

Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
March 10, 2004

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Senate Committee on the Judiciary Hearing:

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

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Today our Committee is holding the latest in what has become a series of hearings on amending the Constitution. It would seem that members of the majority are obsessed with rewriting the Constitution. This is the third constitutional amendment to which this Committee has devoted significant time for debate in the 108th Congress, and this is the second hearing in only a week's time to debate a constitutional amendment during this election year, seeking to limit rather than expand the rights of the American people. This proposal is one of 61 amendments introduced so far this session. Let me repeat that number: Sixty-one amendments to the Constitution introduced in this Congress alone, and over 11,000 since the 1st Congress was convened. Can you imagine what the constitution would look like if all of these amendments were adopted? The amendment we consider today would artificially create division among the American people, and the timing raises concerns with many that the Constitution is being misused for partisan purposes.

SKEWED PRIORITIES, WITH TIME RUNNING OUT

All of this comes at a time when there already are many, many pressing demands on this Committee's time. There is a serious lack of ongoing and meaningful congressional oversight in connection with the war on terrorism. The Senate Judiciary Committee has not fulfilled its responsibility to ensure the rights of the American people, and the government's accountability to the American people, by providing vigorous oversight of the most insular and unilateral Administration in memory.

VETERANS' BUDGET PRIORITIES IGNORED

I know that the flag amendment is an issue of particular importance to veterans, whose opinions rest on both sides of the question, and I know that there are distinguished veterans on our panel and many more present in the audience today. We thank each of you for your service to the Nation, and we welcome you here. And I would note that advocates for the neglected needs of veterans can't help but wonder if this hearing is one more smokescreen for what the Administration is not doing to fulfill its duties to veterans. By focusing attention on this amendment, some are wondering if the Administration believes that veterans might be distracted from the fact that it is failing to meet their long-term health and related needs.

As a member of the Appropriations Committee, I know that where you put your resources tells a lot about your priorities. Take a look at this chart. The Bush Administration's budget has simply failed to honor our veterans, especially when it comes to medical care.

The President's budget request this year fails to maintain even the current level of services. Secretary of Veterans Affairs Principi recently testified that his department asked the White House for an additional \$1.2 billion. Needless to say, he was denied.

But Secretary Principi was not the only one ignored by the President's budget request. This request is almost \$3

billion less than what Veterans groups -- like the American Legion, the Veterans of Foreign Wars, and the Vietnam Veterans of America -- recommended in The Independent Budget. These organizations know what it will take to meet veterans' needs.

It is sad to say, but this is nothing new. For the past three years, Congress has had to add more than \$2.1 billion to the President's budget request just to fill gaps in basic services. If we had done as the President asked, veterans' medical care would be in even worse shape.

At the same time the Administration has been short-changing the budget, out-of-pocket expenses to veterans have skyrocketed. Under the Bush Administration, these expenses are projected to rise by an incredible 478 percent. On top of this, certain Priority 8 veterans are blocked from VA health care altogether, while others cannot receive treatment unless they pay a ridiculously high co-payment.

I could go on and on describing the claims backlog, the longer waits, and the cuts in service. The bottom line is that the Administration's rhetoric towards veterans simply does not match its real priorities.

I hope that Republicans and Democrats will join together this year to make helping our veterans the priority that it needs to be.

CYNICISM AND SYMBOLIC POLITICS

The flag is an important symbol of all that makes America great. But the cynical use of symbolic politics in an election year will not address the very real needs of veterans that are being left unmet by this Administration.

We saw the same kind of manipulation last week when the President's reelection campaign began to run television ads exploiting the September 11 attacks for political advantage. There was an immediate outcry of disgust from victims' families and New York City firefighters who had believed the President when he said that he had "no ambition whatsoever" to use 9/11 or national security as a political issue. On Friday, an organization of victims' and firefighters called for the campaign to stop running the ads, but the President turned them down.

And so, in the midst of manipulative electioneering, this hearing is opportunistically convened to debate a proposed amendment that has already been the subject of extensive review in past years by this Committee and days of debate on the Senate floor.

COUNSEL FROM COMBAT VETERANS JOHN GLENN AND BOB KERREY

I understand that many veterans support the flag desecration amendment, and I respect their views. We must not forget that there also are many veterans who oppose it. Even after the intensity of the emotions after September 11th and wars in Afghanistan and Iraq, many veterans still believe that they fought for what the flag stands for, not for the symbol itself. Senator John Glenn, a combat veteran, wrote, "The flag is the Nation's most powerful and emotional symbol. It is our most sacred symbol. And it is our most revered symbol. But it is a symbol. It symbolizes the freedoms that we have in this country, but it is not the freedoms themselves."

Senator Glenn was invited to testify today but had a longstanding commitment to attend NASA meetings. Senator Bob Kerrey, recipient of the Congressional Medal of Honor, wanted to testify, but he was unable to rearrange his schedule on such short notice.

