

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. fax	cover sheet, OLC to Ed Smith (partial) (1 page)	07/14/1995	P6/b(6)
002. notice	Ben Johnson to Colleague (partial) (1 page)	07/07/1995	P6/b(6)

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Molly Brostrom
OA/Box Number: 8398

FOLDER TITLE:

Flag Burning

2012-0326-S

kc783

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

September 25, 1995

Mr. William M. Detweiler
National Commander
The American Legion
1608 K Street, N.W.
Washington, D.C. 20006

Dear Commander Detweiler:

Thank you for sharing your views about the proposal to amend the United States Constitution in order to protect the American flag.

Our flag is a shining symbol of democracy for our citizens and for people around the world. It must be protected from desecration. When I was Governor of Arkansas, I supported legislation that would have outlawed all intentional desecration of the American flag. I also initiated a statewide "Flag Respect" program designed to encourage a better understanding and appreciation of both our flag and the pledge of allegiance. This program has since been adopted by many other states.

However, I do not believe that protection of the flag should be accomplished through the extraordinary process of amending our Constitution. The Bill of Rights was ratified in 1792 and has never once been amended, demonstrating our historic reluctance to tamper with so important and fundamental a guarantee of our rights as American citizens. The best protection for the flag is the one that has worked for more than two hundred years: the reverence that nearly all Americans feel for this cherished symbol of our unity and freedom.

I appreciate your interest in this important issue.

Sincerely,

BILL CLINTON

BC/efr (Corres. #2475285)
P-2015

cc: Bob Jones, SPL,
cc: w/copy of inc to Scheduling
cc: Legislative Affairs
WHcc: Senator Tom Harkin

7 : 202-456-6216

Jun 5 '95

4:05 No. 011 P. 01

OUTLINE OF PROPOSED TESTIMONY ON FLAG DESECRATION AMENDMENT

The President has a long and vocal record in support of protecting the Flag from burning and other forms of desecration. His abhorrence of those who would show disrespect to our national symbol is profound and unambiguous.

As governor, he supported legislation that would have outlawed all intentional desecration of the American Flag.

Also as governor, he initiated a state-wide "Flag Respect" program designed to encourage a better understanding and appreciation of both the Flag and the Pledge of Allegiance. The program has since been adopted by other states, and the President has received awards from both the Veterans of Foreign Wars and the Vietnam Veterans of America for his support of the program.

While the President worked hard to craft legislation that would survive Supreme Court review, it now appears that that goal cannot be achieved.

Nonetheless, he is reluctant to support the proposed Constitutional amendment. There is an enormous difference between Congress enacting legislation to protect the Flag and Congress proposing to amend the Constitution.

To be clear, our sympathy is with those who believe that the flag is a unique symbol and as such should be protected from physical violation. The fundamental question, however, is whether that desire draws upon considerations of sufficient magnitude to trigger not legislation but the extraordinary process of a constitutional amendment. We are not persuaded that it does.

The Bill of Rights was ratified in 1792. Since then, the Constitution has been amended only 17 times. And the Bill of Rights itself has never been amended. This sparing resort to the amendment process reflects a long held tradition that the fundamental law should not be freely amended.

James Madison noted that constitutional amendments ought to be limited to "certain great and extraordinary occasions." He also objected to the use of the amendment process when appeals to passion are likely to be a driving force.

The proposed Flag Burning amendment ~~would violate both of these principles.~~ *you must first stand* While we all do, and should, object in the strongest terms to any form of flag desecration, we should not use this occasion to tinker with the Bill of Rights.

RESPONSE TO QUESTIONS ABOUT THE PROPOSED FLAG AMENDMENT TO THE CONSTITUTION

- The President has advocated legislation that would outlaw intentional desecration of the American Flag, but does not support an amendment to the Constitution for this purpose. He believes strongly that the Flag should be respected and abhors anyone who shows disrespect for this universal symbol of Freedom.
- VA does not have a position on this matter other than to share President Clinton's abhorrence of any activity which demeans or desecrates the Flag.
- VA is pursuing other, more pressing issues of concern to the Nation's veterans and their families -- that of saving veterans' benefits and services from the desecration of misguided budget proposals now being considered by Congress, which would: eliminate 53,000 VA health care employees, close at least 35 veterans' hospitals, deny care to nearly a million veterans, and take compensation from 137,000 disabled veterans.

THE WHITE HOUSE
OFFICE OF DOMESTIC POLICY

CAROL H. RASCO
Assistant to the President for Domestic Policy

To: CHR - FYI

Draft response for POTUS
and forward to CHR by: _____

Draft response for CHR by: _____

Please reply directly to the writer
(copy to CHR) by: _____

Please advise by: _____

Let's discuss: _____

For your information: _____

Reply using form code: _____

File: _____

Send copy to (original to CHR): _____

Schedule ? : ☐ Accept ☐ Pending ☐ Regret

Designee to attend: _____

Remarks: _____

cc: Molly
Steve
JBA

me
jrb

JUN - 5 1995

THE WHITE HOUSE
WASHINGTON

June 3, 1995

File 1193
BRMM
THE PRESIDENT HAS SEEN

6/3/95

FLAG BURNING

MEMORANDUM TO THE PRESIDENT

FROM:

ABNER MIKVA *ajm*

CHRIS CERF *che*

RE:

Forthcoming Testimony on Flag Burning Amendment

Senator Hatch has asked Walter Dellinger to testify before the Judiciary Committee next Tuesday to present the Administration's position on a proposed flag burning amendment. We have attached for your review a decision memo you previously signed on this issue as well as relevant excerpts from your remarks at the "veterans roundtable" last week. As there is some minor tension between the two, we thought it prudent to solicit your views prior to authorizing Walter to proceed.

