

**Written Testimony of
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**Hearing of the Senate Committee on the Judiciary
“Letting the People Decide: The Constitutional Amendment Authorizing Congress
to Prohibit Physical Desecration of the Flag of the United States”
March 10, 2004**

Thank you Mr. Chairman, Senator Leahy, and distinguished members of the Committee. It is an honor to have the opportunity to submit testimony for today’s hearing of the Judiciary Committee. I had the privilege of testifying in person before the Committee on April 28, 1999, my first appearance before the Senate since my retirement earlier that year. I regret that I was unable to accept the invitation to appear in person at today’s hearing, but due to the short notice of the hearing, and a prior commitment to meet with the NASA Advisory Board, it was simply impossible to rearrange my schedule. I thank you for accepting my written statement and request that you submit it to the hearing record.

As a former member of the Senate Armed Services Committee, I worked very hard to protect the security interests of the Nation and to protect the interests of those who serve in our armed forces. I want to extend to the men and women serving in Iraq, Afghanistan, and other locations my heartfelt support and my prayer that peace will come soon.

The Committee has before it today for consideration the question of a constitutional amendment to permit Congress to enact legislation prohibiting the physical desecration of the American flag.

Like most Americans, I have very, very strong feelings about our flag. Like most Americans I have a gut reaction in opposition to anyone who would dare to demean, deface, or desecrate the flag of the United States. But also like most Americans, I am concerned about any effort to amend the Constitution and the Bill of Rights.

I have watched as those who expressed qualms or doubts or reservations about this amendment run the risk of being smeared, of being labeled as unpatriotic or as a friend of flag burners. I can assure you that I am neither. Many of us feel uncomfortable talking about issues that involve such private and personal emotions. We do not wear our emotions on our sleeves, especially when it comes to how we feel about the flag and about patriotism. We do not parade around those things that are sacred to us.

We all love the flag and no one more than I do. I fought hard for this flag through two wars and while representing the country in the space program. I am both honored and proud that few people in this Nation have been able to take our flag where I took it. The first thing I selected to take on my trips to space was a flag. I took along little silk flags so that I could give them to my children, and they remain among my children's most cherished possessions to this day.

For those who served in the armed services, we risked our lives because we believed it was our duty to defend our Nation. I can tell you that in combat you do not start out thinking about the philosophy of our Nation. When you start a run on a ground position from the air, through antiaircraft, or lead a patrol where people are getting shot, you do not think about such philosophical thoughts. It is survival that holds your attention. But every last fiber in our flag stands for someone who has given his or her life to defend what it stands for. Many of us have as many friends in Arlington Cemetery, bearing silent witness to our flag, as we have bearing public witness to it in the world of the living. Maybe that is why I have so little patience, and even less sympathy, for those pathetic and insensitive few who would demean and defile our Nation's greatest symbol of sacrifice. They deserve harsh censure.

But, in what I view as their demented ways, they also have my pity because they cannot, apparently, feel the pride and the exhilaration that comes from being called to a purpose larger than one's own self. They cannot feel the pride in our Nation and what it stands for; the pride in a Nation whose very strength rests in a guarantee of freedom of expression for every single person, whether that person agrees with the majority, or not. It is a guarantee that some misguided souls exploit for their own egotistical, self-centered purposes.

I believe that the members of this committee have a special responsibility to recognize that it would be a hollow victory indeed if we preserved the symbol of our freedoms by chipping away at fundamental themselves. Let the flag fully represent all the freedoms spelled out in the Bill of Rights, not a partial, watered-down version that alters its protections.

The flag is the Nation's most powerful and emotional symbol. It is our most sacred symbol. And it is our most revered symbol. But it is a symbol. It symbolizes the freedoms that we have in this country, but it is not the freedoms themselves. That is why this debate is not between those who love the flag on the one hand and those who do not on the other. No matter how often some try to indicate otherwise, everyone on both sides of this debate loves and respects the flag. The question is how best to honor it and without taking the chance of defiling what it represents.

Those who have made the ultimate sacrifice and died following that banner did not give up their lives for a red, white and blue piece of cloth. They died because they went into harm's way representing this country and because of their allegiance to the values, the rights, and principles represented by that flag. Without a doubt, the most important of

those values, rights, and principles is individual liberty: The liberty to worship, to think, to express ourselves freely, openly and completely, no matter how out of step those views may be with the opinions of the majority. In that first amendment to the Constitution we talk about freedom of speech, religion, of the press and the right to assemble.

