

**Testimony of  
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Senate Armed Services Committee  
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**INTRODUCTION**

Thank you, Chairman Warner, Senator Levin, and Members of the Armed Services Committee, for inviting me to speak to you today. I appreciate the careful attention that your Committee, and that the Congress as a whole, is devoting to the issue of military commissions.

On Nov. 28, 2001, I testified before the full Senate Judiciary Committee about the President's then two-week old plan to try suspected terrorists in *ad hoc* military commissions. I warned that committee that Congress, not the President, must set up the commissions – and that if Congress did not, the result would be no criminal convictions and a Supreme Court decision striking these makeshift tribunals down.

1693 days have elapsed since my testimony before the Judiciary Committee. During that entire time, not a single trial took place, nor was a single criminal convicted, in these military commissions. It took over two years before anyone was even indicted in a military commission. And on June 29, 2006, the Supreme Court invalidated this scheme devised by presidential fiat.

I did not come here to gloat. The decision to file a lawsuit against the President was the hardest professional decision I have ever faced. I previously served as a National Security Adviser at the United States Department of Justice, and my academic work extols the idea of a strong President in a time of crisis, adopting the “unitary executive” theory of the Presidency. My work in criminal law centers on the need for tough laws that benefit prosecutors, and ways state and local governments can innovatively control crime.

But, despite the fact that I think courts should defer to the President overwhelmingly, I felt the decision to adopt military commissions by executive decree encroached on the constitutional prerogatives of this body, the Congress of the United States. And so I filed suit, along with Lt. Commander Charles D. Swift of the United States Navy and Perkins Coie, a law firm in Seattle. I spent the last four years working on what ultimately became the Supreme Court's decision in *Hamdan v. Rumsfeld*.<sup>1</sup> I argued that case before the Supreme Court of the United States, as well as the United States District Court for the District of Columbia, and the United States Court of Appeals for the District of Columbia Circuit.

In the intervening four years, I have never wavered from my belief that it is the prerogative of Congress, not the President, to create a court system. But I have also learned that I was wrong when I testified in November, 2001. I didn't know much about courts martial at the time, and so I emphasized that until Congress acted, the baseline would be federal civilian court trials.

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<sup>1</sup> *Hamdan v. Rumsfeld*, 548 U.S. (slip op.) (2006).

But I've had the privilege of studying the military justice system over the past four years, and have learned why they are the envy of the world. The Supreme Court's *Hamdan* decision emphasized that both courts martial and civilian courts can try terrorism cases. Justice Stevens' opinion put it simply, "Nothing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case."<sup>2</sup> Justice Kennedy agreed, noting that "Congress has prescribed these guarantees for courts-martial; and no evident practical need explains the departures here."<sup>3</sup> Indeed, there have been 370 courts-martial in Iraq and Afghanistan since 2002, compared to zero military-commission trials.<sup>4</sup>

I would urge Congress and this Committee to heed the words of the Supreme Court, and to employ our military justice system that this body has so carefully and successfully designed. It has worked well for 55 years. In other words, if it ain't broke, don't fix it.

That said, we must also not lose sight of the fact that our existing federal civilian system has worked well in combating terrorism. Indeed, the Justice Department recently extolled its resounding success in terrorism cases in federal civilian court – where it has proceeded with nearly 500 terrorism prosecutions.<sup>5</sup>

I believe that the *Hamdan* decision – which invalidated the President's system of military commissions – represents a historic victory for our constitutional process, and, in particular, the role of the United States Congress and federal judiciary in our tripartite system of government. But I am here to help you determine appropriate steps, consistent with the Court's opinion, for identifying a process that will handle cases against suspected terrorists held at Guantanamo Bay and around the world *and* that will reflect our country's honored commitment to fairness, to equality, and to justice for all.

I commend this Committee, and the Chairman in particular, for proceeding along a very sensible and wise path. I believe the Chairman stated it perfectly last week:

[I]n my judgment, as a Congress, in this legislation, must meet the tenets and objectives of that [*Hamdan v. Rumsfeld*] opinion. Otherwise, such legislation that we will devise and enact into law might well be struck down by subsequent federal court review. And that would not be in the interests of this nation.

The eyes of the world are on this nation as to how we intend to handle this type of situation and handle it in a way that a measure of legal rights and human rights are given to detainees.

Remarks of Sen. John Warner, *Hearing on the Future of Military Commissions to Try Enemy Combatants*, July 13, 2006. The eyes of the world are indeed upon us, and what Congress does here may establish a legal framework for the war on terror for generations to come. We should

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<sup>2</sup> *Hamdan* (slip op. at 60).

<sup>3</sup> *Id.* (slip op. at 16) (Kennedy, J., concurring).

<sup>4</sup> The delay cannot be blamed on civil litigation challenging the tribunals, since the first injunction was not entered until November 8, 2004 and that injunction only applied to the *Hamdan* case.

<sup>5</sup> Remarks of Deputy Attorney General McNulty, American Enterprise Institute, May 24, 2006.

proceed with caution and study the problem first, and do everything in our power to be sure that we need a new system before gambling once again on an unproven one. Given the number of different *existing* avenues for prosecution and detention of those at Guantanamo, the first rule should be for this body to do no harm.

## I. The Flawed Military Commissions.

To understand the appropriate next steps, I believe it is necessary to highlight for the Committee several of the fatal – possibly irreparable – flaws in the military commissions under the President’s Order of November 13, 2001.<sup>6</sup> I think that these defects illuminate why any attempt to start with or ratify the President’s Order would be a serious mistake.

The purpose of a criminal trial is to test the Government’s allegation that a person has committed a crime. The goal of a trial is not to secure a conviction, it is to convict the guilty. And in serving this purpose, a trial does not involve the detention power. As the Supreme Court said in *Hamdan*, a true enemy combatant can still lawfully be held regardless of a trial. The military commission’s sole purpose is to determine whether an individual is guilty of a crime. And the only way a trial can adequately prove guilt or innocence, to the American people and to the world, is when it employs procedures that enable the court to sift the facts from allegations, and that enable it to demonstrate publicly a defendant’s guilt – beyond a reasonable doubt. Unless it does that, a procedure – whether one calls it a military commission, a court-martial, or something else – simply does not count. It is not a court in any sense that Americans would recognize. And such a “trial” would shame the proud traditions of both American military and civilian justice.

As my colleague Lieutenant Commander Swift explained to the Senate Judiciary Committee last week, the commissions consistently failed to meet these proud traditions, both in design and in execution.<sup>7</sup> Although the commissions were established pursuant to the President’s Order in November 2001, a prosecutor and defense counsel were not even appointed until 2003. It took another year, until 2004, until someone was even charged. Hamdan’s case is instructive: he was captured in 2001, but the President did not designate him eligible for a commission trial until July 2003. But he was not charged with an offense at that time; rather, he was placed in solitary confinement and, despite a demand for speedy charges, Hamdan was not charged with any crime for another year.<sup>8</sup> In fact, the federal lawsuit in *Hamdan v. Rumsfeld* preceded the filing of charges – one of the main demands of the lawsuit was that Hamdan be charged because the prosecution was sitting on the case while Hamdan was stuck in solitary confinement.

The commissions denied Hamdan many fundamental rights, including the right to be present at his own trial and to confront the evidence against him. As Justice Stevens explained, the commissions startlingly provided that any confrontation “rights” could be eviscerated at the

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<sup>6</sup> *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57833 (Nov. 13, 2001) (hereinafter “Presidential Order” or “Order”).