We have also drafted an outline we propose that Walter follow. We recommend that you authorize testimony along these lines.

Agree ☒

Disagree ☐

Let's Discuss ☐

*I would change
only last para as noted,
~~and~~ just a subtle change
of emphasis—*

OUTLINE OF PROPOSED TESTIMONY ON FLAG DESECRATION AMENDMENT

- The President has a long and vocal record in support of protecting the Flag from burning and other forms of desecration. His abhorrence of those who would show disrespect to our national symbol is profound and unambiguous.
- As governor, he supported legislation that would have outlawed all intentional desecration of the American Flag.
- Also as governor, he initiated a state-wide "Flag Respect" program designed to encourage a better understanding and appreciation of both the Flag and the Pledge of Allegiance. The program has since been adopted by other states, and the President has received awards from both the Veterans of Foreign Wars and the Vietnam Veterans of America for his support of the program.
- While the President worked hard to craft legislation that would survive Supreme Court review, it now appears that that goal cannot be achieved.
- Nonetheless, he is reluctant to support the proposed Constitutional amendment. There is an enormous difference between Congress enacting legislation to protect the Flag and Congress proposing to amend the Constitution.
- To be clear, our sympathy is with those who believe that the flag is a unique symbol and as such should be protected from physical violation. The fundamental question, however, is whether that desire draws upon considerations of sufficient magnitude to trigger not legislation but the extraordinary process of a constitutional amendment. We are not persuaded that it does.
- The Bill of Rights was ratified in 1792. Since then, the Constitution has been amended only 17 times. And the Bill of Rights itself has never been amended. This sparing resort to the amendment process reflects a long held tradition that the fundamental law should not be freely amended.
- James Madison noted that constitutional amendments ought to be limited to "certain great and extraordinary occasions." He also objected to the use of the amendment process when appeals to passion are likely to be a driving force.
- The proposed Flag Burning amendment ~~would violate both of these principles.~~ *Does not meet these standards* While we all do, and should, object in the strongest terms to any form of flag desecration, we should not use this occasion to tinker with the Bill of Rights.

THE WHITE HOUSE
WASHINGTON

March 21, 1995

MR. PRESIDENT:

Attached is a memo from Ab Mikva and Chris Cerf on a constitutional amendment to ban flag burning which Senator Hatch and others are expected to propose.

Ab and Chris recommend that, if asked about this, you reiterate your abhorrence to flag burning and your regret that the problem evidently cannot be solved legislatively, but oppose a constitutional amendment on the ground that the Bill of Rights is too precious to be tinkered with. Your rationale for opposing the amendment would thus not be that reprehensible forms of speech like this still deserve constitutional protection.

Leon concurs with the recommendation to oppose an amendment. George does too, though he points out that your August 16, 1990 letter to a constituent (see p. 2 of the attachment to the memo) might be construed as tacit support for an amendment.

Approve _____

Disapprove _____

Discuss _____

Jed
Todd Stern

THE WHITE HOUSE

WASHINGTON
March 8, 1995

95123 11 All: 42

MEMORANDUM FOR THE PRESIDENT

THROUGH:

LEON PANETTA

FROM:

ABNER J. MIKVA
CHRISTOPHER D. CERF

SUBJECT:

Proposed Flag Burning Amendment

Senator Hatch and others intend to propose a constitutional amendment granting "Congress and the States . . . the power to prohibit the physical desecration of the Flag of the United States of America." Attached are: (1) a brief chronology of relevant events and (2) a collection of your previous statements on the issue.

In 1989, after the Supreme Court struck down a Texas statute that criminalized flag burning, you responded by: (1) expressing your abhorrence of flag burning; (2) sponsoring legislation that banned such conduct (hoping that it would pass constitutional muster); and (3) initiating an award-winning "flag respect" educational program. In 1991, after a second Supreme Court opinion struck down a similar federal statute, the Arkansas state legislature passed a non-binding resolution urging Congress to propose a constitutional amendment. (43 states have now done the same.) We are informed that such a "memorializing resolution" would not have required the governor's signature. Nor, so far as we are aware, have you ever specifically endorsed a constitutional "fix." Indeed, on one occasion, you expressed your disinclination to carve out a "specific exception" to the Bill of Rights.

Discussion

If asked directly about your position, we recommend that you:

(1) Express your complete abhorrence of flag burning, as reflected by your established record on the issue.

(2) Note, with regret, that it would appear that the problem is not amenable to a legislative solution.

(3) But, nonetheless, express your opposition to a constitutional amendment on the grounds that the Bill of Rights, which has survived unchanged for 200 years, is too precious for this kind of tinkering. This position is premised on a reverence for the Constitution and an appreciation for our historical reluctance to resort to the amendment process lightly. It does not, however, depend on "first amendment values," i.e., the view that even reprehensible forms of speech should be protected.

