

TO PROHIBIT THE PHYSICAL DESECRATION OF THE  
FLAG OF THE UNITED STATES

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JUNE 5, 1997.—Committed to the Committee of the Whole House on the State of  
the Union and ordered to be printed

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

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.J. Res. 54]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the joint resolution (H.J. Res. 54) 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.

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#### PURPOSE AND SUMMARY

H.J. Res. 54 proposes to amend the Constitution to allow Congress to prohibit the physical desecration of the flag of the United States.

The proposed amendment reads simply: “The Congress shall have 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 Supreme Court decision in *Texas v. Johnson*, 109 S.Ct. 2533 (1989), forty-eight states and the Federal Government had laws on the books prohibiting desecration of the flag. The purpose of the proposed constitutional amendment is to restore the power to protect the flag to the Congress.<sup>1</sup>

#### BACKGROUND AND NEED FOR THE LEGISLATION

In June of 1989, the United States Supreme Court in *Texas v. Johnson*, 109 S.Ct. 2533, held that the burning of an American flag as part of a political demonstration was expressive conduct protected by the First Amendment to the U.S. Constitution. After publicly burning a stolen American Flag in a protest outside of the 1984 Republican National Convention in Dallas, Texas, Gregory Johnson was convicted of desecrating a flag in violation of Texas law. 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.”<sup>2</sup> 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 5–4 U.S. Supreme Court opinion affirmed the decision of the Court of Criminal Appeals: Johnson’s conviction was inconsistent with the First Amendment because his actions constituted “symbolic free expression.”

Justice Rehnquist filed a dissenting opinion in which Justices O’Connor and White joined.<sup>3</sup> Justice Rehnquist noted the unique history of the American Flag:

<sup>1</sup> H.J. Res. 79, which the House voted on in the first session of the 104th Congress read: “Congress and the States shall have power to prohibit the physical desecration of the flag of the United States.” H.J. Res. 54 permits only the Congress to take such action.

<sup>2</sup> Tex. Penal Code Ann. Section 42.09(a)(3), Desecration of a Venerated Object, provides 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.”

<sup>3</sup> Justice Stevens filed a separate dissenting opinion.

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 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. *Texas v. Johnson*, 109 S.Ct. at 2552.

Justice Rehnquist also pointed out that Chief Justice Earl Warren, and Justices Black and Fortas all expressed the view that the States and the Federal Government had the power to protect the American Flag from desecration and disgrace.

In response to the *Johnson* decision, in September of 1989, Congress passed the “Flag Protection Act of 1989” under Suspension of the Rules 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.”<sup>4</sup>

On June 11, 1990, in *United States v. Eichman*, 496 U.S. 311, the Supreme Court in another 5–4 decision struck down the newly-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 “Flag Protection Act” was constitutional because, unlike the Texas statute struck down in *Texas v. 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. [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. *U.S. v. Eichman*, 110 S.Ct. 2404 (1990).

<sup>4</sup>“Flag Protection Act of 1989”, H. Rep. No. 101–231, 101st Cong., 1st Sess. 2 (1989). The Act became law without the President’s signature on October 28, 1989 (Pub. L. 101–131).

Justice Stevens wrote a dissenting opinion in which Chief Justice Rehnquist, Justice White and Justice O'Connor joined. He expressed unanimous agreement with the proposition expressed by the majority that "the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." He went on, however, to note that methods of expression may be prohibited under a number of circumstances and set forth the following standard:

If (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 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. *Eichman*, 496 U.S., at 319.

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

Once the Supreme Court ruled a second time that flag burning was expressive speech protected by the First Amendment, it became apparent that no statute could adequately protect the U.S. Flag from desecration—a constitutional amendment was necessary. On June 21, 1990, the House considered H.J. Res. 350, an identical amendment to H.J. Res. 79. The amendment was rejected by a vote of 254 to 177.

Since that time, forty-nine states have passed resolutions calling on Congress to pass an amendment to protect the flag of the United States from physical desecration and send it back to the States for ratification.

Opponents of the amendment have argued that H.J. Res. 54 limits free speech as guaranteed by the first amendment to the U.S. Constitution. The first amendment states, "Congress shall make no law . . . abridging freedom of speech . . ." H.J. Res. 54 gives Congress the power to prohibit the *physical desecration* of the flag of the United States. It does not prevent anyone from making any statement or saying anything—regardless of how objectionable it may be. Until the Supreme Court's decisions in *Texas v. Johnson* in 1989 and *U.S. v. Eichman* in 1990, punishing the physical desecration of the flag was considered entirely in keeping with the protections of the first amendment. Forty-eight states and the Federal Government had laws banning flag desecration.

