U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 7, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed responses to questions arising from the appearance of Acting Assistant Attorney General Steven G. Bradbury before the Committee on July 11, 2006, concerning the standards to be used by military commissions.

Several of the questions relate to the Terrorist Surveillance Program described by the President. Please consider each answer to those questions to be supplemented by the enclosed letter, dated January 17, 2007, from the Attorney General to Chairman Leahy and Senator Specter.

We hope that this information is of assistance to the Committee. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Richard A. Hertling
Acting Assistant Attorney General

Enclosures

cc: The Honorable Arlen Specter
Ranking Minority Member

Committee on the Judiciary
United States Senate

Hearing on
"*Hamdan v. Rumsfeld*: Establishing a Constitutional Process"
July 11, 2006

Questions Submitted by
Senator Patrick J. Leahy
to
Steven G. Bradbury
Assistant Attorney General

Questions for Mr. Bradbury:

1. In response to a question I asked about procedures for trying detainees, you stated that "a good example to look to" for creating separate rules for military commissions would be the international criminal tribunals for the former Yugoslavia and for Rwanda. You characterized those rules as "regularly allow[ing] the use of hearsay evidence." In fact, under Rule 92 *bis* of the rules for both tribunals, hearsay evidence in the form of a statement may be admitted only if the evidence "goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment." Indeed, the trial chamber trying Slobodan Milosevic emphasized that "regardless of how repetitive [hearsay] evidence is, it cannot be admitted if it goes directly to the acts or conduct of the accused." Prosecutor v. Milosevic, ICTY Case No. IT-02-54, P 8 (Mar. 21, 2002).

(A) Were you aware of this limitation on the use of hearsay evidence when you testified?

(B) Does the Administration support the inclusion of a hearsay rule modeled on Rule 92 *bis* in any military commissions legislation passed by Congress?

As I stated at the hearing, the international criminal tribunals for the former Yugoslavia and for Rwanda permit the admission of relevant evidence that the tribunal deems to have probative value, including hearsay evidence, as long as it is not substantially outweighed by the need for a fair trial. The rule to which you refer (Rule 92 *bis*) prohibits the submission of written witness statements to establish the guilt of the accused. This rule does not, however, create a blanket prohibition on the admission of hearsay evidence; instead it provides a narrow limitation on the ability of the prosecution to introduce certain forms of *written* evidence as a substitute for live witness testimony. Thus, although ICTY and ICTR do place some restrictions on the use of written hearsay, both tribunals broadly permit the introduction of reliable hearsay evidence that takes the form of oral testimony. It is worth noting that the rules of the International Criminal

Court similarly permit the introduction of hearsay evidence, whether in oral or written form, so long as it is probative and would not prejudice the fairness of the proceeding.

We believe Congress correctly chose not to distinguish between oral and written hearsay in the MCA because in some circumstances, written hearsay may not only be reliable, but may be the best evidence available to establish a particular fact. Under the MCA, the military judge will be able to admit probative hearsay statements unless the evidence is found to be unreliable under the circumstances. *See* 10 U.S.C. § 948r.

2. There has been much discussion about the need to have adequate procedures in place to protect classified information. The Classified Information Procedures Act (CIPA) was enacted in 1980 to deal with these situations in the domestic, criminal context. CIPA permits a court to authorize the Government to delete specified items of classified information and substitute a summary. Rule 505 of the Military Rules of Evidence provides parallel protections for use of such information in courts-martial.

(A) Have there been any federal terrorism cases that the Government has had to dismiss because of an adverse ruling under CIPA? If so, please provide the names of the cases.

(B) Have there been any federal terrorism cases in which, due to rulings under CIPA, evidence has not been admitted at trial and a defendant has subsequently been acquitted? If so, please provide the names of the cases.

(C) What specifically about the procedures of CIPA, or Rule 505 of the Military Rules of Evidence, is inadequate to keep classified information secret while trying detainees?

We believe that the MCA strikes an appropriate balance between the rights of the accused and the need to protect classified evidence from disclosure to the enemy. The new law grants the accused the right to be present for all trial proceedings. *See* 10 U.S.C. § 949d(e). Moreover, the accused or counsel will have access to all the evidence admitted before the trier of fact. *See id.* §§ 949a(b)(1)(A), 949d(f). At the same time, the MCA contains robust protections to ensure that the United States can prosecute captured terrorists without compromising highly sensitive intelligence sources and methods. *See id.* § 949d(f)(2)(B).

The Administration did not support these procedures because of dissatisfaction with any particular judicial rulings under CIPA or Military Rule of Evidence 505. Rather, we supported these procedures because CIPA and Rule 505 are not principally aimed towards protecting classified information in the way it is likely to be used in military commission prosecutions. CIPA and Rule 505 often apply in cases where the accused himself has had access to the classified information, and the procedures simply permit the trial to go forward in public without the unnecessary disclosure of classified evidence. By contrast, the defendants in a military commission prosecution are not individuals who have had security clearances. Much of the evidence gathered against them, however, is likely to be classified or to be derived from classified sources. While the MCA procedures bear some resemblance to CIPA and Rule 505, the procedures are considerably more robust, in order to allow the prosecution to introduce evidence derived from classified sources and to meet reasonable discovery obligations in ways that permit fair prosecutions while protecting our Nation's secrets from disclosure.

3. The Administration consistently calls every person who is locked up at Guantanamo Bay a terrorist. But many of the detainees at Guantanamo are members of the Taliban and not al Qaeda. In fact, one of the 10 detainees charged in a military commission, David Hicks, falls into that category. Mr. Hicks has been charged with attempted murder and aiding the enemy based on the fact that he was aiding the Taliban on the battlefield. Is it the Administration's position that members of the Taliban who resisted the Northern Alliance and the United States are war criminals? Is everyone who shot back at coalition forces in 2001 a terrorist?

Individuals detained at Guantanamo Bay are detained as enemy combatants, that is, as persons who took part in hostilities against the United States and its coalition partners. Anyone who "shot back" at coalition forces in 2001 would be properly classified as an enemy combatant and, pursuant to the well-established laws of war, may be detained as such for the duration of hostilities. The Supreme Court recognized as much in the *Hamdi* case. It is not necessarily the case that every enemy combatant be deemed a war criminal (or, for that matter, a "terrorist"). Indeed, privileged combatants who abide by the laws of war are generally entitled to immunity for their actions on the battlefield; although they could be detained for the duration of the conflict, they could not be prosecuted merely for shooting back at United States forces.

The members of the Taliban detained at Guantanamo are not lawful combatants, however. They neither distinguished themselves from the civilian population in Afghanistan nor did they conduct their operations in accordance with the laws and customs of war. Furthermore, they actively supported, and fought with, the al Qaeda terrorist organization. Therefore, members of the Taliban do not enjoy the immunity from prosecution afforded to lawful combatants. Where there is evidence tying individuals to specific offenses recognized under the law of war, including unlawful belligerent acts, they may be prosecuted for those offenses. The military commissions convened under the MCA will do just that.

4. In response to one of my questions you stated that, "in general," the Administration views courts-martial as inappropriate to use for detainees. Does the Administration believe it could convict Salim Hamdan or any of the other approximately 450 individuals currently being detained at Guantanamo – whom the Administration has characterized as "the worst of the worst" – in a court-martial? If so, why does it not proceed immediately? If not, why not?

