Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
July 20, 2004

Executive Business Meeting Hearing

Broken Rules and Discarded Traditions

Today's meeting marks another unfortunate milestone in the Senate Judiciary Committee's break with longstanding precedent and Senate tradition. In the past year and a half, with the Senate and the White House under control of the Republican Party, we have witnessed rule after rule broken or misinterpreted away.

The list is long. From the way that home-state Senators are treated to the way hearings are scheduled, to the way the Committee questionnaire was altered, to the way our Committee's historic protection of the minority by Committee Rule IV has been violated; the Republicans on the Committee have destroyed virtually every custom and courtesy available to help create and enforce cooperation and civility in the confirmation process.

Some are now beginning to talk openly about ignoring another longstanding practice, the Thurmond rule, for the first time in this particular presidential election year. We suffered through three years during which the Republican majority has employed a "by any means necessary" approach. That mentality is pervasive, trickling down to the Republican staffers, who for almost two years stole Democratic files off the Judiciary computers. Their approach to our rules and precedents follows their own partisan version of the golden rule, which is that "he, with the gold, rules." That has not been helpful to the process, the Senate or the country.

I was encouraged when the Committee was not forced to proceed to another divisive vote on Claude Allen at the last meeting. But that nomination is listed on the Committee agenda again this week as are two nominees without the support of their home-state Senators.

Over the last months we have begun to see how this Administration -- at the Department of Defense, at the Department of Justice and at the White House -- reinterpreted the law and treaties that had governed our nation's policy and practices for the detention and interrogation of prisoners and how it led to torture and abuse. We have seen two bi-partisan reports, one from the 9-11 Commission and another from the Senate Intelligence Committee, that reveal how unjustified the President and his team were when they argued for a preemptive war. We continue to struggle with the Administration any time we attempt to exercise our oversight responsibilities, asking again and again to see documents and receive information that they would rather keep hidden.

It is as if those currently in power believe that that they are above our constitutional checks and balances and that they can reinterpret any treaty, law, rule, custom or practice they do not like or they find inconvenient.

Some of these interpretations are so contrary to well-established understandings that it is like we have fallen down the rabbit hole in Alice in Wonderland. I am reminded that the imperious Queen of Hearts rebuked Alice for having insufficient imagination to believe contradictory things, saying that some days she had believed six impossible things before breakfast. I have seen things I thought impossible on this Committee in recent times, things impossible to square with the past practices of Committee and the history of the Senate. This Committee is entrusted by the Senate to help determine whether judicial nominees will follow the law. It is unfortunate that the Committee that judges the judges has not followed our own rules.

The appearance of two more nominees to the U.S. Court of Appeals for the Sixth Circuit from Michigan is another example of the downward spiral this Committee continues to travel. Nearly a year ago, the Chairman crossed a line that he had never before crossed when he held a hearing for Henry Saad, a nominee to the U.S. Court of Appeals for the Sixth Circuit, who was opposed by both of his home-state Senators. It may not only have been the first time that this Chairman held a hearing for a nominee without two positive blue slips, indicating support from home-state Senators, but it may have been the first time any Chairman and any Senate Judiciary Committee proceeded with a hearing on a judicial nominee over the objection of both home-state Senators. It was certainly the only time in the last 50 years, and I know it to be the only time during my 30 years in the Senate.

Having now broken a longstanding practice of this Committee founded on respect for home-state Senators, whether in the case of a district or circuit court nominee, the Chairman does not hesitate to break it again. But today he has chosen to up the ante by doubling the violation. The two nominations he asks us to vote upon today are both opposed by their home-state Senators.

The Michigan Senators have come to the Committee and articulated their very real grievances with the White House and their honest desire to work towards a bipartisan solution to the problems filling vacancies in the Sixth Circuit. We should respect their views, as the views of home-state Senators have been respected for decades. I have urged the White House to work with them. I have proposed reasonable solutions to the impasse that the White House rejected. The Michigan Senators have proposed reasonable solutions, including a bipartisan commission, which the White House continues to reject.

It is telling that the other judicial nominee, who I believe will be voted out of Committee today unanimously, is the product of a bipartisan commission. Judge Virginia Maria Hernandez Covington, who has been nominated to the federal District Court in Florida, has the full support of both of her home-state Senators. The Senators from Florida worked long and hard to save the judicial nominating commission that had operated smoothly for many years, and brought excellent candidates to both Democratic and Republican Presidents. Although this White House threatened the integrity of the commission, the Senators fought for it. This important mechanism for promoting experienced and consensus candidates for the federal bench survives, resulting in judges like Judge Covington.

Although President Bush promised on the campaign trail to be a uniter and not a divider, his practice once in office with respect to judicial nominees has been most divisive. Citing the remarks of a White House official, The Lansing State Journal reported that President Bush is simply not interested in compromise on the existing vacancies in the State of Michigan. It is unfortunate that the White House is not willing to work toward consensus with all Senators and on all courts. Over the last three years, time and again the good faith efforts of Senate Democrats to repair the damage done to the judicial confirmation process over the previous six years have been rejected. And time and again, the rules have been thrown by the wayside.

Blue Slip Rules Abandoned for a Republican President

I have explained this at Committee business meetings before, most recently when we were forced to vote on Judge Saad's nomination, but given the continued flaunting of precedent, it bears repeating: When Republicans chaired this Committee and we were considering the nominations of a Democratic President, one negative blue slip from just one home-state Senator was enough to doom a nomination and prevent a hearing on that nomination. This included all nominations, including those to the circuit courts. How else to explain the failure to schedule hearings for such qualified and non-controversial nominees such as James Beaty and James Wynn, African-American nominees from North Carolina? What other reason could plausibly be found for what happened to the nominations of Enrique Moreno and Jorge Rangel -- both Latino, both Harvard graduates, both highly rated by the ABA, and both denied hearings in the Judiciary Committee? There is no denying that was the rule during the previous Democratic Administration. There is no way around the conclusion that with a Republican in the White House, the Republicans in the Senate have found it politically convenient to change the rules.

