is, at bottom, an issue of principle. But would any of us talk of it as “just an issue of principle” and so trivialize it? Surely, the vast majority of Members of Congress would hesitate to talk that way. They, after all, voted for a statute to protect the flag. Hence, I would have hoped that the “What, Me Worry?” argument is not one we would hear from them.

(2) *The “Wacky Hypotheticals” Argument.* The second familiar way of trivializing the amendment’s effects is to imagine all sorts of bizarre applications of a law that (supposedly) might be enacted under the amendment. This line of argument purports to play with the terms “flag” and “physically desecrate.” Often, the imagined application involves damage to an image (a photo or a depiction) of a flag, especially on clothing—frequently, on a bikini or on underwear. And, often, it involves disrespectful words of gestures directed at an actual flag or the display of flags in certain commercial settings—a favorite hypothetical setting is a used car lot. This line of argument is regularly offered with a snicker and sometimes gets a laugh.

Its obtuseness should be clear. The proposed amendment refers to a “flag” not an “image of a flag.” And words or gestures or the flying of a flag can hardly amount to “physical desecration.” In the Flag Protection Act of 1989, Congress explicitly defined a “flag” as taking a form “that is commonly displayed.” And it applied only to one who “knowingly mutilates, defaces, physically defiles, burns, maintains on the ground, or tramples” a flag. Why would anyone presume that, under the proposed constitutional amendment, Congress would be less careful and specific?

That question uncovers the attitude beneath the “Wacky Hypotheticals” argument. For the mocking spirit of the argument suggests disdain not only for people who advocate protection of the American flag. It also depends on an assumption that Congress itself is as wacky—as frivolous and as mean-spirited—as many of the hypotheticals themselves. What’s more, it depends on an assumption that, in America, law enforcement officials, courts and juries are no less wacky. If the Constitution as a whole had been inspired by so extreme a disdain for our institutions and our people, could its provisions granting powers to government have been written, much less ratified?

B. Exaggeration

(1) *The “Save the Constitution” Argument.* Having trivialized the effects of the proposed amendment, its opponents turn to exaggerating those effects. First, they exaggerate the (supposed) effects of “amending the First Amendment.” This might, they insist, lead to more amendments that, eventually, might unravel the Bill of Rights and constitutional government altogether. The argument concludes with a ringing

insistence that the people and their elected representatives must not “tinker” or “tamper” or “fool around” with the Constitution.

The claim that the debate is about “amending the First Amendment” sows deep confusion. The truth is that the proposed amendment would not alter “the First Amendment” in the slightest. The First Amendment does *not* itself forbid protection of the flag. Indeed, for almost two centuries, it was understood to *permit* flag protection. A 5–4 majority of the Court altered this interpretation, only nine years ago. That very narrow decision is all that would be altered by the proposed amendment. The debate thus is about a measure that would *restore* to the First Amendment its long-standing meaning, preserving the Amendment from recent “tampering.”

Adding to the confusion is the bizarre claim that one amendment, restoring the historical understanding of freedom of speech, will somehow lead down a slippery slope to a slew of others undermining the Bill of Rights or the whole Constitution. A restorative amendment is not, after all, the same thing as an undermining amendment. What’s more, the process of amendment is no downhill slide. About 11,000 amendments have been proposed. Only 27—including the Bill of Rights—have been ratified. If there is a “slope”, it plainly runs uphill. The scare rhetoric, then, isn’t only obtuse. It also manifests disdain for the Congress to which it is addressed.

The greatest disdain manifested by this line of argument, however, is for the Constitution and for constitutional democracy—which it purports to defend. Article V of the Constitution specifically provides for amendment. The use of the amendment process to correct mistaken Court decisions—as it has been used several times before—is vital to maintaining the democratic legitimacy of the Constitution and of judicial review itself. To describe the flag amendment as “tinkering with the Bill of Rights”—when all it does, in fact, is correct a historically aberrant 5–4 decision that turned on the vote of one person appointed to office for life—is to exalt a small, unelected, tenured elite at the expense of the principle and practice of constitutional democracy.

(2) *The “Censorship” Argument.* The second exaggeration of (supposed) effects of the proposed amendment portrays it as inviting censorship. If Congress prohibits individuals from trashing the American flag, opponents say, it will stifle the freedom of speech. In particular, they continue, it will suffocate expression of “unpopular” or “minority” points of view. It will thereby discriminate, they conclude, in favor of a competing point of view. This line of argument is, essentially, the one adopted by a 5–4 majority of the Court.

It is, however, mistaken. The argument ignores, first of all, the limited scope of laws that the amendment would authorize. Such laws would block no message. They would leave untouched a vast variety of opportunities for self-expression. Indeed, they would even allow expression of contempt for the flag by words—and by deeds short of the “physical” desecration of a flag. Obviously, there must be some limit on permissible conduct. This is so even when the conduct is, in some way, expressive. What’s important is this: Plenty of leeway would remain, beyond that narrow limit, for the enjoyment of robust freedom of speech by all.

Secondly, the argument that such laws would impose a limit that discriminates among “competing points of view” misrepresents the nature of the American flag. Our flag does not stand for one “point of view.” Ours is not like the flag of Nazi Germany or the Soviet Union—although opponents of the proposed amendment typically make just that comparison. The American flag doesn’t stand for one government or one party or one party platform. Instead, it stands for an aspiration to national unity despite—and transcending—our differences and our diversity. It doesn’t “compete against” contending viewpoints. Rather, it overarches and sponsors their contention. The 5–4 majority on the Court misunderstood the unique nature of our flag. A purpose of the flag amendment is to affirm this uniqueness and, so, correct that mistake.

Thirdly—and most importantly—opponents obtusely ignore the fact that a primary effect of the amendment would be precisely the opposite of the one “predicted” by their scare rhetoric. Far from “censoring” unpopular and minority viewpoints, the amendment would tend to enhance opportunity for effective expression of those viewpoints. A robust system of free speech depends, after all, on maintaining a sense of community. It depends on some agreement that, despite our differences, we are “one,” that the problem of any American is “our” problem. Without this much community, why listen to anyone else? Why not just see who can yell loudest? Or push hardest? It is thus for minority and unpopular viewpoints that the aspiration to—and respect for the unique symbol of—national unity is thus most important. It helps them get a hearing. The civil rights movement understood this. That is why it displayed the American flag so prominently and so proudly in its great marches of the 1960’s.

If we become accustomed to cumulative acts of burning, trampling and urinating on the flag, all under cover of the Supreme Court, where will that leave the next Martin Luther King? Indeed, where will it leave the system of free speech as a whole? As the word goes forth that nothing is sacred, that the aspiration to unity and community is just a “point of view” competing with others, and that any hope of being noticed (if not of getting a hearing) depends on behaving more and more outrageously, won’t we tend to trash not just the flag, but the freedom of speech itself? Opponents of the proposed amendment imagine themselves as champions of a theory of free speech—but their argument is based in a strange disdain for it in practice.

I am, of course, preaching to the choir. The Senate has already voted 91–9 for a flag protection law. Most Senators have, therefore, rejected the “censorship” argument. Now—with the Court absolutely barring such a law on the mistaken ground that any specific protection of the flag discriminates among competing “points of view”—Senators who support protection of the American flag simply have no alternative but to support the proposed constitutional amendment.

II. ARGUMENT ABOUT (SUPPOSED) SOURCES OF SUPPORT FOR THE AMENDMENT

Most opponents of the amendment don’t confine themselves to misrepresenting its effects. Repeatedly, they supplement those arguments with ad hominem, disparaging claims about its supporters as well. Again, they combine strategies of trivialization and exaggeration. What’s remarkable is that they seem to assume their generalizations will go unchallenged. They seem to take for granted a denigrating portrayal of others—as well as their own entitlement to denigrate.

The denigration is not exactly overt. It often takes the form of descriptive nouns and verbs, adjectives and adverbs, woven into apparently reasonable sentences. By now, we’re so used to these terms of derision that we may not notice them or, worse, take them as signs of “wisdom.”

The trivializing portrayal of supporters tends to include references to the (supposedly) “simple” or “emotional” nature of their views—which, in turn, are trivialized as mere “feelings.” It’s often asserted that they are behaving “frivolously.” (Only the opponents, according to themselves, are “thoughtful” people.) Elected officials who back the amendment are said to be “pandering” or “cynical” or taking the “easy” course. (Only opponents, according to themselves, are “courageous” or “honest.”) The patriotism of supporters is dismissed as “flag-waving.”

The (negatively) exaggerated portrayal tends to include references to the (supposedly) “heated” or “aggressive” or “intolerant” nature of support for the amendment. (Only the opponents, according to themselves, are “deliberative,” “restrained” and “respectful of others.”) The goal, of course, is to suggest (not so subtly) that the supporters are fanatics or bullies—that they are like a mob that must be stopped before they overwhelm law, order and reason.

A familiar argument fusing trivialization and exaggeration—a Washington Post editorial of April 24, 1998 is typical—lumps the flag amendment’s supporters with supporters of a great variety of other recently proposed amendments. It smears the former by equating them to others who advocate very different measures more readily belittled as silly or feared as dangerous. There is a name for this sort of argument. It is guilt-by-association. (But then the opponents of the flag amendment, according to themselves, would never employ such rhetoric, would they?)

This is odd. These “thoughtful” people seem to be in the habit of making descriptive generalizations that are not just obtuse but false—not just disdainful but insulting. Why?

III. IGNORING COUNTER-ARGUMENT

Part of the answer, I believe, is that opponents of the flag amendment are in another habit. It is the habit of not really listening to the other views. Not listening makes it easier to caricature those views. And, in turn, the caricature of those views makes it easier not to listen to them.

Anyone who’s been involved with this issue—on either side—over the years, and who has had an opportunity to see every reference to it in the media across the county, can describe one repeating pattern. Most of the time, the issue is not mentioned. Then, in the weeks before one or another congressional consideration of it, there comes a cascade of editorials and commentary—about 90 percent hostile to and professing alarm about the amendment. Supporters can describe the other aspect of the pattern: most of the media simply will not disseminate disagreement with that point of view. Speaking from my experience, I can tell you that only a few newspapers have been willing to publish brief responses to what they assume is the one “enlightened” view—their own.

There is an irony here. Those most alarmed about (supposed) discrimination against the views of people who burn or urinate on the American flag are themselves in the habit of discriminating against the views of others who favor protecting the flag. Warning of a (supposed) dampening of robust debate, they dampen robust debate—and they do it in good conscience and with no conscious intent to apply a double standard. What explains such puzzling behavior?

IV. THE VALUE OF PUBLIC PATRIOTISM

I have characterized the question presented by the flag amendment as involving the value of “community” at the national level. But most opponents seem disinclined to accept that formulation. The question for them seems to involve something they imagine to be narrower than community. For them, the question seems to involve the value of “patriotism.” Beneath much of the opposition is, I think, an uneasiness about patriotism as a public value.

I know: Every opponent of the flag amendment insists that he or she is a patriot, that he or she “loves the flag” and, personally, would defend one with life and limb. I do not doubt their sincerity. But I trust I will be forgiven if I also try to understand the actual behavior of opponents and the language they use to describe the amendment and its source of support. I trust I will be forgiven if I try to understand all this in terms of a distinction that I think they make between “personal” and “public” patriotism.

I believe that many opponents of the amendment have come to see patriotism as a strictly personal matter—much like religious faith. As such, they affirm its value. But they are, I believe, uneasy about public patriotism. If the uneasiness were focused only on government coercion of patriotism (a coerced flag salute, for example) few would differ. But it is focused, also, on its protection by government (that is what the flag amendment is about), and to some degree it may extend to governmental subsidization and facilitation of public patriotism as well.

For the comparison made by opponents of the flag amendment between patriotism and religious faith carries consequences with it. Two main assumptions lead them to oppose even minor sorts of government assistance to religion. First, there is the assumption that religion is not just deeply personal, but deeply emotional and potentially explosive as well, and that any entanglement of government with religion may therefore produce dangerous conflict and official oppression of freedom and diversity. Second, there is the assumption that, in an increasingly secular age, religious faith is not really terribly relevant to good “governance” anyway—that is, unless “religion” is defined to encompass a wide range of currently accepted secular values.

The same kinds of assumptions underlie both the “exaggeration” and the “trivialization” arguments made by opponents of the flag amendment. First, they imagine that public patriotism taps into raw emotions that threaten to cause conflict and official oppression. Thus they insist that the proposed amendment endangers constitutionalism and freedom. Second, they imagine public patriotism as narrowly militaristic and old-fashioned. After the end of the Cold War, what place is there for it? And, in an age of “multiculturalism,” on one hand, and of “globalism,” on the other, what need is there for it in government and in public life? When the amendment’s opponents do affirm the public value of the flag, moreover, they tend to do so by defining “the flag” to stand simply for “the freedom to burn it.”

These assumptions and these arguments are perverse. So, too, is the underlying equation of patriotism to religion. For public patriotism is surely basic to motivating broad participation in, and commitment to, our democracy. Far from endangering freedom and political order, it is essential to the effective enjoyment of freedom and maintenance of the legitimacy of government. If national projects, civilian or military, are to be undertaken—if our inherited ideals of liberty and equality are to be realized through concentrated national effort—public patriotism simply has to be valued; its unique symbol should, therefore, be protected.

Let me speak, finally, as a Democrat: When I was growing up, Democrats knew all this. My own hero, Senator Robert Kennedy, would never have doubted the value of public patriotism. He would never have dismissed it as trivial, dangerous or “right wing.” I believe that he would have voted—as his son did in 1995 and 1997—to restore to the First Amendment the meaning it had, in effect, for two centuries of our history. That belief encourages me to see this as a truly nonpartisan effort, deserving fully bipartisan support. And, so, it encourages me to urge the Senate as a whole to permit consideration of the proposed amendment by representatives of the people in the states, submitting this matter to the great democratic process established by Article V of the Constitution.

The CHAIRMAN. Thank you, Professor Parker.

Major General Brady.

STATEMENT OF PATRICK H. BRADY

Mr. BRADY. Thank you very much, sir. I want to address the monumental importance of our flag to those in combat. I think it is especially relevant today to the young Americans and to their families who will face the horrors of combat and even the worst horrors of captivity.

Consider how many flags will be burned by some in this country if their lives are interrupted and they are ordered into combat. And what will those burnings do to the families mourning the capture or death of their loved ones? And just as important, what will those burnings do to the unity of this Nation?

The great heartbreak for the families of those sacrificing for America would be that the hateful conduct of the cowards and the others who burn the flag would be perfectly legal. At least those of us who served in Vietnam and watched our flag burn knew that the flag we served under was worth protecting.

The first action of our adversaries in Serbia was to burn the American flag. The first action of the families of our three GI's captured in Serbia was to fly the American flag. What other symbol could better express the values of both sides as well as the profound differences? And surrounded by the enemy and facing death and capture, the first action of the downed F-117 pilot in Serbia was to reach for a folded American flag in his flight suit. And I ask you why. He said that the flag reminded him of those who prayed for him, and that was all of America. It inspired in him hope, strength, and endurance, and those are the three essentials to combat survival.

The importance of the flag in combat is highlighted by the fact that more Medals of Honor have been awarded for flag-related heroism than for any other action. The overwhelming majority of living recipients passionately support the right of the people to protect their flag.

For that right, those behind me who have been introduced carry enemy ordnance from and have left body parts on the great battlefields of this century.

George Whalen, behind me, of Utah, he saw our flag raised on Iwo Jima. He said that that famous flag raising erased all his doubts and fears about victory. Three days later, he saved countless lives while being wounded three times.

For many years, our prisoners in North Vietnam found hope, strength, and endurance in the daily pledge to a tattered flag made from scraps by fellow POW Mike Christian. The communists found the flag. They brutally tortured Mike for making it. They were determined that there would be no hope, strength, or endurance in the Hanoi Hilton. It didn't work. Mike just made another flag.

In the movie "Saving Private Ryan," his simple haunting, burning question was whether or not he was worth the suffering of Captain Miller and those who saved his life.

Those opposed to the flag amendment tell us that it is the freedom to burn the flag that makes us worthy of their sacrifices. I wonder how many would use that line to inspire our youth to mobilize today, to tell them they were fighting for the right to burn Old

Glory. If Private Ryan's saviors heard that they died on America's battlefields so that their flag could be burned on America's street corners, they would turn over in their graves. They understood how precious free speech is. They died for it. And those who will serve in Kosovo may die for it as well.

What neither would understand is that defecating on the American flag is speech. And they understood how precious the Constitution is. It was written in their blood. The beauty of the flag amendment is that it does not change the Constitution. It restores the Constitution. It simply takes the power over the flag away from the courts, who have declared that defecating on the flag is speech, and returns it to the people who can then decide whether or not to protect it.

The Constitution gives us the right to peacefully protest an action of our country, and that is what we are doing. It does not give us the right to violently protest the foundation of our country, and that is what flag burners do. This is a values issue, and the entire debate over values is centered on what we teach our children. Flag burning is wrong. But what it teaches is worse. It teaches our children disrespect. It teaches that the hateful conduct of a minority is more important than the will of the majority. It teaches that our laws need not reflect our values, and it teaches that the courts—not the people, not the Congress, but the courts own the Constitution.

Captain Miller's dying words to Private Ryan were, "Earn this." Their flag wasn't earned to be burned, nor was the flag tucked in the flight suit of the downed American pilot.

For over a year now, there has been a clamor from many in Congress that we should listen to the people, and that is our plea as well. Just simply let the people decide. Enough of the issues that tear us apart. We need something that unites us. And on hundreds of battlefields our troops were united under Old Glory. They were inspired by the values it embodies, and it brought them together for victory.

The flag amendment will signal a Congress dedicated to unity, a Congress that respects and acknowledges the will of the people. And now is a great time, I think, for us to begin to wave the flag, time to save Private Ryan's flag. It is time to recapture Mike Christian's flag, to restore the flag of the families of our three POW's, and all the flags that will be in the flight suits and the backpacks of the young troops who serve today and who will be inspired by the hope, the strength, and the endurance that is embodied uniquely in Old Glory.

Thank you, sir.

[The prepared statement of Mr. Brady follows:]

PREPARED STATEMENT OF MAJ. GEN. PATRICK BRADY

My name is Pat Brady. I am the Chairman of the Board of the Citizens Flag Alliance. We are a coalition of some 140 organizations representing every element of our culture, some 20 million souls. We are non-partisan and have one mission and one mission only: to return to the people the right of the people to protect their flag, a right we enjoyed since our birth, a right taken away from us by the Supreme Court. We, the people, 80 percent of us, including the 49 states who have petitioned Congress and 70 percent of that Congress, want that right back.

But our concerns are not sentimental, they are not about the soiling of a colored fabric, they are about the soiling of the fiber of America. We share with the majority

a sincere anxiety that our most serious problems are morally based, and that morality, values and patriotism, which are inseparable, are eroding. This erosion has serious practical consequences. We see it in sexual license, crimes against our neighbors, our land, in our failure to vote, our reluctance to serve and in the level of disrespect we have for our elected officials.

And we see a most visible sign in the decline of patriotism in the legalized desecration of the symbol of patriotism, our flag. Because it is the single symbol of our values, our hope for unity and our respect for each other, the legalized desecration of Old Glory is a major domino in the devaluing of America.

If we ignore the fact that the Supreme Court mistook the founders meaning on the first amendment, we would do well to consider the importance of the flag to the young Americans, and their families, who today face the tragedy of combat and the horrors of captivity.

How many flags will be burned by some in this country if their lives are interrupted and they are ordered into combat in a foreign country? And what would those burnings do to the families mourning the capture or death of loved ones—and what would it do to our unity?

The tragedy for the families of those serving their country would be that the actions of the cowards, and others, who burned the flag would be perfectly legal. How insane. At least those of us who served in Vietnam, and watched our flag burned, knew that the flag we served under was worth protecting.

The first action of our adversaries in Serbia was to burn the American flag. The first action of the families of our GIs captured in Serbia was to fly the American flag. What other symbol could better express the sentiments of both sides—and the profound differences?

The first action of the pilot of the downed F-117 in Serbia was to reach for the folded American flag in his flight suit. He was surrounded by the enemy. His life was in serious danger. Why the flag? He said the flag inspired in him hope, strength and endurance—the three elements essential to survival in combat.

The importance of the flag in combat is highlighted by the fact that more Medals of Honor have been awarded for flag related heroism than any other action.

The most inspirational symbol on any battlefield is the American flag. Behind me is George Wahlen of Utah who saw that flag raised on Iwo Jima, just before he was inspired to save countless lives while being wounded three times and to earn the Medal of Honor.

Leo Thorsness found hope, strength and endurance in the daily pledge to a tattered flag made from scraps by fellow POW Mike Christian. The communists found the flag and brutally tortured Mike for making it. They were determined that there would be no hope, strength or endurance in the Hanoi Hilton. It didn't work. Mike made another flag.

In the movie Saving Private Ryan, his simple, haunting, burning question was whether or not he was worth the suffering of Captain Miller and those who saved his life. Those opposed to the flag amendment tell us that it is the freedom to burn the flag, that makes us worthy of their sacrifices. I wonder how many would use that line to inspire our youth to mobilize today?

If Pvt. Ryan's saviors heard that they died on America's battlefields so that their flag could be burned on America's street corners, they would turn over in their graves. And those who serve today, and their families, feel the same.

Pvt. Ryan's saviors understood how precious free speech is, they died for it. And those who serve in Kosovo today may die for it as well. What they would not understand is that defecating on the flag is speech.

And they understand how precious the Constitution is. The beauty of the flag protection amendment is that it does not change the Constitution, it restores it. It takes the power over the flag back from the courts, who have declared that defecating on the flag is speech, and returns that power to the people who can then protect it if they wish.

The Constitution gives us the right to peacefully protest an action of our country. That is what we are doing. It does not give us the right to violently protest the foundations of our country. That is what the flag burners are doing.

This is a values issue and the entire debate over values is centered on what we teach our children. Flag burning is wrong, but what it teaches, is worse. It teaches our children disrespect. It teaches that the outrageous acts of a minority are more important than the will of the majority. It teaches that our laws need not reflect our values. And it teaches that the courts, not the people, or the Congress, own the Constitution.

Captain Miller's dying words to Pvt. Ryan were, "Earn this." Their flag wasn't earned to be burned. Nor was the flag tucked in the flight suit of a downed American pilot.

For over a year now we have been hearing from many in Congress that we should listen to the people. That is our plea as well, let the people decide.

We've had enough of the issues that tear us apart. It is time for something that unites us. The flag amendment will do that. It will signal a Congress dedicated to unity, a Congress that listens to the will of the people?

It is time to stop wagging the dog and start waving the flag. It is time to save Pvt. Ryan's flag, and recapture Mike Christian's flag, to restore the flag of the families of our POWs and all the flags in the flight suits and nap sacks of young people who are inspired by the hope, strength and endurance embodied in Old Glory.

The CHAIRMAN. Thank you, General Brady. You and I have been working on this amendment for years before many were familiar or became familiar with Kosovo. And I know that you agree with me that one can take a principled position on both sides of the flag amendment debate without indicating any lack of support for our brave troops in the field of Kosovo.

Mr. BRADY. Yes, sir, absolutely. An interesting note. Mr. May and I in our conversations here, it may be that I picked him up in Vietnam, or certainly some member of my unit. And so there would have been 5 people on that helicopter and 1 who didn't agree and 4 who did agree with this. But certainly all five of them would have been patriots.

The CHAIRMAN. Thank you.

Professor May, we will turn to you.

STATEMENT OF GARY E. MAY

Mr. MAY. Thank you. Good morning. I bring you greetings and best wishes from President H. Ray Hoops, the faculty, staff, and students of the University of Southern Indiana. I am extremely flattered and humbled by your invitation and interest in listening to my thoughts about the proposed amendment to the Constitution. I gladly accepted the invitation as yet another opportunity for me to be of service to my country. The views expressed are my own, and I would just add that I am in awe of the gentlemen who surround us, the Medal of Honor winners, and I am very flattered and humbled to be in their presence this morning. And I appreciate that opportunity.

As a Vietnam veteran who lives daily with the consequences of my service to my country, and as the son of a World War II combat veteran, and the grandson of a World War I combat veteran, I can attest to the fact that not all veterans, indeed, perhaps most veterans, do not wish to exchange fought-for freedoms for protecting a tangible symbol of these freedoms. I oppose this amendment because it does not support the freedom of expression and the right to dissent.

I joined the U.S. Marine Corps while still in high school in 1967. This was a time of broadening public dissent and demonstration against our involvement in Vietnam. I joined the Marines, these protests notwithstanding, because I felt that it was my duty to do so. I felt duty-bound to answer President Kennedy's challenge to "Ask not what your country can do for you; ask what you can do for your country." My country was asking me to serve in Vietnam, ostensibly because people there were being arbitrarily denied the freedoms we enjoy as Americans.

During my service with AK Company, 3d Battalion, 27 Marines following the Tet offensive in 1968 in Vietnam, I sustained bilat-

eral above-the-knee amputations as a result of a land mine explosion on April 12, 1968. My military awards include the Bronze Star with combat "V," Purple Heart with star, Vietnam Campaign, Vietnam Service, and National Defense medals.

Now, 31 years, 1 week, and 1 day following the loss of my legs in combat, I am again called upon to defend the freedoms which my sacrifices in combat were said to preserve. It has been a long 31-plus years. I have faced the vexing challenge of reconciling myself with the reality of my military history and the lessons I learned from it and the popular portrayal of veterans as one-dimensional patriots whose patriotism must take the form of intolerance, narrow-mindedness, euphemisms, and reductionism—where death in combat is referred to as "making the ultimate sacrifice" and the motivation for service and the definition of true patriotism is reduced to dedication to a piece of cloth.

Recently, I had a conversation with a colleague at the university. I mentioned the anniversary of my wounding to her and asked her what she was doing 31 years ago. Somewhat reluctantly, she said, "I was protesting the war in Vietnam." I was not offended. After all, our Nation was born out of political dissent. Preservation of the freedom of dissent, even if it means using revered icons of this democracy, is what helps me understand losing my legs.

The strength of our Nation is found in its diversity. This strength was achieved through the exercise of our first amendment right to freedom of expression—no matter how repugnant or offensive the expression might be. Achieving that strength has not been easy. It has been a struggle, a struggle lived by some very important men in my life and me.

In addition to my own military combat experience, I have been involved in veterans affairs as a clinical social worker, program manager, board member, and advocate since 1974. I have yet to hear a veteran I have lived or worked with say that his or her sacrifice and service was in pursuit of protecting the flag. When confronted with the horrific demands of combat, most of us who are honest say that we fought to stay alive. Combatants do not return home awestruck by the flag. Putting the pretty face of protecting the flag on the unforgettable, unspeakable abominations of combat seems to trivialize what my fellow veterans and I experienced. This depiction is particularly problematic in light of the current events in Kosovo.

I am offended when I see the flag burned or treated disrespectfully. As offensive and painful as this is, I still believe that those dissenting voices need to be heard. This country is unique and special because the minority, the unpopular, the dissenters, and the downtrodden also have a voice and are allowed to be heard in whatever way they choose to express themselves that does not harm others. The freedom of expression, even when it hurts, is the truest test of our dedication to the belief that we have that right.

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

brother, me, and others who, like us, served honorably and proudly for freedom.

The pride and honor we feel is not in the flag per se. It is in the principles that it stands for and the people who have defended them. My pride and admiration is in our country, its people, and its fundamental principles. I am grateful for the many heroes of our country, and especially those in my family. All the sacrifices of those who went before me would be for naught if an administration were added to the Constitution that cut back on our first amendment rights for the first time in the history of our great Nation.

I love this country, its people, and what it stands for. The last thing I want to give the future generations are fewer rights than I was privileged to have. My family and I served and fought for others to have such freedoms, and I am opposed to any actions which would restrict my children and their children from having the same freedoms I enjoy.

If we are truly serious about honoring the sacrifices of our military veterans, our effort and attention would be better spent in understanding the full impact of military service and extending services to the survivors and their families. Our record of service to veterans of all wars is not exemplary. In May 1932, in the midst of the Great Depression, World War I veterans had to march on this Capitol to obtain their promised bonuses. World War II veterans were unknowingly exposed to radiation during atomic testing. Korean veterans, perhaps more than any living U.S. veterans, have been forgotten. Vietnam veterans are still battling to obtain needed treatment for their exposure to life-threatening herbicides and withheld support upon their return. The list goes on.

The spotty record in veterans services is more shameful when one considers that the impact of military service on one's family has gone mostly unnoticed by policymakers.

Is our collective interest better served by amending the Constitution to protect a piece of cloth than by helping spouses understand and cope with the consequences of their loved ones' horrible and still very real combat experiences? Are we to turn our backs on the needs of children whose lives have been affected by their parents' military service? The Agent Orange Benefits Act of 1996 was a good start, but we should not stop there. Is our obligation to protect the flag greater, more righteous, more just, more moral, than our obligation to help veterans and their families? I think not.

I respectfully submit that this assault on first amendment freedoms in the name of protecting anything is incorrect and unjust. This amendment would create a chilling environment for political dissent. The powerful anger which is elicited at the site of a flag burning is a measure of the love and reverence most of us have for the flag.

This is among the freedoms for which I fought and gave part of my body. This is part of the legacy I want to leave for my children. This is among the freedoms my grandfather was defending in World War I. It is among the freedoms my father and late father-in-law defended during their combat service during World War II.

Please listen to these perspectives of ordinary veterans who know firsthand the implications of tyranny and denied freedoms. Our

service is not honored by this onerous encroachment on constitutionally guaranteed freedoms.

Thank you for this opportunity.

The CHAIRMAN. Thank you, Professor.

Ms. Seely, we will turn to you.

STATEMENT OF MARIBETH SEELY

Ms. SEELY. Thank you, Mr. Chairman, honorable committee members, and the special military heroes present. I am so honored to testify before this committee for preservation of the American flag. My name is Maribeth Seely, and I am a fifth grade teacher at the Sandystone-Walpack School in New Jersey. Four of my students and their families have traveled here today to be at this hearing.

All of my grandparents came to this country from Ireland. They instilled in me a love for their newfound America and for her flag. Growing up in Massachusetts, my parents, Girl Scouting, and school securely molded my patriotic values.

In addition, I am proud to have had an opportunity to participate directly in our democratic process through service on Senator Kennedy's campaign in greater Lawrence, MA, in the 1970's. Interestingly enough, I do not come from a military background, but have always had the deepest respect for those who gave up their lives and for all who served in the armed forces.

Now when I teach my class, U.S. history, we focus on the same values of patriotism and good citizenship. We write to veterans to show that we remember. My class has invited parents and grandparents who served in the armed forces to participate in Memorial Day observances. It is important to me to have the faces of real heroes emblazoned on the flag and forever placed in the memories of my students.

I believe that our young people today need to have a more personal connection to our flag and to our great country. The glue that has kept us together for over 200 years has been eroded over time and continues to weaken us. For example, many nationalities have their own parades. I feel comfortable with this example because as an Irish American, St. Patrick's Day parades are a must. Thousands turn out. But what about our Memorial Day parades? Many are sparsely attended.

Yet another example of diminished patriotism is reflected in voting. We all know few Americans actually vote. My daughter-in-law is from Ecuador and can't wait to become a citizen so she can vote. She studies current events as well as U.S. history. Do our young people feel connected enough to our country to study these issues and vote?

In America, there are many different opinions, customs, and lifestyles. We celebrate our differences as part of a great melting pot. But I worry that there will not be the glue to keep us together, to unify us. The American flag can be part of that glue, the strength, the reminder of who we are. What legacy are we leaving to future generations if we will have nothing in common with each other, nothing to bind us together?

I asked my fifth grade class for their feelings.

Julie Brehm, age 11, feels so lucky to live in the U.S.A. She writes,

I could have stayed in South America where I probably would have died because I was a very sick baby. I remember the time in my birth country when things seemed unsafe and full of worry. I was adopted from Colombia. The American flag means freedom to some, but to me it means life. The soldiers that fought for America made sure that I had a great country to come to. Now when I remember the scenes in South America, I look at that American flag and say, "Thank you."

Scott Clark, 11:

Our flag is a symbol of freedom, loyalty, and independence. We should treat our flag with respect. We should not step on it, put mud on it, or do anything bad to it. The American flag should be in our hearts.

Molly Green, age 10:

The American flag is the greatest symbol I have ever known. People should look deeper into their hearts. They should find true dignity and respect for those who fought for them.

Nick Hirshberger, 11:

The American flag is a symbol of our country that was reunited after the Civil War. We are a union that hasn't been split since.

Katie Satter, 10:

I pledge allegiance to the flag. These are the first six words you say pretty much every morning. Do you ever think of what those words mean? They meant everything to people who fought for our country? They meant so much, some died over it.

Lucas Pifano, 11:

The American flag means opportunity and freedom. I think of the people who are serving right now in Kosovo. I think of my parents who came here from Brazil. Life is better here. When they came here their lives changed.

Austin Dolan, 11:

When we think of the American flag, we see battles, wars, and soldiers, but do we see other faces inside of the flag? These people are the volunteers who strived to make America better. Do we see the faces of the people who wrote the Constitution? Do we see the faces of the workers who have changed America from an empty land to a blooming flower? Do we see the farmers who tilled the soil, Congress who protected it, the volunteers who loved it, and the veterans who kept it free?

Austin finally asked,

Why do schools teach respect for the flag if there is no law to protect it?

That last question surely caused me to think. Austin is only 11, but he asks a very important question. Why do teachers instruct students to take off their hats and stand when the American flag passes in front of them when our own Government has not seen fit to pass a flag amendment? If this flag amendment is not passed, how am I going to answer the question, "Why?" Why, Mrs. Seely, did our Congress not consider the flag to be a national symbol worthy of protection? We have laws against acts of hatred. But what about hatred for our country and our flag? Shouldn't it be wrong to desecrate our flag? Kids think so and so does the average American.

In conclusion, I feel that we now have an opportunity in this wonderful country to encourage cohesiveness. Protect the American flag and the spirit of America for which so many people have died. Think about this. If for one moment in time all dead servicemen could vote, wouldn't they all be here to vote for that flag amendment? They made us proud. Will we make them proud? Keep young and old together under one flag.

Thank you very much.

The CHAIRMAN. Thank you, Ms. Seely.

Reverend Wilson, we will take your testimony.

STATEMENT OF NATHAN D. WILSON

Reverend WILSON. My name is Nathan Wilson. I am an ordained minister in the Christian Church (Disciples of Christ). Along with serving as an adjunct faculty member at West Virginia State College, I presently work as the executive director of the West Virginia Council of Churches, an organization that consists of Orthodox, Roman Catholic, and various Protestant member bodies, which number about one-third of the population of Virginia. So our organization is quite large and also represents quite a diversity of opinions along ideological perspectives, both religious and political.

I should state up front that I approach this testimony with some degree of turmoil. I, too, have deep respect for the flag as a treasured symbol of the democratic values on which our Nation was founded and that continue to remain the foundation of our Nation. Largely because of this respect, I am appalled when I see the actions of a few toward our flag. And yet, as an American citizen and a person of faith, I am more offended by the proposed flag desecration amendment. So while I resonate with the issue, I oppose strongly the proposed response.

For religious folk—and I understand that includes a number of people in this room—the terms "consecration" and, its opposite, "desecration" are very important. You cannot desecrate something unless it has first been consecrated. When you consecrate something, you recognize it as sacred. Religious communities consecrate women and men to serve as rabbis, ministers, and other religious teachers. We consecrate the teaching and preaching of Holy Scripture and understand that that Scripture has the power to change lives. In the Christian faith, we consecrate the bread and wine and consider that representative of or, in some traditions, actual embodiments of the body and blood of Our Savior.

Consecration is, in fact, the *raison d'être*, the reason for existence for the church. The church is carried on by the ordained consecrated ministry. "Consecrated" is a big word. Just to be able to desecrate the flag means that it has first been consecrated, not as a treasured symbol of democratic values, as I have already named, but as a sacred symbol. At that point, when that happens, Government has determined for us what is sacred.

I agree with Senator Ashcroft that many people revere the flag, but they do so from their own individual decisions. It is not made sacred for them.

There are two major problems when Government determines for its people what is sacred. First, to give to the flag sacred status is, in fact, to give that to which the flag points, namely, the United States of America, divine status. It is unavoidable. This is government-mandated idolatry for people of faith.

Mr. Chairman, I promise not to preach, but if I may, citing from Exodus, Chapter 32, the familiar story of Moses and the golden calf. As Moses was on Mt. Sinai receiving the Ten Commandments from God, the people asked Aaron, the high priest, to create a new god for them. When Moses descended Mt. Sinai, the people were worshipping this false god, symbolized by a golden calf. The Israelites likely had great reverence for their new god and strong emotional feelings toward the symbol of that god, this golden calf. Yet Moses' very first reaction toward this nondivine symbol as sacred was to burn it, and burn it now, he said.

Second, this proposal damages both first amendment religion clauses that have served our country so well. Now, I admit not to be a constitutional scholar, so this is a lay person's perspective. Prohibiting the desecration of the flag is a disturbing usurpation by government of a responsibility reserved in the Bill of Rights to be freely exercised only by religion. Religious traditions uniquely teach what is sacred, and no government should arrogate to itself the right to declare the holy. Government, said another way, should not take away from each religion the opportunity and the responsibility of determining for itself what is sacred. And when government does, it has partially established religion for its people. You see, both religion clauses are damaged.

On a more personal note, the flag, as I have said, is a treasured symbol of the greatest experiment history has known, an experiment in liberty, which is, to quote Roger Williams, a famous Baptist, founder of Rhode Island, "a lively experiment in liberty." It is being a part of this experiment that makes this risky business. It makes it a challenge then for us to stay at the table with those with whom we disagree and who disagree with us. Perhaps Roosevelt did say it best when he said, "All we have to fear is fear itself." My concern is that this proposed amendment is simply a knee-jerk reaction to that fear.

Instead, the way for us to reaffirm the greatness of this country is not to repress, instead appeal to even greater freedom, because we are the country that has risked the experiment in liberty. And the proposed flag desecration amendment may create for us a new golden calf, this time a calf of cloth, thread, and ink.

Thank you.

[The prepared statement of Reverend Wilson follows:]

PREPARED STATEMENT OF NATHAN D. WILSON

Mr. Chairman and members of the Senate Judiciary Committee, thank you for inviting me to testify on the proposed constitutional amendment: Senate joint resolution 14. It is an honor to appear before this Committee.

My name is Nathan Wilson. I am an ordained minister with standing in the Christian Church (Disciples of Christ). Presently I serve as the executive director of the West Virginia Council of Churches, an ecumenical organization with Orthodox, Roman Catholic, and Protestant Christian member communions. More than one-third of the population of West Virginia, roughly 600,000 people, belong to a church that is a member of the West Virginia Council of Churches.

Some of the reasons I oppose Senate joint resolution 14 are outlined below.

1. PROPOSAL MISUSES RELIGIOUS TERMS

Desecration is a term with significant religious connotations. Desecration of an object is possible only if the object is recognized as sacred.

What does it mean to “desecrate” an object? The word comes from the Latin “desecrare”, where “de-” is a prefix meaning “depriving [something] of the thing or character therein expressed;” and “secrare” is the predecessor of the English work “sacred.” In fact, desecrate is the opposite of consecrate, “to set apart as sacred to the deity.”¹

To “desecrate” an object is to remove the property of sacredness from it.

What sort of an object can be desecrated? An object must be consecrated as sacred before it can be desecrated. A sacred object, again defined by Webster’s, is an object, “dedicated or set apart for the service or worship of a deity.”

In most Christian traditions, the eucharistic elements are consecrated as sacred. The ministry of teaching and preaching the gospel is sometimes consecrated.

The flag is a treasured symbol of democracy, liberty, and equality of the United States of America, but the flag is not sacred.

2. PROPOSAL MANDATES IDOLATRY

When the government forces me to understand something not associated with the divine to be holy, the government has mandated religious idolatry for me.

Following directly from the meaning of the word desecrate, the proposed amendment could read as follows:

“The U.S. flag is dedicated to the worship of a deity. The Congress shall have power to prohibit the physical desecration of the flag of the United States.”

People of faith are presented with a dilemma. The proposed amendment declares that the U.S. flag is dedicated to the worship of a deity. What is the U.S. flag a symbol of? Or, more specifically, what deity does the U.S. flag represent?

The United States flag is a treasured symbol of democracy, liberty, and equality, and represents the nation of the United States of America. If the United States flag represents a deity, the only deity that it can possibly represent is the United States itself, and the final rewriting of our preamble to the amendment must read akin to:

“The United States of America is god. The United States flag is a sacred, consecrated symbol of that god and is dedicated to the worship of the United States. The Congress shall have power to prohibit the physical desecration of the flag of the United States.”

Statements such as those above are, of course, religiously idolatrous.

3. PROPOSAL DAMAGES RELIGION CLAUSES

The proposed amendment would partially repeal the establishment clause of the First Amendment because the flag, as detailed above, would necessarily be a sacred object. Thus, the government, not any religion, would decide what is sacred.

The free exercise clause is likewise damaged because my religion is not allowed to teach me what is sacred; rather, the sacredness of at least one object is prescribed to my religion, and thus to me. The unique opportunity and responsibility of religion to teach what is sacred is undermined by the government.

4. PROPOSED AMENDMENT JEOPARDIZES RELIGIOUS FREEDOM AND FREEDOM OF SPEECH

Whenever freedom of speech is limited, religious freedom is likewise endangered. Recall, of course, the interrelationship of these two precious liberties dating to the 1860s, enabling both women and African-Americans to be included in the core un-

¹Webster’s Dictionary, 3rd college edition.

derstanding of the First Amendment. The exclusion of both women and African-Americans from formal political rights, like voting and holding public office, highlighted the importance of their involvement in other organizations, like churches and mission organizations, in order to strengthen their voice.

In a case I first studied many years ago, *West Virginia Board of Education v. Barnette* in 1943, the U.S. Supreme Court wrote, "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."

Please do not nullify the heart of this decree by making the flag a sacred icon.

5. SCRIPTURAL PROBLEMS WITH THE PROPOSAL²

The proposed "flag desecration" amendment contradicts God's prophetic call throughout history documented in scripture, to speak and take action against all injustice. Scripture teaches its audience that the prophets repeatedly spoke and acted through the use of symbols: the creation, interaction, and occasional physical destruction of symbols.

Theologian William Barclay writes:

"Again and again in the religious history of Israel, when a prophet felt that words were of no avail against a barrier of indifference or incomprehension, he put his message into a dramatic ACT which men could not fail to see and to understand."³

Four scriptural passages will be cited.

Exodus 32:1-20—Moses and the golden calf

This first passage is well known, as is its context. For a brief time during the 40-year period the Israelites spent in the wilderness, Moses ascended Mt. Sinai and received the ten commandments from God. While Moses was on the mountain, the people asked Moses' brother Aaron, the high priest, to create new gods for them:

When the people saw that Moses delayed to come down from the mountain, the people gathered around Aaron, and said to him, "Come, make gods for us, who shall go before us; as for this Moses, the man who brought us up out of the land of Egypt, we do not know what has become of him." * * * So all the people took off the gold rings from their ears, and brought them to Aaron. He took the gold from them, formed it in a mold, and cast an image of a calf; and they said, "These are your gods, O Israel, who brought you up out of the land of Egypt!" * * * The Lord said to Moses, "Go down at once! Your people, whom you brought up out of the land of Egypt, have acted perversely; they have been quick to turn aside from the way that I commanded them; they have cast for themselves an image of calf, and have worshiped it and sacrificed to it, and said, 'These are your gods, O Israel, who brought you up out of the land of Egypt!' * * * As soon as he came near the camp and saw the calf and the dancing, Moses' anger burned hot, and he threw the tablets from his hands and broke them at the foot of the mountain. He took the calf that they had made, burned it with fire, ground it to powder, scattered it on the water, and made the Israelites drink it."⁴

The people were worshipping a false god, symbolized by the calf. The Israelites likely had great reverence for their new god and strong emotional feelings towards the symbol of the calf. Yet what is Moses' very first action towards the symbol? Burn it. As people of faith who all believe in some form of holy inspiration of the scriptures, what are Christians to conclude about our response to non-divine symbols claimed as sacred?

1 Kings 11:29-32—Ahija's robe

Some 250 years after the idolatry of the golden calf described in Exodus, the Israelites had established a monarchy in Israel, where Solomon reigned as their third king. Solomon was the last king to reign over all of the twelve tribes of Israel. In 922 BCE, the single kingdom split into the separate kingdoms of Israel and Judah. Prior to this historic schism, Solomon's slavemaster Jeroboam, who was to become the first king of the northern kingdom of Israel, received both an oracle and a warning of what was to come from the prophet Ahija:

About that time, when Jeroboam was leaving Jerusalem, the prophet Ahijah the Shilonite found him on the road. Ahijah had clothed himself with a new garment. The two of them were alone in the open country when Ahijah laid hold

²Much of the following scriptural study was developed by the Reverend Bruce Hahne and is used with his permission.

³William Barclay, *The Gospel of Matthew*, vol. 2, The Westminster Press, Philadelphia, PA, 1958, p. 264.

⁴Scripture citations are from the New Revised Standard Version of the Bible.

of the new garment he was wearing and tore it into twelve pieces. He then said to Jeroboam: Take for yourself ten pieces; for thus says the Lord, the God of Israel, "See, I am about to tear the kingdom from the hand of Solomon, and will give you ten tribes * * *. If you will listen to all that I command you, walk in my ways, and do what is right in my sight by keeping my statutes and my commandments, as David my servant did, I will be with you, and will build you an enduring house, as I built for David, and I will give Israel to you."

In this passage, the prophet's robe is a symbol of the united nation of Israel, and Ahijah used the destruction of the symbol to communicate the upcoming fragmentation of the nation.

Jeremiah 19:1–10—Smashing the clay pot

We now shift another 300 years into the future to the period just prior to the exile of the Israelite people to Babylon. The northern kingdom of Israel had disappeared from human history prior to 700 BCE, and the remaining southern kingdom of Judah was coming under military pressure from the northern nation of Babylon. The prophet Jeremiah, who began his teachings in 626 BCE and continued through to the fall of Jerusalem to the Babylonians in 587 BCE, took a series of prophetic actions to warn the people of Judah of what would (and eventually did) take place if they failed to serve the Lord. One of these actions was to destroy a pot as a symbol of the pending destruction of Jerusalem and the people of Israel:

Thus said the Lord: Go and buy a potter's earthen ware jug. Take with you some of the elders of the people and some of the senior priests, and go out to the valley of the son of Hinnom at the entry of the Potsherd Gate, and proclaim there the words that I tell you. You shall say: Hear the word of the Lord, O kings of Judah and inhabitants of Jerusalem. Thus says the Lord of hosts, the God of Israel: I am going to bring such disaster upon this place that the ears of everyone who hears it will tingle. * * * I will make this city a horror, a thing to be hissed at; everyone who passes by it will be horrified and will hiss because of all its disasters. * * * Then you shall break the jug in the sight of those who go with you, and shall say to them: Thus says the Lord of hosts: So will I break this people and this city, as one breaks a potter's vessel, so that it can never be mended.

Because Jerusalem was the sacred city of the Israelites, destruction of any symbol representing the holy city was a great offense. Yet not only did God order Jeremiah to destroy the pot, representing the city, God also ordered him to do so in the presence of the secular and religious leaders of the Israelite nation. Jeremiah suffered for his prophetic actions, and in chapter 20 we can read that he was immediately thrown in the public stocks for daring to destroy a symbol of something regarded as sacred. Again the scriptures tell us that at times, God calls people of faith to physically destroy symbols, even if authority tells us that those symbols are sacred, and even if we must suffer humiliation or imprisonment for our actions.

John 2:13–16—Christ cleanses the temple

Our New Testament passage is Christ's well-known cleansing of the Jerusalem temple, recorded in all four gospels. The High Priest had established a profitable business of selling animals for sacrifice, and exchanging foreign currency for Jewish, on which the temple tax had to be paid. With a guaranteed market and monopoly on competition, the High Priest and colleagues benefited significantly.

Despite the facts that Jerusalem was the holy city of the Jewish people and the temple was the holiest, most sacred location within the holy city, Christ chose to charge the money changers, who were the agents of the priests and therefore a symbol both of the temple system and of Jerusalem's religious authorities:

The Passover of the Jews was near, and Jesus went up to Jerusalem. In the temple he found people selling cattle, sheep, and doves, and the money changers seated at their tables. Making a whip of cords, he drove all of them out of the temple, both the sheep and the cattle. He also poured out the coins of the money changers and overturned their tables. He told those who were selling the doves, "Take these things out of here! Stop making my Father's house a marketplace!"

William Barclay writes that "if [Christ's Palm Sunday] entry into Jerusalem had been defiance, here is defiance added to defiance." To attack the merchants of the temple was to attack the sacred temple itself. Once again, scripture suggests that even the most revered symbols cannot and must not be sheltered from the prophetic criticism which often takes the form of physical action.

Our five scriptural references lead us to conclude that there are times when God may call us, even order us, to physically attack symbols as a means of expressing our witness to God. We cannot exclude the U.S. flag from the list of possible sym-

bols. On the contrary, the scriptures suggest that it is precisely those symbols which are most revered which are most often subject to the prophet's attack. To attempt to ban such prophetic speech strikes at the heart of the Christian faith. The proposed "flag desecration amendment" may create for us a new golden calf—a calf of cloth, thread, and ink.

Personal note

I will conclude my written testimony on a more personal note.

