

Testimony of

The Honorable Orrin Hatch

November 28, 2001

Mr. Chairman, I want to thank you for convening this timely hearing. The issues we will address today have generated a good deal of attention, and I hope that this hearing will allay concerns about the steps our government is taking to protect our nation from terrorists.

I must say, however, that with only a few notable exceptions, much of the public criticism appears confined to those who make their living carping about the government - especially Republican administrations. I am reminded of a recent line from the journalist Christopher Hitchens, a self-described man of the left. Criticizing the reaction of many on the left to the war on terrorism, Hitchens charged that "all the learned and conscientious objections, as well as all the silly or sinister ones, boil down to this: Nothing will make us fight against an evil if that fight forces us to go to the same corner as our own government."

The American people have quite different feelings. In my travels over the holidays last week, I was struck by the almost universal praise and gratitude Americans feel toward the President and his administration for the steps they are taking to defeat terrorists abroad and protect us at home. To their credit, the American people instinctively know that our country's leaders are acting out of a sincere concern for both our security and our liberty. And unlike some, most Americans also realize that, as Harvard Professor Laurence Tribe - whom no one would accuse of being a member of the "vast right-wing conspiracy"-- acknowledged, "Civil liberties is not only about protecting us from our government. It is also about protecting our lives from terrorism." Indeed, most Americans worry that we are not doing enough to thwart potential terrorist attacks, not that we are doing too much. We might be better served if next week's hearing with the Attorney General focused on whether we have done all we can to address the threat of terrorism and to help our President obtain all the tools he needs to fight Osama bin Laden and the al Qaida organization.

Still, oversight hearings such as this one provide a valuable service to us and to the public. We will learn from Assistant Attorney General Michael Chertoff the legal and policy justifications underlying the Administration's decision to monitor lawyer-client communications, detain aliens, and employ military commissions for non-citizens accused of terrorism. The six other witnesses - 4 of whom were called by the Chairman - will, one hopes, provide their own dispassionate analysis of the legal and policy issues raised by these powers. One only regrets that, given the importance of this hearing and the need for Congress to act in a bipartisan manner in such times, we were not able to agree to an equal number of experts to present a balanced view and analysis of the issues. Nonetheless, it is my hope that the testimony we do have here will dispel many of the needlessly alarmist misconceptions one hears in the media.

Mr. Chairman, before I go further I want to clear up one small misconception concerning the letter you and I recently sent to the Attorney General. It was widely reported that we demanded

that he appear and that I shared in your apparent displeasure with his alleged refusal to cooperate with this Committee. I should note that I did join you in asking that the Attorney General come before this Committee, but I strongly disagree with those who charge that the Attorney General has been less than completely responsive to Congress. And while I do agree with you that we have a legitimate oversight responsibility, I also want to point out that each time we have asked the Administration to appear, they have been more than willing to comply.

Since September 11, the Attorney General has, in effect, been the commanding general of our domestic defense, a job that requires round-the-clock attention on his part. He has borne the awesome responsibility of ensuring that our military efforts overseas are not met with more terrorist attacks at home. I, for one, want to thank the President, the Attorney General, and the rest of our law enforcement and intelligence communities for performing well a tough job in a difficult time.

Mr. Chairman, I also want to clarify some of the misconceptions about lawyer-client monitoring, detention of aliens, and military commissions, which are the issues that you intend to address today. First, some have charged that lawyer-client monitoring is a flagrant violation of the Fourth and Sixth Amendments to the Constitution. While I agree that we should examine this power closely to determine whether it is a wise policy, the Administration's regulation has been carefully crafted to avoid infringing on Constitutional rights. It is well-established that inmates and detainees have greatly diminished Fourth Amendment rights while in custody, and the Supreme Court, in *Weatherford v. Bursey*, upheld the government's authority to monitor detainee-attorney conversations when there is a legitimate law enforcement interest in doing so, the communications are protected from disclosure, and no information obtained through the monitoring is used by the government in a way that deprives the defendant of a fair trial. The regulation recently promulgated by the Department of Justice appears to satisfy all of these conditions.

