

SENATE—Friday, December 8, 1995

The Senate met at 10 a.m. and was called to order by the President pro tempore [Mr. THURMOND].

PRAYER

The Chaplain, Dr. Lloyd John Ogilvie, offered the following prayer:

Let us pray:
 Lord of all life, thank You for the gift of time. You have given us the hours of this day to work for Your glory by serving our Nation. Remind us that there is enough time in any one day to do what You want us to accomplish. Release us from that rushed feeling when we overload Your agenda for us with things which You may not have intended for us to cram into today. Help us to live on Your timing. Grant us serenity when we feel irritated by trifling annoyances, by temporary frustration, by little things to which we must give time and attention. May we do what the moment demands with a heart of readiness. Also give us the courage to carve out time for quiet thought and creative planning to focus our attention on the big things we must debate, and eventually decide with a decisive vote. Help us to be silent, wait on You, and receive Your guidance. May the people we serve and those with whom we work sense that in the midst of pressure and the rough and tumble of political life, we have had our minds replenished by listening to You. In the name of our Lord. Amen.

RESERVATION OF LEADER TIME

The PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

**FLAG DESECRATION
CONSTITUTIONAL AMENDMENT**

The PRESIDENT pro tempore. Under the previous order, the Senate will now proceed to the consideration of Senate Joint Resolution 31, which the clerk will report.

The legislative clerk read as follows:

A joint resolution (S.J. Res. 31) proposing an amendment to the Constitution of the United States to grant Congress and the States the power to prohibit the physical desecration of the flag of the United States.

The Senate proceeded to consideration of the joint resolution.

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

The PRESIDING OFFICER (Mr. DEWINE). The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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 President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. HATCH. Mr. President, in listening to the debate on the flag amendment on Wednesday and some of the remarks of some of my colleagues here on the floor, my reaction with respect to some of their arguments and some of the arguments of the opponents of the flag amendment comes down to, there they go again. The same tired, old, worn out arguments, again and again.

One of my colleagues from Arkansas says we are here because of "pure, sheer politics." Evidently, some opponents of the amendment believe there is only one side to this argument, and everybody else must be playing politics. Tell that to Rose Lee, a Gold Star Wife and past president of the Gold Star Wives of America.

She testified in support of this constitutional amendment to prevent desecration of the American flag, our national symbol. She testified in support of this amendment on June 6, 1995, before the Constitution Subcommittee, and brought with her the flag that had draped her husband's coffin. She said:

It's not fair and it's not right that flags like this flag, handed to me by an honor guard 23 years ago, can be legally burned by someone in this country. It is a dishonor to our husbands and an insult to their widows to allow this flag to be legally burned.

Go tell Rose Lee she supports the flag protection amendment out of pure, sheer politics.

Go tell the members of the American Legion who have been visiting our offices. Go tell our colleague, Senator HEFLIN, a Silver Star winner from World War II, that he is playing politics. Tell the Senate Democratic whip, Senator FORD, that he is playing politics by cosponsoring and supporting this amendment, a man who has suffered a lot for this country. Tell the Democratic leader of the other body, Congressman RICHARD GEPHARDT, and 92 other House Democrats that they played politics when they voted for this amendment.

As for the number of flag desecrations—again, my friend from Arkansas was wrong. He said there were none this year. In fact, there have been published reports of at least 20 American flags destroyed at a cemetery in Bloomington, IN, alone. They were cut or ripped from flagpoles and burned. These desecrations were also reported on local television.

In July of this year, according to USA Today, a flag was defaced with obscene messages about President Clinton and Speaker GINGRICH in New Hampshire. Are there not countless

ways of expressing these views without defacing the flag?

In June, a flag was burned in Hays, KS. Just a short time ago, I saw a news clip about a motorist at a gas station using an American flag to wipe the car's dipstick. A veteran—a veteran—called it to the police's attention but, of course, the individual cannot be prosecuted today for that desecration of the flag. He can keep using it as he has, or perhaps he will next use it to wash his car.

My friend from Arkansas raised a concern about a person being punished for refusing to salute or honor the flag. No law enacted under the flag amendment can compel anyone to salute or honor the flag, to say nice things about the flag, or otherwise compel anyone to respect the flag. There is an obvious difference between prohibiting physical desecration of the American flag and compelling someone to express respect for it. So it is totally irrelevant, in this debate, to talk about punishment for failing to respect or salute the flag or pledge allegiance to it. The pending amendment simply does not authorize such punishment. Nor does it authorize punishment for saying critical things about the flag or anything else.

Some of my friends who have spoken here also drew attention to a chart with various flags on it from places like Nazi Germany, the Soviet Union, Cuba, and Iraq, with the American flag in the middle. One of my colleagues pointed out that these other countries prohibited flag desecration.

But when opponents of the amendment trot out these comparisons among countries and their flag desecration laws, they never really explain fully their point. To begin with, the difference between the American flag and these other flags is certainly self-evident to all of my colleagues and to the American people. And, of course, I know that those of my colleagues who think these comparisons are useful recognize the difference between what the American flag represents and what Nazi Germany's flag represents.

So what really is the point of the comparisons of flag desecration laws in these countries? Is it that, in some undefined way, there is a kind of moral equivalence between Nazi Germany, Iraq, and the United States if all three prohibit physical desecration of their flags? That is too nonsensical to be the point. Indeed, until 1989, 48 States and Congress had outlawed physical desecration of the flag. Did any opponent of the amendment feel they were in a police state during that time? I do not think anybody did. Did the American

● This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

people not have numerous ways to express themselves without physically desecrating our flag? Indeed, as I explained in my opening remarks on Wednesday, freedom of speech actually expanded in this country through 1989, even as flag protection statutes were being enacted.

If I told my colleagues that Nazi Germany also had stringent gun control laws, do the opponents of the flag protection amendment believe, for that reason, America better not adopt a particular gun control measure? They did. To use that kind of reasoning, why would that not follow?

If I told the opponents of the flag protection amendment that a police state had liberal abortion laws, would that turn them into pro-lifers in America? Would it turn them into supporters of the Partial-Birth Abortion Ban Act of 1995?

So what is the point of comparing whether Nazi Germany, Iraq, and the United States protect their respective flags?

Certainly, it is not to compare those who voted for a measure protecting the flag, such as the Biden statute, including the Senator from Arkansas and almost every other Senator, with the dictators of Nazi Germany and Iraq.

I was struck by the highlighting of the Nazi flag on the same chart as the American flag. It reminded me of another use of these two flags.

Stephan Ross is a psychologist in Boston, MA. He gave a presentation in the Hart Senate Office Building earlier this year. He began by displaying a Nazi flag, and told the audience he had lived under that flag for several years.

In 1940, at the age of nine, the Nazis seized him from his home in Krasnik, Poland. He was a prisoner for 5 years in 10 Nazi death camps. The American army liberated Mr. Ross from Dachau in April 1945. In Mr. Ross's words:

We were nursed for several days by these war-weary, but compassionate men and women until we had enough strength to travel to Munich for additional medical attention.

As we walked ever so slowly and unsteadily toward our salvation, a young American tank commander—whose name I have never known—jumped off his tank to help us in whatever way he could. When he saw that I was just a young boy, despite my gaunt appearance, he stopped to offer me comfort and compassion. He gave me his own food. He touched my withered body with his hands and his heart. His love instilled in me a will to live, and I fell at his feet and shed my first tears in five years.

The young American tank commander gave Mr. Ross what he at first believed to be a handkerchief. Mr. Ross said:

It was only later, after he had gone, that I realized that his handkerchief was a small American flag, the first I had ever seen. It became my flag of redemption and freedom.

Even now, 50 years later, I am overcome with tears and gratitude whenever I see our

glorious American flag, because I know what it represents not only to me, but to millions around the world.

Protest if you wish. Speak loudly, even curse our country and our flag, but please, in the name of all those who died for our freedoms, don't physically harm what is so sacred to me and countless others.

Go tell Stephen Ross that protecting the American flag from physical desecration is in any way like protecting the Nazi flag from such desecration, or in any way represents some notion, however small, of moral equivalence between Nazi Germany and the United States, or in any way puts the United States on some kind of par with Nazi Germany. That analogy just will not float.

Mr. Ross still has the flag the American tank commander gave him in 1945. Mr. Ross is a supporter of this amendment, and one can read about his story on the front page of the July 4, 1995, *USA Today*.

Mr. President, some of my other colleagues argue that enactment of this flag amendment would be the beginning of a long slide down a slippery slope to further restrictions on free speech. Give me a break. They even make a thinly veiled comparison between prohibiting physical desecration of the American flag with the Chinese Government's execution of three dissidents. Give me a break. This argument is incredibly overblown. In answer to this, I would like to quote from a letter of Bruce Fein, an opponent of the amendment who testified against the amendment. He wrote to the Judiciary Committee in June of this year in response to my questions. He states:

The proposed amendment is a submicroscopic encroachment on free expression that would leave the U.S. galaxies beyond any other nation in history in tolerating free speech and press. If foreign nations were to emulate the constitutional protection of freedom of expression in the United States even with a flag burning amendment, they would earn glittering accolades in the State Department's annual Human Rights reports and from Amnesty International and Human Rights Watch.

Mr. President, it is time for us to recognize that the American flag is our national symbol; that it has meaning to millions and millions of Americans all over this country, many of whom have fought for this country, many of whom have suffered as family members who have lost somebody who has fought for this country under our flag. About 80 percent of the American people are for this amendment. The remaining 20 percent either do not know, or are people who would not be for anything that contrasts values.

Mr. President, all this amendment would do is allow the Congress to enact a law prohibiting physical desecration of the American flag. We are going to take out of the amendment the three words "and the States," so that we will not have 51 different interpretations of what flag desecration is. This change

will be made at the request of a number of Senators who are concerned, as I am, about that possibility. At the appropriate time, an amendment to make that change will be filed.

All this amendment does is restore the symbol of our American flag to a constitutionally protected status. And it allows the Congress, if it chooses to—it does not have to, but if it chooses to—to enact implementing legislation to protect the flag.

There is no one in Congress who is going to go beyond reason in protecting the flag. We will still have our emblems on athletic equipment. We will still have little flags. We will still be able to have scarves and other beautiful and artistic renditions of the flag. What we will not have is the ability to physically desecrate the American flag.

All we are asking here is to let the American people decide this. If we have enough support, 66 people in favor, we will pass this amendment through the Senate. That is, of course, only the beginning of the process, because three-quarters of the States will then have to ratify this amendment before it becomes the 28th amendment to the Constitution. I believe three-quarters of the States will ratify it, because almost all of the States have already called for this amendment through effective legislative enactment.

But what will ensue once this amendment passes—something that is worth every effort we put forward—is a tremendous debate in our country about values, about patriotism, about what is right or wrong with America, about things that really will help us to resurrect some of the values that have made America the greatest country in the world. It will be a debate among the people.

For those who do not want a constitutional amendment passed, they will have a right to go to every one of our 50 States and demand that people not allow us to protect the flag from desecration. They will have an equal right with anybody else to make their case. We are here to make the decision to let that debate over values, over right and wrong, over patriotic thoughts and principles ensue. It is worth it.

I personally resent anybody indicating that this is just politics. I have heard some people say, "Well, if this was a secret ballot, it would not pass at all." I do not agree with that. I believe there are enough people in this body who realize that we are talking about something pretty valuable here, something pretty personal, something that really makes a difference in all of our lives; our national symbol. The symbol that soldiers rally behind, fight under, went up San Juan Hill to retrieve. For those of us who have lost loved ones in various wars, this particular debate plays an especially significant role.

There are those here who are themselves heroes, and who may disagree, and they have a right to do so. I think they do so legitimately in their eyes, and certainly sincerely. I respect them and respect their viewpoints, just as I hope that those on the other side will respect the viewpoints of those of us who believe that this is an important thing, that this is a value in America that is important, that ought to be upheld.

In my case, our family has seen suffering. I can remember as a young boy playing in the woods down in front of our very, very humble home that my dad had built from a burned-out building. In fact, for the early years of my life our house was black. I always thought all houses were black, or should have been. One side of it had, as I recall, a Meadow Gold Dairy sign on the whole side of the house, because he had to take that wood from another building. It was either that or a Pillsbury Flour sign. I believe it was a Meadow Gold Dairy sign. It was one or the other. I always thought that was a pretty nice thing to have on our house as a young kid.

I was down in front of the house playing in the woods, when I heard my mother and dad. I could tell there was something wrong. I ran out of the woods and ran up to the front porch of our house, this humble place, and there was a representative of the military informing my folks that my brother, my only remaining brother, who we all loved dearly, Jess Hatch, Jess Morlan Hatch, was missing in action. It was a sad occasion. My folks were just broken up about it. They loved all nine of us kids, two of whom had predeceased Jess, who was missing in action.

When my brother was home, my mother had some beautiful yellow roses that she had grown. She really had a green thumb. She could raise beautiful flowers. He used to kid her about taking those yellow roses and giving them to his girlfriend, or taking the plants and giving them to his girlfriend. She always laughed. She knew he would never do it. But, for a couple of months after my brother was listed as missing in action, my mother received a dozen yellow roses from my brother. She believed right up until the day that they found his body and brought him back that he was still alive.

He had flown in that fateful Foggia, Italy mission and helped knock out the oil fields that really helped to shorten the war. He flew in a B-24 bomber. He was a hero, and one of the few people who ever shot down a German jet, which were new planes. I have his Purple Heart in our home out in Salt Lake City, as well as a number of his military memorabilia. I also have all of his letters to my mom and dad. I have read every one of them within this last year, and it was interesting to see how

he was evolving as a high school graduate to the great person that he really was.

My mom and dad died—my mother last June and my dad 2 years before. They would have given their lives to save the American flag. My brother did. One of my most prized possessions is the American flag that draped my brother's coffin. I have that in my home out at Salt Lake as well, along with his medals.

There have been hundreds of thousands of Americans who died to preserve liberty around the world who fought—maybe not for the flag, but under the flag—and who have revered the American flag. Who could forget the Iwo Jima Monument, commemorating the soldiers who risked their lives to see that our Nation's flag was lifted and flown above that island, a symbol for all of them.

You can go through literally thousands of stories on why the flag is important. I do not want to make this so emotional, but the fact is that it is emotional. I think it is wrong for anybody to come here and say that this is just a political exercise. That is not a knock at my dear friends who feel that way. I am sure they are sincere, but I think they are sincerely wrong.

Paul was sincere, I guess, when he held the coats of the people who stoned the first Christian martyr. He was as sincere as anyone could be. He held their coats. He believed in what they were doing. He persecuted the saints. But Paul was sincerely wrong, and I believe anybody that denigrates the intentions of those who want to preserve and protect the flag is, in this case, sincerely wrong.

I guess what I am saying here is that this is a much more important issue than just a political issue. To me, politics does not even enter into this. It is an issue of whether we value the values of our country, the things that made this country great. It is an issue of whether we want to have this debate over values, whether we want to let the American people really decide for themselves whether the flag is important or whether it is not.

In a day and age where we seem to be denigrating values all the time, why should we not stand up for one of the values that really has helped make this country great, that has meant something from the beginning of this Nation? Why should we not have that debate? For those who disagree, however sincerely their opposition, I invite them to join the debate. Prove us wrong, not only here on the floor, but do it, once this amendment passes, with the American people. I think they are going to find that the vast majority of the American people do not agree with them.

Last but not least, there are those who would argue that this is a denigration of the First Amendment, or that

nobody has ever amended the Bill of Rights. Let me tell you something. The Bill of Rights was no sooner passed when the 11th amendment was passed to overcome a faulty Supreme Court decision. A number of the other amendments have been passed since then to overcome Supreme Court decisions that were wrong. It is a legitimate thing.

Keep in mind that Earl Warren, Abe Fortas, Hugo Black, three of the most liberal members ever on the Supreme Court, wrote that they believed the flag could be protected. It had nothing to do with first amendment rights or freedoms in the sense of denigrating the first amendment.

The fact that in the Johnson case, the Supreme Court alluded to the first amendment, and spoke of the first amendment right of free speech being violated, does not make it right. How can anybody say that we are trying to stop any person from saying whatever they want to, to denigrate the flag. They can denigrate the flag all they want to, with all the free speech in the world, and I am certainly going to uphold their right to do it.

What we are against here, and what we need to establish through a constitutional amendment, is that this does not involve speech. It involves improper and offensive conduct. And that is what Justices Warren, Fortas, and Black basically said. This is not a violation of first amendment protected free speech. Anybody can speak any way they want. Physically desecrating the American flag, however, is a violation of the sensitivities and the values of America by means of offensive, improper conduct, physically treating our national symbol with contempt.

And even though desecrations of the flag occur more than they should, but certainly not in overwhelming numbers, every one of them is reported by the media, seen by millions of people.

So it is a lot bigger issue than some would make it on the floor. I have to say, I hope that our colleagues will vote for this amendment. It is worthwhile to do it. All we are going to do is give Congress the right to define this matter once and for all, and then we are going to have a debate in this country about values, one that I think is long overdue. I hope that our colleagues will consider that, and I personally believe we can pass this amendment, although it is always uphill on a constitutional amendment. We understand that, and that we may have to keep bringing this amendment forth. Ultimately, however, this amendment is going to pass. I guarantee it is going to pass someday, even if it does not pass this time. But I personally believe we have a good shot at it this time.

Mr. President, I will yield the floor to my colleague from Wisconsin.

The PRESIDING OFFICER. The Senator from Wisconsin.

Mr. FEINGOLD. I thank the Chair.

I certainly want to join with the chairman's comment that this is a worthy debate and one that people should join in if they have either strong feelings in favor of or against the constitutional amendment regarding flag desecration.

Mr. President, in response to the chairman's challenge, I would like to rise today in opposition, strong opposition, to the proposed constitutional amendment relating to the flag.

I do so with the utmost respect for my colleagues and especially the distinguished chairman of the Judiciary Committee and the many Americans who support this effort and, of course, in the spirit of my own utmost respect for the flag of this country.

Mr. President, I and all Members of this body share the enormous sense of pride that all Americans have when they see the flag in a parade or at a ball game or simply hanging from store fronts and porches all across their home State. It is one of my favorite sights regardless of the occasion. It makes me feel great to be an American when I see all those flags.

I appreciate that this is a deeply emotional issue, and rightly so. Like most Americans, I find the act of burning the American flag to be abhorrent and join with the millions of Americans who condemn each and every act of flag desecration. I understand those who revere our flag and seek to hold it out as a special symbol of this Nation. It is a very special symbol of our Nation.

However, I think the key to this whole issue is that we are not a nation of symbols—we are a nation of principles. Principles of freedom, of opportunity, and liberty. These are the principles that frame our history and these are the principles, not the symbols but the principles, that define our great Nation. These are the principles found in the U.S. Constitution and the Bill of Rights.

No matter how dearly we all hold the flag, it is these principles we must preserve above all else, and it is adherence to these principles which forms the basis of my opposition to the proposed constitutional amendment.

As a threshold, Mr. President, let me say that I view any effort, any effort at all, to amend the U.S. Constitution as something that we should regard with trepidation. The chairman in his comments this morning said to those of us who suggest that maybe if we do the flag amendment, it might lead to other similar amendments, a slippery slope if you will. The chairman kept saying, "Give me a break. Give me a break"—that this was unlikely; that the emotions that fuel this issue would not fuel other attempts to amend the Constitution.

That those emotions would be just as worthy and just as heartfelt and patri-

otic and just as full of values as the emotions that drive this effort, I think is clear on its face and that this is a first step that could lead to many other steps that could leave the first amendment in tatters.

Since the adoption of the Bill of Rights in 1791, the Constitution has been amended on only 17 occasions. Yet, Mr. President, this is the third amendment that has been considered by our Judiciary Committee in the first term of the 104th Congress alone, with hearings being held on what could very well be a fourth constitutional amendment. According to the Congressional Research Service, over 115 amendments—115 amendments—have been introduced thus far just in the 104th Congress—amendments to the U.S. Constitution.

While I do not question the sincerity of these efforts, there is much to be said for exercising restraint in amending this great document. The Constitution has served this Nation well and withstood the test of time, and the reason it has withstood the test of time is that we have typically, almost always resisted the urge to respond to every adversity, be it real or imagined, with that natural instinct to say, "Let us pass a constitutional amendment." It is a gut feeling we have when we see a wrong. Let us just nail it down. Let us not pass a law—put it in the Constitution and forever deal with the issue.

However, history, as well as common sense, counsel that we only amend the Constitution under very limited circumstances. I strongly believe that those circumstances do not exist in the case of the so-called flag burning amendment. Proponents of this amendment argue that we must amend the Constitution in order to preserve the symbolic value of the U.S. flag. However, they do so in the absence of any evidence that flag burning is rampant today or that it is likely to be in the future. But perhaps more importantly, this amendment is offered in the absence of any evidence, any evidence at all, that the symbolic value of the flag has in any way been compromised in this great Nation. It has not. No evidence has been offered to show that the small handful of misguided individuals who may burn a flag each year have any effect whatsoever on this Nation's love of the flag or our Democratic way of life.

The inescapable fact of the matter is that the respect of this Nation for its flag is unparalleled. The citizens of this Nation love and respect the flag for varied and deeply personal reasons, some of which were eloquently expressed today by the distinguished chairman of the Judiciary Committee. That is why they love the flag, not because the Constitution imposes the responsibility of love of the flag on them.

As a recent editorial in the *La Crosse, WI, newspaper* pointed out,

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

I think that is a great statement one of our Wisconsin newspapers made.

Mr. President, the suggestion that we can mandate, through an amendment to the Constitution, respect for the flag or any other symbol ignores the premise underlying patriotism; more importantly, it belies the traditional notions of freedom found in our own Constitution.

Mr. President, some would argue this debate is simply about protecting the flag, that it is just a referendum over who loves the flag more. This faulty premise overlooks the underlying issue which I think is at the heart of the debate, that being to what degree are we as a free society willing to retreat from fundamental principles of freedom when faced with the actions of just a handful of misguided individuals?

In my estimation, Mr. President, the answer is clear. The cost exacted by this amendment in terms of personal freedom—is just far too great a price to pay to protect a flag which already enjoys the collective respect and admiration and love of an entire nation. If adopted, this amendment will have an unprecedented direct and adverse effect on the freedoms embodied in the Bill of Rights. These are freedoms which benefit each and every citizen of this Nation.

Yes, Mr. President, it is true, despite what the chairman said today, it is true that for the first time in our history, for the first time in this great Nation's history, the Constitution and the Bill of Rights, both premised on limiting the Government—they are premised on limiting the Government—will be used to limit individual rights, and, in particular, for the first time the constitutional process will be used to limit, not guarantee, but limit individual freedom of expression.

I do not know how you could overstate the significance of such a new course in our constitutional history. As Dean Nichols of the Colorado College of Law noted before the Constitution Subcommittee of the Judiciary Committee, said, "I think there would be a real reluctance to be the first American Congress to successfully amend the first amendment."

Do not let anyone kid you. That is what this would do. It would amend the first amendment. It will have a different number, it will be listed in the high twenties, but it will change and alter the first amendment.

The chairman tries to address that by saying, well, shortly after the Bill

of Rights was passed, the 11th amendment was passed in 1798. That is accurate. But it did not change the right to free speech. It did not limit the scope of the Bill of Rights.

In fact, the 11th amendment was consistent with the spirit of the Bill of Rights by guaranteeing that the States cannot be compromised by the Federal Government. The 11th amendment was not about limiting free expression or any other freedom of the Bill of Rights. It states:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

It is not about free speech. The point is really that this would be the first time—the first time—in this Nation's history that we would change something I consider to be very sacred, the Bill of Rights. That we would choose now, after 200 years of the most unparalleled liberty in human history, to limit the Bill of Rights in the name of patriotism is inherently flawed. And I think it is really, ironically very tragic.

Some will argue that we should not attach too much significance to this unprecedented step, while still others argue that the amendment has no effect whatsoever on the first amendment. This is despite the fact that this amendment, if adopted—make no mistake about it—if it is adopted, it would criminalize—make it a crime—the very same expression that the Supreme Court has previously held to be explicitly protected under the first amendment.

So it is clearly an erosion of the Bill of Rights. You may argue that it is a justified erosion or a necessary erosion, but it clearly limits what the U.S. Supreme Court has said is part and parcel of our freedom as an American to express ourselves.

Mr. President, I think it is essential to carefully consider the basis for the adoption of the Bill of Rights before we go ahead and alter it for the first time in our Nation's history. Many who originally opposed the Constitution, those not entirely comfortable with the ratification, sought the Bill of Rights in particular because, in their view, the Constitution in its original form without the Bill of Rights, failed to properly consider and protect the basic and fundamental rights of the individuals of this country. That is why we have a Bill of Rights.

Although many Federalists, including Madison, felt that the limited powers conferred to the Government by the Constitution, the limitations in the Constitution itself, were sufficiently narrow so as to leave those rights safe and unquestioned, people still felt we had to go ahead and have a Bill of Rights adopted in order to provide the

reluctant States with the assurance and the comfort necessary so they would approve the Constitution, so they would enter into this great Federal Union. And everyone today in the 104th Congress should understand this.

What is so much of the rhetoric of the 104th Congress about? The concern that the Federal Government is too strong, that it does too much, that we ought to leave enough power to the States and to individuals. That is what all the rhetoric is about today. Well, that is what the Bill of Rights was about also. And that is why we have never changed it. Because the notion of the Contract With America is not a new one. It is a heartfelt feeling of all Americans that the Federal Government must be tightly limited in its powers so that our liberties as individuals and as States cannot be compromised.

From this beginning in compromise, almost exactly 204 years ago, the Bill of Rights has evolved into the single greatest protector of individual freedom in human history. It has done so in large measure, I believe, because attempts to alter its character have to date been rejected. If this great document was changed every few years, as I am sure every Congress has been tempted to do, it would not be the great Bill of Rights that not only Americans revere but people around the world revere as well.

That individuals should be free to express themselves, secure in the knowledge that Government will not suppress their expression based solely upon its content, is a premise on which the Nation was founded. The Framers came to this land to escape oppression at the hands of the state. Obviously, there is no dispute about that, that Government should not limit one's ability to speak out. That is established in our Constitution by the simple words in the first amendment, "Congress shall make no law * * *"—no law—" * * * abridging the freedom of speech * * *."

Of course, over time this Nation has had to grapple with the exact parameters of free speech, regulating in regard to defamation or obscenity for example. However, the fact that some expression may be proscribed, can be stopped, does not obviate the presumptive invalidity of any content-based regulation.

In the words of Justice Scalia of the U.S. Supreme Court:

... the Government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the Government.

In other words, you cannot choose which messages you like and which messages you do not like. You cannot say libel against this Government is different than other kinds of content that might also be libel. Although we need not concern ourselves with the

exact parameters of speech subject to limitation here because the expression in question, political expression, is clearly protected under the first amendment. This points out the fact that the one defining standard that has marked the history of free expression in this Nation is that speech cannot be regulated on the basis of its content.

The presumptive invalidity of content regulation protects all forms of speech, that which we all agree with, as well, of course, as the speech we may disagree with or find objectionable. To do otherwise would make the promise of free speech a hollow promise. What does it mean if we only protect that which we like to hear or is pleasant to our ears?

As the Supreme Court stated in *Street versus New York*:

... freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

Yet, Mr. President, this amendment departs from that noble and time-honored standard. It seeks instead to prohibit a certain kind of expression solely, solely because of its content.

The committee report accompanying this amendment makes it explicit that this effort is directed at that expression which is deemed disrespectful—disrespectful. This amendment attempts to deal only with disrespectful expression. Even more troubling is that this amendment leaves the determination of what is disrespectful to the Government, the very Government that we were trying to limit after we won the Revolutionary War and got together and passed a constitution. It is that Government that we are going to allow to define what is objectionable by this amendment.

What could be more contrary to the very foundations of this country? For the purpose of free expression to be fulfilled, the first amendment must protect those who rise to challenge the existing wisdom, to raise those points which may anger or even offend or be disrespectful.

As the great jurist, William O. Douglas, observed, free speech:

... may indeed serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.

Mr. President, adherence to this ideal is exactly what separates America from oppressive regimes across the world. We tolerate dissent, we protect dissenters, while those other countries suppress dissent and jail dissenters or, for example—and I can give you many examples, as I know the Chair can—as recent events illustrate in Nigeria, the condemnation of dissenters to a fate far more grave than incarceration: summary execution.

The first amendment to the U.S. Constitution is not infallible. It cannot

sanitize free expression any more than it can impart wisdom on thoughts which otherwise have none. Nor can the first amendment ensure that free expression will always comport with the views of a majority of the American public or the American Government.

But what the first amendment does promise is the right of each individual in this Nation to stand and make their case, regardless of their particular point of view, and to do so in the absence of a Government censor. In my estimation, this right is worthy of preserving, and I think that right is at risk today on the floor of the U.S. Senate.

When we start down the road to distinguishing between whose message is appropriate and whose is not, we risk something far greater than the right to burn a flag as political expression.

Much of what is clearly protected expression can easily be deemed objectionable. For example, as I said many times before and a lot of people have said before me, I deplore those who proudly display the swastika as they parade through our neighborhoods. I deplore those who hide behind white sheets and espouse their litany of hate and ignorance under a burning—a burning—cross. I deplore those comments which suggest that the most effective way to deal with law enforcement is to shoot them in the head. We hear that these days. Just as I object to speech which seeks to equate particularly vile criminal acts with a particular political ideology.

Each of these forms of expression, Mr. President, is reprehensible to me and to traditional American values of decency and tolerance. But they are all protected forms of expression nonetheless, and they would continue to be protected after this amendment was passed and ratified. So do I believe that we ought to outlaw them through an amendment to the Constitution of the United States? Of course not.

So too it is with flag burning. As the Supreme Court has repeatedly stated, the act of flag burning cannot be divorced from the context in which it is occurring, and that is political expression. It was pretty clear from our Judiciary Committee hearings if somebody is out in the backyard grilling on July 4th and accidentally burns their flag, that would not be the necessary intent. There has to be some mental element—it cannot just be an accident. So this amendment is about what somebody is thinking. It is about what somebody is thinking when they burn the flag. It is about the content of their mind.

This Nation has a proud and storied history of political expression, much of which, obviously, can be characterized and is characterized sometimes as objectionable. Does any Member of this body believe that if the question had been put to the Crown as to whether or

not the speech and expression emanating from the Colonies in the form of the Boston Tea Party or the Articles of Confederation, should be sustained, the answer, I think, we all know would have been a resounding no. Could not the same be said of messages of the civil rights and suffrage movements? This Nation was born of dissent and, contrary to the view that it weakens our democracy, this Nation stands today as the leader of the free world because we tolerate those varying forms of dissent, not because we persecute them.

In seeking to protect the U.S. flag, this amendment asks us to depart from the fundamental ideal that Government shall not suppress expression solely because it is disagreeable.

As Justice Brennan wrote for the majority in *Texas versus Johnson*:

If there is a bedrock principle underlying the first amendment, it is that the Government may not prohibit expression of an idea simply because society finds the idea itself offensive or disagreeable. We have not recognized an exception to this principle even where our flag has been involved.

In charting a divergent course, this amendment would create that exception, an exception at odds with free expression and with our history of liberty. If adopted, this amendment would, for the first time in our history, signal an unprecedented, misguided and troubling departure from our history as a free society.

Mr. President, there are also definitional and practical flaws with this amendment. Beyond the proposed amendment's departure from traditional notions of free expression, there are practical aspects that raise concerns, not just for those who may offer objectionable points of view, not just for the purported or possible flag burners, but for all Americans. This amendment will subject the constitutional rights of all Americans to potentially an infinite number of differing interpretations, the parameters of which the proponents themselves cannot even define.

Without any guidance as to the definition of the key terms, the proposed amendment provides the Congress and the States the power to prohibit the physical desecration of the U.S. flag.

Testimony was received by the Constitution Subcommittee that the term "flag of the United States," as used in this amendment, is, as they said, "problematic" and so "riddled with ambiguity" as to "war with the due process norm that the law should warn before it strikes." Even supporters of this amendment, including former Attorney General of the United States William Barr, have acknowledged that the term "flag" could mean many different things. The simple fact of the matter is that no one can lend any guidance as to what the term "flag" will mean, other than to suggest that it will be up to various jurisdictions.

Senator HATCH, the chairman, has indicated today that the States will be removed from the amendment. If that is not the case, leaving them in would raise a second practical problem with this effort to amend the Bill of Rights, that being that the fundamental constitutional rights would be explicitly subject to the geographic boundaries of political subdivision.

The report accompanying this measure acknowledges that the extent to which this amendment will limit your freedom of expression could well depend on where you live. Therefore, if you live in Madison, WI, your rights could be vastly different than the rights of your cousin who lives in Seattle, WA, for example.

Furthermore, the rights of the States to limit the first amendment would not prohibit subsequent legislative bodies from expanding or further limiting rights under the first amendment. In other words, fundamental rights to free speech could vary from one election to the next.

So I will await with interest the amendment regarding the States, but as the amendment is written now there will be at least—at least—for the first time in our country's history, 51 interpretations of the first amendment.

I think this is counter to the very premise of the Bill of Rights, that being that the rights of individuals should remain beyond the purview of unwarranted governmental intrusion or intervention. That is what led to the adoption of the Bill of Rights in the first place.

In the words of Justice Jackson, speaking for the Supreme Court in 1943:

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

Yet, this amendment does exactly that and subjects those fundamental rights to the outcome of elections. What comfort is a first amendment which tells the American public that the appropriateness of their political expression will be left up to the Government?

At the core of this proposed amendment is the desire to punish that expression which is disrespectful. The ability to accomplish this troubling goal turns upon the interpretation that would be given to the term "desecration." Mr. President, despite attempts to argue that it means to "treat with contempt" or "disrespect" or to violate the "sanctity" of the flag, it is just obvious that this is subject to interpretation. The word "desecration" could not be more subject to interpretation. It is almost an inherently vague term.

If, as the report accompanying this measure suggests, every form of desecration is not the target of this amendment, then it logically follows that the Government—the Federal Government—will make distinctions between types of political expression, and the distinction will be this: that which is acceptable and that which is not. The flaws in this process should be obvious to every American.

So long as your political expression comports with that of the governing jurisdiction, you are going to have your freedom of expression, and it will be preserved. We can certainly debate this point, but in punishing only that expression which is "disrespectful," someone—in this case the Government—has to decide what is disrespectful and what is not.

For those of us who think that this is an easy distinction and there is not going to be a problem deciding what is desecration and what is disrespectful, I have an example. A Vietnam war veteran, a friend of mine from Wisconsin, Marvin J. Freedman, recently wrote in an article, aptly entitled, "The Fabric of America Cannot Be Burned," that the fatal flaw in this amendment will be its application. In Mr. Freedman's words:

The real potential for crisis is one of context. Consider the star spangled bandanna. Let's say a highly decorated veteran is placing little American flags on the graves at a veterans cemetery for Memorial Day, works up a sweat and wipes his brow with one of those red, white, and blue bandannas. If the flag amendment were on the books, would the veteran's bandanna be deemed a "flag of the United States"? Probably not. But if it were, would his actions be interpreted as "desecration"? I cannot imagine anyone thinking so.

Mr. Freedman continues:

However, if a bedraggled-looking antiwar protester wiped his brow with the same bandanna after working up a sweat and denouncing a popular President and the United States Government's military policy, a different outcome could be a distinct possibility. Whether the bandanna would be deemed a "flag" and the sweat-wiping considered desecration would very likely be directly related to the relative popularity of the President and the war being protested. That is where the flag amendment and the first amendment would bump into each other.

Mr. President, we are all free to draw our own conclusions as to the validity of Mr. Freedman's hypothetical. I think it does a good job in pointing out, in very simple terms, that which the Supreme Court has often stated: You cannot divorce flag desecration from the political context in which it occurs. Ultimately, value judgments have to be made, and I think these are judgments that this amendment, unfortunately, reserves to the Government. For the first time in our history, it gives that judgment to the Government, not to individuals, not to the citizens of this country.

Mr. President, the rights at the heart of this debate are far too fundamental

and far too important to be subjected to the uncertainty created by this amendment. We must not abandon 2 centuries of free expression in favor of an unwarranted and ill-defined standard which allows Government to choose whose political message is worthy of protection and whose is not. This is counter to the very freedoms the flag symbolizes.

The very idea that a handful of misguided people could cause this Nation—a Nation which has, from its inception, been a beacon of individual liberty, and a Nation which has defended, both at home and abroad, the right of individuals to be free—to retreat from the fundamental American principle that speech should not be regulated based upon its content is really cause for great concern.

I cannot believe we are going to let a few people who are not even around, as far as we know, not even doing this flag desecration, cow us into passing this amendment. That would give the victory to the flag burners. It would be score one for the flag burners if we are foolish enough to amend the Constitution and Bill of Rights, for the first time in our history, just to deal with such misguided people.

Again, Mr. President, there is no doubt that the American people care deeply about the flag. But I really believe they care just as deeply about the Constitution. I was recently contacted by a man from Sturgeon Bay, WI, a veteran of the Navy. What did he have to say? He wrote:

The most important part of the Constitution is the Bill of Rights, the first ten amendments. The most important one of those is the first amendment. Burning a flag, in my opinion, is expressing an opinion in a very strong way. While I may disagree with that opinion, I must support the right to express that opinion. To me, the first amendment is the most important thing. The flag is a symbol of that and all other rights, but only that, a symbol.

My constituent, I think, said it quite well. I appreciated very much the time and effort taken to write to me, not because we share the same perspective, but because the letter makes the very important point that, in the final analysis, and as the proponents of the amendment readily concede, the flag is but a symbol of this Nation. As I said at the outset, Mr. President, we are not a nation built on symbols; we are a nation built on principles.

We will be paying false tribute to the flag, in my opinion, if in our zeal to protect it we diminish the very freedoms it represents. The true promise of this great and ever-evolving Nation is rooted in its Constitution. Ultimately, the fulfillment of this promise lies in the preservation of this great document, not just of that which symbolizes it. If we sacrifice our principles, ultimately, our symbols will represent something less than they should.

Therefore, Mr. President, I must respectfully oppose this effort to amend

the Bill of Rights. While I do not oppose this effort with anything less than the utmost respect for the American flag, my belief that we must be vigilant in our preservation of the Bill of Rights and the individual freedoms found therein really dictates my opposition.

Mr. President, to conclude, the measure before us limits the Bill of Rights. It actually limits the Bill of Rights in an unprecedented, unwarranted, and ill-defined manner. As such, I intend to oppose this resolution.

Mr. President, I ask unanimous consent that a series of editorials from throughout the State of Wisconsin, all opposed to flag burning and also to this amendment, be printed in the RECORD.

There being no objection, the articles were ordered to be printed in the RECORD, as follows:

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

OUR OPINION: FLAG BURNING AMENDMENT UNPATRIOTIC

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

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

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

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

Laws to protect the flag would be unworkable.

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

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

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

The arguments could rage on and on, enriching lawyers and diminishing the nation.

A ban on flag burning would set a dangerous precedent.

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

Supporters of a ban on flag burning argue that burning a flag is not symbolic speech at

all but hateful action. But if today's cause is to ban flag burning because it is hateful action, tomorrow's cause may be to ban the display of the Confederate flag because many people consider it to be hateful action. Or to ban the use of racial or sexist comments because they amount to hateful actions. And on and on until we have given up our freedoms because we are intolerant.

The right to protest is central to democracy.

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

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

Flag burners are not worth a constitutional amendment.

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

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

OUR VIEW: THE AMERICAN FLAG—OLD GLORY DOESN'T NEED AMENDMENT

[From the *La Crosse (WI) Tribune*, June 7, 1995]

The U.S. Supreme Court ruled in a Texas case in 1989 that flag burning is protected by the First Amendment as a form of speech.

The court's decision didn't go over very well with friends of Old Glory then, and six years later that ruling still sticks in the craw of many patriots—so much so that constitutional amendments protecting the flag against desecration have picked up 276 cosponsors in the U.S. House of Representatives and 54 in the Senate.

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

For two centuries soldiers have given their lives to keep the American flag flying. It is a symbol of freedom and hope for millions. That is what infuses the stars and stripes with meaning and inspires the vast majority of Americans to treat it with respect.

But to take away the choice in the matter, to make respect for the flag compulsory, diminishes the very freedom represented by the flag.