Like many Americans, I am concerned about division, even disharmony, among citizens. I value unity, and believe it to be valuable for our nation.

I presume this concern is driving some to promote the flag desecration amendment, Senate joint resolution 14. Unfortunately, this amendment will not help unite Americans; rather, it will further divide us by harming the single most uniting aspect of our citizenship: freedom.

It is exactly the freedom we Americans enjoy and for which we are responsible that unites us. Freedoms of press, of speech, of religious expression and peaceful assembly are what unite Americans.

These freedoms are not always easy, either to express or accept. These freedoms sometimes revile, sometimes alarm, sometimes even disgust; and yet, these freedoms sometimes enlighten, sometimes educate, and sometimes these precious freedoms even liberate us.

The proposed amendment weakens and diminishes our freedoms and, in turn, weakens and diminishes our country. Please oppose it.

The CHAIRMAN. Thank you, Reverend.
General Baca.

STATEMENT OF EDWARD D. BACA

Mr. BACA. Thank you, Mr. Chairman, members of the committee. Thank you for the opportunity to appear before you today to tell you the story about a close personal friend and a veteran who served during World War II. I feel that by sharing his experience with you today it will serve to emphasize what the flag means to most Americans, especially those veterans who have fought and died to protect it and the freedom that it represents.

Let me tell you about Jose Quintero. He was born in Corpus Christi, TX, and moved to Albuquerque, NM, where he currently resides, in my home State. And he, like many other New Mexicans from the 200th and the 515th Coast Artillery Regiments of the New Mexico National Guard, was among those who defended Bataan and Corregidor during World War II.

As most of you know, they were attacked on December 8, 1941, by a far superior force of the 14th Japanese army. They courageously defended themselves as they slowly withdrew from the enemy advance towards Corregidor and Bataan. Promised reinforcements and supplies, which they never received, they nevertheless held the Japanese at bay for five long months, completely upsetting the Japanese timetable of conquest. Although they were defeated by disease, hunger, and lack of ammunition in May 1942, they had bought precious time for the United States to regroup for an offensive war to reconquer the Pacific.

Perhaps you already know this little history lesson. However, I would like you to take a moment to truly imagine the fear, the exhaustion, the jungle heat, the hopelessness of their situation. My friend Jose experienced this hardship and the sacrifice. And he did so with one thought in mind: to do his duty, to serve with honor, to fight for the country that he loved. Far from some musty old war story, this was his reality, and it remains so today for Jose and his comrades.

You see, loyalty and patriotism are especially strong traits among these veterans. They fought with unequal courage in the face of a superior force. With courageous hearts, they started down adversity and defended our Nation. Indeed, their bravery and their self-sacrifice in the face of such overwhelming odds are deserving of our eternal admiration.

Jose Quintero was courageous during the battle for the Philippines. He proudly did his best and honored the fighting tradition of his unit. But it was in the camps, Mr. Chairman, that he went beyond courage.

Jose so loved his country that he looked for a way to express that love. He wanted to honor his friends and to make a symbol for himself to prove that he had not been broken in spirit, and that although they had captured him physically, that mentally he was still not their prisoner. And, most of all, he wanted to honor all of those heroes whom he calls "the real heroes of the war," those prisoners that were dying all around him. So he began a project which would have meant instant death for him had he been caught.

He began to scrounge materials in the form of a red blanket, with the help of his fellow prisoners, and a white bed sheet that he stole from his Japanese captors. The blue background came from Filipino dungarees. He began to fashion these into an American flag, aided by a Canadian soldier, a double amputee who worked in the tailor shop in that prison camp.

At the time, Jose didn't even know how many stars were on the flag. He knew how many stripes, but didn't know what they represented. He actually had to ask an officer in the camp the significance of the flag and what it represented before he embarked on this project of making it.

By the way, the staff for the flag came from a prodding stick that the Japanese guards used to discipline the prisoners, to beat them with. It took him a whole year to make this flag, and he kept this flag wrapped in a piece of canvas under his bunk. And he took it out at night, and he worked on it diligently with the help of his Canadian amputee.

About 3 or 4 weeks before the end of the war, they heard a rumble of aircraft, and they knew that it wasn't the Japanese bombers because they hadn't heard aircraft in several months. So they knew it had to be American bombers coming to bomb their prison camp. So Jose Quintero took this flag that I am holding in my hand today that he made in that prison camp, he took this flag and went out into the open compound and waved it at the bombers. The lead bomber saw Jose, tipped his wing, and led the other bombers on from the prison camp.

Ladies and gentlemen, he literally saved the lives of all of his fellow prisoners while risking his own.

Jose Quintero is what peace and freedom are all about. He and those gentlemen that are sitting here today are what make me so proud to be an American. They are what have made this country great.

I am only sorry that Mr. Quintero himself could not be here today to tell you his story and to tell you how he and his buddies in the prison camp and all of those around him feel about this American flag. But I do bring a message to you from him. He said,

Mr. Chairman, to ask you and the members of the committee to please not let anyone dishonor the American flag.

Thank you, sir.

The CHAIRMAN. Thank you, General. That is a wonderful story. We appreciate you being here, and we appreciate you bringing this wonderful flag with you.

I am going to turn to Senator Smith who would like to make a few comments, and then we will begin questioning after Senator Smith.

Senator SMITH. Thank you very much, Mr. Chairman, for your courtesy.

Senator LEAHY. Mr. Chairman, before he starts, just because we did not know on this side of the aisle that you were going to have other statements—of course, I don't object at all, but because of that those who would have, I would ask unanimous consent that members be allowed to put statements in the record.

The CHAIRMAN. Without objection, we will hold the record open until 5 o'clock today for any statements from any member of this committee, and we will put them all in.

STATEMENT OF HON. BOB SMITH, A U.S. SENATOR FROM THE STATE OF NEW HAMPSHIRE

Senator SMITH. Thank you, Mr. Chairman. Let me just say I am an original cosponsor of the flag amendment, and proud of it, and I commend you for not only holding the hearing but your perseverance in trying to see this amendment passed here in the Congress.

Let me also say what a distinguished panel of witnesses. As we all do here, Senators sit hour after hour, day after day, week after week, month after month in hearings, and on both sides of the issue, what a powerful, powerful panel, one of the best that I have ever had the privilege to sit before. So I am pleased and honored to be here to hear you.

Let me just say this: We need to dispel one myth here. This is not about a test of who is a patriot and who is not. And, Mr. May, your testimony was very powerful, and your sacrifice even more so. And I think it is important to point that out, that honest people do differ and it is not about patriotism. It is not about who made the most sacrifice or who feels in one way or another about the sacrifice that is made.

But let me tell you what I think it is about. It is about whether or not the American people have a right to be heard and to differ with five black robes, as I think you said, Professor. And I think that is what this is all about. There is a certain amount of arrogance in this debate that I have heard which troubles me deeply, that somehow the American people don't have the intelligence, perhaps, or the common sense to be right, but Senators or Congressmen or others who oppose this are right and the judges are right, Justices are right, but the American people are wrong.

That does bother me, and I have heard some of that, not necessarily here this morning, but I have heard it in the debate, and I want to clear that up once and for all.

Like so many, probably most of the people in this room, I have one of those flags in my home that belonged to my dad, who died at the end of the Second World War. My mother cherished it. She

is a widow, never remarried, raised two sons, myself and my brother, both of whom proudly served in Vietnam as well. And so, you know, although I may differ respectfully with those who say it is OK to burn it because it is a piece of canvas, let me issue this challenge: If it is only a piece of canvas and it has symbolism and doesn't mean anything, perhaps this is a poor comparison, but let me issue a challenge. Here is a \$5 bill. This is a piece of paper. If it is only a piece of paper, to all of those out there in America who think it is only a piece of paper, you bring them to me. I will accept them all, and I will give you an equal number of these pieces of paper for every one that you give me. And I won't keep the money. I will give it to war orphans or veterans' children who need a college education.

The bottom line is, Mr. Chairman, this \$5 bill is only a piece of paper, but it is more than a piece of paper. We know it, and it is the same reason why that flag is more than a piece of canvas. And we all know it.

I get very frustrated, Mr. Chairman, with those who say that free speech can never be or has never been limited. Of course it has been limited. It is limited all the time. A good example is the bald eagle, which is also a symbol of freedom and a symbol of America, is protected in this country. It is protected. You shoot a bald eagle, and you will pay a price for it. So why not protect the flag, another symbol, Mr. Chairman?

Second—and this has been upheld in the courts—we have had statutes prohibiting the burning of draft cards, if you will recall. Simply another little piece of paper, isn't it? But it has significantly more meaning, and the court stated that the prohibition served a legitimate purpose, facilitating draft induction in time of national crisis that was unrelated to the suppression of the speaker's ideas since the law prohibited the conduct regardless of the message sought to be conveyed by the destruction of the draft card.

Let me point out one more, and I see my colleague, Mr. Feingold, over there. I don't mean to single him out, but just as an example of one who has fought so gallantly on campaign finance reform. I disagree with Senator Feingold on that, but that is a limit on free speech. If we can limit how much money somebody can give to a candidate for political office, then we can limit the desecration of the American flag, for goodness sakes, in the name of the first amendment.

So let's get real with what we are talking about here. This isn't about whether or not we can limit freedom under the first amendment, free speech. It is about what free speech we want to limit. And I say we ought to limit it when it comes to the desecration of the symbol of the United States of America where so many people have died. But let's not make this debate about whether or not we can, because we are doing it all the time and many others are proposing doing it in other ways.

Thank you very much, Mr. Chairman. I don't have any questions of this distinguished panel because they have done a great job.

The CHAIRMAN. Thank you, Senator. I thought that was an eloquent statement. I have appreciated all the statements here today. You all have acquitted yourselves very well, and you have been very helpful to this committee.

Let me just go to you first, General Brady. It is very humbling for this Senator to be in the presence of so many Medal of Honor winners and recipients. We all very much appreciate your contribution during the Vietnam War and subsequently your work with the veterans organizations.

Now, we have polls that say that nearly 80 percent of all Americans support this constitutional amendment. In your experience, do you believe that 80 percent of all veterans would support this amendment?

Mr. BRADY. Yes, sir, very much so. The vast majority of the veterans or the young people who serve today who I come in contact with also support this amendment. But I would never say that it is just a veterans issue. The group of Americans who support it more than any other group, according to the polls, as much as you can believe in the polls, are the women of America. It is something like 85 percent of the women.

As I look at the Medal of Honor recipients, and having been a president of that society, I would say that the number of those folks who support it is much higher than 80 percent.

The CHAIRMAN. Well, that has been my impression from talking to veterans.

General Baca, thank you very much for your story about Jose Quintero, a very touching and moving story to me. Now, Mr. Quintero is a true hero whom all of us must respect.

What is it that made Mr. Quintero risk his life for the flag? Was it love for the so-called right to burn the flag? Or was it something else?

Mr. BACA. Sir, I would say that, as I mentioned in my presentation, Mr. Quintero wanted to pay tribute and he wanted to find that symbol where he could best pay tribute to his fellow prisoners, especially those that were dying. And he chose the flag as the symbol because that was the symbol that he cherished and he treasured that symbolized his own patriotism, his own duty, his own honor. But more than that, it symbolized what the country is all about. And even though he didn't know the specifics about the flag, he truly understood that it represented liberty, it represented justice, it represented everything that was good in America. And that is why he picked the flag as the symbol rather than the Constitution or anything else as a symbol to pay tribute to those fellow prisoners.

The CHAIRMAN. This is the actual flag that he had in the concentration camp.

Mr. BACA. This is the actual flag.

The CHAIRMAN. He did a very good job.

Mr. BACA. Well, like I say, he had help from a fellow prisoner who worked in the tailor shop. He did all the cutting out of the stars and the stripes and all the rest of it, but the other guy helped him stitch it. And they did a fabulous job.

The CHAIRMAN. I would say.

Mr. BACA. I didn't mention, Mr. Chairman, that the tassels and all were—the rope, of course, was from his tent that he carried with him after his capture. But the other stuff came from the parachutes, the tassels and all the fancy stuff, when they dropped the food into them afterwards, and the supplies. They were one of the

first prison camps to get supplies dropped into them because they knew Americans were there.

The CHAIRMAN. They knew about the flag. That is great.

Ms. Seely, your story about your children and their beliefs in the flag, that story is truly inspiring. Do you think that removing the Government sanction from flag burning will help increase the respect for the country that your students are taught in school?

Ms. SEELY. Well, it reminds me of a question that one of my students asked. Tim Hennessey, 11, wanted me to ask this panel: Why would you allow desecration of the American flag? Why would you make that stand? was his question.

I think when our Government sanctions the burning of the flag, I think it sends the wrong message to our youth—that is, the lack of respect. And as a long-standing teacher, I certainly have seen the respect diminished over the course of the last 30 years for many of the values that we have held very dear to our hearts.

So, in answer to your question, absolutely I think the most important thing is to return respect, and I think by protecting the flag you are simply saying you respect the flag.

The CHAIRMAN. Reverend Wilson, I have a great deal of respect for your faith and for your church, and I very much appreciate your faith and the earnestness of your testimony here today. In your written testimony, you stated that you believe that we should not make the flag “sacred,” in quotes, by passing this amendment. You stated that such an amendment would make the flag similar to the golden calf idol that the Israelites worshipped in Exodus 32. Exodus 32:19 talks about what Moses did when he saw the Israelites dancing around the golden calf. He said, “And it came to pass, as soon as he came nigh unto the camp, that he saw the calf, and the dancing; and Moses’ anger waxed hot, and he cast the tablets out of his hands, and brake them beneath the mount.”

Didn’t Moses’ destruction of the Ten Commandments show that he felt that the Israelites did not believe in the God of Israel anymore? And, similarly, doesn’t the Government sanction of flag burning show that maybe some might not believe as much in our country anymore, as Ms. Seely just indicated?

Reverend WILSON. No, sir, there is no support for the idea that Moses’ breaking of the Ten Commandments showed that he did not believe the Israelites believed in their God; rather, it was another emotional response along with his disgust for their lack of faith and their quickness to find—to try and develop a new god, and with that new god a nondivine symbol of it.

The CHAIRMAN. Well, let me just say this: If we follow your logic through to conclusion, then what about our Constitution? Almost all of us consider that to be sacred. This is a piece of paper in the eyes of the rest of the world, but those of us who defend it, those who have given their lives for it, or those who have sacrificed for it, they consider it sacred, and it is an object.

Reverend WILSON. Senator Hatch, with all due respect—

The CHAIRMAN. Wouldn’t that apply to the Constitution as well, that logic?

Reverend WILSON. Let’s see. We have got about three questions before me now.

In response to the first, with all due respect, most Americans, particularly those of particular religious persuasion, would want to more carefully define the word “sacred,” so that, yes, we hold the Constitution in high regard, but certainly it is not sacred.

Second, part of my fear is that next year we might be entertaining a desecration of the Constitution amendment, the year after a desecration of a next treasured symbol amendment, and the list might not stop here.

The CHAIRMAN. I think the point I am making is that most people in this country believe the Constitution is sacred. In fact, in my particular faith, I believe that it is inspired of God. The Bible itself is just an object, but it is sacred. That doesn't mean, because you call something sacred, that you worship it as God. The children of Israel worshipped the golden calf as though it was God. We don't worship the flag as God. We don't worship the flag at all. We hold it sacred because of what it means. So I just wanted to draw that distinction because I think it is an important distinction.

Reverend WILSON. May I interject here that symbols always point to a greater reality. That is the reason for having symbols, of course, because they point to something larger than themselves.

The golden calf pointed to a god that was created by the Israelites in a very desperate time as a symbol. The flag points to the United States and the liberty and equality and freedom, greater realities, greater entities, the flag as its symbol.

The CHAIRMAN. Well, many of us feel that symbol is sacred—not God, but sacred. And I just wanted to make that distinction because I think it is an important one.

Let me ask you this: As a Christian minister, do you believe that America is a more religious Nation today than it was in 1942 when there was no right to physically destroy the flag? Or do you think that we hold our values as high today as we did back in 1942?

Reverend WILSON. Not as though it is any surprise, I wasn't around in 1942. And—

The CHAIRMAN. You are a student of history, though.

Reverend WILSON. Indeed, history and sociology, and I think that, you know, that is a fairly easy and curt response that values in 1942 were held in such higher regard than they are now.

The CHAIRMAN. Let's make it 1952 or 1972.

Reverend WILSON. Same reply. I fail to see that the argument has a point with—a relevant point to this conversation.

The CHAIRMAN. OK; Mr. Parker, one question for you. Have you examined the guidelines for amending the Constitution that Senator Feingold mentioned?

Mr. PARKER. Yes, I have. I attended one meeting with the group, the Citizens for the Constitution.

The CHAIRMAN. How do these guidelines apply to the flag amendment?

Mr. PARKER. Well, without going into detail, most of them, at least in the version that I saw, would endorse the process that the flag amendment has been through. The flag amendment has been very carefully considered and debated for 10 years. A statutory alternative was tried first before the amendment route was taken, another recommendation by Citizens for the Constitution.

The flag amendment does not disturb much at all of surrounding legal doctrine under the Bill of Rights. It is a narrow and focused amendment. The intent behind it is quite clear. There is a statute on the books, as you said, Mr. Chairman, passed by the Senate 91 to 9, 10 years ago that gives it especially pointed and narrow focus. So the most important guidelines suggested by the Citizens for the Constitution I believe are satisfied here despite their somewhat tangential need, apparently, to oppose this amendment.

The CHAIRMAN. We have had it suggested here today, and sincerely so, that, of course, this flag amendment would suppress our rights of free speech. Is the flag amendment really a suppression of speech similar to Cuba, China, and other totalitarian regimes?

Mr. PARKER. Well, I find that comparison, which I did hear Senator Feingold make today—I am sorry, Senator Leahy, I guess, make today, very puzzling. I don't see the relevance of China or Cuba to the United States, and I frankly don't understand why the connection would be made. Protecting a flag in the United States is a very different matter from protection of another flag in another, that is to say, totalitarian country.

Senator LEAHY. Mr. Parker, let's be specific what I was saying. My analogy was how good it is to be able to go in those countries and say we don't need laws to honor our flag, we don't need laws to honor our country, we don't need laws to honor our right to speak out, because we are able to do it as a country.

They feel they have to have laws to protect their flags and to require honoring of the flag. It is kind of a comfortable feeling to say we are better than you, we don't need to do that. That is what I was saying, not the analogy you put on it.

Mr. PARKER. May I have a brief response?

The CHAIRMAN. Sure.

Mr. PARKER. Senator, I understand what you are saying. There are other countries that protect their flag as well. I am told that Israel protects its flag. Denmark does. Do you believe that Denmark is somehow in a category with Cuba and China? I doubt that.

Senator LEAHY. I don't recall that as being my statement, Mr. Parker, and I am—if you want to add to my statement, feel free. But I will accept it as your statement, not mine.

The CHAIRMAN. Well, my time is up. I think I will turn to Senator Leahy at this point. And then as soon as you are through, we will go to Senator Feingold, unless another Republican comes.

Senator LEAHY. Mr. Chairman, you and others have very rightly praised General Brady and others throughout the room for their military service, and nobody has offered similar praise of Mr. May. I will. As the father of a Marine, very proud father of a Marine, I praise your service. Your service is shown as you come in this room without medals, without honors, or anything else. People look at your legs, or what is left of them. They know what your service has been. I admire you for it and I honor you for it.

Mr. MAY. Thank you, sir.

Senator LEAHY. General Brady, if this constitutional amendment is adopted, the Congress will have to then set penalties, actually statutes and penalties. What should be the penalty for burning an American flag?

Mr. BRADY. We have talked about this on many occasions. If it were up to me, two things come to mind. First of all, I think I would handle it, my feeling—a lot don't agree with me on this—is that I would handle it like a traffic ticket. The individual who received the ticket for burning the flag hopefully wouldn't get a lot of attention, but then he could pay the fine or he could then appear before—go to school, like we do for some of them.

Senator LEAHY. A fine of how much?

Mr. BRADY. I have no idea, but I understand that if someone demonstrates on the steps of the Supreme Court, if we had the same kind of a penalty or fine for burning the flag as you have for demonstrating on the steps of the Supreme Court, that might be useful.

But I would send them to a class, and I would tell them this is what the flag means to the people of America, this is what it means to veterans, and that would be it.

Senator LEAHY. So your feeling is we would amend the Constitution to give a penalty which is about similar to that of a traffic fine?

Mr. BRADY. I think that in the past we have had 200 years of experience with these kinds of laws. I don't think it would be difficult for the Congress to sort out an appropriate fine or an appropriate punishment. But I certainly wouldn't make felons out of flag burners, no.

Senator LEAHY. Now, if they wore the flag on their jacket, would that fall into this?

Mr. BRADY. I consider—you know, imitation is the greatest form of flattery. I consider that flattery. I know that in Cuba if you do that—

Senator LEAHY. What if they wore the flag on their jacket and then put some other symbol over it? Would that be desecration, and should they get that same fine?

Mr. BRADY. I don't think so, no. I mean, there are people that disagree with me on that, but anything—

Senator LEAHY. Well, I would.

Mr. BRADY [continuing]. That people do with the—

Senator LEAHY. I could see patriotically wearing a flag on your jacket, but I can't see putting some other symbol over it.

Mr. BRADY. It depends on what they put on it.

Senator LEAHY. I don't care what they put on it. It would be—I don't think the American flag should have something else superimposed on it. Do you?

Mr. BRADY. Well, it certainly wouldn't bother me, no.

Senator LEAHY. OK; General Baca, what should be the fine for a violation or what should be the penalty?

Mr. BACA. Sir, I couldn't tell you. I would say that it would be up to—I think the way the amendment reads, it would be up to the Congress then to determine the law, and from what I understand—

Senator LEAHY. What would be your personal feeling?

Mr. BACA. My personal feeling is that it should be a misdemeanor. I don't think it should be a felony to burn the flag. It should be a misdemeanor.

Senator LEAHY. And you would amend the Constitution for a misdemeanor?

Mr. BACA. Yes, sir, I would in this case.

Senator LEAHY. OK; Ms. Seely, you talked about what kind of an image we give if we allow or do not punish the burning of the flag. I would draw a distinction between allowing and not punishing. I would suspect that anybody in the State of Vermont that burned the flag would do it at their peril. They would probably need more police protection to stop the mob from taking action against them rather than the other way around. Our legislature has taken basically that position, that we are the State that has said that we will honor the flag without being required to honor the flag. I would mention it is the State that has one of the highest percentages of veterans in the country.

But let's accept your feeling that we must protect this as a major symbol. What about the Bible? Should we do the same thing for the Bible, which is a very significant symbol to a large part of our country? We swear an oath on the Bible when we take office. So do all our courts. That is usually the symbol used to give an oath in court. Should we have laws against burning the Bible?

Ms. SEELY. I come to you, Senator, from middle America, out in Sussex County, NJ, and I have no expertise in the area of constitutional law. So I—

Senator LEAHY. Well, I am not suggesting that, but I am just seeking your feeling because you are saying we should do this to protect symbols.

Ms. SEELY. Again, that is something I really have not given any thought to at all, and I do know that what I feel strongly about from my heart is that kids need to know about respect. And certainly the people that have gathered here together, our military heroes, need to be respected, and that is the message that I hope to convey.

Senator LEAHY. General Brady, a national—and I do know you spend a great deal of time on this, and I appreciate that. We also have a national World War II memorial—we were talking about how we honor veterans—that is being built to honor all military veterans of that war, the citizens on the homefront, the Nation at large, the high moral purpose and ideals that motivated the Nation's call to arms. A number of the Senators in both parties that I have had the privilege to serve with who are veterans of World War II have helped on that. It is going to be funded, I believe, entirely by or almost entirely by private contributions.

Is your organization involved in trying to raise funds for that?

Mr. BRADY. No, sir. The organization—although I will say that I am personally in other capacities involved in raising funds for World War II memorials, but the Citizen Flag Alliance has one mission and one mission only, and that is to return to the American people the right to protect their flag. That is all we do. No other mission.

Senator LEAHY. Now, the American Legion has spent about \$3 million in support of this proposed flag amendment. Do you know how much money your alliance and your member organizations have expended on the effort?

Mr. BRADY. I think they have spent a lot more than \$3 million, Senator. I know that they have spent, to restore one flag, the Star Spangled Banner, one flag that the President has called "a treasure"—

Senator LEAHY. No, I am talking about this effort.

Mr. BRADY. I know they have spent something like \$12 million. So we have spent, I think, less than they have for that one flag simply because we believe all flags are treasures.

Senator LEAHY. OK; under the amendment, Professor Parker, do we have to prohibit all flag desecration, or would it permit legislation—now, remember, we don't have the legislation before us, but assuming this is adopted, we have to pass legislation. Would the amendment permit us to pass legislation that prohibited only certain instances of flag desecration? Or would it require all instances?

Mr. PARKER. As I understand it, we do have legislation before us. It is still technically on the books, the Flag Protection Act of 1989. That did, in addition to defining desecration with a string of words—mutilates, defaces, defiles, and so on—make an exception for disposal of a flag when it has become worn or soiled.

Senator LEAHY. But if this amendment passed, would we have to pass new legislation or would it—it speaks prospectively, the amendment. Would we be required to pass new legislation or would the old legislation automatically take effect?

Mr. PARKER. That is a fascinating question. The 14th amendment—

Senator LEAHY. You are a fascinating lawyer. Do you have an answer?

Mr. PARKER. Well, no, I don't have an answer, but I have a thought. The 14th amendment was enacted in large part because of doubts about the constitutionality of the Civil Rights Act of 1866. After—what was it?—3 years later, the 14th amendment established the constitutionality of a previously enacted statute.

Now, that previously enacted statute had not been declared unconstitutional by the Supreme Court, to be sure, and that is a difference. But I think the better view is that this law remains on the books and would be revived if the amendment is ratified. But perhaps it would be more sensible for the Congress to reenact this, perhaps with amendments.

Senator LEAHY. Well, let's say we did and we looked at General Brady's and General Baca's idea that it should be like a traffic fine for this. I mean, that would be something we would want to look at, the amounts. Others might say it should be a felony, and there should be a jail sentence.

So I suspect the reality is, Mr. Parker, if this constitutional amendment were to be adopted, the Congress would begin to spell it out. So let me ask you this: Could we draw legislation that would prohibit only certain instances of flag desecration? Could we, for example, outlaw only those flag burnings intended as a protest against incumbent office holders or exempt them?

Mr. PARKER. Clearly, the answer to that is no. There is a clear answer there. That would be a violation of the first amendment.

Senator LEAHY. Would it supersede a prohibition on prior restraints? Could we prohibit flag desecration conspiracies? You have

somebody on the Internet saying let's get together at 3 o'clock Tuesday afternoon to burn a flag?

Mr. PARKER. Well, first of all, the prior restraint doctrine would remain in place. That is a first amendment doctrine. It wouldn't be changed in any way by this amendment.

As to conspiracies, whether or not—I hadn't thought that the prior restraint doctrine was a problem there, but I suppose there could be a conspiracy prosecution. I don't see any reason why not off the bat.

Senator LEAHY. I am just asking. I am curious myself, and I started thinking of these things yesterday.

What do you feel should be the penalty?

Mr. PARKER. Personally, I would tend to agree with the generals that a jail term is probably not reasonable. But basically this is up to Congress. Members of Congress are elected to make this decision. You made a decision with a lot of expert advice 10 years ago in the Flag Protection Act of 1989, and perhaps you will choose to amend it.

Senator LEAHY. I remember working on that, and I thought we did make some progress on a number of instances, and I believe you were one of the ones who gave—or those associated with you gave us some advice, a lot of which was followed virtually unanimously here. And if we wanted to put a 10-year penalty or a 20-year penalty under this constitutional provision, do you see a reason why we could not do that?

Mr. PARKER. No, I think you could do that, and I certainly trust the Congress—

Senator LEAHY. I do, too. I mean, I just was curious. And I also agree that we can put the traffic fine/misdemeanor thing or the educational aspect that General Brady raised.

Mr. Chairman, I will have other questions for the record. I would also ask that a letter from Dennis Burke, the Acting Assistant Attorney General, explaining their understanding of the notice from the committee be included in the record.

The CHAIRMAN. Without objection, we will put that in the record. [The letter follows:]

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, April 20, 1999.

Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

Hon. PATRICK J. LEAHY,
Ranking Minority Member, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN AND SENATOR LEAHY: Last week the Administration requested that the Committee grant the opportunity for a witness to testify at today's hearing on S.J. Res. 14, which the Committee did. The Department of Justice has testified on this important issue several times over the last few years and the witness has always been the head of the Office of Legal Counsel; Assistant Attorney General William Barr, Acting Assistant Attorney General Michael Luttig, and Assistant Attorney General Walter Dellinger. Consistent with that tradition and precedent, we agreed to provide Acting Assistant Attorney General for the Office of Legal Counsel Randolph D. Moss as a witness. Yesterday, consistent with our request to testify, we provided Mr. Moss' written statement for the record.

As you know, the Department and the Committee have a long-standing agreement over many Congresses that Department witnesses, at hearings such as this, testify after any Members of Congress and only on panels with other Administration wit-

nesses. Unfortunately, twenty minutes before the hearing, we were informed that, contrary to long-standing Committee policy and the Department's request, Mr. Moss would not be afforded the same courtesy traditionally given Department witnesses. As important as it is to have a witness at this hearing, we think it is equally important not to make an exception to this tradition in this case.

We would be happy to answer any questions in writing or testify at any additional hearings on this important constitutional issue. The extremely short notice to the Department on the final decision regarding the panel organization necessitates our equally short notice to you of withdrawing our witness.

Sincerely,

DENNIS K. BURKE,
Acting Assistant Attorney General.

The CHAIRMAN. Let me just, before I turn it to you, Russ, if I can: Mr. Parker, as you will recall, the Congress did enact and the Senate did enact, by 91 votes, a statute back in 1989. And what was the penalty in that statute?

Mr. PARKER. What it says here is that a violation shall be fined under this title or imprisoned for not more than 1 year, or both.

The CHAIRMAN. So that was the penalty that 91 Senators voted for. I did not. But I believe Senator Leahy did vote for that.

I have suggested that, look, if we pass this amendment, we might as well stick with that statute that had such overwhelming support. So that would solve that problem.

Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman. I thank the chairman for raising the question of the guidelines for the constitutional amendments proposed by the Citizens for the Constitution. As indicated in the item we put in the record earlier, there are eight criteria for this, and certainly it would be hard to argue that some of them have not been met. One is that there be full and fair debate on the merits of the proposed amendment, and through the good offices of the chairman, I think that is happening again now in this Congress and has in the past.

But there are other criteria that I don't think are clearly met. Does the proposed amendment address matters that are of more than immediate concern that are likely to be recognized as of abiding importance by a subsequent generation? Certainly you could argue that. On the other hand, when subsequent generations find out that there have only been apparently approximately 36 incidents of this kind in the whole Nation in the last 4 years out of over 250 million Americans, and then the proposal by some is to only make such acts a misdemeanor, I think one may fairly question whether this criteria is met.

Another criteria, is the proposed amendment consistent with related constitutional doctrine that the amendment leaves intact? And, another is, have proponents of the proposed amendment attempted to think through and articulate the consequences of their proposal, including the ways in which this amendment would interact with other constitutional provisions and principles? In my view, that has not been done. In fact, that is my greatest concern, the impact this will have on the basic structure of our Bill of Rights that has been the underpinning of our system of government. So I simply respond to that briefly.

I also want to respond to Senator Smith's remarks. I wish that Senator Smith was still here, because when he gives the example of the burning of the Selective Service card, *United States v.*

O'Brien, he fails to mention that the reason the Court said that individuals could be presented for burning their Selective Service cards was that there was an independent government purpose, in terms of the integrity and the ability, the functioning of the draft and that was the reason why the Court felt that that is not a permissible act. In fact, the court specifically indicated that if the prosecution simply had to do with the nature of the speech rather than that threat, it may have made a very different decision.

Finally, Senator Smith makes my point exactly about the problem with this approach, not with the feeling but the approach, when he says, "Senator Feingold has proposed limitations on free speech through campaign finance reform." You will not see my name on the proposed constitutional amendment to amend the Bill of Rights for purposes of campaign finance reform, as strongly as I feel about it. In fact, I voted against it, as did Senator McCain, because even though I want to win, I do not want to win at all costs. I will play by the rules. And my view of the rules is that it is a huge mistake to amend the U.S. Constitution, particularly the Bill of Rights, so that I can win the campaign finance battle. I want to win it within the rulings of the Supreme Court, even though I may not be happy with them.

I think that is a very important point because it is not your goal of protecting the flag, of course, that I object to. It is the mechanism that you have chosen.

Having said that, I want to ask a question of Professor May. First let me reiterate my admiration for your wonderful service to this country. I was struck by the comparison you drew in your testimony between the effort that is being made by many and by the Congress to pass this amendment and the frequent failures of the Congress and our society to follow through on our commitment to veterans and their families, and especially their healthcare. The reference to the bonus march historically is particularly compelling.

I can tell you there are a lot of veterans out there in this country who feel physically and emotionally hurt by the failure of this Government to provide for their healthcare. I wonder if you would comment a bit about our priorities with regard to those programs versus passing the flag amendment.

Mr. MAY. It is my belief that the true measure of our honor to the people who answer the call to serve under arms is what we do for them afterward, implicit in or explicit in the social contract within which we engage them in military service. So to that end, I would suggest that providing benefits for veterans and understanding the consequences of military service that transcend the veteran experience and spill over into the family is something that we ought to give more attention to as a Nation.

For example, with Vietnam veterans, we found that as early as the mid- and late 1970's, they were not using the healthcare resources that were available to them within the Veterans Administration. And it seemed to be the case that part of the reason for that was that they did not feel the same identification or the affinity with some of the characteristics and trappings of those offices that earlier veterans had felt. That was one of the reasons why in 1979 the VA launched the Vet Center program when Senator Cleland was then Administrator of Veterans Affairs.

So I think the Congress recognized the wisdom and understanding that some of the symbolic representation of service and honoring service that was found in the traditional service delivery system wasn't working well for this new generation of veterans, and the decision then was made to do something that could actually be of help to them in the form of outreach and engaging them with appropriate help so that they could become involved.

I think that the continued shortfall in providing those kinds of services for veterans and families is something that is really a national problem that ought to be addressed.

Senator FEINGOLD. I thank you. I just wish we could have this kind of energy and passion behind the issues relating to healthcare for veterans. It would be enormously helpful to some of our efforts in the Congress.

Reverend Wilson made exceptionally eloquent remarks, and it sort of gave voice to some feelings I didn't even know I had about this issue when it comes to the distinction between that which is secular and that which is sacred.

I am wondering if you have ever had a chance to talk to West Virginians about your views on this, or your parishioners. How do they react? I am sure there are an awful lot of people in West Virginia that believe we ought to pass this amendment. How does it go when you have those kinds of conversations?

Reverend WILSON. I must confess, Senator, I have not had those conversations about this particular amendment. I am sure, however, that you are right, that there are many folks who would fall on each side of the issue.

Senator FEINGOLD. The interesting experience I have had, especially with veterans, is whenever we have had a chance to sit down—I do a town meeting in every one of Wisconsin's 72 counties every year, and sometimes one of the veterans comes from the American Legion to represent their view. On two or three occasions, the individual has come and stated the view of the American Legion Hall that he represents, and then said, "But I don't agree with it," because he as a veteran felt that perhaps this wasn't the wisest course, despite his love for the flag.

General Brady, it is good to see you again.

Mr. BRADY. Yes, sir.

Senator FEINGOLD. In my opening remarks, I talked about the need for those who fervently support this amendment to understand that those of us who oppose it do not support flag burning, and revere and honor the flag for which it stands, and I appreciate your earlier remarks that suggest that.

But I do want to read from an advertisement that was run against a Member of Congress by your organization in the 1996 elections. It said:

Some things are wrong. They have always been wrong. And no matter how many politicians say they're right, they're still hateful and wrong. Stand up for the right values. Call Representative So-and-So today. Ask him why he voted against the flag protection amendment, against the values we hold dear, the constitutional amendment to safeguard our flag, because America's values are worth protecting.

Would you agree that this advertisement suggests that the Representative in question thinks it is OK to burn the flag and that he voted against the flag amendment because he disagrees with America's values? Do you think it is a fair characterization of any member of this body or the other body that votes against the flag amendment because he or she believes that America's values include supporting the right of free expression and that amending the Bill of Rights may send us down a dangerous path is somehow contrary to the most fundamental of American values? In the end, for those of us that have seen these kinds of ads run against us or other Members of Congress, do you really think that is a fair characterization of Members of Congress?

Mr. BRADY. I don't know where you left me here, but I don't think there is any question that—no one is questioning anybody's patriotism or anything like that. I didn't write that. I may not have been with the organization when that was put out. I don't find it offensive as I listen to it just through my ears.

One point, though, I would like to make: You said there were only 39—I don't know how many flag—there have been literally hundreds of flag burnings, hundreds and hundreds of flag burnings.

Senator FEINGOLD. The information that I was presenting was that in the past 4 years, 36 incidents nationally.

Mr. BRADY. Absolutely not true. There have been hundreds. And, of course, that has nothing to do with whether it is right or wrong. We don't have people threaten the President or shout "fire" in a theater very often, but those things are wrong, and there are laws against them.

Senator FEINGOLD. Could you provide the committee with the documentation of those hundreds—

Mr. BRADY. Now, you got to understand that many of the flag burnings are not documented. They do not get documented. They are not in the newspapers because it is perfectly legal to do so. But in some cemeteries, I am told up in one State there have been hundreds of flag burnings on Memorial Day. In my State, on Memorial Day, we have what they call flagsitters in some cemeteries, where they will actually go into the cemetery to protect the flags that go out on the veterans' graves.

So no one could put an exact number on it, but I am very comfortable in saying hundreds.

Senator FEINGOLD. Well, Mr. Chairman, I would really appreciate it if the committee would be provided with any documentation for this. In the absence of documentation, it is awfully difficult for me to accept the notion that there have been hundreds of such incidents. I know that any occasion of this occurring in my State, one famous occasion that you know of, we know about it, we are angry about it, and we condemn it every year by having the biggest Flag Day parade in the United States of America in Appleton, WI, where that incident occurred.

So I think it is important for the record, given the fact that we are talking here about, again, amending the U. S. Constitution's Bill of Rights for the first time, that any evidence of such incidents be presented to the committee and not simply be hearsay.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

General Brady, let me just ask you this. I asked Reverend Wilson if he thought the country had gone downhill, in essence, since 1946, let's say, or 1942. What is your opinion?

Mr. BRADY. I think in my lifetime—

The CHAIRMAN. I am talking about values.

Mr. BRADY. In my lifetime, in terms of the values that I knew as a young person, as opposed to what my children and grandchildren are exposed to today through the media and in many other venues, the standards of the country certainly have gone downhill. The values of the country are not held as dearly as they were once.

The CHAIRMAN. I remember back in my youth, the most startling film ever to come forward was "The Outlaw" with Jane Russell. And that would be kind of a Saturday children's matinee today in comparison to what we have today, wouldn't it?

Mr. BRADY. I remember how horrified we were when the movie "Gone With the Wind," the guy said, "Frankly," somebody, "I don't give a damn." And so when we see what our children are—and we hear often from many people that they believe that patriotism, which I think is absolutely essential to our country, is deteriorating. The majority of the people believe that it is in this country deteriorating. If our people don't love the country, the people, the leaders, the land, their neighbors, there is no hope for us in the future, I don't think.

The CHAIRMAN. Well, I think what I am pointing out is that, you know, some believe that since the school prayer decision we have gone downhill. Some believe that we have gone downhill in some of these earnest interpretations of the first amendment that we will protect almost anything that is bad and criticize almost anything that is good, sometimes. Some believe that since the school prayer decision we can do just about anything we want to in the schools, as long as it isn't sectarian or isn't religious or doesn't include the Bible. And in many respects, some of the things that are done there are not very uplifting to our young people.

You kind of indicated that, Ms. Seely, in your—how many years have you been a teacher?

Ms. SEELY. I have been a teacher for about 22 years, and I certainly agree with what you are saying.

The CHAIRMAN. Well, some people think that our movies have gone downhill, so much so that we have had to categorize them from "G" to "X," I guess. And you can hardly find a good movie today that isn't an "R" movie, which is violence, profanity, sex, et cetera.

Senator FEINGOLD. Mr. Chairman, if I could just make a point? I would be curious to know if the flag amendment passes and doesn't solve the problem of bad movies, what is the next amendment?

The CHAIRMAN. I am not suggesting that, but I am getting to a point. I am getting to a point that I think is far more significant than that.

The Internet today is filled with pornography. I have seen religious sites taken over by pornographers who put obscene things on the religious sites.

You could just go on and on as to the corruption and the vice and the degradation, the lack of morality, the lack of moral purpose, the lack of moral principles, and you have to say that compared to 1942 or 1952 or 1962 or 1972 or 1982, our country is filled with many more problems.

I guess what I am saying is this: Maybe it is time—at least in my opinion, maybe it is time that we have a big battle over values, and let the flag be a part of that battle over values. Because if we pass this amendment through the U.S. Senate by the requisite two-thirds vote—and we have only been about two votes behind up until this year. I believe we can get the 67 votes this year. But if we do that, that means that 50 States—and if we get it through the House by a two-thirds vote, 50 States are going to have to concentrate on just what is valuable and what are the values of this country—at least with regard to the flag. It would be maybe a small step forward compared to what we have been going through over the last 40 or 50 years.

I have to say that maybe it would be very, very good for our young people to see that we value something in this country, albeit a piece of cloth, that is quite beautiful, that 80 percent of us—in fact, I think really most all of us have valued all these years, but 80 percent of us want protection from physical acts of desecration.

I think it would be one of the best things that could happen in this country, and I would like to see these arguments against it made in every State in the Union, and let's let the people decide it. That is what this is all about.

So, last Congress, we were two votes away in the Senate. We passed it in the House of Representatives by the requisite two-thirds vote. We were just two votes away from it as of last Congress, and I do believe we have got some people here that will put us over this time.

I don't think the country is going to be any worse off for it. I think the country is going to be much better off. What is your opinion?

Mr. BRADY. Oh, yes, sir. You know, I think that the beautiful thing is that the people are involved in this. It is the people's will we are dealing with here. And once it gets out of the Congress, if you will just let the people decide, and it gets into the States, we will have this debate. And then the people and the children can talk about what is valuable to them and what their values are in terms of the first amendment and in terms of the flag and what it represents to all of us. It would be a great, great debate, I think.

The CHAIRMAN. General Baca.

Mr. BACA. Mr. Chairman, you know, no question I agree with what you are saying, but let me just say that Mr. Quintero and I had a discussion about this, and let me say that Mr. Quintero speaks very broken English, and what he lacks in formal education he makes up for in common sense, and if I live to be 100 years old, I will not be as wise as he is. And the message that he said—and I probably should have delivered it in my remarks—was that he feels that it is the responsibility of the Government to send that message to the school children. That was his comment to me. He said that the Government should act and send the message to the

school children that it is wrong to burn the flag and that we should start this debate over values.

The CHAIRMAN. The thing that bothers me about our schools is you can teach almost anything that is wrong, but you can't teach some of these things that are right, you know, and that bothers me a great deal. I am not talking about the colleges. I am talking about our elementary and secondary schools of education.

Professor May.

Mr. MAY. Mr. Chairman, if you would permit, I would like to comment on this issue about children and what children seem to understand. I testified—and it is true—that I was wounded slightly over 31 years ago, a week and a day to be exact. Shortly after I was wounded—and I went into the military from a very small town in southwestern Indiana. That was my address of record. After I was wounded, it obviously became well-known in my community that something bad had happened to me in Vietnam. One of the consequences of that was that one of the teachers in one of the parochial schools urged the children in a class that included one of my cousins to write letters to me to express whatever it is they wanted to express. The letters seemed pretty unfiltered. And these were students who were 10 and 11 years old, like Ms. Seely's students.

And what I got from them was not a lot of rhetoric about symbolism. What I got from them was a real sort of down-and-dirty kind of congratulations and thank you and well wishes because of what had happened to me. It seemed that the students appreciated that there was some sort of important connection between what had happened to me and their lives, although they couldn't express that very well.

Many years after that, including in the present time, I do quite a bit of work in schools. I am frequently invited to come to U.S. history classes about this time of year when they are in the unit that talks about more modern history. And I find that students today are concerned, not, again, about abstractions so much as about personal experiences and contributions and meaning that people like me have drawn from their experiences.

So I am not sure that I would endorse the notion that what is happening in the schools, at least as it pertains to veterans and understanding veterans' experiences and what they mean, are negative or deteriorating. I am very pleased and impressed—

The CHAIRMAN. Neither would I say that. But what I am saying is that I think regardless of our religious persuasion or our ethical persuasion or philosophical persuasion, I think many of us feel that our country has allowed some deterioration in values over these last 30 years or so.

Now, you have to contrast that with the right to free speech. You have to contrast that with the right to freedom of expression. On the other hand, that doesn't mean that we have to take an extreme view of these matters either.

Professor Parker, did you have anything you would care to add on this subject?

Mr. PARKER. I would just support your point by saying that I think we know that clear stands on narrow issues can have broad ramifications. Rosa Parks, for example, made a decision on a nar-

row, clear issue, and her stand had broad ramifications. I personally believe that if this is sent to the States and the debate goes on in the States and the people decide to ratify this amendment, it will have broad ramifications in terms—perhaps not legal terms, but in cultural terms I believe it will.

The CHAIRMAN. It may not turn around all the messes that we have created over the last 30 or 40 years, but the fact is that for once we will have stood up on a matter of principle.

Now, let me just say this: I have a tremendous amount of respect for Senator Feingold and his point of view. He has handled this in every way at the highest level, as far as I am concerned. He sincerely believes that he is right on this issue, as I do. I believe I am right on this issue. I believe that most all of you are right. And, Professor May, I have great admiration for you and for what you have gone through and for who you are. And also, Reverend Wilson, like I say, I respect your faith and your beliefs. But I really believe it is time for this country to start holding some things not as sacred in the sense of substituting them for God, but holding matters in such esteem that literally we stand for something.

I am very concerned about it, and especially in this day when we are really in a mess over in Kosovo. I was one who voted to support the President. I have always supported whoever is President when I think that they are doing what is right. And, frankly, I am very upset that he didn't have overwhelming support because what is going on over there is absolutely wrong.

Again, I sometimes question some of the values around here, but it is time for this country to start facing some of these value-laden problems. The best way I can see they can face this problem, because it does involve one of the most important values of our country, a symbol of country, is to have this debate around this country. My personal belief is that if we pass this constitutional amendment and all we do is give the people's representatives, the Congress of the United States, the right to resolve this issue.

Congress may decide not to pass anything and keep the law the way it is with the 5-4 decision of the Supreme Court. But I wouldn't bet on that. And I am willing to bet that if this—not that I am a betting man, but if this passes both Houses of Congress, it will be one of the quickest ratified constitutional amendments in history. And it won't be just out of emotion. It will be because people are sick and tired of the way things are going in this country, the greatest country in the world with the greatest future, the greatest economic system, the greatest constitutional system, the greatest protection for religious freedom and the right to speech, ever seen in the history of the world. And we are continuing to circumscribe speech of those like you, Reverend Wilson, as we continue to allow almost anything else to be heard by our children.

This is kind of nebulous, but I just kind of wanted to make that point. And I really want to just say one more time how moving it is to me to have you holders of the Congressional Medal of Honor, you recipients of the Congressional Medal of Honor in our presence, the sacrifices you made for our country and to find you supporting this.

Now, we have some in our body here who are Medal of Honor winners who do not support this, and they do so sincerely from

their point of view. My feeling is this is something the people ought to decide. And even then, if the people decide to ratify this amendment, assuming we get it out of both Houses of Congress, it is still going to come back to the Congress to determine what we do about it.

I have suggested here today, why don't we just adopt the statute that Senator Leahy voted for, Senator Biden voted for, most members of this committee voted for. I did not because I felt like it wasn't constitutional, and the Supreme Court upheld my point of view in the *Eichman* case. And I just didn't feel like I could do that, although I wanted to—I prayed that that statute would work.

We had such overwhelming support for it. Why not just assume that will be the statute? I certainly don't think it will be any broader than that, and it might even be more narrow than that, because there will be all of those who come back in and say, well, it should be even more narrow if this amendment is passed and ratified.

So all of you have been very helpful to us here today, and you have expressed the points of view, your respective points of view, and to me that is very important.

This will not be our last hearing on this important topic. We will hear from the Department of Justice, which was very miffed today that they had to appear on the same panel as all of you. It is their right because I should have had them in a separate panel, and they should have gone first. But we will remedy that, and I hope they will accept my apology. But we will hear the Department of Justice as well as current and former Senators, and I will need to arrange for the Department's testimony before next week's markup.

So we will hear from Members of Congress and the Department on April 28, and we will move ahead with that.

The CHAIRMAN. We will recess until further notice. Thanks so much.

[Whereupon, at 12:27 p.m., the committee was adjourned.]

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

WEDNESDAY, APRIL 28, 1999

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 9:36 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Grassley, Leahy, Kennedy, Feinstein, and Feingold.

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

The CHAIRMAN. If we could begin, we are happy to welcome everybody here today including each of the Senators here to testify. We are having this special hearing on the constitutional amendment to protect the American flag from acts of physical desecration. I have enjoyed working with my colleagues to hold the full committee hearing on April 20 and the subcommittee markup on April 21. I was also glad to work with them in scheduling today's hearing.

