RECORD VERSION

STATEMENT BY

MAJOR GENERAL SCOTT C. BLACK

BEFORE THE

ARMED SERVICES COMMITTEE

UNITED STATES HOUSE OF REPRESENTATIVES

SECOND SESSION, 109TH CONGRESS

SEPTEMBER 7, 2006

NOT FOR PUBLICATION

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COMMITTEE ON ARMED SERVICES

Thank you, Mr. Chairman, Ranking Member Skelton and members of the committee. I'd like to thank you for the opportunity to appear before you today and for the committee's timely and thoughtful consideration of these significant issues.

I'd also like to express my heartfelt gratitude to the members and staff of this committee for your continuing hard work on behalf of the Army's Soldiers, civilians and family members. We really do appreciate what you do each and every day.

At the outset, I will tell you that military commissions, in some form, are a necessary forum for the trial of enemy combatants captured in the Global War on Terrorism. They are legally viable and pragmatically vital. They allow us to maintain the maximum flexibility in coping with those combatants we find on the current battlefield. Military commissions are well grounded in history and the Uniform Code of Military Justice and provide an indispensable tool to ensure justice under the rule of law.

The Hamdan decision has reinforced our need to ensure military commissions are reflective of American values such as due process and the rule of law. Our task is to balance the utility of the military commissions with these values that are foundational to our democratic society. We have been working within the Government to assemble a product that will do this—that will not only protect this great nation from those who are committed to destroy it, but that will simultaneously uphold the principles that distinguish this nation from those who attack it.

Current military commission procedures reflect a good start, but we can make the system better. While still maintaining the utility and flexibility of military commissions, we can utilize principles and provisions from the Uniform Code of Military Justice. We

also can and should borrow from other sources, such as international law, including the international criminal tribunals when it is appropriate to do so. By doing so, we can create what I believe would be a perfect blend of rights and responsibilities that would make us, literally, the envy of not only the people of our country but the people in the world in terms of the judicial process.

We are prepared to work together with the Congress and look forward to being participants in the process of creating such a system.

Department of Justice

STATEMENT

OF

STEVEN G. BRADBURY
ACTING ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON ARMED SERVICES
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

THE SUPREME COURT'S DECISION IN *HAMDAN v. RUMSFELD*

PRESENTED ON

SEPTEMBER 7, 2006

STATEMENT OF
STEVEN G. BRADBURY
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BEFORE THE
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CONCERNING
THE SUPREME COURT'S DECISION
IN *HAMDAN v. RUMSFELD*

SEPTEMBER 7, 2006

Thank you, Mr. Chairman, Ranking Member Skelton, and Members of the Committee.

I am pleased to appear here today on behalf of the Administration to discuss the proposed legislation that we believe Congress should put in place to respond to the Supreme Court's decision in *Hamdan v. Rumsfeld*.

Earlier this week, the President transmitted to Congress a legislative proposal reflecting the outcome of two months of discussions within the Executive Branch and between the political Branches of Government. In early July, I testified before this Committee on these issues together with Principal Deputy General Counsel of the Department of Defense, Daniel Dell'Orto. I and others within the Administration have testified before other congressional committees, and we have engaged in numerous informal consultations with Members of Congress and their staffs. These discussions have been equally extensive within the Administration, and they have included detailed discussion with and input from the military lawyers in all branches of the Armed

Services, including the TJAGs who are here today. They and their staffs have been active participants in our deliberations, and many of their comments, as well as the comments from the Hill, are reflected in the legislative package that the President has recommended for the consideration of Congress.

Military Commission Procedures

Mr. Chairman, first and foremost, the proposed legislative package responds to the Supreme Court's decision in *Hamdan* by establishing statutory military commissions to try captured terrorists for violations of the laws of war. Shortly after the atrocities of 9/11, President Bush directed the Department of Defense to establish military commissions for trying the terrorists responsible for those and other war crimes. The path to those prosecutions has not been easy, however, as the procedures have been challenged in litigation over the past several years. Now that the Supreme Court has decided *Hamdan*, we believe it is time to establish military commissions as a matter of statute that will satisfy the issues raised by the Court and that will enable the United States to prosecute and bring to justice members of al Qaeda and the Taliban for their war crimes.

