

Testimony of

# The Honorable Patrick Leahy

December 6, 2001

Attorney General Ashcroft, welcome.

In the 12 weeks since the September 11 attacks, Americans in law enforcement have been working tirelessly to protect the public, to capture and thwart terrorists, and to bring them to justice. For its part, Congress too has moved promptly on several fronts, including our expedited consideration and enactment of the anti-terrorism bill two months ago.

In the two months since your last appearance before this committee, terrorism also has reached Congress's doorstep. That is why we are meeting in this room today, and not in the Hart Building, which remains closed.

Last week the Justice Department witness appearing before this committee described Congress as a "full partner" in our nation's anti-terrorism efforts. That is how the Founders and our Constitution intended it. The partnership of our two branches of government working together produced an anti-terrorism bill that was better than either branch acting alone would have produced, and with greater public confidence in the result. America works best when all parts of our government govern together.

As we continue our discussion of important and difficult questions about the means to be used in the fight against terrorism, let no one, friend or foe, mistake this for anything other than what it is: a principled discussion of policy approaches, and a constructive assessment of the effectiveness of those approaches, undertaken by partners in our country's efforts against a common enemy.

Tomorrow is the 60th anniversary of the attack on Pearl Harbor. Many have compared the galvanizing effect of that attack to that of the atrocities committed on September 11. Today, as 60 years ago, government at every level is under great pressure to act. Our system is intended to help make sure that what we do keeps us on a heading that achieves our goals while holding true to our constitutional principles. The Constitution does not need protection when its guarantees are popular, but it very much needs our protection when events tempt us to, "just this once," abridge its guarantees of our freedom.

The need for congressional oversight and vigilance is not, as some mistakenly describe it, "to protect terrorists;" it is to protect ourselves and our freedoms, something in which each and every American has a stake. It is to make sure that we keep in sight at all times the line that separates tremendous government power on the one hand and the rights and liberties of all Americans on the other. It is to make sure that our government has good reason before snooping into our bank records, our tax returns or our e-mail, or before the government listens in as we talk with our attorneys. It is to make sure that no one official, however well intentioned, decides when that line is to be crossed, without good reason for that decision. Whether the Administration's recent

unilateral actions are popular or unpopular at the moment, as the oversight committee for the Department of Justice, we accept our responsibility to examine them. This is our role under the Constitution, this is our duty, and we will not shrink from it.

So, too, is congressional oversight important in helping to maintain public confidence in our system of laws. In our society, unlike in so many other nations, when a judge issues an order, it is respected and carried out because the public has faith in our system and its laws. The division of power and the checks and balances built into our system help sustain and earn the public's confidence in the actions taken by their government. The consent of the governed that is at the heart of our democracy makes our laws effective and sustains our society.

I commend Senator Schumer, the chair of the Administrative Oversight and the Courts Subcommittee, and Senator Feingold, the chair of our Constitution Subcommittee, for holding their hearings earlier this week, and for the constructive contributions to those hearings by Senator Hatch, Senator Sessions, Senator Durbin, Senator Feinstein and others. They were acting in the finest tradition of the Senate and this country.

During the past week of hearings and public debate, this oversight process already has contributed to clarifying the President's order to establish military tribunals. It now seems that the President's language that ostensibly suspends the writ of habeas corpus, the language providing for secret trials, and the expansive sweep of the President's November 13 order were not intended; instead the Administration's intention is to use procedural rules more like those used in our courts and our courts martial. Over the last week it has become clearer that, as written, the President's order outlines a process that is far different than our military system of justice. American military justice is the best in the world and includes open trials, right to counsel and judicial review. It also appears that the risks of pursuing "victor's justice" are beginning to be understood more fully as the initial conception of the order is being reformed and clarified. I commend the members of this committee for their contributions to that process.

Last week, Senator Specter wrote an article expressing his concern that the Administration had not demonstrated the need for the President's extraordinarily broad order on military commissions. Others, Democrats and Republicans, moderates and conservatives, have expressed concern about the broad powers asserted by the Administration and about the manner in which it has asserted them - bypassing both Congress and the courts. Last Wednesday's hearing allowed the Committee to hear firsthand from legal experts across the spectrum on these questions and to assist in clarifying the Administration's intentions and actions.

There are circumstances where military tribunals are appropriate. I agree with the constitutional experts and others who have testified before the Committee that military tribunals can have a role in our prosecution of the campaign against terrorism. However, many issues remain about how to proceed with such tribunals in the best interests of our national security. Ultimately, the question is not only whether our government has the right or the power to take certain actions and in certain ways, but whether the means we choose truly protect our security.

Defining those circumstances where military tribunals serve our national security interests is no easy task, and Congress has contributions to make to this discussion, as we already have. To many, the constitutional requirement that military tribunals be authorized by Congress is clear.

To others, it is not. To everyone, it should be beyond argument that such an authorization, carefully drawn by both branches of government, would be helpful in resolving this doubt and in lending credibility to their use. Several members of the Committee of both parties have been crafting ideas for such an authorizing resolution to clarify these issues, and I invite you to work with members of the Committee in exploring a consensus charter for tribunals.

It is never easy to raise questions about the conduct of the Executive Branch when our military forces are engaged in combat, even when those questions do not concern our military operations. The matters we are examining concern homeland security, our constitutional rights, and preserving the limits on governmental authority that form the foundation of our constitutional democracy. These are questions that go to the heart of what America stands for, to its people and to the world, when we are put to the test. These are questions that we need to debate openly and thoughtfully. This committee hopes to cast the light of reasoned public inquiry on the Administration's actions, especially on sweeping unilateral actions that might affect fundamental rights. Ultimately, taking a close look at assertions of government power is one of the best ways to preserve our freedoms and ensure our security.

None of us in elective or appointive positions in government has a monopoly of wisdom or of patriotism, and under our system, neither do any of us have a monopoly of authority.

The Framers of our Constitution had great confidence in George Washington and certainly did not expect him to abuse his power. But they did not entrust their liberty to his, or to any government's, good intentions. Instead they provided for a system of checks and balances, including congressional oversight, judicial review and openness to public scrutiny. This committee will be vigilant in seeking to preserve those fundamentals of our American constitutional system. We can be both tough on terrorists and true to the Constitution.

I look forward to hearing from the Attorney General. I want to thank him again for appearing today and hope that he will be able to stay to answer the questions of all senators.

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