Now, this hearing is special because we will hear testimony from several current members of the Senate and from a former member. Each of these Senators on our first panel brings an interesting perspective to this important debate, and in order of seniority of current members, these Senators include:

Senator John Chafee from Rhode Island. Senator Chafee is a Marine Corps veteran who served with distinction in World War II, including the Battle of Guadalcanal, and who served in the Korean Conflict as well, if I have that correct.

Next, we are very fortunate to have Senator John McCain. I think Senator McCain will be here momentarily. He is a veteran Navy pilot who, without question, as all of these gentlemen have done, served his country with extraordinary endurance and distinction in the Vietnam War. Now, given the demands on his time being on the floor with the Y2K bill, I appreciate his willingness to testify today.

We also have Senator Bob Kerrey from Nebraska. Senator Kerrey is a Navy SEAL veteran who served with distinction in the

Vietnam War. He is the only Senator to receive the Congressional Medal of Honor for service in a conflict since the Civil War, and we are really proud of you, Bob, and proud to have you here.

We will hear next from Senator Max Cleland of Georgia. Senator Cleland is a veteran of the U.S. Army who served with distinction in the Vietnam War. Senator Cleland is also the lead Democratic cosponsor of the Flag Protection Amendment, and I have certainly enjoyed working with him on this important matter.

We are also going to hear from Senator Chuck Hagel of Nebraska. Senator Hagel is a veteran of the U.S. Army who served with distinction in the Vietnam War. Senator Hagel is the only combat veteran in the Senate who served his country in the enlisted ranks.

We are also very fortunate to have with us, last but not least, Senator John Glenn of Ohio. Senator Glenn is a Marine Corps veteran who served with distinction in World War II and in the Korean Conflict. Further, we are all familiar with Senator Glenn's service to his country as an astronaut and as a Senator. And we are happy to welcome you back, John. We admire you and, of course, appreciate you very much.

On the second panel, we will hear from Randolph Moss, the Acting Assistant Attorney General for the Office of Legal Counsel, and we look forward to hearing Mr. Moss testify today.

There is one other distinguished American whose schedule prevented him from being here today, but who sent a letter. The letter reads in part:

I am honored to have commanded our troops in the Persian Gulf War and humbled by the bravery, sacrifice and "love of country" so many great Americans exhibited in that conflict. These men and women fought and died for the freedoms contained in the Constitution and the Bill of Rights and for the flag that represents these freedoms, and their service and valor are worthy of our eternal respect.
* * *

I am proud to lend my voice to those of a vast majority of Americans who support returning legal protections for the flag.

Sincerely, H. Norman Schwarzkopf, General, U.S. Army, Retired.

I would, without objection, place Senator Schwarzkopf's letter in the record, along with several—

Senator LEAHY. General Schwarzkopf.

The CHAIRMAN. Did I say "Senator" Schwarzkopf? It must be a yearning ambition here, but I would like to place General Schwarzkopf's letter in the record, along with several other letters that we have received in favor of the Flag Protection Amendment.

[The letters referred to are located in the appendix.]

The CHAIRMAN. Now, a number of our Senators on the first panel are on a very tight schedule today. In order to accommodate our distinguished guests, we will hear from these Senators in an order that is somewhat different from their seniority. And I would ask that, as a matter of courtesy, the members of the committee hold any statements they would like to make until after the first panel

is through. In the interest of time, I will put my own statement in the record.

[The prepared statement of Senator Hatch follows:]

PREPARED STATEMENT OF SENATOR ORRIN G. HATCH

Good morning. Today we are having a special hearing on the constitutional amendment to protect the American flag from acts of physical desecration. I have enjoyed working with my colleagues to hold the full committee hearing on April 20th and the subcommittee mark-up on April 21st. And I was glad to work with them to schedule this morning's hearing.

This hearing is special because we will hear testimony from several current members of the Senate and from a former member. Each of these Senators on our first panel brings an interesting perspective to this important debate.

In order of seniority of current members, these Senators include: Senator John Chafee from Rhode Island. Senator Chafee is a Marine Corps veteran who served with distinction in World War II, including the Battle of Guadalcanal, and who served in the Korean Conflict.

Next, we are very fortunate to have Senator John McCain. Senator McCain is a veteran navy pilot who served his country with extraordinary endurance and distinction in the Vietnam War. Given the demands he faces on the floor at this time, I appreciate his willingness to testify today.

We also have Senator Bob Kerrey from Nebraska. Senator Kerrey is a Navy Seal veteran who served with distinction in the Vietnam War. Senator Kerrey is the only Senator to receive the Congressional Medal of Honor for service in a conflict since the Civil War.

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The CHAIRMAN. Naturally, we will listen to the ranking Democrat leader on the committee.

Let me just say this: We are honored to have each and every one of you here. Each of you has an individual perspective on this mat-

ter. Some agree with me and some disagree with me. That is not important to me. What is important is that we have the best testimony we can on both sides of this issue so that we can really give it the consideration that a constitutional amendment truly does deserve.

So, with that, I will turn to the distinguished ranking member.

Senator LEAHY. And to accommodate, I will put my whole statement in the record, Mr. Chairman.

The CHAIRMAN. Without objection.

[The prepared statement of Senator Leahy follows:]

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

I want to thank Chairman Hatch for agreeing to hold this additional session to complete the hearing we began last week. I had asked that we resume this morning to have an opportunity to hear from John Glenn. Senator Glenn had a NASA commitment last week in Houston and could not be with us on the day the Committee had chosen for the hearing.

John Glenn is a highly decorated Marine combat pilot from World War II and the Korean War. He was until his recent retirement the senior Senator from Ohio. He is a mythic figure in the Mercury space program who recently returned to space at the age of 77 as part of a 9-day Space Shuttle mission. I was honored to witness his ascent into the heavens and happier still to see him upon his safe return to earth. No matter what his achievements, the heights to which he has risen, the accolades he has received, John Glenn has always kept his feet firmly planted on the ground. That grounding is something we need on this issue and I thank him for accepting this latest mission, returning to the Senate to share his perspective on this proposed amendment to the Constitution. He and Annie are not only our heroes, they are our friends.

I began my opening statement at our hearing last week urging respect for the differing points of view on this proposed constitutional amendment and recognition of the patriotism of Americans on both sides of this question. The Senators who gather this morning to testify are on both sides of this matter. These are Senators who will have the responsibility of voting whether they deem it "necessary"—in the language of Article V of the Constitution—to cut back on the Bill of Rights for the first time in our nation's history in this regard. We respect them as members of the United States Senate and as decorated veterans of World War II, Korea and Vietnam. I would have been pleased to hear from any number of them at our hearing last week, but understand that they were told they could only appear this morning.

Further, I think that the Committee owes another apology to Mr. Moss, who is appearing on behalf of the Administration. It was not Mr. Moss but the Committee that attempted to impose last-minute and highly-unusual circumstances on that testimony. For anyone to indicate publicly and to the press that Mr. Moss personally objected to appearing with other witnesses was incorrect and unfair to him. I welcome Mr. Moss to the Committee and thank him for the articulate statement forwarded last week.

We need to remember that our soldiers did not fight for a flag, they fought for freedom. Last week, we heard the eloquent words of Professor Gary May, a former Marine and decorated war veteran, who lost both legs as a result of a land mine explosion while serving in Vietnam.

Professor May testified:

I love this country, its people and what it stands for. The last thing I want to give to future generations are fewer rights than I was privileged to have. My family and I served and fought for others to have such freedoms and I am opposed to any actions which would restrict my children and their children from having the same freedoms I enjoy.

Marvin Stenhammar, another decorated and disabled combat veteran—a former paratrooper and Green Beret—testified before this Committee last July:

[T]hough many of my colleagues and friends were wounded in action, they really were not wounded for the flag but rather for what that flag stands for—liberty. Flags, no matter how honored, do not have rights. People do.

Substance, not symbols. The principles of freedom and the sacrifices of our veterans are important. They have about them a greatness that we cannot improve upon and that is beyond the power of any protester to diminish.

I am proud that in 1995, the Vermont Legislature chose the First Amendment over the temptation to make a politically popular endorsement of a constitutional amendment regarding the flag. The Vermont House passed a resolution urging respect for the flag and also recognizing the value of protecting free speech "both benign and overtly offensive." Our Vermont Attorney General has urged that we trust the Constitution and not pander to the passions of the times.

Vermont's actions are consistent with our strong tradition of independence and commitment to the Bill of Rights. Indeed, Vermont's own Constitution is based on our commitment to freedom and our belief that it is best protected by open debate. Vermont did not join the Union until the Bill of Rights was ratified and had become part of the country's fundamental charter.

Vermont sent Matthew Lyon to Congress and he cast the decisive vote of Vermont for the election of Thomas Jefferson. He was the same House member who was the target of a shameful prosecution under the Sedition Act in 1789 for comments made in a private letter. Vermont served the nation again in the dark days of McCarthyism when Senator Ralph Flanders stood up for democracy and in opposition to the repressive tactics of Joseph McCarthy. Vermont's is a great tradition that we cherish and that I intend to uphold.

At the conclusion of last week's hearing on this proposed constitutional amendment, some expressed their view that this is a nation in moral decline and that amending the Constitution to punish "desecration" of the flag is thereby justified.

I would point out that there is far more civic virtue in the American people than some credit. At least that is the case in Vermont.

The issue of civic virtue does merit discussion. We in the Senate do play a role, and an important one, in setting the tone of civic virtue in the Nation.

Many religious leaders, however, take the view that it is a sign of moral confusion that the proposed amendment speaks of "desecrating" a secular object, the flag. They find the language of this proposed amendment offensive.

Reverend Wilson testified last week that "Desecration of an object is possible only if the object is recognized as sacred." He said that when the Government forces people to treat something not associated with the divine as holy, it has mandated religious idolatry.

Do we promote civic virtue when we arrogate to Congress the right to declare "sacred" and capable of "desecration" something that is not associated with the divine? Or do we simply mandate idolatry for people of faith, as Reverend Wilson warned?

This concern is not limited to religious leaders. Conservative legal scholar Bruce Fein emphasized this concern when he testified before a House Subcommittee in 1995. He said:

Inserting the term "desecration" into the Constitution would in and of itself seem highly inappropriate. 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." The introduction of these terms could create a significant tension within our constitutional structure, in particular with the religious clause of the first amendment.

This widespread uneasiness over the language of this amendment underlies a deeper problem. Keith Kreul, a former National Commander of The American Legion, makes this point in his written statement to the Committee:

A patriot cannot be created by legislation. Patriotism must be nurtured in the family and educational process. It must come from the heartfelt emotions of true beliefs, credos and tenets.

We will never promote civic virtue by punishing people for peaceful protest. That can only undermine the foundations of our civic life. If we are sincere about wanting to do something to promote civic virtue in the United States, we can best do it by setting an example in our own service as Senators and as citizens, rather than by attempting to punish a handful of yahoos, most of whom already can be and are punished under existing State laws against theft, destruction of property, and other forms of ordinary hooliganism. We can promote civic virtue not by empty words but by action, by what we do, not by what we say.

We can teach the lessons of civic virtue by setting an example in the way we conduct the work of the Senate. We can show it is important to keep our promises to veterans by providing them with decent health care. We can show leadership by promoting an effective treaty to remove land mines from the face of the earth. We can help put more teachers in the classroom, to help the youth of our country to appre-

ciate and reach for something higher, something nobler. We can help provide more school resource officers and better security at our schools in a time when it is needed.

We can and should promote civic virtue, but we should do so by setting an example in our own exercise of our rights and responsibilities, and not by an effort to limit the rights of others. That is what John Glenn and our other witnesses do every day and what we all should rededicate ourselves to doing.

Senator LEAHY. I would also ask that statements by Professor Robert Cole and a statement of Robert Evans on behalf of the American Bar Association be put in the record at the appropriate place.

[The statements of Mr. Cole and Mr. Evans follow:]

PREPARED STATEMENT OF PROF. ROBERT H. COLE

Thank you for giving me the opportunity to submit this testimony. My name is Robert H. Cole. I am Professor of Law Emeritus at the University of California School of Law at Berkeley, where I have taught Constitutional Law for over 30 years.

As the Nation's great deliberative body, the Senate has a unique role and the solemn responsibility to assure that proposed changes in the basic structure or principles of American Government are in fact necessary to promote fundamental needs of the people. The proposed flag desecration amendment does not meet this test. On the contrary, the proposed amendment represents a very risky departure from established American traditions of freedom and serves no purposes worthy of changing the Bill of Rights.

In our system of individual liberty and limited government, the established legal framework for evaluating government proposals to restrict citizens' expression is to assume that people are free to speak and communicate in ways they think best and to require the government to have very strong justification for silencing them. In constitutional law, cases involving government restriction of speech arose relatively late, but this framework, which was first and eloquently formulated by Justices Holmes and Brandeis, has now been established law for some half of this century.

Texas v. Johnson, the 1989 Supreme Court decision which, as you know, is the central case on "desecration" of a flag, is squarely in this established framework. The Court's treatment of the government's justification for restricting speech is at the heart of the issue before you, and so it may be worth spending a few minutes describing the holding. Johnson was convicted of "damag[ing] a * * * national flag" knowing that this would "seriously offend one or more persons likely to observe * * * his action"; he burned a flag while fellow protesters chanted outside the Republican National Convention. The State of Texas conceded, as it had to, that Johnson's conduct communicated his views and was expression under the First Amendment. Following the established framework, the Supreme Court then looked for the government's justification for punishing communication and found none: In fact there was no damage to others' property or person and no actual threat of violence or disturbance of the peace.

The communication did seriously offend others, but it has been established law for fifty years that offensiveness cannot be a justification for silencing speech. You can readily see why, because all kinds of views may be offensive, outrageous, blasphemous to someone; we simply cannot have a free society if we are going to get into the business of picking and choosing which offensive speech to silence, let alone silence it all. The harms done by speech have to be more than disturbing other people's minds and hurting their feelings, even very much. Few people really disagree that tolerating offensiveness is an acceptable price of our system of free speech.

Finally, the Court acknowledged that government has an interest in preserving the flag as a national symbol but held that such an interest does not justify criminal punishment for burning a flag in political protest. Again, you can see why this is: Coerced belief in symbols is diametrically contrary to the citizen's freedom of conscience. As the Supreme Court said, to pick and choose which symbols some citizen cannot speak ill of or hold in contempt, and thereby to force our political preferences for certain symbols on the citizenry, is exactly what the First Amendment does and must forbid. Instead we come back to the basic framework: If a person expresses his contempt in a way that does real harm to substantive interests—he burns someone else's property, he causes violence, and so on—the government has the justification for punishing his expressive conduct.

No Senator on either side of this issue wants to junk this framework or get into the totalitarian business of enforcing obeisance to various official symbols. Rather the supporters' position seems to be, as the dissenters in the *Johnson* case argued, that flags are unique and should be a one-time exception to this established framework, a framework I would emphasize that has preserved and prompted so much of our liberty and defined who we are as a people. But as we all know from our personal lives, from raising our children, and from standing up for principle, the idea of "just make this one exception" is rarely if ever neat and cost-free. It is certainly not going to be cost-free in the case of this amendment to the Constitution.

To begin with, the amendment is not limited to the cases that are always and apparently only used to support it. No one proposes an amendment simply prohibiting burning flags with a contemptuous state of mind (and, as proponents' testimony keeps repeatedly and excessively saying, defecating on a flag). Obviously, then, the amendment is intended to cover much more than the examples used to support it, and no statute implementing it is likely to be written limited to those terms. However such open-ended language as "the flag" and "physical desecration" is interpreted, we can predict that much peaceful political activity using flags, for instance, draping a flag around oneself or taping a peace symbol to it to protest the Kent State killings (which the Supreme Court held protected in *Spence v. Washington*), or an African-American citizen's burning his ceremonial flag in mournful expression of despair over a racial murder (with accompanying speech protected in *Street v. New York*) will be prevented or punished. Because the flag is a powerful and ubiquitous cultural symbol as well, we can be certain that uses of flags in painting, graphic art, drama, even movies, will be prevented or punished. Because flag insignia are widespread in uniforms, athletic and casual clothing, and in advertising and store-front commercial displays, there is every reason to think that some of these personal and commercial uses of flags will be prevented or punished. Because flags are made in all sorts of sizes and from all sorts of materials for all sorts of display, all sorts of uses, from picnics to home decorations, may be called into question.

Attempting to withdraw so central—and beautiful and evocative—a symbol as the American flag from political and cultural discourse is extremely unwise and wrong, in my judgment. Yet this amendment will certainly attempt to do that in some degree or other. These uses of flags often create a sense of community and patriotic pleasure, as well as serve the high principles and purposes and political expression and cultural commentary. But perhaps it is even more important that these questions have not been debated seriously, systematically, or in the general public. During the ten years that a flag desecration amendment has been regularly brought to the Congress, not once to my knowledge have the supporters of the amendment actually attempted to spell out realistically how far the amendment will go in fact and how far they would like it to go. Not once to my knowledge have they attempted explicitly to work through and justify whether it would be worth the costs that could be fairly predicted. The supporters seem unwilling to acknowledge that there are any risks at all, except to burners and defecators. Nor do the costs seem to have been systematically worked out, stated up front, and debated in concrete terms in the Congress.

Yet, the burden of justifying something so fundamental as a change to the Bill of Rights, to any provision of the Constitution, must be on the proponents. The duty of the Senate is to preserve and protect the Constitution, and it should do so until persuaded that change is necessary for the good of the country. This kind of case has not been made at all and, in keeping with the Senate's conservative rule, the Committee should reject the amendment on these grounds alone. In my judgment, of course, this is not only a case of refusing to amend the Constitution when in such great doubt; these costs will be serious and the amendment will be positively harmful.

You may have seen a news story that the American pilot whose B-2 was downed over Yugoslavia felt sustained during his hours behind enemy lines by the American flag that he had stuffed under his clothes. The story illustrates the emotional attachment people have for our flag. It also illustrates what is wrong with the proposed amendment. Would a crushed, grubby, sweatsoaked flag carried as if it were underwear under one's uniform be thereby desecrated? (This is only an example, of course; the story did not say what the pilot's particular flag ended up looking like.) No statutory form of words can distinguish the condition of such a flag from that of a flag if it were used to dry off after exercise (or the flag that Abraham Lincoln is sitting on in the Lincoln Monument sculpture!)—unless, that is, the statute distinguishes not the grubby condition of the flag but *the state of mind* with which the person used the flag. Inevitably a statute implementing the amendment will have to distinguish between cases of physical harm to flags in which the person using

the flag approves of it or is expressing views deemed by police, prosecutors, or juries to be appropriately patriotic from cases in which these authorities decide the person used the flag with contempt or disrespect. Once the legal authorities get into citizen's attitudes toward patriotism or policy, what will prosecutors do about cases in which a person wraps a flag around himself to protest welfare cuts or to oppose the bombing in Yugoslavia (both examples from newspaper photos)? Are these sufficiently respectful or impermissibly hostile?

These examples—and they are endless—tell what Americans are like. We are inventive, our culture creative, our tradition free. Like the B-2 pilot, we will find all kinds of individualistic ways to express ourselves with flags. It will be a disaster when the government starts trying to sort these out on pain of criminal punishment.

The results are that the amendment will both prevent a wide range of expression and inevitably end up punishing those whose views are considered by someone in law enforcement to be unpatriotic or contemptuous of some symbol, policy, or principle deemed by the authorities to be above such criticism. Supporters of the amendment have repeatedly insisted that the amendment would not punish people for their views. The point is that the amendment necessarily will do just that.

All of these various examples of inhibition and suppression of expression illustrate the kinds of costs the amendment will inflict in our pluralistic and creative society as well as the costs in principle. There may be many more examples and other types of costs. To take just one more example, of a different sort, the judicial process under the proposed amendment might well adversely affect the protections afforded under the First Amendment to other kinds of speech. We do not know how courts would relate the proposed amendment to the First Amendment, but there is the risk that courts will take a flag desecration amendment as expressing an authoritative judgment that offensiveness or symbolism now can constitute interests that the government can use to justify silencing speech in other areas, having nothing to do with flags.

With all of these obvious risks to our very constitutional system, what can justify going ahead anyway? How can we proceed as if systematic study and acknowledgment of the grave downside risks of their proposal were irrelevant? One possibility is that the example the supporters have almost exclusively relied on—burning a flag contemptuously—seems so terrible that it justifies any solution, no matter how dangerous. But the number of such flag burnings is trivial, maybe a handful in a decade. There is no societal problem of actual flag burnings, and I do not believe anyone seriously contends that there is. So it must be that we simply must make sure there never is any such flag burning, or that no flag burner ever goes unpunished.

This absolutist hope cannot be realized in fact and, more important, it shows a disabling loss of perspective and proportion. It is out of proportion when you think of all the truly serious evils that go unremedied, and it is out of proportion when you think of the loss of freedom for a significant number of our citizens that the amendment will impose for so little benefit. It begins to resemble a crusade more than a balanced legislative effort to solve real social problems. The Senate, as our great deliberative body, could well reject the amendment simply because its skewed sense of priority is unacceptable in the solemn context of changing the fundamental charter of the Nation. The cost to our sense of priorities at a time when so much tragedy and need exist in our country and around the world must be added to the costs of this amendment.

Another argument for the amendment that supposedly obviates the need to look at its costs is that the flag in some way functions as a symbol that unifies us or makes all our freedoms possible, so that misuse must be prevented whatever the cost. The argument has been put in various ways. Professor Richard Parker testified (Senate Judiciary Committee, July 8, 1998) that a system of free speech requires a community, that a community requires a unifying symbol, and that the flag is our unifying symbol. Unless desecration of the flag is prohibited, we cannot have a system of free speech. Under this far-fetched theory, we would really not have had a system of free speech at least since *Texas v. Johnson* in 1989, nor could we have free speech with Canada or Great Britain, with whom we do not share a flag or flag-substitute symbol. How coercing people who experiment with flags will actually create a community, and what happens to the community if they start burning more flags, are unexplained. No, whatever community underlies the system of communication is to be found in the deep and ancient bedrock of culture, in the very foundations of language, speaking, and listening, and not in contemporaneous, changing attitudes toward particular political symbols.

Professor Stephen Presser testified (Subcommittee on the Constitution of the House Committee on the Judiciary, March 23, 1999) for the Citizens Flag Alliance, the principal proponent of the amendment, that it should be adopted because in our country “personal liberty * * * has * * * spun almost out of Constitutional control”

at the expense of “responsibility.” “We have not reached the fatal point of anarchy yet in America, but we have come disturbingly close.” We should therefore begin “to enforce responsibility and preserve order” by “restrict[ing] the incendiary manner of expressing” “the message that flag burners, defecators, or other flag destroyers and abusers might seek to convey.” The premise of this argument is a demeaning and, in candor, absurd caricature of the American people. It is an argument that knows no limits, for it would justify any number of other restrictions on liberty that would in Professor Presser’s eyes improve the ratio of responsibility to liberty. It starts with the flag as a “coherent” American symbol but opens the door to whatever it takes to restore the “decency, civility, responsibility and order” that Professor Presser thinks we need to make “our fundamental freedoms possible,” which apparently is not the case now. It takes no account of the fact that there are few, if any, flag destroyers who would be taught a lesson, while the rights of innumerable citizens to use flags in political and cultural discourse would be nullified. Above all, the idea that an amendment to the Constitution allowing Congress to prohibit flag desecration would turn around an out-of-control nation on the brink of anarchy cannot be taken seriously as a factual matter.

Less extreme arguments that the amendment would help “unify” the country are subject to the same empirical objections. In none of these arguments is unity as a social concept ever explained or described, so there is no way of knowing what it means in such a vast and complex country as ours and whether or how the amendment or any other strategy would promote it. It simply becomes a slogan. There is no explanation of how the rare occasions of flag abuse have subverted the unity the great majority of Americans seem to feel. Moreover, at a different level of analysis, respect is a condition of unity and it cannot be coerced. Coerced silence, coerced respect for flags, can only create resentment, disrespect, and disunity, and not just among the disaffected but also among the many ordinary people who will be adversely affected by the amendment. What unifies our country is consent, the voluntary sharing of ideals and commitments and the respect for others given voluntarily.

Another form of the absolutist argument that the amendment is required regardless of the costs to freedom is that “flag desecration” is simply wrong regardless of its failure to meet the existing constitutional requirement of substantive harm, and a way must be found to be sure it can be punished. We have seen that what would make it “wrong” could be offense to others or the desecrator’s attitude, and that punishing a citizen for expression on either of these bases is fundamentally inconsistent with our established system of free expression. The only other basis on which “desecration” is always “wrong” is simply that any given flag ends up mutilated. This may be what is meant when the proponents talk about “protecting the flag.” This argument converts flags into a kind of icon whose purity or sanctity is violated when it is damaged or abused. It is at bottom a religious argument. It is no accident that the proposed amendment prohibits “desecration,” the core meaning of which is to convert a sacred object to a secular use. But flags are secular objects; they are political emblems to be loved if one chooses but not to be sanctified. It is a dangerous confusion of the political with the sacred to think in terms of sanctifying our national flags, or even subconsciously to do so. For the sake of religious faith at least as much as for the neutrality of government, the sacred must be reserved for things having to do with the divine. I would think that believers perhaps above all should reject this argument for the amendment and look at the proposal with sceptical reserve.

A final argument for the amendment is that it is popular and that the Senate should defer to the many state legislatures that have passed resolutions in favor of it. I question the factual premises of this argument, because I believe perhaps not more than one or two percent of the public have ever heard of the proposed amendment, and even fewer have been informed of the arguments on both sides. I believe that state legislatures have responded to a little-noticed unopposed lobbying campaign. Some organized veterans groups have campaigned for the amendment, while other veterans (I am one, for what it is worth, though one not remotely exposed to combat) oppose it.

But, more basically, this whole line of argument misconceives the Senate’s proper role in amending the fundamental charter of our government and liberties. This is not a piece of ordinary legislation, attempting to resolve a clash of interest groups on a specialized subject. The Senate’s role in amending the Constitution is to rise dispassionately above the political pressures of the moment and to make a judgment with the depth, perspective, and independence appropriate to a Constitution that promises “to secure the blessings of liberty to ourselves and our posterity.” In this context, as I have tried to show in this testimony, there really can be no cost-free symbolic gesture, no one-way deference to a constituency.

The proposed amendment is inconsistent with the established American principles of freedom of expression and will work serious harm of unpredictable proportions, while it solves no problem that could justify such costs. I respectfully submit that, exercising their independent judgment in their proper role, this Committee and the Senate should reject the amendment.

PREPARED STATEMENT OF ROBERT D. EVANS ON BEHALF OF THE AMERICAN BAR ASSOCIATION

On behalf of the American Bar Association, I thank you for this opportunity to submit a statement in support of the First Amendment right to free speech and against S.J. Res. 14, the proposed constitutional amendment to ban flag desecration.

As members of the legal profession, the over 400,000 men and women of the American Bar Association have a special obligation to protect and defend principles embodied in the Constitution and the Bill of Rights. Of these principles, none are more cherished than the individual freedoms guaranteed to all Americans under the First Amendment. Religious Freedom. A Free Press. The Right to Assemble. Freedom of Speech. Each of these rights is essential to a free and democratic society.

Our flag is a national treasure worthy of the reverence most Americans afford it. It uniquely symbolizes both the power of authority and the individual rights of the people. The flag stands as a powerful symbol of our nation's sovereignty, unity and patriotism—but also of the freedoms found in the Bill of Rights. National strength, unity and patriotism are compatible with the freedom to protest against such authority, even by destroying in a peaceful manner its preeminent symbol. While such an expressive act is offensive to most of us, the fact that such protest is tolerated gives this nation its strength.

Government may neither prohibit the expression of an idea simply because it is offensive, nor designate acceptable ways to peacefully communicate a message. Justice Jackson stated in *West Virginia State Board of Education vs. Barnette*, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." This amendment seeks to impose patriotism by government decree.

Proponents of this measure argue that it would merely restore the right of the people to protect the physical integrity of the flag. The historical record reads otherwise. There is no 200 years of precedent or implicit understanding that was "suddenly" overturned by the Supreme Courts decision in *Texas v. Johnson* in 1989. There is not a single reference to the flag in the Constitution and its original ten amendments, the Bill of Rights. Our founding fathers saw no need to afford constitutional protection to the newly adopted symbol of our nation. To the contrary, they specifically added the Bill of Rights to limit the government's ability to restrict the fundamental rights of the individual. This proposal would amend the Bill of Rights in a manner that runs counter to the intent of the Framers and the spirit of the Constitution.

Make no mistake, this amendment is not about restoration, but restriction. The proposed constitutional amendment to ban flag desecration would, for the first time in our nation's history, amend the First Amendment to diminish the vital protections conferred by the Bill of Rights and give greater protection to the symbolic value of the flag than to the freedoms and ideals it represents.

Proponents of this amendment argue that the act of flag desecration is not a protected form of political speech. They argue that conduct that does not involve the spoken or written word is not protected speech under the First Amendment. History and the courts have long recognized that speech extends beyond written and spoken words and encompasses symbolic conduct. Of course, by common sense we know that pictures—or actions—can be worth a thousand words. A band of patriots dumps tea into Boston Harbor, a single student stands in front of a tank in Tiananmen Square, an African American woman refuses to give up her seat on a bus—each conveys a powerful message without requiring a single written or spoken word. Political dissent is often more powerfully expressed through peaceful acts of protest than through words.

Certainly we recognize that flying or saluting a flag communicates a message of support for the ideals it symbolizes and the government and policies it represents, just as desecration of a flag communicates disappointment in, or a lack of support for a government or its policies. Free speech under the Constitution provides the same protection to flag burning as it does flag waving. The fact that most of us find flag desecration to be offensive does not take away its status as protected political expression.

It is true that not all conduct is protected under the First Amendment and that some limitations have been placed on the right of free speech. Violent expressive conduct involving flag desecration is already subject to these limitations. In fact, the majority of the incidents cited by proponents of the amendment would be punishable under current law. Persons who engage in flag desecration that involves stolen property, vandalism, violence or imminent danger, or breach of the peace are subject to arrest and prosecution under applicable existing laws. Neither a constitutional amendment nor any new statute is needed to punish those malicious acts.

Since its founding, our nation has thrived on the vigor of free speech and robust dissent. The rare incidents of flag desecration do not present a danger to our society. The remedy for expressive actions that offend the majority is not criminal sanction, but increased political discourse. America has nothing to fear from free and open debate, even in the form of hurtful or offensive treatment of the symbol of our constitutional government. This is because our national strength stems from our tolerance of a diverse range of views in the vast "marketplace of ideas."

Justice Brandeis, in *Whitney v. California*, eloquently put it this way:

To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to espouse through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.

The court in *Texas v. Johnson* offered a similar answer:

The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong * * * because it is our flag involved, one's response to the flag burner may exploit the uniquely persuasive power of the flag itself. We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns. * * *

We are a nation of diverse ideological and often intense political views. We hate flag burning. But survey results show that the majority of Americans who initially indicate support for a flag protection amendment oppose it once they understand its impact. The switch is dramatic; support for an amendment plummets from 64 percent to 38 percent. The majority of Americans recognize that the proposed flag desecration amendment is simply incompatible with our democracy and liberty.

At last week's hearing, two witnesses supporting the amendment testified against making flag desecration a felony or misdemeanor. Major General Patrick H. Brady, Chairman of the Citizen's Flag Alliance, stated that the appropriate penalty for flag burning was a citation equivalent to a "traffic ticket" and/or a "fine" or compulsory education akin to "traffic school." Professor Parker allowed that Congress could do anything, but that a "jail term was not reasonable." Where is the sense of proportion? Amend the Constitution to allow for the equivalent of a traffic ticket? Amending our Constitution is a serious endeavor that must be reserved for issues of the fundamental structure of American government and social order.

This amendment is not a magic panacea for any social or moral issue we face as a nation. Indeed, the time and effort expended on this issue detracts from much more serious problems facing our nation that demand Congress' attention. From violence in our streets and schools, to the economic security of our older generation, to questions of race, to questions of war, our nation is faced today with a myriad of challenges that will determine the shape of the society we will all share. How our nation faces these challenges will have far more impact on our youth than passage of a constitutional amendment on flag desecration.

Flag burning is an important form of political dissent around the world. If Congress rejects the constitutional amendment to prohibit flag desecration, as we hope it will, it does not mean that the government supports or endorses such action. The vast majority of those who oppose such an amendment, including the American Bar Association, deplore any act of flag desecration and hold the flag in high regard. It does mean that our government is defending the principles embodied in the Constitution that have preserved individual liberties for over 200 years. I urge members of the committee to stand firm against emotional appeals for the proposed flag amendment. Protect the freedoms of belief and expression guaranteed to all Americans under the First Amendment by opposing S.J. Res. 14.

Senator LEAHY. Like you, I thank the Senators who are here and taking this time, and Senator Glenn, who wanted to be here last week but had a NASA commitment in Houston and so is here today. The four Senators who are here are all close friends of all of us on this panel, and they don't need to hear my speech. As I said, I will put that in the record.

The CHAIRMAN. We were happy to accommodate you, Senator Glenn. You look much more relaxed than I have been used to seeing you in the past. A lot happier, too. [Laughter.]

Senator GLENN. So is Annie.

The CHAIRMAN. Well, this is the order of the Senators, the suggested order, and if anybody has any objection, we will listen. But we will start with Senator Kerrey, and then Senator Hagel needs to follow Senator Kerrey, as I understand it. Then, Senator Chafee, if we can go to you at that point, we would like to do that.

Senator CHAFEE. That is fine.

The CHAIRMAN. As soon as Senator McCain comes in, we will try to accommodate him after the three of you, and then Senator Glenn, of course, and we will let Senator Cleland be the last one for this first panel.

So, Senator Kerrey, we welcome you. We are proud of you, and we look forward to your testimony.

**STATEMENT OF HON. J. ROBERT KERREY, A U.S. SENATOR
FROM THE STATE OF NEBRASKA**

Senator KERREY. Thank you very much, Mr. Chairman and members of the committee. First of all, I take from your opening remarks, at least, that hope springs eternal. I hope that we don't have a repeat of last year where there was an attempt to get a consent to limit debate to 2 hours. Whenever this comes to the fore, I would never attempt to filibuster this.

The CHAIRMAN. I don't think anybody would.

Senator KERREY. I do hope we have an ample time on the floor to get a full debate this year.

The CHAIRMAN. Well, if you will allow me to interrupt, I wasn't for the 2-hour thing, as far as I was concerned. I felt like—I think they talked in those terms because it was at the end of the session. But I think this deserves a full and fair debate.

Senator KERREY. Thank you, Mr. Chairman.

Well, Mr. Chairman, it is obvious that you are winning converts. Each election brings you closer to the 67 votes that you need or two-thirds of those present and voting to send this 17-word amendment to the States for their ratification, where there are now 49 legislatures that have indicated that they intend to ratify this amendment.

These 17 words would make it constitutional for the Congress to pass a law giving the Government the power to prohibit the physical desecration of the flag of the United States of America.

Mr. Chairman, like you, I respect the views of those that are different than mine, and I especially support and respect the views of those who support this amendment. And, especially, I want to pay tribute to the American Legion and the American Legion Auxiliary. These patriots have done more than any others to help especially young Americans understand that freedom is not free. And

to them I say that I have listened with an open mind to their arguments and their appeals to have me support this amendment. Regretfully and respectfully, I must once again say no.

Mr. Chairman, I fear that the unintended consequences of these 17 words and the laws that will be enacted later will be far worse than the consequences of us witnessing the occasional and shocking and disgusting desecration of this great symbol of liberty and freedom. Real patriotism, Mr. Chairman, cannot be coerced. It must be a voluntary, unselfish, brave act to sacrifice for others.

When Americans feel coercion, especially when the coercion is by their Government, they tend to rebel. So none of us should be surprised, Mr. Chairman, if one unintended consequence of the laws that prohibit unpopular conduct such as this is an actual increase in the incidents of flag desecration.

Another unintended consequence will be the diversion of police resources from efforts to protect us from dangerous crimes, and I regard this as a serious matter. The efforts to protect us from those who desecrate the flag will require police officers to train themselves to decide when and where to respond to complaints. We pass the laws, but others have the responsibility of enforcing them, and they will receive complaints from neighbors about neighbors or friends or people that are desecrating the flag that they want the police to respond to. These laws will give the power of the Government to local law enforcement agencies to come in and decide when some individual is desecrating the American flag.

Mr. Chairman, there are 45 words in the first amendment, and this simple amendment protects the rights of citizens to speak, to assemble, to practice their religious beliefs, to publish their opinions and petition their government for redress of grievance.

The 17 words that are in this proposed 28th amendment would limit what the majority of Americans believe is distasteful and offensive speech. Although this seems very reasonable, since a growing majority of Americans do not approve of flag desecration, Mr. Chairman, it is only reasonable if we forget that it is our right to speak the unpopular or offensive that needs the most protecting by our Government.

In this era of political correctness, where the fear of 30-second ads has homogenized and sterilized our language of any distasteful truth, this amendment takes us in the opposite direction of that envisioned by our Founding Fathers whose words and deeds bravely challenged the comfortable status quo.

Mr. Chairman, I took the liberty of going and buying a flag that I intend to give to this committee because I believe all of you on this committee are patriots and believe that you all love your country and that you especially are moved by the symbol that this flag represents. I bought this flag because it reminds me every time I look at it that patriotism and the cause of freedom produces widows—widows who hold this flag to their bosom as if it were the live body of their loved one.

This flag says more about what it means to be an American than thousands of words spoken by me. But, Mr. Chairman, current law protects this flag. If anyone chooses to desecrate my flag and survives my vengeful wrath, they will face prosecution by our Government. Such acts of malicious vandalism are prohibited by law.

Mr. Chairman, the law also protects me and allows me to give a speech born of my anguish or my anger during which I set this flag aflame. Do we really want to pass a law making it a crime for a citizen, despondent over war, despondent over abortion, despondent about something else they see going on in their country, that burns this flag? Do we really want a law that says that our police will go out and arrest them and put them in jail?

Mr. Chairman, I hope not. Patriotism calls upon us to be brave enough to endure and withstand such an act, to tolerate the intolerable.

Mr. Chairman, I sincerely and respectfully thank you for your patriotism and all of those who hold views different than mine. I will pray this amendment does not pass. But I thank God for the love of country exhibited by those who do.

The CHAIRMAN. Thank you, Senator Kerrey.
Senator Hagel.

**STATEMENT OF HON. CHUCK HAGEL, A U.S. SENATOR FROM
THE STATE OF NEBRASKA**

Senator HAGEL. Mr. Chairman, thank you. I wish to express my thanks, along with my distinguished friend and colleague from Nebraska, for an opportunity to appear here this morning.

It is not often Nebraska gets to go first, Bob. I credit that more because of your presence than mine, so thank you for bringing me along.

I wish to take a different approach than Bob. I have supported this effort, and I, like Bob and all of us here today, very much respect and appreciate the points of view here. There are legitimate questions about this, constitutional questions, relevant questions, differences of opinion and philosophy. But I have come over the last couple of years to this position as a result of some of the thoughts that I wish to share with you this morning.

This is about a statement as much as anything else. It is a statement about America's priorities. I don't see it as depriving individuals of their liberties to say what they wish, to make this an important part of the most important document in our country, the Constitution of the United States.

We all know that freedom also is attached to responsibility, and when you wish to express yourself, you have some responsibility for that expression.

We know that if this amendment passes and our States ratify it and it becomes our newest addition to the Constitution, it will not stop nuts from burning the American flag. We understand that.

But this is a symbol. Senator Kerrey very appropriately identified that symbol. The American flag is a symbol, and America always is in need of a rallying symbol of dignity, respect for others. All that is embodied in our American way of life. The American flag represents that.

This is not a trivial issue. This is not a trivial amendment, in my opinion. This is a very relevant amendment.

The Founding Fathers gave us the ability to amend the Constitution. And why did they do that? This is a breathing, living, dynamic paper. But more than a paper, it is us.

The Founding Fathers gave us the ability to amend the Constitution, which we have done many times, because they understood that there would be new, relevant challenges to the times that America would live in, engage in; and, hence, much good has been the result of those amendments to the Constitution.

I, like all of you, I suspect, have often wondered what the great men and women of early America would have thought, the Founders of the Constitution, the authors of the Constitution, the Founders of our Nation, if over 200 years reeling forward we would be engaged in some debate about individuals burning the American flag, someone other than the British or actually our own people, our own citizens.

So that is a perspective that I think needs to be not only articulated in this debate, but given some perspective overall as we approach what we wish to do about the issue of amending our Constitution to reflect protecting the flag and embody that in the Constitution.

Some of our cultural problems today—and, yes, Littleton, CO, certainly fits into that. Some of these problems are a result of respect or, more appropriately, lack of respect for something bigger than ourselves, something more important than ourselves. The flag represents that.

The flag has been our Nation's symbol since the birth of our country. It does represent all that is good and decent about our country and our values. It does have value. It is a symbol in itself of our values and our respect for all.

The flag has been carried in every battle that this Nation has fought. And as Bob mentioned, the flag covers the caskets of those returning home after making the supreme sacrifice. Its symbolism is so sacred to Americans that we teach our children not to let it touch the ground. It flies over our schools and places of worship. The Pledge of Allegiance unites all Americans, regardless of their heritage, political philosophy, or background.

Freedom of speech is not unlimited. We understand that. We know that you can't yell "fire" in a crowded theater when there is no fire. You are not supposed to. Does that warrant a constitutional amendment? No.

But, for me, when I add it all up and look at the completeness of the issue, it does lead me to believe that not only in a time of great challenge, as is always the responsibility for those of us, not just policymakers but all citizens, to stay vigilant, the symbolism is important, and the statement about our values and our country is important. Because this flag is our national symbol, its desecration stirs many passions.

I believe in the end that the effort to amend the Constitution to specifically protect the flag is not only justifiable, but I think it is the preferred approach, and I will continue to support that effort.

Mr. Chairman, thank you.

The CHAIRMAN. Thank you, Senator Hagel.

Senator Chafee, we will have you next. After Senator Chafee, Senator McCain.

Senator Chafee.

**STATEMENT OF HON. JOHN H. CHAFEE, A U.S. SENATOR FROM
THE STATE OF RHODE ISLAND**

Senator CHAFEE. Thank you very much, Mr. Chairman, for giving me an opportunity to testify on the proposed constitutional amendment, S.J. Res. 14. As you know, I strongly oppose the amendment for several reasons.

First, we come to this debate as we never have before, with the direct experience of having our actions guided by the Constitution—

The CHAIRMAN. Excuse me, John.

Thank you for the flag, Senator Kerrey. We are very grateful to have it for the committee, and it was a wonderful gesture on your part.

Senator KERREY. Thank you.

The CHAIRMAN. Thank you for being here.

Sorry, Senator Chafee.

Senator CHAFEE. My first reason for being opposed to the amendment, Mr. Chairman, is we have just come through the impeachment trial, and in the course of that trial, I think every single one of us delved into the Constitution, read it over to a greater extent than we had in past years. We became much more familiar with that document as a result of the impeachment trial. As a result, I think we all came out marveling at the foresight and the wisdom of the Framers of the Constitution, the men who wrote this document.

The Constitution is a document that provides each citizen with rights. That is what it is all about. Broad rights are provided for in this Constitution. What are some of them? The right to assemble peacefully, the right to speak and publish freely, the freedom to worship without interference, freedom from unlawful search and seizure, freedom from slavery and involuntary servitude, the right to vote. It is these freedoms that define what it is to be American. That is what this Constitution is all about.

In more than 200 years, the Constitution has been amended only 27 times, and one of those was a mistake and was later repealed. The amendments have reaffirmed and expanded individual freedoms. That is what it is all about. This proposed amendment would not expand the list of freedoms. This amendment for the first time would limit individual freedom. Furthermore, in my judgment, it trivializes the Constitution.

I believe none of us can even imagine James Madison taking this proposed amendment seriously, and the other authors of the Constitution.

This proposed amendment would enable Congress to punish those who desecrate the flag. What will be next? Will we next see a constitutional amendment demanding the standing to attention when the National Anthem is played? Will there be a list of worthy documents and symbolic objects for which desecration is constitutionally prohibited? Should there be a constitutional amendment to protect the Bible? What about other religious symbols such as the crucifix or the menorah? What about the Constitution itself? Surely the Constitution embodies the same significance as the flag.

Second, Mr. Chairman, I oppose the amendment for its lack of clarity. The text of the proposed amendment provides no guidance

over what constitutes desecration. In my State of Rhode Island, there is a highly prized work of art at the Rhode Island School of Design. It is a hooked rug, carefully and conscientiously made by patriotic American women some 100-plus years ago, and its design is the American flag. These women made it as a symbol of their national pride, yet it is a rug—which by definition is to be walked on. Is that desecration? Should these patriotic craftswomen have gone to jail?

I have here the Boy Scout Handbook, Mr. Chairman. It is the handbook of which 34 million copies have been made. And what does it do regarding the flag? And I quote from it: “Care of the Flag” on page 478.

Clean the flag if it becomes soiled. Mend it if it is torn.
When worn beyond repair, destroy it in a dignified way,
preferably by burning.

Now, what do we say about that, Mr. Chairman? Is that desecration? Are we going to send Boy Scouts off to jail because they burn a flag?

I wonder what we would say when some bearded, untidy professor burns an American flag outside a convention hall, and the conclusion is he should go to jail. But three blocks away, a Boy Scout burns the flag in a dignified manner. Would he go free? If so, then we are getting into the questions of the intentions of the flag burner, and this, indeed, is a messy area.

Third, there has been no rash of flag-burning incidents. Such incidents are extremely rare. Each year, a mere handful of miscreants have committed the admittedly contemptible act of burning the flag. We don't have an epidemic, we don't have a crisis on our hands, Mr. Chairman, for which a constitutional remedy is the only solution. We should not provide those who burn the flag with the attention they crave. I am confident, as Senator Kerrey noted before, that if this passes, people will use this as a convenient way of getting attention, getting on the television.

At the committee's hearing last week, Senator Feingold asked a witness, Maj. Gen. Patrick Brady of the Citizens Flag Alliance, how many incidents of flag desecration had occurred recently. The witness answered, “Hundreds.” I asked CRS to search news reports from throughout the U.S. for reports of flag desecration. The search covers 4 years, from January 1995 to January 1999. In those 4 years, CRS came up with a grand total of 43 separate incidents. In 1 year there were 7, in another year 11, in another year 10, in another year 15.

Many of these reported flag desecrations were committed by drunken teenagers who were charged with crimes ranging from vandalism to disorderly conduct. I hope the committee agrees that a handful of random acts, 43 over 4 years, committed by disorderly juveniles, would not merit amendment to the Constitution.

Mr. Chairman, I would like to provide for the record a copy of the CRS search for the hearing record.

The CHAIRMAN. Without objection, we will put that in the record.
[The information of the CRS follows:]

CONGRESSIONAL RESEARCH SERVICE,
LIBRARY OF CONGRESS,
April 28, 1999.

Re: Reports of flag burning/desecration in the U.S.
To: Senator John Chafee
Attn: Barbara Richle
From: Kathy Doddridge, Information Research Division

I have reviewed numerous articles on reports of flag burning/desecration in the United States for the years 1995 to 1998.

The results of my research by year are: 1995—7; 1996—11; 1997—10 and; 1998—15.

The above statistics were gathered from newspaper, magazine and wire service articles from the Nexis database (US) using the following search terms and strategy: (American or U.S.) w/3 flag w/5 (burn! or destroy! or desecrat!).

ALL RECORDED FLAG-BURNING INCIDENTS IN THE UNITED STATES

JANUARY 1995—JANUARY 1999

1. March 11, 1995—Pennsylvania

Two boys, ages 15 and 16, burn a flag in a University of Pittsburgh parking lot to protest government “build[ing] arms and bombs and kill[ing] lots of people.” When arrested, the teens object, saying their action is legal; they say they may call the ACLU.

2. April 6, 1995—Illinois

A 17-year-old boy in Berwyn burns a small flag at home and hangs the remnants in his school locker to make a statement against slavery and discrimination; his action initially provokes anger and outcry, but leads to school-wide discussion of ethnic issues and the boy apologizing.

3. June 8, 1995—Indiana

Vandals steal at least 20 flags from the Valhalla Memory Gardens in Bloomington, and burn them behind the mausoleum.

4. July 4, 1995—Ohio

Two teenagers desecrated an American flag during the vandalization of a neighbor’s home. The flag was ripped down from the property and torn.

5. July 5, 1995—Maine

State Police were looking for three juveniles believed to have stolen and burned an American flag.

6. September 19, 1995—Oklahoma

A 17-year-old boy uses a flag to wipe oil from his car’s dipstick.

7. October 22, 1995—Wisconsin

An American flag was burned in a first-floor room of an apartment building causing damage to the building.

8. April 28, 1996—Arizona

A rally to protest the exhibition of an exhibit showing examples of flag desecration is held. Included is an exhibit that invites visitors to trample on a flag placed on the floor.

9. June 2, 1996 New York

Three teenagers faced charges stemming from a vandalism spree that included using a lighter to burn American flags.

10. June 1996 Wisconsin

A 17-year-boy was accused of defecating on a flag and leaving it on the steps of a golf course clubhouse “to be noticed.” [The following March, a local judge held Wisconsin’s flag desecration law to be unconstitutional.]

11. June 4, 1996 Indiana

Members of the Black Panthers protested the death sentences of two individuals at an Olympic torch celebration by attempting to burn an American flag.

