

Originally Processed With FOIA(s):
S; 2004-1280-F

FOIA Number:

FOIA MARKER

This is not a textual record. This is used as an administrative marker by the George Bush Presidential Library Staff.

Record Group/Collection: George H.W. Bush Presidential Records
Collection/Office of Origin: Speechwriting, White House Office of
Series: Grant, Mary Kate, Files
Subseries: Subject File, 1988-1991

OA/ID Number: 13880
Folder ID Number: 13880-010

Folder Title:
Flag Burning Op-Ed, 7/89

| Stack: | Row: | Section: | Shelf: | Position: |
|----------|-----------|----------|----------|-----------|
| G | 19 | 2 | 7 | 5 |

((Grant))
July 19, 1989
Draft three
A:flagburn

PROPOSED ARTICLE ON CONSTITUTIONAL AMENDMENT
PROHIBITING FLAG-BURNING
TO BE AUTHORED BY AN ADMINISTRATION SURROGATE

An ironic and compelling scene took place earlier this week at a congressional hearing, yet the incident went largely unreported by the national press. Former U.S. Solicitor General Charles Fried, ^(the) ^{who had decided that} a man ~~often the target of conservative darts~~ ^{would stay out of the recent} during the Reagan Administration ~~for his reluctance to embrace~~ ~~flag-burning case,~~ ~~right-wing causes,~~ sat ready to testify before a subcommittee of the House Judiciary Committee. He was there to support a statutory remedy (as opposed to a constitutional amendment) to the Supreme Court's decision that flag-burning ^(desecration) is a protected form of free speech.

The Subcommittee had just heard from Assistant Attorney General William Barr, who had eloquently outlined the case for a constitutional amendment; Fried had submitted prior written testimony in support of a flag-protection statute. Fried, to the Subcommittee's chagrin, instead testified that upon reflection, his argument for a statute was untenable. "Bill Barr made a very devastating attack ... This was a very powerful argument. I wasn't sure before I heard Bill's testimony." ^{then} He went on to say ² ~~that should~~ ^{oppose either} a legislative change ^{or} ~~be necessary,~~ only a constitutional amendment ^(o) ~~would do the job.~~ ² Subcommittee members sat slack-jawed at the reversal.

how confusing and unsettling the issue is for many people who specialize in constitutional law.

The episode illustrates ~~the conflicting passions and seemingly contradictory reasoning involved in this debate.~~ One

thing, however, is clear: All sides agree that the vast majority of Americans find desecration of our flag offensive and and deems

disagreeable, and those who defile it willfully should not be they think it diminishes our freedoms.

Those who argue that flag-burning tolerance of flag-burning is the price of liberty I have a strong foe in the allowed to get off scot-free. If this were not true, 48 states and the federal government would not have had statutes on the common sense of the people. books outlawing desecration of the flag.

Texas vs. Johnson was not a case concerning the outlawing of opinions, but rather outlawing only a certain manner of about the suppression about the lawfulness a certain manner of expressing them. As Judge Robert Bork pointed out in his

testimony before the same committee, some political expressions are "disagreeable" and illegal -- delivering a political message over television in obscenities, or expressing a political viewpoint through indecent public behavior, or delivering a political message with a sound truck at 2 a.m. in a residential neighborhood. Using the Supreme Court's rationale in Texas vs. Johnson, none of these actions could be outlawed or punished.

Similarly Abe Yet, in an earlier flag-burning case, Street vs. New York, liberal Justice Fortas wrote, "One may not justify burning a house, even if it is his own, on the ground, however sincere, that he does so as a protest. One may not justify breaking the windows of a government building on that basis. Protest does not exonerate lawlessness."

Judge Bork agreed. "Putting out of bounds a few means of expression in no way threatens the American system of freedom of

speech," he testified. ^{can only} ~~An amendment putting desecration of the~~ ^{there is simply no political thought} ~~or opinion that ~~needs to be expressed by desecrating the flag.~~~~ ~~flag out of bounds does not endanger our free speech.~~

What, then, is the best way to put flag-burning "out of bounds"? To answer this requires an examination of the issues at stake in the Texas vs. Johnson decision. The Supreme Court held that since the flag is "pregnant with expressive content," ^(ital) all flag burning ^{meant as political protest} is expressive conduct; to protect the flag from such actions constitutes suppression of expression. ^{Thus, the Supreme Court has held that flag desecration is by its very nature protected by the First Amendment.} ~~The Government has two interests that could justify the prohibition of expressive behavior as it relates to flags: preservation of the peace, and preservation of the flag as a symbol of our Nation.~~

~~Some observers are supporting a statutory remedy for the protection of the flag~~ ^(liberals say that they) ~~rewording the laws that previously stood~~ [?] ~~to make it a crime to mishandle the flag in public or private, regardless of intent. The statutes that have been proposed are absurdly broad~~ ^{requiring the prosecution of} ~~and would "pose a serious threat to civil liberties by criminalizing a broad range of innocent and unoffensive conduct," according to the Department of Justice. In other words, we'd have to prosecute boy scouts who let flags accidentally hit the ground, or even those flag-burners who fully~~

~~intend to desecrate the flag -- but only in the privacy of their own homes. Why violate the sanctity of the home for flag mishandling, when we preserve its privacy in so many other cases?~~ ^{Some of the same people who are usually apoplectic about government intrusions into} ^{have had a sudden change of heart when it comes to the flag. What are we to make of this sudden outbreak of liberal patriotism?}

Under the sweeping reasoning of Texas vs. Johnson regarding ~~freedom of expression and the preservation of national symbols, a flag protection statute would, of course, be held unconstitutional.~~ ^(by the lower courts, with no need for Supreme Court review.) The Assistant Attorney General explains: "The

paragraph

The Framers of the Constitution specifically set up a lengthy and difficult process of amendment, one ~~which~~ ^{that} ensures thoughtful examination and allows the American people to decide the outcome. "We the People" are the first words of the Constitution, not "We the Congress." ^{or "We the Law Professors."} To argue that a Constitutional amendment "trivializes" the document, as some in Congress have, is wrong -- if anything, it glorifies the Constitution. ^(and the people's role in shaping it.)

~~the real trivialization comes from those who try to confuse the issue by advocating a phony statute, or proposing that we prohibit burning of the Constitution or the Presidential Seal. Insert Bork quote here~~
To the contrary, ~~statutory relief trivializes the document.~~ Passing statute after statute, each getting swatted down by the Supreme Court, only demeans the process. Statute supporters are playing games with the constitutional process by circumventing the Framers' intentions. Just as some Congressmen tried with the pay raise issue, this is an attempt to find an easy way to skirt a tough vote. Only this time, the American people see right through the smokescreen.

This is an issue above politics. ^{IT} This strikes at the heart of what makes America strong. Our flag is our national symbol, and millions of Americans have fought and died for the Flag and the important principles it symbolizes. We believe in our freedoms, and will fight to keep our flag sacred. Enacting a constitutional amendment is the only legally effective and constitutionally sound way to do it. ^{Let's cut through the smokescreens and} Let the voters decide, ^{not} ~~the politicians.~~

#

((Grant))
July 19, 1989
Draft three
A:flagburn

PROPOSED ARTICLE ON CONSTITUTIONAL AMENDMENT
PROHIBITING FLAG-BURNING
TO BE AUTHORED BY AN ADMINISTRATION SURROGATE

An ironic and compelling scene took place earlier this week at a congressional hearing, yet the incident went largely unreported by the national press. Former U.S. Solicitor General Charles Fried, ^{the} ~~a~~ ^{who had decided that} ~~man often the target of conservative darts~~ ^{would stay out of the next} ~~during the Reagan Administration for his reluctance to embrace~~ ~~flag-burning case,~~ ~~right-wing causes,~~ sat ready to testify before a subcommittee of the House Judiciary Committee. He was there to support a statutory remedy (as opposed to a constitutional amendment) to the Supreme Court's decision that flag-^{desecration} ~~burning~~ is a protected form of free speech.

The Subcommittee had just heard from Assistant Attorney General William Barr, who had eloquently outlined the case for a constitutional amendment; Fried had submitted prior written testimony in support of a flag-protection statute. Fried, to the Subcommittee's chagrin, instead testified that upon reflection, his argument for a statute was untenable. "Bill Barr made a very devastating attack ... This was a very powerful argument. I wasn't sure before I heard Bill's testimony." ^{then} He went on to say ^{or} ~~that should a legislative change be necessary, only a~~ ~~constitutional amendment~~ [⊙] ~~would do the job.~~ Subcommittee members sat slack-jawed at the reversal.

How confusing and unsettling the issue is for many people who specialize in constitutional law.

The episode illustrates ~~the conflicting passions and seemingly contradictory reasoning involved in this debate.~~ One thing, however, is clear: ~~All sides agree that~~ the vast majority of Americans find desecration of our flag offensive and and demands disagreeable, and ~~those who defile it willfully should not be~~ they think it diminishes our freedoms. ~~Those who argue that flag-burning should be tolerated & flag-burning allowed to get off scot-free.~~ If this were not true, 48 states is the price of liberty I have a strong foe in the and the federal government would not have had statutes on the Common sense of the people. ~~books outlawing desecration of the flag.~~

Texas vs. Johnson was not a case concerning the outlawing of opinions, but rather outlawing only a certain manner of expressing them. As Judge Robert Bork pointed out in his testimony before the same committee, some political expressions are "disagreeable" and illegal -- delivering a political message over television in obscenities, or expressing a political viewpoint through indecent public behavior, or delivering a political message with a sound truck at 2 a.m. in a residential neighborhood. Using the Supreme Court's rationale in Texas vs. Johnson, none of these actions could be outlawed or punished.

Similarly ~~Yet, in an earlier flag-burning case, Street vs. New York,~~ liberal Justice Abe Fortas wrote, "One may not justify burning a house, even if it is his own, on the ground, however sincere, that he does so as a protest. One may not justify breaking the windows of a government building on that basis. Protest does not exonerate lawlessness."

Judge Bork agreed. "Putting out of bounds a few means of expression in no way threatens the American system of freedom of

There is simply no political thought speech," he testified. ~~An amendment putting desecration of the or opinion that needs to be expressed by desecrating the flag flag out of bounds does not endanger our free speech.~~

What, then, is the best way to put flag-burning "out of bounds"? To answer this requires an examination of the issues at stake in the Texas vs. Johnson decision. The Supreme Court held that since the flag is "pregnant with expressive content," ^{ital} all flag burning ^{meant as political protest} is expressive conduct; to protect the flag from such actions constitutes suppression of expression. ^{Thus, the Supreme Court has held that flag desecration is by its very nature protected has two interests that could justify the prohibition of} ^{by the First Amendment.} expressive behavior as it relates to flags: ~~preservation of the peace, and preservation of the flag as a symbol of our Nation.~~

^{liberals say that they} Some observers ^{are} supporting a statutory remedy for the protection of the flag ^{rewording} the laws that previously stood ^{to} make it a crime to mishandle the flag in public or private, regardless of intent. The statutes that have been proposed are absurdly broad ^{requiring the prosecution of} and would "pose a serious threat to civil liberties by criminalizing a broad range of innocent and unoffensive conduct," according to the Department of Justice. In other words, we'd have to prosecute boy scouts who let flags

accidentally hit the ground, or even those flag-burners who fully intend to desecrate the flag -- but only in the privacy of their own homes. ^{Some of the same people who are usually apoplectic about Government intrusions into} Why violate the sanctity of the home for flag ^{mis} mishandling, when we preserve its privacy in so many other cases? ^{have had a sudden change of heart when it comes to the flag. What are we to make of this sudden outburst of liberal patriotism?}

Under the sweeping reasoning of Texas vs. Johnson regarding freedom of expression and the preservation of national symbols, a flag protection statute would, of course, be held unconstitutional. ^{by the lower courts, with no need for Supreme Court review.} The Assistant Attorney General explains: "The

reason that a statue purporting to protect the Flag would be unconstitutional is simple. In Texas vs. Johnson, the Court held that whenever someone burns the Flag for expressive purposes, that conduct is protected by the First Amendment; that to prohibit such conduct, the Government must have a compelling reason that is unrelated to expression; that the Government's reason for protecting the Flag (to preserve it as a symbol of national unity) is inherently and necessarily related to expression; and that the Government's interest in protecting the Flag as a symbol of our national unity can never be sufficiently compelling to overcome an individual's First Amendment interest in burning the Flag for communicative purposes. This reasoning would extend to any Flag desecration statute enacted to protect the Flag as a symbol of our nation."

In fact, even in a previous decision by the Court (Kime vs. United States), Justice Brennan has written that a statute "that simply outlawed any public burning or mutilation of the flag, regardless of the expressive intent or nonintent of the actor," would be "invalid."

Why not also designate the Constitution as a national symbol? ~~Or the seal of the President?~~ Again, Judge Bork responds: "Copies of the Constitution do not fly over our public buildings and are not lowered to half mast when a national leader dies. Nobody salutes the Presidential seal. Nobody pledges allegiance to the Presidential seal. Marines did not fight their way across Iwo Jima and up Mount Suribachi to raise the flag of Rhode Island, a copy of the Constitution, or the Presidential

Insert in next to last paragraph

Insert or next to last paragraph

seal. The American people have thus demonstrated through consistent conduct over many years that the flag of the United States is a symbol different from all others."

The Constitutional amendment ^{supported by the President will avoid} proposed by Congressmen Michel and Montgomery and Senators Dole and Dixon is sufficiently narrow

to avoid these pitfalls: "The Congress and the States shall have power to prohibit the physical desecration of the Flag of the

United States." ^{(Once this measure is enacted,} ^{will be able to)} Let the peoples' representatives in Congress and

the state legislatures ^{will be able to fix appropriate limits on the prohibition. This is not the} decide whether to prohibit flag burning ^{and the extent they feel punishment is necessary. Allow them to} and the extent they feel punishment is necessary. ^{beginning of the end of the First Amendment, it is merely the} Allow them to ^{decide how specifically to define "flag" and "physical} decide how specifically to define "flag" and "physical ^{restoration of the people's traditional freedom to protect their flag.} restoration of the people's traditional freedom to protect their flag. ^{desecration."} desecration. ^{Simply give the States the framework and the} Simply give the States the framework and the

legislative authority, then let the people decide. Even liberal

Chief Justice Earl Warren wrote that "the states and federal government do have the power to protect the flag from acts of

desecration and disgrace." ~~To give that power to them, an amendment to the Constitution requires the approval of 2/3 of the~~

~~Congress, and 3/4 of the state legislatures. A statute, on the other hand, requires only a simple majority of the Congress.~~

This points up a larger issue concerning a proposed statute. ~~Those who are promoting this solution, and resisting the President's~~ ~~It is a dangerous precedent to allow a constitutional ruling to~~ ~~constitutional amendment, cannot really believe that such a statute would~~ ~~be reversed by a statute. If such a statute were enacted, the~~ ~~be enforced by the courts. They are just trying to buy time in hopes~~ ~~gates would be opened for those who want to change all other~~ ~~that the issue will go away. For what they fear most of all~~ ~~constitutional rulings by statute. This would mean that the~~ ~~is that the people will be reminded that it is their Constitution and~~ ~~Congress could overrule the Supreme Court on a regular basis, by~~ ~~their ~~Constitution~~ Bill of Rights; just as it is their flag.~~ ~~a simple majority vote.~~

The Framers of the Constitution specifically set up a lengthy and difficult process of amendment, one ^{that} ~~which~~ ensures thoughtful examination and allows the American people to decide the outcome. "We the People" are the first words of the Constitution, not "We the Congress" ^{or "We the Law Professors,"} To argue that a Constitutional amendment "trivializes" the document, as some in Congress have, is wrong -- if anything, it glorifies the Constitution ^(and the people's role in shaping it.)

~~the real trivialization comes from those who try to confuse the issue by advocating a phony statute, or ~~pro~~ proposing that we prohibit burning of the Constitution on the Presidential Seal. - insert Berk quote here~~

~~To the contrary, statutory relief trivializes the document. Passing statute after statute, each getting swatted down by the Supreme Court, only demeans the process. Statute supporters are playing games with the constitutional process by circumventing the Framers' intentions. Just as some Congressmen tried with the pay raise issue, this is an attempt to find an easy way to skirt a tough vote. Only this time, the American people see right through the smokescreen.~~

This is an issue above politics. ~~This~~ strikes at the heart of what makes America strong. Our flag is our national symbol, and millions of Americans have fought and died for the Flag and the important principles it symbolizes. We believe in our freedoms, and will fight to keep our flag sacred. Enacting a constitutional amendment is the only legally effective and constitutionally sound way to do it. ^{Let's cut through the smokescreens and} ~~Let~~ the voters decide ^{not} ~~the politicians.~~

THE WHITE HOUSE
WASHINGTON

Date: 7/24

TO: *Mary Kate Grant*

FROM: **NELSON LUND**
Associate Counsel
to the President

- Action
- Comments
- FYI

*A few minor
suggestions. Thanks.*

July 24, 1989

PROPOSED ARTICLE ON CONSTITUTIONAL AMENDMENT
PROHIBITING FLAG-BURNING

An ironic and compelling scene took place earlier this week at a congressional hearing, yet the incident went largely unreported by the national press. Former U.S. Solicitor General Charles Fried, the man who had ~~decided that~~ ^(Kept) the Reagan Administration ~~would stay~~ ² out of the recent flag-burning case, sat ready to testify before a subcommittee of the House Judiciary Committee. He was there to support a statutory remedy (as opposed to a constitutional amendment) to the Supreme Court's decision that flag desecration is a protected form of free speech.

The Subcommittee had just heard from Assistant Attorney General William Barr, who had ~~eloquently~~ ^(Administration's) outlined the case for a constitutional amendment; Fried had submitted prior written testimony in support of a flag-protection statute. Fried, to the Subcommittee's chagrin, instead testified that upon reflection, his argument for a statute was untenable. "Bill Barr made a very devastating attack ... This was a very powerful argument. I wasn't sure before I heard Bill's testimony." He then went on to oppose either a legislative change or a constitutional amendment. Subcommittee members sat slack-jawed at the reversal.

The episode illustrates how confusing and unsettling the issue is for many people who specialize in constitutional law. One thing, however, is clear: The vast majority of Americans find desecration of our flag offensive and disagreeable, and they

think that it diminishes and demeans our freedoms. Those who argue that tolerance of flag-burning is the price of liberty have a strong foe in the common sense of the people.

Texas vs. Johnson was not a case about the suppression of opinions, but about the lawfulness of a certain manner of expressing them. As Judge Robert Bork pointed out in his testimony before the same committee, some political expressions are "disagreeable" and illegal -- delivering a political message over television in obscenities, or expressing a political viewpoint through indecent public behavior, or delivering a political message with a sound truck at 2 a.m. in a residential neighborhood. Similarly, in an earlier flag-burning case, liberal Justice Abe Fortas wrote, "One may not justify burning a house, even if it is his own, on the ground, however sincere, that he does so as a protest. One may not justify breaking the windows of a government building on that basis. Protest does not exonerate lawlessness."

Judge Bork agreed. "Putting out of bounds a few means of expression in no way threatens the American system of freedom of speech," he testified. There is simply no political thought or opinion that can only be expressed only by desecrating the flag.

What, then, is the best way to put flag-burning "out of bounds"? To answer this requires an examination of the issues at stake in the Texas vs. Johnson decision. The Supreme Court held that since the flag is "pregnant with expressive content," all flag-burning meant as political protest is expressive conduct; to

protect the flag from such actions constitutes suppression of expression. Thus, the Supreme Court has held that flag desecration is by its very nature protected by the First Amendment.

Some observers say that they are supporting a statutory remedy for the protection of the flag: rewording the laws that previously stood to make it a crime to mishandle the flag in public or private, regardless of intent. The statutes that have been proposed are absurdly broad, requiring the prosecution of boy scouts who let flags accidentally hit the ground, or even those flag-burners who intend to desecrate the flag -- but only in the privacy of their own homes. Some of the same people who are usually apoplectic about Government intrusion into the sanctity of the home have had a sudden change of heart when it comes to the flag.

Under the sweeping reasoning of Texas vs. Johnson, a flag protection statute would, of course, be held unconstitutional by the lower courts with no need for Supreme Court review. The Assistant Attorney General explains: "The reason that a statute ^(=t=) purporting to protect the Flag would be unconstitutional is simple. In Texas vs. Johnson, the Court held that whenever someone burns the Flag for expressive purposes, that conduct is protected by the First Amendment; that to prohibit such conduct, the Government must have a compelling reason that is unrelated to expression; that the Government's reason for protecting the Flag (to preserve it as a symbol of national unity) is inherently and

necessarily related to expression; and that the Government's interest in protecting the Flag as a symbol of our national unity can never be sufficiently compelling to overcome an individual's First Amendment interest in burning the Flag for communicative purposes. This reasoning would extend to any Flag desecration statute enacted to protect the Flag as a symbol of our nation."

