Senator Ron Wyden
Statement on Senate Resolution 151 on Secret Holds
June 17, 2003

I am honored to appear before this distinguished Committee to speak on behalf of Senate Resolution 151. For the past seven years, Senator Grassley and I have labored as a bipartisan team to champion the cause of the "sunshine" hold, which is the subject of the resolution. I especially want to thank Chairman Lott, who knows all too well the havoc "secret" holds can wreak on the Senate agenda, and Senator Dodd for their commitment to this issue.

Whether public or secret, the hold in the Senate is a lot like the seventh inning stretch in baseball: there is no official rule or regulation that talks about it, but it has been observed for so long that it has become a tradition. Its capacity to tie the Senate and Senators in knots is notorious, and it has even given birth to several intriguing offspring: the hostage hold, the rolling hold and the Mae West hold.

The secret hold is a practice of Senatorial courtesy extended by the respective Leaders. Even though it is one of the Senate's most popular procedures, it cannot be found anywhere in the United States Constitution or in the Senate Rules. It is one of the most powerful weapons any Senator can wield in this body, and in its stealth version, known as the secret hold, it is even more potent.

At the outset, I wish to point out that the Grassley-Wyden resolution deals strictly with what are called "holds," which we define as a Senator's intent to object to proceeding to a motion or matter. The resolution does not deal with so-called "consults," which are confidential communications between a Sentor and the respective Leader informing the Leader of a Senator's interest in a bill or nomination. In plain English, I would say that a hold is intended to kill or stop a bill or nomiation, and a consult is intended to alert a Senator when a bill or nomination is moving toward the floor so that the Senator may prepare for floor consideration.

Nor does the resolution deal with the larger issue of filibusters and cloture, which the Committee examined last week. A hold may be a stepstone to a filibuster, and Leaders may seek to invoke cloture to break either a hold or a filibuster. A hold, however, is intended to prevent debate, whereas a filibuster is intended to prolong it.

I would also like to clarify that although the resolution amends Senate Rule 7, which deals with the legislative calendar, the intent is to cover both legislative and executive calendar business – bills, nominations and treaties – by our choice of the words "measure or matter." I would welcome the Committee's wisdom in refining the language to reflect the intent of covering both legislation and executive calendar business.

Senate Resolution 151 would establish a Senate Rule allowing "sunshine" holds. The new Rule would require a Senator who wishes to object to a motion or matter to publish notice of the intent in the Congressional Record within 48 hours of notifying the respective Leader. The resolution would in no way limit the privilege of any Senator to place a "hold" on a measure or matter. Failure to publish the notice would in no way prevent a Senator from exercising the current prerogative of objecting to a measure or matter on the Senate floor.

Throughout the Senate's history some of the most potent weapons – procedural and otherwise -- often have not been rules but rather the absence of them. Chairmanships, Committee memberships and ratios, the call of the calender and the filbuster come to mind. The secret hold may not have played as colorful or prominent a role as the filibuster, but the growing frequency with which it is used has made it a force to be reckoned with.

Beginning in 1997 and again in 1998, the United States Senate voted unanimously in favor of amendments Senator Grassley and I sponsored to require that a notice of intent to object be published in the Congressional Record within 48 hours. The amendments, however, never survived conference.

So, Senator Grassley and I took our case to the leadership, and to their credit, Tom Daschle and Trent Lott agreed it was time to make a change. They recognized the need for more openness in the way the Senate conducts its business. The Leaders sent a joint letter in February 1999, to all Senators setting forth a policy requiring "all Senators wishing to place a hold on any legislation or executive calender business [to] notify the sponsor or the legislation and the committee of jurisdiciton of their concerns." Their letter said: "written notification should be provided to the respective Leader stating their intentions regarding the bill or nomination," and that "holds placed on items by a member of a personal or committee staff will not be honored unless accompanied by a written notification from the objecting Senator by the end of the following business day."

At first, this action seemed to make a real difference: many Senators were more open about their holds, and staff could no longer slap a hold on a bill with a quick phone call. But after some time, the clouds moved in on the sunshine hold, obscuring the progress that had been achieved. Legislative gridlock resumed, and the Senate seemed to have forgotten the Lott/Daschle letter.

