

STATEMENT OF
THE ATTORNEY GENERAL
BEFORE THE
ARMED SERVICES COMMITTEE
UNITED STATES SENATE
CONCERNING
LEGISLATION IN RESPONSE TO
HAMDAN v. RUMSFELD
AUGUST 2, 2006

Thank you, Mr. Chairman, Senator Levin, and Members of the Committee.

I am pleased to appear here today on behalf of the Administration to discuss the elements of legislation that we believe Congress should put in place to respond to the Supreme Court's decision in *Hamdan v. Rumsfeld*.

Before I get into the details of the legislation, let me say a word about process. As this Committee knows, the Administration has been working hard on a legislative proposal that we have developed through extensive inter-agency deliberations, as well as numerous consultations with Members of Congress. Our deliberations have included detailed discussion with and input from the military lawyers in all branches of the Armed Services, including the members of the Judge Advocate General's (JAG) Corps. I have personally met with the Judge Advocates General on two occasions to discuss the elements of the legislative proposal. They and their staffs have provided multiple rounds of comments on all

aspects of the proposed legislative language, and they have been active participants in our deliberations and discussions. Their comments have been heard, and many are reflected in the legislative package that we plan to offer for Congress's consideration.

Military Commission Procedures

Mr. Chairman, first and foremost, the Administration believes that Congress should respond to the Supreme Court's decision in *Hamdan* by providing statutory authorization for military commissions to try captured terrorists for violations of the laws of war. Fundamentally, any legislation needs to preserve flexibility in the procedures for military commissions while ensuring that detainees receive a full and fair trial.

We believe that Congress should enact a new Code of Military Commissions, modeled on the court-martial procedures of the Uniform Code of Military Justice, or "UCMJ," but adapted for use in the special context of military commission trials of terrorist unlawful combatants. To this end, we would propose that Congress create a new chapter for military commission procedures in title 10 of the U.S. Code, which would follow immediately after the UCMJ. We have carefully reviewed the procedures of the UCMJ, and we believe that dozens of articles of the UCMJ have relevance for military commissions and should be used as the starting point for developing the new Code of Military Commissions.

At the same time, we believe it is important that the military commission process for unlawful terrorist unlawful combatants be separate from the court-

martial process that is used to try our own service members, both because military necessity would not permit the strict application of all court-martial procedures, and because there are relevant differences between the procedures appropriate for trying our service members and those appropriate for trying the terrorists who seek to destroy us.

Still, in most respects, the new Code of Military Commissions can and should track closely the procedures and structure of the UCMJ. We would propose that Congress establish a system of military commissions, presided over by a military judge, with commission members drawn from the Armed Forces. The prosecution and defense counsel would be appointed from the JAG Corps, with an opportunity for the appointment of Justice Department prosecutors and with the ability of the accused to retain a civilian counsel, in addition to assigned military defense counsel. Trial procedures, sentencing, and appellate review would largely track those currently provided under the UCMJ (albeit with federal court review in the D.C. Circuit, as provided for under the Detainee Treatment Act of 2005, or “DTA”).

Because of the specific concerns raised by the Supreme Court in *Hamdan*, and because of comments from Members of Congress and from within the Department of Defense, we would propose that the new Code of Military Commissions depart in significant respects from the existing military commission procedures established by the President in 2001 and 2002.

In particular, we propose that the presiding officer would be a certified military judge with the traditional authority of a judge to make final rulings at trial on law and evidence, just as in courts-martial. And as with courts-martial, the military judge would not be a voting member of the commission.

We would also propose to increase the minimum number of commission members to five, from three, and to require twelve members of the commission for any case in which the death penalty is sought. As is the case under the current military commission procedures, and just as in courts-martial, the Government would bear the burden of proving the accused's guilt beyond a reasonable doubt, and a conviction would require a vote of two-thirds of the commission members in a non-death penalty case. As under the UCMJ, the death penalty would require a unanimous vote of the commission members present.

