AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

107TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
107–115

CONSTITUTIONAL AMENDMENT AUTHORIZING CONGRESS TO PROHIBIT THE PHYSICAL DESECRATION OF THE FLAG OF THE UNITED STATES

JUNE 27, 2001.—Referred to the House Calendar and ordered to be printed

---

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

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.J. Res. 36]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the joint resolution (H.J. Res. 36) proposing an amendment to the Constitution of the United States authorizing the Congress to prohibit the physical desecration of the flag of the United States, having considered the same, reports favorably thereon without amendment and recommends that the joint resolution do pass.

CONTENTS

	Page
Purpose and Summary	2
Background and Need for the Legislation	2
Hearings	6
Committee Consideration	6
Vote of the Committee	7
Committee Oversight Findings	8
Performance Goals and Objectives	8
New Budget Authority and Tax Expenditures	8
Congressional Budget Office Cost Estimate	9
Constitutional Authority Statement	10
Section-by-Section Analysis and Discussion	10
Markup Transcript	11
Dissenting Views	39

89–006

PURPOSE AND SUMMARY

H.J. Res. 36 proposes to amend the United States Constitution to allow Congress to prohibit the physical desecration of the flag of the United States. The proposed amendment reads: "The Congress shall have the power to prohibit the physical desecration of the flag of the United States." The amendment itself does not prohibit flag desecration. It merely empowers Congress to enact legislation to prohibit the physical desecration of the flag and establishes boundaries within which it may legislate. Prior to the United States Supreme Court decision in *Texas* v. *Johnson*,[1] forty-eight states and the Federal Government had laws prohibiting desecration of the flag. The purpose of the proposed amendment is to restore to the Congress the power to protect the flag.

BACKGROUND AND NEED FOR THE LEGISLATION

Since 1994, there have been 86 reports of incidents involving flag desecration that have occurred in 29 states, the District of Columbia, and Puerto Rico. Since the United States Supreme Court's 1989 ruling in *Texas* v. *Johnson*,[2] in which the Court held that burning an American flag as part of a political demonstration was expressive conduct protected by the First Amendment to the U.S. Constitution, neither the States, nor the Federal Government, have been able to prohibit the desecration of the American flag.

Gregory Johnson was convicted of desecrating a flag in violation of Texas law after publicly burning a stolen American flag in a protest outside of the 1984 Republican National Convention in Dallas, Texas.[3] The Texas law prohibited the intentional desecration of a national flag in a manner in which "the actor knows will seriously offend one or more persons likely to observe or discover his action."[4] His conviction was upheld by the Court of Appeals for the Fifth District of Texas at Dallas, but reversed by the Texas Court of Criminal Appeals. The United States Supreme Court, in a 5 to 4 vote, affirmed the Court of Criminal Appeals conclusion that Johnson's conviction was inconsistent with the First Amendment because his actions constituted "symbolic free expression."

Justice Rehnquist, in a dissenting opinion in which Justices O'Connor and White joined,[5] noted the unique history of the American flag:

> The American flag, then, throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. It does not represent the views of any particular political party, and it does not represent any particular political philosophy. The flag is not simply another

---

[1] 491 U.S. 397 (1989).
[2] *Id.*
[3] *Johnson,* 491 U.S. at 399–400.
[4] Tex. Penal Code Ann. Section 42.09(a)(3), Desecration of a Venerated Object, provided as follows:
(a) A person commits an offense if he intentionally or knowingly desecrates:
(1) a public monument;
(2) a place of worship or burial; or
(3) a State or national flag.
(b) For purposes of this section, "desecrate" means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.
(c) An offense under this section is a Class A misdemeanor.
[5] Justice Stevens filed a separate dissenting opinion.

> "idea" or "point of view" competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have. *I cannot agree that the First Amendment invalidates the Act of Congress, and the laws of 48 of the 50 States, which make criminal the public burning of the flag.*[6]

Justice Rehnquist also found persuasive the fact that Chief Justice Earl Warren, and Justices Black and Fortas were also of the opinion that the States and the Federal Government had the power to protect the flag from desecration and disgrace.

In response to the *Johnson* decision, in September 1989, Congress passed the "Flag Protection Act of 1989"[7] by a vote of a 380 to 38. The Act amended the Federal flag statute, 18 U.S.C. § 700, attempting to make it "content-neutral" so that it would pass constitutional muster. As stated in the House Judiciary Committee report, "the amended statute focuses exclusively on the conduct of the actor, irrespective of any expressive message he or she might be intending to convey."[8]

On June 11, 1990, in *U.S.* v. *Eichman*,[9] the United States Supreme Court, in another 5 to 4 decision, struck down the recently-enacted "Flag Protection Act of 1989," ruling that it infringed on expressive conduct protected by the First Amendment. Although the Government conceded that flag burning constituted expressive conduct, it claimed that flag burning, like obscenity or "fighting words," was not fully protected by the First Amendment. The Government also argued the Act was constitutional because, unlike the Texas statute struck down in *Johnson*, the Act was "content-neutral" and simply sought to protect the physical integrity of the flag rather than to suppress disagreeable communication.

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

> Although the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted *interest* is "related 'to the suppression of free expression,'" 491 U.S., at 410, 109 S.Ct., at 2543, and concerned with the content of such expression. . . . But the mere destruction or disfigurement of a particular physical manifestation of the symbol, without more, does not diminish or otherwise affect the symbol itself in any way. . . . [T]he Government's desire to preserve the flag as a symbol for certain national ideals is implicated "only when a person's treatment of the flag communicates [a] message" to others that is inconsistent with those ideals.[10]

Justice Stevens wrote a dissenting opinion in which Chief Justice Rehnquist, Justice White, and Justice O'Connor joined. He ex-

---

[6] *Johnson,* 491 U.S. at 429 (emphasis added).
[7] H.R. 2978, 101st Cong. (1989).
[8] *Flag Protection Act of 1989* H. Rep. No. 101–231, at 2 (1989). The Act became law without the President's signature on October 28, 1989 (Pub. L. No. 101–131).
[9] 496 U.S. 310 (1990).
[10] *Id.* at 315–316.

pressed agreement with the proposition expressed by the majority which stated that, "the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[11] He went on, however, to note that methods of expression may be prohibited under a number of circumstances and set forth the following standard:

> [I]f (a) the prohibition is supported by a legitimate societal interest that is unrelated to suppression of the ideas the speaker desires to express; (b) the prohibition does not entail any interference with the speaker's freedom to express those ideas by other means; and (c) the interest in allowing the speaker complete freedom of choice among alternative methods of expression is less important than the societal interest supporting the prohibition.[12]

Justice Stevens believed that the statute satisfied each of these concerns and thus should have withstood constitutional scrutiny.

Opponents of H.J. Res. 36 have argued that it will undermine First Amendment protections; however, the prohibition of flag desecration is, in fact, consistent with the letter and the spirit of the First Amendment. Under United States Supreme Court precedent, certain "expressive" acts are entitled to First Amendment protection based upon the principle that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.[13] Still, not all activity with an expressive component is currently afforded First Amendment protection. The Court has said that certain modes of expression may be prohibited if: 1) the prohibition is supported by a legitimate government interest that is unrelated to suppression of the ideas the speaker desires to express; 2) the prohibition does not interfere with the speaker's freedom to express those ideas by other means; and 3) the interest in allowing the speaker complete freedom among all possible modes of expression is less important than the societal interest supporting the prohibition.[14]

Applying these principles in *O'Brien*, the United States Supreme Court upheld a statute prohibiting the destruction of draft cards against a First Amendment challenge. 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 because the law prohibited the conduct *regardless* of the message sought to be conveyed by destruction of the draft card. The Court further held that the prohibition did not preclude other forms of expression or protest and that the smooth functioning of the Selective Service System outweighed the need to extend First Amendment protections to the act itself.[15]

In *Johnson*, the Court rejected Texas' attempt to prohibit flag desecration because, the Court concluded, Texas' interest in how one treats the flag will only arise "when a person's treatment of the flag communicates some message," making the prohibition "related 'to the suppression of free expression.'"[16] Similar to the *O'Brien*

---

[11] *Id.* at 319.
[12] *Id.*
[13] *See Texas* v. *Johnson*, 491 U.S. 397, 414 (1989).
[14] *See U.S.* v. *O'Brien*, 391 U.S. 367, 377 (1968).
[15] *See id.* at 381.
[16] *Johnson*, 491 U.S. at 410.

ruling, however, the government's interest in preserving the symbolic value of the American flag is present regardless of the message sought to be conveyed by any particular act of flag desecration. H.J. Res. 36 does not seek to express approval of, nor does it seek to suppress, any particular content of speech or viewpoint. Rather, it seeks to remove the physical flag as a means of communication, regardless of the content or viewpoint of one's speech. Alternative means of expressing ideas are available to speakers, from various points of view on all subjects, who would desecrate a flag in order to express their message. Such was the status quo in 48 states and lands under Federal jurisdiction prior to the *Johnson* and *Eichman* rulings, during which time open debate flourished throughout America's history.

The *Eichman* dissent provides an instructive analysis of why Congressional action prohibiting flag desecration is consistent with the First Amendment. In that dissent, Justice Stevens, joined by Chief Justice Rehnquist, and Justices White and O'Connor, began his analysis stating the well-accepted First Amendment principle that "the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[17] However, Stevens concluded that the Federal Government has a legitimate interest in protecting the intrinsic value of the American flag because it, "in times of national crisis, inspires and motivates the average citizen to make personal sacrifices in order to achieve societal goals of overriding importance," and, "at all times it serves as a reminder of the paramount importance of pursuing the ideas that characterize our society."[18] Speaking of the 1989 Act, Stevens continued:

> It is, moreover, equally clear that the prohibition does not entail any interference with the speaker's freedom to express his or her ideas by other means. It may well be true that other means of expression may be less effective in drawing attention to those ideas, but that is not itself a sufficient reason for immunizing flag burning. Presumably a gigantic fireworks display or a parade of nude models in a public park might draw even more attention to a controversial message, but such methods of expression are nevertheless subject to regulation.[19]

Stevens concluded that the societal interest in preserving the symbolic value of the flag outweighs the interest of an individual who believes that desecrating the flag will be the most effective method of expressing his or her views. Although the value of the individual's choice is "unquestionably a matter of great importance," tolerance of flag burning, concluded Stevens, will "tarnish that value."[20]

The belief that the prohibition of flag desecration is consistent with the First Amendment had gone unquestioned prior to the *Johnson* ruling. Former Chief Justice Earl Warren in *Street* v. *New York*, stated: "I believe that the States and the Federal Government do have power to protect the flag from acts of desecration and

---

[17] *U.S.* v. *Eichman*, 496 U.S. 310, 319 (1990).
[18] *Id.*
[19] *Id.* at 322.
[20] *Id.*

disgrace."[21] In the same case, Justice Hugo Black, a zealous proponent of freedom of speech wrote: "It passes my belief that anything in the Federal Constitution bars . . . making the deliberate burning of the American flag an offense."[22] Again, in *Street*, Justice Abe Fortas stated that, "[t]he States and the Federal Government have the power to protect the flag from acts of desecration."[23] He continued, "[T]he flag is a special kind of personality. Its use is traditionally and universally subject to special rules and regulations."[24] It should also be mentioned that, on numerous occasions, the Supreme Court has upheld government regulation of pure speech. For example, speech that is likely to incite an immediate, violent response,[25] obscenity,[26] and libel[27] are not protected under the First Amendment.

H.J. Res. 36 furthers the legitimate interest of the Federal Government in protecting the American flag, and it does not interfere with a speaker's freedom to express his or her ideas by other means. Because of the *Johnson* and *Eichman* decisions, the only remedy that Congress may pursue in order to protect the American flag from acts of desecration is a constitutional amendment. Since the Eichman ruling, forty-nine states have passed resolutions calling on Congress to pass the amendment and send it back to the states for ratification.[28] H.J. Res. 36 would restore the authority of Congress to prohibit the physical desecration of the flag. The amendment itself does not prohibit flag desecration; it merely empowers Congress to enact legislation to prohibit the physical desecration of the flag and establishes boundaries within which it may legislate. Work on a statute will come at a later date, after the amendment is ratified by three-fourths of the States.

