

Ensuring Liberty And Security Through Checks And Balances: A Fresh Start For The Senate Judiciary Committee

In The New 110th Congress

By Senator Patrick Leahy (D-Vt.)

Incoming Chairman Senate Judiciary Committee

United States Senate (As Prepared)

Georgetown University Law Center / December 13, 2006

It always feels good to come back to Georgetown Law Center. I am grateful to this law school for nurturing my appreciation for the rule of law in a just and free society. I thank Dean Aleinikoff for his invitation and we wish his duties allowed him to be with us today, and I also appreciate the sponsorship of the Constitution Project, which is making a real difference in focusing public discourse on first principles and away from the partisan divisiveness of the last few years. I will not speak long because I know that the students among you, including a number of talented folks who have helped me — Chanda Betourney, Phil Toomajian, and Emily Dakin, to name a few — are in the throes of finals for your classes this semester.

With the Congress finally adjourning early Saturday morning, I want to take this opportunity to look forward to the next Congress and some of the priorities that will help restore balance to our system and better protect the rights and serve the interests of the American people.

I came to the Senate during the ebb tide of Watergate and Vietnam. In my 32 years since then in the Senate, I have never seen a Congress so willfully derelict in its duties as during this Administration. This has been an unfortunate chapter in Congress's history, a time when our Constitution was under assault, when our legal and human rights were weakened, when our privacy and other freedoms were eroded. This election was an intervention. The American people rose up to take away Congress's rubber stamp, and to demand a new direction with more accountability.

The Senate Judiciary Committee will do its part. We will take an active role – and, I hope, a bipartisan role -- in charting a new course. I have enjoyed working closely with our current Chairman, Arlen Specter, who has accomplished much and has tried to accomplish even more, under difficult circumstances and with incredible stamina. We have a strong bond of friendship to build upon.

Restoration, Repair and Renewal

Year in and year out, the Judiciary Committee handles much more than its share of the most sensitive and controversial issues that come before the Senate -- from countering terrorism and fighting crime, to protecting the civil and voting rights of all Americans, to protecting inventors' patents, and everything in between. The Judiciary Committee has a special stewardship role over our national charter and over our most cherished rights as Americans. This sense of stewardship helps shape the agenda that I will discuss today.

As a Democratic majority prepares to take the lead on the Judiciary Committee, we do not have the luxury of starting with a completely clean slate. We begin, knowing that we have a duty to repair real damage done to our system of government over the last few years.

Today I will outline a new agenda for the Senate Judiciary Committee, an agenda of restoration, repair and renewal: Restoration of constitutional values and the rights of ordinary Americans. Repair of a broken oversight process and the return of accountability. And renewal of the public's right to know.

Corrosive Unilateralism

When a White House acts as if it alone knows best, thwarting the accountability of checks and balances, it makes bad decisions, even worse. It also risks losing the people's trust. These are precisely the penalties that this Administration has amassed through its unilateralism, in policies ranging from Iraq, to torture, to domestic surveillance. The Bush Administration's impulse to unilateralism predates 9/11. But after that watershed crisis, the White House accelerated its power plays at the expense of the other branches of government – all, in the name of fighting terrorism.

This Administration has rolled back open government laws and systematically eroded Americans' privacy rights. It has brazenly refused to answer the legitimate oversight questions of the public's duly elected representatives, and it has acted outside lawful authority to wiretap Americans without warrants, and to create databanks and dossiers on law-abiding Americans without following the law and without first seeking legal authorization. This White House has behaved as if the Constitution begins with Article II, and they have taken their extreme ideology of a "unitary executive" to strip both Congress and our independent federal judiciary of their rightful roles.

The Oversight Imperative

The constitutional balance must be restored. Congress has a solemn duty to protect the rights of the American people and to perform meaningful oversight to make sure the laws are followed. Real oversight makes government more accountable and more effective in keeping us safe. This is why oversight of the FBI and the Department of Justice will again be one of my highest priorities when I take the gavel once more as chairman of the Senate Judiciary Committee. When I previously chaired the Committee, our oversight was done in a bipartisan way, and I hope and expect to carry on that tradition in the coming Congress.

