ADDRESS

UPHOLDING AN OATH TO THE CONSTITUTION: A LEGISLATOR'S RESPONSIBILITIES

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Dean Davis, thank you for that kind introduction, and for your outstanding leadership of the Law School. It is an honor to speak as part of this distinguished lecture series, named for a son of Wisconsin who has brought honor to our state with his lifetime of service, both through his work to revitalize the state's Democratic Party, and his service on the Wisconsin Supreme Court and the U.S. Court of Appeals for the Seventh Circuit. Judge Fairchild, it is a great pleasure for me to he here today.

We all know the brilliant legal mind and exceptional character of Judge Fairchild. But he was also an extremely special person in our family, and a great friend of my father's. As is the case with anyone who has known me for more than forty years, he calls me Rusty. Whenever my father, Leon Feingold, or my mother, Sylvia Feingold, referred to Judge Fairchild, it was always with reverence. Some of the biggest decisions of his career were made in our living room. Perhaps these decisions were made in other living rooms as well, but I have always been deeply proud of that.

In keeping with the tradition of this lecture series, I want to examine matters of law, but also the personal struggles behind the making of law. When I was sworn in as a U.S. Senator, I took an oath to uphold the Constitution, but I could never have imagined how that oath would challenge me, how it would bring me into conflict with those I admired, and how it would make my actions a source of controversy. For me, the oath has intersected with lawmaking, and with politics, in unexpected ways, and it is those intersections that I want to talk about today.

By way of introduction, I first want to recall my other oath to the Constitution. I am among a small group of senators in the history of

our country to take a separate oath, amid one of the rarest spectacles a senator can witness—an impeachment trial. At the trial of President Clinton, I swore to "do impartial justice according to the Constitution and laws, so help [me] God."[1] The trial may have been framed by politics, it may even have been inspired by politics, but those who sat in judgment of the President were bound by the law and the Constitution. That oath guided me throughout the impeachment trial, and made me mindful of the duty we bore to the American people, to the Constitution, and to history, as we performed our constitutional duty from January 7 to February 12, 1999.[2] That impeachment oath raised the stakes, demanding more from us than mere partisanship, and I took that very seriously. In a very real sense, it was the oath that led me to be the only Democrat to vote against dismissing the case before we had heard all the evidence,[3] and it was the oath that guided me when I voted to acquit the President on both articles of impeachment.[4]

In the impeachment trial, the Senate acted as both judge and jury, but when faced with a motion to dismiss the charges, I felt we were asked to apply certain legal standards as would a judge. A motion to dismiss, in my mind, had a legal connotation that could not be ignored. When I voted against dismissal midway through the trial, I did so because I simply could not rule, without hearing all the testimony and all the arguments, that the House impeachment managers had no chance of prevailing in the case.[5]

After that vote, I was deluged with phone calls, both from some very angry Democrats who felt betrayed, and from some very surprised and happy Republicans who thought—for once—that I had done the right thing. Many on both sides misunderstood my motives and what the vote meant for my ultimate decision in the case, and they pulled no

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1. 145 CONG. REC. S41 (daily ed. Jan. 7, 1999). For a list of and links to Senate publications related to the impeachment, including references to the applicable *Congressional Record* for the entire trial, see United States Congress, Miscellaneous Publications Related to Impeachment of President William Jefferson Clinton, http://www.access.gpo.gov/congress/senate/miscspub.html (last visited Feb. 10, 2006).

2. *See* 145 CONG. REC. S41 (daily ed. Jan. 7, 1999) (Senate proceedings, day one, administration of oath); 145 CONG. REC. S1458-59 (daily ed. Feb. 12, 1999) (day twenty-one of trial, Senate votes pronouncing President Clinton not guilty).

3. *See* 145 CONG. REC. S1017 (daily ed. Jan. 27, 1999) (recording Senator Feingold's vote against the motion to dismiss); *see also* 145 CONG. REC. S1722 (daily ed. Feb. 22, 1999) (statement of Sen. Feingold).

4. *See* 145 CONG. REC. S1458-59 (daily ed. Feb. 12, 1999) (recording Sen. Feingold's votes of not guilty); *see also* 145 CONG. REC. S1718-1723 (daily ed. Feb. 22, 1999) (statement of Sen. Feingold).

