ran for state auditor. He lost. But he had made contacts in the Minnesota Democratic-Farmer-Labor Party, and he stayed active in politics. In 1988, he was the state co-chairman of the Rev. Jesse Jackson's campaign in the president primary, and in the general election, he was co-chairman of the campaign of Michael S. Dukakis, the Democratic presidential nominee.

Few thought he had a chance when he announced that he would run for the Senate against Mr. Boschwitz, Russell D. Feingold, now a like-minded liberal Democratic senator from Wisconsin, today had this recollection of dropping by to meet Mr. Wellstone in 1989:

''He opened the door, and there he was with his socks off, 15 books open that he was reading, and he was on the phone arguing with somebody about Cuba. He gave me coffee, and we laughed uproariously at the idea that either of us would ever be elected. But he pulled it off in 1990 and gave me the heart to do it in Wisconsin.''

Mr. Feingold was elected in 1992, also with a tiny treasury.

Mr. Boschwitz spent $7 million on his campaign, seven times Mr. Wellstone's budget. To counteract the Boschwitz attacks, Mr. Wellstone ran witty, even endearing television commercials produced without charge by a group led by a former student. In one ad, the video and audio were speeded up, and Mr. Wellstone said he had to talk fast because ''I don't have $6 million to spend.''

Mr. Wellstone toured the state in a battered green school bus, and in the end, he won 50.4 percent of the vote and was the only challenger in 1990 to defeat an incumbent senator.

He arrived in Washington as something of a rube. On one of his first days in town before he was sworn in, he called a reporter for the name of a restaurant where he could get a cheap dinner. When the reporter replied that he knew a place where a good meal was only $15, Mr. Wellstone said $15 was many times what he was prepared to spend.

He also made what he later conceded were ''rookie mistakes.'' At one point, for instance, he used the Vietnam Veterans Memorial as a backdrop for a news conference to oppose the war against Iraq. Veterans' groups denounced him, and he later apologized.

But he soon warmed to the ways of the Senate and became especially adept at the unusual custom of giving long speeches to an empty chamber. Probably no one in the Senate over the last dozen years gave more speeches at night after nearly all the other senators had gone home.

His strength was not in getting legislation enacted. One successful measure he sponsored in 1996 with Senator Pete V. Domenici, Republican of New Mexico, requires insurance companies in some circumstances to give coverage to people with mental illness, but he failed this year in an effort to strengthen the law.

In a book he published last year, ''The Conscience of a Liberal'' (Random House), Mr. Wellstone wrote, ''I feel as if 80 percent of my work as a senator has been playing defense, cutting the extremist enthusiasms of the conservative agenda (much of which originates in the House) rather than moving forward on a progressive agenda.''

In a speech in the Senate this month explaining his opposition to the resolution authorizing the use of force in Iraq, Mr. Wellstone stressed that Saddam Hussein was ''a brutal, ruthless dictator who has repressed his own people.''

But Mr. Wellstone went on to say: ''Despite a desire to support our president, I believe many Americans still have profound questions about the wisdom of relying too heavily on a preemptive go-it-alone military approach. Acting now on our own might be a sign of our power. Acting sensibly and in a measured way, in concert with our allies, with bipartisan Congressional support, would be a sign of our strength.''

Later, Mr. Wellstone told a reporter that he did not believe his stance would hurt him politically. ''What would really hurt,'' he said, ''is if I was giving speeches and I didn't even believe what I was saying. Probably what would hurt is if people thought I was doing something just for political reasons.''

Mr. Wellstone briefly considered running for president in 2000, but he called off the campaign because, he said, the doctors who had been treating him for a ruptured disk told him that his back could not stand the travel that would be required.

Often, Mr. Wellstone was the only senator voting against a measure, or one of only a few. He was, for instance, one of three senators in 1999 to support compromise missile defense legislation. He was the only one that year to vote against an education bill involving standardized tests, and the only Democrat who opposed his party's version of lowering the estate tax.

Mr. Wellstone was one of the few senators who made the effort to meet and remember the names of elevator operators, waiters, police officers and other workers in the Capitol.

James W. Ziglar, a Republican who was sergeant at arms of the Senate from 1998 to 2001 and who is now commissioner of the Immigration and Naturalization Service, remembered today ''the evening when he came back to the Capitol well past midnight to visit with the cleaning staff and tell them how much he appreciated their efforts.''

''Most of the staff had never seen a senator and certainly had never had one make such a meaningful effort to express his or her appreciation,'' Mr. Ziglar said. ''That was the measure of the man.''

The PRESIDING OFFICER. Without objection, the resolution and preamble are agreed to.

The resolution (S. Res. 354) was agreed to.

The preamble was agreed to.

