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THE AUTHORITY TO PROSECUTE TERRORISTS UNDER THE WAR CRIME PROVISIONS OF TITLE 18

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

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THE AUTHORITY TO PROSECUTE TERRORISTS UNDER THE WAR CRIME PROVISIONS OF TITLE 18

WEDNESDAY, AUGUST 2, 2006

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC

The Committee met, pursuant to notice, at 9:30 a.m., in room 226, Dirksen Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Kyl, Graham, Leahy, Kennedy, Feinstein, and Feingold.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Chairman SPECTER. Good morning, ladies and gentlemen.

The Judiciary Committee will now proceed with our hearing following the decision of the Supreme Court of the United States in Hamdan v. Rumsfeld, where we will take up the issue of legislation to comply with the Supreme Court's ruling to specify the war crimes, which are covered by Common Article 3 of the Geneva Convention.

The provisions of 18 U.S. Code § 2441(c)(1) already incorporate the essential provision of Common Article 3 which requires humane treatment. In accordance with the requirements of the criminal law that there be specification, it is the responsibility of Congress to delineate what the specific offenses are.

That specification of particularity is required by our criminal law in order to give those charged an adequate opportunity to defend themselves. We have already had some authoritative judgment that the proceedings at Guantanamo have violated Article 3.

Major General Jack Rives, who will be testifying here today, testified on July 13, 2005: "Some of the techniques that have been authorized to be used in the past have violated Common Article 3," and it is up to the Congress of the United States, under the provisions of Article 1, Section 8, to deal with capture on land and sea and to specify what is covered by "war crimes."

There has been a draft circulated, not officially, but available on the Internet which has disclosed, or at least reportedly disclosed, which provisions are in a draft bill being circulated by the administration.

One of the provisions which is quoted today would give the Secretary of Defense the authority to add crimes under the Military

Court's jurisdiction, a military court to be set up by an act of Congress.

At the outset, I have strong reservations about whether that authority can be undertaken by the Secretary of Defense, where there can be that kind of a delegation by the Congress of the United States. I, frankly, very much doubt it.

We do have a provision in the Criminal Code on war crimes. I think it necessary for the Congress to take up a specific kind of conduct to be covered by the tribunal, however that is established, but we will have to give very serious thought to whether it is doable to have that delegated, to have the Secretary of Defense make those additions.

With respect to the provisions of the tribunal themselves, the Supreme Court has apparently left considerable latitude. I say "apparently," because you never know, until the next decision by the Supreme Court, if there are reasons for the limitations.

But there are some matters which are of substantial concern. The issue of hearsay, for example, whether there may be standards established on reliability of hearsay.

The issue of classified information, which some say should be made available to the defendant's lawyer but not to the defendants themselves. That raises the issue of the right of confrontation.

We do not deal with, necessarily, constitutional rights of confrontation in the Fifth Amendment, but a matter of basic fairness. Perhaps that can be handled analogous to the Confidential Information Protection Act. That is something we will have to look into.

The draft circulated would prohibit evidence obtained by torture. That seems rather fundamental. If it permits evidence to come in under coerced confessions, that is a question which we will have to take up.

But it has long been the rule in judicial proceedings in the United States that evidence obtained by coerced confessions would not be admissible, both on grounds of unfairness and on grounds of unreliability.

I have discussed these issues with Chairman John Warner, who will be working coordinately with the Armed Services Committee. We have been working with the administration on preliminary analysis, and we face a very important task to protect the security of the United States in dealing with terrorism and establish procedures to satisfy the Supreme Court.

My red light just went on, so I will now yield to the distinguished Ranking Member, Senator Leahy.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman.

The Chairman has convened this hearing today to consider the government's authority to prosecute terrorists under the War Crimes Act.

It has long been open to the administration to charge suspected terrorists, including those imprisoned at Guantanamo Bay, with Federal crimes.

In addition to the War Crimes Act, Federal law provides criminal penalties for terrorism, torture, hostage-taking, and other acts that

are considered grave breaches of the Geneva Conventions, irrespective of where these acts occurred. And unlike the international law of war, of course, Federal law allows you to prosecute for conspiracy, so there is ample authority under Federal law for the prosecution of international terrorists.

But for various reasons—some good, and unfortunately some bad—the administration has made little use of that authority against suspected terrorists. As far as I can tell, the Ashcroft Justice Department and the Gonzales Justice Department have yet to file a single charge, not even one, against anyone for violation of the War Crimes Act. Nor has the administration made use of the processes and procedures set forth in the Manual for Courts Martial and the Uniform Code of Military Justice.

Instead, the Bush-Cheney administration has pursued a two-prong strategy. First, with respect to the vast majority, the 700-plus prisoners at Guantanamo and the unidentified prisoners held in secret prisons overseas, the administration has frankly stated it has no interest in trying them in any court, civilian or military. I disagree with them on their conclusion, but you at least have to respect the honesty of their statements, cynical as it might be.

Second, the administration has decided to bring a small number of detainees before military commissions. Now, I have no objection, in principle, to the use of military commissions.

Indeed, I introduced legislation to authorize procedures for military commissions back in February of 2002. I held hearings in 2001 on the issue. I asked the administration to work with us on it. They said, no, they did not want to. They said they had a unilateral, and secret, procedure they were going to follow.

Of course, what happens, instead of having military commissions that would have withstood the test of law, that go-it-alone approach had a predictable result: an embarrassing defeat in the U.S. Supreme Court. Not a single suspected terrorist has been held accountability by a military commission in the last 6 years.

The court's landmark separation of powers decision in Hamdan compelled the Bush-Cheney administration to finally come to Congress to request authorizing legislation.

Mr. Chairman, I was encouraged to read the testimony that the uniformed witnesses provided before the Armed Services Committee which indicated that the starting point for legislation should be the well-established rules governing courts martial. I agree.

But when the administration's civilian lawyers, the people that do not actually have to do this, came before the committee, they, instead, argued that Congress should simply rubber stamp the problematic procedures that the Supreme Court had just shot down. It made no sense at all.

What is at stake for all Americans, as these decisions are made, are our American values and the primacy in our system of government of the rule of law, something we like to say makes us different than a lot of the enemies we face.

Today we have before us some of the uniformed witnesses who testified before the Armed Services Committee. I look forward to the testimony of the JAG officers.

I might say, when I was in ROTC in college—Air Force ROTC, General Rives. My son took a different route. He went into the Ma-

rine Corps. They would not let me in because I was blind in one eye.

But I wanted to become a JAG officer because they had been trying to uphold the best military justice traditions. I thank them for their service. I am sorry they have been cut out, often, from the administration's deliberations.

So I look forward to our consideration at this hearing, whether the War Crimes Act provisions should be expanded to include additional offenses.

In the future, I hope at some point we can get the Committee together to consider, again, how to construct military commissions.

Mr. Chairman, I will put my whole statement in the record.

Chairman SPECTER. Without objection, the entire statement will be made a part of the record.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman SPECTER. We now turn to our first witness, who we would call, first. He is a representative from the Department of Justice, the Acting Assistant Attorney General in the Office of Legal Counsel, Steven Bradbury.

He has a distinguished academic record. He has a Bachelor's degree from Stanford, a magna cum laude law degree from the University of Michigan, an extensive practice in private law, law clerk to Judge James Beckley of the DC Circuit.

We acknowledge the very substantial assistance that Mr. Bradbury has given to this Committee in working through some very difficult legal issues with the Department of Justice.

Thank you for joining us, Mr. Bradbury. We look forward to your testimony.

STATEMENT OF STEVEN BRADBURY, ACTING ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. BRADBURY. Thank you,Mr. Chairman, Senator Leahy, and members of the committee. I appreciate once again the opportunity to appear here today on behalf of the Department of Justice to discuss the question of war crimes prosecutions in the wake of the Supreme Court's decision in *Hamdan* v. *Rumsfeld*.

The administration believes that Congress needs to address the Supreme Court's ruling in *Hamdan* that Common Article 3 of the Geneva Conventions applies to our own conflict with Al Qaeda.

The United States has never before applied Common Article 3 in the context of an armed conflict with international terrorists, yet because of the court's decision in *Hamdan*, we are now faced with the task of determining the best way to do just that.

Many of the provisions of Common Article 3 prohibit actions that are universally condemned, such as murder, mutilation, torture, and the taking of hostages.

It is undeniable, however, that some of the terms in Common Article 3 are inherently vague. For example, Common Article 3 prohibits outrages upon personal dignity, in particular, humiliating and degrading treatment. Of course, it is susceptible to uncertain and unpredictable application.

Furthermore, the Supreme Court has said, in a long line of cases, that in interpreting the treaty provisions such as Common Article 3, the meaning given to the treaty language by international tribunals must be accorded respectful consideration, and the interpretations adopted by other State parties to the treaty are due considerable weight.

Accordingly, the meaning of Common Article 3, which, as a result of the court's decision, is now the baseline standard that applies, including to the conduct of U.S. personnel in the War on Terror, is subject to the evolving interpretations of tribunals and governments outside the United States.

We believe that the standards applicable to the crimes of terrorists, as well as those governing the treatment of detainees by United States personnel in the War on Terror, should be certain and that those standards should be defined clearly by U.S. law, consistent with our international obligations.

Of course, with respect to terrorists, it is our intent to prosecute them for their war crimes through military commissions authorized by Congress.

In terms of our own treaty obligations as a Nation, we believe that one straightforward step that Congress could take would be to define our baseline obligations for the treatment of detainees under Common Article 3 by reference to the U.S. constitutional standard already adopted by Congress in the McCain amendment.

Last year after a significant public debate on the standard that should govern the treatment of captured Al Qaeda terrorists, Congress adopted the McCain amendment as part of the Detainee Treatment Act.

That amendment prohibits cruel and inhuman or degrading treatment or punishment, as defined by reference to the established meaning of our constitution, for all detainees held by the United States, regardless of nationality or geographic location.

Congress rightly assumed that the enactment of the Detainee Treatment Act settled questions about the baseline standard that would govern in the War on Terror. We view this standard established by the McCain amendment as entirely consistent with, and a useful clarification of, our obligations under the relevant provisions of Common Article 3.

Defining the terms of Common Article 3 as a treaty matter, however, is not only relevant for our treaty obligations, but is also important because the War Crimes Act, 18 U.S.C § 2441, makes any violation of Common Article 3 a felony offense.

The administration believes that Congress should ensure that any legislation addressing the Common Article 3 issues created by the *Hamdan* decision will bring clarity and certainty to the War Crimes Act.

One sure way to achieve that clarity and certainty, in our view, would be for Congress to set forth a definite and clear list of offenses serious enough to be considered war crimes punishable as violations of Common Article 3 under the War Crimes Act.

Of course, Mr. Chairman, with respect to military commissions, the current military commission order sets forth a long list of war crimes that would be triable by a military commission and it would be our suggestion that any legislation enacted by Congress to au-

thorize military commissions would similarly set forth a list of substantive war crimes that would be offenses triable by military commission.

The issues raised by the court's pronouncement on Common Article 3 are ones that the political branches need to consider carefully as they chart a way forward after *Hamdan*.

I understand, Mr. Chairman, that the Committee is also interested in the question whether conspiracy to commit a violation of the laws of war may be charged as an offense under the laws of war tried before a military commission. We believe that it may.

On this point, Mr. Chairman, I would simply say that we believe that the dissenting opinion in *Hamdan* was correct in its analysis, and that the plurality's view on this particular question is not sustainable.

I look forward to discussing these subjects with the Committee this morning. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Mr. Bradbury.

Our next witness is the distinguished Former Chairman of the Joint Chiefs of Staff, General Richard B. Myers. He received a Bachelor's degree from Kansas State University, a Master's in business administration from Auburn.

He has an extensive additional educational background while in the service. He held a very impressive list of commands. He has more than 4,100 flying hours, 600 combat hours on the F–4 jet, and, if I may say, is a native Kansan.

Our native State takes great pride in what you have done, General Myers. We welcome you here today, and the floor is yours.

STATEMENT OF GENERAL RICHARD B. MYERS, FORMER CHAIRMAN, JOINT CHIEFS OF STAFF, WASHINGTON, D.C.

General MYERS. Thank you, Mr. Chairman, Senator Leahy. I have a very short statement. First, let me express my appreciation for the opportunity to be here.

All I would like to suggest, is that the issues we are going to discuss today have, potentially, very significant impacts on how this Nation and its ability to prosecute the War on Terrorism will go.

Also, on our troops who are on the front lines of this war. Also, on how the international community is going to view the fairness of whatever process we come up with to deal with unlawful enemy combatants.

So I do not think there is a more important subject being discussed today than this particular subject, given the threat we face from violent extremists and terrorism. I thank you for the opportunity to be here, Mr. Chairman.

Chairman SPECTER. Thank you very much, General Myers.

We turn, now, to Major General Scott Black, the Judge Advocate General for the U.S. Army. General Black received his Bachelor's degree from California Poly Tech State University. He attended California Western School of Law in San Diego, and received a Master in Science from the National Resource Strategy of the National Defense University.

He has an impressive list of military assignments which will be included in the record, and quite a number of awards and honors, also which will be included in the record.

We appreciate your coming in today, General Black, to give us the advantage of your thinking on how to approach these tough judicial issues. The floor is yours.

STATEMENT OF MAJOR GENERAL SCOTT BLACK, THE JUDGE ADVOCATE GENERAL, U.S. ARMY, WASHINGTON, D.C.

General BLACK. Thank you, Mr. Chairman, Senator Leahy, and members of the committee. I would like to thank you for the opportunity to appear before you today, and for the committee's timely and thoughtful consideration of these significant issues.

As you know, soldier-lawyers in the Judge Advocate Generals Corps have practical experience and expertise in the law of war. For the most part, our involvement in this area is focused on helping commanders ensure that U.S. military operations adhere to the rule of law and the law of war, a standard that is typically met and, frankly, a practice that frequently separates us from our enemies.

We are also integrally involved in the prosecution of soldiers for crimes that occur in combat, although our general practice is to charge soldiers with violations of the Uniform Code of Military Justice and not with war crimes.

The Supreme Court's ruling in the *Hamdan* case has reinforced the importance of the rule of law and law of war, and has reinvigorated our scholarship concerning how we charge and prosecute individuals for war crimes.

In *Hamdan*, the Supreme Court reminds us that properly established and enabled military commissions continue to be a viable and vital forum to try those enemy combatants who violate the laws of war.

Congress may specify substantive offenses triable by military commissions in a number of different ways, including in an act related to military commissions, or by amending the War Crimes Act at 18 U.S.C. § 2441, or by both means.

Army Judge Advocates are now involved in the process, led by the Department of Justice and with Judge Advocates of the other services, to propose to Congress the best way to enable military commissions to adjudicate the full range of offenses that are now at issue in the global war on terrorism.

This would include conspiracy, which the Supreme Court found problematic in *Hamdan*. While this review and analytical process is ongoing, I believe that several points are apparent.

First, we need the help of Congress to pass additional enabling legislation, both for the military commission forum and for the substantive offenses that may be tried by commissions.

Second, the War Crimes Act should be amended. In so doing, however, our goal should be to elevate the Act from an aspiration to an instrument. By this I mean that the Act should not simply be a statement of legal policy in furtherance of the ideals of the law of war, but should be a statute defining serious and prosecutable criminal offenses.

Finally, third, whatever is criminalized in the War Crimes Act must withstand the test of fairness, as well as the scrutiny of law. Since it is a criminal statute, it must be clear and it must prescribe, clearly, criminal conduct. There cannot be two standards. If

we are to hold enemy combatants to the War Crimes Act, we must be prepared to hold U.S. personnel to the act.

In conclusion, I believe that with the help of Congress we will have a forum and the necessary offenses that enable the Nation to have a pragmatic, lawful, and effective instrument for maintaining order and the rule of law on the battlefield.

With that, sir, I thank you and look forward to your questions.

Chairman SPECTER. Thank you very much, General Black.

[The prepared statement of General Black appears as a submission for the record.]

Chairman SPECTER. Our next witness is Rear Admiral Bruce MacDonald, Deputy Judge Advocate General for the Department of the Navy and Commander of the Naval Legal Services Command.

He has a Master's degree from Holy Cross, a law degree from the California Western School of Law, and a Master's from Harvard.

He has a very distinguished record in the military, and awards, all of which will be included in the record.

We thank you for coming in today, Admiral MacDonald, and look forward to your testimony.

STATEMENT OF REAR ADMIRAL BRUCE MACDONALD, JUDGE ADVOCATE GENERAL, U.S. NAVY, WASHINGTON, D.C.

Admiral MACDONALD. Thank you very much, Mr. Chairman. I appreciate you inviting me to testify today, Senator Leahy, members of the committee.

During a ceremony conducted at the historic Washington Navy Yard this past Friday, I relieved Rear Admiral Jim McPherson as the Judge Advocate General of the Navy, so I am here before you now as the senior Navy lawyer.

Rear Admiral McPherson retired after more than 27 years of distinguished service to the Navy and to our Nation, and I am honored to follow in his wake. I have the particular good fortune to join the ranks of Generals Jack Rives, Scott Black, and Kevin Sandkuhler, who are military officers and Judge Advocates with the highest professionalism and integrity.

Mr. Chairman, as our National security strategy makes clear, global security ultimately depends on the advance of freedom and democracy, both of which are grounded in the rule of law. We must always accomplish our military missions within the rule of law. Anything less risks forfeiting essential domestic and international support and undercuts the very values for which we stand and fight.

Working together to carefully navigate these important issues, I am confident that we can develop a system that balances the needs of national security with the importance of affording all accused, whether terrorists or American service members, a fair and full judicial proceeding.

Once again, Mr. Chairman, thank you for the opportunity to testify. I look forward to answering your questions.

Chairman SPECTER. Thank you very much, Admiral MacDonald.

[The prepared statement of Admiral MacDonald appears as a submission for the record.]

Chairman SPECTER. We now turn to Major General Jack L. Rives, Judge Advocate General for the U.S. Air Force.

He has a Bachelor's degree from the University of Georgia, a University of Georgia Law School law degree, and extensive additional educational background in the service. He has a distinguished record in the military, with a number of awards, all of which will be made a part of the record.

We appreciate your coming in, General Rives, and the floor is yours.

STATEMENT OF MAJOR GENERAL JACK RIVES, THE JUDGE ADVOCATE GENERAL, U.S. AIR FORCE, WASHINGTON, D.C.

General RIVES. Thank you, Chairman Specter, Senator Leahy, and members of the committee. I appreciate the opportunity to appear before you today as this Committee carefully considers the authority of the United States to prosecute suspected terrorists, consistent with the Supreme Court's decision in *Hamdan* v. *Rumsfeld*.

Prior to enactment of the War Crimes Act, suspected war criminals were prosecuted domestically by the United States for the underlying common law offense, such as murder, rape, or assault.

Consistent with our treaty obligations, Congress enacted the War Crimes Act to prescribe misconduct internationally recognized as constitution violations of the laws of nations. Prosecutions under the War Crimes Act, like all prosecutions under Title 18, include the due process rights afforded in our Federal court system.

While these rights are necessary and appropriate for suspected terrorists, investigated and apprehended through normal domestic law enforcement methods, some, such as the aggressive discovery rules and strict chain of custody requirements are incompatible with the realities and unpredictability of the battlefield. The full discovery rights of our Federal court system may reveal sensible, intelligent sources and methods that would harm our overall national security.

Similarly, the chain of custody requirements of our Federal system are simply unworkable, given the uncertain and ever-changing nature of the battlefield and the need for our military personnel to be free from the technical rules more applicable to domestic law enforcement officers operating in American neighborhoods.

In light of these difficulties, our laws offer alternative means to prosecute suspected terrorists seized on the battlefields of the global war on terrorism. These alternative methods were the subject of *Hamdan* v. *Rumsfeld* and they are the focus of ongoing discussions outside of Title 18.

However, congressional action to amend the War Crimes Act can prove helpful on a related matter. The War Crimes Act currently characterizes all violations of Common Article 3 of the Geneva Conventions as felonies. Violations of Common Article 3 include, among other things, outrages upon personal dignity, in particular, humiliating and degrading treatment.

Under our military justice system, less serious breaches can be handled through administrative or non- judicial means. However, again, the War Crimes Act treats all violations of Common Article 3 as felonies.

We welcome Congressional efforts to better define which outrageous upon personal dignity—in particular, humiliating and degrading treatment—amount to serious breaches worthy as classi-

fication as felonies. Such efforts would serve our men and women fighting the global war on terrorism by providing clearly delineated limits.

As recognized and reaffirmed in last year's Detainee Treatment Act, we cannot, and will not, condone U.S. military personnel engaging in outrageous, humiliating, and degrading conduct as U.S. law defines such misconduct. Congressional efforts to better define these terms for Common Article 3 purposes will provide needed clarity to the rules of conduct for our military forces.

I look forward to discussing these issues with the Committee this morning. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, General Rives.

[The prepared statement of General Rives appears as a submission for the record.]

Chairman SPECTER. Our final witness on the panel is Brigadier General Kevin Sandkuhler, Staff Judge Advocate to the Commandant for the Marine Corps, which is the equivalent of a Judge Advocate General.

His education includes a Bachelor's degree from Holy Cross, he is a cum laude graduate from the California Western School of Law, Master of Law and Government Contracts from George Washington University.

He has a very distinguished record in the military, with many awards, all of which will be made a part of the record.

We welcome you here, General. We look forward to your testimony.

STATEMENT OF BRIGADIER GENERAL KEVIN M. SANDKUHLER, DIRECTOR, JUDGE ADVOCATE DIVISION, U.S. MARINE CORPS, WASHINGTON, D.C.

General SANDKUHLER. Thank you, Mr. Chairman, Senator Leahy, and members of the Judiciary Committee. Good morning. I wish to thank you for the opportunity to appear before you today and for this committee's interest in this critical issue.

As does this committee, we remain keenly interested in continuing to fulfill our international obligations under the Geneva Conventions, as well as ensuring that we are able to effectively and efficiently bring terrorists to justice.

The plurality of the Supreme Court concluded in the *Hamdan* decision that conspiracy was not triable by a law of war or a military commission, in part because it was not positively identified by statute as a war crime. How best to bring terrorists to justice following the *Hamdan* decision is a matter worthy of careful consideration.

The War Crimes Act of 1996 was enacted to carry out the international obligations of the United States under the Geneva Conventions to provide criminal penalties for certain war crimes.

Until its enactment, the United States had never taken affirmative steps to legislate the penal provision of the Geneva Conventions. The War Crimes Act of 1996 accomplished these ends.

The Act was not intended to affect in any way the jurisdiction of any court-martial, military commission, or other military tribunal under any article of the Uniform Code of Military Justice, the law of war, or the law of nations.

Substantively, the Act criminalizes four categories of conduct, committed here or abroad, as war crimes: grave breaches of any of the international conventions signed at Geneva, or any protocol to such convention to which the United States is a party; violations of Articles 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Law and Customs of War on Land; violations of Common Article 3 to the Geneva Conventions; and violations of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices.

The ability of the United States to prosecute terrorists under the War Crimes Act will be driven by whether the crime is covered substantively under the Act, but more importantly by whether the prosecution is practicable under our Federal criminal system.

Procedurally, prosecuting terrorists under Title 18 in Article III Federal courts would present many of the same difficulties we have been addressing in our military commissions process, including a relation between the national security and, for example, discovery rights of the accused, access to classified information, and self- incrimination.

Striking the balance between individual due process and our National security interests, while maintaining our service members' flexibility in dealing with terrorists and unlawful enemy combatants they encounter on the battlefield is the end we all seek.

With that as a backdrop, I look forward to discussing the issues with the committee. Thank you.

Chairman SPECTER. Thank you. Thank you very much, General.

[The prepared statement of General Sandkuhler appears as a submission for the record.]

Chairman SPECTER. I will turn to the Senators for 5 minute rounds of questions.

Mr. Bradbury, does Congress have the authority to delegate to the Secretary of Defense the responsibility and authority to add offenses, crimes, to the statute or is that one of the many non-delegable functions of Congress that would require that Congress make the determination of specific war crimes?

Mr. BRADBURY. Thank you, Mr. Chairman. That is a very interesting question. I would not say that the Secretary of Defense would be creating new crimes from whole cloth, but rather that the Secretary of Defense would be recognizing offenses that exist under the laws of war and providing for their prosecution in the military commission process.

Chairman SPECTER. Well, do you think he would have the authority, as the press reports on a circulated draft, to add offenses to the list in the statute?

Mr. BRADBURY. Yes, provided that they are offenses recognized under the laws of war.

Chairman SPECTER. Is there any reason why we ought to follow that course, which is risky at best? Would it not be preferable if the administration wants to make additions, that you come to Congress now, tell us what you have in mind, let us consider it, let us add them if we think it is correct, as opposed to moving again on risky ground and having the issue go to the Supreme Court again?

Mr. BRADBURY. That is certainly an avenue open to Congress, and one that you might judge is appropriate. Of course, under the

current military commission procedures that have been struck down by the Supreme Court, the administration, through administrative action and under the authority of the Secretary of Defense, had enumerated a list of offenses that would be triable.

Chairman SPECTER. All right. I do not want to cut you short, but I have got a lot of questions for others. I think the key part of your answer so far, is "struck down." So let us try to work it out so we do not take the risk of having it stricken again.

General Black, let me turn to you on the overall question. Do you think it advisable to start from the Uniform Code of Military Justice in structuring the law to comply with *Hamdan* v. *Rumsfeld*, or do you think we ought to start totally new with a military commission line such as the draft which has been circulated?

General BLACK. I believe that the Uniform Code of Military Justice provides a wonderful framework from which to begin.

Chairman SPECTER. So that is where we ought to start?

General BLACK. Yes, sir.

Chairman SPECTER. Admiral MacDonald, do you agree with that?

Admiral MACDONALD. Yes, sir, I do. We have been using the UCMJ for over 50 years and it affords many, many procedural rights.

Chairman SPECTER. General Rives, do you concur?

General RIVES. Yes, Mr. Chairman, I do.

Chairman SPECTER. General Sandkuhler?

General SANDKUHLER. Senator, I concur with the idea that we start with a balanced approach.

Chairman SPECTER. Not necessarily the Uniform Code of Military Justice?

General SANDKUHLER. I think we have to look at the work that we have done over the years with regard to the commission procedures. There has been good work done there. *Hamdan* has struck down those procedures, but there is thought that has been put into those efforts. We are looking for a balance.

Chairman SPECTER. Let me turn, now, to another question. That is the issue of confrontation and classified information. In legislation which I introduced, Senate bill 3614, I provided for a board to be empaneled to go through information which was considered classified before the trial commenced so that there could be a fresh determination as to what really was classified and really had to be kept from the accused.

If you have a procedure where the lawyer is going to know the information but the accused does not, General Rives, does that comport with basic fairness on an opportunity to confront the evidence and to confront, in essence, your accuser?

General RIVES. You raised a number of issues, Mr. Chairman. To address the last question, it does not comport with my ideas of due process for a defense counsel to have information he cannot share with his client.

Chairman SPECTER. Let me ask one final question that I would ask you if we do not get to a second round. That is, excluding torture, would you permit coerced confessions, evidence to be used from them, or would you have some refinement between torture and coerced confessions?

My red light just went on, so I am going to yield now to Senator Leahy.

Senator LEAHY. Do you want to go ahead?

Chairman SPECTER. Senator Leahy has a good idea.

The question was on my time now, but the answer is on your time.

Senator LEAHY. No, no, no. [Laughter.] I have my own questions.

Chairman SPECTER. Oh, no. It is not on your time, it is on their time. "Your" does not refer to you,

Senator LEAHY. How about it, General Black?

General BLACK. Sir, I do not believe that a statement that is obtained under torture, certainly, and under coercive measures should be admissible.

Chairman SPECTER. Admiral MacDonald?

Admiral MACDONALD. I agree with General Black.

Chairman SPECTER. General Rives?

General RIVES. I concur, too.

Chairman SPECTER. General Sandkuhler?

General SANDKUHLER. Yes, sir.

Chairman SPECTER. Thank you, Senator Leahy.

Senator Leahy is now recognized.

Senator LEAHY. Thank you. I concur with all four of you on that answer, something also that both the Chairman and I learned as civilians when we were both prosecutors, and we were both in Air Force ROTC.

Mr. Bradbury, I always find, as you know, your appearances here interesting. This morning I listened to your statement and it seemed more of a press release than anything else.

The hearing is on the authority to prosecute terrorists under the war crime provisions of Title 18, but in the written statement you submitted late last night, there was not a single sentence addressing that subject.

Did the Chairman's office tell you what the title and the subject were going to be before the hearing? That is an easy one for "yes" or "no." Did they tell you what the title was going to be of the hearing?

Mr. BRADBURY. The title?

Senator LEAHY. Or the subject. Either one.

Mr. BRADBURY. They did tell me that there was going to be focus on war crimes prosecutions of terrorists.

Senator LEAHY. They did not tell you what the title of the hearing was?

Mr. BRADBURY. No.

Senator LEAHY. All right.

Mr. BRADBURY. In fact, I do not know what the title of the hearing is as of right now.

Senator LEAHY. The title is, "The Authority to Prosecute Terrorists Under the War Crimes Provisions of Title 18." That is why I mentioned it, because your statement does not refer to that at all.

General Black and General Sandkuhler—am I pronouncing your name right?

General SANDKUHLER. Yes.

Senator LEAHY. I would have to answer to a former lance corporal if I get it wrong.

The intended focus of this hearing is the possible expansion of the War Crimes Act, to include the crime of conspiracy. General Black, you said Congress may specify substantive offenses triable by military commissions by amending the War Crimes Act.

General Sandkuhler, you stated that the War Crimes Act was not intended to affect in any way the jurisdiction of any court-martial, military commission, or other military tribunal under any article of the Uniform Code of Military Justice, the law of war, or the law of nations.

So let me ask both of you this question. Do military commissions have jurisdiction to try crimes under the War Crimes Act? General Rives?

General RIVES. They would.

Senator LEAHY. General Sandkuhler?

General SANDKUHLER. Yes, sir.

Senator LEAHY. All right. Then the confusion is in my mind then.

Now, Mr. Bradbury, your administration has not initiated a single prosecution under the War Crimes Act, but here today you are asking us to narrow the scope. Why have there not been any prosecutions under it? Is it not expansive enough for prosecutions?

Mr. BRADBURY. Well, I guess I have two things to say, Senator. There has not been, not ever, a single prosecution under the War Crimes Act since it was enacted in 1996.

Senator LEAHY. No, no. I am saying there have been no prosecutions under the War Crimes Act, and on the subject we are talking about, the 9/11-related.

Mr. BRADBURY. Right.

Senator LEAHY. There have been no prosecutions under the Act. Is that right?

Mr. BRADBURY. That is correct.

Senator LEAHY. Why?

Mr. BRADBURY. Because the policy that the administration has followed, consistent with past armed conflicts of the United States, would be to try those unlawful enemy combatants who have committed war crimes through a military commission process.