In all, more than 60 of President Clinton's judicial nominees and more than 200 of his executive branch nominees were defeated in Senate committees through the enforcement of rules and precedents that the Republican majority now finds inconvenient -- now that there is a Republican in the White House. Indeed, among the more than 60 Clinton judicial nominees who this Committee did not consider there were several who were blocked despite positive blue slips from both home-state Senators. So long as a Republican Senator had an objection, it appeared to be honored, whether that was Senator Helms objecting to an African-American nominee from Virginia or Senator Gorton objecting to nominees from California.

As I noted last year, this Committee under this Chairman took the unprecedented action of proceeding to a hearing on the nomination of Carolyn Kuhl to the Ninth Circuit over the objection of Senator Boxer. When the senior Senator from California announced her opposition to the nomination as well at the beginning of a Judiciary Committee business meeting, I suggested to the Chairman that further proceedings on that nomination ought to be carefully considered. I noted that he had never proceeded on a nomination opposed by both home-state Senators once their opposition was known. Senator Feinstein has likewise reminded the Chairman of his statements in connection with the nomination of Ronnie White when he acknowledged that had he known both home-state Senators were opposed, he would never have proceeded. Nonetheless, in one in a continuing series of changes of practice and position this year, this Committee was required to proceed with the Kuhl nomination; a party-line vote was the result.

With the Saad nomination, this Committee made a further profound change in its practices. When a Democratic President was doing the nominating and Republican Senators were objecting, a single objection from a single home-state Senator stalled the nomination. The Chairman cannot cite a single example of a single time that he went forward with a hearing over the objection or negative blue slip of a single Republican home-state Senator. Now that a Republican President is doing the nominating, no amount of objecting by Democratic Senators is sufficient. The Chairman overrode the objection of one home-state Senator with the Kuhl nomination. The Chairman overrode the objection of both home-state Senators when he held a hearing on the Saad nomination last year and a vote this year. He did it again by holding a hearing for the two circuit court nominees on today's hearing agenda, and by continuing to move them through the Committee.

I think the Chairman knows what the fate of these nominees will be in this Senate. I suspect he just wants them out of his Committee. As Senator Durbin pointedly asked last week about Mr. Allen's nomination, why move it out of Committee at all then? I hope it is not because there is an election coming up, and some political calculation has been made that points can be scored for Republicans by moving these controversial and divisive nominees out of Committee and into the harsher spotlight of the Senate floor. If indeed the Chairman has concern for the interests of home-state Senators, then work with us on a bipartisan solution agreeable to all before forcing more division. Don't politicize this topic further.

The Sixth Circuit Fared Better Under Chairman Leahy

I know it is frustrating that there are still unfilled vacancies on the Sixth Circuit. Many of us experienced that same frustration during the Clinton years when good nominees were held up for no discernable reason -- other than politics. During President Clinton's second term, the Republican Senate majority shut down the process of confirmations to the Sixth Circuit entirely, and three outstanding nominees were not accorded hearings or Committee consideration. When I chaired the Committee, we broke that impasse with the first Sixth Circuit confirmation in many years and proceeded to confirm two conservative nominees. We have since proceeded with and confirmed two more. That is four circuit confirmations in three years as opposed to no confirmation in the last three years of the Clinton Administration. We cut Sixth Circuit vacancies in half. With cooperation from the White House, we could have done even better. It has been their deliberate choice to keep these vacancies -- now among the very few left on the federal bench -- open. After all, an empty seat on a federal court is a much more potent political weapon than a confirmed consensus judge.

The Republican Senate majority refused for over four years to consider President Clinton's well-qualified nominee, Helene White, to the Sixth Circuit. Judge White has served on the Michigan Court of Appeals with Judge Griffin since 1993, and, prior to her successful election to that seat, served for nearly 10 years as a trial judge, handling a wide range of civil and criminal cases. She was first nominated by President Clinton in January 1997, but the Republican-led Senate refused to act on her nomination. She waited in vain for 1,454 days for a hearing, before President Bush withdrew her nomination in March 2001.

President Clinton had also nominated Kathleen McCree Lewis. She is the daughter of a former Solicitor General of the United States and a former Sixth Circuit Judge. She was also passed over

for hearings for years. No effort was made to accord her consideration in the last 18 months of President Clinton's term. We have a double standard at work now.

Having spoken about the flawed process that has brought us here, let me take a moment to voice my concerns about the nominees themselves. Until and unless the procedural questions are resolved I cannot make a decision about supporting these nominees on the merits, but I have looked at their records, and there are issues I would like to note.

Richard Griffin

As a judge on the Michigan Court of Appeals since 1989, Judge Griffin has handled and written hundreds of opinions involving a range of civil and criminal law issues. Yet, a review of Judge Griffin's cases on the Michigan Court of Appeals raises concerns. He has not been shy about interjecting his own personal views into some of his opinions, indicating that he may use the opportunity, if confirmed, to further his own agenda when confronted with cases of first impression.

For example, in one troubling case involving the Americans with Disabilities Act (ADA), Doe v. Mich. Dep't of Corrections, Judge Griffin followed precedent and allowed the State disability claim of disabled prisoners to proceed, but wrote that, if precedent had allowed, he would have dismissed those claims. Griffin authored the opinion in this class action brought by current and former prisoners who alleged that the Michigan Department of Corrections denied them certain benefits on the basis of their HIV-positive status. Although Judge Griffin held that the plaintiffs had stated a claim for relief, his opinion makes clear that he only ruled this way because he was bound to follow the precedent established in a recent case decided by his Court. Moreover, he went on to urge Congress to invalidate a unanimous Supreme Court decision, written by Justice Scalia, holding that the ADA applies to State prisoners and prisons. He wrote, "While we follow Yeskey, we urge Congress to amend the ADA to exclude prisoners from the class of persons entitled to protection under the act."