ADDITIONAL STATEMENTS

PROTECT ACT

• Mr. LEAHY. Mr. President, I came to the Senate floor and joined Senator HATCH in introducing S. 2520, the PROTECT Act in April, after the Supreme Court's decision in Ashcroft v. Free Speech Coalition, Free Speech. Although there were some others who raised constitutional concerns about specific provisions in that bill, I believed—and still believe—that unlike the Administration proposal it was a good faith effort to work within the First Amendment.

It is important that we respond to the Supreme Court decision but it is just as important that we avoid repeating our past mistakes. Unlike the 1996 Child Pornography Prevention Act, CPPA, this time we should respond with a law that passes constitutional muster. Our children deserve more than a press conference in on this issue. They deserve a law that will stick.

After joining Senator HATCH in introducing the PROTECT Act, I convened a Judiciary Committee hearing on the legislation. We heard from the Administration, from the Center for Missing and Exploited Children, CMEC, and from experts who came and told us that our bill, as introduced, would pass constitutional muster, but the House-passed bill would not.

I also placed S. 2520 on the Judiciary Committee's calendar for the October 8, 2002 business meeting. I continued to work with Senator HATCH to improve the bill so that it could be quickly enacted. Senator HATCH circulated a Hatch-Leahy proposed Judiciary Committee substitute that improved the bill before our October 8 business meeting. Unfortunately, the committee was unable to consider it because of procedural maneuvering that had nothing to do with this important legislation, including the refusal of committee members on the other side of the aisle to consider any pending legislation on the committee's agenda.

I still wanted to get this bill done. That is why for a week I have been working to clear and have the Senate pass a substitute to S. 2520 that tracks the Hatch-Leahy proposed committee substitute in every area but also made one improvement to the affirmative defense. That one improvement related to the ability of defendants to assert an affirmative defense to a charge of child pornography if they could actually prove that only adults, and no children—virtual or not—were used in making the material in question. Other than that, it was identical to the Hatch-Leahy proposed committee substitute in every way. It did not change the definition of child pornography from the PROTECT Act and it also did not change the tools provided to prosecutors. All these provisions remained unchanged. Indeed, the substitute I offered even adopted parts of the House bill which would help the CMEC to work with local and state law enforcement on these cases.

As I stated many days ago on the Senate floor, every single Democratic Senator cleared that measure. I then urged Republicans to work on their side of the aisle to clear this measure—so similar to the joint Hatch-Leahy substitute—so that we could swiftly enact a law that would pass constitutional muster.

Instead of working to clear that bipartisan, constitutional measure, however, my colleagues on the other side of the aisle have opted to use this issue to play politics. They have redrafted the bill, changed crucial definitions, and are now offering a totally new version. Worse yet, the new version is not likely to pass Constitutional muster. Instead, if passed, it will lead to six more years of appellate litigation and yet another law struck down by the Supreme Court. That will help no one and certainly not help the children that these laws are intended to help.

Senator HATCH is offering a new version of the bill that experts have told us is plainly unconstitutional and does not respect or heed the parameters laid down by the Supreme Court

as does the original Hatch-Leahy bill and the Hatch-Leahy substitute circulated to the Judiciary Committee.

First, the new Hatch proposal outlaws precisely the thing that Justice Kennedy and at least 5 other members of the Supreme Court said could not be banned—wholly computer generated child pornography where no real children are involved in the making of the material. The Hatch proposal, in section 5, adds a totally new definition of ''child pornography'' that covers non-obscene ''computer generated images'' not at all related to any real person, if they are ''virtually indistinguishable'' from an actual minor. That is the same approach as the House bill, that we heard so roundly criticized both at our Committee hearing and by other experts. At best, it addresses the concerns of only Justice O'Connor—but she was not the deciding vote in the Free Speech case.

Second, this new definition is particularly problematic because the bill does not allow any affirmative defense for defendants who can show that no children at all were used in the making of the non-obscene image. Thus, even a defendant who can produce an actual 25-year-old in court to prove that the material is not child pornography can be sent to jail under this new provision. So too can the person who can prove in court that the image did not involve real people at all, but only totally computer generated images. Again, that is precisely the problem that Justice Kennedy and even Justice Thomas expressed concern about in the Free Speech case in considering the affirmative defense in the CPPA.

Third, the new Hatch proposal significantly changes the definition of the new crime of ''pandering'' from the original version of S. 2520 that Senator HATCH and I introduced. First, it removes the link to the long-standing obscenity test despite the fact that constitutional experts tell us that this link is necessary for the pandering crime to be constitutional. This changed definition does not address Justice Kennedy's concern that child pornography should be linked to obscenity. We do not want a situation where people who present such movies as Traffic, American Beauty, and Romeo and Juliet could be subjected to criminal prosecution, and this new pandering crime does that.

Second, the new provision compounds the constitutional problems by extending the provision to ''purported material'' in addition to actual material. Thus, not only need the pandering not relate to ''obscene'' material, it need not relate to any material at all.

