

Statement of

# The Honorable Patrick Leahy

United States Senator  
Vermont  
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Opening Statement Of Senator Patrick Leahy  
Executive Business Meeting  
Senate Judiciary Committee  
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I have seen the graphic pictures of the barbaric murder of Nicholas Berg, an atrocity of such depravity that it is hard to fathom. I have also seen the additional photographs of abuse at prisons in Iraq that were made available by the Pentagon for three hours yesterday to Senators.

My heart goes out to the Berg family. Their grief is hard to imagine. If we can be of assistance to them or can help Senator Specter assist them if they want additional information about the hunt for his killers or about his delayed departure from the dangerous situation in Iraq, we should do whatever we can to help. I will ask the FBI about its role in the process and his interrogation and what steps American authorities took to secure his safety and his safe departure from the war zone.

## A Slow Response, Then A Rapid Defense

In Senate hearings before Appropriations, Armed Services and other committees over the past couple of weeks, many of us have probed for answers and a better understanding of what has occurred during the U.S. occupation of Iraq. It is more than a year since the President declared major combat operations concluded. It is more than a year since he replaced General Jay Garner with Ambassador Bremer. It is more than 16 months since international human rights organizations sought to alert the Administration to prison and detention abuses in Afghanistan and elsewhere and 14 months since I began to ask oversight questions of the Administration based on reports of abuses.

It appears that reports and concerns about abusive practices met with little response, and it was only in January, when the military was confronted with the photographic evidence of the abuses, that they began to take it seriously. Five months later, the Administration has its talking points and appears with its supporters to be circling the wagons.

I commend Senators on both sides of the aisle -- for example, Senator Graham as well as Senator Kennedy, Senator McCain and Senator Levin -- for their efforts during the Armed Services hearings to get to the truth.

I was disappointed to see President Bush leap from his declarations last week that we needed to let the investigations take their course to determine what transpired and why, to a definitive declaration at the beginning of this week that the senior civilian leadership at the Pentagon is doing a superb job. The Administration and its supporters have prejudged this matter and seem already to have determined that, no matter what the facts may turn out to be, there is to be no accountability beyond those serving in the prison.

At the Appropriations hearing yesterday I asked Secretary Rumsfeld to answer the question he posed last October in a memo: Are we capturing, killing or dissuading more terrorists every day than the madrasas and radical clerics are recruiting, training and deploying against us? He said yesterday that he did not know the answer.

Last week, at a hearing before this Committee, I asked a Justice Department official whether the Department is investigating these allegations of torture and abuse. The answer I received amounted to "no." In particular, I noted the jurisdiction of the Department of Justice and the FBI under the Military Extraterritorial Jurisdiction Act of 2000. This is a measure I worked on when Senator Sessions introduced it in 1999, and which this Committee reported out and that

the Senate considered and passed twice in 1999 and 2000, to clarify what some viewed as a loophole in the applicability of our criminal laws to those who accompany our military overseas but who are not subject to the Uniform Code of Military Conduct. Curiously, the Pentagon did not even get around to proposing rules to implement the law until just recently, even though the law was used last year to prosecute a spouse who was brought back from Turkey and charged in U.S. federal court in connection with the death of an Air Force staff sergeant.

Given the reports and allegations of abuses of Iraqi prisoners that involved civilian contractors, given the statement of the Chairman of the Joint Chiefs of Staff that the Department of Justice would handle the prosecutions of civilian contractors, and especially given the assurances of the civilian leadership that we will investigate and get to the bottom of these matters, I am troubled at the passivity being displayed by the Department of Justice.

Although we now know that the Administration has known about allegations of abuse of Iraqi prisoners for a year and about the pictures documenting the abuses for five months, it was only during these last few weeks that the American news media - not the Administration -- informed Congress, the American people and the world of these practices. The shock and outrage expressed by senior Administration officials was hard to take in light of the Administration's knowledge of these allegations and various investigative reports it has had for some time -- matters it had knowingly kept from the Republican and Democratic leadership of Congress and from relevant Committees.

#### Oversight Requests Brushed Aside

Two weeks ago I urged our Chairman to hold a hearing on these matters within our jurisdiction. I believe we should be concerned about civil liberties, about prison practices and conditions, about whether those affiliating with our Government are complying with our commitments to the rule of law, including international law. In particular, I had received assurances from the General Counsel of the Department of Defense, William J. Haynes -- someone who the Administration has nominated to a lifetime appointment to the federal judiciary -- regarding our compliance with the Geneva Convention and our compliance with the Convention Against Torture.

