

Statement of

# **The Honorable Orrin Hatch**

United States Senator  
Utah  
June 17, 2004

Good Morning. We have a lot on the agenda today. I want to get to work as soon as we can.

First on the agenda will be the nomination of Henry Saad. We had a good discussion about Judge Saad at our last mark-up and I plan to bring his nomination to a vote today.

Also on the nominations agenda for the first time are Claude Allen to be a Circuit Judge on the 4th Circuit and Michael Watson to be a District Judge for the Southern District of Ohio.

I expect that there will be a request to hold over these nominees. I know that Senator DeWine is especially pleased with the cooperation we received from across the aisle with respect to the Watson nomination.

On the legislative side, I understand that with the notable exception of a possible non-germane amendment that was circulated last night, the Satellite Home Viewer Extension Act is ready for Committee action today. I am hopeful that this non-germane amendment will not be offered and we can report this important bill to the floor today. I also understand that Senator Durbin may wish to work further on an issue of particular interest to him once this bill is reported.

I hope we will be able to move three commemoratives:

C "National Airborne Day"

C "National Attention Deficit Disorder Awareness Week"

C "National Health Center Week"

Once we vote on Judge Saad, I hope to conclude work on the Gang Bill and move to other items on the legislative agenda.

Before I turn to Senator Leahy, I want to acknowledge that I am aware that there is interest in pursuing certain documents possessed by DOJ relating to the treatment and interrogation of POWs and enemy combatants held by the United States in connection with the war against terrorism.

While I want to hear what others have to say about this request, I want to make a few preliminary observations.

First, during the heat of the debate on some aspects of the war against terrorism, it is sometimes easy to lose sight of the fact that the non-conventional but deadly tactics used by terrorists compel us to rethink the traditional defense strategies we have successfully used in conflicts against the uniformed armies of nation-states.

For example, Senator Schumer suggested last week, if a terrorist had information that might prevent the detonation of a nuclear bomb in an American city, extreme interrogation techniques, including torture, may be justified.

I hope we can all agree that it is the evil intentions and actions of the terrorists -- who chose to attack civilian targets in contravention of the rules of warfare -- that caused the federal government to raise the question of whether the Geneva Conventions ought to apply to certain enemies such as Al Qaeda. The first responsibility of the federal government is to protect our citizens and this should include exploring all legal means to thwart those whose stated goal is to attack our country with weapons of mass destruction.

Second, we in Congress are constantly called upon to strike a proper balance between the values of transparency and accountability in government, with the need to protect the confidentiality of Presidential and Executive branch decision making, including the need to create an atmosphere in which key leaders, most importantly, the President, can obtain the candid, informed advice of senior Executive branch officials.

As all of us on this Committee know only too well, we expect candid advice from our staffs' and do not wish to see confidential staff memoranda reprinted in the newspapers.

Nowhere is the need for the appropriate level of secrecy more important than the advice provided regarding the strategy and tactics used by the military during a time of war. This was a point that Attorney General Ashcroft made last week.

This is not to imply that Congress should not have any access to key decision making documents in connection with the war against terrorism. We should, however, proceed with great caution in this area.

Frankly, now that I have carefully read several of the leaked legal memos, including the two widely cited DOJ memos authored by my former General Counsel, John Yoo, concerning the legal status of Al Qaeda and Taliban detainees, I am a bit conflicted. On the one hand, I can argue that every member of Congress and the public should read these documents to better understand the difficult issues that the government is wrestling with in order to prevent future terrorist attacks on our country.

Having said that, we must all recognize that in a matter of a relatively short period of time, a good deal of what is written in the Yoo memos will be superceded when the Supreme Court announces its decisions in a series of terrorism cases.

I am not altogether certain that either the Congress or the Executive branch has much to gain over a pitched battle over already disclosed documents soon to be moot due to Supreme Court decisions.

Moreover, I am greatly displeased and concerned by the realization that Osama Bin Laden and his associates now have access to many documents that can only help Al Qaeda plot against the United States and jeopardize the safety of our troops in the field and our fellow citizens across our country. We should not reveal our interrogation techniques to our enemies.

There must be some reasonable limits on what can and should be disclosed by the Executive Branch to Congress and the public about the war against terrorism.

In this regard, I find the language circulated last night by Senator Leahy to go way too far.

While I am more than willing to continue to work with my friend from Vermont on a bi-partisan manner on this important issue, I must oppose this particular Leahy Amendment and urge all of my colleagues to reject this approach.