As I testified at the hearing, the Department does not believe that courts-martial, which are typically used to try our own troops, are well suited for the trial of unlawful enemy combatants—including persons fighting against the United States on behalf of international terrorist organizations—who are not entitled to combatant immunity and who have committed violations of the laws of war. Courts-martial under the Uniform Code of Military Justice ("UCMJ") include a variety of procedures—such as rigid prohibitions on the use of hearsay evidence, detailed pretrial procedures that are more protective of the accused than those used in civilian criminal proceedings, and strict requirements that *Miranda*-type warnings be given before the accused may be questioned—that would be inappropriate in the trial of unlawful enemy combatants during an ongoing armed conflict. Rather than bring such unlawful combatants before courts-martial, which were not designed with such persons in mind, the United States intends to try enemy combatants before the military commissions that Congress established under the MCA.

5. In response to a question from Senator Schumer, you indicated that the Office of Legal Counsel would review the Hamdan decision to determine how the Court's view of the Authorization for Use of Military Force (AUMF) affects other Bush-Cheney policies and programs. But you further stated that there is no "particular formal process of review."

> **(A) How many Administration policies and programs are justified, in whole or in part, on the AUMF? How many of these policies and programs are public?**
>
> **(B) When do you expect your informal review process to be completed and will you advise this Committee of the results?**

In enacting the AUMF, Congress authorized the President to use force and all of the incidents of force in the course of waging the global war against al Qaeda, the Taliban, and affiliated organizations. The President has relied upon that authority, as well as his own constitutional authority, in the course of waging the armed conflict across the globe over the past five years. In light of the many policies and programs that are incorporated into this effort, it is not feasible to identify a particular number of policies and programs carried out under the AUMF. As you are aware, the Administration has publicly relied upon the AUMF as support for the President's authority to detain enemy combatants, to establish military commissions, and to conduct electronic surveillance against the enemy.

As I said at the hearing, the Department always attempts to take account of developments in the law as it assesses the legality of ongoing Executive Branch programs and activities. *Hamdan* was obviously a significant decision, and the MCA was a very significant piece of legislation. Both will have implications for various policies and practices employed by the Executive Branch. It would, however, be inappropriate in this setting to go into greater detail about confidential and privileged legal advice that the Department provides for the benefit of policymakers within the Executive Branch.

6. At a Senate Armed Services Committee hearing on July 13, 2006, Senator McCain said that we should not carve out exceptions to treaty obligations.

(A) Does the Administration share this position? If not, why not?

(B) Has any nation in the world that is a party to the Geneva Conventions ever passed a law that denies the application of Common Article 3 to any detainee captured as part of an armed conflict?

The Department of Justice agrees that the United States should not carve out exceptions to its obligations under the Geneva Conventions. As you know, the Administration worked closely with Senator McCain, as well as others in the Senate, in reaching agreement upon provisions in the MCA that reinforce and implement our international obligations by defining them with clarity and precision. Congress specifically recognized that these military commissions are "regularly constituted courts, affording all the judicial guarantees which are recognized as indispensable by civilized peoples," in full satisfaction of our treaty obligations. *See* 10 U.S.C. § 948b(f).

Common Article 3 applies only to conflicts "not of an international character." There are, and have been, many international armed conflicts in which countries would not recognize Common Article 3 as the standard governing the treatment of detainees. I am not personally aware of any specific law passed by a foreign country to "deny the application of Common Article 3," but no treaty provision would require a nation to enact a law stating whether or not Common Article 3 applies in a particular conflict.

7. This Committee held hearings a few weeks after the President's Military Order was released in November 2001. At that time, both Senator Specter and I invited the Attorney General and the Administration to work with us to establish a good, effective and legitimate system for trying detainees held in Guantanamo Bay. We offered to remove all doubt about their legality, and we did this in a non-partisan manner. I said to the Attorney General: "To many, the constitutional requirement that military tribunals be authorized by Congress is clear. To others, it is not. To everyone, it should be beyond argument that such authorization, carefully drawn by both branches of Government, would be helpful in resolving this doubt." The response we received was that the President has all the power he needs. In retrospect, does the Administration regret its decision to act unilaterally and squander the last four-and-a-half years, during which not a single trial has been concluded? Please begin your response by answering either "Yes" or "No."

No. Hindsight may be 20/20, but the Administration made its legal judgment based upon the case law existing at the time. Indeed, in several cases arising out of World War II, the Supreme Court held that the President, acting as Commander in Chief, had the constitutional authority to establish military commissions for the trial of enemy combatants. The Court similarly recognized in those cases that Congress had specifically endorsed the President's authority in what is now codified as Article 21 of the UCMJ.

Relying on those decisions, and other legal authorities, the Administration established military commission procedures that we believed to be consistent with the requirements of the Constitution, the laws of the United States, and all applicable treaties. A unanimous panel of the Court of Appeals for the D.C. Circuit, which included now-Chief Justice Roberts, upheld these military commissions based upon the existing legal precedent.

The Supreme Court's decision in *Hamdan* similarly recognized the President's constitutional authority to establish military commissions. The Court did hold, however, in a closely divided vote, that the military commissions established pursuant to the President's order did not comply with certain provisions of the UCMJ. The MCA remedies those statutory issues and will allow for military commission trials of detainees who have engaged in terrorist activity or otherwise violated the laws of war to proceed in an expeditious manner.

8. You argued at the hearing that it would be inappropriate and impractical for military commissions to follow the procedures of courts martial. For example, you stated:

> **"When members of the U.S. Armed Forces are suspected of crimes, the UCMJ, in Article 31(b), provides that they must be informed of their Miranda rights, including the right to counsel, prior to any questioning. ... Granting terrorists prophylactic Miranda warnings and extraordinary access to lawyers is inconsistent with security needs and with the need to question detainees for intelligence purposes. The very notion of our military personnel regularly reading captured enemy combatants Miranda warnings on the battlefield is nonsensical"**

While I agree with you that Miranda warnings need not be provided on the battlefield, I do not read the UCMJ as actually requiring this. In fact, the Court of Military Appeals has held that the UCMJ requires a person to be Mirandized "only if he is a suspect at the time of the questioning and the questioning itself is part of an official law-enforcement investigation or disciplinary inquiry." (*U.S. v. Good*, CMA 1991). When someone is being interrogated for intelligence purposes, the Miranda warnings of UCMJ Article 31 are not required. (*U.S. v. Lonetree*, CMA 1992). In light of these and similar CMA decisions, how would Article 31(b) interfere with "the need to question detainees for intelligence purposes"?

Congress correctly determined that Article 31 of the UCMJ should not apply, directly or indirectly, to the trial of unlawful enemy combatants by military commissions. *See* 10 U.S.C. § 948b(d)(1)(B). With respect to your specific question, Article 31 requires members of our Armed Services to provide *Miranda*-type warnings before questioning any individual suspected of criminal wrongdoing, whenever that questioning may be deemed to be part of an official law-enforcement investigation. That right is broader than the right afforded to criminal defendants in the civilian system and should not be applied to the questioning of captured terrorists. The Court of Military Appeals held in *Lonetree* that intelligence agents who were not members of our Armed Forces did not have to provide Article 31 warnings when conducting an interrogation wholly divorced from a military law-enforcement investigation. *See United States v. Lonetree*, 35 M.J. 396, 405 (C.M.A. 1992). But Article 31 may well apply to many situations in which members of our Armed Forces interrogate or interact with detainees suspected of having violated the laws of war. Our troops should not be required to guess whether the interrogation of a particular detainee is sufficiently investigatory to require that warnings be given. Nor should they be forced to choose between conducting effective interrogations to gather information vital to saving American lives or risking having confessions later deemed inadmissible for failure to provide adequate warnings under Article 31. For this reason, we support Congress's determination to provide expressly that Article 31 shall not apply to military commission proceedings.

