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June 7, 2004

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

Dear Chairman Hatch and Ranking Member Leahy:

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

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

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

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

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

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

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

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

Sincerely,

A handwritten signature in cursive script that reads "Bruce Fein". The signature is written in dark ink and is positioned above the printed name.

Bruce Fein