Senator LEAHY. But yet, when we try to put together a military commission and legislation on that, that same administration did not want us to do it. It is kind of a catch–22.

Now, in your testimony, I am thinking about the allegations against Steven Green. President Bush said, on the Larry King Show, that what Mr. Green is alleged to have done is a despicable crime, and has stained the honorable image of the U.S. military. I tend to agree. But he is being prosecuted in Federal court for murder and rape.

Now, in your testimony, the Bush Justice Department, even though it tried to redefine torture, does include murder as a war crime. Is that right?

Mr. BRADBURY. Murder is. If committed in circumstances of an armed conflict against a protected person under the laws of war internationally, it can be a war crime, yes.

Senator LEAHY. What about rape?

Mr. BRADBURY. It can be a war crime, I believe.

Senator LEAHY. All right.

General Rives, before the Armed Services Committee you stated, in response, I believe, to a question from Senator Graham, who is here, some of the techniques that have been authorized and used in the past have violated Common Article 3. I noted that General Black, Admiral MacDonald, and General Sandkuhler agreed with you on that point.

What specific techniques have been authorized during the past 5 years that have violated Common Article 3, and where have those techniques been used?

General RIVES. Senator, my response to the question related specifically to Paragraph 1(c) of Common Article 3 which provides that it is a violation of Common Article 3 if an individual commits an outrage upon personal dignity, in particular, humiliating and degrading treatment.

In the July 13 Armed Services Committee testimony, there was a lot of discussion about some of the broad, expansive definitions that have been given to that particular provision. I was, frankly, referring to some of the events that have been fairly well publicized that amount to humiliating and degrading treatment.

Senator LEAHY. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Leahy.

Senator Graham?

Senator GRAHAM. Thank you, Mr. Chairman.

You have a suspected terrorist caught on the battlefield. To the Judge Advocates: would it be better to prosecute that person under Title 18 Federal court or a commission, properly constructed? What would be your preference?

General Black?

General BLACK. A military commission, sir.

Senator GRAHAM. Admiral?

Admiral MACDONALD. A commissions, sir.

Senator GRAHAM. General?

General RIVES. Without doubt, a military commission.

Senator GRAHAM. General?

General SANDKUHLER. Commission, sir.

Senator GRAHAM. All right.

Mr. Bradbury, do you agree with that?

Mr. BRADBURY. Yes, I do, Senator.

Senator GRAHAM. We find common ground there.

To the Judge Advocates. Have you been consulted fairly extensively about military commissions in Common Article 3 by the administration?

General BLACK. Yes, sir, we have.

Admiral MACDONALD. Particularly of late, sir.

General RIVES. Yes, sir.

General SANDKUHLER. Yes.

Senator GRAHAM. An unqualified "yes" by everyone. All right.

Would it be fair to say that there are still areas of disagreement?

General BLACK. Yes, sir.

Admiral MACDONALD. Yes, sir.

General RIVES. Yes, sir.

General SANDKUHLER. Yes, sir.

Senator GRAHAM. Is it fair to say there are a lot of areas of commonality?

General BLACK. Yes, sir.

Admiral MACDONALD. Yes, sir. It is an evolving process.

General RIVES. Yes, sir.

General SANDKUHLER. Yes, sir.

Senator GRAHAM. All right.

Now, when it comes to prosecutions under Title 18, the biggest concern I have is that our own troops could be prosecuted for felonies that are not clearly defined. If you are responsible for controlling a detainee, it could become a Federal offense in certain circumstances for you to engage in certain conduct. Do you all agree that we should, as Congress, define what that conduct is so our troops can conform their behavior?

General BLACK. Yes, sir.

Admiral MACDONALD. Yes, sir.

General RIVES. Yes, sir.

General SANDKUHLER. Yes, sir.

Senator GRAHAM. An affirmative answer by all the JAGs.

Now, when it comes time to look at Title 18 anew, would it be a better practice to list specifically the crimes we are talking about rather than just general statements under 1(c)?

General BLACK. Yes, sir.

Admiral MACDONALD. Yes.

General RIVES. Yes.

General SANDKUHLER. Yes.

Senator GRAHAM. That would allow our troops to know what is in bounds and what is not. Is that a fair statement?

General BLACK. Yes, Senator.

Admiral MACDONALD. Yes, sir.

General RIVES. Yes, sir.

General SANDKUHLER. Yes, sir.

Senator GRAHAM. When it comes to interrogating terrorists by other countries, do you know of any country that interrogates terrorists using Common Article 3 standards in their interrogation process?

Admiral MACDONALD. No, sir.

Senator GRAHAM. General Black?

General BLACK. No, sir.

Senator GRAHAM. General Rives?

General RIVES. I have no knowledge, sir.

Senator GRAHAM. All right.

So our dilemma here is how to find a balance between the international treaty obligations and the ability to defend one's self when it comes to interrogations. Is that correct?

General BLACK. Yes, sir.

Admiral MACDONALD. Yes.

General RIVES. Yes, sir.

General SANDKUHLER. Yes.

Senator GRAHAM. An affirmative response from everyone. All right.

General Myers, in 30 seconds, tell us, what has been the down side of not having anyone prosecuted, having one story after another about failed policies when it comes to detention and interrogation in terms of our image throughout the world.

General MYERS. Well, I think the issue of fairness comes up. It has been the intention—when I was in office, of course—to move some people through the process as quickly as possible for their good and for the good of the perception of the process that we had for bringing some of these folks to justice.

The inability to do that, then, creates a lot of uncertainty in their minds, and also, I think, in the international community; are we really serious about this, do we have a process that is fair? I think right now we are stagnated and we need to move forward as we are discussing.

Senator GRAHAM. Mr. Bradbury, do you believe it would be wise and prudent for the Congress to reauthorize the military commissions as originally written without change?

Mr. BRADBURY. Actually, no, I do not, Senator.

Senator GRAHAM. To the Judge Advocates: do you agree with that statement?

General BLACK. Yes, sir.

Admiral MACDONALD. Yes.

General RIVES. I do, sir.

General SANDKUHLER. Yes, sir.

Senator GRAHAM. All right.

To the Judge Advocates: is it your concern that it would be bad for this country to have a procedure where the trier of fact, the military jury, could look at evidence to base their verdict upon that is never shared with the defendant?

General BLACK. Yes, sir.

Admiral MACDONALD. Yes, sir. That is a fair statement.

General RIVES. I agree.

General SANDKUHLER. Yes, sir.

Senator GRAHAM. Do you have any solution to that dynamic, other than just, not prosecute?

Admiral MACDONALD. Sir, I would recommend that Congress look to Military Rule of Evidence 505 and to the SEPA procedures as a great place to start. Those are tried-and-true procedures that we have used in the military and would be a good place to begin.

General RIVES. I agree. We do not have to reveal confidential sources or methods, but we ought to be able to get the information in a format that is consistent with showing to the members of the court, the triers of fact, along with the accused.

Chairman SPECTER. Thank you, Senator Graham.

Senator Kennedy?

Senator KENNEDY. Thank you.

I want to thank all of the panel. It has been very, very helpful and very constructive. I have had a chance to hear a number of you with the Armed Services Committee and I think we are all, as a country, enormously indebted to our JAGs. General Myers, we thank you for your service. Mr. Bradbury, thank you for coming back to speak to us.

I want to refer to a recent article that caught my eye, and I know it will use up my time, but it is interesting. This article was in the *Cape Cod Times*. A fellow named Dan Adams wrote, "As the Bush administration mulls over the recent Supreme Court ruling regarding the rights of any combatants held at Guantanamo, in particular how to assess detainees, they might profit from studying the ac-

tions of General Washington during the Revolutionary War, and specifically, his treatment of Governor Henry Hamilton.

Hamilton was a British Lieutenant Governor of Canada, enlisted in the war effort against the rebellious colonies. He set up headquarters in Detroit and employed tactics abhorrent to Americans, particularly then- Governor of Virginia, Thomas Jefferson.

Hamilton offered a bounty to the Indians for the scalps of rebels, but no bounty for prisoners. He encouraged soldiers under his command to employ the utmost brutality and cruelty. The result was the massacre and torture of innocent men, women and children and earned Hamilton the nickname 'Hair Buyer General.'

In 1779, American General George Clark recaptured Detroit, and took Hamilton prisoner. Military officers at the time were all considered gentlemen, and thus bound by honor to respect the rules of war.

Their treatment as prisoners was lenient. They were trusted to stay where they were told and not escape. Generally, this honor system worked well. Governor Jefferson routinely entertained captured British officers at Monticello, often lavishly.

But Hamilton was different. The atrocities perpetrated by him and the great cruelties proved against him personally caused such resentment, that when Hamilton fell into Jefferson's hands, the latter, deeply angered, placed him in the common jail and clapped him in irons.

General Washington, whose resentment of Hamilton was as great, heard about this treatment, was furious, and insisted, despite Hamilton's atrocities, such outrageous should not be met with equal outrages.

The newly-declared United States, still teetering and experimenting with government, should be an example to the world and should therefore conducts its affairs in a higher plane. He immediately reprimanded Jefferson and insisted on Hamilton's release from jail and further interment to be commensurate with other British officers.

By this and other actions, Washington was setting a standard, a code by which this country should act. He believed we should, in all our actions, be a model for the rest of the world." This is rather powerful.

This morning's newspapers had the article in the Washington Post about the proposal that is being considered by the administration. Mr. Bradbury, are you familiar with either the article or the subject matter?

Mr. BRADBURY. I am.

Senator KENNEDY. Yes. The proposal has not been submitted yet?

Mr. BRADBURY. That is correct.

Senator KENNEDY. Should we anticipate that it will be submitted soon?

Mr. BRADBURY. We are working diligently with all these good folks, and others, on a proposed piece of legislation.

Senator KENNEDY. So, we are still very much open to discussion?

Mr. BRADBURY. Yes. Yes.

Senator KENNEDY. As you are familiar, the article had these kinds of comments: "The military lawyers received a draft after the rest of the government agreed on it; it argued in recent days for

retaining some of the routine protections for defendants, that the political appointees sought to jettison, administration officials said."

Mr. BRADBURY. I disagree with that statement. The legislation has not been agreed upon. It has been going through an interagency discussion process. The JAGs have been brought in as full participants in that process. But we have not finalized the legislation, and had not finalized the legislation previously.

Senator KENNEDY. So it says, "They objected, in particular, to the provision allowing the defendants to be tried in absentia." Is that still in the draft?

Mr. BRADBURY. I do not think anybody would propose that defendants be tried in absentia. I think the issue is the very difficult one that has been raised in some of the questions.

I think everybody would agree it is an imperative during an ongoing conflict not to share sensitive intelligent sources and methods and other information with terrorist detainees.

So the question is how to give these folks fair trials while protecting that information. That is not an easy question. We are working through it. That is still an issue that is very much open and under discussion.

Senator KENNEDY. But the trial in absentia itself, the individual not being present, that is not included in the proposal?

Mr. BRADBURY. Well, the question, Senator, would be whether certain evidence could be taken into account by the commission with the accused not being exposed to that evidence. That is the question. Whether you could do that in narrow circumstances under protected procedures, would be what we would be addressing.

Senator KENNEDY. My time is just about up.

In that Washington Post article it also said that nothing in the draft prohibits using evidence obtained from cruel, inhumane, and degrading treatment that falls short of torture. I think we have the comments from the JAGs here. I think you commented earlier. Was that accurate or inaccurate?

Mr. BRADBURY. Well, I think that certainly we would include in any legislation an absolute prohibition on the use of statements obtained through torture. When it comes to—and I think I have testified to this before this Committee two or 3 weeks ago—a question of statements that have been alleged to have been obtained through coercion, it is a more difficult question. Allegations can be made about coercion and courts have always had a very difficult time in defining what that is.

So I think one of the possible approaches would be to have a certified military judge acting as a gatekeeper to hear any such allegations, to review the circumstances of any statement that has been made that might be introduced as evidence, and to determine whether that statement is unreliable, lacking in probative evidence, et cetera, whether it would be unduly prejudicial, but the sort of gatekeeper role that a traditional judge would play. We think that is a way to address that. It is the way that Article 3 courts have traditionally addressed that question.

Senator KENNEDY. Could I ask the Chair, when do we expect to get the draft? Does the Chair have any information of the timing of this craft?

Chairman SPECTER. My information? I do not have anything at hand. We have been in touch, Senator Kennedy, on a daily basis. We hoped to have had the draft in advance of this hearing so that we could ask more specific questions. We may have to have another hearing. But we urge Mr. Bradbury to let us have the draft as soon as you can.

Mr. BRADBURY. We are working as hard as we can, Mr. Chairman.

Chairman SPECTER. Well, I know you are a hard worker, so we will accept that answer.

Thank you, Senator Kennedy.

Senator Feinstein?

Senator FEINSTEIN. Good morning, gentlemen. If I understand *Hamdan* correctly, questions were raised about whether a war crimes conspiracy charge is ever permissible under U.S. and international law.

I gather Justice Stevens cited the Neurenburg tribunal, which pointedly refused to recognize conspiracy as a violation of the laws of war. Of course, it is a double-sided coin.

Aiding and abetting, conspiracy-related crimes, if they were added, could be used against our people as well. I am really asking each one of you for a quick conclusion. Do you believe that conspiracy crimes should be defined and added to whatever comes out as the vehicle from this committee? Mr. Bradbury?

Mr. BRADBURY. Yes.

Senator FEINSTEIN. General Myers?

General MYERS. I will defer to the others.

General BLACK. Yes, ma'am, I do.

Admiral MACDONALD. Yes, ma'am.

General RIVES. The caveat I would say, is under 18 U.S. Code § 2349(a), we have provided material support to terrorists as an offense. I prefer that to conspiracy, which carries a lot of baggage.

Senator FEINSTEIN. Thank you.

General SANDKUHLER. Senator, I think you can include conspiracy. I think you can work and define it and include it in war crimes.

Senator FEINSTEIN. And you do not believe it is a double-edged sword as far as prosecutions being brought against our people? I assume that is correct. Is that correct?

General SANDKUHLER. Yes, ma'am.

Senator FEINSTEIN. All right.

Admiral MacDonald and General Black, you both speak about Common Article 3 in your written comments, the prohibition. Admiral MacDonald, you say Common Article 3's prohibition upon outrages on personal dignity is not well defined. How would you suggest we define it?

Admiral MACDONALD. Ma'am, that is the $24,000 question as to how we go about doing that. In its current formulation, it is entirely too vague and it puts, as you mentioned before, our own service members at risk.

Senator FEINSTEIN. Does anyone have a suggestion—I know Mr. Bradbury would, but of the JAGs—of how to define it?

Admiral MACDONALD. Ma'am, we have been working through the working group that the Department of Justice put together to work through the commission's process on a definition.

Senator FEINSTEIN. When will that be available?

Admiral MACDONALD. As soon as the administration forwards the package. If they choose to include it, we have offered a definition of what outrageous upon personal dignity would mean. Under the Geneva Conventions, the only prosecutable offenses are serious violations.

So one formulation is to include serious outrages upon personal dignity. And then we have talked about a reasonable persons standard, applying such a standard. So we have got various formulations that we have been working through, but we do not have agreement yet.

Senator FEINSTEIN. Thank you. That is very helpful.

I want to ask this general question. It strikes me that in the war on terror, we are dealing with very different people. They are not conscripts, they are fanatics. They view life very differently. They are prepared to sacrifice their life.

I was struck when I saw over the weekend a 5-year-old little boy dressed upon in a Hezbollah uniform with what appeared to be bombs strapped around his waist. I thought, the traditional laws really are not going to work.

Torture really is not going to work. This kind of coercion really is not going to work if people really have no value on their life and are so fanatic, that the cause is worth any amount of suffering they go through.

Have you gentlemen thought about that, and if so, what are your conclusions?

General BLACK. Yes, ma'am, we certainly have. That is why it is so important to develop a process through our commissions to be able to handle these kinds of individuals and offenses, and we need a system that is enduring that applies not just to Al Qaeda, but to every other type of terrorist individual that falls into that sort of category.

We are very much aware, particularly in the Services, where our troopers are exposed on a day-to-day basis to those individuals. We very much support whatever you can do to help us to get to commissions as fast as we can, and in as correct a manner as possible.

Senator FEINSTEIN. Anybody else want to comment on that?

General MYERS. I will comment. Some of the experience that we had when I was on active duty with some of these individuals, was that once detained, without coercion, that they changed their tunes, sometimes fairly quickly, and they were not quite as willing to sacrifice themselves for the cause. They would change and they would offer up good intelligence and other information that was useful to the war on terrorism.

So, I think what we see sometimes in public displays, and what you find out once they have been captured on the battlefield, are maybe two different things. So, I just would offer that. Not all of them. Some of them are, of course, to the end, very hard core. But not all of them are.

Admiral MACDONALD. Senator, I would just offer that, having visited Guantanamo and talked to our interrogators at Guantanamo, that they strongly believe that coercion and torture does not work, and that it does not get you the actionable intelligence that we need.

They are engaged in a much longer process of building trust with the detainees through fair treatment in the hopes that, as General Myers just said, of getting them to come forward with information of their own accord, and they have been successful.

General RIVES. Senator, I would just add that one of the revelations most Americans had after 9/11, is that we are not dealing with criminals, we are dealing with a different sort of very hostile, non-state actors in most cases.

We need to act with them appropriately on the battlefield when that is necessary, and when we capture them and they become detainees we need to treat them humanely, but we do need to keep them from being able to further engage in their desires.

Senator FEINSTEIN. Thank you. Thank you, gentlemen.

Chairman SPECTER. Thank you, Senator Feinstein.

Senator Feingold?

Senator FEINGOLD. Thank you, Mr. Chairman.

Mr. Bradbury has argued that Common Article 3 is difficult to interpret. When the Judge Advocates General on the panel here today testified before the Armed Services Committee, you confirmed that the military has been—and I am actually quoting General Black—"training to that standard and living to that standard since the beginning." I think each of you agreed, as did Admiral McPherson, who is not here today.

Do you still agree with that? Admiral MacDonald, do you agree as well?

General BLACK. Yes, sir, I do.

Admiral MACDONALD. Yes, sir, I do.

General RIVES. Yes.

General SANDKUHLER. Yes, sir.

Senator FEINGOLD. Well, I think that says a lot. I do appreciate those very direct answers.

General Black, I was struck by something in your testimony. You wrote, "There cannot be two standards. If we are to hold enemy combatants to the War Crimes Act, we must be prepared to hold U.S. personnel to the Act."

Can you say a little bit more about what you meant by that?

General BLACK. The article that Senator Kennedy referred to probably says it best. The United States should be an example to the world, sir. As we put our soldiers in harm's way, we must always consider how they will be treated if they are captured.

Reciprocity is something that weighs heavily in all of the discussions that we are undertaking as we develop the process and rules for the commissions, and that is the exact reason, sir, the treatment of soldiers who will be captured on future battlefields. That is of paramount concern.

Senator FEINGOLD. I would ask the other Judge Advocates to respond.

Admiral MACDONALD. Yes, sir. I agree with General Black on the reciprocity agreement. As Congress goes through the commission

rules that are forwarded by the administration, I think all of us would ask that you keep the reciprocity issue in mind as you go down, line by line, looking at each of the rules.

General RIVES. I agree, also, Senator. As we, especially over the recent days, have worked very closely with the administration on drafting proposed legislation, one of the points that our staff officers have continued to emphasize, as have we directly, is the need to consider reciprocity with everything we are doing.

Senator FEINGOLD. Sir?

General SANDKUHLER. I agree as well, Senator.

Senator FEINGOLD. Thank you. This is for, again, the Judge Advocates. Hypothetically speaking, do you think a military commission would be an appropriate forum to try a U.S. citizen not actively engaged in military operations against the United States? General Black?

General BLACK. No, sir. Not as we are currently conceiving the commissions. It would be unlawful enemy combatants, and that definition should exclude U.S. citizens. We have other forums and other capabilities for handling U.S. citizens.

Admiral MACDONALD. Yes, sir. For armed forces we have the UCMJ, for our own civilians we have our Federal rules, so I would not use commissions.

General RIVES. I agree, Senator.

General SANDKUHLER. I agree, Senator.

Senator FEINGOLD. Thanks to all of you.

Again, for each of you, do you agree that for any deviations of a military commission procedure from the standard UCMJ court-martial procedure, there should be an explicit rational for why that particular provision of the UCMJ is not workable? General?

General BLACK. Yes, sir. I think we can do that.

Admiral MACDONALD. Yes, sir. I agree.

General RIVES. We can do it, and there should be an understandable rationale. Whether the legislation itself—I am not sure what you are suggesting—should explicitly say that or not is another matter, though.

General SANDKUHLER. We have been studying how we can best use UCMJ as a basis and then modify that as required by the practicality of the situation. So I think we all are in general agreement on that.

Senator FEINGOLD. Well, I thank all of you for your direct answers.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Feingold.

General Myers, when the so-called famous Bybee memo was written in the Department of Justice, which was later discredited and rejected, outlining some very extreme forms of interrogation, there was a task force commission of the Department of Defense. We have heard extensive testimony from General Counsel Haynes about that subject.

The question in my mind is, what did some of the experienced people on the military side, like yourself, as Chairman of the Joint Chiefs of Staff, have to say about that? Were you informed? Did you participate at all?

Because sometimes when you have lawyers giving a theoretical answer as to how far you can go, you might not be coming to grips with the reality that more experienced people have who have been in the military and have been much more closely associated with the realities. By way of that background, were you consulted at all on the interrogation techniques/tactics?

General MYERS. Absolutely. As you probably know, the Office of the Chairman has its own legal counsel. Of all the conflicts that we have been involved in, this one probably has more legal context than any conflict we have been in for a very long time. But we absolutely were.

Where I came from on these subjects, and I think where military commanders come from, where Staff Judge Advocates come from, is exactly the same place. That is, the first thing we think about is reciprocity. Well, the first thing you think about, is what is fair? What is consistent with international law and our treaty obligations?

The second thing, is reciprocity. How is this going to apply to our troops on the battlefield if they were captured? Even in a conflict like this where you do not expect particularly good treatment, we have to set the standard. That is, I think, our obligation as a country, as a matter of fact.

So we were consulted and we offered our advice. I think the way those interrogation methods finally came out—and you will have to excuse me here, but I think that the date was probably 2002 in April, or in that time frame.

Chairman SPECTER. Did you concur with the final list that was sent to the Secretary of Defense?

General MYERS. Yes. Again, I am a little fuzzy on dates. I think the final list came out in April or May of 2002, I believe. In fact, I think there were 24 methods consistent with the manual, and excluded some methods that were deemed to be consistent with international law, but it did not seem appropriate from my standpoint. I think that was the standpoint of most.

Chairman SPECTER. You say there were some on that list?

General MYERS. There were some that were excluded. Sure. There were some on there that——

Chairman SPECTER. That you disagreed with?

General MYERS. Well, no. Not of the final list that was approved. But there was a broader list that we pared down to the final list, and took some off. While they may be in compliance with international law as defined by the Justice Department and others, we did not think they were appropriate, so we pared that down.

By the way, I will have to say that the OSD General Counsel also agreed with that. In fact, he was one of the ones that led paring that list down. We were not fighting much of a head wind there. It was also the Secretary's view as well.

Chairman SPECTER. General Black, did you agree with that final list?

General BLACK. Sir, I was not in the position as Judge Advocate General at the time, and I was not even stationed in the DC area. So, I cannot speak to that.

Chairman SPECTER. So you did not have a role to play.

General BLACK. No, sir.

Chairman SPECTER. You were not in the loop.

General BLACK. No, sir.

Chairman SPECTER. How about you, Admiral MacDonald?

Admiral MACDONALD. The same thing, sir. I was not in the loop.

Chairman SPECTER. General Rives?

General RIVES. Senator, when I finally saw the list I believed there was legal support for every decision the Secretary of Defense made in his April, 2003 memorandum.

Chairman SPECTER. Aside from legal support, did you agree with the list?

General RIVES. There were policy calls that the Secretary made that are supportable, and he is the one who makes the policy calls. We are advisors, he makes the policy calls. I did not have a real problem with most of the things on the list. But again, he is the one who makes those policy calls. What he decided is legally supportable.

Chairman SPECTER. General Sandkuhler, did you agree with that list?

General SANDKUHLER. I was there with General Rives.

We did a review of those items listed there. They were supportable. Again, I think decisions needed to be made by those who were in those positions.

Chairman SPECTER. Senator Leahy?

Senator LEAHY. Thank you, Mr. Chairman.

Just to follow up on a question with the JAGs, a question that Senator Feingold had asked. Would you agree that it would be reasonable to limit military jurisdiction to those that fight against U.S. armed forces in places like Iraq and Afghanistan, where, one, the Congress has authorized the use of military force, and, in fact, there is conflict?

General BLACK. I am not sure I would take the additional extension, sir.

Senator LEAHY. All right.

General BLACK. I have not had a chance to look at the issue thoroughly, so I just do not feel comfortable answering the second part, where Congress has authorized specific military action.

But I do agree with the first part of your question, that there should be an explicit and very detailed definition of who the commission should apply to and what the jurisdictional limits are.

Senator LEAHY. Admiral MacDonald?

Admiral MACDONALD. Yes, sir. I would agree with General Black. The discussions we have been having with the DOJ-DoD working group have involved the jurisdictional reach of the commission's legislation.

Senator LEAHY. General Rives?

General RIVES. I agree, Senator.

Senator LEAHY. General Sandkuhler?

General SANDKUHLER. I agree, Senator.

Senator LEAHY. Thank you.

Mr. Bradbury, one week after the Supreme Court handed down its decision in *Hamdan*, I am sure you are aware, the memorandum that Gordon England, the Deputy Secretary of Defense, issued, he instructed officials at the Department of Defense to en-

sure that all their personnel adhere to the requirements of Common Article 3 of the Geneva Conventions.

Have other agencies, such as the CIA, issued similar instructions?

Mr. BRADBURY. Well, Senator, I will say this. I cannot discuss any intelligence activities of the United States here.

Senator LEAHY. Aside from intelligence activities, are you aware of any other departments that have issued similar instructions?

Mr. BRADBURY. This is what I can say. The court's interpretation of Common Article 3, that it applies to our war with Al Qaeda, does mean that it encompasses all Al Qaeda detainees held by the United States.

Senator LEAHY. Well, would you not agree that the *Hamdan* decision removed any doubt that all U.S. personnel must comply with Common Article 3?

Mr. BRADBURY. With respect to persons detained by the United States in our war with Al Qaeda, that is correct.

Senator LEAHY. Do you agree that the *Hamdan* decision removed any doubt that all U.S. personnel must comply with Common Article 3?

Mr. BRADBURY. To the extent it applies, no. You are absolutely right.

Senator LEAHY. So let me ask you this question. Is the memorandum issued for people in the Department of Defense by Gordon England the only such directive issued in the U.S. Government?

Mr. BRADBURY. Again, Senator, I cannot discuss any intelligence activities of the United States.

Senator LEAHY. I am not asking for you to discuss that. I am asking for procedure. You obviously are not going to answer, so let me ask you this. Has the Office of Legal Counsel issued any guidance on this issue?

Mr. BRADBURY. I am not really in a position to discuss specific legal advice that has been given. I have given legal advice on the application of Common Article 3. As I have said today, it does generally apply to detainees.

Senator LEAHY. You cannot tell me whether the Office of Legal Counsel has issued any guidance on this issue?

Mr. BRADBURY. I have participated in advising on this issue. For example, I reviewed Deputy Secretary England's memo before——

Senator LEAHY. That was not my question. Has the Office of Legal Counsel issued any guidance on this issue?

Mr. BRADBURY. I do not think I would say we have issued guidance. I would say that I participated in giving advice. For example, I did advise the Department of Defense and I reviewed Deputy Secretary England's memo.

Senator LEAHY. Let me ask all the JAGs. Could the appeals process for courts-martial be used for military commissions? If not, why not?

Admiral MACDONALD. Sir, I would say that you could use that process. You could also use the DTA, the Detainee Treatment Act, process. You could have an appeal to the DC Circuit Court of Appeals. That would be a way to orchestrate the appeal process. But you could use the UCMJ process.

Senator LEAHY. General Black?

General BLACK. It is an alternative, sir, and certainly worth considering. We have extraordinarily competent and talented judges at appellate levels throughout the Services.

Senator LEAHY. Who are also used to handling classified information.

General BLACK. Yes, sir. That is true.

Senator LEAHY. Without leaks.

General BLACK. Yes, sir.

Senator LEAHY. General Rives?

General RIVES. Yes, sir. Senator, we could use the existing military appellate process. I personally believe a better process would be perhaps creating a new court where you had appellate military judges or other qualified personnel, and then appeals from that court's decision could go to the DC Circuit.

General SANDKUHLER. Senator, I would be concerned about some of the provisions within the appellate process that are unique to the military, in particular, Article 66 of the UCMJ which gives our initial appellate court both the ability to be a finder of fact and a reviewer of the law. That is an authority that I think would be inapplicable in this situation.

Senator LEAHY. Thank you.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Leahy.

General Black, we know you have a commitment to address a group about to depart for Iraq, so we thank you for coming. You are excused. You may leave a little early. We are not too far from finishing, generally. But that business is more pressing and more important than remaining here.

General BLACK. Thank you, sir.

Chairman SPECTER. Senator Leahy will submit more questions for the record.

Senator Graham?

Senator GRAHAM. Thank you.

I would like to revisit a line of questioning that just occurred. General Rives and General Sandkuhler, I think what General Myers was talking about was an April, 2003 memo.

Let us put this in context. In December of 2002, I believe it was, some interrogation policies came about as a result of an Office of Legal Counsel interpretation of the torture statute.

Would it be fair to say that the military Judge Advocates, in December of 2002, January of 2003, along with General Counsel, Mr. Moore, were very upset by this approach?

General RIVES. Yes, Senator, it is.

Senator GRAHAM. Speak up, please.

Senator KENNEDY. Yes, I agree, Senator.

Senator GRAHAM. And in February, I think you wrote a memo, General Rives, saying that if we go down this road, we are going to get our own troops in trouble and lose the moral higher ground. Is that correct?

General RIVES. A working group had been set up in mid-January of 2003. On the 4th of February, the report was released. It was labeled "Final Report." On the 5th of February, I sent a memo in to the working group chairperson to lodge objections along those lines, Senator.

Senator GRAHAM. Mr. Chairman, I believe that has now been declassified and I would like to make it a part of this hearing.

Simply put, you said, I think, in the concluding paragraph, that if we go down the road that is being chartered here, we could lose the moral high ground and put our own troops at risk. Is that correct?

General RIVES. I did write along those lines, Senator.

Senator GRAHAM. As a matter of fact, General Sandkuhler, I think you were even more direct. You were saying to the civilians that Article 93 of the UCMJ makes it a crime to simply slap. A simple assault could be a crime against a detainee.

