Testimony of

The Honorable Orrin Hatch

July 18, 2002

Statement of Senator Orrin G. Hatch (R-UT)
Ranking Republican Member
before the United States Senate Committee on the Judiciary
Executive Business Meeting

on the Biden Substitute to S.2395, Anticounterfeiting Amendments of 2002

Mr. Chairman, the substitute amendment offered by the Senator from Delaware and myself and others to S. 2395, the Biden-Hatch Anticounterfeiting Amendments of 2002, contains a number of important provisions and incorporates my amendment from our last meeting that makes the important protections of this legislation technology-neutral. I am pleased that in addition to a number of clarifying improvements in the drafting, the Biden-Hatch substitute offered today helps us look forward to our digital future and not just to our paper-based past.

Increasingly movies, music, and computer programs are distributed without physical packaging, and therefore without physical authentication features. A pirate who would fool the consuming public with false proof of authenticity should be punishable not only for deception done with paper, but equally for deception done digitally. As more and more people purchase computer software, movies, or music in digital form by downloading or otherwise, the more we need to ensure that these consumers will be protected. I do not see a reason why consumers who are downloading computer programs from a web retailer and who rely on electronic authentication features should not be protected in the same way as if they were buying the software in a box. Consumers in both situations rely on the authentication features to ensure that they are getting legitimate product of the quality they expect. Similarly, we should be equally evenhanded and fair to businesses that may be distributing their works in digital or electronic form, and protect them from digital pirates just as we would protect them in the physical world.

I do not believe we should limit our actions to protecting certification stickers on boxes when the future is neither stickers nor boxes but digital files. If it is wrong to deal in false authentication features, it is just as wrong in cyberspace as it is in physical space. The method of distribution should not make a difference here. I know the Senator from Delaware agrees with me on this. I thank him for working with me on a number of improvements embodied in the substitute including my amendment from our last meeting and commend him for his leadership on this issue. The substitute offered today is consistent with this committee's forward thinking on copyright policy in the digital age as well as with the growing practices of American creators and consumers.

I hope that all my colleagues will support this important legislation.

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on the "Leahy-Feinstein-Biden-Specter Substitute Amendment" to S. 486

At the outset, I wanted to thank the Chairman for making some changes to the substitute amendment which were suggested by my distinguished colleagues Senator Sessions and Senator Kyl.

But even with these minor modifications, however, I cannot support the substitute amendment. While we may disagree on the merits of your substitute amendment, there is much on the DNA testing and competency of counsel issues that we do agree on. First, there is no question that we all agree that the death penalty must be imposed fairly and accurately. To that end, we agree on the need to provide post-conviction DNA testing for certain defendants. And we agree on the need to ensure that every defendant is represented by competent counsel as required by the Sixth Amendment of our Constitution and numerous Supreme Court decisions enforcing this requirement.

But we disagree on the means to those common ends.

Yesterday, I introduced the Hatch-DeWine-Domenici bill, S.2739, "The Death Penalty Integrity Act of 2002," which included 12 co-sponsors. The bill provides for post-conviction DNA testing, and will improve the competence and performance of prosecutors, defense counsel and trial judges handling state capital criminal cases. My proposal will accomplish these objectives within our constitutional framework, with proper regard for traditional state functions, and without burdening states with unfunded mandates.

Now, with respect to the substitute amendment pending before this Committee, I want to take a moment and set out my objections to this proposal.

First, as to DNA testing, the substitute amendment:

includes no time limit on the filing of such requests by convicted federal and state defendants;

allows defendants who plead guilty to obtain a DNA test despite the fact that they voluntarily pled guilty before the same court;

limits the government's ability to use and prosecute defendants where the DNA sample matches DNA recovered from the scene of an unsolved crime;

allows federal defendants to obtain DNA testing in federal court relating to prior state convictions used to enhance their federal sentence, even though the federal judge knows nothing about the state case, has no access to the state trial record or the evidence maintained by the state.

Second, the proposal ignores basic principles of federalism and separation of powers.

For example, with respect to DNA testing, the substitute amendment stretches the 14th Amendment and its remedial purposes to impose a DNA testing requirement on the states. This is an unconstitutional extension of the 14th Amendment. The Supreme Court's decision in City of Boerne v. Flores, 117 S.Ct. 2157, and several subsequent cases, made clear that the 14th Amendment can only be used for remedial purposes to respond to an existing problem.

Many states already have enacted post-conviction DNA testing programs - in fact 25 of the 38 states which have capital punishment already have enacted DNA testing programs, and 6 currently have pending legislation to create such programs. Further, several states already provide DNA testing on an informal basis, and even where there is a statutory requirement, testing may be conducted on an informal basis, short of any litigation requirement. In the absence of a true factual basis and need for remedial measures, extending the 14th Amendment into this area is plainly unconstitutional.

Equally troubling to me is the manner in which the proposal seeks to ensure competent counsel for indigent defendants. Again, let me state I am in favor of reasonable measures to improve the performance of defense counsel in state capital cases. If federal funding is needed to ensure competent counsel at the state level, we should provide it. But I cannot support the way funding is made available to states in this proposal.

As currently fashioned, the proposal strips the traditional power of states and state courts to establish a system for appointing counsel to represent indigent defendants. States and state courts have established systems for ensuring competency and appointment of competent counsel. 34 out of the 38 states with capital punishment have established standards or practices to ensure that competent counsel are assigned. This is a province legitimately reserved to the states and the state courts.

The proposal presents the states with a Hobson's choice: either accept federal grants, which diminish over time, establish "independent" agencies (separate from the executive, legislative and judicial branches) responsible for complying with federally-mandated competency and appointment standards, agree to allow private civil suits against state officers responsible for this program, OR grant money will be sent to private capital defender organizations. This Hobson's choice is nothing more than a veiled attempt to resuscitate the private capital litigation resource centers that Congress defunded in the middle 1990s after a series of abuses and irregularities.

Further, the proposal will burden the states in defending civil enforcement suits which will be churned by a cottage industry fueled by private death penalty opposition groups, prisoners and other interested parties. Again, states will have to devote more and more money to defend these suits, leading to settlements and more and more state funds allocated to creating and maintaining the new agency and system for appointment of counsel. More importantly, I question this provision's constitutionality given the sovereign immunity of states under the 11th Amendment and recent Supreme Court cases on the issue.

The proposal also threatens to reduce critical Byrne grant money to state and local law enforcement agencies if Congress fails to appropriate authorized funding levels. While many are concerned about the FBI's need to focus on terrorism and its ability to continue to investigate

local crimes, this is not the time to reduce federal funding to support state and local law enforcement.

I would note that several significant and credible organizations are opposed to all or parts of S. 486, as modified by the substitute amendment. These organizations include: The National Center for State Courts; the Administrative Office of the United States Courts; National District Attorneys Association; International Association of Chiefs of Police; Fraternal Order of Police; Law Enforcement Alliance of America; Justice for All; Justice Against Crimes; and the Office of the District Attorney, 258th Judicial District of Texas.

As a matter of fact, on July 15, 2002, the National District Attorneys Association adopted a resolution at its national conference, and I will read only a portion of it. The resolution states:

"The NDAA joins the Conference of (State Supreme Court) Chief Justices in 'resolving to oppose any attempt by Congress to impose on state courts standards related to the competence of counsel, or the conduct of court proceedings.' Such standards must be adopted by each state taking into account the needs and resources of their communities."

In sum, I respectfully oppose the Leahy substitute amendment, and I urge my colleagues to support the Hatch-DeWine-Domenici bill.

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