U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

April 27, 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 the written questions of Senators Feinstein, Specter, and Kyl, arising from the appearance of Acting Assistant Attorney General Steven G. Bradbury before the Committee on August 2, 2006, at the hearing entitled "The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18 of the United States Code." As you are aware, the responses to the written questions of Senator Leahy and Senator Durbin were provided to the Committee on March 5, 2007. These remaining responses were inadvertently omitted from that package. 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 advises us that from the standpoint 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
Authority to Prosecute Terrorists Under
The War Crime Provisions of Title 18

Written Questions from
Senator Dianne Feinstein
For
Steven Bradbury
Acting Assistant Attorney General

August 2, 2006

Questions for Mr. Bradbury:

Background: In the War Crimes Act's legislative history in 1996, the Department of Defense's General Counsel referenced a "Memorandum of Agreement between the Department of Defense and the Justice Department," in which "a member of the Armed Forces would be tried for a violation of the War Crimes Act in a military court." Unless that agreement has somehow changed, this should mean that war crimes prosecutions, at least for U.S. servicemen, remain firmly in the hands of military prosecutors.

- **Has this Memorandum of Agreement been altered?**

No. The 1984 Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Certain Crimes ("MOU") remains in effect and unaltered. The memorandum can be found in title 9 of the U.S. Attorneys' Manual, *available at* www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00938.htm, and Appendix 3 of the Manual for Courts-Martial (2005 ed.). As explained in the MOU, a member of the Armed Forces may be prosecuted in either a court-martial or a United States District Court where there is concurrent jurisdiction. In most cases, the court-martial will assert primary jurisdiction over offenses committed by current members of the Armed Forces.

The Military Commissions Act of 2006 does not alter the MOU. Members of the Armed Forces who are accused of criminal acts will continue to be prosecuted just as they were before the Act.

Committee on the Judiciary
United States Senate

Hearing on
Authority to Prosecute Terrorists Under
The War Crime Provisions of Title 18

Written Questions from
Senator Arlen Specter
For
Steven Bradbury
Acting Assistant Attorney General

August 2, 2006

1. **The President has argued that commissions are necessary to dispense swift justice to terrorists. Yet in five years, not one enemy combatant has been tried and convicted. The President's ability to dispense swift justice in the War on Terror has been consistently hampered by lengthy court entanglements. What, if anything, do you believe that the Congress could do to untangle the President's ability to swiftly prosecute terrorists?**

Since my testimony, Congress has enacted the Military Commissions Act of 2006 ("MCA"), which should provide the President with the authority to prosecute terrorists efficiently and fairly. As you know, military commission prosecutions convened under the President's original order were delayed several years by litigation, with the Supreme Court ultimately determining in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), that the commissions themselves were inconsistent with the Uniform Code of Military Justice ("UCMJ"). Congress now has remedied that statutory defect through the enactment of the MCA. The Department of Defense recently promulgated rules of procedure and evidence in the Manual for Military Commissions, and on February 2, 2007, military prosecutors swore charges against the first three alien unlawful enemy combatants to be tried under the MCA.

Although enemy combatants undoubtedly will seek to delay new commission prosecutions through federal court litigation, the MCA contains provisions that should avoid such delays. In particular, the MCA provides that enemy combatants may not challenge military commission procedures, through habeas corpus or otherwise, in federal court before the commission trial. Rather, the MCA provides for judicial review only after the final judgment of a military commission. *See* 10 U.S.C. § 950j(b). Federal courts generally employ the same principle in providing that there will be no appellate review of federal criminal prosecutions or habeas review of state court proceedings until after a verdict in the criminal trial. We expect that this provision will prevent military commission prosecutions from being delayed indefinitely by pretrial court challenges. The provision also will allow appellate courts to review the legality of commission

procedures on an as-applied basis, rather than requiring appellate courts to entertain facial challenges based on the application of procedures to hypothetical cases.

2. **Does according a non-state actor the same rights and privileges as a citizen of a sovereign state have the potential of encouraging—or at least not discouraging—individuals from joining terrorist organizations?**

We agree that non-state actors should not be entitled to the same rights and privileges as citizens of a sovereign state. In particular, the United States has long taken the view that unlawful combatants, such as terrorists, should not be entitled to claim privileges as lawful combatants under international law. One of the bedrock principles of international law is reciprocity—states comply with international law in return for their expectation that other states will comply with international law. Terrorists, however, are not state actors. They assume no obligations under international law, nor do they show any respect for its standards. Therefore, to provide them with rights as combatants under international law would tend to legitimize them on the international stage while undermining the principle of reciprocity.

Before *Hamdan*, the Administration had taken the view that members of al Qaeda were not entitled to invoke the Geneva Conventions because the organization did not constitute a state party under the Convention and because the Global War on Terror was a conflict of an international character. The Supreme Court, however, determined that members of al Qaeda are entitled to the protections of Common Article 3 under the Geneva Conventions. It should be emphasized, however, that the Court did not determine that members of al Qaeda are entitled to the enhanced privileges that the Third Geneva Convention provides to lawful enemy combatants. Rather, the Court determined that Common Article 3 applies to our armed conflict with al Qaeda because it is not a conflict between nations, and in that sense is not an "international" conflict, under that Convention. The MCA similarly distinguishes between unlawful combatants and lawful combatants, by providing that only alien unlawful enemy combatants may be tried by military commission.

