

Statement of

# The Honorable Patrick Leahy

United States Senator  
Vermont  
June 15, 2006

Statement of Senator Patrick Leahy  
Ranking Member, Judiciary Committee  
On the Nomination of Kenneth Wainstein to Be  
Assistant Attorney General for the National Security Section  
Executive Business Meeting  
June 15, 2006

Today we consider a nominee for the new position of Assistant Attorney General for the National Security Division. All too often, in the Bush-Cheney Administration, national security has been cited as a justification for overriding the rule of law and for imposing unprecedented secrecy. With the acquiescence of the Republican-controlled Congress, this Administration may be the most unresponsive in history and the most unaccountable.

Ken Wainstein is President Bush's selection to be the first Assistant Attorney General for National Security, a new position created by Congress. I will not oppose this nomination in the hope that Mr. Wainstein will work with us and be responsive to the Senators on this Committee.

I have concerns about this Administration's unilateral approach to national security issues. Four years ago, the Office of Legal Counsel at the Justice Department issued a secret legal opinion concluding that the President of the United States had the power to override domestic and international laws outlawing torture. The memo sought to redefine torture and asserted that the President enjoys "complete authority over the conduct of war" and asserted that application of the criminal law passed by Congress prohibiting torture "in a manner that interferes with the president's direction of such core war matters as the detention and interrogation of enemy combatants would be unconstitutional." It seemed to assert that the President could immunize people from prosecution for violations of United States criminal laws that prohibit torture. This Justice Department memo was withdrawn only after it became public because it could not withstand public scrutiny.

We have learned through the media of warrantless wiretapping and datamining conducted by this Administration. This, despite the Foreign Surveillance Intelligence Act and its express provisions and the actions on the Senate in voting to curtail the datamining programs by Admiral Poindexter at the Defense Department. We have yet to be provided with a convincing legal justification for these programs. We have yet to be able to investigate or hold the Administration accountable. Instead, every effort at oversight and accountability have been obstructed or curtailed by the Administration. The Administration refuses to follow the law and submit matters to the FISA court and claims state secrets to force court challenges to be dismissed. The Administration tells the Senate when, what and how it may investigate. The Department of Justice's own, internal Office of Professional Responsibility's probe of whether or not lawyers at the Department violated ethical rules in justifying these activities was shut down by the Attorney General and the White House.

As this Administration continues to expand its power, the Department of Justice should be advising the President to obey the law and respect the Congress and the courts, not just helping to rationalize actions and forestall oversight.

In theory, this new position might help Department of Justice attorneys to act responsibly on national security issues, rather than just to do the White House's bidding. It should put national security issues into the hands of experts, not political cronies. In fact, the WMD Commission recommended in March of last year that the different components of

the Department's dealing with national security, terrorism, counterintelligence, and foreign intelligence surveillance be combined to eliminate deficiencies and inefficiencies in the Department's national security efforts. Congress acted to create the post. This new Assistant Attorney General position can only serve a useful role if the person who occupies it is willing to think independently. This Administration has consistently prized loyalty over independence and expertise.

Mr. Wainstein has some experience as a prosecutor, but he has also been a loyal official of this Administration for some time now. I hope that he will be able to look at the crucial national security issues to be handled by this new office with a critical eye and a view toward respecting law and the Congress. If he does, he will be a breath of fresh air in the Bush-Cheney Administration.

Recently the Chairman and I received a letter from the Fraternal Order of Police. The FOP "endorsed" Mr. Wainstein "in order to facilitate his departure from the U.S. Attorney's Office." They criticized him for being "unwilling to perform" the function of investigating and prosecuting an alleged attack on a police officer. That is not what I would term high praise for his judgment. I ask that a copy of the letter be included in the record.

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Ranking Member, Judiciary Committee  
On S.J. Res. 12  
Executive Business Meeting

June 15, 2006

Today we have before us the second proposed constitutional amendment to be considered by this Committee in the last two months. As the Republican leadership continues to schedule political events as a run up to the November election, they continue to mistreat our Constitution as if it were a bulletin board on which to hang political posters or bumper stickers. The Constitution is too important to be used for partisan political purposes, and so is the American flag.

Our Constitution guarantees our rights and freedoms. The Bill of Rights, the first 10 amendments to the Constitution, were adopted to ensure limits on the Government and to protect the liberties of Americans. The First Amendment was expressly designed to protect our freedom of religion and speech. One of the defining characteristics of Americans is our freedom to think independently and to express ourselves freely. It is fundamental to who we are as individuals and as a nation. Vermont did not and would not become a State until 1791, the year the Bill of Rights was ratified. The proposed amendment would be the first time in American history that we would cut back on our First Amendment constitutional freedoms.

To propose a constitutional amendment two thirds of each House of Congress must "deem it necessary." As congressional Republicans have returned time and again to use constitutional amendments as election year rallying cries to excite the passions of voters, those of us who honor our oath of office to "support and defend the Constitution of the United States" are cast in the unpopular role of seeking to conserve the Constitution and constitutional principles in the face of demagogic proposals.

