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The Honorable Arlen Specter
Chairman, United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: *Hamdan v. Rumsfeld*: Establishing a Constitutional Process

Dear Senator Specter:

Thank you again for the opportunity to testify before the Committee on July 11 regarding the very important issues confronting Congress in the wake of *Hamdan v. Rumsfeld*. My responses to your written questions are set forth below.

1. If Congress wanted to ratify the Administration's position that "conspiracy" is in fact a crime of war for which detainees can be tried and convicted, do you believe the Supreme Court would uphold such legislation?

In *Hamdan*, Justice Stevens—speaking only for himself and three other Justices—suggested that the crime of conspiracy cannot lawfully be tried before a military commission because, in his estimation, conspiracy is not a violation of the common law of war. Because this portion of Justice Stevens's opinion did not command a majority of the Court, it is not binding on the President or Congress. Moreover, even if Justice Stevens's opinion were binding, Congress has the constitutional authority to "define and punish . . . Offences against the Law of Nations," U.S. Const. art. I, § 8, and may rely upon this authority to designate conspiracy a war crime subject to trial before a military commission. Indeed, Justice Stevens repeatedly emphasized that Congress had not explicitly endorsed the Executive's decision to try conspiracy as a war crime and that his conclusion that conspiracy cannot be tried before a military commission was premised solely on the contours of the common law of war. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. __ (2006) (slip op. at 34 n.30). If Congress were to designate conspiracy a war crime for which detainees can be tried and convicted, it is likely that the Supreme Court would uphold that determination as a valid exercise of Congress's constitutional prerogatives.

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2. 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 President's inherent Commander-in-Chief powers were not at issue in *Hamdan*. The Court concluded that the President's military commissions were inconsistent with the restrictions imposed by Congress in the Uniform Code of Military Justice. The Court did not pass on the merits of the argument that, notwithstanding such congressional limitations, the President retains the inherent constitutional authority to operate military commissions. *Hamdan*, 548 U.S. at _ (slip op. at 29 n.23). The Court has therefore not addressed the scope of the President's inherent power as Commander-in-Chief to take measures to protect Americans against al Qaeda and other international terrorist organizations. The Framers imbued the President with broad constitutional authority to act swiftly and decisively to defend the Nation against military threats. *See, e.g., The Federalist No. 70*, at 471 (Alexander Hamilton) (J. Cooke ed., 1961); *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850) (the President has the authority to "employ [the Nation's Armed Forces] in the manner he may deem most effectual to harass and conquer and subdue the enemy"). This authority is undiminished by *Hamdan*.

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?

I submit that this question is more appropriately addressed by the Administration. However, I believe that it is of paramount importance that Congress preserve the President's discretion to utilize those military commission procedures that he determines, in his capacity as Commander-in-Chief, to be the most effective means of trying members of al Qaeda and other international terrorist organizations. If Congress were to prescribe specific commission procedures from which the President may not deviate, the President would be unable to react with the requisite vigor and dispatch to the rapidly changing conditions of the Nation's conflict with stateless terrorists. At a minimum, then, I would recommend that Congress endorse the existing military commission structure, based on two centuries of experience and evolution, as embodied in the President's Military Order of November 13, 2001 (which would bring the commissions into compliance with the Uniform Code of Military Justice), and confirm the President's determination that the Geneva Conventions do not apply to conflicts with stateless terrorist organizations.

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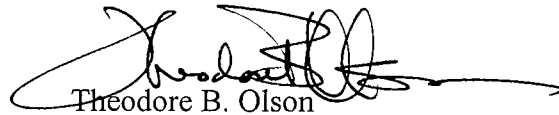
4. How many detainees held at Guantanamo and marked for trial by military commission have been charged with conspiracy? Can you provide us with a complete list of the charges against those detainees?

I do not have access to the information necessary to answer this question.

* * *

I hope that these responses will be helpful to the Committee as it crafts a legislative response to the *Hamdan* decision. Please do not hesitate to contact me if I can provide the Committee with any additional assistance.

Very Truly Yours,



Theodore B. Olson

TBO/hv