

The Executive Memorandum

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AMENDING THE CONSTITUTION TO ALLOW THE SUPREME COURT TO PROTECT THE AMERICAN FLAG

The American flag — truly — is a unique symbol, embodying in a way that nothing else does the nationhood of the United States.

It is only the flag that is entitled to a salute; only the flag to which men doff their hats and all citizens place their hands across their hearts. It is to the flag — not to the President, the Congress, the Supreme Court, or even the Constitution — that Americans pledge their allegiance. It is the survival of the flag, of its broad stripes and bright stars, that is celebrated in the national anthem. It is the stirring image of the raising of the flag on Iwo Jima that more than anything else has come to depict America's victory in war. It is the flag that flutters over countless graves of American soldiers, the flag that drapes their coffins, the flag that is lowered to half mast when great citizens die, the flag that is affixed to foreign streetposts when the President travels abroad. It is the sight of the flag that makes American hearts beat faster and chills their spines. And it was the striking of the flag from the Embassy in Saigon that signalled unequivocally America's defeat and the burning and mutilating of the flag by foreign protestors that unequivocally demonstrates their hatred of America.

So special is the flag that it deserves special protection. With this, the great majority of Americans and lawmakers agree. But in last week's five-to-four decision in *Texas v. Johnson*, the Supreme Court ruled that such protection is not provided by the Constitution and, in fact, that attempts to protect the flag violate the Constitution's guarantee of free speech. The Court's majority may well be right, particularly in light of how constitutional guarantees have been interpreted and broadened in the past half-century to protect the expression of even extremely unpopular ideas. A strong case indeed can be made that, as written and interpreted, the Constitution now entitles Americans to attack their flag, as tasteless and even dangerous as this may be. The Court's majority, however, does not condone attacking the flag; it argues only that the Constitution permits it.

No Frivolous Exercise. If so, and it seems so, then the Constitution should be changed to recognize the unique symbol that the American flag has become and the unique role that it plays. Changing the Constitution, however, should not be the job of the Court, although too often the Justices have shown scant restraint in this regard. Rather than looking to nine Justices for the awesome and forbidding task of revising the Constitution, this only should be attempted through the solemn and tortuous process specifically provided by the Constitution itself. This is no frivolous exercise, no slippery slope down which a host of democratic guarantees may slide. So difficult is it that, aside from the Bill of Rights which were essentially part of the original Constitution, the charter has been amended only 16 times in two centuries.

“The People Have Spoken.” Each of these amendments has had to vault formidable hurdles, first winning a two-thirds vote in the Senate and House of Representatives and then winning approval of three-quarters of the states. In those rare instances when this has happened, then truly it can be concluded that the American people, through both their federal and state representatives, solemnly have decided that the Constitution warrants amending. If ever it can be said that “the people have spoken,” if ever legitimacy is conveyed to an act of government, it is through the American constitutional amending process.

This process should begin immediately to make the flag a protected symbol of the nation. Lawmakers and constitutional scholars should begin drafting a constitutional amendment that would do so. It could state, for instance, that flag burning or mutilation is specifically not protected by the First Amendment. This would allow Congress and other legislatures to pass laws penalizing such actions against the flag. Yet protection for other forms of speech would not be weakened at all.

Forcing Lawmakers to Take a Stand. The amending process would permit a national debate and referendum on the flag. It would force members of Congress to take a stand and vote on the record – and then explain this vote to their constituents. They may recall that it was Massachusetts Governor Michael Dukakis’s veto of the Pledge of Allegiance that prompted many Americans to question his fitness to become President. The debate then would shift to the states. There legislators probably would find that their vote for or against protecting the flag is an action for which they will be held accountable by their voters.

In the wake of last week’s Supreme Court ruling on the flag, congressmen, other officials, and scores of citizens around the country who called radio talk shows all denounced the Court and proclaimed their support for the flag. The Court is not the culprit. The Constitution needs changing so that the Justices, in future decisions, can decide for the Constitution while deciding for the flag. In voting with the majority, Justice Anthony Kennedy almost explicitly makes this point. In his concurring opinion he writes: “The hard fact is that sometimes we must make decisions we do not like. We make them because...the law and the Constitution, as we see them, compel the result.” Even William Brennan’s majority opinion stresses this. He admits that “the very purpose of a national flag is to serve as a symbol of our country” and he recognizes “the flag’s deservedly cherished place in our community.” But then he explains that “there is, moreover, no indication – either in the text of the Constitution or in our cases interpreting – that a separate juridical category exists for the American flag alone.”

Protection for the National Symbol. This separate juridical category must be created. Swift action on this is possible. By a commanding 97 to 3 vote, the Senate last week pledged “to seek ways to restore sanctions against” desecrating the flag. A constitutional amendment to do so, according to a snap poll conducted for *USA Today*, is backed by 69 percent of Americans. When the Senators and Representatives return to Washington from their July Fourth recess, during which they will be saluting countless American flags, they should get to work on an amendment to protect the national symbol which the Constitution has left unprotected.

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