

Statement of  
**The Honorable Patrick Leahy**

United States Senator  
Vermont  
July 28, 2009

Statement Of Senator Patrick Leahy (D-Vt.),  
Chairman, Committee On The Judiciary,  
Hearing On "Prosecuting Terrorism, Civilian and Military Trials  
For GTMO and Beyond"  
Subcommittee On Terrorism And Homeland Security  
July 28, 2009

In a May 21, 2009, speech on national security issues, President Obama spoke of the challenges faced by his administration in prosecuting individuals held at Guantanamo Bay. For those who can be prosecuted, the administration has stated a preference for trying them in Article III Federal courts. I support that decision. Article III courts have legitimacy around the world, and have proven to be able to handle this task.

Last week, the Senate passed S.1390, the National Defense Authorization Act for Fiscal Year 2010, which authorized military commissions as another venue for trying some of these individuals. These commissions are a marked improvement on the military commissions previously authorized by Congress. Those commissions were found to be constitutionally defective by the U.S. Supreme Court in 2008. Nonetheless, I remain concerned about the wisdom of using this alternate system.

First and foremost, I have not been convinced by supporters of military commissions that the Article III courts are not capable of trying terrorism cases. Second, the military commissions utilized by the executive branch since the 9/11 attacks have failed to convict most of the detainees they were created to try. A study by two former Federal prosecutors issued last week by Human Rights First found that 91 percent of terrorism cases resolved in Federal court since 9/11 resulted in convictions. There are currently over 200 inmates in Federal prisons who have been convicted on terrorism-related charges. Meanwhile, after seven long years, only three of the hundreds of detainees who have cycled in and out of Guantanamo have been convicted. Our Federal courts have done much better. The knowledge and expertise of our law enforcement agencies and courts is one of our greatest assets in this fight. Forcing these institutions to take a backseat is dangerous to our national security.

Those who disagree would like us to believe that seasoned men and women in law enforcement are not up to the task. To dispel this myth, we have only to look at the example of former FBI Agent Ali Soufan who obtained intelligence, without using torture, on some of the most infamous terrorists in the world, from the USS Cole bombers to the plotters of 9/11.

As the debate about current and future detainees continues, we must not let rhetoric replace reality. Depriving those in the field of tools that ensure that our Government can convict and detain terrorists hurts our national security. This challenge is too important to leave entirely to a system that so far has resulted only in failure, and too important to disregard tools that have proven to work.

There are a number of detainees for whom prosecution will be difficult because their cases are tainted by the coercive interrogations techniques that were employed by the Bush-Cheney administration. Evidence obtained through coercion is inadmissible in a court of law. President Obama has said that some of those who cannot be tried, whether because of coercion or because of a lack of evidence, may still pose a threat to the United States. The President inherited this problem, and we now face the complex question of how to handle cases in which the Government believes the individual must be further detained. To address such cases, the President described a system of "prolonged detention," with periodic judicial review.

I held a hearing last year on this issue in which I expressed my concerns about any system of detention without sufficient judicial safeguards. The administration has not yet offered details about how a system of prolonged detention would operate. I want to understand the scope of the judicial review contemplated under this proposal before determining for myself whether it meets our standards of fair treatment under law. I want to ensure that a system established by this administration is grounded in constitutional protections so that it cannot be exploited by future administrations.

I appreciate the President's commitment to work with the Congress to ensure that we act consistently with our values and with our Constitution. As Justice Kennedy said in a Supreme Court decision restoring the great writ of habeas corpus, the Constitution is not something an administration is able "to switch on and off at will." I believe strongly that we can ensure our safety and security, and bring terrorists to justice, in ways that are consistent with our laws and values. I am committed to working with the President to ensure we accomplish that goal.