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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OCT 0 3 2006 6

Office of Security Review
Department of Defense

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.

CLEARED
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OCT 0 3 2006 6

Office of Security Review
Department of Defense

06-C-0855/1

CLEARED
For Open Publication

OCT 0 3 2006 6

Office of Security Review
Department of Defense

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

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.

06-C-0855/1

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.

CLEARED
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OCT 0 3 2006

Office of Security Review
Department of Defense

06-C-0855/1

CLEARED
For Open Publication

OCT 0 3 2006 6

Office of Security Review
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.

06-C-0855/1

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.

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

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.

CLEARED
For Open Publication

OCT 0 3 2006 6

Office of Security Review
Department of Defense

06-C-0855/1

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

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.

CLEARED
For Open Publication

OCT 0 3 2006 6

Office of Security Review
Department of Defense

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

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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For Open Publication

OCT 0 3 2006 6

Office of Security Review
Department of Defense

06-C-0855/1

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

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.

CLEARED
For Open Publication

OCT 0 3 2006 6

Office of Security Review
Department of Defense

06-C-0855/1

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

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.

CLEARED
For Open Publication

OCT 0 3 2006 6

Office of Security Review
Department of Defense

CLEARED
For Open Publication

OCT 0 3 2006 6

Office of Security Review
Department of Defense

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

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?

06-C-0855/1

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

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.

CLEARED
For Open Publication

OCT 0 3 2006

Office of Security Review
Department of Defense

06-C-0855/1

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

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.

CLEARED
For Open Publication

OCT 03 2006

Office of Security Review
Department of Defense

06-C-0855/1

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

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.

CLEARED
For Open Publication

OCT 03 2006

Office of Security Review
Department of Defense

06-C-0855/1

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

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.

CLEARED
For Open Publication

OCT 0 3 2006 6

Office of Security Review
Department of Defense

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

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.

CLEARED
For Open Publication

OCT 0 3 2006

Office of Security Review
Department of Defense

06-C-0855/1

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

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.

CLEARED
For Open Publication
OCT 03 2006
Office of Security Review
Department of Defense

06-C-0855

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

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.

CLEARED
For Open Publication

OCT 0 3 2006 6

Office of Security Review
Department of Defense

06-C-0855/1

Hearing Date: August 2, 2006
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.

CLEARED
For Open Publication

OCT 0 3 2006 6

Office of Security Review
Department of Defense

06-C-0855/1

Hearing Date: August 2, 2006
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.

CLEARED
For Open Publication

OCT 0 3 2006 6

Office of Security Review
Department of Defense

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

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.

CLEARED
For Open Publication

OCT 0 3 2006

Office of Security Review
Department of Defense

06-C-0855/1

Hearing Date: August 2, 2006
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.

CLEARED
For Open Publication

OCT 0 3 2006 6

Office of Security Review
Department of Defense

Hearing Date: August 2, 2006
Committee: SJC
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.

CLEARED
For Open Publication

OCT 0 3 2006 6

Office of Security Review
Department of Defense

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

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.

CLEARED
For Open Publication

OCT 0 3 2006

Office of Security Review
Department of Defense

06-C-0855/1

Hearing Date: August 2, 2006
Committee: SJC
Member: Senator Leahy
Witness: MG Scott Black

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

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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