My assessment of the current situation, which is not based on any CRS, GAO or other scientific study, is that a significant number of our colleagues refrain from the use of secret holds. The legislative gridlock experienced because of secret holds may be attributed to a small number of abusers. If adopted, S. Res. 151 would not be disruptive to a solid number of Senators, and it will up the ante on a small group who may be chronic abusers of the Leaders' policy on holds. By

calling for publication of the intent to object in the Congressional Record, I believe the resolution puts the burden where it ought to be: not on the leadership, where it is today, but squarely on the shoulders of the objector. An objector who seeks to kill a bill by hiding behind a curtain of secrecy is hurting the Leaders' ability to run the body and is obstructing rather than facilitating the Senate's business.

Public notice of holds may be an inconvenience for a few, but not a hardship. Just last week, Senators inserted more than two dozen statements in the record on subjects such as sports teams winning championships and charitable fundraisers. These important events should be recognized, but I would hope that the intent of a Senator to block action on a bill or nomination would be considered of equal importance.

Chairman Lott and I have discussed the matter of enforcement. My sense is that no Senator will ever go to jail for failing to give public notice of a hold, just as no Senator has gone to jail for violating the Standing Order adopted in the 98th Congress requiring Senators to vote from their assigned desks during the "yeas" and "nays." There are any number of provisions in the Senate Rules that are not enforced at all or rarely today. Another example is Senate Rule XXVI, which requires the inclusion of various items of information in written committee reports. However, Senate Rules do not require committees to file written reports on bills. Another is Senate Rule VII, para. 5, which provides committees shall make every reasonable effort to have printed hearings available for Senators before a measure comes to the floor for debate. My guess is that the Senate has debated any number of measures without the benefit of a printed report.

The lack of a clear enforcement mechanism or the unwillingness of the Senate to enforce some rules does not make them irrelevant. The rules are there to indicate to all members the Senate's preferred manner of doing business. I think most Senators believe the Senate's business should be conducted in public, and I think the American people would agree.

Sunshine holds would strengthen the Leaders' hands as well as their options. A Leader may opt to continue to honor a secret hold, but a Leader wishing to move a measure or matter would be under no obligation to honor a hold unless the objecting Senator had complied with the Rule and published notice in the Record.

The resolution is constructed to amend the Senate Rules rather than as an experiment to the temporary the Standing Orders, knowing full well that this route may force the resolution to have to clear a 67 vote cloture hurdle. [Rule XXII requires a vote of two-thirds of those present and voting if cloture is sought on a resolution to change the Senate Rules; Rule XXII is silent on changes to the Standing Orders, thereby requiring 60 votes to reach cloture.] We chose the tougher route because as a continuing body the Senate begins every Congress

with its Rules in place. Seeking to place the notion of open holds in the Rules, and if necessary, having to clear the higher hurdle would underscore the gravity and significance of this action.

As United States Senators we occupy a position of public trust, and I believe the exercise of the power that has been vested in us should always be accompanied by public accountability. I would argue that it is not the hold, but the anonymity of the hold that is so odious to the basic premise of our democratic system. The Grassley-Wyden resolution would bring the anonymous hold out of the shadows of the Senate. It would assure that the awesome power possessed by an individual Senator to stop legislation or a nomination would be accompanied by the sunshine of public accountability.

As the Committee weighs the merits of the Grassley-Wyden Resolution, I would respectfully urge the Committee to consider several fundamental questions: whether the practice of secret holds is consisent with a democratic system; whether the elimination of the secrecy would disrupt the Constitutional balance of power between the various branches of government; and whether the removal of the secrecy would tip the balance between the rights of the majority and the minority in the Senate.

My response is that removing secrecy from the hold will not alter the practice, merely its form. Removing secrecy from the hold will not tip the balance in Senate Rules and procedures between majority and minority rights. And removing the secrecy will not alter the balance of powers created under the Constitution. On the contrary, surrendering secrecy will strengthen public accountability and lessen the gridlock that has increasingly come to plague the world's greatest deliberative body.

I would like to close by quoting the foremost authority on Senate Rules, who served as Majority Leader in the 95th, 96th and 100th Congresses. In Chapter 28, "Reflections of a Party Leader," of Volume II of The Senate, the Honorable Robert C. Byrd wrote: "To me, the Senate rules were to be used, when necessary, to advance and expedite the Senate's business." Giving the sunshine hold a place in the Senate's Rules would surely serve this worthy goal.