The Constitutional amendment supported by the President will avoid this problem, and only this problem. It reads: "The Congress and the States shall have power to prohibit the physical desecration of the Flag of the United States." Once this measure is enacted, the peoples' representatives in Congress and the state legislatures will be able to decide whether to prohibit flag burning, and will be able to fix appropriate limits on the prohibition. This is not the beginning of the end of the First Amendment, it is merely the restoration of the people's traditional freedom to protect their flag. Even liberal Chief Justice Earl Warren wrote that "the states and federal government do have the power to protect the flag from acts of desecration and disgrace."

This points up a larger issue concerning a proposed statute. Those who are promoting this solution, and resisting the President's constitutional amendment, cannot really believe that such a statute would be enforced by the courts. They are just trying to buy time in hopes that the issue will just go away.

The Framers of the Constitution specifically set up a lengthy and difficult process of amendment, one that ensures

thoughtful examination and allows the American people to decide the outcome. "We the People" are the first words of the Constitution, not "We the Congress" or "We the Law Professors." To argue that a Constitutional amendment "trivializes" the document, as some in Congress have, is wrong -- if anything, it glorifies the Constitution and the people's role in shaping it.

The real trivialization comes from those who try to confuse the issue by advocating a phony statute, or proposing that we prohibit burning of the Constitution or the Presidential seal. Again, Judge Bork responds: "Copies of the Constitution do not fly over our public buildings and are not lowered to half mast when a national leader dies. Nobody salutes the Presidential seal. Nobody pledges allegiance to the Presidential seal. Marines did not fight their way across Iwo Jima and up Mount Suribachi to raise the flag of Rhode Island, a copy of the Constitution, or the Presidential seal. The American people have thus demonstrated through consistent conduct over many years that the flag of the United States is a symbol different from all others."

This is an issue above politics. It strikes at the heart of what makes America strong. Our flag is our national symbol, and millions of Americans have fought and died for the Flag and the important principles it symbolizes. We believe in our freedoms, and will fight to keep our flag sacred. Enacting a constitutional amendment is the only legally effective and

constitutionally sound way to do it. Let's cut through the
smokescreens and let the voters decide.

#

M/K - go w/changes
except where
noted

XP

Here are some small
comments. I would be
back until about 2pm.
I'd like to tighten up pp 2-4.
I'll get back to you

looks great
Brent

((Grant))
July 19, 1989
Draft two
A: flagburn

PROPOSED ARTICLE ON CONSTITUTIONAL AMENDMENT
PROHIBITING FLAG-BURNING
TO BE AUTHORED BY AN ADMINISTRATION SURROGATE

An ironic and compelling scene took place earlier this week at a Congressional hearing, yet the incident went largely unreported by the national press. Former U.S. Solicitor General Charles Fried, a man often the target of conservative darts during the Reagan Administration for his reluctance to embrace right-wing causes, sat ready to testify before a subcommittee of the House Judiciary Committee. He was there to support a statutory remedy (as opposed to a Constitutional amendment) to the Supreme Court's decision that flag-burning is a protected form of free speech.

The Subcommittee had just heard from Assistant Attorney General William Barr, who had eloquently outlined the case for a Constitutional amendment; Fried had submitted prior written testimony in support of a flag-protection statute. Fried, to the Subcommittee's chagrin, instead testified that upon reflection, his argument for a statute was untenable. "Bill Barr made a very devastating attack ... This was a very powerful argument. I wasn't sure before I heard Bill's testimony." He went on to say that should a legislative change be necessary, only a Constitutional amendment would do the job. Subcommittee members sat slack-jawed at the reversal.

page 13
page 14
page 15

The episode illustrates the conflicting passions and seemingly contradictory reasoning involved in this debate. One thing, however, is clear: All sides agree that most Americans find desecration of our flag offensive and disagreeable, and those who defile it willfully should not be allowed to get off scot-free. If this were not true, 48 states and the federal government would not have had statutes on the books outlawing desecration of the flag. *the vast majority of*

Texas vs. Johnson was not a case concerning the outlawing of opinions, but rather outlawing only a certain manner of expressing them. As Judge Robert Bork pointed out in his testimony before the same committee, some political expressions are "disagreeable" and illegal -- delivering a political message over television in obscenities, or expressing a political viewpoint through indecent public behavior, or delivering a political message with a sound truck at 2 a.m. in a residential neighborhood. Using the Supreme Court's rationale in ~~Under the reasoning of~~ Texas vs. Johnson, none of these actions could be outlawed or punished. Yet, in an earlier flag-burning case, Street vs. New York, Justice Fortas wrote, "One may not justify burning a house, even if it is his own, on the ground, however sincere, that he does so as a protest. One may not justify breaking the windows of a government building on that basis. Protest does not exonerate lawlessness."

Judge Bork agreed. "Putting out of bounds a few means of expression in no way threatens the American system of freedom of speech," he testified. An amendment putting desecration of the flag out of bounds does not endanger our free speech.

What, then, is the best way to put flag-burning "out of bounds"? To answer this requires an examination of the issues at stake in the Texas vs. Johnson decision. The Supreme Court held that since the flag is "pregnant with expressive content," all flag burning is expressive conduct; to protect the flag from such actions constitutes suppression of expression. The Government ^{has two} interests ^{that could justify the prohibition of} ~~may prohibit~~ expressive behavior as it relates to flags, ~~for two~~ reasons: preservation of the peace, and preservation of the flag as a symbol of our Nation.

On the first, the Court ruled that the Government may not assume that flag-burning is a breach of the peace -- it does not incite a riot every time -- so therefore a burning flag is not considered the equivalent of "fighting words," which would cause an onlooker to jump into a fistfight over the incident.

Secondly, to protect the flag as a national symbol directly relates to the "suppression of expression," and the Court ruled that the Government's interest in preserving that symbol will never prevail over the individual's freedom of expression. The Court also brings up the "slippery slope" issue of designating the flag a "national symbol." Why not also designate the Constitution? The seal of the President? Moreover, ~~the Court pointed out that the flag itself has no independent constitutional protection from an individual's right to express himself by burning it.~~

Again, Judge Bork responds: "Copies of the Constitution do not fly over our public buildings and are not lowered to half mast when a national leader dies. Nobody salutes the

This could all be condensed, I'll have about 1/2 page home

Presidential seal. Nobody pledges allegiance to the Presidential seal. Marines did not fight their way across Iwo Jima and up Mount Suribachi to raise the flag of Rhode Island, a copy of the Constitution, or the Presidential seal. The American people have thus demonstrated through consistent conduct over many years that the flag of the United States is a symbol different from all others."

Some observers are supporting a statutory remedy for the protection of the flag -- rewording the laws that previously stood -- to make it a crime to mishandle the flag in public or private, regardless of intent. The statutes that have been proposed are absurdly broad and would "pose a serious threat to civil liberties by criminalizing a broad range of innocent and unoffensive conduct," according to the Department of Justice. In other words, we'd have to prosecute boy scouts who let flags accidentally hit the ground, or even those flag-burners who fully intend to desecrate the flag -- but only in the privacy of their own homes. Why violate the sanctity of the home for flag mishandling, when we preserve its privacy in so many other cases?

Under the sweeping reasoning of Texas vs. Johnson regarding freedom of expression and the preservation of national symbols, a flag protection statute would, of course, be held unconstitutional.

The Assistant Attorney General explains: "The reason that a statue purporting to protect the Flag would be unconstitutional is simple. In Texas vs. Johnson, the Court held that whenever someone burns the Flag for expressive purposes, that conduct is

protected by the First Amendment; that to prohibit such conduct, the Government must have a compelling reason that is unrelated to expression; that the Government's reason for protecting the Flag (to preserve it as a symbol of national unity) is inherently and necessarily related to expression; and that the Government's interest in protecting the Flag as a symbol of our national unity can never be sufficiently compelling to overcome an individual's First Amendment interest in burning the Flag for communicative purposes. This reasoning would extend to any Flag desecration statute enacted to protect the Flag as a symbol of our nation."

In fact, even in a previous decision by the Court (Kime vs. United States), Justice Brennan has written that a statute "that simply outlawed any public burning or mutilation of the flag, regardless of the expressive intent or nonintent of the actor," would be "invalid."

The Constitutional amendment proposed by Congressmen Michel and Montgomery and Senators Dole and Dixon is sufficiently narrow to avoid these pitfalls: "The Congress and the States shall have power to prohibit the physical desecration of the Flag of the United States." Let the ^{peoples' representatives in Congress and the} States _{legislatures} decide whether to prohibit flag burning, and the extent they feel punishment is necessary. Allow them to decide how specifically to define "flag" and "physical desecration." Simply give the States the framework and the legislative authority, then let the people decide. Even liberal Chief Justice Earl Warren wrote that "the states and federal government do have the power to protect the flag from acts of desecration and disgrace." To give that power to them, an

amendment to the Constitution requires the approval of 2/3 of the Congress, and 3/4 of the state legislatures. A statute, on the other hand, requires only a simple majority of the Congress.

This points up a larger issue concerning a proposed statute. It is a dangerous precedent to allow a constitutional ruling to be reversed by a statute. If such a statute were enacted, the gates would be opened for those who want to change all other constitutional rulings by statute. This would mean that the Congress could overrule the Supreme Court on a regular basis, by a simple majority vote.

The Framers of the Constitution specifically set up a lengthy and difficult process of amendment, one which allows the American people to decide the outcome. "We the People" are the first words of the Constitution, not "We the Congress." To argue that a Constitutional amendment "trivializes" the document, as some in Congress have, is wrong -- if anything, it glorifies the Constitution.

To the contrary, statutory relief trivializes the document. Passing statute after statute, each getting swatted down by the Supreme Court, only demeans the process. Statute supporters are playing games with the Constitutional process by circumventing the Framers' intentions. Just as some Congressmen tried with the pay raise issue, this is an attempt to find an easy way to skirt a tough vote. Only this time, the American people see right through the smokescreen.

This is an issue above politics. This strikes at the heart of what makes America strong. Our flag is our national symbol,

ensures thoughtful examination and

Congress made

per a point!

have fought and died for the flag and
~~the~~ the important principles it symbolizes

~~fought for and died over~~ by millions of Americans before us. We
believe in our freedoms, ^{and} ~~but~~ will fight to keep our flag sacred.
Enacting a Constitutional amendment is the only legally effective
and constitutionally sound way to do it. Let the voters decide,
not the politicians.

#

REVISED

TESTIMONY OF CHARLES FRIED¹

July 19, 1989

Gregory Lee Johnson's burning of the American flag was a vile and distressing act. I do not like coming here to urge you to leave alone the laws and Constitution that say he may not be punished for that act. But because I was given the privilege of serving in high public office, as head of the Office of Solicitor General for almost four years during the second Reagan Administration, and because I am now again a teacher of the law, where I have convictions I think it is appropriate to share them with you. You have heard and will hear much technical legal argument on this issue, and during the questions for which I hope to leave time, I stand ready to enter into that technical debate. But what I owe you particularly is testimony about my per-

¹. Charles Fried has taught at Harvard Law School since 1961. During the October Term, 1960 he was law clerk to Mr. Justice John Marshall Harlan. He was Deputy and Counselor to the Solicitor General from February through May, 1985, Acting Solicitor General thereafter, until October, 1985 when he became the country's thirty eighth Solicitor General. On January 20, 1989 he resigned his post to return to teaching.

sonal convictions as an American, an American who loves his country and his flag and who owes America an uncommon debt.

I am humbled by the realization that those who have spoken most feelingly on the opposite side of this debate -- President Bush, Chief Justice Rehnquist, Justice Stevens -- have all had the privilege of serving in the armed forces, a service which obviously builds a special reverence for the flag. But I too have had a distinct privilege and speak from a special perspective: In 1948 as a boy of thirteen I took an oath of allegiance and so by a deliberate act became an American. I came here from Czechoslovakia, a country with a deep and humane tradition of democratic values, crushed first by the Nazis and then by the Soviets and their disgusting little puppets. To the Czechs, at least from the days when Woodrow Wilson befriended the nation's first President Thomas Masaryk -- America was a model and ideal. So America, its traditions and values and its flag are important to me. Foremost among those values is the principle that no one shall be punished for his political expressions -- no matter how offensive or bizarre. That commitment to liberty is our first and greatest contribution to the history of mankind. I would not tamper with it. Though I do not often agree with Justice Brennan, I agree with him entirely that our disdainful tolerance of the likes of

Gregory Johnson only honors the flag he sought so ineffectively to dishonor.

Remember how rare and glorious that national commitment of ours is. I will not speak of tyrannies like Nazi Germany, Cuba or Viet Nam where a good deal less than burning their flag will provoke a brutal official response. They are too extreme to make the point. Consider instead the case of republican France, which just now celebrates its bicentennial and shares with us many common values. When France had kings and those kings represented as does our flag the national dignity and identity, they had a crime called lèse majesté, which punished severely any offense by word or deed to the honor of the king or his name. With the Revolution the concept remained; they just changed the name to lèse nation and hundreds were executed for nothing more than words or symbolic acts which were felt to show insufficient ~~for~~ respect for the nation or the people. There is the story (by no means extreme for those terrible days) of the man who was sent to the guillotine for displaying the national flag, the tricolor with the colors reversed. I tell this story because our two revolutions were closely connected. Lafayette and Rochambeau fought side by side with George Washington. Yet just when the French were consolidating their revolution in the bloodbath of the Terror, this new nation chose to affirm itself by adopting the Bill of

Rights and the First Amendment. The totalitarian ideas and vocabulary of the Terror have persisted and been invoked by ~~many~~ tyrants ever since. Ours is a different tradition. It has brought to this country refugees from two hundred years of tyrannies, tyrannies which have killed and imprisoned people in the name of the honor and dignity of the nation. I beg you not to tamper with our tradition.

[Large section of text is completely redacted with thick black horizontal bars.]

These tyrants have same power -

Rep. Sumner was correct to call this planning cat and mouse with the GOP

...and 1500 ... his ... are the under ... and conspiring.

4A

My good friends and colleagues, Rex Lee and Laurence Tribe, have testified that a statute might be drawn that would pass constitutional muster. For instance there are hints in some Supreme Court opinions that a statute that did not speak specifically of some expressive purpose but proscribed mistreatment of a flag in all circumstances might not run afoul of the First Amendment. After all it has long been a crime to mutilate or deface the currency. 18 U.S.C. 333. In fact as Solicitor General I thought I would have had a duty to attempt to defend the constitutionality of a statute drawn in such more careful terms, which is why I determined not to enter the Johnson case, lest I gratuitously cast doubt on the federal statute as it is presently written. But as a private citizen I must tell you that I very much hope that no such statute will be passed. I agree with the judgment that whatever the technicalities, the evident purpose of such a statute would still be to punish acts of expression, acts that do no harm except as they express political convictions -- mistaken and sordid as those convictions are. I think this would in any event be an undignified and unworthy way for Congress to play games with a Supreme Court decision. If we act, we should act forthrightly -- this is not a matter for tricky legalistic maneuvers. But I hope and urge and pray that we will not act -- that no statute be passed and ofcourse that the Constitution not be amended. In short, I believe the Johnson case is right not just as a matter of present constitutional law. It is right in principle.

Finally, let me say how I differ from of those who agree with me on this particular issue. We can punish the burning of a flag which is not the property of the flag-burner. We can punish the defacing of public monuments. And it is silly to say that freedom of expression protects the right of protesters

[REDACTED]

[REDACTED] issue. We can
[REDACTED] We can

[REDACTED] to pitch tents and sleep in Lafayette Park -- the Supreme Court was right to say so in Clark v. Community for Creative Non -Violence, 472 U.S. 38 (1985). I speak only of criminal punishment for burning a flag, ^{a flag} that any one may own or manufacture. Further, we may and should require that school children be led in a pledge of allegiance -- a pledge like the one I took to become a citizen -- excusing those with conscientious objections . (which is all the Supreme Court required in the Barnette case.) And we may treat as disloyal to our country those who burn or otherwise show disrespect to the flag and can decline to offer or retain such persons in positions of honor or trust. Two years ago, in Rankin v. McPherson, 107 S.Ct. 2891 (1987), I filed a brief in the Supreme Court arguing that a county law enforcement agency might constitutionally dismiss an employee who had expressed the hope that the next time someone shot at President Reagan they would kill him. In a five to four decision the Supreme Court disagreed with me. I think the Court was wrong. I hope that

the Court would at least agree that if Ms. McPherson had instead burned the flag no law enforcement agency in the United States should be required to retain her in its employ. In short I think the government may take many steps to affirm the values for which it stands and to promote respect for the symbols of those values. As for the likes of Gregory Lee Johnson, let us simply turn our backs on him.

((Grant))
July 19, 1989
Draft two
A:flagburn

PROPOSED ARTICLE ON CONSTITUTIONAL AMENDMENT
PROHIBITING FLAG-BURNING
TO BE AUTHORED BY AN ADMINISTRATION SURROGATE

An ironic and compelling scene took place earlier this week at a Congressional hearing, yet the incident went largely unreported by the national press. Former U.S. Solicitor General Charles Fried, a man often the target of conservative darts during the Reagan Administration for his reluctance to embrace right-wing causes, sat ready to testify before a subcommittee of the House Judiciary Committee. He was there to support a statutory remedy (as opposed to a Constitutional amendment) to the Supreme Court's decision that flag-burning is a protected form of free speech.

The Subcommittee had just heard from Assistant Attorney General William Barr, who had eloquently outlined the case for a Constitutional amendment; Fried had submitted prior written testimony in support of a flag-protection statute. Fried, to the Subcommittee's chagrin, instead testified that upon reflection, his argument for a statute was untenable. "Bill Barr made a very devastating attack ... This was a very powerful argument. I wasn't sure before I heard Bill's testimony." He went on to say that should a legislative change be necessary, only a Constitutional amendment would do the job. Subcommittee members sat slack-jawed at the reversal.

The episode illustrates the conflicting passions and seemingly contradictory reasoning involved in this debate. One thing, however, is clear: All sides agree that most Americans find desecration of our flag offensive and disagreeable, and those who defile it willfully should not be allowed to get off scot-free. If this were not true, 48 states and the federal government would not have had statutes on the books outlawing desecration of the flag.

Texas vs. Johnson was not a case concerning the outlawing of opinions, but rather outlawing only a certain manner of expressing them. As Judge Robert Bork pointed out in his testimony before the same committee, some political expressions are "disagreeable" and illegal -- delivering a political message over television in obscenities, or expressing a political viewpoint through indecent public behavior, or delivering a political message with a sound truck at 2 a.m. in a residential neighborhood. Under the reasoning of Texas vs. Johnson, none of these actions could be outlawed or punished. Yet, in an earlier flag-burning case, Street vs. New York, Justice Fortas wrote, "One may not justify burning a house, even if it is his own, on the ground, however sincere, that he does so as a protest. One may not justify breaking the windows of a government building on that basis. Protest does not exonerate lawlessness."

Judge Bork agreed. "Putting out of bounds a few means of expression in no way threatens the American system of freedom of speech," he testified. An amendment putting desecration of the flag out of bounds does not endanger our free speech.

What, then, is the best way to put flag-burning "out of bounds"? To answer this requires an examination of the issues at stake in the Texas vs. Johnson decision. The Supreme Court held that since the flag is "pregnant with expressive content," all flag burning is expressive conduct; to protect the flag from such actions constitutes suppression of expression. The Government may prohibit expressive behavior as it relates to flags for two reasons: preservation of the peace, and preservation of the flag as a symbol of our Nation.

On the first, the Court ruled that the Government may not assume that flag-burning is a breach of the peace -- it does not incite a riot every time -- so therefore a burning flag is not considered the equivalent of "fighting words," which would cause an onlooker to jump into a fistfight over the incident.

Secondly, to protect the flag as a national symbol directly relates to the "suppression of expression," and the Court ruled that the Government's interest in preserving that symbol will never prevail over the individual's freedom of expression. The Court also brings up the "slippery slope" issue of designating the flag a "national symbol." Why not also designate the Constitution? The seal of the President? Moreover, the Court pointed out that the flag itself has no independent constitutional protection from an individual's right to express himself by burning it.

Again, Judge Bork responds: "Copies of the Constitution do not fly over our public buildings and are not lowered to half mast when a national leader dies. Nobody salutes the

Presidential seal. Nobody pledges allegiance to the Presidential seal. Marines did not fight their way across Iwo Jima and up Mount Suribachi to raise the flag of Rhode Island, a copy of the Constitution, or the Presidential seal. The American people have thus demonstrated through consistent conduct over many years that the flag of the United States is a symbol different from all others."

Some observers are supporting a statutory remedy for the protection of the flag -- rewording the laws that previously stood -- to make it a crime to mishandle the flag in public or private, regardless of intent. The statutes that have been proposed are absurdly broad and would "pose a serious threat to civil liberties by criminalizing a broad range of innocent and unoffensive conduct," according to the Department of Justice. In other words, we'd have to prosecute boy scouts who let flags accidentally hit the ground, or even those flag-burners who fully intend to desecrate the flag -- but only in the privacy of their own homes. Why violate the sanctity of the home for flag mishandling, when we preserve its privacy in so many other cases?

Under the sweeping reasoning of Texas vs. Johnson regarding freedom of expression and the preservation of national symbols, a flag protection statute would, of course, be held unconstitutional.

