Hearing Before the Subcommittee on the Constitution, Civil Rights, and Property Rights

United States Senate Committee on the Judiciary

Re: "Restoring the Rule of Law."

September 16, 2008

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Chairman Feingold, Ranking Member Brownback, and Members of the Subcommittee, I appreciate the opportunity to address the topic before the Subcommittee today. As I understand it, the particular focus of today's hearing, and the stated concern in the title for "restoring the rule of law," relates to measures taken in connection with the ongoing conflict with al Qaeda and associated terrorist forces. I gained experience with many legal issues related to the conduct of the war on terrorism, including electronic surveillance and detention of enemy combatants, during my service at the Department of Justice from 2001 to 2005. My duties both as a Deputy Assistant Attorney General in the Office of Legal Counsel and, subsequently, as an Associate Deputy Attorney General involved providing advice on issues related to FISA and the use of electronic surveillance and the detention and trial of enemy combatants. Since my return to the private sector, I have attempted to keep up-to-date with many of the legal developments in these areas.

Because the topic of the hearing is broad, I will touch on only four points, and I hope that they will not be too disjointed for my testimony to be useful for the Subcommittee.

First, I respectfully take some issue with the title of today's hearing. A hearing on "Restoring the Rule of Law" might be understood to imply that it is taken as a given that there has been a widespread abandonment of the rule of law. I cannot accept that fundamental

premise. If the members of the Subcommittee were to adopt that assumption as a starting point, I think it would do a disservice to the dedicated men and women throughout the federal government who work tirelessly every day — and who have done so every day since 9/11 — to ensure that the actions the federal government takes to protect the Nation remain within the bounds of the law. In my time at the Department of Justice, I was privileged to work with dozens of dedicated individuals, both career employees and political appointees, who were committed to getting the right answer and ensuring that the rule of law prevailed.

That does not mean that mistakes have not been made or that there were not sharp disagreements about the law. I was involved in contentious debates at the Department of Justice, debates that required us to address novel and complex issues of law under enormous pressures. And in some instances I ultimately disagreed with reasoning others had endorsed. In the most acrimonious debate that occurred during my time in the government, when there were sharply divided views, the Department of Justice's statement of the law prevailed, and thus I believe that episode was ultimately a vindication of the rule of law. In one way, the very fact that so much energy and contention was focused on disputes about legal interpretations shows that the rule of law was considered vital. If it were not, debates about legal interpretations would not have mattered so much. And disagreements, mistakes, or errors in interpreting the law do not amount to an abandonment of the rule of law.

I think it is also important for me to sound a cautionary note about the tenor of the debate concerning the "rule of law." It is, of course, important for the committees of Congress to ensure, through hearings such as this, that respect for the rule of law is maintained. That is an important role of congressional oversight. But it is also important to bear in mind that if the tenor of the debate shifts too sharply, if the rhetoric goes too far in broadly casting aspersions on

the conduct of the War on Terror as if it has involved a wholesale rejection of the rule of law, that alteration in the tone of the debate could have a very real and negative impact on the morale of the people in the intelligence community who carry out some of the most sensitive and important programs in our struggle with al Qaeda. This factor was brought home to me when I was working at the Department of Justice. After a particularly contentious period of legal debates about a particular classified matter, an employee at an intelligence agency called me to say, in essence, thank you for all the work you did defending our program and for making sure the program was on a solid legal footing, because it really bothers us if people say that what we are doing is illegal. The men and women I met in the agencies of the intelligence community are staunchly dedicated to ensuring that they operate within the bounds of the law. Precisely because they are dedicated to that end, and because their morale matters, it is important that rhetoric should not overshadow responsible debate and we should ensure that hard-fought debates do not descend into broad-brush suggestions that the War on Terror has been lawless.

Second, I want to point out a danger that I believe comes along with many rhetorical uses of arguments related to the "rule of law." Of course, no one is against "the rule of law." It is a bedrock principle that must guide everyone in government service. But all too often in debates related to the War on Terror, many will attempt to pack into the concept of the "rule of law" the implicit assumption that any unilateral Executive Branch action or any argument for Executive power that is not subject to judicial review necessarily abandons the rule of law. In other words, the arguments proceed from the assumption that the rule of law exists only in the form of judicial review over Executive action. That is not the assumption of our Constitution. The Constitution assigns different roles to the three branches of government, and particularly in the conduct of warfare, the role of the Executive is paramount. Intelligence operations are typically conducted

without any form of judicial involvement, and a role for the judiciary such as that created in the Foreign Intelligence Surveillance Act in 1978 is clearly an innovation that is the exception rather than the rule.

