

Statement of
The Honorable Patrick Leahy

United States Senator
Vermont
May 7, 2009

Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
Executive Business Meeting
May 7, 2009

I congratulate the Senator from Alabama on his selection as the Republican leader on this Committee, and I look forward to working with him. I will turn to him for brief opening remarks when I conclude.

I cancelled the business meeting last week, and hope that we can make some progress this week on our agenda. The legislative items have been awaiting action since initially being noticed on April 20, when we resumed activities following the Easter recess.

We have two nominations, and four legislative matters on the agenda. I thank all Senators for their cooperation so that we may proceed to consider the President's nomination of Judge William Sessions to chair the Sentencing Commission. Judge Sessions has served as a Vice Chair of the Sentencing Commission and as a member of the Commission for nearly 10 years.

The written questions sent to John Morton, the nominee to be Assistant Secretary and head the Immigration and Customs Enforcement at the Department of Homeland Security, have been answered. I would like to be able to report that nomination from this Committee. Under the sequential referral, we have a limited time to do so. We had Secretary Napolitano before the Committee yesterday and I know that she looks forward to his joining the Department at the earliest opportunity. Still, if any Senator wishes to hold the matter over, that Senator has the right to do so.

Our legislative agenda is important. I hope that we can proceed to report S.327, a bill to improve assistance to domestic and sexual violence victims. It will make needed improvements in the Violence Against Women Act. I will offer a substitute that has been circulated.

I would also like us to begin work on the State Secrets Protection Act and I know that Senator Whitehouse would like to have the Committee consider the Consumer Credit Fairness Act. Then we will want to turn to the matter of a media shield law. We will make such progress as we can this week, and to the extent that we cannot conclude our consideration of these matters this morning, I trust we will be able to do so at our next meeting.

Senator Sessions.

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Chairman, Senate Judiciary Committee,
State Secrets Protection Act
May 7, 2009

We now turn to the State Secrets Protection Act. I want to again thank Senator Kennedy, who had so much to do with developing this proposal last Congress, for being an original cosponsor of the bill, along with Senators Specter, Feingold, Whitehouse, McCaskill, Tester and Cardin.

After a lengthy debate, this bill was reported by the Judiciary Committee last April. I reintroduced it on February 11.

The state secrets privilege is a common law doctrine that the Government can claim to prevent privileged evidence that would harm national security from being publicly disclosed. During the Bush administration, it was used to avoid judicial review and skirt accountability by ending cases alleging egregious Government misconduct, such as extraordinary rendition and warrantless eavesdropping of Americans, without consideration of the merits. The new administration has continued assertions of the state secrets privilege in at least three cases involving allegations of torture and warrantless wiretapping. If the claim of privilege is sustained, those plaintiffs will never have their day in court. Given the gravity of the outcome in cases where state secrets is claimed, we must ensure that it is invoked properly.

The Ninth Circuit Court of Appeals took a step in that direction recently when it reversed the dismissal of *Mohamed v. Jeppesen*, a case where the plaintiffs are suing defendants that allegedly assisted in transferring the plaintiffs to third countries where they were tortured. The Government intervened in this case claiming state secrets, and the lower court dismissed the case. In its reversal, the appellate court noted that to dismiss the case at the pleadings stage solely on the Government's claim that the very subject matter of the litigation was a state secret would "effectively cordon off all secret government actions from judicial scrutiny, immunizing the CIA and its partners from the demands and limits of the law." The court rejected this theory, "because it forces an unnecessary zero-sum decision between the Judiciary's constitutional duty 'to say what the law is' and the Executive's constitutional duty 'to preserve the national security.'"

We have seen disclosures about the abuses that took place during the last administration on issues where assertions of state secrets are the most troubling. I have proposed a nonpartisan Commission to find out what happened in these areas, and to make sure that we do not cover up abusive policies such as the sanctioning of torture. The lack of bipartisan support for this review has been very disappointing. These issues are too important to sweep under the rug.

Our courts also serve a critical function in providing accountability and oversight in these areas. I believe that the State Secrets Protection Act can help ensure that the courts play their appropriate constitutional role in reviewing these issues.

The State Secrets Protection Act will help guide the courts as they make decisions regarding the Government's interest in secrecy, issues of accountability and protect the rights of citizens to

seek judicial redress. The bill does not restrict the Government's ability to assert the privilege in appropriate cases. Instead, it would ensure that judges look at the actual evidence the Government relies upon so that neutral judges, rather than self-interested executive branch officials, render the ultimate decision about whether the state secrets privilege should apply. This procedure is consistent with other privileges recognized in our courts and how claims of privilege are resolved.

We held a Committee hearing on this issue last year. This legislation codifies the privilege in an effective way that balances the protection of national security with appropriate judicial review. I agree, as the Court of Appeals recently said, that "we simply need not place the 'coequal branches of the Government' on an all-or-nothing collision course." In light of the pending cases where this privilege has been invoked, involving issues of torture, rendition and warrantless wiretapping, I hope we can move forward to again report this bill for Senate consideration.

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Comments Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
On The Improving Assistance to Domestic and Sexual Violence Victims Act
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If we can do so without delay, I would like to take up and report the bill to make needed improvements to the Violence Against Women Act.

The Improving Assistance to Domestic and Sexual Violence Victims Act, S. 327, was developed with the help and assistance of a number of the outstanding advocacy groups that have labored so hard over the years to implement the Violence Against Women Act. And the substitute amendment I have prepared to the bill contains a number of changes after lengthy consultation with the Department of Justice that further refines the legislation.

People like Judy Rex in Vermont and the dedicated people who work every day to provide security for women and families have come to us with improvements that will make implementing the goals of the Violence Against Women act more attainable. That is what this bill is designed to do.

Among other things the bill will make the following improvements:

?It bolsters privacy protections for victims of domestic violence by strengthening the limitation on posting of identifying information about victims

?It enables many rural and Tribal areas that lack Sexual Assault Nurse Examiners to provide rape kits to victims.

?It includes more victim services providers, including community-based organizations, state domestic violence coalitions, state sexual assault coalitions, and tribal coalitions, within its

clearinghouse provisions, thus enabling these providers to make important resources available to employers and employees.

?It updates the definition of rural states and communities to account for overall population growth.

?It specifies that the national baseline study on violence against Native women includes the study of women who live in Alaska Native villages. Women in Alaska Native villages are on the list of federally recognized Indian tribes, but are not included in the term "Indian Country." This provision clarifies that the study is intended to examine violence against Native women on all Indian lands of federally recognized Indian Tribes, which will ensure that Alaskan Native women are included and that the analysis is more complete and accurate.

Among those I want to thank for their help and support are the National Network to End Domestic Violence, the National Center for Victims of Crime, the National Alliance to End Sexual Violence, the Family Violence Prevention Fund, the National Coalition Against Domestic Violence, Casa de Esperanza, the National Resource Center on Domestic Violence, Break the Cycle and the Pennsylvania Coalition Against Rape. I would like to put in the record a letter of support from these groups.

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