

Statement of  
**The Honorable Patrick Leahy**

United States Senator  
Vermont  
July 11, 2006

Statement Of Senator Patrick Leahy,  
Ranking Member, Judiciary Committee  
Hearing On "Hamdan v. Rumsfeld: Establishing a Constitutional Process"

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Mr. Chairman, today we pick up where the Judiciary Committee started almost five years ago in November and December 2001, when we urged the President to work with us to construct a just system of special military commissions. You and I introduced bills with procedures that would have complied with our obligations under law and provided the kind of "full and fair trials" the President has said that he wants to provide.

This hearing today follows the United States Supreme Court's repudiation of the President's military commissions. The Supreme Court determined that the Bush-Cheney Administration's system for prosecuting detainees at Guantanamo is "illegal." It is a decision that has given our system of constitutional checks and balances a tonic that was sorely needed. The Supreme Court is right in holding that the President "is bound to comply with the Rule of Law." One of our core American values is that no one is above the law. I commend the Supreme Court for acting as a much-needed check on this Administration's unilateral policies that have stretched beyond the President's lawful authority.

This decision provides yet another example of this Administration's arrogance and incompetence in the war on terror. When the President announced the creation of these commissions, Alberto Gonzales, then White House Counsel, touted them as a means to "dispense justice swiftly, close to where our forces may be fighting." But the results have proved otherwise. In the last five years there have been no trials and no convictions of any of the detainees and no one has been brought to justice through these commissions. Instead, precious time, effort and resources have been wasted.

In our hearings in 2001 we heard from the Attorney General as well as from two Assistant Attorneys General, the General Counsel to the Department of Defense and a number of knowledgeable witnesses. We suggested that at this hearing the Bush-Cheney Administration be

represented at the highest levels, by the current Attorney General, the Secretary of Defense, and the Navy Judge Advocate General.

Unfortunately, we have been sent a deputy counsel and an acting assistant attorney general and no one from the Judge Advocate General's Corps. That is not the fault of the witnesses, though it is an unmistakable message about this Administration's continuing unwillingness to work with us and listen to those most knowledgeable in these matters from the ranks of experienced and dedicated military lawyers and those from the State Department, as well. Had this Administration done so from the outset, we would not be in the circumstance that we find ourselves in today.

When the Bush-Cheney Administration rejected our advice, refused to work with Congress and chose to go it alone in the development of military commissions, they made a mistake of historic and constitutional proportions. I hope that the Administration will begin today's hearings by admitting their mistakes and acknowledging the limits on presidential authority. As Justice Kennedy emphasized in his opinion: "Subject to constitutional limitations, Congress has the power and responsibility to determine the necessity for military courts, and to provide the jurisdiction and procedures applicable to them."

The Supreme Court's decision is a triumph for our constitutional system of checks and balances. It stands for a simple proposition: When Congress passes a law the President is bound to follow it. Congress passed the Uniform Code of Military Justice. Our country adopted and is bound to abide by the Geneva Conventions, regardless of whether the Attorney General still considers them to be "quaint." This President decided not to follow the law. In America, no one, not even the President, is above the law.

The Supreme Court's opinion is not surprising. What is surprising is that three Justices who claim the mantle of conservatism were so deferential to the President that they would not stand up for the Rule of Law and reinforce the protections of our fundamental freedoms made possible by the Constitution's separation of powers. Instead, they dissented.

In the Fall of 2001, in the wake of September 11, a Democratically led Senate worked on a bipartisan basis to give the Administration the tools it needed to fight the war on terror. Within days of September 11, we passed an Authorization for Use of Military Force in order to provide authority for the military action against Osama bin Laden for those horrific attacks and against those harboring him in Afghanistan. We worked with the President to pass the USA PATRIOT Act, but we included sunset provisions in order to be able to revisit those powers in a timely fashion.

