

**Senate Armed Services Committee
Questions for the Record
Hearing on 7/19/06, #06-59**

“To continue to receive testimony on military commissions in light of the Supreme Court decision in Hamdan v. Rumsfeld”

**Witnesses: Massimino, Newell Bierman, Fidell, Mernin, Carafano, Katyal,
Schleuter, and Silliman**

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Chairman John Warner

Appellate Procedure

- 1. Mr. Fidell, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, in your opinion, does the appellate procedure set out in the Detainee Treatment Act for final decisions of military commissions (i.e., a limited scope of review in the District of Columbia Circuit) comply with the requirements of Common Article 3 relating to "judicial guarantees?"**

No. Section 1005(e) of the Detainee Treatment Act (DTA), under the interpretation given to the Act by the government, turns the traditional concept of a fair trial on its head. It postpones constitutional review of trial procedures until after trial and conviction have occurred. The government has claimed that “review after military justice verdicts is the norm, not before the verdict.” But as the Supreme Court said in *Hamdan*, that principle derives from *courts-martial* – a battle-tested system with independence and a tradition. Here, when dealing with the civil courts, the tradition has always been to review military commissions up front, as in *Ex Parte Quirin* (1942) and *Hamdan* itself.

The DTA system is problematic for four reasons. First, review is only granted automatically to those defendants who are imprisoned for longer than 10 years or who face the death penalty. § 1005(e)(3). Because many of the individuals currently detained are accused only of conspiracy, the DTA cuts off automatic review in most cases that could possibly be brought to trial. For these individuals, appellate review is granted only at the discretion of the court of appeals. Without an avenue for appeal before or during the trial, these prisoners would face a court with unfettered discretion.

Second, even in those cases where judicial review is possible, the DTA creates the possibility of an unnecessarily long trial process. Under the DTA, the first trial must proceed to completion and result in a final decision. In the nearly five years since the tribunals were established, not a single trial has even commenced. Moreover, even if a trial were to proceed in full, its result would only be final upon the President’s determination to that effect. See Commission Order No. 1 §6(H)(6). In effect, the DTA puts judicial review at the mercy of prosecutors and the President. Then, after the final decision, after review in the D.C. Circuit Court of Appeals, and presumably after review in the Supreme Court, a decision overturning the verdict would result in yet another trial.

Prosecutors would have to scramble to retry these defendants 8-10 years after their capture. Reducing the scope of judicial review to final decisions only subjects both the defendants and prosecutors to excessive delays, high costs, and a potentially interminable trial process. Basic standards of criminal procedure, as well as administrative efficiency, require that trial procedures, writ large, be constitutional the first time around.

Third, the limited scope of review in the D.C. Circuit also threatens basic fair trial rights. As Justice Kennedy notes in his concurrence, “provisions for review of legal issues after trial cannot correct for structural defects . . . that can cast doubt on the factfinding process and the presiding judge’s exercise of discretion during trial.” *Hamdan v. Rumsfeld*, 26 S. Ct. 2749, 2807 (2006) (Kennedy, J. concurring). Moreover, if the military trial system is struck down or modified by the courts after conviction, individuals would face retrial after having previewed their defense for the prosecution. The administration has already afforded itself a lopsided advantage in preparing evidence for the trials of suspected terrorists, with limited rules for disclosure and review. A system where defects are remedied only by retrial exacerbates the asymmetry.

Fourth, the DTA cuts out the most relevant military court -- the United States Court of Appeals for the Armed Forces (CAAF). In 1975, the Supreme Court in the *Councilman* decision looked to this court as providing a crucial degree of independence from the Executive in the military justice system. It is a court that is the envy of the world, with specialized expertise in military matters. Given the fact that the Administration is saying that the civilian justice system is not appropriate to try suspected terrorists, one would think that the existing military appellate court, the CAAF, is far better suited to hear these cases than the civilian U.S. Court of Appeals for the District of Columbia Circuit. Decisions from this regular military appellate court may also be subject to more deference in the Supreme Court than the D.C. Circuit.

2. Mr. Fidell, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, what changes in appellate procedure, if any, would you recommend?

As I testified before the committee, the single most important decision Congress must make if they adopt military-commission legislation is to craft an “anti-abstention provision.” This would create an expedited review process, modeled on by the Bipartisan Campaign Finance Reform Act (McCain-Feingold), and would protect the rights of both sides in what is likely to be an unprecedented new trial system. Challenges would go first to a three-judge district court, with immediate certiorari in the Supreme Court. Federal courts must play their role at the outset in order to avoid the trauma to the nation of potentially having convicted terrorists set free, and to protect the minimal trial rights of defendants consistent with constitutional and treaty-based obligations. See my prepared testimony at the July 19 hearing (hereinafter “SASC Testimony”) at pp. 13-14.

