

The bill clerk read as follows:

The Senator from South Carolina [Mr. HOLLINGS] proposes an amendment numbered 3096.

Mr. HOLLINGS. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

After the first article add the following:

“ARTICLE —

“SECTION 1. Congress shall have power to set reasonable limits on expenditures made in support of or in opposition to the nomination or election of any person to Federal office.

“SECTION 2. Each State shall have power to set reasonable limits on expenditures made in support of or in opposition to the nomination or election of any person to State office.

“SECTION 3. Each local government of general jurisdiction shall have power to set reasonable limits on expenditures made in support of or in opposition to the nomination or election of any person to office in that government. No State shall have power to limit the power established by this section.

“SECTION 4. Congress shall have power to implement and enforce this article by appropriate legislation.”

Mr. HOLLINGS. Mr. President, I yield the floor.

Mr. BYRD addressed the Chair.

The PRESIDING OFFICER. Under the previous order, the Senator from West Virginia is recognized.

#### UNITED STATES LEADERSHIP IN BOSNIA

Mr. BYRD. Mr. President, I have been recognized to speak out of order.

Mr. President, President Clinton has made a difficult and courageous decision to accept a role in leading a NATO deployment of forces to implement the peace treaty that the parties to the Bosnia conflict have initialed and that they will soon sign. It was only through strong, persistent, and courageous leadership that these parties reached an agreement to end their atrocious, murderous, ethnic savagery at all.

What is crystal clear is that our European allies, half a century after the end of World War II, are dependent on the United States for leadership on the European Continent. This is a result of the continuous commitment of America to defend Europe against possible aggression by the Soviet empire for many, many years, and of the United States, being willing to provide the glue of military and economic leadership on the European Continent. This reliance on the United States is testimony, one might surmise, to a job that the United States did almost too well, too unselfishly, and under administrations of both political parties.

The argument can be made and will be made that this conflict in Bosnia is a European conflict, and that Europeans should police it without asking the United States to take the lead. That is a logical argument. I agree with it. But what is logical, unfortunately, is not reality in that sense.

The probable effect on the future of NATO—indeed, of Europe itself—of a decision by America not to lead this force can be gleaned from the history of the first half of this century, when the United States refused to take a leadership role, but then was later pushed into entering a European conflict and suffered heavy casualties in the process. I have lived through that. History is clear.

So to those who would say that this conflict is Europe's business and that America need not be involved, they certainly have a point, but there is the history that I have been talking about, and there is in the history of this century a warning about the possible, even probable, results of that view in this situation that we are facing.

This vital military relationship with Europe also affects U.S. vital interests in other areas of the world, as well as in Europe. How will other nations depend on the United States, on our word, if we walk away from NATO by not participating in this unique NATO mission? Our security relationships with NATO, with Asian nations, and elsewhere, are intimately tied through our trading, banking, and diplomatic relationships. U.S. military leadership and security agreements create a strong base upon which to build fertile economic and diplomatic relationships. It is a mistake to view this current situation as some sort of stand-alone problem.

The outcome of U.S. failure to support NATO in this operation could affect U.S. interests in other parts of the world and at other times in history. The risks of not attempting to stabilize the conflict in the Balkans, resulting in the war's spreading outside the immediate theater of conflict that would be a likely consequence, are substantial and troubling. Left unchecked, the Bosnian conflict could spread to Macedonia and Albania, dragging NATO allies Greece and Turkey into an escalating ethnic conflict. That would be disastrous for the future with respect to the interests of NATO and certainly with respect to our own overall security interests.

I do not think I need to point out the damage to the NATO alliance that would result from such an eventuality. U.S. troops are still on watch over Iraq, which remains a threat to Kuwait and Saudi Arabia. Should Iraq move against Kuwait once again, would we be able to count on our allies to stand with us against Iraq a second time?

Whether we like it or not, as we are fond of saying, the United States is the world's sole remaining superpower. I find it ironic that some Senators who promote robust defense budgets, even at the expense of not funding needed domestic infrastructure, educational, and other needs, still shrink from endorsing a role for the United States which has been requested by the NATO alliance. Given our power, given the unbroken leading role we have played in Europe throughout the entire second

half of this century, indeed, given the size of our military budget—I am not altogether supportive of that particular size inasmuch it is representative of the \$7 billion increase over and above the President's budget, which I think is too much at this particular time—it cannot be much of a surprise that European powers are heavily dependent on the United States to lead NATO in implementing a peace treaty in Bosnia. It is, in fact, the case that NATO is now vigorous, and, as Secretary of Defense Perry testified before the Senate Armed Services Committee on Wednesday, December 5 of this year, more united than ever before. Indeed, it is a major development that the French have now agreed to participate in the NATO Military Committee, reversing a standoffish position that has so often characterized France's relationship with NATO since the day of General Charles de Gaulle. It is both notable and telling that while there has been a lot of fiery rhetoric in Congress about not placing U.S. troops under the command of foreign military officers, none of our NATO allies, and none of the other nations sending troops to Bosnia, has expressed any reservation about putting their soldiers under U.S. command. Even the Russian troops who will serve under the U.S. 1st Armored Division around Tuzla have had great difficulty, as a matter of fact had greater difficulty in putting themselves under NATO command than under U.S. command. This is another testament, it seems to me, to U.S. leadership.

President Clinton and the United States accepted a leadership role in Bosnia only reluctantly. We all can recall the cries of outrage from across the United States a year or two ago, as media coverage of wartime atrocities in Bosnia were beamed into our living rooms. Pictures of refugees fleeing burned-out homes, pictures of skeletal prisoners of war recounting tales of torture and suffering, of sobbing women admitting to the rapes they endured, pictures of stoic faces of United Nations observers chained to ammunition bunkers—all of these images led to cries for action by the United States, cries for immediate military reprisals from across the United States.

This was the reaction driven by the media, driven by the electronic eye, and perhaps it is too bad in a sense that we are to be driven and are to let ourselves be driven by that electronic eye, by that television tube.

But the President did not commit U.S. troops to such an effort, and in my opinion he would have been on dubious constitutional grounds had he done so. I know there are those who would say he is the Commander in Chief and that he has that authority. I am not going into that argument at this point but I am prepared to, and may do so before many days have passed—that is a very dubious ground of constitutionality. He

promised troops for our NATO mission on the ground in Bosnia only to help implement a peace agreement, and there was no peace agreement in sight at that time. Now, there is a peace agreement in sight, brought about in large part by the efforts of this administration, and we are faced with the decision of whether or not to support that agreement. We can be sure that those calls for U.S. military action would be heard again, should those tragic images be resurrected as a result of our unwillingness to follow through on this opportunity; that is what it is, an opportunity. That is all it is at the moment, an opportunity. We hope that it will eventually lead to peace, but it is an opportunity for peace.

In many ways, Bosnia represents the future of conflict in the world—an ugly, convoluted, and murderous small war with the ability to spread across borders and to convocate and to draw in neighboring nations and religio-ethnic groups. There is no clear super-power prism to focus and sharpen the lines between warring factions, as there was in the cold war. We cannot intervene in all of these conflicts, of course, nor can we hope to solve all of them. But some can be averted, or shortened, or perhaps settled, as Iraq, and now, hopefully, Bosnia has been, or soon will be, by the combined efforts of the United States and other powers. No single nation can wade in and settle these conflicts as they are too deep-seated, too complex. This places a premium on coalition building and on cooperative efforts by interested parties. It is an approach that worked in Iraq, and hopefully will work in Bosnia. United States leadership and participation have been critical, but we cannot do it alone, anymore than the other nations concerned about Bosnia can do it—or will do it—without us.

The Dayton accords, to be signed in Paris on December 14, are impressive. They comprise the basis for a new start for all the people of Bosnia, covering territorial, military, civil, governmental, and electoral matters. Not every issue is finally resolved, not every issue will be finally resolved, but additional negotiations are called for to resolve the outstanding issues. All three parties to the conflict have initialed these accords, and all three parties have pledged to abide by them. All the parties have sought this peace, and have made the many difficult decisions necessary to reach agreement on these accords. After almost 4 years of bitter conflict, this is truly an impressive achievement, and one that should not be underestimated.

The administration has done a good job in testifying before congressional committees, in laying out in detail the military plan and tasks that we would undertake to fulfill the NATO implementation plan.

I have participated in hearings by the Senate Appropriations Committee, of which I am a member. I have likewise participated in hearings by the Armed

Services Committee, of which I am a member.

So the administration has presented its case. It has responded to questions and, in my judgment, candidly.

We are all very cognizant of the risks of casualties, and the administration is very clear on that point, that there are risks of casualties. And we are rightly concerned about the prospects of mission creep and the resulting quagmire that could develop when unforeseen events attempt to push us into an undefined, interminable and escalating involvement which none of us wants and which none of us—this Senator in particular—is willing to support. I believe that the administration is also concerned about these possibilities, and that we must reject any attempt to expand the limited military role in Bosnia beyond that which has been projected and assured as being the limit by the administration. We must guard against mission creep. We saw that in Somalia. When that happened, then I insisted on an amendment. It was my amendment which drew the line in the sand and said, “This far, no farther. If there is a request, if there is justification for staying longer, then come back, come back to Congress, seek authorization and appropriations.” So the power of the purse was the magic ointment that assured that such a line could be drawn and that it could be enforced.

The United States can be proud of its professional, volunteer military. These men and women are well trained, well armed, willing and ready to meet any challenge.

I have heard it said that they are the best America has ever produced. I am not one who would say that, having lived through two world wars, the war in Vietnam and the war in Korea. The United States has produced great armies, great navies, military forces manned by patriotic individuals who were well trained in past wars. So, some who fought in World War II may question the saying that today's military is the best that America has ever produced. We can say that no better has been produced. And we can be proud of our military men and women.

These men and women are well trained, they are well armed, and they are willing and ready to meet any challenge, and they understand the risks that they face better than I can ever hope to do. They are prepared to operate effectively and decisively in Bosnia.

So, I again commend the President in arranging the Dayton meetings and putting together this opportunity to bring peace to the Balkans. This was quite an achievement in reaching the Dayton accords, quite an achievement in bringing the parties together, quite an achievement in getting them to initial an agreement. It is a noble effort, worthy of America, and it holds promise for a more enlightened 21st century than was the reality of the 20th century. American leadership, we have

learned, makes a difference, and the world recognizes that American leadership makes a difference. Nevertheless, Mr. President, the American people are not anxious to risk their children to tame the excesses of other nations and ethnic groups. We do so very reluctantly, and that is as it should be. But when we contemplate an action such as the President has proposed in the Balkans, the chances of success are greatly enhanced if the execution of the operation is bipartisan and if the President has the support of the Congress in this endeavor.

I wrote to the President on October 13, urging him to seek the support of Congress before beginning this mission, and I commend him for replying in the affirmative on October 19. He promised to provide such a request “promptly after a peace agreement is reached.” And in the next 2 minutes, such a letter will be faxed, as I have just been advised.

It is a truism that when the President succeeds, America succeeds. And if he does not succeed, the Nation as a whole loses. The majority leader, Mr. DOLE, has the experience and wisdom to understand this fundamental axiom of American power and influence, and I commend our majority leader for throwing his support behind the President in the execution of this national commitment. He has done the right thing for our country, and I believe the Congress as a whole should step up to the plate and accept its share of the responsibility.

The Constitution places upon the Congress the authority to declare war. Is one to suppose that anything less than a declaration of war shifts the responsibility elsewhere? I will have more to say on this later.

We in the Senate should come down on this one way or the other. It is the responsibility of the Congress. That is where the responsibility rests. That is where it is vested by the Constitution, and we should be willing to step up to the plate and vote one way or the other.

We have a constitutional duty to do so. We have an obligation to the people who voted to put us here to stand up for what we believe. One may wish to vote no; one may wish to vote aye. It seems to me that we have a responsibility to vote one way or the other. Ducking around the issue, hedging our bets and avoiding responsibility are not what the voters sent us here for. Our constituents deserve our considered judgment and expect us to take a stand on actions which will put their children at risk in foreign lands.

Our foreign military men and women will not have the opportunity to hedge their bets. They are being sent to battle, and they will stand at the plate. And we have a responsibility to do the same. The Constitution places that responsibility right here.

I believe that any resolution that we pass on this matter should clearly state that the Congress is approving

the operation. I would prefer to use the word "authorizing" the operation. That is what we did in the case of the war in the Persian Gulf. Congress authorized the President of the United States, the words being these, and I quote from the Joint Resolution, Senate Joint Resolution 2, as voted on January 12, 1991: "The President is authorized," et cetera.

So we should take a clear stand. It should have the effect of giving the President the clear aegis of congressional authority that there is no doubt in the minds of friend or foe.

I can understand those who may wish to vote against such a measure, but vote we should. It should have the effect, as I say, of giving the President a clear aegis of congressional authority, which will help our military forces to succeed, and thus help America to succeed.

Some have compared this upcoming vote to the vote authorizing President Bush to lead U.S. troops into combat in Operation Desert Storm against Iraq, and I just referred to that resolution. Unlike the Persian Gulf war, when an economic embargo that was only just beginning to bite into the Iraqi economy provided an alternative to war, an alternative that I favored—an alternative that I believe most of the Chiefs of Staff favored, an alternative that I seem to remember General Powell favored—that I favored at that time over risking U.S. service men and women to combat, there is no comparable current alternative in the case of Bosnia. All of the alternatives have been tried over the last 3 or 4 years and have played out whatever impact they had.