5. *See* 145 CONG. REC. S1722 (daily ed. Feb. 22, 1999) (statement of Sen. Feingold, explaining why he did not vote to dismiss).

punches in letting me know how they felt. I have often thought that the very worst job in Washington, D.C. or Wisconsin was answering the phones in my office after I cast that vote.

It was a vote where I tried to move beyond partisanship, just as I did in working with Senator Susan Collins, Republican of Maine, to frame the only bipartisan questions that were asked in the entire trial,[6] but, for a few days anyway, that vote put me squarely in the middle of one of the most partisan battles in decades. It was a totally unexpected moment, a result of an oath to the Constitution I never expected to take, a vote I never expected to cast, and a response I never expected to get. But that is exactly my point—an oath binds us in unexpected ways. My oath of office as a senator, which I have taken three times, reads as follows:

> I, [Russ Feingold], do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.[7]

In 1789, the first Congress had a much more straightforward oath of only fourteen words. It read, simply: "I do solemnly swear that I will support the Constitution of the United States."[8]

But just as the Civil War transformed the United States of America forever, the shifting loyalties of members of Congress during that conflict transformed the oath. It was expanded to include what was known as the "Ironclad Test Oath" where members had to swear or affirm that they had never previously engaged in criminal or disloyal conduct.[9] While this section was eventually removed after the War, to this day senators still formally "subscribe" to the oath by signing a printed copy, a practice that was also put in place while the Civil War was underway.[10]

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6. For an example of such a question, see 145 CONG. REC. S944 (daily ed. Jan. 23, 1999) (question from Senator Collins and Senator Feingold regarding evidence of obstruction of justice).

7. 5 U.S.C. § 3331 (2000) (providing the oath of office).

8. United States Senate, Oath of Office, http://www.senate.gov/artandhistory/history/common/briefing/Oath_Office.htm (last visited Feb. 10, 2006).

9. *Id.*

10. *Id.*

I think the ritual of the oath itself is deeply compelling, and that the changes it has gone through serve to remind us of its significance in our nation's history. Even in the midst of great national crisis, Americans have still believed that such an oath mattered—that to break the oath was to break faith not only with God, but with the nation. The version of the oath we use today is a beautiful affirmation of loyalty to country, and, above all, to the Constitution, and to the rule of law. I have always felt great pride in taking the oath of office, both as a lawyer and a lifetime student of the law. But like the Constitution itself, the oath is not static. It creates constant challenges, and it makes constant demands.

The oath has affected some of the most intense moments I have experienced since I have been in the Senate. When I worked to pass the McCain-Feingold bill,[11] I sought to achieve a legislative goal without running afoul of my oath to the Constitution. When I worked to fix parts of the USA PATRIOT Act[12] ("PATRIOT Act") that I thought could lead to violations of civil liberties, and ultimately voted against the bill, I believed I was upholding my oath to defend the Constitution against a bill that threatened our freedoms. And as I have worked to stop ill-conceived constitutional amendments in the Senate's Subcommittee on the Constitution, I have sought to uphold my oath by protecting the time-honored integrity and structure of the Bill of Rights and the Constitution. In each case, my oath to the Constitution has cast me in a different role, not always one that was easy, but always one that I accept willingly and with some reverence. Which brings me to campaign finance reform.

I. CAMPAIGN FINANCE REFORM

Campaign finance reform is an issue I have been passionate about for many years. By the time I got to the U.S. Senate, I was tired of hearing that it was money—not ideas—that mattered when you ran for office. I was tired of citizens of average means being drowned out of public policy debates while wealthy donors were being catered to by both parties. Most of all, I was tired of seeing how commonplace it was for people to see their own government as corrupt. A situation

11. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (to be codified at 2 U.S.C. § 431 (2006)).

12. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (to be codified in scattered sections of the U.S.C. (2006)).

where the public is constantly questioning whether contributions are influencing decisions in Congress is untenable. As Justice David Souter more eloquently put this point in *Nixon v. Shrink Missouri Government PAC*, "Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance."[13] To me, it was that appearance of corruption that was so urgent for the Congress to address. So when Senator John McCain contacted me in 1995 to draft a bill on campaign finance reform together, I jumped at the chance.

The success of our legislation, and the progress of this issue, has been one of the great thrills of my life. Certainly working so closely with Senator McCain, a true American hero, has enriched my Senate experience beyond anything 1 could have dreamed when I was elected in 1992. But it has also brought me into conflict with those who say that our bill violates our First Amendment freedoms—freedoms I have sought to protect throughout my life in public service.