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

Sen. Howell Heflin, D-Ala., argues that the flag unites us and therefore should be protected. But Heflin and like minded amendment supporters are confusing cause and effect. The flag is a symbol of our unity, not the source of it.

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

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

Alliance that is voluntary is something beyond price. But allegiance extracted by

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

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

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

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

[From the *Oshkosh (WI) Northwestern*, May 28, 1995]

BEWARE TRIVIALIZING OUR CONSTITUTION

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

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

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

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

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

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

At best, the flag protection amendment trivializes the Constitution.

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

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

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

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

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

If someone has a political statement to make and feels strongly enough, he'll do the burning and accept the consequences. The

consequences surely will not be draconian enough that flag burning would rank next best thing to a capital offense.

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

[From the *Milwaukee (WI) Journal Sentinel*, June 12, 1995]

FLAG AMENDMENT ILL-ADVISED

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

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

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

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

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

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

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

Mr. KYL addressed the Chair.

The PRESIDING OFFICER (Mr. GORTON). The Senator from Arizona.

Mr. KYL. Mr. President, I would like to respond briefly to the remarks of the Senator from Wisconsin and other arguments in opposition to this proposed amendment and to speak briefly in favor of the amendment. Senator ROTH from Delaware is here to speak to an important subject as well. So what I will do is truncate my remarks, and Senator HATCH will be here a little bit later to speak at greater length on the constitutional amendment.

Mr. President, I think we need to start with some fundamentals. I have never questioned the sincerity, or the judgment, or reasoning, or conclusions, even, of those who oppose a constitutional amendment on desecration of the flag. There are very sound constitutional arguments on both sides of this issue. It is one of those classical issues on which people on both sides can marshal evidence, historical commentary, and reasoning to support

their views. In my view, it is not an easy question to resolve. But I do take some offense at the suggestion that those who propose the amendment—just to use one quotation used before—are involved in misguided rhetoric, and terminology of that sort. We can disagree over something of this importance, without suggesting that those who hold a different view are dangerous, misguided, or simply engaged in rhetoric.

I think, to some extent, that while nothing—except perhaps declaring war—is a more solemn right and responsibility of the Congress than amending the Constitution, it is also possible that some in Congress, from time to time, become consumed by their own importance. It is easy to do. Yet, I think it is equally important for us to recognize that we do not amend the Constitution, that while it is important for us to raise all of these questions and to debate this as solemnly as we can, that we do not amend the Constitution. Mr. President. The people amend the Constitution. All we can do is recommend an amendment. It is the people who make the ultimate decision.

To put it in the simplest terms, what we are suggesting is we ask the American people: Do you want to amend the Constitution to protect the flag? If the people say no, then it will not happen; if the people say yes, I suggest that we should rely upon their judgment in this matter, the very people who, after all, elect us to represent them in all other matters except amending the Constitution, which under our document is reserved to the people for final decision.

I think we have to put some trust in the American people here to do the right thing.

It is interesting to me that historically in this country for 200 years we got along very well living under a Constitution that protected free speech, and yet in 49 of the 50 States, prevented desecration of the flag. This is not a choice between protecting the flag and the U.S. Constitution, as was suggested a moment ago. That is a false choice. For 200 years we did both. We can do both.

Since the decision of the Supreme Court which struck down the protection of the flag, 49 States, including my State of Arizona, have passed memorializing resolutions calling on Congress to pass a flag desecration amendment so that the States could consider it.

In 1991, Arkansas, while President Clinton was still serving as Governor, became the 11th of 49 States to "urge Congress of the United States to propose an amendment to the U.S. Congress, for ratification by the States, specifying that the Congress and the States shall have the power to prevent the physical desecration of the flag of the United States."

I also note that the decision of the Supreme Court invalidated the law

that then-Governor Clinton had signed months earlier which prohibited the intentional desecration of the flag, though the President now opposes this particular amendment.

The House passed a companion measure to that which is being considered here, on June 28, by a vote of 312 to 120. This has bipartisan support. The Senate Judiciary Committee, with equally bipartisan support, approved the amendment on July 20 by a vote of 12 to 6.

The purpose of this resolution is to restore the authority to adopt statutes protecting the U.S. flag from physical desecration. As I said, it is not a choice between the flag and the Constitution. We proved for 200 years that both are possible to protect.

The flag is worthy of protection. It is a unique national symbol, representative, among other things, of the men and women who have served this country. It is draped over the coffins of those who have paid the ultimate price to preserve our freedom and invokes very strong emotions in all Americans. It is important to protect the symbol for these reasons.

You cannot burn or deface other national symbols which have far less emotional symbolic value than the flag, but we allow it because the Supreme Court said a few years ago we would allow the desecration of the flag.

This resolution, frankly, is in direct response to the Texas versus Johnson decision in Texas of the Supreme Court. It was a 5-to-4 decision. So literally, one unelected judge decided that a law that had existed for over 200 years was now mysteriously unconstitutional.

The Court later ruled in *United States versus Eichman* that Congress could not by statute protect the flag making it very clear that our only response could be a proposed constitutional amendment.

Mr. President, I am not going to respond to each of the arguments made because Senator ROTH has some important things to say on another subject. Let me just respond to a couple.

One of the arguments and probably the key argument of the proponents is that we would be trampling on the right of free speech by adopting this amendment. I understand that argument. It is not a frivolous argument.

The argument of some opponents that flag burning is a nonproblem because it is hardly ever done and therefore why would we even want to bother with this, I think is a good argument against the notion that this would be a significant intrusion on the first amendment.

It seems to me opponents cannot argue on the one hand that this is insignificant, never happens, why are you worrying about it, and on the other hand say it would be the biggest travesty and impingement on free speech to

be visited on the U.S. Constitution and the people of America.

You cannot have it both ways. The truth of the matter is it is true that this is not a big problem, but it does not follow from that that we should not offer the States the ability to restore the protection of the flag that it enjoyed for 200 years. Mr. President, 49 States seem to think this is important enough to have memorialized Congress, asking for the ability to once again restore that protection.

Now, the passing of a constitutional amendment would not prevent those who hate America or who have particular grievances from expressing this contempt through any other speech or even certain conduct as the Supreme Court has permitted. You do not have to burn the flag to express your views.

I suggest in civilized society people should be able to express themselves in ways that are not so personally and viscerally offensive, for example, to a family grieving over the flag-draped coffin of a loved one.

Mr. President, let me just conclude by quoting from some people who have spoken to this issue before in a way which I think is instructive. This is not misguided rhetoric by extremists or superpatriots. I refer, Mr. President, to the words of Chief Justice Earl Warren, an eminently respected jurist of this country: "I believe that the States and the Federal Government do have the power to protect the flag from acts of desecration and disgrace."

A famous liberal jurist, a man greatly respected on the Supreme Court of the United States, Justice Hugo Black:

It passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American flag an offense. It is immaterial that the words are spoken in connection with the burning. It is the burning of the flag that the State has set its face against.

And Justice Abe Fortas, a respected liberal, a Democrat, not an extremist conservative patriot: " * * * the States and the Federal Government have the power to protect the flag from acts of desecration * * * "

Let me quickly also demonstrate this point further by noting the names of many respected members of the Democratic Party who have sponsored or voted for this amendment. This is not a partisan issue, as I said: 93 House Democrats voted for the flag amendment, including RICHARD GEPHARDT the minority leader, Deputy Whips BILL RICHARDSON and CHET EDWARDS, and a host of other ranking and subcommittee members and key members of the Democratic Party. Democrats and Republicans alike, liberals and conservatives, can appreciate the importance of doing this.

And the final argument that was made that these words are so subject to interpretation, "desecration" and "flag"—who knows what "flag" means?

Mr. President, the American experience of 200-plus years teaches us what the word "flag" means, and "desecration" has meaning which can be interpreted by judges of good will.

The Bill of Rights and the 14th amendment to the U.S. Constitution are filled with general statements which the Framers of the Constitution and of the 14th amendment clearly understood need to be phrased relatively generally in order to deal with the variety of circumstances to which they would be applied. Words like "establishment of religion," "unreasonable searches and seizures," leaving "unreasonable" to the interpretation of the courts. "Due process of law"—I can hear the arguments now. What do you mean by "due process"? What do you mean by "just compensation," by "speedy trial"? You need to define it.

Mr. President, one of the geniuses of the Constitution is that it is not defined with all of the precision that we apply to legislation, to laws, and the even greater precision that is applied to regulations to execute those laws. That is the genius of the Constitution.

So, all of the generalized phrases, the "cruel and unusual punishment," "equal protection of the laws," and other generalized statements have served us very well for over 200 years. Certainly for words like "flag," which I suggest has a pretty specific meaning, and even "desecration," which is less so, it is possible to interpret those words in a meaningful and consistent way, particularly, as was noted earlier, if we amend the proposal here to provide for the Federal Government, the Congress, rather than the States, to adopt the legislation that would provide for the protection of the flag.

So, much more will be said about this amendment. Senator HATCH will be here in a moment to discuss the amendment in more detail, to explain the reasons why the Judiciary Committee was able to pass it out with such an overwhelming majority.

I am going to close by quoting from Chief Justice Rehnquist in his dissenting opinion from the decision in the Texas versus Johnson case, which precluded the Congress and the States from any longer protecting the flag. I think these words are appropriate as we think about the possibility that American soldiers will again be sent to foreign lands to fight, and the concern for those people who we put in harm's way, people who defend the ideals of our country. It is appropriate to reflect upon the value of the flag as a symbol to those people.

Let me quote again, as I said, from the dissenting opinion of Justice Rehnquist in Texas versus Johnson. He said:

At Iwo Jima, United States Marines fought hand to hand against thousands of Japanese. By the time the Marines reached the top of Mt. Suribachi they raised a piece of pipe up

right and from one end fluttered a flag. That ascent had cost nearly 6,000 lives.

Mr. President, that sacrifice could never be put adequately into words, but the flag symbolizes perfectly what words cannot describe. And it is that symbol that we see when we go to the monument just a couple of miles south of here and see the flag being raised over Mt. Suribachi that recalls so many memories and evokes so many emotions among Americans, that we come to the conclusion that this one very special symbol of America and everything for which it stands should receive minimal protection by the people of the United States. That is why I urge my colleagues to follow the lead of the House of Representatives and submit this question to the people of the United States to determine whether or not they want to amend the Constitution to protect the flag from desecration.

Mr. President, I yield the floor to Senator ROTH. At the time that Senator HATCH comes, he will speak further to the issue of the flag.

The PRESIDING OFFICER. The Senator from Delaware.

Mr. ROTH. Mr. President, first of all, let me express my appreciation to the distinguished Senator from Arizona for his courtesy and compliment him on his most eloquent statement.

Mr. President, I ask unanimous consent to speak as in morning business.

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

WELFARE REFORM

Mr. ROTH. Mr. President, there are alarming signals coming from the White House that President Clinton may veto welfare reform. Instead of ending welfare as we know it, the Administration apparently intends to continue politics as usual.

From the early days of his administration, President Clinton promised welfare reform to the American people. On February 2, 1993, he told the Nation's Governors that he would announce the formation of a welfare reform group within 10 days to work with the Governors to develop a welfare reform plan. At that meeting, the President outlined four principles which would guide his administration to reform welfare.

The first principle as outlined by the President is that "welfare should be a second chance, not a way of life." In further defining what these means, the President stated that people should work within 2 years and that, "there must be—a time-certain beyond which people don't draw a check for doing nothing when they can do something." On July 13, 1993, President Clinton went even further and told the National Association of County Officials that a 2-year limit could be put on welfare. He said, "you shouldn't be able to

stay on welfare without working for more than a couple of years. After that, you should have to work and earn income just like everybody else." He went on to say, "And if you put the building blocks in, you can have a 2-year limit on welfare as we know it. You would end the system as it now exists."

Mr. President, that is a strong statement and a bold challenge. H.R. 4, the "Personal Responsibility and Work Opportunity Act of 1995," meets this first principle. We require people to work after 2 years and place a 5-year limit on the receipt of Federal benefits. Let me repeat this. We provide not a 2-year limit on benefits, but a 5-year limit. And, I might add, the conference report on H.R. 4 allows the States to exempt up to 15 percent of their caseload from this limit.

The President's support for time limits, by the way, is one of the many ironies throughout the welfare reform debate. A good deal of attention has been focused on the analysis done by the Department of Health and Human Services on the impact the various welfare bills would have on families and children. The single greatest reason families would become ineligible for benefits is the 5 year limit. It is a bit inconsistent for the President to embrace a time limit but invite criticism of our proposal for a 5-year limit on benefits.

The second principle, as outlined by the President, is "we need to make work pay." The President indicated, that through the earned income credit program, "we ought to be able to lift people who work 40 hours a week, with kids in their home, out of poverty."

The Republican balanced budget plan is consistent with this second principle outlined by the President. Under our plan, the EIC continues to grow. We are targeting the EIC program to those most in need.

The administration has criticized the Balanced Budget Act for its provisions on EIC. But I believe it is both fair and accurate to point out that in expanding the EIC, the Clinton administration and the Democratic 103d Congress went far beyond the President's stated goal as well as beyond the original goals of this program. For example, they expanded the credit to individuals who did not have children at home.

We have found unacceptable levels of errors, abuse, and waste in this program. Spending for the EIC is quite simply out of control. We have proposed a responsible and reasonable reform of the EIC program separate from H.R. 4. Our welfare bill does not conflict with the President's principle on work.

The third principle of welfare reform outlined by President Clinton some 34 months ago is that tougher child support enforcement is needed. H.R. 4 fully meets this principle. In an October 18, 1995 letter, the Director of the Office of

Management and Budget informed the majority leader that:

The Administration strongly supports bipartisan provisions in both the House and Senate bills to streamline paternity establishment, require new hire reporting, establish State registries, make child support laws uniform across State lines, and require States to use the threat of denying drivers' and professional licenses to parents who refuse to pay child support.

Clearly H.R. 4 meets the President's position on child support enforcement.

The fourth principle outlined by the President was his commitment to encourage experimentation in the States. To his credit, his administration has approved a number of waivers to allow the States the flexibility to experiment. But waivers are not enough as the President himself, as a former Governor, realizes.

When he spoke to the Governors again this year on June 6, in Baltimore, the President told the Governors,

You could not design a program that would be too tough on work for me. You could not design a program that would give the States any more flexibility than I want to give them as long as we recognize that we . . . have a responsibility to our children and to that in the end, our political and economic policies must reinforce the culture we are trying to create. They must be pro-family and pro-work.

At the same time, President Clinton also told the Governors that, "we can save some money and reduce the deficit in this welfare area."

Then, on July 20 this year, he told the National Conference of State Legislatures that "what I want to do in the welfare reform debate is to give you the maximum amount of flexibility, consistent with some simple objectives. I do think the only place we need Federal rules and welfare reform * * * is in the area of child support enforcement because so many of those cases cross State lines."

The President went on to say, "so I am going to do my best to get you a welfare reform proposal which gives more flexibility to the States and doesn't have a lot of ideological prescriptions * * * and just focuses on one or two big things that need to be done. I think that is the right way to do it."

Mr. President, we will provide the opportunity to make good on these words.

The President has told the Governors he wants to protect the States even when there is an economic downturn. We have done this with an \$800 million contingency fund and a \$1.7 billion loan fund. President told them he wanted funding for child care. H.R. 4 provides \$17 billion for child care for welfare and low-income families. This is over \$700 million more than under current law. He told the Governors the problem with a block grant was that States would cut their own funding and therefore he wanted requirements for States

to maintain their own funding. H.R. 4 imposes such requirements. Furthermore, the conference agreement provides \$3.5 billion in more funding for the block grants to States for temporary assistance for needy families than under the Senate bill which passed 87-12.

The President indicated his interest in a performance bonus which forces the bureaucracy and recipients to focus on work. Establishing performance standards is a subject which I have personally worked on for years. H.R. 4 includes work-based performance standards.

It is clear we have responded positively to all of these concerns.

The President also indicated he was willing to give the States more flexibility in child nutrition, adoption, and child protective services. H.R. 4 protects the current entitlements of foster care and adoption assistance maintenance payments. Between 1995 and 2002, funding for foster care will increase by nearly 80 percent. Funding for child nutrition will increase from less than \$8 billion in fiscal year 1995 to over \$11 billion in 2002.

These are the fundamental principles the President outlined to the Governors and to the Nation. Congress will shortly send a welfare reform bill which meets these principles. It would be regrettable if the President walks away from all of these things which he so recently pledged.

The need to reform the welfare system is as critical today as it was nearly 3 years ago when the President took office. The number of children receiving AFDC increased nearly threefold between 1965 and 1993. By comparison, the total number of children in the United States aged 0 to 18 declined by 5.5 percent during this period.

In 1965, the average monthly number of children receiving AFDC was 3.3 million; in 1970, it was 6.2 million; in 1980, it was 7.4 million; and in 1993, there were nearly 9.6 million children receiving AFDC benefits.

The Department of Health and Human Services has estimated that 12 million children will receive AFDC benefits by the year 2005 under current law. If he vetoes welfare reform, President Clinton will be accepting the status quo in which another two and one-half million children will fall into the welfare system.

If the President vetoes welfare reform, he will be preserving a system which costs and wastes billions of taxpayers dollars. The General Accounting Office has estimated, for example, that nearly \$1.8 billion in overpayments were made in the Food Stamp Program in 1993 alone.

A critical point of welfare reform is to give the States both the authority and the responsibility for efficiently, compassionately, and effectively administering these programs. As a

former Governor, the President surely knows well the duplication in the delivery of benefits. It costs over \$6 billion just to administer the AFDC and Food Stamp Programs. When you include the cost of errors, fraud, and abuse in these two programs, another \$3 billion is wasted.

We have therefore proposed an optional block grant for the Food Stamp Program. At a town meeting this past June, the President told the people of New Hampshire that his administration has given 29 States waivers to use food stamps and welfare checks to employers as a wage supplement. If it is good policy as a waiver, it is good policy to allow Governors to accept an optional block grant.

Another important area of reform is the Supplemental Security Income Program. The SSI Program was established 21 years ago principally to provide a welfare retirement program for aged and disabled adults who were unable to contribute enough into the Social Security system. With this purpose in mind, one would think that the cost of this program should at least be stable as the elderly SSI population has actually declined by more than one-third since 1974.

Instead, SSI is the largest cash assistance program for the poor and one of the fastest growing entitlement programs. Programs costs have grown 20 percent annually in the last 4 years.

The SSI reforms in H.R. 4 are designed to slow the growth in the two populations which have seen tremendous increases in recent years, noncitizens and children. In 1982, noncitizens constituted 3 percent of all SSI recipients. In 1993, noncitizens constituted nearly 12 percent of the entire SSI caseload. From 1986 through 1993, the number of aged or disabled noncitizen recipients grew an average of 15 percent annually, reaching nearly 700,000 in 1993. Today, almost one out of every four elderly SSI recipients is a noncitizen. GAO calculates that noncitizens are actually more likely to receive SSI than citizens. The majority of these elderly noncitizens, 57 percent, have been in the United States less than 5 years.

In total, our reforms directed at noncitizens will save the taxpayers more than \$20 billion. If President Clinton vetoes H.R. 4, these savings will be lost.

According to the General Accounting Office, the growth in the number of disabled children receiving cash payments under SSI was moderate before 1990, averaging 3 percent annually between 1984 and 1990. Then, from the beginning of 1990 through 1994, the growth averaged 25 percent annually, and the number tripled to nearly 900,000. Their share of the disabled SSI population grew from about 12 percent before 1990 to 22 percent in 1994. The number of children who are disabled and receive benefits has increased by 166 percent just since 1990.

I would remind my colleagues that the changes in the definition of childhood disability included in H.R. 4 was adopted on a bipartisan basis.

The conference agreement maintains the commitment to children who are disabled. All children currently receiving SSI benefits will continue to receive the full cash benefit to which they are entitled through January 1, 1997.

The conference report increases Federal spending on welfare programs. Expenditures for the programs under H.R. 4 totaled \$83.2 billion in 1995. Under H.R. 4, they will increase by one-third to total \$111.3 billion in 2002. Between 1995 and 2002, total expenditures for these programs will be \$753.7 billion.

The conference report also provides support for other areas in which the President has indicated support. The President has called for action to prevent teen pregnancies. We provide \$75 million for abstinence education.

The President has called for tough child support enforcement. Our welfare reform bill includes significant improvements in child support enforcement which will help families avoid and escape poverty.

The failure of an absent parent to pay child support is a major reason the number of children living in poverty has increased. Between 1980 and 1992, the nationwide child support enforcement caseload grew 180 percent, from 5.4 to 15.2 million cases. The sheer growth in the caseload has strained the system.

There have been improvements in the child support enforcement system as collections have increased to \$10 billion per year, but we clearly need to do better. The House and Senate have included a number of child support enforcement reforms. These include expansion of the Federal Parent Locator Service, adoption of the Uniform Interstate Family Support Act—UIFSA—use of Social Security numbers for child support enforcement, improvements in administration of interstate cases, new hire reporting, and reporting arrearages to credit bureaus. Our conference report provides increased funding for child support data automation.

As I have already mentioned, these provisions have been endorsed by the administration. Let me also note that I recently received a letter from the American Bar Association in which the ABA states it "strongly supports the child support provisions in the conference report." The letter goes on to say, "If these child support reforms are enacted, it will be an historic stride forward for children in our nation." If the President vetoes welfare reform, he will forfeit this historic opportunity.

On January 24, 1995 President Clinton declared at a joint session of Congress, "Nothing has done more to undermine our sense of common responsibility than our failed welfare system."

Mr. President, vetoing welfare reform will seriously undermine the American people's confidence in our political system. The American people know the welfare system is a failure. They are also tired of empty rhetoric from politicians. Words without deeds are meaningless. The time to enact welfare reform is now.

Mr. President, I yield the floor.
Mr. MCCONNELL addressed the Chair.

The PRESIDING OFFICER. The Senator from Kentucky.

FLAG DESECRATION CONSTITUTIONAL AMENDMENT

The Senate continued with the consideration of the joint resolution.

Mr. MCCONNELL. Mr. President, on Monday I will be offering an amendment in the nature of a substitute to the underlying proposed constitutional amendment, and I ask unanimous consent that this amendment appear in the RECORD at this point. It will be cosponsored by Senator BENNETT of Utah, Senator DORGAN, and Senator BUMPERS.

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

PROPOSED AMENDMENT

Strike all after the enacting clause and inserting the following:

SECTION 1. SHORT TITLE.

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

SEC. 2. FINDINGS AND PURPOSE.

(a) FINDINGS.—The Congress finds that—

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

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

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

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

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

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

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

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

"(a) ACTIONS PROMOTING VIOLENCE.—Any person who destroys or damages a flag of the United States with the primary purpose and intent to incite or produce imminent violence or a breach of the peace, and in circumstances where the person knows it is reasonably likely to produce imminent violence or a breach of the peace, shall be fined not more than \$100,000 or imprisoned not more than 1 year, or both.

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

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

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

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

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

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

Amend the title so as to read: "A joint resolution to provide for the protection of the flag of the United States and free speech, and for other purposes."

Mr. MCCONNELL. Mr. President, every single Senator believes in the sanctity of the American flag. It is our most precious national symbol. The flag represents the ideas, values and traditions that unify us as a people and as a nation. Brave men and women have fought and given their lives and are now entering a war-torn region in defense of the freedom and way of life that our flag represents.

For all these reasons, those who desecrate the flag deserve our contempt. After all, when they defile the flag, they dishonor America. But the issue before this body is: How do we appropriately deal with the misfits who burn the flag?

Many of my colleagues who support a constitutional amendment to ban flag-burners say the only way to ensure flag-burners get the punishment they

deserve is to amend the Bill of Rights for the first time in over 200 years. The first amendment, which they propose to alter, contains our most fundamental rights: free speech, religion, assembly, and the right to petition the Government. The freedoms set forth in the first amendment, arguably, were the foundation on which this great Republic was established.

Amending the Constitution was made an arduous process by the Founding Fathers for good reason. The requirements—approval by two-thirds of each House of Congress and ratification by three-fourths of the State legislatures—ensure that highly emotional issues of the day will not tear at the fabric of the Constitution. Since the addition of the Bill of Rights, the Constitution has been amended on only 17 occasions.

Let me repeat, Mr. President, after the initial 10 amendments known as the Bill of Rights, we have altered the Constitution only 17 times in the history of our country.

And only one of those amendments—prohibition—actually constricted freedom, and it was soon repealed. The 22d amendment also restricts freedom by limiting the President to two terms, but we will have the term limits debate another day.

The proposed constitutional amendment before us does just that—it rips the fabric of the Constitution at its very center: the first amendment.

Our respect and reverence for the flag should not provoke us to cause damage to the Constitution, even in the name of patriotism.

Mr. President, I seek no protection, no safe harbor, no refuge for those who heap scorn on our Nation by desecrating the flag.

The only thing that those who provocatively burn the flag deserve is swift and certain punishment.

Therefore, the statutory amendment I have proposed would ensure that acts of deliberately confrontational flag-burnings are punished with stiff fines and even jail time.

My amendment will prevent desecration of the flag and at the same time, protect the Constitution.

Those malcontents who desecrate the flag do so to grab attention for themselves and to inflame the passions of patriotic Americans. And, speech that incites lawlessness or is intended to do so, the Supreme Court has made abundantly clear, merits no first amendment protection. From Chaplinsky's "fighting words" doctrine in 1942 to Brandenburg's "incitement" test in 1969 to Wisconsin versus Mitchell's "physical assault" standard in 1993, the Supreme Court has never protected speech which causes or intends to cause physical harm to others.

And, that, Mr. President, is the basis for this amendment, that I am discussing. My amendment outlaws three

types of illegal flag desecration. First, anyone who destroys or damages a U.S. flag with a clear intent to incite imminent violence or a breach of the peace may be punished by a fine of up to \$100,000, or up to 1 year in jail, or both.

Second, anyone who steals a flag that belongs to the United States and destroys or damages that flag may be fined up to \$250,000 or imprisoned up to 2 years, or both.

And third, anyone who steals a flag from U.S. property and destroys or damages that flag may also be fined up to \$250,000 or imprisoned up to 2 years, or both.

Some of my colleagues will argue that we've been down the statutory road before and the Supreme Court has rejected it.

However, the Senate's previous statutory effort wasn't pegged to the well-established Supreme Court precedents in this area.

This amendment differs from the statutes reviewed by the Supreme Court in the two leading cases: Texas versus Johnson (1989) and U.S. versus Eichman (1990).

In Johnson, the defendant violated a Texas law banning the desecration of a venerated object, including the flag, in a way that will offend—offend, Mr. President—one or more persons. Johnson took a stolen flag and burned it as part of a political protest staged outside the 1984 Republican Convention in Dallas. The State of Texas argued that its interest in enforcing the law centered on preventing breaches of the peace.

But the Government, according to the Supreme Court, may not—"assume every expression of a provocative idea will incite a riot * * *." Johnson, according to the Court, was prosecuted for the expression of his particular ideas: dissatisfaction with Government policies. And it is a bedrock principle underlying the first amendment, said the Court, that an individual cannot be punished for expressing an idea that offends. I repeat, the Court said you cannot be punished for engaging in offensive speech.

The Johnson decision started a national debate on flag-burning and as a result, Congress, in 1989, enacted the Flag Protection Act. In seeking to safeguard the flag as the symbol of our Nation, Congress took a different tack from the Texas Legislature. The Federal statute simply outlawed the mutilation or other desecration of the flag.

But in Eichman, the Supreme Court found congressional intent to protect the national symbol insufficient—in-sufficient—to overcome the first amendment protection for expressive conduct exhibited by flag-burning.

The Court, however, clearly left the door open for outlawing flag-burning that incites lawlessness. The Court said: "the mere destruction or disfigurement of a particular physical

manifestation of the symbol, without more, does not diminish or otherwise affect the symbol itself in any way."

But, Mr. President, you do not have to take my word on it. The Congressional Research Service has offered legal opinions to Senators BENNETT and CONRAD concluding that this initiative will withstand constitutional scrutiny:

"The judicial precedents establish that the [amendment]"—referring to the amendment I have just been discussing—"if enacted, while not reversing Johnson and Eichman, should survive constitutional attack on first amendment grounds."

In addition, Bruce Fein, a former official in the Reagan administration and respected constitutional scholar concurs:

"In holding flag desecration statutes unconstitutional in Johnson, the Court cast no doubt on the continuing vitality of Brandenburg and Chaplinsky as applied to expression through use or abuse of the flag. [The amendment]"—referring to my amendment—"falls well within the protective constitutional umbrella of Brandenburg and Chaplinsky * * * [and it] also avoids content-based discrimination which is generally frowned on by the First Amendment."

Mr. President, several other constitutional specialists also agree that this initiative will withstand constitutional challenge. A memo by Robert Peck, and Prof. Robert O'Neil and Erwin Chemerinsky concludes that the amendment "conforms to constitutional requirements in both its purpose and its provisions."

Mr. President, I ask unanimous consent that the CRS memos, the Bruce Fein letter, and the legal memo from Robert Peck, Professors O'Neil and Chemerinsky, and Johnny Killian be printed in the RECORD at this point.

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

GREAT FALLS, VA. October 21, 1995.

Senator MITCH MCCONNELL,
U.S. Senate, Russell Senate Office Building,
Washington, DC.

DEAR SENATOR: This letter responds for your request for an appraisal of the constitutionality of the proposed "Flag Protection and Free Speech Act of 1995." I believe it easily passes constitutional muster with flying banners or guidons.

The only non-frivolous constitutional question is raised by section 3(a). It criminalizes the destruction or damaging of the flag of the United States with the intent to provoke imminent violence or a breach of the peace in circumstances where the provocation is reasonably likely to succeed. In *Chaplinsky v. New Hampshire* (1942), the Supreme Court upheld the constitutionality of laws that prohibit expression calculated and likely to cause a breach of the peace. Writing for a unanimous Court, Justice Frank Murphy explained that such "fighting" words "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."

In *Brandenburg v. Ohio* (1969), the Court concluded that the First Amendment is no bar to the punishment of expression "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

In holding flag desecration statutes unconstitutional in *Texas v. Johnson* (1989), the Court cast no doubt on the continuing vitality of *Brandenburg* and *Chaplinsky* as applied to expression through use or abuse of the flag. See 491 U.S. at 409-410.

Section 3(a) falls well within the protective constitutional umbrella of *Brandenburg* and *Chaplinsky*. It prohibits only expressive uses of the flag that constitute "fighting" words or are otherwise intended to provoke imminent violence and in circumstances where the provocation is reasonably likely to occasion lawlessness. The section is also sufficiently specific in defining "flag of the United States" to avoid the vice of vagueness. The phrase is defined to include any flag in any size and in a form commonly displayed as a flag that would be perceived by a reasonable observer to be a flag of the United States. The definition is intended to prevent circumvention by destruction or damage to virtual flag representations that could be as provocative to an audience as mutilating the genuine article. Any potential chilling effect on free speech caused by inherent definitional vagueness, moreover, is nonexistent because the only type of expression punished by section 3(a) is that intended by the speaker to provoke imminent lawlessness, not a thoughtful response. The First Amendment was not intended to protect appeals to imminent criminality.

Section 3(a) also avoided content-based discrimination which is generally frowned on by the First Amendment. It does not punish based on a particular ideology or viewpoint of the speaker. Rather, it punishes based on calculated provocations of imminent violence through the destruction or damage of the flag of the United States that are reasonably likely to succeed irrespective of the content of the speaker's expression. Such expressive neutrality is not unconstitutional discrimination because the prohibition is intended to safeguard the social interest in order, not to suppress a particular idea. See *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 744-746 (1978).

I would welcome the opportunity to amplify on the constitutionality of section 3(a) as your bill progresses through the legislative process.

Very truly yours,

BRUCE FEIN,
Attorney at Law.

(Memorandum)

To: Interested parties.

From: Robert S. Peck, Esq.; Robert M. O'Neil, professor, University of Virginia Law School; Erwin Chemerinsky, Legion Lex Professor of Law, University of Southern California.

Re S. 1335, the Flag Protection and Free Speech Act of 1995.

Date: November 7, 1995.

This memorandum will analyze the constitutional implications of S. 1335, the Flag Protection and Free Speech Act of 1995. As its name implies and the legislation states as its purpose, S. 1335 seeks "to provide the maximum protection against the use of the flag of the United States to promote violence while respecting the liberties that it symbolizes." S. 1335, 104th Cong., 1st Sess. §2(b)

(1995). This memorandum concludes that the bill conforms to constitutional requirements in both its purpose and its provisions.

It would be a mistake to conclude that S. 1335 is unconstitutional simply because the U.S. Supreme Court invalidated the Flag Protection Act of 1990 in its decision in *United States v. Eichman*, 496 U.S. 310 (1990). In this decision, as well as its earlier flag-desecration opinion, the Court specifically left open a number of options for flag-related laws, including the approach undertaken by S. 1335. The Court reiterated its stand in its 1992 cross-burning case, indicating that flag burning could be punishable under circumstances where dishonoring the flag did not comprise the gist of the crime (*R.A.V. v. City of St. Paul*, 112 S.Ct. 2538, 2544 (1992)).

Unlike the 1990 flag law that the Court negated, S. 1335 is not aimed at suppressing non-violent political protest; in fact, it fully acknowledges that constitutionally protected right. In contrast, the Flag Protection Act, the Court said, unconstitutionally attempted to reserve the use of the flag as a symbol for governmentally approved expressive purposes. S. 1335 makes no similar attempt to prohibit the use of the flag to express certain points of view. Instead, it both advances a legitimate anti-violent purpose while remaining solicitous of our tradition of "uninhibited, robust, and wide-open" public debate (*New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

Moreover, the statute is sensitive to, and complies with several other constitutional considerations, namely: (1) It does not discriminate between expression on the basis of its content or viewpoint, since it avoids the kind of discrimination condemned by the Court in *R.A.V.*; (2) It does not provide opponents of controversial political ideas with an excuse to use their own propensity for violence as a means of exercising a veto over otherwise protected speech, since it requires that the defendant have a specific intent to instigate a violent response; and (3) it does not usurp authority vested in the states, since it does not intrude upon police powers traditionally exercised by the States. Each of these points will be discussed in greater detail below.

One additional point is worth noting. Passing a statute is far preferable to enacting a constitutional amendment that would mark the first time in its more than two centuries as a beacon of freedom that the United States amended the Bill of Rights. Totalitarian regimes fear freedom and enact broad authorizations to pick and choose the freedoms they allow. The broadly worded proposed constitutional amendment follows that blueprint by giving plenary authority to the federal and state governments to pick and choose which exercises of freedom will be tolerated. On the contrary, American democracy has never feared freedom, and no crisis exists that should cause us to reconsider this path. Because the Court has never said that Congress lacks the constitutional power to enact a statute to prevent the flag from becoming a tool of violence, a statute—rather than a constitutional amendment—is an incomparably better choice.

I. S. 1335 PUNISHES VIOLENCE OR INCITEMENT TO VIOLENCE, NOT EXPRESSIVE CONDUCT

The fatal common flaw in the flag-desecration prosecution of Gregory Lee Johnson, whose Supreme Court case started the controversy that has led to the proposed constitutional amendment, and the subsequent enactment by Congress of the Flag Protection Act of 1989 was the focus on punishing contemptuous views concerning the Amer-

ican flag (*Eichman*, 496 U.S. at 317-19; *Texas v. Johnson*, 491 U.S. 397, 405-07 (1989)). In both instances, law was employed in an attempt to reserve use of the flag for governmentally approved viewpoints (i.e., patriotic purposes). The Court held such a reservation violated bedrock First Amendment principles in that the government has no power to "ensure that a symbol be used to express only one view of that symbol or its referents." (*Id.* at 417.)

Johnson had been charged with desecrating a venerated object, rather than any of a number of other criminal charges that he could have been prosecuted for and that would not have raised any constitutional issues. Critical to the Supreme Court's decision in this case, as well as to the Texas courts that also held the conviction unconstitutional, was the fact that "[n]o one was physically injured or threatened with injury." 491 U.S. at 399. The Texas Court of Criminal Appeals noted that "there was no breach of the peace nor does the record reflect that the situation was potentially explosive." *Id.* at 401 (quoting 755 S.W.2d 92, 96 (1988)). Thus, the primary concern addressed by S. 1335, incitement to violence, was not at issue in the *Johnson* case. The *Eichman* Court found the congressional statute to be indistinguishable in its intent and purpose from the prosecution reviewed in *Johnson* and thus also unconstitutional.

In reaching its conclusion about the issue of constitutionality, the Court, however, specifically declared that "[W]e do not suggest that the First Amendment forbids a State to prevent 'imminent lawless action.'" *Id.* at 410 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)). In *Brandenburg*, the Court said that government may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. at 447. It went on to state that "[a] statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from government control." *Id.* at 448.

S. 1335 merely takes up the Court's invitation to focus a proper law on "imminent lawless action." It specifically punishes "[a]ny person who destroys or damages a flag of the United States with the primary purpose and intent to incite or produce imminent violence or a breach of the peace, and in circumstances where the person knows it is reasonably likely to produce imminent violence or a breach of the peace." S. 1335, at §3(a). The language precisely mirrors the Court's *Brandenburg* criteria. It does not implicate the Constitution's free-speech protections, because "[t]he First Amendment does not protect violence." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982).

More recently, the Court put it this way: "a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment." *Wisconsin v. Mitchell*, 113 S.Ct. 2194, 2199 (1993). Under the Court's criteria, for example, a symbolic protest that consists of hanging the President in effigy is indeed protected symbolic speech. Although hanging the actual President might convey the same message of protest, a physical assault on the Nation's chief executive cannot be justified as constitutionally protected expressive activity and could constitutionally be singled out for specific punishment. S. 1335 makes this necessary distinction as well, protecting the use

of the flag to make a political statement, whether pro- or anti-government, while imposing sanctions for its use to incite a violent response.

Courts and prosecutors are quite capable of discerning the difference between protected speech and actionable conduct. Federal law already makes a variety of threats of violence a crime. Congress has, for example, targeted for criminal sanction interference with commerce by threats or violence, 18 U.S.C. §1951, (1994), incitement to riot, 18 U.S.C. §2101, tampering with consumer products, 18 U.S.C. §1365, and interfering with certain federally protected activities, 18 U.S.C. §245. S. 1335 fits well within the rubric that these laws have previously occupied. It cannot be reasonably asserted that S. 1335 attempts to suppress protected expression.

II. S. 1335 DOES NOT UNCONSTITUTIONALLY DISCRIMINATE ON THE BASIS OF CONTENT OR VIEWPOINT

The Supreme Court has repeatedly recognized that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department v. Mosley*, 408 U.S. 92, 95 (1972). On this basis, the Court recently invalidated a St. Paul, Minnesota ordinance that purported to punish symbolic expression when it constituted fighting words directed toward people because of their race, color, creed, religion or gender. Fighting words is a category of expression that the Court had previously held to be outside the First Amendment's protections. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). In *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538, 2543 (1992), the Court gave this statement greater nuance by stating that categories of speech such as fighting words are not so entirely without constitutional import "that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content." Explaining this concept, the Court gave an example involving libel: "the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government." *Id.*

As a further example, the Court said a city council could not enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government. *Id.* As yet another example, the Court stated that "burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not." *Id.* at 2544. The rationale behind this limitation, the Court explained, was that government could not be vested with the power to "drive certain ideas or viewpoints from the marketplace." *Id.* at 2545 (quoting *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 112 S.Ct. 501, 508 (1991)).

No such danger exists under S. 1335. Both the patriotic group that makes use of the flag to provoke a violent response from dissenters and the protesters who use the flag to provoke a violent response from loyalists are subject to its provisions. A law that would only punish one or the other perspective would have the kind of constitutional flaw identified by the Court in *R.A.V.* Moreover, the legislation recognizes, as the Supreme Court itself did ("the flag occupies a 'deservedly cherished place in our community,'" 491 U.S. at 419) that the flag has a special status that justifies its special attention. Similarly, the *R.A.V.* Court noted that a law aimed at protecting the President

against threats of violence, even though it did not protect other citizens, is constitutional because such threats "have special force when applied to the person of the President." *Id.* at 2546. The rule against content discrimination, the Court explained, is not a rule against underinclusiveness. For example, "a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud is in its view greater there." *Id.* (parenthetical and citation omitted).