With respect to the detention of aliens, some have accused the government of unlawfully holding detainees incognito and preventing them from obtaining legal counsel. As the Attorney General made clear at a news conference yesterday, these charges are, at best, irresponsible exaggerations. Those being held are in custody on criminal charges, immigration violations, or pursuant to material witness complaints under longstanding statutory authority. In other words, those people have committed crimes, violated our nation's immigration laws, or have information critical to the terrorism investigation. And to the extent they are not being released on bond, it is because a judge has determined that they are likely to flee, will likely pose a danger to the community, or, in the case of immigration detainees, are alleged to be deportable from the United States on the basis of criminal-including terrorist- activity.

What is more, the detainees also have access to counsel who can assist them in challenging the legality of the detention. Any alien charged with a criminal offense or held as a material witness has the right to court-appointed counsel. Under longstanding immigration law, any alien charged with an immigration violation is unequivocally afforded a minimum of 10 days to secure counsel, and may request a continuance for additional time if necessary. Many public interest groups have stepped in to provide counsel to those immigration detainees who cannot otherwise afford a lawyer.

As for the charge that these people are being held incognito, the Attorney General has, in my view, rightly refused to provide a public list of the names of the detainees. I personally agree, as an advocate of personal privacy rights, that such a list would not only alert our enemies to the status of our investigation, it would also violate the privacy of those being held. I find it richly ironic that the same civil liberties groups that adamantly oppose the publication of the names of sexual predators now wax indignant when the Department of Justice refuses to provide The New York Times or The Washington Post a list of those detained in connection with this terrorism investigation.

Finally, there have been many alarmist and misleading statements about the potential use of military commissions. Most glaring is the claim by some of my colleagues this past weekend that military tribunals are "unconstitutional." The Supreme Court has repeatedly upheld the constitutionality of using military commissions to prosecute individuals charged with crimes under the law of war. Specifically, the Court unanimously upheld the constitutionality of President Roosevelt's use of a military commission to try eight Nazi saboteurs who entered the United States via submarine during World War II in *Ex parte Quirin*. The Court also upheld the use of a military commission at the end of the war to try the Japanese commander in the Philippines for violations of the laws of war. In *re Yamashita*. As the Supreme Court has explained, "[s]ince our nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war." *Madsen v. Kinsella*.

Furthermore, contrary to recent suggestion, military tribunals can be - and have been - established without further Congressional authorization. Because the President's power to establish military commissions arises out of his constitutional authority as Commander in Chief, an act of Congress is unnecessary. Presidents have used this authority to establish military commissions throughout our nation's history, from George Washington during the Revolutionary War to President Roosevelt during World War II. Congress, for its part, has repeatedly and explicitly affirmed and ratified this use of military commissions. Article 21 of our Code of Military Justice, codified at section 821 of title 10 of the United States Code, expressly acknowledges that military commissions have jurisdiction over offenses under the law of war.

Mr. Chairman, the oversight we conduct today can be a useful exercise only if we steer clear of distortion and focus on the policy choices we face. That these tools - military tribunals, detainee/attorney monitoring, and detention of aliens - are constitutional is largely beyond dispute. On the other hand, whether, how and when they should be employed, against whom, and with what oversight and accountability are questions we are right to ask, and the administration is wise to answer.

As we confront these policy issues, I would ask my colleagues to heed the strong sentiment of the majority of the American people - both liberal and conservative - to do more than just criticize. It is easy to criticize from where we sit; it is much harder to go to work every day knowing that you are the person in charge of protecting Americans from terrorists. Yes, the Administration has been aggressive in using all the constitutional powers at its disposal to protect Americans. But given what happened on September 11, wouldn't they be unforgivably derelict if they did not? After all, our enemies in this war are not, as many on the extreme left are fond of

saying, simply trying to change our way of life. They are trying to kill Americans-as many as they possibly can. And though we may never know for certain, I, for one, believe that the steps taken by our law enforcement and intelligence communities have saved us from even more harm.

Thank you again, Mr. Chairman, for calling this hearing. I look forward to hearing from our witnesses.

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