HEARINGS

No hearings were held on H.J. Res. 36. However, hearings were held on identical language proposed in the 105th and 106th Congress.[29]

COMMITTEE CONSIDERATION

On Thursday, May 24, 2001, the Subcommittee on the Constitution met in open session and ordered favorably reported the bill, H. J. Res. 36, by a vote of 5 to 3, a quorum being present. On Wednesday, June 20, 2001, the Committee met in open session and ordered favorably reported the bill, H. J. Res. 36 without amendment by a recorded vote of 15 to 11, a quorum being present.

---

[21] 394 U.S. 576, 605 (1969).
[22] *Id.* at 610.
[23] *Id.* at 615.
[24] *Id.* at 616.
[25] *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942).
[26] *Miller* v. *California*, 413 U.S. 15 (1973).
[27] *New York Times, Co.* v. *Sullivan*, 376 U.S. 254 (1964).
[28] The fiftieth State, Vermont, passed the resolution in both Houses, but in separate sessions.
[29] *Flag Desecration Constitutional Amendment: Hearing on H.J. Res. 54 Before the Subcomm. on the Constitution, House Comm. on the Judiciary,* 105th Cong. (1997). *Flag Burning Constitutional Amendment: Hearing on H.J. Res. 33 Before the Subcomm. on the Constitution, House Comm. on the Judiciary,* 106th Cong. (1999).

VOTE OF THE COMMITTEE

1. An amendment was offered by Mr. Watt to add the phrase "Not inconsistent with the first article of amendment to this Constitution," changing H.J. Res. 36 to read: "Not inconsistent with the first article of amendment to this Constitution, the Congress shall have the power to prohibit the physical desecration of the flag of the United States." The amendment was defeated by rollcall vote of 9 to 13.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Hyde			
Mr. Gekas		X	
Mr. Coble		X	
Mr. Smith (Texas)			
Mr. Gallegly			
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Barr		X	
Mr. Jenkins		X	
Mr. Hutchinson			
Mr. Cannon		X	
Mr. Graham			
Mr. Bachus			
Mr. Scarborough			
Mr. Hostettler		X	
Mr. Green		X	
Mr. Keller		X	
Mr. Issa		X	
Ms. Hart		X	
Mr. Flake			
Mr. Conyers			
Mr. Frank	X		
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee			
Ms. Waters	X		
Mr. Meehan			
Mr. Delahunt			
Mr. Wexler	X		
Ms. Baldwin	X		
Mr. Weiner	X		
Mr. Schiff			
Mr. Sensenbrenner, Chairman		X	
Total	9	13	

2. An amendment was offered by Mr. Scott to delete the word "desecration" and insert in its place the word "burning." The amendment was defeated by a voice vote.

3. Final Passage. The motion to report favorably the joint resolution, H.J. Res. 36, was agreed to by a rollcall vote of 15 to 11.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Hyde			
Mr. Gekas	X		

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Coble	X		
Mr. Smith (Texas)			
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Chabot	X		
Mr. Barr	X		
Mr. Jenkins	X		
Mr. Hutchinson			
Mr. Cannon	X		
Mr. Graham	X		
Mr. Bachus			
Mr. Scarborough			
Mr. Hostettler	X		
Mr. Green	X		
Mr. Keller	X		
Mr. Issa	X		
Ms. Hart	X		
Mr. Flake			
Mr. Conyers		X	
Mr. Frank		X	
Mr. Berman		X	
Mr. Boucher			
Mr. Nadler			
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee			
Ms. Waters		X	
Mr. Meehan		X	
Mr. Delahunt			
Mr. Wexler		X	
Ms. Baldwin		X	
Mr. Weiner		X	
Mr. Schiff			
Mr. Sensenbrenner, Chairman	X		
Total	15	11	

COMMITTEE OVERSIGHT FINDINGS

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

PERFORMANCE GOALS AND OBJECTIVES

H.J. Res 36 does not authorize funding. Therefore, clause 3(c) of rule XIII of the Rules of the House is inapplicable.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

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

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the resolution, H.J. Res. 36, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 22, 2001.

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

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.J. Res. 36, proposing an amendment to the Constitution of the United States authorizing the Congress to prohibit the physical desecration of the flag of the United States.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Lanette J. Walker (for Federal costs), who can be reached at 226–2860, and Shelley Finlayson (for the State and local impact), who can be reached at 225–3220.

Sincerely,

DAN L. CRIPPEN, *Director.*

Enclosure

cc: Honorable John Conyers Jr.
Ranking Member

H.J. Res. 36—Proposing an amendment to the Constitution of the United States authorizing the Congress to prohibit the physical desecration of the flag of the United States.

H.J. Res. 36 would propose an amendment to the Constitution to allow the Congress to enact legislation that would prohibit physical desecration of the U.S. flag. The legislatures of three-fourths of the states would be required to ratify the proposed amendment within seven years for the amendment to become effective. By itself, this resolution would have no impact on the federal budget. If the proposed amendment to the Constitution is approved by the states, then any future legislation prohibiting flag desecration could impose additional costs on U.S. law enforcement agencies and the court system to the extent that cases involving desecration of the flag are pursued and prosecuted. However, CBO does not expect any resulting costs to be significant. Because enactment of H.J. Res. 36 would not affect direct spending or receipts, pay-as-you-go procedures would not apply.

H.J. Res. 36 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments. In order for the amendment to become part of the Constitution, three-fourths of the state legislatures would have to ratify the resolution within seven years of its submission to the states by Congress. However, no state would be required to take action on the resolution, either to reject it or approve it.

The CBO staff contacts for this estimate are Lanette J. Walker (for federal costs), who can be reached at 226–2860, and Shelley Finlayson (for the state and local impact), who can be reached at 225–3220. This estimate was approved by Robert A. Sunshine, Assistant Director for Budget Analysis.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article V of the Constitution, which provides that the Congress has the authority to propose amendments to the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

H.J. Res. 36 simply states that "[t]he Congress shall have power to prohibit the physical desecration of the flag of the Unites States." Congress clearly possessed this power prior to the decisions of the United States Supreme Court in *Texas* v. *Johnson*[30] and *U.S.* v. *Eichman*.[31] Those decisions held that the act of physically desecrating the flag by burning was expressive conduct protected by the First Amendment. As interpreted by the Supreme Court, the First Amendment to the U.S. Constitution, which states that, "Congress shall make no law . . . abridging freedom of speech," limits the power of Congress. H.J. Res. 36 makes clear that Congress does have the power to pass legislation to prohibit the physical desecration of the flag of the United States.

This proposed constitutional amendment sets the parameters for future action by the Congress on this issue. After the amendment is ratified, the elected representatives of the people will once again have the power, and can decide whether to enact legislation, to prohibit the physical desecration of the flag.

There are two key issues that will need to be considered in enacting legislation to protect the flag from physical desecration.

First, Congress, must consider the meaning of "physical desecration." The amendment itself requires physical contact with the flag. Under this amendment, Congress could not punish mere words or gestures directed at the flag, regardless of how offensive they were. Webster's Ninth New Collegiate Dictionary defines "desecrate" as follows: "1: to violate the sanctity of: PROFANE 2: to treat irreverently or contemptuously often in a way that provokes outrage on the part of others." "Desecrate" is defined in Black's Law Dictionary as "to violate sanctity of, to profane, or to put to unworthy use." Congress could clearly prohibit burning, shredding, and similar defilement of the flag.

Second, Congress will have to decide what representations of the flag of the United States are to be protected. Of course, the resolution in no way changes the fact that "what constitutes the flag of the United States" is defined by the United States Congress at 4 U.S.C. § 1. In enacting a statute, Congress will need to decide which representations of the flag are to be protected from physical desecration. They may define the flag of the United States as only a cloth, or other material readily capable of being waved or flown, with the characteristics of the official flag of the United States as

[30] 491 U.S. 397 (1989).
[31] 496 U.S. 310 (1990).

described in 4 U.S.C. § 1; or a "flag" could be anything that a reasonable person would perceive to be a flag of the Unites States even if it were not precisely identical to the flag as defined by statute. This would allow States and the Congress to prevent a situation whereby a representation of a United States flag with forty-nine stars or twelve red and white stripes was burned in order to circumvent the statutory prohibition.

MARKUP TRANSCRIPT

BUSINESS MEETING

WEDNESDAY, JUNE 20, 2001

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

The committee met, pursuant to notice, at 11:07 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner [Chairman of the Committee] presiding.

AFTERNOON SESSION [1:47 p.m.]

Chairman SENSENBRENNER. The Committee will be in order.

The next item on the agenda is the consideration of H.J. Res. 36, proposing an amendment to the Constitution of the United States authorizing the Congress to prohibit the physical desecration of the flag of the United States. The Chair recognizes the gentleman from Ohio, Mr. Chabot, the Chairman of the Subcommittee on the Constitution, for a motion.

Mr. CHABOT. Thank you, Mr. Chairman.

The Subcommittee on the Constitution reports favorably the bill H.J. Res. 36 and move its favorable consideration, its recommendation to the full House.

Chairman SENSENBRENNER. Without objection, H.J. Res. 36 will be considered as read and open for amendment at any point. The Chair recognizes the gentleman from Ohio, Mr. Chabot, to strike the last word.

[H.J. Res. 36 follows:]

1A

107TH CONGRESS
1ST SESSION

H. J. RES. 36

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

IN THE HOUSE OF REPRESENTATIVES

MARCH 13, 2001

Mr. CUNNINGHAM (for himself, Mr. MURTHA, Mr. KANJORSKI, Mr. SHIMKUS, Mr. SHOWS, Mr. ROHRABACHER, Mr. RYUN of Kansas, Mr. BURTON of Indiana, Ms. HART, Mr. BARCIA, Mr. CROWLEY, Mr. DOOLEY of California, Mr. THUNE, Mr. BEREUTER, Mr. GUTKNECHT, Mr. HUNTER, Mr. MCCRERY, Mr. BOEHLERT, Mr. SAXTON, Mr. RAMSTAD, Mr. GOODE, Mr. FOSSELLA, Mr. TOOMEY, Mr. BACHUS, Mr. LOBIONDO, Mr. GANSKE, Mr. DUNCAN, Mr. CRAMER, Mr. GREEN of Texas, Mr. KING, Mr. SMITH of Texas, Mr. FRELINGHUYSEN, Mr. HILLEARY, Mrs. KELLY, Mr. GILMAN, Mr. ENGLISH, Mr. OSBORNE, Mr. BUYER, Mr. SUNUNU, Mr. CAMP, Mr. SWEENEY, Mr. FOLEY, Mr. COOKSEY, Mr. DEAL of Georgia, Mr. TAYLOR of North Carolina, Mr. ROGERS of Michigan, Mr. RILEY, Mr. SMITH of New Jersey, Mr. ISAKSON, Mr. EVERETT, Mr. REYNOLDS, Mr. RAHALL, Mr. STENHOLM, Mr. BILIRAKIS, Mr. DOYLE, Mr. WICKER, Mr. SIMMONS, Mrs. MCCARTHY of New York, Mr. STUMP, Mr. TOM DAVIS of Virginia, Mrs. THURMAN, Mr. SKELTON, Mr. LIPINSKI, Mr. GARY MILLER of California, Mr. TAYLOR of Mississippi, Mr. WALDEN of Oregon, Mr. WOLF, Mr. MCNULTY, Mr. HUTCHINSON, Mrs. MYRICK, Mr. CRENSHAW, Mr. BISHOP, Mr. EHRLICH, Mr. SCHROCK, Mr. BARTON of Texas, Mr. SOUDER, Mr. EDWARDS, Mr. FLETCHER, Mr. SIMPSON, Mr. GILLMOR, Mr. BACA, Mr. OXLEY, Mr. HULSHOF, Mr. TANCREDO, Mrs. JO ANN DAVIS of Virginia, Mr. HINOJOSA, Mr. GREEN of Wisconsin, Mr. LEWIS of Kentucky, Mrs. EMERSON, Mr. BAKER, Mr. ADERHOLT, Mr. HORN, Mrs. WILSON, Mr. RADANOVICH, Mr. ISSA, Mr. YOUNG of Alaska, Mr. QUINN, Mr. AKIN, Mr. KERNS, Mr. GRUCCI, Mr. GRAHAM, Mr. MOLLOHAN, Mr. HAYWORTH, Mr. HEFLEY, Mr. BROWN of Ohio, Mr. TURNER, Mr. SHAW, Mr. SAM JOHNSON of Texas, Mr. ROGERS of Kentucky, and Mr. GORDON) introduced the following joint resolution; which was referred to the Committee on the Judiciary

JOINT RESOLUTION

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

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein),

SECTION 1. CONSTITUTIONAL AMENDMENT.

