

By Robert Corn-Revere

# Implementing a Flag-Desecration Amendment to the U.S. Constitution

*An end to the controversy ... or a new beginning?*

## EXECUTIVE SUMMARY

Two important Supreme Court decisions striking down flag-desecration laws as violations of the First Amendment — *Texas v. Johnson* in 1989 and *United States v. Eichman* in 1990 — set off an emotional national debate about whether to amend the U.S. Constitution. That debate continues today as one of the most polarized disputes in the nation’s history. Those proposing a constitutional amendment argue passionately about the need to restore the government’s ability to protect our unique national symbol. Opponents assert with equal force that doing so would elevate an emblem of freedom over its substance.

This is not a conflict that emerged only after 1989, but has its roots in three distinct periods in American history:

- The period between 1897 and World War I, when most states adopted their initial flag-desecration laws;
- The period around World War II, when laws requiring schoolchildren to salute the flag were tested in court;
- And the period from the Vietnam War to the present, when the first federal flag-desecration law was enacted and the Court issued decisions holding that the First Amendment protects various uses of the flag as a form of protest.

# FLAG - D E S E C R A T I O N   A M E N D M E N T

## TIMELINE: History of Flag Protection

Before the Civil War, the few references to protecting the American flag centered mostly on the flag in its official capacity, such as flying at the bow of an American vessel or above a government building or American embassy. With the outbreak of the Civil War, the flag gained popularity and was frequently displayed in the North as a symbol of the nation.

- 1862**     **Gen. Benjamin Butler**, military governor of New Orleans, issues a decree prohibiting the display of any symbol representing an authority other than the United States and demands that “the American ensigns ... be treated with the utmost deference and respect by all persons, under pain of severe punishment.”
  
- 1878**     **Congress considers and rejects** a proposal, H.R. 4305, introduced by Rep. Samuel S. Cox of New York, to ban the use of the flag for commercial advertising. The measure failed because party leaders feared they wouldn’t be able to use the flag in their political campaigns.
  
- 1890**     **The House of Representatives** passes a bill, H.R. 10475, aimed at commercial advertising, “to prevent desecration of the United States flag.”
  
- 1896**     **Prominent use of the flag** highlights a heated McKinley-Bryan presidential campaign that occasionally sparked violence.
  
- 1897**     **The American Flag Association** forms to promote flag-protection legislation. Other groups heavily involved in flag-protection measures include the Daughters of the American Revolution and the Sons of the American Revolution.
  
- 1897**     **Illinois, Pennsylvania and South Dakota** are the first states to pass flag-desecration laws. Eventually, every other state except Alaska and Wyoming would follow suit. Congress rejects more flag-protection proposals.

This history will largely determine how any constitutional amendment would be interpreted and applied.

In recent years, the House of Representatives overwhelmingly has approved a constitutional amendment on flag desecration six times. But in the Senate, proposals have either failed to reach the floor for a vote or have fallen just short of the 67 votes needed. In the current 109th Congress, flag-amendment resolutions introduced in both the House and the Senate (and approved in the House as of July 1, 2005) would provide that:

**The Congress shall have power to prohibit the physical desecration of the flag of the United States.**

Given the changed composition of the Senate following the 2004 election, the amendment appears to be within a couple of votes of the two-thirds majority needed for passage. If the amendment should pass the Senate, approval by three-fourths of the state legislatures would be needed for ratification. It is worth noting here that all 50 states have passed resolutions supporting a flag protection amendment.

Without taking a position on whether such an amendment should or should not be adopted, this report analyzes the legal and practical implications of a constitutional amendment to prohibit the physical desecration of the U.S. flag. It examines the process by which an amendment to the First Amendment would be adopted and interpreted. It also assesses the probable impact of a flag-desecration amendment in light of historical experience, basic constitutional principles and practical considerations.

## EXECUTIVE SUMMARY

### FINDINGS

Passage of a constitutional amendment permitting Congress to ban flag desecration would terminate the immediate dispute about whether to change the Constitution, but it would not end the ongoing debate about the limits of governmental authority in this area. *Johnson* and *Eichman*, the two most recent Supreme Court decisions on flag desecration, are part of a well-developed body of law on symbolic speech and on the use (and misuse) of flags. It will not be easy just to blot out those decisions with a constitutional amendment, since any resulting law must conform to established norms of due process and First Amendment scrutiny.

