Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
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STATEMENT OF SENATOR PATRICK LEAHY
CHAIRMAN, SENATE JUDICIARY COMMITTEE
OPENING STATEMENT
EXECUTIVE BUSINESS MEETING
APRIL 24, 2008

We convene this morning with another full agenda. I trust we will be able to turn to it immediately following my brief opening remarks and those of Senator Specter.

I begin by noting that this is the first business meeting of the Senate Judiciary Committee to be webcast live. I am a strong proponent of webcasting and am delighted that now in addition to webcasting our hearings we are able to provide greater access to the American public by webcasting our business meetings, as well.

On our agenda today are several items. We have the bipartisan Kennedy-Specter-Leahy State Secrets Protection Act that we introduced back in January to aid courts when confronting the burgeoning claims of state secrets privilege by the Bush administration. That assertion is being used by the Government to avoid judicial review and accountability by ending cases without consideration of the merits.

We held a Committee hearing on this issue in February after which Senator Feingold, the Chair of our Constitution Subcommittee, and Senator Whitehouse joined as cosponsors of the bill. A number of other thoughtful Senators have joined as cosponsors, as well.

I first listed this matter for consideration by the Committee at our business meeting on March 6. I hope, after holdovers and time for study, that now seven weeks later we can consider it and report it to the Senate.

Next we have a bill that Senator Kohl has introduced to provide federal assistance to state courts so that they may better provide interpreters and thereby do a better job rendering justice. Six of us have cosponsored that bill, including Senator Specter. I do not believe debate on that measure will take long.

Then we can turn our attention to an issue on which a number of us have been working and concerned about. Senator Schumer has introduced a bill to help the administration expedite the naturalization applications for members of the Armed Forces by creating a liaison at the U.S Citizenship and Immigration Services with the FBI and by setting processing deadlines for these applications. The current naturalization backlogs have been a source of concern for many, and

without greater efforts, upwards from half a million law-abiding people who have played by all the rules and waited in line and applied for citizenship will see their applications stalled until it is too late to participate in the important upcoming elections this fall. We raised this matter with the FBI Director at our oversight hearing in March, and again with Secretary Chertoff at our oversight hearing in April. The administration's response remains wanting. Accordingly, I hope the Committee will today give its attention to Senator Schumer's bill to ensure that the naturalization process for members of the Armed Forces who seek U.S. citizenship is carried out as efficiently as possible.

Then we can turn our attention to a Senate Resolution intended to clarify and recognize that Senator McCain's birth in the Panama Canal Zone in 1936 while his father was serving in the United States Navy should not disqualify him constitutionally from running for President. I have said publicly that I believe no change in law is needed. In response to my question, Department of Homeland Security Secretary Chertoff, a former Federal judge, agreed with me that the circumstances of Senator McCain's birth should not disqualify him from being considered a "natural born Citizen" under the Constitution. He agreed with me that anyone born to American citizens is a "natural born Citizen" and satisfies the purposes of Article II of the Constitution.

Former Solicitor General Theodore Olson and Harvard Professor Laurence Tribe analyzed the issue and came to the same conclusion based on the Framers' intent, the purpose of the provision and historical precedent. When we reach the measure, I will make their letter and analysis part of our record. We should pass this bipartisan resolution to put to rest speculation that Senator McCain is not eligible to run for President because of the circumstances of his birth in 1936 in the Panama Canal Zone and that somehow those circumstances adversely affected his citizenship status.

This bipartisan measure derives from Senator McCaskill's efforts. She introduced the resolution, which Senator Coburn and I have cosponsored, as have both Senator Obama and Senator Clinton, and Senator Webb.

There are additional resolutions commemorating Margaret Truman Daniels and Dith Pran for their lifetime accomplishments.

Finally, we have the opportunity today to report three more lifetime judicial nominations to the Federal courts, a U.S. Marshal nomination and the nomination of Senator Martinez's brother to be a member of the Foreign Claims Settlement Commission. The judicial nominees are from those who participated at the hearing that Senator Kohl chaired earlier this month. I thank the senior Senator from Wisconsin.

I have already announced our next judicial nominations hearing to be chaired by Senator Cardin. Now that we have received the ABA peer review and the paperwork is completed on the nomination of Steven Agee to the Fourth Circuit we will proceed to consider that nomination just as I have said we would since we received the nomination in March. In deference to Senator Lugar and Senator Kyl's requests, I have included judicial nominees from their states at that hearing, as well.

To get through this agenda we will need the cooperation and attention of members from both sides of the aisle.

With that brief opening, I turn to the Ranking Member for his brief opening remarks and then will turn to the agenda.

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Statement of Senator Patrick Leahy
Chairman, Senate Judiciary Committee
On the "State Secrets Protection Act," S. 2533
Executive Business Meeting
April 24, 2008

Today, the Judiciary Committee considers the bipartisan State Secrets Protection Act. This important bill would establish uniform procedures for courts examining state secrets privilege claims to ensure that, whenever possible, plaintiffs have their day in court, while at the same time protecting information that could harm national security if publicly disclosed. I am delighted to be working with Senator Kennedy and Senator Specter on this important and much-needed legislation. Senator Feingold and Senator Whitehouse have also joined as cosponsors, along with others.

The state secrets privilege is a common law doctrine the government can claim in court to prevent evidence that could harm national security from being publicly revealed. The privilege has been used, or misused, in recent years to stymie litigation at its very inception in cases alleging egregious government misconduct, such as extraordinary rendition and warrantless eavesdropping on the communications of American citizens.

A recent example of the state secrets privilege short-circuiting litigation is the 2006 case of Khaled El-Masri. Mr. El-Masri, a German citizen of Lebanese descent, alleged that he was kidnapped on New Year's Eve in 2003 in Macedonia, and transported against his will to Afghanistan, where he was detained and tortured as part of the Bush administration's extraordinary rendition program. He sued the government over his alleged detention and harsh treatment. A district court judge in Virginia dismissed the lawsuit on the basis of an ex parte declaration from the Director of the CIA even though the government has admitted that the rendition program exists. Mr. El-Masri has no other remedy. Our justice system is off limits to him, and no judge ever reviewed any of the actual evidence or merits of the claim.

The government has also asserted the state secrets privilege in the litigation over the warrantless wiretapping of Americans that took place for more than five years. There, a district court judge has rejected the government's claim that the very subject matter at issue was a state secret. The Bush administration is appealing.

The state secret privilege serves important goals when properly invoked. But there are serious consequences for litigants and for the American public when the privilege is used to terminate litigation alleging serious government misconduct. For the plaintiffs, it means that the courthouse doors are closed - forever - regardless of the severity of their injury or wrongdoing. They will

never have their day in court. For the American public, it means less accountability, because there will be no judicial scrutiny of improper actions of the executive, and no check or balance.

The State Secrets Protection Act would help guide the courts to maintain the government's legitimate interests in secrecy while preserving accountability and the rights of citizens to seek judicial redress. The bill does not restrict the government's ability to assert the privilege in appropriate cases. Where the privilege applies and where the information cannot be disclosed in any form without significantly harming national security, cases may still be dismissed. But the bill would ensure that judges actually review the purported state secret claim and information to determine whether the government's claim of privilege should be sustained. This is consistent with the procedures for other privileges recognized in our courts.

I hope the Committee will support passage of this important legislation.

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