9. You testified that the Combatant Status Review Tribunals (CSRTs) "are not required by international law." Does international law impose <u>any</u> obligation on the United States to ensure that people we capture in Afghanistan and imprison for years on end are, to use the Administration's term, enemy combatants?

International law generally leaves decisions about the detention of enemy combatants to the discretion of the parties to an armed conflict. We are aware of no rule of international law that would permit those detained as enemy combatants to insist upon a particular set of procedures for the determination of combatant status. That said, the United States has adopted the CSRT procedures to ensure that those detained are in fact enemy combatants. Congress in the Detainee Treatment Act of 2005 expressly recognized the use of CSRTs to make those determinations, and it provided for judicial review of CSRT determinations in the United States Court of Appeals for the District of Columbia Circuit.

10. According to a recent article in the *New Yorker*, in 2002 a series of meetings was held at the White House in which the deputy national security advisor warned that innocent people were being locked up in Guantanamo Bay. David Addington reportedly responded: "These are 'enemy combatants.' . . . They've all been through a screening process." What screening process was used at that time to determine that those detainees transferred to Guantanamo Bay were properly designated "enemy combatants"?

Since the beginning of this conflict, determinations about enemy combatant status have been made by military personnel who have knowledge about the activities of individuals detained during the course of hostilities. My understanding is that the screening process has been no different from what the United States military has employed in past conflicts, and it is fully consistent with the law of war. As for the exact procedures, however, I would refer you to the Department of Defense, which is in a better position to provide a response. The United States, of course, has no wish to detain individuals who are not enemy combatants and has always sought to make status determinations in an appropriate and reliable manner, consistent with military imperatives.

Under current practice, the Department of Defense provides an unprecedented level of review to enemy combatants, including a review by the United States Court of Appeals for the District of Columbia Circuit. All detainees at Guantanamo Bay have received, or are in the process of receiving hearings before CSRTs. Congress recognized these procedures and provided for judicial review in the Detainee Treatment Act of 2005. In providing alien enemy combatants with an opportunity to challenge their detention in federal court, these procedures go considerably beyond what the United States has provided to detainees in prior conflicts.

11. Section 2441 of Title 18 makes it a war crime under U.S. law to violate Common Article 3 of the Geneva Conventions which, among other things, prohibits "outrages upon personal dignity, in particular, humiliating and degrading treatment." What analysis has been done since the Authorization for Use of Military Force of section 2441 and its criminal prohibitions? What documents, legal memoranda and opinions of the applicability of this law have been produced? Has the President taken any action to immunize conduct that could be argued was in violation of Common Article 3 or section 2441?

As you note, Section 2441(c) of the Title 18 criminalizes violations of Common Article 3. The MCA amended that provision to specify with particularity the grave breaches of Common Article 3 that, if committed in the course of an armed conflict "not of an international character," would give rise to criminal liability. Before the Supreme Court's decision in *Hamdan*, it was the position of the Executive Branch, memorialized in a Memorandum issued by the President of the United States on February 7, 2002, that Common Article 3 did not apply to al Qaeda or Taliban detainees because the relevant conflict was "international" in scope. Based on that understanding, neither Common Article 3 nor Section 2441(c) would apply as a matter of law. At the same time, the President made clear in the February 2002 Memorandum that as a matter of policy, all detainees were to be treated humanely consistent with the values of this Nation and with the principles of Geneva. Beyond that, it would not be appropriate to discuss confidential and privileged legal advice provided by the Department for the benefit of policymakers within the Executive Branch.

Committee on the Judiciary
United States Senate

Hearing on
"*Hamdan v. Rumsfeld*: Establishing a Constitutional Process"
July 11, 2006

Questions Submitted by
Senator Russell D. Feingold
to
Steven G. Bradbury
Assistant Attorney General

1. **Please provide a complete list of each provision of the Uniform Code of Military Justice and the Manual for Courts-Martial that you believe should not apply in trials of Guantanamo detainees. For each individual provision that you object to, please explain:**

   a. **Why you believe the provision should not apply, including an analysis of the text of the provision and the case law interpreting that provision; and**
   b. **The specific change to the provision that you would propose and why the change is necessary.**

As you know, since I testified, Congress has passed the Military Commissions Act of 2006 ("MCA"), which establishes statutory military commissions that track the Uniform Code of Military Justice ("UCMJ") in many respects, but depart where the provisions of the UCMJ would be inappropriate or impracticable for the trial of captured terrorists. The MCA provides that the UCMJ does not directly govern military commission prosecutions, *see* 10 U.S.C. § 948b(c), and it specifically identifies several articles as inapplicable, *see id.* § 948b(d). Other provisions of the MCA track the UCMJ where and to the extent that Congress deemed appropriate, and the Administration supports the judgment of Congress.

The MCA provides that the rules issued by the Secretary of Defense shall track those of the Manual for Courts-Martial insofar as he "considers practicable or consistent with military or intelligence activities," and such rules are consistent with the MCA. *Id.* § 949a(a). After consulting with the Department of Justice, the Department of Defense recently released a Manual for Military Commissions, which tracks the court-martial rules in most instances except where the departures are required by the MCA. With respect to those rules that the Secretary of Defense found to be impracticable or inconsistent with the Nation's military or intelligence activities, I would refer you to the Department of Defense, which is in a better position to respond.

2. **The Administration has repeatedly taken the position that detainees should only have the ability to challenge the military commissions' structure and format in**

post-trial review. The Supreme Court has now ruled that the Administration's military commissions as currently constituted are unlawful. If the Administration's position on post-trial review had been accepted, the Supreme Court's ruling would have been delayed still further, and any proceedings that had been completed would have had to begin again. In light of this history, if Congress determines that legislation is necessary to authorize a new form of military commission, would you support allowing for pre-trial, expedited review of any new military commission structure?

We continue to believe that a detainee, like a criminal defendant in the civilian justice system, should not challenge the military commission's structure until after a conviction, if they are convicted. We believe that the MCA remedies the questions of statutory interpretation that led the Supreme Court to hold that the military commissions in *Hamdan* were not properly authorized and that the procedures were subject to challenge before trial. After military commissions are convened and completed pursuant to the MCA, we believe that courts will be in a better position to review any challenge to commission procedures after a final judgment is reached in a concrete case, rather than by deciding facial challenges to commission procedures in the abstract.

3. **Why have only ten individuals out of the several hundred detained at Guantanamo Bay been charged with crimes?**

As the Supreme Court recognized in the *Hamdi* decision, the United States has the authority to detain all enemy combatants for the duration of the hostilities. In the first instance, the decision whether to charge an enemy combatant with a crime depends, however, on whether there is specific evidence that the individual committed a war crime. To date, that determination has been made for a relatively few individuals detained at Guantanamo Bay, but the conduct of those trials was delayed by the litigation that resulted in the *Hamdan* decision. Now that the MCA has established statutory military commissions, we would expect that a far greater number of detainees will be charged and tried by military commission.

