

Statement of

# The Honorable Patrick Leahy

United States Senator  
Vermont  
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Ranking Member, Senate Committee On The Judiciary  
Hearing On  
"America After 9/11: Freedom Preserved Or Freedom Lost?"  
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This is the second in our series of oversight hearings to review America's progress in the fight against terrorism. Our focus today is on the ways the Administration's policies and actions have impacted the privacy and civil liberties of United States citizens as well as the rule of law. We are examining the implications of ever granting government more power over our liberties, without sufficient checks and balances; the implications of secret detentions and roundups based on religion and ethnicity; and the implications of government secrecy and stonewalling.

This is an ambitious subject for one hearing, and we will need to hold additional hearings next year on related issues. Chairman Hatch and I have already agreed on the need for a separate hearing to examine the Administration's unfettered discretion to designate certain individuals as "enemy combatants." These include two U.S. citizens who were unilaterally transferred from our court system to military custody, where they have no access to lawyers or family, and no meaningful right to challenge the validity of their detention. In addition, more than 650 foreigners are being held without charge or access to counsel at Camp Delta on Guantanamo Bay. Issues raised by their detention are currently pending before the U.S. Supreme Court.

We are still waiting to hear from the Attorney General to find out when he might make the time to appear before this Committee. At our last oversight hearing, on October 21, members of this Committee on both sides of the dais made it clear, if it were not already clear, that they had wanted and expected the Attorney General to testify. If we do not adjourn this week, I hope that the Chairman will make every effort to obtain the Attorney General's appearance before the end of the year. Otherwise, we will expect to see the Attorney General here in January.

We welcome our witnesses today and I thank them for coming. It is important for this Committee to have the opportunity to revisit the policy decisions Congress and the Administration made in the PATRIOT Act, which was negotiated and passed in the emotional aftermath of the terrorist attacks of September 11. At the same time, we need to look beyond the four corners of that legislation to examine other Administration policies and actions that have affected the civil liberties of the American people in the name of the war on terrorism. The recently released report by the Center for American Progress identifies a wide range of civil liberty concerns that include, but go well beyond, the PATRIOT Act, and I appreciate their analysis and recommendations on these issues.

Today, I'll focus on three broad areas of concern.

Denying Liberty Without Due Process

One major area that of concern involves the mass arrests and secret detentions that followed the terrorist attacks - what columnist Stuart Taylor referred to recently as the "Bush Administration's truly alarming and utterly unnecessary abuses of its detention powers."

Earlier this year, the Department of Justice's own Inspector General reported critically on the Department's handling of immigration detainees who were swept up in the 9/11 investigation. The Inspector General found that the vast majority of these immigrants were never linked to terrorism - rather, they had committed only the civil violation of overstaying their visas, and then found themselves in the wrong place at the wrong time. I welcomed the hearing that the Committee held on the report in June, but we also should have heard from outside experts and not just from Administration witnesses. Today we have that opportunity.

Many of the 9/11 detainees were held for weeks or even months without charge or counsel. Indeed, the Justice Department ignored the power it asked for, and that Congress gave it in the PATRIOT Act, to hold aliens suspected of terrorist links for up to seven days without charge. Instead, the Justice Department preferred to hold aliens for longer on its own regulatory say-so. The Department of Justice has refused to this day to release the detainees' names, expending countless hours of DOJ litigation resources to keep their identities secret, even after almost all of them have been removed from the United States.

Even when aliens were finally charged and thus received hearings in the immigration court system, they faced an INS that adopted blanket policies opposing bond in all cases and unilaterally imposed stays in all cases where a judge nonetheless decided to release the alien on bail. The result of these policies was that aliens who had been caught up in the 9/11 investigation were held for months - often in harsh conditions fit for serious criminal offenders - for civil violations. Even after accounting for the severe stress of the post-9/11 period, the Inspector General found that the Justice Department committed serious errors. I agree. As such, it was particularly disappointing when the Inspector General released a subsequent report in September stating that the Justice Department had not yet addressed any of the recommendations of the June report with enough specificity and completeness for the OIG to consider them closed. Full implementation is necessary and should be accomplished without further delay.

