Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Leahy
Witness: BGen Sandkuhler
Question #: 1a

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

Question: Some have proposed legislation that would redefine Common Article 3 in accordance with the "shocks the conscience" standard under the U.S. Constitution, which has been interpreted by this administration as imposing a sliding scale, depending on the circumstances. If the interrogator thinks he needs the information badly, then certain interrogation techniques are allowed. If the need is less, then fewer techniques will be permitted.

(A) Which is easier to teach and train on: an absolute standard or a relative standard that changes according to the circumstances?

Answer: (A) Generally, it is easier to teach and train to an absolute standard as opposed to a relative standard which changes according to the circumstances. However, the armed forces commonly train to standards that either change or require continuous application of judgment and sound decision-making in light of developing circumstances (e.g., escalation in the use of force and rules of engagement). DoD training is generally aimed at a higher standard of conduct than the minimums required by Common Article 3. Specific training for interrogators must focus upon specifically authorized techniques, each of which is evaluated for compliance with applicable legal standards.

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Office of Security Review
Department of Defense

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Leahy
Witness: BGen Sandkuhler
Question #: 1b

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

Question: Some have proposed legislation that would redefine Common Article 3 in accordance with the "shocks the conscience" standard under the U.S. Constitution, which has been interpreted by this administration as imposing a sliding scale, depending on the circumstances. If the interrogator thinks he needs the information badly, then certain interrogation techniques are allowed. If the need is less, then fewer techniques will be permitted.

(B) Would a sliding scale approach to the definition of what constitutes cruel and prohibited conduct add clarity or confusion, in your view?

Answer: (B) For the purposes of training and guiding US service members, a sliding scale approach to the definition of cruel and prohibited conduct would, in my opinion, introduce more confusion than clarity. Regardless of the final choice of legislative standard, we will continue to train personnel to higher standards of conduct than the minimums required by Common Article 3.

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Office of Security Review
Department of Defense

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Leahy
Witness: BGen Sandkuhler
Question #: 2

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

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

Answer: All NATO countries are parties to all four Geneva Conventions of 1949 and some are parties to Additional Protocols I and II to the Geneva Conventions. They are therefore required to apply, at a minimum, Common Article 3 protections to combatants captured in an armed conflict. I am not personally aware of any deviation by our NATO allies in this regard.

Regarding "equivalent protections in all other circumstances," most of our NATO allies (including Turkey) are members of the Council of Europe and are parties to the European Convention of Human Rights (ECHR). Article 3 of the ECHR provides that "no one shall be subjected to torture or inhuman or degrading treatment or punishment." That would seem to guarantee "equivalent protection in all other circumstances."

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Office of Security Review
Department of Defense

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Leahy
Witness: BGen Sandkuhler
Question #: 3

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

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

Answer: Sovereignty dictates that the interpretations of other states and foreign courts are not binding on US domestic interpretations or practice. Examining how such states and foreign courts have addressed Common Article 3 could certainly be helpful and should be considered as part of any congressional effort. But any such interpretations and decisions are not binding precedent.

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Office of Security Review
Department of Defense

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Leahy
Witness: BGen Sandkuhler
Question #: 4

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

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

Answer: Some of the aspects of the commission procedures which seemed to fall short of the Common Article 3 requirement, as addressed in *Hamdan*, were that the convening authority had greater power than in courts-martial, which raised concerns that decision-making was not neutral; the presiding officer needed only to be a judge advocate (attorney), and not a certified/qualified military judge; review was not automatic if an accused's sentence was less than 10 years; and the accused could be excluded from the courtroom during the presentation of evidence against him. (The plurality looked to Article 75 of Additional Protocol I as a good source from which to draw relevant "judicial guarantees.")

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Office of Security Review
Department of Defense

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Leahy
Witness: BGen Sandkuhler
Question #: 5

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

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

Answer: Under **Military Rule of Evidence 304** (MRE 304), which incorporates both a statutory Article 31(b), UCMJ, and a constitutional (5th Amendment) criminal rights warning, including the right to counsel, statements taken from detainees by US service members on the battlefield could be ruled inadmissible.

Article 32 of the UCMJ requires an investigative hearing prior to referring charges to a General Court-Martial (i.e., it is required for the most serious offenses). Unlike a federal grand jury hearing, an accused has a right to be present with counsel, and to present evidence. Further, unparalleled discovery rights for accused and associate logistical difficulties make providing such hearings impracticable.