In other cases, he has also articulated personal preferences that favor a narrow reading of the law, which would limit individual rights and protections. For example, in Wohlert Special Products v. Mich. Employment Security Comm'n, he reversed the decision of the Michigan Employment Security Commission and held that striking employees were not entitled to unemployment benefits. The Michigan Supreme Court vacated part of Judge Griffin's decision, noting that he had inappropriately made his own findings of fact when ruling that the employees were not entitled to benefits. This case raises concerns about Judge Griffin's willingness to distort precedent to reach the results he favors.

In several other cases, Judge Griffin has gone out of his way to interject his conservative personal views into his opinions. The appeals courts are the courts of last resort in over 99 percent of all federal cases and often decide cases of first impression. If confirmed, Judge Griffin will have much greater latitude to be a conservative judicial activist.

It is ironic that Judge Griffin's father who, as Senator in 1968, launched the first filibuster of a Supreme Court nominee and blocked the nomination of Justice Abe Fortas to serve as Chief Justice. Despite the deference given in those days to the President's selected nominee, former

Senator Griffin led a core group of Republican Senators in derailing President Johnson's nomination by filibustering for six days. Eventually, Justice Fortas withdrew his nomination. I know that the Republicans here will call any attempt to block Judge Griffin's nomination "unconstitutional" and "unprecedented", but his father actually set the precedent for blocking nominees by filibuster on the Senate floor.

David McKeague

The second of the two nominees before us today is David McKeague. His record raises some concerns, and his answers to my written questions on some of these issues did little or nothing to assuage them.

In particular, I am concerned about Judge McKeague's decisions in a series of cases on environmental issues. In Northwoods Wilderness Recovery v. United States Forest Serv., 323 F. 3d 405 (6th Cir. 2003), Judge McKeague would have allowed the U.S. Forest Service to commence a harvesting project that allowed selective logging and clear-cutting in areas of Michigan's Upper Peninsula. The appellate court reversed him and found that the Forest Service had not adhered to a "statutorily mandated environmental analysis" prior to approval of the project, which was dubbed "Rolling Thunder."

Sitting by designation on the Sixth Circuit, Judge McKeague joined in an opinion that permitted the Tennessee Valley Authority (TVA) broadly to interpret a clause of the National Environmental Policy Act in a way that would allow the TVA to conduct large-scale timber harvesting operations without performing site-specific environmental assessments. Help Alert Western Ky., Inc. v. Tenn. Valley Authority, 1999 U.S. App. LEXIS 23759 (6th Cir. 1999). The majority decision in this case permitted the TVA to determine that logging operations that covered 2,147 acres of land were "minor," and thus fell under a categorical exclusion to the environmental impact statement requirement. The dissent in this case noted that the exclusion in the past had applied only to truly "minor" activities, such as the purchase or lease of transmission lines, construction of visitor reception centers and on-site research.

Judge McKeague also dismissed a suit brought by the Michigan Natural Resources Commission against the Manufacturer's National Bank of Detroit, finding that the bank was not liable for the costs of environmental cleanup at sites owned by a "troubled borrower." See Kelley ex rel. Mich. Natural Resources Comm'n v. Tiscornia, 810 F. Supp. 901 (W.D. Mich. 1993). The bank took over the property from Auto Specialties Manufacturing Company when it defaulted on its loans. The Natural Resources Commission argued that the bank should be responsible for taking over the cost of cleanup because it held the property when the toxic spill occurred, but Judge McKeague disagreed.

In Miron v. Menominee County, 795 F. Supp. 840 (W.D. Mich. 1992), Judge McKeague rejected the efforts of a citizen who lived close to a landfill to require the Federal Aviation Administration to enjoin landfill cleanup efforts until an environmental impact statement regarding the efforts could be prepared. The citizen contended that if the statement were prepared, the inadequacies of a state-sponsored cleanup would be revealed and appropriate corrective measures would be undertaken to minimize further environmental contamination and wetlands destruction. Holding

that the alleged environmental injuries were "remote and speculative," Judge McKeague denied the requested injunctive relief.

In Pape v. U.S. Army Corps of Engineers, 1998 U.S. Dist. LEXIS 9253 (W.D. Mich.), Judge McKeague seems to have ignored relevant facts in order to prevent citizen enforcement of environmental protections. Dale Pape, a private citizen and wildlife photographer, sued the U.S. Corps of Army Engineers under the federal Resource Conservation and Recovery Act of 1976 (RCRA), alleging that the Corps mishandled hazardous waste in violation of RCRA, destroying wildlife in a park near the site. Despite the Supreme Court's holding in Lujan v. Defenders of Wildlife that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing," and even though RCRA specifically conferred the right for citizen suits against the government for failure to implement orders or to protect the environment or health and safety, Judge McKeague dismissed the case, holding that plaintiff lacked standing to sue.

Judge McKeague found plaintiff's complaint insufficient on several grounds, in particular plaintiff's inability to establish which site specifically he would visit in the future. Plaintiff had stated in his complaint that he "has visited the 'area around' the RACO site 'at least five times per year' and that he has made plans to vacation in 'Soliders Park' located 'near' the RACO site in early October 1998, where he plans to spend his time 'fishing, canoeing, and photographing the area.'" Comparing Pape's testimony with that of the Lujan plaintiff, who had failed to win standing after he presented general facts about prior visits and an intent to visit in the future, Judge McKeague rejected Pape's complaint as too speculative, based on the Court's holding in Lujan that:

[Plaintiffs'] profession of an "intent" to return to the places [plaintiffs] had visited before - where they will, presumably, this time, be deprived of the opportunity to observe animals of the endangered species - is simply not enough to establish standing.... Such "some day" intentions - without any description of concrete plans, or indeed, even any specification of when the some day will be - do not support a finding of the "actual or imminent" injury that our cases require.

In concluding that "the allegations contained in plaintiff's first amended complaint fail to establish an actual injury because they do not include an allegation that plaintiff has specific plans to use the allegedly affected area in the future," Judge McKeague seemed to ignore completely the detailed fact description that Pape submitted in his amendment complaint. The judge further asserted that there was no causal connection between the injury and the activity complained of, and that, in any case, the alleged injury was not redressable by the suit.