The following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission for ratification:

"ARTICLE —

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

○

Mr. CHABOT. Thank you, Mr. Chairman.

Since 1994, there have been 86 reported incidences involving flag desecration. Since the U.S. Supreme Court's 1989 ruling in *Texas* versus *Johnson*, neither the States nor the Federal Government have been able to prohibit the desecration of this unique symbol of America's founding principles. In *Johnson*, the Court, by a 5 to 4 vote, held that burning an American flag as part of a political demonstration was expressive conduct, protected by the First Amendment to the U.S. Constitution.

In response to *Johnson*, Congress overwhelmingly passed the "Flag Protection Act of 1989", which amended the Federal flag statute to focus "exclusively on the conduct of the actor, irrespective of any expressive message he or she might be intending to convey."

In 1990, however, in another 5 to 4 ruling, the U.S. Supreme Court in *United States* v. *Eichman* struck down that act as an infringement of expressive conduct protected by the First Amendment, despite having also concluded that the statute was content-neutral.

According to the Court, the government's desire to protect the flag "is implicated only when a person's treatment of the flag communicates a message to others." Therefore, any flag desecration statute by definition will be related to the suppression of free speech and run afoul of the First Amendment.

Vigilant protection of political speech is central to our political system, and Americans have a profound national commitment to ensuring uninhibited, robust, and wide open debate on public issues. Until the *Johnson* and *Eichman* cases, however, punishing flag desecration had been viewed as compatible with both the letter and the spirit of the First Amendment, and both Thomas Jefferson and James Madison strongly supported Government actions to prohibit flag desecration.

First amendment freedoms do not extend and should not be extended to grant an individual an unlimited right to engage in any form of desired conduct. Both State and Federal criminal codes prohibit conduct that could conceivably be cloaked in the First Amendment, yet the constitutionality of such statutes is not questioned. Burning a $10 bill, urinating in public, pushing over a tombstone, parading through the streets naked are examples of illegal conduct. Such conduct is not a form of argument in which the robust exchange of ideas occurs, and neither does such an exchange occur when one desecrates a flag. Rather, they are examples of conduct that our society has chosen not to condone. Until 1989, flag desecration was included in that list. As a result of the Court's misguided conclusions in *Johnson* and *Eichman*, however, disruptive and violent conduct has been elevated to the same level as pure political speech.

While amending the Constitution is a power that should not be taken lightly, the only remedy left to the American people as a result of the *Johnson* and *Eichman* rulings is a constitutional amendment. The amendment before us will restore the authority of Congress to prohibit the physical desecration of the flag. The amendment itself does not prohibit flag desecration. It merely empowers Congress to enact legislation. Work on a statute will come at a later date, after the amendment is ratified by three-fourths of the States.

In a compelling dissent from the *Johnson* majority's conclusion, Chief Justice Rehnquist, joined by Justices O'Connor and White, stated as follows: "The American flag, then, throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. It does not represent the views of any particular political party, and it does not represent any particular political philosophy. The flag is not simply another idea or point of view competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with almost mystical reverence, regardless of what sort of social, political, or philosophical beliefs they may have."

H.J. Res. 36 simply reflects society's interest in maintaining the flag as the national symbol by prohibiting its physical desecration.

Any statute enacted pursuant to it will not interfere with the ability of persons from various opposing viewpoints to express their ideas by other means. In his *Johnson* dissent, Chief Justice Rehnquist correctly observed that the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places.

I urge the Committee to protect this irreplaceable symbol of America's founding principles and approve this resolution. And I yield back the balance of my time.

Chairman SENSENBRENNER. Who wishes to make the statement for the minority? The gentleman from New York, Mr. Nadler, you are recognized for 5 minutes.

Mr. NADLER. Thank you, Mr. Chairman.

Once again we are going to waste our time on a non-serious amendment to the Constitution. There are enough Members of this House, thankfully, who value the freedoms the flag represents to defeat this amendment this year, as in prior years.

But we will go through this exercise anyway in an annual political rite. I wonder if I am the only Members of this sub—of this Committee who would be willing to simply read last year's debate into the record, allow any new Members to say their pieces, consider any amendments, and then reconvene and move on.

Chairman SENSENBRENNER. Without objection——

[Laughter.]

Mr. NADLER. I would urge my colleagues to revere what the flag represents, the freedoms that make this a great Nation more than the symbol itself. For example, we have read much in the last few weeks of the fact that a flag was burnt at the funeral of Mr. Dorisman, an unarmed man in New York, who was killed by police for the crime of standing on the street corner in my district. I think we all know that disrupting a funeral, stealing someone else's flag and destroying it, is already a serious crime. And no one doubts the constitutionality of what makes it a crime. We do not need to play games with the Bill of Rights to deal with that situation.

I somehow wish the majority would show as much interest in the civil rights of the dead man as they seem to show toward the protection of the flag at that funeral.

People have rights in this country that supersede public opinion and even supersede the regard we have for the flag. The flag is a symbol of those rights which make this Nation great. If we do not preserve those rights, then the flag will have been desecrated far beyond the capability of any individual with a cigarette lighter.

Let there be no doubt that this amendment is aimed directly at ideas, at ideas people have a right to express. Current Federal law says the preferable way to dispose of a tattered flag—this is the current Federal law—is to burn it. But there are those who would criminalize the same act, burning the flag, if it were done to express political dissent as opposed to being done to express reverence for the flag. So what is really being criminalized is not burning the flag, but the wrong intent, an intent I thought that we disagree with, and that is the heart of the First Amendment that we can't do that.

Current law, Federal law, which is constitutionally void, makes it a misdemeanor to use the flag for advertising or in packaging. How many Members of Congress, used-car dealers, fast-food res-

taurants, and other seeming legitimate individuals and enterprises have engaged in this act which our laws define as criminal desecration. This amendment would presumably make that more constitutional once again. If ratified, I think there are more than few people in the House who would have to redesign their campaign materials to stay out of jail.

Let me add one thing. As I said at the Subcommittee, today we often see movies in which actors portraying Nazi soldiers burn the American flag or trample it into the ground. Presumably this amendment will not make those actors subject to arrest. The only people who will be subject to arrest again will be people who do the same thing while expressing an unpopular idea, while expressing dissent or disgust with the policies of this country. But people who in a play or a movie portraying some enemy of the country burn the flag, they're not going to be subject to arrest.

So, again, what is being made criminal, what the desire is to make criminal, is not the act of burning the flag or trampling it into the ground or doing something else disrespectful to the flag. It's doing that in conjunction with unpopular thoughts. Doing it in conjunction with a popular thought, like saying Nazi soldiers are terrible people and you shouldn't do that and we shouldn't follow the example of the Nazi, well, that's fine in a movie or a play or even in an instructional manual. But we are—this is the core of expressive freedom, and the whole purpose of this amendment is to say that we want to criminalize certain kinds of expressive opinion because we do not agree with that opinion. And the Chairman—the Chairman of the Subcommittee started off by saying 86 times since 1991. We're going to amend the Bill of Rights and start down that terrible road because of eight and a half nuts per year in a country of 280 million people? Let those eight and a half nuts be nuts. We'll survive that.

I yield back.

[The statement of Mr. Nadler follows:]

PREPARED STATEMENT OF THE HONORABLE JERROLD NADLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Thank you, Mr. Chairman. Well, here we go again with the annual Republican Rite of Spring: a proposed amendment to the Bill of Rights to restrict what it calls flag "desecration."

Why spring? Because, the calendar tells us, Monday is Memorial Day, June 14, is Flag Day, and then we have July 4th. Members need to send out a press release extolling the need to "protect" the flag. We know this is not, thankfully, a serious amendment. There are enough members of this Congress who value the freedoms the flag represents more than the symbol itself. But we will go through this exercise anyway. I wonder if I am the only member of this Subcommittee who would be willing to simply read last year's debate into the record, allow any new members to say their pieces, consider any amendments, and move on.

I would urge my colleagues to revere what the flag represents, the freedoms that make this a great nation, more than the symbol itself.

For example, the Majority has made much of the fact that a flag was burnt at the funeral of Mr. Dorisman, an unarmed man who was killed by police for the crime of standing on a street corner in my district. I think we all know that disrupting a funeral, stealing someone else's flag and destroying it is already a crime. We do not need to play games with the Bill of Rights to deal with that situation. I somehow wish that the majority would show as much interest in the civil rights of the dead man as they seem to show toward the protection of the flag at that funeral. That, in a nutshell is what is wrong with this amendment. People have rights in this country that supercede public opinion, and certainly a flag. The flag is the symbol of those rights which make this nation great. If we do not preserve those

rights, then the flag will have been desecrated far beyond the capability of any individual with a cigarette lighter.

Let there be no doubt that this amendment is aimed directly at ideas. Current federal law says that the preferred way to dispose of a tattered flag is to burn it, but there are those who would criminalize the same act if it was done to express political dissent. Current federal law, which is constitutionally void, also makes it a misdemeanor to use the flag for advertising or on packaging. How many members of Congress, used car dealers, fast food restaurants, and other seeming legitimate individuals and enterprises have engaged in this act which our laws define as criminal desecration? This amendment would presumably make that law constitutional once more. If ratified, I think there are more than a few people who will have to redesign their campaign materials to stay out of the pokey.

People died for the nation and the rights which this flag so proudly represents. Let us not destroy the way of life for which they made the ultimate sacrifice.

Chairman SENSENBRENNER. Without objection, all Members may put statements in the record at this point.

Chairman SENSENBRENNER. Are there amendments to the joint resolution?

Mr. FRANK. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Massachusetts.

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

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. FRANK. I understand the need for haste, but we are amending the U.S. Constitution here or contemplating that, and this is a very grave matter. And I think—I disagree with those who want to amend the Constitution in this regard. I honor their sentiments, and I think they really are owed a full explanation and a full debate of this.

The problem here is the principle that we operate under. I believe the principle ought to be that simply because the Government does not punish you for doing something in no way indicates that we approve of it or that what we think you're doing is correct. The problem here is that we are approaching the establishment of a principle that says that which the Government does not prohibit, it is in some way countenancing or allowing.

I would hope we would have this view that in this free society the general rule is you as an individual are allowed to do anything, and no inference is to be drawn from the Government not acting. That is, we recognize that there are many choices available to individuals in this society which are despicable, contemptible, which portray terrible moral values, but which precisely because we are free society, individuals are allowed to pursue.

Free speech is, of course, one of the best examples. It is relatively easy to come to the aid of speech with which you are in agreement. The true test of your commitment to free speech is your willingness to allow someone without legal hindrance to say violent, contemptible things.

The Supreme Court of the United States said you have a constitutional right not just to burn a flag but to burn a cross. Few things in this country's history are as much a repudiation of fundamental moral values as race relations. Burning a cross is intended to be a validation of some of the worst crimes committed in this country against people of color. And the Supreme Court said if it's your cross and it's on your property, you've got a right to burn it.

Well, here's the problem. If we amend the Constitution to say that it is wrong to burn a flag because we believe that it is wrong

to burn a flag, what are we then saying when we leave standing the Supreme Court opinion that says it's okay to burn a cross? Okay in the sense that it is not illegal. Not that it's right, not that we have anything but contempt for the bigots who do that. And that's the problem. Once you have established the principle that if we disagree with an action we should make it criminal, what about all of the virtually identical actions that we have not criminalized? Are we then saying—I guess we are—that although we have the power to make it criminal for you to burn a cross or to burn the Bible or to burn copies of the Constitution, as was done by some of the abolitionists, or to deface and degrade and destroy a number of other very important symbols that carry very important weight to people, well, then, we don't really object to that because we have set the principle. If we don't want you to do it, we will stop you legally. And, therefore, what we have not stopped we must be indulging. And I think that it is a mistake.