In short, I believe the Leahy Amendment casts the net far too broadly.

For example, the term terrorist is not defined in his amendment. Yesterday there was yet another misguided attack by the eco-terrorist group, ELF. It took place in my home state of Utah and caused a substantial amount of property damage. I hope that DOJ will catch and prosecute these terrorists.

I do not hope that once an arrest is made, that DOJ will be compelled to send the Judiciary Committee all documents and records relating to this particular ELF attack, but that is what the Leahy Amendment appears to require.

Nor would I want the Judiciary Committee to receive all the documents in DOJ's possession "describing, referring or relating to the treatment or interrogation of prisoners of war, enemy combatants, and individuals held in the custody or physical control of the United States Government ... in connection with the investigation of terrorist activity."

This language would appear on its face to include all of the interrogation records and all of the medical records of Zacarias Moussaoui and any other individual that DOJ is prosecuting, or has prosecuted, on terrorism-related charges subsequent to 2001.

This language could include any interrogation and medical records shared between the Department of Defense and the FBI relating to detainees held at Guantanamo Bay or in Iraq, Afghanistan or elsewhere.

This information request could involve hundreds, if not thousands, of POWs and other enemy combatants, and hundreds of thousands of pages of records.

I do not see the practical utility of providing all of these records pertaining to individual detainees to the Judiciary Committee. Under the Leahy language, this information could

conceivably include prosecution strategy memos, surveillance materials, information provided by, and the identities of, confidential informants, as well as FISA materials.

Surely this language is too broad. I am troubled by the way in which the language appears to stray far away from general policy questions concerning the legal status of certain classes of detainees, such as suspected Al Qaeda members, into matters affecting on-going intelligence gathering from, and the prosecution of, individual terrorist suspects.

In sum, I oppose the Leahy language.

Let me close by making a suggestion to my friend from Vermont. Instead of offering this new language as a non-germane amendment to the bills already on the agenda, please consider the option of holding off from this amendment today and simply see how the Attorney General answers the 5 pages of questions that you submitted to DOJ on Tuesday.

As you recall, at the hearing I requested to the Attorney General that he should attempt to answer all of the questions submitted by the end of the month. We should let the normal question and answer process run its course before legislative steps are considered.

I do have several concerns over the scope and propriety of some of the questions you submitted to the Attorney General for the record. For example, question 2 on page 2, appears to be drafted in particularly expansive terms and appears to include every prisoner held in custody by the U.S., although it is probably only intended to be limited to suspected terrorists.

In any event, it may prove constructive to allow DOJ to take the time over the next few weeks to carefully weigh how the Department will respond to each of your specific document requests and other questions.

Having spent the last few minutes criticizing the amendment developed by, and questions submitted from, my friend from Vermont, let me make a few remarks directed at the Administration.

At the hearing last week, we all heard the Attorney General's reluctance to provide copies of certain memoranda, some of which are already publicly available due to leaks.

As I have discussed with several senior Administration officials over the last few days, and will suggest publicly today, it may be possible to provide to the Committee, under an appropriate confidentiality and security agreement, a finite collection of key documents, such as the final John Yoo memos, that adequately and accurately present the Administration's policies and legal justifications with respect to the detention and interrogation of certain classes of enemy combatants.

The Intelligence Committee, on which I serve, often arrives at such compromises. Perhaps we can do so here.

In making this suggestion, I am fully respectful of the President's role as Commander-in-Chief and the great deference he is owed in matters of national security during a time of war. Likewise,

I understand the Attorney General's resistance to releasing documents that would be seen by some as setting a precedent

for future disclosures. As I said earlier, the Supreme Court is about to provide some definitive answers to some important questions.

With all due respect to the Executive Branch, Congress and this Committee also has a special role to play under the Constitution in overseeing how U.S. law is being interpreted and applied both to citizens, and non-citizens, charged or suspected with terrorist activities. Moreover, under our system of government, the forthcoming Supreme Court decisions may inspire additional legislative actions.

Immediately after Senator Leahy makes his opening remarks, I plan to take up Judge Saad. Next I will move to the Gang Bill and urge all of the bill's co-sponsors and other members of the Committee to vote against the Leahy terrorist document request amendment if he offers it. I hope that my friend from Vermont will hold off until we hear back from DOJ on the questions.

I know that we both want to get to other matters, including the DNA bill, so it is important that we move through the agenda as quickly as we can.