4. **You argued at the hearing that the hearsay rules for courts-martial may need to be changed in the context of prosecuting Guantanamo detainees, and that "a good example to look to is the international criminal tribunals, for example, for the former Yugoslavia and for Rwanda, which regularly allow the use of hearsay evidence, as long as the evidence is probative and reliable in the determination of the fact finder, and as long as it is not outweighed by undue prejudice."**

    a. **Do you agree that the rule governing the admission of hearsay evidence in these international criminal tribunals only allows hearsay evidence "which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment"?**
    b. **Given that you have expressed support for the international tribunal rules as a model for hearsay, would you support also including this exception in any proposed military commission rules allowing hearsay? If not, why not?**

The international criminal tribunals for the former Yugoslavia and for Rwanda permit the admission of relevant evidence that the tribunal deems to have probative value, including hearsay evidence, as long as it is not substantially outweighed by the need for a fair trial. The rule to which you refer (Rule 92 *bis*) prohibits the submission of written witness statements to establish the guilt of the accused. This rule does not, however, create a blanket prohibition on the admission of hearsay evidence; instead it provides a narrow limitation on the admission of certain forms of *written* evidence as a substitute for live witness testimony. Thus, although the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) do place some restrictions on the use of written evidence, which would include written hearsay, both tribunals broadly permit the introduction of reliable hearsay evidence that takes the form of oral testimony. It is worth noting that the rules of the International Criminal Court similarly permit the introduction of hearsay evidence, whether in oral or written form, so long as it is probative and would not prejudice the fairness of the proceeding.

We believe Congress correctly chose not to distinguish between oral and written hearsay in the MCA, because in some circumstances written hearsay may not only be reliable, but it may be the best evidence to establish a particular fact. Under the MCA, the military judge will admit probative hearsay statements unless he determines that they are not reliable under the circumstances.

5. **When I asked you at the hearing about the impact of the Supreme Court's decision in *Hamdan v. Rumsfeld* on the Administration's legal analysis of its NSA wiretapping program, you indicated that you are continuing to look at the opinion and would apprise me of any changes in your views. I am attaching a letter from a group of law professors arguing that the *Hamdan* decision "significantly weakens the Administration's legal footing" on the NSA program. In light of this letter, do you continue to believe that *Hamdan* does not affect your conclusion that the program is legal?**

We continue to believe that the Supreme Court's decision in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), does not alter the Administration's conclusion that the Terrorist Surveillance Program that the President has established to monitor the international communications of terrorists is fully consistent with the Constitution and federal law.

The Supreme Court in *Hamdan* held that the President's military commission order conflicted with the UCMJ. Specifically, the Court held that the President had not made a statutorily required finding that the procedures governing courts martial—in the UCMJ and in ensuing regulations—were impracticable for the trial of alien terrorists and that certain of the procedures in the President's order, if ultimately implemented in a military commission, would not be consistent with the UCMJ, including a provision that incorporated standards in common Article 3 of the Geneva Conventions. As the Court recognized, the Government did not argue that the President's inherent constitutional authority to conduct military commissions would overcome statutory restrictions, but rather that the military commissions complied with the statute. *See id.* at 2777 n.29.

The legal positions of the Executive Branch during this armed conflict have not been merely claims of inherent executive power. By enacting the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) ("Force Resolution"), Congress confirmed the President's authority to "use all necessary and appropriate force" against al Qaeda. Accordingly, the Administration has taken the position that the Force Resolution authorizes a number of measures undertaken to protect the Nation's security and to defeat the forces of al Qaeda. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), for instance, the Supreme Court confirmed that the Force Resolution authorizes the President to employ the "fundamental incidents" to military force, *id.* at 519 (plurality opinion), which includes the authority to detain enemy combatants for the duration of hostilities—a measure to disable them from returning to battle. *Id.*; *see also id.* at 587 (Thomas, J., dissenting). The Court further held that the Force Resolution satisfies a statute that prohibits the detention of U.S. citizens except "pursuant to an Act of Congress." *Id.* at 517; *see also* 18 U.S.C. § 4001.

The Administration similarly has relied upon the Force Resolution as a basis for monitoring the communications of al Qaeda terrorists as part of the Terrorist Surveillance Program. As explained in the Department of Justice's January 19, 2006 paper, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* ("*Legal Authorities*"), conducting electronic surveillance against the enemy in a time of armed conflict is a "fundamental incident" to military force and thus, under the Supreme Court's analysis in *Hamdi*, is included within the statutory authorization provided by the Force Resolution. The Department's paper also explains that, to the extent that the Foreign Intelligence Surveillance Act (FISA) creates any ambiguity as to whether the Force Resolution includes the authority to intercept the international communications of members of al Qaeda, the canon of constitutional avoidance resolves that ambiguity in favor of the President's authority. This is because long-standing judicial and historical precedent suggests that conducting such electronic surveillance during a time of war is a constitutional power of the President with which Congress may not interfere.

The Court's decision in *Hamdan* does not undermine the Justice Department's analysis of the Terrorist Surveillance Program. *Hamdan* did conclude that the Force Resolution did not "expand or alter" the existing statutory limits upon military commissions set forth in the UCMJ. 126 S. Ct. at 2775. But the primary point of analysis in our *Legal Authorities* paper was *not* that the Force Resolution altered, amended, or repealed any part of a federal statute. Rather, it was that the Force Resolution satisfied section 109 of FISA, which expressly contemplates that Congress may authorize electronic surveillance through a subsequent statute without amending or referencing FISA. *See* 50 U.S.C. § 1809(a)(1) (prohibiting electronic surveillance "except as authorized by statute"); *see also Legal Authorities* at 20-23 (explaining argument in detail). Indeed, historical practice makes clear that section 109 of FISA incorporates electronic surveillance authority outside FISA and Title III. *See id.* at 22-23

& n.8 (explaining this point with respect to pen registers, which would otherwise have been unavailable in ordinary law enforcement investigations).

The Force Resolution is best understood as another congressional source of electronic surveillance authority (specific to the armed conflict with al Qaeda), and surveillance conducted pursuant to the Force Resolution is consistent with FISA. In this regard, FISA is quite similar to the provision at issue in *Hamdi*. There, five Justices concluded that the Force Resolution "clearly and unmistakably authorized detention," as a fundamental and accepted incident of the use of military force, notwithstanding a statute that provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress," 18 U.S.C. § 4001(a). *Hamdi*, 542 U.S. at 519 (2004) (plurality opinion); *id.* at 587 (Thomas, J., dissenting). FISA and section 4001(a) operate similarly, incorporating authority granted in other statutes. Article 21 of the UCMJ, the primary provision at issue in *Hamdan*, by contrast, has no provision analogous to section 109 of FISA or section 4001(a).

