

Statement of
The Honorable Patrick Leahy

United States Senator
Vermont
July 11, 2006

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Ranking Member, Judiciary Committee

On the Nomination of William J. Haynes II

To the Fourth Circuit Court of Appeals

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William J. Haynes II has been renominated to the Fourth Circuit Court of Appeals. I have met with Mr. Haynes twice and shared with him my questions and concerns about this nomination. Mr. Haynes has been General Counsel of the Department of Defense since 2001, and in that role has been a key player in some of the more controversial and questionable policies this Administration has issued relating to the treatment and detention of military detainees.

The first time around, Mr. Haynes's nomination was rushed through the Committee in March 2004 before members of the Committee had answers to our questions. It was shortly thereafter that we learned of the scandalous treatment of prisoners at Abu Ghraib prison, which raised additional questions about treatment and interrogation of detainees. In the intervening years, we have learned a bit more about policies and legal positions apparently advocated by Mr. Haynes, and the devastating effects those policies have had on our military and our security. My questions and concerns about this nomination have continued to grow as more information has become available.

Press reports and Mr. Haynes's own statements in the Judiciary Committee questionnaire and elsewhere indicate that he played a key role in developing United States policy toward detainees in Guantanamo Bay and elsewhere. Specifically, he made legal findings and set policies for military tribunals for detainees, the designation of individuals as enemy combatants, and the limits on cruel, inhumane, or degrading interrogation techniques.

Many of these policies have since been discredited. The Supreme Court, in the case of *Hamdan v. Rumsfeld*, recently ruled that military tribunals as constituted by this Administration were "illegal," and that the theory of almost unlimited presidential power that underpinned many of this Administration's policies is invalid. On the issue of detainee interrogation policy, the Department of Justice in late 2003 withdrew the controversial 2002 "Bybee memo" asserting that the President could authorize and immunize torture, and the Defense Department in 2005 declared its working group report, which had reached similar conclusions, a non-operational historical document.

The question for Mr. Haynes is where he stood in the development and analysis of these crucial, discredited policies and legal analysis. I look, by way of comparison, at Alberto Mora, former General Counsel of the United States Navy. Mr. Mora this year won a Profile in Courage Award from the John F. Kennedy Library Foundation for standing up to policies that he recognized as alien to our morals and values and dangerous to our troops. Mr. Mora wrote a July 7, 2004, memorandum to the Navy's Inspector General, setting out his tireless efforts to reverse what he saw as an intolerable direction in United States policy and legal analysis.

Mr. Mora said in accepting the Profile in Courage Award that "for as long as these policies were in effect our government had adopted what only can be labeled as a policy of cruelty." He said, "Cruelty disfigures our national character. It is incompatible with our constitutional order, with our laws, and with our most prized values. Cruelty can be as effective as torture in destroying human dignity, and there is no moral distinction between one and the other."

I want to hear from Mr. Haynes what his role was in the debates over the interrogation and punishment of detainees, whether he shared Mr. Mora's horror at policies authorizing cruelty, and whether he stood up to others to try to put a stop to these policies. Public accounts suggest otherwise. They suggest that Mr. Haynes defended the Administration's authorization of cruel interrogation tactics, that he discounted the concerns of Mr. Mora and others, and that he personally recommended that Secretary Rumsfeld approve specific cruel interrogation techniques. His actions may have earned him a nomination from this President', but they have only heightened my concerns about this nomination.

Yesterday I received a letter from 20 retired senior military officials, many of them generals and admirals expressing "deep concern" about this nomination. They are particularly concerned that Mr. Haynes may not have given proper regard to the views of uniformed and experienced military attorneys. They wrote:

Mr. Haynes was arguably in the strongest position of any other senior government official to sound the alarm about the likely consequences for military personnel of the views being put forward by the Justice Department, because he had the benefit of the clear and unanimous concerns voiced by the uniformed Judge Advocate General of each of the military services. Yet Mr. Haynes seems to have muted these concerns, rather than amplify them.

