

Statement of

# **The Honorable Russ Feingold**

United States Senator  
Wisconsin  
July 20, 2004

Mr. Chairman, first I want to thank you for holding this meeting to mark up the flag amendment. That may surprise you given my opposition to the amendment. But I thank you because in this case you have shown respect for the role of this Committee in reviewing and analyzing proposed constitutional amendments. You also have generally permitted the Subcommittee on the Constitution, chaired by my friend from Texas, Sen. Cornyn, to be the first stop for constitutional amendments and we have so far taken up three in this Congress - the victims rights amendment, the continuity of government amendment, and most recently, this flag amendment.

As a general matter, the committee process serves the Senate well by allowing proposed legislation to be carefully studied and developed before the Senate considers it on the floor. But I commend you Mr. Chairman for recognizing in this case its special value when it comes to amending the basic governing document of our country.

Of course, I am very troubled that the Senate leadership decided to take the Federal Marriage Amendment to the floor without first having the Judiciary Committee consider it. Committee review of proposed constitutional amendments is absolutely essential. The Committee should not be bypassed for reasons of politics. I think we have now seen what a terrible mistake it was to bypass the committee process. So I hope we learned a lesson last week that won't be repeated. And I am pleased we are having a markup in the Judiciary Committee on the flag amendment.

Mr. Chairman, turning to the constitutional amendment before us today, this amendment would, for the first time, amend the Bill of Rights. Make no mistake, we are talking here today about modifying 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 at this table, 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 they may be, 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 is undeniably 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, Mr. Chairman, is a lesson we should proudly teach 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 about 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 know why that is. Our country was attacked on September 11, 2001. 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 to 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 deeply 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. He said, "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 know what the result here today will be. Supporters have the votes to report this amendment to the floor. Thankfully, they do not have the votes to pass it on the floor. So this is a political exercise in an election year. We all understand that. Nonetheless, 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 Guadalcanal and in the Korean War, testified in this Committee 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 echo in my mind. They should serve as a caution to all of us who have the responsibility to vote on this amendment. 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. I urge my colleagues to vote for liberty, and freedom, and the First Amendment by voting "No" on this constitutional amendment. Thank you.