EXECUTIVE SESSION

NOMINATION OF DENNIS W. SHEDD, OF SOUTH CAROLINA, TO BE U.S. CIRCUIT JUDGE FOR THE FOURTH CIRCUIT

The PRESIDING OFFICER. Under the previous order, the Senate will now go into executive session to proceed to the consideration of Executive Order No. 1178, which the clerk will report.

The legislative clerk read the nomination of Dennis W. Shedd, of South Carolina, to be United States Circuit Judge for the Fourth Circuit.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, how much time is under the control of the Senator from Vermont?

The PRESIDING OFFICER. Three hours.

Mr. LEAHY. Mr. President, I have discussed this with the distinguished senior Senator from Utah. I am going to speak on another matter prior to going to the Shedd nomination, although I have no objection to the time coming out of the 3 hours.

INNOCENCE PROTECTION ACT

Mr. LEAHY. Mr. President, for more than 2 years, I have been working hard with Members on both sides of the aisle, in both Houses of Congress, to address the horrendous problem of innocent people being condemned to death within our judicial system. This is not a question of whether you are for or against the death penalty. Many of the House Members and Senate Members who have joined this effort are in favor of the death penalty. I suspect the majority of them are in favor of it. It goes to the question of what happens if you have an innocent person who is condemned to death.

Our bill, the Innocence Protection Act, proposes a number of basic commonsense reforms to our criminal justice system; reforms that are aimed at reducing the risk that innocent people will be put to death.

We have come a long way since I first introduced the IPA in February 2000. At that time, we had four Democratic cosponsors. Now there is a broad consensus across the country among Democrats and Republicans, supporters and opponents of the death penalty, liberals, conservatives, and moderates, that our death penalty machinery is broken. We know that putting an innocent person on death row is not just a nightmare, it is not just a dream, it is a frequently recurring reality.

Since the 1970s, more than 100 people who were sentenced to death have been released, not because of some technicality, but because they were innocent, because they had been sentenced to death by mistake. One wonders how many others were not discovered and how many innocent people were executed.

These are not just numbers, these are real people. Their lives are ruined. Let me give an example: Anthony Porter. Anthony Porter was 2 days from execution in 1998 when he was exonerated and released from prison. Why? Not because the criminal justice system worked. He was exonerated and released because a class of journalism students, who had taken on an investigation of his case, found that did he not commit the crime. They also found the real killer. A group of students from a journalism class did what should have been done by the criminal justice system in the first place.

Ray Krone spent 10 years in prison. Three of those ten years were on death row waiting for the news that he was about to be executed. Then, earlier this year, through DNA testing, he was exculpated and the real killer was identified. These are two of the many tragedies we learn about each year.

These situations result not only in the tragedy of putting an innocent person on death row, but they also leave the person who committed the crime free. Everything fails. We have the wrong person in prison. But we have not protected society or the criminal justice system because the real criminal is still out running free. Often times, the actual perpetrator is a serial criminal.

Today, Federal judges are voicing concerns about the death penalty. Justice Sandra Day O'Connor has warned that ''the system may well be allowing some innocent defendants to be executed.'' Justice Ginsburg has supported a State moratorium on the death penalty. Another respected jurist, Sixth Circuit Judge Gilbert Merritt, referred to the capital punishment system as ''broken,'' and two district court judges have found constitutional problems with the Federal death penalty.

We can agree there is a grave problem. The good news is that there is also a broad consensus on one important step we have to take—we must pass the Innocence Protection Act.

That is why I wanted to let my colleagues know what is happening. As the 107th Congress draws to a close, the IPA is cosponsored by a substantial bipartisan majority of the House and by 32 Senators from both sides of the aisle, including, most recently, Senator BOB SMITH of New Hampshire. A version of the bill has been reported by a bipartisan majority of the Senate Judiciary Committee. And the bill enjoys the support of ordinary Americans across the political spectrum.

What would the Innocence Protection Act do? As reported by the committee, the bill proposes two minimum steps that we need to take—not to make the system perfect, but simply to reduce what is currently an unacceptably high risk of error. First, we need to make good on the promise of modern technology in the form of DNA testing. Second, we need to make good on the constitutional promise of competent counsel.

DNA testing comes first because it is proven and effective. We all know that DNA testing is an extraordinary tool for uncovering the truth, whatever the truth may be. It is the fingerprint of the 21st Century. Prosecutors across the country rightly use it to prove guilt. By the same token, it should also be used to do what it is equally scientifically reliable to do: to establish innocence.

Just like fingerprints, in many crimes there are no fingerprints; in many crimes there is no DNA evidence.

Where there is DNA evidence, it can show us conclusively, even years after a conviction, where mistakes have been made. And there is no good reason not to use it.

Allowing testing does not deprive the State of its ability to present its case, and under a reasonable scheme for the preservation and testing of DNA evidence, it should be possible to preserve the evidence.

The Innocence Protection Act would therefore provide improved access to DNA testing for people who claim that they have been wrongfully convicted.

Just last week, prosecutors in St. Paul, MN, vacated a 1985 rape conviction after a review of old cases led to DNA testing that showed they had the wrong man—and also identified the actual rapist. Think how much better society would have been had they caught the real rapist 17 years ago. The district attorney wanted to conduct DNA testing in two other cases, but the evidence in those cases had already been destroyed. She has called on law enforcement agencies to adopt policies requiring retention of such evidence, and that is what our bill would call for.

Many cases have no DNA evidence to be tested, just as in most cases there are no fingerprints. In the vast majority of death row exonerations, no DNA testing has or could have been involved.

So the broad and growing consensus on death penalty reform has another top priority. All the statistics and evidence show that the single most frequent cause of wrongful convictions is inadequate defense representation at trial. The biggest thing we can do is to guarantee at least minimum competency for the defense in a capital case.

This bill offers States extra money for quality and accountability.

They can decline the money but then the money will be spent on one or more organizations that provide capital representation in that State. One way or another, the system is improved.

More money is good for the states. More openness and accountability is good for everyone. And better lawyering makes the trial process far less prone to error.

When I was a State's Attorney in Vermont, I wanted those I prosecuted to have competent defense counsel. I wanted to reach the right result in my trails, whatever that was, and I wanted a clean record, not a record riddled with error. Any prosecutor worth his or her salt will tell you the same; any