



Federal Bar Association

Office of the President

WILLIAM N. LAForge

Winstead Sechrest & Minick PC
1850 M Street, NW, Suite 800
Washington, DC 20036
(202) 572-8016 • (202) 572-8001 (fax)
wlaforge@winstead.com

September 14, 2006

The Honorable John Warner
Chairman
Committee on Armed Services
United States Senate
Washington, DC 20510

The Honorable Carl Levin
Ranking Minority Member
Committee on Armed Services
United States Senate
Washington, DC 20510

Re: Military Commissions Legislation in Response to *Hamdan v. Rumsfeld*

Dear Chairman Warner and Senator Levin:

As president of the Federal Bar Association, I write to express our association's interest in and concern with legislative proposals under consideration to mitigate the possible adverse effects of the Supreme Court's recent decision in *Hamdan v. Rumsfeld*. Our primary concern is that any legislation be drafted with great care and that all reasonable alternatives be considered on their merits.

For example, it is important to define carefully the circumstances under which military commissions may be used, the procedures to be employed and the evidence to be considered. Thus, attention might be given to consideration of whether, instead of amending Article 36 of the Uniform Code of Military Justice (10 USC 836) to exclude military commissions, the rules of procedure and the rules of evidence set out in the Manual for Courts-Martial be applied, except to the extent that the President by Executive Order creates narrow exceptions for military commissions.

Likewise with respect to appellate review, it seems quite plausible, instead of providing for judicial review overseen by the U.S. Court of Appeals for the D.C. Circuit (an Article III Court), that judicial review might be conducted by the U.S. Court of Appeals for the Armed Forces (CAAF), which is an Article I Court, established by the Uniform Code of Military Justice (UCMJ) and which already has authority under Article 18 of the UCMJ to "try any person who by the law of war is subject to trial by a military

tribunal.” It would be awkward to have one group of accused tried by general courts-martial for violations of the law of war with judicial review by the CAAF and others tried by the law of war and their cases reviewed in the D.C. Circuit (which arguably has less familiarity than the CAAF with issues presented by the law of war).

Similarly, instead of creating a new Court of Military Commission Review to review cases tried by military commissions, such review could be accomplished by the Courts of Criminal Appeals established by Article 66 of the UCMJ, which are empowered to review cases tried by general courts-martial. While this alternative might require adding personnel to the existing courts of criminal appeals, this would be less expensive than creating a new court.

In this same connection, it might be suggested that law of war cases be tried by general court-martial pursuant to Article 18 of the UCMJ (10 USC 818), unless for particular cases or categories of cases a specific determination is made by the President that a military commission should be used. Conversely, perhaps consideration should be given to the President’s amendment of the Manual for Courts-Martial to create special rules of procedure and evidence for cases tried by general courts-martial under the law of war.

Still another issue to be carefully considered is whether to detail more specifically what a violation of the law of war is for purposes of trial either by general court-martial or military commission. For example, “undeclared” war should be included, since the United States has not been involved in a declared war since World War II, notwithstanding its participation in major international hostilities during the same period. In this same connection, it might be desirable to incorporate definitions of war used in the War Crimes Act (18 USC 1441).

In conclusion, the Federal Bar Association urges the exercise of care in drafting whatever legislation is believed to be required in light of the *Hamdan* decision. As always, our Association stands ready to assist the Congress in further accomplishing that objective.

Sincerely,



William N. LaForge
President