We believe that there are two other reasons why *Hamdan* is consistent with the Department's analysis of the Terrorist Surveillance Program in the *Legal Authorities* paper. First, in contrast to FISA, the UCMJ is a statute that expressly regulates the Armed Forces in wartime. By contrast, Congress in FISA left open the question of what rules should apply to electronic surveillance during wartime. *See Legal Authorities* at 25-27 (explaining that the underlying purpose behind FISA's declaration of war provision, 50 U.S.C. § 111, was to allow the President to conduct electronic surveillance outside FISA procedures while Congress and the Executive Branch would work out rules applicable to the war). And, indeed, FISA was directed in the main at routine foreign intelligence surveillance occurring outside the extraordinary circumstances of war. It is therefore more natural to read the Force Resolution to supply the additional electronic surveillance authority contemplated by section 111 specifically for the armed conflict with al Qaeda than it is to read the Force Resolution as augmenting the authority of the UCMJ, which is directed at the U.S. military, an organization whose purpose is to prepare for and to fight our Nation's wars. Indeed, there is a long tradition of interpreting force resolutions to confirm and supplement the President's constitutional authority in the particular context of electronic surveillance of international communications. *See Legal Authorities* at 16-17 (describing examples of Presidents Wilson and Roosevelt); *cf. id.* at 14-17 (describing long history of warrantless intelligence collection during armed conflicts). The Force Resolution therefore should be read in light of this traditional understanding.

Second, in contrast to Congress's regulation of national security surveillance, *Hamdan* concerns an area over which Congress has express constitutional authority, namely the authority to "define and punish . . . Offenses against the Law of Nations," U.S. Const. art. I., § 8, cl. 10, and to "make Rules for the Government and Regulation of the land and naval forces," *id.* cl. 14. Because of these explicit textual grants, Congress's authority in these areas rests on clear and solid constitutional foundations. But there is no similarly clear expression in the Constitution of congressional power to regulate the President's authority to collect foreign intelligence necessary to protect the Nation. *See*

Legal Authorities at 30-34. Indeed, in *Hamdan*, the Court expressly recognized the President's *exclusive* authority to direct military campaigns. *See* 126 S. Ct. at 2773 (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring in judgment)) ("Congress cannot direct the conduct of campaigns."). The Court recognized that each power vested in the President "'includes all authorities essential to its due exercise.'" *Id.* As explained in detail in the *Legal Authorities* paper, signals intelligence is a fundamental and traditional component of conducting military campaigns. Thus, under the reasoning approved by *Hamdan*, the Terrorist Surveillance Program—which the President has determined is essential to protecting the Nation and to waging the armed conflict against al Qaeda—falls squarely within the President's constitutional authority. Nothing in *Hamdan* calls into question the uniform conclusion of every federal appellate court to have decided the issue that the President has the constitutional authority to collect foreign intelligence within the United States, consistent with the Fourth Amendment. *See, e.g.*, *In re Sealed Case,* 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002) ("[A]ll the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information . . . ."). Indeed, the conclusion of the Foreign Intelligence Court of Review that "FISA [cannot] encroach on the President's power," *id.*, is supported by *Hamdan*'s quotation of Chief Justice Chase's opinion in *Ex Parte Milligan*.

Committee on the Judiciary
United States Senate

Hearing on
"*Hamdan v. Rumsfeld*: Establishing a Constitutional Process"
July 11, 2006

Questions Submitted by
Senator Dianne Feinstein
to
Steven G. Bradbury
Assistant Attorney General

1. In response to one of my questions, you indicated that the United States currently detains about 1,000 enemy combatants. Only about 450 of those, however, are at Guantanamo. Can you confirm these numbers, and also whether that includes detainees in Iraq? Does this figure of 1,000 include persons held by the CIA, DIA or other intelligence agencies?

Principal Deputy General Counsel Daniel Dell'Orto provided the response at the hearing to which your question refers. Accordingly, we would refer you to the Department of Defense, which is in a better position to provide a response.

2. If the United States creates exceptions to Common Article 3 of the Geneva Conventions, or declares that certain protections it provides are not enforceable in our courts or military commissions, what limitations, if any, will exist on other countries' abilities to create exceptions of their own to Common Article 3, or to the Geneva Conventions generally, when trying our own officials and troops in their courts or military commissions?

The MCA reflects the continuing commitment of the United States to its international obligations under Common Article 3 of the Geneva Conventions. As I stated during my testimony, some of the provisions of Common Article 3 are undeniably vague. Congress thus appropriately provided clear definitions of many of those terms and reinforced the President's authority to provide additional clarity by issuing interpretive orders. Clarifying and implementing a treaty through domestic statute is a routine international practice, and we are confident that the MCA is fully compliant with United States obligations under international law. We would similarly expect that other States Parties to the Conventions fully comply with their obligations under international law.

The United States will continue to comply with the Geneva Conventions. The MCA simply ratifies the Government's longstanding position that the Conventions are not themselves directly enforceable by private parties in the courts or tribunals of the United States. The Supreme Court has long observed that "a treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *Head Money Cases*, 112 U.S. 580, 598 (1884). The Restatement of Foreign Relations Law similarly reaffirms this basic understanding of treaty law: "International agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private right of action in domestic courts." Restatement (Third) of the Foreign Relations Law of the United States § 907 cmt. a, at 395 (1987).

Consistent with this established principle of treaty law, the Geneva Conventions place no obligations on their Parties to make the Conventions directly enforceable in their domestic courts or other tribunals. Indeed, the text of the Geneva Conventions themselves presumes that their enforcement will be left to relations between States Parties, rather than to the judicial authorities within any particular state. Article 8 of the Third Geneva Convention Relative to the Treatment of Prisoners of War, for example, states that the Convention "shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict." Article 10 further authorizes States Parties to entrust enforcement to an international organization. Article 132 provides a procedure for addressing alleged violations of the Conventions, a process that is begun at the request of a High Contracting Party and that is to be conducted "in a manner to be decided between the interested Parties." Furthermore, Article 129 of the Convention requires that only certain "grave breaches" of the Convention must be subject to judicially enforceable penal sanctions; even there, however, the involvement of courts comes not as a result of the actions of private parties, but instead after the initiation of criminal proceedings pursuant to the State Party's criminal law.

Following these established principles, the Supreme Court held that the Geneva Convention of 1929 was not judicially enforceable. *See Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950). The United States has long believed that the 1949 Geneva Conventions are indistinguishable in this respect. The Supreme Court in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), held that Common Article 3 of the Geneva Conventions was statutorily incorporated as part of the "law of war" referred to in Article 26 of the Uniform Code of Military Justice ("UCMJ"). *Id.* at 1794. But the Court did not hold that absent Article 26 the Geneva Conventions would have been judicially enforceable on their own. *Id.*

Finally, it is worth noting that many States Parties to the treaties do not enforce their treaty obligations, under the Geneva Conventions or otherwise, through their domestic courts. The United States has never suggested that the decision to enforce the Conventions through the relations between States, rather than through a State Party's domestic courts, somehow amounts to a violation of the treaty. Given this international practice, the Administration believes that Congress's decision in the MCA to endorse the longstanding position of the United States and to prohibit private parties from enforcing the Geneva Conventions against the United States in civil actions or military commission trials will affect neither the obligations of the United States under those Conventions nor the ability of the United States to require its treaty partners to adhere to their parallel obligations.

3. What international consequences do you foresee, if any, if Congress were to place new limitations on the applicability or enforceability of Common Article 3 of the Geneva Conventions?

As described in the answer to Question 2, the Geneva Conventions place no obligations on Parties to make the Conventions directly enforceable in their domestic courts or other tribunals. Accordingly, the fact that the MCA specifically provides that parties may not invoke the Geneva Conventions against the United States or its agents in civil actions and military commission trials, *see* MCA § 5(a); 10 U.S.C. § 948b(g), is unlikely to draw credible objections from other States Parties to the Geneva Conventions.