So that's what we are talking about here. It has nothing to do with the merits of the flag or not. It has to do with the established—establishing this basic principle of freedom, and I would hope the principle would be, as we have all tried to hold to, if you are not, in fact, physically injuring someone else, if you are not taking that person's property, depriving them of the property, as the gentleman from New York pointed out, the people who thuggishly burned a flag at the funeral of that man who was unjustifiably shot to death by the police, they behaved in a fashion that was not only bad but illegal, and they could have and should have been prosecuted for a number of crimes. That's what the law ought to do. The law ought to protect our persons and our property from this sort of invasion.

But once you set down the road of physically preventing someone from doing this thing or punishing him or her from doing it because we disapprove of it as an expression, because it destroys a symbol of great value to all of us, then you have breached the principle of freedom and you have set a precedent, and I don't know where it stops. And I am prepared to predict this will not be the only request we get. If, in fact, the constitutional amendment is set up and it's okay to prosecute people for burning a flag, what do you say to the people who say, Well, how can you let them burn a cross? What do you say to African Americans who say, This has been a symbol of the most terrible degradation and oppression imposed on people like me. How can you allow them freely to burn this cross in this way, or destroy the Bible, or destroy these other symbols?

So I hope we will reject the constitutional amendment, not out of any disrespect for the flag but out of recognition of the centrality of the freedom principle.

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

Ms. WATERS. Mr. Chairman and Members——

Chairman SENSENBRENNER. Five minutes.

Ms. WATERS. Thank you. I—this is one of those moments and pieces of legislation where it would be easy to choose to be quiet because, even if you are going to vote to oppose it, you buy yourself a bit of trouble by stepping up and saying that you're going to oppose it and saying why you're going to oppose it. But I think for

those of us who really value freedom and justice and democracy, it is important for us to always be on the cutting edge of this and other issues that we could dismantle if we placed our political interest first rather than supporting this democracy that we believe has held us all in good stead.

Mr. Frank mentioned how it is absolutely difficult for people of color to accept that the burning of a cross is an expression that is protected by the Constitution of the United States. I have always, from the first time I was taught the Constitution and the Bill of Rights, understood why it's so important for us to support and value freedom of speech and freedom of expression.

I would dare say that if we allowed freedom of speech and freedom of expression to be undermined, we would not have the ability to do the kind of protests and marching and rallies that moved this country forward and forced this country to deal with civil rights.

I receive some vicious mail, and often times I'm called terrible names, and I know other Members of Congress sometimes receive this kind of mail. There have been times when I've been in various communities where, you know, someone has stopped to let me know how much they dislike me, how much they dislike people of color, on and on and on. And while for the moment it angers me, I always settle down and think about how precious and important that right is and how it must be protected.

I enjoy so much freedom of expression, freedom of speech. I try in everything that I do to exercise to the best of my ability the right to say and do and be, because this country and this Constitution, this democracy, allows us to do that.

I am—I will not question the motives of my colleague, but this is an issue that distresses me, this flag desecration issue, because I see some people who have paid some—made some terrible sacrifices literally manipulated on this issue. I see veterans who care a lot about the flag, as we all do, and really do believe that they had the responsibility to try and protect the flag, get organized, they come to Congress, and they work very hard to pass this kind of legislation.

And often times I want to say to them so much, you know, look at some of the efforts that are made every year about the 4th of July on this issue and see what is being done, where are these people, on trying to straighten out Veterans Affairs where we have veterans coming to our doors day in and day out who cannot get their disability status. We work long hours to try and make sure that veterans get what's coming to them, and I have an expert in my office who's been able to get back payment, who's been able to work out very difficult issues with Veterans Affairs. We need to straighten out Veterans Affairs. It's not what it should be. We talk about the flag, but we are not talking about putting more money and more resources to make sure that veterans are serviced. We need more veteran centers. There are communities still without veteran centers where veterans can go and get assistance.

We need to straighten out and strengthen veterans' hospitals. We have people who are sitting in those emergency rooms and around those hospitals day in and day out. Well, you talk to some of the same people who make a big, big deal out of flag desecration, and they will tell you they're fiscal conservatives, and they will not sup-

port the spending of more money to do some of the kinds of things that need to be done for veterans.

Well, I'm not a fiscal conservative. I am not going to support a bill like this, but I certainly will support veterans and spend money on them and try and make sure that whether it is Agent Orange or any of the other difficult issues they're dealing with, that this country does what it is supposed to do.

So I would ask my colleagues, and I would ask some of my colleagues who have always gone along with this because they don't have the courage not to, let's send a different message this time. Let us not pass this legislation. Let us oppose it. And let us see if we can't commit to see what we can do to strengthen the democracy and increase the opportunity for people to be able to say what they think is in the best interest of the issues that they're working on, and let us work hard to protect the veterans.

I will yield back the balance of my time.

Chairman SENSENBRENNER. Anybody else who wishes to speak?

Mr. COBLE. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from North Carolina.

Mr. COBLE. Mr. Chairman, I will not use the 5 minutes. Move to strike the last word.

The gentlelady from California said she received hate mail. Well, I say to Ms. Waters she does not own a corner on that market. I receive hate mail as well, but for different reasons. I come down on the side of authorizing the Congress to prohibit the physical desecration of the flag of the United States, and I, too, have received hate mail. This is a volatile issue, and I think many of us are going to have to just learn to disagree agreeably. But hate mail is coming both—on both sides of this issue.

I just wanted to weigh in to that extent, Mr. Chairman, and yield back. Mr. Chairman, I yield back the balance of my time.

Chairman SENSENBRENNER. Are there any amendments? If there are no amendments, we can vote on this. Okay. The Committee stands in recess. Please come back promptly after the rollcalls.

[Recess.]

Chairman SENSENBRENNER. The Committee will be in order. Pending at the time of the recess was the Joint Resolution, H.J. Res. 36, Constitutional Amendment to give Congress the power to prohibit the physical desecration of the flag of the United States. The Joint Resolution was read and open for amendment at any point.

The gentleman from North Carolina, Mr. Watt, for what purpose do you seek recognition?

Mr. WATT. Thank you, Mr. Chairman. I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. The amendment to H.J. Res. 36——

Mr. WATT. Mr. Chairman, I ask unanimous consent the amendment be considered as read.

Chairman SENSENBRENNER. Well, if the gentleman will withhold, we'd like to take a look at it first.

Without objection the amendment is considered as read, and the gentleman from North Carolina is recognized for 5 minutes.

[The amendment follows:]

Amendment to H.J. Res. 36

Offered by Mr. Watt

Page 2, line 12, strike "The" and insert "Not inconsistent with the first article of amendment to this Constitution, the".

Mr. WATT. Thank you, Mr. Chairman. I'll be brief. I think this is an amendment which I have offered before at previous markups, and at the Subcommittee, in the full Committee, and on the floor, which reflects a couple of concerns. Number one, if you've got a constitutional amendment in the form that is currently being proposed, and you have a First Amendment, which already is in the Constitution, one might legitimately be concerned which one would take precedence in the event there were a conflict, and so I think it's important, although it may be redundant, to say that whatever provision might be adopted pursuant to the proposed constitutional amendment that is the subject of debate here, should be subject to the existing First Amendment. If you did it in terms of chronological age, I think all of us would understand that the First Amendment has certainly been around for a long time, much, much longer than anything that—than H.J. Res. 36, the article that would be adopted by H.J. Res. 36.

If you did it in terms of importance, I would dare say that the First Amendment would—should be the provision that takes precedence, but in the absence of this proposed amendment that I'm offering, then basically we are leaving it to the Supreme Court to make the determination of which would take precedence, and I think we ought to make that decision here, not leave it to the Court.

So I'm not going to belabor this. I know the Chairman wants to move on with the markup, and everybody who has been on this Committee in prior years has already heard all the arguments about this, so I will just yield back the balance of my time.

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

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

Chairman SENSENBRENNER. The gentleman's recognized for 5 minutes.

Mr. CHABOT. Thank you, Mr. Chairman. I rise in opposition to the amendment. Mr. Watt's amendment is flawed because the present Court would declare that any legislation that effectively prohibits the physical desecration of the flag is inconsistent with the First Amendment.

As the first phrase of the amendment, any court construing the amendment will find Mr. Watt's additional language controlling. When the Supreme Court struck down the Flag Protection Act passed by Congress in 1989, the majority stated, quote, "Although the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the government's asserted interest is related to the suppression of free expression and concern with the content of such expression," unquote. Thus the *Johnson* and *Eichman* rulings stand for the proposition that legislation prohibiting the desecration of the Amer-

ican flag is, *per se*, unconstitutional under the First Amendment. By requiring the Court to apply its strained interpretation of the First Amendment when interpreting legislation enacted pursuant to H.J. Res. 36, Mr. Watt's amendment will insure that all legislation enacted pursuant to H.J. Res. 36 must be struck down as violating the First Amendment. And therefore, Mr. Watt's proposal here, although certainly interesting—and we discussed this at length in the Committee, I believe—would really make the passage of the constitutional amendment itself pointless, and for that reason, we oppose the amendment.

Mr. NADLER. Mr. Chairman.

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

Mr. NADLER. Thank you. It's heartening to hear the admission from the——

Chairman SENSENBRENNER. Recognized for 5 minutes.

Mr. NADLER. Thank you. Mr. Chairman, it's heartening to hear the admission from the Chairman of the Subcommittee, Mr. Chabot, that indeed the purpose of this seemingly innocuous amendment against flag desecration is really to punish and to prohibit free speech, which is what he just said, that saying it subject to the First Amendment protections of free speech would of course make the amendment a nullity because its purpose is to deter and to punish some free speech. Well, that's exactly what it does. He's entirely correct, and that's why we shouldn't pass the amendment, and if we have to pass it, we should pass Mr. Watt's amendment.

Let me read you, at this point, from a letter, a letter written to Senator Leahy, which I'm going to ask be put into the record, but I want to read part of it first.

Chairman SENSENBRENNER. Without objection.

Mr. NADLER. Thank you. But I want to read part of the letter first. "If someone is destroying a flag that belongs to someone else, that's a prosecutable crime. If it is a flag they own, I really don't want to amend the Constitution to prosecute someone for foolishly desecrating their own property. We should condemn them and pity them instead. I understand how strongly so many of my fellow veterans and citizens feel about the flag, and I understand the powerful sentiment in State legislatures for such an amendment. I feel the same sense of outrage. But I step back from amending the Constitution to relieve that outrage. The First Amendment exists to insure that freedom of speech and expression applies not just to that with which we agree or disagree, but also that which we find outrageous. I would not amend that great shield of democracy to hammer a few miscreants." As we heard before, about $8^{1/2}$ per year. "The flag will be flying proudly long after they have slunk away. Finally, I shudder to think of the legal morass you will create trying to implement the body of law that will emerge from such an amendment. If I were a Members of Congress, I would not vote for the proposed amendment, and would fully understand and respect the views of those who would."

This is signed by General Colin Powell, USA, retired, and I hope that the common sense of this view of this distinguished veteran and Secretary of State of the United States will commend itself to this body.

[The letter follows:]

GENERAL COLIN L. POWELL, USA (RET)
909 NORTH WASHINGTON STREET, SUITE 767
ALEXANDRIA, VIRGINIA 22314

MAY 18, 1999

The Honorable Patrick Leahy
United States Senate
Washington, DC 10510-4502

Dear Senator Leahy,

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

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

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

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

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

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

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

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

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

Sincerely,



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

James H. Warner

WHEN THEY BURNED THE FLAG BACK HOME

Thoughts of a former POW

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

Because the mere sight of the flag meant so much to me when I saw it for the first time after 5 1/2 years, it hurts me to see other Americans willfully desecrate it. But I have been in a Communist prison where I looked into the pit of hell. I cannot compromise on freedom. It hurts to see the flag burned, but I part company with those who want to punish the flag burners. Let me explain myself.

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

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

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

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

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

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

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

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

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

The writer, a Washington attorney and former Marine flyer, was a prisoner of the North Vietnamese from October 1967 to March 1973. The article appeared in The Washington Post on July 11, 1989.

Chairman SENSENBRENNER. The gentleman yield back? The question is on the amendment offered by the gentleman from North Carolina, Mr. Watt. Those in favor will signify by saying aye.

