

Statement of
The Honorable Patrick Leahy

United States Senator
Vermont
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STATEMENT OF SENATOR PATRICK LEAHY,
CHAIRMAN, SENATE JUDICIARY COMMITTEE
HEARING ON
"RESTORING HABEAS CORPUS:
PROTECTING AMERICAN VALUES AND THE GREAT WRIT"
MAY 22, 2007

Today, the Judiciary Committee turns its attention to a top legislative priority that the Ranking Member and I have set for this year: Restoring the Great Writ of habeas corpus, and the accountability and balance it allows. I thank our distinguished panel of witnesses for appearing here today. They illustrate the broad agreement among people of diverse political beliefs and backgrounds that the mistake committed in the Military Commissions Act of 2006 must be corrected.

Habeas corpus was recklessly undermined in last year's legislation. Senator Specter and I urged caution before taking that dangerous step, but fell just a few votes shy on our amendment to restore these protections. It is now six months later with the election behind us. I hope that the new Senate will reconsider this historic error in judgment and set the matter right. It is urgent that we restore our legal traditions and reestablish this fundamental check on the ability of the Government to lock someone away without meaningful judicial review of its action. The time to act is now.

I commend Senator Specter, who feels as passionately as I do about this issue, for helping to plan this hearing. Senator Specter and I together introduced the Habeas Corpus Restoration Act of 2007, (S.185), on the first day of this Congress. This bipartisan bill has 16 co-sponsors.

The Military Commissions Act, passed hastily in the weeks leading up to last year's election, was a profound mistake, and its elimination of habeas corpus rights was its worst error. Like the internment of Japanese Americans during World War II, the elimination of habeas rights was an action driven by fear and another stain on America's reputation in the world.

Justice Scalia wrote in the Hamdi case: "The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive." The remedy that secures that most basic of freedoms is habeas corpus. It provides a check against arbitrary detentions and constitutional violations.

This Great Writ is the legal process that guarantees an opportunity to go to court and challenge the abuse of power by the Government. The Military Commissions Act rolled back these protections by eliminating that right, permanently, for any non-citizen labeled an enemy

combatant. In fact, a detainee does not have to be found to be an enemy combatant; it is enough for the Government to say someone is "awaiting" determination of that status.

The sweep of this habeas provision goes far beyond the few hundred detainees currently held at Guantanamo Bay, and includes an estimated 12 million lawful permanent residents in the United States today. These are lawful residents of the United States, people who work and pay taxes, people who abide by our laws and should be entitled to fair treatment. These are people we have traditionally welcomed to our shores and invited to experience the freedoms that made America the most admired country in the world. Under this law, any of these people can be detained, forever, without any ability to challenge their detention in court. I look forward to hearing from Professor Cuellar and others who can elaborate on this disastrous change, and its potentially disproportionate impact on the Latino population, which accounts for so many of the country's hard-working legal immigrants.

Since last fall, I have been talking about a nightmare scenario in which a hard-working legal permanent resident who makes an innocent donation to a charity, perhaps a Muslim charity, to help poor people around the world in the finest American tradition. Maybe that charity is secretly suspected by the Government to have a tie, however tenuous, to terrorist groups. Based on that suspected "tie," perhaps combined with an overzealous neighbor reporting "suspicious behavior," having seen people of a different culture visiting, or with information secretly obtained from a cursory review of the person's library borrowings, the permanent resident could be brought in for questioning, denied a lawyer, confined, and even tortured. Such a person would have no ability to go to court to plead his or her innocence - for years, for decades, forever.

This is the kind of "disappearance" that America has criticized and condemned in parts of the world ruled by autocratic regimes. That is not America. When I first spelled out this nightmare scenario, many people viewed it as a far-fetched hypothetical, but sadly it was not.

Last November, just after enactment of these provisions, this was confirmed by the Department of Justice in a legal brief submitted in federal court in Virginia. The U.S. Government, seeking to dismiss a detainee's habeas case, said that the Military Commissions Act allows the Government to detain any non-citizen designated as an enemy combatant without giving that person any ability to challenge his detention in court. And this is not just at Guantanamo Bay for those whom this Administration likes to call the worst of the worst. The Justice Department said it is true even for someone arrested and imprisoned in the United States.

I was shocked when Attorney General Gonzales maintained at a hearing earlier this year that our Constitution does not provide a right to habeas corpus. But more damaging was the Senate's decision over our opposition to remove this vital check that our legal system provides against the Government arbitrarily detaining people for life without charge. This is wrong. It is unconstitutional. It is un-American.

We all want to make America safe from terrorism. But I implore those who supported this change to think about whether eliminating habeas truly makes America safer in the world, and whether it comports with the values, liberties, and legal traditions we hold most dear. I hope this hearing will help convince all in Congress that it does none of those things.

Our leading military lawyers, like Admiral Guter, tell us that eliminating key rights for detainees hinders the safety of our troops and the effectiveness of our defense. Diplomats and foreign policy specialists, like Mr. Taft, tell us that eliminating habeas rights reduces our influence in the world. Immigration attorneys and academics tell us that our Nation's hard-working immigrants are at risk from this change.

Top legal scholars, and conservatives like Kenneth Starr, Professor Richard Epstein, and David Keene, head of the American Conservative Union, agree that this change betrays centuries of legal tradition and practice. Professor David Gushee, head of Evangelicals for Human Rights, submitted a declaration signed by evangelical leaders nationwide, which refers to the elimination of habeas rights and related changes as "deeply lamentable" and "fraught with danger to basic human rights."

Senator Specter and I have both supported the notion of effective and efficient military tribunals to bring terrorists to justice. Long before this Administration had to be ordered by the Supreme Court to revisit its unilateral practices, both Senator Specter and I had introduced military commission legislation in 2002.

The elimination of basic legal rights undermines, not strengthens, our ability to achieve justice. It is from strength that America should defend our values and our way of life. It is from the strength of our freedoms, our Constitution, and the rule of law that we can prevail. We can ensure our security without giving up our liberty. I will keep working on this issue until we restore the checks and balances that are fundamental to preserving the liberties that define us as a Nation.

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