The Erosion Of Privacy

At a time when government is trying to databank and datamine more and more information about ordinary Americans, this Administration has been less and less willing to let us know what they are doing. Americans' privacy is a price the Bush Administration is willing to pay for the cavalier way it is spawning new databanks. But privacy rights belong to the people, not to the government. They need to stop treating the privacy of ordinary Americans as an expendable commodity. When it comes to protecting Americans' privacy, what we have today are analog rules in a digital world. We are way overdue in catching up to the erosion of privacy, and the Judiciary Committee now will help to bring this picture into focus. This will be one of our highest priorities.

I have long questioned Secretary Rumsfeld about the Defense Department's creation of dossiers on Quakers and peaceful anti-war protestors. Congress acted to rein in Admiral Poindexter's Total Information Awareness program. Recently we learned through the press -- and I'm thankful for a free and vigilant press -- that the Bush Administration has secretly been compiling dossiers on millions of law-abiding Americans. It is incredible that the Administration has reportedly been sharing this sensitive information with foreign governments and even private employers, while refusing to allow U.S. citizens to see or challenge the so-called terror score that the government has assigned them based on their travel schedules.

New and improved technologies make data banks and data mining more powerful and more useful than they have ever been before. They can be important tools in our national security arsenal, and we should use them in an effective way. But data banks are ripe for abuse and prone to mistakes without proper safeguards. A mistake can cost Americans their jobs and wreak havoc in their lives and reputations that can take years to repair. Mistakes on government watch lists have become legendary in recent years and would be comical if not a tragic reflection of dangerous government incompetence. Not only do we need checks and balances to keep government data bases from being misused against the American people, that is what the Constitution and our laws require.

Senator Specter and I have worked on a good data privacy bill that was reported by the Committee two years ago but never taken up by the Senate. The proliferation of data brokers and the burgeoning market for collecting and selling personal information intrude on the privacy of all Americans. Our bipartisan legislation establishes stronger penalties to deter identity theft and requires companies to notify individuals when their information has been compromised.

War Profiteering Oversight And Prevention

Another oversight priority on the Judiciary Committee will be pressing for accountability over the use and abuse of billions of taxpayers' dollars, sent as development aid to Iraq. Rarely if ever has so much money been funneled so fast to so many unsupervised contractors, with so few safeguards. It is hard to win a battle for the hearts and minds of Iraqis who still are without basic services, even as they watch billions of dollars being siphoned off by unsupervised contractors. Too much of that money is unaccounted for, and many of the facilities and services it was supposed to provide are still nonexistent. And now this week we read about plans to spend hundreds of millions more to create jobs in Iraq. Weren't we supposed to be doing that with all those billions of other taxpayers' dollars? At the risk of incurring another of Vice President Cheney's special season's "greetings," I ask: Where did all the money go?

Up to now, the committees of Congress have looked the other way, and the Administration has fought tooth and nail against any accountability for this massive wastefulness. We even had to fight to preserve the one watchdog that Congress has sent to Iraq: the Special Inspector General for Iraq Reconstruction. Two months ago, a rider was slipped into the Defense Authorization Bill that pulled the plug on the inspector general's work. I am pleased that the election results helped us reverse that last week -- for now.

The Judiciary Committee will be asking the Justice Department why it has slowed and obstructed the civil suits against contractors brought by whistleblowers, under the False Claims Act. And because prosecuting criminal cases against war profiteering is difficult under current law and has to overcome jurisdictional legal defenses, we also will renew our efforts to enact the War Profiteering Prevention Act. I have repeatedly offered this bill, and it has passed the Senate, only to die in a Republican-controlled conference committee.

With each passing day of the conflict in Iraq, it is more than just the future of Iraq that hangs in the balance, but also our own. The recently released Iraq Study Group report offers a way forward to change the disastrous course of the past four years. As the Study Group points out, Iraq has long desperately needed an effective and credible law enforcement and legal system. I look forward to the Judiciary Committee contributing to these efforts by exploring the dozen recommendations relating to the Iraqi justice system and the training of Iraqi police forces. The police force has proven to be one of the worst failures of the occupation. Just this past weekend the press reported that a nephew of Saddam Hussein escaped from custody with the help of police forces.