Opposed, no.

The noes appear to have it.

Recorded vote is ordered. Those in favor of the Watt Amendment will, as your names are called, answer "aye", those opposed, "no", and the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Gekas?

Mr. GEKAS. No.

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

[No response.]
The CLERK. Mr. Smith?
[No response.]
The CLERK. Mr. Gallegly?
[No response.]
The CLERK. Mr. Goodlatte?
[No response.]
The CLERK. Mr. Chabot?
Mr. CHABOT. No.
The CLERK. Mr. Chabot, no. Mr. Barr?
Mr. BARR. No.
The CLERK. Mr. Barr, no. Mr. Jenkins?
Mr. JENKINS. No.
The CLERK. Mr. Jenkins, no. Mr. Hutchinson?
[No response.]
The CLERK. Mr. Cannon?
Mr. CANNON. No.
The CLERK. Mr. Cannon, no. Mr. Graham?
[No response.]
The CLERK. Mr. Bachus?
[No response.]
The CLERK. Mr. Scarborough?
[No response.]
The CLERK. Mr. Hostettler?
Mr. HOSTETTLER. No.
The CLERK. Mr. Hostettler, no. Mr. Green?
Mr. GREEN. No.
The CLERK. Mr. Green, no. Mr. Keller?
Mr. KELLER. No.
The CLERK. Mr. Keller, no. Mr. Issa?
Mr. ISSA. No.
The CLERK. Mr. Issa, no. Ms. Hart?
Ms. HART. No.
The CLERK. Ms. Hart, no. Mr. Flake?
[No response.]
The CLERK. Mr. Conyers?
[No response.]
The CLERK. Mr. Frank?
Mr. FRANK. Aye.
The CLERK. Mr. Frank, aye. Mr. Berman?
[No response.]
The CLERK. Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye. Mr. Scott?
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye. Mr. Watt?
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye. Ms. Lofgren?
Ms. LOFGREN. Aye.
The CLERK. Ms. Lofgren, aye. Ms. Jackson Lee?
[No response.]
The CLERK. Ms. Waters?
[No response.]

The CLERK. Mr. Meehan?
Ms. WATERS. Aye.
The CLERK. Ms. Waters, aye. Mr. Meehan?
[No response.]
The CLERK. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
[No response.]
The CLERK. Ms. Baldwin?
Ms. BALDWIN. Aye.
The CLERK. Ms. Baldwin, aye. Mr. Weiner?
Mr. WEINER. Pass.
The CLERK. Mr. Weiner, pass. Mr. Schiff?
[No response.]
The CLERK. Mr. Chairman?
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.
Chairman SENSENBRENNER. Are there additional Members in the chamber who wish to cast their votes or change their vote? The gentleman from North Carolina, Mr. Coble.
Mr. COBLE. No.
The CLERK. Mr. Coble, no.
Chairman SENSENBRENNER. Gentleman from Virginia, Mr. Goodlatte.
Mr. GOODLATTE. No.
The CLERK. Mr. Goodlatte, no.
Chairman SENSENBRENNER. Gentleman from New York, Mr. Weiner.
Mr. WEINER. Yes.
The CLERK. Mr. Weiner, yes.
Chairman SENSENBRENNER. Gentleman from Florida, Mr. Wexler.
Mr. WEXLER. Yes.
The CLERK. Mr. Wexler, yes.
Chairman SENSENBRENNER. Is there anybody else who wishes to record or to change their vote? If not, the clerk will report.
The CLERK. Mr. Chairman, there are 9 ayes and 13 nays.
Chairman SENSENBRENNER. And the amendment is not agreed to. Are there further amendments? The gentleman from Virginia, Mr. Scott.
Mr. SCOTT. Mr. Chairman, I have an amendment at the desk.
Chairman SENSENBRENNER. The clerk will report the amendment.
The CLERK. Amendment to H.J. Res. 36, offered by Mr. Scott, page 2, line 13, delete "desecration" and insert "burning."
Chairman SENSENBRENNER. The gentleman from Virginia is recognized for 5 minutes.
[The amendment follows:]

AMENDMENT #1
TO H.J. RES. 36
OFFERED BY MR. SCOTT

Page 2, line 13, delete "desecration" and insert" burning".

Mr. SCOTT. Mr. Chairman, I first want to thank you, Mr. Chairman, for holding the markup in Subcommittee and in Committee and for going through regular order. Frequently this particular amendment just gets brought directly to the floor without the regular order. So I want to express, on behalf of at least this Members, appreciation for going through the regular order as we consider something as important as an amendment to the United States Constitution.

Now, first, Mr. Chairman, I want to apologize to those who I have challenged by suggesting that there has not been a rash of flag burning of America. I did a computer—had my staff do a computer search, and found that in fact there has been a rash of flag burning in America. Just recently, June 10th, in the Detroit News, it reports that Dearborn, Michigan will hold its annual Flag Day ceremony from 6:00 to 7:00 p.m. Thursday at Ford Field. The program will include a ceremony to burn tattered flags, tattered American flags, in keeping with the American Legion protocols for disposal of flags no longer fit for public display. So in Michigan there are flag burnings.

In Allentown, Pennsylvania, June 10th, 2001. It reports that the commander of the American Legion Post 379, Bethlehem, began planning for the official disposal, more than a year ago, more than 7,000 flags were offered. The event Saturday served as a token. The bulk of the flags will be disposed of later. Color guards, Marines—of Marines, National Guard members, police and fire departments, scout troops, march towards the site of the fire that would be used to retire the flags. The burning was monitored by the Bethlehem Fire Department. Orange flames engulfed the flags as veterans and members of Boy Scout Troop 352 solemnly dropped flags of all sizes into a 55-gallon drum. Often flames leaped more than 4 feet into the air as others from the audience chose flags from among those piled high into two picnic tables ready for disposal. It went on and on talking about the flag burning.

Also in Chicago. Bartlett Illinois will host its annual Memorial Day walk and remembrance on Monday at 10 o'clock. The Bartlett American Legion Post 1212 will hold a flag retirement ceremony. The legion members will burn 13 flags. Riverside, California warns us of a flag disposal ceremony scheduled for July 3rd.

So there is flag burning going on all over the country, Mr. Chairman. So this would prohibit flag burning. The Supreme Court has considered restrictions on the Bill of Rights that are permissible. For example, under the First Amendment, with respect to speech,

time, place and manner may generally be regulated while content cannot. So if you have a march, what time it is held, where it was held and so forth, can be restricted by the government, but you can't restrict what the people are marching about just because you disagree with that message, unless you decide to ban all marches. You can't allow marches by the Republican Party but not the Democratic Party. My amendment has no content-based restrictions and makes the underlying amendment content neutral. All flag burning would be outlawed. The underlying resolution permits flag burning if you say something nice while you're burning the flag, but would criminalize flag burning if you say something offensive while you're burning the flag.

If we really intend to bar flag burning, then let's bar all flag burning. We should acknowledge that the purpose of the underlying amendment is to stifle political expression we find offensive. And while I agree that we should all respect the flag, I don't think it's appropriate to use a criminal code to enforce our views on those who disagree.

And so this amendment, Mr. Chairman, would change the resolution to say what people have been calling it, the Flag Burning Amendment, and I would hope that we would have truth in legislation and adopt the amendment. Thank you very much.

Chairman SENSENBRENNER. The gentleman's time has expired. The Chair recognizes himself in opposition to the gentleman's amendment.

The gentleman's amendment prohibits flag burning, but does allow other activity that casts contempt upon the American flag. I would like to cite a decision of the Supreme Court of Wisconsin, my own State, to show what type of activity the gentleman's amendment would legalize that would be illegal under an implementing law passed pursuant to H.J. Res. 36, should it be adopted and ratified.

On June 25th, 1998, the Wisconsin Supreme Court, citing both the *Johnson* case and the *Eichman* case of the United States Supreme Court, declared unconstitutional Wisconsin's flag desecration statute. The facts of this case, which were uncontested, involved a young man named Matthew Jansen, who admitted to defecating on the United States flag and leaving it at the door of a country club in Appleton, Wisconsin. The Wisconsin Supreme Court, citing the precedent of the United States Supreme Court, said that Mr. Jansen's disgusting action was free speech that was protected by the United States Constitution.

Now, that's the law because two 5 to 4 decisions of the United States Supreme Court made it the law of the land. And I think what the Supreme Courts both in my State and the United States Supreme Court across the street have done, is to say that defecating on the United States flag is protected free speech, but defecating on the editorial page of the Washington Post, when one disagrees with that, is disorderly conduct. And the only way that we are going to be able to make the law consistent is to defeat the gentleman from Virginia's amendment, and to go on and pass this constitutional amendment and having the States ratify it.

I give back the balance of my time.

Mr. FRANK. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Massachusetts.

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

Chairman SENSENBRENNER. The gentleman's recognized for 5 minutes.

Mr. FRANK. That summarizes my problem with this amendment, because if that's all you do, and you then consider you were ratifying the Wisconsin Supreme Court—it is illegal to defecate on a bible and leave it at the door of a church. It is constitutional to defecate on the Wisconsin State flag and leave it at the door of the governor. Indeed, in a rational society, anyone who engages in that disgusting behavior ought to be prosecuted, and it may be the prosecutor mischarged, but I believe in Massachusetts, anyone who engages in that vile behavior, no matter what the receptacle is that you choose, would be guilty of a violation. The notion that you can do that and deposit that on somebody else's doorstep is appalling, and that's the problem. You will, by this amendment, make it illegal, with appropriate implementing legislation, but it's flag specific. So that by this very example, you are—and it's the old principle of if you include the one, you exclude the others. You are then saying to people, "Okay, but if in Wisconsin you defecate on the bible, on a copy of the US Constitution, on the Wisconsin State flag, on a picture of someone's wife or children or husband, that that's okay, and you can put it on the doorstep."

I would urge instead the Wisconsin legislature, of which we have several distinguished alumni among us, to look at the Wisconsin law, because if it is in fact legal in

Wisconsin for people to do that, and deposit it on somebody else's doorstep, the you need to change the laws of Wisconsin.

But the problem is, as I said—and this shows my problem with this amendment—the behavior there is disgusting. It is an intrusion on other people's rights when you go to leave that on other people's doorsteps, et cetera, and that ought to be criminally prosecuted. That ought to be prohibited, and it ought to be prohibited no matter what sacred symbol you choose to offend people by so denigrating.

So I consider this a further explanation of why I believe this amendment is inappropriate. And as I said, if in fact you pass this amendment, you are then saying, we have—unless you want to pass some other amendments—are we going to pass a bible amendment? Are we going to pass a Wisconsin State Constitution amendment, a Wisconsin State flag amendment, a picture of George Washington amendment? That's the problem. Once you say that the behavior was not the problem, but it's what you choose as a vehicle for carrying it out, and it's okay if you do it on anything else but the flag, you've got a major gap.

Instead, I think, as I said, that there ought to be—and I want to be very clear—I don't believe the Court has ever held—and let's be very clear about this—maybe this is the confusion when we talk about the people who violated the privacy of that funeral or the decency and dignity of that funeral—if something is illegal, if something is physically disruptive, if it takes other people's property, it does not get immunity because you happen to involve the flag. If you rob a bank, the fact that you put the loot in your bag flag doesn't make it okay to rob the bank. If you burn somebody else's property, the fact that the property you chose to burn that belonged to somebody else was a flag, doesn't make it okay. And if

you, in fact, engage in this kind of disgusting behavior that's been described, and then go and infringe on somebody else's property, you get no immunity because you chose to use the flag or the Constitution or anything else. That I think, in fact, defines the difference between us.

Mr. CHABOT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Ohio, Mr. Chabot, is recognized for 5 minutes.

Mr. CHABOT. Thank you, Mr. Chairman. There are several flaws in Mr. Scott's proposal. The purpose of H.J. Res. 36 is to allow Congress to prohibit all conduct that desecrates the American flag, not just burning of the flag.

Webster's Dictionary defines "desecrate" as to violate the sanctity of, to profane, or to treat irreverently or contemptuously, often in a way that provokes outrage on the part of others. In Black's Law Dictionary, it's other acts to violate sanctity of, profane, or to put to unworthy use.