In addition, we would propose to create a formal military appellate process that parallels the appellate process under the UCMJ. We propose that Congress establish a Court of Military Commission Review within DoD to hear appeals on questions of law. We would retain the judicial review of final military commission judgments in the same Article III court, the D.C. Circuit, that currently would hear those judgments under the Detainee Treatment Act. We would propose, however, to give all convicted detainees an appeal as of right to the D.C. Circuit, regardless of the length of their sentence, as opposed to the current system under the DTA of discretionary review for sentences under 10

years. The Supreme Court could review the decisions of the D.C. Circuit through petitions for certiorari.

Although military commissions will track the UCMJ in many ways, we also believe that the military commission procedures should depart from the court-martial procedures in those instances where applying the UCMJ's provisions would be inappropriate or impractical for use in the trial of terrorist unlawful combatants.

The UCMJ provides *Miranda*-type protections for U.S. military personnel that are broader than the civilian rule and that could impede or limit the collection of intelligence during the interrogation of terrorist detainees. I am not aware of anyone who contends that terrorist unlawful combatants must be given *Miranda* warnings before interrogations. The Code of Military Commissions therefore would not include such *Miranda* requirements, but at the same time it does provide a military defense counsel to each accused as soon as charges are brought and recognizes the accused's privilege against self-incrimination during the actual commission proceeding.

The military commission procedures also should not include the UCMJ's Article 32 investigation, which is a pre-charging proceeding that is akin to, but considerably more protective than, the civilian grand jury. Such a proceeding is appropriate when applied to U.S. military personnel, but is unnecessary and inappropriate for the trial of captured terrorists, who are already subject to detention under the laws of war.

Because military commissions must try crimes based on evidence collected everywhere from the battlefields in Afghanistan to foreign terrorist safe houses, we believe that the Code of Military Commissions should provide for the introduction of all probative evidence, including hearsay evidence where such evidence is reliable. Like a civilian judge, the military judge may exclude such evidence if the probative value is substantially outweighed by unfair prejudice. But we believe it is important that the Code of Military Commissions provide a standard of admissibility that is broader than that applied in court-martial proceedings.

Court-martial rules of evidence track those in civilian courts, reflecting the fact that the overwhelming majority of court-martial prosecutions concern not battlefield conduct, but everyday violations of the military code of conduct. By contrast, military commissions must permit the introduction of a broader range of evidence, including hearsay statements, because many witnesses are likely to be foreign nationals who are not amenable to process, and other witnesses may be unavailable because of military necessity, incarceration, injury, or death.

The UCMJ rules of evidence also provide for circumstances where classified evidence must be shared with the accused. I believe there is broad agreement that in the midst of the current conflict, we must not share with captured terrorists the highly sensitive intelligence that may be relevant to military commission proceedings. A more difficult question is posed, however, as to what

is to be done when that classified evidence constitutes an essential part of the prosecution's case.

In the court-martial context, our rules force the prosecution to choose between disclosing the evidence to the accused or allowing the guilty to evade prosecution. It is my understanding that other countries, such as Australia, have established procedures that allow for the court, under tightly defined circumstances, to withhold evidence from the accused that would otherwise be subject to disclosure. Neither those procedures, nor any procedure under consideration, would permit "secret trials" outside the presence of the accused. Nonetheless, it may be possible to ensure fair and accurate commissions proceedings, while protecting our Nation's most sensitive information from its enemies. The Administration and Congress must give careful thought as to how the balance should be struck for the prosecution of terrorists before military commissions.

Common Article 3 of the Geneva Conventions

Mr. Chairman, the Administration also believes that Congress needs to enact legislation in light of the Supreme Court's ruling in *Hamdan* that Common Article 3 of the Geneva Conventions applies to our armed conflict with al Qaeda. It is fair to say that the United States military has never before been in a conflict in which it applied Common Article 3 as the governing detention standard. The military has been trained to apply the special protections that the Geneva Conventions apply to regular and lawful combatants who are captured as prisoners

of war. But we do not train specifically and separately to Common Article 3, and the United States has never before applied Common Article 3 in the context of an armed conflict with international terrorists.