Agree ☒Disagree ☐Let's Discuss ☐

Flag Burn
EXECUTIVE OFFICE OF THE PRES

26-May-1995 03:28pm

TO: (See Below)
FROM: Margaret M. Suntum
Office of the Press Secretary
SUBJECT: INTERNAL TRANSCRIPT: Remarks at Veterans Round

THE WHITE HOUSE

Office of the Press Secretary

Internal Transcript

May 26, 1995

REMARKS BY THE PRESIDENT
IN VETERANS ROUNDTABLE

The Roosevelt Room

1:00 P.M. EDT

THE PRESIDENT: Whoever wants to go first, have at it.

Q Mr. President, the Fleet Reserve Association supports a concept called Medicare -- and this plan would allow the health care financing administration to reimburse the Department of Veterans Affairs for medical services provided to veterans, age 65 and older. I think this was part of your health care plan, something you --

THE PRESIDENT: It was.

Q -- but I'd still like some comments. We as an association feel that it would profit our veterans. It would also be a cheaper way to go, and we'd very much appreciate your remarks on this.

THE PRESIDENT: Well, as you know it was a part of my health care reform package, and I might say just by the way, I still have some hope that before this budget process is finalized, when the Senate and House Republicans look at the

anniversary of the second world war, th will not have historical revisionism as a way of dealing with contemporary sensitivities. There ar other ways to deal with the realiti of today without rewriting what happened 50 years ago.

I feel very strongly about it. But I think that the common sense center of American feels this way so strongly that the main advise I have to you is just to make sure that you speak out about it, that you write about it, and we make a clear record of what went wrong here so we don't do it anymore.

Q American Legion -- Mr. President. Yesterday we had the first tangible action up on Capitol Hill on an issue that a lot of the organizations around this table feel strongly about, and that's the constitutional amendment on the flag. Can you tell us a little bit where you stand and how you see the issue?

THE PRESIDENT: Well, first of all, I don't know v ry much about where it is because I have been overwhelmingly preoccupied with the terrorism legislation and the budget issues in the last few days. And the President also neither signs, nor

Press RETURN to continue, GOLD MENU for options or EXIT to cancel

vetoed proposed constitutional amendments. It's a referral to the states.

I believe -- I disagreed with the Supreme Court decision that said that the statutes weren't legal. I mean, I didn't agree with the decision. And I supported statutory relief. And I had a flag education program that we organized with the veterans groups in Arkansas -- we went into every fifth-grade class in the state just about with a program we put together that we got some national recognition on, didn't we, from the veterans groups, because it was an amazing thing. We had all these veterans in the wake of all that flag burning a few years ago -- flooded our schools and our kids. We found out there were whole classrooms where kids didn't know anything about the flag, how it was supposed to be treated. Some of them didn't even recite the Pledge of Allegiance. Some of them would put their left hand over their heart instead of their right. It was amazing what we found.

So we made something good happen out of something bad. And so I'm very proud of that, and I don't believe that desecration of the flag has to be legal. I think you can make it illegal. Having said that, I have to be honest and tell you that I, as a man who has been the target of a lot of the exercise of the First Amendment -- probably nobody has paid much of a higher price than I have for believing in the First Amendment -- I'm always loathe to see the Constitution amended when it affects the First Amendment, just because I'm always scared how the courts are going to interpret it.

But I personally believe that people ought not to desecrate the flag, and I've done what I could. I thought we had the best response in the country to all that flag-burning, both in the legislation we passed, which has, as you know, been subsequently set aside by the court -- but also in the education we promoted. I have mixed feelings about the constitutional amendment just because it amends the First Amendment, and I've always been for a very broad view of the First Amendment. But it's one fight that I don't have to be involved in one way or the other. (Laughter.) I've got enough to do.

Q Mark Peterson, Stars and Stripes. Later today you're going to be signing the presidential order to establish the Persian Gulf Advisory Committee. Is that going to be independent of the VA-DOD Health and Human Services Joint Task Force, and if so, what exactly that commission going to do that the task force is not doing?

THE PRESIDENT: Well, I will release the -- obviously, later today I will release the executive order on the composition of the committee. But I decided to do this because there were so many continuing questions about whether there had been a truly independent look at what was causing the Persian Gulf illness. And this committee has two Gulf War veterans on it, 12 doctors, scientists, defense experts, and veterans. And I just wanted not only to have our government able to pay for disable veterans with undiagnosed illnesses that we believe were connected to their service, but I wanted the people

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**U.S. DEPARTMENT OF JUSTICE
OFFICE OF LEGAL COUNSEL
WASHINGTON, D.C. 20530**

FLAG BUREAU
Amendment

FACSIMILE TRANSMISSION SHEET

DATE: 7/14/95

FROM: OLC

OFFICE PHONE: () 514-2051

TO: Ed Smith

OFFICE PHONE: ()

NUMBER OF PAGES: 6 (NOT INCLUDING COVER SHEET)

FACSIMILE NUMBER: () 456-2878

REMARKS:

Will Cheeks

Home (ph) #

P8(b)(6)

Testimony Before the Subcommittee
on the Constitution, Federalism, and Property Rights
of the United States Senate Judiciary Committee
on

A Proposed Flag Desecration Constitutional Amendment

Walter Dellinger
Assistant Attorney General

Office of Legal Counsel
United States Department of Justice

June 6, 1995

Mr. Chairman, and Members of the Subcommittee:

As you are aware, in 1989 the Supreme Court held in Texas v. Johnson¹ that a state could not, consistent with the First Amendment, enforce a statute criminalizing flag desecration against a demonstrator who burned an American flag. In 1990, in United States v. Eichman,² the Court held that the First Amendment prohibited the conviction of demonstrators for flag burning under a federal statute that criminalized mutilating, defacing, or physically defiling an American flag.