There are numerous physical acts other than burning that would fall under that definition. The exact definition will be debated, then passed by Congress ultimately if this constitutional amendment actually becomes law. The Congress will then determine what acts exactly should be determined to be desecration. Congress has done this in the past and so can easily be done in the future.

Relative to the gentleman's point about the different incidents, as I stated in the opening, there have been 86 separate documented incidents in which the flag has been desecrated since 1994, and relative to the very honorable practice that veterans groups take part in Veterans Day and other decoration—other very formal, very traditional practices, I mean, there's a proper way to dispose of a flag, and if you didn't have a way, you'd have to maintain the flags in perpetuity. Obviously, that's not what's called for, and I don't think anybody's going to mix up what is a proper way to dispose of a flag and what would be offensive to the law.

And with that, I'll yield back the balance of my time.

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

Mr. WATT. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman's recognized for 5 minutes.

Mr. WATT. Thank you. Mr. Chairman. I think Mr. Chabot continues to illustrate the exact concern that those of us who believe that people ought to be able to express themselves even if we disagree with them should be protected. His whole definition of desecration implies that you have to be expressing yourself in some negative way to raise a level of concern here, and I submit Mr. Scott's amendment clearly illustrates. There are flag burnings going on all over, regularly I mean. There's probably not a Member of Congress that hasn't participated in one of these ceremonies, going to an honorable burning of the flag.

But if you go to a dishonorable burning of the flag, where somebody is saying, "I hate some action of the government" or even "I hate the government" or even "I hate the flag", we may all disagree with that person, but I think what we're saying is that that person has the right to say that in this country. And thus, a principle that our country was founded on. That's what our country is all about.

That's what a lot of the people who support this flag desecration amendment presumably have fought and died for over the years, to preserve the very kind of expression that we all think is despicable, but is protected under the First Amendment to the United States Constitution.

And so I think as a vehicle for illustrating exactly what this proposed constitutional amendment is about, Mr. Scott's amendment clearly illustrates that. If this was about burning a flag, rather than about what somebody was thinking or saying when they burned the flag, then Mr. Scott's amendment would be fine. You wouldn't be—you wouldn't have a need for the underlying constitutional amendment that's being proposed. And so I'm not sure I necessarily agree with Mr. Scott's amendment, that we ought to go overboard and do away with all burnings, but as a means of illustrating what this is about, it clearly illustrates the shortcomings of the underlying amendment.

So I yield back, Mr. Chairman.

Chairman SENSENBRENNER. The question is on the amendment by the gentleman from Virginia, Mr. Scott. Those in favor will signify by saying aye.

Opposed, no.

The noes appear to have it. The noes have it, and the amendment is not agreed to.

Are there further amendments to the Joint Resolution? The gentleman from New York, Mr. Weiner.

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

Chairman SENSENBRENNER. The clerk will report the amendment.

Mr. CHABOT. Mr. Chairman, reserving a point of order.

Chairman SENSENBRENNER. Point of order is reserved by the gentleman from Ohio. The clerk will report the amendment.

The CLERK. Amendment to H.J. Res. 36——

Mr. WEINER. Request unanimous consent to have it accepted as read or considered as read.

Chairman SENSENBRENNER. Without objection, the reading is waived. The amendment is open for amendment at any point, and the gentleman is recognized for 5 minutes.

[The amendment follows:]

Amendment to H.J Res. 36
offered by Mr Weiner

---

strike Page 2, and Insert the following

A BILL

To provide for protection of the flag of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Flag Protection Act of 2001".

SEC. 2. PROTECTION OF THE FLAG OF THE UNITED STATES.

(a) IN GENERAL.—Section 700 of title 18, United States Code, is amended to read as follows:

"§ 700. Protection of the flag of the United States

"(a) ACTIONS PROMOTING VIOLENCE.—Any person who destroys or damages a flag of the United States with intent to provoke imminent violence or a breach of the peace, and in circumstances reasonably likely to produce imminent violence or a breach of the peace, shall be fined under this title or imprisoned not more than one year, or both.

"(b) DAMAGING A FLAG BELONGING TO THE UNITED STATES.—Any person who steals or knowingly converts to his or her use, or to the use of another, a flag of the United States belonging to the United States and intentionally destroys or damages that flag shall be fined under this title or imprisoned not more than two years, or both.

"(c) DAMAGING A FLAG OF ANOTHER ON FEDERAL LAND.—Any person who, within any lands reserved for the use of the United States, or under the exclusive or concurrent jurisdiction thereof, steals or knowingly converts to his or her use, or to the use of another, a flag of the United States belonging to another person and intentionally destroys or damages that flag shall be fined

under this title or imprisoned not more than two years, or both.

"(d) CONSTRUCTION.—Nothing in this section shall be construed as indicating an intent on the part of Congress to deprive any State, territory, possession, or the Commonwealth of Puerto Rico of jurisdiction over any offense over which it would have jurisdiction in the absence of this section.

"(e) DEFINITION.—As used in this section, the term 'flag of the United States' 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 as a flag and would taken to be a flag by the reasonable observer.".

(b) CLERICAL AMENDMENT.—The table of sections for chapter 33 of title 18, United States Code, is amended by striking out the item relating to section 700 and inserting in lieu thereof the following new item:

"700. Protection of the flag of the United States.".

SEC. 3. SENSE OF CONGRESS.

It is the sense of the Congress that the States should enact prohibitions similar to the provisions of this Act in an order to provide the maximum protection to the flag of the United States.

Mr. WEINER. Mr. Chairman, I thank you. I guess I believe that flag burning should be illegal, and I believe—I believe that this constitutional amendment is another example of things we do from time to time in this House that might make us feel good, but at

the end of the day don't result in any change. I think we all know, as we sit here, that the constitution will not be amended with this amendment. I think we know that it lacks the support in this Congress, it lacks the support in the various State legislatures. However, I do believe that there is a way for us to cure and to find remedy for what the Supreme Court has struck down in previous statutes.

I believe that what we should be doing here is offer a statutory fix for a statutory problem. I believe that if we look at the Supreme Court judgments that have been handed down till now, the critique by the Supreme Court has been first that the statutes were vague, and more recently, that they were violative of the First Amendment.

The amendment I'm offering today, which was originally authored by Mr. Boucher, seeks to cure those problems in a statutory confine. What it does is it prevents flag burning by looking at the language that is permitted, already constitutionally about stopping anything that would provoke imminent violence or breach of the peace, or anything that is in the government's right to protect its own property. It provides protection for several—in several areas, on any of the—if it's deemed that the action of burning the flag would promote violence, it is a crime. If the flag is burning to the United States Government, meaning it's on any Federal property, it is a crime. If it's damaging the flag of another country on any Federal land, it is a crime. Flag burning would be illegal. I believe that this is a legitimate way that we can pass from this House a fix that does not continue the fiction of this constitutional amendment.

And there are some who believe that as a matter of—a matter of philosophy, that this should be fixed via constitutional amendment. And I believe that this is a legislative problem that legislators should fix with legislation. And I guess I share the sentiments of Secretary of State Colin Powell, who said—and if you'll permit me to quote—"I understand how strongly so many of my fellow veterans and citizens feel about the flag, and I understand the powerful sentiment in State legislatures for such an amendment. I feel the same sense of outrage, but I step back from amending the Constitution to relieve that outrage. The First Amendment exists to insure that freedom of speech and expression applies, not just to that with which we agree or disagree, but also that which we find outrageous. I would not amend the great shield of democracy to hammer a few miscreants. The flag will be flying proudly long after they have slunk away." Close quote.

I, however, do believe that we should ban flag burning and I ask for favorable consideration of this amendment.

Chairman SENSENBRENNER. Does the gentleman from Ohio insist upon his point of order?

Mr. CHABOT. Yes, Mr. Chairman, I do.

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

Mr. CHABOT. This does not comply with House rules requiring that amendments be germane. This amendment would amend the Federal criminal code and is not related to the fundamental purpose of the joint resolution.

Chairman SENSENBRENNER. Does anybody else wish to be heard on the point of order? The gentleman from New York?

Mr. WEINER. Mr. Chairman, I request unanimous consent to withdraw the amendment.

Chairman SENSENBRENNER. Without objection.

Are there further amendments?

[No response.]

Chairman SENSENBRENNER. There are no further amendments. The question occurs on the motion to report H.J. Res. 36 favorably. All those in favor will say aye.

Opposed, no.

Chairman SENSENBRENNER. The ayes appear to have it. The ayes have it, and the motion to report is favorably adopted.

A record vote is demanded by the gentleman from Massachusetts. The question is on favorably reporting H.J. Res. 36. Those in favor will, as your names are called, answer aye, those opposed, no, and the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Gekas?

Mr. GEKAS. Aye.

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

[No response.]

The CLERK. Mr. Smith?

[No response.]

The CLERK. Mr. Gallegly?

Mr. GALLEGLY. Aye.

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

Mr. CHABOT. Aye.

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

Mr. GOODLATTE. Aye.

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

Mr. BARR. Aye.

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

Mr. JENKINS. Aye.

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

[No response.]

The CLERK. Mr. Cannon?

Mr. CANNON. Yes.

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

[No response.]

The CLERK. Mr. Bachus?

[No response.]

The CLERK. Mr. Scarborough?

[No response.]

The CLERK. Mr. Hostettler?

Mr. HOSTETTLER. Aye.

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

Mr. GREEN. Aye.

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

Mr. KELLER. Aye.

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

Mr. ISSA. Aye.

The CLERK. Mr. Issa, aye. Ms. Hart?

Ms. HART. Aye.

The CLERK. Ms. Hart, aye. Mr. Flake?
[No response.]
The CLERK. Mr. Conyers?
[No response.]
The CLERK. Mr. Frank?
Mr. FRANK. No.
The CLERK. Mr. Frank, no. Mr. Berman.
[No response.]
The CLERK. Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
[No response.]
The CLERK. Mr. Scott?
Mr. SCOTT. No.
The CLERK. Mr. Scott, no. Mr. Watt?
Mr. WATT. No.
The CLERK. Mr. Watt, no. Ms. Lofgren?
Ms. LOFGREN. No.
The CLERK. Ms. Lofgren, no. Ms. Jackson Lee?
[No response.]
The CLERK. Ms. Waters?
Ms. WATERS. No.
The CLERK. Ms. Waters, no. Mr. Meehan?
Mr. MEEHAN. No.
The CLERK. Mr. Meehan, no. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
Mr. WEXLER. No.
The CLERK. Mr. Wexler, no. Ms. Baldwin?
Ms. BALDWIN. No.
The CLERK. Ms. Baldwin, no. Mr. Weiner?
Mr. WEINER. No.
The CLERK. Mr. Weiner, no. Mr. Schiff?
[No response.]
The CLERK. Mr. Chairman?
Chairman SENSENBRENNER. Aye.
The CLERK. Mr. Chairman, aye.

Chairman SENSENBRENNER. Are there additional Members in the room who wish to cast or change their vote? The gentleman from North Carolina.

Mr. COBLE. Aye.

Chairman SENSENBRENNER. Mr. Coble. The gentleman from South Carolina?

Mr. GRAHAM. Aye.

The CLERK. Mr. Graham, aye.

Chairman SENSENBRENNER. Is there anybody else who wishes to cast or change their vote? If not, the clerk will report.

Ms. LOFGREN. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose the gentlewoman from California seek recognition?

Ms. LOFGREN. May I ask how I am recorded?

Chairman SENSENBRENNER. How is Ms. Lofgren recorded?

The CLERK. Ms. Lofgren is recorded as a no.

Ms. LOFGREN. Thank you, Mr. Chairman.

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

Mr. CONYERS. Votes no.

The CLERK. Mr. Conyers, no.

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

Mr. BERMAN. No.

The CLERK. Mr. Berman, no.

Mr. Chairman, there are 15 ayes and 11 noes.

Chairman SENSENBRENNER. And the Joint Resolution is favorably reported. Without objection, the Chairman is authorized to move to go to conference pursuant to House rules. Without objection, the staff is directed to make any technical and conforming changes, and all Members will be given 2 days, as provided by House rules, in which to submit additional dissenting supplemental or minority views.

