

Statement of
The Honorable Patrick Leahy

United States Senator
Vermont
June 11, 2009

Opening Statement Of Chairman Patrick Leahy (D-Vt.)
Senate Judiciary Committee
Executive Business Meeting

June 11, 2009

We continue to have a full agenda that includes many matters that have been before the Committee for several weeks. I had hoped to take action on the President's nomination of Judge Lynch to the Second Circuit last week but it was held over until today. Judge Lynch is a well-respected and well-qualified nominee strongly endorsed by his home state Senators. I hope that the Committee will proceed on that nomination without further delay. The Second Circuit, that serving Vermont, Connecticut and New York, is about to have a number of vacancies. I do not want to see a return to the time when Judge Winter declared a circuit emergency because there were multiple vacancies and the Senate refused to vote on President Clinton's well-qualified nominees.

We should also take action on the nomination of Mary L. Smith to serve as the Assistant Attorney General in charge of the Tax Division at the Justice Department.

Then we will turn our attention back to the State Secrets Protection Act and our legislative agenda. Our legislative agenda continues to grow with new and important matters. We really need to make progress. This week I added the bipartisan measure on judicial survivors. It is supported by the Judicial Conference to allow judges an opportunity to opt into the Judicial Survivors' Annuities System and to increase their contributions to enhance their survivors' benefits. My understanding is that this is without taxpayer expense. We have many other important matters awaiting us this summer as I have repeatedly alerted Senators over the during the last two weeks. With much to do, I hope that all members will cooperate and we can make real progress working our way through our agenda this morning.

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Statement Of Chairman Patrick Leahy (D-Vt.),
On The Nomination Of Judge Gerard Lynch
To The United States Court Of Appeals For The Second Circuit

June 11, 2009

Judge Gerard Lynch has served as a highly respected Federal judge from New York for almost a decade.

Judge Lynch began his legal career as a Federal prosecutor in the U.S. Attorney's Office for the Southern District of New York, where he investigated and prosecuted white collar and political corruption cases, and argued complex criminal appeals. Through his exemplary hard work and considerable skill, he rose to be Chief of the Criminal Division in the Southern District of New York, where he managed the office's criminal cases and supervised well over 130 Federal prosecutors. Judge Lynch has also served as a part-time associate counsel for the Office of Independent Counsel and as a counsel to a Wall Street New York law firm.

He also has impeccable legal credentials. Judge Lynch graduated summa cum laude and first in his class from both Columbia Law School and Columbia University. He clerked for Justice Brennan on the Supreme Court of the United States and Judge Feinberg on the Second Circuit Court of Appeals.

While maintaining a full judicial caseload, Judge Lynch has also been a distinguished legal scholar who has received praise as one of the country's outstanding law professors. For over 13 years, he taught criminal law, criminal procedure, and constitutional law as the Paul J. Kellner Professor of Law at Columbia University's School of Law. For five years, Judge Lynch also served as the Vice Dean of that fine legal institution. He is nationally known as a criminal law expert and has received numerous honors, including the distinction of being the first law professor to receive Columbia University's President's award for outstanding teaching.

Judge Lynch's nomination has received numerous letters of support, including strong endorsements from public officials and law professors across the political spectrum. Otto G. Obermaier, who served as President George H.W. Bush's United States Attorney for the Southern District of New York, supports Judge Lynch's candidacy to the Second Circuit and called him a person of "superior judgment and intelligence" who is "intellectually gifted." Professor Henry P. Monaghan, the Harlan Fiske Stone Professor of Law at Columbia University, writes that Judge Lynch "is everything you want in a judge: fair, tough-minded, enormously experienced, highly intelligent, and apolitical" and his addition to the Second Circuit would "strengthen" that court. He has the support of the Senators from New York.

I support this nomination and look forward to Judge Lynch's confirmation by the United States Senate.

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Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
State Secrets Protection Act
June 11, 2009

We now turn again to the State Secrets Protection Act. I want to thank all of the cosponsors of this bill, including Senator Kennedy, who was at the forefront of developing this proposal last Congress, as well as Senators Specter, Feingold, Whitehouse, and Cardin.

After a lengthy debate, this bill was reported by the Judiciary Committee in April 2008. I reintroduced it earlier this year, and the Committee began discussion on this legislation over a month ago. I hope we can make more progress today, and report this bill to the Senate floor.

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. Just recently, speaking at the National Archives, President Obama raised his concerns that the state secrets privilege has been "over-used." He acknowledged the need for reform in this area and warned: "We must not protect information merely because it reveals the violation of a law or embarrasses the government." I believe that the Bush administration used the state secrets privilege to evade accountability by ending cases without consideration of the merits.

There have been recent developments in cases involving state secrets. In *Mohamed v. Jeppesen*, a case in which the plaintiffs allege that they were transferred to other countries where they were tortured, the Government intervened claiming that the subject matter of the litigation was a state secret and the case was dismissed. The Ninth Circuit Court of Appeals recently reversed that decision, recognizing that to end the case based on the Government's claim that the very subject matter of the suit was a state secret, "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.'"

Last week, the parties met again in another state secrets case, *Al-Haramain v. Obama*, where the plaintiffs are alleging that the Government wiretapped them without a warrant, and where, again, the Government has asked that the case be dismissed on the basis of state secrets. The district court has tried to find a way to move forward, asking the Government to help it craft a protective order regarding the privileged evidence, but the Government has refused. The Government and the court have been at a standstill, with the Government unable to appeal and the court forced to improvise procedural rules.

Finally, last week, the Court scheduled a hearing on the merits of the case for September 1. This delay would have been unnecessary if this bill were the law. Our legislation ensures that interlocutory appeal is available for "any decision or order" of the district court so the government could have appealed without having to wait for a final judgment from the Court.

Al-Haramain underscores why we so urgently need to pass this legislation. Lacking a clear roadmap for how to proceed, the courts are left to improvise. The State Secrets Protection Act enables courts to serve their appropriate constitutional role in reviewing these issues. By requiring the court to review the actual evidence the Government relies upon before irrevocably ending significant litigation, the bill would ensure that a neutral decision maker, rather than self-interested executive branch official, decides whether the state secrets privilege is applicable.

This legislation codifies the privilege in a way that protects of national security with appropriate judicial review. I agree with President Obama that this privilege has been overused and I support his decision to work with Congress. Given the significance of the cases in which the state secrets privilege is claimed, and the haphazard rule-making that courts are forced to create without clear guidance, I hope we can move forward to report this bill for Senate consideration.

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