The economic embargo on Serbia did have an important influence on the behavior of President Milosevic in seeking a peaceful settlement. In the end, however, only resolute U.S. and NATO military power have created conditions in which all of the warring factions have sought peace and have sought to protect this fragile commitment with the security of a NATO presence.

This is unique. It is unique. In Bosnia, our mission is to deter further war, to ensure stability by our very presence, and to give all three parties a chance to back away from conflict and begin anew in peace. This is an important difference. America has long valued peace and valued compromise over conflict.

We should think long and we should think hard before we consider rejecting this compromise, this chance for peace instead of more war. In the end, we do not know how this effort will turn out. It is a serious undertaking, as can be said of many decisions that have been made by our forbears in the past and in many actions that have been taken by our forefathers in the past. The outcome was not assured in their day. The outcome is not assured here, but we must make the best possible choice and decide what is best for America's security interests.

Furthermore, there has been concern over the so-called exit strategy; that

is, the standards of success and benchmarks of military action by the international force which will result in a departure of our forces. The Secretary of Defense, Mr. Perry, and the Chairman of the Joint Chiefs of Staff, General Shalikashvili, testified on Wednesday, December 5, 1995, that they will have no trouble in completing the military mission and removing our forces from the ground operation in Bosnia in "approximately" a year.

That is the exit strategy! Let us vote on language putting their assurances into print, into law, into the action of the Senate. That is the exit strategy, "approximately 1 year." Indeed, they have emphatically argued that the military missions are structured so as to be able to be accomplished well within that time period.

Mr. President, how much time do I have remaining?

The PRESIDING OFFICER. The Senator has 13 minutes and 10 seconds remaining.

Mr. BYRD. I thank the Chair.

The Dayton agreement itself, in Article I, General Obligations, states that the parties "welcome the willingness of the international community to send to the region, for a period of approximately one year, a force to assist in implementation of the territorial and other militarily related provisions of the agreement." Therefore, the expectation of the parties themselves in language that they have initialed is that approximately 1 year is what they get in terms of the NATO operation. This is the clear understanding of the duration of the military mission, and so I think that there should be no ambiguity about this, no invitation to mission creep, no cloud of uncertainty that we are being drawn into a quagmire. The administration and the parties themselves, therefore, have made it indubitably clear that the mission is for approximately 1 year, and the American people have a right to expect it to last no longer than that.

The military operation should not be dependent upon the success of reconstruction attempts by civilian agencies, should not be dependent on the pace of civilian reconstruction, should not be dependent on elections, or other nonmilitary tasks. Therefore, I think it is appropriate to write into whatever resolution we pass a clear date certain—if not that, then the words "approximately 1 year"—so that it would be clear as to when U.S. forces will be expected to have fulfilled their mission and departed. I suggest that it be the language because that is the language the administration witnesses, that is the language that the President, and that is the language that the parties to the agreement themselves have proposed.

The language then should say—should, indeed, let the President know—that we expect that word to be kept. If for some unforeseen reason the circumstances are such that there may appear to be justification for seeking

an extension, then I think that the President can come back to the Congress at that time and seek an extension, and seek the appropriations that are necessary, and Congress may at that time then address such a request promptly and appropriately, based on circumstances at such time.

I am not saying that Congress would favorably respond or that it would not favorably respond. But, again, Congress would speak. The deadline itself then is the ultimate exit strategy, and the administration can clearly plan its activities and withdrawal in an orderly fashion with that deadline understood from the outset. There will be no ambiguity about timeframes, then, regarding American military involvement and exposure of our forces to extended risk in Bosnia.

I should say that such language in no way would prevent the troops from being withdrawn earlier than "approximately 1 year," if all goes as well as expected. And if the mission does not go well, I remind my colleagues that Congress has the ability to end U.S. participation earlier, if necessary. Congress retains the power of the purse. I hope that Congress will think long and many times before it ever shifts that power of the purse to the Chief Executive.

Congress retains the power of the purse and can at any time draw a date-line for cutting off the funds for the mission and bringing the troops home. This is the ultimate authority, the ultimate authority of Congress and the ultimate authority of the American people through their elected representatives in Congress. And the power of the purse is the ultimate oversight tool of the Congress.

While I accept the assurances of our military leadership that the mission is achievable and that U.S. forces are well prepared to deal with the expected problems that may arise, if the situation changes and the parties resume their conflict despite our efforts and despite their pledges, then I would support action to bring our troops home, as I have done in the past.

There may well be needed a follow-on security force, manned by European troops on the ground, when the U.S. mission is over. I strongly encourage the administration to begin planning for such a turnover now. While U.S. leadership is needed now to stabilize the situation, after it is stabilized an insurance policy in the way of a residual European force should be contemplated.

I say all of this, Mr. President, after long consideration and with deep personal reflection and concern. This is a sober, somber thing that we are contemplating. I feel deeply my obligations to the Constitution and to the people of West Virginia and to the people of the United States and to our men and women in uniform. West Virginians will play a role in this mission as they have done so well and so valiantly in so many U.S. military missions throughout the Nation's history.

West Virginians were playing a role even before West Virginia itself became a State. Even before it became the 35th star in the universe of stars, the people of West Virginia, the people beyond the mountains, beyond the Alleghenies played a role. The 152nd POW Information Center, an Army National Guard unit in Moundsville, WV, is among the units that have been ordered to deploy to Bosnia. I wish them well, and I will remember their patriotism daily.

West Virginia is a great and patriotic State with a history of military service. As a percentage of her eligible population, West Virginia stands at the top—not at the bottom, but at the top—in combat casualties in U.S. military operations during the more than 200-year history of our Nation. West Virginia also has citizens whose heritage is Croat, Serb, and Bosnian Moslem—not many, but some. So the people of West Virginia, while most concerned about the fates of the U.S. soldiers, sailors, and airmen serving their country around the world, are not unmindful of the people of Bosnia.

In mid-November, the capital city of Charleston, WV, voted to become the sister city of Sarajevo, the capital of Bosnia. Charleston churches, other religious institutions, and the University of Charleston have generously and selflessly volunteered to support Bosnian refugees, and I am moved by these acts of kindness. We in West Virginia may be physically isolated in our mountains. We do not bemoan that fact. As a matter of fact, we look upon those mountains with immense pride. We may be isolated, but we are not unmindful of the plight of the common people of Sarajevo and the whole of Bosnia and Herzegovina.

This NATO operation in Bosnia in support of the Dayton peace agreement can be a turning point in the history of the Balkans. There are no other viable alternatives to ending this conflict. There is no other alternative to the exercise of American leadership and resolve that has led to this last true attempt at peace.

The President is exercising leadership, and he is rightly seeking the support of the people and he is rightly seeking the support of the Congress of the United States for this mission. It is our constitutional obligation here in the Congress to consider this mission and the consequences of this mission for American interests. It is our obligation to vote, and it is our obligation to watch over the execution of the mission.

I have been glad to see the Senate conducting the hearings and the debate that have led up to this upcoming vote. These have been lengthy hearings. They have been probing, and they have been thoughtful. There have been thoughtful questions and there have been thoughtful answers, and this could be a proud moment in the history of the Senate.

I hope that we can give the troops and the President the guidance and

support that I believe are necessary to see this mission through successfully.

Mr. President, how much time do I have remaining?

The PRESIDING OFFICER. The Senator has 2 minutes and 45 seconds remaining.

Mr. BYRD. I thank the Chair.

Now, Mr. President, I read from a letter that has been sent to our Democratic leader, Mr. DASCHLE, and I understand that the Democratic leader has no objection to my reading from this letter and that he authorizes my doing so.

The letter says in part—it is addressed to the leader:

Dear Mr. LEADER: I consider the Dayton peace agreement to be a serious commitment by the parties to settle this conflict. In light of that agreement and my approval of the final NATO plan, I would welcome a congressional expression of support for U.S. participation in a NATO-led implementation force in Bosnia. I believe congressional support for U.S. participation is immensely important—

Let me say that again.

I believe congressional support for U.S. participation is immensely important to the unity of our purpose and the morale of our troops.

Mr. President, I add my own feeling that congressional support is not only immensely important, but it is also vital, in my judgment, it is vital to the success of the effort.

Mr. President, I ask unanimous consent on behalf of Mr. DASCHLE that the entire letter be printed in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

THE WHITE HOUSE,

Washington, December 11, 1995.

Hon. THOMAS A. DASCHLE,  
Democratic Leader, U.S. Senate,  
Washington, DC.

DEAR MR. LEADER: Just four weeks ago, the leaders of Bosnia, Croatia and Serbia came to Dayton, Ohio, in America's heartland, to negotiate and initial a peace agreement to end the war in Bosnia. There, they made a commitment to peace. They agreed to put down their guns; to preserve Bosnia as a single state; to cooperate with the War Crimes Tribunal and to try to build a peaceful, democratic future for all the people of Bosnia. They asked for NATO and America's help to implement this peace agreement.

On Friday, December 1, the North Atlantic Council approved NATO's operational plan, OPLAN 10405, the Implementation of a Peace Agreement in the Former Yugoslavia. On Saturday, General George Joulwan, Supreme Allied Commander Europe, who will be commanding the NATO operation, briefed me in Germany on the final OPLAN.

Having reviewed the OPLAN, I find the mission is clearly defined with realistic goals that can be achieved in a definite period of time. The risks to our troops have been minimized to the maximum extent possible. American troops will take their orders from the American general who commands NATO. They will be heavily armed and thoroughly trained. In making an overwhelming show of force, they will lessen the need to use force. They will have the authority, as well as the training and the equipment, to respond with decisive force to any threat to their own safety or any violations of the military provisions of the peace agreement. U.S. and NATO commanders believe the

military mission can be accomplished in about a year.

A summary of the OPLAN is attached. Of course, members of my staff and the Administration are available to answer your questions and further brief you on the OPLAN as you require.

I consider the Dayton peace agreement to be a serious commitment by the parties to settle this conflict. In light of that agreement and my approval of the final NATO OPLAN, I would welcome a Congressional expression of support for U.S. participation in a NATO-led Implementation Force in Bosnia. I believe Congressional support for U.S. participation is immensely important to the unity of our purpose and the morale of our troops.

I believe there has been a timely opportunity for the Congress to consider and act upon my request for support since the initialing in Dayton on November 21. As you know, the formal signing of the Peace Agreement will take place in Paris on December 14.

As I informed you earlier, I have authorized the participation of a small number of American troops in a NATO advance mission that will lay the groundwork for IFOR, starting this week. They will establish headquarters and set up the sophisticated communication systems that must be in place before NATO can send in its troops, tanks and trucks to Bosnia.

America has a responsibility to help to turn this moment of hope into an enduring reality. As the leader of NATO—the only institution capable of implementing this peace agreement—the United States has a profound interest in participating in this mission, which will give the people of Bosnia the confidence and support they need to preserve the peace and prevent this dangerous war in the heart of Europe from resuming and spreading. Since taking office, I have refused to send American troops to fight a war in Bosnia, but I believe we must help now to secure this Bosnian peace.

Sincerely,

BILL CLINTON.

Mr. BYRD. Mr. President, I thank the Senate. I thank Senators. I yield the floor.

Mr. KENNEDY addressed the Chair.

The PRESIDING OFFICER. The Senator from Massachusetts if recognized.

Mr. KENNEDY. Mr. President, I strongly oppose the constitutional amendment we are debating this afternoon and will be voting on tomorrow. The first amendment is one of the great pillars of our freedom. It has never been amended in over 200 years of our history and now is no time to start.

Flag burning is a vile and contemptuous act, but it is also a form of expression protected by the first amendment. Surely we are not so insecure in our commitment to freedom of speech and the first amendment that we are willing to start carving loopholes now in that majestic language.

And for what reason? What is the menace? Flag burning is exceedingly rare. Published reports indicate that fewer than 10 flag burning incidents have occurred a year since the Supreme Court's decision in Texas versus Johnson in 1989. According to the Congressional Research Service, there were 7 reported incidents in 1990; 13 in 1991; 10 in 1992; 0 in 1993; and 3 in 1994.

Mr. President, this is hardly the kind of serious and widespread problem in

American life that warrants a loophole in the first amendment. Surely there is no clear and present danger that warrants such a change.

Mr. President, we just heard the excellent statement of the Senator from West Virginia. His statement emphasized that issues of security and interests of peace in the Balkans are a matter of great importance to the American people. It is right that we will debate issues relating to national security and the well-being of our men and women under arms.

Similarly, it is essential that we discuss our Nation's domestic priorities as we address the budget and the deficit. Hopefully debate will lead to progress in an area of great importance.

We also would agree, I daresay, that the issues facing the children of this country—the strength of our educational system, the violence engulfing our society, the exposure to substance abuse and other health risks—are a matter of importance and deserve extensive debate.

But, when you look at the incidents of flag desecration during the last 5 years—three in 1994, none in 1993—it is difficult to believe that we are going to take time to amend the first amendment to the Constitution. I think such an action fails the reality test.

I can remember listening to a speech given by Justice Bill Douglas, one of the great Supreme Court Justices. Students asked him what was the most important export of the United States. He said, without hesitation, "The first amendment." That is the defining amendment for the preservation of speech and religion, so basic and fundamental in shaping our Nation. Now, in the next 2 days, are we going to make the first alteration to the first amendment? I believe it is not wise to do so.

The first amendment breathes life into the very concept of our democracy. It protects the freedoms of all Americans, including the fundamental freedom of citizens to criticize their Government and the country itself, including the flag. As the Supreme Court explained in *Texas versus Johnson*, 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 itself offensive and disagreeable."