Your concern was that if you tried to interpret the torture statute in some tortured way, that you could run afoul of the UCMJ, and no one was looking at that side of the coin. Is that correct?

General SANDKUHLER. Yes, sir.

Senator GRAHAM. Now, in February, you wrote your memos. In March, there was a discussion about revising the December interrogation techniques. Is that correct?

General RIVES. A follow-on report to the February 4 report was released on the 6th of March, Senator.

Senator GRAHAM. Did you all have concerns at that time, still?

General RIVES. I had some concerns. I had lodged my concerns in February. We were not specifically asked for inputs. Because mine were already a matter of record, I did not add to the concerns I had previously lodged.

General SANDKUHLER. We presented a shorter list of concerns, but our concerns were continuing from the prior memorandum.

Senator GRAHAM. Were you ever under the impression that this project was going to be shelved?

General RIVES. We last heard of any activity in this process in March of 2003, after the abuses of Abu Ghraib became public in the spring of 2004, and then we saw that a final report, in fact, had been presented in April of 2003.

Senator GRAHAM. Did you ever get the input on that final report? Did you get to see it? Did you give any input?

General RIVES. I was not aware of the April, 2003 report until June 16, 2004.

Senator GRAHAM. What about you, General Sandkuhler?

General SANDKUHLER. I do not recall the exact dates, but there was a significant time lag. We saw two preliminary reports, and the final report not for a year and a half.

Senator GRAHAM. All right.

Now, let us get back to the war on terror, proper. Is it fair to say that Al Qaeda are trained to allege abuse and coercion?

General SANDKUHLER. Senator, if you read the bible or the manual of Al Qaeda which is now available in many sources, they are trained to allege coercion. That is part of their handbook.

Senator GRAHAM. Do the JAGs feel comfortable with the idea of taking torture off the table and never using any benefits that may flow from torture, that when it comes to allegations of coercion by a defendant in a military commission, that the military judge be the gatekeeper to decide what happened and what did not? Is that a fair process?

General SANDKUHLER. Yes, Senator. That is a fair process.

Senator GRAHAM. General Rives?

General RIVES. I agree, Senator.

Admiral MACDONALD. Yes, sir.

Senator GRAHAM. So we could have a military judge using the standards that we are comfortable with in our own system to be the gatekeeper there when these allegations are made, taking torture off the table. Is that correct?

Admiral MACDONALD. Yes, sir.

General RIVES. Yes, sir.

General SANDKUHLER. Yes, sir.

Senator GRAHAM. All right.

Now, when it comes to Common Article 3, do you have concerns that if we do not domestically define how Common Article 3 operates, that international decision makers could have an influence on the outcome if we just keep it in current treaty form?

General SANDKUHLER. I do, Senator.

Admiral MACDONALD. I do as well.

General RIVES. Yes, sir.

Senator GRAHAM. And the better course would be to sit down and specifically list in Title 18 what would be a war crime, making sure that that which is listed gives our troops an ability to conform their conduct, and when it comes time to codify how Common Article 3 will be implemented, to do so with as much definition and specificity as possible under our domestic law. Is that correct?

Admiral MACDONALD. Yes, sir.

General RIVES. Yes, sir.

General SANDKUHLER. Yes, sir.

Senator GRAHAM. Mr. Chairman, this hearing has been hugely helpful. It has been a great exercise.

I believe, Mr. Bradbury, I appreciate what you have done. You have reached out to me and others, and to the legal community in the military.

These hard questions about classified information, how to define Common Article 3, are within our ability to solve these problems if we will follow what the Chairman was suggesting early on, working together, not separately, getting the Congress involved with the administration, having the legal community from our military relying on our commander's judgment that we can get this right this time around, only if we do it together with a view that we have to sell it to not only our own troops, but to the world, as being fair.

General Myers, thank you for coming as a commander, because it is important for me to hear from you what is at stake here if we do not get this right.

Thank you very much.

Chairman SPECTER. Thank you, Senator Graham.

Admiral MacDonald, you had made reference to Section 501, I believe it was, where the procedures were established for the military on classified information, to handle it in a way which is balanced and fair. What are those essential provisions?

Admiral MACDONALD. Sir, it is Military Rule of Evidence 505. At court-martial, the military judge can hold an in camera proceeding where he takes a look at the classified evidence.

He can determine what parts will come in, what will not, based on a relevance determination. But all of the evidence that the judge

determines to be relevant, if it remains classified, that has to be shown to the accused.

Chairman SPECTER. Would there not be a problem showing an Al Qaeda defendant, for example, classified information under those terms?

Admiral MACDONALD. Yes, sir, there would. I think the answer may be that, in that instance, you would have to give up the prosecution of that particular charge.

Chairman SPECTER. So it would not be a matter of proceeding without informing the defendant so that he would not be denied confrontation, but you would have to drop the charge?

Admiral MACDONALD. Yes, sir.

Chairman SPECTER. Mr. Bradbury, Common Article 3 is in the war crimes section as a prosecutable offense. Is there sufficient specification for a prosecutor to charge Common Article 3 in those generalized terms, and give the defendant with enough information to defend?

Mr. BRADBURY. I think that is a very serious question. I am not sure that there is. Certainly, Common Article 3 has some very clear and serious offenses that it condemns.

As to those offenses, I think you probably do have sufficient notice and clarity as to what the offenses would be. But as to humiliating and degrading treatment, I definitely think that it lacks essential clarity and certainty.

As you may know, Mr. Chairman, it is not a treaty obligation of the United States under the Geneva Conventions to make all violations of Common Article 3 a war crime under our domestic law.

We chose to do that in 1997, at a time when we viewed Common Article 3 as applying only to civil wars, internal conflict like the conflict in Rwanda, for example, where I think everybody can agree that the kind of conduct that is currently being prosecuted under the international criminal tribunal for Rwanda are very serious, egregious, and clear offenses of the laws of war, and I think you could prosecute those under Common Article 3. But no prosecutions have ever been brought in the United States under our War Crimes Act.

Chairman SPECTER. Well, we would appreciate it if you would give some further thought to that recommendation as to whether it ought to be left open so that charges could be brought on the kind of conduct you described which happened in Rwanda, as opposed to limiting that provision to specified offenses which we would delineate by Congressional enactment.

The *Hamdan* case did not deal with detainees, but I would like to take that subject up with you gentlemen for just a minute.

General Myers, as you know, we have several hundred detainees in Guantanamo. A number estimated as high as 25 have been released and returned to the battlefield, so that is not a desirable thing to happen.

The combat review status is emphasized. It happens once a year. There are no clear-cut lines for determining what showing there must be to continue to hold somebody as an enemy combatant. Do you think that the current system is satisfactory?

General MYERS. I think one of the fundamentals that has to surround everything we have discussed, is the fundamental that

enemy combatants can be held until the end of conflict. I think that is important.

The review process, I thought, as it was invigorated by Secretary England when he took responsibility for that as the Deputy Secretary of Defense, was rigorous. That is my understanding of it.

Chairman SPECTER. When you talk about the end of a conflict, when you had what have been normal wars, if there is any such thing, it ended. The war against terrorism has no end in sight.

General MYERS. No. It is a dilemma. It could be a long fight. The alternative, though, to release the individuals who would commit war crimes against humanity, not just the United States, and kill our men, women and children without thinking about it, is not a very good alternative. I am not the legal expert; these folks here are.

But until we find a better way to deal with this—because they all will not come to trial. We probably cannot bring war crimes charges against all of them. But they are very, very dangerous people and we have to figure out a way to deal with them.

Chairman SPECTER. Admiral MacDonald, is there a better way to do it?

Admiral MACDONALD. Sir, I would say that we hold an annual Administrative Review Board, an ARB, down in Guantanamo. They do not release any detainees unless the Administrative Review Board process determines that they are no longer enemy combatants.

Chairman SPECTER. What sort of information—let us not call it evidence—or data is sufficient to make a determination that that individual is too dangerous to release?

Admiral MACDONALD. Sir, I think they have a standard of probable cause to believe that the detainee still poses a threat to the United States.

Chairman SPECTER. How do they make a determination on probable cause with such scarcity of information available as to what that person did?

Admiral MACDONALD. Well, sir, there is quite a bit of intelligence they have in Guantanamo which they continue to exploit that they use to make those determinations at the Administrative Review Board.

I would just say, Senator, we are not required to release any detainee until the end of hostilities. That is a principle in international law. So if the ARBs are releasing individuals, it is because the administration has determined they no longer pose a threat.

Chairman SPECTER. General Rives, does that satisfy you?

General RIVES. The processes we originally had in effect at Guantanamo Bay to process the detainees did not satisfy me, but the processes that General Myers first described, and also Admiral MacDonald, that we now have in effect, starting with the Combatant Status Review Tribunal, is a careful process that does comply with the Geneva standards.

We were behind once the decision to run the CSRTs was made, but we caught up over a period of several months. Any new detainee would be processed under the Combatant Status Review Tribunal rules.

Then as Admiral MacDonald said, they are reviewed on an annual basis by the ARB, the Administrative Review Boards. I am convinced the processes are fair, and I would be comfortable with similar processes being applied to American Service members who may be held.

Chairman SPECTER. General Sandkuhler, do you agree?

General SANDKUHLER. I agree, Senator. I also would state that those processes we have established, the CSRT and the ARB, exceed the requirements of the Geneva Convention.

Chairman SPECTER. Mr. Bradbury, the Committee would appreciate if you could give us some more specification as to what constitutes the probable cause standard that Admiral MacDonald articulates to give us some better handle.

That issue is not before us in the *Hamdan* decision, as we all know, but it may well be. Congress has the responsibility under Articles 1, 6 and 8 to make a determination as to what is done with those individuals.

It is true we do not want to release dangerous people to come back and kill Americans or kill other people and have to face them again on the battlefield, but we have not been able to come to grips with what that probable cause is. So if you could provide that to the committee, it would be appreciated.

Mr. BRADBURY. I would be happy to do so, Mr. Chairman.

Chairman SPECTER. Well, my distinguished Chief Counsel wants to know, how long will you hold them? Does anybody have an alternative to forever, or until we conclude the war on terrorism is over, whichever occurs last?

[No response]

Chairman SPECTER. The silence is profound. This has been a very worthwhile hearing. I think Senator Graham was exactly correct. We have got a lot of tough issues. We have got a very heavy responsibility, but we could meet it. But we are going to have to work together to find an answer. Congress is going to have to make the final determination here.

Thank you all very much. That concludes our hearing.

[Whereupon, at 11:08 a.m. the hearing was adjourned.]

Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Hearing Date: August 2, 2006
Committee: SJC
Member: Senator Specter
Witness: MG Scott C. Black

1. Question: Of the ten detainees at Guantanamo who have been charged, conspiracy is the only charge against seven of them, including Hamdan. In Justice Thomas's dissent in Hamdan, he outlines several other charges that he believes were implied but not stated in Hamdan's charging document, such a aiding and abetting the enemy, belonging to a criminal organization and other common-law war crimes. Why is conspiracy the only charge for 70% of the detainees currently charged when so many other charges could be applied?

Answer: I don't have the necessary information to answer this question. Respectfully request that questions concerning the charging decisions for the detainees at Guantanamo be addressed to the Office of the Chief Prosecutor, Office of the Military Commissions, Defense Legal Services Agency.

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Office of Security Review
Department of Defense

06-C-0855/1

Hearing Date: August 2, 2006
Committee: SJC
Member: Senator Specter
Witness: MG Scott C. Black

2. **Question:** As Justice Breyer stated in *Hamdan*, **"Congress has not issued the Executive a blank check." How can we re-write laws here and still ensure that the Congress isn't giving the Executive a "blank check"?**

Answer: I believe a combination of specific rules and a grant of authority to the DoD is the best method of approaching this problem. The specific rules should reflect our nation's commitment to the rule of law and establish guiding principles that ensure a fair trial. The DoD should be granted authority to establish the majority of the rules of procedure that will implement those principles embodied in the statute. This approach would mirror the current structure of the U.S. military justice system in which Congress promulgated the Uniform Code of Military Justice in statute, but granted the President the authority to create the Manual for Courts-Martial to implement the Code.

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Office of Security Review
Department of Defense

Hearing Date: August 2, 2006
Committee: SJC
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3. Question: Some people would like to use the existing UCMJ as a baseline. If we do this, how should we change the existing UCMJ to adapt for the fact that these detainees come from the battlefield? Can we take evidence from the battlefield? Do the same rules of search and seizure apply? Other people would like to also use Common Article 3 as a baseline. If we do this, how will define "humiliating and degrading treatment"? Is there any specific guidance that the armed services have to give definition to these terms? As they stand, these are very vague phrases which need a certain amount of definition, especially if they're going to be used by our soldiers out in the field to make on the spot determinations.

Answer: I suggest the baseline is not critical. Should we use the UCMJ as the baseline to prosecute suspected unlawful enemy combatants, the Code would have to be substantially changed. There are a number of aspects of the court-martial system, to include search and seizure and evidence collection methods, that, if used to try unlawful enemy combatants, would compromise our warfighting mission. Conversely, the "regularly constituted court" provision of Common Article 3 does not provide, with any specificity, the procedures necessary for a military commission. Consequently, I submit the structure of the military commissions should be a blend of The President's Military Order of November 13, 2001, the UCMJ, the Manual for Courts-Martial, and international courts and tribunals in order to fulfill their purpose of ensuring an effective, disciplined, military response in the war on terror as well as full and fair justice for enemy combatants on and off the battlefield.

The Common Article 3 proscriptions on "humiliating and degrading treatment" and "outrages upon personal dignity" are not specifically defined in the Geneva Conventions. In fact, the official commentary to the Geneva Conventions observes that the framers of the Conventions affirmatively decided not to define the term because "[h]owever much care were taken in establishing a list of all the various forms of infliction, one would never be able to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes."

This is true of numerous legal terms commonly used in our own legal system and in the military justice system. Article 93 of the UCMJ, for example, prohibits "cruelty and maltreatment." The definition given in the UCMJ is less than one paragraph long and is meant to be exemplary, rather than exclusive. Yet, we have successfully prosecuted soldiers for violating this article.

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The United States Army has been applying Common Article 3 as the minimum standard for treatment of all individuals, in all armed conflicts, for several decades. Recently, in section 1003 of the Detainee Treatment Act, Congress has provided greater clarity by tying the meaning of "humiliating and degrading treatment" and "outrages upon personal dignity" to a Constitutional standard. I feel confident in advising that the standards set forth in Common Article 3, the Detainee Treatment Act, and the UCMJ are trained by Commanders and noncommissioned officers, and applied by Soldiers in any operational environment.

Hearing Date: August 2, 2006
Committee: SJC
Member: Senator Specter
Witness: MG Scott C. Black

4. Question: What are the differences if any between the rights afforded prisoners of war under Geneva and the rights afforded to the detainees at Guantanamo via the tribunal/commission system currently employed by the military?

Answer: The minimum standard of treatment for both groups is defined by Common Article 3 and necessarily includes fundamental judicial guarantees recognized by all civilized nations. But unlawful enemy combatants are not afforded all of the same rights and privileges specifically guaranteed to Prisoners of War under the Geneva Convention. Those rights and privileges, by their very terms, are earned by lawful enemy combatants who comply with established rules of conduct. The rights afforded to detainees at Guantanamo under the existing military commission process were previously established in Military Commission orders, instructions, and policies. Specific questions concerning the current military commission procedures are more appropriately addressed by the Office of the Chief Prosecutor, Office of the Military Commissions, Defense Legal Services Agency.

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Department of Defense

Hearing Date: **August 2, 2006**
Committee: SJC
Member: **Senator Durbin**
Witness: **MG Scott C. Black**

1. Question: On January 26, 2002, then-Secretary of State Colin Powell sent a memorandum to then-Counsel to the President Alberto Gonzales arguing that the United States could comply with the Geneva Conventions and effectively fight the war on terrorism.

a. In his memo to Mr. Gonzales, Secretary Powell concluded that the Geneva conventions provide "practical flexibility in how we treat detainees, including with respect to interrogation and length of detention." Do you agree?

Answer: I agree that the Geneva Conventions provide a flexible approach to treating detainees and create categories of detainees to whom we provide differing levels of treatment.

b. Question: Secretary Powell argued that the Geneva Conventions "allow us not to give the privileges and benefits of POW status to al Qaeda and Taliban." Do you agree?

Answer: I agree that the Geneva Conventions contemplate different treatment for different categories of persons, including those who are deemed lawful combatants and those who are not. For example, on January 19, 2002, President Bush determined that the provisions of the Geneva Conventions applied to our conflict with the Taliban but that the Taliban were not entitled to prisoner of war status for purposes of the Geneva Conventions of 1949. However, the President determined that "in detaining Al Qaida and Taliban individuals under the control of the Department of Defense" DoD personnel would "treat them humanely, and to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva Conventions of 1949." Since the Supreme Court decision in *Hamdan*, DoD has emphasized the application of Common Article 3 across the spectrum of conflict. And the U.S. Army has consistently trained its soldiers to provide protections that exceed the requirements of Common Article 3, including humane methods of interrogation and detention, to all detainees.

c. Question: Secretary Powell argued that deciding that the Geneva Conventions do not apply to the war on terrorism "will reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the law of war for our own troops. Do you agree?

Answer: As mentioned above, President Bush determined that the Geneva Conventions apply to our conflict with the Taliban, thus alleviating then-Secretary Powell's concern about reciprocity. Reciprocity is certainly an important tenet of law of war compliance.

Despite the importance of reciprocity as a key tenet of the law of war, U.S. Soldiers are trained to comply with the laws of war even in the face of non-compliance by the enemy. We adhere to the laws of war because it is the right thing to do, not because it ensures reciprocity on the part of our enemies.

d. Question: Secretary Powell argued that deciding that the Geneva Conventions do not apply to the war on terrorism "will undermine public support among critical allies, making military cooperation more difficult to sustain." Do you agree?

Answer: The fundamental fairness of a system that meets the standards of Common Article 3 of the Geneva Conventions will go a long way toward generating good will and support from our allies. But interoperability concerns are present any time that the U.S. armed forces have a different interpretation of a legal requirement than our Allies, or do not become party to a particular Treaty or Convention that our Allies have adopted. These interoperability issues exist with every country in varying degrees over a broad range of topics. None of these issues, including differing interpretations of the Geneva Conventions, will jeopardize the overall relationship with our Allies or create a situation where we can not continue to successfully conduct military operations.

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2. Question: On February 7, 2002, President Bush issued a memorandum stating, "As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely, and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva." To your knowledge, has the Department of Defense provided any guidance on the meaning of humane or inhumane treatment?

Answer: Since prior to the Global War on Terrorism, the U.S. Army has trained Soldiers to treat all detainees humanely. This long-standing tradition of humane treatment is set forth in paragraph 1-5 of Army Regulation 190-8. These same principles are echoed in many Department of Defense publications and directives. Though the Department of Defense has not yet published a final version of its humane treatment policy, it has been a constant topic of discussion and interchange as we ensure our doctrine and training programs instill in all leaders and Soldiers the principles of treating everyone humanely, with dignity and respect. I agree with this approach and believe that Soldiers understand what is humane. This natural understanding is reinforced by clear guidelines and focused training from leaders.

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3. Question: The Schmidt-Furlow Report on the Investigation into FBI Allegations of Detainee Abuses at Guantanamo Bay concluded that an interrogation "resulted in degrading and abusive treatment but did not rise to the level of being inhumane treatment." Do you agree that the treatment of a detainee could be degrading and abusive but not inhumane?

Answer: Yes. "Inhumane treatment" has historically been charged as a "war crime," a serious breach of Common Article 3 that is similar to a "grave breach" of the Geneva Conventions. Abusive treatment, while it might rise to the level of a serious violation, would generally be tried (if committed by our Soldiers), under the UCMJ, as "Cruelty or Maltreatment," or "Assault." Further, "humiliating or degrading treatment," such as verbal harassment or name-calling, may not rise to the level of criminal conduct. I believe that not every act that violates Common Article 3 should be considered a war crime, or a grave breach of the Geneva Conventions. Finally, Soldiers are taught one standard, that of treating all detainees humanely, which incorporates all the provisions of Common Article 3.

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4. **Question: At a July 13 hearing of the Senate Armed Services Committee, Major General Rives testified, "Some of the techniques that have been authorized and used in the past have violated Common Article 3."**

Do you agree with Major General Rives? If so, please provide examples of authorized techniques that violate Common Article 3.

Answer: I do not know what specific instances MG Rives was referring to in his testimony. But I know of no currently authorized technique that violates Common Article 3.

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5. Question: I recently visited Guantanamo Bay. The chief interrogator at Guantanamo told me that the Geneva Conventions provide sufficient flexibility to interrogate detainees effectively. Do you agree?

Answer: Yes. I believe that the standards in the Geneva Conventions inherently distinguish between persons with different status and allow appropriate questioning methods for those detainees.

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6. Question: Defense Department General Counsel William Haynes sent Defense Secretary Rumsfeld a memorandum on November 27, 2002, recommending the approval of certain interrogation techniques for use on Guantanamo Bay detainees. Was your predecessor consulted regarding this memorandum? If so, please describe the nature of these consultations, including whether you agreed with the recommendations in the memorandum.

Answer: My predecessor, MG Romig, U.S. Army, Retired, was The Judge Advocate General at that time. I would respectfully refer the Committee to MG Romig's testimony before the Senate Armed Services Committee on this same issue.

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7. Please respond to each subpart of this question separately:

a. Question: In your personal opinion, is the use of stress positions on detainees legal?

Answer: Forcing detainees to stand, sit, or kneel in abnormal positions for prolonged periods of time is not legal.

b. Question: In your personal opinion, is the use of stress positions on detainees humane?

Answer: Forcing detainees to stand, sit, or kneel in abnormal positions for prolonged periods of time is not humane.

c. Question: In your personal opinion, is the use of stress positions on detainees consistent with Common Article 3 of the Geneva Conventions?

Answer: Forcing detainees to stand, sit, or kneel in abnormal positions for prolonged periods of time is not consistent with Common Article 3.

d. Question: In your personal opinion, is the use of stress positions on detainees consistent with the U.S. Army Field Manual on Intelligence Interrogation (FM 34-52)?

Answer: Forcing detainees to stand, sit, or kneel in abnormal positions for prolonged periods of time is not consistent with FM 34-52.

e. Question: The Army Field Manual provides that, in attempting to determine whether an interrogation technique is legal, an interrogator should consider, "If your contemplated actions were perpetrated by the enemy against U.S. PWs, you would believe such actions violate international or US law." In your personal opinion, would it violate international or US law for enemy forces to use stress positions on U.S. Prisoners of War?

Answer: It would violate the law of war to force a prisoner of war to stand, sit, or kneel in abnormal positions for prolonged periods of time.

f. Question: The Army Field Manual states "forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time" is "physical torture." Do you agree?

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8. Please respond to each subpart of this question separately.

a. Question: In your personal opinion, is the use of dogs to induce stress on detainees legal?

Answer: The use of dogs as a threat of violence to induce stress as an interrogation method or technique is not legal.

b. Question: In your personal opinion, is the use of dogs to induce stress on detainees humane?

Answer: The use of dogs as a threat of violence to induce stress as an interrogation method or technique is not humane.

c. Question: In your personal opinion, is the use of dogs to induce stress on detainees consistent with Common Article 3?

Answer: The use of dogs as a threat of violence to induce stress as an interrogation method or technique is not consistent with Common Article 3.

d. Question: In your personal opinion, is the use of dogs to induce stress on detainees consistent with the Army Field Manual?

Answer: The use of dogs as a threat of violence to induce stress as an interrogation method or technique is not consistent with FM 34-52.

e. Question: In your personal opinion, would it violate international or U.S. law for enemy forces to use dogs to induce stress on U.S. Prisoner of War?

Answer: It would violate the law of war to use of dogs as a threat of violence to induce stress as an interrogation method or technique on a prisoner of war.

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9. Please respond to each subpart of this question separately.

a. Question: In your personal opinion, is the use of removal of clothing as an interrogation technique legal?

Answer: Removal of all clothing, or nakedness, as an interrogation technique is not legal.

b. Question: In your personal opinion, is the use of removal of clothing as an interrogation technique humane?

Answer: Removal of all clothing, or nakedness, as an interrogation technique is not humane.

c. Question: In your personal opinion, is the use of removal of clothing as an interrogation technique consistent with Common Article 3?

Answer: Removal of all clothing, or nakedness, as an interrogation technique is not consistent with Common Article 3.

d. Question: In your personal opinion, is the use of removal of clothing as an interrogation technique consistent with the Army Field Manual?

Answer: Removal of all clothing, or nakedness, as an interrogation technique is not consistent with FM 34-52.

e. Question: In your personal opinion, would it violate international or U.S. law for enemy forces to use removal of clothing as an interrogation technique on U.S. Prisoners of War?

Answer: It would violate the law of war to remove all clothing from a prisoner of war as an interrogation technique.

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10. Please respond to each subpart of this question separately.

a. Question: In your personal opinion, is the use of scenarios designed to convince a detainee that death or severely painful consequences are imminent for him and/or his family (i.e. mock execution) legal?

Answer: Mock execution is not legal.

b. Question: In your personal opinion, is mock execution humane?

Answer: Mock execution is not humane.

c. Question: In your personal opinion, is mock execution consistent with Common Article 3?

Answer: Mock execution is not consistent with Common Article 3.

d. Question: In your personal opinion, is mock execution consistent with the Army Field Manual?

Answer: Mock execution is not consistent with the FM 34-52.

e. Question: In your personal opinion, would it violate international or U.S. law for enemy forces to subject U.S. Prisoners of War to mock execution?

Answer: It violates the law of war to conduct mock executions.

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11. Please respond to each subpart of this question separately.

a. Question: In your personal opinion, is the use of a wet towel and dripping water to induce the misperception of drowning (i.e. waterboarding) legal?

Answer: Inducing the misperception of drowning as an interrogation technique is not legal.

b. Question: In your personal opinion, is waterboarding humane?

Answer: Inducing the misperception of drowning as an interrogation technique is not humane.

c. Question: In your personal opinion, is waterboarding consistent with Common Article 3?

Answer: Inducing the misperception of drowning as an interrogation technique is not consistent with Common Article 3.

d. Question: In your personal opinion, is waterboarding consistent with the Army Field Manual?

Answer: Inducing the misperception of drowning as an interrogation technique is not consistent with FM 34-52.

e. Question: In your personal opinion, would it violate international or U.S. law for enemy forces to subject U.S. Prisoners of War to waterboarding?

Answer: It would violate the law of war to induce the misperception of drowning as an interrogation technique on a prisoner of war.

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12. Question: When the Attorney General testified before the Judiciary Committee on February 6, 2006, Senator Graham asked him, "Do you believe it is lawful for the Congress to tell the military that you cannot physically abuse a prisoner of war?" The Attorney General responded, "I am not prepared to say that, Senator." I asked the Attorney General to answer Senator Graham's question in writing. He responded, "It is not prudent to comment on the constitutionality of legislation described only in abstract terms."

a. Do you believe it is lawful for the Congress to tell the military that you cannot physically abuse a prisoner of war?

Answer: Congress has the authority to proscribe criminal conduct under the punitive articles of the UCMJ. In addition, Congress has regulated military conduct in the Detainee Treatment Act.

b. Do you believe the President is required to comply with the Uniform Code of Military Justice (UCMJ)?

Answer: Respectfully request that you refer questions concerning Presidential authority and actions to the Department of Justice, Office of Legal Counsel.

c. Do you believe the UCMJ is constitutional?

Answer: The US Supreme Court has unequivocally and consistently recognized the Constitutionality of the system of military justice established by Congress and codified in the UCMJ. Dynes v. Hoover, 61 US 65 (1858); Ex Parte Reed, 100 US 13 (1879); Solorio v. US, 483 US 435 (1987). For example, in Solorio the Court held ". . . that the requirements of the Constitution are not violated where, as here, a court-martial is convened to try a serviceman who was a member of the Armed Services at the time of the offense charged." As with any statutory criminal code, elements of the UCMJ have been subject to judicial scrutiny, but as a whole, Courts have always upheld the constitutionality of the UCMJ.

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13. Question: The Working Group Report on Detainee Interrogations in the Global War on Terrorism states, "Any effort by Congress to regulate the interrogation of unlawful combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President."

Do you agree? In your personal opinion, does Congress have authority to regulate the interrogation of unlawful combatants?

Answer: I do not believe it is unconstitutional for Congress to regulate the interrogation of unlawful combatants. Congress has already done so in the Detainee Treatment Act.

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14. Question: The Working Group Report states, "In order to respect the President's inherent constitutional authority to manage a military campaign, 18 U.S.C. §2340A (the prohibition against torture) as well as any other potentially applicable statute must be construed as inapplicable to interrogations undertaken pursuant to his Commander-in-Chief authority."

Do you agree? In your personal opinion, is 18 U.S.C. §2340A unconstitutional when applied to interrogations pursuant to the President's Commander-in-Chief authority?

Answer: I recognize that Congress has regulated the conduct of interrogations in the Detainee Treatment Act. The DTA imposes a standard to which the Army has consistently trained, and will continue to train, all of its leaders and Soldiers.

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Committee: SJC
Member: Senator Feinstein
Witness: MG Scott C. Black

1. In the War Crimes Act's legislative history in 1996, the Department of Defense's General Counsel referenced a "Memorandum of Agreement between the Department of Defense and the Justice Department," in which "a member of the Armed forces would be tried for a violation of the War Crimes Act in a military court." Unless that agreement has somehow changed, this should mean that war crimes prosecutions, at least for U.S. servicemen, remain firmly in the hands of military prosecutors. Has this Memorandum of Agreement been altered?

Answer: The January 1985 Memorandum of Understanding between the Department of Justice and the Department of Defense has not been modified since the DoD General Counsel's 1996 comments.

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Committee: SJC
Member: Senator Feinstein
Witness: MG Scott C. Black

2. Some have raised concerns about the potential ambiguities in the language of Common Article 3 – such as its references to outrages upon personal dignity, and degrading and humiliating treatment. Others, however, have noted that Geneva Convention Protocol II was enacted to supplement and clarify the broad provisions of Common Article 3, in specific response to allegations that Common Article 3 might be difficult to apply in practice, due to its brevity and lack of detail. 160 states are signatories to Protocol II, indicating that it has wide international endorsement. Why is it that Protocol II, and particularly its long Articles 5 and 6 which provide a detailed interpretation of the general provisions contained in Common Article 3, fails to adequately clear up those supposed ambiguities? Is it your position that soldiers have historically had difficulty understanding and applying the principles of Common Article 3?

Answer: Although not yet ratified, Protocol II provides some clarification as to the minimum standards for treatment; in fact, the Army has adopted many of these detailed standards in Army Regulations (AR) 190-8 [para. 1-5], in defining the minimum treatment policy for detainees. The general standards of conduct are well established and Soldiers have been trained on and applied these standards, across the spectrum of conflict, for many years. But the ambiguities to which you refer are most critical when defining crimes cognizable under the War Crimes Act; as I stated in my previous testimony, Congress could clarify certain of these ambiguities by clearly defining those elements of Common Article 3 essentially equivalent to "grave breaches" enumerated in the Geneva Conventions.