12. *July 4, 1996 Indiana*

A group of ten people burn a large flag and several smaller flags outside an Indianapolis police station to protest the arrest of a Black Panther leader and the treatment of black Americans in general. Police are present but no arrests are made.

13. *July 4, 1996 Pennsylvania*

Vandals damaged a number of areas around the Tobyhanna area. Included in the vandalism was a small cemetery where several small American flags were discovered burned.

14. *July 19, 1996—Georgia*

Several young men burn an American flag after an Atlanta rally on state capitol steps in which another group of 75 protesters burned a Georgia state flag.

15. *July 20, 1996—California*

A group of approximately 40 Latino activists marched outside of a LAPD station and burned a small American flag to protest the shooting of Jaime Jaurequi, a Resda resident.

16. *August 27, 1996 Illinois*

Members of a self-styled anarchist group *may* have burned a flag during a demonstration and march to the Democratic Convention Hall, *but this report is never corroborated.*

17. *September 17 and 20, 1996 Tennessee*

Two flags were burned at the flagpole of Collierville High School; later, police found a partly-burned flag at Town Hall. Also, police said four flags were stolen the previous week.

18. *November 6, 1996 California*

Marchers at San Diego State University burn flags at a demonstration against Proposition 209; bystanders react angrily and a scuffle breaks out.

19. *January 11, 1997 Seattle*

Four teenagers were arrested for burning a flag at a veterans' memorial park; the charge was reckless activity.

20. *Late January 1997 Maryland*

Two young men broke into a middle school, disturbed property, and burned several American flags on the roof.

21. *February 1997 North Carolina*

A 17-year-old high school student was arrested for a February incident in which he used a knife to shred a flag used by the school band.

22. *May 24, 1997—Florida*

A Vietnam veteran who had admonished neighborhood kids to put out a flag for Memorial Day later found his flag in ashes on his lawn. He believes the kids set the fire.

23. *May 26, June 9–10, 1997—Wallingford, CT*

Vandals set fire to flags four times over a 3-week period.

24. *July 5, 1997 Massillon, OH*

A 17-year-old girl set fire to a flag at midnight, after a July 4th party.

25. *September 1997, Lares, PR*

Anti-statehood protestors burned an American flag during an annual festival.

26. *October 6, 1997 Sacramento, CA*

Vandals burned, painted, and hung an American flag upside down outside an apartment manager's office.

27. *October 20, 1997 Neptune, NY*

After burning the rope of a flagpole, someone stole the American flag.

28. *November 11, 1997 Bayamon, PR*

A pro-independence separatist group burned 10 American flags at the National Cemetery in the middle of the night before a Veterans Day ceremony.

29. *January 1, 1998 Fresno, CA*

Members of a Hispanic political organization burned an American flag outside City Hall to protect US arm sales to Mexico.

30. *May 15, 1998—New York, NY*

As part of a protest outside of NBC by about 75 Puerto Ricans who were offended by a "Seinfeld" episode in which the character, Kramer, accidentally burns a Puerto Rican flag, an American flag was burned.

31. *May 23, 1998—Somers, CT*

Town employees discovered that 14 flags and flagpoles that had been put up for the Memorial Day celebration had been vandalized. The flagpoles all had been bent and flags were stuffed in the toilet or thrown on the roofs of portable restrooms. Other vandalism was done to the park.

32. *May 21, 1998 Tampa, FL*

A 72-year old Hudson man reported that someone pulled down an American flag from his property and burned it. He did not know who burned the flag or why.

33. *May 30, 1998 Florida*

A man was flying an American flag with a motorcycle embossed on it outside his home until police showed him an obscure 1919 state law that forbids any image being placed on the flag.

34. *July 6, 1998 Durham, NC*

17 flags that were being collected by a former Navy Chaplain were set ablaze by vandals. The Chaplain was collecting the flags in order to properly retire them and sprinkle their ashes over the graves of veterans.

35. *August 7, 1998 Arlington, VA*

2 American flags were burned on headstones in a cemetery.

36. *Late August 1998 Dorado, PR*

An American flag was burned during a pro-independence rally outside the Southern Governors Association meeting.

37. *September 1, 1998 Davenport, WA*

A juvenile in Davenport was arrested for burning a stolen American flag with a flare he had stolen from the patrol car of a Lincoln County Deputy.

38. *September 11, 1998—Boulder, CO*

A late night arsonist climbed atop a park bench and lit the flag afire that flies between the city hall and the public library.

39. *September 17, 1998 Santa Fe, NM*

3 drunken men were arrested outside of the Sweeney Convention Center where a "Fiesta Celebration" was being held. The men claimed to have found the flag. At the time of the arrest, one of the men told police he had burned the flag to protest how the U.S. treats his country. (His national origin was not reported.)

40. *October 27, 1998 Sioux Falls, SD*

When responding to a call about a loud noise, police in Sioux Falls discovered that an 18 year old man, who appeared to be intoxicated, had burned an American flag.

41. *November 3, 1998 Hanover, PA*

A 14 year-old boy was charged in York County Juvenile Court with desecrating the flag after he and another boy, who was not charged, were apprehended by police at the scene of a burning flag. The police believe that the flag burning resulted from boredom and was not a political statement.

42. *November 13, 1998 High Point, NC*

A flag was ripped from its flagpole and burned on the Dr. I.T. Mann American Legion Post 87 in High Point. The flag had been flying at half staff in recognition of a Legion member's death. Its tattered remains were found on a picnic table near the Post's back door.

43. *December 24, 1998 Sharon, MA*

Two temples were damaged during services. Rocks were thrown through the windows of both temples and a menorah was damaged at one. Police found a flag burning on a tree near one of the temples shortly after the vandalism occurred.

MEMORANDUM

April 28, 1999.

To: Senator Chafee
 From: Bob Greenawalt
 Re: Meeting with Senator Packwood

You are scheduled to meet with Senator Packwood today at 12:00. He would like to discuss a change to the restrictions currently placed on activities conducted by Real Estate Investment Trusts (REITS).

BACKGROUND

A real estate investment trust ("REIT") is a corporation that combines capital from many investors to acquire or provide financing for all forms of real estate. A REIT is similar to a mutual fund in that no corporate level tax is levied on the income earned by the REIT as long as it is passed on to the investors.

REITs are restricted to investing in passive investments, primarily real estate and securities. Specifically, a REIT must derive at least 95 percent of its income from real property rents or from securities. Also, a REIT cannot own more than 10 percent of the voting stock of a corporation and no more than 5 percent of the value of its assets be stock of a single corporation.

PROBLEM

Some REITs are conducting active businesses through subsidiaries, which would be impermissible if operated by the REIT directly. The Administration is concerned that operating active businesses through subsidiaries erodes the corporate income tax base. At the same time, the Administration recognizes that many of these businesses are legitimate outgrowths of a REIT's traditional operations. Thus, the Administration has proposed (and Senator Packwood is supporting) changes to the REIT rules to allow a small level of active business to be conducted by REITs. Senator Packwood is meeting with you to ask for your support of this legislation.

ANALYSIS

On balance, the Administration's proposal is a reasonable step. The only question for you to decide is whether there is any reason for you to lend your name to this effort. You have not been contacted by any Rhode Islanders asking that you support this proposal.

Senator CHAFEE. Finally, Mr. Chairman, I don't believe we can mandate respect and pride in the flag. In fact, in my view, taking steps to require citizens to respect the flag sullies its symbolism and significance; 99.9 percent of Americans respect the flag, and I believe, Mr. Chairman, there is no need for this amendment.

I want to thank you very much for the opportunity to testify.

The CHAIRMAN. Thank you, John. We are glad to have you here.

I might mention that when General Brady mentioned that when he said hundreds, he said that a lot of them aren't reported, and that was his additional explanation.

Let's now turn to Senator McCain. I gave you a better introduction than I am giving you right now before you got here. But let me just say this: There was a tremendous article in the Investor's Business Daily a couple of days ago, yesterday or the day before, about your service, and we are just honored to have you here along with the others. So we will turn the time to you.

**STATEMENT OF HON. JOHN McCAIN, A U.S. SENATOR FROM
 THE STATE OF ARIZONA**

Senator McCAIN. I thank you very much, Mr. Chairman, and I will be very brief. I am very honored to be on this panel with some American heroes: John Chafee, who served in some of the fiercest battles in World War II and who is a member of what is now being called the "greatest generation"; Chuck Hagel, who served and was

wounded in the Vietnam Conflict; and, of course, my dear friend John Glenn. I often have described the fact that the only difference between Senator Glenn and me is that he used to, during the Korean War, shoot people down and I used to get shot down. That is a minor distinction, of course. And Senator Kerrey, who left part of himself and who served with such honor on the battlefield of Vietnam. It is a great honor for me to be in the company of some American heroes.

Mr. CHAIRMAN, I would ask that my prepared statement be made a part of the record.

The CHAIRMAN. Without objection.

Senator MCCAIN. And I would just like to illustrate my feelings on this issue by telling a story that I have told before, which is a very brief story. Mr. Chairman, it concerns an incident that happened while I was in prison in Hanoi. For years, the Vietnamese kept the American POW's in conditions of solitary confinement or two or three to a cell. The purposes were to break down organization, thereby reducing resistance and enabling them better to achieve their goals.

After approximately 1971, the Vietnamese changed our conditions from putting us in those conditions into large groups of 25 or 30 prisoners in each cell. One of the prisoners who moved into the cell with me was a young man by the name of Mike Christian. He was from a small town near Selma, AL, came from a very poor family. He did not wear a pair of shoes until he was in his teens. He enlisted in the U.S. Navy when he was 17, later he went to officers' candidate school, and went to pilot training and became a bombardier navigator on an A-6 airplane. Mike Christian had a keen appreciation for the opportunities that the military provides us.

The uniform that we wore in prison was a blue shirt and trousers, sandals made out of automobile tires. I strongly recommend them. The same pair lasted me for 5½ years.

As part of the change in treatment, the Vietnamese allowed us some articles and packages from home. In those packages were small articles of clothing such as handkerchiefs and scarves. Mike Christian fashioned himself a bamboo needle and over a period of several months sewed on the inside of his blue shirt, with a piece of white cloth and a piece of red cloth, the American flag.

Every evening before we would have our bowl of soup in our cell with about 25 people in it, we would put Mike Christian's shirt on the wall of our cell and say the Pledge of Allegiance.

Mr. Chairman, I will freely admit that saying the Pledge of Allegiance to the flag, as happens in many of the events we attend, is not the most important part of those events. In those conditions, being able to pledge allegiance to our flag and our country was a very important part of our day.

One day the Vietnamese came into our cell, searched the cell, and in the course of their search found Mike Christian's shirt with the flag sewn inside of it. They removed it. That evening they came back and opened the door of the cell and called for him to come out, and then closed the door of the cell and beat him rather severely for the next several hours, at the completion of which they threw him back inside the cell.

The cell in which we lived had a concrete slab in the center on which we slept and bare light bulbs in all four corners of the room. We cleaned up Mike Christian as well as we could, and as you can imagine, he wasn't in great shape. And I went over to lie down on the concrete on which we slept, and I happened to look over in the corner of the cell, and Mike Christian was sitting under the light bulb with a piece of white cloth and a piece of red cloth and another shirt, sewing another American flag. He wasn't doing that because it made him feel better. He was doing it because he realized how important it was for us to be able to pledge our allegiance to our flag and our Nation and how important it was to our morale.

All of us are products of our experiences in life, Mr. Chairman, and that is my experience, and that is my view about the sanctity of the American flag and the way that it should be treated. I don't intend to engage in any constitutional arguments. I just feel very strongly that American blood has been shed all over the world with the flag as its symbol, and I believe that it deserves the reverence and respect as a symbol not only of freedom and democracy, but of a great deal of sacrifice.

I thank you very much, Mr. Chairman, for allowing me to appear.

The CHAIRMAN. Thank you, Senator McCain. We know you have to get back to the floor. We really appreciate you taking the time to be with us today.

Senator MCCAIN. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you for being here.

Senator Glenn, we will turn to you.

**STATEMENT OF HON. JOHN GLENN, FORMER U.S. SENATOR
FROM THE STATE OF OHIO**

Senator GLENN. Thank you very much, Mr. Chairman, and I would ask that the longer statement be included in the record.

The CHAIRMAN. Without objection.

Senator GLENN. I will try and summarize here.

I am honored to be here today. This is my first return to Capitol Hill since I left here in January at the end of my last term, so I am honored particularly to be here with the associates at the table this morning.

I don't know of any group of people you could put together here that have demonstrated more their devotion to this country and to the flag and everything that it stands for than this group.

I was sitting here thinking, as John McCain was just speaking, about being on a trip with him to Vietnam, and he had asked to go back and see his old cell up there, and they would never let him in. And one day we were in one of the meetings, and they came in and said he could go back up. And he asked me to go with him, and I did. And he and Pete Peterson, who is now our Ambassador out there, went and they had a little trouble finding the place, and he finally found the old cell. And it was one of my very most memorable experiences on any trip I made out of the Senate of all the time I was here in those 24 years.

Nothing is any more abhorrent to any of us than disrespect for the flag. We all love the flag, and we are dedicated to it and what it stands for. And we have had past experiences as demonstrated

by the people that have been here so far this morning that indicate how we feel about that flag and about dedication to this country.

But, to me, it would indeed be hollow victory to protect the symbol by taking any chance at chipping away at the freedoms themselves. Now, maybe that is why the first item in the Bill of Rights, the first amendment to our Constitution, has never been changed or altered, even a single time, in all of American history. It wasn't changed during the Civil War. It wasn't changed during any of our foreign wars, World War I or World War II, or Korea or Vietnam, any other, and not during recessions, depressions, scares or panics. And even during times of great emotion and anger, like the Vietnam era, when flags were burned or desecrated far more often than they are today, our first amendment remained unchanged and unchallenged.

And yet now sometimes we are told that unless we alter the first amendment, unless we place a constitutional limit on the right of speech and expression—and they go together, speech and expression—that somehow the fabric of our country will somehow be weakened. And I just don't believe that.

There is only one way to weaken the fabric of our country, and it is not through a few misguided souls burning our flag. It is by retreating from the principles that the flag stands for. And that will do more damage to the fabric of our Nation than 1,000 torched flags could ever do.

The first amendment says simply and clearly that Congress shall make no law abridging the freedom of speech, and that has been interpreted to include expression repeatedly by the courts.

For 200 years, in good times and bad, in times of harmony, in times of strife, we have held those words to mean exactly what they say, that Congress shall make no law abridging the freedom of speech. And yet now ostensibly to prohibit something that rarely happens anyway, we are asked to alter those first amendment words to mean that Congress may make some laws restricting freedom of expression. This time those laws would be about flag burning. But what will the next form of political expression be that we seek to prohibit? For once we begin to slide down the slippery slope of restricting freedom of speech, it is impossible to know where that slide will end.

Now, let me say just a few words about the practical problems as I see it here. If this would pass, if the President would sign it and it becomes law, one of the practical problems about enforcing it—and that has been mentioned. John Chafee mentioned a little bit about that a moment ago. If Congress and the States are allowed to prohibit physical desecration of the flag, how are we going to define that? How are we going to administer that? Do we have a definition here of what a flag is? Is it only manufactured flags of cloth or nylon, like we fly over the Capitol here and send out to people? Do they have to be a certain size or description? Does it refer to the small paper flags we stick in cupcakes at political rallies that wind up on the floor or in the garbage? Is that desecration?

How about homemade flags? How about crayon-made flags by a child or something like that? Is that a legal flag to be protected by

other people? If I take a crayon flag from a kid and I say I am going to burn this, is that desecration?

I don't know that we have considered all these things. What size should those crayon flags be, incidentally? Or how do we know what is prosecutable and what is not under this?

Let me take this even further, and I don't want to be disrespectful in any way, shape, or form, but in Chicago, I was in a shop that specializes in just flags and flag paraphernalia when we were out there at the convention some years ago. And I went in because I was curious about what they had, and I was surprised at some of the things I found. What I found were flag bikinis; I also found boxer shorts. I found not only boxer shorts but other shorts. Are people to wear the flag as underwear? If they soil it, is that desecration? Can the police arrest you if you are wearing a flag in that way? I think we ought to consider these things.

I saw a person working under a car with a flag T-shirt on, lying on his back, grease all over, dirt, sweaty. Is that desecration of the flag that he was wearing? I don't know. I think we have to consider things like this, though, if we are going to contemplate making this the law of the land.

Or if you see a person jogging down the street with a flag T-shirt which becomes drenched with sweat. You can't imagine what it smells like if you sidle up to that person. But I don't like that one bit. I have never worn things that had flags like that on them that were mainly a piece of clothing.

Or how about a bumper sticker covered with dust that is a flag? Is that desecration? I think these are things that would have to be thought through. Maybe this is taking it to too much of an extreme. And there could be more examples made, of course.

But about the person who has an old tattered flag and says he is burning it for two reasons: first, I am going to dispose of it, as we are supposed to dispose of it, by burning it; and, second, I just want everybody to know I protest the tax policy in this country, and I am burning it partly because of that.

Now, since burning flags is an officially approved and sanctioned means of flag disposal, will that mean that just half this person's action would be legal? How would a court or jury assign penalty in such a case?

You can say, well, intent is the criteria. Well, is intent that he was made when he burned it? Or was he friendly, was he smiling when he burned it? Plus the lawyers up here can tell me chapter and verse about how tough it is to prove intent in court. I have heard in the past that is one of the most very difficult things to take to court and prove, is intent.

I think we know the reason this is up again, and it is because many organizations, most of which I am a member of and a proud member of—and I think the veterans' organizations have done a tremendous job. As Senator Kerrey said a few moments ago, they have done a tremendous job for this country through the years, going way back. And I am a member of most of those organizations, and I have had the heads of the organizations visit me in my office. And I have posed some questions to them, but I believe the reason this is up again is pressure from some organizations that decided what they wanted many years ago, and they didn't really think

through completely what this action would do and are not willing to see that the right—the right that we are talking about here—and not just the symbol, is the main thing to be protected.

I have tried to discuss this in my office, and we just came to disagreement on that particular item. But this amendment for the very first time in American history would actually change the right because of some action we don't like against the symbol, dear as that symbol is—dear as that symbol is. And I think history and future generations will judge us harshly, as they should, if we permit those who would defile our flag to hoodwink us into also defiling our Constitution.

As has been said this morning, there are laws that cover this kind of thing, and I would hopefully have the toughest kind of arrests and prosecutions of anybody under existing law. But to change our Constitution and diminish the rights that it protects is just not to me the way to go.

As Senator Chafee said a moment ago, how many have been burned, anyway? Is this really a solution looking for a problem? We don't really have any major problem. I don't know that I have ever seen a person burn a flag. It is abhorrent to me, as it is to everybody else. But I don't think we need to let the passions of the moment stampede us into abandoning principles in this issue.

It was once said on another occasion and in another context that what we need now in the Senate and in the Congress is less profile and more courage. If America is truly going to continue to be the land of the free, I think all of us must prove it is still the home of the brave, no matter how much the pressure is and no matter what the threats.

Thank you.

The CHAIRMAN. Thank you, Senator Glenn.

[The prepared statement of Senator Glenn follows:]

PREPARED STATEMENT OF HON. JOHN GLENN

A CONSTITUTIONAL AMENDMENT ON FLAG DESECRATION

Thank you Mr. Chairman, Senator Leahy, and the distinguished members of the Committee. It is an honor to be here in my first appearance before the Senate since my retirement earlier this year. I certainly miss the opportunity to discuss and debate the great issues of the day with my friends and colleagues here but I am happy to leave the hectic schedule and heavy workload to you.

It is also a great privilege to appear today in the company of these most distinguished, much honored and highly decorated men. Our country is fortunate to have had these men in times of war and peace. I am proud to know them as friends.

As a former member of the Senate Armed Services Committee I worked very hard to protect the security interests of the nation and to protect the interests of those who serve in our armed forces. I want to extend to the men and women serving in the Balkans my heartfelt support and my prayer that peace will come soon.

The Committee has before it today for consideration the question of a constitutional amendment to permit Congress to enact legislation prohibiting the physical desecration of the American flag.

Like most Americans, I have very, very strong feelings about our flag. Like most Americans I have a gut reaction in opposition to anyone who would dare to demean, deface, or desecrate the flag of the United States. But also like most Americans I am concerned about any effort to amend the Constitution and the Bill of Rights.

I have watched as those who expressed qualms or doubts or reservation about this amendment have run the risk of being smeared, of being labeled as unpatriotic or a friend of flag burners. And I can assure you that I am neither. We feel uncomfortable sometimes talking about what involves such private and personal emotions. We do not wear those feelings on our sleeves about how we feel about the flag and about

patriotism. We do not parade around those things that are near sacred to us. And trying to put those feelings into words only proves the inadequacies of language.

We all love the flag and no one more than I do. I fought hard for this flag through two wars and representing the country in the space program. I am both honored and proud that few people in this nation have been able to take our flag where I took it. The first thing I selected to take on my trips to space was a flag. I took along little silk flags so I could give them to my children, and they remain among my children's most cherished possessions to this day.

For those who served in the armed services, we risked our lives because we believed it was our duty to defend our nation. I can tell you that in combat you do not start out thinking about the philosophy of our nation. When you start a run on a ground position from the air, through anti-aircraft, or lead a patrol where people are getting shot, you do not think about those philosophical thoughts. It is the survival of the moment that holds your attention. Only later do you think about some of these great philosophical thoughts.

But every last tiny fiber in our flag stands for someone who has given his or her life to defend what it stands for. Many of us here have as many friends in Arlington Cemetery, bearing silent witness to our flag, as we do bearing public witness to it in the world of the living. Maybe that is why I have so little patience, and even less sympathy, for those pathetic and insensitive few who would demean and defile our nation's greatest symbol of sacrifice. They deserve harsh censure.

But, in what I view as their demented ways, they also have my pity because they cannot, apparently, feel the pride and the exhilaration that comes from being called to a purpose larger than one's own self. They cannot feel the pride in our nation and what it stands for, even though not perfect as yet; the pride in a nation whose very strength rests in a guarantee of freedom of expression for every single person, whether that person agrees with the majority, or not. It is a guarantee that some misguided souls exploit for their own egotistical, self-centered purposes.

I believe that the members of this committee have a special responsibility to recognize that it would be a hollow victory indeed if we preserved the symbol of our freedoms by chipping away at those fundamental freedoms themselves. Let the flag fully represent all the freedoms spelled out in the Bill of Rights, not a partial, watered-down version that has altered its protections.

The flag is the nation's most powerful and emotional symbol. It is our most sacred symbol. And it is our most revered symbol. But it is a symbol. It symbolizes the freedoms that we have in this country, but it is not the freedoms themselves. That is why this debate is not between those who love the flag on the one hand and those who do not on the other. No matter how often some try to indicate otherwise, everyone on both sides of this debate loves and respects the flag. The question is, how best to honor it and at the same time not take a chance of defiling what it represents.

Those who have made the ultimate sacrifice, who died following that banner, did not give up their lives for a red, white and blue piece of cloth. They died because they went into harm's way, representing this country and because of their allegiance to the values, the rights and principles represented by that flag and to the Republic for which it stands.

Without a doubt, the most important of those values, rights and principles is individual liberty: The liberty to worship, to think, to express ourselves freely, openly and completely, no matter how out of step those views may be with the opinions of the majority. In that first amendment to the Constitution we talk about freedom of speech, of religion, of the press and right to assemble.

The Bill of Rights was not included in the Constitution. The Bill of Rights was added after the Constitution was passed. Some states refused to ratify the Constitution because it did not have a Bill of Rights defining basic human rights that they wanted this country to stand for. James Madison worked to get a Bill of Rights put together while the Constitution was already in existence.

The Congress passed the first 10 amendments known today as the Bill of Rights. Freedom of speech, freedom of religion, freedom of the press, and freedom of assembly are protected in the first amendment.

That commitment to freedom is encapsulated and encoded in our Bill of Rights, perhaps the most envied and imitated document anywhere in this world. The Bill of Rights is what makes our country unique. It is what has made us a shining beacon of hope, liberty, of inspiration to oppressed peoples around the world for over 200 years.

In short, it is what makes America, America. Those 10 amendments to the Constitution we call the Bill of Rights have never been changed or altered by one iota, by one word, not a single time in all of American history. That is how our forefathers have looked at the Bill of Rights. There was not a single word of change

in that Bill of Rights during the 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 great national times of trials and tribulations and times of great emotion and anger like the Vietnam era, when flag after flag was burned or desecrated, far more often than they are today. Even during all that time, our first amendment remained unchanged and unchallenged.

The amendment under consideration today goes directly to the issue of freedom of speech. We are talking about freedom of expression. The Supreme Court has held on two separate occasions that no matter how great the majority, the minority, under our Bill of Rights, has the right of expression. That expression is protected by freedom of speech.

Do we want to take a chance on reducing our freedom of speech? What about freedom of the press? Do we want to open even a tiny chance to restrict our ability to assemble peaceably? And do we want to take a chance that we would not be able to petition our government for redress of grievances? Those are the things that are covered in that first amendment, known as the Bill of Rights.

I think there is only one way to weaken the fabric of our country, our unique country, our country that stands as a beacon before other nations around this world and that is to allow the few misguided souls to lessen the freedom that we all share.

One of the most exhilarating things that can ever happen to a man or woman is to be able to represent their country and be called to something, to a purpose larger than themselves.

I feel sorry for people who have never had that experience. It is something you cannot really explain.

Of course some may argue that the first amendment is not and has never been absolute, that we already have restrictions on freedoms of expression and that a prohibition on flag burning would simply be one more? After all, it is said that freedom of speech does not extend to slander, libel, revealing military secrets or yelling 'fire' in a crowded theater. That is true. To the extent that flag burning would incite others to violence in response does not constitute a clear and present danger, and that is what the Supreme Court. The difference here is whether it is a clear and present danger that we have every right to try to avert.

I believe that this argument misses a key distinction, and that distinction is that all those restrictions on free speech I just mentioned threaten real and specific harm to other people, harm that would come about because of what the speaker said, not because of what listeners did.

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

What about the argument that flag desecration is an act and is not a form of speech or expression that is protected by the first amendment? Well, I think that argument is a bit specious. Anybody burning a flag in protest is clearly saying something. They are making a statement by their body language, and what they are doing makes a statement that maybe speaks far, far louder than the words they may be willing to utter on such an occasion.

They are saying something, just the same way as people who picket, or march in protest, or use other forms of symbolic speech expressing themselves. Indeed, if we did not view flag burners as something we find offensive and repugnant, we surely would not be debating their right to do so.

Let me say a word about something that has gotten short shrift in this debate, something we should consider very carefully. I am talking about the practical problems with this amendment. Let us say we pass it, the States pass it, it becomes an amendment, and we change the Constitution. Then what a nightmare we would have enforcing it.

If Congress and States are allowed to prohibit the physical desecration of the flag, how precisely are we defining the flag? We do not have an official flag, as such, with an exact size, type, kind of ink, dyes, or fabric. There is no official flag, as such. So does this amendment refer to only manufactured flags of cloth or nylon of a certain size or description, such as the ones we fly over the Capitol? Does it refer to the small paper flags on a stick we hand out to children at political rallies or stick in a cupcake at a banquet? Those flags are often tossed on the floor or in a garbage can at conclusion of an event. How about during the 1976 bicentennial when vendors were selling flag bikini swimsuits for women and boxer shorts for men.

Remember that the proper way to destroy a flag that is old or has become soiled is to burn it. But what if you do it in protest? What was the intent? Every lawyer will tell you that the toughest thing to prove is intent.

I do not know what the courts would do in a case like that. We can go on with all kinds of examples here of how this would be very difficult to administer, and it would be subject to 50 different interpretations. I might be able to do something in Ohio, and I drive across the Ohio River to Kentucky, West Virginia, or Pennsylvania and the same thing might be illegal.

This amendment should be defeated. The dangers from it far outweigh the threat that we have to the flag. I simply do not believe that this is a major problem for this country requiring an amendment to the Constitution of the United States of America.

Our most revered symbol stands for freedom but is not freedom itself. We must not let those who revile our way of life trick us into diminishing our great gift or even take a chance of diminishing our freedoms.

The CHAIRMAN. We will finish our senatorial panel with Senator Cleland, the prime cosponsor of the amendment.

I gave you a better introduction before.

Senator LEAHY. No, he didn't, Max. He said you weren't coming. No, he didn't. He gave you a very good introduction.

**STATEMENT OF HON. MAX CLELAND, A U.S. SENATOR FROM
THE STATE OF GEORGIA**

Senator CLELAND. Thank you very much, Mr. Chairman. Like many Americans, I was troubled when the Supreme Court ruled in two cases, *Texas v. Johnson* and *United States v. Eichman*, that statutes protecting the U.S. flag were unconstitutional violations of the first amendment right to free speech.

I respect the wisdom of the Justices of the Supreme Court. Yet, I was saddened that we were no longer able to rely upon statutory authority to protect the flag. I was especially saddened by the views expressed by such distinguished past and present Supreme Court Justices as Justices Harlan, Warren, Fortas, Black, White, Rehnquist, Blackmun, Stevens and O'Connor. These Justices have each supported the view that nothing in the Constitution prohibits the States or the Federal Government from protecting the flag. Nonetheless, the current Supreme Court view stands. That is what brings us here today.

The flag is not merely a symbol; it is not just a symbol of America. It is in many ways what we stand for; it is what we believe in. It is sacred. I don't have to tell the Senate what the flag means. Just ask the soldier who proudly marches behind the flag what it means to salute the flag. Ask the newly-sworn citizen what it means to claim the flag. Ask the grieving widow or the mother of a slain soldier who is presented with the flag that drapes the soldier's casket.

I like the Civil War, I like to study it, I like to read about it. It is interesting that literally hundreds of citations were given to men in battle during the Civil War for acts of valor associated with the flag. Soldiers were routinely awarded the Medal of Honor, America's highest military award, for defending the flag and carrying it forward in battle. Many of these were awarded posthumously.

Everywhere history has been made in this country, the flag has been present. It was the U.S. flag that inspired our National Anthem. It was an American flag that was raised when Jesse Owens stunned Nazi Germany. It was a U.S. flag that was hoisted in Iwo Jima.

Those who would desecrate the flag, I think, would desecrate our country. Therefore, I favor a constitutional amendment. The

amendment is simple. It simply vests Congress with the authority to protect the flag through statute. We need not fear that the States will create a hodge-podge of flag protection statutes. Instead, under our amendment, Congress can create one uniform statute for the country.

I understand the concerns that have been expressed about the amendment's potential impact on the first amendment. I certainly understand that and respect those views. But I believe that an amendment to physically protect the flag is an acceptable limitation in order to protect the most sacred of American symbols. I don't think it will do anything to prohibit any individual from exercising their rights.

The flag is sacred. It is the one unifying symbol that the vast diversity of this great country has, no matter one's age, religion, culture, or gender. Those who would desecrate the flag, I think, would desecrate America and our freedoms.

The Supreme Court decision in *Texas v. Johnson*, in effect, invalidated the laws in 48 States and the District of Columbia that prohibited flag desecration. Since the Supreme Court's decision, 49 State legislatures have adopted resolutions asking Congress to send the flag protection amendment to the States.

Supreme Court Justice Stevens said in his dissent from *Texas v. Johnson*:

The freedom and ideals of liberty, equality and tolerance that the flag symbolizes and embodies have motivated our Nation's leaders, soldiers and activists to pledge their lives, liberty and honor in defense of their country. Because our history has demonstrated that these values and ideals are worth fighting for, the flag which uniquely symbolizes their power is itself worthy of protection from physical desecration.

These are powerful, wise words, Mr. Chairman, words we should all heed.

Thank you very much.

The CHAIRMAN. Thank you, Senator Cleland. We really appreciate this panel and appreciate all of you taking time to be with us today. Thanks, John, for coming back and we appreciate having your point of view.

I will put into the record 74 incidents, some of which burned numerous flags and multiple flags, since March 24, 1994, incidents with which we are finding fault.

[The document referred to follows:]

FLAG DESECRATION ACTS

March 21, 1994—Cleveland, OH: an American Flag was burned during a news conference in front of police headquarters. This incident was in response to the news that the U.S. Supreme Court let stand an Ohio Supreme Court ruling overturning the earlier conviction of a member of the Revolutionary Communist Party who burned a flag in protest against the Persian Gulf War.

September 7, 1994 Lincoln, NE: one death penalty opponent burned an American Flag outside of the penitentiary where Harold Lamont "Walkin' Willie" Otey was executed. A crowd of approximately 1,000 had gathered to express either support or opposition to the death penalty.

November 2, 1994—San Marcos, CA: an American Flag was burned during a demonstration against Proposition 187. When another flag was doused with lighter fluid,

a student snatched it away to prevent the desecration. He was beaten by protesters as a result of his actions. 11/3/94 The San Diego Tribune, San Diego, CA.

January 10, 1995—Honolulu, HI: two American Flags were burned by native Hawaiian protesters who maintained that the Kingdom of Hawaii is still sovereign. The activists said the purpose of their actions was to make a “complete show of sovereignty.”

February 27, 1995—Twentynine Palms, CA: the charred remnants of an American Flag was discovered. The flag had flown over the Civic Center Professional Building near the city hall.

March 11, 1995—Pittsburgh, PA: two high school students burned an American Flag to protest the fact that the government “builds arms and bombs and kills lots of people.” Both students indicated they had burned flags in the past as a form of protest.

April, 1995—Berwin, IL: a high school student burned an American Flag at his home and brought the remnants to school where he displayed them in his locker. The student purported to make a symbolic statement against slavery, Japanese interment during World War II and other forms of discrimination.

June 8, 1995—Bloomington, IN: twenty flags were taken from poles and burned at the Valhalla Memory Gardens cemetery. The flags had been donated by the families of veterans buried at the cemetery, and were usually displayed between Memorial Day and Flag Day every year.

June 21, 1995—Hays, KS: the flag at city hall was taken down by an unknown individual and burned on the city hall steps with a Graham Greene novel.

July 9, 1995—Geneva, OH: the flag outside of an American Legion post was taken down and burned in front of a church a few blocks away. Several smaller flags were burned and torn at the site, as well.

July 24, 1995—Hampton, NH: more than a dozen flags were stolen from public buildings in the three seacoast towns. One flag was left at a police station with obscene messages about President Clinton and U.S. House Speaker Newt Gingrich.

September 16, 1995—Moore, OK: A Moore teen-ager was arrested for raising his car hood at a convenience store, then retrieved a full-size U.S. Flag from inside the vehicle, and then used the flag to wipe oil from his car’s dipstick. He will not be prosecuted. 9/23/98, The Saturday Oklahoman, Oklahoma City, OK.

March 8, 1996—Denver, CO: the American Flag was trampled by students in protest of racism towards Hispanics outside of Kennedy High School in Denver.

March–June, 1996—Phoenix, AZ: “Old Glory: The American Flag in Contemporary Art,” an exhibit at the Phoenix Art Museum, featured the following art works: the American flag stuffed in a toilet by Kate Millet; a headless crucifix with the American Flag in the background by Hans Burkhardt; an American Flag made out of human hair and skin by Andrew Krasnow; a man dressed in Ku Klux Klan garb holding a baby painted onto an American Flag by Ronnie Cutrone; an American Flag laid out on the floor in order for people to trample on it by Dread Scott; and an American Flag with a lighter on top with a description that reads, “Now more fun than ever” by Erika Rothenburg. The exhibit sparked national controversy, including a demonstration by thousands demanding the exhibit’s removal. 6/14/96, The Phoenix Gazette, Phoenix, AZ.

April 20, 1996—Evanston, IL: the American Flag outside the home of 96-year old Richard Guess was burned by an unknown individual. Mr. Guess, a retired policeman, has flown a flag outside his home for the past 70 years. 4/21/96, Lake Forester, Lake Forest, IL.

April 22, 1996—Dacono, CO: a twenty-foot by thirty-foot flag belonging to the city of Dacono was stolen in broad daylight from the town’s 160-foot water tower. The flag is the largest municipal flag in Colorado.

May 25, 1996—Fitchburg, MA: flags and white crosses placed by AMVETS Post 29 in Monument Park were destroyed during the night. The flags and crosses were among 116 that had been placed in the two days before the Memorial Day weekend to honor fallen comrades.

May 26, 1996—Orange, MA: fourteen American Flags were burned under cover of night at Central Cemetery.

May 27, 1996—Wahpeton, ND: about 20 U.S. Flags were torn down poles along main street in the late evening/early morning hours. The 3-by-6 foot flags are put up every year for Memorial Day by the city’s Fire Department.

May 27, 1996—Grand Forks, ND: flags decorating veterans’ graves were stolen from cemeteries in the city. Some were later found in a dumpster at a local school.

May 28, 1996—Greenville, OH: a half-dozen American Flags were either destroyed or stolen over Memorial Day weekend. The flags had been put up along Broadway in downtown Greenville by local American Legion and Veterans of Foreign Wars posts.

May-June, 1996—Morrefield, WV: more than a dozen flags were cut up by vandals during Memorial Day weekend, and again on Flag Day, June 14.

June 1, 1996—Worcester, MA: an unidentified individual dragged the American Flag on the ground from his bicycle as part of a gay pride parade.

June 5, 1996—Indianapolis, IN: Mmoja Ajabu, a former Black Panther militia leader, and two militia members set fire to an American Flag as the Olympic torch relay wound through the city. The flag was burned in protest of the Indiana Parole Board's vote earlier in the day recommending that Gov. Bayh deny a reprieve to Tommie Smith, a death-row inmate convicted in the 1980 shooting death of an Indianapolis police officer.

June 6, 1996—Jessup, PA: the flag which formerly covered the casket of a World War II hero was taken from a pole and burned at Holy Ghost Cemetery. The flag had been a gift of the family of the late PFC John Vervan to the Michael Steiner American Legion Post in Jessup. PFC Vervan had received the Bronze Star for valor at Saipan, Marianas Islands, June 15–July 9, 1944.

June 11, 1996—Santa Cruz, CA: in a protest over his benefits, Raymond Peterson set fire to an American Flag at a Social Security office. Peterson, who had been seeking to have his Social Security checks mailed directly to him instead of a guardian, also chained shut the door of the office.

June 16, 1996—Birmingham, AL: an American Flag was burned by an audience member during a performance by the "Kevorkian Skull Poets," at the City Stages Festival.

June 28, 1996—La Paz, IN: flags flown outside of the local American Legion Post were cut down and shredded by an unknown party.

July 1, 1996—Chicago Heights, IL: a burning American Flag was discovered by police along with a burning cross in the park Forest area of Chicago Heights.

July 3, 1996—Coolbaugh Township, PA: several American Flags were burned in a small cemetery in the Tobyhanna area during the night. The area has also suffered from recent Bible burnings and vandalism of religious objects.

July 4, 1996—Indianapolis, IN: protesters burned an American Flag in front of a police station to protest the recent arrest of former Black Panther militia leader Mmoja Ajabu and the treatment of blacks in the United States. As police, the public and news reporters looked on, the group's unidentified spokesman said the flag would be burned "to preserve the ideals that this country was founded on."

July 4, 1996—Galesburg, IL: two men in their mid-twenties burned an American Flag in the middle of a street in the early evening. The men claimed they were burning the flag as their way of showing patriotism on Independence Day.

July 7, 1996—Holland, MI: five flags were stolen from downtown Holland during the course of the Independence Day holiday weekend. Two of the flags were ripped away, leaving shreds of the flags still hanging from the poles. The other three flags were stolen along with their poles.

July 8, 1996—Troy, MI: a flag thief has struck several times in suburban Detroit neighborhoods—his latest round included eight flags stolen from four locations. Flags have also been stolen and desecrated in Sterling Heights, Shelby Township and Auburn Hills, and police believe it is the work of the same individual, who has identified himself in writings left behind as the "Motor City Magic Man." Some of the flags have been recovered with a black "X" written across them.

July 14, 1996—Fajardo, Puerto Rico: onlookers cheered as an American Flag was burned at an Independence Day Rally for Puerto Rico. The rally drew tens of thousands of demonstrators, according to newspaper accounts. 7/15/96, Southern Illinoisan, Carbondale, IL.

July 19, 1996—Atlanta, GA: a group of young people burned an American Flag on the steps of the Georgia Capitol, although press reports were not clear as to what the group was protesting. A banner with the group read: "Food Not Bombs."

August 3, 1996—Oak Lawn, IL: an American Flag was removed from the front of a home on West Shore Drive and set on fire on top of a car there, destroying the flag and damaging the car.

August 14, 1996—Bunker Hill, MA: Unknown persons tore down on the American Flag, breaking the upper pulley at the Bunker Hill American Legion Post, threw the flag down on the ground in the parking lot, and then spun their wheels, throwing rocks over the flag.

August 27, 1996—Chicago, IL: a flag was burned as part of a large protest a block away from the Democratic National Convention. The protest of the "Not on the Guest List Coalition" drew about 1,000 participants and snarled traffic near the United Center, causing many convention attendees to miss some of the evening's activities.

September 6–7, 1996—St. Maries, ID: unknown individuals burned U.S. Flags flying outside of homes on successive nights. One home nearly caught fire as a result of the incident, while the family inside slept.

September 20, 1996—Appleton, WI: local youths have admitted stealing, burning and defecating on American flags in a series of more than 20 incidents in the Appleton area. One flag had been left with a note: “The Anarchist Platoon has invaded Appleton, and as long as you put flags up, were (sic) going to burn them.” Press accounts report that the youths attribute their attitudes toward the flag to “listening to punk music.”

September 23, 1996—Lares, Puerto Rico: demonstrators set a U.S. Flag on fire during the Grito de Lares celebration to mark the anniversary of a failed 1868 revolt against Spain and to affirm their desire for independence from the United States.

October 7, 1996—Fort Smith, AR: a flag bearing a swastika and the word “abortion” was displayed hanging upside down outside a house here. The home’s owner said he had displayed the upside-down flag as a statement protesting the failure to overturn President Clinton’s veto of a bill that would have outlawed partial-birth abortions.

January, 1996—Lansing, MI: as evidenced by WILX-TV, Channel 10, the NBC affiliate in Lansing, in the rotunda of the State Capitol, a young Michigan man wiped his rear end with the American Flag at the Governor’s State of the State Address. The event was taped as the crowd chanted, “What do we want? Revolution. When do we want it? Now!” Police stood by and watched—the courts say it’s “free speech.”

March 19, 1997—Greensboro, NC: a 17-year-old high school student was charged with desecration of a flag, along with drug and drug paraphernalia possession, injury to personal property and having a weapon on school grounds. The weapon charge relates to the knife officials said he used to shred the American Flag utilized by the school band. The school official thought it was “just vandalism.” The teen was released from the Guilford County Detention Center on a \$300 bond that same day. 3/19/97, Greensboro New & Record, Greensboro, NC

March 28, 1997—Indianapolis, IN: During the college basketball Final Four playoff opening ceremony at the Pan Am Plaza, Mmoja Ajabu, the former Black Panther leader, began talking into a megaphone about “the system” being unfair. Reporters and news photographers witnessed Ajabu cutting up an American Flag with a pair of scissors. An onlooker who was having none of it approached Ajabu and wrestled the flag from him. The police closed in and removed Ajabu from the plaza. The flag disappeared along with its new owner. 3/29/97, The Indianapolis Star, Indianapolis, IN.

April 1, 1997—Buffalo, NY: Hours after winning a LaCrosse playoff-clinching game the previous Saturday night, the starting goalie and another man climbed over a fence at the Buffalo and Erie County Naval & Military Park, grabbed the U.S. flag, threw it to the ground and snapped the flagpole in two. Both men were charged with criminal trespassing and criminal mischief, which are misdemeanors. The goalie is a Canadian citizen who plays for the Buffalo Bandits on a visa. It is not known whether the arrest would jeopardize the visa. 4/1/97, Buffalo News, Buffalo, NY.

April 21, 1997—Honolulu, HI: Vandals desecrated The National Memorial Cemetery of the Pacific with dark red graffiti, spraying angry messages over memorial walls, flower vases and part of a U.S. flag. One wall bears the message, “H.P.D. ignores hate crime. Ignore this”, an apparent reference to the Honolulu Police Department. Next to the wall was a furled American flag which was also marked with lines of red paint. On the wall opposite was scrawled the sentence, “Let all visitors know—Hawaiians are racist.” Honolulu police have classified the vandalism as first-degree criminal property damage because of the \$20,000 of projected clean-up costs. The police and the FBI also are treating the vandalism as a possible hate crime. The director of the veterans’ cemetery said of the vandals, “The person or persons who did this lack conscience and are morally bankrupt.” 4/22/97, The Washington Post.

May 17, 1997—Beverly, NJ: Vandals desecrated the grounds and dozens of American flags at the National Cemetery, uprooting shrubbery, yanking out deacon’s benches and ripping down dozens of American Flags that had draped the caskets of servicemen. The local American Legion and VFW posts had just finished putting the finishing touches on cemetery for Sunday’s services and a larger parade for Memorial Day. The damage, which was estimated at \$10,000, was discovered by a passing motorist who saw plants and a bench with an American Flag lying on the roadway. The veterans groups are offering \$1,000 reward for information leading to the capture of the vandals. 5/18/97, Courier-Post, Cherry Hill, NJ.

May 24, 1997—Hollywood, FL: Vietnam veteran Bob Gagnon helplessly watched an American Flag burn on his lawn this Memorial Day weekend. He said he knew who set the fire. "Just before the fire, I was talking to some neighborhood kids, asking them why they didn't have a flag at their house. I talk to them all the time. I was just curious." The kids jeered him so he went to a neighbor's house, a WW II veteran. Five minutes after he started talking to the neighbor, someone yelled out "Hey, the front of your house is on fire!" They ran over to put it out but it was too late. Police are investigating the incident. 5/26/97, Sun-Sentinel, Fort Lauderdale, FL.

May 26–June 2, 1997—Klamath Falls, OR: Five of 100 American Flags displayed at Klamath Memorial Park in honor of veterans stolen over the past week. The flags, measuring 5 feet by 7 feet, cost \$100 to replace, said Joe Collings, commander of Veterans of Foreign Wars Post No. 1383. 6/2/97, Herald and News, Klamath Falls, OR.

May 26–June 9, 1997—Wallingford, CT: The burning of four flags hanging outside downtown homes since Memorial Day weekend is beyond the realm of mischievous behavior, said a police spokesman. "When you have a fire that endangers personal property you are looking at a felony crime." One resident looked out to see his 6 by 9 foot flag that was draped on the side of his house ablaze, scorching the side of his house and burning a window shutter. The three remaining flag-burnings were discovered in the morning, having been set on fire sometime the previous night. There have been no suspects or leads in this case. 6/12/97 New Haven Register, CT.

May 30, 1997—San Antonio, TX: Teenagers upset about a new dress code walked out of classes at Holmes High School in northern San Antonio and tore down and threatened to burn the U.S. Flag and the Texas state flag to protest the changes that are to take effect this fall. Students pulled down the flags as students shouted "Burn 'em both! Burn 'em both!" One of the protest organizers rushed to the fray to save the banners. "What they did with the flags is wrong. It's totally disrespectful to have it brought down in shame," said ninth grader Eric Escue. 6/97 The Associated Press.

June 18, 1997—Aurora, IL: Three Aurora boys were arrested after they were seen burning a flag at 12:14 a.m. at a parking lot off N. Lake Street. The boys, 16, 14 and 12 told police they had burned the American Flag and thrown it in a trash container. One of the boys said that it was his right to protest. All were charged with curfew violation and desecrating a flag and were released to the parents. The flag was retrieved from the container and placed into evidence. 6/19/97 Beacon News, Aurora, IL.

July 4, 1997—Springfield, IL: Stealing an American Flag was how one guy celebrated the Fourth of July in downtown Springfield. Passers-by who saw a man cut the rope on the Federal Building flag pole and haul down the flag about 9 p.m. called police. Officers caught up with 40-year-old William G. Howard, at Second and Monroe Streets, with the wadded-up flag at his feet. Howard was jailed on charges of criminal damage to government property, theft and flag desecration. 7/9/97 the State Journal-Register, Springfield, IL.

July 5, 1997—Massillon, OH: Authorities are trying to determine whether they can charge an Alliance teenager who burned an American Flag after a Fourth of July Observance. Court officials forwarded all paperwork involving the case of Kristina Koch, 17, to the county prosecutor's office for research. Koch set the flag on fire at about 12:30 a.m. shortly after Massillon's daylong, July 4 "Party in the Park" celebration had ended. Police Chief Mark D. Weldon said she was setting fire to the flag and then twirling it above her head when an off-duty police officer drove nearby. The officer stopped his car and showed her his badge, telling her, "I won't allow you to burn my flag." The chief said a report of the incident said that Koch told the officer she burned the flag "because she could." The only law she could be in violation of is the local curfew law, which she violated by 30 minutes. 6/9/97 Akron Beacon Journal, Akron, OH.

July 16, 1997—Wallingford, CT: Police charged 17-year-old Jeffrey Bartlett with setting fire to two American Flags and said he may be responsible for 10 flag burnings that have angered and frustrated residents since April. He was charged with reckless burning and criminal attempt to commit reckless burning for burning flags at Church and Main Streets overnight. Bartlett made \$5,000 bail and is due in Meriden Superior Court on August 25. Two more teenagers are suspects and may also be charged, police said. Bartlett is also suspected of setting fire to another half-dozen flags in the downtown area in April and May. Police said Bartlett had a motive for burning the flags, but police won't say just yet what it is. They WILL say it is not a prank. 8/9/97 Record-Journal, Meriden, CT.

