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STATEMENT OF SENATOR EDWARD M. KENNEDY

ON PENDING NOMINATION OF WILLIAM HAYNES

I continue to believe that Mr. Haynes should not be on the agenda for this Committee meeting. His answers to written questions have been evasive, and he has resisted repeated requests for clarification of his position on several important issues.

On some policy questions, he said that he would forward my request to the Defense Department's Office of Legislative Affairs, and on Monday I finally received a response from that office. However, Mr. Haynes and the Department have denied requests for copies of communications on the Department's controversial plan on military tribunals. A Freedom of Information Act request for these communications was submitted five months ago by the National Institute of Military Justice, but the Department's "interim" response was clearly inadequate. These are public documents that may throw needed light on the Haynes nomination, and the Committee has a right to see them before we vote.

I know that other members on the Committee are also not satisfied with the answers Haynes has provided to their questions.

It is disappointing that the majority insists on bringing this nomination to a vote in spite of Haynes's failure to respond adequately to our questions and requests.

Based on the information before us, I intend to vote "no" on his nomination to the Fourth Circuit.

Mr. Haynes been nominated to one of the most influential appellate courts in the country, but he has almost no trial court experience, and no appellate experience at all. In response to the Senate Questionnaire's request for the "ten most significant litigated matters which [he] personally handled," he was able to list only three cases that he litigated himself. The other cases were mostly matters in which his office was represented by the Department of Justice, and he only reviewed briefs drafted by others. None of the cases he handled directly have been appellate cases.

As General Counsel for the Department of Defense, Mr. Haynes shares responsibility for three of the most controversial policies of the Administration:

* The refusal to treat any of the hundreds of persons detained at Guantanamo as prisoners of war under the Geneva Conventions;

* The Defense Department's military tribunal plan, which has been condemned by human rights organizations and our closest allies; and

* The indefinite detention of U.S. citizens without counsel or judicial review.

This is the record we have on Mr. Haynes's nomination to the Fourth Circuit. After a detailed review of the record we have, I do not believe that he has a sufficient commitment to the core constitutional values in our democracy, including respect for the co-equal relationship between the executive, legislative, and judicial branches. It's hard to believe he will enforce the Constitution and the laws fairly and impartially.

1. Detention at Guantanamo

Last October, the International Committee of the Red Cross took the extraordinary step of publicly criticizing the United States for acting above the law in detaining the 650 foreign nationals at Guantanamo.

The United States is a party to the Geneva Conventions of 1949, which provide legal protections to soldiers of all nations. One of their most important principles is that every person in enemy hands must be classified either as a prisoner of war or as a civilian. Civilians may be prosecuted as criminals for their acts of violence, but POWs may be tried only for violations of the laws of war.

Until now, our nation has always complied with the Geneva Conventions, because doing so is so clearly in our national interest. The rules guarantee legal protections to soldiers of all nations, including American soldiers.

The Bush Administration, however, arrogantly refuses to follow the plain language of the Geneva Conventions for the detainees now at Guantanamo Bay. Its refusal unnecessarily jeopardizes our respect in the world and endangers the safety of our own forces.

When Defense Secretary Donald Rumsfeld was asked in January 2002 why he believes the Geneva

Conventions do not apply to the detainees at Guantanamo, he replied that he did not have "the slightest concern" about their treatment in light of what had occurred on 9/11. The British magazine *The Economist* called Rumsfeld's remarks "unworthy of a nation which has cherished the rule of law from its very birth."

Even though the plain language of the Geneva Conventions states that members of the armed forces in an armed conflict shall be treated as prisoners of war, the Bush Administration has categorically denied that any of the 650 detainees at Guantanamo - even those who served in the army of the former Afghan government - qualify as POWs.

The Administration even refuses to convene a tribunal to determine whether any of the detainees are entitled to POW status. Article 5 of the Third Geneva Convention states that if there is "any doubt" as to whether captured combatants should be recognized as POWs, "such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." In other words, if doubt exists, the status of each detainee must be determined individually, not by a blanket decision of the President. How can the Administration say with a straight face that no doubt exists in this case? Clearly, a tribunal should have been convened.

In 1997 the U.S. military issued regulations with detailed procedures for such tribunals. It has routinely convened such tribunals in past wars. Nevertheless, the Defense Department is ignoring its own regulations and past practice and is refusing to convene any such tribunals for the detainees at Guantanamo.

Mr. Haynes and others refuse to concede that "any doubt" exists as to the identity and status of any detainee there. This position defies well-established law, common sense, and multiple reports from reliable sources that dozens of the detainees sent to Guantanamo have been innocent non-combatants with no ties to the Taliban or al Qaeda. Had the Administration convened the required tribunals and made individual determinations of each detainee's status - as required by law - it could have determined which of the detainees were actual combatants and which were innocent persons caught in the wrong place at the wrong time.

