FEAR, FREEDOM, AND THE RULE OF LAW

Patrick J. Leahy*

South Royalton, Vermont

October 14, 2006

Thank you Chairman Cameron, and thanks to Dean Shields and to you, ladies and gentlemen, for the opportunity to speak here today. Vermont is a special place, and Vermont Law School is one of our most respected institutions. I am fortunate to have on my Judiciary Committee staff one of your distinguished graduates, a young man named Matt Virkstis who received his legal training here. I also had the valuable assistance of other VLS students: Chris Mathias, Sam Schneider, and Andrew Mason, who served as law clerks for me on the Judiciary Committee. They were quite helpful to me during this Congress's busy times—and there were many—and I hope that they benefited from the experience.

You are becoming lawyers during a most challenging time, a time of testing, when fear is being used as weapon to curtail freedoms and the rule of law and to accumulate and consolidate power in the executive branch of government. It is a tenuous and volatile time to be sure, but this country has been through such challenges before and emerged true to her traditions of individual freedom and founding principles.

But it does concern me that at a moment when it is even more important for Americans to pull together, we are as divided as we have ever been. A majority party that controls two and arguably all three branches of government acts unilaterally and—as a matter of preference—passes major legislation with only its own party members' votes, instead of reaching across the aisle. The Congress itself is unwilling to serve as a check and balance on an overly aggressive Executive, fostering a palpable loss of accountability and effectiveness in what government decides and how government performs. We have a White House-selected Senate leadership that has been all too willing to jettison the Senate's traditions of bipartisanship and our longstanding rules that protect the minority, and thereby the rights of all Americans.

We have an Administration that values political loyalty over independent thinking, honest discourse, and excellence. We have a President who famously praised a crony, the director of FEMA, for doing a heckuva job amid the suffering from last year's hurricanes and who now

---

* Senior United States Senator from Vermont; J.D. 1964, Georgetown University Law Center; B.A. 1961, Saint Michael's College.

defiantly proclaims in a presidential signing statement just last week that he will not adhere[1] to the requirement added to the law by Congress that the head of FEMA have, to quote the law, "a demonstrated ability in and knowledge of emergency management."[2] We have a Secretary of Defense and a Vice President who have stubbornly refused to acknowledge their mistakes regarding Iraq and the disastrous distraction from the war on terrorism that the war has been. Louis Brandeis, the distinguished Supreme Court Justice in the 1920s and 30s, long ago observed: "The greatest danger to liberty lurks in the insidious encroachment by men of zeal, well-meaning but without understanding."[3]

When the threats to America have seldom been greater, when it has seldom been more important that we join together, we see corrosive demagoguery dividing Americans, our country, and our political parties as we have not seen since the Civil War. We see those in power manipulate fear as a political tool. We are seeing the government turn back to the dark days of spying on Americans without judicial oversight, and those in power attacking the patriotism and the resolve of those who question their policies. The echoes of Watergate, of enemies lists, and even of Joe McCarthy all resonate darkly again in Washington, as they have not for decades. The candidate who promised the American people he would be a uniter and not a divider has been just the opposite. With breathtaking speed, this White House has squandered our unity and the world's solidarity with America ever since 9/11.

Why does any of this matter? Because as with the law, context is important in life, and this is the context in which this Administration has directed our nation's course down a dangerous and unwise path. This President's lawyers are claiming unprecedented secrecy and demanding that he has authority to override any law when he chooses—to spy on Americans without court approval, to torture, to ignore provisions of law he finds inconvenient—as he has proclaimed in hundreds of presidential signing statements.

The lesson you learn as lawyers is that when you study a contract, a statute or a case, you must know its context to fully understand its meaning and intent. This is fundamental; the law, after all, looks to precedent for guidance. And so must we as a nation look to our precedents—our

---

1. *See* Statement on Signing the Department of Homeland Security Appropriations Act, 2007, 42 WEEKLY COMP. PRES. DOC. 1742 (Oct. 4, 2006), *available at* http://www.access.gpo/nara/v42no40.html (stating that the President will construe the limiting language in the Act as consistent with the Appointments Clause of the U.S. Constitution).