The federal laws cited earlier that make certain types of threats of violence into crimes are not thought to pose content discrimination problems because they deal with only limited kinds of threats. To give another example, federal law also makes the use of a gun in the course of a crime grounds for special additional punishment. See 18 U.S.C. §924(c). In *Brandenburg*, the Court found that a Ku Klux Klan rally at which guns were brandished and overthrow of the government discussed remained protected free speech. Because guns were used for expressive purposes in *Brandenburg* and found to be beyond the law's reach there does not mean that the law enhancing punishment because a gun is used during the commission of a crime unlawfully infringes on any expressive rights.

The gun law makes the necessary constitutional distinctions that the Court requires, and so does S. 1335's concentration on crimes involving the American flag rather than protests involving the flag. S. 1335 properly identifies in its findings the reason for Congress to take special note of the flag: "It is a unique symbol of national unity." §2(a)(1). It notes that "destruction of the flag of the United States can occur to incite a violent response rather than make a political statement." §2(a)(4). As a result, Congress has developed the necessary legislative facts to justify such a particularized law.

In its only post-*R.A.V.* decision on a hate-crimes statute, the Court upheld a statute that enhanced the punishment of an individual who "intentionally selects" his victim on the basis of race, religion, color, disability, sexual orientation, national origin or ancestry. *Wisconsin v. Mitchell*, 113 S.Ct. 2194 (1993). A fair reading of the Court's unanimous decision in that case supports the conclusion that the Court would not strike down S. 1335 on *R.A.V.* grounds. In *Mitchell*, the Court concluded that the statute did not impermissibly punish the defendant's "abstract beliefs." *Id.* at 2200 (citing *Dawson v. Delaware*, 112 S.Ct. 1093 (1992)), but instead spotlighted conduct that had the potential to cause a physical harm that the State could properly proscribe. S. 1335 similarly eschews ideological or viewpoint discrimination to focus on the intentional provocation of violence, a harm well within the government's power to punish.

III. S. 1335 DOES NOT ENCOURAGE A HECKLER'S VETO

First Amendment doctrine does not permit the government to use the excuse of a hostile audience to prevent the expression of political ideas. Thus, the First Amendment will not allow the government to give a heckler some sort of veto against the expression of ideas that he or she finds offensive. As a result, the Court has observed, "In public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate breathing space' to the freedoms protected by the First Amendment." *Boos v. Barry*, 485 U.S. 312, 322 (1988). Any other approach to free speech "would lead to standardization of ideas either by

legislation, courts, or dominant political or community groups." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). Thus, simply because some might be provoked and respond violently to a march that expresses hatred of the residents of a community, that is insufficient justification to overcome the First Amendment's protection of ideas, no matter how noxious they may be deemed. See, e.g., *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), Cert. denied, 436 U.S. 953 (1978).

The Supreme Court's flag-burning decisions applied this principle. In *Johnson*, the state of Texas attempted to counter the argument against its flag-desecration prosecution by asserting an overriding governmental interest; it claimed that the burning of a flag "is necessarily likely to disturb the peace and that the expression may be prohibited on this basis." 491 U.S. at 408 (footnote omitted). The Court rejected this argument on two grounds: (1) no evidence had been submitted to indicate that there was an actual breach of the peace, nor was evidence adduced that a breach of the peace was one of Johnson's goals; *Id.* at 407, and (2) to hold "that every flag burning necessarily possesses [violent] potential would be to eviscerate our holding in *Brandenburg* [that the expression must be directed to and likely to incite or produce violence to be subject to criminalization]." *Id.* at 409.

S. 1335 avoids the problems that Texas had by requiring that the defendant have "the primary purpose and intent to incite or produce imminent violence or a breach of the peace. . . . In circumstances where the person knows it is reasonably likely to produce imminent violence or a breach of the peace." S. 1335, at §(a)(a). If Texas had demonstrated that Johnson had intended to breach the peace and was likely to accomplish this goal, Johnson could have been convicted of a crime for burning the U.S. flag. Texas, however, never attempted to prove this.

Moreover, S. 1335 does not enable hecklers to veto expression by reacting violently because it requires that the defendant have the specific intent to provoke that response, while at the same time taking away any bias-motivated discretion from law enforcers. The existence of a scenter requirement and a likelihood element is critical to distinguishing between a law that unconstitutionally punishes a viewpoint because some people hate it and one that legitimately punishes incitement to violence.

IV. S. 1335 IS CONSISTENT WITH FEDERALISM PRINCIPLES

Earlier this year, the Supreme Court held that the Gun-Free School Zones Act of 1990, 18 U.S.C. §922(q)(1)(a) unconstitutionally exceeded the power of Congress to regulate commerce. *United States v. Lopez*, 63 U.S.L.W. 4343 (1995). In doing so, the Court reaffirmed the original principle that "the powers delegated by the [] Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *Id.* at 4344 (quoting *The Federalist* No. 45, pp. 292-293 (C. Rossiter ed. 1961) (James Madison)).

S. 1335 respects these principles by directing its sanctions only at preventing the use of the national flag to incite violence, preventing someone from damaging an American flag belonging to the United States, or damaging, on federal land, an American flag stolen from another person. Each of these acts have a clear federal nexus and remain properly within the jurisdiction of the federal government. Moreover, the bill concedes jurisdiction to the states wherever it may properly be exercised. S. 1335, at §3(a)(d).

V. CONCLUSION

S. 1335 is carefully crafted to avoid constitutional difficulties by being solicitous of federalism and freedom of speech by focusing on incitement to violence. By doing so, it meets all constitutional requirements.

CONGRESSIONAL RESEARCH SERVICE,
THE LIBRARY OF CONGRESS,
Washington, DC, October 23, 1995.
To: Hon. Robert F. Bennett (Attention: Lisa Norton).
From: American Law Division.
Subject: Constitutionality of flag desecration bill.

This memorandum is in response to your request for a constitutional evaluation of S. 1335, 104th Congress, a bill to provide for the protection of the flag of the United States and free speech and for other purposes.

Briefly, the bill would criminalize the destruction or damage of a United States flag under three circumstances. First, subsection (a) would penalize such conduct when the person engaging in it does so with the primary purpose and intent to incite or produce imminent violence or a breach of the peace and in circumstances where the person knows it is reasonably likely to produce imminent violence or a breach of the peace.

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

Of course, the bill is intended to protect the flag of the United States in circumstances under which statutory protection may be afforded. The obstacle to a general prohibition of destruction of or damage to the flag is the principle enunciated in *United States v. Eichman*, 496 U.S. 310 (1990), and *Texas v. Johnson*, 491 U.S. 397 (1989), that flag desecration, usually through burning, is expressive conduct if committed to "send a message," and that the Court would review limits on this conduct with exacting scrutiny; legislation that proposed to penalize the conduct in order to silence the message or out of disagreement with the message violates the First Amendment speech clause.

Rather clearly, subsections (b) and (c) would present no constitutional difficulties, based on judicial precedents, either facially or as applied. The Court has been plain that one may not exercise expressive conduct or symbolic speech with or upon the property of others or by trespass upon the property of another. *Eichman*, supra, 496 U.S. 316 n. 5; *Johnson*, supra, 491 U.S. 397; *Spence v. Washington*, 418 U.S. 405, 408-409 (1974). See also, *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538 (1992) (cross burning on another's property). The subsections are directed precisely to the theft or conversion of a flag belonging to someone else, the government or a private party, and the destruction of or damage to that flag.

Almost as evident from the Supreme Court's precedents, subsection (a) is quite likely to pass constitutional muster. The provision's language is drawn from the "fighting words" doctrine of *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). That case defined a variety of expression that was unprotected by the First Amendment, among

the categories being speech that inflicts injury or tends to incite immediate violence. *Id.*, 572. While the Court over the years has modified the other categories listed in *Chaplinsky*, it has not departed from the holding that the "fighting words" exception continues to exist. It has, of course, laid down some governing principles, which are reflected in the subsection's language.

Thus, the Court has applied to "fighting words" the principle of *Brandenburg v. Ohio*, 395 U.S. 444 (1969), under which speech advocating unlawful action may be punished only if it directed to inciting or producing imminent lawless action and is likely to incite or produce such action. *Id.*, 447. This development is spelled out in *Cohen v. California*, 403 U.S. 15, 20, 22-23 (1971). See also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982); *Hess v. Indiana*, 414 U.S. 105 (1973).

A second principle, enunciated in an opinion demonstrating the continuing vitality of the "fighting words" doctrine, is that it is impermissible to punish only those "fighting words" of which government disapproves. Government may not distinguish between classes of "fighting words" on an ideological basis. *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538 (1992).

Subsection (a) is drafted in a manner to reflect both these principles. It requires not only that the conduct be reasonably likely to produce imminent violence or breach of the peace, but that the person intend to bring about imminent violence or breach of the peace. Further, nothing in the subsection draws a distinction between approved or disapproved expression that is communicated by the action committed with or on the flag.

In conclusion, the judicial precedents establish that the bill, if enacted, would survive constitutional attack. Subsections (b) and (c) are more securely grounded in constitutional law, but subsection (a) is only a little less anchored in decisional law.

Because of time constraints, this memorandum is necessarily brief. If, however, you desire a more generous treatment, please do not hesitate to get in touch with us.

JOHNNY H. KILLIAN,
Senior Specialist,
American Constitutional Law.

Mr. MCCONNELL. I know my colleagues and their allies who support the constitutional amendment are motivated by the highest ideals and principles.

I share their reverence for the flag and the values and history it represents. But even a constitutional amendment won't succeed in coercing proper respect for the flag. It will, however, do damage to the Constitution and the cause of freedom.

After all, is that not what the flag signifies—freedom? That is what it signifies.

Who can forget the pictures of the fall of the Berlin Wall, as nation after nation of Eastern Europe threw off the shackles of communism for freedom? The American flags flying over our embassies in the countries behind the Iron Curtain held the hopes and dreams of those subjugated under communism.

Spreading freedom is uniquely our American creed. In our history, we have seen freedom triumph over our colonial forbearers, over the slave holders, over the Fascists and over the dictators.

To narrow the Bill of Rights, even in the name of the flag and patriotism, constricts freedom and would reverse the 200-year American experiment with freedom that has made our Nation the envy of the world.

Let us not give flag-burners—the miscreants who hate America and the freedom we cherish—more attention than they deserve. Do not let these few scoundrels with nothing better to do than burn our flag chase freedom from the shores of America.

I urge adoption of my statutory alternative to punish those who desecrate the flag, rather than a constitutional amendment that strikes at the heart of our most cherished freedoms.

So, Mr. President, in all likelihood, we will be voting on this amendment sometime either Monday or Tuesday, depending on whether a unanimous-consent agreement is entered into. I hope that the amendment will be given serious consideration by the Senate as an alternative approach which clearly would meet constitutional standards to amending the Constitution.

Mr. President, on another matter, I ask unanimous consent to proceed as in morning business.

THE PRESIDING OFFICER (Mr. INHOFE). Without objection, it is so ordered.

BURMA

Mr. MCCONNELL. Mr. President, last week, in yet another remarkable act of courage, Daw Aung San Suu Kyi announced her party, the National League for Democracy, will not participate in the constitutional convention called by the State Law and Order Restoration Council, SLORC.

As many who have followed Burma in recent years know, remaining true to the people who elected her and the NLD in 1990, Suu Kyi declared,

A country which is drawing up a constitution that will decide the future of the state should have the confidence of the people. a standard SLORC clearly does not and cannot meet.

In fact, SLORC has already stacked the constitutional deck against the NLD and Suu Kyi. Convention participants have been forced to accept guidelines that will preserve a leading role for the military in Burma's political life and would exclude anyone married to a foreigner from assuming the office of president. As we all know, this would prevent Suu Kyi from assuming the position she was elected in 1990 to fulfill since she is married to a British scholar.

Mr. President, at the end of my comments, I will insert two articles which appeared on November 30 in the Washington Post and the New York Times regarding the current situation in Burma—there is no question that the decision to boycott has increased the level of tension in Rangoon. SLORC

has now charged Suu Kyi and her supporters as engaging in confrontational politics, but, as Suu Kyi is quick to point out:

What they have termed confrontational is that we have asked for dialogue, which we want in order to prevent confrontation. To silence the views of people whose opinions are different by putting them in prison is far more confrontational.

Let me assure my colleagues that Suu Kyi's understanding of the deteriorating situation in Burma is not a lonely minority view. Last week the United Nations, once again, took up the question of Burma's political and human rights record. Once again, the Special Rapporteur, Dr. Yokota, issued a report which few may actually read, but it is a powerful voice for the thousands and thousands of Burmese citizens who continue to suffer at the hands of SLORC.

Let me briefly tick off the observations made in the report.

In describing the constitutional convention, Dr. Yokota noted that in spite of his efforts to meet privately with political leaders who still planned to participate in the process, SLORC would only permit visits supervised by SLORC officials. He stated in unequivocal terms, the National Convention 'is not heading toward restoration of democracy.'

While the Special Rapporteur welcomed the release of Suu Kyi and three other senior officials, he criticized the continued imprisonment of several hundred political prisoners and the complex array of security laws allowing SLORC sweeping powers of arbitrary arrest and detention—authority that they continue to use—I might argue abuse—weekly.

Yokota also condemned the severity of court sentences without regard to fair trials, access to defense lawyers or any consideration of proportionality between offense and punishment. After sentencing, he drew attention to the fact that conditions in prisons are impossible to monitor because SLORC continues to stonewall the International Red Cross Committee and its request for access to detention sites.

In his March 1995 report, Dr. Yokota confirmed that military officials have carried out arbitrary killings, rape, torture, forced portage, forced labor, forced relocation, and confiscation of private property—each and every act a violation of international law. In this month's report he indicates that the pattern continues and as before, takes place most frequently in border areas where the Army is engaged in military operations or where regional development projects are taking place. He added:

Many of the victims of such atrocious acts belong to ethnic national populations, especially women, peasants, daily wage earners and other peaceful civilians who do not have enough money to avoid mistreatment by bribing officials.

Dr. Yokota paints a grim portrait of Burma today—a picture which stands at odds with the one the international business community would have us see.

A few months ago, in my office, I listened as the chairman of a large American oil company eager to do business with SLORC denounced as rumors and gossip the idea that the SLORC was engaged in any forced relocations related to his project. I respectfully suggest this month's U.N. report rises above the gossip standard.

Mr. President, I share the concerns raised by the U.N. Rapporteur. Let me stress to my colleagues that he is not reporting on a situation that has changed for the better since Suu Kyi's release, but one which is growing progressively worse.

Mr. President, I have taken the time to come to the floor to discuss these events because I am deeply disturbed by twin developments—a major campaign by American companies to enhance the political legitimacy of SLORC even as SLORC attempts to crush the fledgling democracy movement inside Burma.

In recent weeks, many United States businesses have engaged in an aggressive campaign to persuade the public that SLORC is worth doing business with because like Vietnam and China, Burma can be improved through economic engagement.

I think it is important to draw a key distinction. Unlike China and Vietnam, Burma held legitimate elections and chose a leader, Aung San Suu Kyi. The elections by all accounts were free, fair, and 7 million people made their views absolutely clear.

I must confess, I was appalled by a recent study produced by the National Bureau for Asian Research which suggested these results were essentially irrelevant. The report said, Suu Kyi was:

Obviously sincere, but it remains to be seen how successful she will be in her attempts and whether her supporters are helping her attain a position of leadership.

Insult was added to injury when the report stated:

Even assuming the time may come when she does have a say in how the country is governed, it is an open question of how well equipped she is for such responsibilities, and to what extent she would be able to rely on experienced technocrats and administrators.

These assertions are outrageously offensive. To imply she is incapable of leading her nation offends every citizen who voted for her and more importantly stands in stark contrast to her record. Suu Kyi has conducted herself with dignity and courage uncommon in this century.

The Burmese people voted—they, like Suu Kyi, have earned our respect and support. The fact that the results were rejected by a handful of ruthless, self-serving generals does not undermine the validity of the elections or the outcome.

When recently pressed by a representative of the U.N. Secretary General to engage in a dialog with Suu Kyi, SLORC officials dismissed the request point out, Suu Kyi was now:

An ordinary citizen, that in 1990 there were as many as 230 political parties with which it would be impossible to establish dialogue and it would thus not be even handed to single out any one of them.

Well, she is the one they elected.

Two hundred and thirty political parties did not carry the elections—the National League for Democracy and Suu Kyi did. She has earned the right to negotiate a timetable for the restoration of democracy for her people. It is her right and our obligation as the beacon of democracy to support that effort.

To make the argument that the United States should resign itself to dealing with SLORC to bring about change, compromises the very core of beliefs that define our history and guide this Nation.

We do not yield to vicious dictators—we do not abandon those who strain against the barbed wire shackles of repression.

It absolutely sickens me that any respectable academic organization—for that matter any American company—would suggest that economic opportunity and political expediency should impel the United States to accept SLORC as the representatives of the Burmese people.

It is not just the campaign that is being waged here at home to enhance SLORC's political credentials that has brought me to the floor of the Senate. I am also concerned about recent events in Burma.

Not only has SLORC repeatedly and publicly rejected Suu Kyi's call for a dialog on national reconciliation, last week a senior official threatened to annihilate anyone who attempted to endanger the military's rule. This week, the noose tightened a little more and Suu Kyi was directly threatened. The official military newspaper called Suu Kyi a traitor who should be annihilated.

Rhetoric has been matched by an increased willingness to restrict Suu Kyi's role. In October, the National Democracy League voted to reinstate Suu Kyi as General Secretary along with a slate of other officials. In yet another effort to work peacefully with SLORC, the NLD submitted the leadership list to the junta for approval.

SLORC rejected the results as illegal and refused to recognize Suu Kyi's position. Is it any wonder her party has decided they cannot participate in the constitutional convention process?

Last week—like every week since her release—thousands of people gathered outside Suu Kyi's home to listen to her speak. Each Saturday and Sunday spontaneous crowds have made the pilgrimage to her compound and left inspired by her courage, her confidence,

and her commitment to their freedom and future. It is a crowd described in the U.N. report and in news accounts as large and peaceful with a sense of purpose and discipline.

Unfortunately, 2 weeks ago, there was a sharp change in the SLORC's tolerance for these gatherings. In an apparent attempt to restrict access to Suu Kyi, police began to erect barricades around her home. I understand three young student supporters were arrested when they tried to intervene. According to Dr. Yokota's report, corroborated by newspaper stories, the three were charged and sentenced 2 days later to 2 years imprisonment.

These arrests were followed by another ominous development. When the NLD announced it would not participate in the constitutional convention, the party's senior officials woke up to find their homes surrounded by armed soldiers.

Democracy activists are not suffering in Burma alone. Last week nine members of the New Era newspaper staff were detained in Thailand. The New Era is an underground newspaper with wide circulation inside Burma—apparently being caught with a copy results in immediate arrest. Bowing to pressure from SLORC, in anticipation of an upcoming visit by a senior junta official, Khin Nyunt, Thai officials apparently have detained the New Era journalists—including a 71-year-old editor and his 65-year-old wife.

Reports from activists inside and outside Burma suggest a broad crack down on democratic activists is imminent. I hope this is not true and urge the administration to make clear United States opposition to any such actions. However, the evidence suggests there is credible reason to be concerned.

It is clear that the fledgling democracy movement in Burma is under siege. I find the words of Suu Kyi's fellow democrat, NLD Vice Chairman U Tin O, chilling. On Wednesday night, after the boycott announcement, six soldiers surrounded his home and another soldier now follows him everywhere.

A political prisoner for years, the 68-year-old vice chairman said with a wan smile, "We have no worries at all. I have been in prison before. They can detain me, do whatever they want. This is not a democratic country. We have to face some costs for the legitimate rights of a democracy."

It is my hope he, Suu Kyi and the NLD will not bear the costs alone or for long.

Mr. President, in the near future the United Nations will take up a resolution regarding Burma. I have been advised that the United Nations will, once again, condemn the human rights and political situation in clear and compelling terms. I commend Ambassador Albright for her efforts to assure

our support for Suu Kyi and democracy in Burma are spelled out in the resolution.

However, for more than a year the administration has argued Burma and SLORC has a choice—they must immediately improve their human rights record and move promptly to open the political process or they will face further international isolation. I agree, but my definition of prompt and immediate seems to differ with theirs.

I think we have given SLORC ample time to make a decision. Given recent events, it is clear they have no intention to relax their ruthless grip on power.

So in conjunction with the U.N. resolution it is my intention to introduce bipartisan sanctions legislation. I encourage my colleagues to support this effort as I see no other way to support Suu Kyi and the restoration of democracy in Burma.

There is no question that sanctions and further isolation of SLORC is an initiative she supports. Indeed, once again this week Suu Kyi denounced the increase in foreign investment and urged companies to wait until democracy has been restored before bringing business to Burma.

Mr. President, I ask unanimous consent that the article, which included her remarks, be printed in the RECORD and that the Yokota report and Amnesty International report on the current situation be printed along with that.

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

[From the New York Times, Nov. 30, 1995]

BURMESE OPPOSITION TO BOYCOTT JUNTA'S CONVENTION

(By Philip Shenon)

RANGOON, BURMA.—Defying the military government, Aung San Suu Kyi, the Burmese opposition leader, announced Wednesday that her political party would boycott a military-run convention to draw up a new constitution for Burma.

The move was Mrs. Suu Kyi's most direct challenge to the junta since she was freed in July after spending nearly six years under house arrest.

"The people of Burma are very united in thinking that the national convention is not heading toward democracy," the Nobel Peace Prize winner said in announcing the boycott. "I do not think there is as yet any evidence that the people of Burma support this national convention."

In a letter delivered Tuesday, the party informed the government of its decision to boycott the convention, which reopened this week after a seven-month recess, in protest over the junta's refusal to open negotiations with the party over Burma's political future.

In a response published Wednesday in a government-run newspaper, the junta accused the leaders of the party, the National League for Democracy, of trying to disrupt the national convention in hopes of replacing it "with a convention they would be able to dominate as they like."

The party's decision to boycott the constitutional convention was "totally forsak-

ing and going against the national interests," the military statement warned.

The government also deployed uniformed soldiers to the homes of three senior party members. The soldiers allowed residents of the houses to come and go, but foreign diplomats reported widespread rumors that a wing of Insein Prison, the local penitentiary used to hold political prisoners, had been cleared out in recent days to make space for many of Mrs. Suu Kyi's followers.

The boycott by Mrs. Suu Kyi and her party removes any veneer of legitimacy from the convention, which was organized by the military two years ago to enshrine its political role in the Burmese government.

The junta, which calls itself the State Law and Order Restoration Council, has refused to honor the results of elections in 1990 won overwhelmingly by the National League for Democracy. Mrs. Suu Kyi, the Oxford-educated daughter of Burma's independence hero, Gen. Aung San, was under house arrest at the time of the voting.

Since her release in July, Mrs. Suu Kyi has called repeatedly for negotiations with the junta, saying she is anxious to avoid any possibility of a repetition of the violence that occurred in 1988, when thousands of her supporters were gunned down in a military crackdown that led to her house arrest the next year.

"We do not want to call the people onto the streets, and we have no intention of calling the people into the streets," she said at a news conference Wednesday in her lakeside garden. "We have always said that we are prepared to have dialogue at any time."

But the generals have not responded to her pleas, pushing ahead instead with a stage-managed constitutional convention in which delegates, mostly handicapped by the military, are drafting a constitution that guarantees the military a permanent role in Burmese politics.

As a result of her boycott, the 86 seats allotted to the National League for Democracy were empty in the convention hall Wednesday, the second day of the current session.

"The authorities did not at any time show any willingness to talk to the National League for Democracy as the winning party of the 1990 elections," Mrs. Suu Kyi said. "They keep saying that the national convention is a substitute for dialogue. I do not think they can say that any longer."

Plainclothes soldiers have been stationed outside Mrs. Suu Kyi's house since her release—and at her request, which is seen by diplomats as a clever move since it allows Mrs. Suu Kyi to blame the military if a public disturbance outside her home should get out of hand.

But there was no request by the party for the uniformed soldiers who suddenly appeared outside the homes of three of her senior party colleagues on Tuesday night, hours after the National League for Democracy informed the government of its boycott.

Western diplomats said they feared that the junta might try to arrest some of the party's senior members on charges of inciting public disorder because of the boycott.

The party's vice chairman and one of its founders, U Tin Oo, said in an interview that six uniformed soldiers had appeared outside his home Tuesday night, and that he had been tailed by another soldier as he traveled through the city Wednesday.

"But we have no worries at all," he insisted with a confident smile. "I have been in prison before. They can detain me, do whatever they want. This is not a democratic country. We have to face some costs for the

restoration of the legitimate rights of a democracy."

[From the Washington Post, Nov. 30, 1995]
BURMESE OPPOSITION LEADER SNUBS JUNTA'S CONSTITUTION TALKS
 (By Doug Fine)

RANGOON, BURMA.—Using the backdrop of a government-sponsored constitutional convention as a forum for stepping up opposition to the country's military rules, Nobel Prize-winning opposition leader Aung San Suu Kyi said today that Burma is not headed on the path of democracy.

Four and half months after her release from house arrest by the ruling State Law and Order Restoration Council, Aung San Suu Kyi addresses increasingly large crowds each weekend afternoon from the gate of her home near Rangoon University.

But in a news conference and talk today at her fenced-in compound, she revealed that her National League for Democracy, which overwhelmingly won elections in 1990 that the military refused to recognize, has notified government officials that the party would not participate in the constitutional deliberations. The military government hopes the convention will legitimize its rule by forging an "enduring state constitution." Insisting that the military first open a dialogue with her party, which it has refused to do, Aung San Suu Kyi said, "A country which is drawing up a constitution that will decide the future of a state should have the confidence of the people."

Her party's boycott has resulted in a palpable increase in tension in Rangoon. Party leaders discovered security forces stationed outside their homes when they awoke today, a day after the convention opened.

Despite the tense atmosphere and the chaotic presence at her house of dozens of convention delegates barred from attending the convention, Aung San Suu Kyi took time to outline her views on democracy, the goal of her political movement, which has taken on new life since her release.

"With 7 million votes for the party in 1990," she said, "the views of the people are very clear. They want a constitution that will defend their basic rights."

Despite considerable corruption and a thriving black market, Aung San Suu Kyi insisted that Burma is adequately prepared for democracy and maintained that its absence is responsible for the corruption.

"This country was a democracy once from independence in 1948 until a 1962 military coup, and our situation then was very much better than it is now," she said. "The Burmese people are disciplined and receptive if you explain what is wanted of them and why."

Aung San Suu Kyi was placed under house arrest in 1989, a year after the military instituted a crackdown on her supporters that resulted in thousands of deaths. Many of her associates are still in prison. She won the Nobel Peace Prize in 1991 for her democracy campaign. Since her release from confinement in July, she has repeatedly called for reconciliation and dialogue among democratic forces, ethnic groups and her military foes.

Responding to the military's charges that her party's methods are confrontational, Aung San Suu Kyi reacted angrily. "What they have termed 'confrontational' is that we have asked for a dialogue, which we want in order to prevent confrontation. To silence the views of people whose opinions are different by putting them in prison is far more confrontational."

Yet the move to boycott the constitutional convention is likely to be viewed as a provocation by the regime, which observers said could widen the gulf between government and opposition. The regime says Burma will become a multi-party democracy after the new constitution is drafted, but it has not provided a timetable.

Aung San Suu Kyi, however, said the boycott was necessary. "They won't even talk to us," she said with a laugh. "How could the gulf be widened? It can only be narrowed."

As for the military's intentions in convening the constitutional convention, one Western embassy official, reflecting a widely held view, said, "The path which seems to be one chosen would lead to the drafting of a constitution which calls for transition that ensures civilian rule on the front end, with continued real authority being held indefinitely by the military."

One of the guidelines for the proposed constitution guarantees a "leading role" for the military in politics, and another bans anyone married to a foreigner from assuming the office of president. Aung San Suu Kyi is married to Michael Aris, a British academic.

She has continued to talk of compromise. "We have always said we want to talk over our differences to find an answer that's acceptable to everyone," she said. "We have never closed any doors and are open to any discussions which might result in what's best for Burma's people."

Aung San Suu Kyi insists that her party has no timetable for transition to democracy, and she avoids being locked into any one scenario by saying that the situation is so prone to change.

But Burma is very much at a crossroads now. After years of sealed borders and international ostracism, the government is actively seeking investment, tourism and political legitimacy.

Aung San Suu Kyi, who has been outspoken in urging foreign investors to "Jolly well wait" before bringing business into the country, said, "Luxury hotels do not mean a developed Burma."

Her photogenic presence, Oxford education, revered lineage—her father was the hero of Burma's independence—and her absence from Burma during the 1970s and '80s, which distanced her from factional infighting within the democrats' diverse coalition, make her a magnet for Burma's discontented.

Encounters in Burma's remote interior confirm her widespread support. A shop owner in Yangon, in Shan State, made sure the coast was clear and proudly showed off a T-shirt picturing Aung San Suu Kyi with her quote, "Fear is a habit. I am not afraid," on the back. A Buddhist monk in Mandalay, flipping through an English guidebook, came across her photo and exclaimed, "Do you know who this is? Do you? This is our national heroine."

STATEMENT OF MR. YOZO YOKOTA, SPECIAL RAPORTEUR OF THE COMMISSION ON HUMAN RIGHTS ON THE SITUATION OF HUMAN RIGHTS IN MYANMAR TO THE FIFTIETH SESSION OF THE GENERAL ASSEMBLY

Mr. President, I am here before you for the fourth time since the creation of my mandate by the Commission on Human Rights in March 1992. And, for the fourth time, I have the duty to bring to your attention any progress made toward the restoration of democracy and protection of human rights in Myanmar.

Mr. President, in the interim report which is brought before your Assembly, I provided on the basis of the information received a

summary of allegations reported to have occurred in Myanmar during this last year. This includes: summary executions, arbitrary detention, torture and forced labour. On purpose, I did not draw any conclusions or recommendations in my interim report. To do so, I found it necessary, in accordance with Commission on Human Rights and General Assembly resolutions, to establish or continue direct contact with the Government and people of Myanmar in order to verify the information received and to analyze its content. To my regret, however, such direct contacts in the form of a visit to Myanmar and Thailand were not possible before the deadline for the submission of the interim report.

Mr. President, at the invitation of the Government of Myanmar by a letter of the Minister for Foreign Affairs dated 28 September 1995, I undertook a visit to the Union of Myanmar from 8 to 17 October 1995. From 17 to 20 October 1995, I visited and met with some Myanmar ethnic minorities in Thailand, along the Thai/Myanmar border, to ascertain the situation of human rights within Myanmar for these ethnic minorities namely: Karen, Shan and Kachin.

While in Yangon, my office, accommodation and local transport were provided by the UNDP Office in Myanmar, to which I wish to express my deep gratitude.

Mr. President, I wish to note with special gratitude that the Government of Myanmar facilitated the visit, including the travel within Myanmar to Kachin State in Myitkyina and Eastern Shan State in Kyalong and to Myittha and Insein prisons, and extended me many courtesies.

During this visit, I was received by a number of high-level government officials including Lieutenant General Khin Nyunt, Secretary One of the State Law and Order Restoration Council (SLORC), the Deputy Minister of Foreign Affairs, the Chief Justice, the Minister for Information, the Minister for National Planning and Economic Development, the Minister for Home Affairs and other high level authorities.

During my stay in Yangon, I also had the opportunity to meet twice with Daw Aung San Suu Kyi at her private home. Former NLD Chairmen U Kyi Maung and U Tin Oo, the actual Chairmen and other NLD representatives were also present.

During these meetings, I enjoyed a frank, open and lengthy exchange of views which touched upon most issues of concern for restoration of democracy and respect of human rights in Myanmar. I was informed about the new composition of the Executive Committee of the National League for Democracy which is as follows: U Aung Shwe as Chairman; U Kyi Maung and U Tin Oo as Deputy Chairmen, Daw Aung San Suu Kyi as General-Secretary and U Lwin as Secretary.

According to NLD leaders only peace, public order and dialogue may lead to democratization. Therefore, as a mature political party, NLD does not want to return to the situation which was prevailing in 1988 or to act in vengeance. As a responsible political party, NLD is able to control its supporters. Their only aim is to promote a genuine dialogue with the Government of Myanmar.

While in Myanmar, I also had the opportunity to see the representatives of the three political parties participating in the National Convention, namely, the Union Kaye League, the National League for Democracy and the National Unity Party. In spite of my strong and repeated requests to meet with them in private at my office in the UNDP compound in Yangon, I regret to say that, this year again, the meetings with

these political leaders were arranged to take place at a Government guest house. The location and atmosphere were not conducive to a free and unencumbered exchange of views.

With regard to the detention of political prisoners, I must express my disappointment that this year, despite a formal written request before going to Myanmar and despite my repeated requests while in Myanmar, I was not permitted to see any such prisoner neither in Insein prison nor in Myitkina Jail.

With regard to the National Convention, I was not able to observe its meetings because it was not in session when I visited Myanmar this time. However, information from reliable sources indicates that it is not heading towards restoration of democracy. I am particularly disappointed to learn that the Government has not yet distributed the Myanmar language version of the Universal Declaration of Human Rights to all delegates to the National Convention.

At the completion of my visit to Myanmar, I proceeded from 17 to 20 October 1995, to Thailand, to visit displaced persons from Myanmar in the area of Mae Hong Son and Mae Sariang, where, I established or continued contact with the people of Myanmar living in camps. Let me also take this opportunity to express my deep gratitude to the Government of Thailand who facilitated my visit to the camps.

Mr. President, I now wish to summarize my observations on the human rights situation in Myanmar on the basis of the allegations received, my recent visit to that country and Thailand and of the information received from various sources, including the Government officials and people of Myanmar, staff members of the United Nations and other specialised agencies, staff members of active human rights and humanitarian non-governmental organizations, foreign government officials, journalists, scholars and students.

Since there has been no time to study carefully the information and documents collected during my visits to Myanmar and Thailand, these observations will have to be still preliminary in nature. The full account of my findings, observations and recommendations will be reflected in my final report to the Commission on Human Rights, which I intend to submit at the beginning of next year.

PRELIMINARY OBSERVATIONS

First of all, there are some developments which may lead to improvements in human rights situation in that country.

a. The Government of Myanmar continued to release political prisoners in 1995 although the exact number could not be verified. I was particularly pleased to note that among these released detainees were two prominent political party leaders from the National League for Democracy, U Kyi Maung and U Tin On, the latter of whom I met in Insein Prison in 1993 and 1994.

I have also welcomed with great satisfaction the announcement, made on 10 July 1995, that restrictions on Daw Aung San Suu Kyi were lifted by the Government of Myanmar and that she has been released. I am particularly pleased to note that she was released without conditions and is now free to meet with people and free to travel within the country.

b. Since the release of Daw Aung San Suu Kyi, a crowd of two to three thousand people is gathering every weekend, Saturdays and Sundays, outside the gate of her residence to hear what Daw Aung San Suu Kyi and other leaders say. During my visit to Myanmar, I witnessed personally one of these gatherings.

The atmosphere was peaceful and the crowd of supporters were disciplined. To my knowledge none of these meetings had disorder. To my knowledge none of the supporters was threatened or arrested for having attended such meetings.

Yet, I have to state that last week, on Saturday 18 November among the crowd which gathered that day to listen to Daw Aung San Suu Kyi's speech, I have been informed by reliable sources that three NLD members were arrested for having intervened with the police who was erecting barricades in front of her house. According to the information received, the three persons were charged with assaulting a police officer and were reportedly sentenced two days later to two years imprisonment. Although I have no details of the trial proceedings, it would appear that the accused could not possibly mount an effective defense with regard to the legal and factual basis for the arrest and incarceration in such a short period of time.

c. Cooperation with the Office of the United Nations High Commissioner for Refugees (UNHCR) is continuing and more than 190,000 Myanmar refugees out of estimated total of about 250,000 have so far been repatriated from neighbouring Bangladesh.

d. The Government is expanding cooperation with various other United Nations bodies and specialised agencies such as UNDP, UNICEF and UNDCP. Year after year, the work of the humanitarian non-governmental organizations is slowly expanding. Now, these organisations are allowed to implement programmes outside Yangon and able to reach out grass-root people who suffer from shortage or lack of food, safe water, medicine, medical care and proper education.

e. In cities like Yangon, Myitkyina and Kyanington, I observed that there were visible signs of relaxation of tension in the life of the people. It seems that people generally enjoy normal life. There were many consumer goods in market places where many shoppers crowded. Physical developments in the construction or improvement of roads, bridges, buildings and railways are taking place throughout the country and in some border areas. However, just as last year, I was informed that only a small portion of the population enjoy the improved life and the majority who were poor rather suffered from higher prices of basic necessity goods such as rice and medicine.

f. On the particular question of forced labour, I was informed during my recent mission to Myanmar that the SLORC had issued a "secret directive" to discourage the practice of forced labour. I am hopeful that this directive would be implemented rigorously.

g. As Special Rapporteur, I welcome the signature of several cease-fire agreements between the Government of Myanmar and different ethnic minorities. This is without doubt a positive step towards peace. Needless to say, such agreements should be faithfully respected by both parties.

Mr. President, in spite of these developments, I have the duty to state that there are still many restrictions on fundamental freedoms and serious violations of human rights continuing in Myanmar.

a. As mentioned above, I welcome the recent release of a number of political prisoners. However, I remain concerned about the fact that there are still more than several hundred persons imprisoned or detained for reasons of political activities. I am also concerned about the prevalence of a complex array of security laws which allow the Government sweeping powers of arbitrary arrest and detention. These laws include the 1950

Emergency Provisions Act, the 1975 State Protection Law, the 1962 Printers and Publishers Registration Law, the 1923 Official Secrets Act and the 1908 Unlawful Association Act.

Various articles in these laws continue to be used in combination to prosecute a number of individuals who were exercising their rights to freedom of expression and association. The combination of charges under these laws included ones such as writing and distributing what were described as "illegal leaflets, spreading false information injurious to the state" and "contact with illegal organisations". I understand that due to such laws and other SLORC orders, the activities of the political parties, particularly the NLD, are severely restricted.

b. Severe court sentences for some political leaders have been reported and confirmed. Information from reliable sources indicates that there are problems in the field of the administration of justice with regard to fair trials, free access to defense lawyers, proportionality between the acts committed and the punishment applied and time for careful examination of the case by courts.

c. The non-acceptance by Myanmar of ICRC's customary procedures for visits for places of detention is a negative step towards amelioration of their conditions.

d. There are still cases of torture, arbitrary killings, rapes, and confiscation of private property according to testimony and evidence acquired by me. They seem to be taking place most frequently in border areas by military soldiers in the course of military operations, forced relocations and development projects. Many of the victims of such atrocious acts belong to ethnic national populations, especially women, peasants, daily wage earners and other peaceful civilians who do not have enough money to avoid mistreatment by bribing.

e. I am gravely concerned at the continued reports of forced portage, forced labour, forced relocation which are still occurring in border areas where the Army is engaged in military operations or where "regional development projects" are taking place.

PRELIMINARY RECOMMENDATIONS

a. As Special Rapporteur, I urge the Government of Myanmar to sign and ratify the Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, the Optional Protocol to the Covenant on Civil and Political Rights, as well as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Elimination of All Forms of Discrimination against Women.

b. The Government of Myanmar should comply with the obligations under the International Labour Organization (ILO) Convention No. 29 prohibiting the practice of forced portering and other forced labour.

c. Myanmar law should be brought into line with accepted international standards regarding protection of the physical integrity rights. Among these international standards are the right to life, prohibition of torture, providing humane conditions for all persons under detention and insurance of the minimum standards of judicial guarantees.

d. The Government of Myanmar should take steps to facilitate and guarantee enjoyment of the freedoms of opinions, expression and association, in particular by decriminalizing the expression of oppositional views, relinquishing government control over the media and literary and artistic community, and permitting the formation of independent organized trade unions.

e. All persons including elected political representatives, students, workers, peasants,

monks and others arrested or detained under martial law after the 1988 and 1990 demonstrations or as a result of the National Convention, should be tried by a properly constituted and independent civilian court in an open and internationally accessible judicial process. If found guilty in such judicial proceedings, they should be given a just sentence; alternatively, they should be immediately released and the Government refrain from all acts of intimidation, threats or reprisals against them or their families.

f. As Special Rapporteur, I recommend the Government of Myanmar to repeal or amend as appropriate the relevant provisions which at present prevent the ICRC from carrying out its humanitarian activities as regards the prison visits. In this regard, I encourage the Government of Myanmar, in a spirit of humanitarian goodwill, to re-invite the presence in Myanmar of the International Committee of the Red Cross in order to carry out their purely humanitarian tasks.

g. The Government of Myanmar should publicize the "secret directive" which discourage the practice of forced labour. This will indicate and the will of the Government of Myanmar to effectively prohibit and suppress forced labour. Moreover, wide dissemination of the existence of the directive would promote awareness that forced labour is neither condoned nor tolerated.

h. The Government of Myanmar should without delay resume its dialogue with Daw Aung San Suu Kyi.

i. As Special Rapporteur, I call upon the Government of Myanmar to resolve peacefully its difficulties with ethnic minorities and to take all appropriate measures to ensure respect for human rights and humanitarian obligations in the situation of armed conflicts between the Myanmar Army and the armed ethnic groups.

j. The Government of Myanmar should distribute copies of the Universal Declaration of Human Rights in Myanmar language to all delegates to National Convention which is to be reconvened tomorrow, 28 November 1995. Such action would indicate to the international community the willingness of the Government to bring the relevant provisions of the domestic laws, in particular the new Constitution to be eventually enacted into conformity with international human rights standards.