On another important topic, that of the scheme of enforcing the civil and constitutional rights of institutionalized persons, I am concerned about one of Judge McKeague's decisions. In 1994, (United States v. Michigan, 868 F. Supp. 890 (W.D. Mi. 1994)), he refused to allow the Department of Justice access to Michigan prisons in the course of its investigation into some now notorious claims of sexual abuse of women prisoners by guards undermines the long-established system under the Constitutional Rights of Institutionalized Persons Act or CRIPA. CRIPA's investigative and enforcement regime is unworkable if the Department of Justice is denied access to State prisons to determine if enough evidence exists to file suit, and Judge

McKeague's tortured reasoning made it impossible for the investigation to continue in his district.

I know that concern for the rights of prisoners who have often committed horrendous criminal acts is not politically popular, but Congress enacted the law and expected its statute and its clear intent to be followed. It seems to me that Judge McKeague disregarded legislative history and the clear intent of the law, and that sort of judging is of concern to me.

Finally, I must express my profound disappointment in his answer to a question I sent him about a presentation he made in the Fall of 2000, when he made what I judged to be inappropriate and insensitive comments about the health and well-being of sitting Supreme Court Justices. In a speech to a law school audience about the impact of the 2000 elections on the courts, Judge McKeague discussed the possibility of vacancies on the Court over the following year. In doing so he felt it necessary to not only refer to -- but to make a chart of -- the Justices particular health problems, and ghoulishly focus on their life expectancy by highlighting their ages. He says he does not believe he was disrespectful, and used only public information. There were other, better ways he could have made the same point, and it is too bad he still cannot see that.

Conclusion

Under our Constitution, the Senate has an important role in the selection of our judiciary. The brilliant design of our Founders established that the first two branches of government would work together to equip the third branch to serve as an independent arbiter of justice. As columnist George Will wrote recently: "A proper constitution distributes power among legislative, executive and judicial institutions so that the will of the majority can be measured, expressed in policy and, for the protection of minorities, somewhat limited." The structure of our Constitution and our own Senate rules of self-governance are designed to protect minority rights and to encourage consensus. Despite the razor-thin margin of recent elections, the majority party is not acting in a measured way but in complete disregard for the traditions of bipartisanship that are the hallmark of the Senate. It has acted to ignore precedents and reinterpret longstanding rules to its advantage. This practice of might makes right is wrong.

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On S.J.Res.4, The Constitutional Amendment Authorizing Congress To Prohibit Physical Desecration of the Flag of the United States

It would seem that members of the majority are obsessed with rewriting the Constitution. This is the fourth constitutional amendment that this Committee has considered in the 108th Congress. Of course, the amendments the Republican majority has chosen NOT to consider are the ones promised by the Republican platform four years ago to require a balanced budget and to undercut a woman's right to choose. Even Republican partisans must be embarrassed at the way President Bush and the Republican majorities in the Congress have turned the budget surplus President Clinton provided into the largest budget deficits in history under President Bush. Over the last several years they have sought to undercut a woman's right to choose by way of the President's activist judicial nominees rather than a constitutional amendment.

The proposed amendment we consider today is another in a series of amendments Republicans have pressed that would result in limiting rather than expanding the rights of the American people. This proposal is one of over 70 amendments introduced so far in this Congress alone, and over 11,000 since the First Congress convened in 1789. Can you imagine what the Constitution would look like if all of these amendments had been adopted?

I am encouraged by the Senate's bipartisan rejection of action on S.J. Res. 40, the proposal to federalize marriage by way of a constitutional amendment. Fifty Senators voted against cloture. I know that others who voted in favor of more debate were nonetheless troubled by the proposed constitutional amendment and the process by which the Republican leadership brought it before the Senate at this time. I hope that in the future the Republican leadership will not seek to circumvent this Committee by bringing constitutional amendment proposals directly to the floor of the Senate.

The forced debate on the proposal to federalize marriage by amending the Constitution that consumed the Senate's time last week was both divisive and unnecessary. The failure of the Republican leadership to obtain even a simple majority of Senators to support their efforts, on a procedural vote, should indicate to them how unwise it is to abuse the Constitution in a partisan election year tactic.

The proposed amendment we turn to today would also create division among the American people. The timing of this consideration, also squarely in the middle of an election year as we approach the conventions and as the campaigns pick up momentum nationally, raises concerns, again, that the Constitution is being misused for partisan purposes.

It is wrong to seek partisan advantage at the expense of the Constitution. I am becoming a believer in what we might call the "Durbin Rule." I have heard the astute Senator from Illinois observe recently that we should have a rule that prohibits consideration of constitutional amendments within six months of a presidential election or during the election year. He is right, the Constitution is too important to be made a bulletin board for campaign sloganeering. This could be a corollary to the "Thurmond Rule" on judicial nominations. We should find a way to restrain the impulse of some to politicize the Constitution.

VETERANS' BUDGET PRIORITIES IGNORED

As a member of the Appropriations Committee, I know that where you put your resources reveals a lot about your priorities. The Bush Administration's budget has simply failed to honor our veterans, especially when it comes to medical care.

The President's budget request this year failed to maintain even the current level of services. Secretary of Veterans Affairs Principi recently testified that his department asked the White House for an additional $1.2 billion. Needless to say, he was denied.

But Secretary Principi was not the only one ignored by the President's budget request. This request is almost $3 billion less than what Veterans groups -- like the American Legion, the Veterans of Foreign Wars, and the Paralyzed Veterans of America -- recommended in The Independent Budget. These organizations know what it will take to meet veterans' health care

needs.

During consideration of this year's budget resolution, Senator Daschle offered an amendment to fund veterans programs at the level recommended by the Independent Budget. Unfortunately, only one Republican voted in favor of this amendment, and it was defeated. A second amendment, offered by Senator Nelson, would have increased funding for veterans by $1.8 billion. It too was defeated. Not a single Republican supported the Nelson amendment.