2. Department of Homeland Security Appropriations Act of 2007, Pub. L. No. 109-295, § 611, 120 Stat. 1355 (to be codified at 6 U.S.C. § 503(c)(2)(A)).

3. Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

history—for guidance.

This is why I urge you to read and to study our history. If you remember nothing else of what I attempt today to pass along in the way of guidance to fellow students of the law, remember this tip for being an effective lawyer: read. If it is a contract case, you must carefully read the contract. If it is a case that turns on the law, you must read and absorb the statute or case law. And as you consider your rights and your government, read the Constitution and the laws. Read the Declaration of Independence. See what excesses prompted the patriots in Vermont and throughout the colonies to declare independence from King George and English rule.

During the recent confirmation hearings for Chief Justice Roberts and Justice Alito, I asked each of them about the proper role of the court as a check on the Executive and about the court's responsibility to protect the rights of Americans and to do justice.[4] Based on their answers, my judgment was to vote to confirm Chief Justice Roberts and to vote against the nomination of Justice Alito,[5] who strikes me as all too deferential to the President and executive authority. I have been encouraged to hear the Chief Justice comment recently that as important as the Bill of Rights is, he appreciates how important separation of powers and checks and balances are to preserving our basic freedoms.

With a compliant Senate and House unwilling to exercise oversight or any measure of accountability, the courts have served as the only effective check on government power during the last few years. Three times, in three cases—*Rasul*, *Hamdi*, and *Hamdan*—the Supreme Court has reminded the President that even war does not give him a blank check when it comes to the rights of Americans.[6] At their core, these cases reiterate that the rule of

---

4. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 617–18 (2005) (written questions of Sen. Patrick J. Leahy to Judge John G. Roberts, Jr.); *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 793–96 (2006) (written questions of Sen. Patrick J. Leahy to Judge Samuel A. Alito, Jr.), *available at* http://www.senate.gov/pagelayout/reference/one_item_and_teasers/Supreme_Court_Nomination_Hearings.htm.

5. To find out how individual senators voted on the nominations of Chief Justice Roberts and Justice Alito, respectively, see http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=1&vote=00245 and http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00002.

6. *See* Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2798 (2006) ("But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction."); Rasul v. Bush, 542 U.S. 466, 485 (2004) ("[F]ederal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals

law must be respected.

The President's response, with the acquiescence just last month of the House and Senate, was to try to silence the courts by stripping their jurisdiction from them and by quieting critics by assaulting their patriotism or their resolve against terrorism.[7] These tactics are all too reminiscent of Attorney General Ashcroft's taunt when those of us serving on the Senate Judiciary Committee dared to ask questions following 9/11[8]—too reminiscent of his demand that the Senate adopt within a week an unconstitutional, hastily-written initial version of the Patriot Act.

I regret that despite our efforts to fend off the worst aspects of the recently enacted Military Commissions Act, it was adopted by the Senate with only several hours of debate and with its fundamental flaws unfixed.[9] Included in that measure is a suspension of the writ of habeas corpus and a drastic curtailment of access to the courts to check government abuses.[10]

Habeas corpus provides a remedy against arbitrary detentions and constitutional violations.[11] It guarantees an opportunity to go to court to prove one's innocence.[12] Justice Scalia acknowledged in the *Hamdi* case: "The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive."[13] If, as the President tells us, it is our freedoms that we are fighting for and that the terrorists abhor, let us not sacrifice our liberty and thereby give the terrorists a victory they could never achieve on the

---

who claim to be wholly innocent of wrongdoing."); Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) ("We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.").

7. *See* Bringing Terrorists to Justice Act of 2006, S. 3861, 109th Cong. § 4(a) ("Although military commissions traditionally have been constituted by order of the President, the decision of the Supreme Court in *Hamdan v. Rumsfeld* makes it both necessary and appropriate to codify procedures for military commissions as set forth herein.").