Flash forward seven years from my first discussion with Senator McCain. I am being deposed by famed First Amendment lawyer Floyd Abrams, who is telling me that my bill violates the First Amendment. Now, I also want to point out that he complimented me in that deposition, saying that he did not know of another Senator who more consistently supported the First Amendment, but, let's face it, he was just softening me up for the deposition. His questions about the constitutionality of the bill were a direct challenge to me, and to the oath I had sworn to uphold. Needless to say, I paid attention, not only because I had sworn an oath to be deposed, but because my reputation as a defender of the Constitution matters to me.

At every stage of the McCain-Feingold fight, from the first introduction in 1995, to the enactment of the bill in 2002, to the battle in the federal courts ending with the U.S. Supreme Court's decision in *McConnell v. FEC*[14] on December 10, 2003, and even to this day, we have been accused of attacking free speech in the name of our cause. In fact, we spent a great deal of time in crafting the bill to ensure that we would not violate the First Amendment, and I'll have more to say about that. But first, I have to confess that I did cast one vote for campaign finance reform that I regret, and that in retrospect, I believe was a vote against the First Amendment.

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13. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 390 (2000).
14. 540 U.S. 93 (2003).

It was in 1993, and granted it was a vote that came up quickly and was not a very serious effort. But nonetheless, I cast a vote for a Sense of the Senate resolution, introduced by Senator Fritz Hollings of South Carolina, urging the body to take up a constitutional amendment that would allow the Congress to impose spending limits in federal campaigns.[15] The *Buckley v. Valeo*[16] decision struck down the attempt to limit spending in the post-Watergate reforms, and Senator Hollings' constitutional amendment would have overruled *Buckley*.

Almost immediately after I cast that vote, I regretted it. On the walk back to my office, I started rethinking whether I really wanted the Senate to consider amending the First Amendment, and whether I even wanted the Senate to address the extremely important subject of campaign finance reform. And because there was good and constitutional campaign finance reform legislation pending at the time—a bill that preceded McCain-Feingold—I realized that passing a constitutional amendment would be a mistake. The threshold for amending the Constitution must be a good deal higher than that, and as someone who has spent a lot of time fending off bad constitutional amendments, I know whereof I speak. Suffice it to say, I learned my lesson.

From that moment, I rededicated myself to ensuring that any reform legislation I authored or supported could meet every constitutional test that it faced. I want to emphasize here that I never viewed the Constitution as an obstacle to reform. It was, however, an appropriate restraining force that dictated what the McCain-Feingold bill did, and the way it sought to do it. From day one, we worked with constitutional scholars and legal experts to take constitutional concerns into account as we addressed the explosion in soft money contributions, and the phony issue ads that were commonplace in federal elections. We enlisted 126 legal scholars to sign a letter affirming the constitutionality of the soft money ban. Senator Mitch McConnell, our main antagonist, dismissed our letter saying that he could find 126 legal scholars to claim the opposite. But he never did. Indeed, as the debate progressed over the years, opponents of what we were doing pretty much stopped arguing that banning soft money would violate the First Amendment.

To stop phony issue ads without inappropriately curtailing speech, we created a bright-line test: the only communications affected by the

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15. United States Senate, U.S. Senate Roll Call Votes 103rd Congress 1st Session, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=103&session=1&vote=00129 (last visited Feb. 26, 2006).

16. 424 U.S. 1 (1976).

statute would be radio and TV ads that include the name or likeness of a candidate and that appear within thirty days of a primary or sixty days of a general election.[17] By doing that we believed we could convince the courts that the statute was neither vague nor overbroad. And empirical studies of advertising during the elections that occurred over the seven years of debate on our bill confirmed our view.[18] In 2001, when the bill was about to pass the Senate for the first time, we knew it was time to finish amassing the record we had been building for years—the record supporting our case that the soft money system had stained the Congress with the appearance of corruption.