The Assistant Attorney General explains: "The reason that a statute purporting to protect the Flag would be unconstitutional is simple. In Texas vs. Johnson, the Court held that whenever someone burns the Flag for expressive purposes, that conduct is

protected by the First Amendment; that to prohibit such conduct, the Government must have a compelling reason that is unrelated to expression; that the Government's reason for protecting the Flag (to preserve it as a symbol of national unity) is inherently and necessarily related to expression; and that the Government's interest in protecting the Flag as a symbol of our national unity can never be sufficiently compelling to overcome an individual's First Amendment interest in burning the Flag for communicative purposes. This reasoning would extend to any Flag desecration statute enacted to protect the Flag as a symbol of our nation."

In fact, even in a previous decision by the Court (Kime vs. United States), Justice Brennan has written that a statute "that simply outlawed any public burning or mutilation of the flag, regardless of the expressive intent or nonintent of the actor," would be "invalid."

The Constitutional amendment proposed by Congressmen Michel and Montgomery and Senators Dole and Dixon is sufficiently narrow to avoid these pitfalls: "The Congress and the States shall have power to prohibit the physical desecration of the Flag of the United States." Let the States decide whether to prohibit flag burning, and the extent they feel punishment is necessary. Allow them to decide how specifically to define "flag" and "physical desecration." Simply give the States the framework and the legislative authority, then let the people decide. Even liberal Chief Justice Earl Warren wrote that "the states and federal government do have the power to protect the flag from acts of desecration and disgrace." To give that power to them, an

amendment to the Constitution requires the approval of 2/3 of the Congress, and 3/4 of the state legislatures. A statute, on the other hand, requires only a simple majority of the Congress.

This points up a larger issue concerning a proposed statute. It is a dangerous precedent to allow a constitutional ruling to be reversed by a statute. If such a statute were enacted, the gates would be opened for those who want to change all other constitutional rulings by statute. This would mean that the Congress could overrule the Supreme Court on a regular basis, by a simple majority vote.

The Framers of the Constitution specifically set up a lengthy and difficult process of amendment, one which allows the American people to decide the outcome. "We the People" are the first words of the Constitution, not "We the Congress." To argue that a Constitutional amendment "trivializes" the document, as some in Congress have, is wrong -- if anything, it glorifies the Constitution.

To the contrary, statutory relief trivializes the document. Passing statute after statute, each getting swatted down by the Supreme Court, only demeans the process. Statute supporters are playing games with the Constitutional process by circumventing the Framers' intentions. Just as some Congressmen tried with the pay raise issue, this is an attempt to find an easy way to skirt a tough vote. Only this time, the American people see right through the smokescreen.

This is an issue above politics. This strikes at the heart of what makes America strong. Our flag is our national symbol,

fought for and died over by millions of Americans before us. We believe in our freedoms, but will fight to keep our flag sacred. Enacting a Constitutional amendment is the only legally effective and constitutionally sound way to do it. Let the voters decide, not the politicians.

#

((Grant))
July 19, 1989
Draft two
A:flagburn

PROPOSED ARTICLE ON CONSTITUTIONAL AMENDMENT
PROHIBITING FLAG-BURNING
TO BE AUTHORED BY AN ADMINISTRATION SURROGATE

An ironic and compelling scene took place earlier this week at a Congressional hearing, yet the incident went largely unreported by the national press. Former U.S. Solicitor General Charles Fried, a man often the target of conservative darts during the Reagan Administration for his reluctance to embrace right-wing causes, sat ready to testify before a subcommittee of the House Judiciary Committee. He was there to support a statutory remedy (as opposed to a Constitutional amendment) to the Supreme Court's decision that flag-burning is a protected form of free speech.

The Subcommittee had just heard from Assistant Attorney General William Barr, who had eloquently outlined the case for a Constitutional amendment; Fried had submitted prior written testimony in support of a flag-protection statute. Fried, to the Subcommittee's chagrin, instead testified that upon reflection, his argument for a statute was untenable. "Bill Barr made a very devastating attack ... This was a very powerful argument. I wasn't sure before I heard Bill's testimony." He went on to say that should a legislative change be necessary, only a Constitutional amendment would do the job. Subcommittee members sat slack-jawed at the reversal.

The episode illustrates the conflicting passions and seemingly contradictory reasoning involved in this debate. One thing, however, is clear: All sides agree that most Americans find desecration of our flag offensive and disagreeable, and those who defile it willfully should not be allowed to get off scot-free. If this were not true, 48 states and the federal government would not have had statutes on the books outlawing desecration of the flag.

Texas vs. Johnson was not a case concerning the outlawing of opinions, but rather outlawing only a certain manner of expressing them. As Judge Robert Bork pointed out in his testimony before the same committee, some political expressions are "disagreeable" and illegal -- delivering a political message over television in obscenities, or expressing a political viewpoint through indecent public behavior, or delivering a political message with a sound truck at 2 a.m. in a residential neighborhood. Under the reasoning of Texas vs. Johnson, none of these actions could be outlawed or punished. Yet, in an earlier flag-burning case, Street vs. New York, Justice Fortas wrote, "One may not justify burning a house, even if it is his own, on the ground, however sincere, that he does so as a protest. One may not justify breaking the windows of a government building on that basis. Protest does not exonerate lawlessness."

Judge Bork agreed. "Putting out of bounds a few means of expression in no way threatens the American system of freedom of speech," he testified. An amendment putting desecration of the flag out of bounds does not endanger our free speech.

What, then, is the best way to put flag-burning "out of bounds"? To answer this requires an examination of the issues at stake in the Texas vs. Johnson decision. The Supreme Court held that since the flag is "pregnant with expressive content," all flag burning is expressive conduct; to protect the flag from such actions constitutes suppression of expression. The Government may prohibit expressive behavior as it relates to flags for two reasons: preservation of the peace, and preservation of the flag as a symbol of our Nation.

On the first, the Court ruled that the Government may not assume that flag-burning is a breach of the peace -- it does not incite a riot every time -- so therefore a burning flag is not considered the equivalent of "fighting words," which would cause an onlooker to jump into a fistfight over the incident.

Secondly, to protect the flag as a national symbol directly relates to the "suppression of expression," and the Court ruled that the Government's interest in preserving that symbol will never prevail over the individual's freedom of expression. The Court also brings up the "slippery slope" issue of designating the flag a "national symbol." Why not also designate the Constitution? The seal of the President? Moreover, the Court pointed out that the flag itself has no independent constitutional protection from an individual's right to express himself by burning it.

Again, Judge Bork responds: "Copies of the Constitution do not fly over our public buildings and are not lowered to half mast when a national leader dies. Nobody salutes the

Presidential seal. Nobody pledges allegiance to the Presidential seal. Marines did not fight their way across Iwo Jima and up Mount Suribachi to raise the flag of Rhode Island, a copy of the Constitution, or the Presidential seal. The American people have thus demonstrated through consistent conduct over many years that the flag of the United States is a symbol different from all others."

Some observers are supporting a statutory remedy for the protection of the flag -- rewording the laws that previously stood -- to make it a crime to mishandle the flag in public or private, regardless of intent. The statutes that have been proposed are absurdly broad and would "pose a serious threat to civil liberties by criminalizing a broad range of innocent and unoffensive conduct," according to the Department of Justice. In other words, we'd have to prosecute boy scouts who let flags accidentally hit the ground, or even those flag-burners who fully intend to desecrate the flag -- but only in the privacy of their own homes. Why violate the sanctity of the home for flag mishandling, when we preserve its privacy in so many other cases?

Under the sweeping reasoning of Texas vs. Johnson regarding freedom of expression and the preservation of national symbols, a flag protection statute would, of course, be held unconstitutional.

The Assistant Attorney General explains: "The reason that a statute purporting to protect the Flag would be unconstitutional is simple. In Texas vs. Johnson, the Court held that whenever someone burns the Flag for expressive purposes, that conduct is

protected by the First Amendment; that to prohibit such conduct, the Government must have a compelling reason that is unrelated to expression; that the Government's reason for protecting the Flag (to preserve it as a symbol of national unity) is inherently and necessarily related to expression; and that the Government's interest in protecting the Flag as a symbol of our national unity can never be sufficiently compelling to overcome an individual's First Amendment interest in burning the Flag for communicative purposes. This reasoning would extend to any Flag desecration statute enacted to protect the Flag as a symbol of our nation."

In fact, even in a previous decision by the Court (Kime vs. United States), Justice Brennan has written that a statute "that simply outlawed any public burning or mutilation of the flag, regardless of the expressive intent or nonintent of the actor," would be "invalid."

The Constitutional amendment proposed by Congressmen Michel and Montgomery and Senators Dole and Dixon is sufficiently narrow to avoid these pitfalls: "The Congress and the States shall have power to prohibit the physical desecration of the Flag of the United States." Let the States decide whether to prohibit flag burning, and the extent they feel punishment is necessary. Allow them to decide how specifically to define "flag" and "physical desecration." Simply give the States the framework and the legislative authority, then let the people decide. Even liberal Chief Justice Earl Warren wrote that "the states and federal government do have the power to protect the flag from acts of desecration and disgrace." To give that power to them, an

amendment to the Constitution requires the approval of 2/3 of the Congress, and 3/4 of the state legislatures. A statute, on the other hand, requires only a simple majority of the Congress.

This points up a larger issue concerning a proposed statute. It is a dangerous precedent to allow a constitutional ruling to be reversed by a statute. If such a statute were enacted, the gates would be opened for those who want to change all other constitutional rulings by statute. This would mean that the Congress could overrule the Supreme Court on a regular basis, by a simple majority vote.

The Framers of the Constitution specifically set up a lengthy and difficult process of amendment, one which allows the American people to decide the outcome. "We the People" are the first words of the Constitution, not "We the Congress." To argue that a Constitutional amendment "trivializes" the document, as some in Congress have, is wrong -- if anything, it glorifies the Constitution.

To the contrary, statutory relief trivializes the document. Passing statute after statute, each getting swatted down by the Supreme Court, only demeans the process. Statute supporters are playing games with the Constitutional process by circumventing the Framers' intentions. Just as some Congressmen tried with the pay raise issue, this is an attempt to find an easy way to skirt a tough vote. Only this time, the American people see right through the smokescreen.

This is an issue above politics. This strikes at the heart of what makes America strong. Our flag is our national symbol,

fought for and died over by millions of Americans before us. We believe in our freedoms, but will fight to keep our flag sacred. Enacting a Constitutional amendment is the only legally effective and constitutionally sound way to do it. Let the voters decide, not the politicians.

#

((Grant))
July 19, 1989
Draft one
A:flagburn

PROPOSED ARTICLE ON CONSTITUTIONAL AMENDMENT
PROHIBITING FLAG-BURNING
TO BE AUTHORED BY AN ADMINISTRATION SURROGATE

An ironic and compelling scene took place earlier this week ^{at a Congressional hearing} before a ~~House Judiciary~~ subcommittee, yet the incident went

largely unreported by the national press. Former U.S. Solicitor

General Charles Fried ^{is} a man often the target of conservative

darts during the Reagan Administration for his reluctance to

embrace right-wing causes ^{of} sat ready to testify ^{before the House Judiciary Subcommittee} in support of a

statutory remedy ^(as opposed to a Constitutional Amendment) to the Supreme Court's decision that flag-

burning is a protected form of free speech. ~~Fried~~

The Subcommittee had just heard from Assistant Attorney General William Barr, who had eloquently outlined the case for a Constitutional amendment; Fried had submitted prior written testimony in support of a flag-protection statute. Fried, to the Subcommittee's chagrin, instead testified that upon reflection, his argument for a statute was untenable. "Bill Barr made a very devastating attack ... This was a very powerful argument. I wasn't sure before I heard Bill's testimony." He went on to say that should a legislative change be necessary, only a Constitutional amendment would do the job. Subcommittee members sat slack-jawed at the reversal.

The episode illustrates the conflicting passions and seemingly contradictory reasoning involved in this debate. One

thing, however, is clear: All sides agree that most Americans find desecration of our flag offensive and disagreeable, and those who defile it willfully should not be allowed to get off scot-free. If this were not true, 48 states and the federal government would not have had statutes on the books outlawing desecration of the flag.

Texas vs. Johnson was not a case concerning the outlawing of opinions, but rather outlawing only a certain manner of expressing them. As Judge Robert Bork pointed out in his testimony before the same committee, some political expressions are "disagreeable" -- ^{and illegal --} delivering a political message over television in obscenities, or expressing a political viewpoint through indecent public behavior, or delivering a political message with a sound truck at 2 a.m. in a residential neighborhood. Under the reasoning of Texas vs. Johnson, none of these actions could be ^{outlawed} ~~prevented~~ or punished. ^{yet,} In an earlier flag-burning case, Street vs. New York, Justice Fortas wrote, "One may not justify burning a house, even if it is his own, on the ground, however sincere, that he does so as a protest. One may not justify breaking the windows of a government building on that basis. Protest does not exonerate lawlessness."

Judge Bork agreed. "Putting out of bounds a few means of expression in no way threatens the American system of freedom of speech," he testified. An amendment putting desecration of the flag out of bounds does not endanger our free speech.

What, then, is the best way to put flag-burning "out of bounds"? To answer this requires an examination of the issues at

stake in the Texas vs. Johnson decision. The Supreme Court held that since the flag is "pregnant with expressive content," all flag burning is expressive conduct; to protect the flag from such actions constitutes suppression of expression. The Government may prohibit expressive behavior as it relates to flags for two reasons: preservation of the peace, and preservation of the flag as a symbol of our Nation.

On the first, the Court ruled that the Government may not assume that flag-burning is a breach of the peace -- it does not incite a riot every time -- so therefore a burning flag is not considered the equivalent of "fighting words," which would cause an onlooker to jump into a fistfight over the incident.

Secondly, to protect the flag as a national symbol directly relates to the "suppression of expression," and the Court ruled that the Government's interest in preserving that symbol will never prevail over the individual's freedom of expression. The Court also brings up the "slippery slope" issue of designating the flag a "national symbol." Why not also designate the Constitution? The seal of the President? ^{Moreover,} The Court pointed out that the flag ^{itself} ~~is not any other ^{sort of} "national symbol"~~ has no independent constitutional protection from an individual's right to express himself by burning it.

Again, Judge Bork responds: "Copies of the Constitution do not fly over our public buildings and are not lowered to half mast when a national leader dies. Nobody salutes the Presidential seal. Nobody pledges allegiance to the Presidential seal. Marines did not fight their way across Iwo Jima and up Mount Suribachi to raise the flag of Rhode Island, a copy of the

Constitution, or the Presidential seal. The American people have thus demonstrated through consistent conduct over many years that the flag of the United States is a symbol different from all others."

Some observers are supporting a statutory remedy for the protection of the flag -- rewording the laws that previously stood -- to make it ^A crime to mishandle the flag in public or private, regardless of intent. The statutes that have been proposed are absurdly broad and would "pose a serious threat to civil liberties by criminalizing a broad range of innocent and unoffensive conduct," according to the ^{Asst. AG} Department of Justice. In other words, we'd have to prosecute boy scouts who let flags accidentally hit the ground, or even those flag-burners who fully intend to desecrate the flag -- but only in the privacy of their own homes. Why violate the sanctity of the home for flag mishandling, when we preserve its privacy in so many other cases?

Under the sweeping reasoning of Texas vs. Johnson regarding freedom of expression and the preservation of national symbols, ~~this~~ ^{a flag protection} statute would, of course, be held unconstitutional. In fact, even in a previous decision by the Court (Kime vs. United States), Justice Brennan has written that a statute "that simply outlawed any public burning or mutilation of the flag, regardless of the expressive intent or nonintent of the actor," would be "invalid."

Insert
Barry
p 3

The Constitutional amendment proposed by Congressmen Michel and Montgomery and Senators Dole and Dixon is sufficiently narrow to avoid these pitfalls: "The Congress and the States shall have

power to prohibit the physical desecration of the Flag of the United States." Let the States decide whether to prohibit flag burning, and the extent they feel punishment is necessary. ~~Let~~ *Allow* them ^{to} decide how specifically to define "flag" and "physical desecration." Simply give the States the framework and the legislative authority, then let the people decide. Even liberal Chief Justice Earl Warren wrote that "the states and federal government do have the power to protect the flag from acts of desecration and disgrace." To give that power to them, an amendment to the Constitution requires the approval of 2/3 of the Congress, and 3/4 of the state legislatures. A statute, on the other hand, requires only a simple majority of the Congress. ~~So much for what the people think.~~

This points up a larger issue concerning a proposed statute. It is a dangerous precedent to allow a constitutional ruling to be reversed by a statute. If such a statute were enacted, the gates would be opened for those who want to change all other constitutional rulings by statute. This would mean that the Congress could overrule the Supreme Court on a regular basis, by a simple majority vote.

The Framers of the Constitution specifically set up a lengthy and difficult process of amendment, one which allows the American people to decide the outcome. "We the People" are the first words of the Constitution, not "We the Congress." To argue that a Constitutional amendment "trivializes" the document, ^{as some in} is *Congress* wrong -- if anything, ~~it~~ ^{it} glorifies *The Const.* *have,*

To the contrary, statutory relief trivializes the ^{document.} ~~process.~~
Passing statute after statute, each getting swatted down by the
Supreme Court, only demeans the process. Statute supporters are
playing games with the Constitutional process by circumventing
the Framers' intentions. Just as some Congressmen tried with the
pay raise issue, this is an attempt to find an easy way to skirt
a tough vote. Only this time, the American people see right
through the smokescreen.

This is an issue above politics. This strikes at the heart
of what makes America strong. Our flag is our national symbol,
fought for and died over by millions of Americans before us. We
believe in our freedoms, but will fight to keep our flag sacred.
Enacting a Constitutional amendment is the only legally effective
and constitutionally sound way to do it. Let the voters decide,
not the politicians.

#

TESTIMONY OF ROBERT H. BORK*
BEFORE THE HOUSE JUDICIARY COMMITTEE,
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS,
CONCERNING STATUTORY AND CONSTITUTIONAL RESPONSES
TO THE SUPREME COURT DECISION IN TEXAS V. JOHNSON

July 19, 1989

I am very pleased to testify at the invitation of this Committee concerning the proposed amendment to the Constitution of the United States that would restore to Congress and the States power to prevent the physical desecration of the American flag.

There is no need to begin my testimony with a tribute to the flag as the symbol of this Republic and the freedoms that we enjoy under our system of government. Reverence for the flag is the reason we are all here. But it is not merely that Americans revere the flag that makes this subject so important. If a multitude of individuals are also to be a community, they must have symbols by which they live, symbols that express their identity as a community. The United States is a large and increasingly diverse and pluralistic society. The one symbol that expresses our existence as a community, the one symbol that stands above all others as an expression of our nationhood, is the American flag. The flag should be preserved inviolate as the one symbol that stands above political and partisan ideological dispute.

* John M. Olin Scholar in Legal Studies, American Enterprise Institute for Public Policy Research.

Let me say at the outset that I favor the proposed amendment. The Supreme Court's five-to-four decision in Texas v. Johnson, which holds that flag burning is a mode of expression protected by the First Amendment's guarantee of the freedom of speech seems to me plainly wrong and to rest upon propositions that either are not relevant or that cannot be supported. It is also clear that the matter cannot be cured by statute. Any such attempt would surely be defeated by a holding of unconstitutionality, if the Supreme Court adheres to its rationale in Johnson. It is idle to suppose that a constitutional ruling can be reversed by statute and it would be dangerous to try. Should such an attempt succeed, the way would be open to alter other constitutional rulings by statute. That is the very thing that the judicial application of the Constitution, as elaborated in Chief Justice John Marshall's 1803 decision in Marbury v. Madison, holds may not be done.

I turn first to the Supreme Court decision that created the problem we face.

The first proposition relied upon by the five-Justice majority in Johnson was: "If there is a bedrock principle underlying the First Amendment, it is that Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." That proposition certainly expresses First Amendment doctrine. The difficulty is that the "bedrock principle" had no

application to the question before the Court. The Texas statute in question did not suppress any idea at all.

Johnson's idea, if it deserves the respect of being called an idea rather than an emotion, was simply hatred of the United States. He was and is entirely free to hate the United States and to express his hatred in a hundred ways other than by burning the flag. In fact, he and his fellow demonstrators did express their hatred by chanting, "America, the red, white, and blue, we spit on you," while the flag burned. He was not prosecuted for that chant and no one suggests that he could be. The First Amendment guarantees his freedom to speak in that manner, though most of us find his words not only "offensive and disagreeable" but extraordinarily so. Under the Texas statute Johnson was free to engage in any form of rhetoric about the flag and the Republic it represents, to use any form of insulting gestures he cared to. He was simply not free to desecrate the flag physically.

While the First Amendment allows the expression of any opinion or emotion, it has never been interpreted to allow any and all means of expressing them. Even after the Johnson decision, one supposes, the federal government or a state government could punish such actions as delivering a political message over television in obscenities, or expressing a political viewpoint from a sound truck at two o'clock in the morning in a residential neighborhood, or

4

making a point by engaging in indecent public behavior. Yet if the rationale of the Johnson decision were consistently applied, none of these actions could be prevented or punished.

Those are all powerful methods of expressing an idea or an attitude. They are all strong methods of self-expression. Why does the First Amendment allow them to be punished? Simply because the community finds them extremely offensive methods of making points that could be made in hundreds of other ways. Simply because putting out of bounds a few means of expression in no way threatens the American system of freedom of speech.

