

Anti-flag-burning amendment to US Constitution fails by a single vote

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The US Senate fell short by the narrowest of margins Wednesday in a vote on whether to adopt the first-ever constitutional amendment to restrict free speech. An amendment backed by the Bush administration to give Congress the power to “ban desecration of the American flag” received 66 votes with 34 against, just missing the two-thirds margin required.

The campaign against flag-burning has long been a political hobby-horse for right-wing and chauvinist elements, going back to the Vietnam War period when antiwar protesters frequently burned flags at demonstrations against US aggression and war crimes in Southeast Asia. Numerous state laws against flag-burning were enacted in that period, but convictions under these laws were appealed on civil liberties grounds. The Supreme Court eventually ruled in 1989 that burning the flag and similar symbolic anti-patriotic acts are protected as free speech under the First Amendment.

The number of flag-burning incidents has since dwindled to almost nothing. The web site of the Citizens Flag Alliance, the well-funded lobby for the flag-burning amendment, lists a mere four cases of flag desecration this year and fifty in the past five years. Nonetheless, Republican congressional leaders have sought to keep the flag amendment alive as a political rallying point for their ultra-right base.

The House of Representatives has passed the flag amendment six times since the Republican Party took control of the lower house in 1994. Three times the amendment did not come to a vote in the Senate, and twice before the Senate rejected it, most recently in 2000, when the amendment fell four votes short. The measure was reintroduced after the Republicans gained five seats in the Senate in the 2004 election.

Since a constitutional amendment requires a two-thirds majority of each house, and then ratification by the state legislatures of 38 states, passage depends on substantial

Democratic Party support. The House vote last year, for instance, was by a margin of 286 to 130, with more than 60 Democrats backing the amendment. All 50 state legislatures, whether Republican-controlled, Democratic-controlled or split between the parties, have adopted pro-amendment resolutions under pressure from right-wing groups and veterans’ lobbies like the American Legion.

This pattern held true in the Senate vote Wednesday, as 14 of the 44 Senate Democrats voted for the amendment, including Minority Leader Harry Reid of Nevada, liberals like Jay Rockefeller of West Virginia, Robert Menendez of New Jersey and Debbie Stabenow of Michigan, and presidential hopeful Evan Bayh of Indiana.

The proposed amendment would add 17 words to the text of the US Constitution: “The Congress shall have power to prohibit the physical desecration of the flag of the United States.” This change would have enormous significance, both constitutionally and politically.

All previous amendments to the US Constitution, with the exception of the ill-fated prohibition of the sale of alcoholic beverages (passed in 1919 and repealed in 1933), have in some way extended the democratic guarantees of the Bill of Rights or established more democratic or egalitarian principles in fundamental US law. Such measures as the abolition of slavery, the extension of the franchise to women and to young people aged 18 to 20, direct election of US senators and the establishment of the income tax were all carried out by means of constitutional amendments enacted under conditions of mass pressure from below.

The right-wing domination of official politics in the United States in recent decades has included a push for the first constitutional amendments that would restrict rather than expand democratic rights: banning abortion, for instance, or gay marriage, or flag-burning. In each case the religious or political prejudices of a section of the ultra-right would be embedded in the document that

establishes the long-term framework of American political life. Successful adoption of the flag-burning amendment would undoubtedly encourage efforts on behalf of the other amendments.

There are also potentially important legal implications. The amendment, by using the term “desecration,” confers a quasi-religious status on the American flag. What a Christian fundamentalist or fanatical chauvinist regards as desecration could go well beyond burning or destroying the flag. Given the top-heavy majorities in both houses for the amendment, a law implementing it would undoubtedly be passed quickly and with the widest possible scope. It is entirely possible that, for example, carrying an American flag upside-down at an antiwar demonstration could be characterized as “desecration,” or the use of the flag in antiwar art and filmmaking. If one recalls the outrage among right-wing pundits over the immigrant rights demonstrations in the spring, it is not farfetched to suppose that even the ordinary display of the flag by non-citizens at such a protest could be criminalized as “desecration.”

Another question that will undoubtedly arise is whether to criminalize the widespread burning of the American flag overseas, in demonstrations against US military interventions. Would a French youth who burned the American flag in front of the US Embassy in Paris be subject to arrest and prosecution if she sets foot on US soil? What about an American student who participated in such a protest and then returned home?

Then there is the political significance of the amendment, despite its narrow defeat at this stage. It provided another demonstration of the utter prostration of the Democratic Party before the most reactionary forces in American life.

It is hard to say which was more revolting in the Senate debate—the patriotic hogwash coming from the Republicans, who overwhelmingly supported the amendment, or the legalistic hairsplitting by the Democrats, whether they supported or opposed it. There were only a handful of speakers in the debate who addressed the fundamental issue of free speech. The vast majority either howled in the chorus of flag-wavers, or argued for the prohibition of flag-burning by legislation rather than constitutional amendment.

Nearly every senator in the debate denounced flag-burning as odious, obscene, hateful or otherwise beyond the pale. Most of these gentlemen and ladies were not so exercised about US torture of prisoners at Abu Ghraib and Guantánamo, or the countless atrocities against innocent

civilians in Iraq and Afghanistan. Children dismembered by 500-pound bombs are “collateral damage,” but a piece of colored cotton set on fire is an outrage.

Senator Dianne Feinstein, Democrat of California and wife of a multimillionaire, supported the amendment, arguing that flag-burning was “conduct, not speech,” and declaring the flag “the symbol of our democracy, our shared values, our commitment to justice, our remembrance to those who have sacrificed to defend these principles.” Feinstein has played a leading role in defending the illegal secret wiretapping and communications monitoring by the Bush administration, police-state practices which she regards as compatible with “our democracy.”

One group of Democrats, led by Minority Whip Richard Durbin of Illinois and Senator Hillary Clinton of New York, the presumptive frontrunner for the Democratic presidential nomination, sought to have it both ways, voting against the constitutional amendment while introducing legislation that would prohibit flag-burning under certain rather loosely defined circumstances (as part of incitement to violence or intimidation), which they claimed would pass Supreme Court review. The Durbin-Clinton measure was tabled by 64-36 just before the vote on the amendment itself.

Also significant was the demagogic claim by Republican senators that a constitutional amendment to prohibit flag-burning would be an assertion of popular sovereignty against unelected judges. Senator John Cornyn of Texas asked, “Who gets the final word—five justices on the Supreme Court or we the people?” One might ask the senator where he was when the Supreme Court, by a similar 5-4 margin, suppressed the counting of votes by the people of Florida and installed George W. Bush in the White House.



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