Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
September 30, 2004

Statement of Senator Patrick Leahy
Ranking Democratic Member, Senate Judiciary Committee
Executive Business Meeting
September 30, 2004

I begin by noting the conclusion last weekend of the Jewish holidays. I understand that Richard Ben-Veniste spoke at the George Washington University Hillel services on Saturday and drew important lessons from the Jewish tradition and his recent experiences as one of the 9-11 Commissioners. He spoke about the Jewish tradition of introspection, taking responsibility, being accountable and making amends. These are all important values to remember as we in the Senate continue our debate on the important intelligence reform measure that derives from the unanimous report of the 9-11 Commission.

Word is that today Republicans will seek to gut the important protections provided by a strong civil liberties protection board in that bill. I hope that the President and the responsible Republican leaders in the Senate will oppose that effort. Senator Durbin, Senator Kennedy and others have worked hard and in a bipartisan manner with Senators Collins and Lieberman to provide a civil liberties protection board that can serve all Americans, as recommended by the 9-11 Commission.

The unanimous recommendation of the 9-11 Commission was to create a civil liberties oversight board to help monitor the government's use of the powerful tools it has to conduct intelligence collection and surveillance of individuals living in this country. The 9-11 Commission was right to warn that Americans and the Congress must be mindful of threats to vital personal and civil liberties. I have argued from the very first days after the horrific attacks on 9-11 that we need an enhanced system of checks and balances to protect our personal liberties. I reiterated that need in our consideration and passage of the PATRIOT Act. I have urged more thorough congressional oversight. I strongly agree with the 9-11 Commission that a fundamental component of the legislation the Senate is now considering must be a strong and effective civil liberties protection board.

I joined with other Senators in writing the President about these matters just last week. We need more accountability and real protections for Americans' civil liberties in these difficult times. Those liberties are the values that define us uniquely as a nation. I have often recalled in our deliberations the words of Benjamin Franklin at the founding of this great and free nation, that those who sacrifice essential liberties to obtain a little temporary safety deserve neither liberty nor safety. The terrorists win when we sacrifice our values and forfeit our way of life.

In addition to that debate and the Senate's consideration of that priority measure, today is also a day on which there is an important series of meetings with Hispanic leaders from around the country. There is also a conference on Homeland Security appropriations that will require my attention and the attention of other Members if we are to complete that important matter before we adjourn. These events along with activities in other Committees are reasons that a number of Members will not be able to extend their participation here today.

These last weeks of a session are extremely busy, as I noted last week. Nonetheless, we were able to maintain a quorum for extended debate of the important Advancing Justice through DNA Technology bill. After years of work, a year of seeking a markup, after carrying the bill for four months on our agenda, we successfully reported the bill to the Senate last week. I thank all Members of the Committee for their cooperation and the bipartisan majority that supported the bill. I am pleased to report, as well, that Senator Stevens has now joined as another cosponsor of our bill.

As I look back over this year, I wish we had found better ways to work together. That we were delayed so long on the DNA bill and that the President has presented us with so many divisive nominees has led to too much of the work we should have accomplished on behalf of the American people being delayed and unfinished. It is telling that the agenda for this meeting, for example, extends over four pages and includes a number of items on which we should have been able to reach consensus.

I will continue to work with other Senators in the days remaining in this session to clear measures through the Senate when possible. For example, I know how much work Senator Biden and Senator Feinstein have devoted to the steroids bill and the methamphetamine precursors bill. I know that Senator Specter and Senator Schumer have been working for years to provide compensation to terror victims. I feel a special responsibility to try to include victims of the anthrax attack directed at me and Senator Daschle in October 2001. I hope these measures and other consensus measures will not only clear this Committee but be passed by the Senate without further delay.

I note that this week the House gave final approval to our Senate bill to extend support for the Boys and Girls Clubs of America. The Senate finally cleared the bipartisan bill regarding Supreme Court police that we reported last week, but even that took a week. Senator DeWine's video voyeurism bill, another bipartisan measure, was passed by the House, but they need to correct the enrollment before the Senate can turn to it for final passage.

I have tried to work with Chairman Hatch on a number of fronts and we have had our share of successes. He and I are working hard in a bipartisan way to bring to fruition efforts to improve the law and provide appropriate and focused legal remedies to protect against copyright infringement. We have worked together on federal courts improvement and on an authorization bill for the Department of Justice.

