

Testimony of  
**The Honorable Patrick Leahy**

November 28, 2001

This is one of a series of hearings this committee is holding on the Department of Justice's response to the September 11 attacks and on implementation of the USA PATRIOT Act.

I know I speak for those on both sides of the aisle in beginning this hearing by commending the hardworking men and women of the agencies of the Department of Justice and our State and local officers for their dedicated law enforcement efforts.

At the time Congress worked on the anti-terrorism bill, many observed how important congressional oversight would be in its aftermath. To fulfill our constitutional oversight obligation Senator Hatch and I invited Attorney General Ashcroft to appear before the Committee today, but he asked to have his appearance put off until next week so that he could spend time with the U.S. Attorneys who are in town today and tomorrow. On Monday I learned that the Department was asking that Mr. Chertoff appear as our first witness at this hearing.

I have accommodated both requests by the Attorney General and look forward to his appearance before the Committee next week, on December 6. In the meantime, our oversight hearing today and additional hearings next Tuesday should help build a useful record on several significant issues.

We are all committed to bringing to justice those involved in the September 11 attacks and to preventing future acts of terrorism. As we showed in our passage of anti-terrorism legislation, Congress can act promptly to equip the Executive Branch with the appropriate tools to achieve those goals. The Administration requested many new powers, and after adding important civil liberties protections, we empowered the Justice Department with new and more advanced ways to track terrorists.

We passed the bill in record time and with an extraordinary level of cooperation between Democrats and Republicans, the House and the Senate, and the White House and Congress. The separate but complementary roles of these two branches of government, working together and sharing a unity of purpose, made that bill a better law than either could have made through unilateral initiative.

In the wake of that achievement, the Administration has departed from that example to launch a lengthening list of unilateral actions. Rather than respect the checks and balances that make up our constitutional framework, the Executive Branch has chosen to cut out judicial review in monitoring attorney-client communications and to cut out Congress in determining the appropriate tribunal and procedures to try terrorists.

The three institutional pillars of our democratic government, standing together, are stronger guarantees of our freedoms than any one branch standing alone. America benefits when we trust

our system of government - our system of checks and balances -- to work as it should. Today we may get some insights into why the Administration has chosen this new approach.

Today and in the days ahead we will have an opportunity to explore the Executive action to charter military tribunals that bypass our civilian justice system, to permit eavesdropping on attorney-client communications without court orders, and the circumstances under which hundreds are being detained without public explanation. Whether any or all of these ideas are popular or unpopular at the moment, as an oversight committee we accept our duty to examine them.

## MILITARY COURTS

The President's Military Order of November 13 paves an overly broad path to the use of military commissions to try those suspected of a variety of activities. It is a marked departure from existing practices and raises a wide range of legal and constitutional questions and international implications.

As with several of the unilateral steps announced by the Administration over the last month, a question that puzzles many about the order on military tribunals is this: What does it truly gain us in the fight against terrorism? Would military commissions, however expedient, genuinely serve our national interests in the long term?

As we examine the wisdom of the military order as written, we should consider the risk whether this could become a template for use by foreign governments against Americans overseas. As written, the Military Order does not incorporate basic notions of fairness and due process that are hallmarks of American justice. It does not specify a standard of guilt for convicting suspected terrorists.

It decrees that convictions will not be subject to judicial review, a determination that appears to directly conflict with our international commitments. It allows the Government to tailor rules to fit its proof against individual suspects.

In short, the Military Order describes a type of military tribunal that has often been criticized by the United States when other nations use them. William Safire, in a column in The New York Times on Monday, described it as a "fiat (that) turns back the clock on all advances in military justice, through three wars, in the past half-century."

And what would this mean for Americans abroad - for the traveling public, or, in another instance, for the many U.S. humanitarian aid workers who often serve in areas subject to autocratic and unstable regimes? We do not want, inadvertently, by our example, to encourage the type of "rough justice" those regimes could mete out under military order.

Moreover, these military tribunals may greatly inhibit cooperation from our partners in the fight against terrorism. Spain recently captured several suspects it believes are complicit in the September 11 attacks.

Last week Spain announced that it would not extradite suspects to the United States if they would be tried by military commissions instead of civilian courts. News reports indicate that other European allies share Spain's concerns, and so might other allies in the Middle East and elsewhere.

We are the most powerful nation on earth, and sometimes we indulge in the luxury of going it alone. In the struggle against terrorism, we do not have that option. We need the support of the international community to prevail in a battle that the Administration predicts could last several years. Would these military tribunals be worth jeopardizing the cooperation we expect and need from our allies?

Apart from these practical issues, questions remain about the Executive Branch's authority to establish military commissions on its own and without specific congressional authorization. The Constitution entrusts the Congress with the power to "define and punish . . . Offenses against the law of Nations." On those rare occasions when military commissions have been used in the past, Congress played a role in authorizing them.

This administration has preferred to go it alone, with no authorization or prior consultation with the Legislative Branch. This is no mere technicality. It fundamentally jeopardizes the separation of powers that undergirds our constitutional system, and it may undercut the legality of any military tribunal proceeding.

Finally, there is the danger that if we rush to convict suspects in a military commission - relying on circumstantial or hearsay evidence tailored to serve the government's case - we deepen the risk of convicting the wrong people, leaving real terrorists at large. The Administration has cited the landmark case against German saboteurs during World War II as a precedent. Let's look more closely at that precedent.

Two of the eight Germans who landed in New York immediately informed the Department of Justice about their colleagues' plans. The actions of these men were covered up by J. Edgar Hoover, the FBI director at the time. It now appears that Mr. Hoover was more interested in claiming credit for the arrests than in ensuring fair treatment for the two informants, who were tried with the others, in secret, and sentenced to death before their sentences were commuted to long prison terms at hard labor.

The lesson is that secret trials and lack of judicial oversight can breed injustice and taint the legitimacy of verdicts. Our procedural protections are not simply inconvenient impediments to convicting and punishing guilty people. They also promote accurate and just verdicts.

In sum, it sends a terrible message to the world that, when confronted with a serious challenge, we lack confidence in the very institutions we are fighting for - beginning with a justice system that is the envy of the world. Supreme Court Justice Frank Murphy, dissenting in another World War II-era case involving the use of a military commission, called the procedure "unworthy of the traditions of our people or of the immense sacrifices that they have made to advance the common ideals of mankind." He concluded:

"If we are ever to develop an orderly international community based upon a recognition of human dignity it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness. ... Otherwise stark retribution will be free to masquerade in a cloak of false legalism. And the hatred and cynicism engendered by that retribution will supplant the great ideals to which this nation is dedicated."  
[In re Yamashita, 327 U.S. 1, 28-30 (1946)]

## CONCLUSION

The Justice Department's actions since September 11 have raised many serious questions and concerns, and I hope that today serves as the beginning of a reevaluation of some of the policies that have been put in place, as well as the way in which they have been established.

Earlier generations of Americans have stared evil in the face. Now, so do we. Trial by fire can refine us, or it can coarsen us. It can corrode our ideals and erode our freedom. But if we are guided by our ideals, we can be both tough and smart in fighting terrorism.

The Constitution was not written primarily for our convenience, but for our liberty. Many of the choices that we will face after September 11 will test both our ideals and our resolve to defend them. As these choices emerge, let us first pause long enough to ask: What does it gain us?

I look forward to hearing from our witnesses today, and to hearing from the Attorney General next week.

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