Of course we condemn the act of flag burning. The flag is a grand symbol that embodies all that is great and good about America. It symbolizes our patriotism, our achievements, and reverence our reverence for freedom and democracy.

But how do we honor the flag by dishonoring the first amendment? Consider the words of James Warner, a former marine aviator, who was a prisoner in North Vietnam from 1967 to 1973:

It hurts to see the flag burned, but I part company with those who want to punish the flag burners. . . . I remember one interrogation [in North Vietnam] where I was shown a

photograph of Americans protesting the war by burning a flag. "There," the officer said. "People in your country protest against your cause. That proves you are wrong." "No," I said. "That proves that I am right. In my country we are not afraid of freedom, even if it means that people disagree with us." The officer was on his feet in an instant, his face purple with rage. He smashed his fist onto the table and screamed at me to shut up. While he was ranting, I was astonished to see pain, compounded by fear, in his eyes. I have never forgotten that look nor have I forgotten the satisfaction I felt at using his tool, the picture of the burning flag, against him.

Mr. President: this is James Warner, former marine, prisoner of war for over 7 years.

It hurts to see the flag burned, but I part company with those who want to punish the flag burners. . . . I remember one interrogation [in North Vietnam] where I was shown a photograph of Americans protesting the war by burning a flag. "There," the officer said. "People in your country protest against your cause. That proves you are wrong." "No," I said. "That proves that I am right. In my country we are not afraid of freedom, even if it means that people disagree with us." The officer was on his feet in an instant, his face purple with rage. He smashed his fist onto the table and screamed at me to shut up. While he was ranting, I was astonished to see pain, compounded by fear, in his eyes. I have never forgotten that look nor have I forgotten the satisfaction I felt at using his tool, the picture of the burning flag, against him.

Mr. President, that says it all. We respect the flag the most, we protect it the best, and the flag itself flies the highest when we honor the freedom for which it stands.

Mr. President, I yield the floor.

Mr. HATCH. Mr. President, this amendment, granting Congress power to prohibit physical desecration of the flag, does not amend the first amendment. The flag amendment overturns two Supreme Court decisions which have misconstrued the first amendment.

The first amendment's guarantee of freedom of speech has never been deemed absolute. Libel is not protected under the first amendment. Obscenity is not protected under the first amendment. A person cannot blare out his or her political views at 2 o'clock in the morning in a residential neighborhood and claim first amendment protection. Fighting words which provide violence or breaches of the peace are not protected under the first amendment.

The view that the first amendment does not disable Congress from prohibiting physical desecration of the flag has been shared by ardent supporters of the first amendment and freedom of expression.

In *Street v. New York*, 394 U.S. 576 (1969), the defendant burned a flag while uttering a political protest. The Court overturned his conviction since the defendant might have been convicted solely because of his words. The Court reserved judgment on whether a conviction for flag burning itself could withstand constitutional scrutiny. [Id. at 581.] Chief Justice Warren dissented, and in so doing, asserted:

I believe that the States and the Federal Government do have the power to protect the flag from acts of desecration and disgrace . . . Id. at 605 (Warren, C.J., dissenting).

Justice Black—generally regarded as a first amendment "absolutist"—also dissented and stated:

It passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American Flag an offense. Id. at 610 (Black, J., dissenting).

Justice Fortas agreed with Chief Justice Warren and Justice Black:

[T]he states and the Federal Government have the power to protect the flag from acts of desecration committed in public. . . . [T]he flag is a special kind of personality. Its use is traditionally and universally subject to special rules and regulation. . . . A person may "own" a flag, but ownership is subject to special burdens and responsibilities. A flag may be property, in a sense; but it is property burdened with peculiar obligations and restrictions. Certainly . . . these special conditions are not per se arbitrary or beyond governmental power under our Constitution. Id. at 615-617 (Fortas, J., dissenting).

Prof. Stephen B. Presser of Northwestern Law School testified before the Subcommittee on the Constitution on June 6:

The Flag Amendment would not in any way infringe the First Amendment. . . . The Flag Protection Amendment does not forbid the expression of ideas, nor does it foreclose dissent. [Written Testimony of Professor Stephen B. Presser, June 6, 1995 at p. 11]

Richard Parker, professor of law at Harvard Law School, testified:

The proposal would not "amend the First Amendment." Rather, each amendment would be interpreted in light of the other—much as in the case with the guaranties of Freedom of Speech and Equal Protection of the Laws. When the Fourteenth Amendment was proposed, the argument could have been made that congressional power to enforce the Equal Protection Clause might be used to undermine the First Amendment. The courts have seemed able, however, to harmonize the two. The same would be true here. Courts would interpret "desecration" and "flag of the United States" in light of general values of free speech. They would simply restore one narrow democratic authority. Experience justifies this much confidence in our judicial system.

But, we're asked, is 'harmonization' possible? If the Johnson and Eichman decisions protecting flag desecration were rooted in established strains of free speech law—as they were—how could an amendment countering those decisions coexist with the First Amendment?

First, it's important to keep in mind that free speech law has within it multiple, often competing strains. The dissenting opinions Johnson and Eichman were also rooted in established arguments about the meaning of freedom of speech. Second, even if the general principles invoked by the five Justices in the majority are admirable in general—as I believe they are—that doesn't mean that the proposed amendment would tend to undermine them, so long as it is confined, as it is intended, to mandating a unique exception for a unique symbol of nationhood. Indeed, carving out the exception in a new amendment—rather than through interpretation of

the First Amendment itself—best ensures that it will be so confined. Even opponents of the new amendment agree on this point. Third, it's vital to recognize that the proposed amendment is not in general tension with the free speech principle forbidding discrimination against specific 'messages' in regulation of speech content. Those who desecrate the flag may be doing so to communicate any number of messages. They may be saying that government is doing too much—or too little—about a particular problem. In fact, they may be burning the flag to protest the behavior of non-governmental, 'patriotic' groups and to support efforts of the government to squash those groups. Laws enacted under the proposed amendment would have to apply to all such activity, whatever the specific 'point of view.' One, and only one, generalized message could be regulated: 'desecration' of the flag itself. And regulation could extend no farther than a ban on one, and only one, mode of doing it: 'physical' desecration. Finally, and perhaps most importantly, we mustn't lose sight of the fundamental purpose of the proposed amendment. That purpose is to restore democratic authority to protect the unique symbol of our aspiration to national unity, an aspiration that, I've said, nurtures—rather than undermines—freedom of speech that is 'robust and wide-open. [Written Testimony, Professor Richard D. Parker, June 6, 1995, pages 6-8, footnotes omitted].

In short, Mr. President, there is no conflict between the flag protection amendment and the first amendment—we are only overturning two mistaken Supreme Court decisions.

Mrs. FEINSTEIN addressed the Chair.

The PRESIDING OFFICER. Under the previous order, the Senator from California is recognized.

Mr. HATCH. Will the Senator yield?

Mrs. FEINSTEIN. Yes.

Mr. HATCH. I ask unanimous consent that the distinguished Senator from Alaska, Senator STEVENS, be permitted to speak after our friend, the Senator from California.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from California.

Mrs. FEINSTEIN. I thank the Chair.

Mr. President, I think you have heard some very eloquent words from the senior Senator from Massachusetts. I respect him greatly. I respect the words he said. I think what this proves is that there is no lack of patriotism on either side of this debate. Patriotism and love of country are equally as strong for those of us on each side of this debate.

I support a constitutional amendment to restore protection to our national flag. I do so not in deference to political expediency, but because I believe it is the right thing to do. And I have believed this for a long time. Today I have an opportunity to say why.

Our national flag has come to hold a unique position in our society as the most important and universally recognized symbol that unites us as a nation. No other symbol crosses the political, cultural, and ideological patchwork that makes up this great Nation and binds us as a whole. The evolution of the American flag as the preeminent

symbol of our national consciousness is as old and as rich as the evolution of our country itself.

I will never forget the emotion I felt as a child when I saw that famous photograph by photographer Joe Rosenthal—a photograph of the soldiers raising the American flag at Iwo Jima—capturing in one moment in time, the strength and the determination of this entire Nation.

The unique status of the national flag has been supported by constitutional scholars as diverse as Chief Justices William Rehnquist and Earl Warren, and Justices John Paul Stevens and Hugo Black.

The flag flies proudly over official buildings, and many Americans fly them at their homes. I happen to be one of them.

Our history books are replete with the stories of soldiers, beginning with the Civil War, who were charged with the responsibility of leading their units into battle by carrying the flag. To them it was more than a task—it was an honor worth dying for, and many did. When one soldier would fall, another would take his place, raise the flag, and press forward. They would not fail. Their mission was too important; the honor too great; flag and country too respected to give anything short of their lives to succeed.

(Mr. GRAMS assumed the chair.)

Mrs. FEINSTEIN. Mr. President, our flag is recognized as unique, not only in the hearts and minds of Americans, but in our laws and customs as well. No other emblem or symbol in our Nation carries with it such a specific code of conduct and protocol in its display and handling.

Here are just a few sections of the Federal law:

The United States flag should never be displayed with the Union down, except as a signal of dire distress or in instances of extreme danger to life or property.

The United States flag should never touch anything beneath it—ground, floor, water or merchandise.

The United States flag should never be dipped to any person or thing.

The United States flag should never be carried horizontally, but it should always be carried aloft and free.

Why then, should it be permissible conduct to urinate on, to defecate on, or to burn the flag? That is not my definition of free speech.

Until the Supreme Court's decision in *Texas versus Johnson* in 1990, 48 of 50 States had laws preventing the burning or defacing of our Nation's flag.

I do not take amending the Constitution lightly. However, when the Supreme Court issued the *Johnson* decision and then the *Eichman* decision, those who wanted to protect the flag were forced to find an alternative path.

The Nation's flag is a revered object as well as a symbol. I believe that it should be viewed as such—as a revered national object, not simply as one of many vehicles for free speech.

Everything about the flag in its tangible form, in its very fabric, has sig-

nificance. The shape, the colors, the dimensions, and the arrangement of the patterns help make the flag what it is.

The colors of the flag were chosen by the Continental Congress in the 18th century. In 1782, the Congress of the Confederation chose the same colors for the Great Seal of the United States: Red for hardiness and courage; white for purity and innocence; blue for vigilance, perseverance, and justice.

If one were to change the colors, the orientation of the stripes, or the location of the field of stars, it would no longer be the American flag. What I am saying is that I believe that the physical integrity of the flag is crucial.

Despite this fact, because the flag also has symbolic value, the Supreme Court has determined that physically burning or mutilating the flag does not destroy the symbol. Therefore, a prohibition on burning or mutilating the flag would not serve a "compelling" governmental interest and could not be justified under the first amendment.

I do not agree. I believe that burning, tearing, and trampling on the object undermines the symbol. The process may be incremental, but over time the symbol erodes. The Supreme Court arguably has placed the flag in a kind of catch-22 situation. Because the flag is so important, because the flag is unique, because the flag has such powerful symbolic value, it, ironically, goes unprotected.

I support Senate Joint Resolution 31 because it will return the Nation's flag to the protected status I believe it deserves. The authority for the Nation to protect its central symbol of unity was considered constitutional until 5 years ago.

In the Senate Judiciary Committee's markup of Senate Joint Resolution 31, I proposed alternative legislation with more specific, narrowly tailored language. Although this was not voted on in committee, Chairman HATCH offered to work with me to see if we could develop language we could agree upon.

He has now proposed the substitute amendment that I believe represents a vast improvement over the original language of Senate Joint Resolution 31.

The original language would have allowed Congress, as well as each of the 50 States, to develop legislation prohibiting the desecration of the flag. In other words, each State would have been authorized to define "flag," and each State would have been authorized to define "desecration."

The proposed substitute amendment offered earlier this afternoon would give Congress, and Congress alone, the authority to draft a statute to protect the flag. This will give Congress the opportunity to draft, carefully and deliberately, precise statutory language that clearly defines the contours of prohibited conduct, something along the lines of the language I offered in committee. It would allow Congress to establish a uniform definition for "flag of the United States," rather than allowing for 50 separate State definitions.

Because we are protecting our national symbol, it makes sense to me that Members of Congress, representing the Nation as a whole, should craft the statute protecting our flag.

Let me add that, from a first amendment perspective, a specific constitutional amendment prohibiting flag burning may be preferable to a statute. Harvard Law Prof. Frank Michelman made this point in a 1990 article, "Saving Old Glory: On Constitutional Iconography."

Although not himself an advocate of flag protective prohibitions, Professor Michelman argued that a specifically worded constitutional amendment related to flag burning could be preferable to a statute, posing fewer potential conflicts with the first amendment. An amendment pertaining exclusively to the flag would have little risk of affecting other kinds of expressive conduct. The premise of his argument is that, when the Constitution is amended, Supreme Court review is not required.

By contrast, a statute, if challenged, could only survive if the Supreme Court ultimately determined it to be constitutional. In other words, the Court would need to justify that the statute conformed to existing freedom-of-expression doctrine. In so doing, the Court arguably would need to develop a rationale that could ultimately serve to justify prohibitions on other kinds of symbolic expression.

So, I believe that those who say we are making a choice between trampling on the flag and trampling on the first amendment are creating an unfair dichotomy. Protecting the flag will not prevent people from expressing their ideas through other means, in the strongest possible terms.

Furthermore, the right to free speech is not unrestricted. For example, the Government can prohibit speech that threatens to cause imminent tangible harm, including face-to-face "fighting words," incitement to violation of law, or shouting "fire" in a crowded theater. Obscenity and false advertising are not protected under the first amendment, and indecency over the broadcast media can be limited to certain times of day. Ever since Justice Brennan's 1964 decision in *New York Times versus Sullivan*, statements criticizing official conduct of a public official may be sanctioned if they are known to be false and if they damage the reputation of the official. There is much that is open to debate about the proper parameters of free speech.

