

Statement of

The Honorable Russ Feingold

United States Senator
Wisconsin
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Contact: Trevor Miller
(202) 224-8657

Statement of U.S. Senator Russ Feingold on S.J. Res. 23
At the Senate Judiciary Subcommittee on the Constitution
Meeting on the Continuity of Government

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Mr. Chairman, I want to commend you for your work on this important issue and also for your decision to bring this constitutional amendment first to this Subcommittee. You and I agreed shortly after you arrived in the Senate and took the gavel that if the Constitution Subcommittee did nothing else, it should be the first stop in the Senate for proposed constitutional amendments. I appreciate the dedication to that principle that you have shown. I think the process is greatly improved by having this Subcommittee address constitutional amendments before they move to the full Committee. We saw that in the consideration of the Victims Rights Amendment, and I think we will see that again on this amendment.

As you know Mr. Chairman, I am very skeptical of amending the Constitution. The Constitution is the founding and governing document of our nation. Any proposed change in that document deserves the most exacting and searching scrutiny.

I have voted in favor of a constitutional amendment only once in my nearly 12 years in the Senate. Back in 1993, my first year in the Senate, Senator Hollings offered a Sense-of-the-Senate resolution urging the Senate to take up a constitutional amendment to permit the Congress to pass legislation to impose spending limits on federal campaigns, thus overruling the Buckley v. Valeo decision. I remember we had a very short period of time to consider the resolution before that vote, and I decided to vote with the Senator from South Carolina on that day. I did so because I believed that other than balancing the federal budget, there was perhaps no more fundamental issue facing our country at that time than the need to reform our campaign finance laws.

To be candid, I immediately realized, even as I was walking back to my office from the Senate chamber, that I had made a mistake. I started rethinking right away whether I really wanted the U.S. Senate to consider amending the First Amendment to the Constitution, even to address the extremely important subject of campaign finance reform. And because there was good and constitutional legislation pending on campaign finance reform at the time, I realized that passing a constitutional amendment would be premature.

Later, I was privileged to join the Senate Judiciary Committee, and then the 104th Congress became a teeming petri dish of proposed amendments to the Constitution. On the Judiciary Committee, I had a good seat to witness firsthand the radical surgery that some wanted to perform on the basic governing document of our country. It started with a balanced budget constitutional amendment, and soon a term limits constitutional amendment, a flag desecration amendment, a school prayer amendment, a super majority tax increase amendment, a victims rights amendment, and on it went. In all, over 100 constitutional amendments were introduced in the 104th Congress. This casual proliferation of amendments has tapered off somewhat, but persists to this day. In this Congress, so far, 69 proposed constitutional amendments have been introduced.

Since I have been in the Senate, I have seen legislator after legislator suggest that every sort of social, economic, and political problem we have in this country can be solved merely with enactment of a constitutional amendment. I firmly believe we must curb the reflexive practice of attempting to cure each and every political and social ill of our nation by tampering with the U.S. Constitution. The Constitution of this country was not a rough draft. We must not treat it as such.

And so, since 1993, I have consistently opposed the Hollings campaign finance amendment and every other constitutional amendment that has been considered in the Judiciary Committee or on the floor.

When considering a constitutional amendment, I ask two fundamental questions. First, can the problem the amendment seeks to address be dealt with through legislation? It is not enough for a constitutional amendment to make possible a wider variety of legislative options. The campaign finance constitutional amendment, for example, would have reversed the Supreme Court's *Buckley v. Valeo* decision to permit Congress to enact spending limits for campaigns. I concluded that the problems with campaign financing in this country can be addressed through legislation that does not run afoul of *Buckley*. Senator McCain and I spent seven years working to pass significant campaign finance reform that would be consistent with the *Buckley* decision. Just last December, the Supreme Court upheld our bill against constitutional attack. A constitutional amendment was not needed to enact significant reform.

The second question is whether the issue to be addressed is so significant in its impact on the structure of our government, the safety, welfare, or freedoms of our citizens, or the survival of our democratic republic, to warrant an amendment. There is no question, for example, that for Congress to outlaw flag desecration, a constitutional amendment is necessary. The Supreme Court has said so in two cases. But I do not believe that the shameful expressions of disdain for the flag by a handful of protesters each year threaten the future of the republic. I do not believe that the threat to our country from flag burning is nearly great enough to warrant changing the First Amendment.

