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Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
May 13, 2009

Statement Of Senator Patrick Leahy (D-Vt.),
Hearing Before The Judiciary Subcommittee
On Administrative Oversight And The Courts,
"What Went Wrong: Torture And The Office Of Legal Counsel In The Bush Administration"
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This morning's hearing again raises the question of how we got to a place where the Department of Justice's Office of Legal Counsel (OLC) came to write predetermined and premeditated legal opinions that allowed President Bush to authorize the torture of those in American custody and control. From General George Washington's example during the Revolutionary War through the Civil War, the World Wars, Korea and Vietnam, it was America that provided the model of a Nation that would not engage in such practices. It was America that led the world in the recognition of human dignity and human rights. That the elite legal office at the Justice Department responsible for guiding the Executive Branch, and with the power to issue binding interpretations of law, so misused its authority is one of the fundamental breakdowns in the rule of law that dominated the last eight years.

The recent release of four more OLC memos, written by two former heads of the OLC, Jay S. Bybee and Steven Bradbury, demonstrate in excruciating detail the methods authorized and used on people in American custody. Shackling naked people from the ceiling, keeping them inside a small box with an insect, beating them repeatedly, and waterboarding, are actions we have rightly protested being used against Americans anywhere in the world at any time for any supposed purpose.

The purported legal justifications for these policies are likewise disturbing. Some of the opinions use an ends-justify-the-means type of circular reasoning. Some seek to defend the use of these techniques by relying on hypertechnical interpretations that disregard the prohibitions in our laws. All seem posited on a belief that the President is somehow above the law or can override the laws. The rule of law means that no one is above the law, not even the President of the United States.

I thank Senator Whitehouse for holding this important hearing and for his commitment to the rule of law and to getting to the truth. I would like to see us move forward with a comprehensive, nonpartisan inquiry into these matters. Until Republican Senators come to support that approach, we will necessarily need to proceed piecemeal.

Two weeks ago I invited Judge Jay Bybee to testify before the Senate Judiciary Committee. I did so after reading accounts in The Washington Post suggesting that he had expressed regrets regarding his work product while at OLC. In comments he sent to The New York Times he turned around and defended his legal opinions that have now been withdrawn. I invited him to come forward to tell the truth, the complete truth, before the Committee. I ask that a copy of my April 29 letter to Judge Bybee be included in the record.

Since Judge Bybee, through his lawyers, has declined to testify before the Committee at this time about his role in the drafting and authorization of memoranda from the Office of Legal Counsel that permitted torture, I can only presume that he has no exonerating information to provide. Judge Bybee must know that the presumption in our civil law is that when a person fails to come forward with information in his possession that is relevant to a matter, it is presumed to be because the information is negative and not helpful to his cause.

Testifying voluntary before the Judiciary Committee about these now-public memoranda is one way in which Judge Bybee could have helped complete the record of what happened and why but he refused. This is especially inappropriate given that Judge Bybee has hardly maintained silence about these matters. He has talked to friends and employees, he has communicated to the press and he has communicated through his lawyers to the Justice Department regarding the Office of Professional Responsibility's review of his actions while a government employee in the Office of Legal Counsel. Apparently the only people he will not explain his actions to are the people who granted him a lifetime appointment to the Federal bench -- the American people through their elected representatives in Congress.

How we approach the mistakes of the past, and whether we choose to learn from them, will shape our way forward. Accountability can help restore our reputation around the world. Most importantly, we need to reestablish the trust of the American public in their Government. They deserve to know and understand what happened and why so that we can do our best to ensure that we do not make the same tragic mistakes, again.

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