

Statement of
The Honorable John Cornyn

United States Senator
Texas
June 2, 2004

U.S. Senate Subcommittee on the Constitution, Civil Rights and Property Rights
U.S. Senator John Cornyn (R-TX), Chairman

Executive Business Meeting

S. J. Res. 4, A joint resolution proposing an amendment to the Constitution of the United States authorizing Congress to prohibit the physical desecration of the flag of the United States [Hatch/Feinstein]

Wednesday, June 2, 2004, 1:30 p.m.
Dirksen Senate Office Building Room 226

OPENING STATEMENT OF SENATOR JOHN CORNYN

Last weekend, Americans honored the heroic efforts of our World War II veterans by dedicating the World War II Memorial in Washington, D.C. Today, this subcommittee of the Senate will consider whether to dedicate constitutional protection to that which symbolizes the heroic efforts of all of our veterans - the flag of the United States.

Senate Joint Resolution 4, also known as the Flag Protection Amendment, was introduced last year by Senators Orrin Hatch and Dianne Feinstein. The amendment states simply that "[t]he Congress shall have power to prohibit the physical desecration of the flag of the United States." I am proud to be an original co-sponsor of the Flag Protection Amendment, because I firmly believe that the flag occupies a unique place in our nation and deserves constitutional recognition as such.

The United States flag is more than a piece of cloth. As Justice John Paul Stevens has written, "the flag uniquely symbolizes the ideas of liberty, equality, and tolerance - ideas that Americans have passionately defended and debated throughout our history. The flag embodies the spirit of our national commitment to those ideals."

Moreover, the flag plays a unique role in honoring the men and women of the Armed Forces who died for those ideas. If a soldier dies in defense of our nation, the United States gives the family of the deceased a flag in honor of their service. To countless families, the flag is a treasured possession, and a poignant memory of their loss. For the same reason, the flag is flown at half-staff following the death of high government officials, as a mark of respect to their lives.

In times of national crisis and triumph alike, it is the United States flag that Americans look to with reverence. No other American symbol has been as universally honored as the flag. And until recent years, our ability to protect the flag against physical desecration has not been in doubt.

In *Smith v. Goguen* (1974), the U.S. Supreme Court held, in a decision authored by Justice Lewis Powell, that "nothing prevents a legislature from defining with substantial specificity what constitutes forbidden treatment of United States flags." Justice Byron White stated in that same case that "[i]t would be foolishness to suggest that the men who wrote the Constitution thought they were violating it when they specified a flag for the new Nation There would seem to be little question about the power of Congress to forbid the mutilation of the Lincoln Memorial The Flag is itself a monument, subject to similar protection." In *Street v. New York* (1969), Chief Justice Earl Warren wrote that "the States and Federal Government do have the power to protect the flag from acts of desecration and disgrace." Justice Hugo Black wrote in that same case that "[i]t passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American Flag an offense." And Justice Abe Fortas noted that "the States and the Federal Government have the power to protect the flag from acts of desecration committed in public." More recently, Chief Justice William Rehnquist, Justice John Paul Stevens, and Justice Sandra Day O'Connor have all expressed their belief that nothing in the First Amendment prohibits protection of the flag.

Accordingly, until recently, 48 states have had laws on the books protecting the flag - most of them patterned after the Uniform Flag Act of 1917. The federal government enacted its own law in 1967. And Congress reaffirmed that law in 1989 with the support of 91 Senators.

This historic power to protect the flag was eviscerated in 1989, however, when the U.S. Supreme Court issued the first of two decisions, both decided by a bare 5-4 majority, declaring that flag desecration constitutes speech protected by the First Amendment. [See *Texas v. Johnson* (1989) and *United States v. Eichman* (1990).]

Legal scholars agree that the Flag Protection Amendment is the only way to restore the law as it existed for most of our nation's history. I know that Senator Feingold is not likely to support this amendment, and I respect his right to vote against it. I also respect him for acknowledging at our last subcommittee meeting that the only way to protect the flag against physical desecration is a constitutional amendment, and that a statute would not be sufficient. After all, constitutional amendments are the only way for the American people to reverse judicial constitutional decisions they reject. The Eleventh, Fourteenth, Sixteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments were all ratified in order to reverse judicial decisions with which the American people disagreed.

Of course, the First Amendment guarantees freedom of speech, and thankfully so. And of course, the requirement that constitutional amendments be approved by two-thirds of each House of Congress and three-fourths of the states guarantees that the liberties we hold dear will not be taken away, just because we have acted today to protect the U.S. flag against physical desecration.

That's why the amendment is so strongly supported by the Citizens Flag Alliance, the American Legion, the Congressional Medal of Honor Society, AMVETS, the Knights of Columbus, the

Alliance of Women Veterans, and numerous other groups. All of these groups value the First Amendment as much as any American.

The members of the 50 state legislatures also value the First Amendment. All 50 state legislatures have approved resolutions asking Congress to give them the opportunity to vote on the amendment - reflecting the fact that 80% of Americans support the Flag Protection Amendment.

After all, the law does not allow individuals to yell "Fire!" in a crowded theater - even though such laws do impose a burden on the freedom of speech, albeit a minor one. Likewise, the vast majority of Americans realize that the nation is better off when our flag is protected.

The House has approved the Flag Protection Amendment five times in the last five Congresses - including just last year. And this subcommittee has voted in favor of the Flag Protection Amendment on two separate occasions in recent years. But the last time the amendment was brought to a vote on the floor of the Senate, in the year 2000, 63 Senators voted in favor of it - just four votes shy of the necessary two-thirds of the Senate.

I urge my colleagues at least to give the states the opportunity to consider this amendment. And I urge my colleagues at least to give constitutional recognition to the importance of the United States flag to millions of Americans - even if they ultimately would oppose implementing legislation to protect the flag against physical desecration.

After all, the Flag Protection Amendment does nothing more than to recognize that the United States flag occupies a unique position as the symbol of our Nation and, accordingly, deserves constitutional recognition as such. The amendment would empower Congress to take action to protect the flag, but it would not require Congress to do anything whatsoever.

There are many ways to express one's political views. But there is only one United States flag - and it deserves constitutional protection.