As pointed out by Justice Rehnquist in *Texas v. Johnson*, Chief Justice Earl Warren, and Justices Black and Fortas all expressed the view that the States and the Federal Government had the power to protect the Flag from desecration and disgrace. Former Chief Justice Earl Warren in *Street v. New York*, 394 U.S. 576, 605 (1969) stated, "I believe that States and the Federal Government do have power to protect the flag from acts of desecration and disgrace." 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." *Id.* at 610. Again in *Street*, Jus-

tice Abe Fortas stated, "The flag is a special kind of personality. Its use is traditionally and universally subject to special rules and regulations . . . . The States and the Federal Government have the power to protect the flag from acts of desecration." *Id.* at 615–617.

In addition, opponents argue that H.J. Res. 54 proposes an unprecedented limitation on the content of speech. This assertion is both historically and legally inaccurate. Until 1989, forty-eight states and the federal government had laws criminalizing the physical desecration of the flag and there was no perceived conflict with freedom of speech. In addition, 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, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); obscenity, *Miller v. California*, 413 U.S. 15 (1973); and libel, *New York Times v. Sullivan*, 367 U.S. 254 (1970) are not protected under the first amendment.

In conclusion, H.J. Res. 54 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. It is the only remaining avenue by which the Congress can pass legislation to protect the flag of the United States from physical desecration.

#### HEARINGS

The Committee's Subcommittee on the Constitution held one day of hearings on H.J. Res. 54 on April 30, 1997. Testimony was received from 17 witnesses: Representative Gerald Solomon; Representative David Skaggs; Representative William Lipinski; Representative John Shimkus; Representative Gary Ackerman; Representative Martin Frost; Maribeth Seely, Teacher, Sandystone Walpack School, Layton, NJ; Lawrence Korb, Director, Center for Public Policy Education; Francis Sweeney, Financial Secretary, Steamfitters Local Union 449, Pittsburgh, PA; Carol Van Kirk, Nebraska American Legion Auxiliary; Carole Shields, President, People for the American Way; Alan Lance, Attorney General, State of Idaho; Professor Richard Parker, Harvard University; Professor Norman Dorsen, Stokes Professor of Law, New York University School of Law; Honorable Robert Zukowski, Wisconsin State Legislature; Roger Pilon, Director, Center for Constitutional Studies, Cato Institute; Major General Patrick Brady, Chairman, Citizens Flag Alliance.

Testimony was also received from N. Lee Cooper, President, American Bar Association; Terry Anderson, Former U.S. Marine and Staff Sergeant; James Warner, U.S. Marine decorated for his service in the Vietnam conflict; Professor Jamin Raskin, First Amendment Counsel to the ACLU.

#### COMMITTEE CONSIDERATION

On May 8, 1997 the Subcommittee on the Constitution met in open session and ordered reported favorably the resolution H.J. Res. 54, without amendment, by a voice vote, a quorum being present. On May 14, 1997 the Committee met in open session and

ordered reported favorably the resolution H.J. Res. 54, without amendment by a recorded vote of 20 to 9, a quorum being present.

#### VOTE OF THE COMMITTEE

Final Passage. Mr. Canady moved to report H.J. Res. 54, without amendment, favorably to the whole House. The resolution was reported favorably by a rollcall vote of 20–9.

#### ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Sensenbrenner .....	X		
Mr. McCollum .....			
Mr. Gekas .....	X		
Mr. Coble .....	X		
Mr. Smith (TX) .....	X		
Mr. Schiff .....			
Mr. Gallegly .....	X		
Mr. Canady .....	X		
Mr. Inglis .....	X		
Mr. Goodlatte .....	X		
Mr. Buyer .....	X		
Mr. Bono .....	X		
Mr. Bryant (TN) .....	X		
Mr. Chabot .....	X		
Mr. Barr .....	X		
Mr. Jenkins .....	X		
Mr. Hutchinson .....	X		
Mr. Pease .....	X		
Mr. Cannon .....	X		
Mr. Conyers .....		X	
Mr. Frank .....			
Mr. Schumer .....			
Mr. Berman .....			
Mr. Boucher .....		X	
Mr. Nadler .....		X	
Mr. Scott .....		X	
Mr. Watt .....		X	
Ms. Lofgren .....		X	
Ms. Jackson Lee .....		X	
Ms. Waters .....		X	
Mr. Meehan .....		X	
Mr. Delahunt .....			
Mr. Wexler .....	X		
Mr. Rothman .....	X		
Mr. Hyde, Chairman .....	X		
Total .....	20	9	

#### COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(1)(3)(A) of rule XI 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.

## COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(1)(3)(D) of rule XI of the Rules of the House of Representatives.

## NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(1)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

## CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(1)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the resolution, H.J. Res. 54, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, May 16, 1997.*

Hon. HENRY J. HYDE,  
*Chairman, Committee on the Judiciary,  
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Office has prepared the enclosed cost estimate for H.J. Res. 54, a 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.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Mark Grabowicz, who can be reached at 226-2860, and Leo Lex who can be reached at 225-3220.

Sincerely,

JUNE E. O'NEILL, *Director.*

Enclosure.

*H.J. Res. 54—A 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*

H.J. Res. 54 would propose amending the U.S. Constitution to give the Congress power to prohibit the physical desecration of the U.S. flag.

CBO estimates that enacting this resolution would have no significant impact on the federal budget. H.J. Res. 54 would not affect direct spending or receipts; therefore, pay-as-you-go procedures do not apply. This legislation contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act of 1995 and would impose no costs on the budgets of state, local, or tribal governments. To become part of the Constitution, three-fourths of the states would be required to ratify the proposed amendment within seven years of its submission to the states by the Congress.

The CBO staff contacts for this estimate are Mark Grabowicz, who can be reached at 226–2860, and Leo Lex, who can be reached at 225–3220. This estimate was approved by Paul N. Van de Water, Assistant Director for Budget Analysis.

#### CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to Rule XI, clause 2(1)(4) 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

H.J. Res. 54 simply states “[t]he Congress shall have power to prohibit the physical desecration of the flag of the United States.”

Congress clearly possessed this power prior to the decisions of the United States Supreme Court in *Texas v. Johnson* and *U.S. v. Eichman*. Those decisions held that the act of physically desecrating the flag by burning was expressive conduct protected by the First Amendment. The First Amendment to the U.S. Constitution, which states, “Congress shall make no law . . . abridging freedom of speech . . .” limits the power of Congress. H.J. Res. 54 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 resolved in enacting legislation to protect the flag from physical desecration.

First, Congress may want to flesh out the meaning of “physical desecration.” The amendment itself requires physical contact with the flag. 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. In addition, the term “desecrate” clearly implies that the physical act must demonstrate contempt for 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 the authority to determine “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 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 United 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.

## DISSENTING VIEWS

We strongly oppose H.J. Res. 54, 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. 54 is wrong as a matter of principle, wrong as a matter of precedent, and wrong as a matter of practice.

H.J. Res. 54 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*<sup>1</sup> decision in 1989 there were only 45 reported incidents of flag burning.<sup>2</sup> Moreover, most incidents of flag burning can be successfully prosecuted today under laws relating to breach of peace or inciting violence—all fully within current constitutional constraints.<sup>3</sup>

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. 54 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,<sup>4</sup> and a vaguely worded constitutional amendment such as H.J. Res. 54 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. 54 will merely serve to dishonor the Constitution and compromise the very ideals our nation was founded on. 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

<sup>1</sup> 491 U.S. 397 (1989) (in a 5–4 decision authored by Justice Brennan, the Court found that 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.

<sup>2</sup> Robert J. Goldstein, *Two Centuries of Flagburning in the United States*, 163 *Flag Bull.* 65 (1995).

<sup>3</sup> 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) (“While I believe the *Johnson* and *Eichman* decisions were misguided, I do not believe a constitutional amendment would be a proper response. Flag desecrations when employed as “fighting words” or when intended and likely to incite a violation of law remain criminally punishable under the Supreme Court precedents in *Chaplinsky v. New Hampshire* (1942) and *Brandenburg v. Ohio* (1969”).

<sup>4</sup> 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).

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.<sup>5</sup>

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 oppose 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.

#### 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."<sup>6</sup>

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 insti-

<sup>5</sup>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) (forthcoming) [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 writes 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).

