

Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
July 18, 2006

Statement of Senator Patrick Leahy,
Ranking Member, Judiciary Committee
Hearing on Department of Justice Oversight
Witness: Attorney General Gonzales
July 18, 2006

Three weeks ago, in Hamdan, the Supreme Court held that the President is bound to comply with the rule of law. Three years ago, in Hamdi, the Supreme Court held that war is not a blank check for the President when it comes to the rights of the Nation's citizens. Those are two remarkable statements coming from the Nation's highest court. They are not remarkable for the propositions they state. The Rule of Law was the basic premise upon which this Republic was founded 230 years ago. They are remarkable, instead, for the fact that this Administration's unprecedented record of complete disregard for the rule of law -- coupled with its arrogance and secrecy -- made it necessary to say them at all.

Needed Doses Of Constitutional Tonic

The witness before us today has held two uniquely important roles with respect to the rule of law. As White House Counsel, it was his sworn duty to advise the President how to comply with the rule of law. As Attorney General, he has the further responsibility to lead the Nation's enforcement of the rule of law. On his watch, the Bush-Cheney Administration has repeatedly flouted the laws that limit the power of the Executive.

During the past few years, the Supreme Court has rendered three landmark constitutional decisions regarding Executive power. In all three, it ruled against the President.

In Hamdi, the Court rejected the Administration's unprecedented claim that an American citizen can be stripped of the constitutional right to due process simply on the say-so of the President. The Court held that Mr. Hamdi was entitled to a fair hearing on the legality of his detention.

In Rasul, the Court rejected the legal premise upon which the Guantanamo detention center was built. The Bush-Cheney Administration chose to hold prisoners captured in Afghanistan on the island of Cuba as a means of avoiding the jurisdiction of United States courts. The Court held that the writ of habeas corpus cannot be suspended by housing prisoners off shore.

That brings us to last month's decision in Hamdan. The path to that latest setback to the Administration begins with a memorandum written by today's witness. In January 2002, then-White House Counsel Gonzales advised President Bush that he need not and should not comply with the Geneva Conventions, contrary to the advice of Secretary of State Colin Powell. The President chose to take Mr. Gonzales' advice rather than listen to General Powell. In Hamdan, the Court held that the President is bound by the Geneva Conventions, and that the President's military commissions are illegal. In sum, the Administration is batting 0 for 3 in the Supreme Court.

But the result of this series of blunders is not merely a strike-out: With respect to Mr. Hamdi, after nearly three years of incarceration, during which the Administration insisted that American security would be seriously prejudiced by even affording him a lawyer, the Administration set him free in the Middle East.

Four years after the Administration began transporting prisoners to Guantanamo, that detention center has become an international embarrassment which everyone from Tony Blair to Colin Powell has said should be closed immediately.

And more than four years after initiating a military commissions program which Attorney General Gonzales told us was designed to ensure Aswift justice@ close to the battlefield, the Administration has charged a total of 10 people, convicted zero, and is now back at square one.

Perhaps the only lesson that this Administration learns from its mistakes is not to get caught next time. This Administration is allergic to accountability, whether in the form of judicial review or in the form of congressional oversight.

The attempt to evade habeas review by holding detainees at Guantanamo is just one of a series of measures the Administration has taken to shield its actions from the courts. The Hamdan case addresses another. In one of his notorious signing statements, issued after Congress passed the Detainee Treatment Act in 2005, the President asserted that the Act retroactively stripped the courts of jurisdiction over pending cases. The Court rejected this claim and instead followed the plain language of the Act, informed by the legislative history that was actually available to members of Congress before they voted on the Act.

The case of Jose Padilla presents another example. Three-and-a half years after detaining Padilla as an unlawful combatant, and on the eve of Supreme Court review, the Administration moved to have his case dismissed by transferring him from military to civilian custody. In a unanimous opinion, the conservative Fourth Circuit rejected the Administration's motion. Judge Luttig pointedly noted that the motion appeared to be an attempt to evade Supreme Court review and that it had damaged the government's credibility.

Warrantless Wiretapping

Meanwhile, with respect to its secret domestic wiretapping program, the Administration has for nearly five years evaded even the limited judicial review afforded by the Foreign Intelligence Surveillance Act. In fact, in just the few months since the public and Congress first learned of the NSA's warrantless wiretapping program, the Justice Department has asserted the state secrets

privilege in at least 19 different court cases challenging that program. Last week we learned that in closed-door negotiations with Senator Specter, the Administration made a conditional offer to submit one of its domestic spying programs to secret review by a single FISA court judge. As I understand the Administration's offer, Congress must first agree to completely gut FISA and to deprive American citizens of the right to challenge domestic wiretapping in open court. Nothing more than ratification of the Administration's actions after-the-fact.

So when the President tells the Chairman of this Committee that he is agreeable to judicial review of that program and his other actions, I hope that you understand why some of us are a bit wary.