From time to time I have tried to make helpful suggestions with regard to the work of this Committee. Recently, I sent the Chairman a letter suggesting hearings we should have had -- and still should have -- on important matters, like the allegations of abuse against prisoners in U.S.

custody, voting rights and the widespread reports of efforts to suppress voting rights in the upcoming election.

Like this Committee, the full Senate has many, many items of unfinished business to consider. The new fiscal year begins Friday but we still do not have a federal budget, a budget that was required by law to have been enacted in April. We have enacted only one of the 13 appropriations bills. We have much work to do if we are to complete action on the Collins-Lieberman bill that derives from the recommendations of the 9-11 Commission and is the pending business before the Senate. We need to take final action on the Advancing Justice through DNA Technology Act and many other critical items.

If the voters of Vermont see fit to reelect me in November, I will look forward to working on our unfinished agenda when we return next year.

On The Nomination of David Nahmias
September 30, 2004

After months of stonewalling by this Administration, we are still trying to uncover the truth about the abuse of prisoners in U.S. custody overseas. I have long said that somewhere in the upper reaches of the executive branch a process was set in motion that rolled forward until it produced this scandal. To date, senior Administration officials have avoided any accountability for these atrocities - confirming them to presidential appointments would only underscore this Senate's willingness to ignore its oversight responsibility.

Last year, the Senate was asked to consider the nomination of Jay Bybee to the Ninth Circuit Court of Appeals. During Mr. Bybee's nominations proceedings many Members of the Judiciary Committee questioned him about his legal work -- as Assistant Attorney General for the Office of Legal Counsel (OLC) at the Justice Department -- on issues concerning interrogation techniques, the applicability of the Geneva Conventions to individuals in U.S. custody, and the legal underpinnings of the fight against terror. His answers were non-responsive. For example, when I asked him to discuss his thinking about the status of detainees, Mr. Bybee responded: "As an attorney at the Department of Justice, I am obligated to keep confidential the legal advice that I provided to others in the executive branch. I cannot comment on whether or not I have provided any such advice and, if so, the substance of that advice." One of the nominees on our agenda today, Mr. Nahmias, has provided similar responses to me today on similarly crucial issues.

Despite these non-responsive answers, Mr. Bybee's nomination was strongly pushed by the Administration and he promised the Senate that he would be fair and impartial. So, he was confirmed to a lifetime position on the Ninth Circuit by the Senate on March 13, 2003 by a vote of 74-19.

Since his confirmation, we have learned of the "torture memo" that he signed in August 2002, while his nomination was pending for consideration by the Senate. In this memo he advised the President that he could ignore laws forbidding torture, in violation of international law, and that individuals acting pursuant to the president's commander-in-chief authority could be shielded

from prosecution under U.S. torture statutes and the U.N. Convention Against Torture for torturing detainees. Mr. Bybee's aggressive and partisan legal work for the President apparently earned him a promotion to a lifetime job on the federal bench.

Now, however, with the scandal surrounding his recommendations, the Bush Administration has repudiated the memo and senior Justice Department officials have said that the memo would be withdrawn and rewritten. However, as a group of lawyers, including 12 former presidents of the American Bar Association and several former federal judges, wrote in a memorandum to the President in August, this subsequent repudiation "coming after public outcry, confirms [the Bybee memo's] original lawless character."

Unfortunately, because of his evasiveness, we did not know about a significant part of his record - and his failure to follow the law - prior to his confirmation. Had Mr. Bybee's role in sanctioning cruel, inhumane and degrading treatment and abandoning the rule of law been known before his confirmation, the Senate would not have accepted his promise that he would simply follow the law. His job at the Justice Department was akin to a judicial role in which he was supposed to advise the President on what the law was, not what the President wanted it to be. Mr. Bybee distorted the law to conclude what he wanted to conclude and give the President unchecked authority to authorize barbaric acts.

The record of Mr. Bybee should give us all pause in considering Mr. Nahmias' nomination today. That record demonstrates that when we confirm individuals in this Administration who do not candidly describe their role in considering crucial legal issues we take too great a risk. New information has come to light since Mr. Bybee's confirmation - information that the nominee failed to disclose to the Senate during his consideration - that should serve as a lesson to us as we consider the nomination of David Nahmias.

We are asked to consider the nomination of David Nahmias to serve as a U.S. Attorney in Georgia. Mr. Nahmias has held senior positions at the Department of Justice and unequivocally supported broad executive power in the war on terror - positions that the Supreme Court has soundly rejected. At the Department of Justice, he has worked on the legal underpinnings of the President's war against terror and given speeches about enemy combatants and the applicability of the Geneva Conventions, among other issues.

