

Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
April 29, 2004

Statement of Senator Patrick Leahy
On the Nomination of William Duane Benton to the United States Court of Appeals for the Eighth Circuit
Executive Business Meeting
April 29, 2004

Today, we are considering the nomination of William Duane Benton to the U.S. Court of Appeals for the Eighth Circuit. Judge Benton currently serves on the Supreme Court of Missouri. He has a reputation as a conservative but fair-minded judge. As an attorney he had experience in a variety of areas of law, and on the State Supreme Court has handled complex criminal and civil cases. He has written a number of opinions, and they are really quite good, laying out the facts and the law with no hint of any personal bias. Judge Benton shows a willingness to listen to all litigants and to be fair.

I was especially struck by his fairness in death penalty cases. Far too often judges, especially elected judges, yield to the pressure of those who would sacrifice important constitutional principles in capital cases. As I look at his record, I see that of the 21 published opinions Judge Benton has written in death penalty cases, he has affirmed 12 and reversed nine. Whether I agree or disagree with his decisions in each of these cases, I do think his record indicates some sense of equity. I think it is telling that he is willing to see beyond what are always terrible facts in these cases to ensure that justice and important constitutional safeguards are preserved.

I hope that my praise for his work in death penalty cases will not hurt Judge Benton's nomination. I remember not so long ago when another judge on the Supreme Court of Missouri, now-Chief Justice Ronnie White, was before this Committee as a nominee to a seat on the federal bench. Sadly, Judge White's willingness to uphold the Constitution and ensure fair process in death penalty cases led to his being defeated by a party line vote of Republican Senators. His record was twisted and distorted for purposes of partisan politics.

Judge White was twice nominated by President Clinton to fill a seat on the U.S. District Court. This Committee held two hearings on his nomination and at both of those hearings, Judge White was introduced enthusiastically by Senator Bond, and after each of these hearings the Committee voted favorably to report his nomination to the full Senate. Despite this bipartisan support, however, his nomination was delayed for months and then years. When the time finally came for a vote on the Senate floor, Judge White was ambushed, and he was rejected in a party line vote during which Republicans who had supported his nomination previously reversed position to scuttle it before the Senate.

The biggest distortions of Judge White's record were in death penalty cases. His record on the whole compares favorably to Judge Benton's. According to testimony at Attorney General Ashcroft's confirmation hearing, Judge White voted to affirm the death penalty in 69 percent of the cases he heard. Looking just at the opinions Judge Benton has authored, we see him writing to affirm the death penalty 58 percent of the time. If we factor in cases in which he did not write the opinion but voted to affirm a capital sentence, I am sure the percentage is higher, and approaches Judge White's record.

For opposing a capital sentence in dissent in a small minority of the cases he heard, Judge White was vilified. Then-Senator Ashcroft took to the Senate floor and pointed to Judge White's record in death penalty cases as evidence that White was *pro-criminal*,[@] further describing Ronnie White as a judge, "with a tremendous bent toward criminal activity or with a bent toward excusing or providing second chances or opportunities for those who have been accused in those situations." These were outrageous things to say about a man who had devoted his life to the law,

who had served many years on the State's highest court, and who had voted to reverse a small number of death sentences in order to preserve the integrity of the Constitution. When Judge White came to testify at Attorney General Ashcroft's confirmation hearing, Senator Specter offered him an apology for the way in which he was treated.

I mention all of this, as I said, because it provides such a stark contrast to the treatment that Judge Benton has gotten throughout his so far very smooth nomination process. I doubt anyone will look at the nine cases in which he wrote to reverse a death penalty - 50 percent more cases than those Judge White voted to reverse -- and accuse him of being "pro-criminal". I will be surprised if, because he has found reversible error in the imposition of nine different death sentences, each one involving terrible crimes and horrific facts, any Member of this Committee or this Senate will accuse him of having a "tremendous bent toward criminal activity." I will be shocked if, because he exercised his best judgment and followed the law as he understood it, he will be vilified and humiliated in a sneak attack in the manner that Judge Ronnie White was treated.

