

Testimony of

# The Honorable Orrin Hatch

December 6, 2001

As you know, I was pleased to co-author, with you, the letter we sent to our good friend and former colleague, the Attorney General, asking him to come before this Committee to describe for us, and for the American people, some of the recent initiatives undertaken by the Administration to protect Americans from terrorist attacks. And I am gratified that General Ashcroft readily accepted our invitation and has taken time from his critical duties to be here today.

Before beginning my statement, I would just like to correct the record on one score. At the time we sent our letter to General Ashcroft, it was widely misreported in the press that I was displeased with the Attorney General, and had "demanded" his appearance before the Committee. Nothing could be further from the truth.

I joined the letter to General Ashcroft requesting his appearance because I believed it would be helpful to us, and to the American people, for the Attorney General to come before us and provide us with an update on the Department's efforts to combat terrorism and bring to justice those who helped to perpetrate the barbaric attacks of September 11th.

After we sent the letter, Mr. Chairman, you made some comments to the press in reference to the letter that were critical of the Attorney General. Because I was a co-signatory on that letter, your subsequent statements were attributed to me as well.

Page 1 of 6

So that there will be no mistake, I would like to say here, in the presence of the Attorney General, that I have been extremely pleased with the degree to which he, and the Department as a whole, have been responsive to this Committee's oversight requests. Not only did the Attorney General promptly respond to our invitation to testify, he and the Department have diligently and thoroughly responded to all of the many questions and document requests that have been sent to them by this Committee throughout the year.

And the Department has not just been responsive to our oversight efforts, they have been proactive as well. Last week, when the first in this series of DOJ oversight hearings was convened, the Department of Justice was not invited to testify. Commendably, the DOJ reached out, saying that they believed it was appropriate, given the fact that they were the subject of the hearing, that they also be participants at the hearing. Assistant Attorney General Michael Chertoff made himself available, and provided testimony last week that, I think we can all agree, was very helpful to the Committee.

The same thing happened this week, when the Department was again not invited to testify at Tuesday afternoon's oversight hearing. Again, the Department reached out to us, and offered

Assistant Attorney General Viet Dinh as a witness. And again, I think we can all agree, Mr. Dinh's testimony greatly contributed to the work of this Committee.

I must say, the candor and responsiveness exhibited by this Department of Justice in its dealings with this Committee is a refreshing departure from the responsiveness of the previous Administration to our oversight requests.

As you all know, I was Chairman of this Committee for the last six years of the previous Administration, and I can tell you that getting responsive answers from the Department of Justice during that period was like pulling teeth. Whether we were examining the previous administration's pardoning and release of 11 convicted terrorists affiliated with the FALN, or the campaign finance irregularities probe and the famous conflicting views within the Justice Department on whether to appoint a special counsel, to the Elian Gonzalez matter, to the last-minute pardons . . . and so on.

I must say, given this previous experience, Attorney General Ashcroft's candor and responsiveness to this Committee are all the more commendable. I would like to thank him for his honorable service to this country as Attorney General. I know this nation is a safer place due, in large part, to his tireless, honest efforts to rid us of crime.

Mr. Chairman, I am pleased to see, and supportive of, this Committee exercising its oversight authority over the Department of Justice.

I trust that we all agree as to the reason why it is important that we exercise this oversight function: it is, or at least it should be, to help the DOJ more effectively carry out its duties, and to ensure that it does so consistently with Congressional directives.

I hope that we can also agree, however, that there is a point at which aggressive oversight by this Committee becomes counter-productive. Certainly, we do not want to reach a point where the senior leadership at the Department spends all of its time responding to inquiries from our Committee regarding the terrorism investigation, and none of its time actually tracking down terrorists.

And, I know some might try to argue that this a partisan criticism. Well it is not, it is a bipartisan concern. I should note that one of our Senate Democratic colleagues yesterday properly observed in a press release that, "They need to get off his back and let Attorney General Ashcroft do his job. Military tribunals have been used throughout history. The Supreme Court has twice upheld them as constitutional. Now, we're at war, and we're talking about using military tribunals only for non-citizens. Why in the world would we try our own soldiers with this system of justice but not some foreigner who is trying to kill us? It's crazy. These nit-pickers need to find another nit to pick. They need to stop protecting the rights of terrorists. This is about national security. This is about life and death." Now, I don't mean in any way to suggest that we should not be performing appropriate oversight, or to suggest ill motives behind this hearing today.

My friends, in the last two weeks, we have heard from Justice Department officials, State Department officials, law professors, journalists, defense attorneys, and even an illegal alien from Yemen who was detained the week after the September 11th attacks with box-cutters in his possession. We have heard from two former Attorneys General of the United States, one from a

Republican Administration and one from a Democratic Administration - who, I might add, both testified that they saw no Constitutional problem with any of the actions that are the subject of these hearings.

Some of our friends in academia have not been shy in their criticism of the Administration. One professor whom the Committee invited to testify at last week's hearing compared the United States government to certain authoritarian regimes in Latin America and the totalitarian regime in China.

Nor were these public hearings the only opportunity that the members of our Committee have had to pose inquiries to the Department of Justice. Several members have submitted numerous additional written questions following last week's hearing. The last time the Attorney General appeared before this committee, Mr. Chairman, you alone directed 21 questions to him, with multiple subparts. By my count, over the last 2 months you have submitted 12 letters to Justice Department officials, requesting hundreds of pages of documents and posing dozens of questions.

