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Before the

Senate Committee on the Judiciary
Hearings On The Nomination Of The Honorable Sonia Sotomayor
To Be Associate Justice Of The United States Supreme Court

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Chairman Leahy, Ranking Member Sessions, members of the Committee: I want to thank you for the opportunity to testify today and, I hope, to contribute to the Committee's consideration of President Obama's nomination of Judge Sonia Sotomayor to the United States Supreme Court. I am honored to be here. Please let me begin by noting, however, that I am appearing here on my own account and not to represent the views of my law firm, or any of its clients, or any other entity or organization with which I am affiliated.

I will focus on the question of judicial involvement in the national security area and the related issues I believe the Senate should consider in the context of Judge Sotomayor's nomination. Before addressing national security specifically, however, I would like to make a few observations about the scope of these hearings.

The Senate's duty to advise upon and consent to the President's federal judicial appointments is one of its most important responsibilities. The Senate's performance of this duty must be informed by a proper respect for the principle of separation of powers - including and especially judicial independence. In my view, it would be inappropriate for this Committee, or for the Senate as a whole, to try to obtain commitments from a judicial nominee as to how that person would rule on particular cases if confirmed. It is as important for the Senate to respect the Judiciary's independence as it is for the courts to refrain from legislating from the bench. For that reason, I would urge that members of the Committee - of whatever political persuasion - neither

ask nor expect Judge Sotomayor to commit herself to ruling a particular way on any particular legal question.

At the same time, both the Committee and the Senate as a whole must inquire into Judge Sotomayor's judicial philosophy. It is clear that Judge Sotomayor is both an accomplished lawyer and an experienced and respected jurist. It is nevertheless critical that the Senate weigh her understanding of the Judiciary's proper role in our constitutional system, how she would approach the important task of interpreting both the Constitution and congressional enactments, as well as the temperament and habits of mind she would bring to the High Court.

Of course, it is particularly important that the Senate probe Judge Sotomayor's views on the proper judicial role in the handling of national security issues. This is the case for two distinct reasons.

First, the United States remains engaged in a protracted global war against al Qaeda, the Taliban and other enemies. Winning this war is pivotal to our country, and its conduct has presented legal challenges of a kind rarely seen in conventional conflicts.

Second, despite Judge Sotomayor's long and distinguished service on the federal bench, she has not had the occasion to consider many cases in the national security area. Indeed, in the most significant of the cases involving the war on terror heard by Judge Sotomayor, Arar v. Ashcroft, the Second Circuit has yet to issue a decision. As a result, there is very little data from which the Senate may discern the approach which Judge Sotomayor would take to the vital and unresolved questions of national security law that will inevitably reach the High Court.

Therefore, a central topic of the Committee's inquiry should be Judge Sotomayor's understanding of the proper role of Article III courts vis-à-vis the Executive and Legislative Branches in the area of national defense. To the extent that these hearings have not produced sufficient information regarding Judge Sotomayor's views in this area, I would urge the Committee to pose written questions to her. Such questions permit far more detailed and thoughtful responses than those asked in the glare of a full committee hearing.

As you know, Congress and the President have traditionally been accorded near plenary authority in the national defense and foreign policy areas. This is especially true with regard to questions involving the conduct of armed conflict. Indeed, over the course of our history, the courts have been loath to intrude into such issues, at least until after hostilities have concluded. In recent years, however, the Supreme Court has dramatically expanded its role in these areas. In my view, this has significant implications for the Government's ability to prevent another devastating attack on the United States, and to vanquish al Qaeda and its allies. Indeed, there can be little doubt that the principles the Supreme Court has developed since Hamdi v. Rumsfeld, 542 U.S. 507 (2004), make it far more difficult for the United States to defeat any enemy that resorts to unconventional warfare.

For example, the Supreme Court has imposed what has proven to be an unworkable habeas corpus framework with regard to the detainees now held at Guantanamo Bay, Cuba. That the government has lost 26 of the 31 habeas cases that have been fully litigated so far at the District Court level underscores the practical difficulties caused by the application of this regime to Guantanamo detainees. The question of what to do with these detainees is prompting yet another round of litigation, also likely to reach the Supreme Court. The key question there will be whether Article III judges can order the President to bring to the United States aliens presently held at Guantanamo. The fact that Congress has enacted an appropriations rider which bans the expenditure of funds for such purposes presents a further constitutional issue.