We therefore would propose that Congress enact a new Code of Military Commissions, modeled on the court-martial procedures of the Uniform Code of Military Justice, or "UCMJ," but adapted for use in the special context of military commission trials of terrorists. The proposed legislation would create a new chapter for military commission procedures in title 10 of the U.S. Code, which would follow immediately after the UCMJ. These military commissions would have jurisdiction to try alien unlawful enemy combatants—that is, members of groups, such as al Qaeda and the Taliban, who wage war against the United States in disregard of the established law of

war.

In many respects, the new Code of Military Commissions would track closely the procedures and structure of the UCMJ. We have proposed a system of military commissions, presided over by a military judge, with commission members drawn from the Armed Forces. The prosecution and defense counsel would be appointed from the JAG corps with the ability of the accused to retain a civilian counsel, in addition to assigned military defense counsel, and with the possibility that some prosecutors may be experienced prosecutors from the Department of Justice. Trial procedures, sentencing, and appellate review would largely track those currently provided under the UCMJ (albeit with federal court review in the D.C. Circuit, as Congress provided in the Detainee Treatment Act of 2005, or "DTA").

Because of the specific concerns raised by the Supreme Court, and because of comments from the Hill and within the Pentagon, the new Code of Military Commissions would differ in significant respects from the military-commission procedures established before *Hamdan*.

In particular, the presiding officer would be a certified military judge with the traditional authority of a judge to make final rulings at trial on law and evidence, just as in courts-martial. And as with courts-martial, the military judge would not be a voting member of the commission.

We also propose increasing the minimum number of commission members to five, from three, and require twelve members of the commission for any case in which the death penalty is sought. As is the case under the current military-commission procedures, and just as under the UCMJ, the Government would bear the burden of proving the

accused's guilt beyond a reasonable doubt, and a conviction would require a vote of two-thirds of the commission members in a non-death penalty case. As under the UCMJ, the death penalty would require a unanimous vote of all 12 commission members.

In addition, the Code of Military Commissions would establish a military appeals system that parallels the appellate process under the UCMJ. The draft legislation would create a Court of Military Commission Review within DoD to hear appeals on questions of law. The legislation would provide for judicial review of final military commission decisions in the D.C. Circuit, the same Article III court that currently hears those appeals and other detainee actions under the DTA. The bill would give all convicted detainees an appeal as of right, regardless of the length of their sentence, as opposed to the pre-*Hamdan* system, which provides for discretionary review of sentences under 10 years. The Supreme Court could review the D.C. Circuit's decisions through petitions for a writ of certiorari.

While the proposed military commissions would track the UCMJ in many ways, the Code of Military Commissions would depart from court-martial procedures in those instances where applying the UCMJ's provisions would be inappropriate or impractical. This is critical, because military necessity would not permit the strict application of all court-martial procedures, and because there are relevant differences between the procedures appropriate for trying our service members and those appropriate for trying the terrorists whom they fight.

For instance, the UCMJ provides *Miranda*-type protections for U.S. military personnel that are broader than the civilian rule and that could impede or limit evidence obtained during the interrogation of terrorist detainees. I do not believe that anyone

contends that terrorists should be given *Miranda* warnings before interrogations. The draft legislation therefore would not include such *Miranda* requirements. At the same time, it would provide the accused with counsel once charges are brought and would grant the accused a privilege against self-incrimination during the trial.

The military-commission procedures also would not include the UCMJ's Article 32 investigation, which is a pre-charging proceeding that is akin to, but considerably more protective than, the civilian grand jury. Such a proceeding is appropriate when applied to U.S. military personnel, but is unnecessary and inappropriate for the trial of captured unlawful combatants, who are already subject to detention under the laws of war.

Because military commissions must try crimes based on evidence collected everywhere from the battlefields in Afghanistan to foreign terrorist safe houses, we believe that the Code of Military Commissions should provide for the introduction of all probative evidence, including hearsay evidence, where such evidence is reliable. Like a civilian judge, the military judge may exclude such evidence if the probative value is substantially outweighed by unfair prejudice. But the Code of Military Commissions must provide a standard of admissibility broader than that applied in court-martial proceedings.