September 20, 1997—Humboldt, NE: On Nemaha Street, Mr. Andy Rue received a disturbing call that his flag had been burned and there was nothing left but ashes

on the ground by the pole. A few minutes later, a passerby told Mr. Rue that he saw two young men running near an alley across the street from the Rue residence. The passerby did not recognize the men, nor did he put two-and-two together until he thought about the burning flag later. Deputy Goldsberry of the local police said this will be "booked as an Arson case." 9/25/97 *The Humboldt Standard*, Humboldt, Nebraska.

November 26, 1997—Lawrence County, OH: An American Flag and staff were set on fire about 10 p.m. at the Macedonia Baptist Church on County Road 20 North in South Point. The fire damaged the floor of the church. The Lawrence County Sheriff's Department has reported this as arson, and also said the church does not conduct regular services. (The last service was Sept. 28.) No arrests have been made. 11/30/97 *The Herald-Dispatch*, Huntington, West Virginia.

January 1, 1998—Fresno, CA: a group of about 10 people wearing masks burned a U.S. Flag in front of Fresno City Hall to protest the nation's "contribution" of guns to a massacre in Mexico. Representing a movement called the Nation of Aztlan, they said the flag burning was dedicated to the people of Chiapas, Mexico, 45 of whom were killed in the Dec. 22, 1997 massacre. Sighting the U.S. Flag is a symbol of murder, drugs and rape, they stated this incident is "about the seventh flag we've burned publicly." 1/2/98 *The Fresno Bee*, Fresno, California.

February 21, 1998—Washington, DC: Protesters burned an American Flag in Lafayette Park across from the White House in Washington to protest a possible military action against Iraq. It is unknown what type of action, if any, was taken. 2/22/98 *Standard-Examiner*, Ogden, Utah.

May 14, 1998—Manhattan, NYC, NY: Angry over last week's episode of "Seinfeld" set during the annual Puerto Rican parade, about 75 protesters demonstrated in front of NBC headquarters at Rockefeller Center. In the episode that touched off protests, the Kramer character accidentally set a Puerto Rican flag on fire. Midway through the protest one man, who identified himself as Elio Monteverde Torres, set fire to an American Flag, which quickly burned to ashes. Another man attempted to set fire to an Israeli flag, but was stopped by police officers and other protesters. Organizers of the demonstration said they did not support the flag burnings. 5/15/98 *Newsday*, NY.

May 21, 1998—Somers, CT: Several flags were taken down, ripped, tied in knots and stuffed in toilets at the town's park on Field Road. Town officials believe in the shadow of darkness some local kids destroyed the flags. 6/1/98 *WTNH News Channel 8*.

June 5, 1998—Coventry, CT: Half of about 150 flags disappeared Friday night from veterans graves in the Nathan Hale Cemetery. The loss of the flags was upsetting to members of American Legion Post 52, which serves Coventry and Mansfield. Just before Memorial Day each year, members place flags at veterans' graves in all the cemeteries in town. 6/12/98 *The Hartford Courant*, Hartford, CT.

*June 15, 1998—Prince George, VA: Retired Army Colonel Charles Thornton and wife Amanda woke up to the sound of broken glass. Mr. Thornton later found their American flag lying on the ground ripped and burned along with broken flood lights. Police were called to investigate the crime. Later that evening, American Legion Post 146 Commander Jim Morin, Hopewell, VA presented the Thorntons with a new flag. 6/15/98 *Prince George's Journal*, Lanham, MD.

*June 23, 1998—Prince George, VA: An American Flag was burned a second time in Retired Army Colonel Charles Thornton's front lawn. The flag was found burning on the pole around 6 a.m. by Mr. Thornton. Holes were still burning in the material when found. Arrests have not been made in either incidents. A second replacement flag as donated to the Thorntons by the members of American Legion Post 146 in Hopewell, VA. 6/23/98 *Prince George's Journal*, Lanham, MD.

July 12, 1998—Danbury, CT: A flag was desecrated at the home of Peggy and Wesley Ferguson. The flag was given to them by their son, who is a Marine. The couple notified the police Sunday after noticing someone had also vandalized a sign and gazebo at their home. 7/14/98 *The Danbury News-Times*, Danbury, CT.

August 7, 1998—Minersville, PA: A Pottsville, PA man and four juveniles were arrested in connection with a vandalism spree at the Mount Peace and St. Stanislaus cemeteries. The vandalism included the beheading of a stone statue of Jesus, the burning of about 100 American flags on veteran's graves, the toppling of numerous headstones and an attempt to burglarize a tool shed. Police said an anonymous tip, fueled by public outrage and \$1000 reward, led to the arrests. 8/20/98 *The Harrisburg Patriot*, Harrisburg, PA.

August 26, 1998—Pocono Mountain, PA: A Monroe County man and a 17-year-old were charged with desecrating flags at the Pocono Pines Cemetery. The men broke a flag on a veteran's grave and then set fire to it. 8/28/98 *Allentown Morning Call*, Allentown, PA.

September 10, 1998—Boulder, CO: City maintenance crews found the charred remains of an American flag near city hall and the city's main library. When city employees found it, half the charred stripes lay smoldering on the ground, while the burned stars were still attached to the pole. 9/11/98 Denver Post, Denver, CO.

October 24, 1998—Sioux Falls, SD: An 18-year-old Sioux Falls man was arrested for burning a U.S. Flag, according to police. Steve Knorr was arrested after police were called to a loud party. As the party ended, Knorr picked up a flag and began to set it on fire with a lighter. Knorr was arrested on charges of desecrating a flag, disorderly conduct, resisting arrest and underage consumption. 10/27/98 Sioux Falls Argus Leader, Sioux Falls, SD.

October 31, 1998—York, PA: A 14-year-old boy has been charged in York County Juvenile Court with desecration of a flag after police came across the burning flag Saturday evening, according to Hanover Police Lt. Randy Whitson. A spokesman for the American Civil Liberties Union said, regardless of the motivation, flag burning is protected by the U.S. Constitution. 11/4/98 The Harrisburg Patriot, Harrisburg, PA.

November 11, 1998—High Point, NC: Someone ripped and then burned an American flag outside the Dr. I.T. Mann American Legion Post 87 on Veterans Day or early the next morning. High Point police are investigating the flag burning but have no suspects in the case. The 5-by-8 flag had flown at half-staff since Tuesday because of the death of a Post 87 member. 11/13/98 Greensboro News & Record, Greensboro, NC.

January 28, 1999— Jacksonville, FL: John Edward Reeves, 41, was arrested after he was spotted wearing a flag as a dress. A police officer reported the man had cut a hold in the flag for his head and tied it around his waist with a tie. 1/31/99 Orlando, Sentinel, Orlando, FL.

The CHAIRMAN. I might also mention that this amendment simply provides Congress the opportunity of passing legislation to protect the flag, and I would suggest that legislation would be very similar to the legislation that passed 91 to 9 back in 1989. And everyone who was here then who testified against the flag amendment voted for that particular bill at that time, except Senator Chafee, who, with me, voted against it because I believed it to be unconstitutional. And, of course, the Court held that it was unconstitutional.

So we will put that list of those who voted for that particular flag amendment into the record at this particular point.

[The information referred to follows:]

 **Legislative Activities**
U.S. Senate Roll Call Votes
101st Congress - 1st Session (1989)

as compiled through Senate LEGIS
 by the Senate Bill Clerk under the direction of the Secretary of the Senate

Vote Number: 227 Bill Number: H.R.2978
 Vote Date: October 5, 1989, 11:35 AM
 Title: "Flag Protection Act of 1989"
 Req. for Majority: 1/2 Result: Bill Passed

By Vote

-Year-Nays-

--- YEAs 91---

Adams (MI)	Fowler (GA)	Mikulski (MD)
Armstrong (CO)	Garn (UT)	Mitchell (ME)
Baucus (MT)	Gienn (OH)	Murkowski (AK)
Bentsen (TX)	Gore (TN)	Nickles (OK)
Biden (DE)	Gorton (WA)	Nunn (GA)
Bingaman (NM)	Graham (FL)	Packwood (OR)
Bond (MO)	Gramm (TX)	Pell (RI)
Boren (OK)	Harkin (IA)	Pressler (SD)
Boschwitz (MN)	Hatfield (OR)	Pryor (AR)
Bradley (NJ)	Heflin (AL)	Reid (NV)
Breaux (LA)	Heinz (PA)	Riegle (MI)
Bryan (NV)	Helms (NC)	Robb (VA)
Bumpers (AR)	Hollings (SC)	Rockefeller (WV)
Burdick (ND)	Inouye (HI)	Roth (DE)
Burns (MT)	Jeffords (VT)	Rudman (NH)
Byrd (WV)	Johnston (LA)	Sanford (NC)
Coats (IN)	Kassebaum (KS)	Sarbanes (MD)
Cochran (MS)	Kasten (WI)	Sasser (TN)
Cohen (ME)	Kerry (MA)	Shelby (AL)
Conrad (ND)	Kohl (WI)	Simon (IL)
Cranston (CA)	Lautenberg (NJ)	Simpson (WY)
D'Amato (NY)	Leahy (VT)	Specter (PA)
Danforth (MO)	Levin (MI)	Stevens (AK)
Daschle (SD)	Lieberman (CT)	Symms (ID)
DeConcini (AZ)	Lott (MS)	Thurmond (SC)
Dixon (IL)	Lugar (IN)	Wallop (WY)
Dodd (CT)	Mack (FL)	Warner (VA)
Domenici (NM)	Matsunaga (HI)	Wilson (CA)
Durenberger (MN)	McCain (AZ)	Wirth (CO)
Exon (NE)	McClure (ID)	
Ford (KY)	McConnell (KY)	

--- NAYs 9---

Chafee (RI)	Hatch (UT)	Kerrey (NE)
Dole (KS)	Humphrey (NH)	Kerrey (NE)
Grassley (IA)	Kennedy (MA)	Metzenbaum (OH)
		Moynihhan (NY)

The CHAIRMAN. But the point shouldn't be lost that we actually did come up with a statute that would have solved this problem in a very limited but measured and important way that 91 Senators voted for, including Senators Glenn and Kerrey. And it was a valiant attempt to try and do by statute that which the Supreme Court said could not be done, and that statute was ruled unconstitutional. So, that is why we are here.

And General Brady made it clear that in spite of the—there weren't just 44, there were 74, since March of 1994, incidents, some of which had multiple burnings of flags or desecration of flags—and General Brady made it clear that not all of the flag desecrations were reported. That is why he said "hundreds." So this isn't just the itty-bitty problem that some would have you think.

We are happy at this time to have Mr. Randolph Moss, the administration's witness from the Justice Department, with us, and we are happy to give you this opportunity to express the administration's viewpoint, Mr. Moss, and we welcome you to the committee.

STATEMENT OF RANDOLPH D. MOSS, ACTING ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. MOSS. Thank you, Mr. Chairman, and members of the committee. It is difficult to imagine a more humbling experience than to testify after the panel that has just appeared. But I am very honored to appear before you today on behalf of the administration to present testimony regarding the proposed constitutional amendment on flag desecration.

As you know, in 1989, the Supreme Court held, in *Texas v. Johnson*, that a State could not, consistent with the first amendment, enforce a statute criminalizing flag desecration against a demonstrator who burned an American flag.

In 1990, in *United States v. Eichman*, the Court held that the first amendment prohibited the conviction of demonstrators for flag burning under a Federal statute criminalizing mutilating, defacing, or physically defiling an American flag.

For 9 years, then, the flag has been left without any statutory protection against desecration. For 9 years, only one thing has stood between the flag and its routine desecration—the fact that the flag, as a potent symbol of all that is best about our country, is justly cherished and revered by nearly all Americans.

Chairman Hatch has eloquently described the flag's status among the American people.

The American flag represents in a way nothing else can, the common bond shared by a very diverse people. Yet, whatever our differences of party, politics, philosophy, race, religion, ethnic background, economic status, social status, or geographic region, we are united as Americans. That unity is symbolized by a unique emblem, the American flag.

It is precisely because of the meaning the flag has for virtually all Americans that the last 9 years have witnessed no outbreak of flag burning, but only a few isolated instances. If proof were need-

ed, we now have it. With or without the threat of criminal penalties, the flag is amply protected by its unique stature as an embodiment of our national ideals and unity.

It is against this background that one must assess the need for a proposed constitutional amendment that would provide Congress with the power to prohibit and presumably to punish the physical desecration of the flag. Such an amendment would run counter to our traditional resistance, dating back to the time of the Founders, to resorting to the amendment process. Moreover, the amendment, if passed, would for the first time in our history limit the individual liberties protected by the Bill of Rights, adopted over 2 centuries ago.

Whether other truly exigent circumstances might justify altering the Bill of Rights is a question we can put to one side here. For you are asked to assume the risk inherent in creating a firsttime exception to the Bill of Rights in the absence of any meaningful evidence that the flag is in danger of losing its symbolic value. The proposed amendment before you would create legislative power of uncertain dimension to override the first amendment and other constitutional guarantees. For these reasons, the proposed amendment—and any other proposal to amend the Constitution in order to punish isolated acts of flag burning—should be rejected by this Congress.

Although it goes without saying, I would like to emphasize that the administration's view on the wisdom of the proposed amendment does not in any way reflect a lack of appreciation for the proper place of the flag in our national community. The President always has and always will condemn in the strongest terms those who would denigrate the symbol of our country and our highest ideals. The President's record and statements reflect his long-standing commitment to protection of the American flag and his profound abhorrence of flag burning and other forms of flag desecration.

To conclude that flag desecration is abhorrent and that it should be resoundingly and unequivocally condemned, however, is not to conclude that we should for the first time in our Nation's history cut back on the individual liberties protected in the Bill of Rights. As James Madison observed at the founding, amending the Constitution should be reserved for "great and extraordinary occasions." This caution takes on unique force when we think of restricting the Bill of Rights, for its guarantees are premised on an unclouded sense of permanence, a sense that they are inalienable, a sense that we as a society are committed to the proposition that the fundamental protections of the Bill of Rights should be left alone.

As my written submission sets forth in greater detail, even if it were appropriate to create an exception to the Bill of Rights in some limited manner, the scope of the proposed amendment is far from clear.

To give the first amendment meaning, we must infer at least some restriction on the first amendment freedoms identified in the Supreme Court's flag decisions. It is profoundly difficult, however, to identify just how much the first amendment would be affected. It is unclear whether the powers to be exercised under the amend-

ment would be free from all or only some first amendment constraints.

Would the proposed amendment, for example, permit enactment of a statute that bars flag desecration only when it conveys a particular message, such as contempt for a particular policy? In addition, when faced with genuine uncertainty as to the extent to which the amendment will displace the other protections enshrined in the Bill of Rights, it is unclear, for example, whether the proposed amendment is intended or would be interpreted to authorize enactments that would otherwise violate the due process “void for vagueness” doctrine.

I have real doubts about whether these interpretative concerns could be fully resolved even by the most artful of drafting. But even assuming that all of the interpretive difficulties of this amendment could be cured, it would remain an ill-advised departure from our constitutional history marked by a deep reluctance to amend our most fundamental law. The Bill of Rights was ratified in 1791. Since that time, over 200 years ago, the Bill of Rights has never once been amended. And this is no historical accident, nor a product only of the difficulty of the amendment process itself. Rather, our historic unwillingness to amend the Bill of Rights reflects a reverence for the Constitution. Indeed, part of the unique force, security, and stature of the Bill of Rights derives from the widely shared belief that it is permanent and enduring.

The Framers themselves understood that resort to the amendment process was to be sparing and reserved for “great and extraordinary occasions.” In the *Federalist Papers*, James Madison warned against using the amendment process as a device for correcting every perceived constitutional defect, particularly when public passions are inflamed. He stressed that frequent resort to the amendment process,

would, in great measure, deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability.

The proposed amendment cannot be reconciled with this fundamental and historic understanding of the integrity of the Constitution. I think perhaps Charles Fried, who served with distinction as Solicitor General in the Reagan amendment, made the point best when he testified against a similar proposed amendment in 1990. He said:

The flag, as all in this debate agree, symbolizes our nation, its history, its values. We love the flag because it symbolizes the United States; but we must love the community even more, because the Constitution is not a symbol. It is the thing itself.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. We appreciate having your testimony.

In your written testimony, you state that any implementing legislation for the Flag Protection Amendment has the potential to be void under the vagueness doctrine. Now, in your view, would the

current flag desecration statute—that is 18 U.S.C. 700—which specifically sets out the particular acts that constitute “desecration,” be unconstitutionally vague in its definition of desecration?

Mr. MOSS. Mr. Chairman, what I intended to convey in my written statement was not a conclusion about whether the “void for vagueness” doctrine would apply here or not but, rather, that there would be a question that would arise—

The CHAIRMAN. That it may be a problem, is what you are saying?

Mr. MOSS. That there would be a question that would arise as to whether it would apply and whether in adopting this amendment the Congress and the State legislatures would intend not only to override particular provisions of the Bill of Rights, but also the due process “void for vagueness” doctrine. That actually turns out to be historically a significant question because the Supreme Court, in a case called *Smith v. Goguen*, one of the flag cases, struck down a conviction of someone who had sewn a flag to the seat of his jeans on the grounds that the statute was, at least as applied to that individual, unduly vague under the fifth amendment of the Constitution.

The CHAIRMAN. As you know, section 700(a)(1) punishes anyone who “mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States,” just to use that. But in 1917, the National Conference of Commissioners on Uniform State Laws passed the Uniform Flag Act. Now, many States used this model Act for decades, and their courts reasonably interpreted the term “desecrate” and “flag of the United States.”

Now, is there some new reason why unresolvable ambiguities in these definitions would arise if the Flag Protection Amendment and 18 U.S.C. 700 simply restored the status quo ante?

Mr. MOSS. Mr. Chairman, I don’t mean to suggest that a statute could not be crafted that in the vast majority of its applications would be consistent with the due process “void for vagueness” doctrine. Instead, I am raising a question not dealing with any particular application or any particular statute but, rather, the question of how the courts will interpret the amendment and whether the courts would interpret the amendment to supersede the “void for vagueness” doctrine.

Under current law, there may be a great number of prosecutions that could be brought consistent with the Due Process Clause, putting aside the *Johnson* and *Eichman* cases. But it might be that with this amendment there could be additional prosecutions that could not have been brought, such as the prosecution in *Smith v. Goguen*, and that is a question that I think reflects part of the uncertainty that would result from amending the Constitution in this fashion.

The CHAIRMAN. It is one thing to point out that there may be uncertainties or vagueness, but it is another thing to say there could never be a statute drafted that would resolve these problems, because that is not what you are saying.

Mr. MOSS. No.

The CHAIRMAN. OK; now, many have suggested that the Congress should be very hesitant to send the Flag Protection Amend-

ment to the States for ratification because, as you have heard here today, Senator Glenn, in particular, and Senator Kerrey and Senator Chafee indicated that they assert the Bill of Rights has never been amended. Yet, as you know, the Bill of Rights has been amended in some form on several occasions.

For example, the 13th amendment amended the fifth amendment as interpreted in *Dred Scott v. Sanford* to provide that former slaves are not property subject to the Due Process Clause but free men and women.

The 14th amendment was interpreted in *Bolling v. Sharpe* to have effectively amended the Due Process Clause of the fifth amendment to apply equal protection principles to the Federal Government.

Moreover, in *Engel v. Vitale*, the Supreme Court circumscribed the first amendment rights of American school children by holding that the establishment clause, the Establishment of Religion Clause, precluded prayer in the public schools.

We have limitations on the first amendment with regard to fighting words filed by the courts, with regard to obscenity and pornography, and with regard to burning draft cards. That is offensive conduct, is found to be such under the law, and is a limitation on the first amendment. Yelling "fire" in a crowded theater is a limitation. Libel and defamation is a limitation.

There may have to be some limitations, and the courts may very well find them, with regard to some of the literature and some of the music lyrics that are being expressed today that are distorting and hurting our children in this country. We are going to have to find some way of resolving some of these problems.

Now, each of these constitutional changes substantially modified the rights and correlative duties of affected parties other than those originally envisioned by the Framers of the Bill of Rights given the longstanding tradition of accepting regulation of physically destructive conduct toward the flag that existed for 150 years or more. However, the proposed amendment would effect a much smaller change by simply restoring the right of the people to protect the physical integrity of the flag.

So when faced with the choice of the formal amendment process or a de facto amendment process by Court decision, don't you think that the more appropriate means of amending the Constitution is through the official amendment process as provided in article V, where Congress and the people have the leading roles rather than, say, an activist Court? Weren't the Founding Fathers correct in leaving such major changes to the Congress and to the people instead of to five members of the Supreme Court of the United States?

Mr. MOSS. Mr. Chairman, you have made a number of important points that I would like to attempt to respond to.

With respect to your first point that the Bill of Rights has, in fact, been amended in the past, I would respectfully disagree. In the *Dred Scott* decision, the 13th amendment's outline of slavery in this country, I don't view that as a decision to amend the Takings Clause of the fifth amendment; rather, what Congress did when it outlawed slavery was to change the definition of property in this

country and to say that we could no longer hold people as property in the country.

With respect to the other decisions, Mr. Chairman, that you cited, those were decisions, I believe, extending rather than limiting the Bill of Rights, in which the Court held that, pursuant to incorporation under the 14th amendment, limitations that had been included previously in the Bill of Rights and applied only to the Federal Government were extended and applied to the States.

With respect to your observation that the Court has at times found exceptions to the first amendment in the area of obscenity—for example, fighting words as another example—I think one important line to draw there is—and Justice Scalia makes this point in his fairly recent decision in the *R.A.V.* case. The Court in the obscenity context and in the fighting words context is not saying that the first amendment simply does not apply in that context or that there is an exception to the first amendment but, rather, in interpreting and applying the first amendment, which the Court must do as its charge, the Court has concluded that the small value in pursuit of truth that might derive from obscene speech or fighting words speech is overwhelmed by the very substantial societal interests on the other side in preventing that sort of speech and that as a result the Court concluded that the first amendment protections would not apply, but applied the first amendment and interpreted the first amendment—

The CHAIRMAN. We think that societal values are so important, embodied in the flag, that we should not allow it to be physically desecrated in our country. In fact, I keep making this point over and over. Last night I was on MacNeil-Lehrer, and, of course, some people are trying to bring down Littleton, CO, to gun control. Now, that may be something that has to occur in this country if the people want that to occur. I am not sure they do. But I was pointing out that, you know, before you get to that, there are a lot of other underlying problems that have led to the Littleton, CO, problem, one of which is a lack of values, the lack of some of the basic rights that made this country the greatest country in the world. And some of us believe that it is time to start standing up for those values, and the flag is one of those things that we can stand up for and that we can create a tremendous debate around this country about just what is involved here and being patriotic and being willing to stand up for the symbol of our country that we pledge allegiance to.

I might add that I would also point out that taking the right to pray in school away from children did not expand their first amendment rights. Indeed, every time there is a change in a right, there is also a change in a correlative duty. The proposed amendment, as I view it, merely strikes the balance of rights and duties as the Framers of the Bill of Rights did instead of how five members of the Supreme Court did in *Texas v. Johnson*.

So these are tough issues, and I just want to point out that there are two sides to them, and the people who just say, well, this was the first time in history that the first amendment has been limited, it just isn't true. That just isn't true at all.

Now, if tomorrow the Supreme Court overruled, say, the *Johnson* case, the *Eichman* case, the *R.A.V.* to the extent necessary to hold

that physical desecration of the American flag could be prohibited under *O'Brien*, would that be a legitimate change in constitutional law? That could happen, you know.

Mr. Moss. I agree it could, Mr. Chairman. In fact, when you were talking about the form of balancing that takes place in the area of obscenity and fighting words, the courts do balance in that area, and in some sense that is what the Congress is considering here.

I served as a law clerk to Justice Stevens in 1989 when he wrote his dissenting opinion in *Texas v. Johnson*, and I understand that that, in fact, is what he was saying in that case, and that is the approach he would have taken. The Government argued for that approach in *Eichman* and said to the Court in *Eichman* that you should adopt the same approach to flag burning and you should conclude here that, as Justice Rehnquist said in his dissent in the *Texas v. Johnson* case, this is not a particularly articulate form of speech if it is speech at all, it is more in the nature of a grunt, and that the profound importance of the flag should outweigh any interest in that particular mode of speech.

The Court rejected that argument in *Johnson*, rejecting it in *Eichman*. I don't mean to suggest at all that I don't believe that it is a reasonable argument to make.

What I do mean to suggest, though, is that I think that it is a very different thing for the Court to decide to overrule *Johnson* and *Eichman*, at some point in history for the Court to have reached a different decision in those cases, than it is for the Congress and the people of the United States to amend the Constitution and to change the Bill of Rights. And the reason that I think it is different is because one of the guarantees that the Founders intended in the Bill of Rights was a sense of security, a sense of inalienability, and a sense that it would be interpreted and applied by an independent judiciary. And in that regard, James Madison, when he introduced the Bill of Rights to the House of Representatives, said, "If they are incorporated"—that is, the Bill of Rights—"into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights. They will be an impenetrable bulwark against every assumption of power in the legislative or executive."

And, of course, as you have indicated every day, the courts in this country must interpret and apply the first amendment, but it is a dramatically different step to take that process of interpretation out of the hands of the independent judiciary and submit it to the political process through the article V amendment process.

The CHAIRMAN. Of course, that is precisely what the Constitution provides. In other words, that is every bit as valid a process as having five unelected judges make a determination for everybody as to what the Constitution means, especially over ruling 200 years of consistent support for the proposition that burning the flag and desecrating the flag is an act, an offensive action, rather than actually speech. So, all of a sudden, five Justices make it a speech problem.

The point is, in your remarks, you indicated very few flag desecrations. Since 1954, we have got right here 74 of them, and those are the ones that are reported. We know that there are many, many more that are not reported that are ignored, but the fact of

the matter is that even 74 seems to me a pretty large number for people who want to preserve the values that our country believes in.

Let me say one other thing, and then I will turn it to Senator Leahy, of course. Senator Chafee suggested that the old slippery slope argument should prevent us from sending this amendment to the States. That argument states that if we pass the amendment to protect the flag, there will be a limitless number of amendments protecting the Bible, the Constitution, the cross, the menorah, and other symbols. Of course, the flag, unlike these other objects, has been carried into battle by our troops of all parties and faiths. It has been laid on the caskets of all of our fallen heroes and receives the Pledge of Allegiance from all of our school children, or at least most all of our school children.

Unlike the other symbols, which Senator Chafee mentioned, large super-majorities have supported physical protection for the flag. In fact, 49 States have asked for this amendment. I have to believe that is not just all emotional.

So article V, and I contend, of the Constitution itself, and specifically its multiple and super-majority requirements, are a sufficient guard against a slippery slope of future amendments as it has been for other members for the last 200 years.

Let me also state in regard to the statute that we passed back then, the argument was that we can do this by statute, and there are still those who are making that argument today, although twice now we have been shot down on a statutory basis.

The fact of the matter is 91 Senators voted for that, and I would suggest that that probably would be the form of any flag desecration statute after this amendment is hopefully passed by both Houses of Congress and ratified by 38 States, or three-quarters of the States, but be that as it may, I have been the first to say that there are two points of view here, and I respect both. It is just that I happen to agree with the three people who testified for the amendment and respect the others and you who have differing points of view.

Let me turn to Senator Leahy, and we will finish this up.

Senator LEAHY. Thank you, Mr. Chairman.

I heard the mention of how many cases of flag-burning there have been. I feel any cases of flag-burning, even one, is too many. Somebody asked me earlier today, well, what if somebody came and burned—I have always talked about flying the flag outside of my home, something I do very proudly. In fact, most Vermonters, when they go by, they know I am home because the flag is flying. I tend to have a lot of people drop by. Sometimes they only drive by, but it is nice to live in a State like ours where you can do that.

Somebody said, "What about this? You do not have a law. You do not have a Constitution. Suppose somebody came and took your flag and burned it." I said, "Now wait a minute. We have got all kinds of laws. We can get the person for trespassing. We can get them for destruction of property," my property in this case.

If my young son, the Marine, was home, we would have to serve the subpoena on the person at the hospital, I would suspect, afterward, but these are the things that happen.

I would also mention my pride in going to countries, totalitarian countries, where I could say proudly to the people, where they have to have every single kind of a law to show respect to their government officials, to the symbols of the state and everything else—they have to have these laws and have to enforce them all the time—to say in our country, we do that without the laws because we have respect for our Government and we have respect for our symbols, something these totalitarian countries have to instill by fear, not by example.

I also have to think, as reprehensible as it is, to have the burning of flags, we have had far more incidence of young people shooting other young people, not just the Colorado incident, but throughout this country. Frankly, it would be good if maybe this committee would spend as much time worrying about how to get guns out of the hands of young people.

Frankly, it would be important on the number of hate crimes that we have if we could find time to have hearings and a markup on the hate crime bill, now before the committee. These are things I would like to see happen because these are impacting people all the time.

The people of Colorado, I am sure all respect their flag, as we do. Right now, they are far more concerned about the safety of the children who are still alive in Colorado as they mourn those who are not. That is far more preeminent in their mind, and I suspect if they were to speak to the Congress, they would say that is what they would like us to be focussing our time on.

Mr. Moss, I do appreciate you being here. I am sorry that we were not given the opportunity—and I understand it is a mistake in communication somewhere—for you to testify, as expected, earlier.

I have a few questions, and I know the chairman has a busy schedule, and others do. I will submit my questions for the record.

Mr. MOSS. Thank you, Senator Leahy.

The CHAIRMAN. We will keep the record open.

Senator LEAHY. And I thank you for being here.

Mr. MOSS. Thank you.

The CHAIRMAN. Thank you.

We will keep the record open for others to submit their matters for the record as well.

With regard to Senator Leahy's comments about totalitarian governments, most of those governments do not permit free speech. There is nothing in this amendment or anything pertaining to it that would prohibit any type of free speech, the right to criticize the flag, the right to condemn it, the right to say whatever you want to. It is just that we believe that we ought to prevent physical desecration of the flag, and the only way we can do that now is through a constitutional amendment, in our opinion.

So, again, I just say that there are sincere people on both sides of this issue. We will just have to battle it out on the floor and hopefully get it through both houses, and then, from my point of view, battle it out in the 50 State legislatures and see what happens, but I feel very deeply about it, and those who have spoken on the other side feel very deeply about their position as well. And

I respect both sides, but we are going to push this with everything we can.

We would have preferred to have the administration with us on this, of course, but in any event, we respect you and appreciate you being here. I am sorry we had that little flap before. I personally did not mean that or want that to happen.

With regard to hate crimes, we are going to have a hearing within the next few weeks on hate crimes. I filed a bill that, hopefully, will help to solve some of these problems, but we will talk about it and see where we go from there.

With regard to gun control, it is a constant issue. It is going to be a constant issue. I suspect that the juvenile justice bill will be up within the next month, and I suspect, at that point, there will be all kinds of efforts to impose gun control statutes on the American people, rightly or wrongly. And we will just have to face those and, as far as I am concerned, let the majority win and govern, and we will just face those at that time.

There is one thing that I am super sure of, and that is that our country is in a moral malaise right now, that our values are being tested on all fronts, and that our children are being tested in so many vile and terrible ways.

I just got a list of hundreds of Internet sites where you can learn to build bombs and other weapons of destruction. You wonder how these kids get a hold of all these things. Sooner or later, we may have to come to a conclusion, as we have in some instances, for the protection of children and juveniles, that we have to limit some of these so-called rights in order to protect them and protect society as a whole. The question is: How can we do that? What form should they be? Should it be done at all? This committee is going to have to face these issues, and as long as I am chairman, I will sure try to face them with my colleagues. Of course, I want to give equal consideration to my colleagues on the other side as well, many of whom differ with me on some of these issues. So that is what makes this country great is that we can have these differences and we can debate them, and we can do so in a reasoned and sometimes passionate and sometimes dispassionate manner.

So, with regard to your being here, we appreciate you being here and appreciate your statement, and we will keep the record open for anybody who has any questions in writing until the end of the day and we will go from there.

Thank you so much. Good to be with you.

[The prepared statement of Mr. Moss follows:]

PREPARED STATEMENT OF RANDOLPH D. MOSS

Mr. Chairman, and Members of the Committee.* As you know, in 1989 the Supreme Court held in *Texas v. Johnson*¹ that a State could not, consistent with the First Amendment, enforce a statute criminalizing flag desecration against a demonstrator who burned an American flag. In 1990, in *United States v. Eichman*,² the Court held that the First Amendment prohibited the conviction of demonstrators for

* In 1995, Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, provided substantially similar testimony to the Subcommittee on the Constitution, Federalism, and Property Rights of the United States Senate Judiciary Committee regarding S.J. Res. 31, A Bill Proposing an Amendment to the Constitution of the United States to Grant Congress and the States the Power to Prohibit the Physical Desecration of the Flag of the United States.

¹ 491 U.S. 397 (1989).

² 496 U.S. 310 (1990).

flag burning under a federal statute that criminalized mutilating, defacing, or physically defiling an American flag.

For nine years, then, the flag has been left without any statutory protection against desecration. For nine years, one thing, and only one thing, has stood between the flag and its routine desecration: the fact that the flag, as a potent symbol of all that is best about our Country, is justly cherished and revered by nearly all Americans. Chairman Hatch has eloquently described the flag's status among the American people:

The American flag represents in a way nothing else can, the common bond shared by a very diverse people. Yet whatever our differences of party, politics, philosophy, race, religion, ethnic background, economic status, social status, or geographic region, we are united as Americans. That unity is symbolized by a unique emblem, the American flag.³

It is precisely because of the meaning the flag has for virtually all Americans that the last nine years have witnessed no outbreak of flag burning, but only a few isolated instances. If proof were needed, we have it now: with or without the threat of criminal penalties, the flag is amply protected by its unique stature as an embodiment of national unity and ideals.

It is against this background that one must assess the need for a constitutional amendment (S.J. Res. 14) that would provide Congress with the "power to prohibit," and presumably impose criminal punishment for, the "physical desecration" of the American flag. Such an amendment would run counter to our traditional resistance, dating back to the time of the Founders, to resorting to the amendment process. Moreover, the amendment, if passed, would for the first time in our history limit the individual liberties protected by the Bill of Rights, adopted over two centuries ago. Whether other truly exigent circumstances justify altering the Bill of Rights is a question we can put to one side here. For you are asked to assume the risk inherent in crafting a first-time exception to the Bill of Rights in the absence of any meaningful evidence that the flag is in danger of losing its symbolic value. Moreover, the proposed amendment before you would create legislative power of uncertain dimension to override the First Amendment and other constitutional guarantees. For these reasons, the proposed amendment—and any other proposal to amend the Constitution in order to punish isolated acts of flag burning—should be rejected by this Congress.

I.

At the outset, and out of an abundance of caution, I would like to emphasize that the Administration's view on the wisdom of the proposed amendment does not in any way reflect a lack of appreciation for the proper place of the flag in our national community. The President always has and always will condemn in the strongest of terms those who would denigrate the symbol of our Country's highest ideals. The President's record and statements reflect his long-standing commitment to protection of the American flag, and his profound abhorrence of flag burning and other forms of flag desecration.

To conclude that flag desecration is abhorrent and that it should be resoundingly and unequivocally condemned, however, is not to conclude that we should for the first time in our Nation's history cut back on the individual liberties protected in the Bill of Rights. As James Madison observed at the founding, amending the Constitution should be reserved for "great and extraordinary occasions."⁴ This caution takes on unique force, moreover, when we think of restricting the Bill of Rights, for its guarantees are premised on an unclouded sense of permanence, a sense that they are inalienable, a sense that we as a society are committed to the proposition that the fundamental protections of the Bill of Rights should be left alone. It is against this background that the Administration has concluded that the isolated incidents of flag desecration that have occurred since 1989 do not justify amending the Constitution in this significant respect.

II.

The text of the proposed amendment is short enough to quote in full: "The Congress shall have power to prohibit the physical desecration of the flag of the United States."⁵ The scope of the amendment, however, is anything but clear, and it fails to state explicitly the degree to which it overrides other constitutional guarantees.

³ 141 Cong. Rec. S4275 (daily ed. Mar. 21, 1995).

⁴ *The Federalist* No. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961).

⁵ S.J. Res. 14. See also H.J. Res. 33 (same).

Accordingly, even if it were appropriate to create an exception to the Bill of Rights in some limited manner, it is entirely unclear how much of the Bill of Rights the proposed amendment would trump.

By its terms, the proposed amendment does no more than confer affirmative power upon Congress to legislate with respect to the flag. Its wording is similar to the power-conferring clauses found in Article I, Section 8 of the Constitution: "Congress shall have power to lay and collect taxes," for instance, or "Congress shall have power * * * to regulate commerce * * * among the several states." Like those powers, and all powers granted government by the Constitution, the authority given by the proposed amendment would seem to be limited by the Bill of Rights and the Fourteenth Amendment.

The text of the proposed amendment does not purport to exempt the exercise of the power conferred from the constraints of the First Amendment or any other constitutional guarantee of individual rights. Read literally, the amendment would not alter the result of the decisions in *Johnson* or *Eichman*, holding that exercise of state and congressional power to protect the symbol of the flag is subject to First and Fourteenth Amendment limits. Instead, by its literal text, it would simply and unnecessarily make explicit the governmental power to legislate in this area that always has been assumed to exist.

To give the proposed amendment meaning, then, we must read into it, consistent with its sponsors' intent, at least some restriction on the First Amendment freedoms identified in the Supreme Court's flag decisions. It is profoundly difficult, however, to identify just how much of the First Amendment and the rest of the Bill of Rights is superseded by the amendment. Once we have departed, by necessity, from the proposed amendment's text, we are in uncharted territory, and faced with genuine uncertainty as to the extent to which the amendment will displace the protections enshrined in the Bill of Rights.

We do not know, for instance, whether the proposed amendment is intended, or would be interpreted, to authorize enactments that otherwise would violate the due process "void for vagueness" doctrine. In *Smith v. Goguen*,⁶ the Court reversed the conviction of a defendant who had sewn a small flag on the seat of his jeans, holding that a state statute making it a crime to "treat contemptuously" the flag was unconstitutionally vague. We cannot be certain that the vagueness doctrine applied in *Smith* would limit as well prosecutions brought under laws enacted pursuant to the proposed amendment.

Nor is this a matter of purely hypothetical interest, unlikely to have much practical import. The proposed amendment, after all, authorizes laws that prohibit "physical desecration" of the flag, and "desecration" is not a term that readily admits of objective definition. On the contrary, "desecrate" is defined to include such inherently subjective meanings as "profane" and even "treat contemptuously" itself. Thus, a statute tracking the language of the amendment and making it a crime to "physically desecrate" an American flag would suffer from the same defect as the statute at issue in *Smith*: it would "fail[] to draw reasonably clear lines between the kinds of nonceremonial treatment that are criminal and those that are not."⁷

The term "flag of the United States" is similarly "unbounded,"⁸ and by itself provides no guidance as to whether it reaches unofficial as well as official flags, or pictures or representations of flags created by artists as well as flags sold or distributed for traditional display. Indeed, testifying in favor of a similar amendment in 1989, then-Assistant Attorney General William Barr acknowledged that the word "flag" is so elastic that it can be stretched to cover everything from cloth banners with the characteristics of the official flag, as defined by statute,⁹ to "any picture or representation" of a flag, including "posters, murals, pictures, [and] buttons."¹⁰ And while a statute enacted pursuant to the amendment could attempt a limiting definition, it need not do so; the amendment would authorize as well a statute that simply prohibited desecration of "any flag of the United States." Again, such a statute would implicate the vagueness doctrine applied in *Smith*, and raise in any enforcement action the question whether the empowering amendment overrides due process guarantees.

Even if we are prepared to assume, or the language of the amendment is modified to make clear, that the proposed amendment would operate on the First Amend-

⁶ 415 U.S. 566 (1974).

⁷ 415 U.S. at 574.

⁸ *Id.* at 575.

⁹ See 4 U.S.C. 1.

¹⁰ *Measures to Protect the Physical Integrity of the American Flag: Hearings on S. 1338, H.R. 2978, and S.J. Res. 180 Before the Senate Comm. on the Judiciary, 101st Cong., 1st Sess. 82-85 (1989) ["1989 Hearings"].*

ment alone, important questions about the amendment's scope remain. Specifically, we still face the question whether the powers to be exercised under the amendment would be freed from all, or only some, First Amendment constraints, and, if the latter, how we will know which constraints remain applicable.

An example may help to illuminate the significance of this issue. In *R.A.V. v. City of St. Paul*,¹¹ decided in 1992, the Supreme Court held that even when the First Amendment permits regulation of an entire category of speech or expressive conduct, it does not necessarily permit the government to regulate a subcategory of the otherwise proscribable speech on the basis of its particular message. A government acting pursuant to the proposed amendment would be able to prohibit *all* flag desecration,¹² but, if *R.A.V.* retains its force in this context, a government could not prohibit only those instances of flag desecration that communicated a particularly disfavored view. Statutes making it a crime—or an enhanced penalty offense—to “physically desecrate a flag of the United States in opposition to United States military actions,” for instance, would presumably remain impermissible.

This result obtains, of course, if and only if the proposed amendment is understood to confer powers that are limited by the *R.A.V.* principle. If, on the other hand, the proposed amendment overrides the whole of the First Amendment, or overrides some select though unidentified class of principles within which *R.A.V.* falls, then there remains no constitutional objection to the hypothetical statute posited above. This is a distinction that makes a difference, as I hope this example shows, and it should be immensely troubling to anyone considering the amendment that its text leaves us with no way of knowing whether the rule of *R.A.V.*—or any other First Amendment principle—would limit governmental action if the amendment became part of the Constitution.¹³

III.

I have real doubts about whether these interpretive concerns could be resolved fully by even the most artful of drafting. Any effort to constitutionalize an exception to the Bill of Rights necessarily will produce significant interpretive difficulties and uncertainty, as the courts attempt to reconcile a specific exception with the general principles that remain. But even assuming, for the moment, that all of the interpretive difficulties of this amendment could be cured, it would remain an ill-advised departure from a constitutional history marked by a deep reluctance to amend our most fundamental law. The Bill of Rights was ratified in 1791. Since that time, over two hundred years ago, we have not once amended the Bill of Rights. And this is no historical accident, nor a product only of the difficulty of the amendment process itself. Rather, our historic unwillingness to tamper with the Bill of Rights reflects a reverence for the Constitution that is both entirely appropriate and fundamentally at odds with turning that document into a forum for divisive political battles. Indeed, part of the unique force, security, and stature of our Bill of Rights derives from the widely-shared belief that it is permanent and enduring.

The Framers themselves understood that resort to the amendment process was to be sparing and reserved for “great and extraordinary occasions.”¹⁴ In *The Federalist Papers*, James Madison warned against using the amendment process as a device for correcting every perceived constitutional defect, particularly when public passions are inflamed. He stressed that “frequent appeals would, in great measure, deprive the government of that veneration which time bestows on everything, and

¹¹ 505 U.S. 377 (1992).

¹² Even a statute that prohibited all flag desecration would be in tension with the principle of *R.A.V.* Although a few acts done with a flag could be considered a “desecration” in all contexts, that would not be the case with burning, for example. Only some burnings could be prohibited by statutes adopted under the proposed amendment. Respectful burning of the flag will remain legal after the amendment's adoption as before. See 36 U.S.C. § 176(k) (“The flag, when it is in such condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by burning.”). What may be prohibited is only that destruction of a flag that communicates a particular message, one of disrespect or contempt. The conclusion that a particular act of burning is a “desecration” may require in most instances consideration of the particular message being conveyed.

¹³ Another proposed amendment, contained in H.J. Res. 5, provides: “The Congress and the States shall have power to prohibit the act of desecration of the flag of the United States and to set criminal penalties for that act.” Not only does the phrase “act of desecration” appear to be broader, and more vague, than the term “physical desecration” in S.J. Res. 14 and H.J. Res. 33, but H.J. Res. 5 also grants the power of prohibition to the fifty States and an uncertain number of local governments. That raises, of course, the interpretive question whether state legislatures acting under the amendment would remain bound by state constitutional free speech guarantees, or whether the proposed amendment would supersede state as well as federal constitutional provisions.

¹⁴ *The Federalist* No. 49, at 314 (James Madison).

without which perhaps the wisest and freest governments would not possess the requisite stability.”¹⁵

The proposed amendment cannot be reconciled with this fundamental and historic understanding of the integrity of the Constitution. I think perhaps Charles Fried, who served with distinction as Solicitor General under President Reagan, made the point best when he testified against a similar proposed amendment in 1990:

The flag, as all in this debate agree, symbolizes our nation, its history, its values. We love the flag because it symbolizes the United States; but we must love the Constitution even more, because the Constitution is not a symbol. It is the thing itself.¹⁶

IV.

Americans are free today to display the flag respectfully, to ignore it entirely, or to use it as an expression of protest or reproach. By overwhelming numbers, Americans have chosen the first option, and display the flag proudly. And what gives this gesture its unique symbolic meaning is the fact that the choice is freely made, uncoerced by the government. Were it otherwise—were, for instance, respectful treatment of the flag the only choice constitutionally available—then the respect paid the flag by millions of Americans would mean something different and perhaps something less.

The CHAIRMAN. We will recess until further notice.

Mr. MOSS. Thank you, Mr. Chairman.

[Whereupon, at 10:59 a.m., the committee was adjourned.]

¹⁵See *id.* at 314–17. See also *1989 Hearings* at 720–23 (statement of Professor Henry Paul Monaghan, Columbia University School of Law).

¹⁶*Proposing an Amendment to the Constitution Authorizing the Congress and the States to Prohibit the Physical Desecration of the American Flag: Hearing Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 110 (1990).

APPENDIX

PROPOSED LEGISLATION

IIA

106TH CONGRESS
1ST SESSION**S. J. RES. 14**

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

IN THE SENATE OF THE UNITED STATES

MARCH 17, 1999

Mr. HATCH (for himself, Mr. CLELAND, Mr. ABRAHAM, Mr. ALLARD, Mr. ASHCROFT, Mr. BAUCUS, Mr. BOND, Mr. BREAUX, Mr. BROWNBACK, Mr. BUNNING, Mr. BURNS, Mr. CAMPBELL, Ms. COLLINS, Mr. COVERDELL, Mr. CRAIG, Mr. CRAPO, Mr. DEWINE, Mr. DOMENICI, Mr. ENZI, Mrs. FEINSTEIN, Mr. FITZGERALD, Mr. FRIST, Mr. GORTON, Mr. GRAHAM, Mr. GRAMM, Mr. GRAMS, Mr. GRASSLEY, Mr. GREGG, Mr. HAGEL, Mr. HELMS, Mr. HOLLINGS, Mr. HUTCHINSON, Mrs. HUTCHISON, Mr. INHOFE, Mr. JOHNSON, Mr. KYL, Mrs. LINCOLN, Mr. LOTT, Mr. LUGAR, Mr. MACK, Mr. MCCAIN, Mr. MURKOWSKI, Mr. NICKLES, Mr. REID, Mr. ROBERTS, Mr. ROTH, Mr. SANTORUM, Mr. SESSIONS, Mr. SHELBY, Mr. SMITH of New Hampshire, Ms. SNOWE, Mr. SPECTER, Mr. STEVENS, Mr. THOMAS, Mr. THOMPSON, Mr. THURMOND, and Mr. WARNER) introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

JOINT RESOLUTION

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

- 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-*
- 4 *lowing article is proposed as an amendment to the Con-*

1 stitution of the United States, which shall be valid to all
2 intents and purposes as part of the Constitution when
3 ratified by the legislatures of three-fourths of the several
4 States within 7 years after the date of its submission for
5 ratification:

6 "ARTICLE —

7 "The Congress shall have power to prohibit the phys-
8 ical desecration of the flag of the United States."

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QUESTIONS AND ANSWERS

 APRIL 20, 1999

 RESPONSES OF MAJ. GEN. PATRICK BRADY TO QUESTIONS FROM THE SENATE
 COMMITTEE ON THE JUDICIARY

Question 1. In your view, is it appropriate for the government to protect the burning of a cross, but not the burning of an American flag? If so, why?

Answer. Whether or not the government protects the burning of a cross I think, would depend on the circumstances. I don't see how one can compare a particular religious symbol to a symbol which represents religious freedom. In any event burning a cross or a flag must be a hate crime if there is to be such a thing.

Question 2. Some have suggested that prohibiting physical desecration of the American flag is similar to the suppression of dissent in countries like Nazi Germany, China, and Cuba. Do you believe this is a fair comparison?

Answer. No. This is the most distressing of all the arguments of those who would deny the people the right to protect their flag. To hear a protected American flag, protected according to the will of the majority of a free people, compared with a flag protected according to the will of despots, hurts. George Washington helped design and adopt our flag, does that align him with Communists? James Madison, who wrote the First Amendment, and Thomas Jefferson, believed our flag should be protected. Does that align them with Hitler, or Mao Tse Tung or Castro? It is the remarkable differences between our flag and the flags of tyrants that warrants its protection.

Question 3. In your opinion, what are the most pressing issues facing our veterans?

Answer. Many veterans I speak to are concerned about broken promises, especially health care.

Question 4. Are you aware of the INS's current practice of detaining and deporting American veterans for minor drug-related offenses, without providing them with any meaningful opportunity to be heard regarding their service or other personal circumstances? Are you aware of any veterans organizations that are trying to help veterans who are caught up in immigration proceedings?

Answer. Deporting American Veterans? Where? No, I have not heard of this.

