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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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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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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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Q 1 - Q 5

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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.