Court-martial rules of evidence track those in civilian courts, reflecting the fact that the overwhelming majority of court-martial prosecutions arise from every-day violations of the military code of conduct, far from the battlefield. By contrast, military commissions must permit the introduction of a broader range of evidence, including hearsay statements, because many witnesses are likely to be foreign nationals who are not

amenable to process, and other witnesses may be unavailable because of military necessity, incarceration, injury, or death. In this respect, the Code of Military Commissions follows the practice of international war crimes tribunals, which similarly recognize the need for broad evidentiary rules when dealing with evidence obtained under conditions of war.

Court-martial rules of evidence also require that classified evidence, if it is to be used at a court martial, be shared with the accused. In the midst of the current conflict, we simply cannot consider sharing with captured terrorists the highly sensitive intelligence that may be relevant to military-commission prosecutions. In the court-martial context, the Government must choose between disclosing the evidence to the accused or allowing the accused to evade prosecution. Putting the Government to that choice may be entirely appropriate when it comes to the trial of members of our own Armed Forces, but the Administration does not believe that imposing that dilemma is either necessary or appropriate when it comes to trying alien unlawful combatants for violations of the laws of war. We therefore believe it critical to ensure that military commissions have the discretion, under defined and limited circumstances, to admit classified evidence not shared with the accused.

To this end, the proposed legislation would require that before any classified evidence is to be introduced outside the accused's presence, the head of the executive department or agency that has classified the evidence must certify that sharing the evidence would harm national security and that the evidence has been declassified to the maximum extent possible. The military judge then would be required to make specific findings that the exclusion is warranted, is no broader than necessary, and would not

compromise the accused's right to a full and fair trial. At least one defense counsel, properly cleared, would be able to represent the accused at all proceedings where evidence is offered against the accused. Additionally, the proposed legislation provides the accused with an unclassified version of the classified information introduced against them, consistent with national security concerns. These procedures, properly administered by the military judge, would strike the appropriate balance between safeguarding our Nation's secrets and ensuring a fair trial of the accused.

Common Article 3 of the Geneva Conventions

Mr. Chairman, the Administration also believes that the draft legislation must address 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.

In my previous testimony before the Committee, I discussed with the Committee the problems caused by the vagueness of some terms in Common Article 3, particularly its prohibition of "[o]utrages upon personal dignity, in particular, humiliating and degrading treatment," a phrase that is susceptible of uncertain and unpredictable application. If left undefined by statute, the application of Common Article 3 will subject those who fight to defend America from terrorist attack to an uncertain legal standard that may be influenced by foreign tribunals.

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, without the bill's provisions, the meaning of Common Article 3—the 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. The draft legislation therefore would define our obligations under the relevant treatment provisions of Common Article 3 by reference to the U.S. constitutional standard already adopted by Congress in the McCain Amendment, which are fully consistent with United States international obligations.

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 as 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. Indeed, the same provision was used to clarify similarly vague provisions in another treaty—the Convention Against Torture. 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.

The Administration further believes that we owe it to those called upon to handle detainees in the War on Terror to ensure that legislation addressing the *Hamdan* decision

brings clarity and certainty to the War Crimes Act. To that end, the proposed legislation sets forth a definite and clear list of nine offenses serious enough to be considered "war crimes," punishable as the most serious breaches of Common Article 3, including clear and serious "outrages upon human dignity," such as rape, sexual assault, and conducting Nazi-like human experiments.

Judicial Review of Detainee Claims

Finally, Mr. Chairman, the draft legislation would clarify how the judicial review provisions of the DTA apply. Some have argued that *Hamdan* makes the DTA inapplicable to the hundreds of habeas petitions brought by the Guantanamo detainees to challenge their detention as enemy combatants. While we disagree with that reading, the proposed legislation would make clear that alien detainees held as enemy combatants by the United States in the War on Terror may not challenge their detention or trial in advance of a final judgment of a military commission or a final order of a Combatant Status Review Tribunal.

We believe that that was Congress's original intent under the DTA, and we believe that it makes sense, as in the civilian justice system, to restrict the accused's ability to pursue appellate remedies until after the trial has been completed. Our courts should not be misused to hear all manner of other challenges by terrorists lawfully held as enemy combatants in wartime.

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

Thank you, Mr. Chairman.