The power given to Congress pursuant to a flag-protection amendment would be limited by existing constitutional requirements except for the specific authority granted by the new provision. Any legislation adopted to implement the flag amendment would be subject to judicial review to determine whether it is authorized by the terms of the new constitutional provision and to ensure that it does not exceed the restrictions imposed by other constitutional limits.

Even with a constitutional amendment, Congress would not have unlimited authority to define the terms “physical desecration” and “flag of the United States.” Another limitation on the authority that would be created by the change is jurisdictional. While an earlier proposed amendment would have empowered both the federal government and the states to ban flag desecration, the current proposal would create only federal authority to do so.

### TIMELINE: History of Flag Protection

- 1907** *Halter v. Nebraska*. The U.S. Supreme Court determines that a Nebraska law forbidding the use of the flag for advertising merchandise — in this case, beer — doesn’t violate the Constitution. The Court, however, considered the case only on due-process grounds and not in regard to the First Amendment. Nonetheless, the ruling was so broadly worded that a First Amendment defense would have been rejected as well, especially when it is taken into consideration that, prior to 1925, the Court consistently declined to extend First Amendment rights to citizens who challenged state laws.
- 1917** **Amid the passions** of World War I, Congress makes the public mutilation of a flag a misdemeanor in the District of Columbia.
- 1917** **The National Conference** of Commissioners on Uniform State Laws considered the subject of state flag legislation and adopted the Uniform Flag Act to be submitted to the various state legislatures for adoption.
- 1917** **Flag-protection groups** lobby Congress for passage of the Civilian Flag Code, a guideline for displaying the flag and punishing its desecration. The American Legion drafts its Flag Code five years later.
- 1918** **Congress enacts legislation** that orders the firing of any federal employee who “when the United States is at war ... in an abusive or violent manner criticizes ... the flag of the United States.” This legislation also provided for punishment of “whoever” engages in such conduct.
- 1925** *Gitlow v. New York*. The U.S. Supreme Court suggests for the first time that the First Amendment applies to state laws as well as to federal ones.

# FLAG - D E S E C R A T I O N   A M E N D M E N T

## TIMELINE: History of Flag Protection

- 1931**     ***Stromberg v. California.*** The U.S. Supreme Court rules that a state law prohibiting the display of a red flag violated the First Amendment. The court said that posting such a flag is symbolic speech and the peaceful display as part of “peaceful and orderly opposition” to government policies is protected.
- 1940**     ***Minersville School District v. Gobitis.*** The U.S. Supreme Court rules that requiring Jehovah’s Witness students to salute the flag and recite the Pledge of Allegiance despite their religious objections did not violate their constitutional rights.
- 1942**     **Congress passes** a joint resolution to endorse a voluntary common flag etiquette code, which carried no penalties.
- 1943**     ***West Virginia Board of Education v. Barnette.*** Overruling its own 1940 *Minersville* decision, the U.S. Supreme Court strikes down laws requiring compulsory flag salutes and recitals of the Pledge of Allegiance by American school children.
- 1943**     ***Taylor v. Mississippi.*** The U.S. Supreme Court determines that the state cannot punish individuals for encouraging students and others who attempt “to create an attitude of stubborn refusal to salute, honor, or respect the national and state flags and governments.”
- 1968**     **Congress passes** a national flag-desecration law that imposes criminal penalties nationwide on anyone who “knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning or trampling upon it.”
- 1969**     ***Street v. New York.*** The U.S. Supreme Court overturns the conviction of veteran and Bronze Star honoree Sydney Street, who burned his flag in protest after learning that activist James Meredith had been shot.

This report surveys experience with previous constitutional amendments on other issues as well as case law defining protections for symbolic speech. It concludes that any congressional statute enacted to implement a flag-desecration amendment must be interpreted to be consistent with existing protections for expressive conduct, except for the specific change effected by the amendment for “physical desecration” of the “flag of the United States.” Reviewing relevant law as well as the practical effects of historic disputes about the U.S. flag, it seems reasonable to assume that a constitutional amendment empowering Congress to prohibit flag desecration could produce the following results:

- After ratification, the way would be cleared for supporters of flag protection in Congress to propose legislation to implement the amendment to prevent “physical desecration of the flag of the United States.”
- Instances of flag desecration for political purposes, at least in the short term, could increase dramatically.
- Uncertainty in the law could ensue as courts at various levels struggle to determine what items may be considered the “flag of the United States” and what actions constitute “physical desecration.”

