Testimony of

Mr. Daniel Collins

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before the Senate Committee on the Judiciary
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Chairman Specter, Senator Leahy, and Members of the Committee, I am grateful for the opportunity to testify before you today. The extent to which the use of military commissions remains available as a tool for prosecuting terrorists and other unlawful combatants in the ongoing War on Terror is an important issue that warrants this Committee's prompt attention. The Supreme Court's recent decision in Hamdan v. Rumsfeld, 548 U.S. ___, slip op. (Jun. 29, 2006), casts considerable doubt on the continued practical utility of such commissions, and I thank the Committee for moving expeditiously to examine this vital subject.

My perspective on these matters is informed by my service over the years in various capacities in the Justice Department. Most recently, I served from June 2001 until September 2003 as an Associate Deputy Attorney General ("ADAG") in the office of Deputy Attorney General Larry Thompson. I also served, from 1992 to 1996, as an Assistant United States Attorney in the Criminal Division of the U.S. Attorney's Office for the Central District of California in Los Angeles. And prior to that, I had served from 1989 to 1991 as an Attorney-Advisor in the Office of Legal Counsel in Washington, D.C. I am now back in private practice in Los Angeles, and in that capacity, I filed an amicus curiae brief in support of the Government in Hamdan, on behalf of an association known as "Citizens for the Common Defence." I emphasize, however, that the views I offer today are solely my own.

In Hamdan, a majority of the Supreme Court held that (1) it had jurisdiction to determine the merits of Hamdan's claims, notwithstanding the enactment of the Detainee Treatment Act of 2005 (DTA) or principles of abstention; (2) the procedures established for Hamdan's commission violated the requirement of Article 36(b) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 836(b), which provides that rules of procedure for military tribunals "shall be uniform insofar as practicable"; and (3) the deviations from court-martial structure and procedure in Hamdan's commission rendered it a tribunal that was not "regularly constituted" within the meaning of common Article 3 of the Geneva Conventions (which the Court held applicable to the conflict with al Qaeda in Afghanistan). I believe that the resulting state of the law is highly unsatisfactory, and threatens to eliminate the practical usefulness of military commissions as an option in combating the sort of elusive enemy that an organization like al Qaeda represents. In my view, Congress should move promptly to overrule each of these three holdings by statute.

Before turning to the specific subjects that I believe Congress should address by legislation, I wish to emphasize two very important aspects of the Court's opinion that should not be overlooked.

First, the Court's invalidation of the existing military commission structure and procedures does not rest upon any finding of a constitutional violation. On the contrary, the Court held only that

"the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions." Slip op. at 2 (emphasis added). Indeed, Justice Breyer's concurring opinion (which was joined by three other concurring Justices) explicitly states that "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary." Slip op. at 1 (Breyer, J., concurring) (emphases added). Justice Kennedy's concurring opinion likewise states that "domestic statutes control this case" and that "[i]f Congress, after due consideration, deems it appropriate to change the controlling statutes, in conformance with the Constitution and other laws, it has the power and prerogative to do so." Slip op. at 2 (Kennedy, J., concurring). And again, in a portion of his concurring opinion joined by three other concurring Justices, Justice Kennedy reiterates that "[b]ecause Congress has prescribed these limits, Congress can change them, requiring a new analysis consistent with the Constitution and other governing laws." Id. at 18. Because no constitutional violation was found by any of the Justices, there is nothing in Hamdan that this Congress does not have the power to fix.

Hamdan thus represents the Supreme Court's judgment as to the current state of the law, and as such, it must be respected and adhered to unless and until Congress changes the applicable law. But in making the policy judgment as to whether the law should be changed, Congress can and should undertake its own independent examination of the matter and decide for itself whether the rules announced by the Court ought to be retained.

Second, it should be noted that no member of the Hamdan Court questioned the premise that the current conflict with al Qaeda was in fact an armed conflict within the meaning of the law of war and that it was sufficient to call into play the war powers of the President and Congress. On the contrary, the Court stated that it did "not question the Government's position that the war commenced with the events of September 11, 2001," slip op. at 35 n.31, and that it assumed that the September 18, 2001 Authorization for Use of Military Force (AUMF) "activated the President's war powers," id. at 29. This point is critically important. In discussing the subject of how to confront and disable al Qaeda, too many people seem to view the "war on terror" as being a "war" only in the rhetorical sense, like the "war on drugs" or the "war on poverty," and as a result, they fall back on law-enforcement models for fighting these terrorists. It is, I think, significant that no member of the Court questioned the applicability of a military model, calling forth military powers, including the power to use military tribunals. To be sure, criminal prosecution of individual suspects in Article III courts also remains an available option, but nothing in the numerous opinions in Hamdan in any way suggests that the option of military tribunals cannot also be retained as an appropriate tool.

