

**TESTIMONY OF  
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TO THE  
COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE  
ON  
SENATE JOINT RESOLUTION 4**

**MARCH 10, 2004**

Mr. Chairman and members of the Judiciary Committee, I appreciate you holding these hearings on this important issue and for providing me this opportunity to submit written testimony in support of S.J. Res. 4. As the National Executive Committeeman of The American Legion's Department of Wisconsin, I deem it a great privilege.

Since 1989, The American Legion and 140 other organizations have united their efforts for a single cause – a proposed constitutional amendment you and your colleagues are considering today, S.J. Res. 4. It seems that there are a number of social issues being address these days that call attention to a number of judicial decisions. Whether it be same sex marriages, several incidents during the recent Super Bowl half-time show, or comments and antics in radio broadcasts, there will be a great deal of discussion about the First Amendment rights. I believe that is good because, quite frankly, I believe many individuals have not fully accepted the responsibility that accompanies exercising any constitutional freedoms.

Some have criticized this proposed constitutional amendment because it would restrict freedom of speech. This proposed constitutional amendment does not restrict freedom of speech; however, it does allow Congress to return some degree of individual accountability for wanton misconduct. We are a society of laws – many originating out of this body. Once you and your colleagues agree on legislation, it is sent to the President for his actions. Then the checks and balances move to the next step – judicial review. But Mr. Chairman, that is not the end of the process. The First Amendment provides for those of us who must live under that law the constitutional right to question any law enacted.

Article V provides for two methods of amending the constitution. Obviously, The American Legion and the CFA wisely selected this process over the constitutional convention approach. This venue only involves a supermajority of the House, the Senate, and the American people. I place a great deal of faith in the wisdom of the electorate.

In 1989, Senator Biden was convinced that he could draft flag protection legislation that would pass constitutional muster. The Flag Protection Act of 1989 passed by more than a supermajority in both chambers, but unfortunately, Senator Biden and many of his colleagues were wrong. The Supreme Court returned the same 5-4 decision that the Flag Protection Act of 1989 was also unconstitutional. In fact, few of the Senators that voted against that bill voted because they felt the proposed statute was unconstitutional and preferred the proposed constitutional amendment instead.

Although former Presidents Madison and Jefferson fervently believed that common discourse was essential to democracy, both held the flag in high esteem. They deemed usurpation of the flag as an indignity demanding justice. On July 6, 1807 in a letter to James Monroe, Madison wrote: "The indignity offered to the sovereignty and flag of the nation demands...an honorable reparation...(such as) an entire abolition of impressments from vessels under the flag of the United States..." Likewise, Jefferson, then Secretary of State under George Washington, instructed consuls to punish "usurpation of our flag."

If they were here today, Madison and Jefferson would join with the CFA to reinstate the protection of the flag. However, I sincerely doubt that the Supreme Court in 1807 would have ruled as the Supreme Court did in 1989. The 5-4 ***Texas vs. Johnson*** decision altered the principles of the First Amendment upheld by six previous decisions of their predecessors. That decision set into motion the effort of the American people to correct the error of the Court.

Some have questioned the frequency of such bizarre and abnormal behavior; however, that is a frivolous argument. Public laws are based on legality not frequency. It is either right or wrong to physically desecrate the flag. Although physical desecration has never been widespread in our society, the number of incidents continues, except it is now legal. Even the young man in Appleton that decided to defecate on an American flag used a bodily function to exercise his newly granted constitutional right to physically desecrate Old Glory.

Some try to trivialize the debate on this issue with a seemingly endless list of flag etiquette references – T-shirts, pants, purses, paper plates, slippers and the like – questioning just what is a flag. Ask any sixth grader. They'll tell you what a flag is. In doubt? Ask someone to salute the flag on that T-shirt, or pledge their allegiance to that paper plate. You'll be laughed at, if not ridiculed. For the ultimate test simply ask yourself "would I place that object on a coffin of a deceased veteran to represent the thanks of a grateful nation?"

The amendment currently being considered by the Senate in S.J. Res. 4 simply says: "The Congress shall have power to prohibit the physical desecration of the flag of the United States." This measure has the support of 80 percent of the American people, 50 state legislatures (including Wisconsin), the House of Representatives (passed by super majority votes in 1995, 1997, 1999, 2001 and 2003) and 64 supporters in the Senate. What keeps the issue from the American people are 36 Senators opposed to this proposed constitutional amendment. While we cannot change their minds on this issue, we would certainly hope that just three of them would change their vote and let the people decide this issue which has so much overwhelming support.

Finally, as a veteran, I do not appreciate those, especially non-veterans, who insist on telling me why I served in the armed forces. When I raised my hand, it was to protect and defend the Constitution of the United States that prohibited the physical desecration of the flag of the United States. Five Supreme Court Justices changed that not Congress, the President, nor me. I served to protect freedom, not the right to physically desecrate the Star Spangle Banner. In this veteran's eyes, only an enemy physically desecrates your flag.

Mr. Chairman, flying a nation's flag inverted (upside down) is not physical desecration, but rather an international symbol of distress. My point is simply, there are so many ways to communicate concern short of the physical desecration of Old Glory.

I have heard the story about "pouring hot coffee into a saucer to let it cool." Ladies and gentlemen, the passion behind this proposed constitutional amendment has had 14 years to cool. It is time to let the American people vote on this issue.