Meanwhile, lower courts are already beginning the process of extending this habeas regime to

individuals captured and held by the United States in other parts of the world, including at the Bagram Air Force base in Afghanistan. This development threatens our ability to wage war in the Afghan theater in general and operations of our special forces in particular. This legal architecture is fundamentally inconsistent with the Constitution and established precedent.

When Mohammed Atta and his compatriots boarded their scheduled flights on September 11, 2001, the rights of wartime detainees were governed by several major precedents. These cases were marked by judicial restraint, especially with regard to foreign nationals held by the United States overseas. In crafting its original detainee policies over the fall and winter of 2001-2002, the Bush Administration relied on two critical Supreme Court decisions: Ex parte Quirin, 317 U.S. 1 (1942) and Johnson v. Eisentrager, 339 U.S. 763 (1950). Together, these cases - along with the customary laws of war upon which the Court relied - recognized the President's authority to detain captured enemies without a civilian trial for so long as hostilities continue and to charge them before military courts as appropriate. Foreign nationals held outside of the territorial United States were not entitled to challenge their detention in the federal courts.

This well-settled case law relied upon the vital and traditional distinction between the rights and privileges of "lawful combatants" (generally the regular soldiers of sovereign states) and "unlawful combatants," who fail to meet four critical criteria: (1) a regular command structure; (2) the wearing of uniforms; (3) the carrying of arms openly, and (4) obedience to the laws of war, including not attacking civilians. These requirements force combatants to distinguish themselves clearly from the surrounding civilian populations, and to otherwise comply with international law of armed conflict.

Although individuals held as enemy combatants within the United States or in overseas areas subject to its sovereignty were able to obtain judicial review in a handful of cases, that foreign combatants held overseas should have been able to seek judicial intervention was virtually unthinkable. In Eisentrager, Justice Robert Jackson - fresh from his role as the chief Nuremberg prosecutor - explained why:

It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.

339 U.S. at 779. This was the law in 2001. Of course, the individuals detained by the United States at Guantanamo and elsewhere were not without legal protection. Abuses against detainees can and have been prosecuted under the Uniform Code of Military Justice (UCMJ). Customary international norms entitle detainees to humane treatment - including a trial before criminal punishment may be imposed.

This legal architecture gave way to judicial activism in the Hamdi case. There, a divided Court ruled that detainees were entitled to challenge their classification as enemy combatants through administrative proceedings. In response, the Bush Administration developed an elaborate process to determine whether individual detainees were properly classified as enemy combatants. This process included periodic review of whether a detainee's continued detention was appropriate. In the 2005 Detainee Treatment Act ("DTA"), Congress revised this system to provide for a carefully tailored form of unprecedented judicial review.

In its next major decision, Hamdan v. Rumsfeld, 548 U.S. 557 (2006), the Supreme Court struck down the system of military commissions established by President Bush to try captured al Qaeda

operatives. Although the Court accepted that military commissions were a legitimate part of the American military justice system (a point hard to deny since such bodies have been used by the United States throughout its history), it nevertheless concluded that the President had failed to justify various departures from the procedural rules governing ordinary courts martial under the UCMJ. Congress acted within weeks to amend the UCMJ, and to establish military commissions to try captured terrorists by passing the Military Commissions Act ("MCA"). In this law, as in the DTA, Congress sought to place strict limits on the judiciary's role in reviewing these cases.

The Supreme Court - doubtless emboldened by forty years of growing primacy in domestic affairs - swept aside these MCA-based limitations in Boumediene v. Bush, 128 S. Ct. 2229 (2008). In that case, the Court ruled that detainees at Guantanamo Bay, and potentially at any other site wholly controlled by the United States, were constitutionally entitled to challenge their detention by seeking a writ of habeas corpus in the federal courts.

A very real question now is whether Eisentrager has been abandoned and whether the paralysis which Justice Jackson warned against has come to pass. We may reasonably wonder whether the Supreme Court has presented America's enemies with a new "litigation weapon" and whether there is now any particular reason why all captured combatants, lawful or unlawful, cannot litigate the basis of their detention and force the government to "prove" that they are enemy combatants.

By opening the courthouse doors to our enemies, Boumediene created both uncertainty for our warfighters and opportunities for al Qaeda. It is unclear what other constitutional rights detainees may now enjoy. In a breathtaking assertion of judicial power, the Boumediene Court left all of this for the future. As Justice Kennedy wrote:

Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury. The result is not inevitable, however. The political braches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism.

128 S. Ct. at 2277. Needless to say, Congress and the Executive Branch have been engaged in exactly that debate - about how to protect the Nation's values and the lives of its citizens - since the September 11 attacks. Unfortunately, the results of this debate have not been accorded much respect by the Court.

