

Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
September 25, 2006

I commend the Chairman for holding this hearing today on the provisions in the proposed military commissions bill that would eliminate for detainees the writ of habeas corpus, a cornerstone of our legal and constitutional system. I wish this hearing could have taken place at a time when more Senators could attend and when witnesses, Senators, and staffs could have had time to prepare. This issue carries serious consequences and deserves to be considered carefully.

For weeks now, politicians and the media have breathlessly debated the fine points and political implications of the so-called "compromise" on proposed trial procedures for suspected terrorists. In doing so, we have ignored a central and more sweeping issue. Important as the rules for military commissions are, they will apply to only a few cases. The Administration has charged a total of 10 people in the nearly five years since the President declared his intention to use military commissions, and it recently announced plans to charge 14 additional men. But for the vast majority of the almost 500 prisoners at Guantanamo, the Administration's position remains as stated by Secretary Donald Rumsfeld three years ago: It has no interest in trying them.

Today we are belatedly addressing the single most consequential provision of this much-discussed bill, a provision that can be found buried on page 81 of the proposed bill. This provision would perpetuate the indefinite detention of hundreds of individuals against whom the Government has brought no charges and presented no evidence, without any recourse to justice whatsoever. That is un-American, and it is contrary to American interests.

Going forward, the bill departs even more radically from our most fundamental values. It would permit the President to detain indefinitely - even for life - any alien, whether in the United States or abroad, whether a foreign resident or a lawful permanent resident, without any meaningful opportunity for the alien to challenge his detention. The Administration would not even need to assert, much less prove, that the alien was an enemy combatant; it would suffice that the alien was "awaiting [a] determination" on that issue. In other words, the bill would tell the millions of legal immigrants living in America, participating in American families, working for American businesses, and paying American taxes, that our Government may at any minute pick them up and detain them indefinitely without charge, and without any access to the courts or even to military tribunals, unless and until the Government determines that they are not enemy combatants.

Detained indefinitely, and unaccountably, until proven innocent. Like Canadian citizen Maher Arar. As the Canadian Government recently concluded in a detailed and candid report, there is no evidence that Mr. Arar ever committed a crime or posed a threat to U.S. or Canadian security. Yet, while returning home to Canada from a family vacation, he was detained, interrogated, and then shipped off to a torture cell in Syria by the Bush-Cheney Administration. While the Canadian Government has now documented that the wrong thing was done to the wrong man, the Bush-Cheney Administration has, as usual, evaded all accountability by hiding behind a purported state secrets privilege.

The Administration's defenders would like to believe that Mr. Arar's case is an isolated blunder, but it is not. Numerous press accounts have quoted Administration officials who believe that a significant percentage of those detained at Guantanamo have no connection to terrorism. In other words, we have been holding for several years, and intend to hold indefinitely without trial or any recourse to justice, a substantial number of innocent people who were picked up by mistake in the fog of war.

The most important purpose of habeas corpus is to correct errors like that. It is precisely to prevent such abuses that the Constitution prohibits the suspension of the writ of habeas corpus "unless when in Cases of Rebellion or Invasion the public Safety may require it." I have no doubt that this bill, which would permanently eliminate the writ of habeas for all aliens within and outside the United States whenever the Government says they might be enemy combatants, violates that prohibition. And I have no doubt that the Supreme Court would ultimately conclude that this attempt by the Bush-Cheney Administration to abolish basic liberties and evade essential judicial review and accountability is unconstitutional.

It would be utterly irresponsible for Congress to neglect our oath to the Constitution and the American people and pass this unconstitutional legislation in the hope that the Court will ultimately rescue us from our folly. Doing so would only undermine the War on Terror by prolonging the legal limbo into which the Administration has dragged the entire regime of military detentions.

We should have put military detentions on a solid legal footing and established military tribunals four years ago. I introduced a bill in 2002 to authorize military commissions. So did Senator Specter. But the White House and the Republican leadership ignored us, choosing instead to roll the dice and hope that it could prevail on its radical go-it-alone theories of presidential power.

The Bush-Cheney Administration got a rude awakening earlier this year in the Hamdan case. The Supreme Court -- which happens to include seven Republican appointees in its nine Justices -- affirmed what we had told it all along: when the terrorists brought down the Twin Towers on 9/11, they did not bring down the rule of law on which our system of Government is founded. They did not supplant our republican form of Government with one in which an unaccountable Executive can imprison people forever without trial or judicial review.

On its way to losing that case, the Administration wasted four years. Actually, it did more than waste four years. Just yesterday the press reported what the Administration has been misrepresenting to the American people and what was apparently confirmed in a National Intelligence Estimate: that the invasion and continuing U.S. military presence in Iraq has created a new generation of anti-American terrorists, that the terrorist threat against the U.S. has grown and, according to intelligence officials, that the Iraq war has "made the overall terrorism problem worse." Meanwhile, having failed to try a single detainee, and having failed to secure a conviction of a single terrorist offense, the Administration is demanding that we pass a bill it drafted last week before the end of this week.

The Administration's sudden and belated haste to move ahead makes no sense, other than as a matter of crass electoral politics. We are taking a first look at a bill that the Administration claims is central to the decisive ideological battle of the 21st Century, a bill that would suspend habeas corpus for the first time since the Civil War, and a bill that, if enacted, will almost certainly be used by America's enemies as a pretext for the torture and indefinite detention without judicial review of Americans abroad.

If the Administration and the Republican leadership of the Senate believe that suspending the writ is constitutional and justified, they should grant the joint request that Chairman Specter and I made last week for a sequential referral of the bill. Constitutional issues involving the writ of habeas corpus are at the center of this Committee's jurisdiction. We can and should review this legislation thoroughly, and if a few habeas petitions are filed in the meantime, we will not lose the War on Terror as a result of those filings. If this Congress votes to suspend the writ of habeas corpus first and ask questions later, liberty and accountability will be the victims.