I urged the Administration to work with us on establishing military commissions to ensure their legitimacy, their efficiency, and their effectiveness. The President decided to go it alone. Instead of acting in unity and pursuant to congressional authority, the Administration decided to rely on what it called "an extension of the President's power as Commander-in-Chief."

Instead of working with us, the President established a system so flawed that upon reviewing it, the United States Supreme Court concluded that it violated not only "the American common law of war," but also the rest of the Uniform Code of Military Justice and "the rules and precepts of the law of nations."

It is telling that within a week of the 230th anniversary of our great Declaration of Independence from tyranny, the Supreme Court found it necessary to admonish this Administration with James Madison's warning: "The accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny." In America, no one, not even the President, is above the law.

I am a former prosecutor. I find it hard to fathom that this Administration is so incompetent that it needs kangaroo-court procedures to convince a tribunal of United States military officers that the "worst-of-the-worst" imprisoned at Guantanamo Bay should be held accountable. Military commissions should not be set up as a sham. They should be consistent with the high-standard of American military justice that has worked for decades. If they are to be United States military commissions, they should dispense just punishment fairly, not just be an easier way to punish.

For five years, the Bush-Cheney Administration has violated fundamental American values, damaged our international reputation, and delayed and weakened prosecution of the war on terror -- not because of any coherent strategic view that it had, but because of its stubborn unilateralism and dangerous theory of unfettered Executive power augmented by self-serving legal reasoning. Guantanamo Bay has been such a debacle that even the President now says it should be shut down. But the damage keeps accumulating under this President. Along with Abu Ghraib and the alleged criminal misconduct against civilians in Iraq, the detention of hundreds held at Guantanamo without a single trial or conviction through these now-illegal commissions have undermined our standing in the world and sullied the moral high ground from which we look to lead the world toward democracy, freedom, human rights and human dignity.

I said to the Attorney General in 2001, and I say again now: America works best when all parts of our Government work together. By acting unilaterally, and in violation of laws passed by Congress, this Administration has acted as if it was above the law. The President has important responsibilities and tremendous power, but he is part of a constitutional system and must be subject to the Rule of Law.

Too often the rhetoric surrounding this debate is couched as one about conflicting values of national security versus civil liberties. That is a political distraction that undermines our security and our values. That rhetoric ignores the reality that by getting the process right we will have greater security. The point of having a just system is not to be "soft" on terrorism - rather, it is to ensure the process actually gets the right people. We are not safer as a Nation by imprisoning innocent people while the truly dangerous remain free.

Some still will not admit this Administration's errors. They argue as if the United States should measure itself against the brutality of the terrorists. Our standards have always been higher than that. I disagree with their argument when it comes to the Rule of Law. I disagree when it comes to engaging in torture. I disagree when it comes to honoring our legal and international obligations. America's ideals are sullied whenever we resort to bumper-sticker slogans about giving special privileges to terrorists. No one is urging special privileges. The President says he is for fairness and justice. So am I. But I would like to see a system that can determine guilt and punish the guilty. I am for a system that works, and a system that honors the American values that have been part of our strength as a good and great nation.

Military justice is swift and effective. Courts-martial have been used to bring some members of our own Armed Forces, who violated the law, to justice. Others are being investigated. Meanwhile, not one of the prisoners at Guantanamo Bay, who the President has called the worst-of-the-worst, has been brought to justice. Iraq may well complete its trial of Saddam Hussein before a single Guantanamo detainee is tried. The system the Administration created was fatally flawed, and it has created perverse results.

If the President decides not to proceed promptly by courts-martial against the detainees, I remain willing to work to develop bipartisan legislation creating military commissions that will comply with our laws. I will do so despite the past five years in which the Administration has shown no interest in working with us. If we are to do so we need to have our questions answered. We need to know why we are being asked to deviate from rules for courts-martial. And we also need to see a realization by this Administration that it is Congress that writes our laws, and that no officeholder, branch or agency of our government is above the law.

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