In voting for this legislation, however, I extend a cautionary note. This amendment should not be viewed as a precedent for a host of new constitutional amendments on a limitless variety of subjects. The Constitution was designed to endure throughout the ages, and for that reason it should not be amended to accommodate the myriad of issues of the day. My support of a constitutional amendment to protect the flag reflects the gravity of my belief in the purpose.

I recognize that by supporting a constitutional amendment to protect the flag, I am choosing a different course from many Democrats in Congress and, quite frankly, from many of my close friends for whom I have the greatest respect.

But my support for this amendment reflects my broader belief that the time has come for the Nation to begin a major debate on values. I believe that this country must look at itself in the mirror and come to terms with those values. I do not wish to imply that one set of values is necessarily superior to another. But we cannot keep pressing the envelope and still remain a functional society.

We need to ask ourselves what we hold dear—Is there anything we will not cast contempt upon? We need to ask ourselves: How can we foster respect for tradition as well as for ideological and cultural diversity? How can we foster community as well as individuality, nationhood as well as internationalism? These are all important values, and we have to learn to reconcile them. We must not jettison one at the expense of another.

The Framers of the Constitution recognized two important elements of our constitutional tradition: a liberty element and a responsibility element. Without responsibility, without a rule of law, there could be no protection of life, limb, or property—there could be no lasting liberty. I believe there is a danger of moving too far in either direction—toward too restrictive order, or toward unlimited individual liberty.

In this instance, I believe we cannot tilt the scales entirely in favor of individual rights, when there exists a vast community of people in this country who have gone to war for our flag. And there are mothers and fathers and wives and children who have received a knock at their front door and have been told that their son, or husband, or father had died alone, in a trench. They were given a flag on this occasion, a flag which helps preserve the memory of their loved one, and which speaks to his or her courage.

Last June, the Senate Judiciary Committee heard testimony from Rose Lee of the Gold Star Wives of America, an organization representing 10,000 widows of American servicemen. This is what she said:

The flag, my flag, our flag . . . means something different to each and every American. But to the Gold Star Wives, it has the most personal of meanings. Twenty-three years ago this American flag covered the casket of my husband, Chew-Mon Lee, United States Army. . . Every Gold Star Wife has a flag like this one, folded neatly in a triangle and kept in a special place . . . My husband defended this flag during his life . . . [b]urning the flag is . . . a slap in the face of every widow who has a flag just like mine.

Requiring certain individuals to refrain from defacing or burning the flag, I believe, is a small price to pay on behalf of the millions of Americans for whom the flag has deep personal sig-

nificance. Just 5 years ago, when 48 States had laws against flag burning, the first amendment continued to thrive.

I believe that this legislation will protect the integrity of the flag while keeping our first amendment jurisprudence intact. I urge my colleagues to support it.

I thank the Chair and yield the floor.

Mr. LEAHY addressed the Chair.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, I understand there is a unanimous-consent request for the senior Senator from Alaska to proceed at this time, is that correct?

The PRESIDING OFFICER. That is correct.

Mr. LEAHY. Mr. President, the distinguished senior Senator, my good friend, is not on the floor at the moment. I ask unanimous consent that I might be able to proceed, and I assure my friends that if he arrives, I will yield to him at that point.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from Vermont is recognized.

Mr. LEAHY. I thank the Chair and my friend from Utah.

Mr. President, I find flag burning a reprehensible form of protest. We have, in this the greatest democracy on Earth, freedom of speech, and we have so many ways that we can have political debate and well-understood protests, that it seems like a slap at so many people in this country, certainly those of us who serve our country and are sworn to uphold its laws, and a particularly vile form of protest. It demeans an important symbol of our country and shows disrespect for the sacrifice so many have made to preserve our freedoms. I know that the veterans, the Gold Star Wives, whom the distinguished Senator from California just referred to, and others who are pressing for this amendment are doing so out of sincerity and out of a strong sense of patriotism.

I feel fortunate that we live in a country where the vast majority—I would say 99.9 percent—of our citizens share a deep respect for the flag and all that it symbolizes. It was one of the first things that my grandparents saw when they came to this country—not speaking a word of English but knowing it was a symbol of freedom.

Indeed, most of us do not need a law or the Constitution to require us to honor America. We do so willingly and spontaneously, as I do when I fly the flag at my home in Vermont.

We salute the flag and we stand for "The Star Spangled Banner" not because the law compels it, but out of respect. These are ways of expressing our thanks to those who have left us such a rich heritage. It is that respect that comes voluntarily, that comes from a sense of our history and our debt to prior generations that inspires us to salute, not the command of law or outside imposition of any legal requirement.

I believe that we are being asked to take steps down a road that leads to a weakening of the Bill of Rights and our fundamental guarantees of freedom. No right is more precious than that of freedom, and no freedom is more important than the first amendment's guarantee of freedom of speech. Even though, for a good cause, this proposed constitutional amendment would restrict others' free speech rights, it would set a dangerous precedent.

I believe—and I have said it many times on the floor—that the first amendment is the most valuable bedrock in our Constitution and in our democracy. The first amendment guarantees us the right to practice any religion we want, or no religion if we want. It gives us the right of free speech. That right is unprecedented in any other significant country on this Earth. It guarantees diversity of religion, diversity of belief, diversity of speech, and if you have protected diversity, you have a democracy.

I cannot believe that there is a Member of this Senate—certainly not myself—who was not offended, in 1989 and 1990, by the publicity-hungry flag burners. I am offended to see the American flag burned or trampled overseas. I am offended when our President and Commander in Chief and his family are subjected to mean-spirited and defamatory characterizations, and when nationally syndicated radio personalities talk about how to shoot to kill Federal law enforcement officers.

I am offended when anyone makes such a suggestion.

I am offended by militant extremists who called our Senate colleague from Pennsylvania a representative of "corruption and tyranny" when he chaired a hearing exposing their ideas. I am offended by those who spew racial and ethnic hatred. I am offended that the Supreme Court of the United States required Columbus, OH, to allow the Ku Klux Klan to erect in a public square the KKK's "symbol of white supremacy and a tool for the intimidation and harassment of racial minorities, Catholics, Jews, Communists and other groups hated by the Klan." There is certainly much that offends in our contemporary society.

But we must resist the temptation to make an exception here to limit one form of obnoxious speech. The guts of the first amendment is its extraordinary protection of antigovernment, political speech. Nowhere else in the world or through history has there been such a profound commitment to allow unrestricted criticism of those in power. The shouts of protest disturb, provoke, challenge, and offend. We must tolerate them because they also demonstrate the strength of America.

Polls and resolutions of State legislatures are being cited as reasons to support this proposed constitutional amendment. I have thought hard about the argument that this is a populist amendment and that the States should be given the opportunity to decide

whether to amend our Constitution. In many settings, this would be a strong argument. But here, we are confronted with a proposed amendment to the Bill of Rights, and to that part of the first amendment intended to protect the minority from an orthodoxy of the majority.

We are this year commemorating the 50th anniversary of the end of the Second World War. While that profound conflict raged, in June, 1943, the Supreme Court decided *West Virginia State Board of Education versus Barnette*, a case that raised the question whether children attending public schools could be compelled to salute the flag and pledge allegiance. The Court held, over the vigorous dissent of Justice Frankfurter, that the State could not employ such compulsion to achieve national unity, even in that time of world war.

The Supreme Court's opinion was written by Justice Robert Jackson, a former Attorney General of the United States who later served as the chief prosecutor at the Nuremberg trials. Let me quote from Justice Jackson's opinion:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. . . .

The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own.

Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. Where they are so harmless to others or to the State as those we deal with here, the price is not too great. But 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 politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

If World War II itself was not a circumstance that permitted an exception to the first amendment to foster patriotism and national unity, I do not believe that the potential for disrespectful political protest of today's Government policy provides the justification required by article V of the Constitution for its amendment. There exists

no compelling reason for limiting the Bill of Rights.

I am proud that earlier this year the Vermont Legislature chose the first amendment over the temptation to take popular action. The Vermont House passed a resolution urging respect for the flag and also recognizing the value of protecting free speech "both benign and overtly offensive." Our Vermont attorney general has urged that we trust the Constitution and not the passions of the times.

Vermont's action this year is consistent with its strong tradition of independence and commitment to the Bill of Rights. Indeed, Vermont's own Constitution is based on our commitment to freedom and our belief that it is best protected by open debate. Vermont did not join the Union until the Bill of Rights was ratified and part of the country's fundamental charter.

Vermont sent Matthew Lyon to Congress and he cast the decisive vote of Vermont for the election of Thomas Jefferson. He was the same House Member who was the target of a shameful prosecution under the Sedition Act in 1789 for comments made in a private letter. Vermont served the Nation again in the dark days of McCarthyism when Senator Ralph Flanders stood up for democracy and in opposition to the repressive tactics of Joseph McCarthy. Vermont's is a great tradition that we cherish and that I intend to uphold.

I have deep respect for the position of William Detweiler, the national commander of the American Legion. When he testified this year before the Judiciary Committee he shared with us his concern that we, as a country, "slide down that slippery slope \* \* \* every time we deny our heritage." But the slippery slope that most concerns me is the proposed restriction of the Bill of Rights and the precedent such an amendment would establish.

Never in our history as a Nation have we narrowed the Bill of Rights through constitutional amendment. Our history has been one of expanding individual rights and protections.

Some of our colleagues contend that because the flag is such a unique national symbol, this will be the only time that we will be called upon to limit first amendment rights. Unfortunately, no one can give that assurance or make such a guarantee. Just this session, in the wake of the bombing in Oklahoma City, the Senate passed a terrorism bill that includes new limits on associational rights and, in the heat of the moment, 84 Members of this body voted to censor the Internet and criminalize private, constitutionally protected speech that might be considered indecent during consideration of the telecommunications bill. We cannot be so sure that without the bulwark of the first amendment our rights will be protected.

Barely 5 years ago a similar proposed constitutional amendment was considered and rejected by this Senate after

the U.S. Supreme Court ruled that the conviction in the Eichman case resulted from an unconstitutional application of the Flag Protection Act of 1989. Little has changed. Indeed, in the intervening years, following the protests sparked by Desert Storm, there have been only a handful of flag burnings. None was reported in 1993 and three were reported in 1994, as the drive to amend the Constitution built momentum.

In 1990, 42 Senators stood up for the Bill of Rights and voted against the constitutional amendment we are voting on again today. I urge my colleagues to join with me to preserve the Constitution and protect the very principles of freedom that the flag symbolizes. Fundamental constitutional principles are too important for partisan politics or short-term expediency. Let us not allow this matter to devolve into the bumper sticker politics of emotion that has so dominated this Congress.

One of the best statements that I have ever seen in all the years that we have been debating this issue is that by James H. Warner, a former Marine flyer who had been a prisoner of the North Vietnamese for 5½ years. I ask that his full statement from July 1989 be printed in the RECORD and urge my colleagues to consider it.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From the Washington Post, July 11, 1995]

WHEN THEY BURNED THE FLAG BACK HOME—  
THOUGHTS OF A FORMER POW

(By James H. Warner)

In March of 1973, when we were released from a prisoner of war camp in North Vietnam, we were flown to Clark Air Force base in the Philippines. As I stepped out of the aircraft I looked up and saw the flag. I caught my breath, then, as tears filled my eyes. I saluted it. I never loved my country more than at that moment. Although I have received the Silver Star Medal and two Purple Hearts, they were nothing compared with the gratitude I felt then for having been allowed to serve the cause of freedom.

Because the mere sight of the flag meant so much to me when I saw it for the first time after 5½ years, it hurts me to see other Americans willfully desecrate it. But I have been in a Communist prison where I looked into the pit of hell. I cannot compromise on freedom. It hurts to see the flag burned, but I part company with those who want to punish the flag burners. Let me explain myself.

Early in the imprisonment the Communists told us that we did not have to stay there. If we would only admit we were wrong if we would only apologize, we could be released early. If we did not, we would be punished. A handful accepted, most did not. In our minds, early release under those conditions would amount to a betrayal, of our comrades of our country and of our flag.

Because we would not say the words they wanted us to say, they made our lives wretched. Most of us were tortured and some of my comrades died. I was tortured for most of the summer of 1969. I developed beriberi from malnutrition. I had long bouts of dysentery. I was infested with intestinal parasites. I spent 13 months in solitary confinement. Was our cause worth all of this? Yes, it was worth all this and more.

Rose Wilder Lane in her magnificent book "The Discovery of Freedom," said there are two fundamental truths that men must know in order to be free. They must know that all men are brothers, and they must know that all men are born free. Once men accept these two ideas, they will never accept bondage. The power of these ideas explains why it was illegal to teach slaves to read.

One can teach these ideas, even in a Communist prison camp. Maoists believe that ideas are merely the product of material conditions; change those material conditions, and one will change the ideas they produce. They tried to "reeducate" us. If we could show them that we would not abandon our belief in fundamental principles, then we could prove the falseness of their doctrine. We could subvert them by teaching them about freedom through our example. We could show them the power of ideas.

I do not appreciate this power before I was a prisoner of war. I remember one interrogation where I was shown a photograph of some Americans protesting the war by burning a flag. "There," the officer said. "People in your country protest against your cause. That proves that you are wrong."