<sup>7</sup> *Hamdan v. Rumsfeld: Establishing a Constitutional Process, Hearing before the S. Comm. on the Judiciary*, 109th Cong. (July 11, 2006) (statement of Lt. Cmdr. Charles Swift), available at [http://judiciary.senate.gov/testimony.cfm?id=1986&wit\\_id=5510](http://judiciary.senate.gov/testimony.cfm?id=1986&wit_id=5510) [hereinafter “Swift Testimony”].

<sup>8</sup> *Hamdan*, (slip op. at 4) (Stevens, J.).

discretion of a single individual: “The accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that either the Appointing Authority or the presiding officer decides to ‘close.’”<sup>9</sup> And the government created this gaping exception without ever explaining how it could operate consistently with its assurance of a full and fair trial.<sup>10</sup> The reason that they did not offer a justification on this point is clear: the two are patently incompatible. The accused’s right to be present and to confront the evidence against him are indisputably “the most fundamental protections afforded not just by the Manual for Courts-Martial but also by the UCMJ itself.”<sup>11</sup> As Justice Scalia recently observed for the Supreme Court, “‘It is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine.’” *Crawford v. Washington*, 541 U.S. 36, 49 (2004) (quoting *State v. Webb*, 2 N.C. 103 (1794)).

The military commissions contained myriad other flaws that made them unlawfully biased: they allowed the prosecution to withhold exculpatory evidence from the defense. They dispensed with time honored evidentiary standards, such as the prohibition against hearsay.<sup>12</sup> They countenanced woefully inadequate rules to govern the impartiality of proceedings and participants. For example, the Appointing Authority – the very same individual who convenes and refers charges against individuals to the military commissions – was given a breathtaking amount of power over the establishment and proceedings of the commissions: to select members who vote on guilt or innocence, to oversee the chief prosecutor, to approve or disapprove plea agreements, to close commission proceedings, and to answer interlocutory questions from the presiding officer.<sup>13</sup>

In addition to these procedural and structural flaws, the military commissions suffered from a dangerous conceptual mistake. The government wrongly asserted that the military commissions were not bound to enforce the laws of war. This assertion – roundly rejected in the Court’s opinion – ignored Congress’ clear mandate in the UCMJ, our longstanding treaty commitments, the Supreme Court’s precedent, and our nation’s historical understanding that commissions must comply with the laws of war.

And this divergence from the laws of war was in no way hypothetical. Hamdan was charged with an offense – conspiracy – that is not even recognized in the laws of war.<sup>14</sup> As Justice Stevens explained, the Government “has failed even to offer a ‘merely colorable’ case for inclusion of conspiracy among those offenses cognizable by law-of-war military commission.”<sup>15</sup> Further, the government’s assertion was based on an erroneously cramped reading of the

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<sup>9</sup> *Id.* (slip op. at 50).

<sup>10</sup> *Id.* (slip op. at 71 n. 67) (“[T]he Government suggests no circumstances in which it would be ‘fair’ to convict the accused based on evidence he has not seen or heard.”).

<sup>11</sup> *Id.* (slip op. at 61).

<sup>12</sup> *See id.* (slip op. at 51) (“Another striking feature of the rules governing Hamdan’s commission is that they permit the admission of any evidence that, in the opinion of the presiding officer, ‘would have probative value to a reasonable person.’ Under this test, not only is testimonial hearsay and evidence obtained through coercion fully admissible, but neither live testimony nor witnesses’ written statements need be sworn.”) (internal citations omitted).

<sup>13</sup> *Id.* (slip op. at 12-15) (Kennedy, J., concurring).

<sup>14</sup> *See id.* (slip op. at 43-49) (Stevens, J.) (plurality).

<sup>15</sup> *Id.* at 48 (plurality).

canonical statement of the laws of war: the Geneva Conventions. There is at least one provision of the Geneva Conventions that, regardless of whether a conflict is between signatories, applies with “as wide a scope as possible” – including to the conflict with Al Qaeda. That provision is known as Common Article 3, because it was so essential as to be included in each of the four Geneva Conventions concluded in 1949.<sup>16</sup> Notably, Common Article 3 requires that Hamdan be tried by a “regularly constituted court,” – which these irregular, ad hoc military commissions cannot satisfy.

Finally – as if to underscore that Hamdan was at the mercy of a hastily constituted system, rather than a regularly constituted court – even these biased procedures were subject to change by the stroke of a pen. Most notably, the Department of Defense issued a new Order restructuring the military commissions just one week before the government was due to submit a brief in opposition of certiorari.<sup>17</sup> They changed the rules multiple times, including one change literally on the eve of oral argument in the Supreme Court, when the Pentagon issued a press release stating that it had prohibited testimony obtained by torture from being introduced in the military commissions. (In actuality, even that rule change was cosmetic, since the actual instruction only prohibited such testimony when the prosecution stated it was obtained by torture, and provided no discovery rights to find out whether testimony was, in fact, obtained by torture). In addition, the President’s Order explicitly disclaimed that Hamdan had any rights – even merely to enforce the procedures established by the Order.<sup>18</sup>

For all of these reasons and more, military lawyers involved in both the prosecution and the defense recognized that these commissions lacked the integrity they had come to expect from the military justice system throughout their careers.<sup>19</sup> And it is in *that* system – the one those military lawyers knew and insisted upon – that this Congress will find the best way forward.

## II. Courts-Martial: A Respected, Experienced Institution.

The military already has a battle-tested system for dealing with the problem of trying our enemies: courts-martial. In 1950, Congress adopted the UCMJ, a step that revolutionized military law. It built a system based on fundamental respect for our nation’s traditions as well as international law. The result was a military-justice system that is the envy of the world. We should only break from that proud American tradition for the best of reasons, supported with specific hard facts. There are no such reasons here, and changing the rules now may be another fruitless step backward from the important goal of bringing terrorists to justice. Indeed, rather than searching for ways to resuscitate the failed military commissions, this Committee, and the

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<sup>16</sup> See *id.* (slip op. at 66). Of the four Geneva Conventions, the most relevant is the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U. S. T. 3316, T. I. A. S. No. 3364 (“GPW”).

<sup>17</sup> See *id.*, (slip op. at 49-50) (noting that the order governing the commissions’ procedures “was amended most recently on August 31, 2005 – after Hamdan’s trial had begun”); Gov’t Br. in Opposition to Certiorari, *Hamdan v. Rumsfeld*, No. 05-184, 2005 WL 2214766 at \*5 n.3 (Sept. 7, 2005) (“On August 31, 2005, Secretary Rumsfeld approved changes to the military commission procedures....”).

<sup>18</sup> See President’s Order ¶7(c) (“This order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable at law or equity by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.”).

<sup>19</sup> Swift Testimony, *supra*, at 1.

Congress as a whole, should affirm this proud American tradition of military justice in those cases in which suspected terrorists cannot be tried by civilian courts.

Our civilian courts, after all, have handled a variety of challenges and complicated cases – from the trial of the Oklahoma City bombers to spies such as Aldrich Ames. They have tried the 1993 World Trade Center bombers, Manuel Noriega, and dozens of other sensitive cases. They have prosecuted cases where the crimes were committed abroad. And they have prosecuted hundreds of terrorism cases since September 11.

I am well aware that some organizations, including the CATO Institute, filed briefs in *Hamdan* arguing that only the federal civilian justice system was appropriate. I do not take that position, because I can imagine that there are reasons why we may want to have an alternative to the civilian justice system. I take it that this was the point of Congress' 1916 statute, still on the books, that gives courts martial the ability to try violations of the laws of war. *See* 10 U.S.C. 818. That statute, as the Supreme Court emphasized in *Hamdan v. Rumsfeld*, provides the President with the power to try terrorism cases in courts martial.