For five years, then, the flag has been left without any statutory protection against symbolic desecration. For five years, one thing, and only one thing, has stood between the flag and its routine desecration: the fact that the flag, as a potent symbol of all that is best about our country, is justly cherished and revered by nearly all Americans. Senator Hatch has eloquently described the flag's status among the American people:

¹ 491 U.S. 397 (1989).

² 496 U.S. 310 (1990).

The American flag represents in a way nothing else can, the common bond shared by a very diverse people. Yet whatever our differences of party, politics, philosophy, race, religion, ethnic background, economic status, social status, or geographic region, we are united as Americans. That unity is symbolized by a unique emblem, the American flag.³

It is precisely because of the meaning the flag has for virtually all Americans that the last five years have witnessed no outbreak of flag burning, but only a few isolated instances, immediately and roundly condemned. If proof were needed, we have it now: with or without the threat of criminal penalties, the flag is amply protected by its unique stature as an embodiment of national unity and ideals.

It is against this background that one must assess the need for a proposed constitutional amendment (S.J. Res. 31) that would permit the criminal punishment of those who "physically desecrate" the American flag. The amendment, if adopted, would for the first time in our history alter the Bill of Rights adopted over two centuries ago. Whether in the future some set of truly exigent circumstances might justify tampering with the Bill of Rights is a question we can put to one side here. For you are asked to assume the risk inherent in a first-time edit of the Bill of Rights in the absence of any meaningful evidence that the flag is in danger of losing its symbolic value.

The unprecedented amendment before you would create legislative power of uncertain dimension to override the First Amendment and other constitutional guarantees. More fundamentally, it would run counter to our traditional resistance, dating back to the time of the Founders, to resorting to the amendment process. For these reasons, the proposed

³ 141 Cong. Rec. S4275 (daily ed. Mar. 21, 1995).

amendment -- and any other proposal to amend the Constitution in order to punish a few isolated acts of flag burning -- should be rejected by this Congress.

I.

At the outset, and in an excess of caution, I would like to note that our disagreement about the wisdom of the proposed amendment does not in any way reflect disagreement about the proper place of the flag in our national community. The President always has and always will condemn in the strongest of terms those who would show disrespect to the symbol of our country's highest ideals.

The President's record reflects his long-standing commitment to protection of the American flag, and his profound abhorrence of flag burning and other forms of flag desecration. In 1989, after the Supreme Court invalidated the Texas statute at issue in Johnson, then-Governor Clinton responded promptly by recommending enactment of a new state law prohibiting all intentional destruction of a flag. The President worked hard to craft legislation that would survive Supreme Court review, and his view was that the statute was consistent with the First Amendment. As you know, however, the Supreme Court's subsequent decision in Eichman, invalidating the federal Flag Protection Act, appears to foreclose legislative efforts to prohibit flag burning. In the wake of Johnson, then-Governor Clinton also instituted a state-wide "flag respect" program to teach school children proper appreciation for the flag. Working with veterans groups in Arkansas, Governor Clinton created a program that went on to win awards from the Veterans of Foreign Wars and the Vietnam Veterans of America.

II.

The text of the proposed amendment is short enough to quote in full: "The Congress and the States shall have power to prohibit the physical desecration of the flag of the United States." The scope of the amendment, however, is anything but clear. Because the proposed amendment fails to state explicitly the degree to which it overrides other constitutional guarantees, it is entirely unclear how much of the Bill of Rights it would trump.

By its terms, the proposed amendment does no more than confer affirmative power upon Congress and the states to legislate with respect to the flag. Its wording is similar to the power-conferring clauses found in Article I, Section 8 of the Constitution: "Congress shall have power to lay and collect taxes," for instance, or "Congress shall have power . . . to regulate commerce . . . among the several states." Like those powers, and all powers granted government by the Constitution, the authority given by the proposed amendment would seem to be limited by the Bill of Rights and the Fourteenth Amendment.

The text of the proposed amendment does not purport to exempt the exercise of the power conferred from the constraints of the First Amendment or any other constitutional guarantee of individual rights. Read literally, the amendment would not alter the result of the decisions in Eichman or Johnson, holding that the exercise of congressional and state power to protect the symbol of the flag is subject to First and Fourteenth Amendment limits. Rather, by its literal text, it would simply and unnecessarily make explicit the governmental power to legislate in this area that always has been assumed to exist.

To give the amendment meaning, then, we must read into it, consistent with its sponsors' intent, at least some restriction on the First Amendment freedoms identified in the

Supreme Court's flag decisions. What is difficult, and profoundly so, is identifying just how much of the First Amendment and the rest of the Bill of Rights is superseded by the amendment. Once we have departed, by necessity, from the amendment's text, we are in uncharted territory, and faced with genuine uncertainty as to the extent to which the amendment will displace the protections enshrined in the Bill of Rights.

We do not know, for instance, whether the proposed amendment is intended, or would be interpreted, to authorize enactments that otherwise would violate the due process "void for vagueness" doctrine. In Smith v. Goguen,⁴ the Court reversed the conviction of a defendant who had sewn a small flag on the seat of his jeans, holding that a state statute making it a crime to "treat contemptuously" the flag was unconstitutionally vague. We cannot be certain that the vagueness doctrine applied in Smith would limit as well prosecutions brought under laws enacted pursuant to the proposed amendment.