"No," I said, "That proves that I am right. In my country we are not afraid of freedom, even if it means that people disagree with us." The officer was on his feet in an instant his face purple with rage. He smashed his fist onto the table and screamed at me to shut up. While he was ranting I was astonished to see pain, compounded by fear, in his eyes. I have never forgotten that look, nor have I forgotten the satisfaction. I felt at using his tool, the picture of the burning flag, against him.

Aneurin Bevan, former official of the British Labor Party, was once asked by Nikita Khrushchev how the British definition of democracy differed from the Soviet view. Bevan responded forcefully that if Khrushchev really wanted to know the difference, he should read the funeral oration of Pericles.

In that speech, recorded in the Second Book of Thucydides' "History of the Peloponnesian War," Pericles contrasted democratic Athens with totalitarian Sparta. Unlike the Spartans, he said the Athenians did not fear freedom. Rather they viewed freedom as the very source of their strength. As it was for Athens, so it is for America—our freedom is not to be feared, for our freedom is our strength.

We don't need to amend the Constitution in order to punish those who burn our flag. They burn the flag because they hate America and they are afraid of freedom. What better way to hurt them than with the subversive idea of freedom? Spread freedom. The flag in Dallas was burned to protest the nomination of Ronald Reagan, and he told us how to spread the idea of freedom when he said that we should turn America into "a city shining on a hill, a light to all nations." Don't be afraid of freedom, it is the best weapon we have.

Mr. LEAHY. While a prisoner of war, he was shown a photo of Americans protesting the Vietnam war by burning a flag. His reaction was that of a true American hero: He turned the use of the photo against his captors by proclaiming that the photo proved the rightness of the cause of freedom. He was proud that we in this great country "are not afraid of freedom, even if it means that people disagree with us." Let us heed his words and "not be afraid of freedom."

Mr. President, we are each custodians of the Constitution as well as con-

temporary representatives during our brief terms in office. We were given a Bill of Rights that has served to protect our rights and speech for over 200 years. We should provide no less to our children and grandchildren.

My family and I fly the flag at our home. I display it in my office. No law tells me to do that. Love of my country and its symbols tells me to. That love is far more compelling than any law.

Mr. STEVENS. Mr. President, this resolution proposes a constitutional amendment to empower Congress to prohibit the physical desecration of the flag. I have come to commend my friend from Utah, Senator HATCH, for his leadership on this issue; and I am pleased to join with him as a sponsor of the proposal.

On this subject, I do believe I speak for a majority of Alaskans as I support this legislation. Mr. President, 90 percent of Alaskans who have contacted my office since this matter was proposed are in favor of this amendment.

Our support comes on a little different basis, Mr. President, than others who stand on this floor. We live a long way from this Capitol. We are actually closer to Tokyo than to Washington, DC. We are an independent bunch. Yet we have some very deep-seated feelings on this issue. Why are we for this bill? It is because the flag is truly the symbol of the Nation that we sought to join as a State not too long ago.

As a veteran, I have felt and seen our flag's importance overseas. Living away from home, overseas, away from our freedoms, those of us who served during the long period of World War II learned to respect our flag deeply. It represents what our country stands for, qualities that no other nation can offer its citizens. We stand for freedom in this country, and that is what this flag reminds us all of. Our Nation's anthem, "The Star Spangled Banner," captures the bond that Americans feel toward our flag.

The flag does, in fact, represent America. The 13 stripes represent the 13 States that brought about our Constitution. There are 50 stars, one for each State. I remember well the day that the 49th star was placed on that flag. I was in Maryland assisting in raising the first flag. And also in Alaska, once a territory, now becoming a State, Rita Gravel, the wife of a former Senator, climbed up a long ladder to pin the 49th star on a flag flying in our major city. Those of us who had worked in the statehood movement will never forget that moment. It meant a great deal to us.

In short, it is more than just a symbol. It is a question of belonging. Every State is represented there on that flag, and that has been our tradition since the very beginning. As I said, participating in the statehood movement, which does not happen very often, is something that is deeply ingrained in the soul. It was and remains meaningful to us to have our star on the flag.

I think, then, that desecration of the flag has meant a great deal to States.

I am not sure how many Members of the Senate know, it has probably been said on the floor time and time again, but 48 of our States had laws on the books that punished flag desecration when the Supreme Court rejected such laws.

The Supreme Court has indicated that, absent an expression from the national legislature, State and Federal prohibitions on flag desecration are subject to strict first amendment proscriptions. I do believe we must act now to give our people the opportunity to reverse that position.

I do not take too lightly, and I do not think Alaskans take too lightly, the concept of suggesting and supporting amendments to our Constitution. That is a powerful action to suggest, and a route that has not been taken too often by the Congress.

Mr. President, we pledge allegiance to our flag and to the Nation it represents. If anyone doubts, really, what it means to a veteran to consider the flag, I think a person should take a trip to the Iwo Jima monument. Nothing, I think, represents the Nation the way the flag does. Therefore, I am hopeful that this amendment will be approved by our States, and that it will restore the demand for everyone in this Nation to respect the symbol of our freedoms.

Mr. HATCH. Mr. President, I thank my colleague from Alaska for his excellent statement and for the continuing great work that he does as a Member of the Senate. I really appreciate him personally and I appreciate his support for this amendment.

I might mention that earlier in the day my colleague and friend from Massachusetts said there just are not many flag-burning desecrations, and he cited some statistics that I think are quite wrong.

Based on information provided to me by the Congressional Research Service, the number of flags desecrated have been as follows—and keep in mind these are ones that are reported, the ones where we have had a fuss about. This does not begin to cover those desecrated that were not reported:

In 1990, at least 20 flags in this country; in 1991, at least 10 flags; in 1992, at least 7 flags; in 1993, at least 3 flags; in 1994, at least 5 flags; for a total of 45 flags between 1990 and 1994. In 1995, there have been over 20 flags so far.

Every one of these known flag-burning cases have been covered by the media, so millions of people have been affected by them. Millions of people have seen our national symbol desecrated and held in contempt.

Millions of people are beginning to wonder, why don't we have any values in this country? Why don't we stand up for the things that are worthwhile? Why don't we stand up for our national symbol? What is wrong with that?

What this amendment would do is allow the Congress of the United States to pass legislation that would protect the flag. What is so wrong about that? It would allow us to do that. We could do whatever we wanted to.

If people did not like it, they could vote against it. They could filibuster it, where you have to get 60 votes in the Senate. The President, if he does not like it, has a right to veto it, where you have to get 67 votes in the Senate. It is not like people's rights are being taken away because we pass a constitutional amendment.

I wonder if my friend from Massachusetts believes that the Supreme Court has so far construed the first amendment correctly by holding that it does not protect obscenity and child pornography?

He was attempting to make the point that this amendment is somehow an unprecedented infringement on the first amendment. With all due respect, that is a joke. Last Friday, I listed 21 instances where the Supreme Court upheld laws which limit speech or conduct which some have argued was protected by the first amendment. What we are considering here is not something new.

Some of those cases involved actual speech, including obscenity and limitations on Government speaking. Here, we are talking about offensive conduct, not speech. The Supreme Court, in one of its off days—in fact two off days, when you consider both Johnson and Eichman—decided by a 5 to 4 margin, that this offensive conduct rises to the dignity of free expression.

If my friend from Massachusetts thinks it is terrible to interfere under any circumstances with speech or conduct which some might argue is somehow protected by the first amendment, what about laws prohibiting child pornography? What about laws against obscenity?

Put aside whether my friend would use the same legal test for determining what is obscenity or child pornography as the Supreme Court presently uses. He may not. But I think he would admit that would not want his children or grandchildren to be buffeted by child pornography.

If, after 200-plus years of legal precedent to the contrary, the Supreme Court were to decide, by a 5 to 4 vote, that obscenity is protected by the first amendment, I wonder if some of the people who have argued against this amendment, because they claim it infringes upon the first amendment, would oppose an amendment authorizing the prohibition of the sale and distribution of obscenity or pornography?

And if my friend felt that the 5-to-4 decision was wrong, would he view such an amendment as tampering with the Bill of rights, or just overturning a mistaken judicial interpretation of it?

Would my friend be demanding on the floor of Congress that supporters of an antiobscenity amendment determine in advance whether this or that hypothetical picture, photograph, or writing would qualify as obscene under the amendment?

I doubt it. I sincerely doubt it.

I want to say a few words about Senator BIDEN'S content-neutral constitu-

tional amendment, and then I understand my friend from Idaho is here, and also my friend from Kentucky.

A few critics of the flag amendment believe that all physical impairments of the integrity of the flag, such as by burning or mutilating, must be made illegal or no such misuse of the flag should be illegal. An exception is provided for disposal of a worn or soiled flag. This all or nothing approach flies in the face of nearly a century of legislative protection of the flag.

A content neutral amendment would forbid an American combat veteran from taking an American flag flown in battle and having printed on it the name of his unit and location of specific battles, in honor of his unit, the service his fellow soldiers, and the memory of the lost.

Then Assistant Attorney General for Legal Counsel William S. Barr testified before the Senate Judiciary committee August 1, 1989, and brought a certain American flag with him:

Now let me give you an example of . . . the kind of result that we get under the [content-neutral approach]. This is the actual flag carried in San Juan Hill. It was carried by the lead unit, the 13th Regiment U.S. Infantry, and they proudly emblazon their name right across the flag, as you see; 1,078 Americans died following this flag up San Juan Hill.

. . . Under [a content neutral approach], you can't have regiments put their name on the flag that's defacement . . . (Testimony, Assistant Attorney General William P. Barr, August 1, 1989, at 68).

I wish to empower Congress to prohibit the contemptuous or disrespectful physical treatment of the flag. I do not wish to compel Congress to penalize respectful treatment of the flag. A constitutional amendment which would force the American people to treat the placing of the name of a military unit on a flag as the equivalent of placing the words "Down with the Fascist Federal Government" or racist remarks on the flag is not what the popular movement for protecting the flag is all about. I respectfully submit that such an approach ignores distinctions well understood by tens of millions of Americans.

Moreover, never in the 204 years of the first amendment has the free speech clause been construed as totally "content neutral." Prof. Richard Parker, of Harvard Law School, who believes in "robust and wide-open" freedom of speech and that it ought to be more robust than the Supreme Court currently allows in some respects, noted as much in his testimony:

. . . Everyone agrees that there must be "procedural" parameters of free speech—involving, for example, places and times at which certain modes of expression are permitted. Practically everyone accepts some explicitly "substantive" parameters of speech content as well. Indeed, despite talk of "content-neutrality," the following principle of constitutional law is very clear: Government sometimes may sanction you for speaking because of the way the content of what you say affects other people.

What is less clear is the shape of this principle. There are few bright lines to define it.

The Supreme Court understands the principle to rule out speech that threatens to cause imminent tangible harm: face-to-face fighting words, incitement to violation of law, shouting "fire" in a crowded theater. And it does not stop there. It understands the principle, also, to rule out speech that threatens certain intangible, even diffuse, harms. It has, for instance, described obscenity as pollution of the moral "environment."

I think he makes some very important points. But what about political speech critical of the Government? Is there not there a bright line protecting that, at least so long as no imminent physical harm is threatened? The answer is: No. The Court has made clear, for instance, that statements criticizing official conduct of a public official may be sanctioned if they are known to be false and damage the reputation of the official. There has been no outcry against this rule. It was set forth by the Warren Court—in an opinion by Justice Brennan, the very opinion that established freedom of speech as "robust and wide-open." [*New York Times v. Sullivan*, 376 U.S. 254 (1964)]. It has been reaffirmed ever since. Allowing the Congress to prohibit contemptuous treatment of the American flag does not unravel the first amendment or freedom of speech.

Incidentally, I might add that, in order to be truly "content neutral," an amendment must have no exceptions, even for the disposal of a worn or soiled flag. Once such an exception is allowed, as in the Biden amendment, the veneer of content neutrality is stripped away. The Texas versus Johnson majority itself pointedly noted:

if we were to hold that a state may forbid flag burning wherever it is likely to endanger the flag's symbolic role, but allow it whenever burning a flag promotes that role—as where, for example, a person ceremoniously burns a dirty flag—we would be saying that when it comes to impairing the flag's physical integrity, the flag itself may be used as a symbol . . . only in one direction . . . [491 U.S. at 416-417].

Of course, if Congress proposes and the States ratify a constitutional amendment with such an exception, the Supreme Court would have to uphold the exception. But the amendment would not be content neutral.

The suggestion that a worn or soiled flag is no longer a flag, in an effort to escape the logical inconsistency of a so-called content neutral amendment which would permit an exception for disposal of such a flag, is unavailing. Obviously, a worn or soiled American flag is still a flag, recognizable as such, even if no longer fit for display.

#### BIDEN AMENDMENT—ODD FORM

Mr. President, I draw to my colleagues' attention the text of the amendment by my friend from Delaware. I say with great respect to my friend, and to my colleagues, you will search the Constitution in vain for anything that looks like this. Even if I agreed with its substance, not in 206 years have we had a statute written right in to the text of the Constitution itself with Congress given no more than a right to vote on it up or down.

We have always prided ourselves on distinguishing our fundamental charter from a statutory code. This amendment is a textbook case of blurring that 206-year-old distinction.

Mr. President, I notice the distinguished Senator from Idaho is here. I will be happy to yield the floor.

Mr. CRAIG. Mr. President, I thank the chairman of the Judiciary Committee.

The PRESIDING OFFICER. The Senator from Idaho.

Mr. CRAIG. Mr. Chairman, I thank the chairman of the Judiciary Committee for yielding to me and let me thank him personally for the tremendous leadership he has shown in the area of protecting our flag and offering forth this unique constitutional amendment. He has, without doubt, led the way for us to finally bring this critical issue to the floor.