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3. Army Manual 190-8, Section 1-5, similarly provides that "[a]ll persons will be respected as human beings, and that prisoners will be protected against "inhumane" and "degrading" treatment, including such acts as "insults," "public curiosity," and "reprisals." How are these terms interpreted? Do you believe they are less ambiguous than Common Article 3's provisions? Why or why not? If a Soldier follows Army Manual 190-8, is there any reason to believe that he would be violating Common Article 3 of the Geneva Conventions?

Answer: The definitions of insults, public curiosity, and reprisals are clearly defined and such actions against detainees are prohibited in AR 190-8. The standards of AR 190-8 are entirely consistent with and provide mutual reinforcement of the provisions of Common Article 3. They provide a standard of conduct to which Soldiers have been trained and are expected to adhere. A Soldier who complies with AR 190-8 would be in compliance with Common Article 3.

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Committee: SJC
Member: Senator Leahy
Witness: MG Scott C. Black

1. Some have proposed legislation that would redefine Common Article 3 in accordance with the "shocks the conscience" standard under the U.S. Constitution, which has been interpreted by this administration as imposing a sliding scale, depending on the circumstances. If the interrogator thinks he needs the information badly, then certain interrogation techniques are allowed. If the need is less, then fewer techniques will be permitted. (A) Which is easier to teach and train on: an absolute standard or a relative standard that changes according to the circumstances? (B) Would a sliding scale approach to the definition of what constitutes cruel and prohibited conduct add clarity or confusion, in your view?

Answer: The U.S. Army standard has never been a "sliding scale." The Army has adopted and trained to the highest standards of conduct, with absolute prohibitions, based on the provisions of the Geneva Conventions, including Common Article 3, the Detainee Treatment Act, and the Convention Against Torture. The Army adopts an approach that applies Geneva Convention standards for treatment for all detainees, in order to establish a standard for training Soldiers to act humanely on all battlefields, across the spectrum of conflict. Conduct proscribed by the War Crimes Act should be the clearly defined as the equivalent of a "grave breach" of the Geneva Conventions or a violation of 18 USC §2340.

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Member: Senator Leahy
Witness: MG Scott C. Black

2. In a letter to Senator Graham, dated July 26, 2006, three organizations (Human Rights Watch, Human Rights First, and the National Institute of Military Justice) concluded, after citing specific authority: "America's NATO allies apply the protections of the Geneva Conventions, including, at a minimum, Common Article 3, to the interrogation of terrorist suspects captured in an armed conflict, and equivalent protections in all other circumstances." Are these organizations correct on this point, or are they mistaken.

Answer: I am not conversant with the various policies of our NATO allies. In accordance with DoD policy announced by the Deputy Secretary of Defense in the wake of the *Hamdan* decision, the Department of Defense provides to all detainees the minimum protections of Common Article 3 in all situations, as a matter of law. DoD policy applies the Geneva Convention standards across the spectrum of conflict, in all military operations, no matter how such operations are characterized.

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3. Should an international understanding of what Common Article 3 requires be part of any Congressional effort to define the terms "outrages against personal dignity" and "humiliating and degrading treatment"? Why or why not?

Answer: The various international legal interpretations of Common Article 3, including decisions by international criminal tribunals dating back to the Nuremburg Trials, are not binding on the U.S. Government. But they do offer insights into definitions of key terms; they have been and should continue to be considered as the Department of Defense further develops policies to implement Common Article 3. I would caution, however, that I am referring to the *lex specialis* of the law of war, not to the body of law referred to as Human Rights law, or decisions by the European Court of Human Rights, for example.

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4. When Admiral McPherson testified last month before the Senate Armed Services Committee, he stated, in response to a question from Senator Levin, that we should not simply ratify the procedures for military commissions that the Supreme Court struck down in the *Hamdan* case because "doing that would not fulfill Common Article 3." Common Article 3 requires "a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people." What aspects of the pre-*Hamdan* procedures fell short of this baseline requirement?

Answer: The Supreme Court opinion suggested a number of areas that should be reviewed; currently, efforts are underway within the Government to seek the proper balance between individual rights and due process and our obligation to protect the nation from terrorist and other threats. Based on the Supreme Court opinion, the elements of the rules currently applicable to trials by military commission that should be examined in striking this balance include the accused's access to evidence, his presence at trial, and appellate procedures.

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5. Question: Article 36 of the Uniform Code of Military Justice provides that the procedural rules for courts-martial and military commissions must be "uniform insofar as practicable." What specific procedural rules for courts-martial are not practicable for military commissions, and why?

Answer: The Manual for Courts-Martial promulgates more than 100 procedural rules; that body of rules cannot and should not be applied wholesale to military commissions. Many of the procedures are designed to operate in a traditional military command structure inapplicable to trial by military commission (e.g., the forwarding and endorsement of charges). The application of other procedural rules, such as those concerning pretrial restraint and speedy trial, is not practicable because the authority to detain unlawful enemy combatants exists separate and apart from the trial before a military commission. Other rules, such as those concerning apprehension, are equally impracticable because the nature of warfighting which does not permit Soldiers in combat operations to apply law enforcement apprehension methods. A thorough and thoughtful review of the Rules for Courts-Martial rules will need to be accomplished should the Manual for Courts-Martial be used as a baseline for military commission procedures.

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 5, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed responses to questions arising from the appearance of Acting Assistant Attorney General Steven G. Bradbury before the Committee on August 2, 2006, at the hearing entitled "The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18 of the United States Code." We hope that this information is of assistance to the Committee. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget advises us that from the standpoint of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Richard A. Hertling
Acting Assistant Attorney General

Enclosures

cc: The Honorable Arlen Specter
Ranking Minority Member

Committee on the Judiciary
United States Senate

Hearing on
Authority to Prosecute Terrorists Under
The War Crime Provisions of Title 18

Written Questions from
Senator Patrick J. Leahy
For
Steven Bradbury
Acting Assistant Attorney General

August 2, 2006

1. **You said in your opening remarks that "the meaning of Common Article 3 ... is subject to the evolving interpretations of tribunals and governments outside the United States." How have other signatories to the Geneva Conventions interpreted Common Article 3? What offenses have they considered serious enough to be punishable as violations of Common Article 3? How have they punished such violations?**

As you know, since my testimony, Congress has enacted the Military Commissions Act of 2006 (the "MCA"), which provides clear definitions for the most serious violations of Common Article 3 under United States law. To answer your question, the principal international tribunals that have interpreted Common Article 3 are the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"), which have prosecuted a number of Common Article 3 violations, and the International Criminal Court ("ICC"), which has codified specific criminal offenses keyed to the provision. Appropriately, most of the conduct that ICTY and ICTR have found to violate Common Article 3 has been quite serious: rape; beating an individual so severely that he was unable to stand; using an electric shock device; forcing prisoners to engage in sex acts; forcing a father and son to slap each other repeatedly; forced labor that resulted in serious physical injuries due to dangerous military conditions; and using detainees as human shields in an active combat zone. By contrast, ICTY has held that forced labor outside a dangerous, active combat zone was not a violation of Common Article 3.

Although the United States is not a party to the ICC, the definitions enacted in the MCA are similar to how the ICC has defined violations of Common Article 3 in several respects. First, the ICC definition of the crime of "cruel treatment" proscribes only "severe" physical or mental harm (akin to torture), while the MCA definition reaches "serious," as well as "severe," harm. *See* 18 U.S.C. § 2441(d)(1)(B). Second, the ICC's definition of "outrages upon personal dignity" is circular and vague. The ICC definition requires the prosecution to demonstrate that the "perpetrator humiliated, degraded or

otherwise violated the dignity of one or more persons" and that the "severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity." The ICC's reliance on such a tautological definition led Congress to avoid codifying a general offense of "outrage upon personal dignity," but rather to codify several specific outrages, such as biological experimentation, rape, and sexual assault. Finally, the ICC criminalizes the passing of sentences and the carrying out of executions absent a regularly constituted court. Again, however, the ICC definition of the crime fails to provide any standards in which to govern that determination. Because of the vagueness of that provision, and because the carrying out of an execution absent a regularly constituted court would in fact constitute the war crime of murder, Congress did not include such a definition under the War Crimes Act.

The European Court of Human Rights ("ECHR"), in its interpretations of Article 3 of the European Convention on Human Rights, which—similarly to Common Article 3—proscribes "inhuman or degrading treatment," has condemned a rather wider scope of conduct than have other international tribunals. Conduct that the ECHR has deemed sufficiently severe to violate Article 3 includes: 24-hour-a-day confinement in cells without the opportunity for exercise; lack of access to outside light in prison facilities; nudity without a security justification; cells less than 2.8 square meters in size; poor prison sanitary conditions; confining two prisoners to a common cell with an open toilet; and the so-called "death row effect" (*i.e.*, a substantial delay between the imposition of a capital sentence and the execution of the sentence). These decisions of the ECHR reflect the vagueness of some provisions of Common Article 3 and demonstrate why it was necessary for the MCA to provide clear definitions of prohibited conduct under United States law.

2. **According to a recent article in the *Washington Post* ("Detainee Abuse Charges Feared: Shield Sought From '96 War Crimes Act," July 28, 2006), Attorney General Gonzales has spoken privately with Republican lawmakers about the need to grant U.S. personnel new "protections" for past violations of the War Crimes Act for actions taken under President Bush's 2002 military order and under Justice Department legal opinions that have been withdrawn. What actions sanctioned by the Bush-Cheney administration are you afraid may be prosecutable as war crimes under an international interpretation of Common Article 3?**

In light of the Supreme Court's holding that Common Article 3 applies to United States conduct in the War on Terror, we believed that it was imperative to provide clear standards to United States personnel charged with protecting the Nation from further terrorist attacks. In enacting the MCA, Congress provided that clarity by defining nine grave breaches of Common Article 3 that constitute criminal offenses under the War Crimes Act. *See* 18 U.S.C. § 2441(d). Those offenses govern both past and future conduct, and we are confident that they will provide United States personnel with the security that they deserve.

3. Please specify examples of interrogation techniques that you believe U.S. personnel should be allowed to employ, but may be prohibited by the humane treatment requirements of Common Article 3.

As indicated in my testimony, Common Article 3 includes certain requirements that are quite vague and susceptible to a variety of different interpretations. For example, some might consider it "humiliating and degrading treatment" merely to be spoken to harshly in an interrogation, or to be questioned by an interrogator of the opposite sex. Accordingly, the Administration believed that the standards governing the treatment of detainees in the War on Terror should be certain and clearly defined in U.S. law, consistent with our international obligations. The MCA addresses these concerns by defining clearly the criminal conduct under the War Crimes Act; making clear that the Detainee Treatment Act of 2005's prohibition on cruel, inhuman or degrading treatment or punishment constitutes an additional prohibition under Common Article 3; and reinforcing the President's authority to articulate further our international obligations under United States law. *See* MCA § 6.

4. Let's say Congress adopts an interpretation of Common Article 3 that permits the United States to engage in conduct that other signatories to the Geneva Conventions would consider violations of that provision. Could this make U.S. personnel more vulnerable to similar "local" interpretations of what the Conventions require should they be captured during a foreign conflict?

Clarifying and implementing vague treaty provisions through a domestic statute is an accepted practice by a party to a treaty, and we are confident that the statutory provisions of the MCA implementing Common Article 3 fully comply with our treaty obligations under the Geneva Conventions. The MCA does not, as a matter of statute, set a ceiling on our Nation's obligations under Common Article 3. Rather, it defines certain obligations and reinforces the President's authority to interpret Common Article 3 and define additional prohibitions under United States law.

It is important to remember, moreover, that in our current armed conflict with al Qaeda, our enemies show no regard for the laws of war or the requirements of the Geneva Conventions. They wantonly attack innocent civilians, behead hostages, and commit other atrocities. Indeed, many of the heinous acts expressly prohibited by Common Article 3—murder, maiming, and torture—are precisely the practices that al Qaeda and its affiliates routinely rely upon in fighting this conflict. Whatever interpretation the United States adopts of the substantive scope of Common Article 3 will have no impact on the conduct of these terrorist murderers.

Nonetheless, we recognize that a U.S. interpretation or application of Common Article 3 may have reciprocity implications for U.S. personnel in certain circumstances in future conflicts. We believe that Common Article 3 can be given a reasonable interpretation by the United States, in conformity with our treaty obligations and in compliance with the MCA and the DTA, that will allow the CIA to operate a safe and

professional program of interrogation of high-value terrorist detainees in order to protect the United States and its allies and countless innocent civilians from further catastrophic terrorist attacks, and that we can do so consistent with legitimate reciprocity concerns.

5. **During the past five years, has the Office of Legal Counsel conducted any analysis of the scope of the War Crimes Act and its criminal prohibitions? What documents, legal memoranda and opinions of the applicability of this law have been produced?**

Before the Supreme Court's decision in *Hamdan*, the President had determined, based on the advice of the Department of Justice, that Common Article 3 did not apply to either al Qaeda or Taliban detainees because the relevant conflict was "international" in scope. Any legal advice that was given by the Department of Justice, including any advice that was given about the War Crimes Act, would have proceeded on the basis of that conclusion and on the conclusion that U.S.C. § 2441(c)(3) thus did not apply as a matter of law. Beyond that observation, it would not be appropriate to discuss or reveal confidential and privileged legal advice provided by the Department for the benefit of policymakers within the Executive Branch.

6. **During the past five years, has the President or the Department of Justice taken any action to immunize conduct in violation of the War Crimes Act or Common Article 3 of the Geneva Conventions?**

As described in my previous answer, the President determined before *Hamdan* that Common Article 3 did not apply to either al Qaeda or Taliban detainees. Neither the President's action, nor the Department's advice, was intended to "immunize" any unlawful conduct. Rather, the purpose of the guidance was to inform United States personnel as to the law governing their conduct. Because of the President's decision, all actions taken by the Executive Branch with respect to al Qaeda and Taliban detainees before *Hamdan* were taken under the express understanding that Common Article 3—and thus the relevant provision of the War Crimes Act—did not apply. Congress recognized as much in the Detainee Treatment Act, which expressly provides United States personnel with a defense against liability for engaging in practices related to the detention or interrogation of detainees that "were officially authorized and determined to be lawful at the time that they were conducted."

7. **You said in your opening remarks that the McCain amendment offered a "useful clarification" of the United States' obligations relative to the treatment of detainees under Common Article 3. The McCain amendment, which was enacted as part of the Detainee Treatment Act of 2005, prohibits "cruel, inhuman, or degrading" treatment of detainees, as defined by reference to the Eighth Amendment's ban on "cruel and unusual" punishments. Common Article 3 prohibits "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture, taking of hostages, and outrages upon personal dignity, in particular humiliating and degrading treatment." Are there any kinds of treatment or**

punishment that would be permitted under the former standard but prohibited by the latter? If yes, please describe them. If no, then what need is there of further "clarification"?

Congress did not provide in the MCA that the McCain Amendment would necessarily define the ceiling of United States obligations under Common Article 3. Rather, the MCA recognizes the relevance of the McCain Amendment in defining the substantive requirements of Common Article 3 and then delegates to the President the authority to articulate any additional obligations for purposes of United States law.

As indicated in my testimony and prior answers, the Administration sought a clarification of Common Article 3 under United States law because some of that article's provisions are vague, and because their interpretation would be influenced by the decisions of international tribunals and foreign nations. Our concern was not that Common Article 3 was a higher standard than the McCain Amendment. Our concern was that we must provide clear legal standards to those called upon to handle detainees in the War on Terror based upon well-defined standards of United States law. Congress now has accomplished this by enacting the MCA.

8. Suppose Congress enacts legislation to "clarify" Common Article 3's prohibition of "outrages upon personal dignity." What effect if any would that have on possible war crimes prosecutions for actions taken prior to enactment?

In the MCA, Congress amended the War Crimes Act to prohibit only clear offenses that are serious enough to be labeled "war crimes"—conduct such as murder, torture, rape, and mutilation. *See* MCA § 6(b)(1) (amending 18 U.S.C. § 2441). The MCA makes clear that these definitions are to be applied to govern past, as well as future, conduct. By clarifying the reach of Common Article 3, the MCA provides United States personnel with clear standards as to the law governing both past and future conduct.

9. May Congress specify substantive offenses triable by law-of-war military commissions simply by amending the War Crimes Act at 18 U.S.C. § 2441?

The War Crimes Act is a federal criminal statute that authorizes the prosecution of certain violations of the law of war in federal court. Although it is possible that military commissions with jurisdiction over violations of the law of war could rely on the definitions established under the War Crimes Act as at least a partial codification of offenses, we think that Congress appropriately provided in the MCA for a specific list of offenses that would be triable by military commissions under the new chapter 47A of title 10. That approach will reduce confusion and thereby reduce the likelihood of collateral litigation regarding the commissions' subject-matter jurisdiction.

10. Does labeling conduct a "war crime" for purposes of domestic criminal law affect the definition of the international law of war or the jurisdiction of law-of-war military commissions? Would amending the War Crimes Act to

include the crime of conspiracy make this offense triable by law-of-war military commissions, even if conspiracy is not a recognized violation of the law of war according to international sources?

The Constitution grants Congress the authority to "define and punish . . . Offenses against the Law of Nations." U.S. Const. art. I, § 8, cl. 10. Congress therefore may define the war crimes triable under both domestic criminal law and by military commissions. In enacting the MCA, Congress appropriately exercised this authority by authorizing military commissions to try alien unlawful enemy combatants for conspiring to violate the laws of war. In so doing, Congress specifically recognized that conspiracy is an offense "that ha[s] been traditionally triable by military commission." 10 U.S.C. § 950p(a). As for the War Crimes Act, we would note that conspiracies to commit the offenses defined as "war crimes" in 18 U.S.C. § 2441(c) were already prosecutable in federal court by virtue of 18 U.S.C. § 371. The MCA further amended the War Crimes Act to make clear that conspiring to commit any of the grave breaches under 18 U.S.C. § 2441(d) in fact would constitute a violation of the War Crimes Act itself.

11. Does Congress have the power, without specifically repudiating the Geneva Conventions, to define the laws of war triable by U.S. tribunals more narrowly than international law defines them?

The Geneva Conventions require the High Contracting Parties to criminalize only the grave breaches of the Conventions. They do not specifically require the Parties to criminalize each and every violation of Common Article 3. For instance, Article 129 of the Third Geneva Convention requires High Contracting Parties to "enact any legislation necessary to provide effective penal sanctions for persons committing, or ordered to be committing, any of the grave breaches of the present Convention." Article 130, in turn, provides a list of exceptionally serious conduct—including willful killing, and torture or inhuman treatment—that constitute such "grave breaches." The MCA makes clear that the amended definition of "grave breaches" in 18 U.S.C. § 2441(d) "fully satisfy[ies] the obligation under Article 129 of the Third Geneva Convention for the United States to provide effective penal sanctions for grave breaches which are encompassed in common Article 3 in the context of an armed conflict not of an international character." MCA § 6(a)(2). And, indeed, the definitions provided under the War Crimes Act are fully consistent with international law.

12. When you testified before this Committee on July 11, 2006, you suggested that Congress should simply ratify the military commission procedures that the Supreme Court struck down in the *Hamdan* case. But at the hearing on August 2, when asked whether it would be "wise and prudent" for Congress to reauthorize the military commissions as originally written without change, you stated, "Actually, no, I do not." What is your current position on this point? What if anything about the pre-*Hamdan* procedures do you now believe should be modified, and why?

Although we have contended that the MCA could usefully borrow from some of the previous military commission procedures, the Administration did not propose that Congress simply ratify those procedures in their entirety. The new military commission procedures established under the MCA use the Uniform Code of Military Justice (the "UCMJ") as a starting point, but then depart from those procedures where they would be inappropriate or infeasible. The MCA's provisions differ from the pre-*Hamdan* military commissions in a number of important ways. For instance, the presiding officer of the military commission will be a military judge, drawn from those judges who preside over courts-martial. The rule governing the admission of classified evidence—and providing that the accused will see all evidence presented to the trier of fact—is also quite different from the prior military commission procedures. The Administration supports the new procedures established under the MCA.

13. Article 36 of the Uniform Code of Military Justice provides that the procedural rules for courts-martial and military commissions must be "uniform insofar as practicable." What specific procedural rules for courts-martial are not practicable for military commissions, and why?

Although the UCMJ offered an appropriate and helpful starting point for the MCA, Congress recognized that many court-martial procedures will be impracticable in the military commission context. For example, because many terrorists are captured on the battlefield, hearsay rules that would require foreign nationals and United States military personnel to appear personally at military commissions would present unwarranted obstacles to the trial of such enemy combatants. Therefore, the MCA recognizes that the hearsay rule applicable in courts-martial shall not apply to military commissions. *See* 10 U.S.C. § 949a(b)(2)(E). The MCA also specifically provides that several other provisions of the UCMJ are inapplicable. *See id.* § 948b(d). The Manual for Military Commissions issued by the Secretary of Defense, in consultation with the Attorney General, applies the principles of law and the rules of evidence used in trials by general courts-martial insofar as they are "practicable," "consistent with military or intelligence activities," and not "contrary to or inconsistent with" the MCA. *Id.* § 949a(a).

14. At the hearing, you suggested that coerced confessions should be admissible if a military judge deems them reliable, probative, and not unduly prejudicial. Suppose an American is being tried by a foreign government for war crimes. He is convicted and sentenced to death based primarily on a confession obtained through cruel, inhumane, and degrading treatment that falls short of torture. Would the Bush Administration have any objection to that?

The MCA, like the Detainee Treatment Act, prohibits cruel, inhuman, or degrading treatment or punishment. *See* MCA § 6(c)(1). We, of course, would object to other nations employing such prohibited forms of treatment. That said, the Administration believes that military commissions established to try combatants who

disregard the laws of war should be able to consider a wide range of evidence that the presiding judge determines to be reliable and probative. With respect to statements obtained through torture, consistent with our treaty obligations under the Convention Against Torture, the MCA specifically prohibits the admission of statements against the accused that have been obtained through torture, "except against a person accused of torture as evidence that the statement was made." 10 U.S.C. § 948r(b). The MCA further excludes statements obtained in violation of the Detainee Treatment Act, which was enacted on December 30, 2005. *See id.* § 948r(d).

As for other evidence allegedly obtained through actions that did not violate United States law, the MCA leaves the question of admissibility to the sound discretion and expertise of the military judge. Allegations of "coercion" are easy to make and often difficult to rebut, particularly in the context of an ongoing armed conflict. Accordingly, rather than trying to define "coercion," Congress has appropriately entrusted military judges with the authority to make context-specific determinations about whether a particular statement is reliable under the circumstances and whether the interests of justice would be served by the admission of the statement. *See id.* § 948(c).

Committee on the Judiciary
United States Senate

Hearing on
Authority to Prosecute Terrorists Under
The War Crime Provisions of Title 18

Written Questions from
Senator Dick Durbin
For
Steven Bradbury
Acting Assistant Attorney General

August 2, 2006

1. **The War Crimes Act makes it a crime to violate Common Article 3 of the Geneva Conventions. At a July 13 hearing of the Senate Armed Services Committee, Major General Jack Rives testified, "Some of the techniques that have been authorized and used in the past have violated Common Article 3."**

    a. **Is the Justice Department aware of any alleged violations of the War Crimes Act since 2001?**

    b. **Has the Justice Department opened any investigations of possible violations of the War Crimes Act since 2001?**

The United States has always sought to comply with its international obligations, including the Geneva Conventions. Before the Supreme Court's June 29, 2006 decision in *Hamdan v. Rumsfeld,* 126 S. Ct. 2749 (2006), the President had concluded, on the advice of the Attorney General, that Common Article 3 of the Geneva Conventions did not apply to either al Qaeda or Taliban detainees. Therefore, before *Hamdan*, the Department of Justice did not measure United States interrogation practices against the standards of Common Article 3. Authorized interrogation practices were reviewed and determined to be lawful. The *Hamdan* decision, however, created the need for the United States to define the conduct prohibited under the War Crimes Act. Accordingly, the Administration proposed that Congress define with clarity the serious violations of Common Article 3 that would warrant criminal prosecution. Congress took that step by enacting section 6(b) of the Military Commissions Act of 2006 ("MCA" or "the Act"), which amends the War Crimes Act to define nine offenses that constitute "grave breaches of common Article 3" for purposes of our criminal law. *See* 28 U.S.C. § 2441(d). Our interrogation practices will be closely reviewed to ensure that they comply with the War Crimes Act, as amended by the MCA. With respect to particular criminal prosecutions, the Department of Justice has not filed criminal charges under the War Crimes Act since 2001. Beyond that, it would not be appropriate to discuss any ongoing criminal investigations that may be underway.

2. **Has the Justice Department issued any memoranda or other guidance indicating that the Justice Department will not investigate or prosecute U.S. officials for violations of the War Crimes Act?**

I am not aware of any policy guidance of the kind that you describe. To the extent your question seeks internal legal memoranda, it would not be appropriate for me to discuss confidential and privileged legal advice provided by the Department of Justice for the benefit of the Executive Branch. I would note, however, as I stated in answer to the previous question, the President determined before *Hamdan* that Common Article 3 did not apply to either al Qaeda or Taliban detainees. In enacting the Detainee Treatment Act of 2005 ("DTA"), Congress provided that United States employees should not be subject to criminal liability if they relied in good faith upon the reasonable legal judgments of the United States. Congress reiterated that judgment in section 8(b) of the MCA, specifically with respect to the War Crimes Act. These statutory defenses, as well as other defenses, would be available to United States personnel in any criminal prosecution, and the Department of Justice clearly would have to take the availability of these defenses into account in weighing any criminal investigation.

In amending the War Crimes Act, Congress further made clear what violations of Common Article 3 would give rise to criminal liability. Many acts, such as torture and murder, were already prohibited separate and apart from the War Crimes Act by other federal statutes, including the anti-torture statute and the Uniform Code of Military Justice. The Department of Justice remains committed to investigating, and where appropriate, prosecuting any violations of law with respect to the treatment of those in United States custody.

3. **According to recent media reports, you and other U.S. officials have drafted legislation that would narrow the application of the War Crimes Act.**

   a. **Please provide a copy of this proposed legislation.**

   b. **Would this legislation apply retroactively to provide immunity to U.S. officials for actions they have taken over the last several years?**

   c. **Was Defense Department General Counsel William Haynes one of the U.S. officials who drafted this bill with you?**

Since I testified before the Committee, Congress enacted and the President signed into law the MCA. This important piece of legislation amends the War Crimes Act to clarify the nine violations of Common Article 3—such as murder, torture, and cruel and inhuman treatment—that may give rise to criminal prosecution. The Act further provides that these definitions shall govern any future prosecutions under the Act. The Act does not provide immunity, but it does make clear that conduct falling outside the revised War Crimes Act would not be subject to criminal prosecution as a war crime.

The Administration's proposed MCA was the product of a lengthy interagency deliberative process, which included policy makers throughout the Executive Branch. As to those specific individuals at the Department of Defense who worked on the process, I would refer you to the Department of Defense, which is in a better position to respond.

4. **Following Attorney General Gonzales' testimony before the Judiciary Committee on February 6, 2006, I submitted a question for the record asking the Attorney General whether the Administration believes that the President has the authority to set aside the War Crimes Act and authorize the commission of war crimes.**

   The Attorney General responded, "We have not examined the interaction between the President's constitutional Commander in Chief power and the War Crimes Act of 1996. ... we do not believe it would be productive to engage in speculation about the precise contours of Congress's and the President's respective authority in the abstract."

   However, a January 9, 2002, Justice Department memo from the Office of Legal Counsel to Defense Department General Counsel William Haynes concluded that the War Crimes Act "potentially comes into conflict with the President's Commander in Chief power under Article II of the Constitution" and "represent[s] a possible infringement on presidential discretion to direct the military."

   a. **Is it the Justice Department's position that the War Crimes Act conflicts with the President's Commander-in-Chief power?**

   b. **Is it the Justice Department's position that the War Crimes Act is unconstitutional?**

As the Attorney General stated, we do not believe that it would be productive to speculate in the abstract about the precise contours of such separation of powers questions. It is common ground, I believe, that the War Crimes Act is not unconstitutional on its face, and that the Constitution confers upon the President the authority to take necessary measures in defense of the Nation as the Commander in Chief. Beyond that, I am aware of no specific case in which the application of the War Crimes Act would conflict with the President's constitutional authority. Rather, the President remains committed to upholding and enforcing the statute.

5. **You testified that it would be a "useful clarification" for Congress to "define our obligations" under Common Article 3 by referring to the standard in the McCain Torture Amendment. You testified, "Congress rightly assumed that the enactment of the Detainee Treatment Act settled questions about the baseline standard that would govern the treatment of detainees by the United States in the War on Terror." In light of the President's signing statement on the McCain**

Torture Amendment, it was somewhat surprising that you referred to it as "the baseline standard" for the treatment of detainees.

Can you assure me that, despite the President's signing statement, the Administration will comply with the McCain Torture Amendment in all circumstances?

The McCain Amendment to the DTA establishes the baseline standard that all United States personnel have relied upon since its enactment. Indeed, even before the enactment of the DTA, it was United States policy to treat detainees consistent with the prohibition on cruel, inhuman, and degrading treatment, as defined under the United States' reservations to the Convention Against Torture. As with the War Crimes Act, I am aware of no specific case in which compliance with the DTA would threaten the President's constitutional authority to defend the Nation. Beyond that, I do not think it would be productive to speculate about whether such a circumstance could ever arise.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

April 27, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed responses to the written questions of Senators Feinstein, Specter, and Kyl, arising from the appearance of Acting Assistant Attorney General Steven G. Bradbury before the Committee on August 2, 2006, at the hearing entitled "The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18 of the United States Code." As you are aware, the responses to the written questions of Senator Leahy and Senator Durbin were provided to the Committee on March 5, 2007. These remaining responses were inadvertently omitted from that package. We hope that this information is of assistance to the Committee. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget advises us that from the standpoint of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Richard A. Hertling
Acting Assistant Attorney General

Enclosures

cc: The Honorable Arlen Specter
Ranking Minority Member

Committee on the Judiciary
United States Senate

Hearing on
Authority to Prosecute Terrorists Under
The War Crime Provisions of Title 18

Written Questions from
Senator Arlen Specter
For
Steven Bradbury
Acting Assistant Attorney General

August 2, 2006

1. **The President has argued that commissions are necessary to dispense swift justice to terrorists. Yet in five years, not one enemy combatant has been tried and convicted. The President's ability to dispense swift justice in the War on Terror has been consistently hampered by lengthy court entanglements. What, if anything, do you believe that the Congress could do to untangle the President's ability to swiftly prosecute terrorists?**

Since my testimony, Congress has enacted the Military Commissions Act of 2006 ("MCA"), which should provide the President with the authority to prosecute terrorists efficiently and fairly. As you know, military commission prosecutions convened under the President's original order were delayed several years by litigation, with the Supreme Court ultimately determining in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), that the commissions themselves were inconsistent with the Uniform Code of Military Justice ("UCMJ"). Congress now has remedied that statutory defect through the enactment of the MCA. The Department of Defense recently promulgated rules of procedure and evidence in the Manual for Military Commissions, and on February 2, 2007, military prosecutors swore charges against the first three alien unlawful enemy combatants to be tried under the MCA.