War Crimes Statute

3. Mr. Katyal, Mr. Schleuter, and Mr. Silliman, in light of the Court's Common Article 3 holding, does Congress need to amend the War Crimes Statute (18 U.S.C. 2441) to ensure military interrogators are protected from criminal

liability as they perform their duties?

A statute that would grant immunity for violations of Common Article 3 would be a gross violation of our treaty obligations, as well as customary international law. Although Congress has the power to make such an amendment, it would come at great political cost and would not protect military interrogators from prosecution abroad. Under the principle of "universality," courts abroad may exert jurisdiction over any defendant charged with war crimes that they are able to take into custody. In addition to foreign national courts, the founding charters of numerous international tribunals, including the International Criminal Court, expressly recognize violations of Common Article 3 as war crimes.

Before accepting any claim that the Executive Branch "needs" a "fix" to either the War Crimes Act or Common Article 3, Congress should understand what the Executive's implementing rules are with respect to these laws. For example, the Executive Branch has the power under Article 2 of the Constitution to "take care" that the laws are faithfully executed -- which means that it wields the prosecution power. I would imagine that this power would fairly include the ability to *decline* to prosecute any and all War Crimes Act violations in a given category of cases. If so, it is not clear what purpose, if any, would be served by legislating an exemption or clarification of the existing Act. I believe that it is absolutely essential that Congress inquire as to whether the Administration believes that its Article 2 prosecution power gives it the ability to decline to prosecute cases prior to government activity that might otherwise violate the statute. I also think it imperative that the Committee ask the Executive for any and all memoranda of understanding or other agreements, both formal and informal, between the Department of Justice and other government agencies with respect to prosecution under the War Crimes Act and violations of the Geneva Conventions. If such documents or agreements exist, they will be the most useful materials in deciding whether any legislation in this area is necessary or appropriate.

Geneva Conventions

4. Mr. Katyal, Mr. Schleuter, and Mr. Silliman, in your opinion, do the 1949 Geneva Conventions represent the present state of customary international law with respect to armed conflict?

Yes. Both Congress and the Supreme Court, most recently in *Hamdi v. Rumsfeld*, have recognized the Geneva Conventions as a codification of the law of war. *See* 18 U.S.C. § 2441(c)(1) (2003) (defining violations of the law of war as breaches of the Hague or Geneva Conventions); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2641 (2004). Congress also considers Common Article 3 an essential element of the law of war, as reflected in the War Crimes Act.

5. Mr. Katyal, Mr. Schleuter, and Mr. Silliman, has additional Protocol I of 1977, which the United States refused to ratify, become part of customary international law?

Yes. The United States Government has adhered to the view that Protocol I constitutes customary international law. *See, e.g.*, Brief of Retired Generals and Admirals in Support of Petitioner, *Hamdan v. Rumsfeld*, at 20. In *Hamdan*, the plurality stated that the term “regularly constituted court” must be understood to incorporate at a minimum the trial protections recognized by customary international law as embodied in Article 75 of Protocol I. *See* 126 S.Ct. at 2797. Several court decisions have held that violations of Protocol I are violations of Common Article 3. *See Kadic v. Karadzic*, 70 F.3d 232, 242-43 (2d Cir. 1995); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1351 (N.D. Ga. 2002).

Classified Information

6. Mr. Fidell, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, the present military commission rules allow the appointing authority of the presiding officer of a commission to exclude the accused and his civilian counsel from access to evidence during proceeding that these officials decide to close to protect classified information or for other named reasons. In your opinion, can a process that passes constitutional and statutory muster be constructed without giving the accused and counsel possessing the necessary clearances access to such material in some form?

The court-martial process provides a clear model of how such a system would – and does – operate. If the accused at any stage of a military trial seeks classified information, the government may ask for an *in camera* (closed) proceeding to discuss the use of the information in trial. Mil. R. Evid. 505(i). During this session, the military judge hears arguments from both sides on whether disclosure “reasonably could be expected” to harm national security prior to the accused or his lawyer being made privy to the classified information. Only “relevant and necessary” classified information to the prosecution’s or accused’s case can be made available. Mil. Rule Evid. 505(i).

Moreover, the military rules of evidence provide alternatives to disclosure of classified information, which include: redaction of the classified information; substitution of an unclassified description or summary of the classified information; substitution of a statement admitting the relevant facts the classified information would tend to prove; or full withholding of disclosure. Mil. R. Evid. 505(d), (g). Courts-martial also grant broad privileges for withholding information when it is “detrimental to the public interest.” Mil. R. Evid. 506(a). My testimony addresses these and similar issues at great length, *see* pp. 7-11.

The one thing that federal courts have not accepted, as Senator Lindsey Graham has recently stated, is the exclusion of the defendant from his own criminal trial when he

is not being disruptive. I was only able to find one example in American history when a defendant was excluded from a military commission in 1865, and that conviction was reversed by the Judge Advocate General.