With the inevitable court challenge foremost in our minds, we filled the congressional record with material making clear our legislative intent, and painting a clear, even overwhelming and deeply disturbing, picture of how the soft money system was tainting the work of Congress and public perception of its elected leaders.[19] We also added a section to the bill providing for expedited judicial review of any constitutional challenge, and making sure that members of Congress could intervene as parties in any challenge, so we could defend our work.[20]

The following year, both the House and Senate passed the bill, and the President signed it into law. And then came the part that was, in some ways, the most nerve wracking of all—the journey through the courts. For better or for worse, it was out of our hands. After seven years of a drawn out legislative fight, we would finally see whether we had crafted a bill and built a record that would stand up to the scrutiny of the federal judiciary. We faced what Senator McConnell described as a legal Dream Team—Ken Starr, Floyd Abrams, and Professor Kathleen Sullivan. The confidence, even arrogance, of those who

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17. *See* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 201(a), 116 Stat. 89 (2002).

18. The studies showed that the vast majority of ads that mention candidates are run during the pre-election periods. The studies also showed that the vast majority of ads run by candidates themselves do not use the so-called "magic words" of express advocacy. These studies were conducted by Ken Goldstein of the University of Wisconsin and supported by the Brennan Center for Justice. *See* Statement of Brennan Center President Joshua Rosenkranz on the Legal Defense of New Campaign Reform Law, http://www.brennancenter.org/programs/bcra/mccain_jr_statement.html (last visited Mar. 5, 2006).

19. *See, e.g.*, 148 CONG. REC. S2096-20161 (daily ed. Mar. 20, 2002) (debate of the Bipartisan Campaign Reform Act of 2002).

20. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403(a)-(b), 116 Stat. 114 (2002).

challenged the law was apparent from their race to the courthouse to file suit against the law on the very day that President Bush signed it.[21]

You might be interested to know that the NRA actually won that race. Senator McConnell had to file a motion before the special three-judge panel pleading to be considered the first-named plaintiff in the case.[22] The NRA acceded to his request, and so we now have the delicious irony that the landmark Supreme Court ruling upholding the bill he fought so long and hard against will forever be referred to as "the *McConnell* decision."[23]

We had a pretty dreamy legal team as well, headed by Seth Waxman of the WilmerHale law firm, the former solicitor general, and of course, we had the Department of Justice defending the law. I also want to say a special word of thanks to some critical members of that team from Wisconsin: David Harth, Chuck Curtis, and the firm of Heller Ehrman. We had a great team, and we felt we had done all we could to buttress the law's constitutionality.

But we were never cocky, especially after the oral argument where it became pretty clear that there were four solid votes to uphold most of the law, but the fifth vote was uncertain. We discussed and prepared for a variety of scenarios and put them in five categories ranging from category one, total victory, to category five, total defeat. I think I would have been satisfied with anything in the middle. But in the end, we got category one—all of the central components of the bill were upheld in their entirety. I was particularly gratified that the Court recognized the care we had taken in drafting the bill, and the overwhelming record we developed to support it. The Court stated:

> Just as troubling to a functioning democracy as classic *quid pro quo* corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large

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21. President George W. Bush signed the Bipartisan Campaign Reform Act into law on March 27, 2002. Press Release, President George W. Bush, President Signs Campaign Finance Reform Act (Mar. 27, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/03/print/20020327.html. Senator McConnell and the National Rifle Association filed suit separately on the same day. Complaint at 24, McConnell v. FEC, 251 F. Supp. 2d 176 (D.D.C. 2003) (No. 02-582), *aff'd in part, rev'd in part*, 540 U.S. 93 (2003). Complaint at 23, Nat'l Rifle Ass'n v. FEC, No. 02-0581 (D.D.C. Mar. 27, 2002), http://www.law.stanford.edu/library/campaignfinance/nra-complaint-32702.pdf.

22. McConnell v. FEC, No. 02-582 (D.D.C. Apr. 24, 2002) (order consolidating cases around *McConnell v. FEC*).

23. McConnell v. FEC, 540 U.S. 93 (2003).

> financial contributions valued by the officeholder . . . . [U]nlike straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize. The best means of prevention is to identify and to remove the temptation. The evidence set forth above, which is but a sampling of the reams of disquieting evidence contained in the record, convincingly demonstrates that soft-money contributions to political parties carry with them just such temptation.[24]

With these words, and many others like them in the opinion, I was truly overjoyed. But for someone who has been a lifelong advocate for, and defender of, the First Amendment, the whole experience was a little jarring. When we were attacked by our critics, and accused of violating the First Amendment, I found myself having to defend not only my position, but, I felt, my faithfulness to my oath to the Constitution.