Of course, none of that should happen to Judge Benton, just as none of that should have happened to Judge White. I hope that one day Judge White's name can come back before this Committee and the Senate and that he can be treated with honesty, integrity and respect, just as we do today treat Judge Benton. I will vote in favor of Judge Benton's nomination.

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Statement of Senator Patrick Leahy
Executive Business Meeting of the Senate Judiciary Committee
on the CREATE Act
April 29, 2004

On March 10, Senator Hatch, Senator Kohl, Senator Feingold, and I introduced the "Cooperative Research and Technology Enhancement (CREATE) Act of 2004," legislation that will provide a needed remedy to one aspect of our nation's patent laws.

In 1980, Congress passed the Bayh-Dole Act, which encouraged private entities and not-for-profits such as universities to form collaborative partnerships that aid innovation. It worked, and as a result the Bayh-Dole Act has contributed billions of dollars to the United States economy and has produced hundreds of thousands of jobs.

However, one component of the Bayh-Dole Act, when read literally, runs contrary to the intent of that legislation. In 1999, the United States Court of Appeal for the Federal Circuit ruled that non-public information may in certain cases be considered "prior art" - a standard which generally prevents an inventor from obtaining a patent. The ruling meant that some collaborative teams that the Bayh-Dole Act was intended to encourage have been unable to obtain patents for their efforts.

The Federal Circuit in its ruling invited Congress to better conform the language of the Bayh-Dole Act to the intent of the legislation. Our bill does exactly that. It is a fair, bipartisan, and narrowly tailored measure that will help the growth of technology, and which I hope we can move quickly through the Senate.

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Statement of Senator Patrick Leahy
S. 2107, a bill to reauthorize mental health courts through fiscal year 2009
Executive Business Meeting
April 29, 2004

I am pleased to be an original cosponsor of Senator DeWine's bill, which would reauthorize the Mental Health Court program Congress created in 2000. The program provides \$10 million annually for grants to States and localities that have formed special courts to handle the cases of certain adult and juvenile offenders with mental disabilities or

illnesses. Senator DeWine's bill would extend the program, which is slated to expire at the end of the current fiscal year, through FY 2009.

I have seen the positive effects of this program in Vermont, as Chittenden County Mental Health Court has been a grantee. I also know that the Federal government can provide needed help to the States in addressing the issue of mentally ill offenders. Senator DeWine and I also joined in introducing S. 1194, the Mentally Ill Offender Treatment and Crime Reduction Act, which would provide funding for a range of State and local projects designed to reduce the number of crimes committed by mentally ill individuals. S. 1194, which passed this Committee and the Senate as a whole, is currently before the House Judiciary Committee, which I hope will take it up in the near future.

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Statement of Senator Patrick Leahy
Executive Business Meeting of the Senate Judiciary Committee
on the PIRATE Act
April 29, 2004

On March 11, I joined with Senator Hatch in introducing a bill that will provide the Department of Justice new tools in ensuring that our nation's intellectual property laws are effective and enforceable. In an age of nearly-instantaneous communications and online anonymity, guarding against digital pilfering is more important now than ever before.

The "Protection of Intellectual Rights Against Theft and Expropriation Act of 2004" - the PIRATE Act -- will allow the United States to continue to enforce existing criminal penalties for intellectual property violations while providing new civil copyright enforcement remedies to ensure that American creativity and expression continue to thrive.

Current law limits the Justice Department's ability to protect copyright. While the Department can pursue criminal penalties for copyright violations, civil remedies are not available even though they may at times be more appropriate. Federal prosecutors have no other option. Senator Hatch and I have developed a bill that preserves the ability of the Justice Department to pursue criminal penalties, while recognizing that handcuffs for infringers is often not the appropriate response.