Rule for Courts-Martial (RCM) 701, et al, the discovery rules, would effectively give an accused access to any statements, reports, summaries, interrogation techniques, or other documents that would help the defense prepare for trial. In essence, they require "open file" discovery. The same discovery practice applied whole cloth to prosecuting unlawful enemy combatants would be impracticable.

Speedy trial requirements under **Article 10 and RCM 707** could be impracticable, particularly if a court applied them retroactively to the earliest point at which a detainee was "developed" for war crimes processing.

RCM 910, which addresses guilty pleas and plea agreements, is far more protective than Article III guilty plea rules, requiring detailed and cumbersome providence inquiries and not allowing for Alford pleas. Although some detainees may wish to admit what they have done, many are unlikely to concede that their conduct was wrong, dishonorable, or illegal- which would result in a rejection of their pleas under RCM 910(f).

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Office of Security Review
Department of Defense

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 1a

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

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

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

Answer: Yes. Treating detainees consistent with Common Article 3 of the Geneva Conventions provides this "practical flexibility."

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Office of Security Review
Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 1b

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

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

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

Answer: Absolutely; individuals determined to be unlawful enemy combatants, including members of al Qaeda and the Taliban, are not entitled to the privileges and benefits of POW status.

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Office of Security Review
Department of Defense

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 1c

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

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

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

Answer: Yes. Historically, U.S. policy and practice have been to apply the Geneva Conventions in international armed conflict. To not do so certainly opens up the possibility that our own service members will not receive their protections.

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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 1d

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

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

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

Answer: Yes.

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Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 2

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

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

Answer: I am unaware of any official DoD guidance on the meaning of humane or inhumane treatment, although it is the policy of DoD to comply with the Law of War in all of our military operations. We provide our Marines with Law of War training, and adherence to the Law of War would ensure humane treatment. Also, the Detainee Treatment Act prohibits inhumane treatment, and defines it in the context of its meaning in the 5th, 8th, and 14th Amendments. Finally, a White House Fact Sheet, issued in conjunction with the President's February 7, 2002 Memorandum, amplified the meaning of humane treatment by stating that detainees will not be subjected to physical or mental abuse or cruel treatment.

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Office of Security Review
Department of Defense

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 3

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

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

Answer: I do agree. Certain treatment may be degrading, abusive, and humiliating, such as harsh language, but would not rise to the level of inhumane treatment, such as putting a dog collar and leash on a detainee and forcing him to walk on his hands and knees around a cell block. Also, actual physical harm to a detainee short of torture could be considered inhumane, but much more serious than abusive, degrading, and humiliating language. I admit that many of these terms overlap, depending upon the specific acts, but in my mind, inhumane treatment means something more that just simple abuse, or degrading treatment.

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Office of Security Review
Department of Defense

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 4

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

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

Answer: As I recall, Major General Rives was addressing the vagueness concerns of a number of Senators regarding part of Common Article 3, specifically Paragraph 1(c), which prohibits, in part, "outrages upon personal dignity, in particular humiliating and degrading treatment." I believe some techniques utilized in the past that may have amounted to humiliating and degrading treatment include forced nudity, leading a detainee around a room on all fours/forcing him to do "dog tricks," and sexual humiliation by female interrogators.

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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 5

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

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

Answer: Yes.

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Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 6

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

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

Answer: Our office did not see a copy of Mr. Haynes's memorandum of November 27, 2002, before it was issued, but we were asked to provide comments on the USSOUTHCOM request for approval of certain counter-resistance techniques, which Mr. Haynes's memorandum addressed. We provided comments to the Joint Staff on 4 November 2002. We disagreed with the USSOUTHCOM position that the proposed plan was legally sufficient, and recommended that any new techniques proposed be given a more thorough legal and policy review before implementation. We expressed concerns with certain of the techniques being in violation of the both the President's Military Order No. 1, dated 13 Nov 01, and the White House Memorandum of 7 Feb 02, because both of these documents require detainees to be treated humanely. While under the 7 Feb 02 Memo the principles of Geneva can be "waived" because of military necessity, humane treatment is not subject to waiver. We also thought several of the techniques being requested arguably violated federal law, in particular, the Torture Statute (18 U.S.C. 2340, *et seq*), and put our Service Members at risk for possible violations of the UCMJ. We also pointed out that our Service Members could be exposed to prosecutions by the International Criminal Court. Finally, it was our position that any statements and evidence derived from illegal interrogation techniques would be inadmissible in federal court. The Military Commission procedures had not yet been finalized.

