



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 10, 2006

The Honorable Charles Schumer
Committee on Judiciary
United States Senate
Washington, DC 20510

Dear Senator Schumer:

This responds to your letter, dated June 30, 2006, concerning the implications of the Supreme Court's recent decision in *Hamdan v. Rumsfeld* for the Terrorist Surveillance Program described by the President. The Department of Justice is carefully considering the ramifications of the Court's decision, including any potential effects on the Department's legal justification for the Terrorist Surveillance Program set forth in the Department's January 19, 2006, paper, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* ("Legal Authorities"). For purposes of this letter, we once again assume that the Terrorist Surveillance Program involves "electronic surveillance," as defined by the Foreign Intelligence Surveillance Act of 1978 ("FISA").

The Court in *Hamdan* concluded that the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) ("Force Resolution"), did not "expand or alter" existing authorizations for military commissions set forth in the Uniform Code of Military Justice ("UCMJ"). Slip op. at 29-30. The Court further concluded that "compliance with the law of war is the condition upon which the authority set forth in Article 21 [of the UCMJ, 10 U.S.C. § 821,] is granted." Slip op. at 65. In the Court's view, Hamdan's military commission did not meet the requirements of common Article 3 of the Geneva Conventions, which the Court found was part of the law of war (and therefore incorporated into Article 21 of the UCMJ). For this reason (and another not relevant here), the Court concluded that the military commission lacked power to proceed.

Our initial impression is that the Court's opinion does not affect our analysis of the Terrorist Surveillance Program for several reasons. First, the statutory regime at issue in *Hamdan* is fundamentally different from the one implicated by the Terrorist Surveillance Program. As you know, section 109 of FISA expressly contemplates that Congress may authorize electronic surveillance through a subsequent statute without amending or referencing FISA. See 50 U.S.C. § 1809(a)(1) (prohibiting electronic surveillance "except as authorized by statute"); see also *Legal Authorities* at 20-23 (explaining argument in detail). Article 21 of the UCMJ, the primary provision at issue in *Hamdan*, has no analogous provision. Section 109 of

FISA is, however, quite similar to the provision at issue in *Hamdi v. Rumsfeld*, 542 U.S. 519 (2004). In *Hamdi*, five Justices concluded that the Force Resolution “clearly and unmistakably authorized detention,” as a fundamental and accepted incident of the use of military force, notwithstanding a statute that provides that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress,” 18 U.S.C. § 4001(a). *Hamdi*, 542 U.S. at 519 (2004) (plurality opinion); *id.* at 587 (Thomas, J., dissenting). Because the Terrorist Surveillance Program implicates a statutory regime analogous to the one at issue in *Hamdi*, see *Legal Authorities* at 24, we believe that the reasoning of *Hamdi* is far more relevant to the Terrorist Surveillance Program than the reasoning of *Hamdan*.

Second, the UCMJ expressly deals with the Armed Forces and with armed conflict and wars. By contrast, Congress left open the question of what rules should apply to electronic surveillance during wartime. See *Legal Authorities* at 25-27 (explaining that the purpose of FISA’s declaration of war provision, 50 U.S.C. § 111, is to allow the President to conduct electronic surveillance outside all FISA procedures while Congress and the Executive Branch work out rules applicable to the war). It is therefore more natural to read the Force Resolution as supplying the additional, contemplated electronic surveillance authority for the armed conflict with al Qaeda than it is to read the Force Resolution as augmenting the authority in the UCMJ, which, as noted, is intended to continue to apply during armed conflicts and wars. Indeed, there is a long tradition of interpreting force resolutions to confirm and supplement the President’s constitutional authority in the particular context of electronic surveillance of international communications. See *Legal Authorities* at 16-17 (describing examples of Presidents Wilson and Roosevelt); *cf. id.* at 14-17 (describing long history of warrantless intelligence collection during armed conflicts).

Third, Congress has express constitutional authority to “define and punish . . . Offenses against the Law of Nations,” U.S. Const. Art. I, § 8, cl. 10, to “make Rules concerning captures on Land and Water,” *id.* cl. 11, and to “make Rules for the Government and Regulation of the land and naval forces,” *id.* cl. 14. There is no similarly clear expression in the Constitution of congressional power to regulate the President’s authority to collect foreign intelligence necessary to protect the Nation. See *Legal Authorities* at 30-34. The President’s authority to collect foreign intelligence is a direct corollary of his authority, recognized in *Hamdan*, to direct military campaigns, see *Hamdan*, Slip op. at 27 (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139-40 (1866)). Moreover, nothing in *Hamdan* calls into question the uniform conclusion of every federal appellate court to have decided the issue that the President has constitutional authority to collect foreign intelligence within the United States, consistent with the Fourth Amendment. See, e.g., *In re Sealed Case*, 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002) (“[A]ll the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information . . .”). Indeed, the Foreign Intelligence Court of Review expressed the view that “FISA [cannot] encroach on the President’s power.” *Id.*

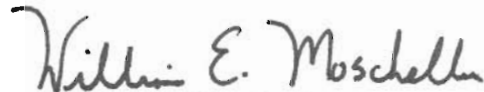
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Finally, the Government did not argue and the Court did not decide in *Hamdan* that the UCMJ would be unconstitutional as applied if it were interpreted to prohibit Hamdan's military commission from proceeding. *See* Slip op. at 29 n.23. In order to sustain this argument, the Court would have had to conclude that the UCMJ, so interpreted, unduly interfered with "the President's ability to perform his constitutional duty." *Morrison v. Olson*, 487 U.S. 654, 691 (1988); *see also id.* at 696-97. Such a showing would be considerably easier in the context of the Terrorist Surveillance Program, where speed and agility are so essential to the ongoing defense of the Nation.

Hamdan is an important and complicated decision. We can assure you that the Department continues to review *Hamdan* and all other legal developments. We hope this information is helpful. Please do not hesitate to contact this office if we may be of assistance with future matters.

Sincerely,

A handwritten signature in black ink that reads "William E. Moschella". The signature is written in a cursive style with a large initial "W".

William E. Moschella

Assistant Attorney General