Mr. President, I have analyzed these allegations and have made some recommendations strictly in terms of the international human rights obligations which Myanmar has freely undertaken. I am particularly thinking of the fact that Myanmar is a Member of the United Nations and is therefore bound to respect the human rights standards emanating from the United Nations Charter. I believe the Government of Myanmar should, and has the ability, to fulfill in good faith the obligations it has assumed.

FLAG DESECRATION CONSTITUTIONAL AMENDMENT

The Senate continued with the consideration of the joint resolution.

Mr. KERREY addressed the Chair.

The PRESIDING OFFICER. The Senator from Nebraska.

Mr. KERREY. Mr. President, I come to the floor to speak on Senate Joint Resolution 31, the proposed resolution that would present to the States the opportunity to amend the U.S. Constitution for the 20th time. It is a very

straightforward, simple proposal that I believe is not necessary and would, indeed, create an environment that would produce, potentially, the opposite of that which we seek to produce, or at least, as I hear, proponents of this amendment are seeking to produce—and that is, that our people have at least one symbol that they respect, that we have a unifying symbol, which is our flag, and that the flag creates, as a consequence of our reverence for it, a sense of national purpose, at least in that one instance.

This proposal, Mr. President, I believe, is well intended in that regard. If I were to identify the thing that troubles me the most about our country today, it is the question of whether or not we are developing the kind of personal character that is needed for the Nation to have the courage and the strength to respond to whatever may happen to us in the future. That kind of individual character development requires a considerable amount of effort and attention not just on the part of young people who are working to acquire it, but adults who are working to try to help them. I note, in particular, that this proposal is a top priority of the American Legion and Veterans of Foreign Wars and the several other service organizations. In both the VFW and American Legion's cases, they have as a top priority as well working with young people to help them acquire the capacity to be good citizens, to respect their country, to respect their flag, to respect their role in a free and independent nation and the requirements that fall to us as individuals in a free and independent nation.

The loss of respect for not just the flag but for many other things in our country today troubles not just members of the Legion but troubles almost anybody who is an observer of American life today.

I know a couple of days ago, Senator LIEBERMAN and Senator NUNN, along with former Secretary of Education Bill Bennett, made a public presentation of proposals to try to deal with the deterioration in the quality of presentations made on daytime broadcast television.

I listened a couple weeks ago to Senator NUNN on the floor go through some things being broadcast on daytime television, and I had a feeling I was on a different planet. Most of us in this body probably do not watch much daytime television, and it was shocking to hear the sorts of things that were being not just discussed, but offered as being OK, offered as being acceptable, offered as being sort of a legitimate kind of behavior.

This deterioration in the quality of our character is a great concern. I see it as a principal motivator behind what I consider, as I said, to be a well-intended proposal.

Mr. President, one of the things I think citizens should understand as we

consider this constitutional amendment is that our flag is already protected. You cannot burn, or desecrate our flag. If it is a flag that I own personally, you cannot desecrate my flag. You certainly cannot desecrate a flag that you and I own. That is our flag. A flag flying over Iwo Jima, the flag that flies at half-mast today around the Washington Memorial, flags at cemeteries, flags that we own. That is our flag. You cannot desecrate that. It is a violation of current law to desecrate in any fashion, to approach in any fashion that would be desecration of our flag under current law.

What this legislation proposes to do is say not only are we going to protect our flag, we are going to protect someone else's flag from us.

If an individual in their home, for example, has a flag in their home and a law is passed, say, in the State of Nebraska, as I think it probably would be, saying that desecration of a flag is a violation of the law, someone could call up and report and say, "Gee, I saw my neighbor do something with the flag in their home and I think it is a violation of law. I think what they were doing with their flag in the home is a violation of the law, and I think you should investigate and make sure they are not desecrating their own flag inside of their home."

Mr. President, I genuinely believe this is going to set off and create the very sort of division and the very sort of problem that we seek to avoid.

I think it is, again, a well-intended constitutional amendment, but I for one do not look forward to an opportunity where the people of this country are debating at the local level whether or not it is a desecration of our flag to have someone sewing the flag on their pants. It may end up being if you are driving down the highway going from, say, California to Florida, it may be legal to have a pair of pants with a flag on it in California; it may be illegal in Texas or Mississippi or vice versa.

One may have to get from AAA information about what the various flag ordinances are from State to State. I think that will, rather than causing us to deepen our respect for the flag and using it as a symbol to inspire us—not just us as adults but to help us inspire our young people to consider the sacrifices that have been made under that rather glorious symbol—rather than inspiring us, it is apt to cause us to deteriorate into an argument that, frankly, I view as something that will produce a negative, not a constructive, result.

This constitutional amendment does not protect our flag. Our flag is already protected. What this does is say it will extend the protection of our flag to the protection of somebody else's flag that they have in their home in any way, shape or form. It will set off a debate about whether or not the Government

has the right to come in, and if it is somebody else's property, take action to protect all of us or what they might be doing with their flag.

The next thing I say, Mr. President, if the flag was not revered, as it clearly is, if it did not set off such a strong emotional reaction, I think a majority of Americans who have experienced in some fashion people giving of themselves—if not giving of their lives—as a consequence of being inspired by that flag, if it was not already revered, if there really was a threat to our flag, you would see a substantial amount of instances out there where people were, as a part of expressing their anger with their country or as part of expressing their anger with something that their Congress is doing or that their Government has done to them, they would be setting the flags on fire. They are not.

The reason they are not is that they know there is a taboo that you are breaking, that you are violating something holy, and if you are trying to score a point, if you are trying to persuade somebody of your point of view, the last thing you want to do is to take a flag that belongs to you and desecrate it in any fashion, or let it trample along the ground, trample it in any way, disrespect the flag at all.

Mr. President, again, I know if the answer is no to this constitutional amendment, that Members are going to have to explain to citizens at home or to organizations at home, why are you not simply allowing us to express the will of the people? Why do you not just let the Constitution be amended?

The clearest answer I can give is that I genuinely believe that this constitutional amendment will produce less respect for the flag, not more respect for the flag. It will make the flag an object of political controversy. We ought to use the flag to educate our young people, rather than telling them that they have to respect the flag at birth without explaining why, without talking to them and giving them the evidence that many of us as adults already have that causes us to tear up and feel emotional around the flag, rather than taking the time and saying: This is what the cold war was. This is what we did in World War I. There were 50 million people under arms in World War I, and 8 million men died in World War I. This is what happened in World War II. This is what men and women of this country did in the Second World War. This is what our fighting people did, as well, in Korea, to stop the Communists from coming down from the North. This is what we did in Vietnam.

Even as controversial and as difficult as it was, there was a movement, a desire to give the people of Vietnam freedom. Did it come off the tracks? Was it loused up? Yes. But people like myself who volunteered, who served, did so because we believed in freedom. That is what the flag does stand for. We should

not require somebody to respect it by passing a law saying, If you violate the law, we will punish you. We should bring them into our presence and say: Understand what character is all about. You do not have character if your behavior is willful. You have character if your behavior is obedient—obedient to your parents, obedient to your church, to your synagogue, obedient to your country. That is what character requires us to do.

If we simply pass a law and say you have to respect the flag, in my judgment, what we are going to do is turn the flag into a political instrument. We are going to diminish its value. We should use it as an object lesson when we are debating the budget, for example, when we are debating anything that requires us to put ourselves on the line, to take risks, to take a chance for freedom, to take a chance for someone else, to say: Rather than just taking care of myself, I am going to take care of somebody else.

The description of the young people—and they were all in their late teens and early twenties, several hundred thousand men who landed on the beaches of Normandy 51 years ago—if you hear that story, and I had the chance last year to hear it told in detail by men now in their seventies who were on that landing, who went on that voyage, there was no guarantee. Indeed, many arguments were given that this thing was going to be a failure. People well informed, leaders with great knowledge believed that it would fail, that it would not be successful.

The sea conditions that day were rough. They got sick on the voyage to France, and they were terrified of the prospect of being killed by German artillery and German weapons. They knew that their lives could end the minute they stepped off of that landing craft. They knew that was a possibility.

That is what we should do when it comes to the flag. When it comes time for talking to our young people, teach them why they should respect the flag. The reason why is that these men who serve and women who serve our country today are saying, We are going to be obedient to this country. We are going to follow orders because we believe that there is a moral principle at stake here, and that principle is giving ourselves to someone else, sacrificing for someone else, paying attention, being considerate, being willing to do things that are good for somebody else, rather than simply trying to figure out how to stick it to them, how to make them look bad, how to make them feel bad as well.

The flag will not be a symbol that inspires us if we require respect, if we say to our young people: Now, we just amended our Constitution. Now we have a law on the books.

There was no law on the books in 1941 when this Nation was attacked by the

Japanese at Pearl Harbor. We did not require that of Americans, and say: Under penalty of the police coming into your home, if you desecrate our flag we are somehow going to take action against you. We knew what it meant to be patriotic. We knew that this Nation's freedom was at risk and this world's freedom was at stake and responded as a consequence.

I have talked to many members of the Legion, the VFW, the DAV, the Vietnam veterans, American veterans, and many other veterans and citizens of Nebraska who say: Just let us amend our Constitution. Just let us pass a law. Let us do this. That is all we are asking, is for the opportunity to do it.

I have to say I am not just sympathetic with that view, I believe I understand it. I understand what they are trying to do. They are concerned about the loss of respect. They are concerned about the loss of respect, not just for the flag—where, in fact, it may be one of the icons left in America where there is automatic respect—but the loss of respect for parents, the loss of respect for our leaders, the loss of respect for institutions, the loss of respect for one another; the unwillingness to be considerate, the unwillingness to be obedient, the deterioration in the value of serving someone else, of risking your life for someone else's freedom.

I understand and believe it is a great challenge for this country to try to build character one person at a time, to say that we are going to reach to our youth and inspire them with a narrative of this country, the stories of this country. The sacrifice that led us to where we are today should cause anyone who pays attention to the history of the United States of America to say that our flag deserves the reverence that this constitutional amendment is attempting to give it with the force of law.

It should be the force of our knowledge, the force of our conscience, the force of our willingness to give it back in kind that causes us to revere this flag, not the force of the police in our local community, not the force that we are afraid something bad is going to happen to us if we desecrate the U.S. flag.

I hope when it comes time to vote that at least 34 Members of this body will vote against this constitutional amendment, not because we believe that the flag should not be revered, not because we are not concerned for the loss of respect for it and other institutions in this country, but for precisely the opposite reason. I hope this debate does not lead us down the road to converting the flag into a political object, which I deeply believe it will if we amend our Constitution.

I hope we take some stock of ourselves, we read a recent assessment that was done about what our young

people and our adults know about the history of this country, where we came from, how it was we got to where we are today. We see a daunting challenge ahead of us. Far too many Americans do not know how it is that we got to where we are today. Far too many Americans still believe that freedom is somehow free, that it is our birthright, and that we need do nothing to remain free. It is ours; we have a right to it; we can do whatever we want with it. We can act and behave in a willful fashion. We do not have to regard at all the feelings or lives not only of other people in our presence, but our future as well.

I know the challenge that this constitutional amendment presents to colleagues is a rather substantial one. You fear you are going to be accused of not being in favor of protecting our flag if you vote against it. I hope, as I said, 34 Members will at least stand on this floor sometime next week when it comes up and say that because we respect this flag of ours, because we believe that it should be revered, because we believe that Americans should make the choice, the personal choice based upon a personal and active knowledge of what this flag represents, that they will say we do not need a law to cause us to behave in the fashion that we know is right. We do not need to amend our Constitution to get us to respect Old Glory.

UNANIMOUS-CONSENT AGREEMENT

Mr. MACK. Mr. President, I ask unanimous consent the following amendments be the only amendments in order to Senate Joint Resolution 31, and they must be offered and debated during Monday's session of the Senate: McConnell, relevant substitute; Hatch, two relevant amendments; Biden, relevant; Feinstein, relevant; Hollings, two relevant amendments.

I further ask that at 9 a.m. on Tuesday, December 12, there be 1 hour 40 minutes for closing debate, to be equally divided in the usual form, and the votes occur on or in relation to the amendments beginning at 2:17 p.m., with the first vote limited to the standard 15 minutes and all remaining stacked votes limited to 10 minutes in length, with 2 minutes for debate prior to the votes for explanation to be equally divided in the usual form.

I further ask unanimous consent that following the disposition of the amendments, the joint resolution be read for a third time and a final vote occur immediately without any intervening action or debate.

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

Mr. MACK. In light of this agreement, there will be no rollcall votes during Monday's session of the Senate and any votes ordered with respect to amendments and the final vote will occur beginning at 2:17 p.m. on Tuesday, December 12, 1995.

Mr. SHELBY. Mr. President, I strongly support Senate Joint Resolution 31, which amends the Constitution to protect the flag of the United States from those who would desecrate it.

The American flag is a national symbol of the values this country was founded on. Many Americans have fought and died to defend these values and this country. It is an insult to these patriots, their relatives, and all other citizens who hold this country dear, to burn or desecrate the symbol of our nation and our freedom.

I certainly support the right of all citizens to freedom of speech, but that right has never been absolute in our country. That's why there are laws against libel, slander, perjury, and obscenity. Similarly, our freedom of political expression is also limited. No one can legally deface the Supreme Court building or the Washington Monument, no matter how much he or she might wish to protest a particular government policy or law. The American flag, as the symbol of all the great values this country stands for, deserves special protection under the Constitution. It simply is not necessary to commit an act of violence against this flag to register protest against the government. Passage of Senate Joint Resolution 31 will help ensure our national symbol receives the respect and protection it deserves.

Again, Mr. President, I offer my strong support for Senate Joint Resolution 31 and I urge my colleagues to support it as well.

Mr. COATS. Mr. President, today we consider a constitutional amendment which allows States to enact laws to protect the American flag. I am cosponsor of this amendment and I strongly believe that it is necessary to render this protection to the most important symbol of our Nation.

The debate about the flag began in 1989 when the Supreme Court curiously determined that it was perfectly legal to burn the American flag as a form of political speech. This ruling led to shock and outrage from all across the United States. Congress immediately took action, passing a statute setting penalties for anyone who physically desecrates the flag. The Supreme Court ruled again that the Federal statute was unconstitutional, violating the first amendment.

Unfortunately, the Senate failed to pass a constitutional amendment to protect the flag. Today, however, we are very near this goal, with 56 cosponsors to the amendment.

The amendment reads simply "The Congress and the States shall have power to prohibit the physical desecration of the flag of the United States."

I feel an overwhelming mixture of regret and thanks—which is the substance of patriotism—when I consider the sacrifice of so many for the sake of America. This pride is rooted in one

solid and extraordinary fact—the selflessness of thousands of men and women who have given their lives to preserve American freedom.

I believe for the vast majority of Americans the flag intrinsically represents this pride. Americans do not blindly follow traditions. But we do care deeply about symbols—particularly that one symbol of ideas and values for which men and women have sacrificed and died in every generation. To desecrate the flag, I believe, is to desecrate the memory and make light of their sacrifice.

Justice Stevens writing in dissent to the 1989 Supreme Court decision said:

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 symbol carries its message to dissenters both at home and abroad who may have no interest at all in our national unity or survival.

There is a type of patriotism that is held so deeply that it finds expression in concrete things like a patriot's crippled body—or in bits of colored cloth. For men who have risked death in service of a flag it is more than just a symbol, it is sacrifice you can hold in your hand—or trample underfoot in contempt.

Men and women who we ask to die for a flag have a right to expect that flag to be respected by those who benefit from their sacrifice. It is part of the compact we make with those who will serve. At the time of the Supreme Court decision, it was the law in 48 States. Since that time, 49 State legislatures have called for a constitutional amendment to prohibit physical desecration of the flag. No other amendment in our history has had the same degree of support in State legislatures.

Tolerance is an important thing in a free and diverse society. Agreement must never be a prerequisite for civility. But tolerance can never be rooted in the view that nothing is worth outrage because nothing is worth our sacrifice.

In Chief Justice Rehnquist's stinging dissent to the court decision, labeled flag burning as "conduct that is regarded as evil and offensive to the majority of people—in a category with—murder, embezzlement or pollution." The Court's ruling, he noted, "found that the American flag is just another symbol, about which not only must opinions pro and con be tolerated, but for which the most minimal public respect may not be enjoined. The Government may conscript men into the Armed Forces where they must fight and die for the flag, but the Government may not prohibit the public burning of the banner under which they fight."

Yes, we must be tolerant but we must never adopt and enervating and cowardly disdain that strips us of patriotic conviction and dulls our ability to be offended by the desecration of vital symbols. "In the world it is called tolerance," wrote author Dorothy Sayers, "but in hell it is called despair * * * the sin that believes in nothing, cares for nothing, enjoys nothing, finds purpose in nothing, lives for nothing, and remains alive because there is nothing for which it will die."

Mr. FORD. Mr. President, yesterday we marked the bombing of Pearl Harbor. Many of us can still remember the gripping of our hearts 54 years ago today, as the realization spread over us that nothing would ever again be quite the same. Yet, I think it is fair to say that there is already a whole generation of Americans who have no grasp of the meaning World War II has for so many of us. Young people who might never hear a parent or a grandparent tell of the time they felt their commitment to a way of life being tested, of a time they could finally close their eyes and rest, knowing an important fight had been won on the world stage.

But when those same young people turn their eyes toward this country's flag, I know they understand that in its fabric was woven the dramas of thousands of battles fought on the shores of foreign lands and over the lunch counters or Main Streets of our own home towns.

There are many good reasons for protecting the unique symbol of the American flag, from the basic liberties it represents to the promise of a better future it holds out. But some of the greatest reasons for protecting the flag lie in its ability to bind one generation to the next in their love and respect for this country, so that even as the memories of yesterday's battles begin to fade, the importance of what they secured continues to hold fast in our hearts.

A flag that flies proudly in this country serves as a reminder of how war can change the course of a life, of a nation, of a world, so that even individuals who were never there, who might never have heard the stories, recognize that those hours of destruction and suffering have altered the future irrevocably, and that their own liberty was a hard won prize.

It follows then that a desecrated flag mocks the millions who have reached out or fought for all that our flag symbolizes, from the basic liberties written into our Constitution to the dreams of a better future for their families.

That's why I believe so strongly that the physical integrity of the American flag must be protected. Back in 1989, the U.S. Supreme Court declared unconstitutional a Texas flag desecration statute, ruling that flag desecration was free speech protected under the first amendment.

In response to that decision, the Senate overwhelmingly passed the Flag Protection Act, which was also declared unconstitutional. The Supreme Court's action made it clear that a constitutional amendment is necessary for enactment of any binding protection of the flag.

Up to this point, neither House of Congress has been able to garner the two-thirds super majority necessary for passage of a constitutional amendment. But because grassroots support for this amendment continues to grow, I've joined with Members on both sides of the aisle to again try passing this amendment. I'm hopeful that this time we'll get the necessary votes.

Clearly no legitimate act of political protest should be suppressed. Nor should we ever discourage debate and discussion about the federal government. The narrowly written amendment gives Congress and the States the "power to prohibit the physical desecration of the Flag of the United States," without jeopardizing those rights of free speech.

On July 14, 1861 a Union soldier wrote his last letter to his wife. He said:

My courage does not halt or falter. I know how American civilization now bears upon the triumph of the government and how great a debt we owe to those who went before us through the blood and suffering of the Revolution, and I am willing, perfectly willing, to lay down all my boys in this life to help maintain this government and pay that debt.

Today, our task here in the Senate seems trivial in comparison. But if we want the flag that hangs in school rooms, over courthouses, in sports stadiums and off front porches all across America, to continue symbolizing that same commitment to country, then it is a challenge we cannot fail to meet.

Mr. President, I urge my colleagues to join me in voting in favor of this important legislation.

Mr. President, I yield the floor, and I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

Mr. WARNER. Mr. President, I see present the distinguished Senator from Ohio on the floor, and I just wish to inform him that I will only be speaking for about 2 or 3 minutes.

Mr. President, I am a cosponsor of the flag protection constitutional amendment, and I am privileged to join my colleagues in cosponsoring this very important piece of legislation.

It is of tremendous interest to the constituents of the State of Virginia, and particularly those who are members of the American Legion and the VFW—both organizations I am privi-

leged to be a member of—and other service organizations. I want to salute their contribution and support toward this legislation.

Today, as I move about the Halls of the U.S. Senate, I have had the opportunity to meet members of those service organizations who come here today to speak to Members and otherwise encourage the strongest support for this legislation. I salute them.

Those who have been privileged to wear the uniform of our country have a constant—what I call—trustee relationship to that flag, a very special trustee relationship.

I served briefly in World War II in the U.S. Navy, and then for a second period of active duty service in the U.S. Marines during the Korean war with a brief period of service in Korea. I have always looked upon those opportunities as a privilege. I would not be a U.S. Senator today had it not been for the training that I received both in the U.S. Navy and in the U.S. Marine Corps. I have always felt that my duty here as a U.S. Senator as one to pay back—particularly those young men and women now wearing the uniform of our country—all that I have received by way of not only education but the first lessons of what leadership means.

I served my country very humbly—never to be added to the columns of those who served with great valor. But I did volunteer twice to do my duty, as others saw fit.

That is all a part of what we are incorporating in the support of this resolution because those of us who served remember so well the many friends that marched with us, or flew with us, or sailed with us—whatever the case may be—who paid the ultimate price, many others who came back with loss of limb and still bear the scars of war.

So I wish to pay special recognition to all and to speak in a very humble manner on their behalf and thank them for their contribution in making possible this legislation and what I hope will be the adoption by the Senate.

I yield the floor.

Mr. GLENN. Mr. President, to take up the issue before us on a constitutional amendment regarding the flag is a very difficult thing to do. The different expressions on the floor are certainly ones to consider whether people are for the amendment or against the amendment. It is very difficult because the feelings run so deep in both directions. I do not know whether there is anyone who is still on the fence with regard to their views on this matter.

Until today, I have not said much about this. I talked about it in the Chamber several years ago when we had the issue before us. But I think people who have very deep feelings on this can have their feelings and we respect those feelings. I do not quarrel one iota with people on the other side of the aisle who have their feelings for

whatever reason. But I do think there is a danger here. I think the danger is that the flag does not need the protection in this argument. What needs protection is really the Bill of Rights, from those who would look at it rather superficially from my view.

So until today, I have tended to hold my tongue and have kept my peace about this issue before us because it is no fun being attacked or being labeled as unpatriotic or a friend of flag burners. And I can assure you that I am neither simply because I have doubts about the wisdom of a constitutional flag burning amendment. I am not taking the floor to speak about this issue, as I say, because some of our feelings about the flag are difficult to discuss. Feelings run very deep and very strong. Let me make a few things very clear up front.

We all, of course, love the flag, and I would say nobody in this Chamber or this country loves our flag more than I do. We all can make that same statement on the floor. I fought hard for this flag through two wars and representing the country in the space program, and so on. I am both honored and proud that few people in this Nation have been able to take this flag where I took it, at least on the first space flight. That is the first thing I selected when I had a personal preference pack, as they called it, along on the trip. I took along little silk flags so I could give them to my children, and they remain among my children's most cherished possessions to this day.

I also know, more importantly, from my own personal experience that every last fiber, every stitch, every thread in that flag can be looked at as standing for someone who gave their life to defend it. At my age, I can tell you that I probably have more friends buried over in Arlington Cemetery bearing silent witness to our flag as I do bearing public witness to it in the world of the living. Maybe that is why I have so little patience and even less sympathy for those pathetic and insensitive few who would demean and defile our Nation's greatest symbol of sacrifice, the flag of the United States of America.

Those are some of the reasons I have kept silent until now. It is now clear that a legislative alternative to amending our Constitution is probably not going to be possible before we have to vote on this. It is now equally clear that those of us who question the wisdom of watering down our Bill of Rights have no choice but to stand up to the political mud merchants in some respects, from some of the comments that have been made, and to speak out against those who would deal in demagoguery on this issue.

It is now clear that those of us who remember and care deeply about the sacrifices made on behalf of freedom have a special responsibility, and we do, to point out that it would be a hol-

low victory, indeed, if we preserved the symbol of our freedoms by chipping away at those freedoms themselves. That is the important choice here. Are we to protect the symbol at the expense of even taking a small chance at chipping away at the freedoms that that symbol represents?

On that score, let us be honest with each other and with the American people. The flag is this Nation's most powerful and emotional symbol, and it is. I have been here with Senator KERREY once in the Chamber when he said he thought in Nebraska they did not need this because if somebody started to burn a flag, they would take care of it themselves right then and there and on the spot. And I agree with that. Back home in Ohio, we have almost 11 million people, and I think there are very few, who, if they saw a flag being burned, would not be willing to take action against that person or persons. It is a gut feeling. I feel that same way myself, and I would join into that.

But we have to think a little longer score on this, it seems to me. So the flag is the Nation's most powerful and emotional symbol, and it is our sacred symbol. It is a revered symbol, but it is a symbol. It symbolizes the freedoms we have in this country, but it is not the freedoms themselves. And that is why this debate is not between those who love the flag on the one hand and those who do not on the other, no matter how often the demagogues try to tell us otherwise. Everyone on both sides of the aisle politically within this Chamber and everyone on both sides of this debate loves and respects the flag. The question is how best to honor it, to honor it and what it represents.

Those who made the ultimate sacrifice for our flag did not give up their lives for just a piece of cloth, albeit red, white, and blue, and it had some stars on it. Not just for the flag. They died because of their allegiance to this country, to the values and the rights and principles represented by that flag and to the Republic for which it stands.

Without a doubt, the most important of those values, the most important of those values, rights and principles is individual liberty, the liberty to worship and think, to express ourselves freely, openly and completely, no matter how out of step those views may be with the opinions of the majority. And that is what is so unique about this country of ours—unique among all the nations around this world—Britain, France, you name them, any place where they have democracy, but ours is especially unique in that regard.

That commitment to freedom is encapsulated, it is encoded in our Bill of Rights, perhaps the most envied and imitated document anywhere in the world. The Bill of Rights is what makes our country unique. It is what has made us a shining beacon in a dark world, a shining beacon of hope and in-

spiration to oppressed peoples around the world for well over 200 years. It is, in short, what makes America America.

You may look back a little bit. You know, the Bill of Rights came into being because the States at that time were not going to approve the Constitution unless we had some of these additional protections included. And so those additional protections that were to be included became known as the Bill of Rights. They are the first series of amendments to the Constitution. Those States were only prepared to accept the Constitution with the understanding that these additional protections for each individual and each individual's rights were incorporated in that Constitution.

That is how the Bill of Rights came to be. The very first item in that Bill of Rights, the first amendment in it to our Constitution has never been changed or altered even one single time. In all of American history, over 7,000 attempts have been made to put amendments through. Just 27 have gotten through, and there was not a single time in all of American history when this was changed, not during our Civil War even, not during the Civil War when passions ran so high and this Nation was drenched in blood like few nations have been throughout their history. That Constitution was not changed. It was not changed during any of our foreign wars. It was not changed during recessions. It was not changed during depressions. It was not changed during scares or panics or whatever happened in this country.

That Bill of Rights has not been changed even during times of great emotion and anger like the Vietnam era, when flags were burned or desecrated far more than they are today. Our first amendment was unchanged, unchallenged, as much as we might have disagreed with what was going on at that time, as abhorrent as we found the actions of a lot of people at that time in their protests against the Vietnam war. But now we are told that unless we alter the first amendment, unless we place a constitutional limit on the right of speech and expression that the fabric of our country will somehow be weakened. Well, I just cannot bring myself to believe that that is the case.

I think once the American people think this issue clear through, I do not think they will buy it, either, whether this passes or not. I do not think the American people will buy it. Once you get past the first gut feeling, if you saw a flag burning, of doing something about it, as I would—so many of the people who visited me in my office the last couple of days would do the same thing—would take action themselves against such activity. Much as that might be the case and satisfying though that might be, I think we have to look at the long term on this, get by

the emotion of that moment and think what it is we are dealing with.

What we are dealing with is the Bill of Rights, dealing with that first amendment to the Bill of Rights. We are saying for the first time in our country's 200-year history, we are going to make, albeit maybe just a tiny crack, but it will be a tiny opening that could possibly be followed by others.

That first amendment says, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;" or the second item, "or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The part we are dealing with today is freedom of speech—freedom of speech. We are talking about freedom of expression. The Supreme Court has held on two separate occasions that no matter how much the majority of us, 99.999 percent of the people of this country disagree, that tiny, tiny, fractional, misguided minority, still under our Bill of Rights they have the right to their expression. Their expression is looked at as coming under that freedom of speech.

You have to look at it from that standpoint. Are we going to even make a tiny opening in changing that first amendment that could be followed on, if we have a tiny, tiny, tiny minority that we do not agree with their religious beliefs, if we have a tiny, tiny, tiny minority that we do not agree with what the press says? There is no body more critical in this whole country of the press than the people in this very room, and me included along with them. We do not like some of the things that happen in the press.

Do we want to open even a tiny, tiny, tiny chance that they might restrict our ability to assemble peaceably? And do we want to take a tiny chance that we would not be able to petition our Government for redress of grievances? Those are the things that are covered in that first amendment, known as the Bill of Rights, along with the other amendments that were incorporated before the Constitution was signed, before it even came into being.

I think there is only one way to weaken the fabric of our country, our unique country, our country that stands as a beacon before other nations around this world. You know when you think about someone burning the flag, I truly do feel sorry for them. I honestly do. My initial gut reaction would be to stomp them, go after them, get them, stop the burning, and so on. It would be a natural reaction that so many people would have as well. I know all the ones that visited my office yesterday, I would not have to ask them to do that same thing.

But that would be one way of showing our unhappiness with these few

misguided souls. At the same time we would be taking action against them. I truly would feel sorry for them. Have they never known the feeling inside of looking at that flag and being proud? Have they never been able to apparently work in any way for their country or the military in war or peace, either one, in which they were called to take action for a purpose bigger than themselves?

I say this morning that is one of the most exhilarating things that can ever happen to a man or woman, to be able to represent their country and be called to something, to a purpose bigger than themselves. I feel sorry for people who have never had that experience. It is something you cannot really explain.

We had a parade once I was involved in down on Pennsylvania Avenue and I addressed a joint meeting of Congress down at the other end of the Capitol, and everybody was waving flags out there. Everybody was waving flags. My comment when I opened down there, I said it just meant so much to me to see all the flags waving coming down Pennsylvania Avenue. It made a hard-to-define feeling within that I could not really describe in words, but I hope that we never lose that hard-to-define feeling as a nation, as individuals and a nation. We would be a lesser country if we lost that exhilaration, that feeling of pride when we see a flag and see it displayed and see people's excitement.

But I feel sorry for those people who have never known that feeling. I truly do. There would not be any problem with people burning the flag if everyone had that individual experience. But it is by retreating from the principles that the flag stands for—"principles" underlined 16 times—principles that this flag stands for, that if we retreat from those principles, that will do more damage to the fabric of our Nation than 1,000 torched flags ever could do.

The first amendment—I read it a moment ago—says simply and clearly: "Congress shall make no law * * * abridging the freedom of speech"—freedom of speech. For 200 years, in good times and bad, in times of harmony and times of strife, we have held those words to mean exactly what they say. That "Congress shall make no law"—no law—that will in any way cut back on that freedom of speech, meaning freedom of expression, as the Supreme Court has said.

And now, ostensibly to prohibit something that very rarely happens anyway, we are asked to alter those first amendment words to mean that Congress may make some laws—little ones—some laws restricting freedom of expression.

I know the other side says, "Well, what we're doing is putting this back to the States." They want us to just put it back to the States and let the

States decide this. I do not care for that approach.

Let me tell you, we are one Nation, one Nation under God, indivisible. It does not say we are going to split things up and we will treat our flag differently and the Constitution will only apply here, the Bill of Rights only applies one way in one State and a different way in another State. I do not agree with that.

So I do not want to see us make some laws, even tiny laws, even the potential of a tiny little crack in that Bill of Rights that would restrict freedom of expression. I agree with, I believe the man's name is Warner. He is a lawyer here in town. He was in the Marine Corps and prisoner of war. One of his captors brought to him a picture of a flag burning in this country and said, "There, that shows what the people think; that shows that it is no good. See this."

He said, "That is what freedom is all about. That is what expression is all about," or words to that effect. I did not bring his exact words here. He said he was proud of it, and it completely crushed his captor. The fellow did not know how to react to that.

Yet, he was right. We can say that this time this law might be about flag burning. The next form of political expression that we might seek to prohibit would be in the religion area. There are lots of religions today. Splinter groups I do not agree with at all and, I would say, 99.99 percent of the people of the country would not agree with them at all. But do we make any restriction on how they can practice their religion? No.

I do not like a lot of things the press writes today, but do we make any tiny little restriction on the press to pull back on what they can do? Or assemble or petition the Government, the other things that are covered in that first amendment.

So we can say this time the laws would be about flag burning or flag desecration, to use the exact words. But what will the next form of political expression be that we seek to prohibit, if we start a crack that has not occurred, not in the 200-plus year's history of this country?

I do not think there is necessarily a slippery slope out there that if we make this little crack here that everything is going to go downhill from there and away we go and we are going to see freedom of speech restricted, everything else and we do not know where that slide will end. I do not think that will happen, but do we want to take a chance that any misguided group of people in the future would even think about going to that end? And for what? For a threat that, at least in current years, is practically nonexistent?

I had been told there was not a single flag burning this year. I was corrected

yesterday, and the people visiting me said they believe there were three they had documented this year. That is one per approximately 90 million people in this country. We are about 260 million, close to 270 million. Even if those are true, and I do not question it. The gentleman who told me seemed to know what he was talking about, so I accept his version of this. But we are talking about one incident out of 90 million people. So I find it a little difficult to think that this is a very major problem at the moment.

But some will ask, is not desecrating the flag obnoxious, abhorrent and offensive to most, and yet it is within our right? You bet. I find it just as obnoxious and abhorrent as any person possibly can, but I try to look beyond that.

I said before, if I was present when somebody started to burn a flag right there, I have no doubt whatsoever I would join the many others here, and the galleries, who would take whatever action to stop it, physical or however we had to do it.

But then you have to think beyond this. Do we want to change the Constitution of the United States and take even a chance of something that is 1-in-a-90 million shot of our citizens doing something like this, if that is the number from this year?

Of course, desecrating the flag is offensive. It is offensive to the vast majority of Americans. Almost everybody. But that is precisely the reason we have a first amendment, to protect the kinds of political expression that are offensive and out of step with majority opinion in this Nation.

The majority opinion said that we should not have civil rights in certain parts of this country. We went ahead with it. That was a much more pervasive problem than this is. But you do not need a first amendment to protect the expression of political views with which everyone else agrees. That is not what we need the first amendment for.

You need the first amendment to protect minority points of view that the vast majority of people disagree with. That is what the protection is all about, and that is what sets this country of ours completely apart from any other nation in the world.

So I think we have to get beyond just the visceral gut reaction of someone burning a flag and think beyond that as to what the implications are if we take action against those poor, misguided souls that I truly do feel sorry for, for reasons I spoke about a moment ago. They deserve to be protected. I may not like it, but they deserve to have their rights protected as much as I deserve to have my rights protected.

So the amendment is to protect minority points of view with which the vast majority of people disagree. Protecting the minority viewpoints

against the tyranny of the majority is exactly the point of the first amendment and why the Founders only agreed to approve the Constitution with the understanding that it was to be included.

It has often been said it is possible to detect how free a society is by the degree to which it is willing to tolerate and permit the expression of ideas that are odious and reprehensible to the values of that society. You and I and a majority of our fellow citizens find flag burning and desecration to be vile and disgusting. But we also find Nazis marching in Skokie, IL, or the Ku Klux Klan marching and burning crosses in Selma, AL, to be vile and disgusting. But if the first amendment means anything at all, it means that those cruel and poor misguided souls, many of them I think demented, have a right to express themselves in that manner, however objectionable the rest of us may find their message.

But what about the argument that the first amendment is not and has never been absolute, that we already have restrictions on freedoms of expression and that a prohibition on flag burning would simply be one more? After all, it said freedom of speech does not extend to slander, libel, revealing military secrets or yelling "fire" in a crowded theater. That is true. To the extent that flag burning would incite others to violence in response does not constitute a clear and present danger, and that is what the Supreme Court has said in their language. That is their language. The difference here is whether it is a clear and present danger that we have every right to try to avert.

But this argument misses a key distinction, and that distinction is that all those restrictions on free speech I just mentioned threaten real and specific harm to other people, harm that would come about because of what the speaker said, not because of what the listeners did.

To say that we should restrict speech or expression that would outrage a majority of listeners or move them to violence is to say that we will tolerate only those kinds of expression that the majority agrees with, or at least does not disagree with too much. That would do nothing less than gut the first amendment.

What about the argument that flag desecration is an act and is not a form of speech or expression that is protected by the first amendment? Well, I think that argument is a bit specious. Anybody burning a flag in protest is clearly saying something. They are making a statement by their body language, and what they are doing makes a statement that maybe speaks far, far louder than the words they may be willing to utter on such an occasion.

They are saying something, just the same way as people who picket, or

march in protest, or use other forms of symbolic speech are expressing themselves. Indeed, if we did not view flag burners as something we find offensive and repugnant, we surely would not be debating their right to do so.

Let me say a word about something that has gotten short shrift in this debate, something we should consider very carefully before voting on this amendment. I am talking about the practical problems with this amendment. Let us say we pass it, the States pass it, it becomes an amendment, and we change the Constitution. Then what a nightmare we would have enforcing it.

First off, we are going to have 50 different interpretations. There is not going to be just one Nation on the Constitution or on the Bill of Rights anymore. There are going to be 50 little interpretations of what is in that Bill of Rights. I do not want to see that happen.

But if Congress and States are allowed to prohibit the physical desecration of the flag, how precisely are we defining the flag? We do not have an official flag, as such, with an exact size, type, kind of ink, dyes, fabric, and the whole works. There is no official flag, as such. So does this amendment refer to only manufactured flags of cloth or nylon of a certain size or description, such as the ones we fly over the Capitol here and send out? I send out dozens of those every year, and I am very proud to do it. There is no official flag, so what size are we talking about? Does it refer to the small paper flags on a stick we hand out to children at political rallies or stick in a cupcake at a banquet? Those flags are often tossed on the floor or in a garbage can at conclusion of an event. I really do not know. I am asking these questions here.

How about back in 1976 when we had the bicentennial? At that time, they were selling flag bikini swimsuits for women and boxer shorts for men. I remember seeing a rock concert one day, and at that time it was an abhorrent thing to me. The guy is strumming away on his guitar, and all at once he takes his pants off on the stage on that great occasion because he had flag shorts on underneath. How about bikinis? Should we permit flags to be worn as bikinis? We know they get soiled once in a while, too. Think of that. I do not want to use all these improper words in the Senate Chamber, but do we want someone possibly urinating on the flag of the United States, worn as shorts or a bikini? I do not. I find that abhorrent. But are we going to restrict that? I probably would like to restrict that, I can tell you.