Common Article 3

7. **Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, in your opinion, does the statutory prohibition on cruel, inhumane, and degrading treatment or punishment enacted last year constitute sufficient legal guidance to ensure compliance with Common Article 3?**

Standing alone, the prohibition enacted by Congress last year, the "McCain Amendment," does not provide sufficient legal guidance. It has at its core a subjective test – the “shocks the conscience” standard for constitutional due process – that is vague and highly case specific. What gives that law practical content is the principle that its text must be read and enforced in a manner consistent with our international obligations, as Acting Assistant Attorney General Stephen Bradbury acknowledged in his testimony. See http://judiciary.senate.gov/testimony.cfm?id=757&wit_id=5505. Its provisions must prohibit, therefore, all conduct that would be prohibited under Common Article 3. While soldiers and military officers are quite familiar with these international standards, the administration, for its part, has protested that they are unclear and appears to have pursued policies that violate the Geneva Conventions, even if they do not directly violate the McCain Amendment’s narrower prohibition. In this sense, then, the McCain Amendment has not provided clear legal guidance on compliance with Common Article 3. Now that the *Hamdan* decision has clarified that Common Article 3 applies to all conflicts, government actors cannot hide behind the literal language of the McCain Amendment to immunize actions that violate the treaty. The military has developed its own system of guidelines and procedures evincing a comprehension and acceptance of the Geneva Conventions. In fact, each Judge Advocate General testified before this Committee that our troops train to these standards and that the *Hamdan* decision imposes no new requirements upon them. There is no reason to think that, now aware that the Article applies, other government actors could not do the same.

8. **Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, would compliance with that statute constitute compliance with Common Article 3?**

No. The McCain Amendment’s literal prohibition is significantly narrower than that of Common Article 3. The standard it applies is that of the federal constitution’s ban on cruel and unusual punishment. The test is whether the conduct “shocks the

conscience.” As this standard has been applied, the reasons for the conduct are relevant to the determination of its legality. A finding of some particularly heightened security need, for example, could justify otherwise “conscience-shocking” treatment of prisoners.

By contrast, Common Article 3 also prohibits conduct constituting “outrages upon personal dignity, in particular humiliating and degrading treatment.” It does not require any physical harm and does not balance the severity of the conduct against its rationale.

It’s easy to see where these two standards would diverge. Imagine the CIA has been “water-boarding” a suspected Al Qaeda operative. Under the McCain Amendment’s standard, such a practice may well be legal. It might be justified by the exigency of the situation, by the rank of the prisoner, or by his access to information. Moreover, this conduct may not count as “torture” under other domestic statutes if it does not cause prolonged physical suffering. Under Common Article 3, however, such a practice may well qualify as the kind of “outrage[] on personal dignity” that is prohibited in all situations.

Compliance with the McCain Amendment will only constitute compliance with Common Article 3 if the constitutional standard is understood to be identical to that of the treaty.

To the extent any legislation that abrogates our Geneva Convention obligations is being contemplated, it deserves the most careful and informed attention by Congress, following the submission of enough intelligence information to make sure that such a step is absolutely necessary. It must take place only after a sober and careful analysis, and not be the product of a rush to legislate.

Senator John McCain

Common Article 3

9. **Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, the Supreme Court found that Geneva Common Article 3, which bars cruel and humiliating treatment, including outrages upon personal dignity, applies to al-Qaeda. In response, some have argued that the terms included in Common Article 3 are vague and undefined in law of war doctrine. In Tuesday's Senate Judiciary Committee hearing, for example, the head of the Department of Justice's Office of Legal Counsel said that some of the terms are "inherently vague." Is this your understanding?**

The "vagueness" of Common Article 3 has never, until now, impeded American military operations. It has never even been raised as an issue, even though American interrogators and soldiers have been subject to its requirements under the War Crimes Act since that law was passed almost nine years ago. For decades the military has trained its soldiers to comply with a standard that goes well beyond what the Geneva Conventions, including Common Article 3, require. Further, the government has itself asserted that the Department of Defense has heretofore been in full compliance with the Geneva Conventions in its conduct of the Global War on Terror. By the Administration's own admission, the military has always known how to comply -- rendering their claim of vagueness nonsensical.

In reality, the vagueness argument is simply another step in an elaborate dance to protect non-complying parties from prosecution. If the United States wants to insulate such conduct, we should do so only after carefully assessing the costs to the international reputation of the United States and the impact of such a decision on our troops. Please also see my answer to Question 8, above.

10. **Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, is there a body of opinion that defines Common Article 3?**

The requirements and purposes of Common Article 3 have been taken up by U.S. domestic courts in the context of civil litigation under the Alien Tort Statute and the Torture Victims Protection Act (TVPA), international criminal tribunals, and commentators, particularly the International Committee of the Red Cross. Most notably, the Second Circuit Court of Appeals applied the law of Common Article 3 in *Kadic v. Karadzic*, 70 F.3d. 232 (2d Cir. 1995). The UCMJ, and interpretations of it, are also relevant to defining Common Article 3 because, as *Hamdan* reaffirms, the UCMJ codifies the laws of war. Moreover, the military's long tradition of training soldiers in the proper treatment of prisoners of war, and its longstanding regulations, should also be treated as a relevant source of interpretive guidance.

11. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, does the vagueness of these terms require a change in America’s relationship to the Geneva Conventions?

Not in the least. American officials and soldiers have long demonstrated both the capacity and the willingness to abide by the Geneva Conventions, without complaint of vagueness or insufficient guidance. Further, the military is not arguing that deviations from the Geneva Conventions are required in order to successfully prosecute the war on terror. Disrupting the existing balance of domestic statutes, international law and judicial glosses on these sources of law in *any* way that reduces or eliminates our obligations under the treaty would be a violation of international law to a degree unprecedented in America’s history. The government would forfeit America’s status as the world’s leading proponent of human rights. By even contemplating such a dramatic – and unnecessary – change, the government is in uncharted territory.

12. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, some have suggested that we put in statute that the prohibitions contained in Common Article 3 are identical to the prohibition against cruel, inhumane, and degrading treatment contained in last year’s Detainee Treatment Act. In that bill, we defined cruel, inhumane, and degrading treatment with reference to the 5th, 8th, and 14th amendments to the U.S. Constitution. Is this a good idea?

As I discussed above, the standard courts apply under those Amendments is whether the conduct in question “shocks the conscience.” This constitutional test, while certainly more familiar to the courts than any new statutory language would have been, may not transfer so cleanly into the context of an international, largely secretive operation against high-level terrorists. First, the test is subjective – the reasons motivating the conduct are relevant to determining whether the conduct is constitutional. For example, punishment grossly disproportionate to the cause of deterring or punishing crime would violate the law. However, where the prisoner is a high-level member of Al Qaeda, or has access to information, the “shocks the conscience” standard may well permit conduct that is categorically prohibited by Common Article 3. There is simply no precedent for evaluating our constitutional standard under these circumstances.

Second, because it is so subjective and case-specific, the standard in the Detainee Treatment Act will put courts in a position of making policy judgments about acts conducted on the ground by military and intelligence personnel. While the flexibility of the DTA standard gives power to the courts to use their discretion, the balancing they will be forced to do makes them more likely to abstain from judgment and allow violations of our international obligations to continue.

Third, because the Executive has asserted that those detained abroad have no constitutional rights, including under the 5th, 8th, and 14th Amendments, it is not clear that the language of the Act protects detainees held outside of the United States at all.

13. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano,

Mr. Katyal, Mr. Schleuter, and Mr. Silliman, what are the implications of our redefining Common Article 3 in this way?

First, it would immediately stop some extreme procedures – such as waterboarding. Even the CIA’s Inspector General has evidently conceded that such procedures shock the conscience.

Distressingly, however, several large loopholes will persist under the DTA’s standard. To the extent that the “shocks the conscience” test would still permit conduct that Common Article 3 would prohibit, such as the elimination of fair trial rights, the statute would violate the Geneva Conventions.

How Congress Should Proceed

- 14. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, and Mr. Schleuter, in Mr. Silliman’s prepared testimony, he stated his view that, as a matter of domestic law, Congress could restrict the application of Common Article 3, but that doing so might not pass judicial muster and would invite additional litigation and more years of legal uncertainty. Could you explain to us why the Supreme Court might not uphold such legislation as Professor Silliman suggests?**

As a matter of domestic law alone, Congress has the power to pass such a law – though at great political cost, with severe legal consequences.

Nevertheless, such legislation would violate international law that binds the United States. Any limit on the application of Common Article 3 would be a material breach of one of the United States’ most important and long-standing treaty obligations. As I discussed in my testimony at page 16, Common Article 3 is considered a “Convention in miniature” because of the fundamental principles it embodies. Violating it would be considered a material breach of the Geneva Conventions as a whole. Moreover, as I mentioned above, the 1949 Geneva Conventions codify existing customary international law. Any statute that permits the violation of Common Article 3 would be illegal under this set of core international legal norms.

- 15. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, and Mr. Schleuter, and could you also give the Committee a more detailed explanation of how such legislation would create more litigation and legal uncertainty?**

If Congress were to authorize practices that violate international and domestic standards, it would run the risk of having the legislation invalidated. Those detained or interrogated by the United States would be able to raise legal claims based, first, on the violation of international law, and second, on the basis of American constitutional protections, whose violation might be inferred from the abandonment of these long-held standards for the treatment of prisoners.

For example, imagine that Congress wrote a statute that said that the UCMJ does

not incorporate Common Article 3, and therefore allows trials without the presence of the defendant or his counsel. We would see another round of litigation challenging, first, the denial of trial rights as a matter of our treaty obligations *with or without an implementing statute*; second, the legality of a statute that implicitly repealed the treaty obligation; and third, the constitutionality of the statute under the 5th Amendment and other protections. Additionally, we could expect to see litigation in international tribunals and wrangling in the U.N. against the United States for rescinding a fundamental treaty obligation.

