

machine gun nests and silenced it with grenades. When wounded again, this time by machine gun bullets through his chest muscles, First Lieutenant Bianchi climbed atop an American tank, seized its anti-aircraft gun, and fired into another enemy position until he was knocked off the tank by a third severe bullet wound.

This story has a sad ending. First Lieutenant Bianchi survived that day and returned to the fight a month later. The American-Filipino forces crushed "the Big Pocket" about a week after his heroics. But the Japanese would take Bataan in the end, and First Lieutenant Bianchi was sent off on the Bataan Death March. Though he survived the march, he died on January 9, 1945, when an American plane bombed a Japanese prison ship, not realizing that it held Americans.

The other hero memorialized in Brookings is Lt. Colonel Leo Thorsness, with whom I share some history. We both studied at SDSU, we both served in the Air Force, and we both ran for South Dakota's 1st Congressional District seat in 1978. While I prevailed, it was only by the skin of my teeth—110 votes out of more than 129,000 total ballots. And from that struggle, I gained a first-hand appreciation of the spirit, determination and patriotism of Leo Thorsness. For me, that experience enhances my appreciation for the remarkable story of a 35-year-old Air Force major who, in the words of his strike force commander, took on "most of North Vietnam all by himself."

Lt. Colonel Thorsness had served as a pilot for about 15 years when he was assigned to the 357th Tactical Fighter Squadron at Takhli Royal Thai Air Base. Lt. Colonel Thorsness was sent in just months after the Soviet Union began supplying North Vietnam with surface-to-air missiles (SAMs), and his mission was a new and dangerous one—distract and destroy the SAMs so that U.S. bombers could deliver their ordnance.

At one o'clock in the afternoon on Wednesday, April 19, 1967, his F-105 screamed off the runway, headed for the Xuan Mai army barracks and storage supply area, 37 miles southwest of Hanoi. Lt. Colonel Thorsness and his wingman attacked from the south, while another pair of F-105s attacked from the north. He silenced one SAM site with missiles, and then destroyed a second SAM site with bombs. But in the attack on the second site, Lt. Colonel Thorsness' wingman was shot down by intensive anti-aircraft fire, and the plane's pilot and electronic warfare officer were forced to eject over North Vietnam. Lt. Colonel Thorsness circled their parachutes and relayed their position to search and rescue crews. While he was circling, a MIG-17 was sighted in the area. Lt. Colonel Thorsness immediately initiated an attack and destroyed the MIG, but he was then forced to depart the area in search of an aerial tanker for refueling.

After learning that rescue helicopters had arrived, but that no additional F-105s were arriving to provide cover, Lt. Colonel Thorsness returned alone, flying back through an area bristling with SAMs and anti-aircraft guns to the downed flyers' position. As he approached, he spotted four MIG-17 aircraft, which he attacked, damaging one and driving away the rest. Soon it became clear that Lt. Colonel Thorsness' plane lacked sufficient fuel to continue protecting the rescue operation and that he would have to find an aerial tanker. On his way to the tanker, however, Lt. Colonel Thorsness received a distress call from a fellow F-105 pilot who had gotten lost in battle and was running critically low on fuel. In response, Lt. Colonel Thorsness allowed that pilot to refuel at the tanker, while he himself flew toward the Thai border, a decision that may have saved the other plane and the life of its pilot, according to the Medal of Honor citation. Lt. Colonel Thorsness managed to return to a forward operating base—"With 70 miles to go, I pulled the power back to idle and we just glided in," he would recall later. "We were indicating 'empty' when the runway came up just in front of us."

A week-and-a-half later, on a similar mission, Lt. Colonel Thorsness was shot down over North Vietnam by a heat-seeking missile from a MIG-21. He spent the next six years as a North Vietnamese prisoner of war. He was released on March 4, 1973, and in October of that year, the President of the United States draped the light blue ribbon of the Congressional Medal of Honor around Lt. Colonel Thorsness' neck.

The official citation says: "Lt. Colonel Thorsness' extraordinary heroism, self-sacrifice, and personal bravery involving conspicuous risk of life were in the highest traditions of the military service and have reflected great credit upon himself and the U.S. Air Force." I could not have put it any better myself.

With this statement before the United States Senate, I join in saluting First Lieutenant Bianchi and Lt. Colonel Thorsness. As Congressional Medal of Honor winners, they are a symbol of the finest our nation has to offer. Their feats serve as extraordinary lessons in courage, commitment, and self sacrifice, and I am proud that they are identified with my home state.

#### THE PROFESSIONAL STANDARDS FOR GOVERNMENT ATTORNEYS ACT OF 2000

Mr. LEAHY. Mr. President, I spoke earlier this month about the continuing problems for Federal law enforcement caused by the so-called McDade law, which was slipped into the omnibus appropriations law at the end of the last Congress. I discussed how the interplay of the McDade law and a recent attorney ethics decision by the Oregon Supreme Court is se-

verely hampering Federal law enforcement efforts in Oregon. Oregon's Federal prosecutors will no longer use federally authorized investigative techniques such as wiretaps and consensual monitoring, and by the end of this week, the FBI will shut down Portland's Innocent Images undercover operation, which targets child pornography and exploitation. This is just the latest example of how the McDade law has impeded important criminal prosecutions, chilled the use of traditional Federal investigative techniques and posed multiple hurdles for Federal prosecutors.

