



# Department of Justice

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STATEMENT

OF

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ACTING ASSISTANT ATTORNEY GENERAL  
OFFICE OF LEGAL COUNSEL  
DEPARTMENT OF JUSTICE

BEFORE THE

HOUSE ARMED SERVICES COMMITTEE  
U.S. HOUSE OF REPRESENTATIVES

CONCERNING

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

PRESENTED ON

JULY 12, 2006

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**JULY 11, 2006**

Thank you, Mr. Chairman, Ranking Member Skelton, and Members of the Committee. I appreciate the opportunity to appear here today to discuss the Supreme Court's decision in *Hamdan v. Rumsfeld*.

*Hamdan* is a decision without historical analogue. Since the Revolutionary War, the United States has used military commissions in time of armed conflict to bring to justice unlawful combatants for violations of the laws of war. Indeed, *Hamdan* recognized that the Supreme Court itself has sanctioned the use of military commissions on multiple occasions in the past. Yet the Court in *Hamdan* held that the military commissions that the President established were inconsistent with the Uniform Code of Military Justice and the Geneva Conventions.

The Court's reasoning in *Hamdan* may be surprising and disappointing to many of us, but it is not my intent to reargue the case this morning. The Administration will, of course, as the President has said, abide by the decision of the Court.

It is important to point out that the Court did not call into question the authority of the United States to detain enemy combatants in the War on Terror, and that the Court's

decision does not require us to close the detention facilities at Guantanamo Bay or release any terrorist held by the United States. Moreover, the Court implicitly recognized several fundamental Government positions: The Court confirmed our view that the atrocities committed by al Qaeda on September 11 have triggered our right to use military force in self-defense and that we are involved in an armed conflict with al Qaeda to which the laws of war apply.

And the Supreme Court made clear that its decision rested only on an interpretation of current statutory and treaty-based law. The Court did not address the President's constitutional authority and did not reach any constitutional question. Indeed, the Court did not accept the petitioner's arguments that the Constitution precludes the use of military commissions.

Therefore, the *Hamdan* decision now gives Congress and the Administration a clear opportunity to work together to address the matters raised by the case, including the appropriate procedures governing military commissions. As Justice Breyer stated in his separate opinion, "Nothing prevents the President from returning to Congress to seek the authority he believes necessary."

In its decision, the Court also addressed the application of the Geneva Conventions to al Qaeda fighters in our War on Terror. On this point, it is important to emphasize that the Court did *not* decide that the Geneva Conventions as a whole apply to our conflict with al Qaeda or that members of al Qaeda are entitled to the privileges of prisoner of war status. The Court *did* hold, rather, that the basic standards contained in common Article 3 of the Geneva Conventions apply to the conflict with al Qaeda.

Of course, the terrorists who fight for al Qaeda have nothing but contempt for the laws of war. They have killed thousands of innocent civilians in New York, Washington, and Pennsylvania—and thousands more in London, Madrid, Kenya, Tanzania, Yemen, Jordan, Indonesia, Iraq, and Afghanistan. They advocate unrestrained violence and chaos. As a matter of course, they kidnap relief aid workers, behead contractors, journalists, and U.S. military personnel, and bomb shrines, wedding parties, restaurants, and night clubs. They openly mock the rule of law, the Geneva Conventions, and the standards of civilized people everywhere, and they will attack us again if given the chance.

The Supreme Court’s conclusion that common Article 3 applies to members of al Qaeda is a significant development that must be considered as we continue the healthy discussion between the political Branches about the standards and procedures that ought to govern the treatment of terrorist detainees.

### **Courts-Martial and Military Commissions**

In moving forward after *Hamdan*, the basic question we must answer together is how best to pursue the prosecution of al Qaeda and other terrorists engaged in armed conflict with the United States.

The *Hamdan* majority held that Congress had greatly restricted the President’s authority to establish procedures for military commissions. The Court read the Uniform Code of Military Justice, or “UCMJ,” to require presumptively that captured enemy combatants, including unlawful combatants such as al Qaeda terrorists, are entitled to the very same military court-martial procedures that are provided for the members of our Armed Forces.

