Testimony of

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I. Introduction

Mr. Chairman and Members of the Committee, thank you for the opportunity to address the topic of today's hearing, "Hamdan v. Rumsfeld: Establishing a Constitutional Process." I hope that my perspective as a participant in setting up military commissions and drafting the military commission procedures at issue in Hamdan will assist the Committee as it considers legislation in the aftermath of the Supreme Court's decision. As a former government official, I am appearing in my personal capacity, and the opinions expressed are solely my own. I will address Hamdan briefly and then turn to the procedural features of war crimes courts that are essential to justice in the broadest sense of the word.

II. Hamdan v. Rumsfeld

I cannot add much to what others have said about the flaws in the Hamdan decision, including the three dissenting Justices. I would, however, point out that the Court majority, in its drive to decide the issues in this case, ignored significant decisions made by both the Congress and the President.

Fortunately, the Hamdan majority's rationale is tied to the text of two provisions of title 10, and the separate opinions written by Justices Kennedy and Breyer expressly invite additional legislation. For example, Justice Kennedy made clear in his partial concurrence that "domestic statutes control this case. If 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."
Any legislation must be crystal clear and comprehensive, because the Supreme Court has been quite assertive in granting hitherto unknown rights to unprivileged belligerents, even at the cost of preventing any practical modality of trial for members of al Qaeda who have sworn to wage war against the United States, its government, and its civilians. For perhaps the first time in our nation's history, the Hamdan majority overturned the President's decisions as to enemy combatants in the middle of a war. Just two summers ago, a similar majority overturned long-standing Supreme Court precedent to grant enemy combatants detained by the military overseas the right to bring habeas petitions, in the Rasul decision. Of course, last year's Detainee

Treatment Act was an attempt, now rendered largely moot by Hamdan, to rein in some of the avalanche of litigation invited by the Rasul decision.

III. Necessary Features of a War Crimes Court

The silver lining of Hamdan is that it gives the Congress and the Executive an opportunity to work together to specify further the procedures for war crimes prosecutions of detainees. Although the possible permutations of fora that could be authorized by legislation are limited only by the imagination, there are at least five features of any law of war court that are necessary for success.

Specialized Court. First, it is critical to have a specialized law of war court. As I will explain, war crimes court procedures need to differ in a few, significant ways from the procedures that have grown up around our domestic criminal courts, including courts-martial. Because of these differences, it would be inappropriate to shoe-horn war crimes trials into domestic criminal courts. The ingrained habits of the domestic criminal courts would have a natural tendency to work against the unique features that war crimes prosecutions in the war with al Qaeda require. Conversely, there could be a tendency for specialized procedures adapted to war crimes prosecutions to be adopted inappropriately in domestic criminal proceedings. Also, there is a long history in this country of creating specialized courts that are adapted to the subject matter of the cases they will hear. Among others, we have specialized courts for bankruptcy, courts for government contracts disputes, courts for family issues, traffic courts, and small claims courts. Creating a specialized court for violations of the law of war is consistent with this history. Indeed, war crimes have always been prosecuted in the United States in specialized courts, not in courts of general criminal jurisdiction.

While trying war crimes by court-martial may have some surface appeal, there are significant problems with this approach. The Hamdan Court itself acknowledged that the court-martial system and military commissions have significantly different functions. The court-martial has been designed to protect United States armed forces personnel in their trials for ordinary offenses, where the success of any particular prosecution is not likely to be tied to the future safety of our country. Also, the use of courts-martial would require drastic modifications. The Uniform Code of Military Justice ("UCMJ") does not contain definitions of war crimes or their elements. The UCMJ requires that courts-martial be convened by the accused's chain of command, which is not applicable for al Qaeda members. And the UCMJ requires that courts-martial panels be drawn from personnel in the service member's unit, which again is not applicable for al Qaeda members. Moreover, it could be much more difficult to try war crimes in courts-martial than even in federal courts. Retired Major General Michael Nardotti, former Judge Advocate Judge General of the Army, in his December 2001 testimony before the Subcommittee on Administrative Oversight and the Courts of this Committee, discussed some of the hurdles that may bar effective prosecutions in courts-martial, exceeding even the requirements of federal district courts. A defendant under the UCMJ must be given "police warnings" when he is suspected, not merely when he is in custody, a requirement that goes even beyond the Supreme Court's Miranda decision. There are stricter speedy trial requirements and broader pre-trial access to evidence than in the federal criminal code. And there is a right to participate in the pre-trial investigation and charging process.