We know that the physical desecration of the American flag is like the use of obscenities or of indecent behavior to express an idea. We know that because of the wave of public outrage that followed the Supreme Court's decision in Johnson. We know that because forty-eight States and the United States had enacted laws prohibiting the physical desecration of the flag.

The other proposition upon which the Supreme Court majority rested fares no better. That proposition was the familiar "slippery slope" argument. That argument has no validity when there is a clear distinction between two cases so that the Court can easily decide one without committing itself to decide the other in the same way. Justice Brennan's opinion for the majority stated:

To conclude that the Government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries. Could the Government, on this theory, prohibit the burning of state flags? Of copies of the Presidential seal? Of the Constitution? In evaluating these choices under the First Amendment, how would we decide which symbols were sufficiently special to warrant this unique status? To do so, we would be forced to consult our own political preferences, and impose them on the citizenry, in the very way that the First Amendment forbids us to do.

This argument is quite wide of the mark. The Justices need not have consulted their own political preferences to decide that the flag is a unique symbol any more than they need consult their own moral and aesthetic preferences to decide that government may punish indecent behavior. The community's standards decide the question for the Court in both instances.

No other object remotely resembles the flag as the symbol of our identity as a nation. That is apparent from objective considerations. No question of the Justices' "preferences," political or otherwise, need be involved.

6

Forty-eight States and the United States have not enacted statutes prohibiting the burning of copies of the Constitution. Copies of the Constitution do not fly over our public buildings and are not lowered to half mast when a national leader dies. Nobody salutes the Presidential seal. Nobody pledges allegiance to the Presidential seal. Marines did not fight their way across Iwo Jima and up Mount Suribachi to raise the flag of Rhode Island, a copy of the Constitution, or the Presidential seal. The American people have thus demonstrated through consistent conduct over many years that the flag of the United States is a symbol different from all others.

We hear a good deal about the dangers of amending the Constitution. I put aside for the moment the fact that the Constitution itself explicitly provides for its own amendment and that the process was deliberately made so difficult and lengthy that no danger of rash action is to be apprehended. The point I wish to make is that, in a very real sense, what is proposed is less an amendment to the Constitution than an amendment to the opinion of the Court which a change of one vote would have caused to go the other way. It is highly unlikely that any previous Supreme Court would have ruled as this one did. Chief Justice Rehnquist's dissent notes that in the past Chief Justice Earl Warren and Justices Hugo Black and Abe Fortas all stated very forcefully that there was no First Amendment problem with punishing the desecration of the

7

flag. Those were liberal Justices and they were also very protective of free speech. Indeed, Hugo Black described himself as a First Amendment absolutist. The flag desecration amendment is not actually an amendment to the Constitution but rather a restoration of the Constitution.

That is why I favor the proposed constitutional amendment which is both vital and narrowly drawn to prohibit only the physical desecration of the American flag.

It has been said, however, that the problem may be cured by statute rather than by adopting a constitutional amendment. That is not the case. No statute can be drawn that will cure the problem created by Texas v. Johnson. Before going to that, however, I want to say that the idea of a statute circumventing a constitutional decision is not only bizarre but, if it were possible, would constitute a dangerous expedient. It would mean that Congress could override the Supreme Court by simple majorities, if the President acquiesced, and by two-thirds votes, if the President objected. That is not the system of government prescribed by the Constitution. It would be a vehicle for quick and passionate response to unpopular Court decisions even if those decisions were entirely correct.

The Constitution, by contrast, prescribes a lengthy deliberative process to ensure that not just a majority but a supermajority of the American people agrees with the proposal. Two-thirds of each House of Congress must propose

the amendment and it must then be ratified by three-quarters of the States. That ensures that no hasty, ill-considered corrections will be adopted. But the Constitution also thereby recognizes that when such a procedure is followed, it is proper to rectify what the Court has done. That has been done before in our history and no one has ever regretted it.

But the main point is that no statute can undo Texas v. Johnson. In the first place, any statute passed in response would be seen, correctly, as an attempt to change the result of that case, no matter how neutrally the statute was worded. Second, the legislative history of the statute would reveal that it was designed to prevent the expression of an idea by desecrating the flag. Members of Congress can hardly be expected unanimously to tell falsehoods about why they are passing a statute. The Court has in the past looked to legislative history for evidence of an unconstitutional motivation. Third, Congress could articulate no reason for prohibiting the defacement or destruction of the flag other than the offensiveness of the mode of expression. That means that when Johnson burned his next flag as a method of expressing his hatred of the United States the lawyer defending the statute would be required to articulate a compelling governmental interest. He would be unable to do so since the only governmental interest would be in preventing flag burning as a means of expression, and that is precisely what Johnson held unconstitutional. Fourth, lower

9

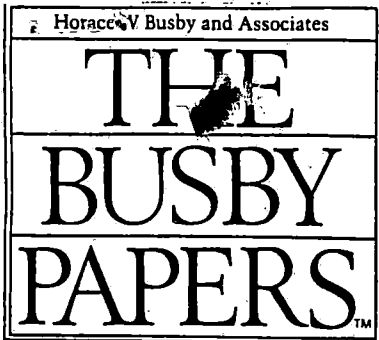
courts would declare the statute unconstitutional on the basis of Johnson and the Supreme Court might not review those decisions. After several years we would be right where we are now.

It has been suggested that a statute such as one prohibiting an open fire in any public place would be neutral as to expressive and non-expressive conduct and hence would pass muster under the Johnson ruling. Quite aside from the points just made, the statute would be utterly ineffective since there are many ways of desecrating the flag other than burning it. For example, in Chicago the flag was placed on the ground for people to walk on. No statute can list all the ways of desecrating a flag without mentioning desecration or showing on its face that desecration is the evil aimed at.

Consideration of a statutory response to the Johnson case will produce delay and nothing else. The responsible course is for Congress to consider the constitutional amendment and not be deflected by fruitless discussion of a statute that is certain to fail.

I urge your favorable consideration of an amendment that would restore the rights of the American community without harming in the slightest the freedom of speech that is central to all other freedoms.

ROBERT HERON BORK, circuit judge, lawyer, educator; University of Chicago, B.A. 1948, J.D. 1953. Born March 1, 1927, Pittsburgh, Pennsylvania. Married, Claire Davidson, June 15, 1952, died, December 8, 1980; children, Robert H., Jr., Charles E., and Ellen E. Married, Mary Ellen Pohl, October 30, 1982. Admitted to the Illinois bar, 1953, D.C. bar, 1977. Associate and partner of the firm Kirkland, Ellis, Hodson, Chaffetz & Masters, Chicago, Illinois, 1955-1962; associate professor, Yale Law School, 1962-1965, professor of law, 1965-1975, on leave, 1973-1975, Chancellor Kent professor of law, 1977-1979, Alexander M. Bickel professor of public law, 1979-1981; Solicitor General of the United States, Department of Justice, Washington, D.C., 1973-1977, acting Attorney General of the United States, 1973-1974; resident scholar, American Enterprise Institute for Public Policy Research, Washington, D.C., 1977, adjunct scholar, 1977-1982; partner, Kirkland & Ellis, Washington, D.C., 1981-1982; Circuit Judge, United States Court of Appeals for the District of Columbia Circuit, 1982-1988; nominated by President Reagan to position of Associate Justice, Supreme Court of the United States, July 1, 1987; confirmation denied by Senate, October 23, 1987; resigned as Circuit Judge, United States Court of Appeals for the District of Columbia Circuit, February 5, 1988; appointed John M. Olin Scholar in Legal Studies, American Enterprise Institute for Public Policy Research, Washington, D.C., February 8, 1988. Member of the Presidential Task Force on Antitrust, 1968; consultant, Cabinet Committee on Education, 1972; trustee of the Woodrow Wilson International Center for Scholars, 1973-1978; fellow, American Academy of Arts and Sciences, 1981-present; recipient, Francis Boyer Award, American Enterprise Institute for Public Policy Research, 1984; member, Board of Governors of the Smith Richardson Foundation, Inc., 1988; member, Legal Advisory Board of the National Legal Center for the Public Interest, 1988; member, Board of Directors of the Institute for Educational Affairs, 1988; member, Development Board of The Federalist Society for Law and Public Policy Studies, 1988; appointed by President Reagan to the Permanent Committee for the Oliver Wendell Holmes Devise, January 19, 1989. Honorary degrees: Doctor of Laws, Creighton University School of Law, 1975; Doctor of Humane Letters, Wilkes-Barre College, 1976; Doctor of Laws, Notre Dame Law School, 1982; Juris Doctor, Honoris Causa, Brooklyn Law School, 1984. Active duty, United States Marine Corps Reserve, 1945-1948, 1950-1952. Author: The Antitrust Paradox: A Policy at War with Itself (1978); The Tempting of America: The Political Seduction of the Law (Nov. 1989).



THIS ISSUE ANALYSIS PAPER TREND PAPER PERSPECTIVE PAPER

VOLUME VIII - 32
ISSN 0738-5767

6.30.89

MEMORANDUM FOR CLIENTS FROM HORACE W BUSBY

RE: Patriotism

It began nine days in advance when the Marines staged at the Corps's Washington Barracks one of their often spine-tingling evening parades for President George Bush. It won't end until the night of the Fourth when the last rocket is fired in the traditional display on the Mall around the Washington Monument.

This is the capital city's high season, a time for an outpouring of a special sort of spontaneous patriotism which has no parallel in other world capitals. Over this year's long holiday weekend, hundreds of thousands of persons, mostly in family groupings, will stream onto Washington's sidewalks and into its parks, squares and ceremonial malls to celebrate the 213th Fourth of July. Nowhere else in the nation is there an observance which quite compares with this.

I.

What happens in Washington is not merely the keeping of a national holiday. Over the past decade, it has become a world holiday, one for all people.

The city's hotels and hostels swell with young visitors. Many, of course, are Americans but there is a surprisingly large presence of youths from abroad, from Europe, Asia, Australia, even some from Russia and the Bloc nations. For many of them, the visit is, they say, fulfillment of a lifelong dream: they know about the fireworks and the bands, but the ideas embodied in America's national day, like the unique "Liberty" statue erected in Tiananmen square, are a powerful magnet.

Some of the capital's veterans see it in these terms. So long as the United States' relations with the world were primarily based on foreign aid programs, there was none of this bonding; everything was government-to-government. But now governments are out of the way. America has a new, more universal and far more alluring meaning. It is the excitement of a freer world a-borning that attracts the young to Washington to celebrate the Fourth of July.

II.

There is still another meaning not to be overlooked. In the early years of the century, displays of patriotism were the ally of the native born. Bands, flags, parades and oratory served to remind, subtly and not-so-subtly, the immigrants from the Old World that this was not -- and, inferentially, would never be -- their country. Theodore Roosevelt played on a popular chord when he railed on against "hyphenated Americans," even as the tide of aliens ran at the flood.

Now, the tables are turned. In the capital as in other cities, the Fourth of July is the great holiday of the new ethnics. The Spanish in the District, the many different Asians in the metropolitan suburbs dominate the day's observances. Aged grandparents and new-born infants in tow, their families occupy the open spaces, tossing frisbees, heading soccer balls, cooking favored native foods. Music is everywhere from everywhere. It is the happiest of times.

Yet what one sees are scenes from the future, scenes from a nation -- and a population -- undergoing the greatest change since the nation's birth. It does not have to be and probably it won't be in the end but much of America is, by way of present reckoning, moving inexorably toward a kind of Third World status.

That is the great challenge of the third American century. It is one reason that the exuberant state of American patriotism is so important.

III.

History affords no example of the successful governance of a nation so diverse in its population as the United States. Before a central government can prevail, in war or peace, it must achieve unity among its populace. The commonality of heritage, culture and language affords a basis for such unity in nations such as France and Japan. For this country, the appeal of patriotism is critical.

Twice, in the world wars of this century, government has resorted -- as a matter of necessity -- to the arts and crafts of propaganda to stir alive the forces of patriotism. But that is an option less and less available. Those Americans born in the 1920s and now well into their '60s accepted indoctrination by their government compliantly, as those born since Pearl Harbor refuse to do. There was, in those instances, the threat of defeat and subjugation by foreign powers. But there are, for now, no threats of such magnitude.

There lies the test of this period. During the earlier years of the 1980s, there was a burst of patriotism, but there were questions about its permanence. President Reagan was artful in his evocations of patriotism but always in the context of rallying the populace to "stand tall" against threats from abroad. Since his departure -- more precisely, since his red, white and blue campaign of 1984 -- some have feared that the changes in the world's prospects might cause that spirit to tail off, weakening a strength essential to American governance.

IV.

On the evidence, thus far, that is not happening. Patriotism and optimism go hand in hand. With American optimism still running strong, patriotism seems to grow as a strong force, stronger because it is welling up from the people themselves rather than being urged upon them by government propaganda.

In that context, there has appeared this Fourth of July a curious sort of conflict and challenge: the Supreme Court's decision that burning the flag is a form of expression protected by the First Amendment to the Constitution. Had such a decision come down when Americans now in their 60s were still in the electoral majority, outrage would have been swift, angry and remorseless. Any sanctioning of such desecration of a national symbol would have been unacceptable. Now, though, new generations form the majority, generations conditioned by very different life experiences. The reaction to come is far from predictable.

It may be prophetic that the flag-burning decision did not leap immediately to the top of public concerns. At the moment, the Court's abortion decision is securely in place as the supremely important issue of the times among both pro- and anti- forces; both sides promise unprecedented public demonstrations. In the values of those born since Pearl Harbor, the flag is not nearly so critical a concern as abortion. The Chinese government's repression of demonstrators in Beijing is having an effect as well: in an essentially conservative reaction, that episode is cited repeatedly in man-on-the-street interviews by younger Americans wary of giving government more power to repress individual expression. There is quite a lot of doubt about how far a constitutional amendment will go.

By the flag-burning decision, as well as others in its recent series of provocative findings on subjects from equal opportunity to porno phone services, the Supreme Court's actions serve to remind that social and cultural issues are still in the forefront of concerns of a greatly changed society. It has been the party's inattentiveness to such concerns that has cost the Democrats heavily. Older hands raise this consideration: after World War II, southern states, such as Georgia, acted to put down religious bigotry with laws prohibiting burning of crosses. Would this court's new stance be unsympathetic to such laws now?

V.

Whatever else, the Fourth of July is a time when Washington focuses on the nation's military. All branches of the services are kept busy providing color guards or other units for the region's many patriotic observances. There are, as well, fly-overs, precision drill teams and countless more performances in demand.

The quality and character of the personnel, men and women, are causes for pride. Never in history has any other nation had officers and enlistees of such high educational attainment. Government-paid college educations are, in fact, a principal recruitment incentive, one reason neither Mr. Reagan nor Mr. Bush has had to face the societally-troubling matter of reinstating the draft.

But change is enveloping the services. This is evident at reviews where the women sometimes appear in pregnancy uniforms. It is less visible but no less a new reality that the conference rooms in the Pentagon, as well as committee rooms on Capitol Hill, are given over increasingly to sessions about reducing the ranks to reflect the changing force requirements of the 1990s and beyond. There is an old caution which infuses such discussions: it is part of the lore, political and military, that hasty reduction of American forces after World War II was a major influence contributing to the rise of Soviet aggressiveness. This time, Washington decision-makers know infinitely more than in 1945 and 1946 about the status of Soviet forces, are far better able to assess Soviet strength.

Now, unlike any other time before, there is no political pressure to shrink the services and "bring the boys home." Quite the contrary, neither "the boys" nor their families are anxious for their service to be ended. Further, as a function of the new patriotism, military careers now enjoy high public prestige.

VI.

Now, as when Washington became the capital, the city's favorite arm of the uniformed services is the Marine Corps. When John Adams and Thomas Jefferson occupied the White House, Marines were the sole guard of the seat of the new

government. The base established by the Marines then in southeast Washington -- so they might repel any British forces which sailed up the Anacostia River -- is still in operation; the residence of the Corps commandment there is the oldest continuously-in-use public building in the capital.

The Marines are sometimes the despair of other services. More colorful, showier, more often on display at the White House and other public functions, they have a way of winning favor in the political community. Harry Truman, a field artillery captain in World War I, never overcame a visceral dislike of Marines, once denounced them for their skills at lobbying Congress. Otherwise, though, the occupants of the White House tend to hold them high in favor. One reason was on display at the start of the Fourth of July observance in Washington.

VII.

Some years ago, the Marines instituted at their Washington Barracks what is regarded as the best show in the capital: a weekly "Evening Parade," complete with the Marine Band, Drum and Bugle Corps, trumpeters atop the four-story barracks, a silent drill team and more. It is a military spectacular.

This year, the Marines staged a showing for the new Commander-in-Chief and a few of his guests, as well as fellow officers and busloads of enlisted Marines and their spouses. For many in attendance, it was a "chance to see the President," always a sought-after privilege in the capital. For the handful of political types -- about 10 members of Congress and assistants from other White Houses back to the Eisenhower years -- it was a chance to watch Mr. Bush at work without pressure.

In such a private situation, the 41st president is a man at ease, much more comfortable in his role than several of his predecessors. Political families must "work the crowd," moving among the guests at such an event to shake hands, engage in brief cordial exchanges, disengage gracefully from any who want to make a speech.

The Bushes go their separate ways. Barbara Bush, forever upbeat, needs no one to guide her through friendly faces. Her husband takes longer. Where Lyndon B. Johnson went down crowd rows, seizing extended hands and throwing startled guests forward with such force as to send some to the ground, George Bush seems to have all the time in the world; he shakes hands easily, converses patiently and sometimes shakes hands again before he moves on down the line.

Unlike virtually all other presidents, Mr. Bush does this without an aide at his side cueing him on names, whispering bits of identification. As one Cabinet officer present observed, "The President knows more people than anyone working for him." On this occasion, he had at his side his eldest grandson, also a George. After greeting guests himself, Mr. Bush introduced young George, offering the lad an often fulsome explanation of who the individual was, how and where they had first known each other and other details of interest to a 13-year-old. One Congressman could not conceal his envy of this skill. "How does the man do it?" he asked. "He even knew my district -- and I am a Democrat."

Such matters may seem small, but actually they are not. At this remarkable season in world affairs, leaders in many other lands are having to learn under duress what Mr. Bush knows instinctively from the traditions of his office: that political power is secure and stable in proportion to the respect which the powerful show for the people they serve.

Horace W Busby
Publisher

Margaret Mayer
Editor

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

June 30, 1989

REMARKS BY THE PRESIDENT
FOR A CONSTITUTIONAL AMENDMENT
TO PROTECT THE FLAG

The Iwo Jima Memorial
Washington, D.C.

9:23 A.M. EDT

THE PRESIDENT: Senator Bob Dole, thank you, sir. (Applause.) Thank you all very, very much. Once again, my thanks to the magnificent Marine Band. Senator Dole, thank you, sir, and Senator Dixon -- appreciate your coming all this way to join us on such short notice. To Congressmen Michel, and Montgomery, my sincere thanks, and all the Members of the Senate and House that are here. Secretary of Defense and other distinguished civilians, the Defense Department, and of course, I salute the members of the Joint Chiefs who have joined us here. I might say I'm delighted to see Admiral Crowe back from his very successful visit to the Soviet Union. Welcome back to the U.S. of A., Bill. (Applause.)

And also our fellow citizens -- citizens of this, the freest, most generous nation on God's Earth. Thank you for joining us.

And we stand today before a symbol of hope -- and of triumph. All across America -- above farmhouses and statehouses, schools and courts and capitals -- our flag is borne on the breeze of freedom.

And it reminds Americans how much they've been given -- and how much they have to give. Our flag represents freedom, and the unity of our nation. And our flag flies in peace, thanks to the sacrifices of so many Americans.

A woman in Florida recently shared with me a letter written by her cousin, a young soldier named Wayne Thomas. On December 16, 1966, he wrote, "Every time we go out on patrol, it gets a little scarier. The only thing that gives us a sense of security is when we walk back into camp and our flag is still flying high."

She told me that Wayne stepped on a land mine eleven days later, and was killed. He was 18 years old. He understood this banner of freedom -- and ultimately gave his life for the flag -- to give others the freedom that it represents.

You know, she also pointed out to me, parenthetically, that she was a registered Democrat. And to me, that simply states that patriotism is not a partisan issue -- it's not a political issue -- (applause) -- our purpose today transcends politics and partisanship.

And we feel in our hearts -- and know from experience -- that the surest way to preserve liberty is to protect the spirit that sustains it. And this flag sustains that spirit. And it's one of our most powerful ideas. And like all powerful ideas, if it is not defended, it is defamed.

To the touch, this flag is merely fabric. But to the heart, the flag represents and reflects the fabric of our nation -- our dreams, our destiny -- our very fiber as a people.

MORE

And when we consider the importance of the Colors to this nation, we do not question the right of men to speak freely. For it is this very symbol, with its stripes and stars, that has guaranteed and nurtured those precious rights -- for those who've championed the cause of civil rights here at home, to those who fought for democracy abroad.