Press reports suggest that career military lawyers were also shut out of the process of determining procedures for military tribunals and that Mr. Haynes played a key role in this process, including opposing any civilian review of the tribunals. If Mr. Haynes had listened to career uniformed attorneys, perhaps the Supreme Court's decision in the Hamdan case checking the encroachment of Executive power would not have been necessary.

Documents and press accounts suggest that Mr. Haynes similarly disregarded the concerns of law enforcement officials who argued that the Defense Department's interrogation policies were ineffective and potentially harmful.

The 20 retired senior military officers wrote that the authorization of cruel interrogation techniques has had and will have a devastating effect on our country and on our military. They wrote, "Today, it is clear that these policies, which rejected long-standing military law grounded in decades of operational expertise, have fostered animosity toward the United States, undermined rather than enhanced our intelligence gathering efforts, and added significantly to the risks facing our troops serving around the world."

This distinguished group of retired officers concluded that the Administration's detainee policies have put our troops in harm's way and undermined our security. We know that these policies resulted in abuses at Abu Ghraib and elsewhere, for which young soldiers have been prosecuted and punished. If Mr. Haynes was in fact instrumental in formulating and defending these policies, it is difficult to understand how he earned a promotion while others who implemented these policies were severely punished.

We learn this morning, during the course of a hearing that Mr. Haynes did not attend but to which he sent his deputy, that days ago, the Defense Department issued a memorandum stating that military detainees being held do deserve some protections under the Geneva Conventions. It was not mentioned in the Administration's written testimony, some of which was not distributed until near midnight last night did not mention this relevant memorandum from last week. Nor did Mr. Haynes' deputy mention it in his initial remarks. Instead, we learned about it through press accounts and had to ask about the press accounts to determine its existence. We now would like

to know what role Mr. Haynes played in its formulation and whether it reflects an admission of error and change of heart and legal analysis on his part.

I also have significant concerns whether Mr. Haynes would recuse himself if issues and policies on which he worked at the Department of Defense were to come before him as a judge. He has refused to make that commitment to me in our private conversations or at an earlier hearing. My suspicion is that a motivation of the President for making this nomination is to have another sure vote on the Fourth Circuit to uphold his actions. The Fourth Circuit and the D.C. Circuit have emerged as the courts to which the Administration directs issues on which the President asserts unitary executive power and wants to be sustained.

The key to our constitutional system is the separation and balance of power. The legislative and judicial branches must serve as a check on the Executive. The Republican Congress has failed to act as a check, instead acting as a rubber stamp for this President's policies. That makes the independent judiciary all the more important. Mr. Haynes's record of helping to formulate, justify and defend this Administration's damaging policies and his failure to commit to recusing himself from hearing cases as a judge on these very same policies raise major concerns whether he would act as a check on the Executive.

I also have concerns about whether Mr. Haynes has always in the past been straightforward with Congress, with the American people, and with me. Mr. Haynes wrote a letter to me on June 25, 2003 in response to a letter I had sent to then-National Security Advisor Condoleezza Rice. In his letter, Mr. Haynes wrote that, under Article 16 of the Convention Against Torture, "the United States also has an obligation to 'undertake ... to prevent other acts of cruel, inhuman, or degrading treatment or punishment which do not amount to torture.'" He defined "cruel, inhuman, or degrading treatment" as that treatment or punishment prohibited by the Fifth, Eighth or Fourteenth Amendments to our constitution and said, "United States policy is to treat all detainees and conduct all interrogations, wherever they may occur, in a manner consistent with this commitment."

I found that letter reassuring, as did many others. Press reports suggest, though, that when Mr. Haynes sent that letter to me, the Department of Defense had recently approved many harsh interrogation techniques and had adopted a working group report presenting a flawed legal justification for cruel treatment of detainees. Indeed, press accounts suggest that as recently as late last year, Mr. Haynes helped to defeat a proposal that would have made it official Department of Defense policy that detainees be treated in accordance with Common Article Three of the Geneva conventions, barring cruel, inhumane, and degrading treatment. It is of great concern to me if Mr. Haynes made reassuring statements to Members of Congress, while pursuing a very different policy.

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