I would add that there is a restrictive bar to hearsay evidence in courts-martial. And there is no ability to limit access by an alleged al Qaeda defendant to classified information concerning the sources and methods used in acquiring evidence against him. Modifying our highly refined court-martial system to work in the context of war crimes trials would thus be quite complex and could have many unintended consequences.

Military Court. Second, the law of war court should be a function of the armed forces of the United States. The military has the subject matter expertise in the law of war to carry out this function. It has custody of the detainees who would be prosecuted and the resources to protect the security of the proceedings. Also, looking to history, the military has always been the arm of government that has carried out our war crimes prosecutions in the past.
Inclusive Rules of Evidence. Third, the law of war court needs to have broadly inclusive rules of evidence that permit a wide variety of information to be heard by the factfinder, whose job it is to then weigh the evidence according to its credibility. The evidence that the government has available to it in the war with al Qaeda is not always going to have the indicia of reliability that we would expect in our domestic criminal court proceedings. For example, the evidence may be hearsay, it may not have been held in a clear chain of custody, it may include custodial statements from individuals who were not given Miranda warnings, and some of the individuals who gave statements may not be available. The admissibility of a broader range of evidence has been accepted in the international war crimes courts, such as the International Criminal Tribunal for the former Yugoslavia, as well as in civil law countries. I do not, however, suggest that the crucial question of the "sufficiency" of evidence for a conviction should ever be altered. We could not and should not alter the requirement of "proof beyond a reasonable doubt." But admitting a broader range of evidence, for careful consideration by the factfinder, does not change either of these guarantees of an accurate verdict.
Some may argue that this broader range of evidence should not be admitted. Yet rigid application of evidentiary rules that have been developed for prosecuting domestic crimes would foreclose most if not all war crimes prosecutions in the war with al Qaeda. This is a case where the perfect is the enemy of the good. Surely it is better to have some war crimes prosecutions, and the justice that it would bring to both the accused and the people of the United States, than simply to detain all enemy combatants for the duration of the conflict.

Protection of Classified Information. Fourth, it is crucial to have enhanced provisions for the protection of classified information. A defendant's cleared counsel should be given access to all information pertinent to the trial. But there may be some rare but important instances where the defendant cannot be given personal access, because it might put in jeopardy another person's life, or shut down crucial methods of monitoring al Qaeda's ongoing offensive operations. The exclusion of the detainee (but not the detainee's cleared counsel) from access to selected portions of information would be permitted only where the presiding officer rules that this is both necessary and consistent with a full and fair trial.

Unlike most prior war crimes trials, which took place after the conflict ended, the war crimes prosecutions under discussion may take place while the war with al Qaeda continues. This involves not a nation-state but a furtive organization that has few if any fixed bases or other physical assets. Information we are able to obtain about al Qaeda is thus a principal weapon in

the war and typically must be kept classified to have value. Because of its ubiquity, classified information is likely to come into play in any war crimes prosecution. There is also the problem of "greymail." Even if the prosecution brings a case based only on unclassified information, the accused may well attempt to gain access to highly sensitive classified information by calling witnesses or seeking documents in an attempt to derail the prosecution.

Exposing such information to an accused al Qaeda member in the course of a war crimes prosecution, even in a closed proceeding, would present great risks to the national security. The accused, unlike his counsel, would have little motivation to keep such information secret after the proceedings. It is no answer to say that the accused could be subject to post-conviction communications monitoring. First, the accused may not be convicted, for any number of reasons. Second, we would not want to have to keep a convicted detainee in complete isolation. Third, communications monitoring may not be effective, as we have seen in the case of attorney Lynne Stewart, who was convicted of helping the jailed terrorist known as the blind Sheikh pass information to his followers. Detainees may attempt to misuse the attorney-client privilege to defeat monitoring, both pre-and post-conviction, as we have seen in the recently reported efforts by detainees at Guantanamo Bay to label information as attorney-client privileged in order to pass sensitive information to each other.
Some will argue that it is impossible to have a perfect trial unless the accused personally has access to all evidence, including classified information. But the accused's cleared counsel would have access to all information presented at trial. If there is a problem in preparing for cross-examination, counsel can inform the presiding judge. The presiding judge would have to assess whether a full and fair trial is possible, in light of the nature of the particular evidence presented at a particular trial. Certainly, as we have seen over the last several years of litigation in federal court, the Judge Advocates General have a tradition of fiercely independent judgment. Sitting as judges presiding over a trial, they will exercise the same tradition of integrity.