Free speech is a right that is dear and close to all. It is in defense of that right -- and the others enshrined in our Constitution -- that so many have sacrificed.

But before we accept dishonor to our flag, we must ask ourselves how many have died following the order to "Save the Colors!" We must ask how many have fought for the ideals it represents. And we must honor those who have been handed the folded flag from the casket at Arlington.

If the debate here is about liberty, then we cannot turn our backs on those who fought to win it for us. We can't forget the importance of the flag to the ideals of liberty and honor and freedom. To burn the flag, to dishonor it, is simply wrong. (Applause.)

And today, we remember one of the most vivid images of our flag -- the one you see behind me -- Joe Rosenthal's stunning photograph immortalized in bronze.

As you view this memorial, think of its flag, and of these men and of how they honor the living, and the dead. Remember their heroism, and their sacrifice -- giving of themselves, and others of their lives. Fighting bravely -- daring greatly -- so that freedom could survive.

The Battle of Iwo Jima wrote one of the greatest chapters in the story of America. And even now, it humbles us. Inspires us. Reminds us of how Henry Ward Beecher said: "A thoughtful mind, when it sees a nation's flag, sees not the flag only, but the nation itself."

The nation itself was ennobled by the Battle of Iwo Jima. It was fought in early 1945 -- fought on eight square miles of sand, caves, and volcanic rubble. And it cost our Armed Forces almost 7,000 killed, and more than 19,000 wounded -- almost a third of the landing force. But -- like Tarawa and Guadalcanal, and the Philippines before -- it had to be won. For victory at Iwo would be yet another step towards bringing that ghastly war to a close.

These Marines wrote a profile in courage. Enduring a torrent of shells -- pushing their way up that extinct volcano -- and they stormed Mount Suribachi. And when they reached the top, the five men behind me raised a piece of pipe upright, and from one end flew a flag. And in the most famous image of World War II, a photograph was taken of these men. And that flag. And what that flag embodies is too sacred to be abused. (Applause.)

As Justice Stevens stated so eloquently in his dissenting opinion in the recent Supreme Court case, "The ideas of liberty and equality have been an irresistible force in motivating leaders like Patrick Henry, Susan B. Anthony, and Abraham Lincoln, schoolteachers like Nathan Hale and Booker T. Washington, the Philippine Scouts who fought at Bataan, and the soldiers who scaled the bluff at Omaha Beach. If those ideas are worth fighting for -- and our history demonstrates that they are -- it cannot be true, he says, that the flag that uniquely symbolizes their power is not itself worthy of protection from unnecessary desecration." The Justice is right. (Applause.)

And today, I am grateful to the leaders here and the leaders of the Congress with us in this audience who have proposed a Constitutional Amendment to protect the flag. Its language is stark,

and it's simple, and to the point: "The Congress and the States shall have power to prohibit the physical desecration of the Flag of the United States." Simple, and to the point. This Amendment preserves the widest conceivable range of options for free expression. It applies only to the flag -- the unique symbol of our nation.

Senator Dole, Senator Dixon, Congressmen Michel, and Montgomery -- I know that you have already taken the lead, but please take the lead, working with others here today in moving this bill forward. With the help of you Members of the Senate and House here today -- and with the help of the many more of your colleagues who couldn't be with us today -- I am confident that we will succeed. I've seen predictions that this will take a long time. It need not. It is simple, to the point, direct, and it addresses itself to only one thing -- our flag will not be desecrated. (Applause.)

Let me close with a letter from a man named Augusto Moreno. Born in Argentina -- now a naturalized citizen -- he likes to say that he's more proud to be an American than most of those born in this country. I'm not sure he's right about that, but that's what he likes to say, anyway. He's very serious when he states, "I am proud to say that my blood is represented on our flag. I was wounded while fighting for democracy with the United States Marine Corps in Vietnam. I am now a disabled veteran. I am sure that there is not one day that goes by without you seeing the faces of those who were not so fortunate to return as you and I."

And he says, "We must continue our struggle to protect the flag now, as when we were in uniform -- if not for us, then for those fallen veterans. We've been entrusted by those who have fought for freedom before us to protect our flag. I cannot allow anyone to desecrate the only symbol of freedom in the world."

And he ends saying, "Sir, I realize that you're a Navy veteran -- but Semper Fi anyway." (Laughter.) Those darn Marines, I'll tell you.

Well, Mr. Moreno, you have our word on it -- for the sake of the fallen -- for the men behind the guns -- for every American -- we will defend the flag of the United States of America.

Than you. God bless this flag. And God bless the United States of America.

END

9:35 A.M. EDT

THE WHITE HOUSE
WASHINGTON



7/10/89

Kristin:

DD just got this memo Friday afternoon before he left. He says there's not much we can do on it immediately.

But, that you should assign someone to be working on an op ed while they're gone to have ready when the issue come up again in a few weeks.

All he said was an op ed on the flag.

Thanks and please call if you have questions.

Sara M. *SM*

THE WHITE HOUSE
WASHINGTON

DATE: 7/7/89

NOTE FOR: THE CHIEF OF STAFF
DAVID DEMAREST ✓

The President has reviewed the attached, and it is forwarded to you for your:

information
action

Thank you.

James W. Cicconi
Assistant to the President
and Deputy to the Chief of Staff
(x-2702)

cc: C. Boyden Gray - FYI
Marlin Fitzwater - FYI

THE WHITE HOUSE
WASHINGTON

DATE:

7-6-89

FROM THE PRESIDENT

TO:

John Sununu

Please ask Demarest or someone to get a good
op-ed piece in for the Post's Sunday
edition... these
quotes from Warren and black are very helpful

Bill Rogers?

Len Garment??

someone with standing amongst the elite.

gb .

cc: Boyden Gray

THE WHITE HOUSE

WASHINGTON

July 6, 1989

NOTE FOR THE PRESIDENT

FROM: C. BOYDEN GRAY *CBG*

As indicated on the phone, attached is today's Op-Ed piece, together with Justice Fortas's dissent in the Street v. New York case referred to in the editorial.

Although the Street case involved flag burning, the smartest and most liberal law clerk (who clerked for Justice Harlan) wrote a brilliant opinion that turned the case into one that did not involve flag burning, in order to avoid (successfully) a decision on the issue. Nevertheless, there were four dissenters, including the Chief Justice and Justice Fortas, who said the case clearly involved flag burning, which could in turn be punished by the government.

On the Flag, The Justices Make Dukakis's Mistake

By L. GORDON CROVITZ

One week after Supreme Court justices ruled that burning the flag doesn't amount to "fighting words," a scrap outside the Arkansas state capitol proved them wrong. A fringe candidate for governor, Robert McIntosh, was set to burn a flag until a group of onlookers rushed him. Auto shop owner Brett Keathley threw a punch at Mr. McIntosh, which gave state police the excuse to arrest both for disorderly conduct. "If it causes me to be arrested, I'll do this every time," Mr. Keathley said.

Similar incidents occurred around the country on July 4. A melee following a left-wing group's effort to burn the flag closed New York's Washington Square Park. Pro-abortion activists in Minneapolis were attacked after burning a flag. Veterans in Albany repeatedly knocked the lighter away from a would-be flag burner.

The broad public outrage since the court ruling in *Texas v. Johnson* may mean the justices so miscalculated how Americans react that if they get another flag-burning case they might come out the other way. This is not because justices are supposed to follow the polls or pander to the majority. Instead, since their approach in such cases is to balance free speech with the likelihood of inciting a breach of the peace, the court's assumption that the average American wouldn't be outraged by someone torching Old Glory means the justices erred as a matter of law.

Justice William Brennan's majority opinion acknowledged that the fighting words doctrine means that the First Amendment does not protect speech or symbolic speech if the expression "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." He was bound by the unanimous Supreme Court opinion in 1942 that upheld the conviction of a demonstrator who had called a local marshal a "God-damned racketeer" and a "damned fascist." *Chaplinsky v. New Hampshire* said that there's no constitutional protection for "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

Provocative speech — or provocative "symbolic speech"—thus does not get absolute First Amendment protection. "Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality," the 1942 case held.

But Justice Brennan wrote that it would be unreasonable to think anyone would be incited by Gregory Lee Johnson's burning of the flag at the 1984 Republican convention. He said that burning the flag does not "fall within that small class of 'fighting words' that are 'likely to provoke the average person to retaliation, and thereby cause a breach of the peace'."

The Brennan opinion assumed "No reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the federal government as a direct personal insult or an invitation to exchange fisticuffs." Actually, one reason no one tried to attack Mr. Johnson may have been that he was surrounded by police officers, who quickly arrested him when he burned the flag.

Chief Justice William Rehnquist's dissent pointed out that states have upheld laws against burning the flag because such desecration is so inherently obnoxious that it will naturally lead to a breach of the peace. He argued that "flag burning is the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others."

Why did the majority of justices in the flag case, including conservatives Antonin Scalia and Anthony Kennedy, misunderstand how the "average American" views the flag? It may be the same miscalculation Michael Dukakis made when he underestimated the Pledge of Allegiance. Or perhaps the court confused the symbol with what it symbolizes. In writing that the flag deserves no protection from desecration, Justice Brennan noted that the Founders "were not known for their reverence for the Union Jack." This misses the point. The Texas law outlawed the burning of the U.S. flag, not the Hammer and Sickle.

Ironically, the justices may have misunderstood how people would react to the burning of the flag partly because there are so few flag burners these days. The situation was different in the 1960s of civil rights and antiwar demonstrations, when a more liberal court heard another case involving flag burning. In that case, *Street v. New York*, the flag burner was freed because the court held that he was prosecuted for his words, not his actions. But the justices who thought he was convicted for burning the flag dissented, saying this was not constitutionally protected.

Among the justices who thought laws could protect the flag was liberal Chief Justice Earl Warren. He wrote that "the states and federal government do have the power to protect the flag from acts of desecration and disgrace." Likewise, Justice Hugo Black said that "it passes my belief that anything in the federal Constitution bars a state from making the deliberate burning of the American flag an offense." Interestingly, antiwar activist Tom Hayden, now a California legislator, last week voted for a constitutional amendment against flag burning because such actions incite violence—and he should know.

There is a problem with a legal doctrine that depends on what nine cloistered justices think makes the average American fighting mad. The justices might have been wiser to give more credence to the state laws and federal statutes that prohibit desecration of the flag, laws written by legislators who think burning the flag amounts to fighting words. Whether or not a constitutional amendment is the proper response, the fact of public outrage over the flag decision is itself good evidence that the justices got the law wrong.

Mr. Crovitz is assistant editor of the Journal's editorial page.

STREET V. NEW YORK.

FORTAS, J., dissenting.

The Court is obviously wrong in reversing the judgment below because it believes that Street was unconstitutionally convicted for speaking. Reversal can follow only if the Court reaches the conviction for flag burning and finds that conviction, as well as the assumed conviction for speech, to be violative of the First Amendment.³ For myself, without the benefit of the majority's thinking if it were to find flag burning protected by the First Amendment, I would sustain such a conviction. I must dissent.

MR. JUSTICE FORTAS, dissenting.

I agree with the dissenting opinion filed by THE CHIEF JUSTICE, but I believe that it is necessary briefly to set forth the reasons why the States and the Federal Government have the power to protect the flag from acts of desecration committed in public.

If the national flag were nothing more than a chattel, subject only to the rules governing the use of private personalty, its use would nevertheless be subject to certain types of state regulation. For example, regulations concerning the use of chattels which are reasonably designed to avoid danger to life or property, or impingement upon the rights of others to the quiet use of their property and of public facilities, would unquestionably be a valid exercise of police power. They would not

³ Arguably, under today's decision any conviction for flag burning where the defendant's words are critical to proving intent or some other element of the crime would be invalid since the conviction would be based in part on speech. The Court disclaims this result, but without explaining why it would not reverse a conviction for burning where words spoken at the time are necessarily used to prove a case and yet reverse burning convictions on precisely the same evidence simply because on that evidence the defendant might also have been convicted for speaking. The Court's seemingly narrow holding may be of potentially broader application, particularly in view of *Thomas v. Collins* as now rewritten by the Court.

FORTAS, J., dissenting.

304 U. S.

necessarily be defeated by a claim that they conflicted with the rights of the owner of the regulated property. See, e. g., *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926); *Berman v. Parker*, 348 U. S. 26 (1954).

If a state statute provided that it is a misdemeanor to burn one's shirt or trousers or shoes on the public thoroughfare, it could hardly be asserted that the citizen's constitutional right is violated. If the arsonist asserted that he was burning his shirt or trousers or shoes as a protest against the Government's fiscal policies, for example, it is hardly possible that his claim to First Amendment shelter would prevail against the State's claim of a right to avert danger to the public and to avoid obstruction to traffic as a result of the fire. This is because action, even if clearly for serious protest purposes, is not entitled to the pervasive protection that is given to speech alone. See *Cantwell v. Connecticut*, 310 U. S. 296, 303-304 (1940). It may be subjected to reasonable regulation that appropriately takes into account the competing interests involved.

The test that is applicable in every case where conduct is restricted or prohibited is whether the regulation or prohibition is reasonable, due account being taken of the paramountcy of First Amendment values. If, as I submit, it is permissible to prohibit the burning of personal property on the public sidewalk, there is no basis for applying a different rule to flag burning. And the fact that the law is violated for purposes of protest does not immunize the violator. *United States v. O'Brien*, 391 U. S. 367 (1968); see *Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490 (1949).

Beyond this, however, the flag is a special kind of personalty. Its use is traditionally and universally subject to special rules and regulation. As early as 1907, this Court affirmed the constitutionality of a state statute making it a crime to use a representation of the United

FORTAS, J., dissenting.

States flag for purposes of advertising. *Halter v. Nebraska*, 205 U. S. 34 (1907). Statutes prescribe how the flag may be displayed; how it may lawfully be disposed of; when, how, and for what purposes it may and may not be used. See, e. g., 4 U. S. C. § 3; 56 Stat. 377, c. 435, 36 U. S. C. §§ 172-177. 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, as *Halter v. Nebraska*, *supra*, held, these special conditions are not *per se* arbitrary or beyond governmental power under our Constitution.

One may not justify burning a house, even if it is his own, on the ground, however sincere, that he does so as a protest. One may not justify breaking the windows of a government building on that basis. Protest does not exonerate lawlessness. And the prohibition against flag burning on the public thoroughfare being valid, the misdemeanor is not excused merely because it is an act of flamboyant protest.

((Grant))
July 19, 1989
Draft one
A:flagburn

PROPOSED ARTICLE ON CONSTITUTIONAL AMENDMENT
PROHIBITING FLAG-BURNING
TO BE AUTHORED BY AN ADMINISTRATION SURROGATE

Shocking nature of this decision. Quote Warren and Black, Abe Fortas. All strong protectors of first amendment freedoms. Tell of Charles Fried's reversal before the committee, contradicting his own written testimony because statute position untenable upon reflection.

Statute vs. amendment:

uuu { The average American: outraged, wants flagburning made illegal. Most Americans believe in 1st Amendment but to what extent? Bork on Johnson not prosecuted for chanting, but for flagburning. Hundred other ways to express ideas about America than to burn a flag. Not outlawing opinions, only certain manner of expressing them. Use examples from Bork bottom of page 3 to illustrate "offensive and disagreeable," and slip opinion on bulletin boards on Washington Monument. "Simply putting out of bounds a few means of expression in no way threatens the American system of freedom of speech." Bork. Most Americans find flag burning "offensive and disagreeable" because 48 states and federal gov't have statutes outlawing flag desecration.

Barr top of page 3 on why a statute will not fix the problem
Texas vs. Johnson summary:

Flag burning as expression

Governmental interest in suppression of expression:

- a. preventing breaches of the peace
cannot assume breaches/ not fighting words
- b. preserve symbol of national unity
this is directly related to expression, therefore "most exacting scrutiny"
designation of symbols questioned/slippery slope by
Bork p.6
no separate juridical category for flag

Anti-Statute

Rm 117

Kasterman - Do you believe it is a reasonably close question whether estate would work (re const.)

Fried: "No, not really, Bill Barr made a very devastating attack I don't know what the answers are [to the typos raised by Bill] This was a very powerful argument I wasn't sure before I heard Bill's testimony"

Statute
over by broad

2930

WHITE HOUSE STAFFING MEMORANDUM

DATE: 7/15/89 ACTION/CONCURRENCE/COMMENT DUE BY: MONDAY 7/17 8:00 AM

SUBJECT: DEPARTMENT OF JUSTICE TESTIMONY ON PROPOSED FLAG AMENDMENT

| | ACTION FYI | | | ACTION FYI | |
|----------------|-------------------------------------|-------------------------------------|------------|-------------------------------------|--------------------------|
| VICE PRESIDENT | <input type="checkbox"/> | <input checked="" type="checkbox"/> | MCCLURE | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| SUNUNU | <input type="checkbox"/> | <input checked="" type="checkbox"/> | NEWMAN | <input type="checkbox"/> | <input type="checkbox"/> |
| SCOWCROFT | <input type="checkbox"/> | <input type="checkbox"/> | PORTER | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| DARMAN | <input checked="" type="checkbox"/> | <input type="checkbox"/> | STUDDERT | <input type="checkbox"/> | <input type="checkbox"/> |
| BATES | <input checked="" type="checkbox"/> | <input type="checkbox"/> | UNTERMAYER | <input type="checkbox"/> | <input type="checkbox"/> |
| BREEDEN | <input type="checkbox"/> | <input type="checkbox"/> | _____ | <input type="checkbox"/> | <input type="checkbox"/> |
| CARD | <input type="checkbox"/> | <input checked="" type="checkbox"/> | _____ | <input type="checkbox"/> | <input type="checkbox"/> |
| CICCONI | <input type="checkbox"/> | <input checked="" type="checkbox"/> | _____ | <input type="checkbox"/> | <input type="checkbox"/> |
| DEMAREST | <input checked="" type="checkbox"/> | <input type="checkbox"/> | _____ | <input type="checkbox"/> | <input type="checkbox"/> |
| FITZWATER | <input type="checkbox"/> | <input checked="" type="checkbox"/> | _____ | <input type="checkbox"/> | <input type="checkbox"/> |
| GRAY | <input type="checkbox"/> | <input checked="" type="checkbox"/> | _____ | <input type="checkbox"/> | <input type="checkbox"/> |
| HAGIN | <input type="checkbox"/> | <input type="checkbox"/> | _____ | <input type="checkbox"/> | <input type="checkbox"/> |

REMARKS:

Please provide comments/recommendations directly to Counsel's Office, (x2632) with an info copy to my office. Thank you.
COMMENTS DUE BY 8:00 AM, MONDAY 7/17.

RESPONSE:

James W. Cicconi
 Assistant to the President
 and Deputy to the Chief of Staff
 Ext. 2702

UNCLAS

CLASSIFICATION

M/K

FYI

5

PAGES

DTG

151835Z

RELEASER

J Doyle

CIRCLE ONE BELOW

IMMEDIATE

PRIORITY

ROUTINE

MODE

SECURE FAX

196

ADMIN FAX #

RECORD #

FROM/LOCATION

1. FRAN WESSEL/THE WHITE HOUSE

TO/LOCATION/TIME OF RECEIPT

1. JAMES W. CICCONI/PARIS

2. CHIEF OF STAFF/PARIS

3. ANDY CARD/PARIS

4. DAVID DEMAREST/PARIS

5. MARLIN FITZWATER/PARIS

6. ROGER PORTER/PARIS

7.

INFORMATION ADDRES/LOCATION/TIME OF RECEIPT

1.

2.

SPECIAL INSTRUCTIONS/REMARKS:

The attached has been staffed to your office in Washington.

UNCLAS

CLASSIFICATION

THE WHITE HOUSE
WASHINGTON

July 15, 1989

1989 JUL 15 11:28 AM

MEMORANDUM FOR JAMES W. CICCONI

FROM: C. BOYDEN GRAY *CBG/jps*

SUBJECT: Department of Justice Testimony on Proposed Flag Amendment

Attached for your information is a copy of a memorandum I received from William P. Barr, Assistant Attorney General, Office of Legal Counsel. It outlines his proposed testimony to the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee on Wednesday, July 19 at 9:30 a.m.; however, he must submit the testimony on Monday, July 17 at 9:30 a.m.

Please staff as appropriate and get back to John Schmitz or me with any comments before Monday.



U.S. Department of Justice
Office of Legal Counsel

Office of the
Assistant Attorney General

Washington D C 20530

July 15, 1989

MEMORANDUM TO C. BOYDEN GRAY
Counsel to the President

Re: Testimony on Proposed Flag Amendment

This memorandum is to provide you with an overview of my prepared testimony on the proposed constitutional amendment to prohibit flag desecration. I am scheduled to testify on Wednesday, July 19, before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee. Especially in light of the political sensitivity of this issue, I would welcome any thoughts you have.

I will begin the testimony by observing that the Flag is a unique symbol of our Nation and that it is unquestionably worthy of protection. The people of this Country overwhelmingly agree that the Flag must be protected. They were understandably outraged to be told that the Flag could be burned, and the President shares that sense of violation. The question at hand is simply how to provide the needed protection.

