

Testimony of
Major General Scott C. Black

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RECORD VERSION
STATEMENT BY

MAJOR GENERAL SCOTT C. BLACK

BEFORE THE

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Thank you Mr. Chairman, Ranking Member Leahy, and members of the committee. I would like to thank you for this opportunity to appear before you today and for the committee's timely and thoughtful consideration of these significant issues.

As you know, Soldier-lawyers in The Judge Advocate General's Corps have practical experience and expertise in the law of war. For the most part, our involvement in this area is focused on helping commanders ensure that US military operations adhere to the rule of law and the law of war, a standard that is typically met and, frankly, a practice that frequently separates us from our enemies. We are also integrally involved in the prosecution of Soldiers for crimes that occur in combat, although our general practice is to charge Soldiers with violations of the Uniform Code of Military Justice and not with war crimes. The Supreme Court's ruling in the Hamdan case has reinforced the importance of the rule of law and law of war, and has reinvigorated our scholarship concerning how we charge and prosecute individuals for war crimes.

In Hamdan, the Supreme Court reminds us that properly established and enabled military commissions continue to be a viable and vital forum to try those enemy combatants who violate the laws of war.

Congress may specify substantive offenses triable by military commissions in a number of different ways, including in an act relating to military commissions or by amending the War Crimes Act at 18 United States Code section 2441, or by both means. Army Judge Advocates are now involved in the process, led by the Department of Justice and with Judge Advocates of the other services, to propose to Congress the best way to enable military commissions to adjudicate the full-range of offenses that are at issue in the Global War on Terrorism. This would include conspiracy, which the Supreme Court found problematic in Hamdan. While this review and analytical process is ongoing, I believe that several points are apparent:

1. We need the help of Congress to pass additional enabling legislation, both for the military

commission forum and for the substantive offenses that may be tried by commissions.

2. The War Crimes Act should be amended. In so doing, however, our goal should be to elevate the Act from an aspiration to an instrument. By this I mean that the Act should not simply be a statement of legal policy in furtherance of the ideals of the law of war, but should be a statute defining serious and prosecutable criminal offenses.

3. Whatever is criminalized in the War Crimes Act must withstand the test of fairness as well as the scrutiny of law. Since it is a criminal statute, it must be clear and it must proscribe clearly criminal conduct. There cannot be two standards: if we are to hold enemy combatants to the War Crimes Act, we must be prepared to hold US personnel to the Act.

In conclusion, I believe that, with the help of Congress, we will have a forum and the necessary offenses that enable the nation to have a pragmatic, lawful, and effective instrument for maintaining order and the rule of law on the battlefield.