How are we going to define this as to what happens? How about the guy who jogs down the street with a flag T-shirt on and becomes drenched with sweat? I do not like that, but is it desecration? He is probably proud that he is wearing the flag.

How about a guy that has an old flag with grease all over it, and he wants to destroy it. You are supposed to burn it to destroy a flag. So he holds it up and he is going to burn it and then he says at the same time, "I am doing this because I do not like the tax bill they passed last year, and I am doing it in protest. I am burning the flag because I do not like what they did in Washington." Are we going to lock him up? Remember, the proper way to destroy a flag that is old or has become soiled is to burn it. But what if he does it in protest? What was his intent? Every lawyer will tell you that the toughest thing to prove is intent.

We could go through example after example after example. We have a postage stamp now that has a flag on it. I was proud when they did that. I wrote a letter complimenting the Postmaster General for that, putting that on every piece of mail going out through the country, to remind people that we have a flag of the United States that stands for something; it stands for principles. What if you take a postage stamp flag and put a match under that thing and it burns up and you say, "There," and you stomp on it? Can you be arrested under the new legislation?

I do not know what the courts would do in a case like that. We can go on with all kinds of examples here of how this would be very difficult to administer, and it would be subject to 50 different interpretations. I might be able to do something in Ohio, and I drive across the Ohio River to Kentucky, West Virginia, or Pennsylvania and the same thing might be illegal. I could be arrested for doing something across the river, if we are going to have 50 different State interpretations along this line.

So I come to the floor today to say that I think—and I regret having to feel that this amendment should and must be defeated, but I really feel that the dangers from it far outweigh the threat that we have to the flag from those 1 in 90 million, if the figures are correct, Americans that have burned a flag in protest this year, as I was told yesterday. I had been told there were no examples this year, but it was corrected, and I was told there were three certified examples of flag burning. That means 1 for every 90 million Americans.

Is this something we need to correct as a major problem for this country with an amendment to the Constitution of the United States of America, which guarantees the freedom of speech and of expression in the Bill of Rights? It was not going to be signed by the States unless that was included. They felt that strongly about protecting the freedom of people to express themselves.

I think history and future generations alike will judge us harshly, as they should, if we permit people who

would defile our flag—or whatever disrespect they pay to the flag, whether they were stomping on it, or burning it, or using it as clothing, or whatever—I think future generations will think that they defiled our flag, but we do not want to let them hoodwink us into also defiling our Constitution, no matter how onerous their acts may be. It would be a hollow victory, it seems to me. We must not let those who revile our freedoms and our way of life trick us into diminishing them, or even take a chance of diminishing them.

Mr. President, I do not think we can let the passions of the moment stampede us into abandoning principles for all time. My gut reaction is that if there was a flag burning or desecration here, or somebody showed disrespect for the flag, it would be the same for the Presiding Officer and everyone in this Chamber and all those in the gallery here—we would probably take our own physical action to stop it right here and now. But then we had better think about, before we take action, what that Bill of Rights means and how precious it is. In all 200 years, we have never made a single change to it.

This Nation was not founded until that provision was included in the Constitution. They would not sign it unless that first amendment was included. If we are going to continue to be the land of the free and the home of the brave, I think we had better be very, very careful. We pledge allegiance to the flag, and that is not an official Government document. Something came up and it became adopted as sort of a pledge of allegiance. We say, "I pledge allegiance to the flag of the United States of America, and to the Republic for which it stands," and we reel that off sometimes at a dinner, while we are looking at our steak and waiting for the dinner to get started, and we think, Well, OK, and we sort of reel those words off and do not think about them. The rest of that pledge we should think about. I think it does tie in with this.

Then we say those words "one nation." We pledge that we will be one nation. These are the principles our flag stands for—one nation. We are going to stand before the rest of the world not as North and South, East and West, black and white, Republican or Democrat. We will be one nation before the rest of this world, and every single person is important, and we will be in every part of this country, and we will be one nation, a nation of might, a nation of resolve. One nation—not split up with 50 interpretations of the Constitution, 50 interpretations of the Bill of Rights for different parts of the country.

The next words are truly unique. I have traveled all over the world and looked at government documents all over this world and never seen the next two words anywhere—"under God." We say, whether we are Protestant, Catho-

lic, Jewish, Moslem, Buddhist, Baptist, Presbyterian—as I am—or whatever you are, we recognize there is a higher power than all of us. If we just pray and listen a little bit—listen a little bit—maybe we will get enough guidance about how to go about helping this country in the future.

It is under God; not just under getting money, not just under the greed of power, not just under a single standard of enforced religious beliefs which are also covered in that very first amendment of the Constitution. Our religious beliefs are not to be imposed by those that think that they, and only they, know and hold the truth. We sure have enough of those around these days. "Under God." Pray a little, listen a little, and maybe we will get some guidance.

Then we say "indivisible." Not rich against poor, young against old, workers against owners, but indivisible. We stand before the rest of this world as an indivisible nation.

Then we say words which I have not found anywhere else in the world, six almost magic words—"with liberty and justice for all." "For all"—underline that in our discussion today—"for all."

Liberty of what? Of course, liberty of opportunity. Sure, we want to see everyone have an opportunity. We want everyone to get a good education. We want much to have a fair shot at a good job and all the other things that we know about.

It is not just for a favored few. It is not just for the rich and the wealthy and the land owners. It is for everyone in this country. And the protections are for everyone in this country. It is not just for those born to power and privilege.

That first amendment talks of this. It says we will be free in our religion; we will be free in our speech, including "expression" which we are talking about today; we will be free in our assembly; and we will be free in redress of our Government. "With liberty and justice for all"—liberty of opportunity and liberty of expression of those freedoms without any question for every single person—for all.

Then we say "and justice for all." That means equality. We are all equal, whether you are President of the United States or you are outside digging a ditch, you have the same protections, the same rights as any other person in this country. It does not say "except" in the case where there are 90 million and one goes astray we will penalize that guy and lock him out. It does not say that.

I think that is a dream for which America still strives. We do not have a perfect society, not by a long shot. We have a long way to go, whether we are talking about civil rights or economic fairness in our country or the rights of every kid to get a decent education. We have so far to go.

I am so proud of this country for addressing these problems. We are willing to stand up and address them and do it in an open forum. We do it every day here on the Senate floor. Where else in the world are people so concerned about the rights of every single individual in their nation—nowhere else in this world.

Take the pledge. "I pledge allegiance to the flag of the United States of America, one nation"—we will keep it one nation, under God. You bet. That is something unique in this country. We say there is a higher power, whatever our approach to that throne of grace may be. "Indivisible"—we will not do things that tear our Nation apart and make us live under different rules. We will live under the same rules as much as we can. "And with liberty and justice for all"—the liberty of opportunity, the liberty of sameness, how we are treated by our Government, and the justice of equality.

Thank God for our country. I yield the floor.

The PRESIDING OFFICER (Mr. GRAMS). The Senator from New Jersey.

Mr. LAUTENBERG. Mr. President, first let me commend our colleague from Ohio. Few have a better right to discuss issues affecting attitudes about our Nation than Senator JOHN GLENN.

His history has been one of service in so many areas—as a pilot, as an astronaut, as a Senator. Now I know JOHN GLENN very well. One area he is not so good in, we have gone skiing together, he is not very good there, but in matters of profession and decency and honor few have the credentials that JOHN GLENN has. I am delighted to hear his comments. I share the views of my friend and colleague.

Mr. President, this is a tough issue. It is tough because people of good will on both sides feel so differently about the issue. The veterans organizations that I belong to are very much supportive of taking good care of the flag, of not permitting the desecration, if that is possible.

I am a life member of the VFW. I served overseas, World War II, and yet we come up with the kind of disagreements on this matter that we have. I regret it.

I respect all the colleagues with whom there may be a difference in point of view—those who think we need an amendment. I disagree with the decision they made but I never questioned their patriotism nor do I expect them to question mine or Senator GLENN or Senator KERREY or others who have served in uniform. Others need not have served in uniform to have a point of view that has to be listened to and perhaps respected.

I want to express my strong support, Mr. President, to the flag of the United States and my outrage at those who would desecrate the flag in any way. At the same time, I rise to express my

deep concern about amending the U.S. Constitution and the Bill of Rights.

I am not a lawyer, Mr. President, but as a private citizen and as a Senator I have always been vigilant about restrictions on the basic freedoms that make America unique in the world. Perhaps because I am the son of immigrant parents whose families fled tyranny for the promise of freedom, the Constitution and the Bill of Rights for me are not abstractions. I was raised to respect them as a sacred promise of freedom. Promises compelling enough to convince my grandparents as they carried my parents to travel halfway across the Earth to live under the protections of the Bill of Rights and the Constitution. They are protections that have drawn millions to our shores.

I remember my dear grandmother, who was born in Russia—my mother was about a year old when she was brought here—talking about what a great country this is. With a thick accent she said, "In this house"—it is funny, she drew her patriotic commitment along verbal lines—she said, with the heaviest accent you can imagine, "In this house we speak only English." It was quite remarkable. It left an impression on me that has lasted all my life.

This country has been so good to me and my family, beyond my wildest childhood dreams; even more important, beyond my mother's most precious dreams. It has been that way for millions of us, and for that reason I volunteered to do my part in World War II. For that reason, although the private sector was a very comfortable arena for me, I sought public office as a U.S. Senator. I wanted to do whatever I could to give something back to our country, our country which continues to serve as a beacon of hope for millions seeking freedom and a better life around the world.

One of the reasons I left the private sector to come here was I wanted to leave my children, and now my grandchildren, an inheritance that went far beyond the value of money and other assets, and that is a strong America, an America where all people could enjoy their freedom as long as they did not encroach upon others. That is the way I feel about our Nation. That is the way I feel about the symbol of our flag.

For that reason, just as I revere the Constitution and the Bill of Rights, I love the flag, which we at my home fly regularly, which embodies our ideals, our liberties, our history and our sacrifices. In that, I know I stand virtually with all Americans.

In my mind, I contrast those patriotic Americans with the image of the flag burner, whether on our shores or anywhere else; pictures on the front pages of the paper, having our flag burned by some in Bosnia. It angers me. We are not there to hurt. We are there to help. But the thousands of pa-

triotic Americans I know, who have been touched by the tragedy of war or sacrifice for this country, are shocked and angered by the view, the image of someone destroying the flag, burning the flag. They are showing their contempt for this incredible Nation in which we live.

The flag is a unique national symbol. I have a special, personal affection for it, as I said, along with all Americans. It is the one great symbol that unites our Nation. The flag represents more than 200 years of our history and our culture.

As a veteran, as a Senator, and as an American, son of immigrants, the flag represents noble things to me. And flag burning is an ugly, despicable, and cowardly act. When I have seen it, though I have not seen it directly—when I have seen pictures of it, it sickens me and it saddens me. Those who burn the flag are ingrates. They lack the courage and the character to fight for change through a well-established and fair and just process. Instead, their mission is different. They want to infuriate and enrage and offend, more than they want to achieve their goals through their attacks on this precious symbol. They are misguided and they deserve the contempt of all of us.

But I am not prepared to sacrifice the principle of freedom of expression embodied in the first amendment to protect a symbol. I worry about compromising the Bill of Rights. I am unwilling to risk, for the first time in our history, narrowing the freedoms expressed in the first amendment. Desecration of our flag is outrageous and my anger at such incidents wants me to seek vengeance, to strike back and to punish those who commit these acts.

However, when I think about how this offensive dissent might be choked off, I conclude that in the process we run the terrible risk of trampling on a fundamental right of our democracy, the right to disagree, the right to speak out freely, to exercise dissent no matter how disagreeable.

There is no right more fundamental to our democracy than the right of free speech, the right to assemble, the right to express ourselves on the issues of importance as citizens. That is why the first step of a despot is to squelch free speech. Silence the people and you cut the throat of democracy.

Our first amendment protects everyone's right to speak out. It is the citizen's shield against tyranny. It is what makes America special. It is what makes America a model for those aspiring to freedom around the world.

The right of the individual American to be free is the right to do what one wishes short of violating the rights of others, and that includes the right to do or say what is popular, certainly—but it also includes the right to do or say the unpopular. For it is then, when actions give offense, that our freedom

is put to the test. It is then, precisely then, that we learn whether or not we are free.

To defend the right to freedom of speech, freedom of expression, is quite different from defending the speech that flows from the exercise of that right. It is perfectly consistent to condemn flag burning, as most Americans do, while defending the right, as unpleasant as it is, for someone to abuse it. The flag is a symbol of our freedom. Desecrating it is offensive because it desecrates every one of us. But what would be even more offensive than the desecration of the symbol would be the desecration of the principle that it symbolizes. In the end, symbols are only symbols. If we desecrate the real thing, the principles our founders fought so hard to secure and that so many since have sacrificed their lives to preserve, we will lose something far more valuable, far more difficult to restore.

I have heard it argued that flag burning is not speech but rather conduct, and thus is not protected by the first amendment. But that argument reflects a misunderstanding of the first amendment. All speech, in a sense, is conduct. When one vocalizes, or uses a printing press, or types into a computer, that is conduct. But it is generally protected conduct if it expresses a political idea. Flag burning is despicable precisely because it expresses a despicable political idea.

Flag burning insults the United States of America. It insults the greatest Nation on the face of the Earth. And that is a disgusting idea. Just about every American is outraged by that idea. But the whole point of the first amendment is to protect the expression of ideas, no matter how despicable.

Throughout the history of our Nation, we have never banned the expression of an idea solely because others have found it offensive; never. We have never sanctioned speech that hurts others, like yelling "fire" in a crowded theater. But we have never banned speech just because it made others uncomfortable. And I feel that this amendment would do just that for the first time. This is a very, very dangerous precedent, as we heard from Senator GLENN a few minutes ago. A little opening often transfers into a giant hole.

Once we ban one idea because it offends some people, other ideas will be threatened as well. Where do you draw the line? It is a dangerous and slippery slope, and ultimately can lead to tyranny.

No doubt, those who are proposing this constitutional amendment are entirely well meaning, but I am reminded of something that the great Supreme Court Justice Louis Brandeis said. He said, "The greatest dangers to liberty lurk in insidious encroachment by men

of zeal, well meaning, but without understanding."

By no means do I intend to suggest that those who feel differently on this amendment are without understanding. But I think this expression, this sense, embraces the concerns that we have to have, that our greatest danger to liberty often lies within our society.

I would add, Mr. President, that if freedom is lost, it is most likely to be lost not in some cataclysmic war. Americans are too patriotic, too willing, too dedicated a country for that to happen. It is most likely to be lost a word at a time, a phrase at a time, a sentence at a time, an amendment at a time. We saw that happen in one of the great—formerly great—nations of the world before World War II in Germany. One of the first things they did was start to ban speech, ban expression, and the rest is one of man's darkest hours, or periods, in history.

Mr. President, I think it is dangerous to tinker with the Bill of Rights, and especially with the first amendment.

I hope my colleagues will stand by the first amendment and support our laws for the flag by working to make our democracy even stronger.

Thank you. I yield the floor.

Mr. HATCH addressed the Chair.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I have listened to the various speeches presented today about the flag amendment. There are people on both sides who speak on this issue with sincerity. For the life of me, I have a rough time understanding some of these arguments. People come to the floor and say that they want to protect the flag, that they love the flag, and that they are patriotic. I do not question that.

All that this amendment says is that Congress has the power to prohibit flag desecration. Everybody knows Congress is going to want to pass a statute once the amendment passes. It will be done reasonably.

With regard to the first amendment, let me point out that this is not an amendment to the first amendment. The flag amendment is the correction of a faulty Supreme Court decision. Chief Justice Warren, Justice Black—first amendment absolutists—Justice Fortas, Justice Stevens, just to mention four liberal Justices, have said that prohibiting flag desecration does not violate the first amendment.

Let me just respond to those people who think that free speech is an absolute, that you can never violate it, that you can never do anything at all to regulate it. First of all, the protection for free speech does not apply to flag burning. Flag burning is conduct. How can anybody say it is speech when in fact it is an act? But let us assume for the sake of argument that it is speech. Let me just list 20 types of speech that are not protected by the first amend-

ment, because people do not realize that there is a lot of speech not protected by the first amendment. Society has chosen not to protect these types of expression. The Supreme Court chooses not to do so.

Let me cite "fighting words." In *Chaplinsky versus New Hampshire*, a 1942 case, the Court said that fighting words can be banned.

Second, in the 1969 case of *Brandenburg versus Ohio*, a very important case, as was *Chaplinsky*, the Court said that speech that incites imminent violence was not protected by the first amendment.

Third, libel is not protected by the first amendment, see *New York Times versus Sullivan*, 1964.

Fourth, defamation *Beauharnais versus Illinois*, a 1952 case.

Fifth, obscenity is not protected by the first amendment. See *Miller versus California*, a 1973 case.

Sixth, speech that constitutes fraud, conspiracy, or aiding and abetting is not protected by the first amendment.

The first amendment is not absolute. There is a lot of speech that is not protected by the first amendment.

Seventh, commercial speech in certain situations is not protected, see *Central Hudson Gas & Electric versus Public Service Commission*, a 1980 case.

Eighth, political contributions are not protected by the first amendment under certain circumstances, see *Buckley versus Valeo*.

Ninth, child pornography is not protected by the first amendment. That is the case of *New York versus Ferber*.

Tenth, political speech of Government employees in certain situations is not protected by the first amendment—*Pickering versus Board of Education*, a 1968 case.

How about speech interfering with elections? That is No. 11. See *Burson versus Freeman*, 1992 case.

These are all cases where we have content-based restrictions on the first amendment.

So people come out here and claim: "My goodness. We cannot amend the first amendment."

All of these cases have limited the reach of the first amendment, and rightly so.

Who wants to allow fighting words? Who wants to allow words that incite people to violence? Who wants to approve or uphold libel that destroys people's reputations? Who wants to approve defamation? Who wants to allow obscenity in this society, true obscenity, that is so foul that the community standards decry it? Who wants to uphold speech that constitutes fraud, conspiracy or aiding and abetting? Who wants to use commercial speech that is improper? How about political contributions? How about child pornography?

Under current law, the government may regulate these types of speech

without violating the first amendment. Naturally, all of these are areas where the Court, or the law, has said that the first amendment does not provide an absolute protection.

Let me provide my colleagues with some reasonable time, place, and manner restrictions on expression.

Twelfth, this is the 12th illustration—is restriction on when Government property, such as national parks, can be used. That is *Clark versus Community for Creative Nonviolence*, a 1984 case.

Thirteenth, picketing in front of a home—that is *Frisby versus Shultz*, a 1988 case.

Fourteenth, posters on street posts—Members of the City Council of Los Angeles versus *Taxpayers for Vincent*, a 1984 case.

Fifteenth, restrictions on speech in prison—the court has held in *Turner versus Safley*, a 1987 case that restrictions can be imposed on speech in prisons.

Sixteenth, regulation of speech in schools—that is the *Hazelwood School District versus Kuhlmeier*, a 1988 case.

Seventeenth, the use of soundtrucks and loudspeakers—that is speech. But it can be regulated under the Supreme Court's decision in *Kovaks versus Cooper*, a 1949 case.

Eighteenth, zoning of adult movie theaters—that is a matter of speech, but see *Young versus American Mini Theaters*, a 1976 case.

Certain speech in airports has been banned.

Restrictions on door-to-door solicitation—that is *Schneider versus State*, a 1939 case.

And, finally, the 21st illustration I will give—and then I will stop—administrative fees and permits for parades. That is *Cox versus New Hampshire*, a 1941 case.

These are all limitations on speech under the first amendment. So I find it hard to understand the other side's arguments that we are going to interfere with the first amendment's rights and privileges and that we will be amending the first amendment. All 21 of these examples are certainly exceptions to free speech, and I am sure that the Supreme Court has recognized others.

So this is not something that is unique or new. We are talking about the flag of the United States, the national symbol. Some people claim: "Oh, my goodness. The rights of free speech supersede everything." Well, they do not. And especially where speech is not involved. But why can we not ban in the interest of patriotism and honor and values in this country, despicable, rotten, dirty, conduct against our national symbol?

It amazes me that these folks come in here and say how they support the flag, how wonderful it is, and how terrible it is for people to do these awful things—to smear the flag with excre-

ment, to urinate on it, to tramp on it, to burn it. What do we stand for around here? Have we gotten so bad in this country that no values count?

I know people are going to vote for this amendment because they are tired of the lack of values in our country. They are tired of people just making excuses for all kinds of offensive conduct in this country. Have we no standards at all? Do we have to tolerate every rotten, despicable action that people take just because we are free people? The answer to that is no, no, no.

I am willing to admit my colleagues are sincere. Bless them for it. But they are sincerely wrong to treat the flag like this while they say they uphold it and honor and love it, and yet they will not vote for a simple amendment that gives Congress the power to say what desecration of the flag really is.

That is all it does. Congress does not even have to act if this amendment is passed. But we all know it will. Congress will act.

Let me just talk a little bit about the McConnell amendment.

Mr. President, make no mistake about it, Senator McConnell and I are the best of friends, but this McConnell amendment absolutely would kill this flag protection amendment. The McConnell amendment is a killer amendment, and I think everybody knows that.

It replaces the flag protection amendment with a statute which cannot withstand Supreme Court review after Johnson and Eichman, and is far too narrow to offer real protection for the flag in any event.

The American Legion and the Citizens Flag Alliance are strongly opposed to the McConnell proposal.

Any Senator who has cosponsored Senate Joint Resolution 31, the flag protection amendment, or stated his or her intention to vote for it, must vote against the McConnell amendment. You cannot be for the flag amendment and the McConnell statute as proposed, which will completely replace the flag amendment.

Mr. President, I appreciate the desire of the Senator from Kentucky to do something to protect the American flag. I know he feels strongly about the flag. I think that is true about everybody in this body. Rightly or wrongly, they feel strongly. And I hope that, in the end, my friend from Kentucky, will see his way clear to supporting our constitutional amendment should his amendment fail.

But I say to my friend from Kentucky, with great respect, we have been down the statutory road before on this issue. It is a dead end, plain and simple.

I well recall my friend from Delaware, Senator Biden lining up a variety of constitutional scholars to support his statute in 1989. Senator Dole, Sen-

ator Grassley, and I, told the Senate that the Supreme Court would strike it down. The statute passed by a vote of something like 91 to 9. Sure enough, the Supreme Court took 30 days after oral argument and less than eight dismissive pages to throw it out in *United States versus Eichman*. I say with all respect, the Senator from Kentucky now invites the Senate down the same barren path.

The Supreme Court, in its Johnson and Eichman decisions, has made its position crystal clear: Special legal protections for the American flag offends the Court's concept of free speech.

In Johnson, the Court made clear that for a State to forbid flag burning whenever such a prohibition protects the flag's symbolic role, but allow such burning when it promotes that role, as by ceremoniously burning a dirty flag, is totally unacceptable. The Court says this allows the flag to be used as a symbol in only one direction.

Similarly, if flag desecration is singled out for greater punishment than other breaches of the peace or incitements to violence, such special treatment promotes the flag's symbolic role. This, sadly, the Court will not tolerate—they have told us this twice, now.

In Eichman, the Court clearly declared that no statute which protects the flag as a symbol would survive constitutional muster. The Flag Protection Act was held invalid, like the Texas statute in Johnson, because of the "same fundamental flaw: [they both] suppress expression out of concern for [its] likely communicative impact." [496 U.S. at 317]. Even though Congress had attempted to write a broader statute to avoid the problems of the Texas law, by making all physical impairments illegal except for ceremonial disposal of a worn flag, the Court found the act unconstitutional anyway because "its restriction on expression cannot be justified without reference to the content of the regulated speech." [Id. at 318]. As Prof. Richard Parker of Harvard University Law School has put it, the Supreme Court found the act invalid because it "involves taking sides in favor of what is 'uniquely' symbolized by the flag—our aspiration to national unity."

Indeed, my friend from Kentucky, has made very clear in his remarks upon introducing the bill what this bill is all about—it is not about breaches of the peace or theft. It is about protecting the flag as a symbol. He said on October 19, 1995:

Flag burning is a despicable act. And we should have zero tolerance for those who deface our flag . . . I am disgusted by those who desecrate our symbol of freedom. . . .

Mr. President, those words reinforce the bill's fundamental conflict with Johnson and Eichman. So does the finding in the proposed statute which describes our flag as:

a unique symbol of national unity and represents the values of liberty, justice, and equality that make this Nation an example of freedom unmatched throughout the world.

But many who burn the flag disagree with every word of that finding. Some of them believe the flag represents oppression, exploitation, and racism. They are wrong, but the Supreme Court has made clear that Congress and the States cannot protect the flag in order to preserve its symbolic value in one direction. I believe the Supreme Court is no more correct than it was in *Dred Scott* and *Plessy versus Ferguson*, but we cannot overrule such errors by statute.

While it is true that flag desecration can be penalized pursuant to a general breach of the peace statute, in the same way other breaches of the peace are punished, offering special protection for the flag is intended to enhance the flag's symbolic role. The Court will not buy it.

Further, even if this statute was upheld, it is, with great respect, very inadequate. Not every flag desecration will cause or likely cause a breach of the peace or violence. That will depend on circumstances. Frankly, I do not want the protection of the flag to be limited to those narrow circumstances.

And these are very narrow circumstances. A flag desecrated in the midst of a crowd of those sympathetic to the desecrator will not elicit a penalty. Those who see it on television or in a news photo or from a distant sidewalk may not like it, but it will not violate a breach of the peace statute.

Moreover, of course, not every flag which is physically desecrated is stolen from the Federal Government, or stolen and desecrated on Federal land.

Indeed, this statute in no way changes the result in the Texas versus Johnson case, which creates the problem bringing us to the floor of the Senate in the first place.

In Johnson, the State of Texas defended its flag burning statute on the ground that it prevented speech that caused violence or breaches of the peace. The Court brushed aside Texas' evidence that witnesses of Gregory Johnson's flag burning were seriously offended and might have caused disorder. Instead, the Court simply noted that—

No disturbance of the peace actually occurred or threatened to occur because of Johnson's burning of the flag. . . . The state's position . . . amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that expression may be prohibited on this basis. Our precedents do not countenance such a presumption. . . . [491 U.S. at 408].

The Court also determined that Johnson did not run afoul of the fighting words doctrine. The Court concluded that "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." Thus, section (a) of the proposed statute does not cover Johnson. Nor does section (b) cover Johnson, because the flag he burned did not belong to the United States. It was taken from a bank building. Finally, section (c) is inapplicable—Johnson burned the flag in front of city hall, not, apparently, on Federal land.

If Gregory Johnson could not be held criminally liable under the Senator's proposed statute, who could?

I ask unanimous consent to enter into the RECORD letters from Prof. Richard Parker of Harvard Law School, Prof. Steven Pressler of Northwestern Law School, concerning the McConnell statute.

There being no objection, the letters were ordered to be printed in the RECORD, as follows:

NORTHWESTERN UNIVERSITY,
SCHOOL OF LAW,
Chicago, IL, December 4, 1995

Hon. ORRIN G. HATCH,
Chairman, U.S. Senate Judiciary Committee,
Washington, DC.

DEAR SENATOR HATCH: You have asked for my thoughts regarding the constitutionality of S. 1335, the Flag Protection and Free Speech Act of 1995. I understand that the sponsors of the legislation, based on an analysis performed by the Congressional Research Service, and apparently also advised by some legal scholars (whose names, as far as I know, have not been made public) have asserted that the act would be able to pass muster in any court review of the act. In my view that is simply incorrect. At least as far as the key section of the proposed act, subsection (a), is concerned, I simply do not see any way in which the statute could meet the tests for constitutionality laid down in *United States v. Lopez*, 115 S. Ct. 1624 (1995), *Texas v. Johnson*, 491 U.S. 397 (1989), and *U.S. v. Eichman*, 496 U.S. 310 (1990).

Subsection (a) of the proposed Act would penalize the conduct of flag-burning when the flag burner does so with the primary purpose and intent to produce a breach of the peace or imminent violence, and in circumstances where the offender knows it is reasonably likely to produce imminent violence or a breach of the peace. There is no general federal power given to Congress to prevent breaches of the peace or safeguard against imminent violence. For Congress to assert this power, presumably under the commerce clause, would result in the statute being struck down under *United States v. Lopez*, 115 S. Ct. 1624. If Congress cannot pass the Gun Free School Zones Act (which presumably had a similar purpose) I can't imagine that subsection (a) of the Flag Protection and Free Speech Act would survive either.

The alternative ground for the Act, Congress's power to protect the national symbol, has been clearly ruled out by Johnson and Eichman, where the court has indicated as clearly as can be that flag desecration, because the court believes it to be a protected form of speech, is a symbolic act which in no way harms the symbolic value of the flag. Indeed, in the Court's view, the desecration of the flag simply reinforces the symbolic value of the flag. Congress is thus without power to prohibit flag burning or

flag desecration by statute, as we made clear in the Eichman case, when an assertedly content-neutral federal statute was struck down.

As you may remember, when Judge Bork and I testified before the Senate Judiciary Subcommittee holding hearings on the statute, we predicted the statute would be held unconstitutional, and we were proven right by Eichman. Subsection (a) of this statute would also be seen by the courts for what it is, an attempt to do by statute what can only be done by constitutional amendment. Given the decisions in Johnson and Eichman, and given the current composition of the court, the court would undoubtedly adhere to its view that such a statute is an attempt to prohibit what the court regards as protected speech. It should be remembered that the statute struck down in Johnson itself was grounded in similar notions about the need to prevent violence and prevent breaches of the peace, and the court simply decided that a statute calculated to prevent the expressive act of flag burning could not be regarded as devoted to a constitutional purpose.

I have heard it argued that the Supreme Court's recent decision in *Wisconsin v. Mitchell*, 113 S.Ct. 2194 (1993), which upheld an enhanced sentence for aggravated battery because the defendant chose his victim on the basis of his race, somehow suggests that the current court would be more lenient in upholding statutes that implicate what has been regarded as conduct protected by the First Amendment. There is no merit to this argument. In Mitchell the court made clear that the Wisconsin statute passed constitutional muster because the conduct at which it was addressed (the infliction of serious bodily harm) was "unprotected by the First Amendment." The conduct at which the Flag Protection and Free Speech Act of 1995 is directed—burning or otherwise destroying the American Flag in order to incite others—is the destroying the American Flag in order to incite others—is the very conduct which the Supreme Court declared in Johnson and Eichman is protected by the First Amendment. Mitchell simply has no application.

The two subsections of the Flag Protection and Free Speech Act of 1995, (b) and (c), which have to do with the stealing or conversion of a flag belonging to the United States, and the stealing or conversion of a flag on federally-controlled land could conceivably survive scrutiny under Lopez (since it is the task of the federal government to patrol federally-controlled property), and it might be regarded as the task of the federal government to punish theft and destruction of federal or private property on federal lands. Even if this were so, however, and it is by no means free from doubt, this would do nothing to overcome the result in the Johnson case, and others like it, where the flag destruction is prohibited by state governments, or takes place on non-federally controlled property.

The whole purpose of the efforts undertaken by the Citizens Flag Alliance and countless numbers of Americans working at the grass roots level (which have so far resulted in the resolutions passed by forty-nine state legislatures asking Congress to send the Flag Protection Amendment to the States for ratification, and the passage of the Amendment by much more than the requisite two-thirds vote in the House of Representatives) was to reverse the result in *Texas v. Johnson*, and give back to the American people their right to protect their cherished national symbol in the manner they

had enjoyed prior to 1989. This included protection by either state or federal governments, as provided for by the Amendment. As I indicated in my testimony before your subcommittee six years ago, five years ago, and most recently last summer, a Constitutional Amendment is a traditional manner in which the American people have corrected erroneous decisions by the Supreme Court, and in which they have asserted the sovereign prerogative, which belongs to them alone.

As you have indicated many times, the Flag Protection Amendment is a worthy measure, expressing noble ideals of decency, civility, and responsibility very much in keeping with American traditions. It should not be sidetracked by a Quixotic quest for a statutory solution. I urge you to do all you can to persuade the Senators who think a statute will work that they are misinformed, and that the proposed statute, if passed, would be declared unconstitutional with regard to subsection (a), and that the remaining subsections would do little to correct the unjust result of *Texas v. Johnson*.

I appreciate the opportunity to share my views with you, and I would be happy to help in any further manner I can.

Yours Sincerely,

STEPHEN B. PRESSER,
Raoul Berger Professor of
Legal History.

HARVARD LAW SCHOOL,
Cambridge, MA, December 4, 1995.
Senator ORRIN HATCH,
U.S. Senate,
Washington, DC.

DEAR SENATOR HATCH: Over the last several months, I've found, in countless conversations with all sorts of people about the proposed constitutional amendment to allow our representatives to prohibit "physical desecration" of the flag, that everybody agrees. We all agree that the flag is the unique expression of our aspiration, as Americans, to national unity. We agree that, nowadays, this aspiration is under assault by a looming tide of disrespect for the very idea of shared national values, to say nothing of patriotic values. We agree that this tide must be stemmed, that when these values are threatened, they must be defended. Rooted in our hearts, they are expressed in symbols—especially, the symbol of the flag—and so, we agree, it is those symbols that we must protect.

On October 19, Senator McConnell gave voice to this basic agreement on the floor of the Senate. He is, he said, "disgusted by those who desecrate our symbol of freedom." "[W]e should have zero tolerance for those who deface the flag," he insisted.

Yet he said that not to support the flag amendment—but to oppose it. He proposed, instead, statute to stem the tide. It would, he said, serve his purpose; showing "zero tolerance for those who deface the flag" by punishing those "who desecrate our symbol of freedom." He, no doubt, means his statute to be interpreted in light of his stated purpose. But—for that very reason—his statute would be an empty gesture, a nullity, another depressing instance of Washington's alienation from reality.

The reason is that his proposed statute would, predictably, be struck down by the Supreme Court—just as, in 1990, another statute, sold as a detour around a constitutional amendment, was struck down. Lawyers sensitive to the the spirit and tendency of the Court's recent decisions know this, even if we wish it were otherwise.

Then, on November 8, a strange thing happened. Mr. John R. Luckey (a Legislative Attorney in the American Law Division of the Congressional Research Service at the Library of Congress) wrote a two-and-a-half page memo stating—flatly and bluntly—that the proposed statute "should survive constitutional attack". It is that very odd memo that I want now to answer.

Though the memo demonstrates a truncated understanding of constitutional law and the Supreme Court, it does get something right. It notes that the proposed statute would not reverse the decisions to which it is a response. It would not protect the flag against "physical desecration" in most instances—or even the instances involved in the Johnson and Eichman cases. To show its "zero tolerance" for those who "deface the flag," it would reach but a few quirky situations; where there is a "primary" purpose and intent and a probability to "incite or produce imminent violence or a breach of the peace" or where the flag was stolen from the federal government, on or off federal lands. It would make a little mole hill out of a big mountain.

On everything but this point, Mr. Luckey's memo is off base. Its reading of constitutional law is, at best, utterly wooden. It is an invitation—whether wide-eyed or winking—to another slap down of the Congress by the Supreme Court, reminiscent of the 1990 fiasco.

The subsections dealing with destruction of a flag stolen from the federal government "present no constitutional difficulties," according to the memo. It offers two bases for this misleading advice. First, it cites a few passages and footnotes in Court opinions which leave undecided the constitutional validity of prohibiting destruction of a flag owned by the government. It reads those passages and footnotes as deciding that such prohibition is valid. It thus makes the mistake that law students soon learn not to make. A question left open is not a question decided. How it will be decided depends on the general principles—and tendencies—that are moving the Court.

As the other basis for its advice, the memo notes three present statutory provisions which prohibit the theft and destruction of government property of all sorts in general. By citing these provisions, it demonstrates again that its author simply does not grasp the general principle that the majority of the Court has been invoking since 1989.

The general principle at work is this: The majority of the Court believes that flag desecration implicates the First Amendment because the flag itself is "speech." Since the flag communicates a message—as it, undeniably, does—any effort by government to single out the flag for protection must involve regulation of expression on the basis of the content of its message. The statutory provisions cited by the memo do not "single out the flag" for protection. Hence, they would satisfy the Court. But Senator McConnell's proposed statute, by its terms, does "single out the flag for protection." Hence, it would be struck down by the Court, as in 1990.

The proposed subsection dealing with incitement of violence is, the memo advises, "quite likely" to pass constitutional muster. The only virtue of this advice is in its qualification. Even at that, it is wholly misleading. For—as the memo notes—the Court has recently refused to allow government "to punish only those 'fighting words' of which [it] disapproves." The memo imagines that the subsection would not run afoul of this principle because it supposedly doesn't make

a "distinction between approved or disapproved expression that is communicated" by destruction of the flag. It thereby makes the same mistake it made before. The memo fails to grasp the Court's fundamental idea: that singling out the flag for protection in and of itself makes a "distinction between approved and disapproved expression" and, so, violates the Constitution as it now stands.

Thus we come back, again and again, to Senator McConnell's statement of the purpose of his proposed statutory detour around a constitutional amendment. (In adjudicating the constitutional validity of statutes, the Court looks to the statements of their sponsors.) His purpose is to single out the flag for protection. Plainly—according to the majority of the Justices—this purpose is unconstitutional. According to the Justices, the only way to realize this purpose is to amend the Constitution, as was provided for in Article V by the framers of that document.

Is there no way around it? Those reluctant to take up the responsibility assigned by Article V seem to be grasping at any straw. Recently, for example, I've heard that some are citing *Wisconsin v. Mitchell*. There, the Court upheld a statute under which a "sentence for aggravated battery was enhanced" because the batterer "intentionally selected his victim on account of the victim's race." A prohibition of the battery of a person, the Court said, is not "directed at expression" and so does not implicate free speech. Consideration of the motive for a battery—in this case racial discrimination, a motive condemned under several civil rights statutes—doesn't offend the First Amendment. This was an easy case. It has no relevance whatsoever to Senator McConnell's proposed statute. For his statute, which singles out the flag for protection, is directed at expression. Its purpose, stated by the Senator, is to enforce "zero tolerance for those who deface the flag."

What if—to avoid a constitutional amendment—Senator McConnell were to take back his statements in favor of the flag? What if he said he never meant it? The Congressional Record could not now be erased. The Court would see it. And, in any event, it would look at the terms of his proposed statute. Those terms make plain its purpose, a laudable purpose, to single out the flag for protection. Yet that purpose is exactly what offends the majority of the Justices.

To make good on Senator McConnell's purpose, there is one and only one means under the Constitution: a constitutional amendment.

Sincerely,

RICHARD D. PARKER,
Professor of Law.

Mr. HATCH. These letters make it very clear that the analysis by CRS is flawed.

My friend from Kentucky wrote an article in the December 5, 1995, Washington Post conceding that the Supreme Court had erred in its two decisions, Johnson and Eichman. As he said: "Much to my disappointment, the Supreme Court has found that laws protecting the flag run afoul of the first amendment. It is hard to believe that burning a flag can be considered 'speech.' But a majority of the court has found this despicable behavior to be 'political expression' protected by the First Amendment."

It is clear that Senator MCCONNELL disagrees with the Supreme Court's decision. Although, as he says, "it is hard to believe," the Court did hold that flag burning was speech. As the Court said in *Johnson*, "The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent." In these circumstances, said the Court, "Johnson's burning of the flag was conduct sufficiently imbued with elements of communication, to implicate the first amendment." [491 U.S. at 406]

My friend makes a critical mistake in acquiescing to the Supreme Court's erroneous decision. Simply because five Justices of the Supreme Court say that flag burning is protected speech does not mean that the Court has correctly interpreted what the Constitution means. It is, no doubt, the province of the judiciary to "say what the law is," in Chief Justice John Marshall's immortal words in *Marbury versus Madison*. But it is not the exclusive responsibility of the courts to interpret the Constitution.

In fact, the Framers of the Constitution believed that Congress would have an independent duty to interpret the Constitution and to correct errors of constitutional dimension. That is one of the purposes of article V of the Constitution, which permits the amendment of the Constitution after two-thirds vote of Congress and three-fourths approval by the States. It is clear that the Framers intended article V to be used to correct errors in constitutional interpretation made by the Supreme Court. Indeed, the 11th amendment, the first amendment ratified after passage of the Bill of Rights, was approved by Congress and the States specifically to overrule a particular Supreme Court decision, *Chisolm versus Georgia*.

It is our responsibility to correct the Supreme Court when it is wrong. And surely it was wrong in calling this offensive, terrible conduct protected speech.