Although enemy combatants undoubtedly will seek to delay new commission prosecutions through federal court litigation, the MCA contains provisions that should avoid such delays. In particular, the MCA provides that enemy combatants may not challenge military commission procedures, through habeas corpus or otherwise, in federal court before the commission trial. Rather, the MCA provides for judicial review only after the final judgment of a military commission. *See* 10 U.S.C. § 950j(b). Federal courts generally employ the same principle in providing that there will be no appellate review of federal criminal prosecutions or habeas review of state court proceedings until after a verdict in the criminal trial. We expect that this provision will prevent military commission prosecutions from being delayed indefinitely by pretrial court challenges. The provision also will allow appellate courts to review the legality of commission

Committee on the Judiciary
United States Senate

Hearing on
Authority to Prosecute Terrorists Under
The War Crime Provisions of Title 18

Written Questions from
Senator Dianne Feinstein
For
Steven Bradbury
Acting Assistant Attorney General

August 2, 2006

Questions for Mr. Bradbury:

Background: In the War Crimes Act's legislative history in 1996, the Department of Defense's General Counsel referenced a "Memorandum of Agreement between the Department of Defense and the Justice Department," in which "a member of the Armed Forces would be tried for a violation of the War Crimes Act in a military court." Unless that agreement has somehow changed, this should mean that war crimes prosecutions, at least for U.S. servicemen, remain firmly in the hands of military prosecutors.

- **Has this Memorandum of Agreement been altered?**

No. The 1984 Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Certain Crimes ("MOU") remains in effect and unaltered. The memorandum can be found in title 9 of the U.S. Attorneys' Manual, *available at* www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00938.htm, and Appendix 3 of the Manual for Courts-Martial (2005 ed.). As explained in the MOU, a member of the Armed Forces may be prosecuted in either a court-martial or a United States District Court where there is concurrent jurisdiction. In most cases, the court-martial will assert primary jurisdiction over offenses committed by current members of the Armed Forces.

The Military Commissions Act of 2006 does not alter the MOU. Members of the Armed Forces who are accused of criminal acts will continue to be prosecuted just as they were before the Act.

procedures on an as-applied basis, rather than requiring appellate courts to entertain facial challenges based on the application of procedures to hypothetical cases.

2. **Does according a non-state actor the same rights and privileges as a citizen of a sovereign state have the potential of encouraging—or at least not discouraging—individuals from joining terrorist organizations?**

We agree that non-state actors should not be entitled to the same rights and privileges as citizens of a sovereign state. In particular, the United States has long taken the view that unlawful combatants, such as terrorists, should not be entitled to claim privileges as lawful combatants under international law. One of the bedrock principles of international law is reciprocity—states comply with international law in return for their expectation that other states will comply with international law. Terrorists, however, are not state actors. They assume no obligations under international law, nor do they show any respect for its standards. Therefore, to provide them with rights as combatants under international law would tend to legitimize them on the international stage while undermining the principle of reciprocity.

Before *Hamdan*, the Administration had taken the view that members of al Qaeda were not entitled to invoke the Geneva Conventions because the organization did not constitute a state party under the Convention and because the Global War on Terror was a conflict of an international character. The Supreme Court, however, determined that members of al Qaeda are entitled to the protections of Common Article 3 under the Geneva Conventions. It should be emphasized, however, that the Court did not determine that members of al Qaeda are entitled to the enhanced privileges that the Third Geneva Convention provides to lawful enemy combatants. Rather, the Court determined that Common Article 3 applies to our armed conflict with al Qaeda because it is not a conflict between nations, and in that sense is not an "international" conflict, under that Convention. The MCA similarly distinguishes between unlawful combatants and lawful combatants, by providing that only alien unlawful enemy combatants may be tried by military commission.

3. **Based on your reading of the *Hamdan* case, what findings should Congress include so as to establish the impracticability of allowing detainees to be tried by court-martials, or by procedures identical to court-martials? In particular, how should we limit the detainee's access to classified information?**

The Supreme Court in *Hamdan* did not purport to require Congress to make specific findings of impracticability in establishing statutory military commissions. Rather, the Court interpreted Article 36 of the UCMJ to require that the President make such findings before establishing military commissions by presidential order. *See Hamdan*, 126 S. Ct. at 2791-92 & n.51. Because Congress specifically established military commissions by statute, it was not necessary to include specific findings on the subject in the statute.

With respect to classified evidence, the MCA strikes an appropriate balance between the rights of the accused and our national security interests. The new law grants the accused the right to be present for all trial proceedings, unless he engages in disruptive conduct that requires his exclusion. *See* 10 U.S.C. § 949a(b)(1)(B); *id.* § 949d(e). Moreover, the accused will have access to all the evidence admitted before the trier of fact. *See id.* § 949a(b)(1)(A). At the same time, the MCA contains robust protections to ensure that the United States can prosecute captured terrorists without compromising highly sensitive intelligence sources and methods. *See id.* § 949d(f).

4. **In light of the Supreme Court's ruling in *Hamdan*, do you still believe that military commissions are best procedure for determining the guilt or innocence of a detainee?**

Yes. The United States and other nations have long used military commissions—not civilian courts—to try unlawful enemy combatants like the members of al Qaeda. It is entirely fitting that we continue to do so, because trying many of these individuals under the rules of federal courts and military commissions often would be impracticable. For example, because the terrorists who would be subject to military commissions were captured on the battlefield, strict hearsay rules that would require foreign nationals and United States military personnel to appear personally at military commissions would present unwarranted obstacles to the trial of such enemy combatants. The MCA therefore contains flexible rules to permit the consideration of reliable hearsay. *See* 10 U.S.C. § 949a(b)(2)(E). Similarly, the rules governing the use of classified information in federal courts and courts-martial would often force the Government to choose between prosecuting terrorists and sharing our Nation's most sensitive intelligence information with the enemy. The MCA provides robust protections for the sources and methods used to collect classified information, *see id.* § 949d(f)(2)(B), while at the same time permitting the accused to be present to challenge and examine all the evidence actually introduced against him, *see id.* § 949a(b). These provisions—which Congress tailored to meet the practicalities of trying terrorists during wartime—will provide for full and fair trials, while also protecting the national security of the United States.

5. **The DOJ draft bill forbids testimony that may have been secured by torture, but it does not address info obtained through coercive interrogation. What types of questioning techniques would you define as coercive, but not torture?**

The Supreme Court has recognized that every custodial interrogation is coercive to some extent. Indeed, the Court fashioned the prophylactic *Miranda* warnings precisely because it was so difficult to draw a "bright-line" rule as to whether a statement was unduly coerced or not. Courts could reasonably reach different conclusions as to whether a particular technique was unduly "coercive" under the totality of the circumstances, and defendants are likely to assert that any statement used by the prosecution was coerced.

Rather than seeking to formulate a definition of coercion, or identifying any particular technique as coercive, the MCA establishes standards regarding the admissibility of statements that are allegedly coerced. As you note, the MCA provides

that statements obtained by torture shall not be admitted in a military commission proceeding. *See* 10 U.S.C. § 948r(b). The MCA further provides that any statement obtained in violation of the Detainee Treatment Act of 2005, which was enacted on December 30, 2005, shall not be admitted before a military commission. *See id.* § 948r(d)(3). As for other statements arguably obtained through "coercion," the MCA entrusts military judges to determine whether a particular challenged statement is reliable under the circumstances and whether the interests of justice favor the admission of the statement.

6. **The legislative history of the 1996 War Crimes Act states that "universal jurisdiction" is not afforded to the provisions of section 2441 of title 18. The Act did not confer the ability of the United States to try accused war criminals that allegedly committed atrocities against non-Americans, but resided in the United States. The United States would then be required to initiate deportation or extradition proceedings. If the War Crimes Act were modified, do you believe the Act should be broadened to afford the United States universal jurisdiction over suspected war criminals?**

The MCA amended the War Crimes Act to clarify Common Article 3, but it did not address the question of universal jurisdiction. The concept of "universal jurisdiction" has been subject to some debate in recent years, particularly as foreign courts invoke it, not only to punish universally reprehensible conduct, but to challenge the policies of governments with which they disagree. During the deliberations that preceded enactment of the MCA, the Administration's primary concern was with establishing clear definitions of offenses under the War Crimes Act that would provide clear guidance to United States personnel already subject to federal court jurisdiction. As such, the United States did not focus on the question of universal jurisdiction, and Congress did not address it through the amendments.

Committee on the Judiciary
United States Senate

Hearing on
Authority to Prosecute Terrorists Under
The War Crime Provisions of Title 18

Written Questions from
Senator Jon Kyl
For
Steven Bradbury
Acting Assistant Attorney General

August 2, 2006

1. I am concerned about questions of separation of powers as they pertain to the interpretation of treaties. Treaties are agreements between nations and traditionally have been enforced by each nation's executive. In *Hamdan*, the 5-justice majority seemed to depart from this understanding and it gave no deference to the executive's interpretation of the Geneva Conventions – or even to such fundamentally executive determinations as the nature and scope of a war.

Would the Administration support inclusion of a provision in the military-commissions bill reaffirming the principle that the courts should defer to executive interpretations of treaties, especially with regard to questions of the scope and nature of a war?

I do agree that one unusual part of the *Hamdan* decision was that the Supreme Court did not give deference to the President's interpretation of the Nation's obligations under the Geneva Conventions. As you know, since my testimony, Congress has enacted the Military Commissions Act of 2006 ("MCA"). The MCA addresses the issue with respect to the Geneva Conventions by reaffirming the President's constitutional authority to articulate our Nation's international obligations, *see* MCA, § 6(a)(3)(A), and by providing that such interpretations, if published, shall be authoritative under United States law in the same manner as other administrative regulations, *id.* The MCA thereby emphasizes the importance of the President's role in interpreting the Nation's international obligations, while also providing clarity to U.S. personnel of their obligations under both domestic and international law.

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Office of Security Review
Department of Defense

SEN Specter
Navy JAG -
RADM MacDonald
SJC, 2 Aug 06
War Crimes & Title 18
Q 1 - Q 4

The Authority to Prosecute Terrorists Under
the War Crime Provisions of Title 18

Question. How can we ensure speedy trials for these detainees? The guarantee of a speedy trial is one of the most basic rights preserved by our Constitution. It is one of those fundamental liberties embodied in the Bill of Rights. We had Nazis in prison camps in our country for years, and then the hostilities ended and they were let go. I want to try these detainees speedily so that dangerous and guilty terrorists aren't released back into the world before we get around to prosecuting them. How then, can we expedite these tribunals while still providing basic rights?

Answer. The principle of "speedy trial" or trial "without undue delay" is a fundamental judicial guarantee that the prosecution should inform a criminal defendant of charges in a timely manner in order to provide him or her with adequate time to prepare a defense before trial. It is met through best efforts of the prosecution. Some criminal procedure codes fix certain times for such notice to occur while others merely require it to occur as soon as possible. In either case, the principle is a basic right that the United States would expect its service members to receive if they are ever held by enemy forces and charged with crimes.

In discussing the applicability of the principle of speedy trial or undue delay, it is important to distinguish between the United States' action in holding detainees as captured enemy fighters during an armed conflict and its action in charging detainees with war crimes. The principle of undue delay does not apply to the former. It does not affect the length of time the United States can hold captured enemy fighters during an armed conflict. Under the Law of War, the United States can hold such detainees for the duration of the conflict. But, if it chooses to charge any detainees with war crimes, then the principle of undue delay will apply and will require that the prosecution promptly notify the accused of the charges pending against them in accordance with this important rule of law.

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Question. Do you agree that, under the existing international law, being an unlawful combatant is essentially a status offense? This is to say that individuals, who join unlawful combatant entities like al Qaeda or Hezbollah, can be punished harshly, up to an including the death penalty, solely for taking up arms as unlawful combatants; no specific overt act, like firing a weapon, is required?

Answer. Existing international law requires evidence of unlawful war crime acts in order to successfully prosecute an unlawful combatant. Further, in *Hamdan*, a plurality of the Supreme Court consisting of Justices Stevens, Souter, Breyer, and Ginsburg found that conspiracy cannot currently be charged as a violation of the law of war and that such a charge is not triable by a military commission. The justices did not find conspiracy identified as a war crime in U.S. law or "in either the Geneva Conventions or the Hague Conventions - the major treaties on the law of war." International war crimes tribunals have recognized conspiracy as a war crime only in the limited contexts of conspiracy to commit genocide and common plan to wage aggressive war, which is a crime against the peace and requires for its commission actual participation in a "concrete plan to wage war." The International Military Tribunal at Nuremburg, over the prosecution's objections, refused to recognize conspiracy to commit war crimes as a violation of the law of war.

Question. What types of protections provided to service members under our court martial procedures should not apply to terrorists?

Answer. Pre-*Hamdan* commission rules need to more adequately address issues with respect to discovery, access to evidence, presence of the accused, and self-incrimination. The following protections, which are provided to service members under the UCMJ, should not apply to terrorists: rights advisements before questioning; a pre-trial investigation and hearing before referral of charges; extensive "open-book" discovery; statute of limitations; and rigid exclusionary rules for searches and seizures performed without a warrant. This issue requires a careful balancing of individual rights and national security interests in order to ensure adequate protection of both.

Question. Given all of the debates about the applicability of Common Article 3 to all of the various aspects of the war against al Qaeda and Taliban, debates that have not been fully resolved by the *Hamdan* decision, would it not be best for Congress to draw on its enumerated Article 1, Section 8, Clause

10 powers "to define and punish ... Offenses against the Law of Nations" and use this power as the basis for fleshing out the offenses to be tried by military commissions? This approach, far from ignoring international law, would actually solidly anchor the military commission statutory exercise into the relevant body of customary international law, developed over the course of centuries through *opinio juris*. In fact, the very process by which Congress would exercise its Article 1, Section 8, Clause 10 powers would both establish the relevant statutory norms as well as contribute to the development of customary international law.

Answer. Yes, the Administration is developing proposed military commission legislation in which Congress would define such war crimes offenses.

With regard to other types of prosecutions, the offenses currently provided in the War Crimes Act are sufficient to try nearly every act a terrorist could commit, from the willful murder of civilians, to hostage taking, to employing poison or poison weapons. Clarification of Common Article 3, as enforced through the War Crimes Act, is generally unnecessary. While some terms within Common Article 3 may be subject to differing interpretation, such as "humiliating and degrading treatment," the categories of actions that violate Common Article 3 are clearly outlined.

However, we would welcome congressional efforts to define which Common Article 3 violations are serious breaches worthy of classification as felonies. The War Crimes Act currently characterizes all violations of Common Article 3 as felonies. Such violations include, among other things, "outrages upon personal dignity, in particular humiliating and degrading treatment." Under our military justice system, less serious breaches can be handled through administrative or non-judicial means.

Congress could further amend the War Crimes Act to add a new substantive offense for conspiracy to commit a war crime. In *Hamdan*, a four-justice plurality of the Supreme Court opined that conspiracy to commit war crimes is not a chargeable crime because neither Congress nor past war crimes tribunals have indicated that such an offense exists. By amending the act, Congress would enable future war crimes prosecutions.

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Office of Security Review
Department of Defense

SEN Durbin
Navy JAG -
RADM MacDonald
SJC, 2 Aug 06
War Crimes & Title 18
Q 1 - Q 14

The Authority to Prosecute Terrorists Under
the War Crime Provisions of Title 18

On January 26, 2002, then-Secretary of State Colin Powell sent a memorandum to then-Counsel to the President Alberto Gonzales arguing that the United States could comply with the Geneva Conventions and effectively fight the war on terrorism.

Question 1a. In his memo to Mr. Gonzales, Secretary Powell concluded that the Geneva Conventions provide "practical flexibility in how we treat detainees, including with respect to interrogation and length of detention." Do you agree?
Answer: Yes.

Question 1b. Secretary Powell argued that the Geneva Conventions "allow us not to give the privileges and benefits of POW status to al Qaeda and Taliban." Do you agree?
Answer. Yes.

Question 1c. Secretary Powell argued that deciding that the Geneva Conventions do not apply to the war on terrorism "will reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the law of war for our own troops." Do you agree?
Answer 1c. Yes.

Question 1d. Secretary Powell argued that deciding that the Geneva Conventions do not apply to the war on terrorism "will undermine public support among critical allies, making military cooperation more difficult to sustain." Do you agree?
Answer 1d.. Yes.

Question 2. On February 7, 2002, President Bush issued a memorandum stating, "As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely, and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva." To your

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knowledge, has the Department of Defense provided any guidance on the meaning of humane or inhumane treatment?

Answer. Our Armed Forces have fifty years of practice in implementing Common Article 3, which represents minimum mandatory rules for humane treatment that must be followed in all armed conflicts. Like all legal instruments, the text of Common Article 3 is subject to interpretation using a reasonable person standard. Army Regulation 190-8 implements Common Article 3 and provides practical guidance with specific examples and the consequences of non-compliance for those in the field. On July 7, 2006, the Deputy Secretary of Defense issued a memorandum that required a review of all relevant Department of Defense directives, regulations, policies, practices, and procedures to ensure that they comply with the standards of Common Article 3.

Question 3. The Schmidt-Furlow Report on the Investigation into FBI Allegations of Detainee Abuses at Guantanamo Bay concluded that an interrogation "resulted in degrading and abusive treatment but did not rise to the level of being inhumane treatment." Do you agree that the treatment of a detainee could be degrading and abusive, but not inhumane?

Answer. The Detainee Treatment Act of 2005 provides one standard for judging cruel, inhuman, and degrading treatment. It provides, in pertinent part, "No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment." To this end, the term "cruel, inhuman, or degrading treatment or punishment" equates to the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, done at New York, December 10, 1984.

Question 4. At a July 13 hearing of the Senate Armed Services Committee, Major General Rives testified, "Some of the techniques that have been authorized and used in the past have violated Common Article 3." Do you agree with Major General Rives? If so, please provide examples of authorized techniques that violate Common Article 3.

Answer 4. Major General Rives was referring to paragraph 1c of Common Article 3, which prohibits "outrages upon personal dignity, in particular, humiliating and degrading treatment." In the July 13th Senate Armed Services Committee hearing, he

referenced alleged incidents reported in the press that amount to humiliating and degrading treatment. The term "outrages upon personal dignity" means acts that are so humiliating and disrespectful that a reasonable person would find them offensive. Examples of conduct that could be considered to violate this standard include strip searches performed by or observed by members of the opposite sex as a means of inducing detainee cooperation; dressing a detainee to wear women's clothing; or, humiliating a detainee in front of his or her fellow detainees through use of verbal taunts or insults. Examples of conduct that would not constitute an outrage upon personal dignity include strip searches performed by members of the same sex when such searches are required by military necessity; or, a strip search performed by a member of the opposite sex, if necessary for operational reasons.

Question 5. I recently visited Guantanamo Bay. The chief interrogator at Guantanamo told me that the Geneva Conventions provide sufficient flexibility to interrogate detainees effectively. Do you agree?

Answer. Yes.

Question 6. Defense Department General Counsel William Haynes sent Defense Secretary Rumsfeld a memorandum on November 27, 2002, recommending the approval of certain interrogation techniques for use on Guantanamo Bay detainees. Was your predecessor consulted regarding this memorandum? If so, please describe the nature of these consultations, including whether you agreed with the recommendations in the memorandum.

Answer. I am not aware that any consultations occurred with my predecessors regarding the November 27, 2002, memorandum before it was issued.

Question 7. Please respond to each subpart of this question separately.

Question 7a. In your personal opinion, is the use of stress positions on detainees legal?

Answer. Stress positions used to cause severe physical pain by forcing detainees to stand, sit, or kneel in abnormal positions for prolonged periods are not legal.

Question 7b. In your personal opinion, is the use of stress positions on detainees humane?

Answer. Stress positions used to cause severe physical pain are not humane.

Question 7c. In your personal opinion, is the use of stress positions on detainees consistent with Common Article 3 of the Geneva Conventions?

Answer. Stress positions used to cause severe physical pain are not consistent with Common Article 3 of the Geneva Conventions.

Question 7d. In your personal opinion, is the use of stress positions on detainees consistent with the U.S. Army Field Manual on Intelligence Interrogation (FM 34-52)?

Answer. Stress positions used to cause severe physical pain are not consistent with FM 34-52.

Question 7e. The Army Field Manual provides that, in attempting to determine whether an interrogation technique is legal, an interrogator should consider, "if your contemplated actions were perpetrated by the enemy against US PWs [Prisoners of War], you would believe such actions violate international or US law." In your personal opinion, would it violate international or U. S. law for enemy forces to use stress positions on U.S. Prisoners of War?

Answer. Yes, stress positions used to cause severe physical pain by forcing prisoners to stand, sit, or kneel in abnormal positions for prolonged periods are not legal.

Question 7f. The Army Field Manual states "forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time" is "physical torture." Do you agree?

Answer. Depending on the context, such treatment can amount to physical torture. For example, it would not be torture to force an individual to stand at attention for only a few minutes. But it would be torture to force him to stand at attention for several hours or in the rain or without sleep, food, or clothing. The context shapes the effect and therefore whether a particular treatment amounts to torture.

Question 8. Please respond to each subpart of this question separately.

Question 8a. In your personal opinion, is the use of dogs to induce stress on detainees legal?

Answer. No.

Question 8b. In your personal opinion, is the use of dogs to induce stress on detainees humane?

Answer. No.

Question 8c. In your personal opinion, is the use of dogs to induce stress on detainees consistent with Common Article 3?
Answer. No.

Question 8d. In your personal opinion, is the use of dogs to induce stress on detainees consistent with the Army Field Manual?
Answer. No.

Question 8e. In your personal opinion, would it violate international or U.S. law for enemy forces to use dogs to induce stress on U.S. Prisoners of War?
Answer. Yes.

Question 9. Please respond to each subpart of this question separately.

Question 9a. In your personal opinion, is the use of removal of clothing as an interrogation technique legal?
Answer. No.

Question 9b. In your personal opinion, is the use of removal of clothing as an interrogation technique humane?
Answer. No.

Question 9c. In your personal opinion, is the use of removal of clothing as an interrogation technique consistent with Common Article 3?
Answer. No.

Question 9d. In your personal opinion, is the use of removal of clothing as an interrogation technique consistent with the Army Field Manual?
Answer. No.

Question 9e. In your personal opinion, would it violate international or U.S. law for enemy forces to use removal of clothing as an interrogation technique on U.S. Prisoners of War?
Answer. Yes.

Question 10. Please respond to each subpart of this question separately.

Question 10a. In your personal opinion, is the use of scenarios designed to convince a detainee that death or severely painful consequences are imminent for him and/or his family (i.e. mock execution) legal?

Answer. No. Threatening a detainee with death is torture under 18 USC §2340.

Question 10b. In your personal opinion, is mock execution humane?
Answer. No.

Question 10c: In your personal opinion, is mock execution consistent with Common Article 3?
Answer. No.

Question 10d. In your personal opinion, is mock execution consistent with the Army Field Manual?
Answer. No.

Question 10e. In your personal opinion, would it violate international or U.S. law for enemy forces to subject U.S. Prisoners of War to mock execution?
Answer. Yes.

Question 11. Please respond to each subpart of this question separately.

Question 11a. In your personal opinion, is use of a wet towel and dripping water to induce the misperception of drowning (i.e. waterboarding) legal?
Answer. No.

Question 11b: In your personal opinion, is waterboarding humane?
Answer. No.

Question 11c: In your personal opinion, is waterboarding consistent with Common Article 3?
Answer. No.

Question 11d: In your personal opinion, is waterboarding consistent with the Army Field Manual?
Answer. No.

Question 11e: In your personal opinion, would it violate international or U.S. law for enemy forces to subject U.S. Prisoners of War to waterboarding?
Answer. Yes.

Question 12. When the Attorney General testified before the Judiciary Committee on February 6, 2006, Senator Graham asked him, "Do you believe it is lawful for the Congress to tell the military that you cannot physically abuse a prisoner of war?" The Attorney General responded, "I am not prepared to say that, Senator." I asked the Attorney General to answer Senator Graham's question in writing. He responded, "It is not prudent to comment on the constitutionality of legislation described only in abstract terms."

Question 12a. Do you believe it is lawful for the Congress to tell the military that you cannot physically abuse a prisoner of war?

Answer. Yes, the Detainee Treatment Act is an example of Congress doing so.

Question 12b. Do you believe the President is required to comply with the Uniform Code of Military Justice (UCMJ)?

Answer. As the Chief Executive, the President has a constitutional duty to faithfully execute and obey all the laws. However, the jurisdiction of the UCMJ does not extend to the President of the United States.

Question 12c. Do you believe the UCMJ is constitutional?

Answer. Yes.

Question 13. The Working Group Report on Detainee Interrogations in the Global War on Terrorism states, "Any effort by Congress to regulate the interrogation of unlawful combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President."

Do you agree? In your personal opinion, does Congress have authority to regulate the interrogation of unlawful combatants?

Answer. On March 17, 2005, the Department of Defense determined that the Report of the Working Group on Detainee Interrogations is not considered to have standing in policy, practice, or law to guide any activity of the Department of Defense.

Question 14. The Working Group Report states, "In order to respect the President's inherent constitutional authority to manage a military campaign, 18 U.S.C. §2340A (the prohibition against torture) as well as any other potentially applicable statute must be construed as inapplicable to interrogations undertaken pursuant to his Commander-in-Chief authority."

Do you agree? In your personal opinion, is 18 U.S.C. §2340A unconstitutional when applied to interrogations pursuant to the President's Commander-in-Chief authority?

Answer. On March 17, 2005, the Department of Defense determined that the Report of the Working Group on Detainee Interrogations is not considered to have standing in policy, practice, or law to guide any activity of the Department of Defense.

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Office of Security Review
Department of Defense

SEN Feinstein
Navy JAG -
RADM MacDonald
SJC, 2 Aug 06
War Crimes & Title 18
Q 1 - Q 5

The Authority to Prosecute Terrorists Under
the War Crime Provisions of Title 18

Background: In the War Crimes Act's legislative history in 1996, the Department of Defense's General Counsel referenced a "Memorandum of Agreement between the Department of Defense and the Justice Department," in which "a member of the Armed Forces would be tried for a violation of the War Crimes Act in a military court." Unless that agreement has somehow changed, this should mean that war crimes prosecutions, at least for U.S. servicemen, remain firmly in the hands of military prosecutors.

Question 1. Has this Memorandum of Agreement been altered?
Answer. No.

Background: Some have raised concerns about the potential ambiguities in the language of Common Article 3 – such as its references to outrages upon personal dignity, and degrading and humiliating treatment. Others, however, have noted that Geneva Convention Protocol II was enacted to supplement and clarify the broad provisions of Common Article 3, in specific response to allegations that Common Article 3 might be difficult to apply in practice, due to its brevity and lack of detail. 160 states are signatories to Protocol II, indicating that it has wide international endorsement.

Question 2. Why is it that Protocol II, and particularly its long Articles 5 and 6 which provide a detailed interpretation of the general provisions contained in Common Article 3, fails to adequately clear up these supposed ambiguities?

Answer. Protocol II is very helpful for interpretation of Common Article 3 of the Geneva Conventions. However, it does not clear up all ambiguities since the examples and explanations of prohibited practices are not exhaustive.

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Question 3. Is it your position that soldiers have historically had difficulty understanding and applying the principles of Common Article 3?

Answer. No. Our Armed Forces have fifty years of practice in implementing Common Article 3. It is clear that Common Article 3 represents minimum standards for human treatment that must be followed in all armed conflicts.

Background: Army Manual 190-8, Section 1-5, similarly provides that "[a] persons will be respected as human beings," and that prisoners will be protected against "inhumane" and "degrading" treatment, including such acts as "insults," "public curiosity," and "reprisals."

Question 4. How are these terms interpreted? Do you believe they are less ambiguous than Common Article 3's provisions? Why or why not?

Answer. Like all legal instruments, the text of Common Article 3 is subject to interpretation using a reasonable person standard. Army Regulation 190-8 implements Common Article 3 and provides practical guidance with specific examples and the consequences of non-compliance for those in the field.

Question 5. If a soldier follows Army Manual 190-8, is there any reason to believe that he would be violating Common Article 3 of the Geneva Conventions?

Answer. No.

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Office of Security Review
Department of Defense

SEN Leahy
Navy JAG -
RADM MacDonald
SJC, 2 Aug 06
War Crimes & Title 18
Q 1 - Q 5

The Authority to Prosecute Terrorists Under
the War Crime Provisions of Title 18

Question 1. Some have proposed legislation that would redefine Common Article 3 in accordance with the "shocks the conscience" standard under the U.S. Constitution, which has been interpreted by this administration as imposing a sliding scale, depending on the circumstances. If the interrogator thinks he needs the information badly, then certain interrogation techniques are allowed. If the need is less, then fewer techniques will be permitted. (A) Which is easier to teach and train on: an absolute standard or a relative standard that changes according to the circumstances? (B) Would a sliding scale approach to the definition of what constitutes cruel and prohibited conduct add clarity or confusion, in your view?

Answer. There is a compelling need for our commanders and their military personnel to have clear, unambiguous, and objective guidance on what constitutes a permissible interrogation technique. The "shocks the conscience" standard lacks objective criteria, does not provide clear guidance, and could lead to inconsistent and potentially unlawful practices in the field.

Question 2. In a letter to Senator Graham dated July 26, 2006, three organizations (Human Rights Watch, Human Rights First, and the National Institute of Military Justice) concluded, after citing specific authority: "America's NATO allies apply the protections of the Geneva Conventions, including, at minimum, Common Article 3 to the interrogation of terrorist suspects captured in an armed conflict and equivalent protections in all other circumstances." Are these organizations correct on this point, or are they mistaken?

Answer. All of America's NATO allies are parties to the Geneva Conventions and are thereby obligated to apply Common Article 3 as a minimum in the case of armed conflict not of an international character. In situations falling outside of those circumstances, other standards would apply such as those for parties to the European Convention of Human Rights. Regarding

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U.S. practice, the Deputy Secretary of Defense issued to the entire Department of Defense a memorandum on July 7, 2006 that requires all relevant directives, regulations, policies, practices, and procedures to comply with the standards of Common Article 3.

Question 3. Should an international understanding of what Common Article 3 requires be part of any congressional effort to define the terms "outrages against personal dignity" and "humiliating and degrading treatment"? Why or why not?