We should reject the Administration's so-called compromise and instead demand that it submit to the judicial review that FISA already requires. But more than that, we in Congress have a responsibility not just to punt to the courts, but to do our job of holding the Administration accountable. Congressional oversight is the ultimate democratic antidote to Executive over-reaching. Oversight makes government more accountable and more effective.

Congress's Oversight Duty

It is time for Congress to fulfill its constitutional duty by acting as a real check on the Executive branch. A Congress that defers to the President and ratifies his continuing illegal actions is no better than a President who seeks to immunize or ignore illegal conduct of his subordinates. Congress needs to act and truly be an independent branch of the Government. A start is real oversight.

For too many months the Department of Justice has shown blatant disregard for this Committee and its oversight role by dispatching junior deputies, unauthorized or unable to answer our questions. Instead of providing us with information, these subordinates were sent to parrot the Administration's talking points. This is not an Administration that recognizes or learns from its mistakes. The Bush-Cheney Administration does not engage in soul-searching. Instead, it blithely maintains, as its witness told us last week, that the President is always right.

Recently, the Republican chair of the House Intelligence Committee complained that the Administration has breached its responsibility to keep his Committee informed of ongoing intelligence operations. Just last week, the New York Times reported that the Republican chair of a House Financial services subcommittee on oversight accused the Administration of being too secretive and failing to adequately inform Congress about the Treasury Department's questionable bank records program. The Republican chair of the House Judiciary Committee described the Attorney General's testimony as Astonewalling. If only Congress had insisted all along on truly effective oversight, all Americans would be better off.

The cost to American liberty, our standing in the world, and to the security of our soldiers and citizens is staggering. Even more than the half a trillion dollar cost of the war in Iraq. Instead of coming to this Committee to get authority under the law to gather intelligence to advance the war on terror, the Administration chose to simply snub Congress. Instead of coming to Congress to create a credible and effective justice system for the war on terror, this Administration chose to

disregard congressional power under the Constitution to Amake Rules concerning Captures on Land and Water@ and to cobble together an illegal system for military tribunals.

The result has been the dangerous specter of illegal Government surveillance at home and a military tribunal system which has undermined our standing in the world, jeopardized our troops abroad and compromised our moral values. The Supreme Court's repudiation of the President's military tribunals has given our system of checks and balances a constitutional tonic that was sorely needed.

Decline In Anti-Crime Support

Further, turning to our domestic situation, despite great gains in the war on crime during the 1990s, this President, Attorney General and the Republican-controlled Congress have cut more than \$2 billion in funding for state and local law enforcement since 2001. It may not be coincidental that we are now witnesses a dramatic rise in violent crime. Last year alone, violent crime increased at the fastest rate in 15 years. Just as we see a world made less safe by a flawed foreign policy, when we look at our domestic situation we see a nation with rising crime, more at risk and more divided. Last week, for example, following a dramatic wave of homicides, D.C. Police Chief Charles Ramsey declared a crime emergency in the Nation's Capital. There have even been expressions of deep concern about crime on the National Mall B just a short walk from where we are today -- after serious crime incidents in recent weeks, directed at tourists. Many of us recall the Bush Administration's firing of former Park Service Chief of Police Teresa C. Chambers three years ago, when she dared to publicly warn Congress and the American people that, quote, AThere's not enough of us to go around to protect those green spaces anymore@ B a reference to the Bush Administration's cuts in the anti-crime budget for the Park Police. Her warnings seem particularly prescient today, and her firing by the White House seems all the shabbier.

Today's oversight hearing provides another new start for Congress to stop rubber-stamping the questionable policies of this Administration and to finally say 'enough is enough.' By acting unilaterally, in secret, and in violation of the laws passed by Congress, this Administration has acted as if it were above the law for far too long. I hope all Members of this Committee, Republican and Democrats alike, will join me to restore the constitutional checks and balances that have been systematically eroded by this Administration, and I hope that we can begin that process today.

At the beginning of my remarks, I quoted the words of President Reagan's first Supreme Court appointee, Justice Sandra Day O'Connor, who wrote in Hamdi that war is not a blank check for the executive. Last month in Hamdan, President Reagan's last Supreme Court appointee, Justice Anthony Kennedy, wrote that concentration of power in the Executive Aputs personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-part system is designed to avoid.@ Congressional oversight is essential to that three-part system. Its restoration is long overdue.

The People's Attorney, Not The President's

During the confirmation hearings on his nomination to be Attorney General, several members of the Committee emphasized that in his new position, Judge Gonzales would no longer be the President's attorney, but the people's attorney. The importance of the person who serves as our top law enforcement officer to be able to act and advise independently has come into even sharper relief over the last year, and especially with these Supreme Court decisions.

The last time the Attorney General appeared before this Committee, he was not very responsive. I hope he will not repeat that performance today. I hope that he will answer our questions. I hope he will admit mistakes and we can join together in meaningful oversight and genuine accountability. I hope today is the beginning of real oversight activity for this Committee and an open exchange of information from the Administration. The American people, expect -- and deserve -- no less.

#