- 16. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman in his prepared testimony, Professor Schleuter states that “it is appropriate for Congress to map out only broad policy guidelines for implementing military commissions, and leave to the President and the Department of Defense (DOD) the task of more specifically setting out the procedures and rules to be used.” Mr. Fidell from the National Institute of Military Justice (NIMJ) seems to agree with that approach. Could the panel address why Congress should set specifically the procedures and rules to be used for military commissions?**

As Justice Kennedy’s concurrence reiterates, the President’s actions are granted the highest degree of deference when they are consistent with, and authorized by, Congress. Giving the Executive branch largely unfettered discretion in the fashioning of a new system creates a high risk that the President’s actions will create procedures and standards far below what treaties require, what the Constitution requires, and what our existing laws require. *Hamdan* makes clear that a vague grant of authority, for example, the AUMF, which could theoretically authorize all sorts of executive actions, does not necessarily immunize all actions taken, allegedly, pursuant to it. Congressional authority insulates the President’s actions from review only when it is specific, thoughtful, and the product of clear deliberation about the proper separation of power between the branches. If Congress were only to set out policy guidelines that are overbroad to the point of being meaningless, it would abdicate a critical role it plays in guaranteeing compliance with the Constitution and other laws. Moreover, Congress is fully capable of designing a fair, effective, and legal system for trying detainees on its own without deferring to the Executive branch.

Indeed, the Executive branch cannot be relied upon to craft an adequate military commission system on its own. The Executive branch has already attempted to design and implement two military commission systems – the one adopted by Military Commission Order No. 1 of March 21, 2002, and the system of August 31, 2005. Neither withstood Supreme Court scrutiny. Despite the failings of the administration’s commissions, Executive branch officials initially asked Congress to simply ratify the August 31, 2005 commission system. The Administration has since circulated a draft bill that is radically deficient in providing the necessary procedural protections to create a fair and reliable commission system.

The Administration’s track record suggests that it is unwilling or unable to produce a commission system that would have the necessary fairness to produce reliable findings entitled to domestic and international legitimacy. Congress unquestionably has the constitutional authority to design any military commission system and should

exercise such authority.

Please also see my answer to question 18 below.

- 17. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, could each of you comment on Mr. Mernin's recommendation that Congress pass legislation appointing an expert panel with the mandate of advising Congress about the best way to establish a military commission system that would respond to the Supreme Court's decision in Hamdan?**

This is an extremely important and good idea -- whether along the lines of Mr. Mernin's proposal or that of Senator Levin, who has advocated a Code Committee review under the UCMJ provision. An expert panel would be helpful for studying the problems involved in trying detainees by military commission and developing useful empirical evidence about the effectiveness and security of the different models available. Indeed, an expert panel would go a long way towards ending the mythmaking and posturing that has dominated this process from the start. The administration has offered no empirical evidence, for example, that courts-martial fail to protect both the government's interests and the constitutional and human rights of the defendants. Moreover, the administration's arguments that the hearsay and chain-of-custody evidentiary rules are burdensome are vastly overstated. See my testimony at pages 7-11.

Given the tremendous delays in getting military commissions off the ground thus far, devoting time and research to designing a viable commission system will cause no cognizable injury to our national security. There have been no military commissions in the past half-century, let alone since September 11th, and, as the Chairman eloquently pointed out, the eyes of the world are watching us. Getting it wrong again is simply too dangerous. That bell cannot be unring.

Attorney General Gonzales's Testimony on Hamdan

- 18. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, in testimony before the Senate Judiciary Committee, Attorney General Gonzales stated that the existing military commissions that were struck down by Hamdan take into account the "situational difficulties" of the war on terrorism and "thus provide a useful basis for Congress's consideration of modified procedures." Do you agree with the suggestion that the commissions should be the starting point for legislation?**

No. The flaws with the existing military commissions -- the flaws which contributed to their dismantling by the Supreme Court -- went to the core of the system itself and reeked of self-serving by the administration. The commissions were plagued by years-long delays in appointing counsel and even in charging the defendants. Further,

the commissions denied even the most basic trial rights to defendants, including the right to be present at trial and the right to question and confront the evidence presented against them. Even the military commission's own prosecutors complained that the system was unfair to defendants and designed to guarantee convictions, not fair trials. The Appointing Authority, who convened the commissions and brought the charges, was also responsible for selecting the panel determining guilt or innocence and exerted control over the prosecutor. Domestically, this is the equivalent of a judge initiating the case, picking the charges, directing the prosecution and selecting the jury. It is unclear where the Attorney General would have Congress “start” in this system, because its flaws are embedded within its very structure.