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STATEMENT OF
MAJOR GENERAL CHARLES J. DUNLAP, JR.
THE DEPUTY JUDGE ADVOCATE GENERAL
UNITED STATES AIR FORCE

BEFORE THE
HOUSE ARMED SERVICES COMMITTEE
UNITED STATES HOUSE OF REPRESENTATIVES
CONCERNING THE SUPREME COURT'S DECISION
IN *HAMDAN v. RUMSFELD*

September 7, 2006

Thank you, Chairman Hunter, Ranking Member Skelton, and members of the committee. Major General Rives, The Judge Advocate General of the Air Force, is currently overseas. Accordingly, 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*, 548 U.S. ___, 126 S.Ct. 2749, (2006).

I start from a premise that legislation is appropriate. As the Supreme Court noted again in *Hamdan*, the President's powers, especially in wartime, are at their greatest when specifically authorized by Congress. While different approaches are feasible, I believe our Nation will be best served by a fresh start to the military commission process.

The United States is more than a nation of laws, it is a country founded upon strong moral principles of fairness to all. Moreover, our country -- to the delight of our adversaries -- has been heavily criticized because of the perception that the pre-*Hamdan* military commission processes were unfair and did not afford "all the judicial guarantees which are recognized as indispensable by civilized peoples."

Now is the time to correct that perception and clearly establish procedures and rules that meet that standard. It will do more than merely correct legal deficiencies; it will help affirm the United States as the leading advocate of the rule of law.

The Uniform Code of Military Justice (10 USC §801 *et. seq.*) (UCMJ) and the Manual for Courts-Martial (MCM) provide superb starting points for the development of a revised commission process. There will, of course, necessarily be differences between current courts-martial procedures and the rules and procedures for military commissions.

However, many of the processes and procedures in the UCMJ and MCM can be readily adapted to meet the needs of military commissions and at the same time meet the requirements Common Article 3 of the Geneva Conventions. The proposal submitted to Congress by the President reflects an attempt to adapt the UCMJ to the military commission process. I support many of its provisions.

A revised approach to military commissions is not only the right thing to do; it also serves the pragmatic military purpose of helping us win the war on Global War on Terrorism.

Success in this war requires the cooperation of many nations around the world. Addressing the Supreme Court's concerns about military commissions will reaffirm our position on the moral and legal high ground. A process fully compliant with Common Article 3 will enhance our standing internationally and empower our allies to embrace the legal reasoning and architecture behind our prosecution of military commission cases. Doing so is plainly in our warfighting interests.

I look forward to discussing these issues with the committee this morning. Thank you, Mr. Chairman.

NOT FOR PUBLICATION UNTIL
RELEASED BY THE SENATE
HOUSE ARMED SERVICES COMMITTEE

STATEMENT OF

REAR ADMIRAL BRUCE MacDONALD, JAGC, USN

JUDGE ADVOCATE GENERAL

BEFORE THE

HOUSE ARMED SERVICES COMMITTEE

7 SEPTEMBER 2006

NOT FOR PUBLICATION UNTIL
RELEASED BY THE
HOUSE ARMED SERVICES COMMITTEE

Chairman Hunter, Ranking Member Skelton, members of the Armed Services Committee, good morning. Thank you for the opportunity to testify today on the subject of military commissions.

Congress' establishment of a permanent, legal framework for military commissions (a Code of Military Commissions) would be a welcome addition to American military jurisprudence. My view is that existing courts-martial rules are not practical for the prosecution of unlawful enemy combatants, now or in future conflicts. Yet, our military justice model (the Uniform Code of Military Justice) can provide an appropriate starting point for the drafting of Commission legislation.

We have been working with others in the Executive Branch to formulate precisely such legislation. I recommend that legislation establish the jurisdiction of military commissions, set baseline standards of structure, procedure, and evidence consistent with U.S. law and the law of war, and prescribe all substantive offenses. The legislation should further authorize the President to promulgate supplemental rules of practice, similar to the Manual for Courts-Martial or, in this case, a Manual for Military Commissions. The legislation proposed by the President generally accomplishes those goals.

Within that context, my personal opinion is that some of the most important legislative sections would provide for:

- Jurisdiction that permits prosecution of all unlawful enemy combatants who engage in or attempt to engage in hostilities against the United States.