Courts martial are tooled up, under existing authority, for handling terrorism cases. And they offer a thorough, respected, and established justice system that is accustomed to handling the inherent security risks and logistical problems of trials for crimes against the laws of war. I would urge this committee to tread carefully before assuming otherwise. This is one area where a solution may be worse than the disease. Consider four basic reasons why this is the case.

- First, the *Hamdan* decision only blocked the trials of 10 individuals. Before rushing to legislate for these 10 men, we should be absolutely convinced of the need for legislation.
- Second, courts-martial have tremendous flexibility today, and can handle the complexities of foreign cases.
- Third, any attempt to resuscitate the military commissions by tinkering with their precise procedures will get bogged down in litigation that may continue for years.
- Fourth, creating two systems of justice, one for “us,” and one for “them,” will look like victor’s justice and have little credibility in the eyes of the world. The court-martial system already commands international respect.

#### **a. Legislation for a Handful of Individuals is Unwise**

Only about 10 individuals are presently indicted by the military commissions — and those indictments took over four years to prepare. To create an entirely new legal system for these ten individuals - and to attempt to do it reasonably promptly – is unprecedented. I am aware that there have been some statements that seventy-five individuals would be designated for trial before these commissions, but a prosecutor in the Office of Military Commissions last

week stated that he was not aware of more than 10 additional cases that could be prosecuted in them.

As Senator Graham reminded us last week, in each of these ten cases, the individuals are being held as “enemy combatants,” and are unable to go free under existing law – whatever Congress decides about prosecution. Even if Congress abolished military commissions, courts-martial, and civilian-trial jurisdiction tomorrow, these individuals would *still* be detained at Guantanamo Bay as enemy combatants. Justice Stevens’ opinion for the Court recognized that present legal status in *Hamdan* itself, stating that the detention issue was not before it. There are, to be sure, two cases pending in the United States Court of Appeals for the District of Columbia Circuit, in which individuals are seeking the right to challenge their detention, but even if the detainees win those cases, it is widely expected that they will wind up at the Supreme Court. And even if the Court were to decline certiorari, they would then go back to the trial courts for factual hearings and oral argument, none of which will set any detainee free, even an entirely innocent one, for a very long time.

This is, in short, one of the worst factual contexts for new legislation. The legislation would be created for only a small number of people, all of whom have already been confined for years, and all of whom will continue to be locked up regardless of any legislation that Congress passes. To boot, each of those men is already amenable to trial in court-martial and in a federal district court.

#### **b. Courts-Martial Have Tremendous Flexibility and International Respect**

The existing court-martial system offers significant promise in handling terrorism cases.<sup>20</sup> We’ve had courts-martial on the battlefields of Afghanistan and Iraq. The “jury” hearing terrorism cases all have security clearances. Military rules already permit closure of the courtroom for sensitive national-security information, authorize trials on secure military bases far from civilians, enable substitutions of classified information by the prosecution, permit withholding of witnesses’ identities, and the like. The UCMJ, in short, has flexible rules in place that permit trials under unique circumstances, and there is no reason to think that they cannot handle these cases today.

In *Curry v. Secretary of the Army*, 595 F.2d 873 (CA DC 1979), the D.C. Circuit rejected a constitutional challenge by a U.S. servicemember to certain structural aspects of the UCMJ. Noting that the UCMJ was designed to work in peace time and in war time, the court stated:

Obedience, discipline, and centralized leadership and control, including the ability to mobilize forces rapidly, are all essential if the military is to perform effectively. The system of military justice must respond to these needs for all branches of the service, at home and abroad, in time of peace, and in time of war. It must be practical, efficient, and flexible.

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<sup>20</sup> Cf. *Hamdan* (slip op. at 49 n.41) (“That conspiracy is not a violation of the law of war triable by military commission does not mean the Government may not, for example, prosecute by court-martial or in federal court those caught ‘plotting terrorist atrocities like the bombing of the Khobar Towers.’”)

593 F.2d at 877. And when drafting the Code, its principal author, Edmund Morgan, emphasized that it struck a flexible balance between fairness for defendants and operation within a military scheme.

It was recognized from the beginning by the committee that a system of military justice which was only an instrumentality of the commander was as abhorrent as a system administered entirely by a civilian court was impractical.... We were convinced that a Code of Military Justice cannot ignore the military circumstances under which it must operate but we were equally determined that it must be designated to administer justice. We, therefore, aimed at providing functions for command and appropriate procedures for the administration of justice. We have done our best to strike a fair balance, and believe that we have given appropriate recognition of each factor.

H.R. 2498 at 605-06 (1949) (Statement of Prof. Edmund Morgan). Those who have practiced within the military law system understand this well. As F. Lee Bailey once put it:

The fact is, if I were innocent, I would far prefer to stand trial before a military tribunal governed by the Uniform Code of Military Justice than by any court, state or federal. I suppose that if I were guilty and hoping to deceive a court into an acquittal or create a reasonable doubt in the face of muddled evidence, I would be fearful of a military court because their accuracy in coming to the "correct" result (in fact and not simply a legally correct result, which means only a fair trial, and not that guilty men are found guilty or that innocent men are acquitted) has a far better accuracy rate than any civilian court has ever approached.<sup>21</sup>

I have listened over the past week to testimony by various Administration officials, who now say what they have not been saying for the past four years, that courts-martial are unable to try these cases. At a minimum, I would strongly urge the committee to inquire, in detail (and perhaps in closed proceedings if necessary) about the 10 current indictments and why they think a court-martial cannot handle them—and to have defense counsel who possess security clearances present at the hearing to respond. I know of no reason why a court-martial would be unable to handle a trial like that of Salim Hamdan, should an Al Qaeda member be captured today. Indeed, the impracticability determination required by Section 836 would best stand up in court after empirical evidence is generated showing that current court-martial rules cannot be applied.

The Administration witnesses thus far have listed a parade of horrors that supposedly follow from the UCMJ. In the four days since this Committee has invited me to testify, I have undertaken a quick examination of the Code, and my expedited examination suggests that each claim is considerably overstated:

- *Miranda Warnings*. Article 31(b) of the UCMJ does contain a heightened *Miranda* requirement. But our nation's highest military court has held that an interrogation for purposes of intelligence gathering was not subject to this

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<sup>21</sup> F. Lee Bailey, *For the Defense* 38 (1976).

requirement, and that evidence obtained without a 31(b) warning can be admitted into a court-martial proceeding. *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992). Military appellate courts have repeatedly held 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). They are not required when questioning is conducted for “operational” reasons. *Id.* at 389. 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. Nor would U.S. personnel interrogating potential enemy combatants for intelligence purposes be required to provide Article 31(b) rights.

- *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 Military Rule of Evidence 807’s residual hearsay exception, 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.

In his testimony before both the Senate Armed Services Committee and the House Armed Services Committee, Assistant Attorney General Bradbury said that both the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) allowed hearsay evidence. For example, he told the Senate Armed Services Committee that “a good example to look to 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.”

As I understand it, however, the rules of both ICTY and ICTR include an important and major restriction to the rule allowing hearsay to the point of making it virtually irrelevant for the current military commissions debate - an exception that Acting Assistant Attorney General Bradbury did not mention. Under Rule 92 bis of both ICTY’s and ICTR’s 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).<sup>22</sup>

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<sup>22</sup> “There is also a brand new Rule 92 bis providing for the admission of a witness’s written statement, so long as it does not go to proof of the conduct or acts of the accused.” Patricia M. Wald, To “Establish Incredible Events by Credible Evidence”: The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings, 42 Harv. Int’l L.J. 535, 548 (2001). As the Appeals Chamber made clear in *Prosecution v. Galic*, “There is a clear distinction to be drawn between (a) the acts and conduct of those others who commit the crimes for which the indictment alleges that the accused is individually responsible, and (b) the acts and conduct of the accused as charged in the indictment which establish his responsibility for the acts and conduct of those others. It is only a written statement which goes to proof of the latter acts and conduct which Rule 92 bis (A) excludes from the procedure laid down in

Those who rely on ICTY evidence rules would also 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, has an untrained, lay, system of 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.