## EXECUTIVE SUMMARY

- Courts are likely to interpret a flag-protection amendment quite narrowly in the long run, and permit prosecutions only against a limited number of physical acts against official U.S. flags.
- A narrowing process could render a new flag-protection law virtually useless against most examples of flag desecration commonly cited by proponents of a constitutional amendment.
- Because the reach of a new flag-protection statute will be interpreted so as to conform to constitutional commands, there could be some continuing uncertainty as to the law's scope. This could lead to discriminatory enforcement of the law based on prosecutors' reactions to the speakers involved.

If these predictions are correct, then both sides of this polarized debate over amending the Constitution are right — and both are wrong.

Proponents of constitutional change probably are correct when they say that an amendment may not broadly undercut First Amendment values, at least not in the long term. But this means that a resulting flag-protection law will apply far too narrowly to suit most advocates of an amendment, for it will leave as protected speech a broad range of activities involving the flag (and near-flags) that they abhor. But in the near term — a period that could last decades — there is likely to be significant constitutional upheaval as courts work through the

### TIMELINE: History of Flag Protection

- |             |   |
|-------------|---|
| <b>1974</b> | <b><i>Smith v. Goguen.</i></b> The U.S. Supreme Court overturns the conviction of a teenager who wore a flag patch on his pants, determining that a Massachusetts law prohibiting “contemptuous” use of the flag was vague. |
| <b>1974</b> | <b><i>Spence v. Washington.</i></b> The U.S. Supreme Court overturns the conviction of a man who taped a peace symbol onto his flag.  |
| <b>1989</b> | <b><i>Texas v. Johnson.</i></b> The U.S. Supreme Court rules that burning the American flag is a constitutionally protected form of free speech.  |
| <b>1989</b> | <b>Congress passes the</b> Flag Protection Act. The act punishes anyone who “knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any U.S. flag ...”                 |
| <b>1990</b> | <b><i>U.S. v. Eichman.</i></b> The U.S. Supreme Court invalidates the Flag Protection Act of 1989. The Court finds that the statute violates free speech.   |
| <b>1990</b> | <b>Only 10 days</b> after the <i>Eichman</i> ruling, the House of Representatives votes against an amendment to the Constitution that would prohibit flag desecration.  |
| <b>1995</b> | <b>After the House</b> voted 312-120 for a flag amendment, the measure fails in the Senate by three votes.  |
| <b>1997</b> | <b>The House approves</b> flag amendment with a 310-114 vote.   |
| <b>1998</b> | <b>Flag-amendment proposal</b> dies in the Senate as Senate leaders fail to get unanimous consent to bring the proposal to the floor.   |

# FLAG - D E S E C R A T I O N   A M E N D M E N T

## TIMELINE: History of Flag Protection

<b>1999</b>	<b>Reps. Randy “Duke” Cunningham</b> , R-Calif., John Murtha, D-Pa., and John Sweeney, R-N.Y., introduce a proposal to amend the Constitution to allow Congress to enact flag-protection laws. House approves bill, 305-124.
<b>2000</b>	<b>Flag amendment falls</b> four votes short of passage in the Senate, 63-37.
<b>2001</b>	<b>Reps. Cunningham and Murtha</b> introduce HJR 36 in the House. Sens. Max Cleland, D-Ga., and Orrin Hatch, R-Utah, introduce SJR 7 in the Senate. HJR 36 passes 298-125. No action is taken on the Senate proposal before the close of the 107th Congress.
<b>2003</b>	<b>Reps. Cunningham and Murtha</b> introduce HJR 4 in the House. Sens. Feinstein and Hatch introduce SJR 4 in the Senate early in the 108th Congress. HJR 4 passes 300-125. Again, no action is taken on the Senate proposal.
<b>2005</b>	<b>Reps. Cunningham and Murtha</b> introduce HJR 10 in the House. Sens. Feinstein and Hatch introduce SJR 12. HJR 10 passes 286-130.

many factual situations in which the new law can be applied.

It would not be passage of an amendment alone that will determine this outcome; the result will be affected by the implementing laws and judicial decisions applying them. History suggests that lower courts will issue conflicting decisions until the matter is finally presented to the Supreme Court in an appropriate case, or cases. Even then, there is likely to be a residue of uncertainty that could encourage selective prosecutions, just as some law enforcement officials continue to prosecute flag desecration today.

Passage of a constitutional amendment would only be the beginning of a long series of disputes over flag desecration.