I want to emphasize that this judicial activism was not prompted by, nor even exclusively directed at, the previous Administration's allegedly exaggerated view of executive power. To begin with, the Bush Administration's use of Presidential powers was far more modest than that of any previous American war-time Presidency's - including those of Franklin Roosevelt, Woodrow Wilson, and Abraham Lincoln.

Second, in striking down the MCA, the Supreme Court invaded the constitutional prerogatives of both political branches. The Court's majority did not seem troubled by the fact that Congress and the President worked in concert at the very apex of their respective Articles I and II constitutional prerogatives as identified in Justice Jackson's landmark Youngstown Sheet & Tube analysis. Nor did it pause at the fact that the very same Court majority a year earlier in Hamdan specifically urged the political branches to undertake exactly this type of collaborative effort, strongly implying that their joint handiwork would be granted the utmost deference.

The substance of these cases aside, I am also troubled by some of the stated and unstated assumptions that seem to undergird the ongoing wave of judicial activism in the national security area. These assumptions are that the courts are the best guardians of civil liberties and that the extension of judicial jurisdiction over all national security issues would produce a superior overall policy for the Nation. These views are both ahistorical and profoundly at odds with our constitutional and political fabric. When Article III courts extend jurisdiction over matters that are not properly subject to judicial review, they act extra-constitutionally. Such an action by the courts, even if cloaked in the language of protecting liberty, is no better than an extra-constitutional exertion of congressional or executive power.

As we address these issues today, I note that these concerns are now shared by both sides of the aisle. Despite criticizing President Bush's wartime policies during last year's campaign, President Obama has continued - in substance if not necessarily in name - virtually all of them. His Administration's litigation strategy on all of the pending key national security issues is identical to that of his predecessor's. This is especially true with regard to the detention of captured enemy combatants without trial outside of the United States. Despite the President's stated desire to the contrary, it now appears likely that the detention facilities at Guantanamo Bay will remain open indefinitely because our allies have refused to take all but a handful of the detainees, and Congress has withdrawn funding for any effort to bring them into the United States.

As a result, Congress and the new Administration can expect that their policies will continue to be challenged in the courts, and that the Supreme Court will continue to play a central part in determining what those policies should be. If Judge Sotomayor is confirmed, her rulings will have immense consequences for our country's safety and security. The Senate owes it to the American people to engage her on these issues fully and openly.

For example, the Committee may want to ask Judge Sotomayor which aspects of the foreign affairs powers exercised by the President, the Congress, or both of the political branches jointly, are plenary, and not subject to review by Article III courts on either constitutional or prudential grounds. Another topic worth exploring is whether Judge Sotomayor shares the view that it is appropriate for the political branches of our government and the courts to balance civil liberties and public safety differently in war time than in peace time. It would also be appropriate to inquire into Judge Sotomayor's views of the "political question" and state secrets doctrines, and particularly the extent to which they are grounded in the Constitution. To emphasize, I believe that these types of questions can be raised and resolved in ways which are consistent with the principle of proper respect for judicial independence and would not require the Judge to indicate how she would rule in any particular case.

Finally, the Senate should also focus on Judge Sotomayor's views regarding the increasing tendency of the Supreme Court to invoke the law and precedent of foreign jurisdictions in interpreting the Constitution and laws of the United States. Although the Court has cited a great many sources, among them Hammurabi and Shakespeare, the use of foreign administrative or judicial rulings or practices in reaching its decisions is highly problematic. The United States Constitution is a unique document. The system of government it established was unprecedented and very much inconsistent with the prevailing legal and political norms at the time it was adopted. Even today, the American system of government remains different in critical respects from that of even our closest democratic allies.

As a result, the views of non-U.S. jurisdictions are of limited utility in the legitimate interpretation of the Constitution and federal statutes, and must be used with great circumspection even in the construction of international law and treaties. This is because the

United States - as an independent sovereign - is not bound by the interpretations or legal rules adopted by other countries, even if these may in some instances prove to be persuasive. Indeed, the right to interpret international law obligations is a fundamental attribute of sovereignty and many of the disagreements between the United States and its allies over the past 8 years can be attributed to the simple fact that it has adopted different views on a number of important questions involving the use of force and the conduct of hostilities. In addition, when United States courts look to foreign law for guidance, let alone a rule of decision, they may inappropriately disregard doctrines such as Stare Decisis, a critical limitation on the exercise of judicial power.

Thank you for this opportunity to share my thoughts with the Committee.