Which brings us to today. Mr. Chairman, as I said earlier, a couple of weeks ago, I joined you in inviting the Attorney General to testify before us on these matters. I continue to believe it is appropriate to have General Ashcroft testify here today. These are important topics, and I know that General Ashcroft welcomes the opportunity to address any concerns that may be raised by the members of the Committee.

General Ashcroft, I want to thank you, and particularly the men and women of the Department of Justice, for their Herculean efforts over the last week and a half, in responding to the oversight efforts of this Committee. We have had a lot of questions, and your responses over the past weeks have helped allay many initially alarmist and hysterical concerns.

And let us not forget, these same men and women at the Department of Justice are the ones who are charged with the essential task of making sure that a day like September 11th never happens again.

As we continue to hold these hearings, I would hope that we don't forget our own essential task of confirming the President's nominees to the positions so important to winning the war against terrorism, and to ensuring that we have justice and liberties. As you know, there has been increasing criticism from around the country for this Committee to take action on the President's nominees - both for judgeships and for important posts in the Administration. Even the Washington Post, has criticized this Committee's failure to act on these important judicial nominations, particularly given the vacancy crisis we face in our judiciary today. As we all recognize, justice delayed is justice denied. This was not a digression, but I think that our duty to act on the President's nominees is at least as critical as our duties of oversight and I would simply hope that we will be as diligent in that role in the coming weeks and months as we are with our oversight responsibility.

Mr. Chairman, what the hearings over the last two weeks have shown is this: the vast weight of legal authority confirms the constitutionality of military tribunals. And, if the issue to be analyzed is not the constitutionality of the tribunals, but rather the fairness of the procedures to

be used, then any criticism is entirely premature, because the Administration has not yet promulgated the procedures that will be employed. Any questions to Attorney General Ashcroft on this topic would be particularly pointless, because it is Secretary of Defense Rumsfeld, not General Ashcroft, who is charged with drafting the procedures.

On the issue of detainees, what we have learned is that every person being detained has either been charged with a violation of U.S. law, or is being held pursuant to the decision of a federal judge to issue a material witness warrant. Each of the detainees has had access to legal counsel and has the right to challenge the grounds for his detention. Every detainee may, if he wishes, publicize his plight, through legal counsel, friends, family, and/or the media. While there has been anecdotal evidence that the system has not worked flawlessly in the wake of September 11th, there is absolutely no basis for believing that the Department of Justice has initiated any systematic policy to deprive detainees of their Constitutional rights.

Now if my colleagues would like to grant additional authorities to the President or the Attorney General, to aid in this war, and to save American lives, then I am all ears - as long as such powers are consistent with our Constitution.

Mr. Chairman, a week ago the airwaves were filled with alarmist rhetoric, charging that the Administration's actions had trampled the Constitution. During the course of these oversight hearings, as expert after expert has affirmed the constitutionality of these measures, I have noticed a change in the tone of the criticisms being leveled at the Administration.

The principal complaints we now hear are not that the measures are unconstitutional, but rather that the Justice Department has engaged in insufficient consultation with Congress, or with this Committee, before announcing them.

I have a couple of observations on this topic.

First, let's put this issue in perspective. We are at war. We are battling an enemy committed to the absolute, unconditional destruction of our society. The principal means that the enemy employs toward this goal is the killing of our civilians in their homes and their places of business. To the extent that this war is being waged on American soil, the Attorney General is one of our leaders in this war. I would hope that, in this time of crisis, we could all check our egos, and for the good of the country, look at the merits of these proposals rather than the manner in which they are packaged.

I'm not saying that we don't have a solemn obligation to assess the Department's actions to ensure that they are both effective and sufficiently protective of our civil liberties. But do any of the members of this Committee really believe that, in this time of crisis, the American people - those who live outside the Capital Beltway - really care whether the President, the Secretary of Defense, or the Attorney General took the time to pick up the telephone and call us prior to implementing these emergency measures? I implore my colleagues - let's keep our focus where it matters - on protecting our citizens.

Certainly, the American people are not interested in watching us quibble about whether we should provide more rights than the Constitution requires to the criminals and terrorists who are

devoted to killing our people. They are interested in making sure we protect our country against terrorist attacks.

To those of you who say that our input is necessary to make sure that these measures are done right, I say: look around, look at the actions of the President, what do you think is happening?

President Bush could have proceeded as President Franklin D. Roosevelt did in 1942. He could have privately called the Secretary of Defense and had him start working, confidentially, on procedures for military tribunals. Three months from now, President Bush could have announced: we have captured some terrorists in Afghanistan, we will try them by military tribunal, and here are the procedures for the tribunals that have been established by the Secretary of Defense.

President Bush did not proceed that way. Instead, he -- responsibly in my opinion -- announced that he wanted military tribunals to be one option for trying unlawful combatants against this country. He publicly tasked the Secretary of Defense with drafting the procedures to be employed. Since then, this Committee, the Armed Services Committee, numerous law professors, and just about every pundit with a microphone or a typewriter have each expressed their opinion as to how those procedures should be written. That is consultation.

And to show how serious the President is about this process, he reserved to himself the ultimate designation as to who will be tried in military tribunals - unlike FDR, who delegated the decision to members of our armed forces.

Mr. Chairman, there is no real question remaining as to the constitutionality of the Administration's initiatives to date. I thank you for your dedication to oversight, and I am hopeful that today's hearing will proceed as a fair examination into the Administration's actions to stop terrorists and save American lives. I thank you for this hearing and I thank the Attorney General for his willingness to be present and for his responsiveness to our oversight requests.

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