Several years ago a bipartisan group was formed to inject some reason into these debates. The Constitution Project has worked long and hard to develop guidelines for when constitutional amendments are appropriate. They have noted: "The founders created a constitution that is difficult to amend, thus insuring a stable constitutional structure. In The Federalist No. 47, James Madison highlighted this very point. He argued that the Constitution should only be altered on 'great and extraordinary occasions.'"

How, given this constitutional standard for an amendment, that it be "necessary", and given Madison's guidance that the Constitution only be altered on "great and extraordinary occasions," can any Senator who values individual liberty, vote to amend the Constitution and the First Amendment for the first time in our history to lessen our individual

freedoms? Proponents have not shown that this proposal meets those sensible guidelines, nor could they. There is no constitutional crisis or emergency that requires this constitutional amendment. There is not even a real problem. Rather, this is regrettably about stirring up political passions.

This raises, again, the question why this is the Republican leadership's priority in the face of an unfinished agenda of legislative matters that do concern Americans ranging from rising gas prices and health care costs to the ongoing violence in Iraq to homeland security. While the news articles and editorials characterizing this effort as crassly political are too numerous to include in the record, I do ask consent to include Norman Ornstein's column from the June 7 Roll Call in the record. Among the matters on which the Senate could be making progress, as Mr. Ornstein points out, is ensuring fair and effective voting in the upcoming election.

The amendment we consider today would artificially create division among the American people, and the timing of this debate -- squarely in the middle of an election year, with a markup between Flag Day and the fourth of July - demonstrates, again, that the Constitution is being misused for partisan purposes. The Constitution deserves our respect, vigilant protection and in the words of our Senate oath our "support". We on this Committee have a special duty to defend it. The Constitution is not a blog for venting political opinions, curry favoring with voters or trying to bump up sagging poll numbers.

#### Cynicism and Symbolic Patriotism

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 and other Americans that are being left unmet by this Administration and the Republican Congress.

We just witnessed a similar escapade when the Republican leadership of the Senate devoted most of a recent week to another divisive constitutional amendment intended not to pass but to inflame. We saw the same kind of manipulation in the 2004 election cycle when the President's reelection campaign ran 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 refused to do so.

#### Combat Veterans' Reminder Of Flag's Meaning

I know that many veterans support the flag desecration amendment and I respect their views. We must not forget though that there also are many veterans who oppose it. I appeared with a number of distinguished veterans on Flag Day who spoke about their dedication to the principles that make this country great and for which they fought and sacrificed. Those principles include our precious freedoms under the First Amendment. These veterans of World War II, Vietnam, Korea, the First Gulf War and Iraq made clear that they fought for what the flag stands for, not just 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 wrote today in a piece in The Washington Post, "Real patriotism cannot be coerced." I ask that a copy of his column be included in the record. He is known to some as a member of the 9/11 Commission, to others as a former Senator, to others as the President of the New School. But before all that he was a decorated combat veteran and a recipient of the Congressional Medal of Honor, our highest award for bravery.

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 later served as President Bush's first 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 but I recognize that any protest or statement these individuals are trying to make is protected by the First Amendment.

In every hamlet and city and on every rural route in America, you can see our flag being flown with pride. Americans in overwhelming numbers are honoring our flag, not defacing it.

There are times 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 in the summer of 2004. Appropriate or not, these acts are protected by our Constitution and they are not punishable by Congress.

#### A Change That Limits Rights

Flag desecration is a despicable and reprehensible act. But the true 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 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 Does Not Come By 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.

Following the very real attacks on 9/11, Americans embraced the flag like never before, proudly displaying flags and flag symbols as a sign of unity and strength in the wake of those horrible acts against our nation. People around the world grieved for us, cared for us, and joined with us to fight terrorism. Over time, missteps and arrogance by the Bush-Cheney Administration have alienated much of the world. Still, Americans of all political persuasions have not needed a law to tell them how precious our freedoms are or how to honor the Stars and Stripes.

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 strongly 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.

As Senator Kerrey has said, patriotism "must be a voluntary, unselfish, brave act to sacrifice for others." Speaking specifically of the act of flag burning, he added: "Patriotism calls upon us to be brave enough to endure and withstand such acts."

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 proudly fly the flag at my farm in Vermont because, as an American, it is what I choose to do. 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 Freedom 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 treasure.

#### Veterans' Priorities Ignored

Now some are seeking to turn the flag into a partisan political weapon and the Constitution into a billboard for political slogans, for partisan gain. That is wrong. I wish the Senate would, instead, use its time to discuss and solve the real problems that real Americans are facing right now, instead of trying to stir public passions for political ends.

This is another transparent effort to seek partisan advantage in the run up to the November elections. I know that in election years some Republicans love to wrap themselves in the flag amendment. I remember when the President's father was running for President in 1988 by visiting a flag factory. If I recall correctly, the last time the Committee voted on this proposal to amend the Constitution was the last election year, and the Senate last voted on it in the fateful presidential election year of 2000. This sudden flurry of constitutional amendments in the Senate is enough to make a cynic ask whether gay marriage and flag burning only reach the level of national crisis in even-numbered years.