From a provision that criminalized primarily commercial speech relating to obscene material, the new proposal has changed to criminalize pure ''chat,'' including over the Internet, about non-obscene child pornography. That is protected speech. I have a letter from Professor Fred Schauer, a nationally recognized First Amendment scholar who testified at our hearing, that I will place in the record that confirms that this change would render the provision pandering unconstitutional.

These are only some of the problems with the new Hatch language. I am disappointed that we could not work together to clear the prior substitute that I have been trying to clear through the Senate for almost a week. That proposal was virtually identical to the proposed Hatch-Leahy committee substitute, and was approved by every single Democratic Senator. If my colleagues would have been willing to do that, we would have had quick action on a law that would stick. Instead, we are being asked to consider a brand new version of S. 2520 with considerable constitutional problems. That is not the way to pass legislation quickly in the Senate.

Unlike Senator HATCH's prior proposals that I cosponsored, this provision will only offer the illusion of action. We need a law with teeth, not one with false teeth. In the end, this provision will be struck down just as was the 1996 CPPA and we will have wasted 6 more years without providing prosecutors the tools they need to fight child pornography and put in jeopardy any convictions obtained under a law that in the end is struck down as unconstitutional. I had hoped that we could work together to get a law that will clearly pass constitutional muster. This issue is too important for politics.

I ask that a letter from Frederick Schauer, Frank Stanton Professor of the First Amendment, be printed in the RECORD.

The material follows:

There being no objection, the material was ordered to be printed in the RECORD, as follows:

HARVARD UNIVERSITY,
Cambridge, MA, October 3, 2002.

Re S. 2520.

Hon. PATRICK LEAHY,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR LEAHY: Following up on my written statement and on my oral testimony before the Committee on Wednesday, October 2, 2002, the staff of the committee has asked me to comment on the constitutional implications of changing the current version of S. 2520 to change the word ''material'' in Section 2 of the bill (page 2, lines 17 and 19) to ''purported material.''

In my opinion the change would push well over the constitutional edge a provision that is now right up against that edge, but probably barely on the constitutional side it.

As I explained in my statement and orally, the Supreme Court has from the Ginzburg decision in 1966 to the Hamling decision in 1973 to the Free Speech Coalition decision in 2002 consistently refused to accept that ''pandering'' may be an independent offense, as opposed to being evidence of the offense of obscenity (and, by implication, child pornography). The basic premise of the pandering prohibition S. 2520 is thus in some tension with more than thirty-five years of Supreme Court doctrine. What may save the provision, however, is the fact that pandering may also be seen as commercial advertisement, and the commercial advertisement of an unlawful product or service is not protected by the Supreme Court's commercial speech doctrine, as the Court made clear in both Virginia Pharmacy and also in *Pittsburgh Press* v. *Human Relations Commission*, 413 U.S. 376 (1973). It is important to recognize, however, that this feature of commercial speech doctrine does not apply to non-commercial speech, where the description or advocacy of illegal acts is fully protected unless under the narrow circumstances, not applicable here, of immediate incitement.

The implication of this is that moving away from communication that could be described as an actual commercial advertisement decreases the availability of this approach to defending Section 2 of S. 2520. Although it may appear as if advertising ''material'' that does not exist at all (''purported material'') makes little difference, there is a substantial risk that the change moves the entire section away from the straight commercial speech category into more general description, conversation, and perhaps even advocacy. Because the existing arguments for the constitutionality of this provision are already difficult ones after Free Speech Coalition, anything that makes this provision less like a straight offer to engage in a commercial transaction increases the degree of constitutional jeopardy. By including ''purported'' in the relevant section, the pandering locks less commercial, and thus less like commercial speech, and thus less open to the constitutional defense I outlines in my written statement and oral testimony.

I hope that this is helpful.

Yours sincerely,

FREDERICK SCHAUER,
Frank Stanton Professor of the First Amendment.●

VETERANS LONG-TERM CARE AND MEDICAL PROGRAMS ENHANCEMENT ACT OF 2002

● Mr. ROCKEFELLER. Mr. President, I am sincerely disappointed about the placing of an anonymous hold on S. 2043, the ''Veterans Long-Term Care and Medical Programs Enhancement Act of 2002.''

There is no apparent reason why this important piece of legislation should be held up at this time. It was developed in a bipartisan manner and encompasses many vital pieces of legislation from both sides of the aisle. It is my sincere hope that the Senator responsible for this hold will realize that this is certainly not the time to be playing politics with legislation that affects our Nation's veterans.

I would like to share with my colleagues some of the key provisions of S. 2043 that seek to improve the accessibility and quality of the VA health care system.

The centerpiece of this bill is an effort to make VA's prescription drug copayment policy a bit more equitable for lower-income veterans. Mr. President, currently, veterans with incomes of less than $24,000 a year are exempt from copayments for most VA health care services. However, when it comes to prescription drugs, the income threshold for exemption is about $9,000 a year. This bill would raise the exemption level for prescription copayments to make them the same as other VA health care copayments.