Defending The Public's Right To Know

The public's need to know is a constant in our democracy, a basic building block for the consent of the governed. This year, we marked the 40th anniversary of the Freedom of Information Act, or "FOIA." Unfortunately, open, informed government has been under assault by the first administration in modern times that is explicitly hostile to the public's right to know. By using ideology to trump science, gagging government scientists and experts, reclassifying public documents and undermining important tools like FOIA, this government has displayed a dangerous disdain for the free press and the public. Dr. James Hansen, director of NASA's Goddard Institute and a leading authority on climate change, was kept away from events where he could share his research insights with the public – the same American public that pays the bills for the research Dr. Hansen has been doing. It will be a priority of mine to continue efforts to strengthen and improve our open government laws. Some may be surprised to know that Senator John Cornyn has been an ally in efforts to restore FOIA. We are forging a bipartisan partnership that I hope will continue, and I look forward to greater progress in the next Congress.

Defending Our Constitution By Restoring Checks and Balances

I am immensely proud to be one of the two Senators given the opportunity to represent a state that boasts such a rich tradition of defending those rights. At one time, we even declared ourselves an independent republic -- Vermont did not and would not become a state until 1791, the year the Bill of Rights was ratified. It is also the state that gave us some of the most honorable senators in our history -- Robert Stafford, Ralph Flanders, George Aiken and Jim Jeffords, to name a few. These are men who exemplified that tradition, who rose up against abuses, against infringements upon Americans' rights when doing that was not popular, but it was right. Just as we cannot allow ourselves to be lulled into a sense of false comfort when it comes to our national security, we cannot allow ourselves to be lulled into parking our rights and liberty in a blind trust. Our freedom is the foundation that makes us strong as a nation.

We must remain vigilant on all fronts or we stand to lose all that is precious – our liberty, along with our security. For years, this Administration had hidden the "President's program" of warrantless wiretapping of Americans. We are now beginning to learn that it was not just one program but many that have been hidden from Congress. We all support monitoring the communications of suspected terrorists. Doing that is basic to thwarting terrorism. It is essential, and it is permitted under existing law. It is also essential that when that monitoring impinges upon the rights of Americans, it needs to be done lawfully and with adequate checks and balances to prevent abuses. Initially the Administration stonewalled our inquiries and claimed unilateral power and a monopoly on deciding what needs to be done and how to do it. As we pressed for answers, their responses turned into a demand for sweeping legal authority without any independent judgment by Congress, or any meaningful answers about what they have been doing.

We came together in the days after 9/11. We worked together to provide new authority the Administration said it needed. But after White House unilateralism set in, they have claimed for themselves broad authority to violate the law and secretly eavesdrop on American phone and computer communications, without proper congressional or judicial review. That is a recipe for abuse. The reason we have the Foreign Intelligence Surveillance Act – or FISA – in the first place is because of a period of earlier abuses of Americans' rights and privacy.

With meaningful oversight and cooperation from this Administration we can achieve the right balance. We all have the same goal – protecting our country and its citizens. We have made more than a dozen changes to FISA since 9/11. If FISA needs more changes, then we should work

together to achieve that in a responsible way, once Congress has a basis in knowledge that justifies further changes.

Defending The Independence Of The Judiciary

The final check on an overreaching Executive in our constitutional structure is the judiciary. The reason I have fought against the packing of the federal courts with those who will not preserve its independence and fairness is because the courts are so important to protecting the rights of all Americans. For too long, this White House has used judicial nominations for partisan political purposes and refused to work with us on consensus nominees. The American people want the Senate to be more than a rubber stamp. They want the Senate to do its job by carefully evaluating nominees for lifetime judgeships -- judgeships that will continue long after this President leaves office and will affect the rights of today's Americans and those of their children and grandchildren.

