

Testimony of

# The Honorable Patrick Leahy

June 25, 2003

On June 2, the Office of Inspector General released a long-awaited report criticizing the conduct of the Department of Justice toward those aliens who were arrested in connection with the investigation into the September 11 attacks. In particular, I thank Glenn Fine and the staff of the Office of Inspector General for doing their job, for noting where we have gone wrong and where we can improve. I know that they could not conduct a truly comprehensive, national review of every case or every setting, but what they did review is important. Unfortunately, the failure of our Committee to call the Attorney General or other senior witnesses from Main Justice and the FBI - or even outside experts who could shed light on the Department's performance - will call into question this hearing's value.

It is disappointing that the Attorney General is not here for this hearing. Last Monday, the Legal Times published a column by Stuart Taylor Jr. entitled, "Why Won't He Apologize?" In it, Mr. Taylor, while criticizing civil libertarians and defending many of the Department's policies, argues:

"[Ashcroft] does owe apologies to several hundred people for holding them far longer than necessary. He also owes apologies to at least 84 people for the unduly harsh conditions at the Metropolitan Detention Center. And he owes apologies to all (or almost all) 762 detainees for his implication ... that they deserved to be treated like terrorists."

Since the Attorney General has declined similar requests for an apology, however, I assume he would not agree with Mr. Taylor or with the requestors. He should be here today to explain why.

The Attorney General undoubtedly is a busy man. Secretary of Defense Rumsfeld and Secretary of State Powell, however, are busy men, too. A June 9 article in Roll Call reported that while Secretary Rumsfeld has testified before the committees that authorize the Defense Department 10 times since 2002 and appears nearly weekly for briefings for Members, and Secretary Powell has appeared before the State Department's authorizing committees eight times during that span, the Attorney General has appeared before the House and Senate Judiciary Committees only three times. I would also note that in his most recent appearance, he shared a single panel with FBI Director Mueller and Homeland Security Secretary Ridge and offered this Committee - which oversees the department he heads -- only a few hours of his time.

We also requested that Deputy Attorney General Larry Thompson, whose office is repeatedly mentioned in the OIG report, and FBI Director Mueller testify at this hearing. It is a regrettable oversight that they were not invited as witnesses either.

Despite my disappointment in the absence of key Justice Department officials, however, I do welcome the witnesses who are here today. I say to Inspector General Fine, you and your office handled a difficult assignment, and I think your report carefully balances the pressures the Department of Justice faced with its obligations as the Nation's preeminent law enforcement agency. It took courage to produce a report that offered substantive criticisms of the Department's response to the September 11 attacks, and I admire you for doing so.

As the report clearly states, and as all of us readily acknowledge, the Justice Department and the government as a whole were under tremendous stress in the wake of the September 11 attacks. But the report also makes clear that the Department committed a series of errors that could have been prevented or minimized. I understand that DOJ and the Department of Homeland Security, which now has primary responsibility for immigration, have agreed to implement a number of the OIG's recommendations, which is good news. This hearing should be part of a larger oversight mission for the Committee, as we monitor how and whether those changes take place, and whether they solve the problems raised in the OIG report. In addition, I renew my call for a hearing with FBI Director Mueller on FISA issues and for Committee consideration of the Leahy-Grassley-Specter Domestic Surveillance Oversight Act.

Perhaps the most lasting impression the OIG report creates is of the Department's failure to draw meaningful or consistent distinctions between those aliens who presented a credible threat and those who simply happened to be discovered by law enforcement officers who were investigating the terrorist attacks. Although it is certainly true that most of the aliens who were detained were not legally present in the United States, the report states that A[s]ome appear to have been arrested more by virtue of chance encounters or tenuous connections to a [] lead rather than by any genuine indications of a possible connection with or possession of information about terrorist activity.@ (OIG Report, pp. 41-42) Moreover, some Department officials told the OIG that they realized at the time that Amany in the group of September 11 detainees were not connected to the attacks or to terrorism in general.@ (47) For an alien, being classified as a 9/11 detainee made an extraordinary difference for length and conditions of detention, ability to be represented effectively by counsel, and ability to be removed promptly from the United States.

**Arrest/Charging:** The OIG report cites specific problems that occurred throughout the process, from the time when aliens were taken into custody through the time that they were to be removed. When aliens were arrested in the course of the investigation, Federal regulation called for them to be charged with an immigration violation within 48 hours, although a longer period was available under "extraordinary circumstances." Since the INS kept no records detailing when charges were brought, however, there was no way for the OIG to evaluate how many times aliens were held for more than 48 hours without being charged. Aliens frequently did not receive a Notice to Appear ("NTA") during the 72-hour period during which the INS' own policies suggested they should be served; indeed, the average length of time exceeded a week. Without such documentation, aliens could not know why they were being held or the specific charges they faced, which in turn inhibited their abilities to obtain effective legal counsel or to request bond re-determination hearings. I agree with the OIG's recommendations that the DHS should document when a charging decision is made, specify what constitutes "extraordinary circumstances" permitting more than 48 hours to bring a charge, and institute as a formal rule the 72-hour limit in serving an NTA.