I asked the Chairman to schedule this hearing so that our former colleagues could appear in person, as they have in the past, in opposition to the amendment. The Chairman declined this request to work cooperatively to find a mutually convenient date when these witnesses in opposition to the proposed constitutional amendment could be here. Our friends and former colleagues, Senator Glenn and Senator Kerrey, have submitted written testimony. I ask that their statements be made part of the record of this hearing.

COLIN POWELL'S ADVICE

A few years ago we heard from another outstanding American in opposition to this proposed amendment. He was a General, who had headed the Joint Chiefs of Staff, and now he serves as our Secretary of State. Colin Powell wrote this to me in May 1999: "We are rightly outraged when anyone attacks or desecrates our flag," he wrote. "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." Referring to the Constitution, General Powell continued, "I would not amend that great shield of democracy to hammer a few miscreants. The flag will still be flying proudly long after they have slunk away." Let me repeat General Powell's concluding line: "The flag will still be flying proudly long after they have slunk away."

I was deeply offended when, during the Super Bowl halftime show, Kid Rock wore a flag as a poncho and then tossed it away, presumably allowing it to land on the ground. I rose out of my chair in disgust when I saw that. To me, that was more offensive than the highly publicized, split-second "wardrobe malfunction." But though I abhor what he did, I recognize that any protest or statement he was trying to make in wearing the flag is protected by the First Amendment.

Sometimes, individuals deface the flag or violate the rules for its care without intending to offend. For example, President Bush was captured on film signing a hand-held flag at a campaign rally last summer. Appropriate or not, these acts are protected by our Constitution, and they are not punishable by Congress.

CHANGE 1ST AMENDMENT FOR THE FIRST TIME?

Flag desecration is a despicable and reprehensible act. But the true question before us is not whether we agree with that - all of us on this dais agree that it is contemptible. Instead, the issue before us is whether we should amend the Constitution of the United States, with all the risks that entails, and whether, for the first time in our history, we should narrow the precious freedoms ensured by the First Amendment. Should we amend the First Amendment so that the Federal Government can prosecute the miniscule number of Americans who show contempt for the flag? Such a monumental step is unwarranted and unwise.

Justice Brennan wrote, "We can imagine no more appropriate response to burning a flag than waving one's own." That is exactly how the American people respond, a point demonstrated by the innate patriotism of Americans in response to events of the past years.

PATRIOTISM DOESN'T COME BY DECREE

Immediately after September 11th, Americans everywhere began to fly flags outside their homes and businesses, to wear flag pins on their lapels, and to put flag stickers on their cars. This surge in patriotism made American flags such a hot commodity that several major flag manufacturers could not keep flags stocked on store shelves. Within one week of those attacks, demand for American flags was 20 times higher than was typical for that time of year, according to the National Flag Foundation in Pittsburgh. During that same week, Wal-Mart sold 450,000 flags. Within days of the terrorist attacks, K-Mart sold 200,000 flags.

This outpouring of patriotism was spontaneous, and it was the sum total of millions of individual Americans, acting on their own, not under government decree. The government did not order Americans to buy and fly the American flag.

Supporters of this constitutional amendment seem to believe that Americans need a lesson in how to respect the flag and that they need rules punishable by law to enforce that lesson. I disagree, and the American people have already proven them wrong. The American people do not need a lesson in cherishing and honoring our flag and the Republic for which it stands. That may be necessary in Saddam Hussein's Iraq or in Stalin's Soviet Union or in Castro's Cuba. But not in America.

Respect cannot be coerced or compelled. It can only be given voluntarily. Some may find it more comfortable to silence dissenting voices, but coerced silence can only create resentment, disrespect, and disunity. In America, you don't stamp out a bad idea by repressing it. You stamp it out with a better idea.

My better idea is to fly the flag, not because the law tells me to; not because there is something that says this is what I have to do to show respect. I fly the flag because, as an American, I want to. The extraordinary display of patriotism we have witnessed in recent years is evidence that the American people do not need laws and penalties to cherish the flag that we all love.

THE FREEDOMS FOR WHICH IT STANDS

Our flag is a cherished symbol. Even more important than the flag itself are the freedoms for which it stands, including the freedom to express unpopular speech or ideas -- even extremely unpopular ideas.

Freedom of speech and of the press is one of the magnificent bequests of earlier Americans to all the generations that follow. These rights are a fragile thing, needing nurturing and protection by each new generation. The erosion of freedom can easily come when lawmakers succumb to the temptation to pander to shifting public passions, at the expense of the public's everlasting interest in preserving freedom. In any session of Congress you do not have to look far to see this dynamic at work. It may not be politically popular to defend against erosive efforts like this, but generations of Americans to come will thank us if we leave for them the same First Amendment that we ourselves inherited and so dearly treasured.

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