I respectfully suggest that in the time left to us in the Senate this year, our time would be better spent working to improve veterans' health care services and protecting veterans' privacy. We have just witnessed the largest theft of private information from the Government ever, the loss of information on more than 26.5 million American veterans, including more than 2 million who are in active service, nearly 80 percent of our active-duty force and a large percentage of our National Guard and the Reserve.

Let me quote what a spokeswoman for the American Legion said recently: "Our armed forces personnel have enough on their plates with fighting the global war on terror, let alone having to worry about theft identity while deployed

overseas." A spokesman for the VFW said: "This confirms the VFW's worst fear from day one. The loss of data encompasses every single person who did wear the uniform and does wear the uniform today."

What is the Administration going to say to these active duty troops? Those of you on the battlefield in Iraq, when you get back in about a year, if you get back alive, we have an 800 number you can call to find out if somebody has stolen your identity.

Because of the recklessness of the Bush-Cheney Administration's Department of Veterans Affairs, our veterans and our active-duty service members are now worried whether their personal information is being sold on the black market or available to foreign intelligence services or terrorists. That adds up to a heckuva bad job for America's veterans and our men and women in uniform. This is just the latest example of how a culture of cronyism and incompetence dominates an Administration that has not been the subject of effective congressional oversight. Compounding the incompetence was the misguided impulse of the Administration to keep everything secret for as long as they could.

Earlier, I called on the President to at least take his friend- Secretary Nicholson-- to the woodshed. Instead, he gets a pat on the back. It sort of reminds me of "Brownie, you're doing a heck of a job," and nothing happens.

Such incompetence at the Bush-Cheney Veteran's Administration is worse than anything I have seen in six presidential administrations. At some point, this Administration has got to stop appointing and hiring cronies, and at some point they might really take responsibility and we might have some real accountability for their incompetence. The American people suffer, the veterans are at risk, but those in responsibility get medals and promotions and the Republican Congress never gets to the bottom of what happened to make sure it will not happen again.

Unfortunately, the Congress is more interested in election-year politics than in making life better for hardworking Americans who are sacrificing so much right now. Rather than work on our privacy and identity theft legislation, rather than proceed on a bill such as Senator Kerry's to provide credit checks and monitoring to those whose private information was compromised, we are being directed to another divisive debate on a proposed constitutional amendment.

We need to take real action to prevent this kind of data losses. Last year, Senator Specter and I introduced the Personal Data Privacy and Security Act, which requires federal agencies and private data brokers to give prompt notice when sensitive personal information has been breached or stolen. The Judiciary Committee overwhelmingly approved this bill last fall, but almost a year later, the Senate has still not acted on this legislation. Had this bill been in enacted, it would have required the VA to promptly notify the millions of Veterans now at risk of identity theft about the theft of their personal data. Our bill also addresses the Government's use of personal data by putting privacy and security front and center in evaluating whether data brokers can be trusted with Government contracts that involve sensitive information about the American people.

The nation's veterans - who have been willing to make the ultimate sacrifice for their country - deserve to have the best tools available to protect themselves and their families from identity theft. Congress must act now to pass comprehensive data privacy and security legislation.

Another continuing priority that has been neglected is veterans' health care. As a senior member of the Appropriations Committee, I know that where you direct your resources tells a lot about your priorities. And what the Bush Administration's budget tells us is that honoring veterans is not a priority, especially when it comes to medical care.

The President's budget requests consistently fall short of the levels needed to provide necessary services and care. Secretary Nicholson had to admit a billion dollar shortfall last year after first issuing inaccurate and unfounded denials of his mismanagement. When Congress was telling the Administration, "Please just let us know what you need and we will make sure you get it," the Administration replied with a curt, "thanks, we're fine." Well, they were not really fine. Secretary Principi before him had testified that the Veterans Department asked the White House for an additional \$1.2 billion but that it was denied.

Veterans groups and families know that even these budget requests are inadequate--nearly \$3 billion less than what veterans groups like the American Legion, the Veterans of Foreign Wars, and the Paralyzed Veterans of America recommend in the Independent Budget. These organizations know what it will take to meet veterans' health care needs.

And when Democratic Senators, like Senators Murray, Akaka, or Nelson, offer amendments to fund veterans programs Republicans refuse to support those amendments to bring funding up to the levels recommended by the Independent Budget and just plain common sense.

We heard in March 2004 from the Chairman of the Citizen's Flag Alliance, Major General Patrick Brady, 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, it appears playing politics with veterans' care is nothing new. Tragically, it continues.

During the past 5 years, Congress has had to add billions of dollars more to the President's budget request just to fill gaps in basic services. If we had done as the President asked year after year, veterans' medical care would be in even worse shape. Unfortunately, this year the Congress is not off to an encouraging start. The most recent supplemental spending bill excluded almost \$400 million in additional spending for the veterans' health care. Again, the Administration said it did not need the additional funding. Also, the Administration is again making an attempt to impose onerous fees and co-payments on our nations' veterans.

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 toward veterans simply does not match its real priorities.

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

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