8. *See DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism Before the S. Comm. on the Judiciary*, 107th Cong. (2001) (statement of John Ashcroft, Att'y Gen. of the United States) (referring to congressional Democrats when stating "Your tactics only aid terrorists—for they erode our national unity and diminish our resolve. They give ammunition to America's enemies, and pause to America's friends."), *available at* http://judiciary.senate.gov/print_testimony.cfm?id=121&wit_id=42.

9. See Terry Friedan, *Justice Defends Ashcroft's Congressional Testimony*, CNN.com, Dec. 7, 2001, http://archives.cnn.com/2001/ALLPOLITICS/12/07/inv.ashcroft.testimony/index.html, for additional reactions to Attorney General Ashcroft's comments.

10. See Press Release, U.S. Senator Patrick Leahy, Statement of Senator Patrick Leahy on the Military Commission Act, S. 3930 (Sept. 28, 2006) (on file with Vermont Law Review), *available at* http://leahy.senate.gov/press/200609/092806c.html, for a more detailed critique of the Military Commission Act.

11. BLACK'S LAW DICTIONARY 728 (8th ed. 2004).

12. *Id.*

13. Hamdi v. Rumsfeld, 542 U.S. 507, 554–55 (2004) (Scalia, J., dissenting).

battlefield.

The bill the Administration wrote and Congress two weeks ago passed does not merely suspend the writ of habeas corpus. It eliminates it permanently.[14] It cuts off all habeas petitions—not just those founded on relatively technical claims, but also those founded on claims of complete innocence.[15]

We did not need this new law for those truly captured on the battlefield who had taken up arms against the United States. That is why the Administration used the bill to redefine "enemy combatant" so expansively,[16] just as it tried to redefine "torture" a few years ago. The new law is designed to cover not just those captured taking up arms on a traditional battlefield, but to sweep broadly to ensnare many others into its net. By its plain language, it would deny all access to the courts of any alien awaiting a government determination of whether the alien is an enemy combatant.[17] This is a determination that the government would be free to delay as long as it liked—for years or even for decades. Read the law.

And when you do, you will see that this law removes the check that our legal system provides against arbitrarily detaining people for life without charge. And, for that matter, this law could make any limits against torture and cruel and inhuman treatment obsolete, because they will be unenforceable. We have removed the mechanism the Constitution provides to check government overreaching and lawlessness. It makes it impossible for anyone ever to challenge and prove such abuses or to restore the rule of law.

This is wrong. It is unconstitutional. It undermines America's core ideals. It is designed to ensure that this Administration will never again be embarrassed by a United States Supreme Court decision reviewing its unlawful abuses of power. The conservative Supreme Court, with seven of its nine members appointed by Republican Presidents,[18] has been the only check on the Administration's lawlessness. And with this new law, the Administration used a complicit Congress to remove that final check.

Read the Constitution. In Article I, regarding the legislative power of the Congress, in Section 9, the Constitution provides in pertinent part: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when

---

14. Military Commissions Act of 2006, Pub. L. 109-366, § 3(a)(1), 120 Stat. 2600 (to be codified at scattered sections of 10 U.S.C.).

15. *See id.* (making no jurisdictional distinction for claims of complete innocence).

16. *See id.* (redefining the terms "lawful enemy combatant" and "unlawful enemy combatant").

17. *Id.*

18. See http://oyez.org/courts/roberts/robt2/ for background information on current U.S. Supreme Court Justices.

in Cases of Rebellion or Invasion the public Safety may require it."[19] Senator Specter and I both argued that the habeas-stripping provisions of the new law were unconstitutional. As Chairman Specter facetiously said during the debate, "I'd be willing . . . to turn clock back 500 years, but 800 years goes too far."[20]

During a Senate debate in which we seemed, unfortunately, to be speaking more to history than to the limited audience that was aware of what was happening, I urged the Senate to retain the Great Writ of habeas corpus and to preserve the checks and balances in our system of self-government. Our amendment failed by two votes. So now the question is left to the courts. Unless the courts review the constitutionality of the habeas-stripping provisions of the Military Commissions Act and find them wanting, another mechanism for accountability and yet another check on abuses of power will have been sacrificed. This law, if upheld, may effectively curtail any way to enforce and protect basic rights and due process. And we all know what a right without a remedy amounts to.