I will point out that two alternative methods of protecting the Flag have been suggested: (1) a neutral statute, and (2) a constitutional amendment that would empower Congress and the States to prohibit those acts they believe desecrate the Flag. I will explain, however, that our analysis convinces us that no statute, however drafted, can prevent the type of intentional flag desecration that outrages the citizens of this Nation, and that we are convinced that a constitutional amendment is necessary. We do not believe this to be an especially close question. If we had concluded that a statute could provide the desired protection, we would have pursued that option.

Turning to the proposed amendment, I will emphasize that the amendment endorsed by the President does not itself prohibit flag desecration; it merely empowers Congress and the States to prohibit legislatively the physical desecration of the Flag, and establishes the limits within which Congress and the States may legislate. Within these broad limits, Congress and the States will be permitted and obliged to draw lines. For example, the legislatures will have to determine how they wish to define

"Flag" and "physical desecration" of the Flag. Additionally, they will have to decide whether to make intent a necessary element of a Flag desecration offense. I will describe the general nature of the decision that will have to be made as to each of these three issues.

In defining "Flag," we believe there are three reasonable lines that could be drawn. First, "Flag" could be defined narrowly to mean only the official, 50-star cloth Flag. Under this definition, however, individuals could simply circumvent any prohibition by burning a flag that is slightly different in an undetectable way from the actual Flag. Thus, we would not be prohibiting acts that are just as offensive to objective onlookers as desecrating the Flag itself. Significantly, Congress recognized this when it enacted the existing federal Flag desecration statute, and did not limit the term "Flag" to the actual Flag of the United States.

A second option would be to define "Flag" as anything that an average person would perceive to be the Flag; thus, "Flag" could include historic versions of the Flag (i.e., a 13-star version) or any flag with a slight variation (i.e., a flag with a stripe missing). Under this option, the protected object would still have to be an actual flag; destruction of a poster, or a painting of the Flag, or painting a picture of the Flag with a swastika on it could not be prohibited because an objective observer would not mistake the object as an actual Flag. The existing federal statute extends beyond this definition as well.

The third possible definition of "Flag," and the one that is used in the existing federal statute, would include any flag, portion of a flag, or any picture or representation of a Flag. This definition would allow the legislatures to protect depictions of the Flag, such as postars, murals, pictures, buttons, and any other representation of the Flag. This definition is reasonable in light of the government's interest in preserving the Flag's symbolic value. It recognizes that the desecration of representations of the Flag can damage that interest as much as desecration of the Flag itself. Senator Biden's statute, as currently worded, would define the Flag in this manner.

I will point out that the amendment would permit the legislatures to define "Flag" as broadly as does the existing federal statute, but I will suggest that they not define it any narrower than in the second definition.

With respect to the phrase "physical desecration," I will emphasize that some physical contact with the Flag is essential; the legislatures would not be permitted to prohibit mere words directed at the Flag, regardless of their offensiveness. The issue will likely be whether the legislatures could prohibit display of the Flag in surroundings they believe unsuitable for the Flag (i.e., inside a massage parlor), or whether they could prohibit only physical acts of abuse upon the Flag itself. I will testify

that we understand the amendment to empower the legislatures to prohibit only actual physical acts of abuse upon the Flag, which could include the physical positioning of the Flag itself (i.e., on the floor), and that they could not prohibit an otherwise customary display merely because of a belief that the particular surroundings do not befit the Flag. We do not believe the Government should be in the position of making value judgments about whether it is demeaning for the Flag to be displayed in particular settings and by particular persons. As long as the Flag is displayed in a customary manner, and not physically mistreated, the amendment would not authorize punishment.

The third issue relates to the actor's state of mind. Both the proposed statute and the amendment would prohibit only voluntary actions; unintended acts could not be punished. For example, one could not be punished for accidentally dropping the Flag or inadvertently stepping on the Flag. The more difficult issue is whether the actor must intend to be contemptuous toward the Flag. We believe Congress and the States would also be free to decide this issue. We suspect that they will usually require that the actor intend to cast contempt. Because the overwhelming number of physical acts of concern to us are intended to express contempt for the Flag, we would not be especially troubled were they to choose to prohibit only those acts that were intended to cast contempt. Nevertheless, the legislatures may choose to prohibit some acts without regard to the actor's intent.

We think that offering the legislatures the option of prohibiting only intentionally contemptuous, physical desecration represents a significant advantage over the statute proposed by Senator Biden and others. Their statute would require that the Government prohibit acts without regard to whether they cast contempt. Thus, a child who innocently steps on a flag, a person who crumbles a Fourth of July flag-decorated paper cup, and a veteran who burns an old Flag out of reverence and respect would all presumably be prosecutable under Senator Biden's statute. Indeed, this absurdity in the statute is further evidence of the reasonableness of a constitutional amendment.

In sum, the Michel-Montgomery amendment confers substantial discretion on Congress and the States to determine precisely the acts that are to be prohibited. The amendment allows legislators to draw reasonable lines and to prohibit only those acts they wish to prohibit. The statute proposed would prohibit numerous acts that reasonable persons would not wish to prohibit, and ultimately would not constitutionally permit prohibition of the very acts that we are attempting to prohibit.



William P. Barr
Assistant Attorney General
Office of Legal Counsel

The Great Communicator's Final Word

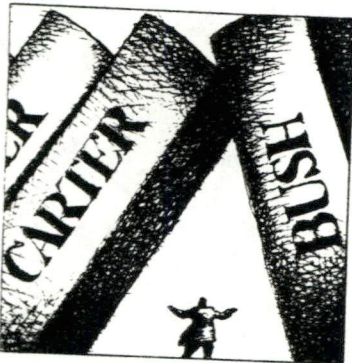
Two days before Ronald Reagan's White House lease ran out, he signed an extraordinary executive order that has thus far gone largely unnoticed. It vested private citizen Reagan, in essence, with the lifetime power to prevent disclosure of "privileged" papers generated by or for him during his presidential tenure. Unless the order is nullified by President George Bush, Reagan may be able to suppress whatever documents he regards as deleterious to his interests and those of his administration.

For sheer audacity, Executive Order 12667—approved by Reagan on Jan. 18 but not published in the Federal Register until Jan. 23 (after his return to California)—has few parallels in the annals of governmental flimflam.

To be sure, departing presidents have often secured more far-reaching control of their records by quietly carting them off in the self-serving belief that "custom" entitled them to personal ownership of their files. Herbert Brownell, former U.S. attorney general who headed a commission that laid the groundwork for the Presidential Records Act of 1978, has attributed the custom to a "legal fiction." Since the hauling away of presidential papers was barred by the 1978 statute, Reagan's order is, in effect, a means of prolonging de facto secrecy powers he enjoyed during his Oval Office years.

Artful Abracadabra

For all its artful abracadabra, the unprecedented order has the telltale earmarks of a stratagem devised to undercut key provisions of the records act. Section 2203 of that law required Reagan to relinquish his official files to the National Archives



and Records Administration at the end of his tenure. Section 2205 authorizes congressional access to his papers, following their acquisition by the National Archives, whenever the information they contain is "needed for the conduct of [legislative] business."

These provisions stemmed from Congress' conviction that personal control of White House documents by former presidents is incompatible with bedrock principles of constitutional government. (Significantly, Richard Nixon's post-presidential effort to obtain control over his tapes and papers was barred by Congress in the Presidential Recordings and Materials Preservation Act of 1974, which nullified a Justice Department opinion supporting his effort. The anonymous author of that opinion was a newly appointed assistant attorney general named Antonin Scalia.)

Since a primary object of Executive Order 12667 is to undercut §§ 2203 and 2205, the omission of any reference to

SEE FINAL WORD, PAGE 14

Smarm-Splattered Banner

Leading Democrats and their favorite constitutional scholar have come up with an ingenious solution to the great flag-desecration crisis.

To get around the Supreme Court's invalidation of laws aimed at flag-burning and flag-trampling political protesters, they want to make it a crime for, say, a husband and wife to trample Old Glory in the sacred precincts of the marital bedroom.

Far-fetched? Let Sen. Joseph Biden Jr. of Delaware, Gov. Mario Cuomo of New York, and Harvard Law Professor Laurence Tribe explain, as Tribe and others will do at three hearings this week before a House subcommittee. As these Democrats read it, the June 21 flag-burning decision, *Texas v. Johnson*, bars the government only from singling out for punishment those who publicly mistreat the flag as a way of expressing their contempt for it.

No problem, say Biden, Cuomo, Tribe, and company. No need to amend the Constitution; just make it a crime to mistreat a flag in private as well as in public, regardless of whether any political message is intended. Then throw the books at all flag desecraters, political protesters as well as . . . as well as . . . —well, as well as all the others, if any.

To make it constitutional, we will have to prosecute lazy scoutmasters who let the Stars and Stripes drag in the dirt and people who maliciously mistreat their own flags in the privacy of their homes for the sheer sadistic pleasure of it.

Biden and company will go to the ramparts to defend your rights to use contraceptives and read obscene books at home, but don't let them catch you abusing a flag there.

'Statutory Choo-Choo'

Of course, the Democrats' word tricks are driven not by constitutional analysis but by raw political panic. They see a freight train barreling down the track at them—the proposed constitutional amendment to ban flag-burning—and are stoking up their own little statutory choo-choo to outrace it. They saw how the voters lapped up George Bush's smarmy exploitation of the flag-salute issue in last year's election, and they don't want to be outdone in patriotic posturing this time.

This Democratic tactic is not, unfortunately, the most grotesque exercise in cynicism, gutlessness, and trivialization of the Constitution on display in the Great Flag Desecration Flap of 1989. That prize must go to President Bush's campaign to ban flag desecration by amending the Constitution.

If there were political advantage in it, Bush would holler for an amendment to punish Salman Rushdie's desecration of Mohammed or Baseball Commissioner A. Bartlett Giamatti's desecration of Pete Rose.

It is nothing new to see Bush and his Republican herd pandering to public passions by trivializing the Constitution. What is especially disheartening is to see our public discourse in such a sorry state that the opposition party, and eminent constitutionalists like Tribe, are clamoring for a civil blasphemy statute instead of standing up for the First Amendment.

One can understand why, for reasons of personal taste as well as political self-preservation, the Democrats want to align themselves with the many Americans who feel pride and reverence for the flag rather than with ragtag radicals who show their contempt for it. And one can appreciate their desperate search for an alternative to the desecration of the Bill of Rights being prepared by Bush and others.

Civil Blasphemy

But can those bent on throwing raw meat to Americans aroused over the occasional flag-burning see no parallel to the mass hysteria and bloodlust that swept the Moslem world after the publication of Rushdie's allegedly blasphemous *The Satanic Verses*?

And has everyone forgotten what Justice Robert Jackson wrote for the Court at the height of World War II, when salute-the-flag mania stalked Jehovah's Witness schoolchildren who refused to worship what they considered a graven image? "Freedom to differ is not limited to things that do not matter much," he said. "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."

The legalistic calculation behind the Democratic push for a flag-protection statute is that one or more of the five justices who voted to strike down the Texas law might grasp at an opportunity to uphold a differently drafted flag-desecration statute.

The calculation is plausible; anyone who has observed the contortions Justice Harry Blackmun has gone through in the past on flag desecration would be foolish to lay odds against it.

Labored distinctions are not without precedent in symbolic-speech cases. For example, *United States v. O'Brien*, in 1968, upheld punishment of anti-war protesters for burning their draft cards on the ground that the law against destroying the cards was not necessarily aimed at protesters but at helping the Selective Service to keep

track of potential draftees.

But the distinction the Democrats are trying to sell with their new flag-protection statute is both spurious and dangerous. It is spurious because one has to stretch to imagine a hypothetical case in which the state would want to punish, or would even find out about, flag desecration by anyone other than a political protester. It is dangerous because once legislatures get into the business of designating symbols too sacred to be desecrated and modes of political dissent too offensive to be tolerated, everyone will want to get in on the act.

Even a scholar of Tribe's brilliance has to strain to cobble together a constitutional argument in support of his view that, as he said in a July 3 column in *The New York Times*, "properly understood, the Court's decision upheld no right to desecrate the flag, even in political protest, but merely required that Government protection of the flag be separated from Government suppression of detested views."

Tribe had a very different perspective last year, when he issued the second edition of his treatise *American Constitutional Law*. He wrote then that protection of the flag as symbol could not be separated from suppression of the desecrator's views, because the symbol is degraded "only when such conduct is perceived by others, and only when the conduct is interpreted in a certain way."

Tribe (unlike Biden and Cuomo) stops short of saying a flag-protection statute is a good idea in any sense other than being a less bad idea than a constitutional amendment. But he now says such a statute would be upheld, citing a couple of oblique footnotes and scraps of text in Justice William Brennan Jr.'s majority opinion and past decisions including *O'Brien*.

It seems more plausible, however, to take Brennan at face value when he says that the government may not "criminally punish a person for burning a flag as a means of political protest."

Tribe likens a hypothetical statute penalizing those who mistreat flags to the valid laws penalizing desecration of grave sites and destruction of historical artifacts.

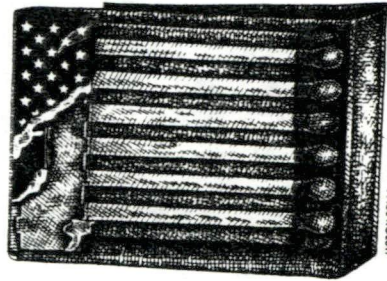
But destroying one of the millions of mass-produced, fungible flags is not at all like destroying a unique physical object, especially one that is somebody else's property. As Brennan noted, "[N]othing in our opinion should be taken to suggest that one is free to steal a flag so long as one later uses it to communicate an idea."

Tribe also notes that "torturing a little animal," even in private, could properly be made a crime.

Well, sure. But torturing a piece of cloth? Only in voodoo constitutional law. Nothing anyone can do to a flag, in public or in private, can destroy or damage the flag, which is an idea and, as such, immortal.

If Congress really wants to armor-plate a flag-desecration ban, it could declare that every American flag in creation is the property of the United States government, held in trust by the possessor. Then damaging a flag would be simple vandalism of government property. Seem ridiculous? Look how far we've come already.

Stuart Taylor Jr. is a senior writer with American Lawyer Media L.P. and *The American Lawyer* magazine. "Taking Issue" appears every other week in *Legal Times*.



2ND STORY of Level 1 printed in FULL format.

Copyright (c) 1989 The New York Times Company;
The New York Times

June 22, 1989, Thursday, Late Edition - Final

SECTION: Section B; Page 8, Column 1; National Desk

LENGTH: 2803 words

HEADLINE: Excerpts From High Court's Decision Barring Prosecution in Flag Protest

BYLINE: Special to The New York Times

DATELINE: WASHINGTON, June 21

BODY:

Following are excerpts from the Supreme Court decision in Texas v. Johnson, holding that a person may not be prosecuted for burning the American flag as a peaceful political protest.

Justice William J. Brennan Jr. wrote the opinion for the 5-to-4 majority. Justice Anthony M. Kennedy filed a concurring opinion. Dissenting opinions were filed by Chief Justice William H. Rehnquist and Justice John Paul Stevens.

FROM THE OPINION
By Justice Brennan

After publicly burning an American flag as a means of political protest, Gregory Lee Johnson was convicted of desecrating a flag in violation of Texas law. This case presents the question whether his conviction is consistent with the First Amendment. We hold that it is not.

While the Republican National Convention was taking place in Dallas in 1984, respondent Johnson participated in a political demonstration dubbed the "Republican War Chest Tour." . . .

The demonstration ended in front of Dallas City Hall, where Johnson unfurled the American flag, doused it with kerosene and set it on fire. While the flag burned, the protestors chanted, "America, the red, white, and blue, we spit on you." After the demonstrators dispersed, a witness to the flag-burning collected the flag's remains and buried them in his backyard. No one was physically injured or threatened with injury, though several witnesses testified that they had been seriously offended by the flag burning.

Of the approximately 100 demonstrators, Johnson alone was charged with a crime. The only criminal offense with which he was charged was the desecration of a venerated object in violation of Texas Penal Code Ann. Sec. 42.09 (a)(3) (1989). ["Desecration of a Venerated Object"]. After a trial, he was convicted, sentenced to one year in prison and fined \$2,000. The Court of Appeals for the Fifth District of Texas at Dallas affirmed Johnson's conviction, but the Texas Court of Criminal Appeals reversed, holding that the State could not, consistent with the First Amendment, punish Johnson for burning the flag in these circumstances. . . .

(c) 1989 The New York Times, June 22, 1989

State Asserted Two Interests

To justify Johnson's conviction for engaging in symbolic speech, the State asserted two interests: preserving the flag as a symbol of national unity and preventing breaches of the peace. The Court of Criminal Appeals held that neither interest supported his conviction.

Acknowledging that this Court had not yet decided whether the Government may criminally sanction flag desecration in order to preserve the flag's symbolic value, the Texas court nevertheless concluded that our decision in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), suggested that furthering this interest by curtailing speech was impermissible.

The First Amendment literally forbids the abridgement only of "speech," but we have long recognized that its protection does not end at the spoken or written word. . . .

Especially pertinent to this case are our decisions recognizing the communicative nature of conduct relating to flags. Attaching a peace sign to the flag, *Spence v. Washington*, 1974; saluting the flag, *Barnette*, and displaying a red flag, *Stromberg v. California* (1931), we have held, all may find shelter under the First Amendment. . . . That we have had little difficulty identifying an expressive element in conduct relating to flags should not be surprising. The very purpose of a national flag is to serve as a symbol of our country; it is, one might say, "the one visible manifestation of two hundred years of nationhood." . . .

Pregnant with expressive content, the flag as readily signifies this nation as does the combination of letters found in "America."

The Government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. . . . It may not, however, proscribe particular conduct because it has expressive elements. . . . It is, in short, not simply the verbal or nonverbal nature of the expression, but the governmental interest at stake, that helps to determine whether a restriction on that expression is valid.

The State offers two separate interests to justify this conviction: preventing breaches of the peace, and preserving the flag as a symbol of nationhood and national unity. We hold that the first interest is not implicated on this record and that the second is related to the suppression of expression.

We thus conclude that the State's interest in maintaining order is not implicated on these facts. The State need not worry that our holding will disable it from preserving the peace. We do not suggest that the First Amendment forbids a state to prevent "imminent lawless action." And, in fact, Texas already has a statute specifically prohibiting breaches of the peace, Texas Penal Code Ann. Sec. 42.01 (1989), which tends to confirm that Texas need not punish this flag desecration in order to keep the peace.

If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. . . .

(c) 1989 The New York Times, June 22, 1989

We have not recognized an exception to this principle even where our flag has been involved. In *Street v. New York*, 394 U.S. 576 (1969), we held that a state may not criminally punish a person for uttering words critical of the flag. . .

Nor may the Government, we have held, compel conduct that would evince respect for the flag. . . .

We never before have held that the Government may insure that a symbol be used to express only one view of that symbol or its referents. . . . To conclude that the Government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries.

Which Symbols Warrant Unique Status?

Could the Government, on this theory, prohibit the burning of state flags? Of copies of the Presidential seal? Of the Constitution? In evaluating these choices under the First Amendment, how would we decide which symbols were sufficiently special to warrant this unique status? To do so, we would be forced to consult our own political preferences, and impose them on the citizenry, in the very way that the First Amendment forbids us to do.

There is, moreover, no indication - either in the text of the Constitution or in our cases interpreting - that a separate juridical category exists for the American flag alone. Indeed, we would not be surprised to learn that the persons who framed our Constitution and wrote the Amendment that we now construe were not known for their reverence for the Union Jack.

The First Amendment does not guarantee that other concepts virtually sacred to our nation as a whole - such as the principle that discrimination on the basis of race is odious and destructive - will go unquestioned in the marketplace of ideas. We decline, therefore, to create for the flag an exception to the joust of principles protected by the First Amendment.

We are fortified in today's conclusion by our conviction that forbidding criminal punishment for conduct such as Johnson's will not endanger the special role played by our flag or the feelings it inspires. . . .

A Reaffirmation of Principles

We are tempted to say, in fact, that the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength.

The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong. . .

We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag-burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by - as one witness here did - according its remains a respectful

(c) 1989 The New York Times, June 22, 1989

burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.

By Justice Kennedy,
Concurring

I write not to qualify the words Justice Brennan chooses so well, for he says with power all that is necessary to explain our ruling. I join his opinion without reservation, but with a keen sense that this case, like others before us from time to time, exacts its personal toll. . . .

The case before us illustrates better than most that the judicial power is often difficult in its exercise. We cannot here ask another branch to share responsibility, as when the argument is made that a statute is flawed or incomplete. For we are presented with a clear and simple statute to be judged against a pure command of the Constitution. The outcome can be laid at no door but ours.

The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases.

Our colleagues in dissent advance powerful arguments why respondent may be convicted for his expression, reminding us that among those who will be dismayed by our holding will be some who have had the singular honor of carrying the flag in battle. And I agree that the flag holds a lonely place of honor in an age when absolutes are distrusted and simple truths are burdened by unneeded apologetics.

With all due respect to those views, I do not believe the Constitution gives us the right to rule as the dissenting members of the Court urge, however painful this judgment is to announce. Though symbols often are what we ourselves make of them, the flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit. The case here today forces recognition of the costs to which those beliefs commit us. It is poignant but fundamental that the flag protects those who hold it in contempt. . . .