As a legislator, I felt a duty to address corruption, and to uphold my oath. I felt that I could do both, but others questioned it, and frankly still do. That is a fact, but it does not undermine what the law has accomplished, or prevent me from believing that we, as reformers, did what we needed to do while still showing respect for the Constitution.

II. THE PATRIOT ACT

Before the saga of campaign finance reform and the Constitution had ended, and before our bill had become law, another important encounter with the oath began. After the horror of September 11th, I found myself, like the rest of the nation, coping with that terrible tragedy. Emotions ran high everywhere, including in Congress, where members quite understandably felt an urgent need to take action, to strike back against those who would so brutally attack our country and to do everything possible to prevent future attacks.

I could not have imagined, in my worst nightmare, the attacks themselves, much less how they would test the American people. Those events tested every American—tested their faith, their fears, and the limits of their grief. In the weeks after the attacks, I was given a test as the Congress rushed through legislation to respond to concerns about our security without doing enough to protect our civil liberties.

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24. *Id.* at 153.

Here again, my oath seemed to present an obligation—to defend the Constitution against those who, I believed, were sacrificing our liberties in the PATRIOT Act.[25]

While the Bush Administration sent up a bill just a week after the attacks, and Attorney General Ashcroft called on Congress to pass it by the weekend, my party controlled the Senate at the time, and insisted, at least at first, on a relatively open process for crafting legislation. As chairman of the Senate Subcommittee on the Constitution, I held a hearing on October 3rd called "Protecting Constitutional Freedoms in the Face of Terrorism."[26] But the process quickly deteriorated into a closed door negotiation between the Administration and congressional leaders, with only a handful of members in a position to influence the direction of the legislation.

Looking for some way to address the civil liberties concerns that I had about the bill before it came to the floor, I called Attorney General Ashcroft. I had known John Ashcroft for many years, and was able to go over my concerns with him in a phone conversation. He agreed that many of my concerns were reasonable, and told me he would seek to make some changes because he wanted me to be able to support the bill. But, as we later learned, it was the White House that blocked any changes, including Attorney General Ashcroft's. That action set the tone for a process that questioned the patriotism of anyone who challenged any part of the bill.

In the end, the White House and the congressional leadership drafted the bill on their own. Senator Leahy, then chair of the Senate Judiciary Committee, tried valiantly to soften some of the most extreme proposals that the Administration made, but he was outmatched in the negotiations. The bill was presented to the Senate, in its entirety, as a non-negotiable document.

This was legislation on the fly, unlike anything I had ever seen in my career, and I hope, unlike anything we will see in the future. Not only was the process disturbing, it was all happening incredibly fast. Many members have since admitted that they never read the PATRIOT Act, and that is in large part because there was so little time to do so. Then, all of a sudden, the leadership in the Senate wanted to bring the

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25. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (to be codified in scattered sections of the U.S.C. (2006)).

26. *Protecting Constitutional Freedoms in the Face of Terrorism: Hearing Before the Subcomm. on the Constitution, Federalism, and Property Rights of the S. Comm. on the Judiciary*, 107th Cong. (2001).

bill up with an agreement to have just a few hours of debate and a final vote, no amendments.

To pass this bill without even considering amendments, when the bill had not gone through the Senate Judiciary Committee but instead had emerged fully formed from closed-door negotiations, seemed to me to be tantamount to abandoning any semblance of a real legislative process. Just as troubling, there would be no opportunity to call public attention to the serious constitutional problems with the bill. I felt I had no choice. The only power I had left to uphold my oath was the power given to every senator: the power to object. And so I objected to the unanimous consent request to vote on the bill without any amendments.

With that objection, I found myself at odds with many colleagues whom I admired. It also brought about one of the most difficult exchanges I have ever had with a colleague. When I spoke to Senator Tom Daschle, then the Majority Leader, we had a heated argument at the back of the Senate floor because I refused to let the bill go forward until I at least had a chance to offer a few of what I considered to be extremely reasonable amendments. Looking back on it now, I can think of no better example of the suffocating atmosphere in the Senate during that debate than those angry moments with someone whom I consider a valued colleague.

In the end, the leadership agreed to let me offer my amendments, late on the night of October 11th. I set out my position on my first amendment, and debated it with Senator Hatch. Senator Specter spoke up in support of my position. We had a good substantive debate about the intent and meaning of the so-called "computer trespass" provision of the bill.[27] We were about to yield back the time and vote when Senator Daschle sought recognition. He made the argument that, by this time, I had already heard several times—that if we did open the bill to amendment it would get worse from a civil liberties point of view. This, mind you, was after the Senate had already limited the amendments that could be offered to those that I presented.