The process starts with the President. In the choices he makes, he can unite the Senate and the American people, or he can divide us. If he works with us to send consensus nominees instead of picking political fights, we can make good progress filling vacancies in these important lifetime appointments. One tangible step we should consider is wider use of bipartisan judicial nominating commissions in screening judicial candidates.

Restoring Our Basic American Values And Human Rights

A lesson in how not to legislate was the adoption in the run-up to the November election of the Military Commissions Act. Congress was wrong to suspend the Great Writ of Habeas Corpus -- a keystone of American liberty -- in order to avoid judicial review that prevents government abuse. That law needlessly undercut our freedoms and values, and, as I noted at the time, allowed the terrorists to achieve something they could never win on the battlefield, an action from fear rather than strength to undercut the Constitution. It was a squandered opportunity to write a good law to set enforceable guidelines for fighting and winning the war on terror without sacrificing American values and American leadership on human rights.

Justice Scalia wrote in the Hamdi case: "The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive." But the bill written by the White House and passed by the last Congress is designed to ensure that the Bush-Cheney Administration is never again embarrassed by a United States Supreme Court decision reviewing its unlawful abuses of power. I am committed to restoring basic American values to the way we combat terrorism and to developing a more effective strategy. As a result of that sweeping, ill-conceived law, we have now eliminated basic legal and human rights for 12 million lawful permanent residents who live and work among us, to say nothing of the millions of other legal immigrants and visitors whom we welcome to our shores each year. I look forward in the next Congress to working with Senator Specter, Senator Dodd and others to restore these fundamental protections and the checks and balances on which the Constitution and our freedoms rest.

Comprehensive Immigration Reform

I hope that we can also advance American interests and American values by making further progress on comprehensive immigration reform. We made some bipartisan progress on the Committee and in the Senate last year only to be stymied by Republican congressional leaders. We can work together to bring people out of the shadows, to treat hardworking people with dignity and respect rather than disdain and discrimination.

Patent Reform And Life-Saving Medicines

Reforming our patent system will also be an enormous, but critically important, project in the new Congress. Our Constitution enshrined patent rights for a reason: "to promote the progress of science and useful arts." The spirit of American innovation has made the United States the world's leader in intellectual property. Yet the expressions of American innovation – in the form of patented goods and processes – are only as good as the system that fosters and protects innovation. Our patent system was created in another century, and we need to update it. It must serve the 21st Century industries that have made us the envy of the world, just as it well served the smokestack industries of an earlier era.

Complementing that effort, I intend to redouble efforts to reexamine our patent laws in the hope that by making thoughtful and practical changes we can greatly increase access to essential medicines throughout the world. We can help struggling families in developing nations, while improving U.S. relations with large segments of the world's population.

The current global health crisis is one of the great callings of our time. Whether it is the Avian Flu, AIDS, SARS, West Nile Virus, or the approaching menace of multi-drug resistant bacteria, we need to recognize that the health of those half way around the world now influences our security and affects our lives here in the United States. I want the work of the Judiciary Committee to be a catalyst to help make life-saving medicines more readily available around the world.

New Subcommittee On Human Rights And The Law

Finally, I plan to establish a new subcommittee, one that will focus our attention and efforts on protecting human rights. A Human Rights and the Law Subcommittee would help us better fulfill our role in a challenging global environment. Over the years we have enacted laws against torture, human trafficking and war crimes, for example. This Human Rights Subcommittee would provide a focal point for our activity. I want to do this on a bipartisan basis and hope to continue consultations so that we can proceed to establish all our subcommittees at the outset of the new Congress.

A Fresh Start Emphasizing Progress Over Politics

There is much work to be done. I look forward to a new Congress where we work together on behalf of all Americans. We are living in challenging times. It is my intention to confront security risks by finding strength in our core American values. Benjamin Franklin memorably warned that those who would "give up an essential liberty for temporary security, deserve neither liberty nor security." History can attest that we are able to make a difference when we fight to protect our freedoms, instead of sacrificing them through fear. Those freedoms and core values are what make this such a great and good nation. Freedom and security must not become mutually exclusive values in America. We can have both, and we must have both. Steering that prudent course will be one of the greatest challenges of our time.