My friends on the other side of the aisle then offered a "smoke and mirrors" amendment on veterans' care. Although this amendment made it seem that the Senate was voting to provide more money for veterans, we all know that this amendment did not add one red cent. The main purpose of this amendment was to provide political cover for the November election.

Answering questions from our March 2004 hearing on the proposed constitutional amendment, the Chairman of the Citizen's Flag Alliance -- Major General Patrick Brady -- noted that "we have never fully met the needs of our veterans." This echoed General Brady's frank admission, following our April 1999 hearing, that "the most pressing issues facing our veterans" were not flag burnings, but rather "broken promises, especially health care."

Sadly, playing politics with veterans' care is nothing new.

For the past three years, Congress has had to add more than $2.1 billion to the President's budget request just to fill gaps in basic services. If we had done as the President asked, veterans' medical care would be in even worse shape. But, this year, the Congress is not off to an encouraging start. It is July 20, we are 10 months into the fiscal year, and the Appropriations Committee has not reported out a single bill - including the VA-HUD bill.

We need to act. While the Administration is shortchanging VA funding, out-of-pocket expenses to veterans are skyrocketing. Under the Bush Administration, these expenses are projected to rise by an incredible 478 percent. Certain Priority 8 veterans are blocked from VA health care altogether, while others cannot receive treatment unless they pay a ridiculously high co-payment.

On top of all of this, a White House memo recently reported in the press, contains instructions for a $910 million decrease in veterans' health care funding in Fiscal Year 2006. I am sure that it is pure coincidence that these additional cuts are scheduled for after the election.

I could go on and on, describing the claims backlog, the longer waits, and the cuts in service. The bottom line is that the Administration's rhetoric towards veterans simply does not match its real priorities.

Instead of debating polarizing issues that we have talked about over and over again, we should be acting to provide real resources for our men and women who served this country with honor. I hope that Republicans and Democrats will join together this year to make helping our veterans the priority that it needs to be.

CYNICISM AND SYMBOLIC POLITICS

The flag is an important symbol of all that makes America great. But the cynical use of symbolic politics in an election year will not address the very real needs of veterans that are being left unmet by this Administration.

We saw the same kind of manipulation earlier this year, when the President's reelection campaign began to run television ads exploiting the September 11 attacks for political advantage. There was an immediate outcry of disgust from victims' families and New York City firefighters who had believed the President when he said that he had "no ambition whatsoever" to use 9/11 or national security as a political issue. An organization of victims and firefighters called for the campaign to stop running the ads, but the President turned them down.

And so, in the midst of manipulative electioneering, this business meeting is convened to debate a proposed amendment that has already been the subject of extensive review in past years by this Committee and days of debate on the Senate floor.

COUNSEL FROM COMBAT VETERANS JOHN GLENN AND BOB KERREY

I understand that many veterans support the flag desecration amendment and I respect their views. We must not forget that there also are many veterans who oppose it. Even after the intensity of the emotions following the September 11th strikes and wars in Afghanistan and Iraq, many veterans still believe that they fought for what the flag stands for, not for the symbol itself.

Former Senator John Glenn, a combat veteran, wrote, "The flag is the Nation's most powerful and emotional symbol. It is our most sacred symbol. And it is our most revered symbol. But it is a symbol. It symbolizes the freedoms that we have in this country, but it is not the freedoms themselves."

Former Senator Bob Kerrey, recipient of the Congressional Medal of Honor, reminded us that in this country we believe that "it is the right to speak the unpopular and objectionable that needs the most protecting by our government." Speaking specifically of the act of flag burning, he added: "Patriotism calls upon us to be brave enough to endure and withstand such acts."

COLIN POWELL'S ADVICE

A few years ago we heard from another outstanding American in opposition to this proposed amendment. He was a General, who had headed the Joint Chiefs of Staff, and now he serves as our Secretary of State. Colin Powell wrote this to me in May 1999:

"We are rightfully outraged when anyone attacks or desecrates our flag. Few Americans do such things and when they do they are subject to the rightful condemnation of their fellow citizens. They may be destroying a piece of cloth, but they do no damage to our system of freedom which tolerates such desecration. ...

"I understand how strongly so many of my fellow veterans and citizens feel about the flag ... I feel the same sense of outrage. But I step back from amending the Constitution to relieve that

outrage. The First Amendment exists to insure that freedom of speech and expression applies not just to that with which we agree or disagree, but also that which we find outrageous.

"I would not amend that great shield of democracy to hammer a few miscreants. The flag will still be flying proudly long after they have slunk away."

Like General Powell, I am deeply offended when anyone desecrates our flag. Recently vandals committed a heinous act in Vermont. Late at night, outside St. Augustine's Church in Montpelier, someone wrapped a statue of the Virgin Mary in an American flag and set it on fire. The statute was seriously damaged. This was an outrageous act, intended to outrage, and it also represents an attack on the religious community as well as being a gross show of disrespect for the flag. There is no reason to believe that acts like these cannot or will not be prosecuted under Vermont and other states' laws prohibiting unlawful mischief and damage to property. In this instance, officials have also indicated that it may be possible to prosecute the perpetrators under the State hate crimes law.

I have to wonder whether the testimony we often hear is coming true -- that agitating for this constitutional amendment actually leads to more flag burning incidents and that adopting it would lead to more still.

Sometimes, of course, individuals deface the flag or violate the rules for its care without intending to offend. For example, President Bush was captured on film signing a hand-held flag at a campaign rally last summer. Appropriate or not, these acts are protected by our Constitution, and they are not punishable by Congress.

CHANGE 1ST AMENDMENT FOR THE FIRST TIME?

Flag desecration is a despicable and reprehensible act. But the question before us is not whether we agree with that -- all of us on this Committee agree that it is contemptible. Instead, the issue before us is whether we should amend the Constitution of the United States, with all the risks that entails, and whether, for the first time in our history, we should narrow the precious freedoms ensured by the First Amendment. Should we amend the First Amendment so that the Federal Government can prosecute the handful of individuals who show contempt for the flag? Such a monumental step is unwarranted and unwise.