In light of the fact that the Hamdan Court did not question the propriety of using military tribunals against members of al Qaeda who violate the laws of war, I can think of no good reason why the Congress would not choose to retain this important tool as an additional arrow in the quiver in fighting this elusive and intractable enemy.

With those observations in mind, I would like to address the question of a possible legislative response to Hamdan. There is, I think, little doubt that Congress should act, and should act promptly, to overrule this decision by statute. The form of military commission left in place by the Court is of so uncertain a character as to be of little utility. Under Hamdan, commission procedure may deviate from courts-martial procedure, but only if the departure is "tailored to the exigency that necessitates it." Slip op. at 56 (emphases added). How much "tailor[ing]" is required? What "exigenc[ies]" will permit a departure? How much of a "necessit[y]" for a departure must be shown? The only thing I can say for certain about the meaning of these terms

is that they are sure to be a source of future litigation. Likewise, the structure and regulation of the commission may deviate from those for courts-martial, but "'only if some practical need explains [the] deviations from court-martial practice.'" Slip op. at 70 (quoting slip op. at 10 (Kennedy, J., concurring)). In his separate concurring opinion (joined in this portion by three other Justices), Justice Kennedy suggested that the sort of "practical needs" that might justify deviations from court-martial "structure, organization, and mechanisms" (as well as court-martial procedures) include "logistical constraints, accommodation of witnesses, security of the proceedings, and the like, not mere expedience or convenience." Slip op. at 10 (Kennedy, J., concurring). I would not envy the Defense Department and Justice Department officials who might be tasked with implementing these vague lines. Is a deviation from court-martial procedure that is designed to accommodate the convenience of a witness a permissible "accommodation of witnesses" or is it a forbidden invocation of "mere ... convenience"? Because Hamdan leaves so much uncertainty hovering over the extent to which military commissions may and may not deviate from courts-martial, their practical utility as an additional tool in the arsenal is greatly diminished. Congress can, and should, act so as to remove this uncertainty, and to preserve this additional mechanism for fighting against the sort of unconventional enemy that al Qaeda represents.

In particular, I recommend that Congress craft legislation to address four particular points raised by the Court's opinion in Hamdan.

First, Article 36 of the UCMJ should be amended to eliminate the requirement (as construed in Hamdan) that military-commission procedure must conform to that of courts-martial "insofar as practicable." 10 U.S.C. § 836(b). As I have just explained, the resulting current uncertainty surrounding the "practicability" determination is likely sufficiently great as to deprive military commissions of much of their practical utility. The Hamdan uniformity-insofar-as-practicable standard thus, in my view, should be rejected. The more difficult question is defining what should replace this standard. There are two aspects to this question, one of which is easier than the other. One (hopefully less controversial) aspect relates to the preservation of some substantial measure of flexibility in the fashioning of military commission procedure. In Madsen v. Kinsella, 343 U.S. 341, 347-48 (1952), the Supreme Court surveyed the then-existing landscape of the use of military commissions and noted that "[n]either their procedure nor their jurisdiction has been prescribed by statute," but instead "has been adapted in each instance to the need that called it forth." The need for the sort of flexibility thus highlighted is, if anything, greater in the context of an armed conflict with a secretive, unconventional, and fanatical enemy, such as al Qaeda, that is by its very nature organized around, and committed to, a policy of gross violations of the laws of war. To preserve this flexibility, both in reality as well as in theory, Congress should not require the President (as the Supreme Court seems to have done in Hamdan) to individually justify to a court each and every deviation from court-martial procedure. That is, there should be a very substantial residuum of Presidential discretion to set military commission procedure that (except as may be required by the Constitution) is not subject to judicial second-guessing. Cf. Hamdan, slip op. at 60 (stating that, because of the existing difference in language between Article 36(a) and Article 36(b), "[w]e assume that complete deference is owed [to] determination[s]" under Article 36(a), not under Article 36(b)) (emphasis added).

At the same time, Congress may wish to specify certain procedural minima from which no derogation will be permitted (or will be permitted only on certain conditions). Should Congress do so, however, I would strongly urge that it resist the temptation to micro-manage military commission procedure in advance, thereby eliminating the very flexibility that makes this tool so

important. Any statutorily specified minima should be narrowly drawn to specify only those procedures that are categorically essential. Cf. note 3 infra.