Nor is this a matter of purely hypothetical interest, unlikely to have much practical import. The amendment, after all, authorizes laws that prohibit "physical desecration" of the flag, and "desecration" is not a term that readily admits of objective definition. On the contrary, "desecrate" is defined to include such inherently subjective meanings as "profane" and even "treat contemptuously" itself. Thus, a statute tracking the language of the amendment and making it a crime to "physically desecrate" an American flag would suffer from the same defect as the statute at issue in Smith: it would "fail[] to draw reasonably

⁴ 415 U.S. 566 (1974).

clear lines between the kinds of nonceremonial treatment that are criminal and those that are not."⁵

The term "flag of the United States" is similarly "unbounded,"⁶ and by itself provides no guidance as to whether it reaches unofficial as well as official flags, or pictures or representations of flags created by artists as well as flags sold or distributed for traditional display. Indeed, testifying in favor of a similar amendment in 1989, then-Assistant Attorney General William Barr acknowledged that the word "flag" is so elastic that it can be stretched to cover everything from cloth banners with the characteristics of the official flag, as defined by statute,⁷ to "any picture or representation" of a flag, including "posters, murals, pictures, [and] buttons".⁸ And while a statute enacted pursuant to the amendment could attempt a limiting definition, it need not do so; the amendment would authorize as well a statute that simply prohibited desecration of "any flag of the United States." Again, such a statute would implicate the vagueness doctrine applied in Smith, and raise in any enforcement action the question whether the empowering amendment overrides due process guarantees.

Even if we are prepared to assume that the proposed amendment would operate on the First Amendment alone, important questions about the amendment's scope remain. Specifically, we still face the question whether the powers to be exercised under the

⁵ 415 U.S. at 574.

⁶ Id. at 575.

⁷ See 4 U.S.C. § 1.

⁸ Measures to Protect the Physical Integrity of the American Flag: Hearings on S. 1338, H.R. 2978, and S.J. Res. 180 Before the Senate Comm. on the Judiciary, 101st Cong., 1st Sess. 82-85 (1989) ["1989 Hearings"].

amendment would be freed from all, or only some, First Amendment constraints, and, if the latter, how we will know which constraints remain applicable.

An example may help to illuminate the significance of this issue. In R.A.V. v. City of St. Paul,⁹ decided in 1992, the Supreme Court held that even when the First Amendment permits regulation of an entire category of speech or expressive conduct, it does not necessarily permit the government to regulate a subcategory of the otherwise proscribable speech on the basis of its particular message. A government acting pursuant to the proposed amendment would be able to prohibit all flag desecration,¹⁰ but, if R.A.V. retains its force in this context, a government could not prohibit only those instances of flag desecration that communicated a particularly disfavored view; statutes making it a crime -- or an enhanced penalty offense -- to "physically desecrate a flag of the United States in opposition to United States military actions," for instance, would presumably remain impermissible.

This result obtains, of course, if and only if the proposed amendment is understood to confer powers that are limited by the R.A.V. principle. If, on the other hand, the proposed amendment overrides the whole of the First Amendment, or overrides some select though unidentified class of principles within which R.A.V. falls, then there remains no constitutional objection to the hypothetical statute posited above. This is a distinction that

⁹ 112 S. Ct. 2538 (1992).

¹⁰ Even a statute that prohibited all flag desecration would be in tension with the principle of R.A.V. Although a few acts done with a flag could be considered a "desecration" in all contexts, that would not be the case with burning, for example. Only some burnings could be prohibited by statutes adopted under the proposed amendment. Respectful burning of the flag will remain legal after the amendment's adoption as before. See 36 U.S.C. § 176(k) ("The flag, when it is in such condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by burning."). What may be prohibited is only that destruction of a flag that communicates a particular message, one of disrespect or contempt. The conclusion that a particular act of burning is a "desecration" may require in most instances consideration of the particular message being conveyed.

makes a difference, as I hope this example shows, and it should be immensely troubling to anyone considering the amendment that its text leaves us with no way of knowing whether the rule of R.A.V. -- or any other First Amendment principle -- would limit governmental action if the amendment became part of the Constitution.

I will make only one last point with respect to the uncertain scope of the proposed amendment. It is possible that conferral of an undelineated power to cut into the Bill of Rights might be of lesser concern if Congress alone were so empowered. But it must be remembered that the amendment at issue here also grants the same power to fifty different states and an uncertain number of local governments. That raises, of course, the interpretive question of whether state legislatures acting under the amendment would remain bound by state constitutional free speech guarantees, or whether the proposed amendment would supersede state as well as federal constitutional provisions. On a more practical level, it increases, by at least fifty times, the risk that unduly restrictive or arbitrary legislation may be enacted at some point in the near or distant future, and it virtually guarantees a patchwork of very different state responses. Under these circumstances, Congress has a special obligation to make clear the dimensions of the power the amendment would confer.

III.

I have real doubts about whether these interpretive concerns could be resolved fully by even the most artful of drafting. In my view, any effort to constitutionalize an "exception" to the Bill of Rights necessarily will produce significant interpretive difficulties and uncertainty, as the courts attempt to reconcile a specific exception with the general

principles that remain.¹¹ But even assuming, for the moment, that all of the interpretive difficulties of this amendment could be cured, it would remain an ill-advised departure from a constitutional history marked by a deep reluctance to amend our most fundamental law.