The Bill of Rights was not included in the Constitution. The Bill of Rights was added after the Constitution was passed. Some states refused to ratify the Constitution because it did not have a Bill of Rights defining the basic human rights that they wanted this count to stand for. James Madison worked to add a Bill of Rights when the Constitution was already in existence.

The Congress passed the first 10 amendments known today as the Bill of Rights. Freedom of speech, freedom of religion, freedom of the press, and freedom of assembly are protected in the first amendment.

That commitment to freedom is encapsulated and encoded in our Bill of Rights, which is perhaps the most envied and imitated document anywhere in this world. The Bill of Rights is what makes our country unique. It is what has made us a shining beacon of hope, liberty and inspiration to oppressed peoples around the world for over 200 years. In short, it is what makes America, America.

Those 10 amendments to the Constitution we call the Bill of Rights have never been changed or altered by one iota, not by one word, not a single time in all of American history. There was not a single word changed in that Bill of Rights during Civil War. There was not a single change during any of our foreign wars, and not during recessions or depressions or panics. Not a single change when we were going through times of great emotion and anger like the Vietnam era, when flag after flag was burned or desecrated, far more often than they are today. Even during all that time, our first amendment remained unchanged and unchallenged.

The amendment under consideration today goes directly to the issue of freedom of speech. We are talking here about freedom of expression. The Supreme Court has held on two separate occasions that no matter how great the majority, under our Bill Rights the minority has the right of expression. That expression is protected by freedom of speech. Do we want to take a chance on reducing our freedom of speech? What about freedom the press? Do we want there to be even a small chance that our ability to assemble peaceably could be restricted? And do we want to take a chance that we would not be able to petition on government for redress of grievances? Those are the things that are covered in that first amendment, known as the Bill of Rights.

I think there is only one way to weaken the fabric of our Nation, a unique country that stands as a beacon before other Nations around this world. The way to weaken our Nation would be to erode the freedom that we all share.

To say that we should restrict the type of speech or expression that would outrage a majority of listeners or move them to violence is to say that we will tolerate only those

kinds of expression that the majority agrees with, or at least does not disagree with too much. That would do nothing less than gut the first amendment.

There is an argument that flag desecration is an act rather than a form of speech or expression that is protected by the first amendment? I believe that argument is a bit specious. Anybody burning a flag in protest is clearly saying something. They are making a statement by their body language, and their action makes a statement that may speak far, far louder than any words they may be willing to utter on such an occasion. They convey a message, just the same way that people who picket, or march in protest, or use other forms of symbolic speech express themselves. Indeed, if we did not view flag burning as something we find offensive and repugnant, we surely would not be debating the right of individuals to take such action.

Let me say a word about something that needs further discussion, something we should consider very carefully. I refer to the practical problems with this amendment. Let us say that the Congress passes it, the States pass it, it becomes an amendment, and we change the Constitution. Then what a nightmare we would have enforcing it.

If Congress and the States are allowed to prohibit the physical desecration of the flag, how precisely do we define the "flag"? We do not have an official flag, as such, with an exact size, type, kind of ink, dyes, or fabric. So does this amendment refer to only manufactured flags of cloth or nylon of a certain size or description, such as the ones we fly over the Capitol? Does it refer to the small paper flags on a stick we hand out to children at political rallies or stick in a cupcake at a banquet? Those flags are often tossed on the floor or in a garbage can at conclusion of event. How about during the 1976 bicentennial when vendors were selling flag bikini swimsuits for women and boxer shorts for men?

Remember that the proper way to destroy a flag that is old or has become soiled is to burn it. But what if you do it in protest? What was the intent? Every lawyer will tell you that the toughest thing to prove is intent.

I do not know what the courts would do in a case like that. We could present all kinds of examples of how this amendment would be very difficult to administer, and it would be subject to 50 different interpretations. I might be able to do something in Ohio, but if I drive across the Ohio River to Kentucky, West Virginia, or Pennsylvania, the same activity might be illegal.

This amendment should be defeated. The dangers from it far outweigh any threat to the flag. I simply do not believe that flag desecration is a major problem for this country that requires an amendment to the Constitution of the United States of America. Our most revered symbol stands for freedom but is not freedom itself. We must not let those who revile our way of life trick us into diminishing our great gift, or even take a chance of diminishing our freedoms.

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