4. Is it your understanding that the UCMJ was intended to cover non-POWs? From the time when the UCMJ was enacted until 2001, were UCMJ protections ever denied to prisoners, or placed into a separate category any particular type of enemy? During the Vietnam War, did the United States give the protections of the Geneva Conventions to the Viet Cong, even though they did not follow the laws of war? If so, why would similar procedures not suffice in the al Qaeda context?

The UCMJ was enacted to govern the conduct of the members of the Armed Services and certain other personnel closely connected with the operations of the military. *See* 10 U.S.C. § 802. Although prisoners of war are subject to the UCMJ, *id.* § 802(a)(9), unlawful enemy combatants, who do not merit prisoner of war status, are not. To be sure, provisions in the UCMJ that prescribe rules of conduct for U.S. military personnel may benefit enemy combatants with whom those personnel come in contact. Similarly, the Supreme Court in *Hamdan* interpreted Articles 21 and 36 of the UCMJ to impose limitations on the procedures for military commissions convened to try unlawful enemy combatants. By enacting the MCA, Congress reaffirmed that unlawful enemy combatants should not be tried by courts-martial, but rather should be tried by military commissions established under chapter 47A.

The MCA's treatment of unlawful enemy combatants is entirely consistent with the law of war. Under Articles 99-108 of the Third Geneva Convention Relative to the Treatment of Prisoners of War, prisoners of war must generally be tried in the same manner "as in the case of members of the armed forces of the Detaining Power." The United States has complied with this treaty obligation by granting to prisoners of war the full protections of the UCMJ, the code that would govern the trial of a member of the United States armed forces. The Third Geneva Convention extends this special privilege only to prisoners of war—that is, those persons who meet the criteria of Article 4 of the Third Geneva Convention—not to other enemy combatants. Thus, not extending the full procedures and protections of the UCMJ to unlawful enemy combatants is consistent with the international legal obligations of the United States under the Geneva Conventions. And, even under the Supreme Court's interpretation of Articles 21 and 36 of the UCMJ, the United States need not extend the full protections of the UCMJ to enemy combatants who are not prisoners of war. The United States may deviate from those procedures to the extent it finds them impracticable and to the extent that alternative procedures comply with the laws of war.

As a matter of policy, rather than legal obligation, the United States extended the protections of the Third Geneva Conventions for prisoners of war to members of the Viet Cong captured in that conflict. The Viet Cong presented difficult classification questions under Article 4 of the Third Geneva Convention. The Viet Cong was an organized military force. They were "commanded by a person responsible for his subordinates"; though secretive, they did wear uniforms "with a fixed distinctive sign"; and they often carried arms openly. The Viet Cong did not show much respect for the laws of war, but whether this disregard rose to the systematic level necessary to disqualify them from prisoner of war status under Article 4.A.(2)(d) was a difficult question, the resolution of which was avoided by the United States policy decision.

The status of a terrorist organization such as al Qaeda presents no such difficult questions under Article 4. Al Qaeda is nothing like an organized military force, and its commanders take no responsibility for the actions of al Qaeda agents. Al Qaeda members wear no uniforms. And from the beginning of this conflict, al Qaeda's primary offensive tactic has been to commit acts of terrorism and murder against civilians. Whether al Qaeda conducts its "operations in accordance with the laws and customs of war" is thus not a thorny question. In this context, the protections of the Third Geneva Convention, many of which depend on the existence of a command structure and the vestiges of an organized military force, would be completely inapposite if applied to al Qaeda. Terrorists who demonstrate no respect for the laws of war should not, and cannot, claim the protections afforded to lawful combatants.

5. In his written testimony, Lt. Commander Swift spent much of his time outlining abuses that have occurred during the military commissions. In addition, he has provided emails from some military prosecutors that discussed serious allegations of misconduct. Has there been any investigation into these charges? If so, what has been done? Please also produce a copy of any report or investigation into these allegations.

With respect to this question, we would refer you to the Department of Defense, which is in a better position to provide a response.

6. Is the "war on terror" different than a conventional war? What do you consider a triggering moment or event that would allow the United States to declare that the "war on terror" has come to an end? If this war on terror continues for decades, can our Government hold the individuals detained in Guantanamo without charges for 10 years, 20 years, 50 years, or even indefinitely?

The United States is currently in an armed conflict with al Qaeda and affiliated terrorist organizations. That armed conflict is different from a conventional war insofar as the United States is fighting a vicious, dispersed enemy with no respect for the laws of war and an acute desire to kill American civilians. As in any war, it is difficult to predict when the armed conflict will end, which will be a determination based on all relevant factors. The President is committed to achieving this objective and, as it is crucial to the protection of the American people, to doing so as quickly as possible. Nevertheless, the President has pledged to the American people that he will take every action available to him under law, for as long as is necessary, to defeat this vicious enemy and to defend the Nation.

Under the law of war, the United States may detain al Qaeda enemy combatants for the duration of hostilities. Nevertheless, the United States has voluntarily taken measures to release persons from custody who no longer pose a substantial threat to the United States, including through annual Administrative Review Board proceedings to reevaluate the status of each detainee in light of any new information. In addition, the United States has undertaken extraordinary measures to repatriate enemy combatants to their home countries. Detaining dangerous enemy combatants is crucial to protecting American troops and civilians in this continuing armed conflict. On at least a dozen occasions, enemy combatants released by the United States have returned to the field of battle, only to take up arms once again against American forces. Accordingly, for the safety of United States citizens, it is important that enemy combatants be prevented from returning to the conflict until al Qaeda no longer poses a threat to the United States.

Committee on the Judiciary
United States Senate

Hearing on
"*Hamdan v. Rumsfeld*: Establishing a Constitutional Process"
July 11, 2006

Questions Submitted by
Senator Edward M. Kennedy
to
Steven G. Bradbury
Assistant Attorney General

Questions for Steven Bradbury

Fundamental due process safeguards must exist to identify the guilty and protect the innocent. What is your position on whether rules of procedure provide (or should provide) for each of the following safeguards for trials of detainees? In your response, please address each of these ten safeguards individually:

- **an independent and impartial tribunal**
- **the presumption of innocence**
- **proof "beyond a reasonable doubt"**
- **open and public trials, with exceptions only for demonstrable reasons of national security or public safety**
- **representation by independent and effective counsel**
- **the right to examine and challenge evidence offered by the prosecution**
- **the right to present evidence of innocence**
- **the right to cross-examine adverse witnesses and to offer witnesses**
- **fixed, reasonable rules of evidence**
- **fair appellate review of convictions and sentences**

The Department of Justice agrees that military commissions conducted by the United States must provide the accused with full and fair trials. We reach this conclusion not because the constitutional guarantees provided to our Nation's citizens necessarily apply to the trials of unlawful enemy combatants, but because our Nation's commitment to the rule of law demands no less. We believe that the MCA will provide full and fair trials, while preserving the flexibility required by the circumstances surrounding the capture and detention of unlawful enemy combatants. In particular, we believe that these procedures will provide for every one of the safeguards that you have identified above.