I think it is high time that we listen, that we listen to not only the debate on the floor but, more important, we listen to the American people on the issue of flag protection and this amendment.

Some of my colleagues may remember that more than a year ago, I came to this Senate floor with memorials from 43 State legislatures—memorials urging Congress to take action to protect the American flag from physical desecration. Those memorials were inserted in the CONGRESSIONAL RECORD for all to read.

Now the number of those memorials has reached 49, and a 1995 Gallup Poll found that almost 80 percent of the American public supports a flag protection amendment.

This is a truly historic outpouring of popular support. And we have an opportunity to respond to the American people by passing a very simple amendment and sending it to the States for ratification: It authorizes Congress and the States to prohibit physical desecration of the flag of the United States.

Opponents of this amendment are doing their best to find bogeymen hiding inside this proposal, or to tie it up in a mass of legal complications—but in fact, it is a very straightforward issue to most Americans.

Old Glory holds a special place in our hearts. No other emblem, token, or artifact of our Nation has been defended to the death by legions of patriots. No other has drawn multitudes from abroad with the promise of freedom. No other unifies the diverse cultures that form the amalgam we call the United States.

No other has inspired generations with the belief that life, liberty, and the pursuit of happiness are the birthright of every human being. It is because the flag holds the unique place in the hearts of Americans that they have demanded ultimate protection for it. Congress has already tried furnishing that protection by statute, and, as we know, the Supreme Court shut the door on that particular strategy—firmly and for all time, in my opinion. A constitu-

tional amendment is the only vehicle left for those who believe in protecting the flag.

I expect the opposition to argue that protecting the flag from physical desecration somehow runs afoul of the first amendment and the freedom of expression, Mr. President. That is part of the debate that has been going on here now for a good many hours. I believe—and I think all Americans believe—that nothing could be further from the truth. The flag amendment does not prevent the expression of any ideas. As a matter of fact, there are far more direct ways of expressing one's opinion than engaging in an act—even the act of destroying or defiling a flag.

Another accusation the opposition will try to use is that this is a slippery slope to Government censorship. I say hogwash as straightforward and as best I can, Mr. President. We are trying to protect the flag—and only the flag and only from physical desecration—because it is uniquely revered by Americans. That uniqueness absolutely prevents this effort from being extended to anything else. It is a very specific amendment.

Mr. President, obscene speech that outrages a community is not protected by the Constitution. Fighting words that outrage individuals and provoke violence are not protected by the Constitution. Both these standards are well known and widely accepted in this country. Yet, when 80 percent of Americans say they are outraged by the physical desecration of the flag and ask us to protect it, our opponents accuse them of advocating censorship and interfering with the freedom of speech.

I say to the American people, do not believe them. This amendment is narrowly tailored to allow protection only of the flag and only from physical desecration. It will not force anyone to salute the flag. It will not mandate participation in the Pledge of Allegiance. It will not stop individuals from telling the world exactly and in detail how they feel about the flag, even if they despise it. This simply allows Congress and the States to prevent one act: the physical act of desecrating the flag.

The concern has been raised that physical desecration can be defined to mean anything. That may be true in a vacuum. But it is most certainly not true in the marketplace of ideas, where all points of view have an opportunity to be heard, and that is precisely where this definition is going to be written, Mr. President.

This amendment enables the American people to weigh in on this definition, whether they support or oppose protecting the flag. There will not be any midnight, closed-door, secret session to write this definition. It is going to be fully and openly discussed in every State in the Union.

Mr. President, Congress has acted once before to protect the flag. By the narrowest of margins, the Supreme Court stopped that effort from succeeding. However, the Supreme Court's decision did not change the value at

stake, it did not change the need for this protection, and, most important, it did not change the heart and the minds of the American people.

Against all odds, against all expectations, support for this effort continues to grow, not to diminish. At a time when some are wringing their hands about the erosion of values in America, we have a grassroots movement demanding the opportunity to protect the symbol of our country's aspirations and our country's values.

Are we so preoccupied with the problems of our Nation here in Washington that we cannot recognize the positive signs when we see it, Mr. President? Millions of our fellow citizens are telling us that the sight or mention of our flag still has the power to awaken the American spirit of the American patriot. We should be cheering them on, not ignoring them or denying them access to their Constitution.

In providing two methods for amending the Constitution, article V safeguards the people's right to correct what they believe is a wrong decision by the Supreme Court or the Congress. The people have asked for this opportunity to make a correction in the case of the flag, and I urge my colleagues to listen to them, to send the American people an amendment allowing protection of the great flag of our country.

Mr. President, I yield the floor.

Mr. McCONNELL addressed the Chair.

The PRESIDING OFFICER. The Senator from Kentucky is recognized.

Mr. McCONNELL. Mr. President, parliamentary inquiry. We are operating under a unanimous-consent agreement, are we not, that anticipates that I will send to the desk an amendment in the nature of a substitute which will be voted on in the morning, along with the constitutional amendment?

The PRESIDING OFFICER. The Senator from Kentucky is correct.

AMENDMENT NO. 3097

(Purpose: To provide a substitute)

Mr. McCONNELL. Mr. President, I therefore send that amendment to the desk on behalf of myself, Senator BENNETT, Senator DORGAN, and Senator BUMPERS.

The PRESIDING OFFICER. Without objection, the pending amendment will be set aside.

The clerk will report.

The bill clerk read as follows:

The Senator from Kentucky (Mr. McCONNELL), for himself, Mr. BENNETT, Mr. DORGAN, and Mr. BUMPERS, proposes an amendment numbered 3097.

Mr. McCONNELL. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

Strike all after resolving clause and inserting the following:

**SECTION 1. SHORT TITLE.**

This Act may be cited as the "Flag Protection and Free Speech Act of 1995".

**SEC. 2. FINDINGS AND PURPOSE.**

(a) FINDINGS.—The Congress finds that—

(1) the flag of the United States is a unique symbol of national unity and represents the values of liberty, justice, and equality that make this Nation an example of freedom unmatched throughout the world;

(2) the Bill of Rights is a guarantee of those freedoms and should not be amended in a manner that could be interpreted to restrict freedom, a course that is regularly resorted to by authoritarian governments which fear freedom and not by free and democratic nations;

(3) abuse of the flag of the United States causes more than pain and distress to the overwhelming majority of the American people and may amount to fighting words or a direct threat to the physical and emotional well-being of individuals at whom the threat is targeted; and

(4) destruction of the flag of the United States can be intended to incite a violent response rather than make a political statement and such conduct is outside the protections afforded by the first amendment to the United States Constitution.

(b) PURPOSE.—It is the purpose of this Act to provide the maximum protection against the use of the flag of the United States to promote violence while respecting the liberties that it symbolizes.

**SEC. 3. PROTECTION OF THE FLAG OF THE UNITED STATES AGAINST USE FOR PROMOTING VIOLENCE.**

(a) IN GENERAL.—Section 700 of title 18, United States Code, is amended to read as follows:

**"§ 700. Incitement; damage or destruction of property involving the flag of the United States**

"(a) ACTIONS PROMOTING VIOLENCE.—Any person who destroys or damages a flag of the United States 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, shall be fined not more than \$100,000 or imprisoned not more than 1 year, or both.

"(b) DAMAGING A FLAG BELONGING TO THE UNITED STATES.—Any person who steals or knowingly converts to his or her use, or to the use of another, a flag of the United States belonging to the United States and intentionally destroys or damages that flag shall be fined not more than \$250,000 or imprisoned not more than 2 years, or both.

"(c) DAMAGING A FLAG OF ANOTHER ON FEDERAL LAND.—Any person who, within any lands reserved for the use of the United States, or under the exclusive or concurrent jurisdiction of the United States, 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 or damages that flag shall be fined not more than \$250,000 or imprisoned not more than 2 years, or both.

"(d) CONSTRUCTION.—Nothing in this section shall be construed to indicate an intent on the part of Congress to deprive any State, territory or possession of the United States, or the Commonwealth of Puerto Rico of jurisdiction over any offense over which it would have jurisdiction in the absence of this section.

"(e) DEFINITION.—As used in this section, the term 'flag of the United States' means any flag of the United States, or any part thereof, made of any substance, in any size, in a form that is commonly displayed as a flag and would be taken to be a flag by the reasonable observer."

(b) CLERICAL AMENDMENT.—The table of sections for chapter 33 of title 18, United States Code, is amended by striking the item relating to section 700 and inserting the following new item:

700. Incitement; damage or destruction of property involving the flag of the United States."

Mr. McCONNELL. Mr. President, I assume that I have to do nothing further in order to have this amendment in the nature of a substitute be pending in the morning for a vote.

The PRESIDING OFFICER. The Senator is correct.

Mr. DORGAN. Mr. President, I am pleased to join my colleagues Senators McCONNELL and BENNETT in offering a statutory proposal, rather than a constitutional amendment, to prohibit the desecration of the American flag.

For me and for most American citizens, the flag of this Nation holds a special place in our minds and hearts as the unique symbol of our Nation and of the fundamental democratic freedoms for which it stands. It symbolizes the extraordinary sacrifices that millions of Americans have made over the past 200 years to preserve those freedoms. And freedom-loving Americans throughout this great Nation are appalled when someone chooses to defile, deface, or destroy our national symbol.

Honorable men and women in this country and in this body may disagree on the means to achieve the objective we all share—the protection of the flag of the United States. But we are united in our love and respect for it. Protecting the flag from those who would destroy it is not in dispute. What is in dispute is how we best achieve the objective of protecting our national symbol while preserving the principles and values for which it stands.

One of the most fundamental freedoms guaranteed by the Constitution and symbolized by the flag is the right to express one's views without fear of retribution. It is enshrined in the first amendment to the Constitution. It is part of the Bill of Rights. It is a right we all cherish. It is a right we all want to preserve. Preserving this basic right guaranteed by the Constitution is not always easy. Often it poses a dilemma. Such is the case with protecting the flag. But preserving the Constitution should be the backdrop of this debate. Justice Holmes framed the issue this way:

[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.

His imperative is one we should all take to heart.

Unfortunately, the rhetoric of the flag debate has been highly charged. Accusations of disloyalty have been hurled against those who oppose the proposed constitutional amendment while those who support it are referred to as patriots. I hope we can lower the rhetoric and instead focus on the substance of this issue. Let us begin the debate by agreeing that honorable men and women can disagree on this very

important issue. As the esteemed senior Senator from South Carolina, Senator THURMOND, has stated: "The fact is, there are intelligent arguments on both sides of the debate."

Mr. President, I have worked closely with Senators MCCONNELL and BENNETT to develop a legislative solution to protect the flag that we believe will pass constitutional muster. The American Law Division of the Congressional Research Service has provided an analysis of our proposal which makes us optimistic that our approach will survive any constitutional attack on first amendment grounds. I ask unanimous consent that the CRS analysis be printed in the RECORD at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. DORGAN. Amending the Constitution should never be taken lightly. It is an approach that ought not be pursued if there is an alternative which can achieve the same objective. The amendment we are offering provides such an alternative, and I hope my colleagues will give it careful consideration.

Our amendment, which was introduced earlier this year as S. 1335, would punish criminal acts of incitement, damage, or destruction of property involving the flag of the United States. The destruction of the flag can be intended to incite a violent response rather than to make a political statement. If that is the intent, that conduct is outside the protections offered by the first amendment, just like shouting fire in a crowded theater is outside its purview. Under our legislation, those who destroy or damage the flag with the intent of inciting violence or breaching the peace would be fined or imprisoned or both. Our proposal would also punish those who steal a flag belonging to the Federal Government and intentionally destroy or damage it.

Our purpose in offering this amendment is clear. We want to provide the maximum protection of our flag from those who would defile it while preserving the constitutional liberties that it symbolizes. We believe our proposal strikes that important and delicate balance.

During a June 21, 1990 Senate Judiciary Committee hearing on a constitutional amendment to prohibit flag desecration, several constitutional scholars were asked to analyze a similar bill which had been introduced by Congressman Jim Cooper in the House of Representatives. The views of these experts is quite telling.

One of them, Charles Fried, the Carter Professor of General Jurisprudence at Harvard University, said that this approach was perfectly proper and perfectly constitutional. He stated that if a person burns a flag in a situation which presents an immediate incitement to violence, that is squarely within Supreme Court doctrine as the

kind of thing which can be criminalized.

Many other experts also agree that our legislative proposal would pass constitutional muster and protect the flag from those who would use it to promote violence or to infringe on another's right to wave the flag. Those are important goals and ones which I believe are the crux of this issue. We can achieve these goals by passing a statutory remedy. We do not need to, nor should we, amend the Constitution of the United States if a statutory alternative can accomplish the same objective. I ask unanimous consent that a very thoughtful column which appeared in the Washington Post and was written by James H. Warner, a former marine pilot and POW in Vietnam, be printed in the RECORD.

There being no objection, the column was ordered to be printed in the RECORD, as follows:

[From the Washington Post, July 11, 1989]

WHEN THEY BURNED THE FLAG BACK HOME

(By James H. Warner)

THOUGHTS OF A FORMER POW

In March of 1973, when we were released from a prisoner of war camp in North Vietnam, we were flown to Clark Air Force base in the Philippines. As I stepped out of the aircraft I looked up and saw the flag. I caught my breath, then, as tears filled my eyes, I saluted it. I never loved my country more than at that moment. Although I have received the Silver Star Medal and two Purple Hearts, they were nothing compared with the gratitude I felt then for having been allowed to serve the cause of freedom.