There is one other point I wish to make on this issue of replacing the uniformity-insofar-as-practicable standard with an approach that relies on Presidential discretion (subject perhaps to certain statutory minima). Although the Court formally reserved any ruling as to whether the current military commission procedures violate the separate requirement in Article 36(a) that such procedures may not be "contrary to or inconsistent with" the terms of the UCMJ, see slip op. at 59, 61, prudence would dictate that, if Article 36(b) is amended to give the President the sort of discretion described here, an appropriate conforming amendment should be made to Article 36(a) so as to ensure that the degree of discretion intended to be conferred by the amendment to Article 36(b) is properly effectuated.

Second, Congress should adopt a new provision of law that eliminates the uncertainty and reduced flexibility occasioned by the Hamdan Court's reliance upon common Article 3 of the Geneva Conventions. As Justice Kennedy's concurring opinion makes clear, the Court relied upon common Article 3 to, in effect, create with respect to the issues of commission structure and organization a uniformity-insofar-as-practicable standard that "parallels the practicability standard" that Article 36(b) imposes with respect to procedure. Slip op. at 10 (Kennedy, J., concurring). Congress has the power to overturn this holding and should do so.

The Court in Hamdan construed Article 3's requirement of a "regularly constituted" tribunal to mean a tribunal "'established and organized in accordance with the laws and procedures already in force in a country,'" and it held that the current commissions were not such tribunals because "[a]s Justice Kennedy explains, ...'[t]he regular military courts in our system are the courts-martial established by congressional statutes.'" Slip op. at 69-70 (quoting slip op. at 8 (Kennedy, J., concurring)). Again relying upon Justice Kennedy's concurring opinion, the Court stated that a military commission "'can be "regularly constituted" by the standards of our military justice system only if some practical need explains deviation from court-martial practice.'" Slip op. at 70 (quoting slip op. at 10 (Kennedy, J., concurring)). This was true, Justice Kennedy explained in his separate opinion, because "courts-martial provide the relevant benchmark" for assessing the "level of independence and procedural rigor that Congress has deemed necessary, at least as a general matter, in the military context." Slip op. at 10 (Kennedy, J., concurring). Thus, "a military commission like the one at issue--a commission specially convened by the President to try specific persons without express congressional authorization--can be 'regularly constituted' by the standards of our military justice system only if some practical need explains deviations from court-martial practice." Id. (emphasis added).

Because Congress has the authority to set "the standards of our military justice system" and to define which tribunals have "express congressional authorization" and which may be established pursuant to "congressional statutes," it necessarily has the power, by statute, to establish that military commissions are henceforward "regularly constituted" within the meaning of common Article 3. Note that, by doing so, Congress would not have to directly challenge the Court's conclusion that common Article 3 applied in the first place. Cf. slip op. at 42-44 (Thomas, J., dissenting).

There are a variety of ways in which Congress could effectuate this. One might be to provide explicitly by statute that the use of military commissions is authorized to try any law-of-war violation (or any other offense made triable by statute before a military commission) committed by any unlawful combatant against whom the President has been congressionally authorized to use military force. As applicable in the immediate context, the basic concept would be that any

unlawful combatant who is on the opposing side of the armed conflict recognized by the September 18, 2001 AUMF should be expressly statutorily eligible for trial by military commission for any law-of-war violations or any eligible statutory violations. Any necessary conforming amendment to Article 21 of the UCMJ should also be made.

Third, although Justice Stevens did not garner a majority for his view that conspiracy is not a recognized violation of the law of war, slip op. at 31-49 (opin. of Stevens, J.), Congress may wish to clarify the uncertainty created by this discussion. Cf. slip op. at 20 (Kennedy, J., concurring) (declining to address the merits of this issue one way or the other). Under our Constitution, whether conspiracy is an offense under the laws of war is not a matter to be settled in the final instance by international consensus; on the contrary, the Constitution squarely grants to Congress the ultimate power to "define and punish ... Offences against the Law of Nations." U.S. Const., art. I, § 8, cl. 10 (emphasis added).

Fourth, Congress should revise the applicable judicial review provisions (which had been amended in the Detainee Treatment Act, but in a manner that the Court determined not to be fully effective to pending cases), so as to eliminate the sort of pre-judgment review of military proceedings that occurred in Hamdan. Congress should make the necessary amendments to ensure that, except to the extent the Constitution may otherwise require, any further review of military commissions, including in pending cases, is "channeled ... exclusively through a single, postverdict appeal to Article III courts" as envisioned in the DTA. Slip op. at 24 (Scalia, J., dissenting).

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In closing, I wish to thank the Committee for moving promptly to address this very important subject. The decision in Hamdan leaves the applicable law in is a highly undesirable state, and the Congress should move promptly to reject the decision's central holdings.

I would be pleased to answer any questions the Committee might have on this subject.