

Testimony of

The Honorable Daniel Bryant

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before
The United States Senate
Committee on the Judiciary

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Letting the People Decide: The Constitutional Amendment Authorizing Congress to Prohibit Physical Desecration of the Flag of the United States

Good morning, Mr. Chairman and distinguished members of the Committee. Thank you for the opportunity to join you today to reiterate the Administration's continuing support for a constitutional amendment authorizing Congress to protect the American flag from physical desecration. The President joins a majority of Members of both Houses of Congress in supporting this constitutional amendment to protect and honor this great symbol of the American democratic ideal.

Let me state at the outset that we do not believe that amending the Constitution is something to be undertaken lightly. Altering the Constitution is a weighty matter, but one that we believe is warranted to protect the unique, enduring symbol of our great Nation.

It is noteworthy that Americans overwhelmingly refer to the flag as the "American flag," not the "United States flag." In a simple way, this tendency provides an insight, I think, into the way we as Americans associate with the flag. It's not simply the flag of a particular constitutional system, that of the United States. More than that, it's the flag of us as a people. Over the centuries, it has become an integral part of who we are as Americans.

Accordingly, the Administration believes that the Congress should allow the American people, through their elected representatives, to accord the flag - our flag - the respect and corresponding protection it deserves.

There can be no doubt that under the current interpretation of the First Amendment, physical desecration of the American flag in protest is protected speech. Attempts by Congress and by state legislatures to pass statutes to protect the flag have been struck down by the United States Supreme Court. Against this backdrop, it is clear that the only way the flag can be protected is through an amendment such as the one proposed by S.J. Res. 4, currently before you.

S.J. Res. 4 is a simple measure, providing in relevant part: "The Congress shall have power to prohibit the physical desecration of the flag of the United States." There are two noteworthy features in connection with this resolution. First, it does not itself prohibit the physical desecration of the flag, but merely provides that Congress may do so. This will allow the democratically elected legislature to decide whether and how to protect the flag from desecration. Second, as with any resolution to amend the Constitution, by passing this resolution, Congress is not itself amending the Constitution but is simply providing the states an opportunity to deliberate and ultimately decide whether the Constitution should allow Congress to protect the United States flag.

Many Americans find it strange that federal law protects symbols such as the bald eagle and our currency from destruction but does not protect the flag. This perverse result did not occur because Congress and state legislatures have not tried to protect the flag. Over thirty-five years ago, Congress attempted to protect the flag by passing the

Flag Protection Act of 1968 (1968 Act). This congressional action was in response to the television broadcasting of multiple images of flag desecration at a time when young American soldiers were sacrificing their lives in Vietnam. The Act prohibited any person from "knowingly cast[ing] contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it." Forty-eight states followed suit, and passed state legislation prohibiting the desecration of the flag. For twenty years following passage of the 1968 Act, lower federal courts heard constitutional challenges to it and upheld the statute as a valid exercise of congressional authority.

In *Joyce v. U.S.*, for example, the U.S. Court of Appeals for the D.C. Circuit held that the statute proscribed only conduct, was thus not aimed at the suppression of speech, and only imposed "the smallest restraints on 'communication.'" The Ninth Circuit also upheld the statute, finding that Article I, § 8, of the Constitution authorized Congress to prohibit the burning of the flag, and that the statute did not violate free speech rights. The Fourth Circuit similarly upheld the statute, without written opinion, against a constitutional challenge. In each of those cases, the United States Supreme Court refused to hear an appeal.

The Supreme Court also declined to decide the facial constitutionality of several state statutes banning flag desecration. In several challenges by protestors convicted of flag desecration under state law, the Court avoided the First Amendment question about flag burning by holding for the protestors on case-specific grounds. For example, in *Smith v. Goguen*, the Court declined to reach the question of whether a Massachusetts statute that subjected to criminal liability anyone who publicly "mutilates, tramples upon, defaces or treats contemptuously the flag of the United States" violated the First Amendment. Instead, the Court ruled in favor of the appellant, who was convicted for wearing an American flag on the seat of his pants, on the ground that the words "treats contemptuously" were too vague and did not provide the appellant with enough notice of what type of conduct was prohibited.

Fifteen years later, in *Texas v. Johnson*, the Supreme Court found that a state statute prohibiting desecration of the United States flag violated the First Amendment as applied to a man convicted for burning a flag during a demonstration outside of the 1984 Republican Convention. Although the Court declined to rule the statute facially unconstitutional, in practical terms the decision rendered invalid the 1968 Act and similar provisions in forty-eight states that prohibited the desecration of the flag as part of a public demonstration.

Recognizing that the Johnson decision effectively invalidated the 1968 Act, Congress passed the Flag Protection Act of 1989 (1989 Act). Unlike the 1968 Act, the 1989 Act did not require that the offender cast contempt upon the flag, focusing not on desecration of the flag but instead on protecting its physical integrity. Congress believed that with this distinction, the Act was no longer aimed at expression and hence should be judged by the less exacting standard of review enunciated in *U.S. v. O'Brien* rather than strict scrutiny. The Supreme Court disagreed, and held in *U.S. v. Eichman* that the 1989 Act's prohibitions were still aimed at the suppression of expression and that the Act was unconstitutional on its face.

Since the Eichman decision, every Congress has considered a constitutional amendment that would grant to Congress the power to enact legislation to protect the United States flag from physical desecration. However, although the House has passed such an amendment in five of the past Congresses, including a bill identical to the one before the Senate that passed the House on June 3, 2003, by a vote of 300 to 125, such an amendment has never been approved by the full Congress and sent to the states for ratification.

The Administration believes that this Congress should allow the ultimate decision of whether to amend the Constitution to lie with the individual states by passing this resolution and sending the amendment to them for ratification. At one time, all but two states attempted to protect the flag by passing state provisions. With Supreme Court precedent definitively answering in the negative the question of whether such statutes pass constitutional muster, the Nation must now decide if what is needed is an amendment to the Constitution allowing Congress to protect the flag. Congress should allow this decision, whether to protect a flag that has such undeniable symbolic value of all that this Nation has been through, and all that makes it great, to rest with the fifty states represented by that flag.

Thank you once again for allowing me to appear before you today to discuss this very important issue.