The Nuremberg Tribunal permitted trials in absentia, and most courts permit defendants to be removed for misconduct (witness the number of times Zacarias Moussaoui was removed from his trial). Again, the perfect is the enemy of the good, and broad access by the accused to classified information is likely to prevent many war crimes prosecutions even from being brought, because of the security risks involved. Is it better to have fewer, if any, war crimes prosecutions and the same procedures for access to information that we are accustomed to in our domestic criminal courts, or is it better to have more war crimes prosecutions along with have specialized procedures that take into account the nature of the war with al Qaeda, the crimes committed, and the available evidence? I would argue the latter.

Cleared, Mandatory Counsel. Fifth, consistent with the need to limit access to classified information is the need for the procedures to specify that the accused be represented by counsel who can be cleared to the highest level of classified information presented at trial. The accused should not have the right to self-representation. War crimes trials will involve a complicated military justice procedural environment, and it will be difficult to guarantee a full and fair trial without counsel. In addition, self-representation would defeat protections for classified information.

To summarize, an effective war crimes court in the war with al Qaeda should have at least the following five qualities:

1. it should be a specialized court, distinct from other courts;
2. it should be a military court;
3. it should have broadly inclusive evidentiary rules;
4. it should have special procedures for the protection of classified information; and
5. it should require that the accused be represented by cleared defense counsel.

IV. Legislative Recommendations

We are obviously not writing on a blank slate, and there is an existing forum that has all of the above qualities - the military commissions that were established prior to the Supreme Court's ruling in Hamdan. The President's Military Order, Military Commission Order No. 1, and the implementing Military Commission Instructions set up a comprehensive system for the conduct of military commission proceedings, from the definition of crimes to the processing of appeals. They already take into account the practical issues that Justice Kennedy emphasized in his partial concurrence. The Department of Defense has spent nearly five years creating and refining the system.

The Congress may of course modify through legislation any particulars of the existing military commission process. It may be advisable to revisit certain structural issues, such as the appointment of military judges and the appellate process, to address concerns about independence. It will be critical for any new legislation to clarify the Detainee Treatment Act to prevent premature habeas petitions and to include a requirement for detainees to exhaust their remedies within DoD before seeking habeas relief. Given the Supreme Court's desire for unequivocal legislative statements in this area, I would recommend specific statutory authorization for the crimes and elements to be tried by military commission, perhaps by codifying Military Commission Instruction No. 2, "Crimes and Elements for Trials by Military Commission." Among other things, a statutory imprimatur would address the authority of military commissions to try conspiracy. As part of any codification of military commission procedures, I recommend modifying Article 21 and Article 36 of the UCMJ to make clear that the military commission procedures established by Congress are not subject to challenge on the grounds that they differ from procedures that may be required for courts-martial or that they are allegedly inconsistent with the laws of war. Congress should also consider addressing the procedures by which unprivileged belligerents are held in long-term detention, perhaps by codifying, with any necessary modifications, the Combatant Status Review Tribunal and Administrative Review Board processes at Guantanamo Bay.

In fact, the "Unprivileged Combatant Act," introduced by the Chairman on June 29 and referred to the Senate Armed Services Committee, contains almost all of the five key war crimes court features I have discussed. It provides statutory authorization for the Department of Defense to conduct military commissions; it contains a broadly inclusive evidentiary standard; it restricts the dissemination of classified information to individuals with clearances; and it mandates clearances for defense counsel (but does not expressly require defense counsel). Among other things, it also requires that military judges preside over military commissions, provides for appellate review by the United States Court of Appeals for the Armed Forces, and codifies the Military Commission Instruction on the elements of war crimes. While the legislation may need some adjustments -

including to take into account the specific holdings of Hamdan and to refine the procedures for long-term detention of enemy combatants - I believe it is an excellent first step towards a legislative response to Hamdan.

V. Conclusion

The Supreme Court's decision in Hamdan gives the Congress and the Executive Branch the opportunity to work together to create a more solid legislative basis for war crimes trials in the war with al Qaeda. Critical aspects of any war crimes trial procedure include a specialized, military court; broad admissibility of evidence; strengthened protection for classified information used in trials; and mandatory, cleared counsel for defendants. The existing military commission system, with appropriate modifications by Congress, is ideally suited to trying law of war violations in the war with al Qaeda. There is no reason to start from scratch and throw the baby out with the bath water.

Mr. Chairman and Members of the Committee, I would be delighted to answer your questions.