DISSENTING VIEWS

We oppose H.J. Res. 36, which would—for the first time in our Nation's history—modify the Bill of Rights to limit freedom of expression. Although the motives of the proposition's supporters are well-intended, we believe that adopting H.J. Res. 36 is wrong as a matter of principle, wrong as a matter of precedent, and wrong as a matter of practice.

H.J. Res. 36 responds to a perceived problem—flag burning—that is all but nonexistent in American life today. Studies indicate that in all of American history from the adoption of the United States flag in 1777 through the *Texas* v. *Johnson* [1] decision in 1989 there were only 45 reported incidents of flag burning.[2] Moreover, most incidents of flag burning can be successfully prosecuted today under laws relating to breach of the peace—all fully within current constitutional constraints.[3]

By embedding a principle prohibiting flag desecration into the Constitution, we will have elevated the flag over other cherished symbols, including not only national symbols such as the Declaration of Independence and Statue of Liberty, but religious symbols such as crosses and bibles.

Ironically, H.J. Res. 36 will not even achieve the sponsors' stated purpose—protecting the American flag and honoring American's veterans. History has taught us that restrictive legislation merely encourages more flag burning in an effort to protest the law itself,[4] and a vaguely worded constitutional amendment such as H.J. Res. 36 will surely cause such efforts to increase many times over. If we truly want to honor our veterans, it would be far more constructive for Congress to ensure that money is available under the budget to provide them promised health care benefits and pension payments. Thus, while we condemn those who would dishonor our nation's flag, we believe that rather than protecting the flag, H.J. Res. 36 will merely serve to dishonor the Constitution and com-

---

[1] 491 U.S. 397 (1989). In a 5–4 decision authored by Justice Brennan, the Court found that the Texas flag desecration law was unconstitutional as applied in that it was a "content-based" restriction. Subsequent to *Johnson*, Congress enacted the Flag Protection Act in an effort to craft a more content-neutral law. In *United States* v. *Eichman*, 496 U.S. 310 (1990), the Court overturned several flag burning convictions brought under the new law, finding that the Federal law continued to be principally aimed at limiting symbolic speech.

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

[3] See *Hearing on H.J. Res. 79, Proposing an Amendment to the Constitution of the United States Before the Subcomm. on Constitution of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. (May 24. 1995) [hereinafter, *1995 House Judiciary Hearings*] (statement of Bruce Fein, at 1).

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

promise the very ideals our nation was founded on. Retired General Colin L. Powell echoed this sentiment, stating,

> The First Amendment exists to insure that freedom of speech and expression applies not just to that with which we agree or disagree, but also that which we find outrageous. I would not amend that great shield of democracy to hammer a few miscreants. The flag will be flying proudly long after they have slunk away.[5]

IMPORTANCE OF FREEDOM OF EXPRESSION

Freedom of expression is one of the preeminent human rights and is central to fostering all other forms of freedom. Professor Emerson notes that since as early as the Renaissance, free and open expression has been considered to be an essential element of human fulfillment: "The theory [of free expression] grew out of an age that was awakened and invigorated by the idea of a new society, in which man's mind was free, his fate determined by his own powers of reason, and his prospects of creating a rational and enlightened civilization virtually unlimited."[6]

Freedom of expression also provides an important safety valve for society. Professor Greenwalt writes that "those who are resentful because their interests are not accorded fair weight, and who may be doubly resentful because they have not even had a chance to present those interests, may seek to attain by radical changes in existing institutions what they have failed to get from the institutions themselves. Thus liberty of expression, though often productive of divisiveness, may contribute to social stability."[7]

Freedom of expression also serves as an important tool in checking the abuse of powers by public officials. Professor Blasi has noted that this "checking function" should be accorded a level of protection higher than that given any other type of communication because "the particular evil of official misconduct is of a special order."[8]

Perhaps the most important function served by a system of free expression is that it allows for free and open exchange of thoughts—referred to by Justice Holmes as the "marketplace of ideas."[9] In a 1644 speech before the English Parliament criticizing censorship laws, Milton articulated the notion that free expression helps to prevent human error through ignorance:

> [T]hough all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let

---

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

[6] Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 886 (1963).

[7] Kent Greenwalt, *Speech and Crime,* Am. B. Found. Res. J. 645, 672–3 (1980). See also Rotunda, *Treatise on Constitutional Law: Substance and Procedure* § 20.6 at 18 (2d ed. 1992).

[8] Vincent Blasi, *The Checking Valve in First Amendment Theory,* 1977 Am. B. Found. Res. J. 521, 526

[9] Justice Holmes articulated his "marketplace of ideas" theory of free speech in his dissent in *Abrams* v. *United States,* 250 U.S. 616, 630 (1919): "[T]he ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get it accepted in the competition in the market."

> her and falsehood grapple, whoever knew truth put to the worse in a free and open encounter? [10]

In his 1859 essay *On Liberty,* John Stuart Mill further expanded upon this vision when he recognized the public good and enlightenment which results from the free exchange of ideas:

> First, if any opinion is compelled to silence, that opinion for aught we can certainly know, be true. . . . Secondly, though this silenced opinion be in error, it may, and very commonly does, contain a portion of the truth. . . . Thirdly, even if the received opinion be not only true but the whole truth; unless it is suffered to be and actually is, vigorously and earnestly contested, it will by most of those who receive it, be held in the manner of a prejudice.[11]

The American system of government is itself premised on freedom of expression. Professor Emerson notes, "Once one accepts the premise of the Declaration of Independence that governments derive 'their just powers from the consent of the governed'—it follows that the governed must, in order to exercise their right of consent, have full freedom of expression both in forming individual judgments and in forming the common judgments." [12]

The founding fathers recognized the difficulties in maintaining a system of free expression against the "tyranny of the majority." In *The Federalist Papers,* James Madison expressed concern as to the unfettered power of the majority: "By a faction I understand a number of citizens, whether amounting to a majority or a minority of the whole who are . . . adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." [13] It is for these reasons that the Constitution not only explicitly protected freedom of expression,[14] but created a judiciary possessing the power of review over all legislative and executive action. These twin safeguards—a written constitution and an independent judiciary—have served to foster in this country the freest society in human history.

H.J. RES. 36 IS WRONG AS A MATTER OF PRINCIPLE

Unfortunately, H.J. Res. 36 belies our system of unfettered political expression. In so doing, it not only undermines our commitment to freedom of expression and opens the door to selective prosecution based on political belief, but diminishes our nation's international standing.

The true test of any nation's commitment to freedom of expression lies in its ability to protect unpopular expression, such as flag desecration. In 1929, Justice Holmes wrote that it was the most imperative principle of our Constitution that it protect not just freedom for the thought and expression we agree with, but "free-

---

[10] J. Milton, *Areopagitica, A Speech for the Liberty of Unlicensed Printing to the Parliament of England* (1644).

[11] J.S. Mill, *On Liberty* Ch. II. (1859).

[12] Emerson, *supra* note 6, at 883.

[13] The Federalist No. 10 (J. Madison) at 57 (J. Cooke ed. 1961).

[14] Indeed, the framers chose to include freedom of speech in the First Amendment of the Bill of Rights, and wrote its protection in absolute terms: "Congress shall make no law . . . abridging freedom of speech. . . ." The strictness of the language is in contrast with the Fourth Amendment, for example, which prohibits only "unreasonable searches and seizures."

dom for the thought we hate."[15] As Justice Jackson so eloquently wrote in 1943:

> Freedom 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. 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.[16]

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

> The fact is, the principles for which we fought, for which our comrades died, are advancing everywhere upon the Earth, while the principles against which we fought are everywhere discredited and rejected. The flag burners have lost, and their defeat is the most fitting and thorough rebuke of their principles which the human could devise. Why do we need to do more? An act intended merely as an insult is not worthy of our fallen comrades. It is the sort of thing our enemies did to us, but we are not them, and we must conform to a different standard. . . . Now, when the justice of our principles is everywhere vindicated, the cause of human liberty demands that this amendment be rejected. Rejecting this amendment would not mean that we agree with those who burned our flag, or even that they have been forgiven. It would, instead, tell the world that freedom of expression means freedom, even for those expressions we find repugnant.[17]

And there can be no doubt that "symbolic speech" relating to the flag falls squarely within the ambit of traditionally protected speech. Our nation was borne in the dramatic symbolic speech of the Boston Tea Party, and our courts have long recognized that expressive speech associated with the flag is protected speech under the First Amendment.

Beginning in 1931 with *Stromberg* v. *California*[18] and continuing through the mid-1970's with *Smith* v. *Goguen*[19] and *Spence* v. *Washington,*[20] the Supreme Court has consistently recognized that flag-related expression is entitled to constitutional protection. Indeed, by the time Gregory Johnson was prosecuted for burning a

---

[15] *United States* v. *Schwimmer,* 254 U.S. 644, 655 (1929) (Holmes, J., dissenting).

[16] *West Virginia Board of Education* v. *Barnette,* 319 U.S. 624, 642 (1943).

[17] See *Hearing on H.J. Res. 54, Proposing an Amendment to the Constitution of the United States Before the Subcomm. on the Constitution of the House Comm. on the Judiciary,* 105th Cong., 2nd Sess. (April 30, 1997) [hereinafter *1997 House Judiciary Hearings*] (statement of Jim Warner). These thoughts are echoed by Terry Anderson, a former U.S. Marine Staff Sergeant and Vietnam veteran who was held hostage in Lebanon, who wrote that "[H.J. Res. 54] is an extremely unwise restriction of every American's Constitutional rights. The Supreme Court has repeatedly held that the First Amendment protects symbolic acts under its guarantee of free speech. Burning or otherwise damaging a flag is offensive to many (including me), but it harms no one and is so obviously an act of political speech that I'm amazed anyone could disagree with the Court." (*Id.* statement of Terry Anderson).

[18] 283 U.S. 359 (1931) (State statute prohibiting the display of a "red flag" overturned). Absent this decision, a State could theoretically have prevented its citizens from displaying the U.S. flag.

[19] 415 U.S. 94 (1972).

[20] 418 U.S. 405 (1974) (overturning convictions involving wearing a flag patch and attaching a peace sign to a flag).

U.S. flag outside of the Republican Convention in Dallas, the State of Texas readily acknowledged that Johnson's conduct constituted "symbolic speech" subject to protection under the First Amendment.[21] Those who seek to justify H.J. Res. 36 on the grounds that flag desecration does not constitute "speech" are therefore denying decades of well understood court decisions.[22]

While we deplore the burning of an American flag in hatred, we recognize that it is our allowance of this conduct that reinforces the strength of the Constitution. As one Federal court wrote in a 1974 flag burning case, "[T]he flag and that which it symbolizes is dear to us, but not so cherished as those high moral, legal, and ethical precepts which our Constitution teaches."[23] The genius of the Constitution lies in its indifference to a particular individual's cause. The fact that flag burners are able to take refuge in the First Amendment means that every citizen can be assured that the Bill of Rights will be available to protect his or her rights and liberties should the need arise.

H.J. Res. 36 will also open the door to selective prosecution based purely on political beliefs. When Peter Zenger was charged with "seditious libel" in the very first case involving freedom of speech on American soil, his lawyer, James Alexander warned:

> The abuses of freedom of speech are the excrescences of Liberty. They ought to be suppressed; but whom dare we commit the care of doing it? An evil Magistrate, entrusted with power to punish Words, is armed with a Weapon the most destructive and terrible. Under the pretense of pruning the exuberant branches, he frequently destroys the tree.[24]

The history of the prosecution of flag desecration in this country bears out these very warnings. The overwhelming majority of flag desecration cases have been brought against political dissenters, while commercial and other forms of flag desecration have been almost completely ignored. An article in *Art in America* points out that during the Vietnam War period, those arrested for flag desecration were "invariably critics of national policy, while 'patriots' who tamper with the flag are overlooked."[25] Whitney Smith, director of the Flag Research Center has further observed that commercial misuse of the flag was "more extensive than its misuse by leftists or students, but this is overlooked because the business interests are part of the establishment.[26]

Supporters of H.J. Res. 36 argue that many flag desecration "incidents" involve the burning of the flag. Yet the burning of the flag

---

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

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

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

[24] Philadelphia Gazette, Nov. 17, 1737, quoted in Levy, *Legacy of Suppression* 135 (1960).