Answer. Yes, those views may be generally taken into account, but they are not controlling and should be used only to the extent they are helpful in contributing to a logical understanding of the provisions under consideration.

Question 4. When Admiral McPherson testified last month before the Senate Armed Services Committee, he stated, in response to a question from Senator Levin, that we should not simply ratify the procedures for military commissions that the Supreme Court struck down in the *Hamdan* case because "doing that would not fulfill Common Article 3." Common Article 3 requires "a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people." What aspects of the pre-*Hamdan* procedures fell short of this baseline requirement?

Answer. Pre-*Hamdan* procedures need to more adequately address issues with respect to discovery, access to evidence, and presence of the accused. This issue requires a careful balancing of individual rights and national security interests in order to ensure adequate protection of both.

Question 5. Article 36 of the Uniform Code of Military Justice provides that the procedural rules for courts-martial and military commissions must be "uniform insofar as practicable." What specific procedural rules for courts-martial are not practicable for military commissions, and why?

Answer. A judicial process for military commissions should utilize the UCMJ as a baseline, with modifications to rules such as those dealing with self-incrimination, the presence of the accused, handling of classified information, admissibility of hearsay, and the like. Establishing rules for this process requires a careful balancing of rights under Common Article 3 and national security interests. UCMJ Article 31(b) concerns self-incrimination and is broader than Miranda in that it requires rights advisements at the point of suspicion, not at the point of custodial interrogation. When an individual is captured on the battlefield, he can be interrogated for

intelligence purposes or to obtain information that can be used to ensure the success of our operations or the safety of our troops, just like police officers are currently permitted to interrogate a suspect for public safety purposes. One change that should be implemented is that any rights against self-incrimination should not attach until after the individual's intelligence usefulness has ended but he remains in custody.

The primary concerns of hearsay evidence should be trustworthiness and corroboration. Consistent with international tribunals, hearsay evidence should be admitted as long as the court is satisfied of its reliability given the purpose for which such evidence is introduced.

With regard to access to evidence and classified information, Common Article 3 requires individuals have access to and the opportunity to review the evidence presented against them. It does not require that they have the same discovery rights provided either under Article III of the Constitution or under the UCMJ. Under the UCMJ, discovery rights are generally broader than those afforded to civilians in civilian courts, as prosecutors must provide access to, and in most instances, provide copies of, all evidence to the accused. The accused is also generally entitled to access to any material that might lead to admissible evidence. But that is not required under Common Article 3.

The Military Rule of Evidence 505 process deals with access to classified information and how that classified information can be placed in a public forum. At a minimum, an *ex parte* review should be conducted by the military judge, who may approve an unclassified summary of the evidence. Unclassified summaries can provide an option to protect classified evidence while satisfying Common Article 3.

Senator Arlen Specter
War Crimes & Title 18
August 2, 2006
Questions for General Myers

- Given the prevalence of unlawful combatants in today's conflicts and the grave threat they pose to civilian populations, both by virtue of attacking civilians and hiding amongst civilians, do you agree that it is essential to continue to delegitimize unlawful combatants?

  The existence of unlawful combatants, those combatants who do not adhere to the law of war, has always threatened the safety of civilians by blurring the line between innocent civilians and combatants. It is critical that we continue to provide enhanced protections for lawful combatants who do abide by the law of war (such as prosecution under the UCMJ when warranted), while simultaneously reproving the conduct of unlawful enemy combatants through the use of all available political, diplomatic, social, and military means. To accomplish this we need to: 1) continue to capture these unlawful combatants and, pursuant to the law of war, keep them in detention until the end of hostilities to prevent them from returning to the fight; and 2) prosecute those unlawful combatants that committed war crimes.

- Do you not agree that, in order to continue to delegitimize and stigmatize unlawful combatancy, captured unlawful combatants, while accorded a considerable level of due process, should not be prosecuted through exactly the same institutions as lawful combatants, whether POWs or our own personnel, who have been accused of individualized laws of war violations?

  Those combatants who adhere to the law of war deserve advantageous treatment in accordance with the protections established by the law of war. In contrast, unlawful combatants, who refuse to follow the law of war, should not be afforded exactly the same protections of lawful combatants. We also need to keep in mind that whatever system or process we establish, these same procedures may be used against our own service members by a foreign country. As a result, we need to ensure that the benchmark we establish would be acceptable if applied to our own forces.

- In your opinion, can a detainee be afforded a "full and fair trial" while the DOD protects classified and sensitive information?

  While this question is more appropriate for our uniformed judge advocates, it is my belief that we can develop trial procedures that will ensure that a detainee receives a full and fair trial, while safeguarding our national security. The solution to this issue requires a careful balance between the rights of a detainee and the security interests of the nation.

Senator Feinstein
The Authority to Prosecute Terrorists Under The War Crime Provisions of Title 18
August 2, 2006

Questions for General Myers:

Background: In the War Crimes Act's legislative history in 1996, the Department of Defense's General Counsel referenced a "Memorandum of Agreement between the Department of Defense and the Justice Department," in which "a member of the Armed Forces would be tried for a violation of the War Crimes Act in a military court." Unless that agreement has somehow changed, this should mean that war crimes prosecutions, at least for U.S. servicemen, remain firmly in the hands of military prosecutors.

- *Has this Memorandum of Agreement been altered?*

- I have no knowledge of whether this agreement has been altered or remains in force. I recommend that the DoD General Counsel answer this question.

QUESTION FOR THE RECORD
SENATE COMMITTEE ON THE JUDICIARY
HEARING ON THE AUTHORITY TO PROSECUTE TERRORISTS UNDER THE WAR CRIME PROVISIONS OF TITLE 18
AIR FORCE WITNESS: MAJOR GENERAL JACK L. RIVES, AIR FORCE JUDGE ADVOCATE GENERAL
AUGUST 2, 2006
COMMITTEE NUMBER QFR 1

Question: Chairman Specter – In your Senate Armed Services testimony on July 13th, 2006 you said that you believed that American soldiers had violated Common Article 3 of the Geneva Conventions in their treatment of detainees. Is there any legal protection for American soldiers who were following lawfully given orders that may have violated Common Article 3? If there is no protection, should we create an immunity from prosecution for them?

Answer: General Rives –

The Uniform Code of Military Justice provides appropriate legal protections to American servicemembers. A servicemember may raise as an affirmative defense under the Rules for Courts-Martial, Rule 916(d), that the servicemember was acting pursuant to orders -- unless the servicemember knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.

Because appropriate legal protection is already provided, I do not recommend creating immunity from prosecution. Whether the affirmative defense of obedience to orders applies in a given case appropriately depends upon the particular facts and circumstances.

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QUESTION FOR THE RECORD
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HEARING ON THE AUTHORITY TO PROSECUTE TERRORISTS UNDER THE WAR CRIME PROVISIONS OF TITLE 18
AIR FORCE WITNESS: MAJOR GENERAL JACK L. RIVES, AIR FORCE JUDGE ADVOCATE GENERAL
AUGUST 2, 2006
COMMITTEE NUMBER QFR 2

Question: Chairman Specter – How can we draw up a clear bright line test to prohibit coerced evidence obtained by torture or should we distinguish evidence obtained by torture from coerced testimony?

Answer: General Rives –

We should distinguish between statements obtained by torture and those obtained by coercion. Statements obtained by use of torture, as defined in 18 U.S.C. § 2340, whether or not under color of law, should be prohibited.

As for statements obtained by methods short of torture, the question of what constitutes undue coercion and an involuntary statement does not lend itself to simple definition. In general, the confession or admission of an accused that has been determined by a military judge to be involuntary is not admissible in a court-martial over the accused's objection. Usually, a statement is involuntary if it is obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31 of the Uniform Code of Military Justice, or through the use of undue coercion, unlawful influence, or unlawful inducement. Each situation is subject to a determination on the facts, and the military judge makes a determination whether the statement is voluntary considering the totality of the circumstances. I do not believe evidence that a military judge finds to be unduly coerced, and thus involuntary, should normally be considered by a military commission.

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AIR FORCE WITNESS: MAJOR GENERAL JACK L. RIVES, AIR FORCE JUDGE ADVOCATE GENERAL
AUGUST 2, 2006
COMMITTEE NUMBER QFR 3

Question: Chairman Specter – Is it possible for the Congress to create a detainee bill that would allow terrorists to be charged with conspiracy in military tribunals that would not violate the *ex post facto* prohibition in the Constitution?

Answer: General Rives –

Generally, the *ex post facto* clause of the Constitution precludes laws from being passed that criminalize acts that were otherwise innocent when committed; increase the punishment for a pre-existing crime; make an existing crime more severe; or, change the rules of evidence to make a conviction easier. The Supreme Court has held that "to be *ex post facto* the law must apply to events occurring before the law's enactment and must adversely affect the individual."

Assuming the Constitution applies to "terrorists to be charged with conspiracy in military tribunals," to the extent that conspiracy is a new crime not already prohibited by domestic or international law, the Constitution would prohibit its application. Conversely, a crime would not be *ex post facto* if the act was clearly criminal under international or domestic law when committed, even if the conspiracy occurred before the crime is effective.

Arguably, individuals accused of conspiracy could only be prosecuted under a detainee bill that makes conspiracy a crime if conspiracy was an international crime subject to universal jurisdiction as a matter of customary law.

Whether conspiracy is an international crime subject to universal jurisdiction as a matter of customary law is an open question. Conspiracy has only been held to apply to the crime of genocide as a substantive offense. However, should Congress clearly create the crime of conspiracy for military commissions or other tribunals, any conspiracy committed after the enactment could be effectively prosecuted.

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AIR FORCE WITNESS: MAJOR GENERAL JACK L. RIVES, AIR FORCE JUDGE ADVOCATE GENERAL
AUGUST 2, 2006
COMMITTEE NUMBER QFR 4

Question: Chairman Specter – If Congress wanted to ratify the Administration's position that "conspiracy" is in fact a crime of war for which detainees can be tried and convicted, do you believe the Supreme Court would uphold such legislation?

Answer: General Rives –

Without specific legislation and a definite factual predicate, it is extremely difficult to predict how the Supreme Court might view a case. Some indication may be found in the *Hamdan* decision where the plurality found that Joint Criminal Enterprise has not been accepted as a substantive criminal offense in international law. As discussed earlier, conspiracy could be subject to an *ex post facto* holding for acts committed prior to passage of the bill. However, I believe that the Supreme Court would likely uphold legislation clearly creating a crime of conspiracy, if the person accused of the crime is alleged to have committed the conspiracy after the legislation is enacted. Although conspiracy may not be a recognized war crime under international or our common law, I believe that Congress has the authority to make it a war crime for the purpose of US domestic law.

Instead of conspiracy, you may want to consider the crime of providing material support to terrorists. This crime is essentially the same as the common law offense of 'aiding and abetting.' Aiding and abetting is an offense in both United States jurisprudence as well as international criminal law. In U.S. criminal law, to constitute aiding and abetting, a person (other than the defendant) must commit a substantive offense and the defendant must have consciously shared the person's knowledge of the underlying criminal act, and committed some act intended to help that person. The defendant need not have full knowledge requirement of the intricacies of the crime, merely knowledge of the general purpose of the related action.

The international community also accepts the crime of aiding and abetting. Both the ICTY and the ICTR have prosecuted using aiding and abetting as a substantive offense.

With the wide acceptance of aiding and abetting as a substantive offense, it may be a viable alternative to conspiracy.

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AIR FORCE WITNESS: MAJOR GENERAL JACK L. RIVES, AIR FORCE JUDGE ADVOCATE GENERAL
AUGUST 2, 2006
COMMITTEE NUMBER QFR 1

Question: Senator Durbin – On January 26, 2002, then-Secretary of State Colin Powell sent a memorandum to then-Counsel to the President Alberto Gonzales arguing that the United States could comply with the Geneva Conventions and effectively fight the war on terrorism.

a. In his memo to Mr. Gonzales, Secretary Powell concluded that the Geneva Conventions provide "practical flexibility in how we treat detainees, including with respect to interrogation and length of detention." Do you agree?

Answer: General Rives – Yes.

b. Secretary Powell argued that the Geneva Conventions "allow us not to give the privileges and benefits of POW status to al Qaeda and Taliban." Do you agree?

Answer: General Rives –

The privileges and benefits of POW status only inure to those who meet the specific requirements of the Geneva Conventions. Thus, if an individual al Qaeda and Taliban detainee is determined to be an unlawful combatant by a tribunal that meets the requirements of Article 5 of the Third Geneva Convention, then that particular detainee is not entitled to the privileges and benefits of POW status.

c. Secretary Powell argued that deciding that the Geneva Conventions do not apply to the war on terrorism "will reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the law of war for our own troops." Do you agree?

Answer: General Rives –

Generally, yes. Obviously, the meaning of the "war on terrorism" is manifold and, in certain instances, the appropriate legal architecture to address aspects of the "war on terrorism" should be domestic criminal or civil law, That said, the US has never before determined that the Geneva Conventions, or its precursors, did not apply to an international conflict. Any limitation on the scope of the Geneva Conventions may have an impact on the protections they provide for US troops abroad.

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d. Secretary Powell argued that deciding that the Geneva Conventions do not apply to the war on terrorism "will undermine public support among critical allies, making military cooperation more difficult to sustain." Do you agree?

Answer: General Rives - Yes.

QUESTION FOR THE RECORD
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AIR FORCE WITNESS: MAJOR GENERAL JACK L. RIVES, AIR FORCE JUDGE ADVOCATE GENERAL
AUGUST 2, 2006
COMMITTEE NUMBER QFR 2

Question: Senator Durbin – On February 7, 2002, President Bush issued a memorandum stating, "As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely, and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva." To your knowledge, has the Department of Defense provided any guidance on the meaning of humane or inhumane treatment?

Answer: General Rives –

To my knowledge, the Department of Defense has not provided official guidance on the meaning of humane or inhumane treatment. Inhumane treatment is prohibited by the Detainee Treatment Act of 2005 and defined there with reference to its meaning in 5th, 8th, and 14th Amendment jurisprudence. Department of Defense Directive 2310.01, *DoD Program for Enemy Prisoners of War (EPOW) and Other Detainees* (August 18, 1994), although currently undergoing revision, requires that the US military "shall comply with the principles, spirit, and intent of the international law of war, both customary and codified, to include the Geneva Conventions." It is my belief that full compliance with the Geneva Conventions ensures humane treatment. US military training has always included training to the humane standards of the Geneva Conventions.

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AIR FORCE WITNESS: MAJOR GENERAL JACK L. RIVES, AIR FORCE JUDGE ADVOCATE GENERAL
AUGUST 2, 2006
COMMITTEE NUMBER QFR 3

Question: Senator Durbin – The Schmidt-Furlow Report on the Investigation into FBI Allegations of Detainee Abuses at Guantanamo Bay concluded that an interrogation "resulted in degrading and abusive treatment but did not rise to the level of being inhumane treatment." Do you agree that the treatment of a detainee could be degrading and abusive, but not inhumane?

Answer: General Rives –

It is possible that degrading and abusive treatment might not rise to the level of inhumane treatment. While the terms cruel, inhumane, and degrading may overlap and are often used together, the terms should not be understood to be interchangeable. For example, degrading treatment may involve causing a feeling of fear, anguish, or inferiority that is humiliating and debasing. Inhuman or inhumane treatment may involve causing intense physical or mental suffering that falls short of torture.

Article 16 of the Convention Against Torture prohibits the "cruel, inhuman or degrading treatment or punishment which do not amount to torture." The Detainee Treatment Act of 2005 refers to the US Reservation to Article 16, which states that the US considers itself bound "only insofar as the term `cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."

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AIR FORCE WITNESS: MAJOR GENERAL JACK L. RIVES, AIR FORCE JUDGE ADVOCATE GENERAL
AUGUST 2, 2006
COMMITTEE NUMBER QFR 4

Question: Senator Durbin – At a July 13 hearing of the Senate Armed Services Committee, you testified, "Some of the techniques that have been authorized and used in the past have violated Common Article 3."

Please provide examples of authorized techniques that violate Common Article 3.

Answer: General Rives –

My response to the question in the July 13th Senate Armed Services Committee testimony related specifically to Paragraph 1(c) of Common Article 3, which provides that it's a violation of Common Article 3 if an individual commits an outrage upon personal dignity, in particular humiliating and degrading treatment. At that hearing, a number of Senators were concerned with some of the broad, expansive definitions that have been given to that particular provision. The authorized techniques that I referred to were those that have been fairly well-publicized that amount to humiliating and degrading treatment. Some of those techniques that were conducted with at least implicit authorization included forced nakedness and sexual humiliation by female interrogators.

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AIR FORCE WITNESS: MAJOR GENERAL JACK L. RIVES, AIR FORCE JUDGE ADVOCATE GENERAL
AUGUST 2, 2006
COMMITTEE NUMBER QFR 5

Question: Senator Durbin – I recently visited Guantanamo Bay. The chief interrogator at Guantanamo told me that the Geneva Conventions provide sufficient flexibility to interrogate detainees effectively.

Do you agree?

Answer: General Rives – Yes.

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AIR FORCE WITNESS: MAJOR GENERAL JACK L. RIVES, AIR FORCE JUDGE ADVOCATE GENERAL
AUGUST 2, 2006
COMMITTEE NUMBER QFR 6

Question: Senator Durbin – Defense Department General Counsel William Haynes sent Defense Secretary Rumsfeld a memorandum on November 27, 2002, recommending the approval of certain interrogation techniques for use on Guantanamo Bay detainees. Were you or anyone in your office consulted regarding this memorandum? If so, please describe the nature of these consultations, including whether you agreed with the recommendations in the memorandum.

Answer: General Rives –

I have no record or memory that anyone in my office saw a copy in advance or was consulted on the specific recommendations Mr. Haynes made in his memorandum to Secretary Rumsfeld on November 27, 2002. Prior to that memorandum, my office was tasked to provide comments to the Chairman of the Joint Chiefs of Staff by November 4, 2002, on a list of three categories of proposed interrogation techniques. In his memorandum to Secretary Rumsfeld, Mr. Haynes recommended a subset from that same list of techniques.

The Air Force provided three critical comments to the Chairman. First, we raised "serious concerns regarding the legality of many of the proposed techniques, particularly those under Category III." Second, we raised the concern that use of coercive interrogation techniques may preclude the ability to prosecute the individuals interrogated in the future because the requirements of humane treatment and coercive nature may render any statements inadmissible. Third, we raised the concern that approval of the proposed techniques would require a change in Presidential policy on the treatment of detainees that President Bush outlined on February 7, 2002.

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AIR FORCE WITNESS: MAJOR GENERAL JACK L. RIVES, AIR FORCE JUDGE ADVOCATE GENERAL
AUGUST 2, 2006
COMMITTEE NUMBER QFR 7

Question: Senator Durbin – please respond to each subpart of this question separately.

a. In your personal opinion, is the use of stress positions on detainees legal?

Answer: General Rives –

When a stress position becomes cruel, inhumane, or torture, it is clearly illegal under both domestic and international law. A directive to a subject to "sit up straight" or "stand at attention" for reasonable periods is likely not a "stress position" under ordinary circumstances. Moreover, what might be called a "stress position" may be legal when done for a brief period of time for a legitimate purpose such as an inspection for contraband. When a stress position is prolonged and conducted for the purpose of improperly coercing a subject prior to interrogation, it is likely illegal.

b. In your personal opinion, is the use of stress positions on detainees humane?

Answer: General Rives –

Recognizing that not every direction involving a physical position is necessarily a "stress position" there are plainly circumstances where forcing a subject to assume certain positions would be inhumane. For example, the excessive and prolonged use of a stress position for interrogation purposes would be inhumane.

c. In your personal opinion, is the use of stress positions on detainees consistent with Common Article 3 of the Geneva Conventions?

Answer: General Rives –

The prolonged use of a stress position for interrogation purposes would violate common Article 3 at a point where it rose to a level of cruel treatment or torture.

d. In your personal opinion, is the use of stress positions on detainees consistent with the U.S. Army Field Manual on Intelligence Interrogation (FM 34-52)?

Answer: General Rives –

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No. While under revision, Army FM 34-52, *Intelligence Interrogation* (September 28, 1992) does not authorize stress positions.

e. The Army Field Manual provides that, in attempting to determine whether an interrogation technique is legal, an interrogator should consider, "If your contemplated actions were perpetrated by the enemy against US PWs [Prisoners of War], you would believe such actions violate international or US law." In your personal opinion, would it violate international or U.S. law for enemy forces to use stress positions on U.S. Prisoners of War?

Answer: General Rives –

Yes. Stress positions used on prisoners of war would violate Article 17 of the Third Geneva Convention, which prohibits coercion and "any unpleasant or disadvantageous treatment of any kind."

f. The Army Field Manual states "forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time" is "physical torture." Do you agree?

Answer: General Rives –

Yes, if the stress position is "specifically intended to inflict severe physical or mental pain or suffering" as required by the definition of torture provided in 18 U.S.C. § 2340.

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AIR FORCE WITNESS: MAJOR GENERAL JACK L. RIVES, AIR FORCE JUDGE ADVOCATE GENERAL
AUGUST 2, 2006
COMMITTEE NUMBER QFR 8

Question: Senator Durbin – please respond to each subpart of this question separately.

a. In your personal opinion, is the use of dogs to induce stress on detainees legal?

Answer: General Rives –The use of dogs for guard duty and protection is not illegal even though their use in such contexts may produce stress in some detainees. The fear of the animal may properly deter misconduct and enhance good order and discipline among detainees. However, I do not know of any use of dogs in an interrogation setting for other than guard and protection purposes as outlined above that would be proper in my opinion.

b. In your personal opinion, is the use of dogs to induce stress on detainees humane?

Answer: General Rives – As I've indicated above, the use of dogs to deter misconduct and enhance good order and discipline may be proper and humane depending upon the precise facts and circumstances of their employment. However, when dogs are used in interrogation settings for other purposes such use of the animals can be inhumane.

c. In your personal opinion, is the use of dogs to induce stress on detainees consistent with Common Article 3?

Answer: General Rives –

No. Any use of dogs other than guard duty and protection could violate common Article 3 by being inhumane or degrading. The use of dogs may be inhumane if it causes intense physical or mental suffering, and it may be degrading if it causes the detainee fear that is humiliating or debasing based on a religious or cultural belief.

d. In your personal opinion, is the use of dogs to induce stress on detainees consistent with the U.S. Army Field Manual?

Answer: General Rives – Except as outlined above for guard and protection purposes, I do not believe their use in interrogation settings is consistent with the Field Manual.

e. In your personal opinion, would it violate international or U.S. law for enemy forces to use dogs to induce stress on U.S. Prisoners of War?

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Answer: General Rives –

Yes, using dogs to induce stress on prisoners of war in interrogation settings except for guard and protection purposes would likely violate Article 17 of the Third Geneva Convention.

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AIR FORCE WITNESS: MAJOR GENERAL JACK L. RIVES, AIR FORCE JUDGE ADVOCATE GENERAL
AUGUST 2, 2006
COMMITTEE NUMBER QFR 9

Question: Senator Durbin – please respond to each subpart of this question separately.

a. In your personal opinion, is the use of removal of clothing as an interrogation technique legal?

Answer: General Rives – Requiring a subject, for example, to remove his hat in the presence of a senior officer may be legal as would, for example, a requirement to remove clothing that may present a security threat to the interrogator. Under no circumstances, however, would it be lawful to, for example, require a subject to remove clothing for the purpose of degrading or humiliating the subject.

b. In your personal opinion, is the use of removal of clothing as an interrogation technique humane?

Answer: General Rives –

Removal of clothing is more likely to be considered to be humiliating or degrading, not inhumane. However, I would not rule out particular circumstances where such a directive could rise to the level of being inhumane.

c. In your personal opinion, is the use of removal of clothing as an interrogation technique consistent with Common Article 3?

Answer: General Rives –

I would not object to an interrogator or subject removing a hat or protective gear as a means of generating trust and respect. However, the lewd or suggestive removal of clothing as an interrogation technique is improper. Specifically, the removal of clothing for the purpose of humiliating or degrading the subject is very likely a violation of common Article 3.

d. In your personal opinion, is the use of removal of clothing as an interrogation technique consistent with the Army Field Manual?

Answer: General Rives – No.

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e. In your personal opinion, would it violate international or U.S. law for enemy forces to use removal of clothing as an interrogation technique on U.S. Prisoners of War?

Answer: General Rives –

Yes, except as outlined above, I believe the removal of clothing as an interrogation technique for prisoners of war would violate Article 17 of the Third Geneva Convention.

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AIR FORCE WITNESS: MAJOR GENERAL JACK L. RIVES, AIR FORCE JUDGE ADVOCATE GENERAL
AUGUST 2, 2006
COMMITTEE NUMBER QFR 10

Question: Senator Durbin – please respond to each subpart of this question separately.

a. In your personal opinion, is the use of scenarios designed to convince a detainee that death or severely painful consequences are imminent for him and/or his family (i.e. mock execution) legal?

Answer: General Rives –

The use of such mock execution scenarios appears to fit squarely within the definition of torture in 18 U.S.C. § 2340 and is clearly prohibited. It is not improper, however, to tell a subject the penalty for unlawful acts and to use that fact as a means to garner cooperation.

b. In your personal opinion, is mock execution humane?

Answer: General Rives – No.

c. In your personal opinion, is mock execution consistent with Common Article 3?

Answer: General Rives – No.

d. In your personal opinion, is mock execution consistent with the Army Field Manual?

Answer: General Rives – No.

e. In your personal opinion, would it violate international or U.S. law for enemy forces to subject U.S. prisoners of War to mock execution?

Answer: General Rives – Yes.

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AIR FORCE WITNESS: MAJOR GENERAL JACK L. RIVES, AIR FORCE JUDGE ADVOCATE GENERAL
AUGUST 2, 2006
COMMITTEE NUMBER QFR 11

Question: Senator Durbin – please respond to each subpart of this question separately.

a. In your personal opinion, is use of a wet towel and dripping water to induce the misperception of drowning (i.e. waterboarding) legal?

Answer: General Rives –

No. An interrogation technique that is specifically intended to cause severe mental suffering involving a threat of imminent death by asphyxiation is torture under 18 U.S.C. § 2340.

b. In your personal opinion, is waterboarding humane?

Answer: General Rives – No.

c. In your personal opinion, is waterboarding consistent with Common Article 3?

Answer: General Rives – No.

d. In your personal opinion, is waterboarding consistent with the Army Field Manual?

Answer: General Rives – No.

e. In your personal opinion, would it violate international or U.S. law for enemy forces to subject U.S. prisoners of War to waterboarding?

Answer: General Rives – Yes.

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AIR FORCE WITNESS: MAJOR GENERAL JACK L. RIVES, AIR FORCE JUDGE ADVOCATE GENERAL
AUGUST 2, 2006
COMMITTEE NUMBER QFR 12

Question: Senator Durbin – When the Attorney General testified before the Judiciary Committee on February 6, 2006, Senator Graham asked him, "Do you believe it is lawful for the Congress to tell the military that you cannot physically abuse a prisoner of war?" The Attorney General responded, "I am not prepared to say that, Senator." I asked the Attorney General to answer Senator Graham's question in writing. He responded, "It is not prudent to comment on the constitutionality of legislation described only in abstract terms."

a. Do you believe it is lawful for the Congress to tell the military that you cannot physically abuse a prisoner of war?

Answer: General Rives – Yes

Question: Senator Durbin –

b. Do you believe the President is required to comply with the Uniform Code of Military Justice (UCMJ)?

Answer: General Rives –

I believe the UCMJ is a proper exercise of Congress' Article I power under the Constitution, and the President is obliged to comply with the Constitution as interpreted by the Judiciary.

Question: Senator Durbin –

c. Do you believe the UCMJ is constitutional?

Answer: General Rives – Yes

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AIR FORCE WITNESS: MAJOR GENERAL JACK L. RIVES, AIR FORCE JUDGE ADVOCATE GENERAL
AUGUST 2, 2006
COMMITTEE NUMBER QFR 13

Question: Senator Durbin – The Working Group Report on Detainee Interrogations in the Global War on Terrorism states, "Any effort by Congress to regulate the interrogation of unlawful combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President."

Do you agree? In your personal opinion, does Congress have authority to regulate the interrogation of unlawful combatants?

Answer: General Rives – Yes

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AIR FORCE WITNESS: MAJOR GENERAL JACK L. RIVES, AIR FORCE JUDGE ADVOCATE GENERAL
AUGUST 2, 2006
COMMITTEE NUMBER QFR 1

Questions for Major General Black, Rear Admiral MacDonald, Major General Rives and Brigadier General Sandkuhler:

Senator Feinstein -

Background: In the War Crimes Act's legislative history in 1996, the Department of Defense's General Counsel referenced a "Memorandum of Agreement between the Department of Defense and the Justice Department," in which "a member of the Armed Forces would be tried for a violation of the War Crimes Act in a military court." Unless that agreement has somehow changed, this should mean that war crimes prosecutions, at least for U.S. servicemen, remain firmly in the hands of military prosecutors,

- *Has this Memorandum of Agreement been altered?*

Answer: General Rives – Not to my knowledge.

I believe the memo you reference is the 1984 memo between DoD and DoJ, Memorandum or Understanding between The Departments of Justice And Defense Relating to the Investigation and Prosecution of Certain Crimes. That memo is preserved in DoDD 5525.7 and is Appendix 3 of the MCM. While war crimes are not specifically mentioned, the general rule is laid out in para C3, which gives jurisdiction over crimes committed off military installations to DoD if they are ones normally prosecuted by DoD.

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QUESTION FOR THE RECORD
SENATE COMMITTEE ON THE JUDICIARY
HEARING ON THE AUTHORITY TO PROSECUTE TERRORISTS UNDER THE WAR CRIME PROVISIONS OF TITLE 18
AIR FORCE WITNESS: MAJOR GENERAL JACK L. RIVES, AIR FORCE JUDGE ADVOCATE GENERAL
AUGUST 2, 2006
COMMITTEE NUMBER QFR 2

Question: Senator Feinstein –

Background: Some have raised concerns about the potential ambiguities in the language of Common Article 3 – such as its references to outrages upon personal dignity, and degrading and humiliating treatment. Others, however, have noted that Geneva Convention Protocol II was enacted to supplement and clarify the broad provisions of Common Article 3, in specific response to allegations that Common Article 3 might be difficult to apply in practice, due to its brevity and lack of detail. 160 states are signatories to Protocol II, indicating that it has wide international endorsement.

- Why is it that Protocol II, and particularly its long Articles 5 and 6 which provide a detailed interpretation of the general provisions contained in Common Article 3, fails to adequately clear up these supposed ambiguities?

Answer: General Rives –

Protocol II is helpful for interpreting Common Article 3. However, many of the same terms used in common Article 3 are simply repeated in Protocol II, with little or no clarification.

- It is your position that soldiers have historically had difficulty understanding and applying the principles of Common Article 3?