Committee on the Judiciary
United States Senate

Hearing on
"*Hamdan v. Rumsfeld*: Establishing a Constitutional Process"
July 11, 2006

Questions Submitted by
Senator Arlen Specter
to
Steven G. Bradbury
Assistant Attorney General

1. **What does *Hamdan* mean for the President's other claims of inherent executive power, such as activities of the National Security Agency that have recently come to light?**

The Supreme Court in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), held that the President's military commission order conflicted with the Uniform Code of Military Justice ("UCMJ"). Specifically, the Court held that the President had not made a statutorily required finding that the procedures governing courts martial—in the UCMJ and in ensuing regulations—were impracticable for the trial of alien terrorists and that certain of the procedures in the President's order, if ultimately implemented in a military commission, would not be consistent with the UCMJ, including a provision that incorporated standards in common Article 3 of the Geneva Conventions. As the Court recognized, the Government did not argue that the President's inherent constitutional authority to conduct military commissions would overcome statutory restrictions, but rather that the military commissions complied with the statute. *See id.* at 2777 n.29.

The legal positions of the Executive Branch during this armed conflict have not been merely "claims of inherent executive power." By enacting the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) ("Force Resolution"), Congress confirmed the President's authority to "use all necessary and appropriate force" against al Qaeda. Accordingly, the Administration has taken the position that the Force Resolution authorizes a number of measures undertaken to protect the Nation's security and to defeat the forces of al Qaeda. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), for instance, the Supreme Court confirmed that the Force Resolution authorizes the President to employ the "fundamental incidents" to military force, *id.* at 519 (plurality opinion), which includes the authority to detain enemy combatants for the duration of hostilities—a measure to disable them from returning to battle. *Id.*; *see also id.* at 587 (Thomas, J., dissenting). The Court further held that the AUMF satisfies a statute that prohibits the detention of U.S. citizens "except as authorized by statute." *Id.*; *see also* 18 U.S.C. § 4001.

The Administration similarly has relied upon the Force Resolution as a basis for monitoring the communications of al Qaeda terrorists as part of the Terrorist Surveillance Program. As explained in the Department of Justice's January 19, 2006 paper, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* ("*Legal Authorities*"), conducting electronic surveillance against the enemy in a time of armed conflict is a "fundamental incident" to military force and thus, under the Supreme Court's analysis in *Hamdi*, is included within the statutory authorization provided by the Force Resolution. The Department's paper also explains that, to the extent that FISA creates any ambiguity as to whether the Force Resolution includes the authority to intercept the international communications of members of al Qaeda, the canon of constitutional avoidance resolves that ambiguity in favor of the President's authority. This is because long-standing judicial and historical precedent suggests that conducting such electronic surveillance during a time of war is a constitutional power of the President with which Congress may not interfere.

The Court's decision in *Hamdan* does not undermine the Justice Department's analysis of the Terrorist Surveillance Program. *Hamdan* did conclude that the Force Resolution did not "expand or alter" the existing statutory limits upon military commissions set forth in the UCMJ. 126 S. Ct. at 2775. But the primary point of analysis in our *Legal Authorities* paper was *not* that the Force Resolution altered, amended, or repealed any part of a federal statute. Rather, it was that the Force Resolution satisfied section 109 of FISA, which expressly contemplates that Congress may authorize electronic surveillance through a subsequent statute without amending or referencing FISA. *See* 50 U.S.C. § 1809(a)(1) (prohibiting electronic surveillance "except as authorized by statute"); *see also Legal Authorities* at 20-23 (explaining argument in detail). Indeed, historical practice makes clear that section 109 of FISA incorporates electronic surveillance authority outside FISA and Title III. *See id.* at 22-23 & n.8 (explaining this point with respect to pen registers, which would otherwise have been unavailable in ordinary law enforcement investigations).

The Force Resolution is best understood as another congressional source of electronic surveillance authority (specific to the armed conflict with al Qaeda), and surveillance conducted pursuant to the Force Resolution is consistent with FISA. In this regard, FISA is quite similar to the provision at issue in *Hamdi*. There, five Justices concluded that the Force Resolution "clearly and unmistakably authorized detention," as a fundamental and accepted incident of the use of military force, notwithstanding a statute that provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress," 18 U.S.C. § 4001(a). *Hamdi*, 542 U.S. at 519 (2004) (plurality opinion); *id.* at 587 (Thomas, J., dissenting). FISA and section 4001(a) operate similarly, incorporating authority granted in other statutes. Article 21 of the UCMJ, the primary provision at issue in *Hamdan*, by contrast, has no provision analogous to section 109 of FISA or section 4001(a).

We believe that there are two other reasons why *Hamdan* is consistent with the Department's analysis of the Terrorist Surveillance Program in the *Legal Authorities* paper. First, in contrast to FISA, the UCMJ is a statute that expressly regulates the

Armed Forces during wartime. By contrast, Congress in FISA left open the question of what rules should apply to electronic surveillance during wartime. *See Legal Authorities* at 25-27 (explaining that the underlying purpose behind FISA's declaration of war provision, 50 U.S.C. § 111, was to allow the President to conduct electronic surveillance outside FISA procedures while Congress and the Executive Branch would work out rules applicable to the war). And, indeed, FISA was directed in the main at routine foreign intelligence surveillance occurring outside the extraordinary circumstances of war. It is therefore more natural to read the Force Resolution to supply the additional electronic surveillance authority contemplated by section 111 specifically for the armed conflict with al Qaeda than it is to read the Force Resolution as augmenting the authority of the UCMJ, which is directed at the U.S. military, an organization whose purpose is to prepare for and to fight our Nation's wars. Indeed, there is a long tradition of interpreting force resolutions to confirm and supplement the President's constitutional authority in the particular context of electronic surveillance of international communications. *See Legal Authorities* at 16-17 (describing examples of Presidents Wilson and Roosevelt); *cf. id.* at 14-17 (describing long history of warrantless intelligence collection during armed conflicts). The Force Resolution therefore should be read in light of this traditional understanding.

Second, in contrast to Congress's regulation of national security surveillance, *Hamdan* concerns an area over which Congress has express constitutional authority, namely the authority to "define and punish . . . Offenses against the Law of Nations," U.S. Const. Art. I., § 8, cl. 10, and to "make Rules for the Government and Regulation of the land and naval forces," *id.* cl. 14. Because of these explicit textual grants, Congress's authority in these areas rests on clear and solid constitutional foundations. But there is no similarly clear expression in the Constitution of congressional power to regulate the President's authority to collect foreign intelligence necessary to protect the Nation. *See Legal Authorities* at 30-34. Indeed, in *Hamdan*, the Court expressly recognized the President's *exclusive* authority to direct military campaigns. *See* 126 S. Ct. at 2773 (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring in judgment)) ("Congress cannot direct the conduct of campaigns."). The Court recognized that each power vested in the President "'includes all authorities essential to its due exercise.'" *Id.* As explained in detail in the *Legal Authorities* paper, signals intelligence is a fundamental and traditional component of conducting military campaigns. Thus, under the reasoning approved by *Hamdan*, the Terrorist Surveillance Program—which the President has determined is essential to protecting the Nation and to waging the armed conflict against al Qaeda—falls squarely within the President's constitutional authority. Nothing in *Hamdan* calls into question the uniform conclusion of every federal appellate court to have decided the issue that the President has the constitutional authority to collect foreign intelligence within the United States, consistent with the Fourth Amendment. *See, e.g., In re Sealed Case,* 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002) ("[A]ll the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information . . . ."). Indeed, the conclusion of the Foreign Intelligence Court of Review that "FISA [cannot] encroach on the President's power," *id.*, is supported by *Hamdan*'s quotation of Chief Justice Chase's opinion in *Ex Parte Milligan*.

