Statement
United States Senate Committee on the Judiciary
RESCHEDULED--The Authority to Prosecute Terrorists Under The War Crime Provisions of Title 18
August 2, 2006

The Honorable Patrick Leahy
United States Senator , Vermont

Statement of Senator Patrick Leahy,
Ranking Member, Judiciary Committee
"The Authority to Prosecute Terrorists Under
The War Crime Provisions of Title 18"
Judiciary Committee
August 2, 2006

In 1996, working with the Department of Defense, Congress passed the War Crimes Act to provide criminal penalties for certain war crimes committed by and against Americans. The next year, again with the Pentagon's support, Congress extended the War Crimes Act to violations of the baseline humanitarian protections afforded by Common Article 3 of the Geneva Conventions. Both measures were supported by a broad bipartisan consensus, and I was proud to sponsor the 1997 amendments.

The legislation was uncontroversial for a good reason. As I explained at the time, the purpose and effect of the War Crimes Act as amended is to provide for the implementation of America's commitment to the basic international norms we subscribed to when we ratified the Geneva Conventions in 1955. Those norms are truly universal: They condemn war criminals whoever and wherever they are.

That is a critically important aspect of the Geneva Conventions and our own War Crimes Act. When we are dealing with fundamental norms that define the commitments of the civilized world, we cannot have one rule for us and one for them, however we define "us" and "them."

As Justice Jackson said at the Nuremburg tribunals, "We are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us."

In that regard, I was disturbed to read recent reports that the Department of Justice is drafting legislation to narrow the scope of the War Crimes Act to exclude violations of the Geneva Conventions and retroactively immunize past violations. Before taking such a drastic step there is much we need to know. In particular, I have been concerned for some time that this President has thought he could immunize conduct otherwise illegal. I want to know whether the Administration has sought to immunize illegal conduct and on what basis.

But the Chairman convened this hearing today to consider the Government's authority to

prosecute terrorists under the War Crimes Act. It has long been open to the Administration to charge suspected terrorists, including those imprisoned at Guantanamo Bay, with federal crimes. In addition to the War Crimes Act, federal law provides criminal penalties for terrorism, torture, hostage-taking, and other acts considered grave breaches of the Geneva Conventions, regardless of where these acts may occur. And unlike the international law of war, Federal law allows for prosecution of the crime of conspiracy.

There is ample authority under federal law for the prosecution of international terrorists. But for various reasons, some good and some bad, the Administration has made little use of that authority against suspected terrorists. As far as I can tell, the Ashcroft Justice Department and the Gonzales Justice Department have yet to file a single charge against anyone for violation of the War Crimes Act. Nor has the Administration made use of the processes and procedures set forth in the Manual for Courts-Martial and the Uniform Code of Military Justice.

Instead, the Bush-Cheney Administration has pursued a two-pronged strategy. First, with respect to the vast majority of the 700-plus prisoners at Guantanamo and the unidentified prisoners in secret prisons abroad, the Administration has frankly stated that it has no interest in trying them in any court, civilian or military.

Second, this Administration has decided to bring a small number of detainees before "military commissions." I have no objection in principle to the use of military commissions. Indeed, I introduced legislation to authorize procedures for military commissions back in February 2002 after holding hearings in 2001 on the issue. I invited the Administration to work with Congress on legislative authority for such commissions. Regrettably, when the Administration had the option to work in a constructive way with Congress, it chose its customary path of secrecy and unilateralism. This Administration's go-it-alone approach yielded the predictable result after four years; it has achieved nothing other than an embarrassing defeat in the United States Supreme Court. Not a single suspected terrorist has been held accountable before a military commission in the last six years.

The Court's landmark separation-of-powers decision in Hamdan compelled the Bush-Cheney Administration to finally come to Congress to request authorizing legislation. I was encouraged to read the testimony the uniformed witnesses provided before the Armed Services Committee, in which they indicated that the starting point for legislation should be the well-established rules governing courts-martial. But when the Administration's civilian lawyers came before this Committee, they instead argued that Congress should rubberstamp the problematic procedures that the Supreme Court struck down.

What is at stake for all Americans as these decisions are made, are our American values and the primacy in our system of government of the rule of law.

Today, we have before us some of the uniformed witnesses who testified before the Armed Services Committee. I look forward to the testimony of the JAG officers. They have been trying to uphold the best military justice traditions, but have too often been cut out of this Administration's deliberations. I thank them for their services and their willingness to work with us in Congress and to share their views.