Although we are debating several divisive issues during this Congress, I believe that we can all agree that the promise of the digital age can only be fulfilled if we empower our federal prosecutors to protect the important rights enshrined in the Copyright Act. Senator Hatch and I recognize this need, and I thank him again for working with me to produce this important, bipartisan piece of legislation.

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Statement of Senator Patrick Leahy
on the ART Act
Executive Business Meeting of the Senate Judiciary Committee
April 29, 2004

I am glad that the Judiciary Committee can vote today on the ART Act, a piece of legislation that will help protect America's movies from a form of piracy that has become all too prevalent. The Committee has heard a great deal about the harms wreaked by intellectual property theft, which robs our innovators - not to mention all those working behind the scenes - of compensation owed to them for producing films that carry American culture around the globe. The Motion Picture Association of America estimates that the movie industry loses \$3 billion worldwide to piracy each and every year.

Too often, we think of movie piracy as a disease whose symptoms are manifest only in foreign territories. While it is true that much of the movie industry's losses occur due to lax intellectual property enforcement in countries where the authorities are either ill-equipped or disinclined to enforce creators' rights, there is much we can do in this country to get our own IP house in order.

I appreciate that Senator Feinstein and Senator Cornyn have been so willing to address my concerns that their legislation as introduced might inadvertently have a negative impact on the TEACH Act. In the 107th Congress, Senator Hatch and I worked to pass the TEACH Act, which ensured that educators could use limited portions of dramatic literary and musical works, audiovisual works, and sound recordings, in addition to the complete versions of non-dramatic literary and musical works that were already permitted, and that they could use the Internet to do so.

I also appreciate my colleagues' willingness to eliminate the presumptions in the criminal liability provisions, and to take up the Copyright Office's creative ideas for addressing pre-release works.

Were it not for their willingness to address these concerns, I would not be able to offer my support to this legislation. This is an important but complicated bill, and we will need to craft the report language carefully, to provide guidance to those who have not had the opportunity to actually participate in the drafting, and to ensure that the interpretation of the bill is fully consistent with its purposes. I look forward to that next phase of this project, and I am pleased to support the ART Act.

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Opening Statement of Senator Patrick Leahy
Executive Business Meeting of the Senate Judiciary Committee
April 29, 2004

9/11 Commission

Today President Bush and Vice President Cheney are jointly meeting with the 9/11 Commission. We join all Americans in expressing our gratitude to the 9/11 Commission for taking its mandate seriously and for performing some of the investigation that we on this Committee had proposed and hoped that we could perform in 2002. Unfortunately, our efforts were blocked by Republican objections that fall. Now, almost two years later, some of the facts are coming out. It took only two weeks for President Roosevelt to appoint a Commission on the December 7, 1941, attack on Pearl Harbor. It will have taken us almost three years to fight through the White House opposition and delays before the 9/11 Commission issues its report later this summer. The government's preparedness in the fall of 2001 for potential terrorist attacks is an important issue and one that for too long has been avoided. I have never seen an investigation in which witnesses testify together but then we will not see this testimony either, since it is being done behind closed doors and, as I understand it, without being recorded. I remember when President Ford testified before the Congress to help inform the people's representatives and the American people. That will not be the case today.

I also want to commend Commissioner Jamie Gorelick in particular. She is someone I know and who the Chairman knows well. She is characteristically doing her job and serving the American people in spite of death threats and vicious partisan attacks upon her from the right wing. She is a patriot and a public servant. Along with the other 9/11 Commissioners she is engaged in critically important work.

Supreme Court Cases

Last week the Supreme Court heard arguments in the first in a series of cases arising from the Administration's policies and practices. Last week's case involved the detentions at the U.S. military facility at Guantanamo. That was one of the topics on which I had expected we would have held hearings. This week the Court heard argument in the case involving Vice President Cheney's refusal to reveal who participated in and advised the Administration's energy task force. Then yesterday the Court heard the constitutional challenges to the Administration's position that it has the power to detain American citizens and others whom the President declared enemy combatants without a hearing, without a trial and without allowing a lawyer for an indefinite period of time.