It is certainly proper for the government to enforce our immigration laws. At the same time, those laws should be enforced without regard to the religion or ethnicity of the aliens involved. An unbiased immigration policy is not simply the right thing to do - it is also the best national security policy. Immigration enforcement is not a substitute for sound and thorough criminal investigations, and arbitrarily enforcing rules can make matters worse. Notwithstanding whether a sleeper terrorist would voluntarily comply with special registration rules, I suspect that to the extent the government has singled out Arab and Muslim aliens for differential treatment, it has detracted from our government's ability to enlist the help we need within the communities where these aliens reside. It has also created resentment that may be exploited by al Qaeda recruiters.

For example, the "call-in" registration program, under which nationals from 25 predominantly Arab and Muslim nations were forced to come into INS offices and register, created significant tension both here and abroad. As a result of the program, more than 13,000 aliens - the vast majority of whom had absolutely nothing to do with terrorism - have faced removal from the United States. Of these 13,000, many would have been in legal status but for INS backlogs that delayed the processing of their "green card" applications. (The Senate agreed to eliminate the "call-in" program, but that provision was removed in conference.)

As Ejaz Haider, a visiting Pakistani scholar at the Brookings Institution who was himself arrested after he took the advice of the INS and did not register under a related program, wrote in a Washington Post op-ed, "It is argued that this policy is meant to increase security for the United States. A worse way of doing so could hardly be imagined. The policy is an attempt to draw a Maginot line around America. Not only is it likely to fail in securing the homeland, it is creating more resentment against the United States. Does America need a policy that fails to differentiate between friend and foe?"

Contrary to this Administration's instinct, protecting our country, our ideals and our citizens requires that we uphold, not assault, our civil liberties. Our long-term fight against terrorism hinges on promoting democracy and American values, particularly in nations like Iraq. We undermine our credibility and our efforts by failing to respect individual rights here at home.

Along these lines, I was deeply troubled by recent reports that the FBI assisted in the rendition of a Canadian-Syrian citizen to Syria, where he reportedly was put in a prison and beaten for several hours until he confessed to attending a training camp in Afghanistan. He says that he was held in a cell that was three feet wide, six feet deep and seven feet high for 10 months until he was released by Syrian authorities in October. Stories like this are appalling, if true, and seriously damage our credibility as a responsible member of the international community.

When earlier allegations of rendition surfaced, I wrote to Administration officials asking for guarantees that the United States is complying with its obligations under the Convention against Torture. I sent a letter to National Security Advisor Condoleezza Rice on June 2 of this year, which was answered by Department of Defense General Counsel William Haynes on June 25, 2003. Mr. Haynes stated that if the United States should transfer an individual to another country, it would obtain specific assurances that the receiving country would not torture the individual. I wrote a follow-up letter to Mr. Haynes on September 9 asking for a greater detail on the our government could guarantee compliance with any such assurances. I have not received a response, but I intend to ask him about this topic tomorrow when he appears before the Committee in a confirmation hearing for a seat on the 4th Circuit Court of Appeals. Finally, I wrote to to FBI Director Mueller yesterday to inquire about the alleged role of the FBI in this case.

While non-citizens have suffered many of the most questionable uses of government power in the post-9/11 era, U.S. citizens have also been affected. The most prominent examples are Jose Padilla and Yaser Esam Hamdi, who have been incarcerated without charge or access to counsel under the Administration's "enemy combatants" policy. As I said earlier, I look forward to the Committee's hearing on enemy combatants and will save further comment on that set of cases for that hearing.

In addition, dozens of individuals were rounded up after 9/11 and held as "material witnesses" under 18 U.S.C. ' 3144. This includes the eight men in Evansville, Indiana, to whom the FBI eventually felt compelled to apologize. I and other Members have repeatedly voiced concerns that the material witness statute invites confusion and abuse, but efforts to clarify or reform that statute have been met with disinterest by the Administration. I wrote to Attorney General Ashcroft in early June, proposing five specific changes to the statute, but have yet to receive a response.

