Testimony of

The Honorable Patrick Leahy

October 1, 2002

Today's hearing is long overdue. Over the past few years, we have seen an unrelenting assault by the U.S. Supreme Court on the legislative powers of Congress. In a series of five-to-four decisions, the Court's so-called "conservative" wing has radically altered the balance of power between the Congress and the states, greatly restricting our ability to protect the individual rights and liberties of ordinary Americans. These decisions have not been based on the text of the Constitution or on precedent. Instead, the Court appears to have made a policy decision that broad abstract notions of "state sovereignty" are more important than the accountability of state governments to the American people. The Court's imposition of that policy decision over the will of Congress smacks of judicial activism of the most dangerous, anti-democratic kind.

As a member of the bar of the Court, as a U.S. Senator, and as an American, I have the utmost respect for the Court's role in our constitutional system. In matters of constitutional interpretation, the Court's rulings are the supreme law of the land, whether they are decided unanimously or by a single vote. I have defended the Court even when I strongly disagreed with a decision, such as the five-to-four decision in Bush v. Gore. While I felt the Court was wrong, I said that its decision was final and that we all must abide by it.

But as Justice Jackson once said, the Supreme Court is not final because it is infallible. It does make mistakes, as we all do. And we in Congress, who have also taken an oath to uphold the Constitution, should let the Court know when we think it is headed down a dangerous course for our democracy. Our system is one of checks and balances, and just as the Court serves as an important check on the power of the executive and legislative branches, we have a role to play in checking the Court, whether through legislation or, from time to time, when we are called upon to give our advice and consent to high court nominees.

I began expressing my concerns about the Court's new direction in July 1999, shortly after it issued its end-of-term decisions in the Florida Prepaid, College Savings Bank, and Alden cases. In Florida Prepaid and College Savings Bank, the Court ruled that states could no longer be held liable for violating the federal intellectual property laws, even though they can and do enjoy the full protection of those laws for themselves. In Alden, the Court held that states could no longer be held liable for violating the federally-protected right of their employees to get paid for overtime work. In short, the Court held that state institutions were above the law.

The Court's decisions in the Florida Prepaid trilogy have been the subject of bipartisan criticism. Charles Fried, a former Solicitor General during the Reagan Administration, has called these decisions "truly bizarre." Senator Specter has remarked that they "leave us with an absurd and untenable state of affairs," where "States will enjoy an enormous advantage over their private sector competitors." I could not agree more. I also agree with the four dissenting justices that these decisions constitute an egregious example of judicial activism and a misapplication of the

Constitution. In their rush to impose their natural law notions of sovereignty as a barrier to democratic regulation, the activist majority cast aside the text of the Constitution, ripped up precedent, and treated Congress with less respect than that due to an administrative agency.

Senator Brownback and I have introduced a bill, S. 2031, that would repair some of the damage caused by the Florida Prepaid decisions by restoring federal remedies for violations of intellectual property rights by states. The Committee held a hearing on the bill in February, and I had hoped that we could have made more progress before the end of the session.

When I discussed the Florida Prepaid decisions in July 1999, I warned that they could endanger a wide range of other federally-protected rights. That prediction unfortunately came to pass. Since then, the Court's abstract notion of state sovereignty has been accumulating concrete victims at ever-increasing speed.

In July 2000, I went to the floor of the Senate to discuss another crop of five-to-four decisions that further chipped away at congressional authority. In Kimel v. Florida Board of Regents, the Court held that state employees are not protected by the Federal law banning age discrimination, notwithstanding Congress's clearly expressed intent. In United States v. Morrison, the Court invalidated a portion of the Violence Against Women's Act that provided a federal remedy for victims of sexual assault and violence. In both cases, the five-justice majority was unimpressed with the evidence that Congress had amassed demonstrating the need for remedial legislation.

As I noted two years ago, these decisions are troubling, both for what they do to the rights of ordinary Americans, and for what they say about the relationship between Congress and the present majority of the Supreme Court. The legislative judgments we make that are reflected in the laws we pass deserve more respect than the Rehnquist Court has shown. It is troubling when five unelected Justices repeatedly second-guess our collective judgments as to whether discrimination and violence against women and other major social problems are serious enough, or affect commerce in the right sort of way, to merit a legislative response.

The Court continued its state sovereignty crusade the following year in the Garrett case. I spoke about this case on the floor the week after it was issued. The Court held that state employees can no longer enforce their right under the Americans with Disabilities Act not to be discriminated against because of a disability. The plaintiff in Garrett was a nurse at the University of Alabama, who was diagnosed with breast cancer, and was demoted after taking sick leave to undergo surgery and chemotherapy.

I was proud to be part of the overwhelming bipartisan consensus that passed the ADA in 1990. I remember the day that the first President Bush signed the ADA into law. He later took the unusual step of writing an eloquent brief to the Supreme Court in support of the ADA and in support of Patricia Garrett's right to her day in court. Sadly, the Court paid little heed to the view of either democratic branch of our government - the Congress that enacted the ADA or the President who signed it into law.

Now it is up to another Congress, and another President Bush, to seek new ways to protect the rights of disabled Americans and other groups who have been sacrificed on the alter of state sovereignty. I believe that Congress needs to remind the Supreme Court that we are a coequal

branch of government whose policy determinations deserve respect just as the Court demands respect for its legal determinations.

We should always cherish judicial independence, even when we dislike the results, but we also must defend our democratic role as the peoples' elected representatives. When we see bipartisan policies, supported by the vast majority of the American people, being overturned time and again by the unelected members of an increasingly activist Supreme Court majority, it is our right and duty to voice our concerns.

The Rehnquist Court has embarked on a path of sacrificing the legal rights of individuals in favor of what it calls the "dignity" of the states. Yet there is nothing dignified in claims of immunity that seek to avoid accountability for unlawful discrimination and violations of intellectual property and labor rights. As the peoples' representatives, we have a responsibility to protect their rights and keep their government accountable. There is ample dignity in adherence to the rule of law.

I look forward to today's hearing and thank our witnesses for coming.

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