These cases raise a number of matters of interest to this Committee. I have argued for some time that we are strengthened as a country and certainly practices affecting civil liberties would be on more solid legal footing if Congress had been allowed by this Administration to be a full partner in the development of legal structures and

practices. Yesterday's editorial in The Washington Times reached the same conclusion, that it might be useful to enact laws bringing clarity and consistency to these matters. I could not agree more. That is what I have been urging with respect to military tribunals and detention and other matters from the outset. This Administration, instead, chooses to go it alone. Without the bulwark of congressional authorization, its practices should be subject to more searching inquiry by the judicial branch as the last remaining check and balance on Executive excess. Just as I commend the 9/11 Commission for its attention to its duties, I want to acknowledge the judiciary for the vital role it needs to play to preserve our constitutional democracy.

Theft of Confidential Committee Computer Files

On another important matter, I can report this week we did hear from the Department of Justice that it had assigned the criminal investigation of the theft of Democratic computer files to the acting United States Attorney for the Southern District of New York David Kelley. This is the matter that was previously investigated by Senator Hatch and by the Senate Sergeant at Arms. Seven weeks after a bipartisan majority of Senators on this Committee wrote to the Department of Justice urging an investigation into the theft of confidential Democratic computer files by Republican staff from at least 2001 into 2003, that matter has now been assigned for such an investigation. We look forward to the "thorough, fair, impartial and professional" investigation that the Department of Justice has promised. I have offered my help to Mr. Kelley, who the Department characterizes "as an experienced prosecutor of the highest integrity and independence."

The Attorney General and Committee Oversight Activities

I look forward to working with Chairman Hatch to schedule the oversight hearings we should be holding on a number of topics. I hope that the Attorney General is making swift progress after his surgery and will be able to join us, without too much more time passing by, for some thorough oversight sessions. We have not had the Attorney General appear before the Committee for more than a year, and he has not made an extended appearance for much longer than that. There are many outstanding requests for information and many more matters that need to be explored.

There is also a recent revelation by the Inspector General at the Justice Department that the Department's Public Integrity Section is reviewing whether Attorney General Ashcroft violated federal campaign finance and disclosure laws in connection with his political action committee and reelection campaign committee. Based on information developed by the Federal Election Commission, Mr. Ashcroft's campaign committee lawyers described him as the owner of the PAC mailing list. But Mr. Ashcroft reportedly did not list that asset or report income from it in his Senate or Executive Branch financial disclosures. Then there is the question of whether he declared and paid taxes on the hundreds of thousands of dollars of income derived from that asset. I understand that the National Voting Rights Institute and a number of public interest groups have called for a Special Prosecutor to handle that investigation rather than a section of the Attorney General's own Justice Department.

Senate Action

I proudly note Senate passage of S. Res. 310, a resolution to designate May 15, 2004, as National Peace Officers Memorial Day earlier this week. This is a matter on which this Committee acted at our last meeting. We are right to remember and commemorate the sacrifice and commitment of our law enforcement officers serving our communities, States and country. We annually honor the officers and their families who made the ultimate sacrifice for public safety. I commend Senator Campbell for his leadership in this issue and thank Senators on both sides of the aisle for their support.

We thank all of our nation's brave law enforcement officers for their unwavering commitment to the safety and protection of their fellow citizens. They are real-life heroes. Currently, more than 850,000 men and women guard our communities at great risk. Each year, 1 in 15 officers is assaulted, 1 in 46 officers is injured, and 1 in 5,255 officers is killed in the line of duty in the United States every other day. In 2003, 146 law enforcement officers died while serving in the line of duty. Already this year, another 43 police officers have been killed in the line of duty.

During the 108th Congress, we have improved the Justice Department's Public Safety Officers Benefits (PSOB) program by enacting into law the Hometown Heroes Survivors Benefits Act (Public Law 108-182), which allows survivors of public safety officers who suffer fatal heart attacks or strokes while participating in nonroutine stressful or strenuous physical activities to qualify for federal survivor benefits.