The Bill of Rights was ratified in 1792. Since that time, over two hundred years ago, the Bill of Rights has never once been amended. And this is no historical accident, nor a product only of the difficulty of the amendment process itself. Rather, our historic unwillingness to tamper with the Bill of Rights reflects a reverence for the Constitution that is both entirely appropriate and fundamentally at odds with turning that document into a forum for divisive political battles.

The Framers themselves understood that resort to the amendment process was to be sparing and reserved for "great and extraordinary occasions."¹² In The Federalist Papers, James Madison warned against using the amendment process as a device for correcting every perceived constitutional defect -- a practice that could not help but undermine the role of the Supreme Court.¹³ Of particular interest here, Madison objected especially to amendment on issues that inflamed public passion, fearing that such actions might threaten "the constitutional equilibrium of the government."¹⁴

¹¹ For an earlier discussion of this problem in the context of a proposed Silent Prayer Amendment, see Walter Dellinger, The Sound of Silence: An Epistle on Prayer and the Constitution, 95 Yale L.J. 1631, 1644-45 (1986).

¹² The Federalist No. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961).

¹³ See id. at 314.

¹⁴ Id. at 315-17. See also 1989 Hearings at 720-23 (statement of Professor Henry Paul Monaghan, Columbia University School of Law).

The proposed amendment cannot be reconciled with this fundamental and historic understanding of the integrity of the Constitution. I think perhaps Charles Fried, who served with distinction as Solicitor General under President Reagan, made the point best when he testified against a similar proposed amendment in 1990:

The flag, as all in this debate agree, symbolizes our nation, its history, its values. We love the flag because it symbolizes the United States; but we must love the Constitution even more, because the Constitution is not a symbol. It is the thing itself.¹⁵

IV.

We come to this discussion at a time when peace among ourselves seems threatened, and national unity an elusive goal. The unity we seek, however, should be of the kind that is freely chosen, because that is the only kind that matters and the only kind that will endure. Americans are free today to display the flag respectfully, to ignore it entirely, or to use it as an expression of protest or reproach. By overwhelming numbers, Americans have chosen the first option, and display the flag proudly. And what gives this gesture its unique symbolic meaning is the fact that the choice is freely made, uncoerced by the government. Were it otherwise -- were, for instance, respectful treatment of the flag the only choice constitutionally available -- then the respect paid the flag by millions of Americans would mean something different and perhaps something less.

#

¹⁵ Proposing an Amendment to the Constitution Authorizing the Congress and the States to Prohibit the Physical Desecration of the American Flag: Hearing Before the Senate Comm. on the Judiciary, 101st Cong., 2d Sess. 110 (1990).

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
002. notice	Ben Johnson to Colleague (partial) (1 page)	07/07/1995	P6/b(6)

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Molly Brostrom
OA/Box Number: 8398

FOLDER TITLE:

Flag Burning

2012-0326-S

kc783

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

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RR. Document will be reviewed upon request.

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- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

07/14/95 17:48

To: Teresa Roseborough

From: Ben Johnson

7-7-95 11:48am p. 2 of 2

[002]
012

IMPORTANT NOTICE IMPORTANT NOTICE IMPORTANT NOTICE

July 7, 1995

Dear Colleague:

This is to advise you that you are invited to a very important briefing of senior African American appointees on July 19, 1995. The briefing is for PA's, PAS, and SES appointees and will focus on communications and current issues facing the Clinton Administration and the nation.

The briefing will be held in room 450 of the Old Executive Office Building and will begin promptly at 4:30pm and end at 6:30pm. You must arrive with valid photo ID at the Pennsylvania Avenue entrance to the OEOB no later than 4:10pm. In order to gain entry to the building, you must fax us your full legal name as it appears on your photo ID, along with your birthdate and social security number. This information is to be faxed to me at 456-6218 no later than July 13, 1995.

Additionally, please advise all African American Schedule C appointees that due to space limitations, this briefing is for PA, PAS, and SES employees only. We intend to brief all Schedule C appointees in the immediate future (date and time to be announced shortly). Thanks for your attention to this memorandum and we look forward to seeing you on July 19th.

Sincerely,

Ben Johnson
Associate Director, OPL

~~Teresa Wynn Roseborough~~

P6(b)(6)

Apologies —

Teresa will be out-of-town
the week of July 19th

OUTLINE OF PROPOSED TESTIMONY ON FLAG DESECRATION AMENDMENT

The President has a long and vocal record in support of protecting the Flag from burning and other forms of desecration. His abhorrence of those who would show disrespect to our national symbol is profound and unambiguous.

As governor, he supported legislation that would have outlawed all intentional desecration of the American Flag.

Also as governor, he initiated a state-wide "Flag Respect" program designed to encourage a better understanding and appreciation of both the Flag and the Pledge of Allegiance. The program has since been adopted by other states, and the President has received awards from both the Veterans of Foreign Wars and the Vietnam Veterans of America for his support of the program.

While the President worked hard to craft legislation that would survive Supreme Court review, it now appears that that goal cannot be achieved.

Nonetheless, he is reluctant to support the proposed Constitutional amendment. There is an enormous difference between Congress enacting legislation to protect the Flag and Congress proposing to amend the Constitution.