Since my friend finds it "hard to believe burning a flag can be considered speech," as I do, he ought to agree with me that the flag protection amendment does not amend the first amendment. It overturns two erroneous Supreme Court decisions.

To obediently accept the Supreme Court's decisions in *Johnson* and *Eichman*, as my friend from Kentucky would, when we know the Court is wrong, is to read article V out of the Constitution, and is to abdicate the Senate's responsibility to the people and to the Constitution.

My friend is also dead wrong to suggest that this amendment authorizes legislation to compel anyone to respect the flag. It does not. No one can be forced to salute, honor, respect, or pledge allegiance to the flag under this amendment. So my friend's invocation

of speech codes is, frankly, totally irrelevant. It is a straw argument.

Finally, my friend from Kentucky says "it is hard to draw the line" in determining what to protect. He cites vulgar or offensive renditions of our national anthem and asks, "How can we single out the flag for special protection but not our country's song?" Two hundred-plus years of history give us the answer. There is no other symbol like our flag. Moreover, while the national anthem is a great song, it is not a tangible symbol of the country. Ironically, the Senator's question answers itself: our national anthem, the "Star Spangled Banner," is about our Nation's unique symbol.

These arguments get repeated over and over, but the flag protection amendment is no precedent for any other legislative action because of the uniqueness of our flag. Even the Clinton Justice Department acknowledged that the flag stands apart, *sui generis*, as a symbol of our country.

Right here behind me is a picture of what some of my colleagues call freedom of speech—it is pathetic. Senator MCCONNELL said here today that prohibiting the burning of the flag "strikes at the heart of our cherished freedom"—as overblown and exaggerated a statement as we will hear in this debate.

Even one of the lawyers the Senator from Kentucky relies upon for his proposition on the issue, Bruce Fein, has written that Senate Joint Resolution 31, the flag protection amendment, "... is a submicroscopic encroachment on free expression..."

My friend from Nebraska says we should not compel patriotism. He says that respect for the flag would mean something less if we were compelled to offer such respect.

Mr. President, this straw argument is offered over and over again. The flag protection amendment does not authorize any law which compels anyone to respect the flag, honor it, pledge allegiance to it, salute it, or even say nice things about it. It does not require anything like that. So that is a straw argument.

There is an obvious difference between prohibiting someone from physically desecrating our flag and compelling someone to respect it and salute it.

Moreover, I am astonished that anyone can claim that respect for our flag would mean something else if we enact legislative protection of the flag. I am surprised anybody would argue that. Until 1989, 48 States and the Federal Government prohibited flag desecration. Did any of my colleagues believe their respect for the flag meant something less in 1989 than it did after the misguided *Johnson* decision?

This issue boils down to this: Is it not ridiculous that the American people have no legal power to protect their beloved national symbol?

Let me just reiterate what I said this morning. On Monday we will offer an amendment which deletes the States from the amendment. The amendment will read as follows: "The Congress shall have power"—the Congress shall have power—"to prohibit the physical desecration of the flag of the United States." That is all it says. It is a very narrow amendment that says, "The Congress shall have power to prohibit the physical desecration of the flag of the United States," not the States. So Senators concerned about the multiplicity of State laws protecting the flag need not worry about that anymore.

There would be one definition of "physical desecration" and one definition of "flag of the United States." And those definitions will be decided by the Congress of the United States, as it should be. And it will apply everywhere. And it will be a narrow definition. I have no doubt about it. It will be one that will work and one that will lend credibility to our values in our society, our values of patriotism, honor, dignity, country, family. That is what this is all about.

This is a chance to have that debate on values, honor, dignity, family, country, yes, patriotism. I think that this amendment is worth it alone. I really do.

And those definitions that would be set by Congress would need the President's signature as well because it would be a statute. And either the President will sign it, or veto it if he did not like it. So you have all these checks and balances. Let us trust the people on this matter.

The American Legion and the Citizen's Flag Alliance reluctantly support this compromise. We have gone more than halfway, and I ask the opponents of the amendment to accept this compromise. Let us at least protect the flag at the Federal level. We can do it narrowly and do it fairly and do it in the right manner.

I am just going to say one or two more words about the amendment. It amazes me that people come on this floor and say, "It's terrible what they're doing to our flag. We should not allow people to smear excrement on it and put epithets and obscenities on it, and we shouldn't allow them to burn it and trample on it, and it is so terrible," but they are unwilling to do anything about stopping it.

Some had the temerity to say that "Well, we don't have that many flag burnings and that many flag desecrations." Well, I submit we do, because every flag desecration that occurs—and we have had them every year—every one that occurs is covered by the press and goes out to millions of people in this country, every last one. And, frankly, it affects everybody in this country every time we see this kind of heinous conduct.

It is time for us to quit using these phony arguments and stand up and vote to honor our national symbol by merely giving Congress the power to honor it, if it so chooses, with the right of the President to veto whatever they do, if he or she so chooses.

Mr. President, I think we debated this enough today.

MORNING BUSINESS

Mr. HATCH. I now ask unanimous consent that there now be a period for the transaction of routine morning business with Senators permitted to speak for up to 10 minutes each.

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

THE ROLE OF GOVERNMENT

Mr. PELL. Mr. President, I once more express reservations about the premise upon which we are proceeding in attempting to balance the budget in 7 years. I am mindful that both my party and the President have agreed to undertake this herculean task of reaching an accord where the difference between what the President has proposed and what the congressional majority seeks is pegged at some \$730 billion in entitlement savings, discretionary spending levels, and tax cuts. While I fully support their determination to curb deficit spending, I remain skeptical of the specific objective they have set.

With due respect for the Democratic leadership, I must express my continuing discomfort with the view that it is imperative that the Federal budget be balanced by a date certain. I have always believed, and continue to believe, that the Federal budget is not supposed to be in perpetual balance, but that as John Maynard Keynes wisely noted, it should remain a flexible instrument of national economic policy, registering a surplus in good times and engaging in stimulative spending in bad times. To insist on a balanced budget means requiring tax rates to be increased during a recession and outlays for such programs as help for the unemployed to be decreased. This is not a palatable solution, and it is one with which most economists would find fault.

My views, I realize, are not widely held. Hence, I was most heartened to read the words of Robert Eisner, professor emeritus at Northwestern University and a past president of the American Economic Association in the *Wall Street Journal* of November 28. In an article entitled "The Deficit Is Budget Battle's Red Herring," Professor Eisner states, and I most strongly concur, that balancing the budget is a "brief armistice in a much larger war." What we are really engaged in is a fundamental disagreement about the role of Government in our lives.

The real objective of the so-called revolution is the effective dismantling

ment of progressive government as we have come to know and benefit from for half a century. Federal spending on health care for the elderly, the poor, and the disabled is being drastically reduced. Cutbacks are contemplated in our investment in education, the environment, the arts and sciences, and foreign relations. These cuts typify the great differences in priorities and values which distinguish the opponents from the proponents of progressive government. And all of this occurs while we focus on that red herring, the balanced budget.

Professor Eisner accepts the premise that government should provide activities and services that the private economy would not provide or would not provide adequately. And he recognizes that many of us believe that the programs developed over the last 50 years are "indispensable both to stable economic growth and the social compact on which our economic system and our society depend."

Mr. President, I ask unanimous consent that the text of Professor Eisner's article be reprinted in the *RECORD*.

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

THE DEFICIT IS BUDGET BATTLE'S RED HERRING

(By Robert Eisner)

The agreement reached between President Clinton and congressional Republicans to try to "balance the budget" by uncertain measures in seven years is a brief armistice in a much larger war. The war has very little to do with budget deficits. What really concerns combatants on all sides—and should concern the American people—is the role of government in our economy and in our lives.

The "balanced budget" slogan is thought to ring very well with voters, so well that virtually all politicians find it obligatory to say that they, too, are committed to it. In fact, it is not clear that the ring is very loud; it is quickly drowned out by the suggestions that achieving balance might entail cutting health care and education or, generally, eliminating programs from which our citizens think they benefit. Even less popular is an obvious solution for deficits—raising taxes. Last year's deficit, already down to \$164 billion from the \$290 billion of three years earlier, would have been wiped out completely with 12% more in federal receipts. The transparency of Washington's alleged concern for budget balancing is revealed by the various proposals for tax cuts that in themselves only increase deficits.

The current argument is not about balancing the budget now or even in seven years. It's about what to do to be able to make a forecast that the budget will be "balanced" in 2002. In January 1993, as the Bush administration was coming to a close, its Office of Management and Budget forecast for that fiscal year—already three months along—a deficit of \$327 billion. That estimate turned out to be \$72 billion in excess of the actual deficit of \$255 billion. So who can honestly predict now what tax revenues and outlays will be in seven years?

The Congressional Budget Office projects 2.4% annual growth in real gross domestic product and 3.2% inflation. The Clinton administration's Office of Management and

Budget projects 0.1 to 0.2 percentage point more growth and 0.1 percentage point less inflation, and those differences would so affect revenues and outlays as to reduce accumulated deficits by almost \$500 billion in seven years, and more than double that amount in 10 years. By 2005, these slight differences in projections would amount to half of the CBO-projected deficit. That suggests that raising the OMB projected growth less than 0.2 percentage point and lowering the projected inflation rate 0.1 percentage point more would project a balanced budget by 2005 without any cuts in government programs.

Newt Gingrich insists that the budget projections must be based on "honest scoring," implying somehow that Bill Clinton's OMB is dishonest. But who is to say which projections are correct? Many private forecasters are more optimistic, and an increasing number of economists—and this newspaper's editor—even suggest that considerably higher growth is feasible. Even a modest 0.5 percentage point more, to 3% a year, would wipe out the deficit well within seven years.

But Sen. Phil Gramm gave away the game when he argued on "Face the Nation" recently that a balanced budget that would permit more government spending was unacceptable. No deficit projections, accurate or inaccurate, should be used as an excuse to avoid essential cuts in projected government outlays.

And that is the real issue—not deficits and debt but the role of government. Conservative economists arguing for a balanced budget have long made clear that it is not deficits in themselves that concern them but the fact that, given public aversion to taxes, preventing deficits would hold down government spending. Voters would not permit increased spending if it had to be financed by taxes rather than painless borrowing.

Of course, these conservative economists are right in recognizing that deficits and an essentially domestically held public debt such as ours are not a concern. As Abraham Lincoln said in his 1864 Annual Message to Congress: "The great advantage of citizens being creditors as well as debtors with relation to the public debt, is obvious. Men can readily perceive that they cannot be much oppressed by a debt which they owe themselves."

One thing a balanced budget would do is eliminate efforts by the government to maintain private purchasing power. Such efforts would entail cutting tax rates, or at least leaving them unchanged, and raising government benefits, or at least allowing them to grow in the face of business downturns. Insisting on a balanced budget means requiring tax rates to be increased during a recession and outlays of unemployment benefits and food stamps, for example, to be decreased. Aside from the misery that some of these actions might entail, they would appear to most economists as exactly the wrong thing to do.

Government should provide activities and services that the private economy would not provide or would not provide adequately. Much of social insurance is in this category—retirement benefits and medical care for the aged, unemployment benefits for the jobless and "welfare" payments for those unable to work and their children. It is perhaps not widely acknowledged, for reasons for electoral politics, that the privatization that conservatives generally favor would extend to Social Security.

A further role for government is to be found in the funding, if not always the provision, of education. This would include such

federal programs as Head Start for preschoolers; school lunches in primary schools; apprentice and school-to-work programs in high schools; and direct loans, scholarships and social service programs to facilitate enrollment in colleges and other post-secondary institutions. Government would appear needed to support the basic research on which progress in new technology and health maintenance ultimately depend. And efforts such as the earned-income tax credit and job training to get more people to work and off pure government handouts are also viewed by many, including President Clinton, as very much in order.

Republicans would generally reduce or eliminate these programs and cut taxes, most heavily for those with high incomes. They claim that this would help the economy and hence ultimately make better off the poor and less fortunate who have only been trapped in their worsening positions by the government programs designed to help them.

The current Republican revolutionaries would reduce or eliminate government programs that have been developing since the New Deal of the 1930s. To the new revolutionaries these programs injure the workings of a free-market economy that has contributed so much to our well-being. But to many others they are indispensable both to stable economic growth and the social compact on which our economic system and our society depend.

What we've been witnessing in these heated political battles is not just posturing or boys fighting in the schoolyard. There are fateful issues involved. But it is not the deficit, stupid.

PARTIAL-BIRTH ABORTION BAN ACT

Mr. BYRD, Mr. President, the Senate voted on November 8 to commit H.R. 1833, the partial-birth abortion ban bill, to the Senate Judiciary Committee for a hearing and, within 19 days, to report the bill back to the full Senate. The Judiciary Committee held a hearing on this measure on November 17. H.R. 1833 came before the Senate again yesterday, December 7, and I voted against this measure.

This is an extremely difficult issue, one which I have wrestled with a great deal. However, after carefully listening to the debate and following the Judiciary Committee hearing, I have concluded that this is a matter in which Congress should not impose its judgment over that of the medical community.

H.R. 1833, the Partial-Birth Abortion Ban Act, would criminalize a medical procedure, the partial-birth abortion. Physicians have expressed concern that the bill does not use recognized medical terms in defining partial-birth abortion, thus, creating uncertainty as to what procedures would be banned. It is my understanding that the American College of Obstetricians and Gynecologists oppose this bill. Beyond the concern about the terminology used to define the procedure, the college also expressed concern that Congress is attempting to impose its judgment over that of physicians in medical matters.

The Senate Judiciary Committee hearing had a panel of physicians testify who could not agree about this procedure. If doctors are uncertain, I do not believe it is a good idea for Congress to ban this procedure in all instances. Although an exception for the life of the mother was adopted during this debate, the health of the mother is not taken into account. It is my understanding that this procedure, in some circumstances, may be the least risky option for a woman and may be necessary to preserve the health and the future fertility of the woman.

Also testifying before the Senate Judiciary Committee were women who had this procedure. I admire these women for coming forth to relate their painful and personal experiences so that the Senate could better understand the impact of this legislation. These women were faced with the necessity of terminating their very much wanted pregnancies because their unborn babies suffered severe abnormalities. Their physicians decided that in their tragic circumstances, this procedure was the safest option.

No woman should have to face this situation. But unfortunately and tragically pregnancies do not always do as planned. Severe fetal abnormalities or the threat to a woman's life or health that may be exacerbated by pregnancy sometimes lead to the need for women and their families to make difficult decisions. These are tragic decisions women and their doctors should make without the interference of the Congress. I sympathize greatly with the women and families who unfortunately have had to face these decisions. If we enact this legislation, aren't we making the plight of women who may face this agonizing situation in the future that much more difficult by removing what may be the safest option as determined by the woman and her doctor?

In addition, the Supreme Court has ruled that States can ban, restrict, or prohibit post-viability abortions except in cases where the woman's life or health is a jeopardy. In fact, 41 States have chosen to restrict abortions after viability. I believe this issue is best left to States to regulate.

Given the uncertainty in the medical community surrounding this procedure and the unprecedented step this bill takes in criminalizing a medical procedure, I voted against H.R. 1833. I do not believe that the Federal Government should be usurping the powers of the States in such matters. Nor do I believe that politicians should be involved in private decisions between patients and their doctors regarding the appropriate medical treatment of serious heart-rending and critical health matters.

THE BAD DEBT BOXSCORE

Mr. HELMS, Mr. President, the skyrocketing Federal debt is now slightly

in excess of \$11 billion shy of \$5 trillion.

As of the close of business Thursday, December 7, the Federal debt—down to the penny—stood at exactly \$4,989,071,101,377.59 or \$18,938.60 on a per capita basis for every man, woman, and child.

MESSAGES FROM THE PRESIDENT

Messages from the President of the United States were communicated to the Senate by Mr. Kalbaugh, one of his secretaries.

EXECUTIVE MESSAGES REFERRED

As in executive session the Presiding Officer laid before the Senate messages from the President of the United States submitting a withdrawal and a nomination which was referred to the Committee on the Judiciary.

(The nominations received today are printed at the end of the Senate proceedings.)

EXECUTIVE AND OTHER COMMUNICATIONS

The following communications were laid before the Senate, together with accompanying papers, reports, and documents, which were referred as indicated:

EC-1669. A communication from the Chief of Legislative Affairs, Department of the Navy, transmitting, pursuant to law, notice relative to renewing a lease; to the Committee on Armed Services.

REPORTS OF COMMITTEES

The following reports of committees were submitted:

By Mr. MURKOWSKI, from the Committee on Energy and Natural Resources, with an amendment in the nature of a substitute and an amendment to the title:

S. 907. A bill to amend the National Forest Ski Area Permit Act of 1986 to clarify the authorities and duties of the Secretary of Agriculture in issuing ski area permits on National Forest System lands and to withdraw lands within ski area permit boundaries from the operation of the mining and mineral leasing laws (Rept. No. 104-183).

INTRODUCTION OF BILLS AND JOINT RESOLUTIONS

The following bills and joint resolutions were introduced, read the first and second time by unanimous consent, and referred as indicated:

By Mr. MCCAIN:

S. 1461. A bill to amend title 49, United States Code, relating to required employment investigations of pilots; to the Committee on Commerce, Science, and Transportation.

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mr. MCCAIN:

S. 1461. A bill to amend title 49, United States Code, relating to required employment investigations of pilots; to the Committee on Commerce, Science, and Transportation.

THE AIR TRANSPORTATION SAFETY
IMPROVEMENT ACT OF 1995

• Mr. McCAIN. Mr. President, I introduce the Air Transportation Safety Improvement Act of 1995, which will go a long way to ensure the continued safety of those who use the nation's air transportation system. Clearly, this legislation complements current more comprehensive efforts to improve the Federal Aviation Administration and to enhance the safety and efficiency of the air traffic management system. In specific, this bill will permit the transfer of relevant employment and training records to prospective employers when an individual has applied for a position as a pilot.

The bill necessarily focuses on encouraging and facilitating the flow of information between employers so that safety is not compromised. In addition, to ensure that the burden of this legislation does not fall on employers and the legal system, when a transfer is requested and complied with, both the employer who turns over the requested records and the prospective employer who receives them will be immune from lawsuits related to the transferred information. Complete immunity is critical—without it, the legislative cannot achieve its objective of making it a common practice of prospective employers to research the experience of pilots and to learn significant information that could affect air carrier hiring decisions and, ultimately, airline safety.

After reviewing information about certain investigations and recommendations of the National Transportation Safety Board, I have become very concerned about deficiencies in the pre-employment screening of pilots. Right now, the FAA requires airlines only to determine whether a pilot applicant has a pilot license, to check the applicant's driving record for alcohol or drug suspensions, and to verify that person's employment for the five previous years. Yet, the FAA does not require airlines to confirm flight experience or how a pilot applicant performed at previous airlines. The NTSB, however, after studying certain airline accidents that were determined to be caused by pilot error, has recommended three times since 1988 that airlines should be required to check information about a pilot applicant's prior flight experience and performance with other carriers.

Compounding my concern about the insufficient sharing of pilot performance records among employers is that in the near future, there may be a shortage of well-qualified U.S. airline pilots because the military, which in the past has regularly trained the vast

majority of airline pilots, will be training fewer of them. This will happen at the same time that the demand for pilots at U.S. major and regional carriers increases. Since many future pilots will not have experienced rigorous and reliable military aviation training, the ability of prospective employers to have access to records from previous employers will be even more critical to airline and passenger safety.

Safety in our Nation's air transportation system is paramount. I believe this bill will not only encourage employers to make more thorough background checks of the pilots they hire, but will also enhance safety.

Mr. President, I ask unanimous consent that this legislation and certain newspaper articles dealing with this matter be printed in the RECORD.

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

S. 1461

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 44936 of title 49, United States Code, is amended by adding at the end thereof the following:

"(f) RECORDS OF EMPLOYMENT.—

"(1) IN GENERAL.—An air carrier or foreign air carrier receiving an application for employment from an individual seeking a position as a pilot may request and receive records described in paragraph (2) relating to that individual's employment from any person who has employed that individual at any time during the 5 years preceding the application.

"(2) RECORDS TO WHICH SUBSECTION APPLIES.—The records referred to in paragraph (1) are—

"(A) the personnel file of the individual;

"(B) any records maintained under the regulations set forth in—

"(i) section 121.683 of title 14, Code of Federal Regulations;

"(ii) paragraph (A) of section VI, appendix I, part 121 of title 14, Code of Federal Regulations;

"(iii) section 125.401 of title 14, Code of Federal Regulations;

"(iv) section 127.301 of title 14, Code of Federal Regulations; and

"(v) section 135.63(a)(4) of title 14, Code of Federal Regulations; and "(C) any other records concerning—

"(i) the training, qualifications, proficiency, or professional competence of the individual;

"(ii) any disciplinary action taken by the employer with respect to the individual; and

"(iii) the release from employment, resignation, termination, or disqualification of the individual.

"(3) RIGHT TO RECEIVE NOTICE AND COPY OF ANY RECORD FURNISHED.—An individual whose employment records have been requested under paragraph (1) of this subsection—

"(A) shall receive written notice from each person providing a record in response to a request under paragraph (1) of the individual's right to receive such copies; and

"(B) is entitled to receive copies of any records provided by the individual's employer or a former employer to any air carrier or foreign air carrier.

"(4) REASONABLE CHARGES FOR PROCESSING REQUESTS AND FURNISHING COPIES.—A person

who receives a request under paragraph (1) may establish a reasonable charge for the cost of processing the request and furnishing copies of the requested records.

"(5) STANDARD FORMS.—The Administrator shall promulgate—

"(A) standard forms which may be used by an air carrier or foreign air carrier to request records under paragraph (1) of this subsection; and

"(B) standard forms which may be used by any employer receiving a request under paragraph (1) for records to inform the individual to whom the records relate of the request and of the individual's right to receive copies of any records provided in response to the request.

"(6) REGULATIONS.—The Administrator may prescribe such regulations as may be necessary—

"(A) to protect the personal privacy of any individual whose records are requested under paragraph (1) of this subsection and to protect the confidentiality of those records;

"(B) to limit the further dissemination of records received under paragraph (1) of this subsection by the person who requested them; and

"(C) to ensure prompt compliance with any request under paragraph (1) of this subsection.

"(g) LIMITATION ON LIABILITY; PREEMPTION OF STATE LAW.—

"(1) LIMITATION ON LIABILITY.—No action or proceeding may be brought by or on behalf of an individual who has applied for a position described in subsection (a)(1) of this section against—

"(A) an air carrier or foreign air carrier with which the individual has filed such an application for requesting the individual's records under subsection (f)(1);

"(B) a person who has complied with such a request; or

"(C) an agent or employee of a person described in subparagraph (A) or (B) of this paragraph

in the nature of an action for defamation, invasion of privacy, negligence, interference with contract, or otherwise, or under any State or Federal law with respect to the furnishing or use of such records in accordance with subsection (f) of this section.

"(2) PREEMPTION.—No State or political subdivision thereof may enact, prescribe, issue, continue in effect, or enforce any law, regulation, standard, or other provision having the force and effect of law that prohibits, penalizes, or imposes liability for furnishing or using records in accordance with subsection (f) of this section."

[FROM THE NEW YORK TIMES, NOV. 10, 1995]
SAFETY BOARD URGES GOVERNMENT TO
MONITOR PILOTS' JOB RECORDS

(By Matthew L. Wald)

WASHINGTON, November 9.—The National Transportation Safety Board recommended today that the Government keep employment records on pilots to keep bad ones from jumping from job to job.

The recommendation came after the board blamed the crash of an American Eagle turboprop last November on pilot error; the pilot had been hired a few days before he was to be dismissed by his previous employer, but American did not know that.

Currently, airlines do not share such data out of concern that a pilot denied employment because of unfavorable information provided by a former employer can sue.

"We can't permit liability to drive safety issues," James E. Hall, chairman of the safety board, said in a telephone interview

today. "Somebody has got to take a step forward to do what's in the public interest."

But the board said privacy questions must be worked out. Moreover, the Federal Aviation Administration, which the safety board wants to compile the data, was reluctant to act without Congressional authorization.

The organizations representing the commuter airlines and the major carriers both expressed support yesterday, although a pilots' union said it objected to such a move.

Last month the safety board concluded that American Eagle flight 3372, a twin-engine turboprop on the way to Raleigh-Durham International Airport from Greensboro, N.C., crashed after the pilot, Michael P. Hillis, became confused about whether the left engine had stopped and failed to focus on flying the airplane. Mr. Hillis, who was killed in the crash, along the co-pilot and 13 of the 18 passengers, had been on the verge of dismissal from Comair, a smaller carrier, when he was hired by American.

American said it never asked Comair about Mr. Hillis's record because it was unlikely that the airline would divulge anything beyond the dates of employment and the kind of equipment that the pilot flew.

The safety board recommended that the airlines and the F.A.A. develop a standardized report on "pilot performance in activities that assess skills, abilities, knowledge, and judgment." The data would be stored by the F.A.A., and with a pilot's permission, could be given to potential employers.

Walter S. Coleman, president of the Regional Airline Association, which represents commuter carriers said in a statement that his group "supports the intent" of the Safety Board's recommendations.

At the Air Transport Association, which represents the major carriers, Tim Neale, a spokesman, said, "I don't think this is going to cause problem for the airlines."

The Air Line Pilot's Association said that any deficiencies in Mr. Hillis's performance should have been obvious because he had been with the airline for four years by the time of the crash. The union also said test results should not be shared among airlines because the tests were not standardized. It called for more training of pilots.

[From USA Today, Sept. 29, 1995]
PUBLIC DESERVES MORE FROM FAA
WATCHDOG

How long does it take to learn from your mistakes? At the Federal Aviation Administration, guardian of public air safety, the answer is a disastrously long time.

In a three-part series concluded Thursday, USA TODAY reporters Julie Schmitt and John Ritter reveal that the system for assuring pilot competence is dangerously flawed. In fact, it has contributed to 111 deaths, all but one on small airlines, which have less-experienced pilots.

At the heart of the problem is the FAA. The record shows the FAA was warned repeatedly about flaws in pilot testing and hiring, that it recognized the flaws and that it was flagrantly ineffective in fixing them.

One telling example:

On Nov. 15, 1987, 28 passengers and crew died when Continental Flight 1713 crashed on takeoff from Denver. National Transportation Safety Board investigators blamed the crash on bad flying by co-pilot Lee Bruecher. Unbeknown to Continental, Bruecher had been fired from one airline. He'd also flunked pilot tests and had been cited nine times for motor vehicle violations, a red flag for risky pilots.

The NTSB's conclusion: Airlines should be required to check previous employer records

of prospective pilots, including test scores, training results, performance evaluations and disciplinary actions.

The FAA's response: No. Its rationale: Benefits from such regulatory change would not justify enforcement costs.

Eight years and six pilot-error airline crashes later, airlines still were not required to verify applicants' flight experience.

That set the stage for crash 7. An American Eagle accident last December in North Carolina explored in detail by the USA TODAY reporters. They found that the pilot, Michael Hillis, was widely known for indecisiveness. Documents showed he'd failed FAA check-rides, and his judgment in critical situations had been found unsatisfactory by previous employers. But the airline didn't know all that until after Hillis ran his plane into trees at 200 mph, killing 15, including himself.

Another pilot-safety flaw emerged from the reporters' research, as well.

Had the FAA required more crew-coordination training, Hillis' co-pilot, who'd never met his captain before the flight, might have been able to override his errors. The NTSB has warned the FAA since 1979 of the critical need for improved crew-coordination training. But the FAA failed to act until this year.

All this points to a problem larger than pilot error. Again and again, the NTSB has told the FAA what's broken in aviation and how to fix it. Yet critical improvements have stalled—and not just because of incompetence or bureaucratic sluggishness.

The FAA is hamstrung by a conflicting mandate. It is charged with both protecting safety and promoting air travel.

So while it can mandate safety measures, it must first weigh the cost-benefit wisdom of its changes. The result: too little, too late in safety improvements.

There are recent signs of progress with new FAA rules for enhanced pilot training and renewed interest in background checks. But even these are half-measures, requiring only some airlines to comply and making some rules voluntary. And this comes as a pilot shortage is approaching.

If ever a lesson is to be learned from aviation accidents, it is that timidity has no place in safety. The NTSB knows that. It's time the FAA did as well.

Regional airlines caught in a bind. Business is booming for small airlines, but their supply of military-trained pilots is down. And there's little incentive for prospective pilots to spend four years and \$70,000 for a commercial pilot's license to get a job that starts at \$14,000 per year. Meanwhile, starting jobs at the major airlines pay twice that and can reach more than \$100,000 after 10 years.

Military trains fewer pilots: 1992, 3,742; 1996, 2,678(1).

Regional airline business soaring. Passengers (in millions): 1984, 26; 1995, 60(1).

Ranking salaries. Average second-year pay for a regional airline co-pilot compared to other professions:

Secretary, \$19,100.
Phone operator, \$19,100.
Data entry, \$17,750.
Co-pilot, \$15,600.
Receptionist, \$15,400.
Bank teller, \$14,600.

[From USA Today, Sept. 28, 1995]

PILOT PERFORMANCE: TOP OFFICIALS RESPOND

Q: American Eagle Capt. Michael Hillis washed out at his first airline, Comair. Eagle hired him without knowing that. Last year,

he crashed a plane, killing himself and 14 others. Should airlines share records of pilot training and performance?

Pena: That was a very upsetting (crash). We are working with Congress to get legislation passed to allow airlines to share (pilot performance) information, and we will support such legislation.

Q: What do you say to people who are shocked that a pilot who failed at one airline could get hired at another?

Broderick: I am incensed, too, every time an accident happens. We work 24 hours a day trying to make this system a zero-accident system. I think we've got it to where it is the best in the world. It is still not good enough, and every time the system fails, it is extremely frustrating to all of us. We want to do whatever it takes to make sure that failure never happens again.

Q: Did the system fail in the American Eagle crash?

Broderick: The system failed because a plane crashed and people lost their lives.

Q: Does that mean the system doesn't always identify weak pilots?

Broderick: No. It points out where they're weak so we can train them in areas where they need it. Success isn't in getting rid of people. Success is having qualified people on the flight deck. If the system is such that you fail (and) you're out, it couldn't work.

Q: In the past 12 years, there have been 16 fatal accidents in 15- to 19-seat planes. In five of those, the FAA was cited for inadequate supervision of the airline. Is that acceptable?

Pena: No. Absolutely not. We're going to continue to press to improve the level of safety for smaller planes.

Q: But what are you doing to hold the FAA to a higher standard?

Pena: We have a new management team in place that is very focused on this issue. And I am very focused on this issue. We've changed our attitude. We've sent a strong message to everybody to think of safety differently than the way it was viewed in the past, which was "accidents will happen." No one would say that, but that was the unstated assumption. Our attitude now is "no more accidents." Our thinking now is perfection.

Q: What have you done to make that reality?

Pena: We've added more inspectors. We've reached an agreement, which was a big breakthrough, with the airlines. We can now review all their flight data recorders (the "black boxes" on planes that record pilot conversations). In some cases, they show mistakes made by pilots. We can take that information and share it with all pilots to show (that) that was the wrong thing to do, here is what should have been done. We've also pushed for a higher level of safety on regional airlines. (Next year, all regionals will have to meet many of the same safety standards already in use at large regional and major airlines.)

Q: Safety investigators have cited inadequate pilot training as a factor in two fatal crashes since 1985. In one, the FAA had allowed an airline to reduce training below the FAA's minimum standard. Why do you set minimum standards and then allow airlines to go below them?

Hinson: Any exemption we grant is only done when it is an equivalent level of safety. In regulatory law, you write a regulation that focuses on what you're trying to accomplish but realizes there is more than one path. It takes five years to build an airplane. It takes three years to redesign an airline's

training program. We cannot change our regulations every six months. One of the purposes of having exemptions is to allow air carriers to take advantage of new technology within the existing framework so we don't have to say to them, 'I'm sorry, the rule doesn't allow this.'

Q: The FAA is supposed to regulate and promote aviation. Aren't those conflicting responsibilities?

Q: Hinson: No. We are to provide a safe aviation environment. In that context, promotion means we should have laws giving us authority to set standards, impose penalties and provide enforcement. The most aggressive form of promotion is to have the confidence of people who use the system.

Q: Before the FAA passes a new regulation, it must weight the cost of it to the airlines.

Q: Hinson: That's true. We could provide a regulatory environment that was so strict and so punitive that people would ask, 'Why go into that business?' We could say (planes) must have six engines, four pilots instead of two. We don't do that. We have 17 cost-benefit laws that we have to answer to. The National Transportation Safety Board and the other oversight groups can have opinions without regard for cost. We can't.

Q: One criticism is that it takes repeated accidents before the FAA acts. What's being done?

Q: Hinson: To some degree that is a fair criticism. It results from a propensity of our people to be extremely cautious and it comes back to the requirement of cost-benefit analysis. We are beginning to see a reduction in the processing time of regulations. One of my charges is to create more sense of urgency in that arena.

[From USA Today, Sept. 28, 1995]
EXPENSE SOMETIMES STOPS FAA FROM ORDERING SAFETY IMPROVEMENTS
(By John Ritter and Julie Schmitt)

The FAA rejects dozens of changes it deems too costly or burdensome to airlines, even if other experts think they're important to safe airline operation.

Sometimes the FAA repeatedly turns down a National Transportation Safety Board recommendation—under industry pressure, critics say—only to accept it later after more crashes.

December's American Eagle crash near Raleigh, N.C., is an example. Records show the pilot had been forced to resign at one airline. But Eagle hired him unaware of his poor record.

Three times since 1988, the NTSB had urged tougher pilot background checks, including verifying flight, training and disciplinary records and FAA violations. But the FAA says enforcing a new regulation would be too costly and leaves such checks up to the airlines.

There are other examples:

The NTSB urged ground-proximity warning devices on planes in 1986. An FAA rule requiring them took effect last year, but loopholes will delay full compliance until 1996.

After a 1993 Express II accident near Hibbing, Minn., the NTSB said the device would have given pilots 33 seconds' notice they were too close to the ground—plus an urgent "pull up" warning 21 seconds before—time enough to avoid the crash, which killed 18.

Fatal runway crashes in Los Angeles, Detroit and Atlanta within a year led the NTSB in 1991 to urge the FAA to speed up installing ground radar.

The FAA moved quickly but delays persisted. In November, a TWA MD-80 took off

from St. Louis while a Cessna was on its runway. The jet sheared the top off the smaller plane, killing two pilots. The MD-80 passengers escaped.

Investigators found that the FAA modifications had delayed St. Louis' radar. The NTSB then asked for a schedule for remaining airports and held a hearing to pressure the FAA. Even now, "We don't expect them to have the system fully installed until 1999," says Barry Sweedler, director of the NTSB's safety recommendations office.

In 1979 the NTSB began urging a new kind of training to make cockpit crews work together better. And although the majors and some regionals now teach Crew Resource Management (CRM), it's not uniform or required.

But most crashes involving pilot error can be traced to CRM deficiencies—faulty communication or poor coordination between pilots.

New FAA rules this fall will require CRM industrywide for all pilots flying planes with 10 or more seats. But it won't be pass-fail training—pilots whose CRM skills are weak won't necessarily be pulled from the cockpit.

[From USA Today, Sept. 28, 1995]
PILOT ERROR: SOLUTIONS, BETTER REGULATIONS, SAFER SKIES

Problem: Pilot Supply 1. Provide public funding for pilot training to ensure high quality. The Air Force spends \$533,000, on average, to train one pilot. It exports pilots to the latest aircraft and computer technologies. U.S. flight schools, which rely almost completely on tuition, can't afford such training. Most student pilots train in single-engine planes quite unlike those flown by regional and major airlines. Who must act: Congress, FAA. 2. Provide pilot candidates with more financial assistance, including guaranteed student loans and scholarships. That would ensure that the industry gets the best applicants, not just those who can afford the training. The cost of a commercial pilot license and four-year degree is about \$70,000. Most new pilots find that it takes five years, or more, to get a job that pays more than \$30,000 a year. Who must act: Congress, FAA. 3. Require airline pilots to have four-year degrees. Many major airlines used to require a four-year degree. Now, most list it as a preferred qualification. The military still requires it of pilot applicants. Requiring bachelor's degrees would help ensure that pilots have the ability to understand today's sophisticated planes. Who must act: FAA, airlines. 4. Have examiners chosen at random. Make it impossible for pilots and student pilots to choose their own examiners for licensing and aircraft certification tests. The current system is open to abuse by examiners who give easy or short tests. The more tests they give, the more money they make. Who must act: FAA.

Problem: Pilot Hiring 5. Require tougher background checks of pilot applicants. Airlines are required to verify an applicant's pilot license and work history for the previous five years. They also must check driving records for alcohol or drug convictions. The FAA should require airlines to verify applicants' flight experience, check FAA records for accidents or violations and check any criminal records. The National Transportation Safety Board has suggested tougher background checks three times since 1988—each time after a fatal accident. Who must act: Congress, FAA. 6. Require airlines to share training records. These may reveal recurring weaknesses on such things as judgment and decision-making, which wouldn't

show up in FAA records. Today, the records aren't shared because airlines fear invasion-of-privacy lawsuits from former employees. Who must act: Congress, FAA. 7. Set minimum qualifications for new airline pilots. Currently, each airline sets its own standards, which go up and down based on the supply of applicants. When supplies are tight, airlines often hire pilots who would not be considered when applicants are plentiful. Who must act: FAA.

Problem: Training 8. Tighten monitoring of exemptions and waivers to the FAA's minimum training standards. Most major airlines now exceed the FAA's minimums because the airlines deem them too low. Even so, the FAA allows some regional airlines to shorten training programs if it is convinced their alternatives won't compromise safety. Waivers are given by regional FAA inspectors. There is no national database, which makes monitoring difficult. Who must act: FAA. 9. Speed up implementation of new techniques such as the Advanced Qualification Program. AQP requires airlines to train pilots as crews—rather than individually—which improves crew coordination, a key factor in many accidents. AQP also identifies marginal pilots sooner because pilots are tested more often throughout the training process instead of just once at the end. Who must act: FAA, airlines.

Problem: Testing 10. Require airlines to better monitor pilots who barely pass flight tests. Now pilots pass or fail. If they pass, they don't get more training. If they fail, they do. The system does not recognize that some pilots pass with ease while others struggle. Who must act: FAA, airlines.

Problem: Oversight 11. Encourage pilots to report unsafe pilots by requiring airlines and unions to establish and monitor reporting systems. Most airlines have union committees for this, but it's not an FAA requirement. Who must act: FAA, airlines. 12. Require the FAA to improve the quality of its own databases, which often are incomplete and inaccurate. The FAA has more than 25 databases collecting information on such things as failed pilot tests and pilot violations. The databases are supposed to help the FAA target inspections at high-risk airlines, but inspectors cannot rely on poor data. Who must act: FAA.

[From USA Today, Sept. 28, 1995]
HOUSE SEEKS PILOT HEARINGS: AIRLINE RECORD-SHARING "PART OF SAFETY EQUATION"

(By Julie Schmitt and John Ritter)

The chairman of the House subcommittee on aviation Wednesday called for hearings on requiring airlines to share pilot performance records.

Record-sharing would prevent marginal pilots from moving from airline to airline without the new employer learning about past performance.

Rep. John Duncan, R-Tenn., responding to a USA Today investigative report, said if airlines won't start sharing records voluntarily, "we will go for a legislative solution."

Sen. John McCain, R-Ariz., Senate aviation subcommittee chairman, said airlines may have to be exempted from civil privacy suits. "Safety is paramount, and we have to take whatever steps are necessary."

"Lives will be saved," said Jim Hall, National Transportation Safety Board chairman. "The flying public has the right to know airlines are doing all they can to ensure safety."

Airlines are reluctant to share records because they say it opens them to privacy suits.

But government reports show that since 1987, 111 have died in seven crashes blamed on pilots' performance.

In some cases, those pilots had poor histories at other airlines. Information their new employer did not have.

"We welcome the interest" in Congress, said FAA administrator David Hinson. "A pilot's record . . . is an important part of the safety equation."

The Air Line Pilots Association, the USA's largest pilot union, wants airlines, the Federal Aviation Administration and unions to develop national standards to screen applicants.

Many of the several dozen pilots who called USA TODAY about this week's three-part series said too many marginal pilots continue flying.