Question 5. How much has the Citizens' Flag Alliance and its member organizations expended on its efforts in support of the proposed constitutional amendment? I would like to know both the total amount spent, and a breakdown of your expenditures since the organization was founded in 1994.

Answer. The CFA does not raise money. The American Legion has appropriated by resolution with the consent of its members \$13.277 million for the flag campaign over a period of five years. This money has been spent on the services of legal counsel, lobbyists and grassroots education, travel and related expenses.

Question 6. You asserted at today's hearing that there are "hundreds" of flag burnings in this country each year. By contrast, your organization's Web site lists only 73 incidents of flag "desecration" over the last five years, and many of those incidents involved simple theft or acts other than actual flag burnings. The Congressional Research Service has uncovered only about three dozen flag incidents during the same period, or about seven incidents a year, and Professor Robert Justin Goldstein, the leading historical scholar on this issue, testified last year that there have been only about 200 flag burning incidents in the entire history of the country. Given this discrepancy in the data, could you provide this Committee with all documentary support for your assertion?

Answer. I was responding to a comment that there had only been 36 (?) since the Court's decision, not each year. It is safe to say there have been hundreds but no one knows the exact number since it is legal and many don't get reported. In Connecticut alone there were reported over a hundred. The following is from the 6-12-98 issue of the *Hartford Courant*. "The small American flags marking the graves of veterans in the Nathan Hale Cemetery have disappeared. The flags, which were placed at the grave sites by members of the local American Legion before Memorial Day, were ripped from their posts, police and the cemetery caretaker said. Half of the about 150 flags disappeared Friday night; the remainder were discovered miss-

ing Wednesday. "There's not a single one left," said Nelson Bearce, the sexton of the century, which is on Lake Street. In WA they have flag sitters on patriotic days to protect the flags. In any event what has the number to do with what is right or wrong?

Question 7. Your organization has argued that the Supreme Court's decision in Johnson overturned 200 years of precedent, and that the Founding Fathers thought that flag desecration should be punished. Why was there no federal flag desecration law until 1968?

Answer. Laws were written in the States and on the books from the 1880's. It wasn't until the 1960's with the overwhelming number of flag desecration incidents that Congress passed a law to prohibit flag desecration in the District of Columbia. It came as a result of the effect that such desecrations had on the morale of the men on the front lines in Vietnam. It was, I believe, the flag protection act of 1967 and it had very heavy support from Congress * * * as did the flag protection act of 1989.

Question 8. Major General Brady, the President of the American Bar Association wrote a letter last year opposing this amendment, writing that "America is not so weak that it must serve patriotism by mandating it through a constitutional amendment." Do you think that passing this amendment would show American weakness or, to the contrary, would it show American strength and resolve in protecting our values?

Answer. Answer was not legible.

Question 9. When did you first become involved with Citizens Flag Alliance? What positions have you held with the organization and when did you serve in those positions?

Answer. I was elected to the Board of Directors in 1994 and became the Chairman of the Board in 1996.

Question 10. Your testimony states that the Citizens Flag Alliance is a coalition of 140 organizations representing some 20 million people. Please provide a list of your member organizations and their approximate number of members.

Answer. List provided by separate cover (fax).

Question 11. You stated at the hearing that there have been "hundreds" of flag desecration incidents in this country in recent years. The Congressional Research Service has been able to identify only 36 reported incidents since January 1995. Please provide whatever documentation you or your organization have compiled of flag desecration incidents since that date.

Answer. See above answer.

Question 12. Your testimony states that flag burning and the Supreme Court's decision that laws prohibiting it are unconstitutional "teach [] that the outrageous acts of the minority are more important than the will of the majority." Don't you agree that the Bill of Rights of our Constitution is intended to protect the rights of individuals against the will of the majority?

Answer. That is certainly part of it but the outrageous acts of a minority should never be more important than the will of the majority in a country such as ours. I believe that the amendment clause in the Constitution is designed to protect the majority from mistakes by a minority, in this case, the Supreme Court. So much of what we hear on this and much else is opinion. It is the will of the majority that should determine the facts.

CITIZENS FLAG ALLIANCE, INC. MEMBER ORGANIZATIONS—AS OF APRIL 9, 1999

AMVETS (American Veterans of WWII, Korea and Vietnam), African-American Women's Clergy Association, Air Force Association, Air Force Sergeants Association, Alliance of Women Veterans, American Diamond Veterans, National Association, American GI Forum of the U.S., American GI Forum of the U.S. Founding Chapter, The American Legion, American Legion Auxiliary, American Merchant Marine Veterans, American War Mothers, Ancient Order of Hibernians, Association of the U.S. Army, Baltic Women's Council, Benevolent & Protective Order of the Elks, Bunker Hill Monument Association, Inc., Catholic Family Life Insurance, Catholic War Veterans, The Center for Civilian Internee Rights, Inc., and The Chosin Few.

Combat Veterans Association, Croatian American Association, Croatian Catholic Union, Czech Catholic Union, Czechoslovak Christian Democracy in the U.S.A., Daughters of the American Colonists, Drum Corps Associates, Dust Off Association, Eight & Forty (des Huit Chapeaux et Quarante Femmes), Enlisted Association National Guard U.S. (EANGUS), Family Research Council, Fleet Reserve Association, Forty & Eight (La Societe des Quarante Hommes et Huit Chevaux), Fox Associates,

Inc., The General Society, Sons of the Revolution, Gold Star Wives of America, Inc., Grand Aerie, Fraternal Order of Eagles, Grand Lodge Fraternal Order of Police, Grand Lodge of Masons of Oklahoma, Great Council of Texas, Order of Red Men, Hungarian Association, and Hungarian Reformed Federation of America.

Just Marketing, Inc., Knights of Columbus, Korean American Association of Greater Washington, Ladies Auxiliary of Veterans of World War I, MBNA America, Marine Corps League, Marine Corps Mustang Association, Inc., Marine Corps Reserve Officers Association, Medal of Honor Recipients for the Flag, Military Order of the Purple Heart of the U.S.A., The Military Order of the Foreign Wars, The Military Order of the World Wars, Moose International, National Alliance of Families for the Return of America's Missing Servicemen, National Association for Uniformed Services, National Association of State Directors of Veterans Affairs, Inc. (NASDVA), National Center for Public Policy Research, National 4th Infantry (IVY) Division Association, National FFA (Future Farmers of America) Organization, National Federation of American Hungarians, Inc., National Federation of State High School Associations, National Grange, National Guard Associations of the U.S., and National League of Families of Am. Prisoners and Missing in SE Asia.

National Officers Association (NOA), National Organization of World War Nurses, National Service Star Legion, National Slovak Society of the United States, National Sojourners, Inc., National Society Daughters of the American Revolution, National Society of the Sons of the American Revolution, National Twenty & Four, National Vietnam Veterans Coalition, Native Daughters of the Golden West, Native Sons of the Golden West, Navajo Codetalkers Association, Naval Enlisted Reserve Association (NERA), Navy League of the U.S., Navy Seabee Veterans of America, Non-Commissioned Officers Association, The Orchard Lakes School, PAC Pennsylvania Eastern Division, Past National Commander's Organization (PANCO), Patrol Craft Sailors Association, Polish American Congress, Polish Army Veterans Association (S.W.A.P.), Polish Falcons of America, and Polish Falcons of America—District II.

Polish Home Army, Polish Legion of American Veterans, U.S.A., Polish Legion of American Veterans, U.S.A. Ladies Auxiliary, Polish National Alliance, Polish National Union, Polish Roman Catholic Union of North America, Polish Scouting Organization, Polish Western Association, Polish Women's Alliance, The Reserve Officers Association of the United States, The Retired Enlisted Association (TREA), The Retired Officers Association of Indianapolis, Inc., Robinson International, Ruritan National, Sampson WWI Navy Vets, Inc., San Diego Veterans Services**, Scottish Rite of Freemasonry—Northern Masonic Jurisdiction, Scottish Rite of Freemasonry—Southern Jurisdiction, The Seniors Coalition, Sons of Confederate Veterans, Sons of The American Legion, Sons of the Revolution in the State of Wisconsin, Sportsmen's Athletic Club—Pennsylvania, and Standing Rock Sioux Tribe.

Texas Society Sons of the American Revolution, The Travelers Protective Association, TREA Senior Citizens League, The Ukrainian Gold Cross, The Uniformed Services Association (TUSA), United Armed Forces Association, U.S. Coast Guard Enlisted Association, U.S. Coast Guard Chief Petty Officer Association, U.S. Marine Corps Combat Correspondents Association, U.S. Pan Asian American Chamber of Commerce, U.S.A. Letters, Inc., U.S.S. Intrepid Association, Inc., Veterans of the Battle of the Bulge, Veterans of the Vietnam War, Inc., Vietnam Veterans Institute (VVI), Vietnam Veterans of America, Chapter 415, Vietnam Veterans of America, Chapter 566, VietNow, Virginia War Memorial Foundation, WAVES National, Women's Army Corps Veterans Association, Women's Overseas Service League, Woodmen of the World, 63rd Infantry Division Association, USAR, and 66th Engineering TOPO Vets**—140 Total.

HARVARD LAW SCHOOL,
Cambridge, Massachusetts, April 27, 1999.

Sen. ORRIN HATCH,
U.S. Senate,
Washington, DC.

DEAR SENATOR HATCH. Thank you for your letter enclosing questions submitted by members of the Judiciary Committee regarding my testimony about the flag amendment on April 20. My responses are as follows.

** Indicates added organization.

RESPONSES OF RICHARD D. PARKER TO QUESTIONS FROM SENATOR HATCH

Question 1. The question is about the "Guidelines for Constitutional Amendments" promulgated by a group that calls itself "Citizens for the Constitution." As I said on April 20, I am familiar with this group. I participated in two of its meetings—one public, one private—held at Harvard Law School. I have general views about its "Guidelines" project as well as particular views about application of the "Guidelines" to the flag amendment.

THE "GUIDELINES" IN GENERAL

Answer 1. Three general features of the "Guidelines" project are striking. (1) The ultimate and authoritative guidelines for amendment of the Constitution are set forth in the document itself. On one hand, Article V prescribes the requisite supermajority votes required of specified representative institutions. And, on the other, the Preamble makes clear that the "sovereign" to which representative institutions in the federal government are responsible is "We, the People." It follows that, in the end, the crucial guideline for congressional referral of a proposed constitutional amendment to the state legislatures is the will of the people—a will that is sustained, over some time, by more than a bare majority among them. Of course, anyone is free to try to persuade the people (and their representatives) to support or oppose a particular amendment. What's more, anyone is free to advocate general "guidelines" for amendment going beyond the democratic ones set forth in the Constitution—just as anyone is free to advocate general "guidelines" that ought to be met by social welfare legislation or health care legislation. But the job of Congress, I would assume, is to vote up or down on each proposal and to do so as representatives of the people, not as devotees of anyone's extra-constitutional "theory."

(2) The eight "guidelines" advocated by the Citizens for the Constitution are platitudes. Although (as I have indicated) they should not be viewed as requirements, who could disagree, in the abstract, that they are, at least, relevant considerations? Indeed, they are so commonplace and vaporous as to make one wonder why anyone would imagine Congress needs to be informed of their relevance. The question is: What are the drafters of the "guidelines" afraid of?

(3) The overall emphasis in the Introduction to the "guidelines" and in the "guidelines" themselves is on "self-restraint" and on fear that "self-restraint may be breaking down" among elected representatives—rather than on responsiveness to the people. The bias, indeed, is in favor of "amendment" of the Constitution by unelected people wearing black robes—rather than by elected representatives as was plainly intended by Article V. The Citizens for the Constitution may talk of the value of "stability." But they seem unconcerned about instability produced by constant changes in constitutional meaning accomplished by a majority—often a mere 5–4 majority—of the Supreme Court. What they are afraid of—and what their scare rhetoric seeks to stir up fear of—is "We the People."

The "guidelines" thus seek to entrench the status quo, the judicially determined status quo. There was a similar effort—also led by prestigious members of the bar—early in this century. Then, prominent lawyers and law professors sought to entrench a judicially determined status quo—the common law—against social welfare and regulatory reform by legislatures. Then, too, they mobilized abstract platitudes in service of "stability." But, then, it was progressives who exposed and opposed their effort to stymie democratic government. Where are the self-styled "progressives" today? It seems (as an active Democrat I'm sorry to say this) that a number of them have taken up the old across-the-board stance against change and democracy.

THE "GUIDELINES" AS APPLIED TO THE FLAG AMENDMENT

As abstract platitudes, the "guidelines" are susceptible to use as wise-sounding wrapping around conclusory assertions—what I describe to my students as "reasoning by harrumphing." Thus a standpatter can cite one of them and simply say, "I'm concerned [or worried] about that." I am confident the Senate will not settle for such a parody of debate. And, once citation of the "guidelines" is made a subject of clear-headed point-by-point debate, I am confident that the Senate will see that, as applied to the flag amendment, the "guidelines" are in fact fully satisfied.

Let me go through the eight "guidelines" in order.

(1) "*Abiding Importance*" In my testimony, I took pains to emphasize that what is at stake here is not a matter of "immediate gratification" or of opposition to a particular series of flag-burnings. Rather, I said, it is about restoring the power of Congress to preserve a vital national resource, a resource that is invisible but no less real for that—respect for the ideal of national community, uniquely symbolized

by the flag. This resource was long taken for granted, but is being eroded not by the “malcontents” who trash the flag, but by the 5–4 Court decision that “amended” the First Amendment to *legitimate* the trashing and by the failure of the rest of us to correct that mistake decision. Our children, or our children’s children, eventually may not even remember what this eroded resource was, much less have access to it. If that happens, they will be the poorer, since any great military or domestic project depends on it and since, as I said, liberty that lacks a foundation in community rests on a foundation of sand. What is at stake, then, is the kind of America we leave to future generations, obviously a matter of “abiding importance.”

(2) *Making “Our System More Politically Responsive or Protect[ing] Individual Rights”* The flag amendment restores to Congress power to be responsive to a sustained value-commitment of most of the American people. It was the 5–4 Court decision that “amended” the Constitution, after two centuries, to block such responsiveness. The majority of the Court did not “protect” an individual “right.” It concocted a new one. By the same token, the Court did not “protect” a “powerless minority.” For the right of a minority to express its views in any number of ways (by words and by acts) has long been guaranteed and is not affected by the proposed amendment. If however, long-recognized free speech rights are to be maintained in the future—if free speech is not to turn into a contest to see who can yell loudest—respect for American community-despite-diversity must be maintained. That is the aim of this amendment. Hence, this amendment protects individual rights.

(3) *Exhaustion of “Other Means”* In 1989, Congress went the extra mile and, against good advice, tried a statutory alternative to an amendment. It was slapped down immediately by the 5–4 Court majority. It is now perfectly clear—as I demonstrated in my letter to you of March 10—that there is absolutely no alternative. All “other means” have been thoroughly exhausted.

(4) *Consistency With “Related Constitutional Doctrine That The Amendment Leaves Intact”* The flag amendment is more narrowly and sharply focused than any under consideration in the last two decades. It is designed specifically to correct one and only one mistaken “interpretation” of the First Amendment by five Justices in 1989 and 1990. It would *restore* to the First Amendment the meaning it was understood to have for the two centuries before 1989. Plainly, then, it is perfectly consistent with all other free speech doctrine, that which existed along with it before 1989 and that which has been elaborated since then. Thus, contrary to bizarre speculation in the statement by the Acting Assistant Attorney General, the void-for-vagueness doctrine and the doctrine of the *R.A.V.* decision would not be affected in any way. A statute enacted under the amendment would have to pass muster under both—that is, it could not be excessively vague (and the Flag Protection Act of 1989, drafted with much expert advice, was not) and it could not discriminate among particular points of view of those who physically desecrate the flag in a fashion specified by the statute (and the Flag Protection Act of 1989 does not). What is most peculiar is that opponents of a restorative (as opposed to a transformative) amendment try to depict it as “inconsistent” with surrounding doctrine—or as an “amendment of the Bill of Rights”! Obviously, this is utterly false.

(5) *“Enforceable Standards”* Being so narrowly and sharply focused—and being intended to restore authority that the Congress exercised for most of this century and, in particular, to validate the Flag Protection Act of 1989—there can be no legitimate issue on this count. Terms in provisions of the Constitution are interpreted in context. And, in this case, there is a long-standing context and practice by which to read the terms “physical desecration” and “flag.”

(6) *“Think[ing] Through and Articulat[ing] Consequences”* For the last ten years—and particularly for the last five—we have considered consequences of adopting the flag amendment. There is no issue on this count. What is odd, again, is that anyone would raise it with respect to a proposed amendment that *restores*—rather than transforms—the long-understood meaning of the Constitution.

(7) *“Full and Fair Debate”* Everyone recognizes that the debate over this amendment has been as “full” and as “fair” as a debate could possibly be.

(8) *“Ensuring a Contemporaneous Consensus”* It is, of course, up to Congress whether to set a deadline for ratification of an amendment and, if so, what deadline. In this case, however, there is little problem of ensuring a “contemporaneous consensus.” Already, the legislatures of 49 states have memorialized Congress urging it to send the flag amendment to them, pursuant to Article V. It is as likely as can be that they will act on it promptly once it is sent to them.

At the hearing on April 20, we were criticized for having “chosen” the “mechanism” of constitutional amendment. *It was, however, the framers who “chose” it.* And for good reason. Article V is the keystone of the authority of the Constitution. It guarantees that—despite short-sighted efforts by some to entrench a judicially determined status quo—the Constitution will remain the property of “We the People.”

RESPONSES OF RICHARD D. PARKER TO QUESTIONS FROM SENATOR LEAHY

Answer 1. The amendment would authorize only Congress to enact legislation prohibiting physical desecration of the flag.

Answer 2. The question is premised on the idea that the flag amendment is meant to serve “purely symbolic purposes.” This premise is mistaken. Like other amendments, this one is meant to vindicate a very important *principle*. Like other amendments, it is meant to correct a mistaken decision by the Supreme Court and, so, to restore the long-standing state of constitutional law under the First Amendment. And, like other amendments, it is meant to authorize Congress to enact a law that would affect actual behavior as well as providing a basis for punishment. There is nothing “purely symbolic” about it.

Answer 3. My “empirical basis” for suggesting that the amendment—by taking a clear stand on a matter of principle and by undoing the mistaken *legitimation* of flag desecration in a 5–4 Court decision—would “help instill public patriotism and community values” is a combination of common sense and long study of American legal, political and social history.

RESPONSES OF RICHARD D. PARKER TO QUESTIONS FROM SENATOR THURMOND

Answer 1. It is generally agreed by people on both sides of this issue that, in the 1790’s, the framers of the Bill of Rights did not think they were protecting desecration of the flag as part of the First Amendment. It took almost two centuries for the First Amendment to be so “amended”—by five members of the Supreme Court. The purpose of the amendment under consideration now is to restore to the First Amendment the meaning that its framers took for granted.

Answer 2. The Supreme Court has never—repeat: never—understood the guarantee of free speech to be “absolute.” Significantly, the one Justice who did often seem to endorse “absolutism”—Justice Hugo Black—specifically and adamantly opposed extending such protection to expressive conduct in general and to flag desecration in particular.

Answer 3. Congress not only could, but already has passed a statute protecting the flag without interfering with “commercial items such as clothing and caps.” Indeed, the Senate passed it by a vote of 91–9. It is the Flag Protection Act of 1989.

RESPONSES OF RICHARD D. PARKER TO QUESTIONS FROM SENATOR FEINGOLD

Answer 1. The question—like the statement by Acting Attorney General Moss, submitted to the Committee on April 20—suggests a concern that settled doctrines of constitutional law such as the “void for vagueness” doctrine and the rule of the *R.A.V.* case, might not apply to a statute enacted under the proposed amendment. With respect, I must say that I cannot imagine what could have given rise to this concern. For it is absolutely baseless.

The “Void for Vagueness” Doctrine. I assume the idea here is that words in the amendment—“physical desecration” and perhaps “flag”—are themselves “vague.” But many, even most, words in significant provisions of the Constitution are “vague” by that standard. (Think of the words “commerce among the several states” or “general welfare.”) The point, however, is that the “void for vagueness” doctrine has *nothing* to do with language in the *Constitution*. Rather, it has to do with language in *statutes*. The flag amendment is intended to validate a specific statute—the Flag Protection Act of 1989—carefully drafted, with much expert advice, and enacted by a 91–9 vote in the Senate. When the Constitution employs general terms to grant Congress power, it is up to Congress to legislate in ways that satisfy the “void for vagueness” doctrine, whether under the First Amendment or the Due Process Clause. Plainly, the 1989 Act showed that this can be done with respect to prohibition of “physical desecration of a flag of the United States.” The “void for vagueness” doctrine thus would not be affected in the slightest by the flag amendment; it would apply to any statute enacted under the amendment; and Congress has demonstrated that such a statute can be drafted so as to pass review under the doctrine.

The Rule of the R.A.V. Case. This rule bars government from proscribing sub-categories of generally “proscribable” expressive activity—such as “obscenity” or “fighting words”—if the sub-categories are defined by their particular message or point of view. What the flag amendment would do would be to establish “physical desecration of a flag of the United States” as an activity generally “proscribable” by Congress. The *R.A.V.* rule would not be affected in the slightest by ratification of the amendment. Rather, it would *forbid* Congress to punish only those instances of the

generally “proscribable” activity—i.e., “physical desecration” of a flag—by Democrats or by anti-war demonstrators or by people protesting actions by the President. Again, the Flag Protection Act of 1989 passes review under this rule. The exception it makes for “disposal of a flag when it has become worn or soiled” does not discriminate *within* generally “proscribable” activity in terms of viewpoint. Rather, it plainly is designed to track, and give effect to, the definition of that activity—“physical desecration” of a flag.

Answer 2. The hypotheticals involving flag “decoration on clothing” and symbols on flags—ranging from “Elvis Presley” to a “dollar sign” to a “swastika”—tend, at one and the same time, to exaggerate and to trivialize the reach of a statute protecting the American flag from physical desecration. This is, of course, a familiar mode of opposition to all proposals that are expressed in words. With respect, let me suggest that in our system of government there is good reason—in assessing the words of any constitutional provision—to trust Congress (enacting laws) and the Judiciary (enforcing them) to weed out both excessive and trivial cases. As I have said, Congress demonstrated that it deserves that trust in the Flag Protection Act of 1989. It defined “flag” as “in a form that is commonly displayed.” And it provided for punishment only of one who “knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground or tramples upon” a flag. The courts have shown time and again that they, similarly, can be trusted in sorting out any remaining ambiguities in such statutory language.

I must add that the last two sentences of the question are misguided. The fear invoked in the first should be laid to rest by the *R.A.V.* rule. And the suggestion in the second that the flag amendment would “modify” the First Amendment is simply mistaken. To the contrary, it would restore to the First Amendment its long-standing meaning—a meaning “amended” away by a 5–4 vote of the Court.

Answer 3. I would urge Congress, in enacting a statute under the proposed amendment, to stick with traditional forms of punishment. That is what it did in the Flag Protection Act of 1989.

I hope these responses are of use to the Committee. Again, I thank you and the Committee for giving me the opportunity to participate in this stage of the process provided for by Article V of the Constitution.

Sincerely,

RICHARD D. PARKER,
Williams Professor of Law.

RESPONSE OF GARY E. MAY TO A QUESTION FROM SENATOR HATCH

Question 1. You eloquently stated that the veterans of World War I, World War II, and the Vietnam War fought for freedom of speech, including freedom for dissenters to physically desecrate the American flag. However, the Supreme Court of the United States did not interpret the First Amendment to protect the physical desecration of the flag until 1989 after the conclusion of all these wars. *Texas v. Johnson*, (1989). Would you respond to this?

Answer. Thank you for giving me the opportunity to respond to your observation and query.

My testimony included the assertion that the *freedoms* fought for by military veterans of all wars, more than tangible symbols of these freedoms, were powerful motivating forces which fueled their service and sacrifice. It does not follow that because the Supreme Court had not made a ruling on flag desecration as a protected form of speech until after the wars I cited in my testimony that this was implicitly *not* included among the freedoms for which service was rendered during those wars. In my opinion, to suggest that wars are fought and service is rendered to preserve the freedoms and cultural milieu up to and including a specific moment in time—the time of the war, for example—and not beyond that moment is incorrect. I don’t believe most World War II veterans would say they do not support integration even though the landmark *Brown v. Board of Education* decision was well after the end of the war in which they fought. Similarly, Korean veterans probably don’t oppose the Civil Rights Act, even though it followed their war. Certainly, as a person with a disability, I support civil rights protections, such as the Americans with Disabilities Act, for people with disabilities—which wasn’t passed by Congress and signed by President Bush until 1990.

In my experience, veterans fought to protect, preserve and extend freedoms. We fought for our form of government, for our institutions, and for the opportunities for others to experience such freedoms and government. We also fought with the understanding that we would receive meaningful benefits upon discharge. I do not believe

that most veterans fought to protect our flag—but for everything that it represents, including freedom of speech.

RESPONSE OF GARY E. MAY TO A QUESTION FROM SENATOR LEAHY

Question. In your opinion, what are the most pressing issues facing our veterans?
Answer. Thank you for giving me the opportunity to respond to your query.

In my opinion, one of the most pressing and overlooked issues facing America's veterans is the long term impact of military service on veterans and their families. The programs funded by the Agent Orange Class Assistance Program (AOCAP) found a high incidence of disabilities and health problems among children of Vietnam veterans, for example. These community-based programs also found many lingering consequences of service among veterans, including PTSD, substance abuse problems, marital discord, poverty, and estrangement from potential sources of help such as the Department of Veterans Affairs, Department of Health and Human Service, and others. The programs found an aggressive case management approach to be very effective in working with these families. Such an approach helped families navigate the patchwork of programs and services. An important focus of the AOCAP-funded programs was also to debunk the myths among non veteran oriented service providers that the Veterans Administration "takes care of veterans and their families".

While the services funded by the Agent Orange settlement were targeted to Vietnam veterans and their families it was clear that veterans of other periods of service had similar needs. My own early clinical experience as a Social Worker in Veterans Administration medical center and outpatient clinic settings, where most of my clients were World War II veterans, were very similar to the experience of the AOCAP-funded programs.

More detailed descriptions of the experiences of AOCAP programs can be found in *The legacy of Vietnam veterans and their families—Survivors of war: Catalysts for Change*, (1995). Rhoades, D.K., Leaveck, M.R. & Hudson, J.C., eds. This book is available from the Government Printing Office.

Thankfully, most Americans will never experience the consequences of war, but for those who do and for their families, I think we have an enormous obligation. Our response must be substantive, targeted, meaningful, and available. Historically, the Department of Veterans Affairs has been seen as the sole institution to fulfill this obligation. The experience of AOCAP programs and the performance of many community-based veteran service organizations which emerged during and following the Vietnam War underscored the need for services to be actively outreach oriented and community-based v. passively institutionally-based.

Currently, the programs previously funded through AOCAP are represented by Veterans Families of America (VFA). I was the founding president of this organization, which began as the National Alliance of Veteran Family Service Organizations, and still serve on its board of directors. VFA is working with the Department of Veterans Affairs, Health and Human Services, and other federal agencies to secure funding to revitalize the former AOCAP programs and expand their reach to veterans and families from all eras and conflicts.

Veterans and their families need services and opportunities, not symbolism. Recruitment for military service is predicated in part on a quid pro quo—if honorable service is rendered, then meaningful post service benefits will follow. Our record of making good on this contract is not good. The favorable expressed sentiment for veterans by supporters of the flag desecration amendment would be better placed in support of extending and stabilizing services responsive to the day-to-day needs of ordinary veterans and their families.

RESPONSE OF MARIBETH SEELY TO A QUESTION FROM SENATOR HATCH

APRIL 27, 1999.

DEAR SENATOR HATCH: The following is my answer to the question posed to me in a fax from your office:

Answer. In my view, the cognitive ability of ten and eleven year old children is not developed to the point where he or she would accurately interpret the action of the police protecting the rights of a flag burner. Children understand that burning the flag is wrong. After all, they salute that same flag everyday. They would be confused to see a policeman who in their minds is a community helper protect flag burning.

I did poll my fifth graders, and without exception and with the abilities commensurate with their age, they said that they would not want to see someone burning the American flag. I think, at this point, they would see this as yet another example of violence.

MARIBETH SEELY.

RESPONSE OF LT. GEN. EDWARD D. BACA TO A QUESTION FROM SENATOR LEAHY

Question 1. In your opinion, what are the most pressing issues facing our veterans?

Answer. In my interaction with veterans, I have found there are a number of issues of importance they would like to see Congress address. They include a constitutional amendment that would return to the American people the right to protect their flag, health care, funding of VA Hospitals and improved benefits. Access and funding are the keys when it comes to health care. Values are at the essence of the flag debate.

Asking a veteran to choose which issue is “most” important is like asking a father to choose a favorite among his children. All are equally important and equally valuable.

The American Legion has made a flag-protection amendment their number one priority for the last ten years. At the same time, they continue to play an active role in working to improve veterans health care and veterans benefits. There is no reason why Congress cannot address all of these issues.

When I told Jose Quintera I would be testifying before the Senate in favor of a flag-protection amendment he told me, “Tell them how much my flag means to me and to other veterans.” Jose is only one man, but he is echoing the sentiments of millions of others veterans—veterans, who like Jose, will one day be buried under the Stars and Stripes.

ADDITIONAL SUBMISSIONS FOR THE RECORD

APRIL 20, 1999

AMERICA BAR ASSOCIATION,
GOVERNMENTAL AFFAIRS OFFICE,
Washington, DC, April 20, 1999.

DEAR SENATOR: On behalf of the American Bar Association, I write to urge you to oppose S.J. Res. 14, the proposed Constitutional Amendment to prohibit the physical desecration of the flag of the United States.

The Association deplors any desecration of the flag, but we must not forget that the flag is a symbol of both national unity and sovereignty *and* the individual freedoms we so uniquely enjoy in this country—the freedom to think one’s own thoughts, to express one’s beliefs, and to associate freely with those of like mind. Nowhere are these principles tested more than when the beliefs of a few individuals offend the sensibilities of the majority. But I would call your attention to the words of Justice Jackson in *West Virginia State Board of Education vs. Barnette*:

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

Our institutions cannot be destroyed by the exercise of First Amendment freedoms, only strengthened. Even in the scarce instances in our history in which the flag has been physically abused in political protest, the ideas and ideals that the flag symbolizes have never been damaged by such abuse. For the ideals of freedom and liberty that the flag represents are held secure in the hearts and minds of the American people and can easily withstand these infrequent episodes of political dissent.

The flag does not stand unprotected today. For those who physically abuse the flag for the purpose of inciting others or inflaming conflicts, rather than for peaceful political protest, the punishment is sure and certain. There is a myriad of laws already in place that would punish the vast majority of incidents of flag desecration cited by proponents of the amendment. A review of those cases shows that the persons charged with flag desecration were also charged and prosecuted under local criminal statutes, such as theft, vandalism, destruction of property, disorderly conduct, or public disturbance.

The proposed flag amendment therefore targets the very speech that the Constitution now protects—peaceful political dissent. The American people do not want or need Congress to go to the extreme of tampering with the First Amendment to deal with the very rare actions of a few individuals who physically abuse the flag in political protest.

As a symbol, the flag is important, but not more important than the Bill of Rights. The ideals to be protected reside not in the flag, but in the principles the flag represents; and those ideals remain long after any particular flag has fallen to the ravages of time or the destructive hands of an enemy at war or a political dissenter at home. We urge you to express your support for the principle of freedom of speech which our flag represents by opposing S.J. Res. 14.

Sincerely,

ROBERT D. EVANS.

PREPARED STATEMENT OF WALTER CRONKITE

With the myriad of serious issues now facing Congress and the Nation, I am at a loss to understand the congressional rush to take up the flag desecration amendment. Congress has pursued this unwise amendment for almost a decade, trying to punish the acts of a handful of immature, flag-burning hooligans who have successfully aroused our anger but who pose no threat to our flag.

This tiny band of malcontents has inspired a threat by otherwise thoughtful, serious citizens to amend the very foundation of our liberties, which has stood solid and unshaken through political and economic crises, through insurrection and civil war, through assaults by foreign ideologies. The Senate has steadfastly rejected such an amendment twice before. It should do so again for the third and final time.

The response the demonstrators have inspired would be laughable were the consequences not so dangerous. Are we *really* ready to let an emotional reaction to a picayunish provocation restrict the precious freedoms guaranteed by our Bill of Rights?

More than any other nation, we Americans have invested in our flag special properties. We revere it, we pledge allegiance to it, we have a special code for the proper treatment of it. To us it represents the embodiment of those mystical qualities that make up the American spirit.

We are infuriated by those who desecrate it to call attention to whatever it is that feeds their discontent at the moment. But beyond raising the calculated ire among the rest of us, no real harm has been done. Our society is not endangered. Our country has not quaked on its foundation and there are no cracks in its walls. Our strength as a nation is not one whit reduced.

In truth, the opposite has happened. These random acts establish once again that our democratic system is as strong as we always have hoped it would be, strong enough to tolerate any peaceful dissent no matter how objectionable to the vast majority.

Even if the flag desecrators were of far greater numbers and represented a cause of some significance, they still would cause no threat to the integrity of our national emblem. But those who would amend the Constitution do threaten the integrity of that far more precious of our possessions—our freedom of thought and speech.

PREPARED STATEMENT OF KEITH A. KREUL

I provide this statement in opposition to S.J. Res. 14, the flag desecration resolution under Senate consideration in this 106th Congress. This amendment will neither protect the flag nor promote true patriotism. It is a radical approach to a near nonexistent dilemma akin to atom bombing a sleeping city because a felon may be in the vicinity.

I am a U.S. Army veteran who proudly served my country, and was privileged to subsequently serve as National Commander of The American Legion. The preamble of The American Legion states that "right is the master of might." With that motto in my heart, I urge the Senate to reject the amendment, to say "no" to the misguided organized campaign that would put the flag above the Constitution. The flag is a beautiful and inspiring banner representing freedom and justice for all Americans. It represents those beliefs, credos and tenets that are outlined by the Constitution of the United States of America.

Freely displayed, our flag can be protected only by us, the people. Each citizen can gaze upon it, and it can mean what our heartfelt patriotic beliefs tell us individually. Government "protection" of a nation's banner only invites scorn upon it. A patriot cannot be created by legislation. Patriotism must be nurtured in the family and educational process. It must come from the heartfelt emotion of true beliefs, credos and tenets.

The proposed amendment is described by advocates as being narrowly written. In reality, the amendment language is broad based and vague. It clearly would provide future Congresses with a carte blanche authority to enact statutes whenever it was perceived there was a majority demand for increased "protection". In our history we have witnessed the enactment of Sedition Acts that subsequently were repealed. Recently Supreme Court Justice Scalia stated "A Bill of Rights that means only what the majority wants it to mean is no Bill of Rights at all". The idea that the flag can be protected or will be safer if flag desecration legislation is enacted is an idle myth. Those very few citizens that resort to the extremism of defiling the Nation's banner will not be deterred by a law. In fact, the law likely will give their cause added undeserved publicity.

Long standing local statutes and ordinances concerning theft, vandalism, destruction of stolen property, are realistic punishment for offenders. These laws ensure swift justice under the jurisdiction of the local community. Vague Federal statutes will only assure publicity and unending litigation resulting in diminished reverence to the now beautiful flag that means so very much to patriotic Americans. Chief Supreme Court Justice Rehnquist, former Attorney General Meese and the American Bar Association have all recently made pleas to Congress to desist enacting Federal law that burdens the Court with trivial cases.

Yes, the Constitution can be amended. But will an amendment that is in obvious conflict with the First Amendment accomplish a purpose, or will it bring further confusion and discontent diminishing the beauty the flag has today as it hangs free, revered by us, the people, not ordered by Government edict? Our nation was not

founded on devotion to symbolic idols, but principles, beliefs and ideals expressed in the Constitution and its Bill of Rights.

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

The proposed amendment would stain the image of our banner, as it would no longer wave free, unprotected by Government and freely held high by the proud citizens of the United States of America. Legislators advocating "drawing a line" are indeed fostering the birth of tyranny. Are we now, after 210 successful and glorious years, going to knuckle under to the pressure of modern lobbying techniques to pursue pseudo patriotism? Organizations exploiting high tech lobbying, spending millions pressuring lawmakers and pandering to a false patriotism, should rethink their priorities and not succumb to the temptation of the "golden calf."

We must not delegate to government our responsibility of citizenship lest we endanger our most precious freedoms. Teaching in the home and in our schools the principles evident in our Constitution and Bill of Rights requires responsibility and sacrifice. That energy enhances pride in our heritage. Respect for our beautiful flag can only come from the hearts of the people. Attempts to bestow honor by government decree upon the flag are idle myths and must not prevail.

Thank you for this opportunity to express my views.

A BRIEF BIOGRAPHY OF KEITH A. KREUL

Keith was born to Harry and Elsie Kreul on a farm near Mt. Ida, Wisconsin on April 21, 1928. At one year of age the family moved to a farm southwest of Fennimore, Wisconsin. He attended the rural one room school and graduated from Fennimore High School in 1946. In 1947 he enrolled at the University of Wisconsin, graduating in 1951 with a B.S. in Mechanical Engineering.

He enlisted in the U.S. Army in October 1951 and received a commission of Second Lieutenant in the Ordnance Corps at Aberdeen Proving Grounds in September 1952. He was assigned to Lima Ordnance Depot, Lima, Ohio until separated in October 1953. He served in the U.S. Army Reserve until 1962.

Following a stint with Fairbanks-Morse at Beloit, Wisconsin in their Plant Engineering Dept., Kreul returned to Fennimore. He joined his father and brother in a family farming operation that grew from 320 acres and 50 registered Angus cows to 950 acres and 300 Angus cows. In 1964 the family formed one of the first family farm corporations in the area. He still resides on the family farm.

In 1969 he was appointed Chairman, Agricultural Stabilization and Conservation Service State Committee. In 1971 Kreul was appointed State Executive Director of that USDA agency, a capacity he served until August 1977. In 1981 Kreul was appointed State Director of the Farmers Home Administration located at Stevens Point, Wisconsin, a position he left to serve as National Commander, The American Legion, in August 1983. Following his year at the helm of The American Legion, he was employed as a District Director for the Farm Service Agency of the USDA until his retirement after twenty-four years of Federal Service.

In the American Legion, Kreul has served in all leadership positions on the Post, County, District, Department and National echelons. This career of volunteer service was climaxed with the election as National Commander in Seattle, Washington in 1983.

Keith and his wife Dolores are the parents of three sons, one daughter and eight grandchildren.

PREPARED STATEMENT OF THE PEOPLE FOR THE AMERICAN WAY

The Bill of Rights, the bulwark of American liberty, has never been restricted by constitutional amendment in its 206 year history. The proposed amendment would be the first in our nation's history to cut back on the First Amendment's guarantee of freedom of expression that is central to vigorous debate in our democracy. It would set an exceedingly dangerous precedent for further erosion of our fundamental freedoms.

According to a 1995 Peter Hart poll, a majority of Americans opposed such an amendment by 52 percent to 38 percent when they knew that it would be the first in our nation's history to restrict our First Amendment freedoms of speech and expression. This finding was confirmed by a 1997 Freedom Forum poll where a majority also opposed the proposed amendment after learning that it would be the first to restrict First Amendment freedoms.

As the Supreme Court has repeatedly explained since 1931 when the Court first applied the First Amendment to a flag statute, the non-verbal, peaceful use of the flag to make a political statement, whether it be by flying, saluting, or burning, is fully protected under the First Amendment's guarantee of free expression. Thus, since 1931, the Supreme Court has consistently struck down flag statutes requiring students to salute the flag, prohibiting flying a "red flag," and prohibiting burning the U.S. flag. In doing so, the Court has held that it is a "bedrock principle underlying the First Amendment * * * that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive and disagreeable." The First Amendment is designed precisely to protect unpopular forms of peaceful expression and political dissent such as flag or cross burning, although these acts are highly offensive to almost all Americans.

Banning flag desecration would put America in the unwelcome league of totalitarian states such as Communist China, the former Soviet Union, Cuba and Iran which fear political dissent and imprison dissenters for desecrating their national flags. We do not need to coerce patriotism in America and we should not let a handful of offensive individuals cause us to voluntarily surrender the very freedoms that make us a beacon of liberty for the rest of the world.

It is entirely unnecessary to amend the Constitution to punish most incidents of flag desecration. Most of these acts, including burning or soiling a flag, are typically punishable under public burning, public health, theft or destruction of public property statutes. In addition, any offensive expression, including flag desecration, performed for the purpose of inciting violence or a breach of the peace and that it is likely to produce an immediate danger is already punishable consistent with the First Amendment.

The amendment addresses a non-issue. Flag burning is an exceedingly rare occurrence in our country and the voluntary love of flag and country are nowhere in jeopardy. The Congressional Research Service found, on average, less than eight flag desecration incidents per year from 1990 to 1994. According to one prominent historian of the flag issue, there have been fewer than 200 flag burning incidents in all of American history. Public repudiation of persons desecrating the flag has been widespread and clear.

Instead of increasing respect for the flag, the amendment would actually make flag burning—which is exceedingly rare—a more noteworthy and common occurrence. Indeed, there have been almost three times as many flag burnings since 1989 when this became a front-page issue than in the preceding over 200 years of American history since the flag was adopted in 1777.

The amendment is phrased in broad and vague terms that will have unintended consequences including censorship of images of the flag in works of art, commerce or advertising that contains physical representations of flag. Display of the flag in a Jasper Johns painting, above a car dealership, or on a billboard could constitutionally be criminalized under the amendment. Amendment supporter and House Constitution Subcommittee Chair Charles Canady (R-FL) has conceded that the amendment would permit punishment for producing boxer shorts with the design of the flag on them. In this regard, it should be noted that the existing Flag Code expressly prohibits the use of the flag as "wearing apparel" or "as a costume or athletic uniform," and expressly prohibits use of the flag "for advertising purposes in any manner whatsoever." 36 U.S.C. 176. Ironically, the proposed amendment would permit prosecutions not only of protesters, but of individuals who do not intend disrespect for the flag.

Congress has already debated and rejected a constitutional amendment on the flag twice, in 1990 and 1995. The issue has had no impact on subsequent Congressional elections. The public as demonstrated by the 1996 elections, wants Congress to focus on real issues that affect their daily lives and well being.

People For the American Way is a nonprofit, nonpartisan organization representing more than 300,000 members and activists dedicated to fighting for fundamental American values including opportunity, equal justice under the law, and individual liberty.

DUKE UNIVERSITY,
SCHOOL OF LAW,
Durham, NC, March 31, 1999.

Senator ORRIN G. HATCH,
Chairman, Senate Judiciary Committee,
Washington, DC.

DEAR SENATOR HATCH: I have reviewed S. 1335 styled "The Flag Protection and Free Speech Act of 1995." I have also reviewed the November 8, 1995 Memorandum of the Congressional Research Service, and the recent letters you received from Professors Stephen Presser and Paul Cassell offering comments and observations on the proposed act. My observations, such as they are, are these—

I

If the principal provisions of this proposed bill are narrowly construed—as I believe they might well be¹—then I am inclined to agree more nearly with the analysis provided by the Memorandum of the Congressional Research Service than with that provided by my able colleagues at Northwestern (Steve Presser) and Utah (Paul Cassell). In brief, as narrowly construed and rigorously applied, the principal section of the act (§3(a)) may not be inconsistent with the First Amendment and may withstand judicial scrutiny when reviewed in the courts. I say this because as thus narrowly construed and applied, §3(a) may apply only in circumstances in which it would meet the requirements the Supreme Court itself has laid down in the principal case applicable to more general laws of this same sort.² Herein is how that analysis is likely to proceed:

A. Specifically, §3(a) proposes to amend §700 of title 18 (the Criminal Code of the United States). It does so, however, by subjecting to criminal prosecution only such person who—

destroys or damages a flag of the United States *with the primary purpose and intent to incite or produce imminent violence or a breach of the peace,* and in circumstances where the person *knows* it is reasonably likely to produce imminent violence or a breach of the peace.

Fairly (albeit strictly) read, the statute thus may require both of the following matters to be proved in any case brought pursuant to this section—and both of these matters must, as in any other criminal case, be proved beyond reasonable doubt:

1. That "the primary purpose" (i.e., the principal objective³) sought by the defendant was to incite "violence or a breach of the peace" and, indeed, that it was his specific intent to do just that;

2. That when he acted primarily to bring about the result (and only secondarily, if at all, to achieve some other aim), moreover, the circumstances were such that it was at least "reasonably likely" in fact his actions would have precisely that consequence (as he fully intended) even as he himself fully understood.

3. Likewise, however, according to the plain implication of its own terms as thus understood, nothing in this section⁴ is meant otherwise to subject one to prosecution

¹It is the firm practice of the Supreme Court to construe acts of Congress very stringently (i.e., narrowly) when any broader construction would at once draw it into serious first amendment question. (For useful and pertinent examples, see *National Endowment for the Arts v. Karen Finley et al.*, 118 S. Ct. 2168 (1998); *Watts v. United States*, 394 U.S. 705 (1969); *Yates v. United States*, 354 U.S. 198 (1957).)

²That controlling case is almost certain to be *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (discussed *infra*, in footnote 9).

³Not a secondary or even related, co-equal, objective * * *

⁴To be sure, other sections do reach some other acts (e.g., "damaging a flag belonging to the United States" (§700(b)) or stealing or knowingly converting and destroying a third person's flag (§700(c)), but these provisions are doubtless secondary in significance and so I defer consideration for such slight discussion of these provisions as they are worth. (Briefly, however, there is no likely problem with the provision re "a flag belonging to the United States." (See e.g., *Spence v. Washington*, 418 U.S. 405, 409 (1974) (dictum) ("We have no doubt that the State or National Governments constitutionally may forbid anyone from mishandling in any manner a flag that is public property.") As to a flag merely owned by a third party, that one "steal[s], knowingly convert[s], and destroy[s]," there may be—as the other commentators have noted—a federalism problem (the act in this regard would not appear to meet any of the requirements under *United States v. Lopez*, 514 U.S. 549 (1996), nor does the act appear to be connected to any other enumerated power provided in Article I §8 of the Constitution (e.g., the spending power, tax power, etc.). It remains arguable, however, that the same (merely implied) power providing Congress with legislative authority to establish incidental insignia of nationhood (e.g., a

merely for destroying or damaging a flag of the United States—no matter how offensive or objectionable others may find any such act to be. And, specifically, to make this latter matter quite clear in a relevant fashion, § 2(a)(4) (which immediately precedes § 3(a))—expressly distinguishes any and all cases where one destroys or damages a flag when one does so to “make a political statement,” rather than merely “to incite a violent response.”⁵

4. Subsection (a)(3) of § 2, separately declares that “abuse of the flag * * * may amount to fighting words,” which doubtless is true (i.e., it may, just as the provision thus also equally acknowledges, however, that it may not.) To avoid constitutional difficulties—difficulties that would arise from any broader understanding of this provision—it would be appropriate to interpret this provision merely to declare that abuse of the flag may be a means chosen deliberately to provoke a violent reaction and if undertaken just for that purpose then—as in the instance of “fighting words” (e.g., when “fighting words” are themselves used not as a form of political statement but, rather, in order to provoke a violent reaction)—it is the author’s understanding that such conduct when intended to incite a violent response rather than to make a political statement is outside the protections afforded by the first amendment. Again, taken this way, the observation may be substantially correct—but in being correct, it also covers very little ground.⁶

B. Necessarily, all of this should mean⁷ that even if the circumstances were such that violence (or a breach of peace) could reasonably be expected to result as a consequence of the defendant’s actions, so long as it was not his primary purpose or intent to induce or incite it—when he burned or destroyed a flag⁸—he is *not* to be subject to *any* penalty under this law. Specifically, if this is correct, all merely “reactive” violence—violence *not* sought as the immediate object by the defendant (who burns a flag as a political statement or as a public, politically demonstrative act of protest) but violence by those who, say, are but observers or passersby made angry or indignant by what they regard as outrageous behavior by him, for example, is thus *not* to be utilized as sufficient reason to seek his imprisonment rather than theirs.—Or so, at least, I believe the statute can be interpreted to provide. And if (and probably *only* if) it is so interpreted as I believe it thus can be understood, I think it will survive in the courts.⁹

II

The vast majority of all instances when the American flag has been used in some fashion others find offensive (and some may be inclined to react to in ways involving violence or a breach of the peace) have been so overwhelmingly merely an inseparable part of some kind of obvious political statement, however, that a criminal statute reaching such a use of the flag (including defacing or burning a flag) *only* when “primarily * * * intended to incite a violent response rather than [to] make a political statement,” will cover very little. For example, so far as I can determine, it will cover *no* instance of public flag “desecration” of *any* of the *many* (allegedly) offensive

flag, motto, seal, etc.) could conceivably permit it to draw on the “necessary and proper clause” to protect personal flag ownership from interference (including interference by theft or conversion), so the ultimate answer to this question is a bit unclear. I agree with the other commentators, however, that without doubt state criminal (and tort) laws already reach all instances that would come within this provision—so it is at best redundant and may (inadvertently?) represent still one more instance of gratuitously piling federal criminal sanctions on top of pre-existing state sanctions (a practice the American Bar Association, as well as the Chief Justice of the United States, has recently asked Congress to use more sparingly if at all). In brief, neither need for, nor any special utility of, these provisions has been shown).