- *Warrants*. Under Military Rule of Evidence 315(e)(4), evidence obtained during a search in a foreign country will be admissible even if it is seized without a warrant. Additionally, under Mil. R. Evid. 314(g)(4) if the Constitution does not require a warrant then the court-martial will not require one either.
- *Protection of Witnesses*. Mil. R. Evid. 507 allows protection of identity of witnesses.
- *Chain of Custody*. Mil. R. Evid. 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* (5<sup>th</sup> 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), "There 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 9-8; *see also United States v. Hudson*, 20 M.J. 607 (A.F.C.M.R. 1985) (noting the trial judge has broad discretion in ruling on chain of custody matters and that all that is required is that it be reasonably certain that the "exhibit has not been changed in any important aspect."). Military courts will dispense with any requirement for a chain of custody for items that are unique in appearance. *See, e.g., United States v. Thomas*, 38 M.J. 614 (A.F.C.M.R. 1993); *United States v. Parker*, 10 M.J. 415 (C.M.A. 1981).<sup>23</sup>

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that rule." *Prosecutor v. Galic*, ICTY Case No. IT-98-29-AR73.2, at 1 (June 7, 2002) (ICTY Judicial Supplement No. 34, decision on interlocutory appeal concerning Rule 92 bis (C)).

The Appeals Chamber also emphasized that "the purpose of Rule 92 bis is to restrict the admissibility of this very special type of hearsay to that which falls within its terms, and a party is not permitted to tender a written statement given by a prospective witness to an investigator of the Office of the Prosecutor under Rule 89(C) in order to avoid the stringency of Rule 92 bis." *Id.* (footnote omitted).

<sup>23</sup> Indeed, the International Criminal Tribunal for the Former Yugoslavia (ICTY), even though it is structured without a judge and jury, uses an authentication rule similar to Military Rule of Evidence 901. *See Prosecutor v.*

- *Classified Evidence.* A court-martial, unlike a civilian trial, can take place with a “jury” composed of individuals who possess security clearances. Existing rules permit courts-martial to be closed to the public and press. Mil. R. Evid 505(j); R.C.M. 806. If the accused at any stage of a 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. R. Evid. 505(i).

In one court-martial espionage case tried under Mil. R. Evid. 505’s procedures, the military judge allowed an intelligence agent to testify under a pseudonym and his real name was never disclosed to the defense. The Court of Military Appeals upheld that procedure and the United States Supreme Court denied the accused’s request to review that decision. *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992), *cert. denied*, 507 U.S. 1017 (1993).

The military rules of evidence already 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). And courts-martial also grant broad privileges for withholding information when it is “detrimental to the public interest.” Mil. R. Evid. 506(a).

The most troubling thing about the testimony that Administration officials have provided over the past week is that they have read the UCMJ in the most selective, condemning manner possible. Their reading is in considerable tension with the way they have been reading other statutes for the past four years, including the 1978 Foreign Intelligence Surveillance Act and the 2001 Authorization for the Use of Military Force. In those settings, they have emphasized the flexibility and open-endedness of statutes, and supplemented their readings with caselaw interpreting the provisions. But here, they are reading the statutes in the most restrictive way possible. Nothing they have said thus far justifies this skepticism. And before this body accepts such skepticism, it should have, at a minimum, some empirical evidence showing that courts-martial cannot try these cases, instead of a rather questionable projection by a prosecuting branch.

Moreover, a court-martial is a decidedly *legal* proceeding. Congress already has 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*

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*Mucic*, Trial Chamber Decision on the Motion of the Prosecution for the Admissibility of Evidence (Jan. 19, 1998) available at <http://www.un.org/icty/celebici/trialc2/decision-e/80119EV21.htm>. The ICTY considers the issue of authentication so important that in some cases the court employs its own experts in determining the authenticity of evidence. See *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Trial Chamber III Final Decision of the Admissibility of Intercepted Communications in the case of (June 14, 2004) available at <http://www.un.org/icty/milosevic/trialc/decision-e/040614.htm>.

opinion. And they satisfy all the conditions the *Hamdan* majority found the president's commissions failed to meet. They would eliminate the problems of uniformity that the Supreme Court found so damning to the military commissions.<sup>24</sup> They would provide assurances of independent proceedings and review that the commissions sorely lack.<sup>25</sup> 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.

By using an existing system, we would not just be reaffirming our core American values, we'd also have smoother prosecutions. Right now, the United Kingdom refuses to recognize the commission system, with its attorney general calling them completely "unacceptable" because they fail to offer "sufficient guarantees of a fair trial in accordance with international standards." Australia has cut a special side deal with the Bush administration so one of its citizens, David Hicks, is treated differently from other commission defendants. A United Nations Expert Committee says these commissions are fundamentally unfair—a report that will prompt other nations to refuse to let their citizens be tried in these bodies. And extradition, sharing of prosecution/intelligence information, and availability of witnesses will all become extremely serious problems when other countries refuse to cooperate. Without an extensive track record showing that courts-martial are failures, it is exceptionally dangerous to gamble our prosecution strategy on the administration's diplomatic ability to persuade other nations to cooperate with these commissions.

I am by no means the first person to suggest this course. Just last week, Professor Scott Silliman, who served for twenty five years in the Air Force's Judge Advocate General Department, endorsed the same approach before the Senate Judiciary Committee: "[Courts-martial] is a fair and well-proven system of law, created by Congress some 56 years ago, that is more than adequate to the task. Article 18 of the Code gives general courts-martial jurisdiction to prosecute violations of the law of war, and the President need only make the policy decision to use them."<sup>26</sup> Bruce Fein, a former high-ranking Department of Justice official in the Reagan Administration, also wrote: "[T]rial by courts-martial under the UCMJ would prohibit secret evidence and require sworn testimony. The reliability of verdicts compared with military commissions would be sharply advanced. And the government invariably wins when justice is done."<sup>27</sup>

**c. Legislation for this Handful of Defendants Will Get Bogged Down in the Courts and Delay the Crucial Goal of Bringing Terrorists to Justice.**

Whatever purported benefits might be gained by some new system have to be weighed against the inevitable litigation risk. The *Hamdan* decision makes clear that any changes that depart from our nation's military tradition and international law are going to be closely

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<sup>24</sup> See *id.* (slip op. at 56-62).

<sup>25</sup> See *id.* (slip op. at 14) (Kennedy, J., concurring) ("This is another means in which, by structure and tradition, the court-martial process is insulated from those who have an interest in the outcome of the proceedings.").

<sup>26</sup> *Hamdan v. Rumsfeld: Establishing a Constitutional Process, Hearing before the S. Comm. on the Judiciary*, 109th Cong. (July 11, 2005) (statement of Scott L. Silliman), available at [http://judiciary.senate.gov/testimony.cfm?id=1986&wit\\_id=5511](http://judiciary.senate.gov/testimony.cfm?id=1986&wit_id=5511).

<sup>27</sup> Bruce Fein, *Are the Military Panels Needed?*, WASH. TIMES, July 11, 2006, available at <http://www.washingtontimes.com/commentary/bfein.htm>.

scrutinized by the courts. The result of changing the rules again now could be another four years with no prosecutions and perhaps yet another reversal by the Supreme Court. “Four more years” is not a convincing slogan, especially when not a single terrorist has been brought to justice in these military commissions.