And so we come to the amendment that the Subcommittee is considering today. In the two years and eight months since the attacks of September 11th, we have been repeatedly reminded that there are terrorists working every day to attack our country. The evil we face is very real, and certainly a massive attack on the federal government would achieve many of the terrorists' goals. Indeed many believe that the fourth hijacked airplane on September 11th was headed to the Capitol when the heroic passengers brought it down in a field in Pennsylvania.

Our first duty as legislators is to do whatever is necessary to ensure the security of the American people. But we must also recognize the possibility of future terrorist attacks and plan for them. Discussions about various hypothetical scenarios that could occur in the wake of a catastrophic terrorist attack may seem abstract and far-fetched. But in the terrible event that any of these nightmare scenarios should come true, thousands of lives may depend on the ability of the legislative and executive branches to survive and effectively respond.

Mass vacancies or incapacitations in the House or Senate could seriously obstruct Congress from responding to the crisis created by a catastrophic terrorist attack. So there is no question about the importance of this issue to the future of our country. The question is whether our constitutional structure allows us to prepare for the horrible possibility of a catastrophic terrorist attack. I have concluded that it does not. No legislation that the Constitution now allows us to pass can deal with a situation where a significant percentage of our legislators in the House are dead or incapacitated and the effective functioning of the legislative branch is threatened. Nor does the Constitution permit us to plan for a time when a very large number of Senators are incapacitated, but not killed by, for example, a biological attack. With mass vacancies in either or both bodies, the ability of the Congress to act in an emergency and, just as importantly, to be seen as legitimate in doing so, would be severely compromised.

So, in my view, this is that rare situation when a constitutional amendment is justified. I think that S. Res. 23 takes the right approach by authorizing Congress to pass legislation to plan for such an emergency. Some might wonder, for example, why the amendment doesn't define "incapacitated" or "inability," or why the amendment doesn't specify the process by which states can select replacements for dead or incapacitated members. But I think it is better to leave those questions to be answered in the legislative process. For one thing, the plan can be modified at a later date by a vote of Congress, rather than having to go through the constitutional amendment process again.

Mr. Chairman, I am aware that this amendment is very controversial in the House of Representatives. Many members of that body are reluctant to tamper with "the People's House." I agree that there is something very special about a legislative body in which every member is elected, not appointed. I would never support a constitutional amendment to change that for ordinary vacancies. In fact, while the 17th Amendment to the Constitution allows for the appointment of replacements when Senators die, my own state of Wisconsin requires a special election. I support that approach to ordinary vacancies and I support giving states the option on how to deal with emergencies.

But S.J. Res. 23 deals with an extraordinary situation. It allows for the appointment of House members only if one fourth of the body has been killed or incapacitated. I would expect that legislation to implement this amendment would give states the option of having special elections rather than appointing replacements. But in a case where over 109 or more members of the House are killed in a terrorist attack, I think the legitimacy of the Congress may very well depend on the authorization of temporary replacement Members and Congress needs to be able to consider that question and pass appropriate legislation.

There is a legitimate concern that under the approach of S.J. Res. 23, the implementing legislation could somehow become the vehicle for a partisan effort to take over the Congress. On an issue as sensitive as this, I believe that any implementing legislation must be bipartisan and indeed it ought to be overwhelmingly approved by the Congress. I will therefore propose an amendment today that would require any implementing legislation to be passed by the same two-thirds majority in both Houses that is required to pass the constitutional amendment itself. I hope my colleagues will support this important effort to ensure a bipartisan approach to what will be, when it is passed, unprecedented legislation.

Mr. Chairman, today we face the threat of attacks on a scale that would have been unimaginable not many years ago, and as we know, historical events can sometimes alert us to vulnerabilities or flaws in our constitutional structure. The assassination of President Kennedy led to the adoption of the 25th Amendment. The attacks of September 11th have alerted us to the vulnerability of the legislative branch of government to massive vacancies and should lead to the adoption of a 28th Amendment. So I will vote in favor of S.J. Res. 23 and I urge my colleagues to do the same. Thank you.

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