As Senator Daschle said, "my argument is not substantive, it is procedural."[28] He went on to say, "I hope my colleagues will join me tonight in tabling this amendment and tabling every other amendment that is offered, should he choose to offer them tonight."[29] My colleagues were not only being told to vote against my amendments,

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27. PATRIOT Act § 217.

28. 147 CONG. REC. S10574 (daily ed. Oct. 11, 2001) (statement of Sen. Daschle).

29. *Id.*

they were told to do so without any substantive reason. The message was, do not vote on the merits, just keep the bill moving, no matter what the cost to our Constitution.

1 am very grateful that not every senator took this blunt advice. Although 1 never got more than thirteen votes in support of an amendment that night, those few who stepped forward to support my efforts—including two Republicans—made a huge difference to me personally in what had become a truly frightening scene on the floor of the Senate.

Although 1 had some support for my amendments, and a few senators voted in favor of all three, it became pretty clear that most, if not all, of them would vote for the bill in the end. When the time caine, 1 went to the well, took a good gulp, and voted no. 1 did not know the impact on my career, and 1 was not thinking much about it at the time. Then, I came home. The weekend after the vote I returned here to Wisconsin, and not without some trepidation. I was holding a listening session in Walworth County on Monday, and others soon after, and I knew that, as always, these sessions would be the best gauge of public opinion I could get.

1 was surprised and gratified to discover that in counties across the political spectrum, my vote against the PATRIOT Act was something that touched a chord. People were genuinely concerned about the civil liberties problems with the bill, and, even in the uncertain weeks after the terrible September 11th attacks, they did not hesitate to stand up in defense of their own liberties, or to tell me to stand my ground.

1 am deeply grateful to the people of this state for the encouragement 1 got at those sessions, and for the support they have given me ever since. In the last campaign, my opponent made a big effort to make an issue of my PATRIOT Act vote.[30] I do not think it played well, particularly because he started doing that before he even read the bill. People in Wisconsin want a senator to take the job seriously and be true to the oath, even if they disagree with their senator.

III. ROLE ON THE CONSTITUTION SUBCOMMITTEE

There is yet another role I have in the Senate where my oath conies into play and where people disagree with me on a regular basis.

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30. Associated Press, *Feingold Wins Third Term in U.S. Senate*, USATODAY.COM, Nov. 11, 2004, http://www.usatoday.com/news/politicselections/vote2004/2004-11-03-wi-ussenate_x.htm.

I have served as either the chairman or the ranking member of the Subcommittee on the Constitution of the Senate Judiciary Committee since 1997. Unfortunately, I have been the ranking member (and not the chairman) for most of the time.

The Subcommittee has dealt with many hot-button constitutional issues, from flag burning, to victims' rights, to gay marriage. In fact, I have served as ranking member with four different chairmen during my time on the Subcommittee, and three of them used it as a platform to pursue their interests in those hot-button issues. First, then-Senator Ashcroft when he was considering a run for President in 2000, later Senator John Cornyn, making a mark in his first term after he was elected in 2002. And Senator Sam Brownback, the new chair of the Subcommittee, has already held hearings on pornography and gay marriage. The only chair of the Subcommittee who did not hold many hearings was Senator Strom Thurmond in his final years.

From the moment I joined the Judiciary Committee, I have had a front row seat to witness the radical surgery that some want to perform on the basic governing document of our country. In the 104th Congress, when the Republicans took over control of Congress after the 1994 elections, it started with a balanced budget constitutional amendment, and soon a term limits constitutional amendment, the flag desecration amendment, a school prayer amendment, a supermajority tax increase amendment, a victims' rights amendment, and so on.

In all, over one-hundred constitutional amendments were introduced in the 104th Congress, when the ranking member of the Subcommittee was the late Senator Paul Simon of Illinois. When Senator Simon retired in 1996, I asked to take his place on the Subcommittee. I sought to be the ranking Democrat on the Subcommittee because I could not think of a better place to fulfill my oath to the Constitution and fend off ill-conceived constitutional amendments. It is a personal goal of mine, a touchstone of my service in the Senate, to not allow this kind of abuse of the Constitution, particularly the Bill of Rights, on my watch.