Every other country in the world, including our closest allies in the war on terrorism, knows that we are violating the plain language of these landmark treaties. The Administration's actions at Guantanamo have damaged our reputation abroad, caused serious tensions with our allies, and violated a fundamental principle of international law that has long protected American soldiers serving abroad.

The Administration's refusal to follow clearly established law has been compounded by its efforts to place Guantanamo beyond the reach of any law and outside the jurisdiction of any court. It is now fighting in the Supreme Court to prevent any judicial review of the legality of the detentions there. It claims the right to detain cititzens from foreign countries, allies and enemies alike, and do anything it wants with the detainees for as long as it wants, without complying with any rule of law, international or domestic.

As General Counsel for the Defense Department, Mr. Haynes is the primary architect and defender of the Department's policy on the Geneva Conventions. Yet when he is asked to explain his position on this issue, he has repeatedly refused to give a straight answer.

At his nomination hearing, Mr. Haynes stated that the four-part test in the Third Geneva

Convention must be met for any detainee to be considered a prisoner of war. The four-part test to which he refers, however, applies only to members of militias and volunteer corps. It does not apply to members of the armed forces of a party to the conflict, who automatically qualify as POWs.

I asked him whether he agrees that the plain language of the Geneva Conventions applies to members of the armed forces in an armed conflict. I asked how he can justify the categorical denial of POW status to the detainees in Guantanamo who served as soldiers in the armed forces of the former Afghan government. I asked him for any evidence that the Geneva Conventions support his view.

Instead of answering the questions, he restated the government's litigating position and quoted from an unrelated district court decision. He simply refused to answer the question.

The obvious answer is that the Department's position is indefensible, so he goes to any length to avoid answering the question.

As a federal judge, Mr. Haynes may interpret regulations, statutes, and even constitutional provisions in the same way - overriding the plain language of the text in order to achieve the outcome he wants. How can the Senate confirm anyone who takes that view of the law?

Mr. Haynes's record on this issue is particularly troubling, since he has been nominated to the Fourth Circuit, which hears a wide array of important cases in criminal law, civil rights, and workers' rights. The Fourth Circuit has also increasingly become the Justice Department's preferred court on controversial cases involving the detention of foreign nationals and other civil liberties issues. Because the Supreme Court can review only a small number of cases each year, the Fourth Circuit often has the last word on important issues affecting the civil liberties of persons throughout the nation. It's critical for this Committee not to confirm any nominee to that court who has shown a willingness to ignore the law in order to reach the result he wants.

2. Military Tribunals

Another important aspect of Mr. Haynes's record is the Defense Department's plan on military tribunals.

Military tribunals have not yet been convened at Guantanamo, but our commitment to due process and the rule of law is already on trial because of them.

"Unjust, unwise, unAmerican" was the judgment of *The Economist* magazine on the Administration's plan. 175 members of the British Parliament from all parties have filed a friend-of-the-court brief with the U.S. Supreme Court, arguing that the plan flouts the rule of law. Many months of high-level negotiations between Lord Peter Goldsmith, the British Attorney General, and Administration officials culminated in the recent release of five British detainees from Guantanamo.

When our closest ally in Iraq and the war on terrorism and a nation proud of its own judicial system objects so vigorously, and the Administration capitulates, it is time to rethink what we are doing.

The Constitution gives Congress the power to define and punish offenses against the law of nations and create courts to enforce them. But Congress has not authorized the kind of military tribunals about to take place. Even though White House Counsel Alberto Gonzales has justifiably described our system of courts-martial as "the finest in the world," the Administration refuses to use it to try the detainees at Guantanamo.

In several important ways, the rules the Administration has adopted for these ad hoc tribunals are fundamentally unfair. Representation by military defense counsel is mandatory, regardless of the defendant's wishes, even though military lawyers report to the same executive branch officials as the prosecutors, judges, and those who have held the detainees at Guantanamo for so long. Detainees may retain civilian lawyers to assist in their defense, but civilian lawyers who agree to participate will be at a disadvantage. They must undergo a security clearance at their own expense, and they can still be denied access to certain evidence to be used at the trial and to certain proceedings in the case. Attorney-client conversations can be monitored by the military, and civilian lawyers must obtain permission from the Secretary of Defense to speak publicly about any aspect of the proceedings, even if no classified or protected information is involved.

There is no appeal to an independent civilian court. A panel of military officers appointed by the Secretary of Defense will review convictions and sentences, and President Bush will make the final judgment. The tribunal rules claim to provide a presumption of innocence, but given the President's public assertion that "the only thing I know for certain is that these are bad people," that presumption is an empty promise.

As one Marine Corps lawyer recently said, the tribunal rules of the Department create "an unfair system that threatens to convict the innocent and provides the guilty a justifiable complaint as to their convictions."

The tribunals are further tainted by the Administration's disregard for the Geneva Conventions, which I have already discussed. These treaties make clear that a POW may be tried only by the same courts and the same rules applied to our own soldiers - *i.e.*, a court-martial conducted under the Uniform Code of Military Justice, with the right of appeal to an independent civilian court.