Because the mere sight of the flag meant so much to me when I saw it for the first time after 5½ years, it hurts me to see other Americans willfully desecrate it. But I have been in a Communist prison where I looked into the pit of hell. I cannot compromise on freedom. It hurts to see the flag burned, but I part company with those who want to punish the flag burners. Let me explain myself.

Early in the imprisonment the Communists told us that we did not have to stay there. If we would only admit we were wrong, if we would only apologize, we could be released early. If we did not, we would be punished. A handful accepted, most did not. In our minds, early release under those conditions would amount to a betrayal, of our comrades, of our country and of our flag.

Because we would not say the words they wanted us to say, they made our lives wretched. Most of us were tortured, and some of my comrades died. I was tortured for most of the summer of 1969. I developed beriberi from malnutrition. I had long bouts of dysentery. I was infested with intestinal parasites. I spent 13 months in solitary confinement. Was our cause worth all of this? Yes, it was worth all this and more.

Rose Wilder Lane in her magnificent book "The Discovery of Freedom," said there are two fundamental truths that men must know in order to be free. They must know that all men are brothers, and they must know that all men are born free. Once men accept these two ideas, they will never accept bondage. The power of these ideas explains why it was illegal to teach slaves to read.

One can teach these ideas, even in a Communist prison camp. Marxists believe that ideas are merely the product of material conditions; change those material conditions, and one will change the ideas they produce. They tried to "re-educate" us. If we

could slow them that we would not abandon our belief in fundamental principles, then we could prove the falseness of their doctrine. We could subvert them by teaching them about freedom through our example. We could show them the power of ideas.

I did not appreciate this power before I was a prisoner of war. I remember one interrogation where I was shown a photograph of some Americans protesting the war by burning a flag. "There," the officer said. "People in your country protest against your cause. That proves that you are wrong."

"No, I said. "That proves that I am right. In my country we are not afraid of freedom, even if it means that people disagree with us." The officer was on his feet in an instant, his face purple with rage. He smashed his fist onto the table and screamed at me to shut up. While he was ranting I was astonished to see pain, compounded by fear, in his eyes. I have never forgotten that look nor have I forgotten the satisfaction I felt at using his tool, the picture of the burning flag, against him.

Aneurin Bevan, former official of the British Labor Party, was once asked by Nikita Khrushchev how the British definition of democracy differed from the Soviet view. Bevan responded, forcefully, that if Khrushchev really wanted to know the difference, he should read the funeral oration of Pericles.

In that speech, recorded in the Second Book of Thucydides "History of the Peloponnesian War," Pericles contrasted democratic Athens with totalitarian Sparta. Unlike the Spartans, he said, the Athenians did not fear freedom. Rather, they viewed freedom as the very source of their strength. As it was for Athens, so it is for America—our freedom is not to be feared, for our freedom is our strength.

We don't need to amend the Constitution in order to punish those who burn our flag. They burn the flag because they hate America and they are afraid of freedom. What better way to hurt them than with the subversive idea of freedom? Spread freedom. The flag in Dallas was burned to protest the nomination of Ronald Reagan, and he told us how to spread the idea of freedom when he said that we should turn America into "a city shining on a hill, a light to all nations." Don't be afraid of freedom, it is the best weapon we have.

Mr. DORGAN. Mr. Warner's sentiments express far better than I am able why we should not amend the Constitution to safeguard the flag. I hope, therefore, that my colleagues will join our efforts to protect the flag from desecration without amending the Bill of Rights. I believe that is the right approach. The flag, which all of us love and respect, will then be protected, as will be the freedoms our flag has symbolized since the dawn of the Republic.

EXHIBIT 1

CONGRESSIONAL RESEARCH SERVICE,

Washington, DC, November 8, 1995.

To: Honorable Kent Conrad.

From: American Law Division.

Subject: Analysis of S. 1335, the Flag Protection and Free Speech Act of 1995.

This memorandum is furnished in response to your request for an analysis of the constitutionality of S. 1335, the Flag Protection and Free Speech Act of 1995. This bill would amend 18 U.S.C. § 700 to criminalize the destruction or damage of a United States flag under three circumstances. First, subsection (a) of the new § 700 would penalize such conduct 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.

Second, subsection (b) would punish any person who steals or knowingly converts to his or her use, or to the use of another, a United States flag belonging to the United States and who intentionally destroys or damages that flag. Third, subsection (c) punishes any person who, within any lands reserved for the use of the United States or under the exclusive or concurrent jurisdiction of the United States, 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 who intentionally destroys or damages that flag.

The bill appears intended to offer protection for the flag of the United States in circumstances under which statutory protection may still be afforded after the decisions of the Supreme Court in *United States v. Eichman*<sup>1</sup> and *Texas v. Johnson*.<sup>2</sup> These cases had established the principles that flag desecration or burning, in a political protest context, is expressive conduct if committed to "send a message," that the Court would review limits on this conduct with exacting scrutiny; and legislation that proposed to penalize the conduct in order to silence the message or out of disagreement with the message violates the First Amendment speech clause.

Subsections (b) and (c) appear to present no constitutional difficulties, based on judicial precedents, either facially or as applied. These subsections are restatements of other general criminal prohibitions with specific focus on the flag.<sup>3</sup> The Court has been plain that one may be prohibited from exercising expressive conduct or symbolic speech with or upon the converted property of others or by trespass upon the property of another.<sup>4</sup> The subsections are directed precisely to the theft or conversion of a flag belonging to someone else, the government or a private party, and the destruction of or damage to that flag.

Almost as evident from the Supreme Court's precedents, subsection (a) is quite likely to pass constitutional muster. The provision's language is drawn from the "fighting words" doctrine of *Chaplinsky v. New Hampshire*.<sup>5</sup> In that case the Court defined a variety of expression that was unprotected by the First Amendment, among the categories being speech that inflicts injury or tends to incite immediate violence.<sup>6</sup> While the Court over the years has modified the other categories listed in *Chaplinsky*, it has not departed from the holding that the "fighting words" exception continues to exist. It has, of course, laid down some governing principles, which are reflected in the subsection's language. Thus, the Court has applied to "fighting words" the principle of *Brandenburg v. Ohio*,<sup>7</sup> under which speech advocating unlawful action may be punished only if it is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.<sup>8</sup>

A second principle, enunciated in an opinion demonstrating the continuing vitality of the "fighting words" doctrine, is that it is impermissible to punish only those "fighting words" of which government disapproves. Government may not distinguish between classes of "fighting words" on an ideological basis.<sup>9</sup>

Subsection (a) reflects both these principles. It requires not only that the conduct be reasonably likely to produce imminent violence or breach of the peace, but that the person intend to bring about imminent vio-

lence or breach of the peace. Further, nothing in the subsection draws a distinction between approved or disapproved expression that is communicated by the action committed with or on the flag.

There is a question which should be noted concerning this subsection. There is no express limitation of the application of the provision to acts on lands under Federal jurisdiction, neither is there any specific connection to flags or persons that have been in interstate commerce. Therefore, application of this provision to actions which do not have either of these, or some other Federal nexus, might well be found to be beyond the power of Congress under the decision of the Court in *United States v. Lopez*.<sup>10</sup>

In conclusion, the judicial precedents establish that the bill, if enacted, while not reversing *Johnson* and *Eichman*, should survive constitutional attack on First Amendment grounds. Subsections (b) and (c) are more securely grounded in constitutional law, but subsection (a) is only a little less anchored in decisional law.

We hope this information is responsive to your request. If we may be of further assistance, please call.

JOHN R. LUCKEY,

Legislative Attorney, American Law Division.

#### FOOTNOTES

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

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

<sup>3</sup>See, 18 U.S.C. §§641, 661, and 1361.

<sup>4</sup>*Eichman*, supra, 496 U.S., 316 n. 5; *Johnson*, supra, 412 n. 8; *Spence v. Washington*, 418 U.S. 405, 408-409 (1974). See also *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538 (1992) (cross burning on another's property).

<sup>5</sup>315 U.S. 568 (1942).

<sup>6</sup>*Id.*, at 572.

<sup>7</sup>395 U.S. 444 (1969).

<sup>8</sup>*Id.*, at 447. This development is spelled out in *Cohen v. California*, 403 U.S. 15, 20, 22-23 (1971). See, also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982); *Hess v. Indiana*, 414 U.S. 105 (1973).

<sup>9</sup>*R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

<sup>10</sup>115 S. Ct. 1624 (1995).

Mr. McCONNELL. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. DOLE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

(At the request of Mr. DASCHLE, the following statement was ordered to be printed in the RECORD.)

• Mr. KOHL. Mr. President, we all agree that flag burning is reprehensible. After all, hundreds of thousands of Americans have given their lives to protect the principles that our flag represents, and burning the flag offends the memory of those who made that ultimate sacrifice. Acting on this belief, I voted for legislation to protect the flag. Unfortunately, however, our statute was struck down by the Supreme Court.

Although we should protect the flag, we must also approach amendments to the Constitution with great caution. Throughout our 200-year history we have never amended the Bill of Rights—the guardian of the principles and freedoms that our flag represents. During all this time—through a bloody Civil War, two world wars, a Depression, and urban riots—the first amendment has needed no repair.

Mr. President, I have great faith that the American flag is strong enough to withstand the foolish actions of a handful of extremists. The Bill of Rights, however, is much more fragile. If we pass a constitutional amendment to prohibit this behavior—deplorable as it is—sooner or later the Government may prohibit other more legitimate types of expression and protest. So to my mind, protecting our revered symbol means ensuring that we do not infringe upon the freedoms that it represents.

One of the most persuasive arguments against this amendment came from Keith Krueger of Fennimore, WI. A former national commander of the American Legion, he wrote that "when the flag is not accorded proper consideration under the present flag code, it upsets patriotic Americans. Rightly so. [but] no one ever has, nor can, legislate a patriot." I agree.

And do not take my word for it, ask the editorial writers of Wisconsin. Across my home State, from the Milwaukee Journal Sentinel to the Eau Claire Leader-Telegram to the Appleton Post-Crescent to the LaCrosse Tribune, these newspapers firmly believe that a flag desecration amendment is a bad idea. I ask that these editorials be printed in the RECORD at the conclusion of my statement.

In closing, Mr. President, we should all be clear on our opposition to flag burning. But we should also resist this well-intentioned but unwise effort to tinker with the Bill of Rights.

The editorials follow:

[From the Milwaukee Journal Sentinel, June 12, 1995]

#### FLAG AMENDMENT ILL-ADVISED

Probably nine-tenths of the knuckleheads who get their jollies from burning the American flag or desecrating it in other ways have no idea what freedoms that flag symbolizes. Because these people are stupid as well as ungrateful, they never think about the precious gift they have been given.

The irony is that the American flag stands for, along other things, the freedom to express yourself in dumb and even insulting ways, like burning the flag. This is a freedom literally not conferred on hundreds of millions of people.

A few years ago, several states passed laws that made it illegal to desecrate the flag, but in 1989 the Supreme Court ruled that such statutes violated the Bill of Rights. Congress is now moving to amend the Constitution itself, so that flag desecration laws can be enacted.

That movement is as ill-considered as it is understandable. The Constitution should be amended only reluctantly and rarely, when a genuine threat to our nation emerges and when there is no other way to guard against it.

That is why the founding fathers made it so difficult to revise the Constitution, and why, as a Justice Department spokesman pointed out the other day, the Bill of Rights has not been amended since it was ratified in 1792.

The unpatriotic mischief of adolescent punks is infuriating. But it is not a serious enough act to warrant revision of the nation's charter. The Bill of Rights exists to protect people whose behavior, however repugnant, injures nothing but people's feelings.

The American flag protects even people who burn it; it prevails over both them and their abuse. That is one of the reasons the flag and the nation it stands for are so strong.

[From the Eau Claire Leader-Telegram, June 18, 1995]

#### LET'S CONCENTRATE ON REAL PROBLEMS

There's no winning for those who oppose a constitutional amendment to outlaw desecration of the American flag.

You might as well be against Mother's Day.

But for several reasons we ought to let this idea die.

Sure, burning the American flag to protest one thing or another is a stupid thing to do. And the few times we've seen someone burn the flag on television, we've never seen the protester follow up by sweeping up the ashes with a broom and dust pan, so it seems there is grounds to nail the protester on a littering charge anyway.

But even if they beat the littering rap, the only thing such protesters prove is their ignorance. Burning a flag doesn't signify anything positive or suggest alternatives to make our nation stronger. It's just an action that indicates you oppose our nation. So what? How do they propose to make it better?

But it's quite a jump from not liking stupidity to tinkering with the U.S. Constitution to make flag-burning illegal. The Constitution has guided us well for more than 200 years, and to amend it in an effort to prohibit flag-burning—which by one estimate occurs only about eight times a year—seems to be an overreaction.

But the most important reasons to stop this proposal are that there are far more important things for Congress and the people to worry about, and that it promotes a mindless nationalism that challenges citizens to "prove" their patriotism by endorsing the litmus test in the form of a constitutional amendment.

Politicians without the guts or the brains to solve what really ails this country know that they can fool many voters simply by using the flag as a political prop and making flowery speeches about patriotism, love of country, etc.

We should be more worried about where the flag gets its strength. Instead of focusing on the flag itself, what about the federal deficit (more than \$200 billion a year) and the national debt (nearing \$5 trillion)? These are far greater threats to Old Glory than some clown with a cigarette lighter at a protest rally.

What a legacy to leave to our children: "Hey, kids, we've mortgaged your future in the name of special interests and for our convenience, but we've protected the flag with an amendment. Pretty smart, huh?"

