

Testimony of

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before the Senate Judiciary Committee
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Mr. Chairman and Members of the Committee, I appreciate this invitation to appear before the Senate Judiciary Committee to testify against the proposal to amend the Constitution to give Congress the power to prohibit the physical desecration of the flag of the United States.

Although I am employed by the Center for American Progress and have part time affiliations with the Center for Defense Information and the Council on Foreign Relations, I am speaking for myself.

As a 23-year navy and Vietnam veteran, as a former official in the Reagan Defense Department, as a former professor at the Navy War College and the Coast Guard Academy, as a second generation American, as a lifelong Republican, and as a long time member of the American Legion, I revere the flag and that "for which it stands." As much as any citizen, I still get a lump in my throat when I see the flag raised or lowered. Nonetheless, I am unalterably opposed to S.J. Res. 4.

As I understand it, one of the main goals of passing the amendment at this time is to show support for those currently serving in the armed forces in the war against terrorists with a global reach, as well as our veterans of previous wars, I would suggest that the Congress could help them much more by resisting the draconian measures advocated by the Bush administration that adversely impact our current and future veterans. Let me mention but a few:

First, since coming into office the Bush administration has increased the out of pocket costs for veterans using VA's medical facilities by nearly 500%. Veterans are paying more than \$1 billion a year to the VA for medical care than they were in 2001.

Second, the administration has fought tooth and nail to prevent disabled veterans who are also military retirees from getting "concurrent receipts" of both their retired and disability pays. Were it not for the Congress, disabled military retirees would still be getting shortchanged. As it is, they will have to wait until 2010 until this system is completely changed.

Third, the Bush administration actively sought to reduce hostile fire pay and family separation pay while our troops were fighting wars in two countries and our troops were spending an unprecedented amount of time away from their home bases.

Fourth, in what the Army Times has called an act of betrayal, the Department of Defense is considering closing commissaries and schools on military bases throughout our country.

Fifth, the administration refuses to endorse Congressional proposals to allow Guard and reserve members to participate fully in the military's Tricare Health System. Thanks to the efforts of the Congress, there have been some temporary moves in this direction, but it needs to be done on a permanent basis. Not only is it the right thing to do, but it will help retain those reservists who have been called up more frequently and for longer periods than the norm. Finally, in spite of the unprecedented strain being placed on the active duty Army and its reserve component, the administration continues to resist permanently adding 40,000 people to the active Army.

Mr. Chairman and members of the Committee, if you are concerned about those who have and are serving in our Armed forces, you will deal with these six issues promptly. They need this much more than a constitutional amendment that infringes on our freedom of speech. But having said that let me give you my reasons for opposing the amendment.

First, during my years of military and civilian service during the cold war, I believed I was working to uphold democracy against the totalitarianism of Soviet Communist expansionism. I did not believe then, nor do I believe now, that I was defending just a piece of geography, but a way of life. If this amendment becomes a part of our Constitution, this way of life will be diminished. America will be less free and more like the former Soviet Union, present-day China, Iraq under Saddam Hussein, or Afghanistan under the Taliban.

Second, the proposed amendment is bad public policy. During our 212 years of history, the Bill of Rights has never been restricted by a constitutional amendment. If ratified by the Congress and the states, this amendment would be the first in our history to cut back on the First Amendment's guarantee of that freedom of expression that is so

necessary to ensure the vigorous debate and dissent that is imperative to prevent the abuse of power in our democracy. This amendment could set a dangerous precedent for limiting our other fundamental freedoms. We must be especially careful about limiting our freedoms at this time in our history. We all know that in the aftermath of September 11, 2001, there was a tendency to overreact and characterize those who criticized the Bush National Security Strategy as unpatriotic.

Third, the amendment is poorly drafted. It is phrased in such broad and vague language that it can and will have unintended consequences. These could include censorship of images of the flag in works of art, advertising, or commerce. Moreover, the amendment would permit indictments and prosecutions not only of protestors, but individuals who purchase these works of art, or who use advertisements that desecrate the flag. This could happen even though these consumers intend no disrespect.

Fourth, the people, the Supreme Court, and previous Congresses do not support the basis for this amendment. Although some opinion polls indicate that a majority of Americans support the amendment in the abstract, opinion polls also demonstrate that the majority of Americans reject such an amendment when they discover that it would be the first amendment in our history to restrict our First Amendment freedoms. The highest court in the land has twice ruled that destruction of the flag for political purposes, although highly offensive to almost all Americans is undeniably a political statement and a political expression. See *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310 (1990). The Court has held that it is a bedrock principle underlying the First Amendment that the government may not prohibit the expression of an idea simply because society finds the idea offensive and disagreeable. See *Texas*, 491 U.S. at 414. Furthermore, four times in the past 14 years the Congress has rejected this amendment, most recently in March, 2000.

Fifth, the amendment is unnecessary to punish most incidences of flag burning or mutilations. Desecrating a flag belonging to the government or a non-consenting individual is punishable under existing statutes. See 4 U.S.C.A. §§ 1-10 (1998) (The Federal Flag Code). Moreover, flag desecration performed for the purpose of breaching the peace or with knowledge that it will produce an immediate danger is already punishable consistent with the First Amendment.

Finally, flag burning is exceedingly rare in this country. Since the Supreme Court's 1990 flag decision in *United States v. Eichman*, there have been less than 70 burning incidents.

In conclusion, I think that the motives of the sponsors and supporters of this amendment are beyond reproach. Indeed I understand why they and so many Americans have such a strong reaction to the idea of flag desecration. But, for the reasons I mentioned above, I believe they are wrong and that the Congress should focus more on the immediate needs of our troops and veterans.