This body should do what the President did not over four and a half years ago, consider whether its decision to create a new trial system will set back the war on terror by inviting litigation, and the overturning of criminal convictions in terrorism cases. The *Hamdan* decision is important here because of its implications for the Detainee Treatment Act (DTA). Some individuals, including Justice Scalia, read the DTA to strip the Supreme Court of jurisdiction over Guantanamo cases. Under their reasoning, the DTA meant that Hamdan could only come into federal court to challenge the military commission after he was convicted, not beforehand.

But that reading did not prevail – and with good reason. Senator Levin of this Committee worked with Senator Graham and others to modify the initial version of the DTA, which would have created that outright jurisdiction stripping. Instead, the modifications of Senators Levin and Graham grandfathered the *Hamdan* case – and in a way that is good for the fight against terrorism. Could you imagine if the contrary reading would have prevailed? We would have put the country through the 10 commission trials, at huge taxpayer expense, and then they would have come to the Supreme Court 4 or 5 years from now at the earliest. And they then would have been thrown out as illegal for the reasons the Supreme Court gave us on June 29. We would have then possibly faced the terrible prospect of these individuals going free.

The nation owes a debt of gratitude to Senator Levin for ensuring that careful thought and attention was devoted to this point in the last-minute appropriations process, and to Senator Graham and the others who worked with him. Otherwise, we would be having these debates in Congress about how to try suspected terrorists four or five years from now – and in a much worse factual environment – where criminal convictions have been thrown out as illegal and where terrorists might even have been released. By trying them according to court-martial procedures, we still have the opportunity to do it right the first time.

For that reason, if this body adopts any legislation today, it should mandate an anti-abstention principle, and provide for expedited review of any military commission challenge to the Supreme Court of the United States. If you do not, we will face the same prospect of criminal convictions being overturned in several years. The *Hamdan* decision makes clear that the federal courts have a vital role to play in ensuring the fairness and legality of any system of criminal justice. That role should be played at the outset, to avoid the trauma to the nation that would result from a decision setting the convicted terrorists free, or, possibly forcing an individual to be retried after they have already previewed their defense for the prosecution. In these circumstances, a retrial would not be considered just in the eyes of the world.

An expedited review provision has been used many times in recent years, including, for example, the Bipartisan Campaign Finance Reform Act. A three judge district court would hear the challenge, and then it would go to the Supreme Court on a fast-track basis. That path would provide a sure footing and stability beforehand.

Again, my strong view is that it is better to get the show on the road and use the existing system, instead of having to wait for a risky new scheme to be tested in the courts. But the worst of all worlds would be legislation that adopts a risky system and tries to defer federal court challenges until after convictions happen. Such a system will put courts in an impossible position. This country, the families and survivors of the 9/11 attacks, and the rest of the world, deserve to see a fair trial of the suspected Al Qaeda terrorists that the Administration has been holding onto for more than four years now. A “wait and see” attitude toward criminal convictions of suspected terrorists is not something that can wait any longer.

Finally, judicial abstention provides yet another powerful and compelling reason for the use of courts martial instead of commissions. The Supreme Court in 1975 in *Schlesinger v. Councilman* stated that challenges to a court-martial generally must take place after, not before, someone is convicted in them. The government tried to advance a similar principle in *Hamdan*, but not one of the three courts to hear the case – at the trial, appellate, or Supreme Court level – accepted this notion. Instead, all three courts made clear that they would hear legal challenges, *pre-trial*, to military commissions. Courts-martial have developed a body of caselaw and tradition that federal courts feel comfortable deferring to; but a newfangled institution will command no such deference. Because we are talking about the most awesome powers of government – dispensing the death penalty and life imprisonment – courts will carefully scrutinize the procedures and rules for trial. The only way to ensure that scrutiny yields a decision in which the system is not tossed out is to use a system that is battle-tested and approved already by the Supreme Court of the United States. Courts-martial and federal civilian trials meet these tests; military commissions do not.

**d. Creating a Separate Trial System Will Undermine American Credibility and Threaten Compliance with the Geneva Conventions.**

Senator McCain last week stated it perfectly:

[W]e will have more wars, and there will be Americans who will be taken captive. If we somehow carve out exceptions to treaties to which we are signatories, then it will make it very easy for our enemies to do the same in the case of American prisoners.

Remarks of Sen. John McCain, *Hearing on the Future of Military Commissions to Try Enemy Combatants*, July 13, 2006.

Let’s be clear about what the *Hamdan* decision did and did not do. It did not, by its terms, guarantee prisoner of war privileges to al Qaeda or individuals who do not wear a uniform and comply with the laws of war. Nor did it, by its terms, extend the full protections of the Geneva Convention to *Hamdan* or any other detainee. Instead, it simply reaffirmed that the minimal, rudimentary requirements of Common Article 3 apply to all conflicts.

We must be careful not to further the perception that, in matters of justice, particularly when the death penalty is at stake, the American government adopts special rules that single out foreigners for disfavor. If Americans get a “Cadillac” version of justice, and everyone else gets a

“beat-up Chevy,” the result will be fewer extraditions, more international condemnation, and increased enmity toward Americans worldwide.

An extensive amount of material has already been generated on this point. Secretary of State Madeline Albright and 21 other senior diplomats filed a brief in *Hamdan v. Rumsfeld* explaining that the military commissions lacked credibility internationally and were interfering with our ability to project our nation as one of fairness and justice.<sup>28</sup> 422 Members of the European and United Kingdom parliaments filed a brief condemning military commissions as fundamentally unfair and a violation of international law.<sup>29</sup> That brief, notably, was signed by leaders of all of the major political parties in Britain, including the conservative Tories. Retired Generals and Admirals filed a brief containing similar views—building on Colin Powell’s stated beliefs while serving as Secretary of State.<sup>30</sup> All of these warnings square with what the Senate has itself said about the Geneva Conventions – that they represent minimal standards for all conflicts. In recommending ratification of the Geneva Conventions in 1955, the Senate Committee on Foreign Relations stated:

Our Nation has everything to gain and nothing to lose by being a party to the conventions now before the Senate, and by encouraging their most widespread adoption.... The practices which they bind nations to follow impose no burden upon us that we would not voluntarily assume in a future conflict without the injunctions of formal treaty obligations.

We should not be dissuaded by the possibility that at some later date a contracting party may invoke specious reasons to evade compliance with the obligations of decent treatment which it has freely assumed in these instruments. Its conduct can now be measured against their approved standards, and the weight of world opinion cannot but exercise a salutary restraint on otherwise unbridled actions....

The committee is of the opinion that these four conventions may rightly be regarded as a landmark in the struggle to obtain for military and civilian victims of war, a humane treatment in accordance with the most approved international usage. The United States has a proud tradition of support for individual rights, human freedom, and the welfare and dignity of man. Approval of these conventions by the Senate would be fully in conformity with this great tradition.

The Army Field Manual itself has recognized in the past that compliance with Common Article 3 is necessary in order to *promote* interrogations, and to win the hearts and minds of the enemy and potential sympathizers.

Humane treatment of insurgent captives should extend far beyond compliance with Article 3, if for no other reason than to render them more susceptible to interrogation. The insurgent is trained to expect brutal treatment upon capture. If, contrary to what he has been led to believe, this mistreatment is not forthcoming, he is apt to become psychologically softened for interrogation. Furthermore,

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<sup>28</sup> See [http://www.hamdanvrumsfeld.com/Hamdan\\_AlbrightDiplomats\\_brief.PDF](http://www.hamdanvrumsfeld.com/Hamdan_AlbrightDiplomats_brief.PDF).