Last fall I raised a number of oversight concerns about a Syrian-born Canadian citizen, Maher Arar, who was detained by U.S. officials and then deported to Syria, even though he was carrying a Canadian passport. Mr. Arar claimed that he was physically tortured during his detention in Syria, a nation with a well-documented history of state-sponsored torture. In fact, President Bush declared on November 7, 2003, that Syria has left "a legacy of torture, oppression, misery, and ruin" to its people. This is a country against which President Bush ordered sanctions just this week under the Syria Accountability Act.

I wrote to FBI Director Mueller and Attorney General Ashcroft during the week of November 17, 2003, for more information on the case. I finally received a letter in response last week. The Department, which answered for the FBI, said that it could not answer my questions because Mr. Arar has filed a lawsuit under the Torture Victims Protection Act, among other laws. This is a rather convenient response for the Department to offer six months after it received my letter. But the truth is that Mr. Arar filed his suit on January 22, 2004, a full two months after I wrote to the Attorney General and the FBI. The Department could have, and should have, responded promptly to my questions on this matter. Instead, it chose to follow its familiar pattern of delay and obfuscation. Perhaps now the Administration will agree that the Senate deserves an answer. Stories like Mr. Arar's are appalling and, if true, seriously damage our credibility as a responsible member of the international community.

#### Abuse Allegations Brushed Aside

Unfortunately, accusations of abuse by military personnel have surfaced several times since we began to wage war in Afghanistan and Iraq. A March 4, 2003, article in The New York Times described the treatment of Afghan prisoners at the Bagram air base after two young prisoners died in U.S. military custody. Other prisoners described being forced to stand naked in a cold room for 10 days without interruption, with their arms raised and chained to the ceiling and their swollen ankles shackled. They also said they were denied sleep for days and forced to wear hoods that cut off the supply of oxygen. After 17 months of inquiries to the Administration, Human Rights Watch issued a report documenting similar charges after reviewing U.S. practices in Afghanistan over the past two years.

After hearing from military sources a year ago, the Committee on International Law of the Association of the Bar of New York City compiled a 110-page report examining U.S. and international legal standards governing the treatment

of prisoners. Military officers reportedly told the New York City Bar representatives that the DoD general counsel was instrumental in creating "an atmosphere of legal ambiguity" that has contributed to the mistreatment of prisoners in Afghanistan and Iraq.

The February 2004 report by International Committee of the Red Cross (ICRC) includes charges of brutality resulting in death, physical and psychological coercion, and prolonged solitary confinement. The ICRC reported these findings to Coalition Forces throughout 2003, and yet the mistreatment continued. U.S. forces systematically violated the Geneva Conventions, the ICRC report found. It described the abuse as "standard operating procedure."

#### Conduct Beneath Our Great Nation

The inhumane treatment of prisoners, whoever they are, is beneath a great nation. It is also illegal. That is the law whether U.S. military officers engage in such conduct themselves, or they turn over prisoners to the government agents of another country where torture is commonly used, in order to let others do the dirty work. It is also the law when contractors or subcontractors of the U.S. military are involved.

I have warned for years as well as in these recent weeks that we place Americans in greater dangers when we engage in and condone treatment that we seek to prevent around the world. It is hypocritical, it is wrong and it cannot be tolerated. It forfeits our credibility in criticizing other governments for treating prisoners inhumanely if we do not conform to recognized Geneva practices for prisoners. It undermines our reputation as a nation of laws. It damages our national security and foreign policy interests abroad. And it invites others to use similar tactics against our soldiers and citizens.

#### Administration's Empty Assurances To Congress

When allegations of rendition and possible breaches of the Convention Against Torture ("Torture Convention") surfaced in the summer of 2003, I wrote to Administration officials asking for assurances that the United States is complying with our obligations under this Convention. I received a response from the Mr. Haynes, the DoD counsel, that contained a welcome commitment by the Administration that it is the policy of the United States to comply with all of our legal obligations under the Torture Convention. I wrote to Mr. Haynes again for clarification on a number of points, such as how the Administration reconciled this statement of policy with reported acts of rendition and accusations of the use of interrogation techniques rising to or near the level of torture. After two months with no response, another letter, this one not from Mr. Haynes himself but from a subordinate, was delivered late at night on the eve of Mr. Haynes' November 19, 2003, confirmation hearing for a seat on the Fourth Circuit Court of Appeals. That letter was completely unresponsive to my questions.