[From USA Today, Sept. 27, 1995]

THE PILOT WHO CRASHED FLIGHT 3379

FIRST TIME AS A TEAM, PILOTS MADE MISTAKES

(By John Ritter and Julie Schmitt)

A stall warning horn blared again. "Lower the nose, lower the nose, lower the nose," co-pilot Matthew Sallor told Hillis. By now, the plane was rotating left. "It's the wrong foot, wrong foot, wrong engine," Sallor said. Hillis, one of several pilots with troubling flight records, tried in the dark cockpit to control the plane. He pressed the wrong rudder pedal. The rotation worsened. Six seconds later, the plane slammed into trees four miles from the runway at 200 mph.

December 13, 1994, an American Eagle Jetstream descends in darkness, rain and fog toward Raleigh-Durham Airport.

A light blinks on, warning of possible engine failure.

Two pilots, flying together for the first time, scramble to sort out what has gone wrong. Fifty seconds later, the twin-engine turboprop slams into woods west of Raleigh at 200 mph. Both pilots and 13 passengers die.

American Eagle officials believe the crew of Flight 3379 bungled a situation it was trained to handle. In November, the National Transportation Safety Board is expected to report—as it does in 7 out of 10 airplane accidents—that the pilots made mistakes. Almost certainly the NTSB will urge—for the fourth time in seven years—tougher background checks of the nation's airline pilots.

What is clear from the third fatal crash in a year involving a regional carrier—and the 18th in four years—is that the flight captain, Michael Patrick Hillis, was a marginal pilot who had managed to slip through the airline industry's elaborate safety net. Moreover, the crash puts under fresh scrutiny a decades-old, traditional-bound system of hiring and training airline pilots.

The young Eagle captain had no violations on his record. Hillis had never been in an accident. But he had failed tests and shown poor judgment at two airlines. He had struggled with landings easier than the one that confronted him out-side Raleigh. He was not, his fellow pilots made clear, a man they wanted to fly with in an emergency.

Shy, studious and unassuming, a quiet loner who found relationships difficult, Hillis, 29, did not fit the take-charge image of an airline pilot. An instructor who had him in a small ground-school class weeks before the accident couldn't remember him.

And throughout a five-year airline career, doubts had persisted about his flying abilities.

"He was very indecisive and very hesitant," says his pastor, the Rev. Robert D. Spradley. "Unless he changed into some-

thing other than what we saw when he got in the cockpit, those emergency decisions must have been very difficult for Mike."

William Gruber, a 20-year pilot at Embry-Riddle Aeronautical University, concludes after reviewing Hillis' career: "I can't say I'd allow him to take command of an aircraft."

Hillis survived in a system that should have weeded him out—a system of hiring, training and testing pilots that has no fail-safe mechanism to keep track of marginal performers, no way even to ensure that their records follow them from one job to the next.

Flight 3379 underscores the randomness of air travel: Pilots fly whole careers and never have an engine fail.

It underscores the contrasts: The brief career of Hillis' co-pilot, Matthew Sallor, was an exceptional and full of promise as Hillis' was bumpy and unremarkable.

And it underscores the irony: On the eve of the fatal flight, Hillis was ready to quit American Eagle. He had even asked a friend about working at a Wal-Mart.

Most of all, Hillis' story underscores the imperfections of the airline pilot system.

Eagle managers say Hillis was competent because he passed every test he had to pass. "We don't know any way we could have caught this guy," says Robert Baker, vice president of AMR, parent of American Eagle and American Airlines.

But a USA Today investigation reveals a less reassuring picture of Hillis' hiring and advancement. Eagle never learned the real reason he wanted to leave his first airline for a lower-paying job at a second one.

Hillis was brought on board quickly by Eagle, an expanding carrier eagerly hiring pilots. He didn't move up Eagle's applicant pool gradually as Sallor, hired three years later, did.

And, the preliminary crash report shows, when Hillis failed an FAA check-ride—a key benchmark—Eagle ignored its own rules and let the same examiner retest him.

In his Eagle file, Hillis had no evaluations by senior captains he flew with his first year—a tool many airlines, but not Eagle, use to identify poor performers.

He kept advancing, as he had since his first solo flight not long after high school in 1984—from small single-engine planes to twin engines, to planes that carried a few passengers to planes that carried more.

But once he hit the airlines, troubles cropped up. When he couldn't cut it in his first job, as a first officer at Comair, a Cincinnati-based regional airline, Comair got rid of him. That alone would have ended many careers, but not this one.

Hillis' problems started in the first check-ride.

Hillis joined Comair as a co-pilot trainee in January 1990, after flying four years for a small Memphis freight operation. Weeks after arriving at Comair, he had his first FAA check-ride and bombed.

In a check-ride, an examiner tests a pilot's skill on takeoffs, approaches and landings. Hillis flunked three of four landings, three of nine instrument procedures and one of five takeoffs. Worse, he got what pilots liken to a scarlet letter: "unsatisfactory" on judgment.

"It means the examiner believes the guy shouldn't be flying," says Robert Iverson, a longtime Eastern Airlines pilot and former KIWI Airlines top executive. "It is a subtle way to pass that along. . . to say, 'Hey management, you better wake up.'"

Instead, Hillis got more training and passed his retest two days later. But in his early flights, captains flying with him commented that his landings were still weak.

In April 1990, Comair Capt. Mitchell Serber rated Hillis in the lowest fifth of pilots on flight skills, but above average on willingness to learn. Serber also found him impatient, a "very high-strung person . . . who gets upset with his performance to the point it distracts him."

He had "functional knowledge of his duties" but not a good understanding of the plane. After a month in the cockpit with Hillis, Serber rated "his overall performance as weak." He certainly wasn't ready to be a captain, Serber felt. He should stay a first officer at least a year.

On evaluation forms that asked if they would be comfortable flying as a passenger with Hillis, Serber and two other captains checked "no."

But by December, one of those captains found him "moody and unpredictable" and urged dismissal. Serber, after talks with Comair chief pilot Roger Scott, agreed. He had never recommended firing a pilot.

Senior pilots warned about Hillis' flight weaknesses.

Serber was worried, he told safety investigators after the crash, that Hillis would get tunnel vision in an emergency. His timing was off: "Mike was frequently behind the airplane." He often lost situational awareness. He would "make large abrupt corrections, mostly on instrument approaches." These deficiencies would all come into play in the crash.

But even senior pilots' warnings weren't enough to get Hillis fired. He was allowed to resign, on Jan. 3, 1991, after less than a year at the airline. Comair won't discuss details, but vice president K. Michael Stuart says, "Our system at a very early point determined that there was a problem and we took care of it."

Took care of it to a point. Unknown to Comair, in October Hillis had applied for a job at Nashville Eagle, a regional carrier flying under American Eagle's logo. In an application letter he said he wanted to return to Tennessee.

On paper, he was a dream candidate: 2,100 flight hours, above the 1,500 Eagle requires. And as a working airline pilot, he had had more training than most. "We naturally assume they know what they're doing," says American's Baker.

Eagle officials had no idea Hillis was on thin ice at Comair. They sent Comair a questionnaire they send all previous employers. Hillis even authorized Comair in writing to furnish information. One of the questions was, "To what degree was this person's job performance satisfactory?"

Comair didn't send the form back. Eagle executives say. Rarely will an airline release information about a pilot. Comair says it provides only dates of employment. Eagle has the same policy. So do many companies outside the aviation industry. They won't risk invasion of privacy and defamation suits from ex-employees.

"Sure, we'll ask for more," says former Eagle president Bob Martens, "but we don't get it for the same reason we don't give it out: We're subject to lawsuits from individuals."

But privacy lawyers say there's no liability if the information is true. "It's a phobia companies have," says Robert Ellis Smith, a Providence, R.I., privacy lawyer. "I call it a conspiracy of silence."

Not but by all. Some airlines won't hire without information from previous employers. They want to know: Would you hire this person again? "If we don't get a response to that, we don't hire," says William Traub, United Airlines vice president.

Hiring without knowing how well a pilot performed elsewhere worries safety experts. Three times since 1988, the NTSB has urged the FAA to require airlines to do detailed background checks before they hire and to provide the records of their former pilots when another airline requests them. The FAA has said enforcing such regulations would be too costly.

But since December's crash, FAA officials are considering ways to require carriers to share information.

American officials, in hindsight, acknowledge the value of sharing previous employment records. They want the FAA or Congress to mandate it. "We're already doing it with drug and alcohol testing," Baker says. "We're required by law to pass that information on." The information goes into an FAS database, which airlines can access.

But when Hillis applied, Eagle relied—as it still does today—on its own screening and training to spot unworthy pilots.

In that process, senior captains grill applicants on cockpit situations. A security agency investigates gaps in work history. Driving records are examined. There's a flight test in an aircraft simulator and a medical exam, which, like those at most airlines, exceeds FAA requirements.

Hillis went through his screening on Oct. 24, 1990, and passed. But there should have been concern. He lacked two qualifications Eagle prefers in its pilots: a college degree and an airline transport pilot certificate, the highest class of license.

In a Cessna simulator, Hillis flew adequately, and evaluator Sam White saw "very good captain potential." But White also noticed that Hillis leveled off too low after descending from cruise altitude, and was slow to correct the mistake.

When asked if he had ever been fired or asked to resign from a job, Hillis could honestly answer no. It wasn't until two months later that Comair would force him out. There's no record that Eagle asked him during the screening about his work there.

Jennings Furlough, an Eagle flight standards manager who interviewed Hillis, pronounced him a "very good candidate." On Jan. 7, 1991, four days after leaving Comair, he began first officer training in a 19-passenger Jetstream turboprop.

Co-pilot Sailor came from a different flight background:

As Hillis started a new job, the co-pilot who died with him in the crash, Matthew Sailor, was beginning his final semester in aeronautical studies at the University of North Dakota in Grand Forks, one of the top collegiate aviation programs.

Over the next two years, Sailor, 22, would build a solid resume flying as an instructor pilot to gain hours. "He was very proficient, one of the best we've had," says Joe Sheble, owner of Sheble Aviation in Bullhead City, Ariz., where Sailor earned advanced pilot and instructor ratings and spend hundreds of hours teaching students how to handle engine failure. "He was probably as comfortable flying with one engine as two," Sheble says.

Eagle hired Sailor in December 1993, two years after he applied. He had both the college degree and top pilot certificate Hillis had lacked. In contrast to Hillis, two captains rated Sailor outstanding his first year, one of the airline's best first officers.

By the time Sailor was hired, Hillis had been with Eagle almost three years. His first year was unremarkable. A month into his initial training as a first officer, he passed an FAA check-ride in a Jetstream.

But in January 1992 he faced a crucial decision. Eagle's "up or out" policy meant he had to upgrade to captain when he rose high enough on the pilot seniority list or leave the company. "We do not want people to make careers of being co-pilots," Baker says. Most airlines agree.

This was seven months after Command Airlines and Nashville Eagle had merged to form Flagship, one of the four American Eagle carriers. The new carrier was expanding rapidly.

It needed captains, and many first officers were upgrading. It's not clear how eager Hillis was, but he had no choice. In 1993, the policy changed, and Eagle began allowing first officers to defer upgrades up to a year.

Hillis began captain training in a Shorts 360, a 36-seat turboprop. Almost immediately, he had problems.

Watching him in a simulator, instructor Ray Schaub rated him unsatisfactory on two maneuvers. One was handling an engine failure. The other was for not executing a go-around of the airport after an engine failed on approach—the very situation he would confront before the crash. After 15 sessions Hillis passed his captain's check-ride and began flying out of Raleigh-Durham.

Less than four months later, he was back in a Jetstream when the number of Shorts captains was reduced. Now he had to recertify in the plane he'd flown before as co-pilot.

Records show once more he struggled, blowing an approach and flunking an FAA check-ride for the second time in his career. He got his second unsatisfactory on judgment.

At most airlines, including Eagle, two failed check-rides and two unsatisfactoriness on judgment would get a pilot kicked out. But Eagle knew nothing of the record at Comair.

Hillis' FAA examiner, Kevin Cline, told investigators he failed about 1 in 5 pilots, but only 2 percent or 3 percent got an unsatisfactory on judgment.

Hillis got 1.8 more hours of simulator training. Then Cline retested him, even though Eagle's policy is for another examiner to retest. Cline passed him the second time.

Assigned to Raleigh-Durham, Hillis flew uneventfully for the next two years. Eagle records show he passed eight checks from September 1993 to July 1994.

Rumors spread and one pilot balked at flying with Hillis.

If Hillis struggled during those tests, a record wouldn't have been kept at Eagle's training academy. That is Eagle's policy, approved by the FAA, so that instructors make no assumptions about how a pilot will perform.

But while Hillis was bearing up in the Eagle training academy's predictable environment, pilots he was flying with at Raleigh-Durham were talking about his indecisiveness and poor judgment.

On Nov. 18, 1994, Sandra O'Steen was scheduled to be Hillis' co-pilot from Raleigh to Knoxville, Tenn. She'd heard the rumors and told Raleigh base manager Art Saboski she didn't want to fly with Hillis—the only time she'd ever done that.

Saboski confronted O'Steen: Did she want to be judged on rumor? She said no and agreed to fly. During the flight, Hillis asked her about the rumors. Ignore them, O'Steen said.

Later, she e-mailed Saboski that the flight "went by the book," signing off "sorry for the fuss." She told investigators that Hillis' flying skills were OK, but he wasn't decisive.

Hillis was so upset about the rumors that he called Saboski at home on a Saturday. They met on Monday, and Hillis told his boss his reputation was being smeared. Saboski asked Hillis twice if he thought he needed more training. "He pooh-poohed it," Saboski says. The meeting ended.

Saboski, who was supervising nearly 300 pilots, was torn. "Rumors fly like crazy," he says. "The pilots are a fraternity. But there's always a question in my mind as to whether there's truth in what's being said."

Former Eagle president Martens agrees Saboski did not have enough information to act on.

Everyone's morale was low; layoffs were expected:

Three weeks later, on Dec. 10, American Eagle announced it was pulling out of Raleigh-Durham. Low morale plunged lower. Pilots were angry because they'd have to relocate or be furloughed. They'd been grumbling all year about their contract. They felt overworked and underpaid. Hillis shared the anger, and the announcement, along with the flap over rumors, apparently galvanized a decision to quit. He called in sick on the 10th, 11th and 12th.

"I tried to contact him. I knew something was going on," says Jody Quinn, a friend since Hillis had come to Raleigh two years before. He was, she says, not a hard person to figure out: "Just a good ol' down-to-earth everyday person. But incredibly conscientious. On top of everything. Very together and organized."

To Quinn and North Carolina State University students Brent Perry and Mike Parsons, who shared a house with him, Hillis was a dedicated churchgoer, a man who liked nature and photography. He studied a lot—especially airplane manuals and economics. He'd accumulated 42 hours at Memphis State University and was now taking courses at N.C. State.

"He'd bounced around from here to there to everywhere," Quinn says, "and he just liked North Carolina and decided to stay. . . . He wanted to finally finish something, finish his degree. He wanted some roots."

Hillis' mother, Theresa Myers of Wauchula, Fla., says her son loved flying but was uncertain about his future. "I never wanted him to fly," she says. "I wanted him to get a college degree, and in the end I think that's what he wanted, too."

Spradley, his pastor, thought Hillis battled depression. "He lacked self-confidence and personal strength, not just in his spiritual life but his social life as well. He didn't make friends easily and while he wanted them desperately, he didn't seem to know how to manage friendships."

A job at Wal-Mart began to look appealing:

On Monday the 12th, Hillis studied for a final in his economics class. He and Parsons watched the Monday Night Football game, but Hillis was brooding about his future. He asked Perry how he like working at Wal-Mart and whether it had good benefits. "He didn't like the idea of being unemployed," Perry says.

The two talked about the Raleigh-Durham hub closing, and Hillis said he was thinking of quitting that week. "We prayed about it, prayed about what he hoped to do," Parsons says.

Hillis' scheduled co-pilot the next day, Sailor, spent that night in a hotel near the airport. Based in Miami, Sailor was assigned temporarily to Raleigh-Durham. He had been an Eagle pilot just a year, but told friends he wasn't worried about being laid off.

He and Hillis—who had never met—were scheduled for a two-day trip Tuesday and Wednesday. They flew the initial 38-minute leg to Greensboro on Tuesday afternoon uneventfully.

As they took a break before flying the second leg, back to Raleigh, Hillis told airport service rep Sara Brickhouse, "The company doesn't care about me." He was somber and unhappy, she told investigators.

Less than two hours later, as the Jetstream descended toward final approach into Raleigh, a small amber ignition light, the left one, flashed on. Hillis, flying the plane, said: "Why's that ignition light on? We just had a flameout (engine failure)?"

Sailor answered: "I'm not sure what's going on with it." Then Hillis declared: "We had a flameout."

The timing was bad. The plane, carrying a maximum weight load and its engines on idle, was quickly slowing down. It was at a point when Hillis should have been applying power to maintain minimum approach speed.

For 30 seconds, he and Sailor considered what to do as the plane stayed stable on its glide slope. They'd already lowered the landing gear and set the flaps for landing. Hillis decided to continue the approach and asked Sailor to back him up. Twice the cockpit recorder caught the sound of propellers out of sync.

Then Hillis made a fateful decision: He would abandon the approach, fly around the airport and try another landing. It would give them time to work the problem. Sailor said, "All right."

The plane by then had slowed dangerously. A stall warning horn blared, and Hillis called for maximum power in the good engine to gain speed. But he apparently failed to make two critical adjustments. Powering up the right engine would cause the plane to rotate left. To counter that, he should have raised the left wing and set full right rudder.

A stall warning horn blared again. "Lower the nose, lower the nose, lower the nose," Sailor told Hillis, to gain speed and lift. Three seconds later, both stall horns went off. Again, Sailor said, "Lower the nose." By now, the plane was rotating steeply left.

Then, "it's the wrong foot, wrong foot, wrong engine," Sailor said. Hillis trying in the dark cockpit to counter the rotation and control the plane, had pressed the wrong rudder pedal with his foot. The rotation, or yaw, only worsened.

Six seconds later, at 6:34 p.m. ET, the plane slammed into trees four miles from the runway at 200 mph. Fifteen of the 20 on board died.

From wreckage, investigators determined that at impact both engines were functioning fully. Experts familiar with the flight data say Hillis misdiagnosed the ignition light and overreacted—escalating a minor anomaly into a catastrophe.

Familiar flaws had shown up again, this time for real: suspect landing skills; the tendency to make major, abrupt corrections; poor judgment. Preoccupied by the engine problem—the tunnel vision others had worried about—Hillis ignored the first rule in an emergency: keep flying the plane.

He decided unequivocally that he had a dead engine but then didn't conform it by advancing the throttle or checking the rpm gauge.

The left engine could have lost power then regained it. One thing the light is designed to indicate is that an internal system is trying automatically to reignite the engine.

But in training, according to crash investigation records, Eagle pilots were taught an

ignition light coming on meant only one thing: flameout.

Eagle instructors followed the operating manual of the Jetstream's manufacturer, British Aerospace. Less than a month after the crash, the company issued a "Notice to Operators" that clarified what it means when the light comes on. And Eagle has since changed its training manual.

The decision not to land turned out to be fatal.

In post-crash tests, investigators found that sometimes, with engines at idle, the light came on when propeller speed levers were advanced quickly. Hillis had done that five seconds before he saw the light.

One thing is clear: Moss pilots, trained to land planes on one engine, would have shut down the bad engine and landed—not tried a go-around at 1,800 feet. It was the decision to circle that led to the sequence of events that caused the crash.

Sailor must have sensed what was happening. As an instructor in Arizona, he'd logged hundreds of hours teaching people to handle engine failure in flight. American's Baker is convinced, reading the voice transcript, that he "had a much better sense of what was going on."

Pilots who have read transcripts of the final seconds give this interpretation:

Sailor's comments seem intended to keep Hillis on track. "K, you got it?" he asks Hillis seconds after the light came on. (Translation: Are you going to keep flying the plane?)

Then, "We lost an engine?" (You want the engine-out procedure?)

Later, "Watta you want me to do; you gonna continue" the approach? And Hillis says: "OK, yeah. I'm gonna continue. Just back me up."

Fifteen seconds before impact, the plane slipping out of control, Sailor says, "You got it?" (You want me to take it?)

Finally, six seconds to impact, the recorder catches one last word, from Sailor: "Here." (Here, give it to me.)

But if Sailor thought the captain was in trouble, shouldn't he have suggested shutting down the engine? And if he did finally grab the plane from Hillis, why did he wait until it was too late?

"It's a very difficult move," Baker says. "But if I saw the trestops coming up, you'd have to fight me for that airplane."

In the culture of airline cockpits, co-pilots assume that seasoned captains know what they're doing. Sailor had been flying as a first officer less than a year. On loan from Miami, he probably hadn't heard the rumors about Hillis. Otherwise, he might have been more assertive.

The NTSB likely will criticize Eagle for not giving pilots enough training in cockpit teamwork. But questions remain:

Was the crew—Hillis and Sailor—dysfunctional? Did Hillis, the pilot in command with the questionable record, fall when it mattered most?

Or were Hillis and Flight 3379's passengers the victims of a system that failed?

[From USA Today, Sept. 26, 1995]

MARGINAL PILOTS PUT PASSENGERS' LIVES AT RISK

(By Julie Schmit and John Ritter)

Marvin Falitz, a pilot at Express II Airlines, failed three flight tests in six years, hit a co-pilot and was suspended once for sleeping in the cockpit during a flight.

On Dec. 1, 1993, on a short trip from Minneapolis to Hibbing, Minn., Falitz tried a risky, steep approach.

Flight 5719, a Northwest Airlines commuter, crashed short of the runway. All 18 on board died. Investigators blamed Falitz. They also blamed the airline for ignoring repeated warnings about his performance.

Other airlines have ignored warnings about bad pilots, too, and passengers have died because of them.

Since November 1987, pilots with documented histories of bad judgment, reckless behavior or poor performance have caused six other fatal crashes—all but one on small airlines. Death toll: 111, including crewmembers.

A USA Today investigation—including reports of the government's own safety review—has found that despite the nation's elaborate air safety system, marginal pilots get and keep jobs. This is particularly true at commuter, or regional, airlines, which often run on small budgets and hire the least-experienced pilots.

At regionals, hiring standards vary widely and are sometimes dangerously low. Training and testing procedures don't catch all marginal pilots. A system of independent contractors who test and license pilots is ripe for abuse.

And airlines are sometimes reluctant to fire bad pilots.

These problems are about to get worse: A shortage of well-qualified pilots is expected through the next 15 years because the military, which used to train 90% of U.S. airline pilots, is training fewer and keeping them longer. At the same time, demand for pilots is exploding, especially at regionals—the fastest-growing segment of U.S. aviation.

"The surplus of quality pilot applicants is about to end," says Robert Besco, pilot-performance expert and retired American Airlines pilot. "It is a big problem. But it is a tomorrow problem so the government and airlines have their heads in the sand."

The military has been a dependable supplier of pilots since the passenger airline industry began growing after World War II. It trains and tests pilots rigorously to weed out poor performers.

As the supply of military pilots shrinks, regional airlines will have to dip deeper into the pool of those trained at civilian flight schools.

Regionals fly smaller planes between cities that major airlines don't serve. Since 1988, major airlines have turned over 65% of the routes less than 500 miles to commuters, says airline analyst Sam Butttrick.

New regional pilots are paid \$13,000 to \$19,000 a year, one-third of what major airlines pay new pilots. But experience at that level can lead to lucrative jobs at the majors.

Last year, new pilots hired by regionals that fly turboprops had slightly more than half the experience of pilots hired by major airlines. Yet regional pilots can fly 20% more hours than major airline pilots.

Their planes are less automated, and they fly at lower altitudes where the weather is more severe. And because their flights are shorter, regional pilots make more daily takeoffs and landings, which is when most accidents occur.

According to government reports, for the past decade the accident rate for regional airlines has been significantly higher than the rate for major airlines. Still, accidents are rare. People are nearly three times more likely to die in a car than in a 15- to 19-seat plane, says aviation consultant Morten Beyer.

The Federal Aviation Administration, which regulates airlines, asserts regional airlines are safe—and getting safer. Says Transportation Secretary Federico Pena: "If they're not, we shut them down."

An analysis of official crash reports, however, shows that some airlines are not always as safety conscious as they should be—or as they say they are. The problems occur at every stage in a pilot's career: licensing, hiring, training and testing.

LICENSING: PILOTS CAN SHOP FOR EASY EXAMINERS

To get a license to fly passenger planes, most pilots are required by the FAA to have at least 191 hours of flying time. Then they must pass FAA tests, usually given by FAA-approved examiners for fees from \$100 to \$300. Pilots or their instructors can choose the examiners. Just as lawyers can shop for sympathetic judges, pilots can seek easy testers.

"If you're a real hard-nosed examiner, you run the risk that (they) aren't going to call you," says John Perdue, an aviation consultant and a retired Delta pilot.

Some flight schools, concerned about abuse, will let students take tests only from examiners they endorse. "I want to know that (students) are tested by someone who's not giving away that ticket," says Steve Van Kirk, 49, at Northwest Airlines pilot and owner of Control Aero Corp. in Frederick, Md.

But not all flight schools are that strict. And the system is vulnerable to other abuses, such as examiners who rush through tests so they can do more in a day.

In 1987, Continental Airlines hired 26-year-old Lee Bruecher as a co-pilot. He was flying a DC-9 when it crashed shortly after takeoff in Denver. The captain, Bruecher and 26 others were killed. Bruecher had been fired in 1985 by Able Aviation in Houston because he had a chronic problem of becoming disoriented—a fact Continental failed to discover.

Safety investigator cited Continental for poor pre-employment screening. Continental has since tightened its screening procedures.

But Bruecher's career might have been cut short long before he got to Continental. In 1983, he passed a test that allowed him to fly multi-engine planes. Two months later, his examiner was fired by the FAA for giving short, easy tests—including one to Bruecher. FAA records say the examiner had been under investigation for nine months.

Poor examiners remain a problem for the FAA. In May, it revoked or suspended the licenses of 12 designated pilot examiners for giving each other phony certificates, allowing them to fly numerous types of planes. The FAA canceled the certificates. It said none of the pilots had used them to fly passengers. It appears the certificates were being collected almost as a game.

HIRING: FEWER PILOTS, LESS COCKPIT EXPERIENCE

After pilots are licensed to fly passengers, most spend years instructing others or flying cargo. Their goal: build flight hours to land jobs with airlines. Most major airlines require at least 2,500 flight hours; most regionals, at least 1,500. Most pilots, when hired, exceed the minimums.

But when faced with a shortage of pilots, airlines lower their standards.

In 1985, 22% of new regional pilots had fewer than 2,000 hours, says FAPA, an Atlanta-based aviation information service. In 1990, when regionals faced tight pilot supplies, 44% of new pilots had fewer than 2,000 flight hours.

Even in years when pilots are plentiful, regionals hire less experienced pilots.

In 1992, GP-Express hired pilot Vernon Schuety, 29, who had 850 flight hours, and pilot James Meadows, 24, who had 1,100

hours. That June, the two flew together for the first time. They crashed near Anniston, Ala., while attempting to land. Three people died.

Investigators said the pilots lost awareness of the plane's position and blamed pilot inexperience, among other things.

The flight was Capt. Schuety's first unsupervised flight as an airline pilot. GP-Express, a Continental Express carrier, had made him a captain right away, without the usual co-pilot experience.

GP-Express president George Poulos says the pilots met all of the FAA's requirements and that the airline only hires pilots who meet or exceed the FAA's minimums.

HIRING: LITTLE BACKGROUND CHECKING IS REQUIRED

On April 22, 1992, Tomy International Flight 22, doing business as air-taxi Scenic Air Tours, hit a mountain on the island of Maui, Hawaii.

The pilot, Brett Jones, 26, and eight passengers died. Investigators said Jones failed to use navigational aids to stay clear of the mountain. He flew into clouds that hid it.

Investigators faulted the air taxi for not checking Jones' background properly and faulted the FAA for not requiring substantive background checks for all pilots. Jones, investigators' records show, had been fired by five employers, including a major airline, for poor performance. He also lied about his flight experience.

Tomy International didn't uncover those facts because it didn't have a policy of verifying an applicant's background. The FAA started requiring a five-year employment check in 1992. Jones was hired in 1991.

The pre-employment check into Jones' aeronautical background consisted of one phone call to a charter and cargo airline, where Jones had worked one year. That operator said Jones departed in good standing.

Jones also received a recommendation from the previous owner of Tomy International, who had once employed him as a van driver.

Tomy International did not return repeated phone calls.

The FAA requires airlines to do very little when checking an applicant's background. They must verify that the applicant has a pilot license; check motor vehicle records for alcohol or drug suspensions; and verify the applicant's employment for the previous five years.

The FAA does not require airlines to verify flight experience, nor to check FAA records for accidents, violations, warnings or fines—or if an applicant has a criminal history.

"They are strongly encouraged to check all those things and we make it easy for them to do that," says Jeff Thal, FAA spokesman.

Most important, an airline is not required to find out how an applicant performed at any previous airline.

Airlines do give applicants flight and oral tests. And most check FAA records and driving histories for more than just alcohol or drug convictions. Two speeding tickets over a year can get an applicant rejected at Southwest Airlines, for example.

"They're not law-abiding," says Paul Sterbenz, Southwest's vice president of flight operations.

But an analysis of government crash reports shows that poor pre-employment screening has contributed to passenger deaths.

Consider the Jan. 19, 1988, crash of a Trans-Colorado plane, a now-defunct Continental Express carrier, near Bayfield, Colo. Both pi-

lots and seven passengers died. Investigators faulted the pilots.

The captain, Stephen Silver, 36, had used cocaine the night before the flight. His pre-employment record included a non-fatal crash landing on the wrong runway, a suspended driver's license and five moving vehicle violations in three years.

Co-pilot Ralph Harvey, 42, had been fired from another regional airline for poor performance. His pre-employment record also included two alcohol-related driving convictions and one non-driving alcohol conviction.

At the time, the FAA did not require airlines to check for alcohol- or drug-related driving convictions. Trans-Colorado executives told investigators they were unaware of Harvey's alcohol history, and Silver's driving history and previous crash.

In another example, Aloha IslandAir hired Bruce Pollard. In 1989, Pollard crashed into a mountain, killing himself and 19 others. Investigators cited Pollard's recklessness and faulted the airline's hiring procedures. IslandAir didn't check with Pollard's previous employers, the accident investigation showed.

Two previous employers said he was careless and one of them was about to fire him before he resigned to join IslandAir.

IslandAir learned. After the crash, it added tough screening procedures that weeded out the pilot who later was involved in Tomy International's 1992 Maui crash.

No airline checks what could be the most important records of all: an applicant's training records at previous airlines. To do so could run afoul of privacy laws, they say, and subject the airline that shared them to suits.

Nonetheless, many airlines refuse to hire a pilot unless they get a good reference from a previous airline-employer. Threat of lawsuit or not.

But actual training records aren't shared. Those reveal how pilots make decisions, handle stress and work with others—insights that don't show up in FAA data and insights airlines are hesitant to share.

If training records had been shared, 15 people might not have died on Dec. 13, 1994, when an American Eagle plane crashed near Raleigh-Durham, N.C. A preliminary government report points to pilot error. Capt. Michael Hillis, 29, was distracted by an engine failure warning light. While figuring out what to do, he and his co-pilot let the plane lose too much speed. It crashed four miles from the runway.

Hillis had been forced to resign from his first regional, Comair, because his superiors worried about his skills and decision-making abilities—facts documented in training records that Eagle never saw.

The American Eagle crash has the FAA reconsidering its stance, and Peña says he would support legislation to mandate sharing of information between airlines.

"We need to have that. I don't want unqualified pilots flying those planes," he says.

TRAINING: FAA DOESN'T KEEP TRACK OF ALL THE WAIVERS GIVEN

Once hired, pilots have to go through their airline's training program. The FAA approves each program. The airlines set requirements based on FAA minimums that are so low most major airlines exceed them, sometimes by 50%.

"They are the floor and should be viewed that way," says William Traub, vice president of flight standards for United Airlines.

Regionals are much less likely to exceed the minimums. Some even fall short. Of 16 larger regionals surveyed at random by USA

TODAY, seven—including four American Eagle carriers—said they were allowed to reduce training below FAA minimums. The airlines say they were able to prove their programs were superior or sufficient, even with fewer training hours.

The FAA keeps track of training exemptions, which are granted by Washington after a formal review. But it doesn't keep track of waivers, which are granted at the regional level. The FAA doesn't even keep a central record of how many waivers have been given. The FAA even grants training waivers to its own inspectors. In 1992, the Department of Transportation inspector general criticized the FAA for allowing 18% of inspectors to skip ongoing training designed to keep them sharp.

The FAA says safety is not compromised. "The word exemption does not mean we're giving anybody anything," says FAA Administrator David Hinson. He says exemptions allow airlines to use new techniques without waiting for new FAA rules.

But the agency has rescinded waivers and exemptions after crashes. For eight years, the FAA allowed Henson Airlines, now Piedmont Airlines, to cut pilot flight training hours by about 40%. That was rescinded in 1985 after 14 people died when a plane crashed near Grovetts, Va.

Investigators blamed inadequate pilot training, among other things. Currently, Piedmont has no training exemptions and exceeds the FAA's minimum training requirements.

The FAA's willingness to grant waivers or exemptions spotlights a flaw in its structure, safety experts say. The agency has two missions: to promote aviation and to regulate it. Critics say they are in conflict.

When an inspector decides on a waiver that might help a carrier financially, is safety compromised? The FAA says no. Others wonder.

"The FAA is understaffed and politically invaded," says aviation consultant Michael Boyd, president of Aviation Systems Research Corp. "The system is corrupt."

TESTING: IN PASS/FAIL, NO ONE KNOWS WHO BARELY PASSED

Few professionals undergo as much training and testing as pilots. Each year, most captains must have at least two flight tests called "check-rides." Co-pilots have one. These flights with an examiner test a pilot's skill on such things as takeoffs, approaches and landings.

"Check-rides are a series of practiced maneuvers," says Robert Iverson, former Eastern Airlines pilot and former CEO of KIWI International Airlines. "Practiced enough, even marginal pilots can pass."

In addition, pilots are graded pass/fail. If they fail, they are pulled from the cockpit to get more training. Within days, they are retested. If pilots pass check-rides, as more than 90% do, they keep flying.

The pass/fail system does not recognize that some pilots pass with ease while others struggle.

A small percentage, 1% to 2%, barely pass, flight instructors say. Others put the percentage higher.

"Maybe 5% are getting by, but probably shouldn't be," says Van Kirk, the Northwest pilot. Even if 1% are just getting by, that would be more than 500 U.S. airline pilots.

In a 1994 review of major airline accidents, the NTSB called check-rides "subjective" and noted differences among airlines in how they graded pass/fail.

And most airlines do not keep closer tabs on pilots who barely pass.

United is an exception. If pilots struggle through check-rides but pass, they are retested within two months instead of the usual six or 12 months, Traub says.

If Express II had a policy of following struggling pilots more closely, pilot Marvin Falitz, who crashed near Hibbing, Minn., might have been weeded out. He failed three check-rides—in 1988, 1992 and 1993. In 1987, he failed an oral exam. Each time, Falitz was retrained and retested the same day. Not surprisingly, he passed, and continued flying.

On two tests, he failed working with other pilots—what investigators faulted him for in the crash.

Since the crash, Express has intensified pilot training. "Hibbing was an isolated incident and an unfortunate incident," says Phil Reed, vice president of marketing. "We run a safe airline."

After the crash, Northwest Airlines insisted that all of its commuter partners, including Express, train to the highest FAA standards.

FIRING: PILOTS ARE ALLOWED TO QUIT RATHER THAN BE FIRED

Even when an airline decides a pilot is unfit to fly, the pilot isn't always fired. Comair, a Delta Connection carrier, didn't fire Michael Hillis. It let him resign. Hillis did and started at American Eagle four days later.

Many U.S. airlines will let marginal pilots resign rather than fire them. The reasons: Airlines fear being sued, and problem pilots go away quicker if given an easy way out.

"They're gone with fewer repercussions," says Southwest's Sterbenz.

Letting pilots resign often puts them back in the cockpit—of another airline. Still, airlines defend the practice. "The airlines are pretty diligent in looking out for those people" who have resigned, says Tom Bagley, vice president of flight operations for Scenic Airlines.

Not always. American Eagle knew Hillis had resigned from Comair. Hillis told Eagle he wanted to live in a different city. But Eagle didn't know Hillis had been forced to resign. Comair didn't provide that information, Eagle says, and the FAA doesn't require airlines to pass on that information.

The reluctance to fire pilots goes beyond fear of lawsuits, however. It is tied to the status and deference that pilots enjoy and to the high cost of training new pilots.

"Airlines carry weak pilots for long periods," says Diane Damos, a University of Southern California aviation psychologist. "It's just part of the culture."

Says aviation lawyer Arthur Wolk: "It's aviation's good old boy network. Nobody wants to trash a pilot."

Co-pilot Kathleen Digan, 28, was given the benefit of the doubt and later crashed a plane, killing herself and 11 others. Digan was hired in 1987 by AVAir Inc., doing business as American Eagle. She was flying a plane that crashed on Feb. 19, 1988, in Raleigh-Durham, N.C.

During a check-ride her first year, the examiner said Digan needed more work on landings. Another called her job "unsatisfactory" and recommended she be fired. A captain who flew with her said she "overcontrolled" the plane.

But Digan wasn't let go. AVAir's director of operations defended the decision to keep her, telling investigators: "She had invested a lot in our company and our company had invested a lot in her."

Even the FAA has protected poor pilots. On Oct. 26, 1993, three FAA employees died in a crash near Front Royal, Va. Safety officials blamed Capt. Donald Robbins, 55.

That was no surprise. During his 10-year career, Robbins flunked three FAA tests. He had two drunken-driving convictions. Eight co-pilots avoided flying with him, and several complained to supervisors. Nothing was done. In fact, in Robbins' last evaluation, his supervisor gave him a positive review and complimented him on his ability to "get along well with his fellow workers."

The path pilots take to the cockpit: 1. Enter military or civilian flight school. 2. Pass test to get private license; can't work for hire. 3. Pass test to get commercial license; can work for hire. 4. Many military pilots get jobs at airlines after leaving military. Flight school pilots fly cargo or work as instructors to build experience. 5. Get job as co-pilot at regional airline. 6. Pass airline's training program. 7. Pass test to fly certain type of plane. Testing required each time a pilot switches to new type of plane. 8. Spend first year on probation; get reviews; pass first-year test. 9. Pass test to get air transport license; required to become captain. 10. As captain, must pass medical and two flight tests every year.

Regional airlines scramble for pilots. Growth in commuter or "regional" air travel, coupled with a decrease in the number of military-trained pilots, has forced airlines to hire more pilots trained in civilian flight schools.

Military training fewer pilots 1992 3,742 1996 2,678(1).

Regional airline business soaring Passengers (in millions) 1984 26,995 2001 60(1).

Ranking salaries Average second-year pay for a regional airline co-pilot, compared with the median pay for other jobs: Secretary, \$19,100; Phone operator, \$19,100; Data entry clerk, \$17,150; Co-pilot, \$15,600; Receptionist, \$15,400; and Bank teller, \$14,600.

Comparing accident rates Accident rates for regional airlines that fly planes with 30 or fewer seats are higher than rates for regionals with bigger planes and major airlines. Rates per 100,000 flights:

	1984	1994
Small regionals	82	32
Major airlines, large regionals	23	24

For this three-day series, USA TODAY reporters John Ritter, and Julie Schmit set out to learn how a marginal pilot slipped through the safety net of a U.S. airline and crashed near Raleigh-Durham last December. They discovered more than one poor pilot had kept flying and that, if nothing changes, more are likely to.

Ritter and Schmit analyzed accident reports since 1985 and obtained FAA documents on current aviation practices through the Freedom of Information Act.

Other sources included the National Transportation Safety Board, which investigates accidents, the General Accounting Office, the Federal Aviation Administration, airline executives, union officials, pilots and safety experts.

ADDITIONAL COSPONSORS

S. 309

At the request of Mr. BUMPERS, the name of the Senator from Connecticut [Mr. DODD] was added as a cosponsor of S. 309, a bill to reform the concession policies of the National Park Service, and for other purposes.

