

Statement of  
**The Honorable Patrick Leahy**

United States Senator  
Vermont  
March 19, 2009

Statement of Senator Patrick Leahy (D-Vt.),  
Chairman, Senate Judiciary Committee,  
Opening Statement  
Executive Business Meeting  
March 19, 2009

This is the third consecutive Congress in which Senator Hatch and I have introduced bipartisan patent reform legislation. I thank Senators Schumer and Whitehouse for cosponsoring this legislation. The hearing we held last week was the eighth this Committee has held since 2005 on patent reform issues. Last Congress, the bill was the subject of consideration and amendments over four weeks of mark-up sessions in this Committee, and even after the Committee voted 13 to 5 to report the bill favorably, we continued to hold numerous meetings, briefings, and roundtables.

While we have been deliberating, innovation and American inventors have been suffering from an outdated patent system and counterproductive litigation process. I hope that the time has finally come for Congress to act.

The hearing last week demonstrated that there is wide consensus among participants in the patent system, academics, and Senators on this Committee that patent reform is necessary. It should also be apparent, at least in my view, that the time for posturing has ended, and the time for reaching agreement has arrived.

The most difficult issue remains the calculation of damages. Now, I have a great deal of respect for the jury system. I think the Supreme Court got it right earlier this month in upholding a Vermont jury's award of damages in the Wyeth decision.

But in some areas of the law, as good as juries are, they would benefit from more guidance. In my view, just dropping 15 complicated factors into the laps of jurors and asking them to make a complex decision has become unhealthy for the system. A University of Houston law professor suggested at recent FTC hearings, that: "[This may be] why we are getting erratic results. It certainly does not lend itself to . . . predictable results." Similarly, a Minnesota law professor testified that the factors "can be so easily manipulated . . . to reach any outcome."

Judge Edward Becker was a brilliant judge, a wonderful man, and a friend to many on this Committee. Before he became the Chief Judge for the Third Circuit, in his days as a district court judge, he had occasion to write about the importance of the jury's role, and its limits. It was in the television antitrust cases, but the issue that he discussed in that complex economic context

also resonates in the patent context we discuss today. He upheld the right to a jury trial when some on the Third Circuit were ready to conclude that some matters are simply too complicated for a jury, and should be decided by the judge. I respect our jury system and the Seventh Amendment guarantee of jury trials. But I believe that in many patent infringement cases, the courts can be much more helpful to a lay jury, and they should be. After all, it was the courts that over time developed the 15 factors that may be relevant to determining a patent infringement award. It makes sense for the judge to help the jury by identifying the factors that will lead to an appropriate damages award.

Senator Specter asked the witnesses at our hearing last week for language to describe what the test should be. Many of them were close to using the same words in response. We are looking for a way to get this right, to legislate responsibly.

We are having very productive meetings with a number of offices. The way to a resolution is not to stall this process now, but to amplify our efforts. I appreciate those who are working cooperatively and collaboratively as we devise language that will allow us to respond to the growing consensus that we must modernize our patent laws. I want our language to allow innovators in all sectors of our economy to flourish.

Before we take up the Patent Reform Act, we have as unfinished business before the Committee today the President's nomination of Dawn Johnsen to be the Assistant Attorney General to head the Office of Legal Counsel. After turning to the Ranking Member for his opening remarks, I intend to recognize Senator Feinstein, who chaired the hearing on that nomination, and then proceed with our debate and our Committee vote on that nomination.

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STATEMENT OF SENATOR PATRICK LEAHY (D-VT.),  
CHAIRMAN, SENATE JUDICIARY COMMITTEE,  
ON THE NOMINATION OF DAWN JOHNSEN  
TO BE ASSISTANT ATTORNEY GENERAL FOR THE OFFICE OF LEGAL COUNSEL  
EXECUTIVE BUSINESS MEETING  
MARCH 19, 2009

Today, the Committee will turn to President Obama's nomination of Dawn Johnsen to lead the Department of Justice's Office of Legal Counsel. If confirmed, she will be the first woman to be confirmed by the Senate and appointed by the President to head this important component of the Justice Department. It is Women's History Month. Let's help the President make history by sending this nomination to the floor. Let's not take a step backward to the days when women were not allowed to be lawyers or hold the top jobs, when Sandra Day O'Connor was only offered secretarial jobs after she graduated from Stanford Law School. It is my hope that we will not see another double standard applied today as we consider this nomination.

Dawn Johnsen's nomination has a good deal of well-deserved support. I recommend to all Senators the letter I received yesterday from Walter Dellinger, a former head of the office and will include a copy in the record. It serves to recommend the nominee in an extraordinarily

comprehensive manner. Mr. Dellinger supervised Professor Johnsen when she began her work in that office and knows her and her work well. He rightly points to her experience as a strong qualification: "Because of her exemplary resume, her extraordinary legal credentials, her extensive body of scholarship exploring issues of separation of powers, and her substantial prior experience in the Office of Legal Counsel, Dawn comes to the leadership of OLC as the most highly qualified nominee in memory." He concludes: "I believe that Dawn Johnsen will be the best head of OLC in the history of the office."

Professor Johnsen has been open about her writings as a professor, the causes she has advocated, and her personal beliefs. Senators on this Committee have read her writings and asked her questions in an open, public hearing. In addition, Professor Johnsen has answered more than 165 written follow-up questions. She has responded to questions about terrorism, detainee treatment, the war on terror, executive power, warrantless wiretapping and electronic surveillance, the use of military force and CIA operations against al Qaeda, extraordinary rendition, guidelines for the proper operation of OLC, reproductive rights, the judicial nominations process, a "progressive agenda", voter ID laws, the Supreme Court's decision in *Bush v. Gore*, enforcing and defending the Constitution, obscenity and child pornography, and the list goes on and on.

On one hand we hear complaints from some Republican Senators that President Obama's nominees are not providing sufficient information for Senate consideration, on the other hand, Professor Johnsen is being criticized because she has been too forthcoming with the Committee. Professor Johnsen's candor should not be now used against her.

As Mr. Dellinger explains in his letter, to suggest that Professor Johnsen would not be able to set aside her personal views if confirmed is false. She has done the job and has already demonstrated her ability to do it without regard to her personal views. A five-year veteran of the office she has been nominated to lead, Professor Johnsen has a deep understanding of what the responsibilities of the Office of Legal Counsel.

Indeed, when the excesses of the Bush administration's legal policies and its misuse of the Office of Legal Counsel were emerging in 2004, Professor Johnsen tried to protect OLC's integrity and processes. She brought together 19 former OLC attorneys and led them in the formulation of 10 "Principles to Guide the Office of Legal Counsel," based on longstanding practices of OLC under both Democratic and Republican administrations.

When Senator Specter pressed for an answer about whether she was involved in legal opinions on extraordinary rendition and detainee policy when she served in the Office of Legal Counsel during the Clinton administration, she answered his question.

I wish that other nominees to that office had been as forthcoming. When I asked Jay Bybee about his work in that office when President Bush nominated him to a lifetime appointment, he refused to answer. When we asked questions of Stephen Bradbury, he refused to answer. It was not until Professor Jack Goldsmith left the office and published his book *The Terror Presidency* that we learned of his work. None of the Bush nominees were as forthcoming during their confirmations as Professor Johnsen has been. Again, I trust that a double standard will not be applied to her.

I believe that Professor Johnsen understands that we must ensure that the rule of law is restored as the guiding light for the work of the Department of Justice. I urge all Members of the Committee to join in supporting her nomination.

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