One particular aspect of the judicial-centric rhetoric of the "rule of law" deserves emphasis. In many instances, the subtext packed into arguments about the "rule of law" is essentially that the conduct of the War on Terror is somehow "lawless" unless it is constrained more and more by the processes and "rights" for "suspects" that are familiar to us from our criminal justice system. In other words, the arguments are, at bottom, a challenge to the fundamental legal paradigm governing the conflict with al Qaeda and associated terrorist forces. In the wake of the attacks of September 11, the President determined that attacks on that scale by a transnational force were acts of war, that the United States was engaged in an armed conflict, and thus that the struggle against al Qaeda should be treated as an armed conflict, not as a mere matter of criminal law enforcement. Congress agreed with that assessment by passing the Authorization for Use of Military Force (AUMF), 115 Stat. 224. Significantly, moreover, the Supreme Court has also endorsed that paradigm for the conflict with al Qaeda. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Court accepted the judgment of the political branches that the Nation is engaged in an armed conflict and that, through the AUMF, the President is authorized to detain combatants in that conflict until the end of hostilities. As the Court put it, detention of combatants, "for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." *Id.* at 518. The proper legal framework for our conflict with al Qaeda is thus provided by the laws of war, not what is most familiar to us from the processes of the criminal law.

The third point I would like to make simply involves an example of a situation where I believe that, unwisely, the assumption that "more involvement for the courts is necessarily better" has prevailed. This summer, Congress passed much needed amendments to the Foreign Intelligence Surveillance Act. *See* Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (July 10, 2008). In part, that legislation consisted of necessary amendments to provide the Executive the flexibility needed to acquire intelligence when targeting collection at aliens overseas. But the legislation also added a new provision to FISA that requires the government to obtain a warrant from the FISA Court in order to conduct surveillance of a U.S. citizen who is reasonably believed to be *outside the United States*. To obtain such a warrant the Attorney General must submit to the FISA Court an application setting forth facts demonstrating that there is probable cause that the target of the surveillance is an agent of a foreign power or terrorist organization. This is a new requirement that expands the jurisdiction of the FISA court into an area that had previously been the exclusive province of the Executive Branch.

As I explained in testimony before the full Committee when that legislation was under consideration in October 2007, I believe that this expansion of the FISA court's jurisdiction was unnecessary and unwise. For decades, under Executive Order 12333, the Attorney General was permitted to authorize surveillance of U.S. citizens overseas upon a finding of probable cause to believe that that the person in question is an agent of a foreign power. Such determinations were handled outside of the FISA framework and without resort to the FISA Court. That system worked well in allowing the Executive to move flexibly and expeditiously to collect valuable intelligence on U.S. citizens who unfortunately choose to align themselves with foreign powers or terrorists. That system was consistent with the President's independent authority to conduct

intelligence activities in the course of conducting United States foreign policy and acting to counter foreign threats. *See, e.g., In re Sealed Case*, 310 F.3d 717, 742 (Foreign Intel. Surveillance Ct. of Review 2002) (describing the inherent authority of the President to gather foreign intelligence information). It was also consistent with the Fourth Amendment. The touchstone of the Fourth Amendment is reasonableness, and it has long been held that in foreign intelligence investigations, the President may order warrantless searches even of citizens within the United States consistent with the Fourth Amendment. *See, e.g., United States v. Brown*, 484 F.2d 418, 425-26 (5th Cir. 1973). That result applies *a fortiori* to searches overseas.

Nor was there any record established before Congress to suggest that the power to conduct surveillance of U.S. citizens overseas had been abused. Attorneys General have exercised their powers under Executive Order 12333 with judgment and discretion. Instead, it seems that the only real reason for the amendment was the assumption that "more involvement for the courts is better." In the field of foreign intelligence collection, particularly collection taking place overseas, I do not believe that assumption is correct. The Constitution assigns the Executive Branch the primary role in matters of foreign affairs and collecting foreign intelligence, and with good reason. The Executive, not the judiciary, is expert in such matters. *Cf. Chicago & S. Air Lines v. Waterman S.S. Co.*, 333 U.S. 103, 111 (1948) ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world"; foreign affairs matters "are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility"). Requiring resort to the FISA court before collection can begin overseas adds an unnecessary layer of procedural complexity to a process that must be as swift and flexible as possible to ensure timely collection of intelligence. Particularly where there has been no record

of Executive Branch abuses suggesting the particular need for a new layer of judicial oversight, I do not think expanding the role of the FISA court was wise.