S. 331

At the request of Mr. HELMS, his name was added as a cosponsor of S.

334, a bill to amend title I of the Omnibus Crime Control and Safe Streets Act of 1968 to encourage States to enact a Law Enforcement Officers' Bill of Rights, to provide standards and protection for the conduct of internal police investigations, and for other purposes.

S. 607

At the request of Mr. WARNER, the name of the Senator from Tennessee [Mr. FRIST] was added as a cosponsor of S. 607, a bill to amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 to clarify the liability of certain recycling transactions, and for other purposes.

S. 881

At the request of Mr. GRASSLEY, the name of the Senator from Utah [Mr. BENNETT] was added as a cosponsor of S. 881, a bill to amend the Internal Revenue Code of 1986 to clarify provisions relating to church pension benefit plans, to modify certain provisions relating to participants in such plans, to reduce the complexity of and to bring workable consistency to the applicable rules, to promote retirement savings and benefits, and for other purposes.

S. 1136

At the request of Mr. HATCH, the name of the Senator from Wisconsin [Mr. KOHL] was added as a cosponsor of S. 1136, a bill to control and prevent commercial counterfeiting, and for other purposes.

S. 1228

At the request of Mr. D'AMATO, the name of the Senator from Maine [Mr. COHEN] was added as a cosponsor of S. 1228, a bill to impose sanctions on foreign persons exporting petroleum products, natural gas, or related technology to Iran.

ADDITIONAL STATEMENTS

THE COMMERCE, STATE, JUSTICE APPROPRIATIONS BILL

• Mr. ABRAHAM. Mr. President, I reluctantly voted for the conference report for the Commerce, State, Justice appropriations bill, knowing that it will be vetoed, because it does contain many provisions that will do significant good for the country and because much of the funding it provides is very important to our efforts to fight violent crime. I look forward to working with the managers of the bill to resolve the problem areas of this bill when it comes up for consideration again.

Let me begin by outlining what is good in this bill. First, the prison litigation reform title of the bill makes important and needed changes to the Federal laws governing lawsuits brought against prison administrators across the country. Right now, in many

jurisdictions, judicial orders entered under Federal law are having an enormously destructive effect on public safety and the administration of prisons. They are also raising the costs of running prisons far beyond what is necessary. And they are undermining the legitimacy and punitive and deterrent effect of prison sentences.

These orders are complemented by a torrent of prisoner lawsuits. Although these suits are found nonmeritorious 95 percent of the time, they occupy an enormous amount of State and local time and resources; time and resources that would be better spent incarcerating more dangerous offenders.

In my own State of Michigan, the Federal courts are now monitoring our State prisons to determine:

First, how warm the food is.

Second, how bright the lights are.

Third, whether there are electrical outlets in each cell.

Fourth, whether windows are inspected and up to code.

Fifth, whether prisoners' hair is cut only by licensed barbers.

Sixth, whether air and water temperatures are comfortable.

Meanwhile, in Philadelphia, American citizens are put at risk every day by court decrees that curb prison crowding by declaring that we must free dangerous criminals before they have served their time, or not incarcerating other criminals at all. As a result, thousands of defendants who were out on the streets because of these decrees have been rearrested for new crimes, including 79 murders, 959 robberies, 2,215 drug dealing charges, 701 burglaries, 2,748 thefts, 90 rapes, and 1,113 assaults in just 1 year. Obviously, these judicial decrees pose an enormous threat to public safety.

Finally, in addition to massive judicial interventions in State prison systems, we also have frivolous inmate litigation brought under Federal law. Thirty-three States have estimated that this litigation cost them at least \$54.5 million annually. The National Association of Attorneys General have concluded that this means that nationwide the costs are at least \$81.3 million. Since, according to their information, more than 95 percent of these suits are dismissed without the inmate receiving anything, the vast majority of this money is being entirely wasted.

Title VIII of this conference report contains important measures that will help stop the destructive effect on public safety, the unnecessary micro-management, and the waste of resources that this litigation is causing. It limits intervention into the affairs of State prisons by any court, State or Federal, undertaken under Federal law, to narrowly tailored orders necessary to protect the inmates' constitutional rights. It also makes it very difficult for any court to enter an order directing the release of prisoners. Finally, it

contains a number of very important limitations on prisoner lawsuits.

These provisions are based on legislation that I have worked on assiduously along with the distinguished chairman of the Judiciary Committee, Senator HATCH, the majority leader, and Senators HUTCHISON and KYL. They have the strong support of the National Association of Attorneys General and the National District Attorneys Association. They will make an important contribution to public safety and the orderly running of prisons by the State officials charged with running them without unnecessary Federal interference. And they will help limit the waste of taxpayer money now spent defending frivolous lawsuits and feeding prisoners' sense that as a result of committing a crime, they have a grievance with the world, rather than the other way around.

I thank the appropriators in both Houses, as well as the efforts of the majority leader and the chairman of the Judiciary Committee, for seeing to it that these provisions were included in this legislation.

The second reason I support this bill is that it makes significant improvements in the law governing the funding of prison grants to the States. Although styled truth-in-sentencing grants, the language in present law is so full of loopholes that it does little to advance the cause of incarcerating the most violent offenders or assuring that they would actually serve the time they were sentenced to serve. The new version does a much better job of targeting this money in a manner that creates the proper incentives.

Now let me outline the areas of this bill with which I have serious reservations. First, I believe the bill goes too far in diffusing money that the version of this legislation that passed the Senate had dedicated to the hiring of police officers in the COPS Program. I sympathize with the desire of my colleagues in the House to give the States more flexibility in spending this money, but this could mean that our goal to put more police on the street may not be achieved. I would much prefer to see a system where the States do have additional flexibility, but are given some real incentives to spend the money hiring additional law enforcement officers.

Second, Mr. President, I believe the provisions related to the Commerce Department fall short of what we should be doing—namely eliminating the Commerce Department altogether. I am the lead Senate sponsor of legislation to abolish the Department of Commerce, S. 929. I think the record is clear—the Department of Commerce is the least essential of all 14 Cabinet-level agencies. Any effort to reorganize and reform Government should begin there.

Although this bill does not eliminate the umbrella organization of the Commerce Department, it does reduce and eliminate some of the Department's more indefensible programs and agencies. It terminates corporate welfare programs like the Advanced Technology Program and the U.S. Travel and Tourism Administration, and it establishes procedures by which the Administration can act.

On the other hand, the conference report fails to take a strong position toward indefensible programs like the Economic Development Administration. Whereas the Senate had funded this program at only \$89 billion, the report before us would provide the EDA with over \$300 billion for next year. Given the EDA's record of waste and abuse, I believe this funding is excessive and I look forward to an opportunity to debate the merits of the EDA, and other programs like it, when my bill to terminate the Commerce Department is debated on the Senate floor. In addition, this report deletes the fund to cover the costs of terminating the Department and transferring necessary functions to other areas of the Government. Various concerns have been raised regarding the cost of terminating the Department of Commerce, and this provision would have helped address those concerns.

I think some of the money being spent on these unnecessary programs in the Commerce Department would have been better spent funding Federal law enforcement at the levels the Senate proposed in the pre-conference version of this legislation.

Finally, this conference report accepted the House funding level for legal services for the poor and maintains the existing structure for the provision of these services. The Legal Services Corporation, albeit with provisions seeking to ensure that some of the worst misallocations of funds that the Corporation has permitted do not recur. As I explained when the issue came before the Senate originally in connection with this bill, I believe the approach the Senate subcommittee took to this issue originally, which would have eliminated the Federal Corporation and block-granted to the States Federal funds for the provision of legal services to the poor, was far superior. The Corporation itself provides no legal services to the poor, but rather grants Federal money to local organizations that give legal assistance to the poor. This is a function the States can perform at least as effectively as the Corporation has.

While I voted for this conference report, I will reserve judgment on the next Commerce, State, Justice appropriations bill.

THE COMMERCE, STATE, JUSTICE APPROPRIATIONS CONFERENCE REPORT

• Mr. BINGAMAN. Mr. President, I rise in strong opposition to the Commerce-Justice-State appropriations conference report.

When this bill was adopted by the Senate on September 29, it maintained the Community Oriented Policing Services Program (COPS) by eliminating the State and Local Law Enforcement Assistance Block Grant Program, reinstated the Legal Services Corporation, and fully funded the Violence Against Women Act. Now this appropriations bill returns to the Senate reflecting the wishes of the House at the expense of the Senate. The COPS Program has been eliminated by the reinstatement of the State and Local Law Enforcement Assistance Block Grant Program. The Legal Services Corporation will receive approximately \$60 million less than the Senate had agreed upon, and the Violence Against Women Act will also receive approximately \$40 million less than what the Senate agreed upon.

As we all know, the COPS Program has proven to be successful. In one year, since the program's inception, New Mexico has received over 180 officers from the COPS Program. All parts of New Mexico have been awarded officer positions. From the Aztec Police Department in the north and Sunland Park in the south, to Quay County in the east and Laguna Pueblo in the west, all have felt the impact of this program.

The COPS Program is different from the block grant contained in the conference report because it emphasizes the concept of community policing. It gets officers out into the community preventing crimes rather than reacting to crimes once they have been committed.

Mr. President, I understand that the language in this appropriations bill would allow a community to use the block grant money to hire secretaries, buy a radar gun or buy a floodlight for a local jail. The law enforcement community is against this broad approach. The sentiment is best summed up by Donald L. Cahill, the chairman of the national legislative committee for the Fraternal Order of Police, who testified before the Senate Judiciary Committee in February on the block grant type proposal. He stated:

This broader category opens the door to using these funds for numerous purposes other than hiring police officers—such as hiring prosecutors or judges, buying equipment, lighting streets, or whatever. These are all worthwhile—but they won't arrest a single criminal.

The bottom line is to place more officers on the street and the COPS program has proven to be successful. That is why the Fraternal Order of Police, the National Sheriffs' Association, and

the National Troopers' Coalition support the COPS Program.

To quote Mr. Cahill again, "Police are the answer for today and prevention is the answer for tomorrow."

If the Senate agrees to fund the Violence Against Women Act at the figure contained in the conference report, the Senate is stating that this program is not as strong a priority as it was on September 29.

If given the resources, this act has the potential to demonstrate that the Federal Government can make a real difference when dealing with violence against women. Through prosecution, outreach, and education, the Federal Government has assumed the responsibility of a full partner in this cause.

In summary, our communities will suffer the direct affects of these misaligned priorities.

Mr. President, I would like to take a few additional minutes to discuss some other areas of the conference report that have led me to oppose the bill.

I want to preface my comments with a reminder to those who are earnestly committed to the future economic well-being of our Nation and our citizens. Balancing the budget is certainly a goal I support; this cause does make sense, but that goal alone is not enough to secure a robust and healthy economic future for our country. How we cut, what we cut matters a great deal. As many of you know, I have watched rather incredulously as aid to dependent children, student loans, Medicare and Medicaid, the earned income tax credit have been slashed and attacked in this Chamber as we proceed, without missing a beat, to provide nearly \$800 million on 129 military construction projects above the Pentagon's request, above what the President of the United States proposed was necessary to maintain the national security interests of the country. We are making tough decisions that affect people's lives and impact the ability of so many who are hard-working, low income Americans to keep their families together, keep food on the table, and have a chance at getting their children into colleges.

What we cut matters, and I am opposed to the decimation of our Nation's technology programs. Our firms are at a distinct disadvantage to firms in Germany, France, Israel, Japan, South Korea, and in nearly all industrialized nations when it comes to making the investments required to match what foreign government-industry partnerships provide for pre-competitive technology support. We have achieved laudable and significant results from the Technology Reinvestment Program, the Advanced Technology Program, and the Manufacturing Extension Program. While we cut programs, even eliminate some—the Office of Technology Assessment, for example, no longer exists—the Japanese Government, despite its budget and economic

problems, is going to double its research and development expenditures by the year 2000. Our technology programs are not corporate welfare; these have been programs that have helped trigger the competitive rebound of our Nation's firms and that have helped small and medium-sized firms benefit from national technology programs and projects, that would have otherwise been the exclusive privilege of larger firms with the contacts, resources, and infrastructure to cooperate with national laboratories.

This Commerce-Justice-State appropriations bill is a disturbing ideological exercise that threatens the health of our future economy. The technology programs of the Department of Commerce help to expand our economy, help Americans compete in the global marketplace, and help to generate high-quality, high-wage jobs that our workers need. Many say that the reason that the Advanced Technology Program is being eliminated is that the projects did not earn any political ownership. This is a sad commentary on our judgment of what is important and not important as we make decisions in our budget-cutting efforts. As Leslie Helm of the Los Angeles Times wrote on November 26, 1995:

The Advanced Technology Program . . . works because projects are proposed by industry and companies are required to match government money on their own.

This is an example of how we should be leveraging the taxpayer's dollar, getting more from government investments than we otherwise would achieve. The ATP was created during the Bush administration and had strong bipartisan support, support that such a promising, successful program should have today.

I also cannot support this bill because of the sharp reduction for the National Information Infrastructure Grants Program. The NII Program assists hospitals, schools, libraries, and local governments in procuring advanced communications equipment to provide better health care, education, and local government services. The conference report eliminates funding for the GLOBE Program, which promotes knowledge of science and the environment in our schools. And although it remains anemically funded, I think that the reductions in this bill for the Manufacturing Extension Program are wrong-headed and continue the trend of undermining our Nation's best efforts in decades at partnering with industry to maintain our national technological competitiveness both in the commercial and national defense sectors.

We need to bias our spending toward those projects that produce real growth in our economy. Growth generates jobs, better incomes, and a higher standard of living for our citizens.

For these reasons, Mr. President, I must strongly oppose this bill and urge the President to veto it. •

SPEEDY SENATE RATIFICATION OF START II IS NECESSARY

• Mr. HARKIN. Mr. President, Wednesday Senator BINGAMAN gave an important statement about the necessity to ratify START II quickly, and I would like to add my voice in support of his position.

START II will cut the number of the world's nuclear weapons in half, getting rid of nearly 4,000 deployed H-bombs in Russia and about the same number here. An overwhelming number of our citizens favor implementing this treaty, and a large number of elected officials on both sides of the aisle have expressed their support for it. Names and statements of support by Republican leaders were read by my friend from New Mexico, and I will not take time to add to this list now.

Apparently START II is being held hostage in a dispute over the consolidation of our foreign affairs agencies. I hope this is not the case.

Even worse, some groups are now calling to add certain conditions for ratifying START II. These conditions have all been discussed in bills that have now passed the Senate, and should not be attached to the ratification of a treaty. The Senate can not change START II, either we ratify it or not. Attaching political conditions on a treaty is a dangerous practice and should be avoided on procedural considerations.

Mr. President, START II should be ratified for many reasons. First, START II destroys weapons. This reduces the risk of an accidental launch. Second, every Russian weapon destroyed is a weapon we don't need to defend against. The following table shows the numbers and kinds of ICBMs that can be eliminated under START II.

I ask that it be printed in the RECORD.

The table follows:

INTERNATIONAL BALLISTIC MISSILES—ELIMINATED UNDER START II

Delivery system	Launchers	Warheads
SS-18	188	1,880
SS-19	170	1,020
SS-24	46	460
SLBM's		2,600
Totals	404	3,960

¹ Some SS-19's may be converted to carry only a single warhead in order to offset the cost of developing a new launcher.

² Based on limit of 1,750 submarine launched ballistic missiles. The current Russian arsenal of SLBM's is estimated at 2,350.

Source: "Bulletin of Atomic Scientists," Nuclear Notebook, September/October 1995.

Mr. HARKIN. Additionally, destroying weapons saves taxpayers' money. Just look at the current Senate Defense authorization bill. As my friend from New Mexico pointed out in the report to the Defense Authorization Act,

the act "proposes a nuclear weapons manufacturing complex sized to meet a need of a hedge stockpile far above the active START II stockpile of 3500 weapons." The total cost of producing our nuclear weapons to date is about \$4 trillion. Compare that with our \$5 trillion national debt. In 1995 alone, \$12.4 billion was spent to build, operate and maintain strategic nuclear weapons. If we ratify START II we can give taxpayers the double peace dividend of higher security at lower cost.

Even if START II were fully implemented, we would have more than 3,000 deployed strategic missiles—500 warheads on missiles in silos, 1,680 warheads on submarine-launched missiles, and 1,320 on airplanes. Furthermore, an additional 4,000 nuclear weapons would remain in our stockpile. Surely, this will be more than enough atomic fire power to counter any conceivable threat to the United States.

Mr. President, Russia and other former Soviet Republics are more open than ever before. We have all seen the unprecedented pictures on television of Russian missiles and airplanes being destroyed. This new openness will make START II even more verifiable than START I. With Russian elections this month and our own presidential election season just starting, we must act now to keep the this olive branch from withering.

In conclusion, Mr. President, we need to ratify START II quickly. It is not in the national interest to play politics over the ratification of any treaty. Russian President Yeltsin is ill and needs quick American ratification of START II to help get the Russian Parliament to ratify it. We need the security of fewer Russian warheads now. We need to stop spending so much money making our nuclear weapons now. We can use the warheads we have now to defend America. We need to ratify START II now. •

THE PASSING OF THOMAS L. WASHINGTON

• Mr. ABRAHAM. Mr. President, it is with great, personal sadness that I note the passing this Tuesday, December 5 of Thomas L. Washington. Tom was a personal friend, a valued supporter, a concerned husband and father, and a dedicated leader in his community.

Tom was an avid and renowned sportsman. He exemplified all that is good about the sportsman: he was hardy and self-reliant; he also was frugal with and respectful of our great outdoors. Tom loved Michigan's wetlands and forests. He spent time in them, enjoying them and working to preserve them.

Because he loved the outdoors, Tom founded and led the Michigan United Conservation Clubs. Indeed, he built that organization into the largest single State conservancy in the Nation.

Tom was a strong, committed advocate for preserving Michigan's outdoors, and also the great outdoors of America and beyond, for all to enjoy.

He served on the board of directors of the Safari Club International and the National Wildlife Federation. True sportsman that he was, he was as concerned to preserve the environment for future generations as to enjoy it for himself.

Thus he helped draft legislation creating the Michigan Natural Resources Trust Fund. This fund purchases prime recreational lands for public use with royalties from oil, gas, and mineral production on State lands. In 1976 Tom was appointed a charter member of the board that administers the fund. He served on the board until his death, including several terms as chairman.

He served on a number of Michigan State committees, including the committee that wrote administrative rules for the Michigan Farmland and Open Space Preservation Act, which is central to the State's land-use program.

Tom also served on the Governor's Interim Committee on Environmental Education, the Michigan Department of Natural Resources Endangered Species Committee, and the Governor's Interim Committee on Environmental Education. And he served as vice chairman of the Governor's Michigan Land Inventory Committee.

He was a recipient of the American Motors Conservation Award, Safari Club International's Chairman's Award, and the Miles D. Pirnie Award for his leadership in preserving wetlands and wetlands wildlife.

Part of the reason for Tom's care for the environment no doubt stemmed from the fact that he was a family man. He cared about his wife and children and wanted to pass on to them the same rights and the same opportunities that he enjoyed.

A hunter concerned to protect all our rights, he also fought for the second amendment.

Tom was elected president of NRA's board of directors in 1994 and reelected in 1995. First elected to the board of directors in 1985, Tom served as second and then first vice president prior to being elected president.

Tom worked for responsible use of our rights, working with training and informational programs along with second amendment defense.

He was a fine man, whom I personally shall miss. I extend my condolences to the Washington family. •

RATIFY THE CHEMICAL WEAPONS CONVENTION

• Mr. HARKIN. Mr. President, the Chemical Weapons Convention [CWC] is a watershed agreement that will eliminate an entire class of weapons of mass destruction. Upon ratification, the CWC calls for the complete elimi-

nation of all chemical weapons within 10 years.

This landmark treaty is perhaps the most comprehensive arms control agreement ever signed. To begin with, the Chemical Weapons Convention requires all signatories to begin destruction of their chemical weapons stockpiles within 1 year of ratification, and to complete this destruction within 10 years. In addition, the CWC prohibits the production, use and distribution of this class of weapons, and provides an intrusive international monitoring organization in order to prevent the development of these weapons.

This verification allows not only for the inspection of "declared" sites, but also permits international inspectors access to any suspected undeclared facilities. Signatories do not have the right of refusal to deter inspection. Should a member nation requests a "challenge inspection" of a suspected chemical facility, the nation called into question must permit the inspectors to enter the country within 12 hours. Within another 12 hours, the inspectors must have been allowed entry into the suspected warehouse. It is very unlikely that every trace of the banned chemicals could be eliminated within 24 hours.

In addition to providing broader powers to an international inspection regime, the CWC includes strong punishment to those nations who choose to violate this agreement. The violating nation, as well as nonmember nations, could no longer purchase an entire group of chemicals from member nations. The chemicals which would be banned are necessary for factories to produce products such as pesticides, plastics, and pharmaceuticals. So this measure is not only a "carrot" to induce nations to join, but a "stick" to ensure their compliance.

Obviously, Mr. President, no treaty is 100 percent watertight, but the strength of the international monitoring regime, the Organization for the Prohibition of Chemical Weapons, makes the manufacture of chemical weapons difficult to conceal, and the punishment provides a strong deterrent to developing this class of weapons.

Among all weapons of mass destruction—biological, chemical, and nuclear—chemical weapons are the most plausible and potent threat available to terrorists. These chemical weapons are relatively easy to make, and a dosage that can kill thousands is very easy to conceal. Recent events in Tokyo and Oklahoma City have provided the wake-up call to the international community, showing that the world can no longer slumber in a blanket of false security.

From a historical perspective, agreements to curtail chemical weapons use have been largely successful. The best example is the 1925 Geneva Protocol. Even during World War II, the vast ma-

jority of nations observed the Geneva Protocol, which banned the first-use of chemical weapons in war. However, the use of chemical weapons by Saddam Hussein against Iran and the Iraqi Kurdish population forced the world community to realize the danger of these weapons. The production of chemical weapons by nations facilitates the proliferation of these weapons to state sponsored terrorist groups.

The United States must place a high priority on the elimination of this deadly class of weapons. If the United States wishes to retain its position as a world leader, the Senate must provide its advice and consent to the ratification of the Chemical Weapons Convention with urgency, and persuade other nations to follow our lead.

Mr. President, to call attention to the proliferation of weapons of mass destruction, I would recommend a highly informative article by Robert Wright entitled "Be Very Afraid", which appeared in the May 1, 1995 edition of *The New Republic*. To Quote Mr. Wright:

All told, the world's current policy on weapons of mass destruction can be summarized as follows: The more terrible and threatening the weapon, the less we do about it. There has never been a more opportune time to rethink these priorities. * * * A good model for reform exists in the Chemical Weapons Convention, which now awaits ratification after more than a decade of negotiation involving three administrations. The CWC has both kinds of teeth that the NPT lacks: A tough inspection regime and real punishment for violation.

I ask that the text of the article be printed in the RECORD.

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

[From the *New Republic*, May 1, 1995]

NUKES, NERVE GAS AND ANTHRAX SPORES—BE VERY AFRAID

(By Robert Wright)

Once you've assimilated the idea that an apocalyptic new-age cult with offices on three continents had stockpiled tons of nerve-gas ingredients and was trying to cultivate the bacterial toxin that causes botulism, the rest of the story is pretty good news. The cult, Aum Supreme Truth, employed its nerve gas on only one of the continents, rather than aim for synchronized gassings of the Tokyo, New York and Moscow subways. Only a small fraction of its chemical stock was used, and that was prepared shoddily: the gas seems to have been a degraded version of sarin, and the "delivery systems" the emitted it were barely worthy of that name. Rather than thousands dead on three continents we got eleven dead on one. A happy ending.

On the other hand, a worldwide display of well-run chemical and biological terrorism would have had its virtues. From mid-April through mid-May, on the eve of the Nuclear Non-proliferation Treaty's expiration at age 25, representatives of more than 170 nations are meeting in New York to vote on renewing the treaty. Conceivably, this gala event could inspire a broader and much-needed dialogue on the state of the world's efforts to control weapons of mass destruction, including chemical and biological arms. Then

again, conceivably it couldn't. So far attempts to take a truly fresh look at this issue have tended to encounter a certain dull inertia within policy-making circles. This is the sort of condition for which 10,000 globally televised deaths on three continents might have been just the cure.

One salient feature of the world's approach to weapons of mass destruction is perverseness. The Nuclear Non-proliferation Treaty—the NPT—is a much weaker document than the recently negotiated Chemical Weapons convention, which now awaits American ratification; yet nuclear weapons are much more devastating than chemical ones. Meanwhile, biological weapons are essentially devoid of international control, yet they're the scariest of the three. They may not be the most potent—not for now, at least—but they have the greatest combination of potency and plausibility. If someone asks you to guess which technology will be the first to kill 100,000 Americans in a terrorist incident, you shouldn't hesitate; bet on biotechnology. And not futuristic, genetically engineered, genocidal viruses, though these may be along eventually. Plain old first-generation biological weapons—the same vintage as the ones Aum Supreme Truth was trying to make—are the great unheralded threat to national security in the late 1990s.

All told, the planet's current policy on weapons of mass destruction can be summarized as follows: the more terrible and threatening the weapon, the less we do about it. There has never been a more opportune time to rethink these priorities.

I

To its credit, the Clinton administration has lately wobbled doggedly on behalf of NPT renewal. Officials have traveled the globe, reminding world leaders that they're more secure with the treaty than without it, and promising the more ambivalent ones God-knows-what in exchange for their support. The treaty now seems assured of extension before the New York conference adjourns.

Extension is certainly better than non-extension. Still, since its inception back in the 1960s, the treaty's structural weakness has gotten sufficiently glaring that one wishes those weren't the only two options.

The idea behind the treaty was that the nuclear haves—Britain, China, France, Russia, the United States—would buy off the have-nots. The have-nots would pledge not to acquire nuclear weapons, and the haves would help them get and maintain nuclear energy for peaceful use. That was the carrot. Once the have-nots had signed on, they would be subjected (along with the rest of us) to the stick: international inspection of nuclear reactors, with the understanding that misuse of the technology would lead to its cutoff. Administering both carrot and stick is the International Atomic Energy Agency, or IAEA.

One oddity of this arrangement is that the IAEA's job is to relentlessly complicate its own life. As it helps spread "peaceful" nuclear materials around the globe, opportunities for illicit use multiply, and so does the need for stringent policing. Thus, the world must get better and better at two things: detecting cheaters, and punishing them with sufficient force to deter others. Recent events show the world to have failed in both regards.

At the outset of the Persian Gulf war, Iraq was an NPT member in technically good standing. After the war, the world discovered what a meaningless fact that can be. Indeed, as if to drive home the IAEA's impotence, a separate agency, under United Nations aus-

pices, went into Iraq, documented the nuclear weapons program and dismantled it.

It's true that the existence of this program didn't come as a bolt from the blue. There had long been grave suspicions, but President Bush's aversion to regional Iranian hegemony had given him a certain tolerance for Iraqi excesses. Still, few suspected the scope of Saddam Hussein's nuclear program, or the subtlety of its concealment. Hussein proved that the IAEA's inspection regime—confined to declared nuclear sites—is inadequate.

The first application of this lesson was in North Korea. After inspection of a declared site revealed nuclear materials to be missing, the IAEA, for the first time ever, asked to look at an undeclared site. The North Korean refusal confirmed everyone's worst suspicions, and thus revealed a second NPT deficiency: once the world knows something fishy is going on, there are no provisions for assured and effective punishment. In theory the IAEA could appeal to the U.N. Security Council for economic sanctions—or, indeed, for the authorization of air strikes against the suspect facility. But often this channel will be blocked by a Big Five veto—possibly China's in the case of North Korea, perhaps Russia's in some future case involving Iran. Of course, the IAEA can stop all further shipment of nuclear materials to outlaw nations. But it may be too late for that tack to keep the bomb out of their hands, and any adverse effect on their energy supply wouldn't be felt for a while.

Notwithstanding these flaws, the NPT has been pretty effective. Nobody called John Kennedy an hysteric when in 1963 he predicted that within a dozen years fifteen to twenty nations would have the bomb. Yet now, thirty-two years later, the best guess is that eight nations have a functioning bomb—the Big Five within the NPT and, outside of it, Israel, Pakistan and India. (In addition, Ukraine, Belarus and Kazakhstan were born with the bomb, and say they'll give it up.) A primary reason for this glacial pace is that the NPT eased fears, in large chunks of the world, about the imminent nuclearization of neighbors.

Still, the Middle East and south Asia have gotten arms-race fever since 1963, and North Korea may yet start a race in the Pacific. So it would be nice to make the NPT more seductive and effective: to raise both the benefits of signing and the costs of reneging. And, though no one is talking about using the present conference to amend the NPT (this would supposedly open up various cans of worms) there is talk of reaching that goal in other ways. For example, the IAEA can interpret its sometimes ambiguous mandate broadly—as it did in claiming the right to inspect undeclared sites in North Korea—and hope everyone goes along, thus setting a precedent. Or the agency can approach member nations collectively about a generic rewrite of their individual "safeguard agreements," the documents, technically separate from the NPT, which grant the IAEA's power to inspect. In any event, if NPT extension happens early enough in New York, there will be time for the conference at least to open a dialogue about the grave flaws of the current regime.

II

A good rough model for reform exists in the Chemical Weapons Convention, which now awaits Senate ratification after more than a decade of negotiation involving three administrations. The CWC has both kinds of teeth that the NPT lacks: a tough inspection regime and real punishment for violation. In

the arms-control field, says Berry Kellman, a law professor at DePaul University, it is a "wholly unprecedented document of international law." Were it already in effect, Aum Supreme Truth's attempt to make chemical weapons would have been a lot harder.

Under the chemical convention, the Organization for the Prohibition of Chemical Weapons (or OPCW, the CWC's version of the IAEA), would be routinely informed about the commercial transfer of substances used to make chemical weapons—and substances used to make substances that are in turn used to make chemical weapons. That covers dozens and dozens of substances. It also covers a lot of sellers and buyers, because those substances tend to have legitimate uses as well. Thiodiglycol is used to make both mustard gas and ballpoint pen ink. Dimethylamine makes for good nerve gas and detergent. In an impressive balancing act, CWC negotiators managed to craft a system that (a) monitors the sale and transport of these chemicals and entails periodic inspections; and (b) has the unambiguous support of the Chemical Manufacturers Association.

Unlike the NPT, the CWC goes well beyond this inspection of "declared" sites—factories that avowedly employ the suspect chemicals—and provides explicitly for the inspection of undeclared sites. And here things can happen pretty fast. If the United States requests, a "challenge inspection" of, say, a suspicious-looking warehouse in Iran (a signatory), Iran must let inspectors into its country within twelve hours of being notified. After another twelve hours, it must have escorted the inspectors to the perimeter of the warehouse. (Eliminating every trace of chemical weapons manufacture within twenty-four hours is considered quite unlikely.) At this point there can be up to ninety-six hours of negotiations about which parts of the warehouse are subject to inspection. But any vehicles leaving the area in the meanwhile can be searched.

A country could conceivably keep this standoff going longer by arguing that a search warrant at the national level is required. Indeed, it might even be telling the truth (though for chemical factories, already subject to government regulation, this excuse wouldn't wash). And, what's more, such a warrant might wind up being truly unobtainable—if, for example, the requested search were of your indoor tennis court and the OPCW could provide no evidence of illegal activity there. Still, if such appeals to national sovereignty had an overpoweringly phony air, the country could be deemed in noncompliance with the treaty by a vote of OPCW member-states.

Nations so deemed would truly be put in the dog-house. There is a whole slew of substances relevant to chemical warfare that treaty violators could no longer buy from OPCW members, a group that would include roughly the whole industrialized world. And the cutoff of these substances could harm factories that make things ranging from pesticides to plastics to ceramics to pharmaceuticals.

Here the CWC breaks momentarily new ground, though less by design than by technological happenstance. Because of the flexibility of chemical technology, the treaty's punishment by denial of "military" chemicals amounts to broad and immediately painful sanctions against the civilian economy. And these sanctions are a good reason not just to stay in compliance, but to sign the treaty in the first place. If you don't join the OPCW, its members—just about everybody—won't sell you these chemicals in the first place. *That's* a carrot; and *that's* a stick.

Obviously, no weapons control regime can be foolproof. (That's why, notwithstanding the NPT's high-minded call for the eventual elimination of all the Earth's nuclear weapons, this won't happen anytime soon. A few powerful but reasonably responsible nations must preserve a nuclear arsenal, lest the next, slightly wilder version of Saddam Hussein be empowered to hold the world hostage with half a dozen warheads, or other weapons of mass destruction.) Still, the CWC, given the complexity it confronts, would have a good chance of success. It would make the manufacture of chemical weapons an endeavor with a significant risk of unmasking, and unmasking would bring painful penalties—penalties that no Security Council member would have the chance to veto. If the NPT had the CWC's built-in vigilance, Hussein would have found it much harder to reach the point he reached and still retain NPT membership. And if the NPT had the CWC's membership benefits, it would be much harder for any nation—Iraq, Israel, India, Pakistan—to bear the prospect of nonmembership.

The irony in this disparity between the NPT and the CWC is that nuclear weapons are much more devastating than chemical weapons. Japanese newspapers estimated that Aum Supreme Truth's many tons of chemicals could theoretically cause 4 million deaths, but the key word here is "theoretically." This calculation assumes that the poison gas is spread with perfect efficiency, so that every bit gets breathed by someone and no one breathes more than his or her share (a lot to ask of a dying subway rider). More reasonable figures would be in the hundreds of thousands.

And even those numbers are inflated. If you discovered a cache of 800,000 bullets, you might say this was enough to kill 500,000 people, even allowing for inefficient application. But inefficiency is only half the problem; fairly early in the application process you'd attract official resistance. So, too, with chemical weapons. Whereas converting a single nuclear bomb into 500,000 deaths is a simple matter of parking a van and setting a timer, converting a single chemical weapon into 500,000 deaths isn't even remotely possible. A thousand deaths is more like it. Racking up large numbers means mounting a well-orchestrated campaign.

This doesn't mean chemical weapons don't warrant the tight treatment they get in the CWC. For one thing, some of them, such as skin-melting and often nonlethal mustard gas, have uniquely horrifying effects. Second, although a single chemical weapon possesses a tiny fraction of a nuclear bomb's lethality, chemical weapons are much easier to get. The recipe for making them is public, a first-rate chemistry major can follow it (if at some health risk), and the ingredients grow more widely available each decade.

Besides, chemical weapons, though the least massively destructive weapon of mass destruction, are much more potent than conventional explosives. A conventional warhead might kill ten people in a suburban neighborhood where a chemical warhead could kill 100. The Iraqi chemical arsenal discovered after the Persian Gulf war—100,000 artillery shells, warheads and bombs—was theoretically enough to wipe out the entire Israeli population many, many times over. It is with good reason that chemical weapons are put in a special class of global abhorrence and regulation, along with nuclear and biological weapons.

Still, chemical weapons aren't nearly as pernicious as nuclear weapons. And what

most people still don't understand is that in important respects nuclear weapons aren't as pernicious as biological weapons.

III

In one sense, biological weapons are commonly overestimated. People tend to assume they work by starting epidemics, when in fact most biological weapons kill by direct exposure, just like chemical weapons. To be sure, contagious weapons exist. American settlers purposefully gave Native Americans blankets infested with smallpox; more recently, both American and Soviet military researchers have experimented with some readily transmittable viruses. Still, in general, contagious weapons have a way of coming back to haunt the aggressor. So biological weaponry this century has involved mainly things like anthrax spores, which enter your lungs and hatch bacteria that multiply within your body and finally kill you, but don't infest anyone else in the meanwhile.

Genetic engineering may eventually make contagious weapons more likely. In principle, for example, one could design a virus that would disproportionately afflict members of a particular ethnic group, thus giving some measure of safety to attackers of other ethnic persuasions. And—more realistically in the near term—genetic engineering makes it easier to match a killer virus with an effective vaccine, so that the aggressor could be immunized. Still, the main effect of modern biotechnology to date—and it has been dramatic—is to make traditional weapons, such as anthrax, much cheaper and easier to produce. A basement-sized facility, filled with the sort of equipment found at garden-variety medical labs and biotechnology companies, will do the job; the recipes are available at college libraries; and the ingredients—small cultures of pathogens that can be rapidly multiplied in fermenting tanks—are routinely bought from commercial vendors or passed from professor to graduate students.

The weapons that can result are phenomenally destructive. An (excellent) Office of Technology Assessment (OTA) report on weapons of mass destruction estimates that a single warhead of anthrax spores landing in Washington, D.C., on a day of moderate wind could kill 30,000 to 100,000 people—a bit more damage than a Hiroshima-sized atomic bomb would do, though nothing like the devastation from a modern nuclear warhead. (And a day of fever, coughing, vomiting and internal bleeding is an appreciably less desirable way to die than incineration.) In addition, anthrax spores buried in the soil, beyond the reach of sunlight, live on. Gruinard Island, where Britain detonated an experimental anthrax bomb during World War II, is still uninhabitable.

But a warhead is not the most likely form in which biological weapons will first reach an American city. A ballistic missile, after all, has a return address: so long as the United States has a nuclear deterrent, Americans can feel pretty secure against missile attacks in general. And there's another problem with missile-delivered biological weapons. The technological challenge of making an explosive device yield a widespread mist is considerable. Iraq, we've learned since the war, has done research on anthrax and botulin weapons, but not with evident success. Still, if you're not attacking from a distance and can deliver the spores in person, the obstacles to biological attack diminish. "Figuring out how to do it in a terrorist kind of way is trivial," says one analyst in the defense establishment. Thus the fact

that no nation has used biological weapons since World War II is no reflection of the likelihood of their future use. Only recently has the technology become so widely available that a well-organized terrorist group can harness it.

Of all the things that might attract terrorists to biological warfare—the relative cheapness, the inconspicuous production—perhaps the most important is the anonymity. A small, private airplane with 220 pounds of anthrax spores could fly over Washington on a north-south route, engage in no notably odd behavior and—by OTA reckoning—trail an invisible mist that would kill a million people on a day with moderate wind. A plane spewing ten times that much sarin would kill only around 600 people—or, on a windier day, 6,000. More to the point: the sarin attack, with its immediate effects, would have authorities hunting for a culprit before the plane landed. Anthrax, in contrast, takes days to kick in; the pilot could be vacationing in the Caribbean before anyone noticed that something was amiss.

Or consider this charming scenario, courtesy of Kyle Olson of the Chemical and Biological Arms Control Institute. Get a New York taxicab, put a tank of anthrax in the trunk and, by slightly adapting commercially available equipment, arrange for it to release an imperceptible stream of aerosol. (You would be wise to build a special filter for the air entering the cab, though getting an anthrax vaccination might be enough protection.) Then drive around Manhattan for a day or two. You'll kill tens of thousands, maybe hundreds of thousands, of people. And, again, nobody will know. With nerve gas, in contrast, the long line of gagging, writhing people leading to your taxicab would arouse the suspicion of local authorities—even if your gas mask had somehow escaped their attention.

Note that these scenarios make biological weapons potentially genocidal even in an ethnically heterogeneous city. A taxi-cab can be driven all over Harlem, block by block—or, instead, through Chinatown or through the Upper East Side. Terrorists, who have been known to harbor ethnic prejudice, needn't wait for an ethnically biased designer virus.

Though biological weapons are the most horrifying terrorist tool today, they are also the furthest from being on the radar screen of any politician who matters. The Biological Weapons Convention of 1975, which commits the United States, Russia and other signatories to forgo any biological weapons program, is so toothless as to make the NPT seem like a steel trap. (When in 1979 the Soviet Union suffered a mysterious outbreak of anthrax in the vicinity of a military research facility, Pentagon officials weren't stunned; but the United States was powerless to pursue its suspicions.) And no remedial proposal from the Clinton administration is imminent. Meanwhile, the most visible result of a series of meetings among BWC signatories about revising the BWC is a series of agreements to keep meeting. There is very little talk anywhere about giving the Biological Weapons Convention a rigor reminiscent of the chemical convention.

When you ask people to explain this anomaly, they cite the practical problems that make detecting biological weapons harder than detecting chemical weapons. There are so many small, theoretically suspect rooms, at so many medical and biotech facilities. And upon inspection it's so hard to say for sure whether anything illicit is going on. The perfectly legitimate endeavor of making