FROM DISSENTING OPINIONS
By Chief Justice Rehnquist

In holding this Texas statute unconstitutional, the Court ignores Justice Holmes's familiar aphorism that "a page of history is worth of volume of logic." For more than 200 years, the American flag has occupied a unique position as the symbol of our nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here.

At the time of the American Revolution, the flag served to unify the 13 colonies at home while obtaining recognition of national sovereignty abroad. Ralph Waldo Emerson's Concord Hymn describes the first skirmishes of the Revolutionary War in these lines:

(c) 1989 The New York Times, June 22, 1989

'By the rude bridge that arched the flood,
Their flag to April's breeze unfurled,
Here once the embattled farmers stood,
And fired the shot heard round the world.'

In the First and Second World Wars, thousands of our countrymen died on foreign soil fighting for the American cause. At Iwo Jima in the Second World War, United States Marines fought hand to hand against thousands of Japanese. By the time the marines reached the top of Mount Suribachi, they raised a piece of pipe upright and from one end fluttered a flag. That ascent had cost nearly 6,000 American lives. . . .

The flag symbolizes the nation in peace as well as in war. It signifies our national presence on battleships, airplanes, military installations and public buildings from the United States Capitol to the thousands of county courthouses and city halls throughout the country. . . .

No other American symbol has been as universally honored as the flag. In 1931 Congress declared 'The Star Spangled Banner' to be our national anthem. In 1949 Congress declared June 14th to be Flag Day. In 1987 John Philip Sousa's 'The Stars and Stripes Forever' was designated as the national march. Congress has also established 'The Pledge of Allegiance to the Flag' and the manner of its deliverance. . . . ming, all of the states now have statutes prohibiting the burning of the flag. . . .

The result of the Texas statute is obviously to deny one in Johnson's frame of mind one of many means of 'symbolic speech.' Far from being a case of 'one picture being worth a thousand words,' flag burning is the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others. . . .

The Texas statute deprived Johnson of only one rather inarticulate symbolic form of protest - a form of protest that was profoundly offensive to many - and left him with a full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy. . . .

But the Court today will have none of this. The uniquely deep awe and respect for our flag felt by virtually all of us are bundled off under the rubric of 'designated symbols' that the First Amendment prohibits the Government from 'establishing.' But the Government has not 'established' this feeling; 200 years of history have done that. The Government is simply recognizing as a fact the profound regard for the American flag created by that history when it enacts statutes prohibiting the disrespectful public burning of the flag.

The Court concludes its opinion with a regrettably patronizing civics lecture, presumably addressed to the members of both houses of Congress, the members of the 48 state legislatures that enacted prohibitions against flag burning, and the troops fighting under that flag in Vietnam who objected to its being burned: 'The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong.'

The Court's role as the final expositor of the Constitution is well established, but its role as a platonic guardian admonishing those responsible to public opinion as if they were truant school children has no similar place

(c) 1989 The New York Times, June 22, 1989

in our system of government. . . .

By Justice Stevens,
Dissenting

Even if flag burning could be considered just another species of symbolic speech under the logical application of the rules that the Court has developed in its interpretation of the First Amendment in other contexts, this case has an intangible dimension that makes those rules inapplicable.

A country's flag is a symbol of more than "nationhood and national unity." It also signifies the ideas that characterize the society that has chosen that emblem, as well as the special history that has animated the growth and power of those ideas. . . .

So it is with the American flag. It is more than a proud symbol of the courage, the determination and the gifts of nature that transformed 13 fledgling colonies into a world power. It is a symbol of freedom, of equal opportunity, of religious tolerance and of good will for other peoples who share our aspirations. . . .

The value of the flag as a symbol cannot be measured. Even so, I have no doubt that the interest in preserving that value for the future is both significant and legitimate. . . . The creation of a Federal right to post bulletin boards and graffiti on the Washington Monument might enlarge the market for free expression, but at a cost I would not pay.

Similarly, in my considered judgment, sanctioning the public desecration of the flag will tarnish its value - both for those who cherish the ideas for which it waves and for those who desire to don the robes of martyrdom by burning it. That tarnish is not justified by the trivial burden on free expression occasioned by requiring that an available, alternative mode of expression - including uttering words critical of the flag - be employed.

The ideas of liberty and equality have been an irresistible force in motivating leaders like Patrick Henry, Susan B. Anthony, and Abraham Lincoln, schoolteachers like Nathan Hale and Booker T. Washington, the Philippine Scouts who fought at Bataan, and the soldiers who scaled the bluff at Omaha Beach. If those ideas are worth fighting for - and our history demonstrates that they are - it cannot be true that the flag that uniquely symbolizes their power is not itself worthy of protection from unnecessary desecration.

TYPE: Text

SUBJECT: UNITED STATES POLITICS AND GOVERNMENT; FLAGS, EMBLEMS AND INSIGNIA;
DECISIONS AND VERDICTS; DEMONSTRATIONS AND RIOTS

ORGANIZATION: SUPREME COURT (US)

STATEMENT
OF
WILLIAM P. BARR
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
UNITED STATES DEPARTMENT OF JUSTICE
BEFORE
THE
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES
IN SUPPORT OF
A CONSTITUTIONAL AMENDMENT TO PROHIBIT
PHYSICAL DESECRATION OF THE FLAG
OF THE UNITED STATES

JULY 19, 1989

Mr. Chairman and Members of the Subcommittee:

Thank you for providing me the opportunity to appear today. I am pleased to present to the Subcommittee the Administration's views on a constitutional amendment to allow Congress and the States to prohibit the physical desecration of the Flag of the United States. This proposed amendment is prompted by the Supreme Court's recent decision in Texas v. Johnson, 57 U.S.L.W. 4770 (June 21, 1989), that a State cannot punish a person for burning the Flag. For reasons which I will explain, a constitutional amendment is the only way to protect the Flag in the wake of the Court's expansive decision. An amendment is the only way to adequately respond to the overwhelming--and understandable--sentiment of the American people that the Flag must be protected. I trust that few among us would disagree that the Flag is deserving of protection. As the symbol of our Nation, the Flag is the embodiment of our commitment to freedom. It stands in sacred honor of those who have sacrificed their lives in defense of that freedom. It holds in sacred trust the spirit of the American people.

Given the deserved reverence accorded the Flag, it is not at all surprising that the American people reacted with outrage when they were told that this Flag can be burned, shredded and spat upon with impunity. It would have been surprising had they reacted otherwise.

The President shares the profound sense of personal violation felt by the American people. He firmly believes that

we have an obligation to the people to act swiftly and decisively to protect the Flag from those who would break our spirit through desecration of this one symbol that unites us.

We must be mindful that we here in Washington are but trustees of the will of the people; our authority is derivative. The will of the people is unmistakable. They want the Flag of the United States protected from those who would defile it.

I. INTRODUCTION

The issue that has occupied the lion's share of the Subcommittee's time thus far is not whether to provide protection for the Flag, but how to provide that protection. Specifically, the debate has centered around whether an amendment to the Constitution is required or whether a statute would suffice. The Department of Justice, at the request of the President, has carefully considered whether it is possible to protect the Flag through statute. You have my assurance that the President and the Attorney General would be the first to support a statute if they thought a statute could survive constitutional challenge and protect the Flag from desecration. Unfortunately, we are convinced that, in light of the expansive decision of the Court, a statute simply would not suffice, and that the only way to ensure protection of the Flag is through a constitutional amendment. This is confirmed by even the most cursory reading of the Court's opinion.

The reason that a statute purporting to protect the Flag would be unconstitutional is simple. In Texas v. Johnson, the Court held that whenever someone burns the Flag for expressive purposes, that conduct is protected by the First Amendment; that to prohibit such conduct, the Government must have a compelling reason that is unrelated to expression; that the Government's reason for protecting the Flag (to preserve it as a symbol of national unity) is inherently and necessarily related to expression; and that the Government's interest in protecting the Flag as a symbol of our national unity can never be sufficiently compelling to overcome an individual's First Amendment interest in burning the Flag for communicative purposes. This reasoning plainly would extend to any Flag desecration statute enacted to protect the Flag as a symbol of our Nation.

We do not believe that it is necessarily unfortunate that an amendment is required. The amendment process serves as a reminder, lest we forget, that the law is of the people.

II. ANALYSIS OF TEXAS v. JOHNSON

To make an informed judgment as to whether an amendment is required, it is necessary to understand both the way in which the Supreme Court analyzes symbolic speech cases, and the reasoning employed by the Court in reaching its decision in Texas v. Johnson.

The Court has repeatedly held that the First Amendment extends to symbolic speech where the conduct was intended to convey a message and the likelihood was great that the message conveyed would be understood. See Spence v. Washington, 418 U.S. 405, 410-411 (1974). For example, the Court held in Brown v. Louisiana, 383 U.S. 131 (1966), that a peaceful sit-in in a public library to protest the library's policy of segregation was protected by the First Amendment. Where the Government attempts to prohibit, punish or otherwise burden communicative conduct, the Court carefully analyzes the Government's interest in imposing the burdens. If the Government's interest is unrelated to suppression of expression, the regulation is subjected to the comparatively more lenient standard set forth in the Court's opinion in United States v. O'Brien, 391 U.S. 367 (1968). Under that standard, the Government's interest must only be important or substantial to justify the regulation. Id. at 377. If, on the other hand, the Government's interest is related to suppression of expression, the regulation is subjected to the "most exacting scrutiny." Texas v. Johnson, 57 U.S.L.W. 4770, 4774 (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)). Under this standard, the Government's interest must be compelling.

Turning to the decision in Texas v. Johnson, the threshold question addressed by the Court was whether Johnson's burning of the Flag constituted expressive conduct protected by the First Amendment. Noting that the Flag is "[p]regnant with expressive content," id. at 4772, the Court readily determined that

Johnson's burning of the Flag was "'sufficiently imbued with elements of communication'" id. (quoting Spence v. Washington, 418 U.S. 405, 409 (1974)), to justify invocation of the First Amendment.

The Court then analyzed the interests advanced by the State in support of its Flag burning prohibition to determine whether those interests related to the suppression of expression. Texas v. Johnson, id. at 4772. The State of Texas asserted two interests in support of its prohibition on Flag burning: preventing breaches of the peace, and preserving the Flag as a symbol of nationhood and national unity. The Court held that the State's interest in preventing breaches of the peace was not implicated on the record because there was no evidence that Johnson's burning of the Flag actually caused a breach of the peace, and he was not prosecuted for breach of the peace. Id. at 4772-4773.

Significantly, however, the Court held that the government can never assume that Flag burning will cause a breach of the peace. Id. at 4773. Moreover, said the Court, Johnson's burning of the Flag as a "generalized expression of dissatisfaction with the policies of the Federal Government" was not the equivalent of "fighting words" that could cause a breach of the peace because "[n]o reasonable onlooker" would regard it as a "direct personal insult or an invitation to exchange fisticuffs." Id. The Court went on to say that its precedents "recognize that a principal function of free speech under our system of government is to

invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'" Id. (quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949)).

The Court then turned to the State's asserted interest in preserving the Flag as a symbol of our Nation. It held that this interest was directly related to the suppression of expression: "[T]he Government's interest in preserving the flag's special symbolic value 'is directly related to expression in the context of activity'" intended to express a message. Id. (quoting Spence, 418 U.S. at 414 n.8). Because the State's interest in preventing Flag burning was related to expression, the Court held that the considerably less demanding standard of O'Brien did not apply, and that the State's interest must be subjected to the "most exacting scrutiny." Id. at 4774.

The Court held that Texas' interest in preserving the Flag as a symbol of our Nation and national unity could not justify its prohibition on Flag burning. The Court reasoned that governmental protection of the Flag because of its symbolic importance to the Nation would be tantamount to a governmental directive that the "symbol be used to express only one view of that symbol or its referents." Id. at 4775. The Government, said the Court, may not "foster its own view of the flag by prohibiting expressive conduct relating to it." Id. Any attempt to preserve the Flag as a symbol offends the "bedrock principle" that "the Government may not prohibit the expression of an idea

simply because society finds the idea itself offensive or disagreeable." Id. at 4774. Finally, the Court explicitly refused to accord the Flag any special constitutional significance, finding "no indication - either in the text of the Constitution or in [its] cases interpreting it - that a separate juridical category exists for the American flag alone." Id. at 4775.

III. CONSTITUTIONALITY OF FLAG DESECRATION STATUTES AFTER TEXAS V. JOHNSON

We think it is plain under this reasoning that any statute prohibiting desecration of the Flag for communicative purposes would be unconstitutional. The Flag is by nature communicative. It is a symbol "[p]regnant with expressive content." Id. at 4772. Thus, the Government's interest in preserving the Flag as a symbol is inherently related to expression. It is precisely because the Flag is the symbol of this Nation that the Government wants it protected against conduct that will undermine its communicative force, i.e., conduct that will prevent or interfere with the message communicated by the Flag. As the Court observed in Texas v. Johnson, the Government "is concerned that such conduct will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not in fact exist, that is, we do not enjoy unity as

a Nation." Id. at 4773. Accordingly, any Flag desecration statute will be subject to the "most exacting scrutiny."

The Court has held that under this exacting scrutiny the Government's interest in preserving the symbolic value of the Flag can never be sufficiently compelling to stop an individual from desecrating the Flag whenever the desecration is done for communicative purposes.

An asserted interest in preventing breaches of the peace would not save the statute because the Court also held that the Government may never assume that Flag burning or other Flag desecration will cause a breach of the peace. Moreover, the Court has said that desecration of the Flag as a "generalized expression of dissatisfaction with the policies of the Federal Government" cannot cause a breach of the peace because "[n]o reasonable onlooker" would regard it as a "direct personal insult or an invitation to exchange fisticuffs." Id. at 4773. The Court's categorical rejection on these grounds of the only two conceivable interests for prohibiting the desecration of the Flag render it certain that the Court would strike down any such statute.

It has been argued that the Court would uphold a statute if it prohibited all Flag desecration, whether in public or private, and whether done with contempt or not. This argument is demonstrably wrong because it assumes that the Government's reason for enacting a facially neutral prohibition (that is, a statute neutral as to the particular viewpoint expressed) would

be "unrelated to expression." It would not be. The Government's reason for passing a viewpoint-neutral prohibition would be the same as its reason for passing a prohibition on contemptuous desecration only: protection of the symbolic value of the Flag. The Supreme Court has held in two successive cases, Spence v. Washington and Texas v. Johnson, that it is the Government's reason for the prohibition, not the scope of the prohibition, that determines the level of scrutiny. Because the Government's reason for protecting the Flag is necessarily related to expression, the prohibition would always be subjected to exacting scrutiny, and therefore would never prevail over an individual's First Amendment interest in expressive conduct.

In essence, the argument fails to appreciate that a statute neutral as to the particular viewpoint expressed can nonetheless be unconstitutional if its prohibition is content-based (i.e., related to expression). The Supreme Court has distinguished between "content" and "viewpoint" regulation. See, e.g., Boos v. Barry, 108 S. Ct. 1157, 1163-1164 (1988). If the regulation is either content-based or viewpoint-based, it is subject to the "most exacting scrutiny." Id. Importantly, a regulation can be viewpoint-neutral, but content-based. Id. Even assuming that the proposed statute would be held to be viewpoint-neutral (which itself is doubtful), it would never be held content-neutral.

A statute is content-neutral only if its restrictions on communicative activity "are justified without reference to the content of the regulated speech." Id. at 1163 (quoting Virginia

Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)). Its restrictions must have "nothing to do with that speech;" the statute must not have been "aim[ed] at the suppression of free expression." Id.; see also Texas v. Johnson, 57 U.S.L.W. 4770, 4774.

The restrictions imposed on speech, even by a facially neutral Flag desecration statute, neither would nor ever could be justified by anything other than the Government's interest in protecting the symbolic value of the Flag. (Any legislative determination to the contrary would plainly be pretext and would be recognized by the Court as such. See, e.g., Wallace v. Jaffree, 472 U.S. 38 (1985)). Indeed, in Spence v. Washington, the Court considered a facially neutral statute virtually identical to the statute now proposed. Prosecution under the statute at issue in that case, like under the statute proposed here,

[did] not depend upon whether the flag is used for communicative or noncommunicative purposes; upon whether a particular message is deemed commercial or political; upon whether the use of the flag is respectful or contemptuous; or upon whether any particular segment of the State's citizenry might applaud or oppose the intended message.

Spence, 418 U.S. at 422-23 (Rehnquist, J., dissenting). In holding the statute unconstitutional as applied to a person engaged in communicative conduct, the Court explained that

[even] [i]f [the government's interest in preserving the value of the Flag as a symbol of our Nation] is valid, we note that it is directly related to expression in the context of activity like that undertaken by appellant.

Id. at 414 n.8. Justice Brennan, the author of the Court's opinion in Texas v. Johnson, in fact has previously written that,

the only basis for a governmental interest (if any) in protecting the flag is precisely the fact that the flag has substantive meaning as a political symbol. Thus, assuming that there is a legitimate interest at stake, it can hardly be said to be one divorced from political expression.

Kime v. United States, 459 U.S. 949, 953 (1982) (Brennan, J., dissenting). And the Supreme Court in Texas v. Johnson has now held that the Government's interest in protecting the Flag as a national symbol is, by definition, related to the suppression of free expression. Thus, it simply could never be successfully maintained that such a statute was content-neutral. The statute is not rendered content-neutral merely because it prohibits private desecrations as well as public desecrations of the Flag. The Government's purpose in prohibiting the desecration is the same whether or not the statute extends to private conduct.

Because any statute would necessarily relate to expression, the more relaxed standard of O'Brien would never apply, and the statute would always be subject to the "most exacting scrutiny." The Supreme Court in Texas v. Johnson has now unequivocally held, however, that the government's interest in protection of the symbolic value of the Flag will never support a prohibition on the communicative desecration of the Flag under this heightened standard. As Justice Brennan has said, "any governmental interest in protecting the flag's symbolism is one that cannot pass muster under the third branch of the O'Brien test." Kime v. United States, 459 U.S. at 953 (cert. denied, Brennan, J.,

dissenting). Moreover, the Court has flatly refused to recognize a separate constitutional or juridical category for the Flag.

In the face of the Court's holdings in Texas v. Johnson, and Spence v. Washington, and especially given the sweeping reasoning in those cases, it cannot be seriously maintained that a statute aimed at protecting the Flag would be constitutional. Significantly, Justice Brennan himself has even written that a statute "that simply outlawed any public burning or mutilation of the flag, regardless of the expressive intent or nonintent of the actor," would be "invalid for the reasons stated in . . . Spence." Kime v. United States, 459 U.S. at 955 n.7.

IV. PROPOSED CONSTITUTIONAL AMENDMENT

If we are interested in protecting the Flag from desecration, the focus should be on the various amendments that have been proposed in the two Houses of the Congress. Today, I would like to discuss the amendment that has been proposed by Congressmen Michel and Montgomery, and endorsed by the President. That amendment reads: "The Congress and the States shall have power to prohibit the physical desecration of the Flag of the United States."

The first, and perhaps most important, point to be made is that the amendment does not itself prohibit Flag desecration. The amendment merely empowers Congress and the States to prohibit legislatively the physical desecration of the Flag, and

establishes the boundaries within which they may legislate. With the ratification of this amendment, Congress and State legislatures, the representatives of the people, would be able to decide if they want to prohibit Flag desecration, and if so, in what manner. We believe it is fitting that the people should decide through their elected representatives the extent to which they wish to prohibit desecration of their national symbol. This amendment gives them that opportunity.

The amendment would define the framework within which the legislative authority of the Congress and the States could be exercised. Within this framework, however, the Congress and the States would have wide latitude to prohibit that conduct toward the Flag that they believe deserves proscription.

If Congress and the States chose to legislate, as we anticipate they would, they would be permitted and obliged to draw lines. For example they would have to determine how they wished to define "Flag" and "physical desecration" of the Flag. They would have to decide whether to make intent a necessary element of a Flag desecration offense. Doubtless, there would be other questions as well. I can describe the general nature of the decisions that would have to be made on the principal issues. But again I would emphasize that this amendment creates only the necessary framework; the bulk of the decisionmaking would be left to the legislatures.

The first question that the legislatures would face is how to define "Flag." There would be any number of options that

would be permissible under the amendment. Let me discuss three of the most obvious. First, "Flag" could be defined narrowly as only a cloth, or other material readily capable of being waved or flown, with the characteristics of the official Flag of the United States, as described in 4 U.S.C. § 1. (This definition could also include historic versions of the Flag (i.e., a 13-star version)). A benefit of such an objective definition is that there would be absolute certainty as to what one would be prohibited from desecrating. One of the costs of such a narrow definition, however, is that legislatures would not be prohibiting acts that are just as damaging to the symbolism of the Flag as desecration of the Flag itself. People would simply circumvent any statutory prohibition by desecrating a Flag that is slightly different in an undetectable way from the actual Flag. For instance, they would burn or shred a Flag that has only 49 stars, or one on which the stripes are of incrementally different dimension, but is otherwise identical to the official Flag. While we believe the amendment would certainly permit the legislatures to define "Flag" in this manner, legislatures would be free to adopt a broader definition, as Congress itself has done.