Due to my serious concerns about the adverse effects of the McDade law on Federal law enforcement efforts, I introduced S. 855, the Professional Standards for Government Attorneys Act, on April 21, 1999. The Justice Department has called this legislation "a good approach that addresses the two most significant problems caused by the McDade Amendment—confusion about what rule applies and the issue of contacts with represented parties."

Since that time, I have conferred with a number of lawmakers from both sides of the aisle about crafting an alternative to the McDade law. Together, we worked out a proposal based on S. 855, which would address the problems that have caused by the McDade law, while adhering to the basic premise of that law—that the Department of Justice should not have the authority it long claimed either to write its own ethics rules or to exempt its lawyers from the ethics rules adopted by the Federal courts. Based on these discussions, I am filing this substitute amendment to my bill, S. 855.

I regret that we have squandered opportunities to move any corrective legislation through the Congress. The consequences of our inaction have been severe, as I have discussed, and it is clear that Federal law enforcement efforts will continue to suffer if we do not act now.

I ask unanimous consent that a copy of the substitute amendment and a section-by-section summary be printed in the RECORD.

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

#### SUMMARY OF THE PROFESSIONAL STANDARDS FOR GOVERNMENT ATTORNEYS ACT OF 2000

##### 1. OVERVIEW

The Professional Standards for Government Attorneys Act of 2000 adheres to the basic premise of section 801 of the omnibus appropriations act for fiscal year 1999 (Pub. L. 105-277), commonly known as the McDade law: the Department of Justice does not have the authority it has long claimed to write its own ethics rules. The proposed legislation would establish that the Department may not unilaterally exempt federal trial lawyers from the rules of ethics adopted by the federal courts. Federal courts are the more appropriate body to establish rules of professional responsibility for federal prosecutors, not only because federal courts have traditional authority to establish such rules for lawyers generally, but because the Department lacks the requisite objectivity.

The first part of the proposed legislation embodies the traditional understanding that when lawyers handle cases before a federal court, they should be subject to the federal court's rules of professional responsibility, and not to the possibly inconsistent rules of other jurisdictions. By incorporating this ordinary choice-of-law principle, the proposed legislation would preserve the federal courts' traditional authority to oversee the professional conduct of federal trial lawyers, including federal prosecutors. It would thereby avoid the uncertainties presented by the McDade law, which subjects federal prosecutors to state laws, rules of criminal procedure, and judicial decisions which differ from existing federal law.

The second part of the proposed legislation addresses the most pressing contemporary question of government attorney ethics—namely, the question of which rule should govern government attorneys' communications with represented persons. It asks the Judicial Conference of the United States to submit to the Supreme Court a proposed uniform national rule to govern this area of professional conduct, and to study the need for additional national rules to govern other areas in which the proliferation of local rules may interfere with effective federal law enforcement. The Rules Enabling Act process is the ideal one for developing such rules, both because the federal judiciary traditionally is responsible for overseeing the conduct of lawyers in federal court proceedings, and because this process would best provide the Supreme Court an opportunity fully to consider and objectively to weigh all relevant considerations.

## 2. SHORT TITLE

Section one is the short title of the bill.

## 3. AMENDMENTS TO 28 U.S.C. 530B

Section two supersedes the McDade law with a new 28 U.S.C. 530B, consisting of four subsections.

Subsection (a) codifies the definition of "attorney for the Government" in the current Department of Justice regulations, and also includes in the definition any outside special counsel, or employee of such counsel, as may be appointed by the Attorney General under 28 CFR 600.1 or any other provision of law.

Subsection (b) establishes a clear choice-of-law rule for government attorneys with respect to standards of professional responsibility, modeled on Rule 8.5(b) of the ABA's Model Rules of Professional Conduct. An attorney who is handling a case in court would be subject to the professional standards established by the rules and decisions of that court. An attorney who is conducting a grand jury investigation would be subject to the professional standards of the court under whose authority the grand jury was impanelled. In other circumstances, where no court has clear supervisory authority over particular conduct, an attorney would be subject to the professional standards established by rules and decisions of the United States district court for the judicial district in which the attorney principally performs his official duties, except that the Act does not apply to government attorney conduct that is unrelated to the attorney's work for the government.

Thus, for example, an Assistant United States Attorney for the Eastern District of New York would ordinarily be subject to the attorney conduct rules prescribed by the E.D.N.Y. courts, as interpreted and applied by those courts. If the attorney handled a government appeal in the United States Court of Appeals for the Second Circuit, the attorney's conduct in connection with the appeal would be subject to the local rules and interpretive decisions of the Second Cir-

cuit. If cross-designated to handle a prosecution in another judicial district, e.g., the District of New Jersey, the attorney's conduct with respect to that prosecution would be subject to the local federal district court rules. Similarly, if the attorney were to handle a matter for the government before a New York State court, the attorney would be subject to the professional standards established by the rules and decisions of that court, in the same manner and to the same extent as other New York State practitioners.