⁵Subsection (a)(4) of § 2, (“Findings and Purposes”) declares (with emphasis and bracketed material added) that “destruction of the flag * * * can [but need not] be intended to incite a violent response *rather than make a political statement* and such conduct [presumably meaning by ‘such conduct’ only such conduct as is indeed intended to incite a violent response and not intended to make a political statement] is outside the protections afforded by the first amendment * * *.” As thus understood (i.e., understood as aided by the words I have placed in brackets), the subsection is not necessarily inaccurate as a strict first amendment matter.

⁶(See discussion *infra* in text at II.)

⁷And to avoid first amendment objections, must probably be construed to mean * * *

⁸Whether as “a political statement” or for any other purpose * * *

⁹As thus construed and applied, it may meet the test provided in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (“Our decisions] have fashioned the principle that the guarantees of free speech * * * do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”). If such “advocacy” (i.e., such “speech act” as one engages in) is directed to “inciting or producing” imminent lawless action (and is “likely to incite or produce such action”), on the other hand, the Court plainly implies that “the guarantees of free speech” do *not* immunize one from arrest or from prosecution under a suitably framed, properly applied law.

kinds of “flag abuse” that have been a fairly commonplace feature of our political landscape during the past fifty years in point of fact. And unless these past practices suddenly take a different turn, therefore, whatever the pretensions of the sponsors of the bill might be, there will be little or no real work for this proposed act to do.¹⁰

But permit me to get quite specific about this last observation, since it may seem counterintuitive. Still, there is frankly no question that this observation is fully applicable, by way of example, both to the events involved in *Texas v. Johnson*¹¹ and to those also involved in *United States v. Eichman*,¹² which events and cases previous bills (and now this bill) were evidently meant to respond to in some fashion, but that this bill could by its own terms *not affect at all*.¹³ And I press this observation, because precisely to the extent the bill *has* been drafted—and *can* be construed—to avoid the constitutional infirmities of prior, failed “flag protection” acts—by being very narrowly drawn as the sponsors have striven to do, it merely indicates limitations in no way reflecting on its drafters, but merely what the First Amendment itself protects—and will continue to protect unless itself altered, amended, or abridged.

A. So, for example in *Texas v. Johnson*, Justice Brennan begins the Opinion for the Court by expressly noting that Johnson was convicted for publicly burning an American flag,¹⁴ but strictly as an expressive part and feature of a public and political demonstration, neither more nor less, as Justice Brennan expressly observed in the opening sentence of the Court’s Opinion in the case.¹⁵ Indeed, it was this fact—that the particular acts of the defendant were so entwined—that brought the first amendment to bear, and it also this fact that served as the basis of the Court’s decision reversing his conviction—nor would the proposed bill apparently affect the case in any way at all.¹⁶ As Justice Brennan also noted in the case,¹⁷ while “several witnesses testified they were seriously offended by the flag-burning,” it was also clear that “[n]o one was physically injured or threatened with injury” by anything Johnson said or did, including (among the things he did) burning a flag.

B. Next, when this Congress nevertheless reacted to the furor created by the Supreme Court’s decision in *Texas v. Johnson*, by enacting the Flag Protection Act of 1989 (as I and others urged it at the time not to do and testified would not withstand constitutional scrutiny consistent with the Court’s decision in *Johnson*), that act in turn was at once tested by individuals who protested that act’s enactment by very publicly burning flags in demonstrative opposition to the act itself.¹⁸ In re-

¹⁰ Moreover, to the extent there is any such useful work, such as it might be thought to be, it would be largely merely redundant of what is already subject to a multitude of state and local criminal laws—laws that already reach incitement to riot, violence, or breach of the peace, whether or not it involves torching a flag. Nor is there any reason at all to believe that any of the states—all of which already have such laws—are either unable or unwilling to bring the full force of any such merely standard criminal statutes to bear when any actual case would arise of a kind any of these criminal statutes can validly reach. In brief, this is simply *not* a subject where state or local law enforcement authorities lack encouragement or means to apply the regular force of applicable state criminal law, nor do I think the sponsors of the bill could readily provide examples of such local or state prosecutorial laxity. Far from this being the case, quite the opposite tends to be the rule—prosecutorial zeal in this area is surely the more usual response. The “need” for some overlapping, largely duplicative, criminal statute by Congress in this area, in short is thus far from clear.

¹¹ 491 U.S. 397 (1989).

¹² 486 U.S. 310 (1990).

¹³ Indeed, however, the observation is fully applicable as well to virtually every other case the Supreme Court and indeed the lower courts have had occasion to consider during the past fifty years, involving politically controversial uses of the flag. Some of these are discussed *infra* in the text.

¹⁴ (—For which he was promptly prosecuted under the relevant Texas statute punishing acts of physical desecration of venerated objects including the American flag as one such object, ultimately and successfully appealing that conviction to the Supreme Court.)

¹⁵ 491 U.S. 397, 399 (1989).

¹⁶ Johnson was not arrested or prosecuted for “inciting, or attempting to incite, a riot or violence,” nor is there any reason to think he would not have been charged with that offense had the arresting officers believed there were suitable grounds (rather there was simply no evidence that this was his intent—to incite or to provoke a riot—in burning the flag in a public plaza—as an incident of expressing bitter feelings for ongoing proceedings in the Republican Convention then in progress, in Dallas).

¹⁷ 491 U.S. at 399.

¹⁸ In one instance the defiance of Congress’s handiwork was demonstrated very publicly indeed, specifically, as noted in the Court’s subsequent Opinion, by several persons who “knowingly set fire to several United States flags on the steps of the United States Capitol while protesting various aspects of the Government’s domestic and foreign policy” and virtually simultaneously by others, “by knowingly setting fire to a United States flag in Seattle while protesting the Act’s passage.” (See *United States v. Eichman*, 496 U.S. 310 at 312 (1990).

viewing the several convictions obtained in the lower courts (under the new act of Congress) in both these cases, the Supreme Court at once did all of the following: (a) It expressly affirmed its decision in *Johnson*; (b) applied it to these cases (which had been brought to it for prompt review of those convicted under the new act of Congress); (c) reversed both convictions; and (d) held the act unconstitutional as applied.¹⁹

Nor—and here’s the immediate point to which these observations are meant to be pertinent—do I read or understand the provisions of the proposed bill, S. 1335, as presuming to try to dictate a different result in any case involving similar facts and acts as were all present in these cases—for, indeed, if it did, presumably, the outcome would once again be the same—the acts as thus applied (were it thought to apply) would be unconstitutional as applied unless the Court itself is prepared simply to overrule itself as there is no reason to think it would should.

C. And again, in still a different case, in *Spence v. Washington*,²⁰ the alleged criminalized misuse of a flag consisted of defendant’s effrontery in having presumed to tape a peace symbol onto the face of a flag—thus “defacing” it—which flag he then displayed (as a political demonstration of his views) outward from the windows of his apartment for public view. Here, again, the Supreme Court reversed the conviction (a conviction obtained under a state law forbidding such defacing and public display of a flag). It reversed that conviction “on the ground that as applied to appellant’s activity the Washington statute impermissibly infringed protected expression.”²¹

In brief, here, too, the facts involved a politically expressive use of a physical flag, not burned, but nevertheless altered in a manner the state forbade, and then publicly displayed, as Spence saw fit to do. Moreover, that Spence’s uses of his flag in this way may have offended others (as indeed it did), or may have motivated some even to want to act against him in some way, was neither here nor there. As the Court itself observed in *Spence*.²² “We are unable to affirm the judgment below on the ground that the State may have desired to protect the sensibilities of passersby. ‘It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.’”²³

D. The just-quoted portion of *Spence*, moreover, was itself taken from a still earlier “flag-abuse” case, itself once again, however, also involving a political demonstrative destruction (burning) of a flag on the public street, with the defendant’s conviction once again reversed on First Amendment grounds. In *Street v. New York*,²⁴ as in each of these other real cases, it was plain on the facts that the incident was one involving the public expression of political feelings (nor was there any evidence that Street presumed to burn a flag when and as he did to incite lawless action either against himself or anyone else). Indeed, however, I have found no case at all where it was plain that the “destruction of the flag of the United States” was in fact “intended to incite a violent response rather than make a political state-

¹⁹ *United States v. Eichman*, 496 U.S. 310 (1990).

²⁰ 418 U.S. 405 (1974).

²¹ *Id.* at 406.

²² *Id.* at 412.

²³ And in *Spence*, note, too, that the Court had also declared: “Nor may appellant be punished for failing to show proper respect for our national emblem [citing still previous decisions of the Court].” There was no novelty in any of this. The Court has for decades made it perfectly plain that the first amendment protected uses of flag (e.g., incidental to political demonstrations) were not to made subject to any offended person’s veto; nor may the state use the disturbance of the peace, much less the threat of riot, by persons affronted or made angry over one’s provocative use of first amendment rights (including flag uses) as a justification to arrest the person exercising those rights. See, e.g., *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538 (1992); *American Booksellers v. Hudnut*, 771 F.2d 323 (7th cir. 1985), *summarily affd.*, 475 U.S. 1001 (1986); *Houston v. Hill*, 482 U.S. 451 (1987); *People v. Cohen*, 403 U.S. 15 (1971) (“[T]he issue is whether California can excise as ‘offensive conduct,’ one particular scurrilous epithet from public discourse, either upon the theory * * * that its use is inherently likely to causes violent reaction or upon a more general assertion that the State, acting as guardian of public morality, my properly remove this offensive word from the public vocabulary. * * * The argument amounts to little more than the self-defeating proposition that to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the State may more appropriately effectuate that censorship [itself].”); *Rosenfield v. New Jersey*, 408 U.S. 901 (1972); *Lewis v. New Orleans*, 408 U.S. 913 (1972); *Brown v. Oklahoma*, 408 U.S. 914 (1972); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (“[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”) *Cantwell v. Connecticut*, 320 U.S. 296 (1940). See also *Skokie v. National Socialist Party*, 373 N.E.2d 21 (Ill. 1978).

²⁴ 394 U.S. 576 (1969).

ment,”²⁵ so lift it out from First Amendment protection, much less any that appear to meet the full requirement of the act.

IV

Briefly Then To Sum Up: Unless the critical provision of the act is applied more broadly than a tightly constrained construction would approve²⁶—

(a) If thus construed (as it can be construed) to apply only in circumstances consistent with the requirements of *Brandenburg v. Ohio*, within that restricted field of application, it may well be sustained in the Supreme Court;

(b) However, as thus very tightly constrained, it will not reach many—possibly not any—of the various kinds of “flag burning” cases, or other “flag desecration” or “flag abuse” cases involving varieties of political expression political demonstrations previously held by Supreme Court to be protected by the First Amendment.

(c) Moreover, the cases it—the act—may *clearly* reach *without* substantial risk of being held unconstitutional as applied, are cases involving acts *already* so subject to such criminal penalties (e.g., for incitement to violence or riot) as state and federal criminal law *already* cover, as to raise as a fair question respecting the need for or propriety of this legislation at all. And in brief, if this is so, one must finally ask, just what is there, if anything, of a constitutionally proper concern, that is honestly sought to be served by the act?

V

I am frankly unable to answer this last question I have just posed, and may be forgiven a reluctance to speculate. Yet, whatever it is, it will be most unseemly, I cannot help but believe, that Congress may exhibit no equal interest in bringing to bear the full impact of harsh national criminal sanctions against anyone mistreating the flags of *other* nations in demonstrations of protest as may occur in this country, as Congress appears so willing to provide for our own. But evidently this is what some in Congress appear eager and willing to do. Again, however, I cannot imagine why.

Yet, if so, is this, then, finally to be the example of “liberty” and of “freedom” we now mean to broadcast to the world?—That Americans are free to burn the English Union Jack, or despoil the French Tricolor, or trample the flag of Canada, South Africa, Iraq, Pakistan, India, or Mexico, as they like, in messages and demonstrations of discontent or protest as they may freely occur in this country, but assuredly *not* (or not so far as this Congress will be given license by the Supreme Court to prevent it) so to make any equivalent use of our own? And indeed that *this* is how we now want to present ourselves to the world?

But I would hope, Senator Hatch, that you and your colleagues would think otherwise, and that you will conclude that to “wrap the flag” in the plaster casts of criminal statutes in this way—as this and virtually every similar bill²⁷ seeks to do—would be a signal mistake. Its occasional burning, utterly unattended by arrest, by prosecution, by sanctions of jail and imprisonment, is surely a far better tribute to freedom than that it is never burned—but where the explanation is not that no one is ever so moved to do (we know some are) but are stayed from doing to by fear of being imprisoned, as some would seek to have done. *That* kind of inhibiting fear is merely the example even now, half-way around the world. It is furnished in a place called Tianamen Square. It is a quiet, well-ordered place.²⁸ But Tianamen Square is *not* what ought to appeal to us—it is but a quietude of repression, it has a desuetude of fear, it is a place occupied by the harsh regime of criminal law. It furnishes no example whatever of a sort we should desire to emulate or pursue.²⁹

So, I hope in the end that you and your colleagues may come to believe the flag of the United States is not honored by putting those who “abuse” it, whether in

²⁵ Whether or not by means one could expect to stir some to resentment or anger (that it may do so does not in any degree make it less of a means of making a political statement on that account).

²⁶ In which event, if it is given any significantly broader sweep it is likely to be held unconstitutional (even as Professors Presser and Cassell suggested).

²⁷ And even some proposed amendments to the Constitution itself

²⁸ No one would dare burn the national flag of the The Peoples’ Republic, not now, not in Tianamen Square.

²⁹ The better contrasting example we should desire to furnish, surely, is to be found in the compelling remarks by Thomas Jefferson in his own first Inaugural Address. It was Jefferson’s straightforward view that—

“If there be any among us who would wish to dissolve this union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.”

some egregious or in some petty incendiary fashion, in prison or in jail. Rather, let us regard them even as Jefferson spoke more generally to such matters in his first Inaugural Address,³⁰ leaving them “undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it,” as surely is true.

Sincerely,

WILLIAM VAN ALSTYNE.

HARVARD LAW SCHOOL,
Cambridge, MA, April 21, 1999.

Senator ORRIN HATCH,
U.S. Senate,
Washington, DC.

DEAR SENATOR HATCH: I want to thank you again for inviting me to appear at yesterday’s hearing on the constitutional amendment restoring congressional authority to protect the American flag. I am especially grateful for your graciousness to the witnesses on both sides of the issue.

I would like to take this opportunity, if I may, to expand on my answer to one question you asked me—the one about the “Guidelines for Constitutional Amendments” promulgated by a group that calls itself “Citizens for the Constitution.”

As said yesterday, I am familiar with this group. I participated in two of its meetings—one public, one private—held at Harvard Law School. I have general views about its “Guidelines” project as well as particular views about application of the “Guidelines” to the flag amendment.

THE “GUIDELINES” IN GENERAL

Three general features of the “Guidelines” project are striking. (1) The ultimate and authoritative guidelines for amendment of the Constitution are set forth in the document itself. On one hand, Article V prescribes the requisite supermajority votes required of specified representative institutions. And, on the other, the Preamble makes clear that the “sovereign” to which representative institutions in the federal government are responsible is “We, the People.” It follows that, in the end, the crucial guideline for congressional referral of a proposed constitutional amendment to the state legislatures is the will of the people—a will that is sustained, over some time, by more than a bare majority among them. Of course, anyone is free to try to persuade the people (and their representatives) to support or oppose a particular amendment. What’s more, anyone is free to advocate general “guidelines” for amendment going beyond the democratic ones set forth in the Constitution—just as anyone is free to advocate general “guidelines” that ought to be met by social welfare legislation or health care legislation. But the job of Congress, I would assume, is to vote up or down on each proposal and to do so as representatives of the people, not as devotees of anyone’s extra-constitutional “theory.”

(2) The eight “guidelines” advocated by the Citizens for the Constitution are platitudes. Although (as I have indicated) they should not be viewed as requirements, who could disagree, in the abstract, that they are, at least, relevant considerations? Indeed, they are so commonplace and vaporous as to make one wonder why anyone would imagine Congress needs to be informed of their relevance. The question is: What are the drafters of the “guidelines” afraid of?

(3) The overall emphasis in the Introduction to the “guidelines” and in the “guidelines” themselves is on “self-restraint” and on fear that “self-restraint may be breaking down” among elected representatives—rather than on responsiveness to the people. The bias, indeed, is in favor of “amendment” of the Constitution by unelected people wearing black robes—rather than by elected representatives as was plainly intended by Article V. The Citizens for the Constitution may talk of the value of “stability.” But they seem unconcerned about instability produced by constant changes in constitutional meaning accomplished by a majority—often a mere 5–4 majority—of the Supreme Court. What they are afraid of—and what their scare rhetoric seeks to stir up fear of—is “We the People.”

The “guidelines” thus seek to entrench the status quo, the judicially determined status quo. There was a similar effort—also led by prestigious members of the bar—early in this century. Then, prominent lawyers and law professors sought to entrench a judicially determined status quo—the common law—against social welfare and regulatory reform by legislatures. Then, too, they mobilized abstract platitudes

³⁰(See quotation *supra*, n. 29.)

in service of “stability.” But, then, it was progressives who exposed and opposed their effort to stymie democratic government. Where are the self-styled “progressives” today? It seems (as an active Democrat I’m sorry to say this) that a number of them have taken up the old across-the-board stance against change and democracy.

THE “GUIDELINES” AS APPLIED TO THE FLAG AMENDMENT

As abstract platitudes, the “guidelines” are susceptible to use as wise-sounding wrapping around conclusory assertions—what I describe to my students as “reasoning by harrumphing.” Thus a standpatter can cite one of them and simply say, “I’m concerned [or worried] about that.” I am confident the Senate will not settle for such a parody of debate. And, once citation of the “guidelines” is made a subject of clear-headed point-by-point debate, I am confident that the Senate will see that, as applied to the flag amendment, the “guidelines” are in fact fully satisfied.

Let me go through the eight “guidelines” in order.

(1) *“Abiding Importance”* In my testimony, I took pains to emphasize that what is at stake here is not a matter of “immediate gratification” or of opposition to a particular series of flag-burnings. Rather, I said, it is about restoring the power of Congress to preserve a vital national resource, a resource that is invisible but no less real for that—respect for the ideal of national community, uniquely symbolized by the flag. This resource was long taken for granted, but is being eroded not by the “malcontents” who trash the flag, but by the 5–4 Court decision that “amended” the First Amendment to *legitimate* the trashing and by the failure of the rest of us to correct that mistake decision. Our children, or our children’s children, eventually may not even remember what this eroded resource was, much less have access to it. If that happens, they will be the poorer, since any great military or domestic project depends on it and since, as I said, liberty that lacks a foundation in community rests on a foundation of sand. What is at stake, then, is the kind of America we leave to future generations, obviously a matter of “abiding importance.”

(2) *“Making ‘Our System More Politically Responsive or Protect[ing] Individual Rights’* The flag amendment restores to Congress power to be responsive to a sustained value-commitment of most of the American people. It was the 5–4 Court decision that “amended” the Constitution, after two centuries, to block such responsiveness. The majority of the Court did not “protect” an individual “right.” It *concocted* a new one. By the same token, the Court did not “protect” a “powerless minority.” For the right of a minority to express its views in any number of ways (by words and by acts) has long been guaranteed and is not affected by the proposed amendment. If, however, long-recognized free speech rights are to be maintained in the future—if free speech is not to turn into a contest to see who can yell loudest—respect for American community-despite-diversity must be maintained. That is the aim of this amendment. Hence, this amendment protects individual rights.

(3) *“Exhaustion of ‘Other Means’* In 1989, Congress went the extra mile and against good advice, tried a statutory alternative to an amendment. It was slapped down immediately by the 5–4 Court majority. It is now perfectly clear—as I demonstrated in my letter to you of March 10—that there is absolutely no alternative. All “other means” have been thoroughly exhausted.

(4) *“Consistency With ‘Related Constitutional Doctrine That the Amendment Leaves Intact’* The flag amendment is more narrowly and sharply focused than any under consideration in the last two decades. It is designed specifically to correct one and only one mistaken “interpretation” of the First Amendment by five Justices in 1989 and 1990. It would *restore* to the First Amendment the meaning it was understood to have for the two centuries before 1989. Plainly, then, it is perfectly consistent with all other free speech doctrine, that which existed along with it before 1989 and that which has been elaborated since then. Thus, contrary to bizarre speculation in the statement by the Acting Assistant Attorney General, the void-for-vagueness doctrine and the doctrine of the *R.A.V.* decision would not be affected in any way. A statute enacted under the amendment would have to pass muster under both—that is, it could not be excessively vague (and the Flag Protection Act of 1989, drafted with much expert advice, was not) and it could not discriminate among particular points of view of those who physically desecrate the flag in a fashion specified by the statute (and the Flag Protection Act of 1989 does not). What is most peculiar is that opponents of a restorative (as opposed to a transformative) amendment try to depict it as “inconsistent” with surrounding doctrine—or as an “amendment of the Bill of Rights”! Obviously, this is utterly false.

(5) *“Enforceable Standards”* Being so narrowly and sharply focused—and being intended to restore authority that the Congress exercised for most of this century and, in particular, to validate the Flag Protection Act of 1989—there can be no legitimate

issue on this count. Terms in provisions of the Constitution are interpreted in context. And, in this case, there is a long-standing context and practice by which to read the terms “physical desecration” and “flag.”

(6) “*Think[ing] Through and Articulat[ing] Consequences*” For the last ten years—and particularly for the last five—we have considered consequences of adopting the flag amendment. There is no issue on this count. What is odd, again, is that anyone would raise it with respect to a proposed amendment that *restores*—rather than transforms—the long-understood meaning of the Constitution.

(7) “*Full and Fair Debate*” Everyone recognizes that the debate over this amendment has been as “full” and “fair” as a debate could possibly be.

(8) “*Ensur[ing] a Contemporaneous Consensus*” It is, of course, up to Congress whether to set a deadline for ratification of an amendment and, if so, what deadline. In this case, however, there is little problem of ensuring a “contemporaneous consensus.” Already, the legislatures of 49 states have memorialized Congress urging it to send the flag amendment of them, pursuant to Article V. It is as likely as can be that they will act on it promptly once it is sent to them.

At the hearing yesterday, we were criticized for having “chosen” the “mechanism” of constitutional amendment. *It was, however, the framers who “chose” it.* And for good reason. Article V is the keystone of the authority of the Constitution. It guarantees that—despite short-sighted efforts by some to entrench a judicially determined status quo—the Constitution will remain the property of “We the People.”

Sincerely,

RICHARD D. PARKER,
Williams Professor of Law.

THE UNIVERSITY OF UTAH,
Salt Lake City, UT, March 11, 1999.

Re: proposed criminal statute on flag protection.

Senator, ORRIN G. HATCH,
Chairman, Senate Judiciary Committee,
Washington, DC.

DEAR SENATOR HATCH: Thank you for your recent inquiry about the constitutionality and practicality of the Flag Protection and Free Speech Act, a proposed federal criminal statute prohibiting flag burning in certain narrowly-specified circumstances. I understand your inquiry to request information primarily about section (a) of the statute, which would provide federal criminal penalties for any person “who destroys or damages a flag of the United States with the primary purpose and intent to incite or produce imminent violence or a breach of the peace, and in circumstances where the person knows it is reasonably likely to produce imminent violence or a breach of the peace.” Sections (b) and (c), prohibiting theft of flags belonging to the federal government or on federal property, do nothing other than duplicate existing laws.

Under current Supreme Court doctrine, section (a) has grave constitutional difficulties and would, in all likelihood, be invalidated by the Court were a case to present the issue. Two serious challenges can be raised. First, as you are well aware, the Supreme Court in several recent cases has emphasized that Congress must not tread on the powers reserved for the states. Thus, in *United States v. Lopez*, 514 U.S. 549 (1995), the Court declared unconstitutional the federal Gun-Free School Zones Act, which made it a federal crime to possess a firearm in or near a school. The Court explained, “[t]he possession of a gun in a local school zone is in no sense an economic activity that might through repetition elsewhere, substantially affect any sort of interstate commerce.” *Id.* at 567. The same kind of challenge can be raised to proposed anti-flag burning provision. It essentially criminalizes breach of the peace throughout the states whenever that breach relates to a flag. It is unclear what power Congress could use to justify this extension of the federal criminal law.

The statute is also, of course, open to serious challenge under the Supreme Court’s opinions striking down two previous criminal statutes prohibiting flag burning. As is well known, in *Texas v. Johnson*, 496 U.S. 310 (1990), and again in *United States v. Eichman*, 496 U.S. 310 (1990), the Supreme Court by the narrowest of margins declared unconstitutional statutes that singled out the flag for special protection. The five-member majority in *Eichman* explained that, in seeking to protect the flag, “the Government’s asserted interest is related to the suppression of free expression.” 496 U.S. at 315 (internal quotations omitted). This principle demonstrates that the third time will not be the charm in surviving Supreme Court re-

view. The proposed statute's express goal—the protection of the flag—is that which the Court has found to be constitutionally impermissible. It makes no difference that the proposed statute is narrowly drawn so as to cover only destruction of the flag with the intent to produce violence or a breach of the peace. The fact remains that the statute's animating concern is for the “flag's symbolic value,” 496 U.S. at 317, something that the current Court will not permit. Indeed, the narrowness of the provision's reach only renders it more susceptible to attack. In a separate line of cases, the Court has explained that “selective limitations upon speech” are subject to First Amendment attack. See, e.g., *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 392 (1991). Nothing could be more “selective” than a statute that singles out for criminal sanction, among all forms of breach of the peace, those involving flag desecration.

All of this strongly suggests that the proposed statute would not survive constitutional challenge in the Supreme Court. It is open to question, however, whether a conviction under the statute could ever be obtained without the virtual consent of a defendant. The statute covers those who act with the “primary purpose and intent” of producing “imminent violence or a breach of the peace.” As a former federal prosecutor, I find it hard to imagine a case of flag burning that would fall within these terms—much less one that could be proven beyond a reasonable doubt to do so. Perhaps if the statute were adopted, a person hoping to be the Supreme Court test case would obligingly announce that his purpose is to provoke such a breach of the peace. It is debatable whether such a prosecution would truly involve a “case or controversy” under the Constitution eligible for Court review. Other than such contrived situations, virtually no case of flag desecration would be prohibited by the provision.

As I understand the intent of the drafters of the provision, it was to demonstrate “zero tolerance for those who deface our flag” by providing “swift and certain punishment” for flag desecration. 41 Cong. Rec. S15338 (Oct. 19, 1995) (statement of Sen. McConnell). The statute plainly will not achieve these goals. The only way to truly protect our nation's national symbol is to pass a constitutional amendment, as the overwhelming majority of the nation's citizens desire. Such a step would be no innovation, nor would it pose a threat to recognized freedoms. Until the recent decisions of the Supreme Court, it was generally accepted that statutes criminalizing the desecration of the flag were consistent with our constitutional history and traditions. I hope that the Congress will move swiftly to restore this conventional understanding.

Sincerely,

PAUL G. CASSELL,
Professor of Law.

CONGRESSIONAL MEDAL OF HONOR SOCIETY, UNITED STATES OF AMERICA,
Olympia, WA.

“WHAT THE FLAG MEANS TO ME”

As a young man I was exposed to some history of our flag by our Scout Master, Mr. Robert Timkala. This was a very short dissertation concluded with honor your flag. As an adult I have cherished his words and followed his direction and I fly the American Flag at my home and place of business every day. This represents to me the strength of our country as it protects all of the citizens and much of the free world. The raising of the flag on Iwo Jima represented the successful conclusion of the massive task in World War II, the honor and pride I have in this symbol of our great nation and should not be reduced in any manner.

Sincerely,

ROBERT E. BUSH, C.M.H.,
Past President, Medal of Honor Society.

REMARKS OF RAY DAVIS ON BEHALF OF MAJ. GEN. PATRICK BRADY

Consider all those legions of young Americans who stood tall when our flag was near and then gave their lives to defend it.

Recall Fort McHenry in September, 1814, where our gallant defenders withstood 25 hours of bombardment from enemy ships, then repelled a landing force as they refused to lower our flag. That flag inspired our national anthem.

Permitting the desecration of our flag will invite conflict. Teams of fighters will be formed to extinguish any burning flag, fight any desecration and encourage respect for our flag—all under the stretched definition of “speech”.

APRIL 29, 1997.

No one loves liberty more than those who lose it and lose it for a long time. I was shot down on August 26, 1967 * * * captured, escaped, and was recaptured some two weeks later. I spent 38 months of my 67 months in solitary * * * where I had the time to sort out what is important, and what is not. I started my daily regimen by first saying the pledge of allegiance to the flag, then reciting the lord’s prayer, and then praying for my family.

The reason for doing it in that order was that I knew above all other things that my country would never desert me * * * and it was of utmost importance that I not desert my flag! She was my link to civilization.

When we were moved into joint living with about 40 other people, I was the commander. I ordered my troops to face to the East every afternoon to say the pledge of allegiance. This motivated one of my junior officers (Mike Christian) to craft a home-made flag from scraps. He sewed it inside of his shirt, and at pledge time, he would turn the shirt wrongside out, hang it on a line * * * and we would say the pledge and render a hand salute. It was the best time of every day.

At one of the shakedown inspections, the commies found the flag. They brutally dragged Mike out and we could hear them beating him for hours. He came back that nite with broken ribs, and his face battered. They broke his ribs * * * but not his spirit. A few days passed and Mike approached me. He said: “Major, they got the flag * * * but they didn’t get the needle I made it with. If you agree * * * I’m making another flag!”

My answer was * * * “Do it!”

It was several weeks before we had another homemade flag * * * but he finished it.

There was never a day from that day forward that the stars and stripes did not fly in my room, with 40 American pilots proudly saluting! What we guaranteed to 40 American prisoners should be the minimum guarantee for the entire United States.

God bless U, and God bless your efforts.

COL. BUD DAY, MOH-AFC,
POW 1967-1973.

APRIL 24, 1997.

Per your request, here are some of my thoughts on what the flag means to me.

A few days ago I went to a friend’s wake service. There in his casket, in front of the church for all to see was a neatly folded United States flag, given to the family from a grateful nation. Ray was a veteran and had served his country honorably.

I couldn’t help but think, would the flag mean as much to the family of a deceased veteran or to any American if we allow people to burn, spit and whatever else they do in the name of “Freedom of Speech”. As a veteran myself, I am sick of it, and feel the flag should be protected for future generations.

Sincerely,

MICHAEL J. FITZMAURICE, CMH.

FRATERNAL ORDER OF POLICE, NATIONAL LEGISLATIVE PROGRAM,
Washington, DC, April 13, 1999.

Hon. ORRIN HATCH,
Chairman, Senate Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: I am writing this letter on behalf of the more than 277,000 members of the Grand Lodge, Fraternal Order of Police to advise you of the strong support of S.J. Res. 14, which would amend the Constitution to give Congress the power to prohibit the physical desecration of our nation’s flag.

Attempts by the Congress to protect the flag statutorily have failed to withstand judicial review. The Supreme Court has, in two narrow 5-4 decisions, overturned statutes prohibiting physical desecration of the flag. Amending the Constitution is the only way to return to the American people the right to protect their flag.

Flag burning is not free speech; it is an act of vandalism—a hate crime, pure and simple. What is the difference in the political statement made by a vandal torching the American flag and a terrorist who makes his political statement by blowing up government buildings? Quite simply, there is no difference. The American people recognize that, and Congress ought to recognize it by passing this amendment.

When we bury a hero, a brother or sister from the ranks of our military or our police departments, a flag is draped over the coffin. It is folded solemnly and presented to the surviving members of the family in remembrance of the one who gave his or her life. Whether a soldier fighting a foreign enemy on a foreign shore, or a police officer killed in the line of duty—the sacrifice of each is symbolized by the flag. To desecrate this symbol is to dishonor that sacrifice. To use freedom or liberty as a shield to commit a crime is no more than base cynicism and a very real miscomprehension of the American concept of liberty.

I salute you, Mr. Chairman, for your sponsorship of Senate Joint Resolution 14, and join you in urging all members of the United States Senate to protect our flag from those who would dishonor our nation and its heroes.

If we can be of any further assistance to you in moving this bill forward, please do not hesitate to contact me or Executive Director Jim Pasco at my Washington office.

Sincerely,

GILBERT GALLEGOS,
National President.

B/G PAT BROOKS, CHAIRMAN OF THE BOARD

WHAT THE FLAG MEANS TO ME.

The American Flag means I can go anywhere I want to go. I fought for the American Flag and the United States of America.

We won the victory when we was fighting in Korea. It was for the Red, White and Blue Flag, and the United States of America.

God Bless you all.

RODOLPHO "RUDY" P. HERNANDEZ.

THE AMERICAN LEGION,
Washington, DC, April 14, 1999.

Hon. ORRIN HATCH,
U.S. Senate,
Washington, DC.

DEAR SENATOR HATCH: On behalf of the 4 million members of the American Legion family, I want to personally thank you for sponsoring SJR 14, the Flag Protection Constitutional Amendment. We truly realize how important passage of this amendment is to the future of our children. It is imperative that we return to the American people the right to protect the U.S. Flag. I can assure you that Legionnaires and their families will do everything possible throughout our great nation to assist you in getting SJR 14 passed this year.

The majority of Americans support this amendment. Polling during the past 10 years has consistently shown nearly 80 percent of voters believe protecting the U.S. Flag through a constitutional amendment is the right thing to do. They do not believe such protection is a threat to freedom to speech.

I am certain you were as touched as I in reading the reports of our stealth pilot rescued from Yugoslavia. He carried an American flag, folded under his flight suit. The flag was given to him by an airman before he took off from Aviano Air Base in Italy. Following his rescue the pilot told reporters, "For me, it (the flag) was representative of all the people who I knew were praying. It was a piece of everyone and very comforting. It helped me not let go of hope. Hope gives you strength * * * it gives you endurance."

My heart also swelled with pride when I saw an Associated Press photo of a flyer from the 31st Air Expeditionary Wing at Aviano waving an American flag to boost morale as U.S. war planes prepared to launch another series of strikes in support of NATO's Operation Allied Force.

The U.S. Flag is a powerful symbol. A living symbol of our great nation. Providing a special place in the U.S. Constitution that protects our flag is what Americans want and deserve.

I stand ready to assist you in any way that will help assure passage of this amendment. I know that your encouragement of your fellow Senators will make the crucial difference.

Thank you again for your sponsorship of SJR 14.

Sincerely,

HAROLD L. "BUTCH" MILLER,
National Commander.

THE AMERICAN LEGION,
Indianapolis, IN, April 23, 1999.

Hon. ORRIN HATCH,
U.S. Senate,
Washington, DC.

DEAR SENATOR HATCH: On September 5, 1989, American Legion delegates at the National Convention in Baltimore, Maryland, unanimously adopted a resolution seeking adoption and ratification of a flag-protection amendment. In every year since, the issue has been debated at every national convention and at every meeting of the National Executive Committee, and a new resolution authorizing continuation of the campaign has been adopted. Each resolution supporting a flag-protection amendment passed unanimously with all Past National Commanders having a right to be heard. Past National Commander Keith Kreul, who, as a PNC and delegate to the National Conventions, has both a voice and a vote in the making of Legion policy, has never publicly uttered a word in opposition.

As National Commander, it is my duty, and privilege, to serve a one-year term as the executive head of the The American Legion with full power to enforce the provisions of the National Constitution and by-laws as well as resolutions of the National Convention. And this national commander fervently supports the flag-protection amendment, as do all living Past National Commanders of The American Legion, save one.

In honor of their service, I would like to enter into the record the 28 Past National Commanders of The American Legion who have given of themselves for God and Country and who stand with me in their support of an amendment which would return to the American people the right to protect their flag. They are listed below in order of service.

E. Roy Stone, Jr., South Carolina.
Erle Cocks, Jr., Georgia.
J. Addington Wagner, Michigan.
Preston J. Moore, Oklahoma.
William R. Burke, California.
Hon. Daniel F. Foley, Minnesota.
Donald E. Johnson, Iowa.
William E. Galbraith, Nebraska.
John H. Geiger, Illinois.
Joe L. Matthews, Texas.
James M. Wagonseller, Ohio.
William J. Rogers, Maine.
John M. Carey, Michigan.
Frank I. Hamilton, Indiana.
Michael J. Kogutak, New York.
Clarence M. Bacon, Maryland.
Hon. James P. Dean, Mississippi.
John P. Comer, Massachusetts.
Hon. H.F. Gierke, North Dakota.
Miles S. Epling, West Virginia.
Robert S. Turner, Georgia.
Dominic D. DiFrancesco, Pennsylvania.
Roger A. Munson, Ohio.
Bruce Thiesen, California.
William M. Detweiler, Louisiana.
Daniel A. Ludwig, Minnesota.
Joseph J. Frank, Missouri.
Anthony G. Jordan, Maine.

Their service spans nearly five decades. Many served in their position in an era when our flag was protected under law. Only ten of us have served since the erroneous 1989 *Texas v. Johnson* Supreme Court decision which invalidated flag protection laws in 48 states and the District of Columbia.

I am proud to be among this elite group of distinguished gentlemen who stand united in a common goal—passage of a flag-protection amendment.

Sincerely,

HAROLD L. "BUTCH" MILLER,
National Commander,
The American Legion.

To me and to many of my fellow Americans, we feel strongly, that to show disrespect or to desecrate our flag, the "Stars and Stripes" is an act that should not and cannot be allowed.

I was prepared to die by defending our flag as did so many of my fellow Americans during time of War.

The "Stars and Stripes" is a symbol of what our great country represents and stands for and we need to preserve the dignity and honor of our flag, the "Stars and Stripes".

Thank you.

HIROSHI MIYAMURA.

SALON NATIONAL LA BOUTIQUE,
Washington, UT, March 13, 1999.

To: the U.S. Senate Judiciary Committee,
Washington, DC.

GENTLEMEN: I am writing as the National Chapeau of the Eight and Forty a subsidiary organization of the American Legion Auxiliary, consisting of 17,144 Partners (members). We are asking that when the measure to pass a constitutional amendment to protect our flag, comes before you that you unanimously approve the bill.

I have just recently had the opportunity to help judge girls who are in their Junior year of High School to attend the American Legion Auxiliary Girls State. One of the questions we asked each applicant was how they felt regarding a bill to protect our flag and each and every girl said she felt that there should be a law protecting our flag from desecration.

So for both the young people of our country and the older people who have fought to protect our country, we of the Eight and Forty ask you to support this bill.

Yours in Service to our Country,

WANDA S. NORTH,
Le Chapeau National.

HARVARD LAW SCHOOL,
Cambridge, MA, April 23, 1999.

Senator ORRIN HATCH,
U.S. Senate,
Washington, DC.

DEAR SENATOR HATCH: At the Judiciary Committee hearing on April 20, I regretted the last minute refusal by Randolph Moss to appear on a panel with other witnesses. For it meant that the rest of us had no opportunity to hear and respond to views of the Justice Department that the Acting Assistant Attorney General was going to present about the flag amendment. I have now read the statement he submitted to the Committee. I would like to take this opportunity, if I may, to respond to it.

The statement is an exercise in scare rhetoric. It repeatedly cites supposed uncertainties, risks and dangers. It calls for "caution" and "stability." It is, however, itself built of shoddy reasoning and even misstatements of law. Let me go through some of the flaws one by one.

(1) Mr. Moss says (page 2) that there is no need to protect the flag since "the last nine years have witnessed no outbreak of flag burning, but only a few isolated instances." I don't know how he uses the words "a few" or "isolated." More significantly, I don't see the relevance of this claim. As all who have been following this debate know, the need for flag protection has not been based on the number of recent incidents of flag desecration. (i) Rather, it has been based on the mistaken decision by five Justices of the Court to *legitimate*, such desecration. Putting the imprimatur of the Constitution on this behavior, the Justices in effect "authorized" and even "encouraged" it (as the Court itself has written in another context). Children growing up in the 1990's—unlike adults—tend to take flag burning for granted. If

the Court's decision is not corrected, it follows that, over the next several decades, young adults and then old adults will simply forget that the flag was ever (i.e., for two centuries) regarded as special, as something is be respected by all, whatever our other disagreements. (ii) The flag, therefore, needs to be protected as a matter of *principle*.

The statement by Mr. Moss that there is no need for flag protection is odd for another reason: It is at odds with the position of President Clinton. For, while the President has opposed an amendment, he has supported flag protection by statute.

(2) Mr. Moss speaks (page 2) of "our traditional resistance, dating back to the time of the Founders, to resorting to the amendment process." This is peculiar since it was the generation of the Founders that crafted and ratified Article V and that added more amendments to the Constitution than any other generation!

(3) Mr. Moss (page 2) claims that the flag amendment "would for the first time in our history limit the individual liberties protected by the Bill of Rights." This claim is as odd as it is familiar. For the point of the amendment is to *restore* the meaning that the Bill of Rights had for two centuries, until 1989. It was the 5-4 Court decision that changed its long-standing meaning.

His claim is odd for another reason: Some time ago, the President endorsed a victim rights amendment to the Constitution. Though, at the time of his original endorsement, there was (as I recall) no agreed upon text to endorse, he clearly was proposing to "amend the Bill of Rights." We must conclude, then, that the President is not panicked by this particular slogan.

(4) Mr. Moss argues (pages 3-4) that the Bill of Rights is "premised on an unclouded sense of permanence." Yet this argument is not only in some tension with the President's support for a victim rights amendment. More importantly, it seems (again) to miss the very point of the flag amendment—*restoring* the long-standing meaning of the First Amendment in order to *vindicate* its permanence, a permanence undermined by the 5-4 Court decisions in *Johnson* and *Eichman*.

(5) On pages 4-5—beginning the central part of his statement—Mr. Moss starts through a "reading" of the flag amendment that, with respect, can only be called bizarre. (i) First, he says it "fails to state explicitly the degree to which it overrides other constitutional guarantees." No amendment—other than the one specifically repealing the prohibition amendment—does so! In any event, it's not even a question here since the flag amendment plainly would not touch any other guarantee. Instead, it would simply restore to the First Amendment its pre-1989 meaning with respect to one issue. (ii) Nevertheless, Mr. Moss goes on to say "it is entirely unclear how much of the Bill of Rights the proposed amendment would trump." "How much"? The answer is: None. (iii) Then, going into reverse for a moment, he suggests that a "literal" reading of the amendment would cause it not even to affect the Court's flag burning decisions! Fortunately, he quickly recognizes the patent absurdity of this observation. But its very absurdity demonstrates that his aim is not to "read" the amendment at all, just to smear it with any gob of mud, however weak. (iv) He concludes that "we are in uncharted territory." Either: he is truly confused and at a loss. (In this case, he ought to speak autobiographically.) Or: he is trying to create confusion among others. (In this case, he plainly has not even begun to succeed.)

(6) Next (pages 5-7) Mr. Moss goes on to claim that the flag amendment might "authorize enactments that otherwise would violate the due process 'void for vagueness' doctrine." I really cannot imagine how he came up with this idea. He rests his case on what he says is the vagueness of words—"desecration" and "flag"—in the proposed amendment. But many, even most, words in significant provisions of the Constitution are vague by that standard. (Think of the words "commerce among the several states" or "general welfare.") The point is that the "void for vagueness" doctrine has *nothing* to do with language in the *Constitution*. Rather, it has to do with language in *statutes*. The flag amendment is intended to validate a specific statute—the Flag Protection Act of 1989—carefully drafted, with much expert advice, and enacted by a 91-9 vote in the Senate. When the Constitution employs general terms to grant Congress power, it is up to Congress to legislate in ways that satisfy the Due Process clause. Plainly, it showed that this can be done—and did so—with respect to prohibition of physical desecration of a flag of the United States.

(7) Then, Mr. Moss returns (pages 7-8) to the strange idea that, under the flag amendment, Congress might "be freed from all, or only some, First Amendment constraints." The phrase "all or only some" is puzzling. He mentions just one: the doctrine articulated in the *R.A.V.* case that forbids government to proscribe only certain sub-categories of "proscribable" expressive activity—such as "fighting words"—on the basis of their particular message or point of view. Obviously, this deeply-rooted doctrine would remain in place and would *forbid* Congress to punish only instances of flag burning by Democrats or by anti-war demonstrators. Yet Mr. Moss is "im-

mensely troubl[ed]” that the flag amendment might “override” *R.A.V.* so as to permit such laws—or even override “the whole of the First Amendment”! I really don’t know what to say to such scare rhetoric clothed as legal analysis—except that it is ridiculous and irresponsible.

(8) At the end (pages 9–10) Mr. Moss reprises his various claims. He says he has “real doubts” whether his “difficulties and uncertainty” can be resolved by “even the most careful drafting”. It appears that, if he had been at the Philadelphia Convention in 1787, he would have opposed any Constitution—the “uncertainties,” the “drafting” problems, would have seemed overwhelming. Yet he goes on to speak of this “reverence for the Constitution” and (again) of his unwillingness to “tamper with the Bill of Rights” which, he says (again), should be “permanent and enduring.” Yet his reverence in this instance appears to be focused not on the Constitution and Bill of Rights—which were products of a political process—but on the Court which “interprets,” and “reinterprets” and thereby “amends” it, free of any direct responsibility to the people.

Perhaps the problem, again, is that Mr. Moss is just unaware of the nature of the flag amendment—restoration to the First Amendment of its long-accepted and, it had been supposed, “permanent” meaning.

Sincerely,

RICHARD D. PARKER,
Williams Professor of Law.

RAOUL BERGER PROFESSOR OF LEGAL HISTORY,
NORTHWESTERN UNIVERSITY SCHOOL OF LAW,
Chicago, IL, March 6, 1999.

Hon. ORRIN G. HATCH,
Chairman, Senate Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: You have asked me for my views on the proposed Flag Protection Amendment, and on whether a statute could be passed to protect the United States Flag from desecration, thus making a Constitutional Amendment unnecessary. I would assume that any bill that might be submitted would be essentially the same as S. 982, the “Flag Protection and Free Speech Act of 1997,” which was introduced in the last Congress by Senators McConnell and Bennett, and embraced as well by Senator Lieberman. From time to time bills such as S. 982 attract some interest, and even though the Congressional Research Service (CRS) has taken the position that such a bill would pass constitutional muster, I disagree. There are many things in Constitutional law that are difficult or confused, as you know, but there is now one thing that is as certain as anything in Constitutional law can be, and that is that a bill such as S. 982, if passed, would be declared unconstitutional, and would be rejected by each and every federal or state court which considered it. Such a bill, given the current state of Constitutional law, would be not only a futile exercise in legislation, but an attempt to usurp a right, the right of Amending the Constitution, belonging to the American people, and would be an attempt thus to infringe on the right of the American people to determine for themselves the meaning of their Bill of Rights.

As you know, back in 1990, when the Congress was considering earlier legislation to protect the American flag, and when the Congress was advised by several law professors (among them Harvard’s Lawrence Tribe) that a statute could pass Constitutional muster, a few of us (including Judge Robert Bork and me) explained as clearly as we could that the language in *Texas v. Johnson*, the 1989 case which found unconstitutional the Texas flag desecration statute, meant that *no statute which sought to protect the flag from desecration could ever survive the strict scrutiny the Supreme Court said it would apply*. We were proved correct, when, in 1990, in *U.S. v. Eichman*, the Supreme Court rejected as unconstitutional a Congressional attempt to get around the *Texas v. Johnson* decision by statute. Every flag desecration statute that has come before the courts since 1989 has been rejected as unconstitutional, most recently the Wisconsin statute, which the Wisconsin Supreme Court held in 1998, *State v. Janssen*, could not even be applied to convict a ruffian who defecated on the flag. The Wisconsin Supreme Court implied that only an Amendment to the United States Constitution could protect the flag in such a situation.

In *Johnson* and *Eichman*, the majority of the United States Supreme Court made clear its belief, first that burning or desecrating the flag was an act of speech, and second, that any legislative measure designed to protect the flag from desecration would be viewed as “content discrimination,” as implying government disapproval

for a particular kind of speech. Such content discrimination, the Court pointed out, pursuant to its view of First Amendment interpretation, could only be justified for a “compelling governmental purpose.”

The only “compelling governmental purpose” the Court was willing to find in statutes preventing flag desecration, the Court made clear in *Johnson* and *Eichman*, was the protection of the flag’s symbolic value to the nation. But the Court also made clear that the only “symbolic value” of the flag which it was willing to allow a government to promote was *its standing for the very freedom of speech which the court believed was exercised in the act of desecrating the flag!* By this neat (one is tempted to say circular or specious) trick, the Court, in effect, was able to declare that those who desecrated the flag, by burning it, by shredding it, or even by defecating on it (as the Wisconsin decision reminds us), simply enhanced the symbolic value of the flag as a guarantee of free speech. Since the only permissible “compelling governmental purpose,” according to the court, was enhanced by permitted flag desecration, any statute prohibiting flag desecration would be construed as weakening this compelling governmental purpose instead of strengthening it. There could thus be no “compelling governmental purpose” in preventing flag desecration, and accordingly, since the Court claims that a flag desecration statute would be “content discrimination,” no flag desecration statute could pass Constitutional muster.

The federal statute rejected in *Eichman* purported to be “neutral” as to the content of the message intended by the flag desecrator, but this was of no moment to the *Eichman* court, which looked at the legislative history of the measure, and the public sentiment which led to it, and simply declared that it was an impermissible attempt to meddle with the Court’s conception of freedom of speech. The precise same fault would doom any bill similar to S. 982, but S. 982, and bills like it, have several other weaknesses which suggest their questionable provenance and which would render them unconstitutional.