So far, so good, although there have been a few close calls, including some very close votes where the flag burning amendment nearly passed the Senate. The casual proliferation of constitutional amendments has tapered off somewhat, but persists to this day. So far, forty-three proposed constitutional amendments have been introduced in the 109th Congress. 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 with enactment of a constitutional amendment.

1 firmly believe we must curb the reflexive practice of proposing constitutional amendments at the first sign of trouble. The Constitution of this country was not a rough draft. We must not treat it as such. And so, since my vote on Senator Hollings' campaign finance amendment in 1993, with one exception I will discuss in a moment, I have consistently opposed every constitutional amendment that has been proposed in the Senate.

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 a wider variety of legislative options possible. Senator Hollings' amendment, for example, would have reversed the Supreme Court's *Buckley v. Valeo*[31] decision to permit Congress to enact spending limits for campaigns. But I concluded that the problems with campaign financing in this country could be addressed through legislation that does not run afoul of *Buckley*, and the McCain-Feingold bill did just that. 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.[32] 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.

There has only been one time since 1993 when I thought an amendment met both of these tests, and that was when Senator Cornyn brought his proposal concerning the continuity of government in the event of a terrorist attack before the Constitution Subcommittee. 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 such that the effective functioning of the legislative branch is threatened. Nor does the Constitution permit us to

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31. 424 U.S. 1 (1976).

32. United States v. Eichman, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989).

plan for a time when a very large number of Senators are incapacitated, but not killed by, for example, a biological attack.

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 Twenty-Fifth Amendment.[33] The attacks of September 11th have alerted us to the vulnerability of the legislative branch of government to massive vacancies and, I believe, warrant the adoption of a Twenty-Eighth Amendment. But again, this has been a rarity in my experience in the Senate.

All too often, some Senators see constitutional amendments as a political tool, rather than an extreme step that, if successful, will fundamentally change our constitutional landscape, with implications for the future of this nation that we cannot predict, much less analyze, with any confidence or certainty. Working on the Constitution Subcommittee has given me ample opportunity to make the case against abusing the Bill of Rights, and if anything is certain, it is that I will have an almost limitless opportunity to continue that work.

I have no doubt we will continue to see a steady stream of these proposed constitutional amendments, which often make up with tremendous political momentum what they lack in legal judgment. Protecting the Bill of Rights is an ongoing challenge, just as is reforming our campaign finance system and protecting civil liberties from overreaching legislation such as the PATRIOT Act.

IV. CONCLUSION

None of the issues I have talked about today are static, and neither is the oath I took. As these issues move forward, the oath will continue to offer constant challenges, and make constant demands. The oath has brought me to unexpected places—into controversies I could never have anticipated, and sometimes into conflict with people and organizations with whom I often agree.

I have wondered more than once how trying to uphold my oath could put me across the table from Floyd Abrams at a deposition, alone in the well of the Senate a month after the September 11th terrorist attacks, in the midst of heated debates over some of the most controversial social issues of the last decade, and viewing the videotaped testimony of Monica Lewinsky in a heavily guarded room in

33. U.S. CONST. amend. XXV (regarding succession to the Presidency and Vice Presidency and disability of the President).

the Capitol. What has surprised me the most is how complex it has been to uphold the oath to which 1 am bound, whether I was trying to work within constitutional boundaries, or trying to stop others from going beyond those boundaries. I hope I have generally made the right decisions, but the questions are never easy or clear-cut.

I have struggled constantly to get it right—to adhere to my oath, and go where my best judgment tells me it points. I have no doubt that it will remain a struggle for as long as I serve in the Senate, as long as the difficult issues before us test our fidelity to the document that every Senator pledges to uphold. I think that it is that friction, that struggle, that truly gives the oath its power. The history of the oath reminds us that even in the most difficult times that this country has faced, people still believed that those words mattered; that they bound us to something larger, and made us strive for something better within ourselves. I, too, believe that they did matter, and that they still do.

I am proud to have taken the oath, to be sure. But most of all, I am privileged to have a job that lets me try, each day, to keep it—to endure its tests, feel the pull of its weight, and bear its solemn and historic responsibility. It is that effort that defines not just my work, but the work of the Congress, and the work of the nation. It is that effort to which we are all bound and to which we must all be dedicated, if our nation's greatest document, and our highest ideals, are long to endure.

Thank you.