In speeches, he has unequivocally supported the President's authority as Commander in Chief to designate and detain suspected terrorists, including American citizens, as enemy combatants without judicial review by an Article III court. In the case of the American citizens detained as enemy combatants, he argued that there was no reason for judicial review of their detentions because they, "received the absolute ultimate executive branch process," because the "President of the United States, operating as the Commander-in-Chief, personally reviewed their cases, and personally designated them as enemy combatants." The Supreme Court strongly rejected this position this year and held that the detainees in Guantanamo Bay and U.S. citizens being held as enemy combatants have the right to challenge their detentions in federal courts.

Mr. Nahmias has also made other troubling comments - such as saying that having hearings for enemy combatants would undermine national security; and that what is "unusual about the

military commissions" is "the amount of procedural protection that's being offered in those commissions compared to the way they work historically and in other parts of the world."

I asked Mr. Nahmias questions about his views on the rights of enemy combatants, his role in investigating, approving, or otherwise reviewing rules, procedures, or guidelines involving the interrogation of individuals held in the custody of the U.S. government or an agent of the U.S. government, and his role in the prosecution of domestic terrorism cases. His original answers were largely non-responsive, despite the number of words used, and I sent him further questions to clarify his record and views. Again, he failed to provide complete responses.

For example, I asked him about his role in the development or review of advice from the Office of Legal Counsel on the interrogation of detainees, a serious and important issue to this Senate and the American people. As we all now know, Mr. Bybee's torture memo was written during Mr. Nahmias' tenure at the Department. This memo redefined torture to allow all sorts of brutal treatment (such as mock burial alive, simulated drowning, electrocution, tearing off of fingernails, and other such barbaric treatment) so long as the pain caused is not akin to organ failure, and concluded that, as commander in chief in the war against terror, the President and federal agents are not constrained by anti-terror laws.

Before confirming Mr. Nahmias to this important appointment, Senators should know what role he played in the development of this policy. We should know what role he continues to play in these matters. This is an area where bipartisan leaders and attorneys have called for increased Senate oversight and action. Unfortunately, however, Mr. Nahmias decided to give us as limited information as possible while on its face appearing to answer the question. He does not thoroughly describe his communications with OLC, the nature of his work, or what he was asked to do. Instead, he writes, "While I have participated in portions of that internal deliberative process [related to the interrogation of detainees], it would not be appropriate for me to comment in detail about my involvement in the process."

U.S. Attorneys serve as the nation's lead prosecutors and conduct most of the work in which the United States is a party and should not be selected merely on the basis of partisan loyalty. Mr. Bybee's nomination reminds us of the importance of careful review, and tells us something about the sort of individuals President Bush is selecting. In his case - and the case of some of the other 200 nominees confirmed for President Bush - the Senate has perhaps acted too promptly to confirm nominees with questions remaining in their records.

Despite two rounds of questions, I still do not know the full extent of Mr. Nahmias's role in the review of interrogation procedures for detainees, and whether he worked to sanction cruel, inhumane and degrading treatment, or assisted in the distortion of the rule of law to give the President unlimited authority. For this reason, I cannot support his nomination today.

On Judicial Nominations
September 30, 2004

The Senate has already confirmed more than 200 of President Bush's nominees to lifetime

appointments in our federal courts. The American people ought to know that the Senate has confirmed more of President Bush's judicial nominees than President Reagan got in his first term, than his father put on the bench, or than President Clinton appointed in the most recent presidential term. With this high number of confirmations, we are at the lowest number of vacant seats on the federal courts in 16 years, since 1988. Yet, Republicans keep claiming that they are entitled to have every nominee confirmed and to confirm nominees for vacancies that have not even arisen and will not arise until after the upcoming presidential election. This is a complete reversal of their position in 1996 when they would allow only 17 district court judges to be confirmed that entire session.

Whether you call it the Thurmond Rule, or something else, it is a well-established reality in the Judiciary Committee that after the party conventions, with such a short time to go before votes are cast in a presidential election, hearings and deliberations on judicial nominees are essentially over. While the two parties may, as they have in the past, work out an agreement for moving some of the consensus nominees still pending in Committee or on the Floor, it has been the Republican position that absent the consent of the minority, we await the results of the election and the inauguration of a new president before moving any new nominees to these lifetime positions.