To be clear, our sympathy is with those who believe that the flag is a unique symbol and as such should be protected from physical violation. The fundamental question, however, is whether that desire draws upon considerations of sufficient magnitude to trigger not legislation but the extraordinary process of a constitutional amendment. We are not persuaded that it does.

The Bill of Rights was ratified in 1792. Since then, the Constitution has been amended only 17 times. And the Bill of Rights itself has never been amended. This sparing resort to the amendment process reflects a long held tradition that the fundamental law should not be freely amended.

James Madison noted that constitutional amendments ought to be limited to "certain great and extraordinary occasions." He also objected to the use of the amendment process when appeals to passion are likely to be a driving force.

The proposed Flag Burning amendment does not meet those standards. While we all do, and should, object in the strongest terms to any form of flag desecration, we should not use this occasion to tinker with the Bill of Rights.

JUN - 5 1995

THE WHITE HOUSE

WASHINGTON

June 3, 1995

THE PRESIDENT HAS SEEN

6/3/95

File 1 "g"
BRMM

MEMORANDUM TO THE PRESIDENT

FROM:

ABNER MIKVA *ajm*

CHRIS CERF *cc*

RE:

Forthcoming Testimony on Flag Burning Amendment

Senator Hatch has asked Walter Dellinger to testify before the Judiciary Committee next Tuesday to present the Administration's position on a proposed flag burning amendment. We have attached for your review a decision memo you previously signed on this issue as well as relevant excerpts from your remarks at the "veterans roundtable" last week. As there is some minor tension between the two, we thought it prudent to solicit your views prior to authorizing Walter to proceed.

We have also drafted an outline we propose that Walter follow. We recommend that you authorize testimony along these lines.

✓
Agree ☒

Disagree ☐

Let's Discuss ☐

*I would change
only last para as noted!
~~and~~ just a subtle change
emphasis—*

OUTLINE OF PROPOSED TESTIMONY ON FLAG DESECRATION AMENDMENT

- The President has a long and vocal record in support of protecting the Flag from burning and other forms of desecration. His abhorrence of those who would show disrespect to our national symbol is profound and unambiguous.
- As governor, he supported legislation that would have outlawed all intentional desecration of the American Flag.
- Also as governor, he initiated a state-wide "Flag Respect" program designed to encourage a better understanding and appreciation of both the Flag and the Pledge of Allegiance. The program has since been adopted by other states, and the President has received awards from both the Veterans of Foreign Wars and the Vietnam Veterans of America for his support of the program.
- While the President worked hard to craft legislation that would survive Supreme Court review, it now appears that that goal cannot be achieved.
- Nonetheless, he is reluctant to support the proposed Constitutional amendment. There is an enormous difference between Congress enacting legislation to protect the Flag and Congress proposing to amend the Constitution.
- To be clear, our sympathy is with those who believe that the flag is a unique symbol and as such should be protected from physical violation. The fundamental question, however, is whether that desire draws upon considerations of sufficient magnitude to trigger not legislation but the extraordinary process of a constitutional amendment. We are not persuaded that it does.
- The Bill of Rights was ratified in 1792. Since then, the Constitution has been amended only 17 times. And the Bill of Rights itself has never been amended. This sparing resort to the amendment process reflects a long held tradition that the fundamental law should not be freely amended.
- James Madison noted that constitutional amendments ought to be limited to "certain great and extraordinary occasions." He also objected to the use of the amendment process when appeals to passion are likely to be a driving force.
- The proposed Flag Burning amendment ^{does not meet these standards} ~~would violate both of these principles~~. While we all do, and should, object in the strongest terms to any form of flag desecration, we should not use this occasion to tinker with the Bill of Rights.

THE WHITE HOUSE
WASHINGTON

March 21, 1995

MR. PRESIDENT:

Attached is a memo from Ab Mikva and Chris Cerf on a constitutional amendment to ban flag burning which Senator Hatch and others are expected to propose.

Ab and Chris recommend that, if asked about this, you reiterate your abhorrence to flag burning and your regret that the problem evidently cannot be solved legislatively, but oppose a constitutional amendment on the ground that the Bill of Rights is too precious to be tinkered with. Your rationale for opposing the amendment would thus not be that reprehensible forms of speech like this still deserve constitutional protection.

Leon concurs with the recommendation to oppose an amendment. George does too, though he points out that your August 16, 1990 letter to a constituent (see p. 2 of the attachment to the memo) might be construed as tacit support for an amendment.

Approve___ Disapprove___ Discuss___

TJS
Todd Stern

THE WHITE HOUSE

WASHINGTON
March 8, 1995

55123 11 All: 42

MEMORANDUM FOR THE PRESIDENT

THROUGH:

LEON PANETTA

FROM:

ABNER J. MIKVA
CHRISTOPHER D. CERF

SUBJECT:

Proposed Flag Burning Amendment

Senator Hatch and others intend to propose a constitutional amendment granting "Congress and the States . . . the power to prohibit the physical desecration of the Flag of the United States of America." Attached are: (1) a brief chronology of relevant events and (2) a collection of your previous statements on the issue.

In 1989, after the Supreme Court struck down a Texas statute that criminalized flag burning, you responded by: (1) expressing your abhorrence of flag burning; (2) sponsoring legislation that banned such conduct (hoping that it would pass constitutional muster); and (3) initiating an award-winning "flag respect" educational program. In 1991, after a second Supreme Court opinion struck down a similar federal statute, the Arkansas state legislature passed a non-binding resolution urging Congress to propose a constitutional amendment. (43 states have now done the same.) We are informed that such a "memorializing resolution" would not have required the governor's signature. Nor, so far as we are aware, have you ever specifically endorsed a constitutional "fix." Indeed, on one occasion, you expressed your disinclination to carve out a "specific exception" to the Bill of Rights.