What's at work here is a time-tested political practice. That is, if you can't solve the real problems, throw up a diversion to get people thinking and talking about something else.

Paying for health care, environmental protection, defense, education and all the rest are complex issues that bore readers and viewers. So if the real goal is to be re-elected to a job with a six-figure salary, what a better way than to focus on push-button issues like patriotism, the flag, etc.

Burning the American flag won't solve anything, but neither will outlawing burning of the flag while the nation it represents crumbles underneath it.

[From the Appleton Post-Crescent, Oct. 28, 1995]

#### FLAG-PROTECTION AMENDMENT NOT WHAT IT SEEMS

(By William B. Ketter)

Congress is about to put an asterisk on the First Amendment.

I am talking about the constitutional amendment to "protect" the American flag from the kind of free expression that this country was founded on.

It is more commonly called the flag-desecration amendment, and it protects nothing, not the flag, not values and certainly not free speech.

It does represent a test of will that has Congress on the spot with The American Legion, Women's Army Corps, Navy League and every other well-meaning veterans and fraternal organization.

The House in June overwhelmingly passed the amendment. The Senate showdown could come any day now. Sixty-seven Senate votes are needed to send it to the states for ratification. The protect-the-flag partisans are flooding lawmakers with tens of thousands of God-and-motherhood telegrams.

If it is approved, the essence of free political speech will drift from the first time from the First Amendment mooring that gives every citizen a constitutional right to challenge, even cast aspersions on, the icons of government.

The federal government and the 50 states will have wide latitude in determining what desecrates the flag. Given the emotions over this issue, flag-themed soda cans, bumper stickers, or the shirt on your back could be targets of local harassment. Already, there's a town in Minnesota that wants to keep car dealers from flying more than four U.S. flags on their lots.

Yes, this is a Boston Tea Party type of issue even if we don't think of it that way. And yes, few institutions, the press included, seem terribly bothered by it all.

The principal reason for the apathy: The issue has been miscast as a patriotic cause to safeguard the flag against the scruffy likes of Gregory Lee Johnson, and never mind our revered right to free speech.

It is easy to dislike Gregory Lee Johnson. He's the radical protester who doused the American flag with kerosene, then put a match to it in front of the Dallas City Hall during the 1984 Republican National Convention.

He was arrested and convicted and no one cared. Except the U.S. Supreme Court, which ruled in 1989 that the flag-protection law used to prosecute Johnson violated his constitutional right to free expression.

"It was enough to make any American's blood boil," says William M. Detweiler, immediate past national commander of The American Legion. "We cannot allow our proud flag—and our proud nation—to be ripped apart, piece by piece."

Most Americans, myself among them, hate what Johnston did to the flag. From the cradle, we are taught to respect it as a symbol of our unprecedented form of democracy. We grow up saluting it as school children, little leaguers, girl scouts, soldiers, proud citizens. Beyond that, many of us have family members who died fighting for the exception freedom the flag represents. We don't want it spit at, trampled under foot, burned in protest or in any way defaced.

Yet it is because of that special freedom—including the right to extreme political views—that the Senate should reject the flag amendment.

No nation has a more important history of tolerating dissent, even conduct we have come to genuinely hate, than the United States. The Founding Fathers wanted it that

way. They experienced the heavy hand of the British Crown, and saw the right of protest as a vital bulwark against injustice and tyranny. It's what sets America apart from nations that quash citizen protest—and especially flag-burning—nations such as China, North Korea, Vietnam, Iran, Iraq, Cuba.

In other words, any effort to limit liberty is ultimately directed at you. The flag amendment—and the laws that would follow—probably would not prevent extremists from doing violence to the flag. It is attention that the Gregory Lee Johnsons of this world crave, and getting arrested is part of the act.

Furthermore, there aren't a lot of lunkheads like Gregory Lee Johnson. Only four cases of flag burning were reported last year in all of America. And those were prosecuted, with the full authority of existing law and the First Amendment.

How can this be, given the Supreme Court's flag ruling?

Simple. All those cases were prosecuted under other laws prohibiting theft, vandalism or inciting riots.

So to solve a problem that does not exist (when was the last time you remember someone burning a flag?), the proponents of this amendment would chip away at the fundamental freedoms guaranteed to all Americans.

And in case that sounds like a self-interested argument from a First Amendment fundamentalist listen to U.S. Sen. Bob Kerrey of Nebraska, a Vietnam veteran who lost a leg in the war. "The community's revulsion at those who burn a flag" Kerrey said, "is all that we need. It has contained the problem without the government getting involved."

Indeed, in their effort to protect the flag, the advocates of this amendment do far greater damage to the principles of liberty for which that flag stands. We need not wrap ourselves in the flag to protect it.

We do need, however, to standing up for the freedom that Old Glory represents and urge the U.S. Senate to turn down the flag amendment.

[From the Wisconsin State Journal, June 14, 1995]

#### FLAG BURNING AMENDMENT UNPatriotic

Today, Flag Day, is an occasion to celebrate liberty. And one of the best ways you can celebrate liberty is to write your congressman to urge a vote against the proposed constitutional amendment to ban flag burning.

It may seem unpatriotic to stand up for a right to burn the American flag. But the proposed amendment is not about whether it is patriotic to burn a flag. It is about whether it is right to limit the liberties for which our flag flies. A true patriot would answer no.

Consider: It's futile, even counter-productive, to try to require patriotism by law.

In fact, it would inspire greater respect for our nation to refrain from punishing flag burners. As conservative legal scholar Clint Bolick of the Institute for Justice told a House subcommittee, we can lock up flag burners and by doing so make them martyrs, "or we can demonstrate, by tolerating their expression, the true greatness of our republic."

Laws to protect the flag would be unworkable.

The proposal now before the House seeks a constitutional amendment to allow Congress and the states to pass laws banning physical desecration of the flag. It would require approval by two-thirds of the House and Senate and three-fourths of the states.

It's called the flag burning amendment because many of its supporters consider burning the flag to be the most egregious form of desecration.

But what counts as desecration of the flag? What if someone desecrated something made up to look like a flag with some flaw, like the wrong number of stars or stripes? Does that count? What if a flag is used in art that some people consider rude or unpatriotic? Does that count as desecration?

The arguments could rage on and on, enriching lawyers and diminishing the nation. A ban on flag burning would set a dangerous precedent.

The proposed amendment is a reaction to 1989 and 1990 Supreme Court rulings that invalidated federal and state laws banning flag desecration. The court ruled that peaceful flag desecration is symbolic speech, protected by the First Amendment freedom of speech clause.

Supporters of a ban on flag burning argue that burning a flag is not symbolic speech at all but hateful action. But if today's cause is to ban flag burning because it is hateful action, tomorrow's cause may be to ban the display of the Confederate flag because many people consider it to be hateful action. Or to ban the use of racial or sexist comments because they amount to hateful actions. And on and on until we have given up our freedoms because we are intolerant.

The right to protest is central to democracy.

A democracy must protect the right to protest against authority, or it is hardly a democracy. It is plainly undemocratic to take away from dissenters the freedom to protest against authority by peacefully burning or otherwise desecrating a flag as the symbol of that authority.

If the protesters turn violent or if they steal a flag to burn, existing laws can be used to punish them.

Flag burners are not worth a constitutional amendment.

A good rule of thumb about amending the U.S. Constitution is: Think twice, then think twice again. Flag burning is not an issue that merits changing the two-centuries-old blueprint for our democracy.

This nation's founding fathers understood the value of dissent and, moreover, the value of the liberty to dissent. So should we.

[From the La Crosse Tribune, June 7, 1995]

#### EDITORIAL

The U.S. Supreme Court ruled in a Texas case in 1989 that flag burning is protected by the First Amendment as a form of speech. The court's decision didn't go over very well with friends of Old Glory then, and six years later that ruling still sticks in the craw of many patriots—so much so that constitutional amendments protecting the flag against desecration have picked up 276 co-sponsors in the U.S. House of Representatives and 54 in the Senate.

The House Judiciary Committee takes up the amendment today, with a floor vote expected on June 28. The Senate Judiciary Committee tackled a similar amendment on Tuesday.

For two centuries soldiers have given their lives to keep the American flag flying. It is a symbol of freedom and hope for millions. That is what infuses the stars and strips with meaning and inspires the vast majority of Americans to treat it with respect. But to take away the choice in the matter, to make respect for the flag compulsory, diminishes the very freedom represented by the flag.

Do we follow a constitutional amendment banning flag desecration with an amendment requiring everyone to actually sing along when the national anthem is played at sports events? An amendment making attendance at Memorial Day parades compulsory?

Sen. Howell Heflin, D-Ala., argues that the flag unites us and therefore should be pro-

TECTED. But Heflin and like minded amendment supporters are confusing cause and effect. The flag is a symbol of our unity, not the source of it.

Banning flag burning is simply the flip side of the same coin that makes other shows of patriotism compulsory. What are the names of the countries that makes shows of patriotism compulsory? Try China, Iraq. The old Soviet Union.

Coerced respect for the flag isn't respect at all, and an amendment protecting the American flag would actually denigrate that flag.

Allegiance that is voluntary is something beyond price. But allegiance extracted by statute—or, worse yet, but constitutional fiat—wouldn't be worth the paper the amendment was drafted on. It is the very fact that the flag is voluntarily honored that makes it a great and powerful symbol.

The possibility of the Balkanization of the American people into bickering special interest groups based on ethnicity or gender or age or class frightens all of us, and it's tempting to try to impose some sort of artificial unity. But can the flag unit us? No. We can be united under the flag, but we can't expect the flag to do the job of uniting us.

We oppose flag burning—or any other show of disrespect for the American flag. There are better ways to communicate dissent than trashing a symbol Americans treasure. But making respect for the flag compulsory would, in the long run, decrease real respect for the flag.

The 104th Congress should put the flag burning issue behind it and move on to the nuts-and-bolts goal it was elected to pursue: a smaller, less intrusive, fiscally responsible federal government. A constitutional amendment protecting the flag runs precisely counter to that goal.

[From the Oshkosh Northwestern, May 28, 1995]

#### BEWARE TRIVIALIZING OUR CONSTITUTION

It is difficult to come out against anything so sacrosanct as the American flag amendment—difficult but not impossible.

An amendment to protect the flag from desecration is before Congress and has all the lobbying in its favor.

The trouble is, it is an attempt to solve, through the Constitutional amendment process, a problem that really is not a problem.

Flag burning is not rampant. It occurs occasionally; it brings, usually, society's scorn upon the arsonist, and does no one any harm, except the sensitivities of some.

These sensitivities give rise to the effort to abridge the freedom of expression guaranteed by the First Amendment, which has been held by the courts to include expressions of exasperation with government by burning its banner.

At worst, this flag protection is an opening wedge in trimming away at the basic rights of all Americans to criticize its leaders. That right was so highly esteemed by the Founding Fathers that they made free speech virtually absolute.

At best, the flag protection amendment trivializes the Constitution.

That is no small consideration. The Constitution was trivialized once before. The prohibition amendment had no business being made a constitutional chapter. It was not of constitutional stature. It could not have been done by statute alone. Its repeal showed that it was a transitory matter rather than being one of transcendent, eternal concern.

The flag protection amendment is trivial in that flag burning is not always and everywhere a problem. If the amendment succeeds, what else is out there to further trivialize the document?

Must the bald eagle be put under constitutional protection if it is no longer an endangered bird?

This is a "feel good" campaign. People feel they accomplish something good by protecting the flag from burning. (Isn't the approved method of disposing of tattered flags to burn them, by the way?)

But it offers about the same protection to flags that the 18th offered to teetotaling.

If someone has a political statement to make and feels strongly enough, he'll do the burning and accept the consequences. The consequences surely will not be draconian enough that flag burning would rank next best thing to a capital offense.

Congress has more pressing things to do than put time into this amendment.●

Mr. DOLE. Mr. President, was leaders' time reserved?

The PRESIDING OFFICER. The Senator is correct.

#### DEATH OF HARRY KAUFMAN

Mr. DOLE. Mr. President, last month, two thugs squirted a bottle of flammable liquid into a subway token booth in Brooklyn's Bedford-Stuyvesant neighborhood. They then lit a match, igniting an explosion that blew the token booth apart.

Engulfed in flames, the booth's operator, 50-year-old Harry Kaufman, suffered second- and third-degree burns over nearly 80 percent of his body as well as severe lung injuries. Mr. Kaufman was subsequently taken to the New York Hospital-Cornell Medical Center. The two men who committed this vicious crime continue to remain at large.

The Brooklyn attack closely resembled two scenes depicted in the new movie "The Money Train," a Columbia Pictures production starring Woody Harrelson and Wesley Snipes. Since the movie's November 22 debut, there have been a total of seven separate copycat fire attacks on New York City subway token booths.

Yesterday, after a 14-day fight for his life, Harry Kaufman passed away.

I take this opportunity to publicly express my deepest condolences to Stella Kaufman, Harry Kaufman's wife, to their 17-year-old son Adrian, and to the rest of the Kaufman family.

#### A NEW PARTNERSHIP

Mr. DOLE. Mr. President, when Americans changed the party in control of Congress last November, they also changed the relationship between Capitol Hill and our 50 State capitols.

The Washington, DC-knows-best attitude that was the hallmark of the Democrat Congress has been replaced by a return to the 10th amendment. Paternalism has been replaced by a new partnership between Congress and America's Governors.

One of the most talented of those Governors is William Weld of Massachusetts, who has provided innovative solutions in the areas of health care reform and welfare reform—reducing government spending, and cutting taxes while he was at it.