<sup>29</sup> See <http://www.hamdanvrumsfeld.com/HamdanParliamentariansFreshfields.pdf>

<sup>30</sup> See <http://www.hamdanvrumsfeld.com/GeneralsandAdmirals.pdf>

brutality by either capturing troops or friendly interrogators will reduce defections and serve as grist for the insurgent's propaganda mill.<sup>31</sup>

Some have suggested, in response to the Supreme Court's decision, that while Congress must respect the Supreme Court's interpretation of the Geneva Conventions,<sup>32</sup> Congress does not need to respect the Conventions themselves. It can pass a new law—such as one authorizing the current military commissions or a substantially similar alternative—that overrides the Conventions and denies the protections of Common Article 3 in full or in part to suspected members of groups like al Qaeda. As a matter of domestic law, Congress currently has the power to do this. But the political costs would be enormous and the legal consequences severe.

For starters, even if accompanied by a “jurisdiction-stripping” measure, any such statute would invite a litany of legal challenges. *Hamdan* did not reach constitutional questions. If Congress now authorizes commissions that fail to meet recognized international standards, it runs the risk of violating constitutional due process and tying up the courts for years in new rounds of detainee-rights litigation.

A statute that works to limit Common Article 3 would also be in serious violation of international law, on at least two levels. First, any statute that does not comply in full with Common Article 3 would amount to a breach—and likely a material breach—of one of the United States' most fundamental treaty obligations. Common Article 3 is no ordinary provision. It is often referred to as a “Convention in miniature”<sup>33</sup> for the way it distills the hundreds of articles contained in the four Geneva Conventions into “the common principle which governs them,”<sup>34</sup> a principle of “indivisible nature.”<sup>35</sup> A statute that conflicts with Common Article 3 would violate “a provision essential to the accomplishment of the object or purpose of the treaty” and therefore constitute a material breach of the entire Geneva Conventions.<sup>36</sup> Because Common

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<sup>31</sup> Army Field Manual 34-52.

<sup>32</sup> See *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2684 (2006) (explaining the Supreme Court's interpretive supremacy over treaties).

<sup>33</sup> E.g., 3 INT'L COMM. OF RED CROSS, COMMENTARY: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 34 (1960).

<sup>34</sup> *Id.* at 35.

<sup>35</sup> *Id.* at 38. These quotations come from the official ICRC commentary to the Geneva Conventions, which the Supreme Court recognized in *Hamdan* as “relevant in interpreting the Conventions' provisions.” *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2789 n.48 (2006).

<sup>36</sup> See Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 60(3)(b), 1155 U.N.T.S. 331, 346 (defining “material breach”); see also ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 238 (2000) (noting that the breach of even “an important ancillary provision” of a treaty will constitute a material breach); MOHAMMED M. GOMAA, SUSPENSION OR TERMINATION OF TREATIES ON GROUNDS OF BREACH 39 (1996) (The [materially] breaching act may be based on grounds of municipal law such as the enactment of legislation or execution of rules of municipal law which are contrary to the State's contractual obligations.”). While the Vienna Convention on the Law of Treaties is not binding on the United States, it is widely agreed, and executive-branch officials have assumed, “that the Convention generally reflects customary international law.” Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 424 (2000).

Some commentators have argued that violations of Common Article 3 constitute not only material breaches, but also “grave breaches” expressly criminalized under the Geneva Conventions. See, e.g., Ruth Wedgwood, *War Crimes in the Former Yugoslavia: Comments on the International War Crimes Tribunal*, 34 VA. J. INT'L L. 267, 272-73 (1994). The U.S. government has taken this position at least once. See Amicus Curiae Brief Presented by the Government of the United States of America, at 35-36, *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment (May 7, 1997).

Article 3 is non-derogable, claims of military or security necessity are no justification for violating it.<sup>37</sup> And because the provisions of Common Article 3 are not severable from one another, Congress must apply the Article in its entirety.<sup>38</sup> Accordingly, a statute that serves to “rein in”<sup>39</sup> any provision of Common Article 3, for any reason, would leave the United States in material breach of all four Geneva Conventions. Treaty obligations are “too fundamental to be easily cast aside,”<sup>40</sup> and that maxim holds especially true here, where the treaty at issue is one of the United States’ most powerful tools for upholding the law of war and ensuring humane treatment for our soldiers.<sup>41</sup>

In addition to violating treaty law, any statute that conflicts with Common Article 3 would be argued to be illegal on a second level of customary international law. Common Article 3 sets forth “the most fundamental norms of the law of war”<sup>42</sup> and thereby reflects “elementary considerations of humanity.”<sup>43</sup> As a result, it is now widely regarded to be a signal example of customary international law.<sup>44</sup> (Some even believe Common Article 3, and the Geneva Conventions more generally, to be *jus cogens*, a peremptory norm of general international law that may never be set aside unless a subsequent contrary norm develops.<sup>45</sup>) Any statute that tries

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<sup>37</sup> See Theodor Meron, *Internal Strife: Applicable Norms and a Proposed Instrument*, in HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD 249, 255-57 (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991) (explaining why “[i]t is now generally accepted that humanitarian instruments, having been adopted to govern situations of armed conflict, are not subject to derogations” on any grounds). A few particular articles of the Geneva Conventions (such as Articles 5 and 27 of the Fourth Convention) do allow limited derogations, but Common Article 3 is emphatically not one of them.

<sup>38</sup> Cf. Hamdan v. Rumsfeld: *Establishing a Constitutional Process: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 10 & n.58 (2006) (statement of Harold Hongju Koh, Dean, Yale Law School), available at [http://www.law.yale.edu/documents/pdf/Deans\\_Office/KOH\\_Hamdan\\_TESTIMONY.pdf](http://www.law.yale.edu/documents/pdf/Deans_Office/KOH_Hamdan_TESTIMONY.pdf) (observing that the Supreme Court gave no indication in *Hamdan* that Common Article 3 may ever be applied piecemeal).

<sup>39</sup> See Kate Zernike, *Administration Prods Congress To Curb the Rights of Detainees*, N.Y. TIMES, July 13, 2006, at A1 (quoting one Senator as saying that Common Article 3 must be “reined in” by Congress).

<sup>40</sup> United States v. Dion, 476 U.S. 734, 739 (1986).

<sup>41</sup> It is important to note that, contrary to what Daniel Collins asserted last week, see Hamdan v. Rumsfeld: *Establishing a Constitutional Process: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Daniel Collins, Partner, Munger, Tolles & Olson), available at [http://judiciary.senate.gov/testimony.cfm?id=1986&wit\\_id=5512](http://judiciary.senate.gov/testimony.cfm?id=1986&wit_id=5512), if Congress simply asserts that the existing commissions are “regularly constituted,” this would not be sufficient to save compliance with Common Article 3. First, it takes a highly formalistic interpretation of “regularly constituted” to mean merely “sanctioned by congressional declaration.” Second and more basic, this argument ignores section 1(d) of Common Article 3, which states that protected persons must be tried by a “regularly constituted court *affording all the judicial guarantees which are recognized as indispensable by civilized peoples*” (emphasis added). The Supreme Court has already indicated in *Hamdan* that the existing commissions fall far short of these guarantees.

<sup>42</sup> Kadic v. Karadzic, 70 F.3d 232, 243 (2d Cir. 1995).

<sup>43</sup> Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 114, para. 218 (June 27).

<sup>44</sup> See, e.g., *id.*; Kadic, 70 F.3d at 243; Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1351 (N.D. Ga. 2002); THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 380 (2004) (“[Common Article 3’s] minimum standards are generally accepted throughout the world as customary international law.”).