#### Increased But Unchecked Powers

Let me turn now to a second area in which the Administration's response to 9/11 has raised civil liberties concerns. This area involves certain government powers, including some that Congress provided in the PATRIOT Act, that are not subject to effective checks and balances to ensure against abuse.

One example is the so-called National Security Letter, or "NSL." NSLs are a form of administrative subpoena that are used to secretly obtain certain types of business records in terrorism and intelligence investigations. Section 505 of the PATRIOT Act greatly broadened the FBI's authority to gather information under NSLs, including information from public libraries. Efforts to further broaden this authority are already underway.

The Attorney General has said that judicial approval requirements constitute a "critical check" on law enforcement. Administrative subpoenas do not require this critical check - an FBI agent can simply pull a form out of his desk, fill it in, sign it, and serve it. The Administration simply has not made the case for further eroding the judiciary's role in overseeing federal investigations.

The public is also concerned about so-called "sneak and peak" search warrants, as authorized by section 213 of the PATRIOT Act. Like conventional search warrants, "sneak and peaks" are predicated on probable cause to believe that evidence of criminal activity will be found on the premises; unlike conventional search warrants, however, "sneak and peaks" permit law enforcement to delay notice to the owner that his premises have been searched. Recognizing the value in this tool, but also its vulnerability to abuse, I worked hard to ensure that section 213 included significant protections against government overreaching. Still, this provision could be improved if the Administration were more forthcoming with information about how it is being used.

We should also examine privacy threats like the Justice Department's various data-mining projects, which collect vast amounts of personal information about citizens with little or no process for ensuring that the information is accurate.

### Government Secrecy

Finally, we need to examine certain Administration policies that perpetuate government secrecy rather than ensure government accountability to the American people. The knee-jerk reaction of this Administration is to keep its actions secret and conduct the public's business behind closed doors.

For example, the Wall Street Journal reported earlier this month that, due to a "glitch," the public became aware of secret court hearings on an immigrant's challenge to his secret detention. This matter is now before the Supreme Court.

Over the past few months, we have witnessed a standoff between the Administration and the 9/11 Commission, which Congress established last year to examine the circumstances surrounding the 9/11 attacks. Only under the threat of subpoena did the Administration come to the table with information, and it is still not clear at this point whether that information will be complete. This Administration continues to operate as if the checks and balances incorporated in statute are a bothersome nuisance that they need not trouble themselves with.

As another example, the Justice Department is attempting to extend the number and types of matters that are pursued before the FISA court, rather than through traditional, more transparent and accountable investigatory means. The FISA Court, though staffed by highly respected jurists, is not required to publish its opinions. Any information that is released about its operations is classified or highly redacted. I have introduced several pieces of legislation, including the Domestic Surveillance Oversight Act, to restore the necessary level of transparency, and the Restoration of Freedom of Information Act, which would protect public access to non-classified information regarding critical infrastructure, ensuring government accountability. The purposes of these bills are central to the democratic process and to the government's accountability to the American people.

The Administration has attempted to defend its unprecedented levels of secrecy and unaccountability by repeatedly citing 9/11 and terrorism. But their own actions threaten to erode the very liberty and democracy that the terrorists are attacking.

The civil liberties entrusted to each generation of Americans are ours to defend, but they belong not only to us but to every generation that follows. We are benefactors of the freedoms we have inherited, but we are also their stewards. Our children and grandchildren will look back to see whether we were diligent when we were tested, or whether we were silent. Others around the world, including, right now, the people of Iraq, will also take note of how vigilant we are in defending the freedoms of our own democracy.

Our civil liberties were hard won, but they are easy to lose. And once we give them away, they are difficult to reclaim. Benjamin Franklin said those who would trade their freedom for security deserve neither.

Hearings like this produce report cards on how well we are meeting this test and honoring this trust.

I thank Chairman Hatch for his attention to these matters and my distinguished colleagues for their active and informed participation in this vital debate.