<sup>6</sup>Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *Yale L.J.*, 877, 886 (1963).

tutions themselves. Thus liberty of expression, though often productive of divisiveness, may contribute to social stability.”<sup>7</sup>

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.”<sup>8</sup>

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.”<sup>9</sup> 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 her and falsehood grapple, whoever knew truth put to the worse in a free and open encounter?<sup>10</sup>

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.<sup>11</sup>

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.”<sup>12</sup>

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,

<sup>7</sup>Greenwalt, *Speech and Crime*, A.B.F. Res.J 645, 672–3 (1980). See also Rotunda, *Treatise on Constitutional Law: Substance and Procedure* §20.6 at 18 (2d ed. 1992).

<sup>8</sup>See Redish, *The Value of Free Speech*, 130 U. Penn. L.Rev., 591, 611 (1982).

<sup>9</sup>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.”

<sup>10</sup>J. Milton, *Areopagitica, A Speech for the Liberty of Unlicensed Printing to the Parliament of England* (1644).

<sup>11</sup>J.S. Mill, *On Liberty* Ch. II. (1859).

<sup>12</sup>Thomas I. Emerson, *Toward a General Theory of the First Amendment*, *supra* note 6 at 883.

or to the permanent and aggregate interests of the community.”<sup>13</sup> It is for these reasons that the Constitution not only explicitly protected freedom of expression,<sup>14</sup> 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. 54 IS WRONG AS A MATTER OF PRINCIPLE

Unfortunately H.J. Res. 54 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 protects not just freedom for the thought and expression we agree with, but “freedom for the thought we hate.”<sup>15</sup> 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.<sup>16</sup>

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*<sup>17</sup> (state statute prohibiting the display of a “red flag” overturned) and continuing through the mid-1970’s with *Smith v. Goguen*<sup>18</sup> and *Spence v. Washington*<sup>19</sup> (overturning convictions involving wearing a flag patch and attaching a peace sign to a flag), 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 U.S. flag outside of the Republican Convention in Dallas, the State of Texas readily acknowledged that

<sup>13</sup>The Federalist No. 10 (J. Madison) at 57 (J. Cooke ed. 1961).

<sup>14</sup>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.”

<sup>15</sup>*United States v. Schwimmer*, 254 U.S. 644, 655 (1929) (Holmes, J., dissenting).

<sup>16</sup>*West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

<sup>17</sup>283 U.S. 359 (1931). Absent this decision, a State could theoretically have *prevented* its citizens from displaying the U.S. flag.

<sup>18</sup>415 U.S. 94 (1972).

<sup>19</sup>418 U.S. 405 (1974).

Johnson's conduct constituted "symbolic speech" subject to protection under the first amendment.<sup>20</sup> Those who seek to justify H.J. Res. 54 on the grounds that flag desecration does not constitute "speech" are therefore denying decades of well understood court decisions.<sup>21</sup>

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, "the 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."<sup>22</sup> 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. 54 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.<sup>23</sup>

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 has 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."<sup>24</sup> 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."<sup>25</sup>

Almost as significant as the damage H.J. Res. 54 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

<sup>20</sup>*Texas v. Johnson*, *supra* note 1 at 397.

<sup>21</sup>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").

<sup>22</sup>*U.S. ex rel Radich v. Criminal Court of N.Y.*, 385 F.Supp. 165, 184 (1974).

<sup>23</sup>Philadelphia Gazette, Nov. 17, 1737, quoted in Levy, *Legacy of Suppression* 135 (1960).

<sup>24</sup>See Robert J. Goldstein, *Saving Old Glory: The History of the American Flag Desecration Controversy*, *supra* note 4 at 154.

<sup>25</sup>*Id.*

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 therefore essential that we remain fully open to unpopular dissent, regardless of the form it takes.<sup>26</sup>

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.<sup>27</sup> By adopting H.J. Res 54 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. 54 IS WRONG AS A MATTER OF PRECEDENT

Adoption of H.J. Res. 54 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. 54, 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 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.<sup>28</sup>

Adoption of H.J. Res. 54 will also diminish and trivialize our Constitution.<sup>29</sup> 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.<sup>30</sup> Conservative legal scholar Bruce Fein emphasized this

<sup>26</sup> 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.")

<sup>27</sup> Rotunda, *Treatise on Constitutional Law: Substance and Procedure*, supra note 7, § 20.49 at 352.

<sup>28</sup> *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*].

<sup>29</sup> 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.

<sup>30</sup> 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

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.<sup>31</sup>

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.<sup>32</sup>

#### H.J. RES. 54 IS WRONG AS A MATTER OF PRACTICE

As a practical matter, H.J. Res. 54 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.<sup>33</sup>

row'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).