Fourth and finally, I would like to address one area where I believe Congress can and should take action to accomplish, not a restoration of the *rule* of law, but a needed restoration of *balance* in the law. I believe that, as Attorney General Mukasey has argued, legislation is warranted in response to the Supreme Court's decision in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

In *Boumediene*, the Court determined — in what it acknowledged was an unprecedented holding — that aliens detained by the military outside the sovereign territory of the United States during an ongoing armed conflict have a constitutional right to the writ of *habeas corpus*. My own views on the merits of that question were established some time ago. As Justice Scalia noted in his dissent, I co-authored the opinion of the Office of Legal counsel concluding that, under *Johnson v. Eisentrager*, 339 U.S. 763 (1950), aliens held at the U.S. Naval Station at Guantanamo Bay, Cuba, did not have such a constitutional right and that courts in the United States would not have jurisdiction to entertain *habeas corpus* petitions filed by them. *See Boumediene*, 128 S. Ct. at 2294 (Scalia, J., dissenting). And I have testified before the House Armed Services Committee that I believed the Court of Appeals for the D.C. Circuit ruled correctly in concluding that aliens detained at Guantanamo did not have a constitutional right to *habeas corpus*. In my view, *Boumediene* overruled the longstanding holding of *Johnson v. Eisentrager*.

At the same time that the *Boumediene* Court effected a seminal shift in the law concerning constitutional rights for aliens outside the United States, however, the Court declined to provide further concrete guidance concerning exactly what procedures would be required in

these particular *habeas* cases to satisfy an alien enemy combatant's right to the Great Writ. Under the Court's decision, that thorny matter would be left entirely for lower courts (and subsequently appellate courts, and eventually the Supreme Court itself) to sort out in litigation. At least as a practical matter, there thus may be some truth in what Chief Justice Roberts pointed out in dissent: what the decision is about most significantly is "control of federal policy concerning enemy combatants." 128 S. Ct. at 2279 (Roberts, C.J., dissenting). The Supreme Court's decision shifts a large measure of that control to the judiciary and away from the political branches, both Executive and Legislative, which had already jointly crafted a detailed system of review for the detainees at Guantanamo through the Detainee Treatment Act and the Military Commissions Act of 2006. Here again, simply increasing the role of courts is not necessarily better — it does not necessarily advance the "rule of law." The Constitution assigns responsibility over warfare to the Executive and Legislative Branches, and *Boumediene* marks an extraordinary extension of judicial control over an element of war policy. Chief Justice Roberts makes an interesting point in noting that, if one considers who has "won" as a result of *Boumediene*, it is "[n]ot the rule of law, unless by that is meant the rule of lawyers, who will now arguably have a greater role than military and intelligence officials in shaping policy for alien enemy combatants." 128 S. Ct. at 2293 (Roberts, C.J., dissenting).

The lack of concrete guidance provided by *Boumediene* will now spawn a flurry of litigation brought by detainees at Guantanamo in which the contours of these new *habeas* actions will be fleshed out. The common law process, however, is not well suited to providing swift and certain guidance. To the contrary, it will doubtless require multiple rounds of litigation, with trips to the court of appeals and perhaps even to the Supreme Court — a process that, as experience with *Boumediene* already shows, could take *years*. That approach thus threatens to

create exactly the *practical* problem that the *Eisentrager* Court pointed out over half a century ago — distracting the resources of both the military and the Department of Justice to handle burdensome litigation.

For that reason, although the Supreme Court has spoken definitively on the rights of the detainees at Guantanamo to have access to *habeas corpus*, I believe its decision still leaves an important role for the political branches to play. Congress can and should step in to shape those *habeas* actions by legislation to streamline the procedures rather than leaving the matter solely to the ad hoc process of multiple rounds of litigation. After all, the *Boumediene* Court itself acknowledged that in these new *habeas* actions "accommodations can be made to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ," 128 S. Ct. at 2276, and that, in these proceedings, "the Government has a legitimate interest in protecting sources and methods of intelligence gathering," *id.* Such matters, however, are primarily within the competence of the political branches, not the courts. Thus, even though it will ultimately be up to the Supreme Court to determine what the constitutional right to *habeas* requires, it is entirely appropriate for Congress to streamline the process through legislation rather than leaving the entire matter to the trial-and-error process of months (or years) of litigation.

Legislation introduced by Senator Graham in the form of S. 3401 provides a step in the right direction. It addresses the concerns that Attorney General Mukasey has pointed out in terms of (i) limiting courts' ability to order the transfer of enemy combatants detained *outside* the United States *into* the United States; (ii) ensuring the protection of classified information; and (iii) simplifying the procedures for these new *habeas* actions by permitting them to be conducted largely as paper hearings. I urge the Committee to give that bill, or similar legislation, serious

consideration rather than leaving the contours of the *habeas* actions required in the wake of *Boumediene* to be determined solely by litigation.

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Thank you, Mr. Chairman, for the opportunity to address the Subcommittee. I would be happy to address any questions.