Justice Brennan wrote, "We can imagine no more appropriate response to burning a flag than waving one's own." That is exactly how the American people respond, a point demonstrated by the innate patriotism of Americans in response to events of the past years.

PATRIOTISM DOESN'T COME BY GOVERNMENT DECREE

Immediately after September 11th, Americans everywhere began to fly flags outside their homes and businesses, to wear flag pins on their lapels, and to put flag stickers on their cars. This surge in patriotism made American flags such a hot commodity that several major flag manufacturers could not keep flags stocked on store shelves. Within one week of those attacks, demand for American flags was 20 times higher than was typical for that time of year, according to the

National Flag Foundation in Pittsburgh. During that same week, Wal-Mart sold 450,000 flags. Within days of the terrorist attacks, K-Mart sold 200,000 flags.

This outpouring of patriotism was spontaneous, and it was the sum total of millions of individual Americans, acting on their own, not under government decree. The government did not order Americans to buy and fly the American flag.

Supporters of this constitutional amendment seem to believe that Americans need a lesson in how to respect the flag and that they need rules punishable by law to enforce that lesson. I disagree, and the American people have already proven them wrong. The American people do not need a lesson in cherishing and honoring our flag and the Republic for which it stands. That may be necessary in Saddam Hussein's Iraq or in Stalin's Soviet Union or in Castro's Cuba. But not in America.

Former Senator Bob Kerrey said, "Real patriotism cannot be coerced. It must be a voluntary, unselfish, brave act to sacrifice for others." Some may find it more comfortable to silence dissenting voices, but coerced silence can only create resentment, disrespect, and disunity. In America, you do not stamp out a bad idea by repressing it. You stamp it out with a better idea.

My better idea is to fly the flag, not because the law tells me to; not because there is something that says this is what I have to do to show respect. I fly the flag because, as an American, I want to. The extraordinary display of patriotism we have witnessed in recent years is evidence that the American people do not need laws and penalties to cherish the flag that we all love.

THE FREEDOMS FOR WHICH IT STANDS

Our flag is a cherished symbol. Even more important than the flag itself are the freedoms for which it stands, including the freedom to express unpopular speech or ideas -- even extremely unpopular ideas.

Freedom of speech and of the press is one of the magnificent bequests of earlier Americans to all the generations that follow. These rights are a fragile thing, needing nurturing and protection by each new generation. The erosion of freedom can easily come when lawmakers succumb to the temptation to pander to shifting public passions at the expense of the public's everlasting interest in preserving freedom. In any session of Congress you do not have to look far to see this dynamic at work. It may not be politically popular to defend against erosive efforts like this, but generations of Americans to come will thank us if we leave for them the same First Amendment that we ourselves inherited and so dearly treasured.

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Advancing Justice Through DNA Technology Act of 2003

It has been more than four years since Senator Gordon Smith, Senator Susan Collins and I joined together to introduce the Innocence Protection Act. The reforms we had proposed were modest and practical. They were aimed at reducing the risk of error in capital cases by creating a fairer

system of justice - a system where the problems that sent innocent people to death row would not occur and where victims and their families could be more certain of the accuracy and finality of the results.

During the last Congress, the Innocence Protection Act gained enormous momentum, with 32 Senators and 250 Representatives--well over half the House--signed on in support. Hearings were held in each House, and a version of the bill was reported out of the Senate Judiciary Committee by a bipartisan vote of 12 to 7.

Now, in the 108th Congress, we are considering a new version of the bill as a piece of a larger bill called the Advancing Justice through DNA Technology Act, S.1700. In addition to the Innocence Protection Act, which is contained in title III, this bill includes provisions that will help law enforcement use DNA technology to effectively, and accurately, fight crime.

The Chairman and I along with many other members of this Committee - Senators Biden, Feinstein, Specter, DeWine, and others -- introduced S.1700 on October 1, 2003. Chairman Sensenbrenner introduced a companion bill on the same day together with my long-time partners on the Innocence Protection Act, Congressmen Bill Delahunt and Ray LaHood. The bill was reported out of the House Judiciary Committee less than three weeks later, by a vote of 28 to 1, and it passed the full House just a few weeks later by a vote of 357 to 67.

More than eight months have passed since that overwhelming vote in the House. It is past time that we pass this important bill.

This bill is a critical piece of legislation. It is the culmination of many years of work and extensive negotiations by members of both Houses. It has broad bipartisan support, both here on Capitol Hill and throughout the country. The Committee has received many letters in support of this legislation, and I would like to include some in the record today. One letter is signed by a number of leaders in the victims' assistance field. Another is signed by various faith-based organizations including the Kids First Coalition, the Christian Coalition, the Traditional Values Coalition, and the Prison Fellowship Ministries, among others. These groups support the two key policy provisions in title III of the bill - the Innocence Protection Act.

I am aware of the Justice Department's vitriolic attack on title III. I am disappointed that the Department that bears the name of "Justice" does not support a bill that will reduce the risk of error in criminal prosecutions, and may save innocent lives. Many prosecutors do support this bill. I hope that the Department will reconsider its position.

Overview of the Innocence Protection Act

The Innocence Protection Act proposes two critical reforms. First, it provides greater access to post-conviction DNA testing in appropriate cases where it can help expose wrongful convictions, and authorizes $25 million in grants over five years to help defray the costs of such testing. Second, the bill addresses what all the statistics and evidence show is the single most frequent cause of wrongful convictions -- inadequate defense representation at trial. By far the most important reform we can undertake is to help States establish minimum standards of competency and funding for capital defense.

Other provisions of the Innocence Protection Act establish standards for preserving biological evidence in criminal cases and substantially increase the maximum amount of compensation that may be awarded in Federal cases of wrongful conviction.

The Innocence Protection Act reflects a principled consensus on basic and essential criminal justice reforms; it raises no serious constitutional or law enforcement concerns; it will improve criminal justice in America considerably; and, most importantly, it may well save innocent lives.