[25] See Robert J. Goldstein, supra note 4, at 154.

[26] *Id.*

is also considered to be the proper way to retire a flag, and such flag burning events are common throughout the country.[27] H.J. Res. 36 seeks to alter the present First Amendment implications of flag burning. It is clear under H.J. Res. 36 that burning a flag while saying something respectful would not be inconsistent with the proposed Amendment, while burning a flag while saying something which offended the local sheriff could be a criminal offense. Thus, what would be regulated by H.J. Res. 36 is not the physical action of burning a flag, but the sentiments expressed with the burning.

Almost as significant as the damage H.J. Res. 36 would do to our own Constitution, is the harm it will inflict on our international standing in the area of human rights. Demonstrators who cut the communist symbols from the center of the East German and Romanian flags prior to the fall of the Iron Curtain committed crimes against their country's laws, yet freedom-loving.

Americans justifiably applauded these brave actions. If we are to maintain our moral stature in matters of human rights, it is essential that we remain fully open to unpopular dissent, regardless of the form it takes.[28]

To illustrate, when the former Soviet Union adopted legislation in 1989 making it a criminal offense to "discredit" a public official, Communist officials sought to defend the legislation by relying on, among other things, the United States Flag desecration statute.[29] By adopting H.J. Res 36 we will be unwittingly encouraging other countries to enact and enforce other more restrictive limitations on speech while impairing our own standing to protest such actions.

H.J. RES. 36 IS WRONG AS A MATTER OF PRECEDENT

Adoption of H.J. Res. 36 will also create a number of dangerous precedents in our legal system. The Resolution will encourage further departures from the First Amendment and diminish respect for our Constitution.

If we approve H.J. Res. 36, it is unlikely to be the last time Congress acts to restrict our First Amendment liberties. As President Reagan's Solicitor General Charles Fried testified in 1990:

> Principles are not things you can safely violate "just this once." Can we not just this once do an injustice, just this

---

[27] A June 19, 2001 search of recent news articles conducted by the Congressional Research Service revealed four articles, all of which referred to flag burning by the American Legion. See "Wayne Briefly," *The Detroit News* June 10, 2001, at 3 (the town of Dearborn, Michigan would burn tattered American flags during its annual Flag Day ceremony from 6:00 to 7:00 p.m. on June 14, 2001); Sonia Csencsits, "Ex-POW Tells What To Do Before Disrespecting Flag—Ask Someone To Whom It's Meaningful, He Urges at Disposal Event," *The Morning Call,* June 10, 2001, at B3 (The town of Bethlehem, PA disposed of more than 7,000 flags by burning them. "Orange flames engulfed the flags as veterans and members of Boy Scout Troop 352, Bethlehem, solemnly dropped flags of all sizes into a 55-gallon drum. Often flames leaped more than 4 feet in the air as others from the audience chose flags from among those piled high on two picnic tables, ready for disposal."); LaTanya Letcher & Sue Ter Maat, "War Dog Memorial To Be Unveiled in Streamwood," *Chicago Daily Herald,* May 24, 2001, at C1 (the annual Memorial Day walk in Bartlett, Illinois would include a flag retirement ceremony where 13 flags would be burned); Melissa Eiselein, "Legion Shares Etiquette, Symbolism of Old Glory," *The Press-Enterprise,* June 14, 2001, at B02 (flags would be destroyed in a ceremony on July 3). No incidents of flag burning aside from these American Legion events were found.

[28] See, e.g., *1997 House Judiciary Hearings, supra* note 5 (statement of PEN American Center, Feb. 5, 1997) ("To allow for the prosecution of [flag burners] would be to dilute what has hitherto been prized by Americans everywhere as a cornerstone of our democracy. The right to free speech enjoys more protection in our country than perhaps any other country in the world.").

[29] Rotunda, *supra* note 7, § 20.49 at 352.

> once betray the spirit of liberty, just this once break faith with the traditions of free expression that have been the glory of this nation? Not safely; not without endangering our immortal soul as a nation. The man who says you can make an exception to a principle, does not know what a principle is; just as the man who says that only this once let's make 2 + 2 = 5 does not know what it is to count.[30]

Adoption of H.J. Res. 36 will also diminish and trivialize our Constitution.[31] If we begin to second guess the courts' authority concerning matters of free speech, we will not only be carving an awkward exception into a document designed to last for the ages, but will be undermining the very structure created under the Constitution to protect our rights. This is why Madison warned against using the amendment process to correct every perceived constitutional defect, particularly concerning issues which inflame public passion.[32] Conservative legal scholar Bruce Fein emphasized this concern when he testified before the Subcommittee at 1995 House Judiciary hearings:

> While I believe the *Johnson* and *Eichman* decisions were misguided, I do not believe a Constitutional amendment would be a proper response. . . . To enshrine authority to punish flag desecrations in the Constitution would not only tend to trivialize the Nation's Charter, but encourage such juvenile temper tantrums in the hopes of receiving free speech martyrdom by an easily beguiled media. . . . It will lose that reverence and accessibility to the ordinary citizen if it becomes cluttered with amendments overturning every wrong-headed Supreme Court decision.[33]

And, as Professor Norman Dorsen points out in his testimony, "not including the Bill of Rights, which was ratified in 1791 as part of the original pact leading to the Constitution, only 17 amendments have been added to it, and very few of these reversed constitutional decisions of the Supreme Court. To depart from this tradition now . . . would be an extraordinary act that could lead to unpredictable mischief in coming years." [34]

---

[30] *Measures to Protect the American Flag, Hearing Before the Senate Comm. on the Judiciary,* 101st Cong., 2d Sess. (June 21, 1990) (statement of Charles Fried at 113) [hereinafter *1990 Senate Judiciary Hearings*].

[31] 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 religion clause of the First Amendment.

[32] Legal philosopher Lon Fuller also highlighted this very problem over four decades ago: "We should resist the temptation to clutter up [the Constitution with amendments relating to substantive matters. In that way we avoid] . . . the obvious unwisdom of trying to solve tomorrow's problems today. But [we also escape the] more insidious danger of the weakening effect [such amendments] have on the moral force of the Constitution itself." L. Fuller, *American Legal Philosophy at Mid-Century,* 6 J.L. Ed. 457, 465 (1954), as cited in *Hearings on Proposed Flag Desecration Amendment before the Subcomm. on Constitution of the Senate Comm. on the Judiciary,* 104th Cong., 1st Sess. (June 6, 1995) [hereinafter, 1995 *Senate Judiciary Hearings*] (statement of Gene R. Nichol).

[33] *1995 House Judiciary Hearings, supra* note 3 (statement of Bruce Fein at 1–2).

[34] See *1997 House Judiciary Hearings, supra* note 5 (statement of Professor Norman Dorsen, New York University School of Law).

H.J. RES. 36 IS WRONG AS A MATTER OF PRACTICE

As a practical matter, H.J. Res. 36 is so poorly drafted and conceived that there can be no doubt it will open up a "Pandora's Box" of litigation. Not only are its terms incredibly open-ended and vague, but the Resolution gives us no guidance as to its intended Constitutional scope or parameter. While the amendment's supporters claim they are merely drawing a line between legal and illegal behavior, in actuality, they are drawing no line at all, but merely granting the Federal Government open-ended authority to prosecute dissenters who use the flag in a manner deemed inappropriate.

There is little understanding or consensus concerning the meaning of such crucial terms as "desecration" and "flag of the United States." Depending on the statute ultimately adopted under the Amendment's authority, "desecration" could apply to canceling flag postage stamps or use of the flag by Olympic athletes. The term "flag of the United States" could include underwear from the "Tommy Hilfiger" collection as well as a Puerto Rican flag including a likeness of the U.S. flag.[35]

The Resolution's sponsors also appear to have little understanding as to its Constitutional scope or breadth. H.J. Res. 36 gives us no guidance whatsoever as to what if any provisions of the First Amendment, the Bill of Rights, or the Constitution in general that it is designed to overrule.[36] During debate of the 1995 proposed amendment, amendment sponsor Charles Canady (R-FL) asserted that the flag desecration amendment would simply restore the status quo before the Supreme Court ruled in 1989.[37] He later insisted, however, that the amendment would also allow the States to criminalize wearing clothing with the flag on it.[38] The latter interpretation goes well beyond overturning *Johnson* and indicates that the flag desecration amendment could permit prosecution under statutes that were otherwise unconstitutionally void for vagueness. For example, the Supreme Court in 1974 declared unconstitutionally vague a statute that criminalized treating the flag contemptuously and did not uphold the conviction of an individual wearing a flag patch on his pants.[39] Rep. Canady's interpretation

---

[35] *1995 House Judiciary Hearings, supra* note 3 (statement of Representative Serrano). See also, Rotunda, supra note 7, § 20.49 at § 90 (If we adopt laws outlawing flag desecration "there will be future problems defining what is a flag. Will it be a crime for someone to burn a flag? Or burning fireworks in the shape of an American flag? May a movie director (filming Francis Scott Key watching Fort McHenry) order that the American flag of 1812 be shot at and otherwise defaced? Will it be a crime for the post office to cancel (i.e. deface) a stamp that has on it a copy of the American flag? If a flag design is on a birthday cake, will it be a Federal crime to light the birthday candies on the cake? Will cutting the cake deface it? Is it defacing the flag to display it upside down?").

[36] Since H.J. Res. 36 is drafted to modify the entire Constitution, rather than any portion of the First Amendment, it is unclear whether and to what extent it will supersede provisions in the Bill of Rights relating to "void for vagueness" (First and Fifth Amendments), overbreadth and least restrictive alternatives test (First Amendment), search and seizure (Fourth Amendment), due process and self-incrimination (Fifth Amendment), cruel and unusual punishment (Eighth Amendment) and provisions in the Constitution relating to the supremacy clause (Article VI, Section 2) and the speech and debate clause (Article 1, Section 6). See e.g., *1990 Senate Judiciary Hearings, supra* note 29 (statement of Walter Dellinger); William Van Alstyne, *Stars and Stripes and Silliness Forever,* Legal Times, at 34 (October 2, 1989).

[37] *House Comm. on the Judiciary, Markup Session of H.J. Res. 79,* 104th Cong., 1st Sess. 109 (1995).

[38] *Id.* at 110.

[39] *Smith* v. *Goguen,* 415 U.S. 566, 568–69 (1974).

of the flag desecration amendment would allow such a prosecution despite the statute's vagueness.

It is insufficient to respond to these concerns by asserting that the courts can easily work out the meaning of the terms in the same way that they have given meaning to other terms in the Bill of Rights such as "due process." Unlike the other provisions of the Bill of Rights, H.J. Res. 36 represents an open-ended and unchartered invasion of our rights and liberties, rather than a back-up mechanism to prevent the government from usurping our rights.

CONCLUSION

Adoption of H.J. Res. 36 will undermine our commitment to freedom of expression and do real damage to the constitutional system set up by our forefathers. If we amend the Constitution to outlaw flag desecration, we will be joining ranks with countries such as China and Iran and the regimes of the former Soviet Union and South Africa.[40]

We believe we have come too far as a nation to risk jeopardizing our commitment to freedom in such a fruitless endeavor to legislate patriotism. As the Court wrote in *West Virginia State Board of Education* v. *Barnette:*

> [The] ultimate futility of . . . attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition as a means to religious and dynastic unity, the Siberian exiles as a means of Russian unity, down to the last failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.[41]

If we adopt H.J. Res. 36, we will be denigrating the vision of Madison and Jefferson, and glorifying the simple-mindedness of Johnson and Eichman. If we tamper with our Constitution, we will have turned the flag, an emblem of unity and freedom, into a symbol of intolerance. We will not go on record as supporting a proposal which will do what no foreign power has been able to do—limit the freedom of expression of the American people.

JOHN CONYERS, JR.
BARNEY FRANK
HOWARD L. BERMAN
JERROLD NADLER
ROBERT C. SCOTT
MELVIN L. WATT
ZOE LOFGREN
SHEILA JACKSON LEE
MAXINE WATERS
TAMMY BALDWIN

○

[40] Roman Rolinick, "Flag Amendment would put U.S. with Iran, China," UPI (July 1, 1989).
[41] 319 U.S. at 641.