The starting point – and ending point – for any proposed authorizing legislation is the court-martial system established by the UCMJ. For reasons explored in my testimony, the court-martial system has many significant advantages over any system that could be crafted out of the existing commissions. Chief among these advantages is the tremendous respect that has been accorded to the UCMJ since the time that it was written. Countries throughout the world have emulated the U.S. court-martial system, and it continues to be a model of how to achieve justice when sensitive information and special parties are involved. The court-martial system is flexible, secure and effective. And best of all, it already exists.

19. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, why would someone suggest that the commissions and not the Uniformed Court of Military Justice (UCMJ) should be the starting point for legislation?

From the prosecutor's perspective, if Congress gives you the ability to write all the rules for trial and the ability to define the offenses and pick the judges, you are likely to be elated. It's just like appointing the fox to guard the henhouse. Trying prisoners captured in the Global War on Terror no doubt poses unique challenges. For these reasons, the Administration tends to argue that it needs a unique court system to try those captured in such unique circumstances. Nevertheless, different circumstances alone do not justify deviating from a set of laws that has been flexible enough to meet the needs of the military during a period where the nature of war, and the nature of the military, have both changed rapidly.

The UCMJ is unfamiliar to most civilian lawyers and has its own system of precedent and procedure that government lawyers would themselves have to learn. Of course, it's easy to see why the Administration would rather start from scratch and build a system where it has written all the rules and picked the judges. The Administration, however, has failed to articulate a compelling explanation for why such a deviation from the existing system is necessary or prudent. Indeed, as the Administration has pointed out elsewhere, the Department of Justice has been remarkably successful in using the existing Article III courts to obtain terrorism convictions – 261 between September 11, 2001 and June 22, 2006 by its own count.

20. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano,

Mr. Katyal, Mr. Schleuter, and Mr. Silliman, in testimony before the Senate Judiciary Committee, Attorney General Gonzales stated that “no one can expect members of our military to read Miranda warnings to terrorists captured on the battlefield, or provide terrorists on the battlefield immediate access to counsel, or maintain a strict chain of custody for evidence. Nor should terrorist trials compromise sources and methods for gathering intelligence, or prohibit the admission of probative hearsay evidence.” Mr. Gonzales suggests that each of these examples would happen if the UCMJ were used as the basis for detainee trials. Do you agree with Mr. Gonzales’s assessment?

My testimony goes at length into each of these issues at pp. 8-10. To summarize:

Miranda Warnings. Article 31(b) of the UCMJ does contain a *Miranda*-like requirement. But our nation’s highest military court has held that an interrogation for purposes of intelligence gathering was *not* subject to this requirement, and that evidence obtained without a 31(b) warning can be admitted into a court-martial proceeding. *See United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992). Military appellate courts have repeatedly held that Article 31(b) warnings are required only for “a law-enforcement or disciplinary investigation.” *See, e.g., United States v. Loukas*, 29 M.J. 385, 387 (C.M.A. 1990). The notion that soldiers in the field would be required to give Article 31(b) warnings to potential enemy combatants whom they encounter or detain is simply not true.

Counsel: I know of no responsible scholar or lawyer who seriously contends that existing law requires "provid[ing] terrorists on the battlefield immediate access to counsel." Come to think of it, I do not know any irresponsible ones who seriously advocate this position either.

Chain of Custody: Military Rules of Evidence 901-903 deal with the admission of documents – and these rules make introduction of evidence easy, not difficult. The proponent of evidence can use various methods to authenticate it and is not tied to any rigid step-by-step authentication techniques. Stephen A. Saltzburg et al., *Military Rules of Evidence Manual* 9-4 (5th ed. 2003). Military Rule of Evidence 901 requires only a showing of authenticity through either direct or circumstantial evidence. *Id.* Under the identical Federal Rule 901(a), "[t]here is no single way to authenticate evidence. In particular, the direct testimony of a custodian or a percipient witness is not a *sine qua non* to the authentication of a writing. Thus, a document's appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances, can, in cumulation, even without direct testimony, provide sufficient indicia of reliability to permit a finding that it is authentic." *United States v. Holmquist*, 36 F.3d 154, 167 (1st Cir.1994) (citations and internal quotation marks omitted), *cert. denied*, 514 U.S. 1084 (1995). Additionally, "[m]ere breaks or gaps in the chain [of custody] affect only the weight of the evidence, and not its admissibility." Saltzburg, *supra*, at 8-9; *see also United States v. Hudson*, 20 M.J. 607 (A.F.C.M.R. 1985).

Hearsay: The 800 series of the Military Rules of Evidence generally track the Federal Rules of Evidence, though the military's business records exception is far broader than the civilian rule, expressly allowing the admission of such records as "forensic laboratory reports" and "chain of custody documents." The hearsay rules, including the residual hearsay exception in Military Rule of Evidence 807, are actually quite flexible. They are designed to promote accuracy by allowing in forms of hearsay that are reliable and excluding forms of hearsay that are unreliable. These rules should be embraced, not feared.

