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BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

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

Thank you, Mr. Chairman, Ranking Member Leahy, and Members of the Committee. On behalf of the Department of Defense, please allow me to express my gratitude for the opportunity to appear before you today, and for the prompt and careful consideration by the Committee of necessary measures in response to the Supreme Court's decision in *Hamdan v. Rumsfeld.*

I join whole-heartedly in Mr. Bradbury's statement and add just a few words of my own. The United States military has convened criminal tribunals other than courts-martial since the days of the very first Commander-in-Chief, George Washington. From the Revolutionary, Mexican-American and Civil Wars on through World War II and the present, our nation and its military have considered these tribunals an indispensable tool for the dispensation of justice in the chaotic and irregular circumstances of armed conflict. The military commission system reviewed by the Court in *Hamdan* fits squarely within this long tradition.

Tradition, however, is not the only justification for employing criminal adjudication processes other than courts-martial in times of armed conflict. Alternative processes are necessary to avoid the absurd result of adopting protections for terrorists that American citizens do not receive in civilian courts.

The court-martial system is not well known or understood outside the military. One common misperception is that courts-martial must necessarily render a lesser form of justice because they fall outside the judicial branch. But the opposite is actually true. To protect in court those who protect us in battle, and to avoid even the appearance of unlawful command influence, courts-martial are more solicitous of the rights of the accused than our civilian courts.

For every court-martial rule that is arguably less protective of the accused than its civilian analogue, there are several that are indisputably more protective. For example, legal counsel is provided without cost not just for the indigent, but for all. The rights to counsel and against self-incrimination are afforded earlier in the military justice system than in civilian practice. Instead of indictment by grand jury, which convenes in secret without the defendant and defense counsel, the military justice system requires for a general court-martial a thorough and impartial investigation open to the public and the media, at which the accused and defense counsel may conduct pre-trial discovery and call and cross-examine witnesses. The court-martial process allows open and full discovery of the government's information by the accused, a process more open and automatic than discovery in civilian criminal prosecutions. The speedy trial rules are stricter in the military justice system than in the civilian system. The statute of limitations that applies to most military offenses is shorter than the federal statute for terrorism offenses. And the rules for exclusion of evidence are more generous toward the accused than their civilian counterparts.

While tradition and common sense therefore provide strong support for alternative adjudication processes for terrorists and other unlawful enemy combatants, military

necessity is perhaps the strongest reason of all. It is simply not feasible in time of war to gather evidence in a manner that meets strict criminal procedural requirements. Service personnel are generally not trained to execute military combat and intelligence missions while simultaneously adhering to law enforcement standards and constraints. Asking our fighting men and women to take on additional duties traditionally performed by police officers, detectives, evidence custodians and prosecutors would not only distract from their mission, but endanger their lives as well.

Intelligence gathering would also suffer terribly. It would greatly impede intelligence collection essential to the war effort to tell detainees before interrogation that they are entitled to legal counsel, that they need not answer questions, and that their answers may be used against them in a criminal trial. Similarly, full application of court-martial rules would force the government either to drop prosecutions or to disclose intelligence information to our enemies in such a way as to compromise ongoing or future military operations, the identity of intelligence sources, and the lives of many. Military necessity demands a better way.

As Mr. Bradbury stated, the *Hamdan* decision provides Congress and the President an opportunity to address these critical matters together. We look forward to working with you.

Thank you, Mr. Chairman.

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