3. **Based on your reading of the *Hamdan* case, what findings should Congress include so as to establish the impracticability of allowing detainees to be tried by court-martials, or by procedures identical to court-martials? In particular, how should we limit the detainee's access to classified information?**

The Supreme Court in *Hamdan* did not purport to require Congress to make specific findings of impracticability in establishing statutory military commissions. Rather, the Court interpreted Article 36 of the UCMJ to require that the President make such findings before establishing military commissions by presidential order. *See Hamdan*, 126 S. Ct. at 2791-92 & n.51. Because Congress specifically established military commissions by statute, it was not necessary to include specific findings on the subject in the statute.

With respect to classified evidence, the MCA strikes an appropriate balance between the rights of the accused and our national security interests. The new law grants the accused the right to be present for all trial proceedings, unless he engages in disruptive conduct that requires his exclusion. *See* 10 U.S.C. § 949a(b)(1)(B); *id.* § 949d(e). Moreover, the accused will have access to all the evidence admitted before the trier of fact. *See id.* § 949a(b)(1)(A). 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).

4. In light of the Supreme Court's ruling in *Hamdan*, do you still believe that military commissions are best procedure for determining the guilt or innocence of a detainee?

Yes. The United States and other nations have long used military commissions—not civilian courts—to try unlawful enemy combatants like the members of al Qaeda. It is entirely fitting that we continue to do so, because trying many of these individuals under the rules of federal courts and military commissions often would be impracticable. For example, because the terrorists who would be subject to military commissions were captured on the battlefield, strict 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. The MCA therefore contains flexible rules to permit the consideration of reliable hearsay. *See* 10 U.S.C. § 949a(b)(2)(E). Similarly, the rules governing the use of classified information in federal courts and courts-martial would often force the Government to choose between prosecuting terrorists and sharing our Nation's most sensitive intelligence information with the enemy. The MCA provides robust protections for the sources and methods used to collect classified information, *see id.* § 949d(f)(2)(B), while at the same time permitting the accused to be present to challenge and examine all the evidence actually introduced against him, *see id.* § 949a(b). These provisions—which Congress tailored to meet the practicalities of trying terrorists during wartime—will provide for full and fair trials, while also protecting the national security of the United States.

5. The DOJ draft bill forbids testimony that may have been secured by torture, but it does not address info obtained through coercive interrogation. What types of questioning techniques would you define as coercive, but not torture?

The Supreme Court has recognized that every custodial interrogation is coercive to some extent. Indeed, the Court fashioned the prophylactic *Miranda* warnings precisely because it was so difficult to draw a "bright-line" rule as to whether a statement was unduly coerced or not. Courts could reasonably reach different conclusions as to whether a particular technique was unduly "coercive" under the totality of the circumstances, and defendants are likely to assert that any statement used by the prosecution was coerced.

Rather than seeking to formulate a definition of coercion, or identifying any particular technique as coercive, the MCA establishes standards regarding the admissibility of statements that are allegedly coerced. As you note, the MCA provides

that statements obtained by torture shall not be admitted in a military commission proceeding. *See* 10 U.S.C. § 948r(b). The MCA further provides that any statement obtained in violation of the Detainee Treatment Act of 2005, which was enacted on December 30, 2005, shall not be admitted before a military commission. *See id.* § 948r(d)(3). As for other statements arguably obtained through "coercion," the MCA entrusts military judges to determine whether a particular challenged statement is reliable under the circumstances and whether the interests of justice favor the admission of the statement.

6. **The legislative history of the 1996 War Crimes Act states that "universal jurisdiction" is not afforded to the provisions of section 2441 of title 18. The Act did not confer the ability of the United States to try accused war criminals that allegedly committed atrocities against non-Americans, but resided in the United States. The United States would then be required to initiate deportation or extradition proceedings. If the War Crimes Act were modified, do you believe the Act should be broadened to afford the United States universal jurisdiction over suspected war criminals?**

The MCA amended the War Crimes Act to clarify Common Article 3, but it did not address the question of universal jurisdiction. The concept of "universal jurisdiction" has been subject to some debate in recent years, particularly as foreign courts invoke it, not only to punish universally reprehensible conduct, but to challenge the policies of governments with which they disagree. During the deliberations that preceded enactment of the MCA, the Administration's primary concern was with establishing clear definitions of offenses under the War Crimes Act that would provide clear guidance to United States personnel already subject to federal court jurisdiction. As such, the United States did not focus on the question of universal jurisdiction, and Congress did not address it through the amendments.

Committee on the Judiciary
United States Senate

Hearing on
Authority to Prosecute Terrorists Under
The War Crime Provisions of Title 18

Written Questions from
Senator Jon Kyl
For
Steven Bradbury
Acting Assistant Attorney General

August 2, 2006

1. I am concerned about questions of separation of powers as they pertain to the interpretation of treaties. Treaties are agreements between nations and traditionally have been enforced by each nation's executive. In *Hamdan*, the 5-justice majority seemed to depart from this understanding and it gave no deference to the executive's interpretation of the Geneva Conventions – or even to such fundamentally executive determinations as the nature and scope of a war.

Would the Administration support inclusion of a provision in the military-commissions bill reaffirming the principle that the courts should defer to executive interpretations of treaties, especially with regard to questions of the scope and nature of a war?

I do agree that one unusual part of the *Hamdan* decision was that the Supreme Court did not give deference to the President's interpretation of the Nation's obligations under the Geneva Conventions. As you know, since my testimony, Congress has enacted the Military Commissions Act of 2006 ("MCA"). The MCA addresses the issue with respect to the Geneva Conventions by reaffirming the President's constitutional authority to articulate our Nation's international obligations, *see* MCA, § 6(a)(3)(A), and by providing that such interpretations, if published, shall be authoritative under United States law in the same manner as other administrative regulations, *id.* The MCA thereby emphasizes the importance of the President's role in interpreting the Nation's international obligations, while also providing clarity to U.S. personnel of their obligations under both domestic and international law.