This provision anticipates that the Supreme Court might promulgate one or more uniform national rules governing the professional conduct of government attorneys practicing before the federal courts. In this event, the terms of the uniform national rule would apply.

Subsection (c) codifies the predominant practice with respect to state disciplinary proceedings against government attorneys. A government attorney whose conduct is subject to the professional standards of a federal court may be disciplined by state authorities only if referred to state authorities by a federal court. No referral is needed when the applicable professional standards are those of a state court (which may occur, under subsection (b), if the attorney is handling a matter before a state court). This gatekeeping provision ensures that federal courts will have the first opportunity to interpret and apply federal court rules to government attorneys, while leaving substantial enforcement authority with state disciplinary bodies. This provision also specifically promotes federal uniformity in the application of professional standards to government attorneys.

Subsection (d) clarifies the law regarding the licensing of government attorneys, an issue that is currently addressed through the appropriations process. Since 1979, appropriations bills for the Department of Justice have incorporated by reference section 3(a) of Pub. L. 96-132, which states: "None of the sums authorized to be appropriated by this Act may be used to pay the compensation of any person employed after the date of the enactment of this Act as an attorney (except foreign counsel employed in special cases) unless such person shall be duly licensed and authorized to practice as an attorney under the laws of a State, territory, or the District of Columbia."

Subsection (d) codifies this longstanding requirement, and also makes clear that government attorneys need not be licensed under the laws of any state in particular. The clarification is necessary to ensure that local rules regarding state licensure are not applied to federal prosecutors. Cf. *United States v. Straub*, No. 5:99 Cr. 10 (N.D. W. Va. June 14, 1999) (granting defense motion to disqualify the Assistant United States Attorney because he was not licensed to practice in West Virginia).

Subsection (e), like the McDade law, authorizes the Attorney General to make and amend rules to assure compliance with section 530B.

## 4. JUDICIAL CONFERENCE REPORTS AND RECOMMENDATIONS

Section three directs the Judicial Conference of the United States to prepare two reports regarding the regulation of government attorney conduct. Both reports would contain recommendations with respect to the advisability of uniform national rules.

The first report would address the issue of contacts with represented persons, which has generated the most serious controversy regarding the professional conduct of government attorneys. See, e.g., *State v. Miller*, 600 N.W.2d 457 (Minn. 1999); *United States v.*

*McDonnell Douglas Corp.*, 132 F.3d 1252 (8th Cir. 1998); *United States v. Lopez*, 4 F.3d 1455 (9th Cir. 1993); *United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988).

Rule 4.2 of the ABA's Model Rules of Professional Conduct and analogous rules adopted by state courts and bar associations place strict limits on when a lawyer may communicate with a person he knows to be represented by another lawyer. These "no contact" rules preserve fairness in the adversarial system and the integrity of the attorney-client relationship by protecting parties, potential parties and witnesses from lawyers who would exploit the disparity in legal skill between attorneys and lay people and damage the position of the represented person. Courts have given a wide variety of interpretations to these rules, however, creating uncertainty and confusion as to how they apply in criminal cases and to government attorneys. For example, courts have disagreed about whether these rules apply to federal prosecutor contacts with represented persons in non-custodial pre-indictment situations, in custodial pre-indictment situations, and in post-indictment situations involving the same or different matters underlying the charges.

Lawyers who practice in federal court—and federal prosecutors in particular—have a legitimate interest in being governed by a single set of professional standards relating to frequently recurring questions of professional conduct. Further, any rule governing federal prosecutors' communications with represented persons should be respectful of legitimate law enforcement interest as well as the legitimate interests of the represented individuals. Absent clear authority to engage in communications with represented persons—when necessary and under limited circumstances carefully circumscribed by law—the government is significantly hampered in its ability to detect and prosecute federal offenses.

The proposed legislation charges the Judicial Conference with developing a uniform national rule governing government attorney contacts with represented persons. Given the advanced stage of dialogue among the interested parties—the Department of Justice, the ABA, the federal and state courts, and others—the Committee is confident that a satisfactory rule can be developed within the one-year time frame established by the bill.

While the "no contact" rule poses the most serious challenge to effective law enforcement, other rules of professional responsibility may also threaten to interfere with legitimate investigations. The proposed legislation therefore directs the Judicial Conference to prepare a second report addressing broader questions regarding the regulation of government attorney conduct. This report, to be completed within two years, would review any areas of conflict or potential conflict between federal law enforcement techniques and existing standards of professional responsibility, and make recommendations concerning the need for additional national rules.

## HISPANIC HERITAGE MONTH

Mr. KERRY. Mr. President, I would like to take this opportunity to commemorate the 30-day period from September 15 through October 15, which was designated by the President as Hispanic Heritage Month. Hispanic Heritage Month was first initiated by Congress in 1968 to celebrate the diverse cultures, traditions, and valuable contributions of Hispanic people in the United States.