Yet because of the Court's decision in *Hamdan*, we are now faced with the task of determining the best way to do just that. Although many of the provisions of Common Article 3 prohibit actions that are universally condemned, such as "murder," "mutilation," "torture," and the "taking of hostages," it is undeniable that some of the terms in Common Article 3 are inherently vague, as this Committee already discussed in its recent hearing on the subject.

For example, Common Article 3 prohibits "[o]utrages upon personal dignity, in particular, humiliating and degrading treatment," a phrase that is susceptible of uncertain and unpredictable application. If left undefined by statute, the application of Common Article 3 will create an unacceptable degree of uncertainty for those who fight to defend us from terrorist attack, particularly because any violation of Common Article 3 constitutes a federal crime under the War Crimes Act.

Furthermore, the Supreme Court has said that in interpreting a treaty provision such as Common Article 3, the meaning given to the treaty language by international tribunals must be accorded "respectful consideration," and the interpretations adopted by other state parties to the treaty are due "considerable weight." Accordingly, the meaning of Common Article 3—the baseline standard that now applies to the conduct of U.S. personnel in the War on Terror—would be

informed by the evolving interpretations of tribunals and governments outside the United States.

We believe that the standards governing the treatment of detainees by United States personnel in the War on Terror should be certain, and that those standards should be defined clearly by U.S. law, consistent with our international obligations.

Congress can help by defining our obligations under section 1 of Common Article 3, with the exception of the obligations imposed by 1(b) and 1(d), by reference to the U.S. constitutional standard already adopted by Congress in the McCain Amendment, which we believe to be a reasonable interpretation of the relevant provisions of Common Article 3.

Last year, after a significant public debate on the standard that should govern the treatment of captured al Qaeda terrorists, Congress adopted the McCain Amendment, part of the Detainee Treatment Act. That Amendment prohibits “cruel, inhuman, or degrading treatment or punishment,” as defined by reference to the established meaning of our Constitution, for all detainees held by the United States, regardless of nationality or geographic location. Indeed, the same provision was used to clarify similarly vague provisions in another treaty—the Convention Against Torture. Congress rightly assumed that the enactment of the Detainee Treatment Act settled questions about the baseline standard that would govern the treatment of detainees by the United States in the War on Terror. We view the standard established by the McCain Amendment as consistent with, and a

useful clarification of, our obligations under the relevant provisions of Common Article 3.

Defining the terms in Common Article 3, however, is not only relevant in light of our treaty obligations, but is also important because the War Crimes Act, 18 U.S.C. § 2441, makes any violation of Common Article 3 a felony offense.

The Administration believes that we owe it to those called upon to handle detainees in the War on Terror to ensure that any legislation addressing the Common Article 3 issues created by the *Hamdan* decision will bring clarity and certainty to the War Crimes Act. The surest way to achieve that clarity and certainty, in our view, is for Congress to set forth a definite and clear list of offenses serious enough to be considered “war crimes,” punishable as violations of Common Article 3 under 18 U.S.C. § 2441.

The difficult issues raised by the Court’s pronouncement on Common Article 3 are ones that the political Branches need to consider carefully as they chart a way forward after *Hamdan*.

Judicial Review of Detainee Claims

Finally, Mr. Chairman, the Administration believes that any legislation in this area should also clarify how the judicial review provisions of the Detainee Treatment Act apply. Some have argued that *Hamdan* makes the DTA inapplicable to the hundreds of habeas petitions brought by the Guantanamo detainees to challenge their detention as enemy combatants. Although we disagree with that reading, we think that the legislation should make clear that the detainees

may not challenge their detention or trial before a final judgment of a military commission or a final order of a Combatant Status Review Tribunal. Moreover, we think that, once such a final judgment or order is in place, the detainees should be able to raise challenges only as provided for in the DTA itself.

We believe that that was Congress's original intent under the DTA. We also believe that it makes sense, as in the civilian justice system, to restrict the accused's ability to pursue appellate remedies until after the trial has been completed and after the commission has returned a guilty verdict on one or more charges.

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I look forward to discussing these subjects with the Committee this morning.

Thank you, Mr. Chairman.

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