<sup>45</sup> See INGRID DETTER, THE LAW OF WAR 410 (2d ed. 2000); Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT’L L. 348, 350 (1987). The official commentary to the Geneva Conventions notes that its principles “are today the essential expression of valid international law in this sphere” and therefore “exist independently of the Convention and are not limited to the field covered by it.” 1 INT’L COMM. OF RED CROSS, *supra*, at 412-13. Even formal denunciation of the Conventions does not “impair the obligations which the Parties to the conflict remain bound to fulfill by virtue of the principles of the law of nations, as they result from the usages

to avoid or narrow Common Article 3 would thus be not only a profound affront to the norms and morals of the global community, but also claimed to be an *illegal* affront to them.

Make no mistake: If Congress wants to avoid applying any provision of Common Article 3 to “enemy combatants” or other groups, it must be crystal clear that it so intends, because under the *Charming Betsy* doctrine courts will construe statutes so as to harmonize with international agreements whenever fairly possible.<sup>46</sup> Congress’s abrogation of Common Article 3 would need to be very explicit, and very public, or else courts will not recognize it. The boldness required to specifically override the guarantees of Common Article 3 with new legislation would be exceptional. Indeed, it would be unprecedented; apparently no legislature has ever passed such a measure.<sup>47</sup>

And if Congress were to assume this ignoble mantle, the legal troubles wouldn’t end with constitutional challenges and our breaches of treaty law, customary law, and, arguably, *jus cogens*. To effectuate its new statute, Congress would need to amend or repeal at least three other controlling statutes: the Uniform Code of Military Justice, the McCain Amendment, and the War Crimes Act. The latter statute imposes federal criminal sanctions on “conduct . . . which constitutes a violation of common Article 3.”<sup>48</sup> Congress would need to take the remarkable step of striking that language from the War Crimes Act unless it wants U.S. military personnel—including those who administer deficient trial proceedings—to be prosecuted for war crimes in U.S. courts. But even *that* would not protect these military personnel from prosecution abroad. Under the principle of “universality,” “[m]ost authorities have accepted that breaches of the laws and customs of war, especially of the 1907 Hague Conventions and the 1949 Geneva Conventions, may be punished by any state that obtains custody of persons suspected of responsibility.”<sup>49</sup> Not only other countries’ courts, but also the founding charters of numerous international tribunals expressly recognize violations of Common Article 3 as war crimes.<sup>50</sup>

In the legal fallout that would ensue from any congressional effort to “rein in” Common Article 3, the fact that al Qaeda does not abide by the Article would be of no moment. Were it a party to the Geneva Conventions, Al Qaeda would be in material breach. No one doubts this. But the Geneva Conventions, as well as background principles of international law, do not permit

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established among civilized peoples, from the laws of humanity and the dictates of the public conscience.” *Id.* at 413.

<sup>46</sup> See *Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 253, 307 (1829); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987).

<sup>47</sup> See Adam Liptak, *Scholars Agree That Congress Could Reject Conventions, but Not That It Should*, N.Y. TIMES, July 15, 2006, at A10; cf. *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgement, ¶ 138 (Dec. 10, 1998) (observing that no State has ever “shown or manifested opposition to the implementation of treaty provisions against torture,” including those contained in Common Article 3), available at <http://www.un.org/icty/furundzija/trialc2/judgement/fur-tj981210e.pdf>.

<sup>48</sup> 18 U.S.C. § 2441(c)(3).

<sup>49</sup> JOHN NORTON MOORE ET AL., NATIONAL SECURITY LAW 379 (1990); accord IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 303 (6th ed. 2003).

<sup>50</sup> See, e.g., Rome Statute of the International Criminal Court, July 17, 1998, art. 8, § 2(c), (e)(vi), U.N. Doc. A/Conf.183/9 (2002); Statute of the International Criminal Tribunal for Rwanda, Nov. 8, 1994, art. 4, U.N. Doc. S/Res/955 (1994); Statute of the Special Court for Sierra Leone, Jan. 16, 2002, art. 3, available at <http://www.scs-l.org/scsl-statute.html>; see also Moirah Sanchez et al., *Case Concerning the Women and Children of the Civil War*, 10 ILSA J. INT’L & COMP. L. 215, 223-24 & nn.20-21 (explaining international courts’ prosecution of Common Article 3 violations and state approval thereof).

other countries to breach, suspend, or terminate the Conventions or any part thereof in response to another party's material breach.<sup>51</sup> If the United States does not think Common Article 3 should apply in full in a particular armed conflict, it must—as a matter of Geneva law and international law—formally denounce the entire treaty, an act that no state has ever before taken.

Against this mainstream interpretation of the Geneva Conventions,<sup>52</sup> and to widespread public criticism, some Administration officials have argued that the United States may retaliate against al Qaeda and the Taliban by temporarily suspending the Conventions with respect to those entities.<sup>53</sup> If one accepts this logic of negative reciprocity—and there is no guarantee that creative lawyers in other governments wouldn't—then a congressional act that breaches the Conventions might be seen to authorize other countries to suspend application of the Conventions *with respect to the United States*. This may be unlikely in the case of our allies, but it is not impossible in the case of many key players in the war on terror; the administration has, after all, already supplied them with the legal arguments.

So a new statute “reining in” Common Article 3 would not only raise significant constitutional and administrative concerns, leave the United States in violation of a major treaty obligation and a major tenet of customary international law, fundamentally alter and undermine our legal framework for the treatment of captives, and expose U.S. officers to possible war crimes liability; it might also set the course to the unraveling of the Geneva Conventions themselves.

I do not need to remind this committee why the Geneva Conventions are so vital to our national interest, or explain how defying the Conventions would do irreparable, perhaps unprecedented damage to our nation's standing and reputation in the eyes of the world, including those whom we are trying to win over to our side. As commentators on the law of war have observed, “the rules contained in Article 3 are minimum standards in the most literal sense of the term; standards, in other words, no respectable government could disregard for any length of time without losing its aura of respectability.”<sup>54</sup>

Finally, it is sometimes said Congress must act in the wake of the *Hamdan* decision because otherwise a rogue international prosecutor will indict a United States government official while traveling abroad. This argument is a canard. Leave aside the fact that the Defense Department

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<sup>51</sup> Common Article 1 of the Conventions stipulates that the Contracting Parties “undertake to respect and to ensure respect for the present Convention *in all circumstances*” (emphasis added). This language reflects the customary rule that humanitarian treaties may not be suspended or derogated from in response to another party's material breach. See Vienna Convention on the Law of Treaties, *supra*, at art. 60(5); see also AUST, *supra*, at 238 (indicating that the drafters of the Vienna Convention had the Geneva Conventions specifically in mind when they included this provision).

<sup>52</sup> Expressions of this position can be found, *inter alia*, in DETTER, *supra*, at 403-04, 410; FRITZ KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR 75 (2d ed. 2001); David A. Elder, *The Historical Background of Common Article 3 of the Geneva Conventions of 1949*, 11 CASE W. RES. J. INT'L L. 37, 52 (1979).

<sup>53</sup> See Memorandum from Jay S. Bybee, Assistant Att'y Gen., to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel, Dep't of Defense 23-25 (Jan. 22, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf> (acknowledging legal precedents and norms to the contrary, but asserting that the Executive may suspend the Geneva Conventions because “unfairness” and “non-compliance” might result if we did not do so).

<sup>54</sup> KALSHOVEN & ZEGVELD, *supra*, at 69.

has publicly stated that it has been in full compliance with Article 3, and that our troops are trained to dispense Common Article 3 protections. The more basic problem is that whatever Congress (or, for that matter, the Supreme Court) defines Common Article 3 to mean wouldn't matter to this hypothesized rogue prosecutor abroad. If that prosecutor wanted to use the customary definition of Common Article 3 as applying to all conflicts, he would be free to do so – regardless of what the Supreme Court or Congress of the United States said. The decision of both domestic institutions is utterly irrelevant to what a rogue prosecutor in Spain, Belgium, or some other country might decide to do.

