

Testimony of
Rear Admiral Bruce MacDonald

August 2, 2006

STATEMENT OF
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JUDGE ADVOCATE GENERAL
BEFORE THE
SENATE JUDICIARY COMMITTEE
2 AUGUST 2006

Chairman Specter, Senator Leahy, members of the Committee, good morning. Thank you for the opportunity to testify today on the subject of prosecution of terrorists under the war crimes provisions of Title 18.

Title 18, section 2441, the War Crimes Act, was enacted in large part to carry out the international obligations of the United States under the Geneva Conventions to provide criminal penalties for certain war crimes. The WCA goes beyond what is necessary to implement our obligations under the GCs. The ability of the United States to successfully prosecute terrorists in the War on Terror under the War Crimes Act will depend on whether the crime is covered substantively under the Act and whether such prosecution is practicable under our federal criminal system given the unique circumstances of these prosecutions.

Substantively, the Act criminalizes four categories of conduct, committed here or abroad, as war crimes: Grave breaches of the four Geneva Conventions; violations of Articles 23, 25, 27, or 28 of the Hague Convention IV, Respecting the Law and Customs of War on Land; violations of Common Article 3 to the Geneva Conventions; and violations of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II).

This extensive list of offenses would cover nearly every act a terrorist could commit from the willful murder of civilians, to hostage taking, to employing poison or poison weapons. Although many of the provisions of those treaties, including Common Article 3, are actions easily understandable and universally condemned, Common Article 3's prohibition upon "outrages upon personal dignity" is not well defined. The ability of the United States to prosecute an offense based upon an alleged outrage upon personal dignity will depend upon whether Congress provides definition and certainty to the meaning of that term.

The Supreme Court in Hamdan accepted the President's determination that it would be impracticable to prosecute members of al Qaida captured on the battlefield in U.S. federal court for their war crimes. It is my understanding that the Executive Branch has resolved to work with Congress to fashion a new Military Commission system that will comply with the holding in Hamdan. I look forward to discussing these subjects with the Committee this morning.