Overview of the Substitute Amendment

The substitute amendment that we are considering today is based on the version of the bill that the House passed last November. I do not agree with some of the changes that were made to the House bill after it was introduced, but as I told Chairman Sensenbrenner, I am willing to accept them in the interest of getting the bill enacted this year.

We have also made a few modifications to the House-passed bill to address issues raised by the Department of Justice in its views letter. For example:

? DOJ claimed that most States could not satisfy the "grandfather clause" in title III, and would have to change their laws in order to qualify for grants under this bill. We clarified our intention that virtually every State that has already passed a post-conviction DNA testing statute will be grandfathered in.

? We have also clarified - if it was not already clear -- that inmates may not "game the system" by filing multiple motions for DNA testing, each time seeking testing of additional or slightly different pieces of evidence. Re-testing is allowed only if it involves a new method or technology that is substantially more probative than the prior test.

? DOJ complained that the bill would require the Government to preserve biological evidence even when it has already been subjected to DNA testing. We have added language that addresses this concern.

? DOJ argued that the bill would effectively bankrupt States that choose to accept Federal money for their capital defense systems by requiring them to spend "limitless" amounts of money for capital defense, unchecked by any budgetary limitations. This criticism was a stretch even by DOJ standards -- nothing in the bill requires States to spend "limitless" amounts on capital defense. Still, we have tweaked the bill to address the concern.

These are a few of the changes we made; there are others as well. We have gone the extra mile to build support for this legislative package.

Capital Representation Improvement Grants

I would like to take a moment to elaborate on the capital defense representation provisions of the bill, both because they are the more important provisions and because they have been the principal subject of the recent revisions to the bill.

The new version of the Innocence Protection Act establishes a grant program for States to improve the systems by which they appoint and compensate lawyers in death cases. States that authorize capital punishment may apply for these grants or not, as they wish. However, if a State chooses to accept the money, it must open itself up to a set of requirements designed to ensure that its system truly meets basic standards. After all, the point of the bill is not to throw money at the problem of inadequate representation -- the point is to fix it.

Getting States to participate in the program may be difficult. Indeed, the States that are in most need of reform may be the least inclined to participate given that they will have the most to do to bring their indigent defense systems into compliance with the terms and conditions of the grant. I am hopeful that States will want to improve their systems and will welcome the infusion of Federal funds for this purpose. But Congress will need to monitor this program carefully to ensure that it is meeting its stated objective of improving the quality of legal representation provided to indigent defendants in State capital cases and, if it is not, to take additional remedial action.

Kirk Bloodsworth Post-Conviction DNA Testing Grant Program

We have also established a $25 million grant program to help defray the costs of post-conviction DNA testing. This program is named in honor of Kirk Bloodsworth, the first death row inmate to be exonerated by DNA testing.

I first met Kirk in February 2000 when he came to me as a man who had been exonerated after almost nine years of wrongful imprisonment. I am proud to say that we have become close friends and partners in the fight to reform capital punishment in America. I am also delighted that Kirk can finally feel truly free. Last fall, the State of Maryland charged another man with the crime for which Kirk was convicted and sentenced to death after prosecutors finally ran the DNA evidence in the case through the DNA database. The prosecutor who sent Kirk to death row, and who had previously refused to acknowledge his innocence, went to his home to apologize to him. The other man was recently sentenced to life imprisonment for committing the horrific crime of which Kirk was wrongfully convicted.

Kirk Bloodsworth=s battle to prove his own innocence has been won. But his nightmare of wrongful conviction has been repeated again and again across the country. Since the reinstatement of capital punishment in the 1970s, more than 110 individuals who were convicted and sentenced to death have been released from death row with evidence of their innocence, according to the Death Penalty Information Center. In addition, since the introduction of forensic DNA typing into the legal system in the early 1990s, many more individuals who were sentenced to long terms of imprisonment have been exonerated by post-conviction DNA testing. The Kirk Bloodsworth Post-Conviction DNA Testing Grant Program will help assist others who have experienced wrongful conviction.

Debbie Smith DNA Backlog Grant Program

As I noted earlier, this version of the Innocence Protection Act is part of a larger package of criminal justice reforms which will substantially increase Federal resources available to State and local governments to combat crimes with DNA technology. Among other things, this legislation

creates the Debbie Smith DNA Backlog Grant Program, which authorizes $755 million over the next five years to reduce the current backlog of unanalyzed DNA samples in the Nation's crime labs.

I have worked with the proponents of this program to revise the allocation formula so that each State is guaranteed a minimum allocation of .50 percent of the total amount appropriated in a fiscal year. This will make the program fair for all States, including smaller States like Vermont.

As DNA testing has moved to the front lines of the war on crime, forensic laboratories nationwide have experienced a significant increase in their caseloads, both in number and complexity. Funding has simply not kept pace with this increasing demand, and forensic labs nationwide are now seriously bottlenecked.

Backlogs have seriously impeded the use of DNA testing in solving cases without suspects - and reexamining cases in which there are strong claims of innocence - as labs are required to give priority status to those cases in which a suspect is known. Solely for lack of funding, critical evidence remains untested while rapists and killers remain at large. The Debbie Smith DNA Backlog Grant Program will give States the help they desperately need to carry out DNA analyses of backlogged evidence, and I strongly support its passage and full funding.

Expansion of the Paul Coverdell Forensic Sciences Improvement Grant Program.

The bill also expands and extends for another three years an existing grant program named after our late colleague, Senator Paul Coverdell. Congress passed the Paul Coverdell National Forensic Sciences Improvement Act three years ago with the goal of improving the quality and timeliness of State and local forensic science services. I was proud to cosponsor that legislation, and have worked since its passage to secure full funding for the grant program it establishes.

Unfortunately, despite my efforts and those of other Members, and notwithstanding the urgent pleas of lab directors nationwide, the President has never requested funding for Paul Coverdell grants, and Congress has never appropriated sufficient funds to make the program effective. This legislation renews our commitment to this important initiative.

