

Testimony of
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STATEMENT OF
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BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
CONCERNING
PROSECUTIONS OF WAR CRIMES FOLLOWING HAMDAN v. RUMSFELD
AUGUST 2, 2006

Thank you, Mr. Chairman, Senator Leahy, and Members of the Committee.
I appreciate the opportunity to appear here today on behalf of the Department of Justice to discuss the question of war crimes prosecutions in the wake of the Supreme Court's decision in Hamdan v. Rumsfeld.

The Administration believes that Congress needs to enact legislation in light of the Supreme Court's ruling in Hamdan that Common Article 3 of the Geneva Conventions applies to our armed conflict with al Qaeda. The United States has never before applied Common Article 3 in the context of an armed conflict with international terrorists, yet because of the Court's decision in Hamdan, we are now faced with the task of determining the best way to do just that.

If left undefined by statute, the application of Common Article 3 will create an unacceptable degree of uncertainty for those who fight to defend us from terrorist attack.

Although many of the provisions of Common Article 3 prohibit actions that are universally condemned, such as "murder," "mutilation," "torture," and the "taking of hostages," it is undeniable that some of the terms in Common Article 3 are inherently vague. For example, Common Article 3 prohibits "[o]utrages upon personal dignity, in particular, humiliating and degrading treatment," a phrase that is susceptible of uncertain and unpredictable application.

Furthermore, the Supreme Court has said that in interpreting a treaty provision such as Common Article 3, the meaning given to the treaty language by international tribunals must be accorded "respectful consideration," and the interpretations adopted by other state parties to the treaty are due "considerable weight." Accordingly, the meaning of Common Article 3--the baseline

standard that now applies to the conduct of U.S. personnel in the War on Terror--would be informed by the evolving interpretations of tribunals and governments outside the United States.

We believe that the standards governing the treatment of detainees by United States personnel in the War on Terror should be certain, and that those standards should be defined clearly by U.S. law, consistent with our international obligations.

Congress can help by defining our obligations under those portions of Common Article 3 that govern the treatment of detainees by reference to the U.S. constitutional standard already adopted by Congress in the McCain Amendment, which we believe to be a reasonable interpretation of the relevant provisions of Common Article 3.

Last year, after a significant public debate on the standard that should govern the treatment of captured al Qaeda terrorists, Congress adopted the McCain Amendment, part of the Detainee Treatment Act. That Amendment prohibits "cruel, inhuman, or degrading treatment or punishment," as defined by reference to the established meaning of our Constitution, for all detainees held by the United States, regardless of nationality or geographic location. Congress rightly assumed that the enactment of the Detainee Treatment Act settled questions about the baseline standard that would govern the treatment of detainees by the United States in the War on Terror. We view the standard established by the McCain Amendment as entirely consistent with, and a useful clarification of, our obligations under the relevant provisions of Common Article 3.

Defining the terms in Common Article 3, however, is not only relevant in light of our treaty obligations, but is also important because the War Crimes Act, 18 U.S.C. § 2441, makes any violation of Common Article 3 a felony offense.

The Administration believes that we owe it to those called upon to handle detainees in the War on Terror to ensure that any legislation addressing the Common Article 3 issues created by the Hamdan decision will bring clarity and certainty to the War Crimes Act. The surest way to achieve that clarity and certainty, in our view, is for Congress to set forth a definite and clear list of offenses serious enough to be considered "war crimes," punishable as violations of Common Article 3 under 18 U.S.C. § 2441.

The difficult issues raised by the Court's pronouncement on Common Article 3 are ones that the political Branches need to consider carefully as they chart a way forward after Hamdan.

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I understand the Committee is also interested in the question whether conspiracy to commit a violation of the laws of war may be charged as an offense under the laws of war and tried before a military commission. We believe that it may.

On this point, Mr. Chairman, we believe that Justice Thomas in his dissenting opinion in Hamdan was correct in his analysis, and that the plurality's view on this question is not sustainable. As Justice Thomas showed, the historical and international precedents and authorities clearly support the conclusion that conspiracy to commit a war crime has long been recognized as a separate offense in violation of the laws of war that is triable by military commission.

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I look forward to discussing these subjects with the Committee this morning.

Thank you, Mr. Chairman.

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