**Opposition to Bond/"Hold Until Cleared" Policy:** Those aliens who were taken into custody typically were in for a long stay, due to the Department's decision to oppose bond in all cases, and not to allow the release or removal of any aliens until their cases were "cleared" by the FBI. These decisions were discussed at the highest levels of the Justice Department, and Michael Chertoff, the head of the Criminal Division, is quoted in the report as saying that Awe have to hold these people until we find out what is going on.@ (39)

I think that none of us would second-guess the Department for searching exhaustively for lawful means to hold aliens who truly presented a security threat. And I think that all of us would agree that there is no easy way to determine who does and does not present such a threat. A review of this report, however, suggests that the process by which the Department determined that an alien was Aof interest@ -- and thus subject to the holding requirements -- was Aindiscriminate and haphazard.@ (70) As the report states, Athe Department and the FBI did not develop clear criteria for determining who was, in fact, >of interest= to the FBI's terrorism investigation.@ (40) The report offers a number of recommendations to the Department, DHS and the FBI in this area - including the development of clear criteria to determine when an alien is 'of interest' for terrorism purposes and a time limit on making such a designation - and I look forward to hearing the testimony of our witnesses on these recommendations.

While the process by which aliens were determined to be Aof interest@ was murky, the consequences of such a determination were clear. Receiving FBI clearance took an average of 80 days, a delay the OIG attributes primarily to the FBI's failure to devote sufficient resources to the project. Indeed, as the report details, numerous detainees waited for months to receive clearance even though all investigative work had been completed in a matter of weeks. (62-65) Their cases seem to have simply become lost in the system.

The Ano bond@ policy - in which the government categorically opposed bond for any alien classified as a 9/11 detainee - not only had an obvious impact on aliens, but also appears to have created ethical dilemmas for INS personnel. Because of the policy, and the FBI's inability or failure to provide detailed information in individual cases to support the government's opposition to bond, the INS Office of General Counsel Abecame concerned that [INS attorneys=] duty of candor to the Court created an ethical dilemma when [they] argued that aliens be detained without bond and there was no evidence to sustain such positions.@ (81) When the INS sought to enter into four memoranda with the FBI to memorialize and expedite the process of receiving information about the detainees in its custody, a senior attorney in the Deputy Attorney General's office allegedly said Athere was no need to document the clearance process in this written fashion.@ (85) The OIG found that in light of how lengthy the FBI clearance process turned out

to be, and the Department's growing realization that many of these detainees were guilty of immigration violations alone, DOJ should have re-evaluated its original decision to deny bond in all cases. (88)

**Aliens with Removal Orders:** An additional significant issue was the Department's consistent policy of keeping in custody 9/11 detainees who had been ordered removed and who were in fact removable. I wrote to the Attorney General in November 2001 to express my concerns about this policy, after the death in custody of Muhammad Rafiq Butt, a Pakistani national who had accepted a voluntary departure order. Apparently, the INS was also concerned at that time about the legality of detaining aliens with valid removal orders, especially after the 90-day statutory deadline for removal. There is a dispute between the INS and the Deputy Attorney General's office about how much time elapsed before those concerns were communicated. Concerns about the policy were sufficiently widespread, however, that the OIG reports that attorneys at both the Deputy Attorney General's office and the Office of Immigration Litigation at DOJ were concerned about Bivens liability for INS officials. (96) In addition to being concerned about personal liability, INS attorneys were concerned about the impact an indefinite detention policy would have upon the Justice Department's larger efforts to obtain cooperation from the Arab and Muslim communities. (99-100)

It is commendable that the hold until cleared policy was eventually modified to permit the removal of certain aliens with final removal orders, but I agree with the OIG that the INS and the Department did not address this issue in a timely or considered fashion. (108) I also agree both that the INS should have pressed the issue more insistently, and that even in the absence of such pressure, the Deputy Attorney General's office had enough information to realize that this was a significant legal issue that needed to be addressed. (110)

**Detention Conditions/Right to Counsel:** The report also reaches disturbing conclusions about the treatment of those detainees held by the Federal Bureau of Prisons (BOP) at the Metropolitan Detention Center (MDC) in New York. Much has been said, and rightly so, about the pattern of physical and verbal abuse these detainees experienced. (142) It is a bedrock principle of the American justice system that even the worst offenders should not experience such abuse at the hands of their jailers. The violation of that principle is all the more offensive where its recipients are detained on civil, not criminal, violations, and where the assignment of detainees to the MDC was largely haphazard.

In addition to detailing physical and verbal abuse, however, the report describes the barriers the detainees who were held in the MDC faced in obtaining and communicating with counsel. First, the Deputy Attorney General's office reportedly told the head of the BOP not to be in a hurry to allow the detainees to have outside communications, including legal calls and visits, and that the detainees appear to have been held incommunicado for several weeks. (113, 158) Then, the detainees' status was so closely guarded that even some MDC employees were unaware they were there. Presumably as a result, at least three attorneys were incorrectly told that their clients were not present at the facility. (116) This state of affairs cannot be attributed to the confusion in the immediate aftermath of the attacks - the OIG found that attorneys were still receiving incorrect information about their clients' whereabouts more than six months after the attacks. (159) It was not significantly easier for detainees to speak to their attorneys by phone. They were allowed only one call a week, and calls met by answering machines or, in some reported cases, busy signals, counted as their weekly call. (134)

Overall, the OIG found that the BOP's decisions severely limited the detainees' abilities to obtain meaningful representation. (130) This is a matter that deserves the attention of DOJ and DHS, and I look forward to hearing today how it will be addressed.

**Conclusion:** The Office of Inspector General has performed a valuable service in producing this report. I was dismayed by the defensiveness of the Justice Department's initial reaction to the report, which suggested that Department officials somehow read the report as a vindication. These findings are not a vindication; they are a portrait of mistakes and policy misjudgments made in during a difficult time. I am pleased that both DOJ and DHS have since recognized the wisdom of the Inspector General's conclusions and recommendations, and I look forward to hearing their testimony today.

#####