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Discussion

If asked directly about your position, we recommend that you:

(1) Express your complete abhorrence of flag burning, as reflected by your established record on the issue.

(2) Note, with regret, that it would appear that the problem is not amenable to a legislative solution.

(3) But, nonetheless, express your opposition to a constitutional amendment on the grounds that the Bill of Rights, which has survived unchanged for 200 years, is too precious for this kind of tinkering. This position is premised on a reverence for the Constitution and an appreciation for our historical reluctance to resort to the amendment process lightly. It does not, however, depend on "first amendment values," i.e., the view that even reprehensible forms of speech should be protected.

Agree ☒Disagree ☐Let's Discuss ☐

EXECUTIVE OFFICE OF THE PRES

26-May-1995 03:28pm

TO: (See Below)

FROM: Margaret M. Suntum
Office of the Press Secretary

SUBJECT: INTERNAL TRANSCRIPT: Remarks at Veterans Round

THE WHITE HOUSE

Office of the Press Secretary

Internal Transcript

May 26, 1995

REMARKS BY THE PRESIDENT
IN VETERANS ROUNDTABLE

The Roosevelt Room

1:00 P.M. EDT

THE PRESIDENT: Whoever wants to go first, have at it.

Q Mr. President, the Fleet Reserve Association supports a concept called Medicare -- and this plan would allow the health care financing administration to reimburse the Department of Veterans Affairs for medical services provided to veterans, age 65 and older. I think this was part of your health care plan, something you --

THE PRESIDENT: It was.

Q -- but I'd still like some comments. We as an association feel that it would profit our veterans. It would also be a cheaper way to go, and we'd very much appreciate your remarks on this.

THE PRESIDENT: Well, as you know it was a part of my health care reform package, and I might say just by the way, I still have some hope that before this budget process is finalized, when the Senate and House Republicans look at the

'anniversary of the second world war, then we will not have historical revisionism as a way of dealing with contemporary sensitivities. There are other ways to deal with the realities of today without rewriting what happened 50 years ago.

I feel very strongly about it. But I think that the common sense center of American feels this way so strongly that the main advise I have to you is just to make sure that you speak out about it, that you write about it, and we make a clear record of what went wrong here so we don't do it anymore.

Q American Legion -- Mr. President. Yesterday we had the first tangible action up on Capitol Hill on an issue that a lot of the organizations around this table feel strongly about, and that's the constitutional amendment on the flag. Can you tell us a little bit where you stand and how you see the issue?

THE PRESIDENT: Well, first of all, I don't know very much about where it is because I have been overwhelmingly preoccupied with the terrorism legislation and the budget issues in the last few days. And the President also neither signs, nor

Press RETURN to continue, GOLD MENU for options or EXIT to cancel

vetoed proposed constitutional amendments. It's a referral to the states.

I believe -- I disagreed with the Supreme Court decision that said that the statutes weren't legal. I mean, I didn't agree with the decision. And I supported statutory relief. And I had a flag education program that we organized with the veterans groups in Arkansas -- we went into every fifth-grade class in the state just about with a program we put together that we got some national recognition on, didn't we, from the veterans groups, because it was an amazing thing. We had all these veterans in the wake of all that flag burning a few years ago -- flooded our schools and our kids. We found out there were whole classrooms where kids didn't know anything about the flag, how it was supposed to be treated. Some of them didn't even recite the Pledge of Allegiance. Some of them would put their left hand over their heart instead of their right. It was amazing what we found.

So we made something good happen out of something bad. And so I'm very proud of that, and I don't believe that desecration of the flag has to be legal. I think you can make it illegal. Having said that, I have to be honest and tell you that I, as a man who has been the target of a lot of the exercise of the First Amendment -- probably nobody has paid much of a higher price than I have for believing in the First Amendment -- I'm always loathe to see the Constitution amended when it affects the First Amendment, just because I'm always scared how the courts are going to interpret it.

But I personally believe that people ought not to desecrate the flag, and I've done what I could. I thought we had the best response in the country to all that flag-burning, both in the legislation we passed, which has, as you know, been subsequently set aside by the court -- but also in the education we promoted. I have mixed feelings about the constitutional amendment just because it amends the First Amendment, and I've always been for a very broad view of the First Amendment. But it's one fight that I don't have to be involved in one way or the other. (Laughter.) I've got enough to do.

Q Mark Peterson, Stars and Stripes. Later today you're going to be signing the presidential order to establish the Persian Gulf Advisory Committee. Is that going to be independent of the VA-DOD Health and Human Services Joint Task Force, and if so, what exactly that commission going to do that the task force is not doing?

THE PRESIDENT: Well, I will release the -- obviously, later today I will release the executive order on the composition of the committee. But I decided to do this because there were so many continuing questions about whether there had been a truly independent look at what was causing the Persian Gulf illness. And this committee has two Gulf War veterans on it, 12 doctors, scientists, defense experts, and veterans. And I just wanted not only to have our government able to pay for disable veterans with undiagnosed illnesses that we believe were connected to their service, but I wanted the people