The Senate also passed the Campbell-Leahy Bulletproof Vest Partnership Grant Act (S. 764), which will extend through FY 2007 the authorization of appropriations for the Bulletproof Vest Partnership Grant Program that helps State, tribal and local jurisdictions purchase armor vests for use by law enforcement officers. The House has yet to act on this important measure. We want to be sure that every police officer who needs a bulletproof vest gets one and that those vests provide the protection needed.

This National Peace Officers Memorial Day, Vermonters will remember our brave State Police Trooper, Sergeant Michael Johnson, who was killed last Father's Day while trying to stop a suspect leading two other State troopers on a high-speed chase. Sergeant Johnson was not even on duty, but he went to help his fellow troopers that Sunday afternoon after hearing their trouble on his radio. He had just deployed a set of tire spikes across the interstate when the suspect swerved to avoid the spikes and struck him. Sergeant Johnson left behind his wife and three children. Words are insufficient for the brave sacrifice of the man who was so admired by his family, community and the Vermont State Police force. In memory of his bravery and service to his family, community, State and country, Sergeant Johnson will be one of the names added this year to the National Law Enforcement Officers Memorial.

Today's Agenda

With respect to the agenda, I remain deeply disappointed that the majority has refused to act on either of the bills introduced in the Senate to solve the H-2B visa crisis. H-2B visas are used by employers throughout the nation who need seasonal labor and are unable to find U.S. workers. The Department of Homeland Security announced last month that for the first time ever, the statutory cap on this program has been reached. As a result, employers who were depending on foreign workers for summer industries -- such as tourism -- have been harmed severely. Dozens of businesses in Vermont have pleaded for help in meeting this unexpected problem. I know they have been joined by thousands of businesses from across the country.

The Republican leadership has simply ignored these urgent pleas from businesses. I cosponsored bipartisan legislation -- S.2252, the Save Summer Act of 2004 -- that would have solved the problem by increasing the number of visas for the current fiscal year by 40,000. Senator Hatch subsequently introduced S.2258, a competing bill offering a convoluted approach to the problem. His bill was sponsored only by Republicans. Even this partisan bill, however, has failed to pass muster in the Republican cloakroom, where it remains subject to a hold. Meanwhile, time is running out. Obtaining these visas takes weeks, if not months, as the Departments of Labor and Homeland Security must both sign off on them. If we do not pass legislation by May 1, it may well be useless to pass legislation at all. I urge those who are holding up this bill to reverse course and help our nation's businesses meet their summer needs.

I am also personally disappointed that we have not made Senate progress on the Advancing Justice Through DNA Technology Act (S. 1700/H.R. 3214), which includes the Innocence Protection Act. I made many compromises to reach an agreement on this bill. Chairman Sensenbrenner has worked with Congressmen Delahunt, LaHood and others to obtain House passage of the bill last November. This is an important bill with many improvements to our criminal justice system that we have worked on in a bipartisan way over many years. We have made no further Senate progress and a very short legislative year is left to us.

I think that we can make progress on a number of items on the legislative agenda today, including the CREATE Act, S.2192; the PIRATE Act, S.2237; the ART Act, S. 1932; and the PTO modernization bill, H.R. 1561. These are intellectual property initiatives about which I will have more to say as we consider each of them.

I hope that we can also make progress on Senator Feinstein's bill regarding unaccompanied minors which we have carried over since last year, S.1129, although I understand that we may not be in position to report that today.

I expect most of our time will be spent considering and debating S.1735, the gang and federal criminalization legislation on the agenda. I have a statement about that measure when we begin our consideration.

Nominations

We had another hearing on another divisive nominee this week, our ninth already this year. We continue to seek to work through the problems created by this Administration's abuse of its recess appointment power and its partisan approach to filling bipartisan boards and commissions. I have spoken to these issues over the last several months - and over the years, as well. I remain hopeful that our efforts will lead to better understandings and additional confirmations. I look forward to a time when the White House will work with us more closely and cooperatively.

