



June 14, 2006

**Re: Oppose S.J. Res. 12, the Constitutional Amendment on Flag  
Desecration**

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Dear Senator,

We are writing to urge you protect free speech by opposing S.J. Res. 12, the constitutional amendment on flag desecration. As a member of the Senate, you are entrusted with the privilege and responsibility of defining, drafting and implementing the laws that protect our civil liberties. The upcoming vote on S.J. Res. 12 tests that leadership responsibility at its very core. We urge you to defend the fundamental liberties that our flag and other cherished symbols represent by opposing this amendment because it would cause needless injury to the Bill of Rights.

Some members of Congress assert that all veterans favor this amendment. However, veterans themselves are divided in their opinions on this proposal and how best to express their patriotism. While some veterans want their litmus test of patriotism enforced on others through this amendment, many others, such as those represented by Veterans Defending the Bill of Rights and Veteran's for Common Sense, ask that you take the long view of liberty. They urge you to vote to reinforce the truth that our Bill of Rights, unaltered for more than 200 years, is greater than the sum of its parts, and that the inappropriate rendering of the First Amendment by this amendment to punish a rare and expressive act tatters the whole fabric of the Bill of Rights.

A well-known and highly regarded veteran, Secretary of State Colin L. Powell, in his capacity as a retired general, voiced his opposition to the flag amendment while the Senate was considering it several years ago. He said:

I understand how strongly so many of my fellow veterans and citizens feel about the flag and I understand the powerful sentiment in state legislatures for such an amendment. I feel the same sense of outrage. But I step back from amending the Constitution to relieve that outrage. The First Amendment exists to insure that freedom of speech and expression applies not just to that with which we agree or disagree, but also that which we find outrageous. *I would not amend that great shield of democracy to hammer a few miscreants. The flag*

*will be flying proudly long after they have slunk away.*  
[emphasis supplied]

The American people as a whole are decidedly against amending the Constitution to ban flag desecration. According to a poll conducted by the First Amendment Center in May 2005, 63% of those sampled said the U.S. Constitution “should not be amended to prohibit burning or desecrating the American flag,” up from 53% in 2004 and the highest number against the proposed amendment since the annual survey began in 1997. It is noteworthy that decline in support for this proposal comes at a time when the United States is fighting a war in Iraq. The majority of Americans have come to understand that opposing the flag desecration amendment honors and protects the freedoms so many Americans have given—and continue to give—their lives to defend.

Beyond the issue of whether Americans support this proposal, there are reasons intrinsic to the interpretation and operation of the amendment to oppose its passage. This constitutional amendment empowers Congress to prohibit desecration of the flag and punish those who injure a flag in a manner that shows contempt for the U.S. Government. That means that elected officials, law enforcement agents, and the courts will be asked to define and enforce that prohibition by deciding which use of an important national symbol is acceptable and which is not. When curators, salespersons, clothiers and political pundits all worry that their use of a flag—orally, symbolically, or physically—will subject them to civil or criminal sanctions, we will have reached a point of government regulation of thought and expression that is truly un-American.

This amendment empowers Congress to determine that one valuable national symbol is sacred, but others are not. Would this body consider next an amendment to protect against the desecration of the Declaration of Independence or another to protect against the desecration of the Bible? S.J. Res. 12 gives Congress the power to prioritize that which is most sacred, that which is merely sacred, and that which is not—an entanglement that so many people, religious and not, have fought valiantly to avoid.

If enacted, this would mark the first time an amendment altered the carefully balanced Bill of Rights. In opposing this very amendment last year another veteran, Senator John Glenn, reminded us:

Those 10 amendments to the Constitution we call the Bill of Rights have never been changed or altered by one iota, not by one word, not a single time in all of American history. There was not a single word changed in that Bill of Rights during Civil War. There was not a single change during any of our foreign wars, and not during recessions or depressions or panics. Not a single change when we were going through times of great emotion and anger like the Vietnam era, when flag after flag was burned or desecrated, far more often than

they are today... I think there is only one way to weaken the fabric of our Nation, a unique country that stands as a beacon before other Nations around this world. The way to weaken our Nation would be to erode the freedom that we all share.

Senator Byrd, in deciding to oppose this amendment said on the Senate floor, "[T]he flag is the symbol of all we hold near and dear. That flag is the symbol of our Nation's history. That flag is the symbol of our nation's values. We love that flag. But we must love the Constitution more. For the Constitution is not just a symbol, it is the thing itself!"

And finally, nearly fifteen years ago, Supreme Court Justices Brennan and Scalia agreed on a tenet of freedom the articulation of which we cannot improve:

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... *Punishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering.* (United States v. Eichman, 1990).

The very principle behind the inclusion of First Amendment in our Constitution was to protect the voices, views, beliefs and expression of the minority against the sometimes suppressive will of the majority. It sets a very dangerous precedent to argue, as proponents of this amendment do, that certain forms of speech should be restricted because the majority of veterans are offended and/or disagree with a particular form of speech.

The ACLU urges you to oppose this constitutional amendment. It would enshrine in the highest law of our land an unnecessary government power harmful to core liberties. Please do not hesitate to call Terri Schroeder at 202-675-2324 if you have any questions regarding this issue.

Sincerely,



Caroline Fredrickson  
Director



Terri A. Schroeder  
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