

Statement of
The Honorable Patrick Leahy

United States Senator
Vermont
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OPENING STATEMENT OF SENATOR PATRICK LEAHY,
CHAIRMAN, SENATE JUDICIARY COMMITTEE
EXECUTIVE BUSINESS MEETING
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Today, we have the opportunity, following our recent hearing on the matter, to get about the business of restoring the Great Writ of habeas corpus, and the accountability and balance it allows. This is a top legislative priority the Ranking Member and I share with a number of Members on this Committee.

Our hearing illustrated 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. Senator Specter has shown great leadership on this important matter and remains the lead sponsor on our Habeas Corpus Restoration Act of 2007, S.185, which we introduced on the first day of this Congress. This bipartisan bill has 16 co-sponsors, including six members of this Committee, the Chairman of the Armed Services Committee, and the Chairman of the Select Committee on Intelligence.

Habeas corpus was needlessly undermined in last year's legislation. I hope that in this new Senate we will reconsider this historic error in judgment and set the matter right. It is urgent that we restore our legal traditions and re-establish 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.

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

This Great Writ is the legal process in our great legal tradition of fairness and accountability 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 new law, any of these people can be detained, forever, without any ability to challenge their detention in court.

At Tuesday's hearing, Stanford Professor Mariano-Florentino Cuellar called this an issue about which the Latino community must be concerned. His testimony is bolstered by a letter from Carlina Tapia-Ruano, President of the American Immigration Lawyers Association.

Since last fall, I have been talking about a nightmare scenario surrounding a hard-working legal permanent resident who makes an innocent donation to a charity that 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 picked up and held with no ability to go to court to plead his or her innocence - for years, for decades, forever.

Sadly, this is no far-fetched hypothetical. 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. The Justice Department said it is true even for someone arrested and imprisoned in the United States.

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.

Top 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 Epstein wrote to Senator Specter last week that the habeas-stripping provision is like a "Kafkaesque novel" and continued: "This conscious disregard of traditional practice in the United States counts as an affront to the rudimentary principles of fair play that has commended itself to every court that does not model itself on the old English Star Chamber." Similarly, 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."

William Howard Taft IV, a senior Defense and State Department official in three Republican administrations including the present one, testified Tuesday that habeas rights for detainees strengthen our ability to combat terrorism by "hav[ing] the judiciary endorse the detention of the terrorists who threaten us" and reiterated what is so obvious -- that our disastrous legal policies toward detainees have caused great damage to our diplomatic efforts and standing in the world.

Perhaps most powerful for me on Tuesday was the testimony of Rear Admiral Donald Guter, who was working in his office in the Pentagon as Judge Advocate General of the Navy on September 11, 2001. As someone with a deep commitment to the military and a real understanding of the current war effort, his credibility is unimpeachable when he says that denying habeas rights to detainees endangers our troops and undermines our military efforts.

In his testimony to this Committee, Admiral Guter wrote: "We are the bright light of the world. Every step we take that dims that bright shining light undermines our role as a world leader. As we limit the rights of human beings, even those of the enemy, we become more like the enemy. That makes us weaker and imperils our valiant troops, serving not just in Iraq and Afghanistan, but around the globe."

The elimination of basic legal rights undermines rather than 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. I hope the Members of this Committee will join me in proceeding today to take another important step in the process of restoring the Great Writ by considering and reporting our bill today.

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