For example, in Section 2(a)(1) of S. 982 Congress would have declared that the flag “represents the values of liberty, justice and quality that make this Nation an example of freedom unmatched throughout the world.” While this may well be correct, the Supreme Court, in construing the flag only to stand for the freedom of speech which it believes extends to the act of flag desecration itself, has given the flag a much narrower meaning. Since this is based on the Court’s reading of the Constitution, Congress is without power to broaden it. Strange and strained and bizarre as this point is, it’s inescapable after reading the *Johnson* and *Eichman* cases.

More troubling, I think, is the extraordinary assertion in Section 2(a)(2) of S. 982, that clearly implies that the proposed Flag Protection Amendment (that it seeks to replace) would amend the Bill of Rights, and that the Constitution “should not be amended in a manner that could be interpreted to restrict freedom, a course that is regularly resorted to by authoritarian governments which fear freedom and not by free and democratic nations.” This assertion is, among other things, a gratuitous insult to the men and women in the forty-nine state legislatures who have petitioned the Congress to pass the Flag Protection Amendment, and the roughly 80 percent of the American people who have consistently indicated their approval of the proposed Amendment. It is ridiculous and unseemly to suggest that their motive is to emulate authoritarian governments or that they “fear freedom.”

Equally disturbing is the fact that the decision on whether to amend the Constitution is not one on which Congress has the right to advise the American people, to whom that amendatory power ultimately belongs. It is true that one route to the Amendment goal starts with Congress, and the people’s representatives have their say, but they are authorized to act as the people’s *agents*, and not as their *masters* in the Amendment process.

Moreover, for more than one hundred years the courts upheld flag desecration statutes, and such noble champions of the Bill of Rights as Justices Hugo Black and Earl Warren saw no conflict between the Bill of Rights and flag desecration statutes. A Constitutional Amendment which would once again permit flag desecration legislation would not amend the bill of Rights as Black and Warren understood it, it would simply correct, in the name of the people—who are the Constitution’s ultimate beneficiaries and guardians—an erroneous construction of the Constitution by a transient majority of the Supreme Court. This sort of correction of Supreme Court errors is a time-honored purpose of Constitutional Amendments.

The proposed Flag Protection Amendment, as you know, is not some misguided attempt to amend the Bill of Rights. It is simply an opportunity for the American people to reaffirm the distinction between the speech protected by the First Amendment and outrageous, inflammatory, and harmful acts which have no such protection. The Supreme Court, unfortunately, got it wrong in *Texas v. Johnson*, and the proposed Flag Protection Amendment would simply set things right again. It would restore to the American people their right which Black and Warren recognized, their

right to determine for themselves the meaning of their cherished and unique national symbol and how it ought to be protected.

But even if the Supreme Court would not have a basis in its prior misreading of the First Amendment to reject as unconstitutional such statutory exercises as S. 982, it is clear that bills such as S. 982 would be unconstitutional because of their declared purpose, based on the so called "fighting words" doctrine (see S. 982, Section 2(a)(3), which limns a purpose to prevent "imminent violence or a breach of the peace"). Such a bill goes beyond the powers entrusted to Congress and unconstitutionally invades areas reserved to the "police power" of the states. There is no general grant to Congress of power to prevent violence or to guard against breaches of the peace. These are matters that have historically been entrusted to the state and local governments, those closest to the people. The basic Constitutional principle of Federalism, of dual sovereignty, reserves some areas of governance to the states and some areas (such as interstate commerce regulation and foreign affairs) to the federal government.

In the important *U.S. v. Lopez* case, in 1993, the Supreme Court, in declaring unconstitutional the Federal Gun-Free School Zones Act, which made it a federal crime to possess a firearm near or in a school, held that this went beyond Congress's powers and invaded the domain of the states. In the Court's 1997 term the court released several other decisions which underscored the importance of Federalism to our system, and recently some lower federal courts have even declared unconstitutional (on federalism grounds) the federal legislation which sought to impose penalties for violence against women. There is no doubt that the logic of *Lopez* would render unconstitutional a national "breach of the peace" statute such as S. 982.

Such statutory attempts are unworthy and now clearly unconstitutional pieces of legislation. They purport to be conceived to protect our cherished national symbol, but they wrongly denigrate the efforts of those who support the Flag Protection Amendment. They accuse them, as for example, Senator Lieberman did in his statement in support of S. 982, of seeking to alter the First Amendment and of wanting to expand the power of government at the expense of individual liberty. This betrays a sad and fundamental misunderstanding of the nature of liberty in this country.

Individual freedoms are, of course, important, and it may well be that the American political system is the most admirable because it offers the most protection to individual liberty. But it remains true, as our Framers knew, that liberty cannot exist without a foundation in civility and order, and there are times when outrageous actions are not manifestations of liberty, but rather of license, which undermines the basis of civilized order itself. In the past year, which has seen the country roiled by the effects of license in the Oval Office itself, we have seen extraordinary proof of the need to keep license checked. Our Framers tried to strike a balance between liberty and license, and by doing so to establish "domestic tranquility." The Constitution and its attendant Bill of Rights recognized that the most important liberty was the liberty of the American people themselves to exercise popular sovereignty and to pass their own laws to promote both order and liberty.

Striking this delicate balance between liberty and order is a difficult task, and one entrusted by the Constitution, in the Article V Amendment process, to the people themselves. In returning us to the balance struck for the century before *Texas v. Johnson*, the proposed Flag Protection Amendment would not amend or in any way alter the Bill of Rights, it would instead solidify the foundation of American liberty itself.

I would be happy to discuss the Flag Protection Amendment further at your convenience.

Yours sincerely,

STEPHEN B. PRESSER.

NONCOMMISSIONED OFFICERS ASSOCIATION
OF THE UNITED STATES OF AMERICA,
Alexandria, VA, April 15, 1999.

Hon. ORRIN G. HATCH,
U.S. Senate,
Washington, DC.

DEAR SENATOR HATCH: The Noncommissioned Officers Association of the USA (NCOA) has joined with the Citizens Flag Alliance (CFA) to support the efforts of many in Congress to pass a Flag protection amendment. NCOA's 148,000 members are solidly committed to the passage of Flag protection legislation and have placed the issue among their very highest legislative priorities. In this regard NCOA is delighted with the recent introduction of S.J. Res 14 in the U.S. Senate.

On behalf of NCOA's noncommissioned and petty officer members, I fully expect the members of Senate Judiciary Committee to approve legislation and pave the way for the matter of Flag protection to be brought to the Senate floor for vote in an expeditious manner. NCOA urges your support of S.J. Res 14.

In closing allow me to reiterate the importance of this matter to NCOA members and their families. They will never give up on this issue and look to you to support their desires to see Flag protection legislation passed during the 1st Session of the 106th Congress

Sincerely,

ROGER W. PUTNAM,
President/CEO.

THE OHIO AMERICAN LEGION,
Columbus, OH, March 10, 1999.

Hon. ORRIN HATCH,
U.S. Senate,
Washington, DC.

DEAR SENATOR HATCH: The Ohio American Legion, consisting of 165,000 members, is supportive of a Constitutional Amendment to protect the U.S. Flag from physical desecration.

We urge your favorable consideration and vote for a measure that will allow the American people what polls have shown for years they favor, the right to have their flag protected by laws of the land.

Sincerely,

CARL SWISHER,
Department Commander.

APRIL 5, 1999.

DEAR SENATOR HATCH: I am writing to express my support and gratitude for your sponsorship of the flag protection constitutional amendment (S.J. Res. 14), which I understand may come before the Senate for a vote in the near future. Like you, I regard legal protections for our flag as an absolute necessity and a matter of critical importance to our Nation. The American flag, far from a mere symbol or a piece of cloth, is an embodiment of our hopes, freedoms and unity. The flag is our national identity.

I am honored to have commanded our troops in the Persian Gulf War and humbled by the bravery, sacrifice and "love of country" so many great Americans exhibited in that conflict. These men and women fought and died for the freedoms contained in the Constitution and the Bill of Rights and for the flag that represents these freedoms, and their service and valor are worthy of our eternal respect. Most of these great heroes share my view that there is no threat to any right or freedom in protecting the flag for which they fought. Perhaps as much as any American, they embrace the right to free speech. Indeed, they risked death to protect it.

I do see a very real threat in the defilement of our flag. We are a diverse people, living in a complicated, fragmented society. And I believe we are imperiled by a growing cynicism toward certain traditions that bind us, particularly service to our nation. The flag remains the single, preeminent connection among all Americans. It represents our basic commitment to each other and to our country. Legally sanctioned flag desecration can only serve to further undermine this national unity and identity that must be preserved.

I am proud to lend my voice to those of a vast majority of Americans who support returning legal protections for the flag. This is an effort inspired by our nation's history and our common traditions and understanding, under which, until a very recent and controversial Supreme Court decision, the American flag was afforded legal protection from acts of desecration. The flag protection constitutional amendment is the only means of returning to the people the right to protect their flag, and your leadership will undoubtedly help to ensure the success of this important campaign.

Sincerely,

H. NORMAN SCHWARZKOPF,
General, U.S. Army, Retired.

APRIL 29, 1999.

Hon. ORRIN G. HATCH,
Chairman of the Senate Judiciary Committee,
Washington, DC.

Hon. PATRICK J. LEAHY,
Ranking Minority Member of the Senate Judiciary Committee,
Washington, DC.

DEAR MR. CHAIRMAN: We, the undersigned religious leaders, believe the proposed constitutional amendment to prohibit physical "desecration" of the flag of the United States is a disturbing usurpation by Government of a responsibility reserved in the Bill of Rights to be freely exercised only by religion.

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

"We understand that those who promote the proposed amendment* are seeking to honor our country and would not wish to compel idolatry on people of faith. We hope Congress will not enshrine idolatry in the Constitution but will respect people of faith and honor the Bill of Rights. We urge Congress to defeat this religiously offensive amendment."

Rev. Robert Millner Adams, Sun Prairie, WI.
 Rev. Dr. Alan B. Anderson, Bowling Green, KY.
 Super Intendent Darline Balm-Demmel, United Methodist District, Sioux City, IA.
 Reverend Doctor Lee Barker, Neighborhood Church, Pasadena, CA.
 Rev. Eugene Birmingham, United Church of Christ, IL.
 Rev. Ruth M. Brandon, United Church of Christ, Westfield, MA.
 Pastor Charles W. Brockwell, Jr., Fourth Avenue United Methodist Church, Louisville, KY.
 Rev. Leo Brummett, KY.
 Clerk John Buck, Patapsco Friends Meeting, MD.
 Ret. Rev. John Burt, Bishop of Ohio.
 Prof. Dr. Joeseeph Chuman, Columbia University, NJ.
 Rev. James Conn, United Methodist Church, Los Angeles, CA.
 Rev. Sam Cox, Kailua, HI.
 Reverend Doctor Beverly Dale, Disciples of Christ, Philadelphia, PA.
 Rev. Joseph R. Alfred, Evergreen Park, IL.
 Rev. Martin J. Bagay, Sparta, NJ.
 Rev. David A. Barber, Community United Church for Christ, NC.
 Rev. Henry L. Bird, Episcopal Diocese of Maine, Brunswick, ME.
 Rev. Walter Boris, Kirkland Congregational Church, U.C.C., Kirkland, WA.
 Rabbi Balfour Brickner, Synagogue, NY.
 Priest Canon Roberts Brooks.
 Rev. John Buchanan, Southern Baptist.
 Pastor Dr. Michael Burr, American Baptist Churches, USA, Issaquah, WA.
 Prof. & Trustee Ernest Cassara, First Parish and the First Church in Cambridge, Cambridge, MA.
 Pastor Robert C. Cochran, MI.
 Clergyman Paul Connie, Myerstown, PA.
 Pastor Rufus Cuthbertson, Evangelical Lutheran Church in America, Dahlongaqa, GA.
 Rev. Terrence H. Davis, West Hartford, CT.
 Rev. Randall Day, St Mark's Episcopal Church, Teaneck, NJ.
 Minister Herbert Dimock, United Church of Christ, CA.
 Rev. John P. Donovan, Hamilton, NY.
 Minister Dr. E. Dale Dunlap, United Methodist Church, Raymore, MO.
 Rev. Myles W. Edwards, Kensington, MD.
 Rev. Johnathan Eilert, OH.
 Ret. Rev. W.W. Finlator, Pullen Memorial Church.
 Rev. William J Fleener, New Era, MI.
 Rabbi Joan Friedman.
 Rev. John E. Gibbons, First Parish in Bedford, Bedford, MA.
 Rabbi James A. Gibson, Mount Sinai, PA.
 Canon Doctor John S. Gill, Los Olives, CA.
 Lay Minister Donald W. Gregg, Atlanta, GA.
 Rev. Linda Hansen, Cedar Rapids, IA.

Director Stanley Diamond, Northwest Interfaith Movement, Philadelphia, PA.
 Rev. Larry Doerr, Presbyterian Church (U.S.A) Homestead Presbytery, Lincoln,
 NE.
 Rabbi William Dreskin, Woodlands Community Temple, White Plains, NY.
 Rev. Myles Edwards, Kensington, MD.
 Sister Maureen Fiedler, SL.
 Rev. W.W. Finnlator, Raleigh, NC.
 Rev. Dr. Allen M Fluent, Mt. Sinai Congregational United Church of Christ, Mt.
 Sinai, NY.
 Treasurer Barbara P. Gardner, Unitarian Universalist Church of Riverside, River-
 side, CA.
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 Rabbi Debora Gordon, Congregation Berith Sholom, NY.
 Father Robert Gregg, Stanford University Chaplain, Stanford, CA.
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 Rabbi Daniel Isaak, Congregation Never Shalom, Portland, OR.
 Ret. Clergy Wayne G. Johnson, WI.
 Rev. Carol Karlson, Unitarian Universalist Association, Brattleboro, VT.
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 Rabbi Lawrence Kushner, Congregation Bethel, Sudbury, MA.
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 Secretary David Mertz, Grace Evangelical Lutheran Church in America (ECLA),
 Aurora, IL.
 Rev. Sandra Herman, Milwaukee, WI.
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 Rev. Dr. Arnold Howard, Enon Baptist Church.
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 Rev. Canon Elizabeth Keaton, Newark, NJ.
 Rev. Theresa A. Kime, Unitarian Universalist Congregation of Erie, Erie, PA.
 Rabbi William Kuhn, Philadelphia, PA.
 President Duane Lemley, Eastrose Unitarian-Universalist Church, Portland, OR.
 Rev. Nurya Love Lindberg, MI.
 Rabbi Michael M. Remson, Naperville, IL.
 Rev. Timothy McDonald III, First Iconium Baptist Church, Atlanta, GA.
 Rabbi Ralph Mecklenburger, Beth-El Congregation, TX.
 Rev. Mark Middleton, The Episcopal Church, USA.
 Pastor Jerry Mileson, United Methodist Church, Wichita, KS.
 Rabbi Jay Moses, Chicago, IL.
 Rev. William Murphy, WI.
 Rev. Sue Ann O'Neill, Momence, IL.
 Rev. Peter Baldwin Panagore, Congregational Church of Boothbay Harbor.
 Rev. William Potter, St. Luke's Episcopal Church, Hope, NJ.
 Rev. Lisa Romantum Schwartz, Topeka, KS.
 Rabbi David Saperstein, Union of American Hebrew Congregations.
 Rabbi Jeffrey Schein, Beachwood, OH.
 Rev. Gilbert Schroerlucke, Louisville, KY.
 Rabbi Barry L. Schwartz, Temple Sinai, Amherst, NY.
 Rabbi Charles P. Sherman, Tulsa, OK.
 Rev. Stephen B. Snider, Wynnewood, PA.
 Rev. Betty Stapleford, CA.
 Reverend Doctor Dave Steffenson, Columbus, WI.
 Rev. Jim Mitulski, Metropolitan Community Church of San Francisco, San Fran-
 cisco, CA.
 Rev. Randall Mullins, WA.
 Rev. Thea Nietfield, IA.

Rev. Michelle Panabecker Neff, First Fundamentalist Constitutionalist Church of the Savior, Dublin, OH.
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 Lay Minister Arthur Thexton, James Reed Unitarian Universalist Congregation, Madison, WI.
 Reverend Doctor Vester L. Vanstrom, San Antonio, TX.
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 Rev. Brent Walker, Director of Baptist Joint Committee.
 Rabbi Arthur Waskow, The Shalom Center, Philadelphia, PA.
 Rev. James Watkins, Old South Church, U.C.C., Kirtland, OH.
 Rev. Robin Whitlock, New Orleans, LA.
 Rev. John W. Wimberly, Jr., Western Presbyterian Church, Washington, DC.
 Rev. Rodge Wood, Christ Episcopal Church, Pittsburgh, Terra Alta, WV.
 Intern Minister Amy Zucker, Champlain Valley Unitarian Universalist Society, Middlebury.

LEGION ASSAILS FLAG PROTECTION AMENDMENT DETRACTORS, CALLS FOR SENATE TO "DO RIGHT THING"

WASHINGTON (April 28, 1999)—Calling on the Clinton administration to be consistent, the elected leader of the 2.8-million member American Legion condemned the administration and some Senators who "just don't get it" for lobbying against Senate Joint Res. 14, a flag-protection constitutional amendment.

"Today's testimony by Senators Chafee, Kerrey, former Senator Glenn and Randolph Moss of the Justice Department was a slap in the face to Americans, past and present, who believe that the citizens of this great land have a constitutional right to representative government," Butch Miller, national commander of The American Legion said. "Even as the administration testified today before the Senate Judiciary Committee against Senate Joint Res. 14, a constitutional amendment that would protect our flag, various polls conducted over 10 years have shown consistently that 80 percent of the American people support the amendment. Forty-nine state legislatures have passed resolutions supporting the amendment.

"Why is it, a handful of Senators continue to thumb their noses at the right of the people, and the 49 state legislatures who represent them, to simply exercise their Article V right under our constitution?" Miller said. "It is time for those we have elected to represent us in Washington to do the right thing, and the right thing is for them to vote 'yes' on SJR 14 and send it to the state for the ratification process. Stop the lying and fear mongering about protecting Old Glory. Let the people decide.

"When the president's place in history was in the hands of members of Congress, the administration wanted the 'will of the people' to prevail, because the polls showed most Americans wanted him to finish his presidency," Miller said. "All we

want is for the Clinton administration to be consistent in this record. If the polls save the presidency, then the polls can save our flag.”

Miller and other Legion officials are enraged at the president’s flip-flop; Clinton supported protecting the flag when he was a presidential candidate while addressing The American Legion National Convention in Chicago in 1991.

“Crossing the Memorial Bridge in Washington, D.C., you see the entrance to Arlington National Cemetery, the Korean War Memorial, the Vietnam War Memorial, the Iwo Jima Memorial, the World War II Memorial site, and may even pass a school where children are respectfully raising the American flag. Yet, the administration seems to believe that our flag is not worth protecting,” Miller said.

“Relegating our flag to ‘a piece of cloth’ is a revisionist view of our nation’s history. Our founding fathers did not permit desecration of the American Flag. The flag was protected in its role as an incident of our sovereignty.

“The flag flies over our young men and women in uniform in Yugoslavia. We approved the use of the Flag of the United States on foreign oil tankers during the Persian Gulf War so Saddam Hussein couldn’t attack them. An attack on them, like an attack on our men and women in uniform, would have been an assault on the sovereignty of the United States of America. Refugees from Kosovo are fleeing to the protection of that flag, as did many of our forefathers.

“A piece of cloth—of no value? Is that their position? God help our nation if it is their final testament that the flag that may drape the coffins of some of our sons and daughters is just a piece of cloth in their eyes.”

The proposed 28th Amendment, “The Congress shall have power to prohibit the physical desecration of the flag of the United States,” passed in the House in each of the last two sessions—and is likely to pass again in the 106th Congress. Essentially, two Senate votes are all that keep the amendment from being sent to the states for ratification.

A pair of 5–4 rulings of the U.S. Supreme Court in 1989 and 1990 invalidated century-old federal law and the laws of 48 states that banned physical desecration of the U.S. Flag, and ruled flag-protection statutes unconstitutional. Only by a constitutional amendment can the American people reclaim the right to protect the U.S. Flag from acts of physical desecration.

WALTER D. EHLERS OF BUENA PARK, CA—CONGRESSIONAL MEDAL OF HONOR
RECIPIENT

If there is a day that changed the rest of my life, it was the day that I had to get my Mother and Dad’s signatures on my Army enlistment papers.

My Dad said he would sign. My Mother said she would sign on one condition, “If you are going to be a soldier, be a Christian soldier.” I told her I would do my best. It was not easy to be a Christian soldier. There were many temptations and every time I was tempted, I could see the tears in my Mother’s eyes and I was not about to cause her any disappointments.

I was born in Kansas, raised on a farm. The first nine years of my life were great. Then came the Great Depression and the worst drought of the century in the Midwest and in 1935 the worst flood. We were able to survive but it wasn’t easy. My Dad and Mother worked hard and set a good example for family life.

I joined the Army in October 1940. I went to Ft. Ord. On the day war was declared, December 7, 1941, I was on Mt. Rainier in Washington State. I was at about 8,000 feet altitude, strapping on a pair of skis. I had never been on skis before. I hadn’t been on a hill over 200 feet. When the radio at the ski shack announced the bombing of Japan, followed up with the announcement that all servicemen were to return to their units immediately, it probably saved my life. I unstrapped my skis. I never went down the mountain. I shudder to think what might have happened.

In October, 1942, we set sail for our overseas destination. We were briefed about our landing objective; it was to be French Morocco, North Africa. If I hadn’t been so seasick, I would probably have been scared. But it didn’t take the seasickness long to wear off. The casualties on the beach and the strafing soon gave me much more to worry about.

I was transferred to the First Infantry Division. My brother and I were in the same company. We fought through Africa and Sicily. My brother was wounded in Sicily and sent to a hospital in Africa. I finished up in Sicily and we were sent to England. We trained constantly until we boarded ships for the Normandy Invasion.

My brother had returned from the hospital in Africa. At the embarkation was the last time I saw him. He was killed in the D-Day landings on Omaha Beach. I went on to receive several decorations including three Purple Hearts and the Medal of

Honor. I am a survivor. My brother and many of my close friends paid the supreme sacrifice. Because of them, hundreds of thousands of them, you and I are here today.

What I have written about above is typical of the World War II veteran. He knows why he was going to war. Many veterans who have gone to later wars have not been so sure of the reason for their being there. We, the people, are the government and it is our duty to make sure we are not wasting lives in becoming involved in military actions that cannot be resolved or come to an honorable conclusion. We do not work for the Congress or the administration, they work for us.

We live in the greatest country in the world. After all I have seen of the world, I would not trade any of our states for it.

Our country is unique. We have all colors, races, nationalities and ethnic groups. We have the greatest freedom of any country in the world. We have problems, but all nations do. However, we have many more good things in this country than bad. One of the unfortunate things is that there is so much crime reporting on television and other news media, that we very seldom hear about the good things.

But wherever Americans go we can be proud of our heritage. Our flag—the Red, White and Blue is the most respected emblem in the world. I am a strong supporter of a constitutional amendment to protect that flag. I believe the war did change me. I have come to have more respect for our country and realize that we have the best of everything; people, government, freedom and opportunities.

PREPARED STATEMENT OF GENERAL LIVINGSTON

Senator Goldwater said: “We cannot allow the American flag to be shot at anywhere on earth if we are to retain our respect and prestige.” We certainly should not allow it to be shot at here at home

The flag is that one symbol which represents to the world the commitment of our great country to freedom. When our flag is present, people throughout the world, both friends and foe, recognize this flag may have been tarnished at times in our history, but even tarnished, it represents a people who will not compromise under any circumstance.

Americans have never waved a white flag but we will wave the red, white and blue flag until our elected officials return to us the right to protect the greatest symbol of freedom on this planet.

Today, let us all stand together and send the message “it is time” to fix this problem; it is time to quit making excuses and to ensure that those who have defended the flag in combat don’t have to defend this flag—our flag—on the streets of our homeland.

GOD BLESS AMERICA!

GENERAL LIVINGSTON.

PREPARED STATEMENT OF PROF. STEPHEN B. PRESSER

My name is Stephen Presser, I am the Raoul Berger Professor of legal history at Northwestern University School of Law, I have been serving for several years as a Constitutional issues consultant to the Citizens Flag Alliance, and I am submitting this written testimony in support of S.J. Res. 14, the proposed “Flag Protection” Amendment, and against any further attempts to protect the flag by Congressional statute. I have appeared before Senate and House subcommittees to testify in favor of this Amendment several times before, and my goal in this testimony, as it was before, is both to indicate the persuasive arguments in favor of the Amendment, and to address some of the objections that were raised ten years ago, four years ago, and are still being raised against the Amendment.

You have heard from other proponents of the Amendment who were extremely eloquent in its support and who addressed their special feeling for the American flag and the need to protect it from desecration. The desire for the Amendment is also evident, from the fact that the Amendment has repeatedly garnered so many sponsors in the House and Senate and has been the subject of favorable resolutions in 49 state legislatures. I do not know of any other Amendment in American history that has ever achieved that kind of support prior to its passage. I believe that I can best serve the Committee by making some comments about the legal background that gives rise to a need for the Amendment, by underscoring that unless the Amendment is passed a federal statute could not do the job of protecting the flag, and by addressing the general arguments of legal scholars and commentators who have criticized this Amendment effort.

I. THE NEED FOR THE FLAG PROTECTION AMENDMENT

The need for the Amendment, as you know, results from the Supreme Court's surprising decision in *Texas v. Johnson* (1989). There, by a bare five to four majority, the Court declared that flag-burning was speech protected by the First Amendment, and could therefore not be banned by the federal government or by state legislatures. This decision outraged the four dissenters and many Americans, who thought that the defendant Gregory Johnson's conduct (incinerating the flag after repeatedly chanting "Red White and Blue, we spit on you") was an outlandish act of arson, and not the kind of speech James Madison had in mind when he and his colleagues were drafting what became the First Amendment.

Chief Justice Rehnquist, writing for the dissenters in *Johnson*, wondered how legislation protecting the flag that had been on the books in most states for a century, without objection, could have suddenly become impermissible. Rehnquist, after observing that several of the Court's greatest champions of the First Amendment, including Hugo Black and Earl Warren, thought that the flag could be protected from desecration, noted that the protection of the national symbol ought to be seen as no threat to the Constitution as a matter of common sense, perhaps, rather than as a matter of sophisticated First Amendment jurisprudence. But common sense is now too often in short supply in Constitutional discourse. The obvious, it would seem, now has to be embarrassed in the academy and in the courts, where gorgeous subtleties and refined analysis cloaked in balancing tests and multi-level tiers of scrutiny conceal what is essentially result-oriented reasoning. The majority's opinion in *Texas v. Johnson* is one of the worst examples of this sad tendency.

In *Texas v. Johnson* the majority even conceded that if the government had a "compelling interest" in preserving the symbolic value of the flag it could override any First Amendment protections, but the court then declared, in effect, *that the only permissible "symbolic value" of the flag was that it stood for the right to express oneself in opposition to the flag and desecrating the flag was simply a manifestation of this right.* Thus, by this curious circular argument, the Court held that the government could have no "compelling interest" in preventing flag desecration, *since flag desecration simply confirmed the symbolic value of the flag.* I believe that the Supreme Court had no basis for declaring that preserving this sort of license—it can't really be called liberty—was the only symbolic value of the flag, but a majority of the Supreme Court has held fast to this view.

Following *Texas v. Johnson*, in a wave of public outrage, the Congress passed a statute (Pub. L. 101-131, Sections 2,3, October 28, 1989, 103 Stat. 777) forbidding flag desecration. The statute was drafted in neutral language, in order to seem as not to be attacking speech. It provided, in pertinent part, that "Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both." (18 U.S.C.A. Section 700(a)(1)). The statute also indicated that it did not "prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled." *Id.*, Section 700(a)(2). Several leading constitutional scholars, most prominently Lawrence Tribe of Harvard, advised Congress that such a statute could solve the problem, and that the First Amendment and statutory flag protection could co-exist. Several of us told the Congress that given the Court's views expressed in *Texas v. Johnson*, only an Amendment could authorize flag desecration statutes, since the Court was disposed to read any prohibition on conduct involving the flag as an infringement of the First Amendment. We were proved right when, a year after *Johnson*, in *U.S. v. Eichman*, the Supreme Court found the new statute unconstitutional.

Sadly, there appear to be a few distinguished members of the United States Senate who still wrongly believe a statute protecting the flag could be held Constitutional and who resist an Amendment for that reason. *If there is one clear principle in current Supreme Court jurisprudence, however, it is that the Supreme Court will hold that any statute dealing with the flag is interference with purported First Amendment freedoms, because a majority of the Court has indicated that it will find any statutory attempt to protect the flag to be an impermissible endorsement of a view that the court has said the government has no compelling interest in promoting.*

Justice Brennan made as clear as he could in his opinion in *Eichman* that even a facially-neutral statute *would be construed as an attempt to silence speech expressing a particular point of view* (that of those seeking to express contempt for the flag by desecrating it). Any statute seeking to protect the flag, then, would thus be construed as a violation of the First Amendment, because, in this misguided construction, it would be construed as a Congressional statute interfering with freedom of speech. Justice Brennan made clear that in the case of such statutes the Court would look beyond form to substance, and would declare them unconstitutional.

In *Eichman* Brennan stated that “Although the Flag Protection Act [18 U.S.C.A. Section 700] contains no content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government’s asserted interest [protecting the flag] is ‘related to the suppression of free expression.’” *United States v. Eichman*, 496 U.S. 310, 315 (1990). A Court manifesting Brennan’s view would find any act passed with a desire to protect the Flag to be an unconstitutional infringement of freedom of speech.

Some current advocates of a statute have mistakenly believed that they could formulate one that would come within the “fighting words” exception to the broad sweep of First Amendment protection. They are wrong. Not only is that doctrine increasingly under attack, and unlikely to furnish much support, but in light of the Supreme Court’s unwillingness in *Texas v. Johnson* to allow breach of the peace justifications for flag protection legislation, and its concomitant insistence that normal state criminal statutes are sufficient to protect persons against harm caused by “fighting words” uttered in connection with the flag, it is inconceivable that any statute could now survive the Constitutional scrutiny of a kind that the Court used in *Eichman*.

Justice Brennan has retired from the Court, but Justice Souter, who replaced him, has First Amendment views similar to his, and Justices Scalia and Kennedy, who concurred with Brennan in *Eichman* would take the same position in a future case. Justices Ginsburg and Breyer have first Amendment views close to those of Justices Souter, Kennedy, and Scalia, and would make up the necessary five votes for a majority in any future challenge to a statute. Justice O’Connor was one of the dissenters in *Johnson* and *Eichman*, but since those decisions she has (with Justices Souter and Kennedy) been one of the Court’s strongest proponents of *stare decisis* (following previously decided cases), and she might well be found in the majority rejecting future statutes. Justice Thomas’s views on this question are unknown, but he has often been sympathetic to the positions taken by Justice Scalia, and he might well follow him on this matter. Justices Rehnquist and Stevens would likely find a statute constitutional if they chose to follow the reasoning in their dissenting opinions in *Johnson* and *Eichman*. At best then, any new statute would fall in a 5 to 4 decision, and very possibly in a 7 to 2 decision. The statutory route is simply not open to those who would protect the flag, just as it was not in 1989.

Following the failure of the statute, after the *Eichman* decision in 1990, the proponents of the Amendment once again sought help from Congress, only to suffer defeat as the Amendment failed to garner the necessary two thirds majority in the House. The Amendment effort then returned to the grass roots, and its proponents redoubled their efforts. As you know, in 1995, the Amendment passed the House by the requisite two-thirds majority, only to fail by three votes in the Senate. During the last Congressional session, as you also know, the Amendment again garnered the requisite majority in the House, through grass-roots effort, although it was never brought to the floor of the Senate for a vote. It has been reintroduced in this session, and is now before you again.

II. THE ARGUMENTS IN FAVOR OF THE AMENDMENT

Why then am I for this Amendment, when the Supreme Court has twice rejected the constitutionality of flag desecration, when many members of the legal academy, and many commentators in the media remain adamantly opposed to it? Why do I reject the view of those who still claim that the Flag Protection Amendment is an attempt to infringe our precious First Amendment freedoms? First, I believe that since before the 1989 *Johnson* decision it was widely believed that the First Amendment could properly be construed as not including within its ambit acts of flag desecration, and since that view has only been overturned by the slimmest of transient majorities on the Supreme Court, widespread public opinion, expressed in the continued grass roots desire for a Constitutional Amendment, ought to be the most relevant factor in defining the nature of our First Amendment freedoms. In other words, we have to ask the question here, who should be defining the scope of the First Amendment? Who should be determining what the word “speech” in that Amendment means?

If the American people (as indicated by the favorable resolutions in forty-nine state legislatures) feel that there is a difference between pure political speech (which the First Amendment incontrovertibly protects), and intentionally outrageous acts of arson, defecation, or other forms of destruction (which it does not), that feeling deserves deference, and a Constitutional Amendment is the proper manner in which that deference ought to be expressed. The Constitution and the Bill of Rights, after all, are acts of the sovereign people, and the sovereign people have a continuing role in the preservation and interpretation of the Constitution.

To put this another way, the current Flag Protection Amendment effort is a vital exercise in participatory democracy, in popular sovereignty, and is deserving of support for that reason alone. Popular sovereignty is the basis of our Constitutional system, and Article V, which authorizes the Amendment process, recognizes this. Where the Supreme Court has misconstrued the Constitution, the Amendment process allows the people to correct the Court's error, as was done, for example, in the case of the Thirteenth, Fourteenth, Sixteenth, and Nineteenth Amendments.

There is another manner in which the Flag Protection Amendment effort can be seen as a necessary corrective, and this brings me to what I believe is the most important reason the Amendment ought to have the support of Constitutional scholars, and deserves passage. I believe that the Flag Protection Amendment is a small but vital step in returning us to a Constitutional path from which we have wrongly strayed, and in redressing a delicate Constitutional balance that has become dangerously skewed.

III. A DELICATE BALANCE OF PHILOSOPHIES AND PURPOSES

Our Framers understood that there were two important elements to our Constitutional tradition which we inherited from Great Britain—a liberty element and a responsibility element. Without the liberty guaranteed to us by the English Common Law, we often said at the time of the Revolution, we would be slaves, and no better than the subjects of some Asiatic potentate. Without liberty we could not hope to realize the aspirations toward religious freedom and republican government for which the United States was colonized and then, later, declared independent. But the Framers also realized that without responsibility, without order, without submission to the rule of law, there could be no protection for life, limb and property, there could be no lasting liberty. The Federal Constitution itself was drafted and adopted following the failure of the state legislatures to understand that more responsibility was needed, and that we could not enjoy the blessings of liberty without security to person and property.

To make this same point in a manner heard more generally today, it was one of the goals of the Constitution's framers to foster a sense of community among all the citizens of our republic, to secure a certain baseline of civilized behavior. It is the recognition of this goal, by the way, that has always permitted reasonable time place and manner restrictions on even the speech protected by the First Amendment. The proposed Flag Protection Amendment is quite consistent with such restrictions.

If the Flag Protection Amendment becomes law, and Flag protection legislation is enacted, the message that flag burners, defecators, or other flag destroyers and abusers might seek to convey—that we ought to destroy the symbols that bind us together—can still be conveyed by pure speech, of course. All that will have happened will be that one particular incendiary manner of expressing similar sentiments would be restricted, in the interest of other Constitutional goals, most notably the recognition that with liberty comes responsibility, and that it is the duty of society to enforce that responsibility and to preserve order. Even if the Flag Protection Amendment is adopted, it would still be true that our First Amendment jurisprudence would be marked by a tolerance for the expression of dissenting or even despised views, but not necessarily by a tolerance for all intentionally inflammatory actions.

Many of our judges, and the majority of the Supreme Court in the two flag decisions in particular, appear to have gone too far in embracing an individualistic constitutional jurisprudence, and to have forgotten other elements in our political and constitutional tradition. The Framers of the Constitution and the Bill of Rights were not merely a group of late 18th century John Stuart Mills, devoted solely to maximizing opportunities for the expression of individual lifestyles or sentiments. They adhered to a nearly bewildering number of governmental philosophies, chief among them what we now call classical republicanism, which was characterized by an emphasis on individual restraint, altruism and civic virtue.

Included also among the Framers, of course, were a bevy of Hobbesians who believed in the need for a strong central government to protect us from our baser instincts. Included as well were a number of evangelical theorists who sought to preserve a strong role for religion and morality in American life. There were also adherents to the Scottish Enlightenment and to the new market theories of Adam Smith. Finally, there were a number of Lockeans, committed to the protection of what they took to be individuals' rights of life, liberty, property, and the pursuit of happiness.

It is not too much to say that it was the genius of our Constitution and of much of our political history that we usually managed successfully to juggle our competing basic philosophies, to grant more individual freedom than was available in any

other country, but to balance it by community-centered restraints, in order to achieve what we call ordered liberty. We thus succeeded in protecting the security of person and property, but sought still to allow our people to enjoy enough independence to realize their particular callings in the community. When the Supreme Court's majority, in its *Johnson* decision, created a single symbolic meaning for the flag, its supposed apotheosis of individual self-expression, it betrayed a fundamental misunderstanding of the nature of the American founding.

Thus, if there is a single message in our Constitutional history, it is probably that each time we move too far in one direction, towards unlimited liberty, or toward too restrictive order, there is a reaction, and sometimes a violent one. In recent years we have been living through a period in which this delicate balance of Constitutional philosophies and purposes has gone awry. We are at a point where the personal liberty element of our tradition has, in effect, spun almost out of Constitutional control. It has now become commonplace to lament the decline in national standards and morality, but it is rarely recognized that a significant part of the problem is that many of the people and the courts have forgotten what the Constitution, and perhaps even the flag, stood for. For at least the last forty years, our constitutional law has been radically reconceived as concerned only with the gratification of individual desires, and the expansion of individual license.

The erroneous notion that our basic constitutional philosophy is individual self-actualization—the mistake of the *Johnson* majority—has led too many courts to misconstrue the Constitution and to forget the need for community responsibility and self-restraint. This kind of Constitutionalism makes the First Amendment and the Fourteenth Amendment into tails wagging the whole Constitutional dog, and improperly uses the Bill of Rights as a club to beat back the right of the people to take some necessary steps for the preservation of ordered liberty. The original Bill of Rights recognized the need for responsibilities as well as rights, as does the Flag Protection Amendment.

IV. CONSEQUENCES OF CONSTITUTIONAL IMBALANCE

Ideas or the failure to remember ideas have consequences. I don't think it goes too far to say here that we should draw a lesson from recent events in America such as the riots following the first Rodney King trial several years ago, the recent explosion in the birth of children born out of wedlock, the increase in mindless and random acts of violence particularly in our schools (as most horrifically observed recently in Colorado), the Oklahoma City bombing, or even the recent widespread failure of many governmental officials, including even the President, to abide by the simplest moral principles, or perhaps even the rule of law itself. All of these, I think it can be said, are products of our failure, as a Constitutional society, to remember that with individual liberty ought to come basic decency and responsibility.

The Supreme Court's two decisions regarding flag burning didn't create all these problems, of course, but they are part of a jurisprudence that encourages moral chaos and individual irresponsibility in society. In the *Texas v. Johnson* case the five Justices in the majority were guilty of failing to be able to distinguish between the kind of liberty of speech which needs to be protected in a republic, and the kind of irresponsible and outrageous acts of arson and desecration which should be punished. The Flag Protection Amendment does no more than return us to an understanding that we had as recently as ten years ago: The understanding of Justices Earl Warren and Hugo Black. This was that our traditions allow for full freedom of speech, but that our traditions also demand that the exercise of our rights be done in a matter that accords with our responsibilities. This is why I believe that what's done in other nations with regard to flags is of no relevance here. We have a long tradition of protecting our flag, as the unique symbol of our nationhood and national community, and its protection—for a century—was a basic part of our heritage of ordered liberty.

I don't mean by my support of the Amendment that I think the welfare of the Republic is immediately threatened by platoons of potential flag burners, and I think it's important to realize that the proponents of the Flag Protection Amendment are not motivated by a Spanish-inquisition-type zeal to punish flag desecrators or even flag defecators. Indeed the actual number of flag desecrators is not at all the issue here. The issue is what the Flag Protection Amendment means to the American people in general, and, in particular to those who have fought so hard for it. They are motivated by a desire to recapture the community's right to set standards of responsibility and decency, and to guarantee that there are some things that are even more important than individual self actualization. We Americans have no national religion, nor do we have many coherent tangible symbols of our traditions of liberty under law, of liberty with responsibility. The flag may be the only such

symbol we possess, and if we, as a community, do not have the right to preserve that symbol in a manner that expresses the responsibility and decency that are necessary for civility and popular sovereignty itself, then it is not likely that the goals for which our republic was founded will long endure.

V. A CONSTITUTIONAL CROSSROADS

We are now at an important Constitutional, political, and social crossroads. The events in Europe in 1989, and the events in the United States in the last six years, as we have seen the formation of new political alignments and new party platforms, and as we have been through a wrenching impeachment proceeding, have demonstrated that much of what passed for wisdom in the American media and even in the American legal academy was simply foolishness or worse.

This is not to say that there have not been very positive developments in recent years. Even the Supreme Court has recently shown signs of recapturing the Constitution, as several of its recent decisions have reasserted the primacy of popular sovereignty in the states, and reminded us that the federal government is one of limited and enumerated powers.

Perhaps the Supreme Court and the American people are on the brink of recapturing much of the original understanding of the Constitution itself, and I think the Flag Protection Amendment is a very good means of contributing to that process. Still, some of the Flag Protection Amendment's critics have suggested that to pass this Amendment would amount to "trivializing the Constitution." They reach this conclusion because they assert that the number of potential flag burners are few, that it is more appropriate that they be pitied rather than punished, and that flag burning itself represents no threat to the stability of the republic. Other critics continue to maintain that to pass the Flag Protection Amendment would be dangerously to amend the First Amendment and the Bill of Rights itself. Still other's believe that the problems of definition and implementation of flag desecration legislation are insurmountable. How might one respond to these criticisms?

To address the trivialization point first. It is not the fate of individual flag burners that is at stake here; the Flag Protection Amendment is more properly viewed as a question of the continued nature of the American political and social community itself. Nothing could be more important than the right of the people to express and implement our tradition of guaranteeing the responsibility that is necessary as a foundation for liberty. Far from being a threat to the First Amendment and the Bill of Rights, the baseline of decency, civility, responsibility and order that the Flag Protection Amendment is designed to supply is what makes the exercise of our fundamental freedoms possible. As the Framers understood and often observed, liberty without order or without responsibility soon becomes anarchy, and anarchy is inevitably followed by repression and tyranny. We have not reached the fatal point of anarchy yet in America, but on occasion, in parts of our country, we have come disturbingly close.

It is time for some responsibility, not to attack, but to protect the First Amendment, and our other freedoms. The Flag Protection Amendment does nothing to infringe the First Amendment. It does not forbid the expression of ideas, nor does it foreclose dissent. It merely allows the people to reassert their right to shape the contours of political development in the country and to reconstruct a dangerously-fractured sense of community. The effort to pass the Flag Protection Amendment—a grass roots effort of intensity almost never before seen in American history—is not an attempt by the government to suppress fundamental rights of the people. It is an attempt by the people, consistent with a century of their history, to reclaim the right to declare what kind of a society they want to live in.

The passage of the Flag Protection Amendment will not lead to any automatic prohibition on flag desecration. There will still have to be a Congressional statute passed, but the problems of definition and implementation will not be difficult. After all, there was a century of flag protection legislation which had been upheld by the state and federal courts until *Texas v. Johnson* overturned that century of jurisprudence in 1989. For example, the matter of defining the flag is not difficult. One could simply reenact the definition of 18 U.S.C.A. Section 700(b), that the flag means "any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed." The act of flag desecration can also be simply defined, as it was in the language from the 1989 Act to which I have already referred.

Once the Flag Amendment is passed it will not be a difficult matter to implement the protection of the Flag of the United States by legislation. The Amendment expresses something that represents the best in our political tradition in America, and something that is vital to the continuance of our national community. It's a small

Amendment, but it's a good one, and I urge you to act favorably on it, and send it on to the floor of the Senate and then on to the state legislatures. You will not be hurting the Bill of Rights. Instead, you will be helping the First Amendment and the rest of the Constitution to flourish, and you will be reinforcing the popular sovereignty that is the basis of our society.

WHAT MY FLAG MEANS TO ME

By Col. Carl L. Sitter

The flag of a nation is basically the symbol of that nation. It symbolically represents to the world the philosophy and ideals of that nation. The stars and stripes is my flag, and even trying to eliminate any vestige of bias, it is the most beautiful flag in the world.

While our flag has changed 27 times since its inception, it has been the rallying symbol for generations of Americans and the shroud of millions who have paid the ultimate price for what those stars and stripes symbolize.

To me this is what my flag represents: Freedom unequalled. Opportunity unparalleled. A life style unsurpassed. The right to live, to work, to strive and to struggle to make my dream become a reality.

When I look at our American Flag, I see symbols that remind me that it is more than a piece of red, white, and blue cloth. It is more than a symbol of our land, more than a symbol of a government, more than a symbol of a people. I see a set of ideals that leap across all lines of nationality, race and creed. A set of ideals for our nation to teach to others by precept and most importantly, by example.

As I gaze on our flag and the freedom it stands for, I realize that the pursuit of freedom has been costly. Our heritage was bought in blood and sacrifice, and this is easily remembered each time I salute it, and thank the lord for giving me "Old Glory" the red, white and blue.

PREPARED STATEMENT OF RICHARD K. SORENSON—MEDAL OF HONOR

There are no words that can express an adequate tribute to the emblem of our nation. For those who have shared this nation's life and felt the beat of its pulse it must be considered a matter of impossibility to express the great things which that emblem embodies. I venture to say that a great many things are said about the flag which very few people stop to analyze.

For me the flag does not express a mere body of vague sentiment. The flag of the United States has not been created by rhetorical sentences in the Declaration of Independence and in the Bill of Rights—it has been created by experience of a great people. And nothing is written upon it that has not been written by their life it is the embodiment. Not of sentiment, but of a history, and no man or woman can rightly serve under that flag who has not caught some of the meaning of that history.

Incarnate in the stars and stripes are the ideals, aspirations and principles of a free-minded people. When a person desecrates our flag they are showing contempt for all this country stands for and those who have spilled their blood for this nation.

Our flag is so revered that it's placed on the coffins of all national leaders, service personnel and veterans.

PREPARED STATEMENT OF JAMES D. STATON, CHIEF MASTER SERGEANT, USAF (RET.)

Mr. Chairman and distinguished committee members, numerous polls in recent times have shown that over 80 percent of the American people say that they should have the right to decide the question of flag protection through the constitutional amendment process. In fact, all but one state have passed memorializing resolutions asking Congress to send the flag protection amendment question to the states. Senate Joint Resolution 14 would give the American people the opportunity they desire to protect their flag through law. S.J. Res. 14 would send to the people a very simple article: "The Congress shall have power to prohibit the physical desecration of the flag of the United States." The 150,000 members of the Air Force Sergeants Association urge you to support this resolution. AFSA represents the millions of active duty and retired enlisted Air Force, Air Force Reserve, and Air National Guard members and their families. These Americans, perhaps more than any others, have a vested interest in that they put their lives on the line under the banner of this sacred symbol of greatness and sovereignty.

All members of the 106th Congress should support this resolution in order to put this important decision in the hands of the people. If the congressional representatives truly represent the will of the people, there should be no delay in acting upon the wishes of the people by allowing them to rule on this question. The personal feelings and opinions of elected representatives on this issue should be subordinated to opinions held by those to whom the elected officials are responsible—those who own the process. Our members have strongly communicated their concern over the need to protect the flag and, at the same time, to have a role in deciding the laws governing that protection.

For enlisted military members, whose work is characterized by dedicated sacrifice, the flag is a reminder of why they serve. For those stationed overseas, it is a symbol of America, seen every day. For all military members, the flag represents the principles for which they are prepared to sacrifice. Supreme Court Justice John Paul Stevens once wrote:

“A country’s flag is a symbol of more than nationhood and national unity. It also signifies the ideas that characterize the society that has chosen that emblem as well as the special history that has animated the growth and power of those ideas. * * * So, too, the American flag is more than a proud symbol of the courage, the determination, and the gifts of a nation that transformed 13 fledgling colonies into a world power. It is a symbol of freedom, of equal opportunity, of religious tolerance, and of goodwill for other people who share our aspirations.”

Military members serve so that they can protect this country, putting their lives on the line if necessary, and they revere our nation’s most visible symbol—Old Glory. It is the one hallowed symbol all patriots hold sacred. Most importantly, the flag plays a central role in ceremonies that honor those who have fought, suffered and died. *They know full well that this very flag may drape their coffins as a result of their unselfish service.* Denying protection and, thereby allowing desecration, of this important symbol of sacrifice insults the memories of those who are honored in these ceremonies.

The American people, especially those in the military, deserve the opportunity to make the decision if they want to put flag protection into the law. Through their sacrifice and dedication, those who have served have earned your support in giving them the ability to make this decision.

Mr. Chairman and committee members, we urge your full support of S.J. Res. 14. Some questions of governance and law are of such importance to a people that they deserve the opportunity to speak directly to those issues. This is one such question. We thank you for this opportunity to represent our views on this important matter. As always, AFSA is ready to support you on matters of mutual concern.