With respect to judicial nominations, this Committee has already held more hearings this year than were held in all of 1996, the last year of President Clinton's first term. With the judicial nominees on the agenda today, we will have considered 27 judicial nominees since the beginning of the year. Those 27 lifetime appointments include eight to the circuit courts. By April 29 in 1996, the Committee had not reported a single circuit court nominee and had reported only four district court nominees. By April 29 in 2000, the Committee had reported only two circuit court nominees and only four district court nominees.

Of course, the Senate has already confirmed 173 judicial nominations of this President, more than were confirmed for President Reagan in his entire four-year first term. If we are able to receive the necessary assurances of cooperation from the White House and proceed on just half of the judicial nominees reported this year by this Committee, we will better the record set in 1996.

We now have 16 vacancies in the circuit courts. That is the number of vacancies that existed when Republicans took majority control of the Senate in 1995. Unfortunately, through Republican obstruction of moderate nominations by President Clinton, those circuit vacancies more than doubled, rising to 33 by the time Democrats resumed Senate leadership in the summer of 2001. We steadily reduced circuit vacancies over the 17 months that Senate Democrats were in charge. Even though an additional 15 circuit vacancies have arisen since July 2001, we have done what Republicans refused to do when President Clinton was in the White House by not only keeping up with attrition but actually working to reduce vacancies. We have now reduced circuit vacancies to the lowest level since Republican Senate leadership irresponsibly doubled those vacancies in the years 1995 through 2001. We have already reduced overall federal court vacancies to the lowest levels in 14 years. The number of vacancies would be even lower if the White House would work with us on presidential nominations.

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Statement of Senator Patrick Leahy
Executive Business Meeting of the Senate Judiciary Committee
The Patent and Trademark Office Fees Modernization Act
H.R. 1561
April 29, 2004

The Patent and Trademark Office is a vital asset for American industry. It plays a critical role in defining the rights of intellectual property holders and helps the United States enforce those rights at home and around the world. The Patent and Trademark Office's function is also complex and time consuming. It must examine extremely technical patent applications and make judgments about their patentability. It must do this for a wide variety of inventions. When the PTO fails to process these complex applications quickly and properly, our entire economy suffers.

For years now the PTO has been trying to modernize its operations in accordance with its Twenty-First Century Strategic Plan. The success of this reform is absolutely essential to our continued leadership in the world of intellectual property. The industries that use the PTO recognize this fact by taking the extraordinary step of asking to have their fees raised so that the PTO can better respond to their needs and encourage a new generation of inventions.

In my home state of Vermont, IBM produced 275 new patents last year. These inventions fueled the Burlington economy by supporting local jobs and investing new licensing fees into the local economy. Those jobs, however,

depend on a PTO that responds to patent applications quickly and accurately. I applaud companies like IBM and others who have the foresight to realize that it is in their best interest to support the PTO in its critical mission.

This bill doubles certain PTO application fees. It is important to realize that doubling these fees will help the PTO only if those funds are available for use by the PTO. Under this bill, fees that are not used by the PTO are returned to the people and the companies who paid them.

In addition, the bill calls for the PTO to administer a limited 18-month pilot program to test the ability of commercial contractors to conduct prior art searches in advance of examination by PTO examiners. It expressly prohibits any outsourcing to overseas employees or companies.

This bill is not without some difficulties. I understand there are concerns that the mechanism used to return unused fees to those who paid those fees in the first place might cause a technical accounting problem. I also understand that this problem can be fixed with a minor technical change. We need to fix this problem before this bill can become law.

In addition, some have raised concerns that the bill does not do enough to protect workers who perform the important prior art searches that are a part of any patent application process. At the same time, others are concerned that the bill might be misread to limit the number of contractors who may compete to perform prior art searches. More work remains to be done on this bill, and I look forward to continuing to work on it as it moves to the Senate Floor.

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