A second option for the legislatures would be to define "Flag" as anything that a reasonable person would perceive to be a Flag of the United States meeting the dimensions and having the characteristics of the Flag as set forth in 4 U.S.C. § 1, and capable of being readily waved or flown, whether or not it is

precisely identical to the Flag as so defined. This definition would extend protection to any Flag with a slight variation (i.e., a Flag with a stripe missing). However, it would not prohibit destruction of a poster or a painting of the Flag, or the painting of a picture of the Flag with a swastika on it, because a reasonable observer would not mistake such an object as an actual Flag. In this regard, the definition is substantially narrower than the existing federal statute, which extends to any object that "an average person seeing the same without deliberation may believe . . . to represent" the Flag. 18 U.S.C. § 700(b).

A third option for Congress and the States would be to define "Flag" as it is defined in the existing federal Flag desecration statute, 18 U.S.C. § 700(b). The federal statute prohibiting Flag desecration, 18 U.S.C. § 700(b), defines "Flag" as follows:

any flag, standard, colors, ensign, or any picture or representation of either, or of any part or parts of either, made of any substance or represented on any substance, of any size evidently purporting to be either of said flag, standard, color, or ensign of the United States of America, or a picture or a representation of either, upon which shall be shown the colors, the stars and the stripes, in any number of either thereof, or of any part or parts of either, by which the average person seeing the same without deliberation may believe the same to represent the flag, standards, colors, or ensign of the United States of America.

18 U.S.C. § 700(b). In general terms, this definition includes any Flag, portion of a Flag, or any picture or representation of a Flag. It would allow the legislatures to protect depictions of

the Flag, such as posters, murals, pictures, buttons, and any other representation of the Flag. This definition would be consistent with the Government's interest in preserving the Flag's symbolic value because it recognizes that the desecration of representations of the Flag damage that interest as much as desecration of the Flag itself. I would note that even the legislative proposals proffered to redress the Court's decision would retain this definition of Flag.

Regardless of how "Flag" is defined, however, Congress and the State legislatures would have to define the term clearly to avoid successful challenge on the ground that they are unconstitutionally vague. In fact, it is worth noting that many Flag desecration statutes have been invalidated on the ground that they were unconstitutionally vague. See, e.g., Smith v. Goguen, 415 U.S. 566 (1974).

We believe the phrase "physical desecration," too, would provide some latitude to Congress and the States, although the amendment would significantly channel the legislative decision. There are two discrete aspects of the term "physical desecration," "physical" and "desecration." The amendment would not permit Congress or the States to punish or penalize any non-physical desecration of the Flag. Some contact with the Flag, some physical touching of the Flag, whether by the person himself or caused by the person would be essential. The legislatures thus could not punish or penalize mere words or gestures directed at the Flag, regardless of their offensiveness.

The amendment would simply import the common-sense understanding of the term "desecration." Webster's Ninth New Collegiate Dictionary defines "desecrate" as follows: "1. to violate the sanctity of: PROFANE 2: to treat irreverently or contemptuously often in a way that provokes outrage on the part of others." Black's Law Dictionary contains a similar definition of "desecrate": "To violate sanctity of, to profane, or to put to unworthy use." These definitions capture the essence of the term as used in the amendment. Indeed, these definitions make clear that a ban on "desecration" is particularly well suited for preserving the symbolic value of the Flag.

There are an infinite number of forms of desecration. I will not attempt even a representative listing here. But obviously, the legislatures could clearly prohibit the burning, shredding and similar defilement of the Flag.

I would note, however, that we do not understand that the legislatures could ever prohibit the proper display of the Flag merely because they believe the particular surroundings of the display are unfitting for the Flag. The proper display of the Flag, without more, could never constitute an act of physical desecration. We simply do not believe the Government should be in the position of making value judgments about whether the proper display of the Flag in particular settings and by particular persons is nonetheless demeaning. As long as the Flag is displayed in a customary manner, and not physically mistreated, the amendment would not authorize punishment or

penalty. Of course, the legislatures could constitutionally prohibit the display of the Flag in a manner that they deemed inappropriate because such proscriptions would not require value judgments about who could display the Flag or where it could be displayed. Thus, they could prohibit, for example, the display of the Flag on the floor or the upside-down display of the Flag.

Beyond this, I would simply urge the Subcommittee not to lose sight of the ultimate objective of protecting the Flag by becoming mired in countless hypotheticals that can be posed to test at the margins choice of the term "desecration." One can always construct hypotheticals that push the limits of any word in the language. This is as true of statutory language as it is of constitutional language. In the end, those who are responsible for the ultimate choice of language, must simply choose terms that most clearly reach the conduct they wish to reach, and only that conduct. At the margins, one has no choice but to rely upon the individual legislatures in the first instance, and ultimately on the courts, to prevent application of the language in a manner that would do injustice to the drafters' intent.

We believe that the phrase "physical desecration" is sufficiently flexible to permit the Congress and the States to reach all physical acts of desecration with which the people are concerned, yet sufficiently exacting to prohibit them from reaching activity that is properly protected.

proposed statute. While we do not believe that most people want to prohibit actions, such as those identified above, when they are not done to cast contempt, we believe that Congress and the States should be free to make that determination as they see fit, to create the exceptions that logic and reason compel.

By way of summary, the Michel-Montgomery amendment confers substantial discretion on Congress and the States to determine precisely the degrading acts toward our Flag that are to be prohibited. The amendment gives them the latitude to draw reasonable lines that will reflect the conscience of the people. The Administration believes that this is as it should be. The proposed statute not only prohibits much conduct that no one wishes to prohibit; ultimately it would not constitutionally prohibit the very acts that we wish to prohibit.

CONCLUSION

On behalf of the President, I urge the prompt approval of the Michel-Montgomery Amendment so that the ratification process may begin.

The third area in which Congress and the States will have to draw lines relates to the actor's state of mind. The amendment only authorizes prohibition of voluntary actions; involuntary acts--such as accidents--could not be punished. The more difficult issue is whether the actor must intend to be contemptuous toward the Flag. We believe Congress and the States are, and should be, free to decide whether to require intent. We suspect that they will choose to require that the actor intend to cast contempt. Because the overwhelming number of physical acts that are of concern to us are intended to express contempt for the Flag, we would not be especially troubled were they to choose to require intent. Nevertheless, there may well be conduct that the legislatures would want to prohibit, irrespective of the intent of the actor, and they would be permitted to do so under the amendment. The legislatures would be free to impose an intent requirement or not, as they deemed appropriate.

We think offering legislatures the option of prohibiting only intentionally contemptuous, physical desecration represents a significant advantage of the amendment over the proposed statute. Presumably to convince the courts that its proscriptions are unrelated to expression, the proposed statute would require that the Government prohibit acts without regard to whether they cast contempt. Thus, a child who innocently steps on a Flag, a person who crumbles a Fourth of July Flag-decorated paper cup, or a veteran who burns an old Flag out of reverence and respect would all presumably be prosecutable under the

From Brent

The Department of Justice has concluded unequivocally that a statute attempting to protect the Flag would itself be unconstitutional. This should put to rest the arguments that have been made that a statute would correct the Court's decision in Texas v. Johnson.

The Assistant Attorney General presented a 20-page legal analysis of the Department's position and answered questions from members of a subcommittee of the House Judiciary Committee. He explained to the subcommittee that, under the law, any statute would be "dead on arrival" and would never withstand constitutional scrutiny. He explained that the statute that has been proposed in any event would be absurdly broad, and would pose a serious threat to civil liberties by criminalizing a broad range of innocent and unoffensive conduct. In contrast, the narrow amendment that has been proposed by Congressmen Michel and Montgomery and Senators Dole and Dixon would address only the specific conduct of contemptuous desecration of the Flag, which is what offends the American people.

Before hearing the Department's position, former Solicitor General Fried, now a Harvard Law School professor, had submitted a written statement to the subcommittee stating that a statute might suffice. In his testimony before the subcommittee yesterday, Mr. Fried reversed his position, telling the subcommittee that the Department's legal analysis is "devastating," and that a statute would not be constitutional.

The subcommittee, chaired by Congressman Don Edwards (D-Cal.), is known as the "graveyard for constitutional amendments" because of its unwillingness to report out proposed amendments. Congressman Edwards and others on the subcommittee are known to be opposed to an amendment.

The President fears that an effort may be afoot to bottle up the proposed amendment in subcommittee. He has reiterated his position that the people should be allowed to decide whether an amendment to the Constitution should be made to protect the Flag. And he will do all within his power to see to it that the people are given that opportunity to decide for themselves.

Texas v. Johnson

A constitutional amendment is necessary to protect the Flag in the wake of the Supreme Court's decision in Texas v. Johnson; a statute would not suffice, given the Court's reasoning. The Court said that virtually all flag burning is communicative conduct and, as a consequence, any prohibition of flag burning can only be justified by a compelling governmental interest. There are only two conceivable governmental interests in preventing flag desecration:

(1) preservation of the Flag as a symbol of our Nation, and (2) preservation of the peace. The Court held, however, that the government's interest in preserving the symbolic value of the Flag can never be compelling, and that the government can never assume that Flag burning will result in breach of the peace. Moreover, the Court held that there is no "separate juridical category" for the Flag under the Constitution.

* * * * *

A. Burning the Flag or any other mistreatment of the Flag is virtually always communicative conduct. The person prosecuted for such conduct, therefore, may invoke the First Amendment.

1. "[W]e have had little difficulty identifying an expressive element in conduct relating to flags." (Slip op. at 7).

2. The Flag is "pregnant with expressive content." (Slip op. at 7).

B. The inquiry then focuses on the Government's interests in prohibiting the conduct. If the reasons for prohibiting the conduct are "unconnected to expression," they are subject to the lower standard of O'Brien, and they will prevail over the individual's First Amendment interests, provided they are "important or substantial." (Slip op. at 9). If the Government's reasons for prohibiting the conduct are related to the expression, the statute is subject to "exacting scrutiny."

C. The Government has two obvious interests in prohibiting flag burning and other flag desecration: (1) preventing breaches of the peace; and (2) protecting and preserving the symbolic value of the Flag. After Texas v. Johnson, neither interest will support a statutory ban on desecration of the Flag.

D. The Government's interest in preventing breaches of the peace cannot justify a statutory ban on flag desecration.

1. The Government is not allowed to assume that every flag burning will lead to a breach of the peace. "We have not permitted the Government to assume that every expression of a provocative idea will incite a riot." (Slip op. at 11). Instead, there must always be "careful consideration of the actual circumstances surrounding [each] expression." (Slip op. at 11).

2. Burning or other desecration of the Flag as a "generalized expression of dissatisfaction with the policies of the Federal Government" is not the equivalent of "fighting words" that could cause a breach of the peace because "no reasonable onlooker" would regard it as a "direct personal insult or an invitation to exchange fisticuffs." (Slip op. at 12).

E. The Government's second interest, preserving the symbolic value of the flag, is directly related to the suppression of expression.

1. "The Government's interest in preserving the flag's special symbolic value is 'directly related to expression'" (Slip op. at 12).

2. Because the Government's interest "blossoms only when a person's treatment of the flag communicates some message," it is "thus related 'to the suppression of expression.'" (Slip op. at 12-13).

F. Because the Government's interest in the symbolic value of the flag is related to expression, any ban will be subject to the "most exacting scrutiny" to determine if it justifies limiting an individual's First Amendment interests. (Slip op. at 15).

G. Under the "most exacting scrutiny" standard, the Government's interest in preserving the symbolic value of the Flag will never prevail over the individual's communicative interests.

1. The Government may not "foster its own view of the flag by prohibiting expressive conduct relating to it." (Slip op. at 17-18). "We never before have held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents." (Slip op. at 19).

2. "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." (Slip op. at 16).

H. The Flag has no independent constitutional significance that would permit its protection as against an individual's right to communicate by burning the Flag.

1. There is "no indication - either in the text of the Constitution or in our cases interpreting it - that a separate juridical category exists for the American flag alone." (Slip op. at 20).

2. "We decline . . . to create for the flag an exception to the joust of principles protected by the First Amendment." (Slip op. at 20).

WITNESS LIST

HOUSE COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

HEARING: Statutory and Constitutional Responses
to the Supreme Court Decision in
Texas v. Johnson (desecration
of the flag)

DATE: Wednesday, July 19, 1989

TIME: 9:30 a.m.

ROOM: 2141 Rayburn House Office Building

William Barr
Assistant Attorney General
Office of Legal Counsel
U.S. Department of Justice
Washington, D.C.

The Honorable Robert M. Bork^H
American Enterprise Institute
Washington, D.C.

Charles Fried
Harvard Law School
Cambridge, Massachusetts

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

INCOMING

DATE RECEIVED: JULY 07, 1989

NAME OF CORRESPONDENT: MR. STANLEY S. HUBBARD S.

SUBJECT: WRITES REGARDING THE SUPREME COURT DECISION
ON BURNING OF THE FLAG AND SUGGESTS THAT ANY
EFFORT TO PASS ANY LAWS TO OUTLAW FLAG
BURNING BE SET ASIDE FOR A LONG ENOUGH TIME *

| ROUTE TO: OFFICE/AGENCY (STAFF NAME) | ACTION | | DISPOSITION | |
|---|-------------|------------------|--------------|---------------------------|
| | ACT CODE | DATE YY/MM/DD | TYPE RESP | C COMPLETED D YY/MM/DD |
| C. BOYDEN GRAY | ORG | 89/07/07 | | |
| REFERRAL NOTE: | | | | |
| DAVID DEMAREST ✓ | RSI | 89/07/07 | | C 89/07/07 |
| REFERRAL NOTE: | | | | |
| REFERRAL NOTE: | | | | |
| REFERRAL NOTE: | | | | |
| REFERRAL NOTE: | | | | |

COMMENTS: * FOR REASON TO REPLACE EMOTION

ADDITIONAL CORRESPONDENTS: MEDIA:L INDIVIDUAL CODES: _____

MI MAIL USER CODES: (A) _____ (B) _____ (C) _____

```

*****
*ACTION CODES:          *DISPOSITION          *OUTGOING          *
*                       *                       *CORRESPONDENCE:  *
*A-APPROPRIATE ACTION  *A-ANSWERED          *TYPE RESP=INITIALS *
*C-COMMENT/RECOM       *B-NON-SPEC-REFERRAL *           OF SIGNER  *
*D-DRAFT RESPONSE      *C-COMPLETED        *           CODE = A   *
*F-FURNISH FACT SHEET  *S-SUSPENDED        *COMPLETED = DATE OF *
*I-INFO COPY/NO ACT NEC*                       *           OUTGOING *
*R-DIRECT REPLY W/COPY *                       *                       *
*S-FOR-SIGNATURE       *                       *                       *
*X-INTERIM REPLY       *                       *                       *
*****

```

REFER QUESTIONS AND ROUTING UPDATES TO CENTRAL REFERENCE
(ROOM 75, OEOB) EXT-2590
KEEP THIS WORKSHEET ATTACHED TO THE ORIGINAL INCOMING
LETTER AT ALL TIMES AND SEND COMPLETED RECORD TO RECORDS
MANAGEMENT.

51370



Hubbard Broadcasting, Inc.

3415 UNIVERSITY AVENUE • SAINT PAUL, MINNESOTA 55114

STANLEY S. HUBBARD
President and Chief Executive Officer

June 28, 1989

The President of the United States
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20500

Dear President Bush:

I think that my family and I are as patriotic as anyone. We believe in the United States of America, and we pledge allegiance to the flag. However, in pledging allegiance to the flag, we are pledging allegiance to a concept which goes far beyond the importance of the flag itself as a material object. We believe that anyone who burns the flag is, to say the least, a "jackass" and such a person, like any other person who engages in offensive behavior, should be derided and looked down upon by his fellow Americans.

One of the most important principles which has guided the development of our country is the freedom of speech and expression. We all know the old saying, "I may not agree with what you have to say, but I will defend your right to say it." The same is true of the flag. If a person wants to be so foolish as to buy an American flag and then burn it, that should be that person's privilege. In this regard, we think the Court is absolutely correct. The right to burn your private property, whether that be the result of a whim or the result of a desire to communicate some kind of protest, is, according to the decision of the Supreme Court, and ought to be, the right of every American citizen.

In addition, and not related to any Constitutional question, the Court has once again, we believe, provided a service to the American people which will help to defuse radicalism. When Nixon was forced from office, the point was made to the radicals that no one is above the law. Now, when the Court affirms a radical's right to burn the flag, I believe in practical terms the Court is going to defuse any effect that burning the flag might have had; and it is going to cause many would-be flag burners to stop and reflect that perhaps their country is wonderful after all.

My suggestion is that any effort to pass any laws to outlaw flag burning be set aside for a long enough time for reason to replace emotion.

The United States of America is the greatest country in the history of the world; and thank God it is a country where we can fly the flag proudly if we wish or we can burn it if we want to be so foolish.

Sincerely,

Stanley S. Hubbard

cle

On the Flag, The Justices Make Dukakis's Mistake

By L. GORDON CROVITZ

One week after Supreme Court justices ruled that burning the flag doesn't amount to "fighting words," a scrap outside the Arkansas state capitol proved them wrong. A fringe candidate for governor, Robert McIntosh, was set to burn a flag until a group of onlookers rushed him. Auto shop owner Brett Keathley threw a punch at Mr. McIntosh, which gave state police the excuse to arrest both for disorderly conduct. "If it causes me to be arrested, I'll do this every time," Mr. Keathley said.

Similar incidents occurred around the country on July 4. A melee following a left-wing group's effort to burn the flag closed New York's Washington Square Park. Pro-abortion activists in Minneapolis were attacked after burning a flag. Veterans in Albany repeatedly knocked the lighter away from a would-be flag burner.

The broad public outrage since the court ruling in *Texas v. Johnson* may mean the justices so miscalculated how Americans react that if they get another flag-burning case they might come out the other way. This is not because justices are supposed to follow the polls or pander to the majority. Instead, since their approach in such cases is to balance free speech with the likelihood of inciting a breach of the peace, the court's assumption that the average American wouldn't be outraged by someone torching Old Glory means the justices erred as a matter of law.

Justice William Brennan's majority opinion acknowledged that the fighting words doctrine means that the First Amendment does not protect speech or symbolic speech if the expression "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." He was bound by the unanimous Supreme Court opinion in 1942 that upheld the conviction of a demonstrator who had called a local marshal a "God damned racketeer" and a "damned fascist." *Chaplinsky v. New Hampshire* said that there's no constitutional protection for "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

Provocative speech — or provocative "symbolic speech" — thus does not get absolute First Amendment protection. "Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality," the 1942 case held.

But Justice Brennan wrote that it would be unreasonable to think anyone would be incited by Gregory Lee Johnson's burning of the flag at the 1984 Republican convention. He said that burning the flag does not "fall within that small class of 'fighting words' that are 'likely to provoke the average person to retaliation, and thereby cause a breach of the peace'."

The Brennan opinion assumed "No reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the federal government as a direct personal insult or an invitation to exchange fisticuffs." Actually, one reason no one tried to attack Mr. Johnson may have been that he was surrounded by police officers, who quickly arrested him when he burned the flag.

Chief Justice William Rehnquist's dissent pointed out that states have upheld laws against burning the flag because such desecration is so inherently obnoxious that it will naturally lead to a breach of the peace. He argued that "flag burning is the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others."

Why did the majority of justices in the flag case, including conservatives Antonin Scalia and Anthony Kennedy, misunderstand how the "average American" views the flag? It may be the same miscalculation Michael Dukakis made when he underestimated the Pledge of Allegiance. Or perhaps the court confused the symbol with what it symbolizes. In writing that the flag deserves no protection from desecration, Justice Brennan noted that the Founders "were not known for their reverence for the Union Jack." This misses the point. The Texas law outlawed the burning of the U.S. flag, not the Hammer and Sickle.

Ironically, the justices may have misunderstood how people would react to the burning of the flag partly because there are so few flag burners these days. The situation was different in the 1960s of civil rights and antiwar demonstrations, when a more liberal court heard another case involving flag burning. In that case, *Street v. New York*, the flag burner was freed because the court held that he was prosecuted for his words, not his actions. But the justices who thought he was convicted for burning the flag dissented, saying this was not constitutionally protected.

Among the justices who thought laws could protect the flag was liberal Chief Justice Earl Warren. He wrote that "the states and federal government do have the power to protect the flag from acts of desecration and disgrace." Likewise, Justice Hugo Black said that "it passes my belief that anything in the federal Constitution bars a state from making the deliberate burning of the American flag an offense." Interestingly, antiwar activist Tom Hayden, now a California legislator, last week voted for a constitutional amendment against flag burning because such actions incite violence—and he should know.

There is a problem with a legal doctrine that depends on what nine cloistered justices think makes the average American fighting mad. The justices might have been wiser to give more credence to the state laws and federal statutes that prohibit desecration of the flag, laws written by legislators who think burning the flag amounts to fighting words. Whether or not a constitutional amendment is the proper response, the fact of public outrage over the flag decision is itself good evidence that the justices got the law wrong.

Mr. Crovitz is assistant editor of the Journal's editorial page.