As it turns out, the reassurances I was given, the Senate was given and the American people were given were not true. An editorial in The Washington Post on May 11 said it well: "On June 27 President Bush pledged in a speech that the United States would not use torture on detainees in the war on terrorism. The same day, the Defense Department's general counsel released a letter specifying that 'all interrogations, wherever they may occur,' would not violate prohibitions in the U.S. Constitution against cruel and unusual punishment. It turns out those assurances were false." The Washington Post wrote again yesterday on the assurances given about strict adherence to the Geneva Conventions in Iraq by Administration officials, this time by Under Secretary of Defense for Intelligence Stephen A. Cambone. The editorial noted that "these assertions are contradicted by International Red Cross and Army investigators, by U.S. generals overseeing the prisoners, and by Mr. Cambone himself."

#### A Nominee Who Requires Further Review

With respect to Mr. Haynes, Senator Kennedy has sent him inquiries in connection with these recent revelations. Senator Durbin has urged the Chairman to hold another hearing on Mr. Haynes' nomination. As precedent for such a hearing on a nomination already on the calendar, but reported by this Committee without a single affirmative vote from a Democratic Senator, I would point to the Chairman's practice of having hearings on legislation and a constitutional amendment after they are reported and pending on the Senate calendar. I also recall that in connection with the judicial nomination of Judge Frederica Massiah-Jackson, a second hearing was held after that nomination

had been reported to the Senate. I hope the Chairman will reconsider and that the declaration by his spokesperson, that no additional hearing will be held, will be reconsidered.

During Mr. Haynes' nomination proceedings earlier this year, many Members of this Committee questioned him about his legal work on issues concerning detainees and interrogation tactics. His answers were overwhelmingly non-responsive, and Members are continuing to pursue responsive answers to their questions, to no avail. Accordingly, many Members passed on voting for his nomination in Committee.

Since the time of Mr. Haynes' Committee vote, several press reports and editorials have directly implicated him in the loosening of legal standards for the detainment and interrogation of detainees in Iraq. Many of us remain concerned about the permissive environment that may have fomented the cruelty evidenced by the photographs taken at Abu Ghraib. According to press reports, defense contractors who participated in the interrogation of Iraqi prisoners were operating in a "legal twilight zone." These reports reflect directly on the actions of the lead lawyer at the Defense Department.

At this week's hearing before the Senate Armed Services Committee, the Under Secretary of Defense for Intelligence offered to have Mr. Haynes brief Senators on issues arising out of the military's treatment of detainees in Iraq. Senator Kennedy and Senator Durbin were justified in their requests to have Mr. Haynes called back to testify before this Committee to answer questions about his involvement in setting policies that may have facilitated the situation at Abu Ghraib.

#### A Nominee With A Troubling View On Torture

In addition to Mr. Haynes, there is another nominee of this Administration who has spoken and written widely on these matters. That is David B. Rivkin Jr. Mr. Rivkin has been nominated by President Bush to an executive position in the Department of Justice to rule on claims, including claims of mistreatment and torture. I have been deeply concerned by the Mr. Rivkin's views concerning torture and concerning cruel, inhuman, or degrading treatment. He has claimed, for example, that some forms of "aggressive interrogation" -- which according to him could include deprivation of food and water, mental pain and suffering, contorted positions, sleep deprivation, and even beatings - are arguably technically legal in certain cases. Of course the fact that most legal authorities, including the Israeli Supreme Court and the European Court of Human Rights, disagree with Mr. Rivkin's views have done little to dissuade him, and he has continued to write and speak in defense of the Administration's "aggressive" approach to detainees and in favor of punishment for captured insurgents, including with respect to Iraq, as recently as last month.

Mr. Rivkin's position is clear from an article he co-authored in January 2003: "The United States has not granted the rights of honorable prisoners of war to the Guantanamo Bay detainees because they are neither legally nor morally entitled to those rights. . . . Article 17 of that treaty . . . is inapplicable to the Guantanamo detainees and does not limit the United States' right to interrogate them. Moreover, even assuming that the detainees have been subjected to the interrogation methods . . . including painful bindings, contorted positions, sleep deprivation, piercing noises and even beatings -- a claim that al Qaeda members are trained to make and that has not been substantiated -- these do not, as a matter of law, constitute torture."

Mr. Rivkin's narrow views of human rights law and the definition of torture raised significant concerns in connection with his nomination and raise additional concerns about this Administration's policies and practices. In numerous articles over the years, Mr. Rivkin has argued that international humanitarian law, a well-established component of international law that protects civilians during wartime, is illegitimate. He has also criticized the International Committee of the Red Cross and other organizations for "relentlessly" promoting international humanitarian law.