In trying al Qaeda terrorists for their war crimes, we firmly believe that it is neither appropriate as a matter of national policy, practical as a matter of military reality, nor feasible in protecting sensitive intelligence sources and methods, to require that military commissions follow all of the procedures of a court-martial.

For example, when members of the U.S. Armed Forces are suspected of crimes, the UCMJ, in Article 31(b), provides that they must be informed of their *Miranda* rights, including the right to counsel, prior to any questioning. The right of access to a lawyer in the military justice system is even more protective than in civilian courts, since it applies as soon as the service member is suspected of an offense. Granting terrorists prophylactic *Miranda* warnings and extraordinary access to lawyers is inconsistent with security needs and with the need to question detainees for intelligence purposes. The very notion of our military personnel regularly reading captured enemy combatants *Miranda* warnings on the battlefield is nonsensical.

The rules that apply to courts-martial under the UCMJ also impose strict requirements on the admission of evidence in court-martial proceedings that are wholly unworkable for military commission trials of unlawful combatants in the War on Terror. Court-martial rules require that the chain of custody for evidence be preserved, and that all documents admitted be painstakingly authenticated. But it is extremely difficult during an armed conflict to gather evidence in a way that meets strict criminal procedure requirements, whether collected on the battlefield, during military intelligence operations, or during interrogations of detainees.

Furthermore, court-martial rules prohibit the use of hearsay in ways very similar to the civilian rules of evidence. Yet reliable hearsay statements from the battlefield and

from fellow terrorists are often the only probative evidence readily available. In these situations, use of court-martial procedures may mean that the most relevant and probative evidence will be inadmissible. Securing properly sworn and authenticated evidence would also require members of the Armed Forces to leave the front lines to attend legal proceedings, in effect, requiring them to fight al Qaeda members twice, once on the battlefield and then again through legal proceedings.

Article 46 of the UCMJ, and the procedures prescribed under it, require that prosecutors share classified information with the accused if the information will be introduced as evidence at trial. We cannot put at risk our Nation's most sensitive secrets in the War on Terror by exposing them to terrorist detainees. The disclosure of classified information about intelligence sources and methods would compromise national security and could endanger the lives of Americans at home and around the world. That is a risk that can be avoided, while still ensuring that military commission trials are fundamentally fair.

The insistence upon the protections of the UMCJ may not always be easy in the military justice system, but it is often impossible on the battlefields of the present conflict. Our forces are dedicated to fighting this armed conflict; unsurprisingly, they cannot be expected to focus on the law enforcement tasks of gathering evidence and conducting criminal investigations. Such duties would, at best, distract from the military's central mission—fighting and winning the war. Congress has never embraced the notion that dangerous foreign terrorists are entitled to the same procedural protections as American citizens who risk their lives for the Nation.

All of the issues with military commissions identified by the Supreme Court can be addressed and resolved through legislation. The Administration stands ready to work with Congress to do just that. We would like to see Congress act quickly to establish a solid statutory basis for the military commission process, so that trials of captured al Qaeda terrorists can move forward again.

The United States may continue to detain the terrorists we have captured. But as of right now, we cannot effectively punish those who have committed war crimes. That is unacceptable.

### **The Court's Jurisdiction Under the DTA**

In addition to developing appropriate procedures for military commissions, we will need to consider carefully how any new legislation should clarify the scope of judicial review. In this connection, I want to comment briefly on the Court's threshold conclusion in *Hamdan* that it was proper for the Court to exercise jurisdiction over the case.

The role of the Supreme Court in the separation of powers depends crucially upon the principle that the jurisdiction of federal courts extends only to cases that properly arise under the laws enacted by Congress. Last December, in the Detainee Treatment Act of 2005, Congress expressly established procedures for the review of military commission decisions. The DTA provided that judicial review of military commission proceedings would be strictly limited to post-trial review of the final judgments of military commissions; the DTA expressly deprived the federal courts of jurisdiction to hear pre-trial habeas petitions, such as *Hamdan's*.