I look forward to our consideration at this hearing whether the War Crimes Act provisions should be expanded to include additional offenses. In the future I hope that that they will be willing to appear before our Committee, again, as we consider how to construct military commissions.

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August 2, 2006

Major General Scott C. Black
The Judge Advocate General , United States Army

RECORD VERSION
STATEMENT BY

MAJOR GENERAL SCOTT C. BLACK

BEFORE THE

COMMITTEE JUDICIARY
UNITED STATES SENATE
SECOND SESSION, 109TH CONGRESS
AUGUST 2, 2006

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.

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August 2, 2006

Mr. Steve Bradbury
Acting Assistant Attorney General, Office of Legal Counsel , Department of Justice

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STATEMENT OF
STEVEN G. BRADBURY
ACTING ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
DEPARTMENT OF JUSTICE
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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August 2, 2006

Rear Admiral Bruce MacDonald
Judge Advocate General , United States Navy

STATEMENT OF
REAR ADMIRAL BRUCE MacDONALD, JAGC USN
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.

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August 2, 2006

Major General Jack Rives
The Judge Advocate General , United States Air Force

TESTIMONY OF
MAJOR GENERAL JACK L. RIVES
THE JUDGE ADVOCATE GENERAL
UNITED STATES AIR FORCE
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
CONCERNING THE AUTHORITY TO PROSECUTE TERRORISTS
UNDER THE WAR CRIMES PROVISIONS OF TITLE 18
August 2, 2006

Thank you Chairman Specter, Senator Leahy, and members of the Committee. I appreciate the opportunity to appear before you today as this Committee carefully considers the authority of the United States to prosecute suspected terrorists consistent with the Supreme Court's decision in Hamdan v. Rumsfeld.

Prior to enactment of the War Crimes Act, suspected war criminals were prosecuted domestically by the United States for the underlying common law offense -- such as murder, rape, or assault. Consistent with our treaty obligations, Congress enacted the War Crimes Act to proscribe misconduct internationally recognized as constituting violations of the Laws of Nations.

Prosecutions under the War Crimes Act, like all prosecutions under Title 18, include the due process rights afforded in our Federal Court system. While these rights are necessary and appropriate for suspected terrorists investigated and apprehended through normal domestic law enforcement methods, some -- such as the aggressive discovery rules and strict chain of custody requirements -- are incompatible with the realities and unpredictability of the battlefield. The full discovery rights of our Federal Court system may reveal sensitive intelligence sources and methods that would harm our overall national security. Similarly, the chain of custody requirements of our Federal system are simply unworkable given the uncertain and ever changing nature of the battlefield and the need for our military personnel to be free from the technical rules more applicable to domestic law enforcement officers operating in American neighborhoods.

In light of these difficulties, our laws offer alternative means to prosecute suspected terrorists seized on the battlefields of the Global War on Terrorism. These alternative methods were the subject of Hamdan v. Rumsfeld, and are the focus of ongoing discussions outside of Title 18. However, Congressional action to amend the War Crimes

Act can prove helpful on a related matter.

The War Crimes Act currently characterizes all violations of Common Article 3 of the Geneva Conventions as felonies. Violations of Common Article 3 include, among other things, "outrages upon personal dignity, in particular humiliating and degrading treatment." Under our military justice system, less serious breaches can be handled through administrative or nonjudicial means. However, the War Crimes Act treats all violations of Common Article 3 as felonies. We welcome Congressional efforts to better define which "outrages upon personal dignity, in particular humiliating and degrading treatment" amount to serious breaches worthy of classification as felonies. Such efforts would serve our men and women fighting the Global War on Terrorism by providing clearly delineated limits.

As recognized and reaffirmed in last year's Detainee Treatment Act, we cannot and will not condone US military personnel engaging in outrageous, humiliating and degrading conduct as US law defines such misconduct. Congressional efforts to better define these terms for Common Article 3 purposes will provide needed clarity to the rules of conduct for our military forces.

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

Thank you, Mr. Chairman.

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August 2, 2006

Brigadier General Kevin M. Sandkuhler
Staff Judge Advocate to the Commandant of the Marine Corps , United States Marine Corps

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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 committeeâ€™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 membersâ€™ 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.