Our bill also expands the purposes for which Paul Coverdell grants may be used to include the elimination of a non-DNA forensic evidence backlog. The need for this measure is clear. At a recent subcommittee hearing on funding forensic sciences, witness after witness testified that DNA evidence is not the only evidence that is going untested for lack of resources: Crime labs are also facing substantial backlogs with respect to other types of forensic science evidence, including firearms, latent prints, controlled substances, toxicology, trace evidence, questionable documents, and forensic pathology. We need to ensure that our labs are equipped to address the full range of issues that they are called upon to handle.

Conclusion

Mr. Chairman, as you know, this is not one of those bills that is cobbled together in one night and passed without hearings, without public comment, below the radar screen. We do pass bills like that occasionally. But this is not one of them. This bill has been years and years in the making.

Some may think that this bill goes too far in providing inmates with access to post-conviction DNA testing that may prove their innocence. Personally, I think it does not go far enough. But maybe that means we got it right.

More than ever, this bill is a collaborative product of which we all can be proud -- an exercise of bipartisanship that is in the best tradition of the United States Congress. I am proud to sponsor it, and I know that many members of this Committee feel the same way. I hope we can report it to the floor today.

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Regarding Nominations to the United States Sentencing Commission

I worked very hard during the Clinton Administration to replenish the Sentencing Commission with a slate of outstanding Commissioners. It took us years to get agreement with the Republican leadership of the Senate to such a group. We engaged in extensive collaboration and in a cooperative effort that resulted in a bipartisan result that led to a fine group of Commissioners.

In light of our respect and protection of the rights of Republicans during the Clinton Administration, I would have hoped for reciprocity and fairness. Instead, the Bush Administration has been most begrudging in any efforts to continue our bipartisan tradition vis a vis the Sentencing Commission. The Republican leadership seems intent on abetting the Administration's continuing efforts to undercut the Commission and a fair role for Senate Democratic input in its makeup.

Last year Republicans insisted on provisions undercutting the Sentencing Commission in the PROTECT Act conference report. It almost brought down the entire conference, including the Amber Alert legislation.

Now, the Chairman seems intent on acting in league with the Administration rather than as a defender of the Senate's role in the process. This agenda lists only a partial slate of Sentencing Commission nominees. If it went forward it would reward the White House's unwillingness to work with Senate Democrats to fill the vacancy created by Judge Murphy's resignation.

In January 2003 Senator Hatch and I jointly wrote the President urging the renomination of three Commissioners whose terms were expiring. Instead, the Administration insisted on proceeding first and exclusively to fill vacancies with two of its own selections in 2003 and did not proceed with a full panel of nominees as we had done in the past.

I, nonetheless, supported the confirmation of Judge Ricardo Hinojosa to the Commission. I supported the confirmation of Michael Horowitz, once the Administration finally confirmed that their selection of Mr. Horowitz would not be counted against the three Democratic slots that were to remain on the seven-member commission.

After the confirmations of Judge Hinojosa and Commissioner Horowitz I had to remind the President last December of the efforts I had undertaken to fill vacancies on the Commission,

including clearing Judge Hinojosa's nomination in May so that he could be confirmed before the Memorial Day recess. Despite the assurance I had received about a presidential renomination of Judge Sessions, that nomination was delayed four additional months until September. Once that nomination was reported by the Committee, anonymous Republicans put holds on it for several weeks and it was not cleared for action before the Thanksgiving Recess. Ultimately, with the help of Democratic Senators, we were able to clear the nomination of Judge Sessions on the last day of the last session, on December 9.

Senate Democrats are not being treated fairly with respect to this President's nominations to bipartisan boards and commissions. I have spoken of this often, as have the Democratic Leader and Assistant Leader. I have noted it here at our meetings for years. It was one of the factors that the Democratic and Republican leaders have discussed over the entire course of this most partisan Administration.

The President took almost 10 months to consider our bipartisan recommendation of Judge Sessions and nominate him. He took even longer, 18 months, for the President finally to renominate Judge Ruben Castillo. Judge Castillo is a distinguished and hardworking Federal Judge from Chicago. He is universally respected and praised. He is a knowledgeable and fair Commissioner. I am relieved that our efforts during the last two years have finally led the President to renominate Judge Castillo and wholeheartedly support that nomination. Likewise, I support the renomination of Professor O'Neill, a former counsel to Senator Hatch.

Since the resignation of Judge Murphy, the Commission has been operating with three acting chairs and it continues to do a good and effective job. I have told the White House that I would be happy to vote for the confirmation of Judge Hinojosa as the chair of the Commission as part of a package filling all the vacancies. Instead, the White House seems intent on leaving one vacancy unfilled--a Democratic slot.

Senator Daschle and I have made a series of recommendations to fill that slot. In early March we made a formal recommendation of an outstanding candidate. After months and months, the President rejected our recommendation. We have now made another recommendation. We have not insisted on our initial choice, but have tried to be reasonable and show flexibility by suggesting an alternative candidate who is also well-qualified and would make an outstanding Commissioner. She would lend some diversity to a Commission that will otherwise be all male.

When the President accepts our recommendation, I will be prepared to expedite consideration of all these nominations. Until then, given this Administration's past history, I have little confidence that the President will not celebrate the confirmation of his selected chair and leave the Democratic slot vacant. That would be unfair. Accordingly, the Sentencing Commission nominations will be held over until after the recess to give the Administration the time it apparently needs to review our most recent recommendation and send that nomination forward. That way the nominations can all be considered together and proceed through the confirmation process together.

Last week, this Committee held an important hearing on the ramifications of the Supreme Court's recent decision about sentencing in the Blakely case. We were benefited by hearing testimony from two Sentencing Commissioner, two of those serving as acting chairs of the Commission.

One was recommended by Republicans to President Clinton, one was recommended by Republicans and Democrats to President Bush. This is a pivotal time for federal criminal sentencing policy and practice. We need to have a full panel of Commissioners that can work together in the best bipartisan tradition. To get that full panel in place, we need the cooperation of the White House. I hope that the President will look with favor on our recommendation to fill the remaining Democratic slot on the Commission without further delay so that the entire group of Sentencing Commission nominations can move forward together.

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