Specific Trial Procedures

21. **Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, in testimony last week before the Senate Judiciary Committee, Steven Bradbury from the Department of Justice (DOJ) stated that "a good example to look to for an acceptable hearsay rule is the international criminal tribunals, for example, for the former Yugoslavia and for Rwanda, which regularly allow the use of hearsay evidence, as long as the evidence is probative and reliable in the determination of the fact-finder, and as long as it is not outweighed by undue prejudice." Do you believe that this is an acceptable hearsay rule?**

As my testimony explains at pages 7-11, this is actually not an accurate statement of the hearsay rules used in the international criminal tribunals. Those who would rely on ICTY/ICTR evidence rules would do well to consider that the factfinders in those tribunals are all legally-trained individuals and judges who are used to certain standards of evidence, and who know how to discount evidence that does not meet traditional indicia of reliability. The military commission, by contrast, consists of untrained, lay factfinders, all of whom may have differing assumptions about such matters. Rules of evidence are drafted, in part, to guide lay "jurors" and avoid evidence that might be inflammatory or probative in the minds of the untrained. In short, the hearsay standard adopted by the international criminal tribunals is acceptable for that court system, but not for military commissions to try detainees. And as I understand it, the ICTY/ICTR can't adjudge death, whereas a military commission can, so there is reason to be even more cautious with respect to evidentiary rules for commissions than for international tribunals. Please also see my answer to question 22, below.

22. **Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, is this how the hearsay rule used by the international criminal tribunals works?**

No. As I understand it, Assistant Attorney General Bradbury did not mention that

the rules of both ICTY and ICTR include an important and major restriction to the rule allowing hearsay -- to the point of making a comparison virtually irrelevant for the current military commissions debate. Under Rule 92 *bis* of both ICTY and ICTR rules, the trial chamber may choose to admit "a written statement in lieu of oral testimony" *unless* such a statement would prove "acts and conduct of the accused as charged in the indictment." The trial chamber trying Slobodan Milosevic emphasized that "regardless of how repetitive [written statement] evidence is, it cannot be admitted if it goes directly to the acts or conduct of the accused." *Prosecutor v. Milosevic*, ICTY Case No. IT-02-54, P 8 (Mar. 21, 2002). If the Administration seriously wants to play by ICTY/ICTR rules, it should play by *all* of them, and not handpick a few divorced from context to suit its purposes.

- 23. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, does the UCMJ and specifically Military Rule of Evidence 501, adequately protect classified evidence? If not, what do we need to do to enhance the protection of classified information in detainee trials?**

Please see my answer to question 6, *supra*, and my testimony at p. 11. There is no need to break from these rules without strong empirical evidence demonstrating such a necessity.

- 24. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, in testimony before the Senate Judiciary Committee and the Senate Armed Services Committee last week, much was made of the potential problems posed by Article 31(b) of the UCMJ – which essentially sets up the military’s Miranda rights – in the context of detainee trials. Is it the case that this Article ties our hands with respect to intelligence gathering?**

Please see my answer to question 20, *supra*, as well as my testimony at pp. 8-9.

- 25. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, if the military’s Miranda rule is truly problematic, how should we fix it?**

I would only “fix” any of the military’s existing rules after the empirical evidence has demonstrated that they need fixing. On the other hand, statutory language codifying the case law exempting operational/intelligence questioning from the Article 31(b) rights warning requirement and the exclusionary rule for violating the rights warning requirement would do no harm – it would simply codify the existing law.

- 26. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, at the House Armed Services**

Committee hearing on Hamdan, Mr. Bradbury of the Justice Department's Office of Legal Counsel said the Administration wishes to maintain flexibility in introducing evidence coerced from detainees. Specifically, he said, "We do not use as evidence in military commissions evidence that is determined to have been obtained through torture. But when you talk about coercion and statements obtained through coercive questioning, there's obviously a spectrum, a gradation of what some might consider pressuring or coercion short of torture, and I don't think you can make an absolute rule." Is Mr. Bradbury correct in his analysis of coercion and the need to introduce coerced evidence in detainee trials?

As Senator McCain has stated, coerced confessions should be excluded. The Supreme Court has repeatedly recognized "the probable unreliability of confessions that are obtained in a manner deemed coercive." *Jackson v. Denno*, 378 U.S. 368, 386 (1964). The Supreme Court recognized this concept most recently in an opinion written by Chief Justice Roberts. *See Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) ("We require exclusion of coerced confessions both because we disapprove of such coercion and because such confessions tend to be unreliable.").

Article 31(d) of the UCMJ categorically excludes from courts-martial statements obtained by coercion. Article 31(a) of UCMJ extends this rule to compelling someone to answer questions. The commission version of Article 31(a), meanwhile, only speaks to testifying. When combined with the commission version of 31(b), which allows the admission of coerced statements, the result is that U.S. military members have an incentive to use coercion to gather information.