Answer: General Rives – No.

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AIR FORCE WITNESS: MAJOR GENERAL JACK L. RIVES, AIR FORCE JUDGE ADVOCATE GENERAL
AUGUST 2, 2006
COMMITTEE NUMBER QFR 3

Question: Senator Feinstein –

Background: Army Manual 190-8, Section 1-5, similarly provides that "[a]ll persons will be respected as human beings," and that prisoners will be protected against "inhumane" and "degrading" treatment, including such acts as "insults," "public curiosity," and "reprisals."

- How are these terms interpreted? Do you believe they are less ambiguous than Common Article 3's provisions? Why or why not?

Answer: General Rives –

Army Regulation 190-8, Section 1-5, applies to enemy prisoners of war, retained persons (such as medics and chaplains), and civilian internees. A plain reading of this section is clear: US military policy is to treat these detainees with respect and to protect them from all acts of violence.

I believe the policy set forth in Section 1-5 is more stringent and less ambiguous than common Article 3 requirements. Section 1-5 effectively synthesizes treaty and customary laws of war that apply to detainees taken in any armed conflict. Section 1-5 requires US military personnel to provide fundamental protections for detainees, whether or not the nature of the conflict or status of the detained person obligates the US to provide certain specific protections under international law. For example, the Army regulation sets forth standards established by the larger body of the Geneva Conventions, not just common Article 3.

The Army regulation is less ambiguous because it is more specific and inclusive and provides more examples of prohibited conduct.

- If a soldier follows Army Manual 190-8, is there any reason to believe that he would be violating Common Article 3 of the Geneva Conventions?

Answer: General Rives – No.

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HEARING ON THE AUTHORITY TO PROSECUTE TERRORISTS UNDER THE WAR CRIME PROVISIONS OF TITLE 18
AIR FORCE WITNESS: MAJOR GENERAL JACK L. RIVES, AIR FORCE JUDGE ADVOCATE GENERAL
AUGUST 2, 2006
COMMITTEE NUMBER QFR 1

Question: Senator Leahy – Some have proposed legislation that would redefine Common Article 3 in accordance with the "shocks and conscience" standard under the U.S. Constitution, which has been interpreted by this administration as imposing a sliding scale, depending on the circumstances. If the interrogator thinks he needs the information badly, then certain interrogation techniques are allowed. If the need is less, then fewer techniques will be permitted.

(A) Which is easier to teach and train on: an absolute standard or a relative standard that changes according to the circumstances? (B) Would a sliding scale approach to the definition of what constitutes cruel and prohibited conduct add clarity or confusion, in your view?

Answer: General Rives –

(A) Generally, it is easier to teach and train to an absolute standard as opposed to a relative standard that changes according to the circumstances. The armed forces, however, commonly train to standards that change according to the circumstances, such as the use of force and following rules of engagement. DoD training is generally to a higher standard of conduct than that required by common Article 3 toward detainees. Specific training for interrogators will only focus upon specifically authorized techniques, each of which will be evaluated for compliance with all applicable legal standards.

(B) I would have to see a detailed presentation of what is exactly meant by a "sliding scale" to opine about its propriety. That said, it is my sense that, for the purposes of training and guiding US servicemembers, a sliding scale approach to the definition of cruel and prohibited conduct would likely introduce more confusion than clarity. A "sliding scale approach" – if proper at all - should only be used to evaluate the legality of the guidance provided to US servicemembers.

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SENATE COMMITTEE ON THE JUDICIARY
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AIR FORCE WITNESS: MAJOR GENERAL JACK L. RIVES, AIR FORCE JUDGE ADVOCATE GENERAL
AUGUST 2, 2006
COMMITTEE NUMBER QFR 2

Question: Senator Leahy – In a letter to Senator Graham dated July 26, 2006, three organizations (Human Rights Watch, Human Rights First, and the National Institute of Military Justice) concluded, after citing specific authority: "America's NATO allies apply the protections of the Geneva Conventions, including, at minimum, Common Article 3 to the interrogation of terrorist suspects captured in an armed conflict, and equivalent protections in all other circumstances." Are these organizations correct on this point, or are they mistaken?

Answer: General Rives –

This question includes two elements: first, do our NATO allies apply common Article 3 in an armed conflict, and second, do they provide equivalent protection in all other circumstances.

First, all NATO countries are parties to all four Geneva Conventions of 1949 and some are parties to Additional Protocols I and II to the Geneva Conventions. Consequently, our NATO allies are required to apply at a minimum the common Article 3 protections to combatants captured in an armed conflict. I am not aware any statements or actions of our NATO allies to the effect that they did not consider themselves bound to the minimum standards of common Article 3.

Second, I believe the question of equivalent protections in all other circumstances refers to non-armed conflict situations and the fact that nearly every European state and most of our NATO allies (including Turkey) are members of the Council of Europe and, consequently, parties to the European Convention of Human Rights. Article 3 of this Convention provides that "no one shall be subjected to torture or inhuman or degrading treatment or punishment."

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SENATE COMMITTEE ON THE JUDICIARY
HEARING ON THE AUTHORITY TO PROSECUTE TERRORISTS UNDER THE WAR CRIME PROVISIONS OF TITLE 18
AIR FORCE WITNESS: MAJOR GENERAL JACK L. RIVES, AIR FORCE JUDGE ADVOCATE GENERAL
AUGUST 2, 2006
COMMITTEE NUMBER QFR 3

Question: Senator Leahy – Should an international understanding of what Common Article 3 requires be part of any congressional effort to define the terms "outrages against personal dignity" and "humiliating and degrading treatment?" Why or why not?

Answer: General Rives –

It is a basic rule of sovereignty that interpretations provided by other state parties or courts are not binding on US practice or domestic interpretations. As in other cases, how other state parties and courts have addressed an issue can be helpful in framing issues and identifying concerns, but those decisions or writings are not considered binding precedent that must be followed by the United States. If universal agreement develops among states that a specific conduct or act violates common Article 3, then the United States may be bound by customary international law to abstain from that act.

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QUESTION FOR THE RECORD
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HEARING ON THE AUTHORITY TO PROSECUTE TERRORISTS UNDER THE WAR CRIME PROVISIONS OF TITLE 18
AIR FORCE WITNESS: MAJOR GENERAL JACK L. RIVES, AIR FORCE JUDGE ADVOCATE GENERAL
AUGUST 2, 2006
COMMITTEE NUMBER QFR 4

Question: Senator Leahy – When Admiral McPherson testified last month before the Senate Aimed Services Committee, he stated, in response to a question from Senator Levin, that we should not simply ratify the procedures for military commissions that the Supreme Court struck down in the *Hamdan* case because "doing that would not fulfill Common Article 3." Common Article 3 requires "a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people." What aspects of the *pre-Hamdan* procedures fell short of this baseline requirement?

Answer: General Rives – I believe that the nation would be better served by a fresh start to the military commission process. Existing criminal justice systems, including the process established by Military Commission Order 1, should be reviewed to develop a system that would best serve the interests of justice and those of the United States. The UCMJ and the Manual for Courts-Martial is a superb starting point in doing so. The processes and procedures in the UCMJ and MCM have served us well and can be readily adapted to meet the needs of military commissions. I believe the administration is preparing legislation for your consideration using this approach.

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QUESTION FOR THE RECORD
SENATE COMMITTEE ON THE JUDICIARY
HEARING ON THE AUTHORITY TO PROSECUTE TERRORISTS UNDER THE WAR CRIME PROVISIONS OF TITLE 18
AIR FORCE WITNESS: MAJOR GENERAL JACK L. RIVES, AIR FORCE JUDGE ADVOCATE GENERAL
AUGUST 2, 2006
COMMITTEE NUMBER QFR 5

Question: Senator Leahy – Article 36 of the Uniform Code of Military Justice provides that the procedural rules for courts-martial and military commissions must be "uniform insofar as practicable." What specific procedural rules for courts-martial are not practicable for military commissions, and why?

Answer: General Rives –

I believe that the UCMJ and the Manual for Courts-Martial is a superb starting point for updating military commissions with regard to evidentiary issues. I believe you could enact legislation that could detail the basic evidentiary requirements and then permit an executive order to have the details, just as we have the Manual for Courts-Martial with the details.

I recognize there will necessarily be differences between current court-martial procedures and the rules and procedures for military commissions. The processes and procedures in the UCMJ and MCM can be readily adapted to meet the needs of military commissions and still meet the requirements of criminal justice systems established by common Article 3 of the Geneva Conventions. Because of the differences between military commissions and courts-martial I believe that you could apply a broader rule that would admit evidence provided there are guarantees of its trustworthiness, the evidence has probative value, and the interests of justice are be best served by its admission. Specific provisions could be adapted to address such issues as hearsay, procedures for addressing the admission of classified evidence, and the admissibility of an accused's own statements.

I believe the administration is preparing legislation for your consideration using this approach.

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Office of Security Review
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Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Leahy
Witness: BGen Sandkuhler
Question #: 1a

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: Some have proposed legislation that would redefine Common Article 3 in accordance with the "shocks the conscience" standard under the U.S. Constitution, which has been interpreted by this administration as imposing a sliding scale, depending on the circumstances. If the interrogator thinks he needs the information badly, then certain interrogation techniques are allowed. If the need is less, then fewer techniques will be permitted.

(A) Which is easier to teach and train on: an absolute standard or a relative standard that changes according to the circumstances?

Answer: (A) Generally, it is easier to teach and train to an absolute standard as opposed to a relative standard which changes according to the circumstances. However, the armed forces commonly train to standards that either change or require continuous application of judgment and sound decision-making in light of developing circumstances (e.g., escalation in the use of force and rules of engagement). DoD training is generally aimed at a higher standard of conduct than the minimums required by Common Article 3. Specific training for interrogators must focus upon specifically authorized techniques, each of which is evaluated for compliance with applicable legal standards.

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Office of Security Review
Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Leahy
Witness: BGen Sandkuhler
Question #: 1b

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: Some have proposed legislation that would redefine Common Article 3 in accordance with the "shocks the conscience" standard under the U.S. Constitution, which has been interpreted by this administration as imposing a sliding scale, depending on the circumstances. If the interrogator thinks he needs the information badly, then certain interrogation techniques are allowed. If the need is less, then fewer techniques will be permitted.

(B) Would a sliding scale approach to the definition of what constitutes cruel and prohibited conduct add clarity or confusion, in your view?

Answer: (B) For the purposes of training and guiding US service members, a sliding scale approach to the definition of cruel and prohibited conduct would, in my opinion, introduce more confusion than clarity. Regardless of the final choice of legislative standard, we will continue to train personnel to higher standards of conduct than the minimums required by Common Article 3.

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Office of Security Review
Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Leahy
Witness: BGen Sandkuhler
Question #: 2

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: In a letter to Senator Graham dated July 26, 2006, three organizations (Human Rights Watch, Human Rights First, and the National Institute of Military Justice) concluded, after citing specific authority: "America's NATO allies apply the protections of the Geneva Conventions, including, at minimum, Common Article 3 to the interrogation of terrorist suspects captured in an armed conflict, and equivalent protections in all other circumstances." Are these organizations correct on this point, or are they mistaken?

Answer: All NATO countries are parties to all four Geneva Conventions of 1949 and some are parties to Additional Protocols I and II to the Geneva Conventions. They are therefore required to apply, at a minimum, Common Article 3 protections to combatants captured in an armed conflict. I am not personally aware of any deviation by our NATO allies in this regard.

Regarding "equivalent protections in all other circumstances," most of our NATO allies (including Turkey) are members of the Council of Europe and are parties to the European Convention of Human Rights (ECHR). Article 3 of the ECHR provides that "no one shall be subjected to torture or inhuman or degrading treatment or punishment." That would seem to guarantee "equivalent protection in all other circumstances."

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Office of Security Review
Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Leahy
Witness: BGen Sandkuhler
Question #: 3

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: Should an international understanding of what Common Article 3 requires be part of any congressional effort to define the terms "outrages against personal dignity" and "humiliating and degrading treatment?" Why or why not?

Answer: Sovereignty dictates that the interpretations of other states and foreign courts are not binding on US domestic interpretations or practice. Examining how such states and foreign courts have addressed Common Article 3 could certainly be helpful and should be considered as part of any congressional effort. But any such interpretations and decisions are not binding precedent.

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Office of Security Review
Department of Defense

06-C- 0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Leahy
Witness: BGen Sandkuhler
Question #: 4

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: When Admiral McPherson testified last month before the Senate Armed Services Committee, he stated, in response to a question from Senator Levin, that we should not simply ratify the procedures for military commissions that the Supreme Court struck down in the *Hamdan* case because doing that would not fulfill Common Article 3. Common Article 3 requires a "regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people." What aspects of the pre-*Hamdan* procedures fell short of this baseline requirement?

Answer: Some of the aspects of the commission procedures which seemed to fall short of the Common Article 3 requirement, as addressed in *Hamdan*, were that the convening authority had greater power than in courts-martial, which raised concerns that decision-making was not neutral; the presiding officer needed only to be a judge advocate (attorney), and not a certified/qualified military judge; review was not automatic if an accused's sentence was less than 10 years; and the accused could be excluded from the courtroom during the presentation of evidence against him. (The plurality looked to Article 75 of Additional Protocol I as a good source from which to draw relevant "judicial guarantees.")

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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Leahy
Witness: BGen Sandkuhler
Question #: 5

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: Article 36 of the Uniform Code of Military Justice provides that the procedural rules for courts-martial and military commissions must be "uniform insofar as practicable." What specific procedural rules for courts-martial are not practicable for military commissions, and why?

Answer: Under **Military Rule of Evidence 304** (MRE 304), which incorporates both a statutory Article 31(b), UCMJ, and a constitutional (5th Amendment) criminal rights warning, including the right to counsel, statements taken from detainees by US service members on the battlefield could be ruled inadmissible.

Article 32 of the UCMJ requires an investigative hearing prior to referring charges to a General Court-Martial (i.e., it is required for the most serious offenses). Unlike a federal grand jury hearing, an accused has a right to be present with counsel, and to present evidence. Further, unparalleled discovery rights for accused and associate logistical difficulties make providing such hearings impracticable.

Rule for Courts-Martial (RCM) 701, et al, the discovery rules, would effectively give an accused access to any statements, reports, summaries, interrogation techniques, or other documents that would help the defense prepare for trial. In essence, they require "open file" discovery. The same discovery practice applied whole cloth to prosecuting unlawful enemy combatants would be impracticable.

Speedy trial requirements under **Article 10 and RCM 707** could be impracticable, particularly if a court applied them retroactively to the earliest point at which a detainee was "developed" for war crimes processing.

RCM 910, which addresses guilty pleas and plea agreements, is far more protective than Article III guilty plea rules, requiring detailed and cumbersome providence inquiries and not allowing for Alford pleas. Although some detainees may wish to admit what they have done, many are unlikely to concede that their conduct was wrong, dishonorable, or illegal- which would result in a rejection of their pleas under RCM 910(f).

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Office of Security Review
Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 1a

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: On January 26, 2002, then-Secretary of State Colin Powell sent a memorandum to then-Counsel to the President Alberto Gonzalez arguing that the United States could comply with the Geneva Conventions and effectively fight the war on terrorism.

a. In his memo to Mr. Gonzales, Secretary Powell concluded that the Geneva Conventions provide "practical flexibility in how we treat detainees, including with respect to interrogation and length of detention." Do you agree?

Answer: Yes. Treating detainees consistent with Common Article 3 of the Geneva Conventions provides this "practical flexibility."

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Office of Security Review
Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 1b

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: On January 26, 2002, then-Secretary of State Colin Powell sent a memorandum to then-Counsel to the President Alberto Gonzalez arguing that the United States could comply with the Geneva Conventions and effectively fight the war on terrorism.

b. Secretary Powell argued that the Geneva Conventions "allow us not to give the privileges and benefits of POW status to al Qaeda and Taliban." Do you agree?

Answer: Absolutely; individuals determined to be unlawful enemy combatants, including members of al Qaeda and the Taliban, are not entitled to the privileges and benefits of POW status.

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Office of Security Review
Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 1c

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: On January 26, 2002, then-Secretary of State Colin Powell sent a memorandum to then-Counsel to the President Alberto Gonzalez arguing that the United States could comply with the Geneva Conventions and effectively fight the war on terrorism.

c. Secretary Powell argued that deciding that the Geneva Conventions do not apply to the war on terrorism "will reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the law of war for our own troops." Do you agree?

Answer: Yes. Historically, U.S. policy and practice have been to apply the Geneva Conventions in international armed conflict. To not do so certainly opens up the possibility that our own service members will not receive their protections.

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Office of Security Review
Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 1d

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: On January 26, 2002, then-Secretary of State Colin Powell sent a memorandum to then-Counsel to the President Alberto Gonzalez arguing that the United States could comply with the Geneva Conventions and effectively fight the war on terrorism.

d. Secretary Powell argued that deciding that the Geneva Conventions do not apply to the war on terrorism "will undermine public support among critical allies, making military cooperation more difficult to sustain." Do you agree?

Answer: Yes.

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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 2

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: On February 7, 2002, President Bush issued a memorandum stating, "As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely, and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva." To your knowledge, has the Department of Defense provided any guidance on the meaning of humane or inhumane treatment?

Answer: I am unaware of any official DoD guidance on the meaning of humane or inhumane treatment, although it is the policy of DoD to comply with the Law of War in all of our military operations. We provide our Marines with Law of War training, and adherence to the Law of War would ensure humane treatment. Also, the Detainee Treatment Act prohibits inhumane treatment, and defines it in the context of its meaning in the 5th, 8th, and 14th Amendments. Finally, a White House Fact Sheet, issued in conjunction with the President's February 7, 2002 Memorandum, amplified the meaning of humane treatment by stating that detainees will not be subjected to physical or mental abuse or cruel treatment.

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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 3

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: The Schmidt-Furlow Report on the Investigation into FBI Allegations of Detainee Abuses at Guantanamo Bay concluded that an interrogation "resulted in degrading and abusive treatment but did not rise to the level of being inhumane treatment." Do you agree that the treatment of a detainee could be degrading and abusive, but not inhumane?

Answer: I do agree. Certain treatment may be degrading, abusive, and humiliating, such as harsh language, but would not rise to the level of inhumane treatment, such as putting a dog collar and leash on a detainee and forcing him to walk on his hands and knees around a cell block. Also, actual physical harm to a detainee short of torture could be considered inhumane, but much more serious than abusive, degrading, and humiliating language. I admit that many of these terms overlap, depending upon the specific acts, but in my mind, inhumane treatment means something more that just simple abuse, or degrading treatment.

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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 4

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: At a July 13 hearing of the Senate Armed Services Committee, Major General Rives testified, "Some of the techniques that have been authorized and used in the past have violated Common Article 3." Do you agree with Major General Rives? If so, please provide examples of authorized techniques that violate Common Article 3.

Answer: As I recall, Major General Rives was addressing the vagueness concerns of a number of Senators regarding part of Common Article 3, specifically Paragraph 1(c), which prohibits, in part, "outrages upon personal dignity, in particular humiliating and degrading treatment." I believe some techniques utilized in the past that may have amounted to humiliating and degrading treatment include forced nudity, leading a detainee around a room on all fours/forcing him to do "dog tricks," and sexual humiliation by female interrogators.

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06-C- 0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 5

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: I recently visited Guantanamo Bay. The chief interrogator at Guantanamo told me that the Geneva Conventions provide sufficient flexibility to interrogate detainees effectively. Do you agree?

Answer: Yes.

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Office of Security Review
Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 6

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: Defense Department General Counsel William Haynes sent Defense Secretary Rumsfeld a memorandum on November 27, 2002, recommending the approval of certain interrogation techniques for use on Guantanamo Bay detainees. Were you consulted regarding this memorandum? If so, please describe the nature of these consultations, including whether you agreed with the recommendations in the memorandum.

Answer: Our office did not see a copy of Mr. Haynes's memorandum of November 27, 2002, before it was issued, but we were asked to provide comments on the USSOUTHCOM request for approval of certain counter-resistance techniques, which Mr. Haynes's memorandum addressed. We provided comments to the Joint Staff on 4 November 2002. We disagreed with the USSOUTHCOM position that the proposed plan was legally sufficient, and recommended that any new techniques proposed be given a more thorough legal and policy review before implementation. We expressed concerns with certain of the techniques being in violation of the both the President's Military Order No. 1, dated 13 Nov 01, and the White House Memorandum of 7 Feb 02, because both of these documents require detainees to be treated humanely. While under the 7 Feb 02 Memo the principles of Geneva can be "waived" because of military necessity, humane treatment is not subject to waiver. We also thought several of the techniques being requested arguably violated federal law, in particular, the Torture Statute (18 U.S.C. 2340, *et seq*), and put our Service Members at risk for possible violations of the UCMJ. We also pointed out that our Service Members could be exposed to prosecutions by the International Criminal Court. Finally, it was our position that any statements and evidence derived from illegal interrogation techniques would be inadmissible in federal court. The Military Commission procedures had not yet been finalized.

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Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 7a

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: Please respond to each subpart of this question separately.

a. In your personal opinion, is the use of stress positions on detainees legal?

Answer: A stress position intended to cause severe physical pain is not legal. A stress position that does not cause pain *could* be legal, if done for a brief period of time in support of an approved interrogation technique (such as forcing a detainee to stand at attention in order to have an effect on his ego.)

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Office of Security Review
Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 7b

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: Please respond to each subpart of this question separately.

b. In your personal opinion, is the use of stress positions humane?

Answer: A stress position intended to cause severe physical pain as an interrogation technique would be inhumane.

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Office of Security Review
Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 7c

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: Please respond to each subpart of this question separately.

c. In your personal opinion, is the use of stress positions consistent with Common Article 3 of the Geneva Conventions?

Answer: A stress position intended to cause severe physical pain as an interrogation technique would not be consistent with Common Article 3.

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Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 7d

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: Please respond to each subpart of this question separately.

d. In your personal opinion, is the use of stress positions consistent with the U.S. Army Field Manual on Intelligence Interrogation (FM 34-52)?

Answer: No; FM 34-52 did not authorize stress positions.

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Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 7e

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: Please respond to each subpart of this question separately.

e. The Army Field Manual provides that, in attempting to determine whether an interrogation technique is legal, an interrogator should consider, "If your contemplated actions were perpetrated by the enemy against US PW's [Prisoners of War], you would believe such actions violate international or US law." In your personal opinion, would it violate international or US law for enemy forces to use stress positions on US Prisoners of War?

Answer: Yes, because international law sets forth special protections for prisoners of war, as an incentive for nations to conduct wars using regular armed forces and to discourage civilians from unlawfully taking part in combat. This special protection for prisoners of war prohibits "unpleasant or disadvantageous treatment of any kind" in accordance with Article 17 of the Third Geneva Convention.

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Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 7f

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: Please respond to each subpart of this question separately.

f. The Army Field Manual states "forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time" is "physical torture." Do you agree?

Answer: Yes, if the activity meets the definition of torture provided by Congress in 18 USC §2340: "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control."

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Department of Defense

06-C- 0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 8a

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: Please respond to each subpart of this question separately.

a. In your personal opinion, is the use of dogs to induce stress on detainees legal?

Answer: No, because the use of dogs may be construed by a detainee as an imminent threat that he will be subjected to death or severe physical pain, both of which are clearly prohibited under the torture definition found in 18 USC §2340.

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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 8b

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: Please respond to each subpart of this question separately.

b. In your personal opinion, is the use of dogs to induce stress on detainees humane?

Answer: No.

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Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 8c

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: Please respond to each subpart of this question separately.

c. In your personal opinion, is the use of dogs to induce stress on detainees consistent with Common Article 3 of the Geneva Conventions?

Answer: No, because Common Article 3 prohibits torture, and the use of dogs may place the detainee in imminent fear of death, which satisfies the torture definition found in 18 USC §2340.

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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 8d

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: Please respond to each subpart of this question separately.

d. In your personal opinion, is the use of dogs to induce stress on detainees consistent with the US Army Field Manual on Intelligence Interrogation (FM 34-52)?

Answer: No.

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Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 8e

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: Please respond to each subpart of this question separately.

e. In your personal opinion, would it violate international or US law for enemy forces to use dogs to induce stress on US Prisoners of War?

Answer: Yes, the use of dogs would violate Article 17 of the Third Geneva Convention, protecting prisoners of war from "unpleasant" treatment.

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Office of Security Review
Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 9a

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: Please respond to each subpart of this question separately.

a. In your personal opinion, is the use of removal of clothing as an interrogation technique legal?

Answer: The removal of clothing used as an interrogation technique to humiliate or degrade a detainee would not be legal. Removal of clothing that is not humiliating or degrading might be legal, when performed in support of an approved interrogation technique. For example, upon a detainee's request, it may be lawful to remove his outer coat on a warm day under the technique of "fear down" (i.e., putting the detainee at ease/making him more comfortable.)

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Office of Security Review
Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 9b

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: Please respond to each subpart of this question separately.

b. In your personal opinion, is the use of removal of clothing as an interrogation technique humane?

Answer: In my opinion, the primary concern about removal of clothing is that it may be degrading or humiliating, not that it may be inhumane. Removal of clothing in extremely cold temperatures could rise to the level of being inhumane.

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Office of Security Review
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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 9c

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: Please respond to each subpart of this question separately.

c. In your personal opinion, is the use of removal of clothing as an interrogation technique consistent with Common Article 3 of the Geneva Conventions?

Answer: No, the removal of clothing as an interrogation technique to humiliate or degrade the detainee is not consistent with Common Article 3.

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Department of Defense

06-C 0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 9d

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: Please respond to each subpart of this question separately.

d. In your personal opinion, is the use of removal of clothing as an interrogation technique consistent with the US Army Field Manual on Intelligence Interrogation (FM 34-52)?

Answer: No.

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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 9e

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: Please respond to each subpart of this question separately.

e. In your personal opinion, would it violate international or US law for enemy forces to use removal of clothing as an interrogation technique on US Prisoners of War?

Answer: Yes, because prisoners of war are protected by both Common Article 3 of the Geneva Conventions and Article 17 of the Third Geneva Convention.

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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 10a

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: Please respond to each subpart of this question separately.

a. In your personal opinion, is the use of scenarios designed to convince a detainee that death or severely painful consequences are imminent for him and/or his family (i.e., mock execution) legal?

Answer: No, because threatening a detainee with imminent death is torture under 18 USC §2340.

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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 10b

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: Please respond to each subpart of this question separately.

b. In your personal opinion, is mock execution humane?

Answer: No.

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06-L-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 10c

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: **Please respond to each subpart of this question separately.**

c. In your personal opinion, is mock execution consistent with Common Article 3 of the Geneva Conventions?

Answer: No.

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Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 10d

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: Please respond to each subpart of this question separately.

d. In your personal opinion, is mock execution consistent with the US Army Field Manual on Intelligence Interrogation (FM 34-52)?

Answer: No.

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Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 10e

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: Please respond to each subpart of this question separately.

e. In your personal opinion, would it violate international or US law for enemy forces to subject US Prisoners of War to mock execution?

Answer: Yes.

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Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 11a

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: Please respond to each subpart of this question separately.

a. In your personal opinion, is the use of a wet towel and dripping water to induce the misperception of drowning (i.e., waterboarding) legal?

Answer: No, because threatening a detainee with imminent death, to include drowning, is torture under 18 USC §2340.

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Office of Security Review
Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 11b

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: Please respond to each subpart of this question separately.

b. In your personal opinion, is waterboarding humane?

Answer: No.

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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 11c

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: **Please respond to each subpart of this question separately.**

c. In your personal opinion, is waterboarding consistent with Common Article 3 of the Geneva Conventions?

Answer: No.

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Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 11d

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: **Please respond to each subpart of this question separately.**

d. In your personal opinion, is waterboarding consistent with the US Army Field Manual on Intelligence Interrogation (FM 34-52)?

Answer: No.

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Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 11e

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: Please respond to each subpart of this question separately.

e. In your personal opinion, would it violate international or US law for enemy forces to subject US Prisoners of War to waterboarding?

Answer: Yes

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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 12a

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: When the Attorney General testified before the Judiciary Committee on February 6, 2006, Senator Graham asked him, "Do you believe it is lawful for the Congress to tell the military that you cannot physically abuse a prisoner of war?" The Attorney General Responded, "I am not prepared to say that, Senator." I asked the Attorney General to answer Senator Graham's question in writing. He responded, "It is not prudent to comment on the constitutionality of legislation described only in abstract terms."

a. Do you believe it is lawful for the Congress to tell the military that you cannot physically abuse a prisoner of war?

Answer: Yes.

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Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 12b

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: When the Attorney General testified before the Judiciary Committee on February 6, 2006, Senator Graham asked him, "Do you believe it is lawful for the Congress to tell the military that you cannot physically abuse a prisoner of war?" The Attorney General Responded, "I am not prepared to say that, Senator." I asked the Attorney General to answer Senator Graham's question in writing. He responded, "It is not prudent to comment on the constitutionality of legislation described only in abstract terms."

b. Do you believe the President is required to comply with the Uniform Code of Military Justice (UCMJ)?

Answer: The President is not listed under Article 2 of the UCMJ as a "person subject to this chapter." Further interpretation of how the UCMJ applies specifically to the President is more appropriate for response by DOJ.

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Office of Security Review
Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 12c

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: When the Attorney General testified before the Judiciary Committee on February 6, 2006, Senator Graham asked him, "Do you believe it is lawful for the Congress to tell the military that you cannot physically abuse a prisoner of war?" The Attorney General Responded, "I am not prepared to say that, Senator." I asked the Attorney General to answer Senator Graham's question in writing. He responded, "It is not prudent to comment on the constitutionality of legislation described only in abstract terms."

c. Do you believe the UCMJ is constitutional?

Answer: Yes.

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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 13

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: The Working Group Report on Detainee Interrogations in the Global War on Terrorism states, "Any effort by Congress to regulate the interrogation of unlawful combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President." Do you agree? In your personal opinion, does Congress have authority to regulate the interrogation of unlawful combatants?

Answer: The Congress has taken steps to regulate the interrogation of unlawful combatants by passing the Detainee Treatment Act. Whether this was constitutional or not would need to be decided by the Supreme Court of the United States. Congress has already acted by passing the Torture Statute, as well as the UCMJ, which prescribes the conduct of US Service Members.

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Office of Security Review
Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 14

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: The Working Group Report states, "In order to respect the President's inherent constitutional authority to manage a military campaign, 18 U.S.C.A. Sec. 2340A (the prohibition against torture) as well as any other potentially applicable statute must be construed as inapplicable to interrogations undertaken pursuant to his Commander-in-Chief authority." Do you agree? In your personal opinion, is 18 U.S.C.A. Sec. 2340A unconstitutional when applied to interrogations pursuant to the President's Commander-in-Chief authority?