I mentioned before that if Congress chooses to pass a law overriding any provision of the Geneva Conventions, it would make ours the first government ever to do so. It would not, however, make us the first country to publicly violate Common Article 3. Other prominent examples include the Khmer Rouge in Cambodia, the Revolutionary United Front in Sierra Leone, the current Khartoum government in Sudan, and Saddam Hussein in Iraq.<sup>55</sup> These are not the bedfellows the United States is accustomed to keeping, nor the precedents the United States wants to evoke. Congress should make sure that any “legislative response” to *Hamdan* does not tamper with Common Article 3 and put America on the wrong side of history.

### III. Moving Forward.

Chairman Warner and Members of the Committee, the Supreme Court got it right. The president's military commissions departed in major ways from the most basic tenets of American justice. For the first time, defendants were kicked out of their own criminal trials without their consent. Even a military commission prosecutor called the system “a half-hearted and disorganized effort by a skeleton group of relatively inexperienced attorneys to prosecute fairly low-level accused in a process that appears to be rigged.”<sup>56</sup> Another prosecutor lamented that “writing a motion saying that the process will be full and fair when you don't really believe it is kind of hard—particularly when you want to call yourself an officer and a lawyer.”<sup>57</sup> This is the danger of departing from established and time-tested rules.

Indeed, something that has gone without notice thus far is that the lengthy judicial opinions that sided with Mr. Hamdan all have been penned by jurists who actually served in our military: Justice John Paul Stevens, Justice Anthony Kennedy, and lower court Judge James Robertson. I believe this is hardly a coincidence. For years, the military has stood at the forefront of protecting the rule of law, knowing that if our courts give the executive branch the power to break from the Geneva Conventions, then executives from other countries will do it back to our

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<sup>55</sup> See MICHAEL BYERS, WAR LAW: UNDERSTANDING INTERNATIONAL LAW AND ARMED CONFLICT 36 (2005) (Sudanese government violating Common Article 3); Laura Forest, Note, *Sierra Leone and Conflict Diamonds: Establishing a Legal Diamond Trade and Ending Rebel Control over the Country's Diamond Resources*, 11 IND. INT'L & COMP. L. REV. 633, 659 n.225 (2001) (RUF violating Common Article 3); Erik Suy, *International Humanitarian Law and the Security Council Resolutions on the 1990-1991 Gulf Conflict*, in HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD 515, 523 (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991) (Saddam Hussein violating Common Article 3); Hans-Peter Gasser, *Non-International Armed Conflicts*, 31 AM. U. L. REV. 911, 921 (1982) (Khmer Rouge); Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, U.N. GAOR, 53d Sess., Annex, 75 (1999), available at <http://www1.umn.edu/humanrts/cambodia-1999.html>.

<sup>56</sup> See Swift Testimony, *supra*, at 1 (quoting Air Force Captain John Carr).

<sup>57</sup> *Id.* (quoting Air Force Major Robert Preston).

own troops some day when they are captured. As a group of retired Admirals and Generals pointed out to the Court as amici curiae, during Senate considerations of the Conventions, ensuring the protection of our troops was an overriding concern.<sup>58</sup> Perhaps for that reason, and despite all the Administration's resistance to the Court's Geneva Conventions holding, the Pentagon recently issued a memo informing all branches of the military of the Supreme Court's interpretation of the Conventions and finding that Common Article 3 – the provision at issue in *Hamdan* – now protects detainees across the globe and must be respected.<sup>59</sup> These are all steps in the right direction.

Legislation in response to *Hamdan* must also consider the open-ended nature of this conflict and guard against undue encroachment of military jurisdiction in the administration of justice. After all, our tradition of civilian justice is one of the defining principles of this nation, one that the founders of this republic were prepared to defend with (in the words of the Declaration of Independence) their lives, their fortunes, and their sacred honor. Unlike past military commissions, which were used in combat or occupation zones under military control, the use of commissions in the freestanding conflict with al Qaeda means that potentially anyone, including an American citizen apprehended on American soil, could be tried before such a tribunal. As the Supreme Court has repeatedly pointed out in defending the jurisdiction of civilian courts, the jurisdiction of past military commissions has been strictly confined by time, place, person, and charge. All of those constraints appear to be much weaker, if they are going to be applied at all, in the proposed military commissions today. The result is that new legislation authorizing military commissions in an unbounded "war on terrorism" almost certainly would depart from the longstanding view, enshrined in one of the landmark decisions of the Supreme Court, *Ex parte Milligan*, 71 U.S. 2 (1866), that when the civilian courts are open and unobstructed in the exercise of their function, they should be used. This Congress should not resort to military commissions unless it is convinced that the gravity of the threat truly requires such a momentous step. In a very real sense, use of military commissions expresses a lack of faith in the institutions of civilian rule that have served this country well in times of crisis every bit as dangerous as that which we face today.

What makes America great is not the quality of the soil on which we stand, but the principles that define our nation. My parents came here from a distant land, attracted by that promise, of inalienable rights for all and equal opportunity. We are a land of justice and fairness, and with a system that is strong enough to handle even the most extraordinary of challenges. We witnessed an extraordinary event three weeks ago in the Supreme Court, where a man with a fourth-grade Yemeni education accused of conspiring with one of the world's most evil men sued the President in the nation's highest court – and won. Only America is strong enough to permit such a challenge. Only America is fair enough to let that challenge proceed. And only America is wise enough to let such a decision stand as the law of the land – and to celebrate it as a vindication of the Rule of Law. For on that day, *Hamdan* won something that every American

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<sup>58</sup> Amicus Br. of Retired Generals and Admirals, *Hamdan v. Rumsfeld*, No. 05-184, at 3, *available at* <http://www.hamdanvrumsfeld.com/briefs> ("I cannot emphasize too strongly that the one nation which stands to benefit the most from these four conventions is the United States....To the extent that we can obtain a worldwide acceptance of the high standards in the conventions, to that extent will we have assured our own people of greater protection and more civilized treatment.") (quoting Sen. Alexander Smith).

<sup>59</sup> Mark Mazzetti and Kate Zernike, *White House Says Terror Detainees Hold Basic Rights*, N.Y. TIMES, July 12, 2006.

has celebrated from the Declaration of Independence on – a fair trial. While the rule of law came out the winner in *Hamdan*, it is not as if national security came out the loser. Quite the opposite, in fact. Hamdan, like any suspect, deserves to be tried and held accountable for any crimes he committed, but in a way that is fair and preserves America’s honor and integrity.

In sum, I ask members of this Committee to see an America that is fulfilling the promise to protect our troops and values – a promise embodied in the words of Justice Rutledge, dissenting in the last great military commission case, *Yamashita v. Styer* (1946):

More is at stake than General Yamashita's fate. There could be no possible sympathy for him if he is guilty of the atrocities for which his death is sought. But there can be and should be justice administered according to law. In this stage of war's aftermath it is too early for Lincoln's great spirit, best lighted in the second inaugural, to have wide hold for the treatment of foes. 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.

In 1956, a young former law clerk to Justice Rutledge quoted these words in a book chapter.<sup>60</sup> His name was John Paul Stevens. And exactly fifty years later, he made good on Justice Rutledge’s promise.

Thank you.

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<sup>60</sup> John Paul Stevens, MR. JUSTICE RUTLEDGE, in Allison Dunham and Philip B. Kurland (eds.), MR. JUSTICE, The University of Chicago Press (Chicago 1956).