There is no rebellion or invasion that would justify such a retreat from the rule of law and our fundamental principles. For reasons both practical and rooted in principle, this bill now has become a law that would make the struggle against terrorism more difficult for us to win. Even our effort to include a sunset provision, to allow meaningful congressional review after five years, was cast aside by party-line vote. Some Senators who know how unconstitutional this bill is have explained voting for it by arguing that the courts later will be able to clean up the mess that Congress and the President have made. In response to that, I would note the high irony in the fact that the bill itself includes a provision stripping jurisdiction from the courts. After the vote, the President and his campaign lieutenants wasted no time in launching political assaults on those of us who voted no on this bill. I regard the President's personal attack on my role, which he made last week at a campaign event in California for Congressman Pombo,[21] as something of a badge of honor.

It was more than thirty years ago that I was first elected to the Senate. This, too, was a volatile time. It was in the aftermath of the Watergate scandals about money and power that took down a President. It was a time when Americans demanded accountability by using their voices and their votes to incite change. Those changes led to changes in Congress and

---

19. U.S. CONST. art. I, § 9, cl. 2.

20. Dahlia Lithwick & Richard Schragger, *Pass the Buck*, SLATE, Oct. 7, 2006, http://www.slate.com/toolbar.aspx?action=print&id=2151048.

21. Remarks at a Breakfast for Congressional Candidate Richard W. Pombo in Stockton, California, 42 WEEKLY COMP. PRES. DOC. 1719 (Oct. 3, 2006).

leadership. It led to the Senate investigating the abuses of power by J. Edgar Hoover and the CIA, which led to enactment of the Foreign Intelligence Surveillance Act to be the "exclusive means" by which surveillance of Americans was to be authorized. It led to campaign finance restrictions and greater openness in reporting. It was a testament to how our system of participation and checks and balances was designed to work.

I realize that today's law students may not have born until long after the presidency of Richard Nixon, Watergate, and Nixon's pardon by Gerald Ford. For those entering college this year and approaching their first vote in an election, those are distant events, as are World War II, Vietnam, the Soviet Union, and the Cold War. If you go to see the documentary film "The U.S. vs. John Lennon," it may seem an interesting movie with a great soundtrack, but for me it is a flashback to a difficult time in American some thirty years ago that should have taught us lessons about abuses of power.

As students of the law, we, more than many of our fellow citizens, know that this is a momentous time in our nation's history—a defining moment. We are facing our generation's test, much as earlier generations of Americans faced such tests as whether to imprison Japanese-Americans in concentration camps during World War II.[22] It took decades after that sad experience for consensus to emerge about how wrong that decision was.[23]

I urge you to get involved. Participate in our system of self government. As history attests, you can make a difference. When we refuse to cower to fear, when we participate and work to change the course, when we fight to protect our freedoms, when we act from the strength that our democracy gives us, we can make a difference. Let us treasure, and steadfastly defend, the rule of law.

---

22. This led to the landmark case *Korematsu v. United States*, 323 U.S. 214, 217–19, 224 (1944), which upheld as constitutional the internment of Japanese-Americans in camps during the war and affirmed Fred Korematsu's conviction for violating the order excluding Japanese-Americans from designated areas in the western United States.

23. President Clinton later awarded Fred Korematsu the Medal of Freedom, the nation's highest civilian honor. Neil A. Lucas, *President Names 15 for Nation's Top Civilian Honor*, N.Y. TIMES, Jan. 9, 1998, at A16.