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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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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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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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.

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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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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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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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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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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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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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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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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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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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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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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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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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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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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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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 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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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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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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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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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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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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