

Statement of  
**The Honorable Russ Feingold**

United States Senator  
Wisconsin  
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Statement of U.S. Senator Russell D. Feingold  
Senate Judiciary Committee Hearing on  
"Hamdan v. Rumsfeld: Establishing a Constitutional Process"  
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Mr. Chairman, thank you for holding this hearing.

The Supreme Court's decision striking down the President's military commissions is yet another major rebuke to an Administration that has too often disregarded the rule of law. The Supreme Court has once again affirmed that detainees must be accorded basic rights and treated humanely, pursuant to U.S. law as well as universally respected international standards.

Throughout our history, the courts have often given great deference to the executive branch during times of war, but there are some actions that simply go too far. It is a testament to our system of government that the Supreme Court stood up against this Administration's overreaching. We are fortunate to live in a country where the checks and balances in government are real.

Mr. Chairman, in the case of the treatment of detainees, this Administration has disregarded in many instances its own experts - military attorneys and other experts within the executive branch who tried to object to radical policies regarding military commissions, interrogation techniques and other actions. The Administration's extreme theories of executive power, its unilateral approach and its refusal to listen to any dissent have been entirely counter-productive and have harmed our relations around the world, weakening us in the fight against al Qaeda and its allies.

If this Administration had not argued that detainees were not subject to the Geneva Conventions, if this Administration had not argued that detainees had no right to counsel or to make their case in federal court, if this Administration had not insisted on trying those few detainees who are charged with crimes in tribunals lacking basic due process, if this Administration had not sought to exploit every ambiguity in the law to justify its unprecedented actions, we would not be where we are today.

Now, in the aftermath of the Hamdan decision, we are faced with an important question, one that Congress and the President should have worked together to answer four years ago: How do we try suspected terrorists captured overseas?

There is one option that would allow trials to begin immediately, without further legislation, and with the least likelihood of further, successful legal challenges. The Supreme Court said very

clearly that the President already has the authority to move forward under the long-established military system of justice, a system that has rules for dealing with classified evidence. In fact, Justice Kennedy in his concurrence seemed to suggest that might be our best option when he said: "The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment."

So a threshold question, before we consider drafting legislation to authorize any new form of tribunal, is whether there are reasons why we can't or shouldn't use the existing military justice system. And let me just say, for supporters of the Administration to suggest that this option just amounts to "giving terrorists the same rights and privileges as our own brave soldiers" is offensive and misses the point.

However we move forward, the individuals held at Guantanamo Bay should be tried in accordance with our fundamental American values and the laws of war. Unfortunately, we have already heard some members of Congress argue that Congress should simply authorize the President's existing military commission structure. That would be a grave mistake. For one thing, it would surely be subject to further legal challenge, and would likely squander another four years while cases work their way through the courts again. Let's learn the lesson that the Supreme Court has taught us in Hamdan and move forward with respect for the rule of law. We can and must fight terrorism aggressively without compromising fundamental American values.

Mr. Chairman, in closing let me do something I don't do very often - and that is quote John Ashcroft. According to the New York Times, at a private meeting of high-level officials in 2003 about the military commission structure, then-Attorney General Ashcroft said: "Timothy McVeigh was one of the worst killers in U.S. history. But at least we had fair procedures for him."

How the Congress proceeds in the wake of the Hamdan decision will say a lot about how it views the fundamental principles that make this country great. Thank you again for holding this hearing so we can start that discussion.