

Testimony of  
**Brigadier General Kevin M. Sandkuhler**

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STATEMENT OF  
BRIGADIER GENERAL KEVIN M. SANDKUHLER  
STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE MARINE CORPS  
BEFORE THE  
SENATE JUDICIARY COMMITTEE  
2 AUGUST

Chairman Specter, Senator Leahy, members of the Judiciary Committee, good morning. I wish to thank you for the opportunity to appear before you today, and for this committee's interest in this critical issue.

As does this committee, we remain keenly interested in continuing to fulfill our international obligations under the Geneva Conventions, as well as ensuring that we are able to effectively and efficiently bring terrorists to justice. A plurality of the Supreme Court concluded in the Hamdan decision that conspiracy was not triable by a law-of-war military commission, in part because it was not positively identified by statute as a war crime. How best to bring terrorists to justice following the Hamdan decision is a matter worthy of careful consideration.

The War Crimes Act of 1996 was enacted to carry out the international obligations of the United States under the Geneva Conventions to provide criminal penalties for certain war crimes. Until its enactment, the United States had never taken affirmative steps to legislate the penal provision of the Geneva Conventions; the War Crimes Act of 1996 accomplished these ends. The Act was not intended to affect in any way the jurisdiction of any court-martial, military commission, or other military tribunal under any article of the Uniform Code of Military Justice, the law of war, or the law of nations. Substantively, the Act criminalizes four categories of conduct, committed here or abroad, as war crimes: grave breaches of any of the international conventions signed at Geneva on 12 August 1949, or any protocol to such convention to which the United States is a party; violations of Articles 23, 25, 27, or 28 of the Annex to 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). The ability of the United States to prosecute terrorists under the War Crimes Act will be driven by whether the crime is covered substantively under the Act, but more importantly by whether prosecution is practicable under our federal criminal system.

Procedurally, prosecuting terrorists under Title 18 in Article III federal courts would present many of the same difficulties that we have been addressing in our military commissions process, including the relation between the national security and, for examples, discovery rights of the accused, access to classified information, and self-incrimination. Striking the balance between

individual due process and our national security interests, while maintaining our service members' flexibility in dealing with terrorists and unlawful enemy combatants they encounter on the battlefield is the end we all seek.

With that as a backdrop, I look forward to discussing these issues with the Committee.