I voted against Mr. Rivkin last year when his nomination was considered by this Committee because I did not think, based on his positions, that he could consider such claims fairly. I am astounded that the Administration chose to resubmit his nomination this year -- after abuses at several U.S. detention centers were widely reported in the press and alleged to have been due, in part, to the same narrow view of our obligations under international law that Mr. Rivkin has espoused. The Senate's obligation to consent on nominees is not a rubber-stamp but an essential check to ensure that those who serve in positions of public trust uphold core constitutional values and human rights.

## Congressional Oversight is Vital

We need to know more about this Administration's policies in these matters in light of the views of its nominees. During hearings this week Secretary Rumsfeld and General Myers were quick to lay at the feet of the Administration's lawyers the approval of the interrogation and detention practices it is using. We need to know who in the Department of Justice and in the White House are being consulted about these matters and what they are approving. The Senate was gracious enough to confirm to head the Department of Justice Office of Legal counsel a former Defense Department counsel. Since the Attorney General will not answer my requests for information about legal opinions rendered by the Office of Legal Counsel, we do not yet know how deeply involved in the development and approval of these policies the Attorney General has been. We also should learn more about Justice Department involvement in sending to Iraq to oversee the refurbishing of Abu Ghraib prison someone who reportedly resigned from a State correctional department after a mentally ill inmate died while shackled to a restraining chair, naked for 16 hours, and whose private prison company was reportedly under investigation by the Justice Department for unsafe conditions.

We in the Senate are entitled to know what the policies of the United States Government are and when those policies are justified as legally sanctioned, and we are entitled to know the basis and analysis for that legal judgment by the Executive Branch.

Three weeks ago, the Supreme Court heard arguments in the first in a series of cases arising from the Administration's policies and practices. The case involved the detentions at the U.S. military facility at Guantanamo Bay. That was one of the topics on which I had expected we would have held hearings. Two weeks ago, the Court heard argument in the case involving Vice President Cheney's refusal to reveal who participated in and advised the Administration's energy task force and in the constitutional challenges to the Administration's position that it has the power to detain American citizens and others whom the President declared enemy combatants without a hearing, without a trial and with a limited right to counsel, for an indefinite period of time.

These cases raise a number of matters of interest to this Committee. I have argued for some time that we are strengthened as a country and certainly practices affecting civil liberties would be on more solid legal footing if Congress had been allowed by this Administration to be a full partner in the development of legal structures and practices. Last week an editorial in The Washington Times reached the same conclusion, that it might be useful to enact laws bringing clarity and consistency to these matters. I could not agree more. That is what I have been urging with respect to military tribunals and detention and other matters from the outset. This Administration, instead, chooses to go it alone. Without the bulwark of congressional authorization, its practices should be subject to more searching inquiry by the judicial branch as the last remaining check and balance on Executive excess. Just as I commend the 9/11 Commission for its attention to its duties, I want to acknowledge the judiciary for the vital role it needs to play to preserve our constitutional democracy.

## Unchecked Government Power Invites Abuses

The abuses at the Abu Ghraib prison, along with reports of mistreatment and torture at other U.S. detention facilities and of many innocents being detained by mistake without any review process, raise serious and important concerns about the policies and positions this Administration has taken in pursuing its war on terror.

In its policies on enemy combatants, military commissions, and treatment of detainees, the Bush Administration has acted unilaterally, with virtually no input or oversight by Congress, with minimal review by the courts, and with flagrant disregard for the views of the international community. Instead of checks and balances, it wrote itself a blank check and said to the country and the world, "trust us."

In the three cases currently pending before the Supreme Court, the Administration has claimed unlimited and unreviewable authority to designate and indefinitely detain U.S. citizens and foreign nationals as "enemy combatants." It has detained more than 600 foreign nationals from more than 40 countries at Guantanamo Bay and argued that these detainees are entitled to no protection under either the Geneva Conventions or the Bill of Rights and can be held without charge for the duration of the "war on terror," a period of time that is impossible to predict and could last for decades.

We do not even know if these detainees were combatants engaged in battle against the U.S., if they were aid workers caught up in the crossfire, or if they were sold for bounty to the U.S. military. But the Administration says, "trust us," we will do the right thing. In fact, Deputy Solicitor General Paul Clement went so far as to claim, in the Guantanamo Bay case that the Administration's actions were beyond the reach of the law, even if detainees were being tortured or summarily executed.