While it might be appropriate to include a definition of coerced statements in a statute applicable to commissions -- a definition that does not appear in the UCMJ -- coerced statements should be *per se* inadmissible.

Specific Trial Procedures

27. **Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, in a letter dated July 10, 2006, and addressed to Chairman John Warner of the Senate Armed Services Committee and Chairman Arlen Specter of the Senate Judiciary Committee, a group of retired Judge Advocates state that we should "bring accused terrorists to justice in military trials based on the UCMJ and Manual for Courts Martial (MCM)." The letter goes on to say that, in developing legislation to address the *Hamdan* ruling, "it should start from the premise that the United States already has the best system of military justice in the world" but that narrowly targeted amendments to the UCMJ to accommodate "specific difficulties in gathering evidence during the time of war" would be acceptable. If the current rules are not adequate, what changes need to be made to those rules?**

Again, I do not believe that the rules for military commissions should deviate from the UCMJ rules for courts-martial until there is empirical evidence to demonstrate

that such deviations are necessary. Please also see my answers to questions 6, 16-20, and 23 above.

28. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, how, in your view, can Congress best fashion legislation that will stand up to Supreme Court scrutiny?

In my view, it is vital that Congress first to do no harm. No changes to the court-martial system should be made until there is empirical evidence demonstrating that such deviations are required. The Administration's proposed legislation that was circulated by the Washington Post 10 days ago, for example, would quickly be invalidated by courts, and lead again to the terrible prospect of not having any convictions of detainees in the wake of September 11th.

The court-martial system can meet the needs of the government while protecting our national security interests and fulfilling our constitutional and international obligations. Importantly, a court-martial is a decidedly *legal* proceeding and there is already substantial law on the books authorizing and governing them. The Supreme Court has on countless occasions recognized and affirmed such proceedings – most recently in the *Hamdan* opinion. Courts-martial satisfy all the conditions for trials of detainees that the *Hamdan* majority found the president's commissions lacking. They would eliminate the problems of uniformity that the Supreme Court found so problematic; they would provide assurances of independent proceedings and review that the commissions sorely lack; and they would satisfy Common Article 3's requirement of a "regularly constituted court" – a requirement that may be difficult, if impossible, to achieve by patchwork legislation.

Finally, any departures from the UCMJ must be coupled with an anti-abstention provision, along the lines of the McCain-Feingold campaign finance legislation. The system needs to be reviewed immediately, not years after the fact when convictions would have to be reversed and terrorist defendants potentially set free. Please also see my answer to question 2, above.

29. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, the Hamdan Court appeared to be concerned about an accused and his civilian counsel being excluded from, and precluded from ever learning what evidence was presented during, any part of the military commission trial. How should this concern be addressed?

The accused must be entitled to be present during all proceedings and the accused must be entitled to see all of the evidence that the members see. As former RADM Hutson pointed out, denying the accused this most basic of rights results in telling him, basically, "We know you're guilty. We can't tell you why, but there's somebody that says you're guilty." Denying this right to the accused, especially in light of the *Hamdan*

majority's mandate, would be extremely dangerous, unjust, and unwise. As Senator Graham stated in the August 2 hearing:

SEN. GRAHAM: So the question may become for our nation, if the only way we can try this terrorist is disclose classified information and we can't share it with the accused, I would argue don't do the trial. Just keep him. Because it could come back to haunt us. And I have been in hundreds of military trials. And I can assure you the situation where that's the only evidence to prosecute somebody is one in a million. And we need not define ourselves by the one in a million.

- 30. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, Dr. Carafano suggested in his testimony that to win the war of ideas in the war on terrorism Congress should essentially ratify the military commissions that have been overturned by the Supreme Court. I would suggest that there are some here who believe that the exact opposite is true: That to win the war of ideas we need to put in place a system that is based on the UCMJ and that respects Common Article 3, and that only that way will we show the world that we are truly different from our enemy in this war. Would the panel care to comment?**

This question, more than any other in the thousands of words I have read since working on this issue for the past 5 years, states the precise problem. To answer it, I will quote from what another brave American, Justice Rutledge, said 60 years ago. In his dissent in the last significant military commission case (*Yamashita v. Styer* (1946)), Justice Rutledge said:

It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents. It can become too late.

This long-held attachment marks the great divide between our enemies and ourselves. Theirs was a philosophy of universal force. Ours is one of universal law, albeit imperfectly made flesh of our system and so dwelling among us. Every departure weakens the tradition, whether it touches the high or the low, the powerful or the weak, the triumphant or the conquered.

Gilding over the existing, flawed military commission system, which the Supreme Court has found illegal and that other countries have found unconscionable, would dishonor our country's great constitutional tradition. The right to a fair trial is one of the

foundational rights enshrined in our Constitution, one that has weathered every war this country has fought. Strict adherence to that tradition, and to the fundamental principle of rule of law, is what separates us from our enemies, and what makes America the best country in the world.

The Rule of Law should not be another victim in the War on Terror.