

Statement of
The Honorable Russ Feingold

United States Senator
Wisconsin
August 2, 2006

Statement of U.S. Senator Russ Feingold
At the Senate Judiciary Subcommittee Hearing
"Paying Your Own Way: Creating a Fair Standard for Attorney's Fee Awards in Establishment
Clause Cases"

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Thank you Mr. Chairman. I want to join you in welcoming our witnesses, and I thank you and your staff for working with us to have this hearing on the remedies available in cases involving challenges to government action under the Establishment Clause of the First Amendment to the Constitution.

Mr. Chairman, the desire for freedom of religious expression was a very important motivation for both the establishment of the American colonies and the founding of this country. The Constitution contains two important guarantees of religious freedom in the First Amendment. Americans have the right to freely exercise their religion, and Americans of any faith, or no faith at all, have the right to be free from government establishment of religion in their lives. The Establishment Clause and the Free Exercise Clause have created some tension and uncertainty throughout our history, but together, they have allowed freedom of religion, and religion itself, to thrive in this country for over 200 years.

So, Mr. Chairman, when I see proposed legislation that could stifle claims challenging violations of religious freedom, I am wary. I certainly have reservations about the bill you introduced last month, S. 3696, which would prohibit federal courts from awarding damages and reasonable attorney's fees and costs to parties who prevail in Establishment Clause cases. For that reason, I find the title of today's hearing, "Paying Your Own Way: Creating a Fair Standard for Attorney Fees Awards in Establishment Clause Cases," to be a bit misleading. It is hard to see what is fair about a standard that singles out one of the Constitution's twin guarantees of religious freedom to be less worthy of protection than the other, or than any other constitutional right.

Congress made the judgment right after the Civil War that citizens should be able to defend their constitutional rights by bringing actions against state and local governments. And 30 years ago, Congress recognized that being able to obtain reasonable attorneys' fees was a crucial component of the right to obtain redress when the government violates constitutional guarantees. By barring the award of attorney's fees to prevailing parties in certain cases, this legislation will discourage people from asserting their rights. And note that this has nothing to do with deterring frivolous claims, since Rule 11 sanctions already exist for that purpose. Instead, the bill seems intended to

deter even valid claims. Remember also that fees under the Equal Access to Justice Act are available only in cases where the government's position was not substantially justified. This bill would deny fees even in the narrow category of cases where fees are permitted under that statute.

The only reason I can see for this approach is hostility to decisions that the courts have reached in some religious freedom cases. I understand that some people are upset with how the courts have enforced the Establishment Clause. But we have a system of law in this country that has stood the test of time. The courts are the final arbiter of the meaning of the Constitution, and their decisions can be overturned only by appeal, or, ultimately, by amending the Constitution. In my view, depriving people of the lawyers they need to assert their rights, like trying to deprive the courts of jurisdiction over certain constitutional claims, is the wrong way to go about trying to change the law. And it sets a dangerous precedent as well. What will be the next constitutional right to be relegated to second class status?

Mr. Chairman, I was struck by something that Peter Keisler, the President's latest nominee to the D.C. Circuit, said in his opening remarks at yesterday's nomination hearing in the full committee. He was talking about the great honor it is to be a judge in our legal system. He said that in our system, "[a]nybody can file a case, make an argument, be heard by a decisionmaker." And he noted with pride that in this country, "people are entitled to their day in court." I agree with those sentiments, but I would note they are given meaning by laws like 42 U.S.C. section 1988 and the Equal Access to Justice Act, which help assure that people with valid constitutional claims will get their day in court, even if they can't afford a lawyer.

Again, Mr. Chairman, I believe that both of the religion clauses of the First Amendment are critical in protecting religious freedom and allowing Americans to practice, express, and thrive in whatever religion they choose. Unfortunately, S. 3696, like the bill in the House, would put a finger on the scales of justice. I cannot support that.

Thank you, Mr. Chairman. I look forward to hearing from our witnesses.