Yet because the Administration has refused to treat any of the detainees as POWs - even regular members of the army of the former Afghan government - or even convene a "competent tribunal" to determine the detainees' status, this important safeguard has been ignored. Detainees brought before military tribunals will face the hopeless task of convincing their military judges that they can be tried only by a court-martial.

If we compound our current failure to comply with the Geneva Conventions by proceeding with improper and unfair military trials, we will jeopardize the safety of our own military personnel, who could receive similar treatment if they are captured by foreign governments in future conflicts.

It is essential for the United States to maintain its role in the world as a leader on human rights. Over the years, we have strongly criticized military tribunals in other nations, including Nigeria, Eritrea, Peru, Burma, and Colombia, because of their failure to provide basic legal protections. In the case of Lori Berenson, the American citizen who was tried for terrorism in Peru, the State Department said, "Proceedings in these military courts . . . do not meet internationally accepted standards of openness, fairness, and due process." Military trials at Guantanamo that do not provide independent appellate review or other fundamental guarantees and which violate the Geneva Conventions will draw the anger of the world community, not just Great Britain.

All of us are proud of the men and women of our armed forces for all they've done and all they are doing for our country. To the fullest extent possible, civilian courts should try terrorists, and the military should focus on what it does best - protecting our country and our freedoms. It may make sense to use military tribunals for the limited purpose of trying members of al Qaeda captured on the battlefield and suspected of war crimes, but the tribunals should be specifically authorized by Congress

and be consistent with principles of due process and international law.

As General Counsel, Mr. Haynes bears major responsibility for the serious mistakes the Defense Department has made in developing its military tribunal plan. Despite all the criticism of the Department's rules from authorities at home and abroad, he has described the rules as "generous to the interests of accused persons." He has also asserted the Department's right to continue holding indefinitely even those detainees who are found by military tribunals to be innocent. Mr. Haynes's disregard for fundamental principles of domestic and international law has led to increased tensions with our closest ally and violated our own basic principles.

3. Detention of U.S. citizens as "enemy combatants"

Another post-9/11 policy that Mr. Haynes has championed is the Administration's "enemy combatant" policy. The Administration claims it has the inherent authority even to detain U.S. citizens indefinitely, without access to counsel, and with no judicial review. Because this policy has been carried out by the military, not the Justice Department, Mr. Haynes, as General Counsel for the Defense Department, has major responsibility for it.

Mr. Haynes has been relentless and uncompromising in his defense of the "enemy combatant" policy. In a speech delivered to the Federalist Society in 2002, he dismissed criticism that the Administration was violating the rule of law by arguing that "all too often" critics "use 'rule of law' rhetoric as a metaphor for their preferred outcomes based on their perception, unconnected to legal authority, of what justice or fairness requires." The right of access to counsel and the principle of judicial review, however, are not just debating points. They are not luxuries to be abandoned in time of war, or granted at the whim and convenience of the Executive Branch. They are fundamental constitutional safeguards designed to identify the guilty and protect the innocent. Mr. Haynes's endorsement of a policy that so clearly undermines these safeguards makes him unsuited for a lifetime appointment to the federal courts.

Recently, the Supreme Court announced it would review the Administration's policy. Until then, Mr. Haynes had vigorously tried to prevent any U.S. citizens detained as "enemy combatants" from even talking to a lawyer. He argued that such access "might enable detained enemy combatants to pass concealed messages to the enemy." But such concerns are routinely handled in terrorism cases and other sensitive criminal prosecutions in federal court.

Never in the history of our country have U.S. citizens been held without the right to speak to a lawyer. Mr. Haynes's effort to deny access to counsel for U.S. citizens raises serious questions about whether he would protect any right of any U.S. citizens as a judge on the Fourth Circuit.

In its briefs defending the "enemy combatant" policy, the Administration initially argued that no court could "review at all its designation of an American citizen as an enemy combatant" because the Administration's "determinations on this score are the first and final word." Even the conservative Fourth Circuit found this position too preposterous to accept. The court said it "would be embracing a sweeping proposition - namely that, with no judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." Now that the issue is before the Supreme Court, the Administration concedes that courts may review "enemy combatant" determinations, but only to see if "some evidence" supports it.

Mr. Haynes's vigorous defense of the harsh "enemy combatant" policy reflects the Administration's efforts to undermine and remove many other restraints on the power of the Executive Branch.

An essential part of winning the war on terrorism and protecting the country for the future is protecting the ideals that America stands for here at home and around the world. The checks and balances in the Constitution, including an independent federal judiciary and the Bill of Rights, are essential to our democracy, and a continuing source of our country's strength. They are not obstacles or inconveniences to be jettisoned in times of crisis.

Nominations don't get much worse than this. Mr. Haynes's record clearly shows that he doesn't come anywhere close to the commitment to fundamental rights and the principle of separation of powers that we all expect from the federal courts. I urge my colleagues to reject his nomination.

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