Similarly, during oral argument in the case of an American citizen who is being detained as an "enemy combatant," the Deputy Solicitor General brushed aside a Supreme Court Justice's concern that there be some check against torture and abuse. He argued, "[W]here the Government is on a war footing ... you have to trust the executive to make the kind of quintessential military judgments that are involved in things like that."

As the abuses in Abu Ghraib demonstrate, we cannot just trust the executive to protect human rights. Rather, we need to trust our constitutional system of checks and balances on government power. As Major General Taguba's testimony to the Armed Services Committee suggested, it is precisely when there is a lack of appropriate supervision or oversight, a lack of clear rules, and a lack of discipline that abuses occur.

### Disastrous Consequences

Unfortunately, the abuses at Abu Ghraib prison also demonstrate the disastrous consequences -- on our foreign policy, on our security, and on human rights worldwide -- when there is no check. It is not just Abu Ghraib but history that teaches us that the executive branch should not be given unchecked authority during wartime. Certain aspects of the "war on terror" may be unprecedented, but the challenges to constitutional liberties that we face now are comparable to those that the nation has confronted before. As we aim to expand and support democracy, freedom and human rights around the world, we must serve as a role model. We should show the world that, in a democracy, no branch of government can rule without oversight, and that the rule of law must be followed, especially when it is most tempting not to do so.

I wrote a letter to the Attorney General on April 8, 2004, asking him to explain why the Justice Department was seeking to overturn a \$653 million judgment awarded to former U.S. POWs who were tortured by the Iraqi military during the 1991 Persian Gulf War. The former POWs won the judgment against the Iraqi government in June 2003 and are seeking payment from frozen Iraqi assets in the U.S.

The Secretary of Defense recently told the Armed Services Committee that he is "seeking a way to provide appropriate compensation to those detainees who suffered such grievous and brutal abuse." He continued, "It's the right thing to do." It may well be the right thing to do in the case of abused Iraqi detainees, but it is certainly the right thing to do in the case of American veterans of the Gulf War. I am most disappointed by DOJ's position on this, and I look forward to receiving the Attorney General's explanation of its decision to actively oppose the former POWs' judgment to compensate them for the torture they endured.

### Honoring Law Enforcement's Active And Fallen Heroes

Finally, I want to note that this is National Police Week and based on our resolutions, S. Res. 310, Saturday is National Peace Officers Memorial Day. This is a matter on which this Committee acted at our last meeting. We are right to remember and commemorate the sacrifice and commitment of our law enforcement officers serving our communities, States and country. We annually honor the officers and their families who made the ultimate sacrifice for public safety. I commend Senator Campbell for his leadership in this issue and thank Senators on both sides of the aisle for their support.

We thank all of our nation's brave law enforcement officers for their unwavering commitment to the safety and protection of their fellow citizens. They are real-life heroes. Currently, more than 850,000 men and women guard our communities at great risk. Each year, 1 in 15 officers is assaulted, 1 in 46 officers is injured, and 1 in 5,255 officers is killed in the line of duty in the United States every other day. In 2003, 146 law enforcement officers died while serving in the line of duty. Already this year, another 43 police officers have been killed in the line of duty.

During the 108th Congress, we have improved the Justice Department's Public Safety Officers Benefits (PSOB) program by enacting into law the Hometown Heroes Survivors Benefits Act (Public Law 108-182), which allows survivors of public safety officers who suffer fatal heart attacks or strokes while participating in nonroutine stressful or strenuous physical activities to qualify for federal survivor benefits.

The Senate also passed the Campbell-Leahy Bulletproof Vest Partnership Grant Act (S. 764), which will extend through FY 2007 the authorization of appropriations for the Bulletproof Vest Partnership Grant Program that helps State, tribal and local jurisdictions purchase armor vests for use by law enforcement officers. The House has yet to act on this important measure. We want to be sure that every police officer who needs a bulletproof vest gets one and that those vests provide the protection needed.

This National Peace Officers Memorial Day, Vermonters will remember our brave State Police Trooper, Sergeant Michael Johnson, who was killed last Father's Day while trying to stop a suspect leading two other State troopers on a high-speed chase. Sergeant Johnson was not even on duty, but he went to help his fellow troopers that Sunday afternoon after hearing their trouble on his radio. He had just deployed a set of tire spikes across the interstate when the suspect swerved to avoid the spikes and struck him. Sergeant Johnson left behind his wife and three children. Words are insufficient for the brave sacrifice of the man who was so admired by his family, community and the Vermont State Police force. In memory of his bravery and service to his family, community, State and country, Sergeant Johnson will be one of the names added this year to the National Law Enforcement Officers Memorial.

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