

Statement of

The Honorable Russ Feingold

United States Senator
Wisconsin
June 2, 2004

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At the Subcommittee on the Constitution, Civil Rights, and Property Rights of the Senate
Judiciary Committee Mark Up on
S.J.Res. 4, Flag Desecration Amendment

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I want first to thank you, Mr. Chairman, for insisting on holding this meeting so that the subcommittee can again fulfill its role of being the first stop for proposed constitutional amendments. It is one thing to be true to our agreement to mark up constitutional amendments first in this subcommittee when there is no particular schedule for future consideration of a constitutional amendment, as was the case with the continuity of government amendment. It is another thing entirely when our agreement conflicts with demands to move the amendment quickly to the floor coming from outside of the subcommittee. So I do appreciate you standing up for this process, which I think we both agree shows respect for the Constitution and recognizes the great significance of proposals to amend it.

I want to also thank you for your cooperation in scheduling this markup at a mutually convenient time.

While we agree on the process, and I sincerely salute you for that, on the substance, Mr. Chairman, it will come as no surprise to you to learn that I strongly oppose S.J. Res. 4. This constitutional amendment would, for the first time, amend the Bill of Rights. Make no mistake, we are talking here today about amending the Constitution of the United States to permit the government to criminalize conduct that, however misguided and wrong, is clearly expressive, and sometimes undertaken as a form of political protest. I cannot support this course.

Let me state one thing very clearly at the outset. Not a single Senator who opposes the proposed constitutional amendment, as I do, supports burning or otherwise showing disrespect to the flag. Not a single one. None of us think it's "OK" to burn the flag. None of us view the flag as "just a piece of cloth." On those rare occasions when some malcontent defiles or burns our flag, I join everyone on this dias, and in this room, and in this country, who condemns that action.

At the same time, whatever the political cost, I will defend the right of Americans to express their views about their government, however hateful or spiteful or disrespectful, without fear of their government putting them in jail for those views. America is not simply a nation of symbols, it is a nation of principles. And the most important principle of all, the principle that has made

this country the beacon of hope and inspiration for oppressed peoples throughout the world, is the right of free expression. This amendment threatens that right, and I must oppose it.

I respectfully disagree with the supporters of the amendment about the effect that this issue has on our children. We can send no better, no stronger, no more meaningful message to our children about the principles and the values of this country than if we oppose efforts to undermine freedom of expression, even expression that we find offensive. When we uphold First Amendment freedoms despite the efforts of misguided and despicable people who want to provoke our wrath, we explain what America is really about. Our country and our people are far too strong to be threatened by those who burn the flag. That is a lesson worth teaching our children.

Amending the First Amendment so we can bring the full wrath of the criminal law and the power of the state down on political dissenters will only encourage more people who want to grandstand their dissent and imagine themselves "martyrs for the cause." We all know what will happen the minute this amendment goes into force - more flag burnings and other despicable acts of disrespect to the flag, not fewer. Will the new law deter these acts? Of course not. Will the amendment make these acts any more despicable than they are today? Certainly not. Will it make us love the flag any more than we do today? Absolutely not.

It was just under four years ago, in 2000, another presidential election year, that the Senate rejected this constitutional amendment. I think it is fair to say that patriotism has survived, and even flourished, without this amendment, and in very difficult times.

Indeed, Mr. Chairman, I think that outward displays of patriotism are on the rise since we last considered this amendment. We all know why that is. Our country was attacked on September 11th. And America responded. We didn't need a constitutional amendment to teach Americans how to love their country. They showed us how to do it by hurling themselves into burning buildings to save their fellow citizens who were in danger, by standing in line for hours to give blood, by driving hundreds of miles to search through the rubble for survivors and help in cleanup efforts, by praying in their houses of worship for the victims of the attacks and their families.

September 11th inspired our citizens to perform some of the most selfless acts of bravery and patriotism we have seen in our entire history. No constitutional amendment could ever match those acts as a demonstration of patriotism, or create them in the future.

Mr. Chairman, I know that many veterans fervently support this amendment. I respect their opinions and their right to urge the Congress to pass it. But I also want the record to be clear that many of those who have served our country in battle oppose the amendment as well.

One of those veterans, Professor Gary May of the University of Southern Indiana, testified at our hearing on March 10, 2004. Professor May, whose father, father in law, grandfather, and brother all also served our country in the armed forces, lost both legs in the Vietnam War on April 12, 1968, just over 36 years ago. He opposes this amendment, and because of what he has sacrificed for his country, he spoke more eloquently than I could ever hope to about the danger of this amendment. Prof. May testified as follows:

"Freedom is what makes the United States of America strong and great, and freedom, including the right to dissent, is what has kept our democracy going for more than 200 years. And it is freedom that will continue to keep it strong for my children and the children of all the people like my father, late father in law, grandfather, brother, me, and others like us who served honorably and proudly for freedom.

The pride and honor we feel is not in the flag per se. It is in the principles for which it stands and the people who have defended them. My pride and admiration is in our country, its people and its fundamental principles. I am grateful for the many heroes of our country - and especially those in my family. All the sacrifices of those who went before me would be for naught, if an amendment were added to the Constitution that cut back on our First Amendment rights for the first time in the history of our great nation."

Prof. May also provided in his statement excerpts from letters he has received from other veterans who oppose the amendment. One veteran, Bob Cordes of Mason, Texas served in the Air Force for 22 years from 1956 to 1978. A fighter pilot, he was shot down in Vietnam and after a year of hospitalization he served a second tour of combat duty in Thailand. Mr. Cordes wrote:

"I know you hear from many veterans who support this amendment, but you should also know that there are many veterans that have faithfully served our nation who strongly believe that amending the Constitution to ban flag desecration is the antithesis of what they fought to preserve."

James Lubbock of St. Louis, Missouri, who served in World War II and who has two sons who served in the Vietnam War, put it very simply: "Let's not alter the Bill of Rights to save the flag. We should respect the flag, but we should all cherish the Bill of Rights much, much more."

Mr. Chairman, I have no illusions about what will happen here. We will report this amendment to the full committee, and in the full committee the supporters obviously have the votes to report it to the floor. But I sincerely hope that in the debate on the floor we will remember what this debate is really about -- not whether flag burning is a good idea, not whether we love and respect our flag, but whether the threat to our country from those who would burn the flag is so great that we must sacrifice the power and majesty of the First Amendment to the Constitution in order to prosecute them.

In 1999, the late Senator John Chafee, one of this country's greatest war heroes at Gaudalcanal and in the Korean War, testified against this amendment. He said: "[W]e cannot mandate respect and pride in the flag. In fact, taking steps to require citizens to respect the flag, sullies its significance and symbolism." Senator Chafee's words still bring to us a brisk, cool wind of caution. What kind of symbol of freedom and liberty will our flag be if it has to be protected from protesters by a constitutional amendment? Mr. Chairman, I will proudly defend our Constitution against this ill-advised effort to amend it. Thank you.