Answer: In the past, we did not view the Torture Statute as being inapplicable to interrogations conducted by US Service Members. In fact, one of our objections to the USSOUTHCOM request for certain counter-resistance techniques was that several of the techniques were arguably in violation of the Torture Statute (18 U.S.C.A. Sec. 2340A). Whether the Torture Statute would be considered unconstitutional when applied to interrogations pursuant to the President's Commander-in-Chief authority is an issue for the Supreme Court of the United States to decide.

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Office of Security Review
Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Specter
Witness: BGen Sandkuhler
Question #: 1

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: In your Senate Armed Services testimony on July 13th, you said that you would look into whether there is a document that defines inhumane treatment or humiliating acts. Have you been able to find such a document?

Answer: No. I have found no document which defines inhumane treatment or humiliating acts with specificity. However, we do currently look to Army Field Manual 34-52 (FM 34-52), which sets forth as doctrine a highly protective standard for interrogation of detainees, in order to make reasoned determinations. Under FM 34-52, "[t]he use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind is prohibited by law and is neither authorized nor condoned by the US Government." It also states that "the use of force is a poor technique as it yields unreliable results."

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Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Specter
Witness: BGen Sandkuhler
Question #: 2

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: How can we edit the existing UCMJ to provide for a solution within the parameters of the *Hamdan* decision? Can you touch on topics such as the complexity of discovery, the ability to provide witnesses given that apprehensions take place on the battlefield and how to protect classified information?

Answer: Complexity of discovery. UCMJ rules and practice amount to what is often characterized as "open file" discovery. In balancing the UCMJ with the original commission rules, I believe that we can devise rules for discovery which are practicable and guarantee fundamental fairness. The primary concern here is how we treat classified evidence requested by an accused. Assuming the process is presided over by a military judge (which it should be), then he or she, upon a sufficient showing, should have the discretion to authorize the government counsel to delete specified items of classified information from documents to be provided the accused through discovery. Where applicable, the military judge should also have the discretion to order the substitution of an unclassified summary of information for classified documents, or the substitution of an unclassified statement which admits the relevant facts that the subject classified information would tend to prove.

Providing witnesses. Generally, process issued in military commissions to compel witnesses to appear and testify should be similar to that which US courts having criminal jurisdiction may lawfully issue. Process should run to any place where the United States has jurisdiction. As suggested in the question, the battlefield presents a challenging environment. It may be impracticable for the government to locate some foreign national witnesses. Additionally, it may be impracticable to physically produce coalition members due to operational commitments. So the rules must take these intricacies into account. The ability to use statements in lieu of physical testimony (as a rule, not an exception) will be a necessary aspect of the military commission process.

Protecting classified information. I believe that the rules for courts-martial (RCM 505 and 506) and CIPA provide an excellent framework for protecting classified (and government information other than classified) information and the rights of an accused.

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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Specter
Witness: BGen Sandkuhler
Question #: 3

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: Does the Uniform Code of Military Justice provide adequate measures to meet the requirements of national security? And if so how, in particular, do the investigative and evidentiary rules of the Uniform Code of Military Justice, specifically the immediate appointment of counsel, efficiently confront the current national security requirements in obtaining information from terror suspects?

Answer: As stated above, I do believe that the rules for courts-martial applicable to the UCMJ do provide adequate measures to meet national security requirements. I wish to provide slight clarification to the above assertion that the UCMJ mandates "immediate appointment of counsel." The appointment or "detailing" of counsel to an individual under the UCMJ is generally triggered by actually charging that individual with an offense under the Code. Thus, there is no immediate appointment of counsel when a person is questioned. Under Article 31(b) of the Code (in line with *Miranda*), when an individual invokes his right to speak with counsel, questioning must cease. Obviously, in the context of commissions designed to prosecute unlawful enemy combatants, Article 31 rights would be both impracticable and unnecessary. Therefore, there really is no "immediate appointment of counsel" concern that I see relative to obtaining information from terror suspects.

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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Specter
Witness: BGen Sandkuhler
Question #: 4

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: Why, under the current Military Commission rules, are detainees not permitted access to an attorney at their Combat[ant] Status Review Tribunal or subsequent Annual [Administrative] Review Board hearings? Some individuals, who have been detained for two to three years and no longer can provide valuable information, are still denied the right to an attorney for national security reasons. Shouldn't these individuals have access to an attorney to challenge their status as enemy combatants?

Answer: The Combatant Status Review Tribunal (CSRT) and Administrative Review Board (ARB) processes are without precedent in history. They are not legal proceedings (for which access to an attorney should be a right), yet they provide an enumerated list of rights and procedures that Article 5 of the Geneva Conventions (requiring determination of status by a "competent tribunal") arguably never envisioned. Having visited Guantanamo Bay within the past year, I am not convinced that individuals who have been detained for two to three years necessarily can no longer provide valuable information. Those who can not, and who no longer pose threat, have the opportunity to demonstrate such at their ARB, and to be released accordingly. (Of course, detainees also have the right to a review of their CSRT determination by the Court of Appeals for the D.C. Circuit.)

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Office of Security Review
Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Feinstein
Witness: BGen Sandkuhler
Question #: 1

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: In the War Crimes Act's legislative history in 1996, the Department of Defense's General Counsel referenced a "Memorandum of Agreement between the Department of Defense and the Justice Department," in which "a member of the Armed Forces would be tried for a violation of the War Crimes Act in a military court." Unless that agreement has somehow changed, this should mean that war crimes prosecutions, at least for U.S. servicemen, remain firmly in the hands of military prosecutors.

- **Has this Memorandum of Agreement been altered?**

Answer: This document has not been altered to my knowledge. (Although dated January 22, 1985, it is included in the 2005 Manual for Courts-Martial as Appendix 3.) Plain reading of the Memorandum provides that DoD is responsible for maintaining discipline over its personnel. DoD will have jurisdiction over crimes committed off installation, if they are crimes over which DoD typically has jurisdiction. Though war crimes are not specifically mentioned, they would fall within the category of crimes over which DoD would typically have jurisdiction.

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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Feinstein
Witness: BGen Sandkuhler
Question #: 2

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: Some have raised concerns about the potential ambiguities in the language of Common Article 3 – such as its references to outrages upon personal dignity, and degrading and humiliating treatment. Others, however, have noted that Geneva Convention Protocol II was enacted to supplement and clarify the broad provisions of Common Article 3, in specific response to allegations that Common Article 3 might be difficult to apply in practice, due to its brevity and lack of detail. 160 states are signatories to Protocol II, indicating that it has wide international endorsement.

- **Why is it that Protocol II, and particularly its long Articles 5 and 6 which provide a detailed interpretation of the general provisions contained in Common Article 3, fails to adequately clear up these supposed ambiguities?**

Answer: Protocol II does assist in clarifying and augmenting CA3, but it does not eliminate all ambiguity. In my opinion, the drafters understood that attempts to define the terms in CA3 by detailing certain behaviors as prohibitive or listing specific examples of acceptable practices would risk defining the terms too narrowly. Further, such attempts would likely beget new terms, inviting more definitions.

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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Feinstein
Witness: BGen Sandkuhler
Question #: 3

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: It is your position that soldiers have historically had difficulty understanding and applying the principles of Common Article 3?

Answer: No.

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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Feinstein
Witness: BGen Sandkuhler
Question #: 4

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: Army Manual 190-8, Section 1-5, similarly provides that "[a]ll persons will be respected as human beings," and that prisoners will be protected against "inhumane" and "degrading" treatment, including such acts as "insults," "public curiosity," and "reprisals."

- **How are these terms interpreted? Do you believe they are less ambiguous than Common Article 3's provisions? Why or why not?**

Answer: Army Regulation (AR) 190-8, sect. 1-5, specifically sections (b) and (c), provide greater detail about the types of prohibited activities and conduct, *vis a vis* "prisoners" and "persons," whether interned or detained. The terms can be subject to different interpretations, because no objective bright line exists by which to measure them. However, looking at them in the context of the entire section can provide *reasonable* guidance about what they mean. (For example, the requirement to protect persons from "public curiosity" compared to the prohibition in the section against photographing for other than facility administration or intelligence/counterintelligence purposes.)

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Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Feinstein
Witness: BGen Sandkuhler
Question #: 5

The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18

Question: If a soldier follows Army Manual 190-8, is there any reason to believe that he would be violating Common Article 3 of the Geneva Conventions?

Answer: No.

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06-C-0855/3

SUBMISSIONS FOR THE RECORD

RECORD VERSION

STATEMENT BY

MAJOR GENERAL SCOTT C. BLACK

BEFORE THE

COMMITTEE JUDICIARY

UNITED STATES SENATE

SECOND SESSION, 109TH CONGRESS

AUGUST 2, 2006

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COMMITTEE ON JUDICIARY

Thank you Mr. Chairman, Ranking Member Leahy, and members of the committee. I would like to thank you for this opportunity to appear before you today and for the committee's timely and thoughtful consideration of these significant issues.

As you know, Soldier-lawyers in The Judge Advocate General's Corps have practical experience and expertise in the law of war. For the most part, our involvement in this area is focused on helping commanders ensure that US military operations adhere to the rule of law and the law of war, a standard that is typically met and, frankly, a practice that frequently separates us from our enemies. We are also integrally involved in the prosecution of Soldiers for crimes that occur in combat, although our general practice is to charge Soldiers with violations of the Uniform Code of Military Justice and not with war crimes. The Supreme Court's ruling in the Hamdan case has reinforced the importance of the rule of law and law of war, and has reinvigorated our scholarship concerning how we charge and prosecute individuals for war crimes.

In Hamdan, the Supreme Court reminds us that properly established and enabled military commissions continue to be a viable and vital forum to try those enemy combatants who violate the laws of war.

Congress may specify substantive offenses triable by military commissions in a number of different ways, including in an act relating to military commissions or by amending the War Crimes Act at 18 United States Code section 2441, or by both means. Army Judge Advocates are now involved in the process, led by the Department of Justice and with Judge Advocates of the other services, to propose to Congress the best way to enable military commissions to adjudicate the full-range of offenses that are at issue in

the Global War on Terrorism. This would include conspiracy, which the Supreme Court found problematic in Hamdan. While this review and analytical process is ongoing, I believe that several points are apparent:

1. We need the help of Congress to pass additional enabling legislation, both for the military commission forum and for the substantive offenses that may be tried by commissions.
2. The War Crimes Act should be amended. In so doing, however, our goal should be to elevate the Act from an aspiration to an instrument. By this I mean that the Act should not simply be a statement of legal policy in furtherance of the ideals of the law of war, but should be a statute defining serious and prosecutable criminal offenses.
3. Whatever is criminalized in the War Crimes Act must withstand the test of fairness as well as the scrutiny of law. Since it is a criminal statute, it must be clear and it must proscribe clearly criminal conduct. There cannot be two standards: if we are to hold enemy combatants to the War Crimes Act, we must be prepared to hold US personnel to the Act.

In conclusion, I believe that, with the help of Congress, we will have a forum and the necessary offenses that enable the nation to have a pragmatic, lawful, and effective instrument for maintaining order and the rule of law on the battlefield.

Department of Justice

STATEMENT

OF

STEVEN G. BRADBURY
ACTING ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

BEFORE THE

COMMITTEE ON JUDICIARY
UNITED STATES SENATE

CONCERNING

"THE AUTHORITY TO PROSECUTE TERRORISTS UNDER THE WAR CRIME PROVISIONS OF TITLE 18"

PRESENTED ON

AUGUST 2, 2006

STATEMENT OF

STEVEN G. BRADBURY
ACTING ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

PROSECUTIONS OF WAR CRIMES
FOLLOWING *HAMDAN v. RUMSFELD*

AUGUST 2, 2006

Thank you, Mr. Chairman, Senator Leahy, and Members of the Committee.

I appreciate the opportunity to appear here today on behalf of the Department of Justice to discuss the question of war crimes prosecutions in the wake of the Supreme Court's decision in *Hamdan v. Rumsfeld.*

The Administration believes that Congress needs to enact legislation in light of the Supreme Court's ruling in *Hamdan* that Common Article 3 of the Geneva Conventions applies to our armed conflict with al Qaeda. The United States has never before applied Common Article 3 in the context of an armed conflict with international terrorists, yet because of the Court's decision in *Hamdan*, we are now faced with the task of determining the best way to do just that.

If left undefined by statute, the application of Common Article 3 will create an unacceptable degree of uncertainty for those who fight to defend us from terrorist attack.

Although many of the provisions of Common Article 3 prohibit actions that are universally condemned, such as "murder," "mutilation," "torture," and the "taking of hostages," it is undeniable that some of the terms in Common Article 3 are inherently vague. For example, Common Article 3 prohibits "[o]utrages upon personal dignity, in particular, humiliating and degrading treatment," a phrase that is susceptible of uncertain and unpredictable application.

Furthermore, the Supreme Court has said that in interpreting a treaty provision such as Common Article 3, the meaning given to the treaty language by international tribunals must be accorded "respectful consideration," and the interpretations adopted by other state parties to the treaty are due "considerable weight." Accordingly, the meaning of Common Article 3—the baseline standard that now applies to the conduct of U.S. personnel in the War on Terror—would be informed by the evolving interpretations of tribunals and governments outside the United States.

We believe that the standards governing the treatment of detainees by United States personnel in the War on Terror should be certain, and that those standards should be defined clearly by U.S. law, consistent with our international obligations.

Congress can help by defining our obligations under those portions of Common Article 3 that govern the treatment of detainees by reference to the U.S. constitutional standard already adopted by Congress in the McCain Amendment, which we believe to be a reasonable interpretation of the relevant provisions of Common Article 3.

Last year, after a significant public debate on the standard that should govern the treatment of captured al Qaeda terrorists, Congress adopted the McCain Amendment, part of the Detainee Treatment Act. That Amendment prohibits "cruel, inhuman, or degrading treatment or punishment," as defined by reference to the established meaning of our Constitution, for all detainees held by the United States, regardless of nationality or geographic location. Congress rightly assumed that the enactment of the Detainee Treatment Act settled questions about the baseline standard that would govern the treatment of detainees by the United States in the War on Terror. We view the standard established by the McCain Amendment as entirely consistent with, and a useful clarification of, our obligations under the relevant provisions of Common Article 3.

Defining the terms in Common Article 3, however, is not only relevant in light of our treaty obligations, but is also important because the War Crimes Act, 18 U.S.C. § 2441, makes any violation of Common Article 3 a felony offense.

The Administration believes that we owe it to those called upon to handle detainees in the War on Terror to ensure that any legislation addressing the Common Article 3 issues created by the *Hamdan* decision will bring clarity and

certainty to the War Crimes Act. The surest way to achieve that clarity and certainty, in our view, is for Congress to set forth a definite and clear list of offenses serious enough to be considered "war crimes," punishable as violations of Common Article 3 under 18 U.S.C. § 2441.

The difficult issues raised by the Court's pronouncement on Common Article 3 are ones that the political Branches need to consider carefully as they chart a way forward after *Hamdan*.

* * *

I understand the Committee is also interested in the question whether conspiracy to commit a violation of the laws of war may be charged as an offense under the laws of war and tried before a military commission. We believe that it may.

On this point, Mr. Chairman, we believe that Justice Thomas in his dissenting opinion in *Hamdan* was correct in his analysis, and that the plurality's view on this question is not sustainable. As Justice Thomas showed, the historical and international precedents and authorities clearly support the conclusion that conspiracy to commit a war crime has long been recognized as a separate offense in violation of the laws of war that is triable by military commission.

* * *

I look forward to discussing these subjects with the Committee this morning.

Thank you, Mr. Chairman.

from the office of

Senator Edward M. Kennedy

of Massachusetts

FOR IMMEDIATE RELEASE
August 2, 2006

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STATEMENT BY SENATOR EDWARD M. KENNEDY ON AMENDING WAR CRIMES ACT

(AS PREPARED FOR DELIVERY BEFORE JUDICIARY COMMITTEE)

It is important to make sure that the Justice Department has all of the options it needs to hold terrorists accountable in our criminal justice system. I welcome this hearing and I hope that we will proceed with deliberation and care in making any changes in the War Crimes Act of 1996.

That Act was originally introduced by conservative members of the House of Representatives and passed by a Republican Congress. It is not a complex law. In less than three-hundred words, it makes it illegal for "a member of the Armed Forces of the United States or a national of the United States" to commit a war crime, and criminalizes war crimes against Americans. This brief law speaks volumes about the rule of law and what America stands for.

Basic American ideals did not change after 9/11, or become less relevant. America did not resolve to set aside the Constitution or the rule of law after those vicious attacks. We did not decide as a nation to stoop to the level of terrorists.

In fact, we have been united in our belief that an essential part of winning the war on terrorism and protecting the nation for the future is safeguarding the ideals and values that America stands for here at home and around the world.

That is why, time after time, government lawyers, military officials, and the American people have been shocked by the Administration's eagerness to abandon America's basic values, in the misguided belief that the end justifies the means. The result has been disastrous.

The Administration brazenly claimed that detainees in the Afghanistan War were not subject to the basic human rights protections of the Geneva Conventions. Despite strenuous objections from Secretary of State Colin Powell, the Administration arrogantly refused to follow the law in this area, and our actions have wreaked havoc with our moral standing in the world and made the war on terrorism harder to win.

Its lawless policies backfired again when the Administration claimed the inherent power to try detainees in military commissions outside of established legal structures. Instead of cooperating with Congress and attempting to operate within the rule of law, the Administration pressed ahead with its irresponsible unilateral approach.
Not a single conviction was obtained under the military commissions, and the Supreme Court has now unequivocally declared that the commissions were not authorized by Congress and do not satisfy Common Article 3 of the Geneva Conventions.

The Administration even attempted to narrow the definition of torture. The Bybee Torture Memorandum, issued in August 2002, took the outrageous position that torture was limited to conduct that caused pain equivalent to death or organ failure. That indefensible position was adopted as official executive policy over the strong and virtually unanimous objections of career military lawyers, who believed it was illegal and unnecessary, and would be harmful to our own troops. When this secret memo finally, came to light, public outcry forced the Administration to repudiate it. Yet when Congress passed the Detainee Treatment Act prohibiting cruel, inhuman and degrading treatment of detainees, the President signed the Act but issued a signing statement indicating he would ignore the law whenever he felt like it.

In the *Hamdan* case, the Supreme Court clearly reaffirmed the applicability of the Geneva Conventions to the detainees. It rejected the President's unilateral military commissions, and emphasized Congress's important role in maintaining the rule of law.

An essential part of winning the war on terrorism and safeguarding the country for the future is to protect the ideals that America stands for here at home and around the world. It has taken several years, and in some instances Supreme Court action, to force the President to comply with the rule of law and to respect those ideals.

We must make sure that the War Crimes Act remains intact, as a bulwark against future abuses and as a signal to the world that we intend to reclaim our long-standing role as leaders in promoting human rights protections here and around the world.

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Statement
United States Senate Committee on the Judiciary
RESCHEDULED--The Authority to Prosecute Terrorists Under The War Crime Provisions of Title 18
August 2, 2006

The Honorable Patrick Leahy
United States Senator , Vermont

Statement of Senator Patrick Leahy,
Ranking Member, Judiciary Committee
"The Authority to Prosecute Terrorists Under
The War Crime Provisions of Title 18"
Judiciary Committee
August 2, 2006

In 1996, working with the Department of Defense, Congress passed the War Crimes Act to provide criminal penalties for certain war crimes committed by and against Americans. The next year, again with the Pentagon's support, Congress extended the War Crimes Act to violations of the baseline humanitarian protections afforded by Common Article 3 of the Geneva Conventions. Both measures were supported by a broad bipartisan consensus, and I was proud to sponsor the 1997 amendments.

The legislation was uncontroversial for a good reason. As I explained at the time, the purpose and effect of the War Crimes Act as amended is to provide for the implementation of America's commitment to the basic international norms we subscribed to when we ratified the Geneva Conventions in 1955. Those norms are truly universal: They condemn war criminals whoever and wherever they are.

That is a critically important aspect of the Geneva Conventions and our own War Crimes Act. When we are dealing with fundamental norms that define the commitments of the civilized world, we cannot have one rule for us and one for them, however we define "us" and "them."

As Justice Jackson said at the Nuremburg tribunals, "We are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us."

In that regard, I was disturbed to read recent reports that the Department of Justice is drafting legislation to narrow the scope of the War Crimes Act to exclude violations of the Geneva Conventions and retroactively immunize past violations. Before taking such a drastic step there is much we need to know. In particular, I have been concerned for some time that this President has thought he could immunize conduct otherwise illegal. I want to know whether the Administration has sought to immunize illegal conduct and on what basis.

But the Chairman convened this hearing today to consider the Government's authority to prosecute terrorists under the War Crimes Act. It has long been open to the Administration to charge suspected terrorists, including those imprisoned at Guantanamo Bay, with federal crimes. In addition to the War Crimes Act, federal law provides criminal penalties for terrorism, torture, hostage-taking, and other acts considered grave breaches of the Geneva Conventions, regardless of where these acts may occur. And unlike the international law of war, Federal law allows for prosecution of the crime of conspiracy.

There is ample authority under federal law for the prosecution of international terrorists. But for various reasons, some good and some bad, the Administration has made little use of that authority

against suspected terrorists. As far as I can tell, the Ashcroft Justice Department and the Gonzales Justice Department have yet to file a single charge against anyone for violation of the War Crimes Act. Nor has the Administration made use of the processes and procedures set forth in the Manual for Courts-Martial and the Uniform Code of Military Justice.

Instead, the Bush-Cheney Administration has pursued a two-pronged strategy. First, with respect to the vast majority of the 700-plus prisoners at Guantanamo and the unidentified prisoners in secret prisons abroad, the Administration has frankly stated that it has no interest in trying them in any court, civilian or military.

Second, this Administration has decided to bring a small number of detainees before "military commissions." I have no objection in principle to the use of military commissions. Indeed, I introduced legislation to authorize procedures for military commissions back in February 2002 after holding hearings in 2001 on the issue. I invited the Administration to work with Congress on legislative authority for such commissions. Regrettably, when the Administration had the option to work in a constructive way with Congress, it chose its customary path of secrecy and unilateralism. This Administration's go-it-alone approach yielded the predictable result after four years; it has achieved nothing other than an embarrassing defeat in the United States Supreme Court. Not a single suspected terrorist has been held accountable before a military commission in the last six years.

The Court's landmark separation-of-powers decision in Hamdan compelled the Bush-Cheney Administration to finally come to Congress to request authorizing legislation. I was encouraged to read the testimony the uniformed witnesses provided before the Armed Services Committee, in which they indicated that the starting point for legislation should be the well-established rules governing courts-martial. But when the Administration's civilian lawyers came before this Committee, they instead argued that Congress should rubberstamp the problematic procedures that the Supreme Court struck down.

What is at stake for all Americans as these decisions are made, are our American values and the primacy in our system of government of the rule of law.

Today, we have before us some of the uniformed witnesses who testified before the Armed Services Committee. I look forward to the testimony of the JAG officers. They have been trying to uphold the best military justice traditions, but have too often been cut out of this Administration's deliberations. I thank them for their services and their willingness to work with us in Congress and to share their views.

I look forward to our consideration at this hearing whether the War Crimes Act provisions should be expanded to include additional offenses. In the future I hope that that they will be willing to appear before our Committee, again, as we consider how to construct military commissions.

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NOT FOR PUBLICATION UNTIL
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JUDICIARY COMMITTEE

STATEMENT OF

REAR ADMIRAL BRUCE MacDONALD, JAGC USN

JUDGE ADVOCATE GENERAL

BEFORE THE

SENATE JUDICIARY COMMITTEE

2 AUGUST 2006

NOT FOR PUBLICATION UNTIL
RELEASED BY THE
SENATE JUDCIARY COMMITTEE

Chairman Specter, Senator Leahy, members of the Committee, good morning. Thank you for the opportunity to testify today on the subject of prosecution of terrorists under the war crimes provisions of Title 18.

Title 18, section 2441, the War Crimes Act, was enacted in large part to carry out the international obligations of the United States under the Geneva Conventions to provide criminal penalties for certain war crimes. The WCA goes beyond what is necessary to implement our obligations under the GCs. The ability of the United States to successfully prosecute terrorists in the War on Terror under the War Crimes Act will depend on whether the crime is covered substantively under the Act and whether such prosecution is practicable under our federal criminal system given the unique circumstances of these prosecutions.

Substantively, the Act criminalizes four categories of conduct, committed here or abroad, as war crimes: Grave breaches of the four Geneva Conventions; violations of Articles 23, 25, 27, or 28 of the Hague Convention IV, Respecting the Law and Customs of War on Land; violations of Common Article 3 to the Geneva Conventions; and violations of the Protocol on Prohibitions or

Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II).

This extensive list of offenses would cover nearly every act a terrorist could commit from the willful murder of civilians, to hostage taking, to employing poison or poison weapons. Although many of the provisions of those treaties, including Common Article 3, are actions easily understandable and universally condemned, Common Article 3's prohibition upon "outrages upon personal dignity" is not well defined. The ability of the United States to prosecute an offense based upon an alleged outrage upon personal dignity will depend upon whether Congress provides definition and certainty to the meaning of that term.

The Supreme Court in Hamdan accepted the President's determination that it would be impracticable to prosecute members of al Qaida captured on the battlefield in U.S. federal court for their war crimes. It is my understanding that the Executive Branch has resolved to work with Congress to fashion a new Military Commission system that will comply with the holding in Hamdan. I look forward to discussing these subjects with the Committee this morning.

DEPARTMENT OF THE AIR FORCE

**PRESENTATION TO THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

SUBJECT: THE AUTHORITY TO PROSECUTE TERRORISTS UNDER THE WAR CRIME PROVISIONS OF TITLE 18

**STATEMENT OF: MAJOR GENERAL JACK L. RIVES
THE JUDGE ADVOCATE GENERAL
UNITED STATES AIR FORCE**

AUGUST 2, 2006

**NOT FOR PUBLICATION UNTIL RELEASED
BY THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

TESTIMONY OF
MAJOR GENERAL JACK L. RIVES
THE JUDGE ADVOCATE GENERAL
UNITED STATES AIR FORCE

BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
CONCERNING THE AUTHORITY TO PROSECUTE TERRORISTS
UNDER THE WAR CRIMES PROVISIONS OF TITLE 18

August 2, 2006

Thank you Chairman Specter, Senator Leahy, and members of the Committee. I appreciate the opportunity to appear before you today as this Committee carefully considers the authority of the United States to prosecute suspected terrorists consistent with the Supreme Court's decision in *Hamdan v. Rumsfeld*.

Prior to enactment of the War Crimes Act, suspected war criminals were prosecuted domestically by the United States for the underlying common law offense -- such as murder, rape, or assault. Consistent with our treaty obligations, Congress enacted the War Crimes Act to proscribe misconduct internationally recognized as constituting violations of the Laws of Nations.

Prosecutions under the War Crimes Act, like all prosecutions under Title 18, include the due process rights afforded in our Federal Court system. While these rights are necessary and appropriate for suspected terrorists investigated and apprehended through normal domestic law enforcement methods, some -- such as the aggressive discovery rules and strict chain of custody requirements -- are incompatible with the realities and unpredictability of the battlefield. The full discovery rights of our Federal Court system may reveal sensitive intelligence sources and methods that would harm our overall national security. Similarly, the chain of custody requirements of our Federal system are simply unworkable given the uncertain and ever changing nature of the battlefield and the need for our military personnel to be free from the

technical rules more applicable to domestic law enforcement officers operating in American neighborhoods.

In light of these difficulties, our laws offer alternative means to prosecute suspected terrorists seized on the battlefields of the Global War on Terrorism. These alternative methods were the subject of *Hamdan v. Rumsfeld*, and are the focus of ongoing discussions outside of Title 18. However, Congressional action to amend the War Crimes Act can prove helpful on a related matter.

The War Crimes Act currently characterizes all violations of Common Article 3 of the Geneva Conventions as felonies. Violations of Common Article 3 include, among other things, "outrages upon personal dignity, in particular humiliating and degrading treatment." Under our military justice system, less serious breaches can be handled through administrative or nonjudicial means. However, the War Crimes Act treats all violations of Common Article 3 as felonies. We welcome Congressional efforts to better define which "outrages upon personal dignity, in particular humiliating and degrading treatment" amount to serious breaches worthy of classification as felonies. Such efforts would serve our men and women fighting the Global War on Terrorism by providing clearly delineated limits.

As recognized and reaffirmed in last year's Detainee Treatment Act, we cannot and will not condone US military personnel engaging in outrageous, humiliating and degrading conduct as US law defines such misconduct. Congressional efforts to better define these terms for Common Article 3 purposes will provide needed clarity to the rules of conduct for our military forces.

I look forward to discussing these issues with the Committee this morning.

Thank you, Mr. Chairman.

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JUDICIARY COMMITTEE

STATEMENT OF

BRIGADIER GENERAL KEVIN M. SANDKUHLER

STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE MARINE CORPS

BEFORE THE

SENATE JUDICIARY COMMITTEE

2 AUGUST 2006

NOT FOR PUBLICATION UNTIL
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SENATE JUDICIARY COMMITTEE

Chairman Specter, Senator Leahy, members of the Judiciary Committee, good morning. I wish to thank you for the opportunity to appear before you today, and for this committee's interest in this critical issue.

As does this committee, we remain keenly interested in continuing to fulfill our international obligations under the Geneva Conventions, as well as ensuring that we are able to effectively and efficiently bring terrorists to justice. A plurality of the Supreme Court concluded in the *Hamdan* decision that conspiracy was not triable by a law-of-war military commission, in part because it was not positively identified by statute as a war crime. How best to bring terrorists to justice following the Hamdan decision is a matter worthy of careful consideration.

The War Crimes Act of 1996 was enacted to carry out the international obligations of the United States under the Geneva Conventions to provide criminal penalties for certain war crimes. Until its enactment, the United States had never taken affirmative steps to legislate the penal provision of the Geneva Conventions; the War Crimes Act of 1996 accomplished these ends. The Act was not intended to affect in any way the jurisdiction of any court-martial, military commission, or other military tribunal under any article of the Uniform Code of Military Justice, the law of war, or the law of nations. Substantively, the Act criminalizes four categories of conduct, committed here or abroad, as war crimes: grave breaches of any of the international conventions signed at Geneva on 12 August 1949, or any protocol to such convention to which the United States is a party; violations of Articles 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Law and Customs of War on Land; violations of common article 3 to the Geneva

Conventions; and violations of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II). The ability of the United States to prosecute terrorists under the War Crimes Act will be driven by whether the crime is covered substantively under the Act, but more importantly by whether prosecution is practicable under our federal criminal system.

Procedurally, prosecuting terrorists under Title 18 in Article III federal courts would present many of the same difficulties that we have been addressing in our military commissions process, including the relation between the national security and, for examples, discovery rights of the accused, access to classified information, and self-incrimination. Striking the balance between individual due process and our national security interests, while maintaining our service members' flexibility in dealing with terrorists and unlawful enemy combatants they encounter on the battlefield is the end we all seek.

With that as a backdrop, I look forward to discussing these issues with the Committee.

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