

Constitutional Scholar Invokes Hyde's Call for Americans to 'Catch a Falling Flag'

In what was surely one of the most moving moments of the recent House debate on the impeachment of President Bill Clinton, Judiciary Committee Chairman Henry Hyde spoke of the current dangers facing the nation, and his hope for the future.

“What we are telling you today,” said Chairman Hyde, “are not the ravings of some vast right-wing conspiracy, but a reaffirmation of a set of values that are tarnished and dim these days, but it is given to us to restore them so our Founding Fathers would be proud.” Deeply critical of the President’s conduct in allegedly lying to a grand jury and obstructing justice through other means, Hyde closed with a peroration directed not so much at his colleagues in Congress as to all of us.

“It’s your country,” said Hyde, “the President is our flag-bearer, out in front of our people. The flag is falling my friends — I ask you to catch the falling flag as we keep our appointment with history.”

Whatever one thinks of what should be done with President Clinton, Hyde’s notions that “the flag is falling” and that our founders’ “set of values...are tarnished and dim these days” must surely have resonance. With possibly deliberate irony, when Hyde asked us “to catch the falling flag as we keep our appointment with history,” he may have been referring as well to the effort to pass the Flag Protection Amendment, which will soon be reintroduced in Congress.

The Amendment is a small one, but there are those who are passionate about it, and those who believe that it represents an important restatement of our founders’ values. Its text simply provides that “Congress shall have the power to prohibit the physical desecration of the flag of the United States,” but those eloquent 17 words would, at a stroke, return us to a more civilized state of constitutional law than we have had for some time.

When, in 1989, the Supreme Court reversed a century of jurisprudence and decided, by the slimmest of majorities, that desecrating the flag was simply political speech protected by the First Amendment, it ignored not only its own precedents, but also simple common sense.

Two of the Supreme Court’s greatest defenders of the First Amendment, Chief Justice Earl Warren and Associate Justice Hugo Black, for example, had no trouble distinguishing the intentionally outrageous and inflammatory act of flag desecration from the kind of speech Madison and Jefferson had in mind when the First Amendment was crafted. Neither do the 80 percent of the American public who favor the Flag Protection Amendment, or the 49 state legislatures that have petitioned Congress for its passage.

Sadly, many members of academic community and many editorial writers and commentators do not seem to have been able to make the distinction. Worried that any attempt to restrict expression — no matter how unseemly, insulting, or odious to those who sacrificed life or limb for their country or their families — would somehow result in a torrent of draconian legislation

which would silence the press or public debate, the enemies of the Flag Protection Amendment have foolishly frustrated its passage. In the last Congress, the measure handily garnered the necessary two-thirds vote in the House of Representatives, but was never brought to the Senate floor because those who wished to see the measure defeated cravenly refused consent to allow a vote.

Those who are against the Flag Protection Amendment also seem to be against democracy, in that they seem wrongly to believe that the American people — who favor the amendment — shouldn't be able to return us to the constitutional views of Earl Warren or Hugo Black.

In 1989, and again in 1990, the Supreme Court made a mistake when it declared that no statute could protect the flag from desecration. Over the more than two centuries of our constitutional experience, one tested and valued way for the American people to correct mistakes made by the court is through constitutional amendment, and this should be allowed to happen with the Flag Protection Amendment.

Those who would deny the will of the people to pass the Flag Protection Amendment not only fear and distrust their fellow citizens, but they also argue that the Amendment will be a dagger struck at the First Amendment and a trivialization of the Constitution. They never explain, of course, how something “trivial” could wreak such damage to freedom of speech, but they have a deeper inability to understand what the Flag Protection Amendment really represents.

The Flag Protection Amendment would not trivialize the Constitution. It would ennoble it further by providing a reaffirmation of the values of the framers Henry Hyde championed in his speech. The Flag Protection Amendment is a restatement of the most important rule of law in a constitutional republic — that there can be no liberty at all without some restraint; that liberty unchecked degenerates into license and erodes the foundation of all government.

The Flag Protection Amendment is a simple statement of the need for some civility, decorum, and honor in the life of our nation. It will erode no one's freedom, but it will return to the American people their right to protect the unique and cherished symbol of their nationhood.

When Congress passes the amendment and it is ratified by the state legislators, we will have gone some distance toward responding to Henry Hyde's plea to catch the falling flag and to restore the values of our framers.

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