Republicans adhered to these rules when they ran this Committee in 1996 and in 2000. In 1996, when a Democratic President was seeking re-election, the Republican-controlled Committee held only one hearing to consider one district court nominee after the August recess, and then never allowed that nominee to have a Committee vote. In 2000, when a Democratic Vice President sought the White House, the Republican-controlled Committee followed the Thurmond Rule to the letter. After the August recess work on judicial nominations came to a halt. Although there were over 30 nominees pending, after July 25, 2000, no more judicial nominees were scheduled for hearings or considered by the Committee.

But now that there is a Republican in the White House, old rules are not followed. If Rule IV were still enforced in this Committee, the minority might still be able to exercise its right to debate these double standards. Certainly if the blue slip rules were enforced today as they were during the Clinton Administration, the Michigan Senators' views would be respected. And, as I have just explained, if the practice of waiting on nominations until after the election was consistently followed, we would not be having any of these votes today. But none of these rules is administered fairly.

I am going to vote no on Judge Neilson's nomination, and pass on Judge Starrett and Judge Alvarez.

Keith Starrett is nominated to a vacancy on the Southern District of Mississippi empty since the President ignored the Senate's withholding of its consent and recess appointed Charles Pickering to the Fifth Circuit. I am not sure Judge Starrett is the person for this position. I note the concerns of so many African American organizations and lawyers who continue to ask the President to begin to achieve some diversity on that bench. This is another problem of the President's own making. He should not have recess appointed Charles Pickering to the Fifth Circuit, and once he

did, knowing there would be a vacancy, he has only himself to blame for not naming a consensus replacement immediately.

Judge Alvarez is nominated to a position that will not be vacant until after the presidential election. Judge Boyko is nominated to a position that will not be vacant until a month after that.

Finally, Judge Susan Neilson, nominated to the Sixth Circuit from Michigan was given a hearing over the objection of both of her home-state Senators, something this Committee never used to do but now does with disturbing regularity. As Senators Levin and Stabenow have made clear so many times before, unless and until there is a real bipartisan solution worked out for appointing judges in Michigan, they will not consent to the nominations now before us. 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. This is not the time to press ahead with yet another Sixth Circuit nominee without a resolution to this impasse.

In addition to the serious and substantial objections of the Senators from Michigan, I would note that Judge Nielson spent most of her legal career defending big businesses in products liability and personal injury cases, before she was appointed to the state trial court bench by Republican Governor Engler. Most of her judicial decisions over the past decade are not published but she has been reversed about 40 times and the pattern of her reversals shows that from the bench she has continued to favor the side she served as a litigator, corporate defendants in civil cases. It is very troubling that her reversals reveal that she tends erroneously to prevent factual disputes from reaching the jury in civil cases and has committed numerous legal errors that have mostly, although not exclusively, favored corporations.

Judge Nielson and her husband have been very active in Republican Party politics and fundraising, and she has continued to make campaign contributions to Republicans while sitting on the bench as a judge. Judge Nielson is also a member of the Federalist Society, like most of President Bush's circuit court nominees. In fact, President Bush has nominated more people involved in the Federalist Society's agenda to reverse many civil rights decisions and restrict congressional power to protect people than African Americans, Latinos, and Asian Americans combined. He is more committed to ideological purity than diversity. His choices for the bench demonstrate his allegiance to imposing a right-wing social agenda through the selection of judicial zealots for the lifetime positions as federal judges.

Given Judge Nielson's record and the strong opposition of her home-State Senators to proceeding in this fashion, I will vote against reporting her nomination.

In her answers to Senators' questions she stated that federal judges do have the power to create new rights not listed in the Constitution. If a Clinton nominee had dared to give such an answer, assuming he or she got a hearing, that sort of response would have been the death knell for the nomination.

Just last week, the Chairman gave a speech to the Christian Coalition in which he said "America's founders insisted that the people and their elected representatives make the law and

that the judiciary be the weakest branch. They wrote a Constitution because writing down words that have meaning would limit the power of government. Does a written Constitution mean anything if unelected judges can find all sorts of unwritten stuff in there? How can the Constitution limit judges if they can make it mean anything they want?" Yet, here we are with another Bush nominee who candidly answers that she thinks federal judges can find new rights, and not a single Republican here has expressed any concern about her nomination.

Part of the double standard we see today is that it is apparently okay if Republican judges create new rights to benefit the Republican Party, just like the Republican majority has created new rules and abandoned settled precedents to favor the Republican President's nominees. It is just as unfair as a kid changing the rules of the game when he is losing. Except that this is not a game and the Senate Judiciary Committee is supposed to honor the rule of law not political expediency.