It has long been a canon of interpretation, firmly established by what the dissenting Justices called “[a]n ancient and unbroken line of authority,” that statutes removing jurisdiction from the courts have immediate effect in all pending cases. Congress was entitled to legislate against the background of that traditional canon when it enacted the DTA. *Hamdan* makes clear, however, that if Congress seeks to limit the Court’s jurisdiction in future cases, it may be well advised to enact statutory provisions that are ironclad and leave absolutely no wiggle room with respect to Congress’s intent.

### **Common Article 3 of the Geneva Conventions**

Finally, we will need to address the Court’s ruling 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. When the Geneva Conventions were concluded in 1949, of course, the drafters of the Conventions certainly did not anticipate, and did not agree to cover, armed conflicts with international terrorist organizations such as al Qaeda.

In directing that our Armed Forces would treat all detainees humanely regardless of their legal status, the President specifically determined in February 2002 that common Article 3 does not apply to the conflict with al Qaeda on the ground that the War on Terror is decidedly an “international” conflict. It involves the projection of U.S. force to different states to combat a transnational terrorist movement with global reach and a proven record of targeting the United States in multiple countries. The President’s conclusion on this point was plainly reasonable. Indeed, it reflects what is a fundamental



truth about the Geneva Conventions—that they were not designed as a framework for addressing the kind of conflict we are in with al Qaeda.

We are now faced with the task of implementing the Court’s decision on common Article 3. Last year, Congress engaged in a significant public debate on the standard that should govern the treatment of captured al Qaeda terrorists. Congress codified that standard in the McCain Amendment, part of the Detainee Treatment Act, which 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 DTA settled questions about the baseline standard that would govern the treatment of detainees by the United States in the War on Terror.

That assumption may no longer be true. By its interpretation of common Article 3 in *Hamdan*, the Supreme Court has imposed another baseline standard—common Article 3—that we must now interpret and implement.

On the one hand, when reasonably read and properly applied, common Article 3 will prohibit the most serious and grave offenses. Most of the provisions of common Article 3 prohibit actions that are universally condemned, such as “violence to life,” “murder,” “mutilation,” “torture,” and the “taking of hostages.” These are a catalog of the most fundamental violations of international humanitarian law. In fact, they neatly sum up the standard tactics and methods of warfare utilized by our enemy, al Qaeda and its allies, who regularly perpetrate gruesome beheadings, torture, and indiscriminate slaughter through suicide bombings. Consistent with that view, some in the international

community, including the International Committee of the Red Cross, have stated that the actions prohibited by common Article 3 involve conduct of a serious nature.

On the other hand, although common Article 3 should be understood to apply only to serious misconduct, it is undeniable that some of the terms in common Article 3 are inherently vague. 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. It is also unclear what precisely is meant by “judicial guarantees which are recognized as indispensable by civilized peoples.”

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. Many of these interpretations to date have been consistent with the reading that we would give to common Article 3. Nevertheless, the application of common Article 3 will create a degree of uncertainty for those who fight to defend us from terrorist attack.

We believe that the standards governing the treatment of detainees by the United States in the War on Terror should be certain, and that those standards should be defined by U.S. law, in a manner that will fully satisfy our international obligations.

The meaning and application of the vague terms in common Article 3 are not merely academic questions. The War Crimes Act, 18 U.S.C. § 2441, makes any violation of common Article 3 a felony offense.

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*. We think this, too, is an area that Congress should address.

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Notwithstanding the problematic aspects of the Court's opinion I have described, the decision in *Hamdan* gives the political Branches an opportunity to work as one to reestablish the legitimate authority of the United States to rely on military commissions to bring the terrorists to justice. It is also an opportunity to come together to reaffirm our values as a Nation and our faith in the rule of law.

We in the Administration look forward to working with Congress to protect the American people and to ensure that unlawful terrorist combatants can be brought to justice, consistent with the Supreme Court's guidance. I look forward to discussing these issues with the Committee this morning.

Thank you, Mr. Chairman.

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