Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
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Ranking Member, Judiciary Committee
"The Authority to Prosecute Terrorists Under
The War Crime Provisions of Title 18"
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In 1996, working with the Department of Defense, Congress passed the War Crimes Act to provide criminal penalties for certain war crimes committed by and against Americans. The next year, again with the Pentagon's support, Congress extended the War Crimes Act to violations of the baseline humanitarian protections afforded by Common Article 3 of the Geneva Conventions. Both measures were supported by a broad bipartisan consensus, and I was proud to sponsor the 1997 amendments.

The legislation was uncontroversial for a good reason. As I explained at the time, the purpose and effect of the War Crimes Act as amended is to provide for the implementation of America's commitment to the basic international norms we subscribed to when we ratified the Geneva Conventions in 1955. Those norms are truly universal: They condemn war criminals whoever and wherever they are.

That is a critically important aspect of the Geneva Conventions and our own War Crimes Act. When we are dealing with fundamental norms that define the commitments of the civilized world, we cannot have one rule for us and one for them, however we define "us" and "them."

As Justice Jackson said at the Nuremburg tribunals, "We are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us."

In that regard, I was disturbed to read recent reports that the Department of Justice is drafting legislation to narrow the scope of the War Crimes Act to exclude violations of the Geneva Conventions and retroactively immunize past violations. Before taking such a drastic step there is much we need to know. In particular, I have been concerned for some time that this President has thought he could immunize conduct otherwise illegal. I want to know whether the Administration has sought to immunize illegal conduct and on what basis.

But the Chairman convened this hearing today to consider the Government's authority to prosecute terrorists under the War Crimes Act. It has long been open to the Administration to charge suspected terrorists, including those imprisoned at Guantanamo Bay, with federal crimes. In addition to the War Crimes Act, federal law provides criminal penalties for terrorism, torture,

hostage-taking, and other acts considered grave breaches of the Geneva Conventions, regardless of where these acts may occur. And unlike the international law of war, Federal law allows for prosecution of the crime of conspiracy.

There is ample authority under federal law for the prosecution of international terrorists. But for various reasons, some good and some bad, the Administration has made little use of that authority against suspected terrorists. As far as I can tell, the Ashcroft Justice Department and the Gonzales Justice Department have yet to file a single charge against anyone for violation of the War Crimes Act. Nor has the Administration made use of the processes and procedures set forth in the Manual for Courts-Martial and the Uniform Code of Military Justice.

Instead, the Bush-Cheney Administration has pursued a two-pronged strategy. First, with respect to the vast majority of the 700-plus prisoners at Guantanamo and the unidentified prisoners in secret prisons abroad, the Administration has frankly stated that it has no interest in trying them in any court, civilian or military.

Second, this Administration has decided to bring a small number of detainees before "military commissions." I have no objection in principle to the use of military commissions. Indeed, I introduced legislation to authorize procedures for military commissions back in February 2002 after holding hearings in 2001 on the issue. I invited the Administration to work with Congress on legislative authority for such commissions. Regrettably, when the Administration had the option to work in a constructive way with Congress, it chose its customary path of secrecy and unilateralism. This Administration's go-it-alone approach yielded the predictable result after four years; it has achieved nothing other than an embarrassing defeat in the United States Supreme Court. Not a single suspected terrorist has been held accountable before a military commission in the last six years.

The Court's landmark separation-of-powers decision in Hamdan compelled the Bush-Cheney Administration to finally come to Congress to request authorizing legislation. I was encouraged to read the testimony the uniformed witnesses provided before the Armed Services Committee, in which they indicated that the starting point for legislation should be the well-established rules governing courts-martial. But when the Administration's civilian lawyers came before this Committee, they instead argued that Congress should rubberstamp the problematic procedures that the Supreme Court struck down.

What is at stake for all Americans as these decisions are made, are our American values and the primacy in our system of government of the rule of law.

Today, we have before us some of the uniformed witnesses who testified before the Armed Services Committee. I look forward to the testimony of the JAG officers. They have been trying to uphold the best military justice traditions, but have too often been cut out of this Administration's deliberations. I thank them for their services and their willingness to work with us in Congress and to share their views.

I look forward to our consideration at this hearing whether the War Crimes Act provisions should be expanded to include additional offenses. In the future I hope that that they will be willing to appear before our Committee, again, as we consider how to construct military commissions.

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