<sup>31</sup> *1995 House Judiciary Hearings supra* note 3 (statement of Bruce Fein at 1-2).

<sup>32</sup> See *1997 House Judiciary Hearings, supra* note 5(statement of Professor Norman Dorsen, New York University School of Law).

<sup>33</sup> *1995 House Judiciary Hearings supra* note 3 (statement of Representative Serrano). See also, Rotunda, *Treatise on American Constitutional Law: Substance and Procedure, 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 candles on the cake? Will cutting the cake deface it? Is it defacing the flag to display it upside down?").



The Resolution's sponsors also appear to have little understanding as to its Constitutional scope or breadth. H.J. Res. 54 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.<sup>34</sup> 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.<sup>35</sup> He later insisted, however that the amendment would also allow the states to criminalize wearing clothing with the flag on it.<sup>36</sup> 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.<sup>37</sup> Chairman Canady's interpretation 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. 54 represents an open-ended and uncharted 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. 54 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.<sup>38</sup>

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 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

<sup>34</sup>Since H.J. Res. 54 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 amendment), 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 I, 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).

<sup>35</sup>*House Comm. on the Judiciary, Markup Session of H.R.J. Res. 79*, 104th Cong., 1st Sess. 109 (1995).

<sup>36</sup>*Id.* at 110.

<sup>37</sup>*Smith v. Goguen*, 415 U.S. 566, 568-69 (1974).

<sup>38</sup>Roman Rollnick, "Flag Amendment would put U.S. with Iran, China," UPI (July 1, 1989).

unity, the Siberian exiles as a means to 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.<sup>39</sup>

If we adopt H.J. Res. 54, 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.  
RICK BOUCHER.  
JERROLD NADLER.  
ROBERT C. SCOTT.  
MELVIN L. WATT.  
ZOE LOFGREN.  
SHEILA JACKSON LEE.  
MARTIN T. MEEHAN.

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<sup>39</sup> 319 U.S. 624, 641 (1943).

## DISSENTING VIEWS OF HON. RICK BOUCHER

On May 8, 1997, I, along with Congressman Wayne Gilchrest, (R-MD) introduced H.R. 1556, the “Flag Protection Act of 1997,” which imposes criminal penalties on those who desecrate the United States flag. H.R. 1556 is a statutory alternative to H.J. Res. 54, and would punish flag desecration, regardless of whether it occurs on public or private property, without weakening the freedoms provided under the First Amendment to the U.S. Constitution.

It is unfortunate that the majority would not permit a vote on H.R. 1556 as a substitute to H.J. Res. 54, which, if adopted, will have a detrimental impact on the Constitution and on the rights of individuals. Our strength as a nation and our distinction as the freest people on earth derives in significant part from the broad guarantee of freedom of speech contained in the First Amendment. Proponents of a statutory alternative to the proposed Amendment agree that H.R. 1556 achieves the same goal of protecting our flag without cutting back on the freedom of expression guaranteed by the First Amendment.

H.R. 1556 would criminalize the destruction or damage of a U.S. flag when the person engaging in it does so with the primary purpose and intent to incite or produce imminent violence or a breach of the peace and in circumstances where the person knows it is reasonably likely to produce imminent violence or a breach of the peace. It would punish any person who steals or knowingly converts to his or her use, or to the use of another, a U.S. flag belonging to the United States and who intentionally destroys or damages that flag. Finally, H.R. 1556 would punish any person who, within any lands reserved for the use of the United States or under the exclusive use or concurrent jurisdiction of the U.S., 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 that flag.

Several constitutional scholars, including Professors Laurence Tribe and Erwin Chemerinsky, have observed that the provisions of the bill are constitutional. Moreover, the Congressional Research Service has reviewed the bill and issued a memorandum which concludes that it is constitutional. H.R. 1556 offers protection for the flag in circumstances under which statutory protection may still be afforded after the Supreme Court decisions in *United States v. Eichman*<sup>1</sup> and *Texas v. Johnson*.<sup>2</sup>

This tough criminal statute would have the added advantage of protecting the flag now, not three years from now—the probable time it would take to ratify a constitutional amendment. Moreover, it would have the twin virtues of outlawing flag desecration while preserving all of our First Amendment freedoms.

RICK BOUCHER.

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<sup>1</sup> 496 U.S. 310 (1990).

<sup>2</sup> 491 U.S. 397 (1989).