2. **The Supreme Court found in *Hamdan* that the government failed to demonstrate that there were circumstances which made courts-martial rules impracticable for use in these military commissions. Could you give us some examples, generally speaking, of what might be acceptable circumstances?**

The Supreme Court in *Hamdan* held that the President's military commission order did not explicitly address the impracticability of the UCMJ, or rules for courts-martial promulgated thereunder, for use in military commissions. According to the Court, Article 36 of the UCMJ, 10 U.S.C. § 836, required a specific finding that court-martial procedures were impracticable and the Court faulted the President's military commission order for the absence of specific findings. *See* 126 S. Ct. at 2792. To be clear, the Court did not hold that such a finding was impossible. *Id.* at 2792-93. Indeed, the President's order was based on a review of court-martial procedures, and a determination that many specific rules—designed primarily for the trial of our own troops charged with criminal offenses—were not practicable for the trial of hardened terrorists, captured on the battlefields thousands of miles from the United States.

Congress recognized in enacting the Military Commissions Act of 2006 ("MCA") that many court-martial rules would be impracticable for military commissions. For example, because many terrorists were captured on the battlefield, hearsay rules that would require foreign nationals and United States military personnel to appear personally at military commissions would present unwarranted obstacles to the trial of such enemy combatants. Therefore, the MCA recognizes that the hearsay rule applicable in courts-martial shall not apply to military commissions. *See* 10 U.S.C. § 949a(b)(2)(E). The MCA also specifically provides that several other provisions of the UCMJ shall be inapplicable, *see id.* § 948b(d), and that the rules issued by the Secretary of Defense shall track those of courts-martial only insofar as he "considers practicable or consistent with military or intelligence activities," *id.* 949a(a). The MCA thus tracks the UCMJ in many respects, but Congress correctly determined that the UCMJ could not apply in toto for military commissions.

3. **On June 29, 2006, while speaking at a public news conference, President Bush said he planned to work with Congress to "find a way forward," and there were signs of bipartisan interest on Capitol Hill in devising legislation that would authorize revamped commissions intended to withstand judicial scrutiny. Can you provide some examples of how you would like to see legislation "revamp" the current commissions in a manner that would enable them to withstand judicial scrutiny as well as meet the goals of the administration?**

As President Bush indicated, the Administration worked closely with Congress over the past several months in developing a statutory system of military commissions. The MCA reflects the product of those efforts. Commissions convened under the MCA will depart from the preexisting procedures in a number of ways. For instance, the presiding officer of the new commission will be a military judge, who will not be a voting member of the commission, and who will exercise the traditional authority of a judge to make final rulings at trial on law and evidence. In addition, the minimum number of commission members will be increased from three to five, as under the UCMJ, and there will be twelve members of the commission in cases in which the death penalty is sought. Finally, the MCA provides for a more formalized appellate process, granting every defendant convicted by a military commission an appeal as of right to the Court of Military Commission Review and the Court of Appeals for the D.C. Circuit. We are confident that the law will provide for the full and fair trials of unlawful enemy combatants, which will fully withstand judicial scrutiny.

4. **Justice Thomas's dissent suggests that the conduct allegedly done by Mr. Hamdan could be described as more than just "conspiracy" because Mr. Hamdan also allegedly violated the "law of war" by his "membership in a war-criminal enterprise." It also seems to me that since Mr. Hamdan allegedly transported weapons and al Qaeda operatives, including bin Laden himself, prior to his capture, and that Mr. Hamdan was on the loose after the Authorization for the Use of Military Force was enacted (the date which the Court said the war began), it is likely that Mr. Hamdan assisted al Qaeda while the war was in progress. Has the administration considered simply rewriting the charge against Mr. Hamdan in such a way that it clearly alleges a violation of the "law of war"?**

The Administration, in preparing for the trial by military commission of Hamdan and other alien enemy combatants, carefully considered the charges that could be brought against them under the law of war and Military Commission Instruction No. 2. Now that Congress has enacted the MCA, military prosecutors will determine what charges under the new law are consistent with the evidence.

With respect to the offense of conspiracy, the Constitution grants Congress the constitutional authority to "define and punish ... Offences against the Law of Nations," U.S. Const. Art. I, § 8, cl. 10. In the MCA, Congress exercised this authority and determined that conspiracy constitutes a substantive offense under the law of war, triable by military commission. *See* 10 U.S.C. § 950v(28). This legislative determination should remove any doubt over whether the offense is properly triable by military commission. For the reasons stated by Justice Thomas in his opinion in *Hamdan*, we believe that this view is supported by historical practice and by authoritative commentators on the law of war. Justice Stevens's determination that conspiracy is not an offense under the law of war did not receive the agreement of a fifth justice and thus does not constitute the opinion of the Court.

5. **How many detainees held at Guantanamo and marked for trial by military commission have been charged with conspiracy? Can you provide us with a complete list of the charges pending against those detainees?**

Under the previous military commission system, ten detainees held at Guantanamo had been charged with conspiracy for purposes of their trials by military commissions. Three of those detainees are also charged with other offenses. David

Matthew Hicks also had been charged with attempted murder by an unprivileged belligerent and aiding the enemy. Omar Ahmed Khadr also had been charged with murder by an unprivileged belligerent, attempted murder by an unprivileged belligerent, and aiding the enemy. Abdul Zahir also had been charged with attacking civilians and aiding the enemy. Now that Congress has enacted the MCA, the Department of Defense will review the evidence against those individuals and others detained at Guantanamo Bay and make new charging decisions based upon the standards and offenses detailed in the new Act.

The Attorney General
Washington, D.C.

January 17, 2007

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Arlen Specter
Ranking Minority Member
Committee of the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy and Senator Specter:

I am writing to inform you that on January 10, 2007, a Judge of the Foreign Intelligence Surveillance Court issued orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization. As a result of these orders, any electronic surveillance that was occurring as part of the Terrorist Surveillance Program will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court.

In the spring of 2005—well before the first press account disclosing the existence of the Terrorist Surveillance Program—the Administration began exploring options for seeking such FISA Court approval. Any court authorization had to ensure that the Intelligence Community would have the speed and agility necessary to protect the Nation from al Qaeda—the very speed and agility that was offered by the Terrorist Surveillance Program. These orders are innovative, they are complex, and it took considerable time and work for the Government to develop the approach that was proposed to the Court and for the Judge on the FISC to consider and approve these orders.

The President is committed to using all lawful tools to protect our Nation from the terrorist threat, including making maximum use of the authorities provided by FISA and taking full advantage of developments in the law. Although, as we have previously explained, the Terrorist Surveillance Program fully complies with the law, the orders the Government has obtained will allow the necessary speed and agility while providing substantial advantages. Accordingly, under these circumstances, the President has determined not to reauthorize the Terrorist Surveillance Program when the current authorization expires.

The Intelligence Committees have been briefed on the highly classified details of these orders. In addition, I have directed Steve Bradbury, Acting Assistant Attorney General for the Office of Legal Counsel, and Ken Wainstein, Assistant Attorney General for National Security, to provide a classified briefing to you on the details of these orders.

Sincerely,

Alberto R. Gonzales
Attorney General

cc: The Honorable John D. Rockefeller, IV
The Honorable Christopher Bond
The Honorable Sylvester Reyes
The Honorable Peter Hoekstra
The Honorable John Conyers, Jr.
The Honorable Lamar S. Smith