

Senators, Congressmen, Please Heed the Call ...

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May 2006 - This spring, the American Flag was in the news again. Several high schools forbade students to display a flag – or even to wear red-white-and-blue clothing. Their reason was stark. The flag, they said, is controversial. It represents, they claimed, one "point of view" with which some disagree, basically no different from a Mexican flag – or, for that matter, a swastika.

This line of argument shocked many Americans. It is, however, the very same line of argument that lays behind the Supreme Court's conclusion that, under the First Amendment, the flag may not be singled out for legal protection -- even when someone burns it, rips it up or defecates on it.

Soon, the flag amendment – the proposed constitutional amendment that would restore to Congress its long-standing authority to protect the American Flag from physical desecration – will arrive at a moment of truth.

Once again, huge bipartisan majorities in the House and in the Senate want to send it to the states for debate and ratification, as provided for in the Constitution. This time, just one or two senators stand in the way.

Now, the fundamental issue is coming into a new and sharper focus.

In the past, the debate was, first of all, about whether the flag deserves protection. That no longer is the crucial issue. The pivotal senators agree that it does, indeed, deserve protection.

In the past, the debate was over whether protecting the flag from physical desecration is consistent with respect for the freedom of speech. The pivotal senators understand that there is no basic inconsistency, since singling out the flag for protection does not involve taking sides in favor of a controversial "point of view" but, instead, affirms a value that transcends – and, in fact, undergirds – controversy among competing points of view.

In the past, the debate was about those who have the last word in interpreting the Constitution – five people on the Supreme Court or "We the people"? That, too, is no longer the issue. The pivotal senators recognize that the people have the right, under Article V of the Constitution, to amend the Constitution – especially, as in this case, to restore to the Constitution its traditional meaning.

What they say, however, is that the flag can be protected without an amendment -- simply by passing yet another statute. Recently, debate focused on the merits of the statute they propose. But that, now, is no longer the issue, for their statute has been revealed to be empty. It is, at best, a fantasy. Overwhelming majorities in the Senate have rejected it -- repeatedly. They have done so for two reasons. On one hand, most senators see that the terms of the statute, in fact, provide no real protection to the flag. On the other hand, they – along with all credible experts –

understand that, if enacted, the statute would be struck down, like other such statutes, by at least five of the members of the Supreme Court.

So, what is the fundamental issue now?

It is this: Why are the one or two pivotal senators hiding behind this statutory fantasy in defiance of public opinion? And what, in our constitutional democracy, can be done about that?

After talking with members of Congress over 10 years – in public hearings and in private meetings – I believe that two basic convictions underlie the defiant reliance by these senators on so transparent a fantasy. It is appropriate, after all this time, to be blunt in describing those convictions and in responding to them.

The first conviction has to do with the role and status of the Senate itself – imagined by some senators, perhaps, as a sort of British House of Lords.

The Senate is sometimes said to be the "upper" house of Congress. It differs, to be sure, from the House of Representatives in certain ways. Its special responsibilities, its smaller size and its longer terms of office suggest to some that it is supposed to be the more mature, "deliberative" legislative body. And the vast inequality of population from state to state – each of them with two senators – suggests to some that, as a whole, the Senate is "above" the democratic norm of one-person-one-vote. For some, a conviction may follow that the Senate is supposed to be a less "representative" body, even one that is "above" representation of the views of ordinary people.

What may follow, next, for certain senators is a conviction that they have a duty, on principle, to resist popular opinion. Indeed, they may suppose they have a special duty when it comes to constitutional matters. While recognizing the right of the people to amend the Constitution, they may imagine themselves as a bulwark against the exercise by the people of that right. Indeed, a few years ago, one retiring senator stated openly – and a veteran senator said to me in private – that among his proudest moments in office were occasions on which he helped to stop any popular amendment of the Constitution.

From that, it is but a small step to justify opposition to any popular amendment with bogus but plausible-sounding arguments – that is, arguments that may sound plausible to ordinary people – such as the illusion of a supposed statutory "alternative" to the flag amendment.

However well meant, this idea of senators as bulwarks of the constitutional status quo is, in truth, a subversion of the Constitution. It subverts the very foundation of the Constitution – which is popular sovereignty. Indeed, it subverts the Constitution's conception of the Senate itself.

Among the founding fathers, there were a few who thought senators should hold office for life, portraying them as a sort of virtuous "aristocracy." But that view had almost no support. In fact, it was condemned. That is why, in the original Constitution, senators were subjected to political responsibility – periodically chosen for, and removed from, office by elected state legislatures.

Then in 1913, the 17th Amendment to the Constitution sealed the matter. It provided for the

direct popular election of senators. Its purpose was to ensure that the Senate be not only responsible, but also responsive, to the people.

To imagine, in the 21st century, that the U.S. Senate should behave like the unelected, hereditary British House of Lords of the 19th century is especially odd. In Britain, after all, the House of Lords was brought to heel more than 90 years ago. And, today, it is being systematically dismantled – precisely because of its occasional resistance to popular will. Thus has the "upper" house in Britain come down to earth.

Can our own "upper" house presume, for long, to resist this democratic law of gravity? No doubt, the vast majority of our Senators, nowadays, have no desire to do so. But a few, a pivotal few, may still cling to the aristocratic dream.

The second conviction that underlies the defiance of popular will by these pivotal senators – hiding behind an illusory statutory "alternative" to the flag amendment – is, I believe, rather different from the first. It accepts the reality of the electoral responsibility of the Senate to the people. But it calculates that, in this case, senators need not heed the discipline of electoral responsibility.

One senator indicated to me that, although the flag amendment is supported by most Americans, his own political, and financial, "base" is against it. And, he said, for the majority of his constituents, it is not a "voting issue." What he meant is that most people, as he sees it, simply will not vote against a senator who defies their view on this issue. Hence, he concludes, he can go on defying public opinion – claiming the "cover" of a statutory "alternative" – without paying any price at the polls.

The accuracy of this perception, however, is now in doubt. In several recent senatorial elections – in Virginia, in South Carolina and in South Dakota, for example – the flag amendment was put in issue. And, in those elections, the candidate supporting the amendment won.

Thus there is but one way, in the end, to correct this mistaken Supreme Court decision and to restore the traditional meaning of the Constitution. It is to vindicate the principle of popular sovereignty by acting on that principle. That is to say, by acting on it at the ballot box – making the flag amendment a "voting issue" in state after state. And, for that to happen, candidates for the Senate must put it in issue. They have every incentive to do so.

After 17 years, the American people have sustained their support for the flag amendment. No other constitutional amendment proposed in the last quarter-century has enjoyed such active and enduring commitment. Just as rivers run to the sea, the force of such sustained public opinion will, eventually, prevail. Faith in the potential of American democracy, which all of us share, entails at least that measure of faith.