- Independent military judges who preside and have authority to make final rulings on all matters of law.

- Defense counsel with an independent reporting chain of command, free from both actual and perceived influence of prosecution and convening authorities.

- Introduction of hearsay evidence so long as the evidentiary standard is clarified to exclude information that is unreliable, not probative, unfairly prejudicial, confusing, or misleading, or when such exclusion is necessary to protect the integrity of the proceedings. Such an approach would be consistent with the practice of international war crimes tribunals supported by the United States in Rwanda and the former Yugoslavia.

- The presence of the accused, perhaps crafting a process similar to Military Rule of Evidence 505, which permits a military judge to conduct an *in camera, ex parte* review of the Government's interest in protecting classified information and encourages the substitution of unclassified summaries or alternative forms of evidence in lieu of the classified information.

I and other military lawyers have worked with many others in the Administration to incorporate these ideas into the draft legislation recently submitted before you. The draft legislation reflects many of our comments, although there are some issues, particularly the use of classified evidence, where I would stand by the approach similar to that taken by the

Uniform Code of Military Justice. It is Congress that will make the final decision on these issues, however. I am confident in so doing that we can achieve the necessary and appropriate balance between affording an accused the judicial guarantees recognized as indispensable by civilized peoples on the one hand, and our valid national security interests on the other.

Thank you again for this opportunity to appear today. I look forward to answering your questions and working with the Committee on this important endeavor.

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HOUSE ARMED SERVICES COMMITTEE

STATEMENT OF

BRIGADIER GENERAL JAMES C. WALKER

STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE MARINE CORPS

BEFORE THE

HOUSE ARMED SERVICES COMMITTEE

7 SEPTEMBER 2006

NOT FOR PUBLICATION UNTIL
RELEASED BY THE
HOUSE ARMED SERVICES COMMITTEE

Chairman Hunter, Ranking Member Skelton, members of the Committee, good morning. I wish to thank you for the opportunity to appear before you today, and for this Committee's interest in the military commissions process. I assumed duties as Staff Judge Advocate to the Commandant on 25 August, and look forward to working with the committee on this and future matters.

Military commissions are a necessary forum for the trial of unlawful enemy combatants captured in the Global War on Terror. They can provide the flexibility essential for dealing with these individuals in the construct of a war with no readily identifiable end.

Since the Supreme Court's decision in *Hamdan v. Rumsfeld* in June, a significant amount of effort has been devoted to drafting a legislative proposal to address shortfalls with the commissions identified by the Court, as well as the concerns of Congress and the American people. While this work occurred during my predecessor, Brigadier General Sandkuhler's tour, I am aware that military judge advocates provided feedback in response to drafts circulated via the Department of Defense. Additionally, following a meeting between the Attorney General and The Judge Advocates General, uniformed attorneys met with Department of Justice representatives to discuss the proposed legislation and participated in subsequent discussions. The draft legislation submitted by the President incorporates a number of comments presented by the military judge advocates in those meetings.

The *Hamdan* decision underscores the necessity of ensuring that military commissions reflect American values such as due process and the rule of law. In previous hearings on this very topic, the word "balance" has been used repeatedly to describe the nature of the challenge before us. Striking the balance between individual due process and our national security interests, while maintaining our nation's flexibility in dealing with terrorists and unlawful enemy

combatants we encounter on the battlefield is the end we all seek. At the end of the day, the system we create must provide the "judicial guarantees which are recognized as indispensable by civilized peoples," as required by Common Article 3 of the Geneva Conventions.

In determining what would constitute "indispensable judicial guarantees," a plurality of the Court looked to the "fundamental guarantees" listed in Article 75 of Additional Protocol I to the Geneva Conventions of 1949. These Article 75 enumerated rights include, among others, the presumption of innocence the right against self-incrimination, and the right to presence during one's trial. Throughout the drafting process I previously described, the Judge Advocates General steadfastly maintained that a system which would permit the introduction of evidence against an accused, outside of his presence, is objectionable. I join them in this regard, and in their enthusiasm in continuing to work with Congress to create a system which will simultaneously help to defend our nation from those who seek to destroy it, while upholding the values which have set us apart for over 230 years.