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Department of Defense

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 7a

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

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

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

Answer: A stress position intended to cause severe physical pain is not legal. A stress position that does not cause pain *could* be legal, if done for a brief period of time in support of an approved interrogation technique (such as forcing a detainee to stand at attention in order to have an effect on his ego.)

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Office of Security Review
Department of Defense

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 7b

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

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

b. In your personal opinion, is the use of stress positions humane?

Answer: A stress position intended to cause severe physical pain as an interrogation technique would be inhumane.

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Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 7c

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

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

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

Answer: A stress position intended to cause severe physical pain as an interrogation technique would not be consistent with Common Article 3.

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Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 7d

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

Question: **Please respond to each subpart of this question separately.**

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

Answer: No; FM 34-52 did not authorize stress positions.

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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 7e

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

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

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

Answer: Yes, because international law sets forth special protections for prisoners of war, as an incentive for nations to conduct wars using regular armed forces and to discourage civilians from unlawfully taking part in combat. This special protection for prisoners of war prohibits "unpleasant or disadvantageous treatment of any kind" in accordance with Article 17 of the Third Geneva Convention.

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Office of Security Review
Department of Defense

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 7f

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

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

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

Answer: Yes, if the activity meets the definition of torture provided by Congress in 18 USC §2340: "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control."

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Office of Security Review
Department of Defense

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 8a

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

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

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

Answer: No, because the use of dogs may be construed by a detainee as an imminent threat that he will be subjected to death or severe physical pain, both of which are clearly prohibited under the torture definition found in 18 USC §2340.

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Office of Security Review
Department of Defense

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 8b

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

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

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

Answer: No.

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Office of Security Review
Department of Defense

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 8c

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

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

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

Answer: No, because Common Article 3 prohibits torture, and the use of dogs may place the detainee in imminent fear of death, which satisfies the torture definition found in 18 USC §2340.

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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 8d

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

Question: **Please respond to each subpart of this question separately.**

d. In your personal opinion, is the use of dogs to induce stress on detainees consistent with the US Army Field Manual on Intelligence Interrogation (FM 34-52)?

Answer: No.

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Office of Security Review
Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 8e

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

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

e. In your personal opinion, would it violate international or US law for enemy forces to use dogs to induce stress on US Prisoners of War?

Answer: Yes, the use of dogs would violate Article 17 of the Third Geneva Convention, protecting prisoners of war from "unpleasant" treatment.

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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 9a

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

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

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

Answer: The removal of clothing used as an interrogation technique to humiliate or degrade a detainee would not be legal. Removal of clothing that is not humiliating or degrading might be legal, when performed in support of an approved interrogation technique. For example, upon a detainee's request, it may be lawful to remove his outer coat on a warm day under the technique of "fear down" (i.e., putting the detainee at ease/making him more comfortable.)

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Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 9b

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

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

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

Answer: In my opinion, the primary concern about removal of clothing is that it may be degrading or humiliating, not that it may be inhumane. Removal of clothing in extremely cold temperatures could rise to the level of being inhumane.

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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 9c

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

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

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

Answer: No, the removal of clothing as an interrogation technique to humiliate or degrade the detainee is not consistent with Common Article 3.

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Department of Defense

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 9d

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

Question: **Please respond to each subpart of this question separately.**

d. In your personal opinion, is the use of removal of clothing as an interrogation technique consistent with the US Army Field Manual on Intelligence Interrogation (FM 34-52)?

Answer: No.

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Office of Security Review
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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 9e

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

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

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

Answer: Yes, because prisoners of war are protected by both Common Article 3 of the Geneva Conventions and Article 17 of the Third Geneva Convention.

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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 10a

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

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

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

Answer: No, because threatening a detainee with imminent death is torture under 18 USC §2340.

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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 10b

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

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

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

Answer: No.

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Department of Defense

06-L-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 10c

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

Question: **Please respond to each subpart of this question separately.**

c. In your personal opinion, is mock execution consistent with Common Article 3 of the Geneva Conventions?

Answer: No.

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Office of Security Review
Department of Defense

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 10d

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

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

d. In your personal opinion, is mock execution consistent with the US Army Field Manual on Intelligence Interrogation (FM 34-52)?

Answer: No.

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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 10e

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

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

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

Answer: Yes.

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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 11a

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

Question: **Please respond to each subpart of this question separately.**

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

Answer: No, because threatening a detainee with imminent death, to include drowning, is torture under 18 USC §2340.

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Office of Security Review
Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 11b

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

Question: **Please respond to each subpart of this question separately.**

b. In your personal opinion, is waterboarding humane?

Answer: No.

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Question #: 11c

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

Question: **Please respond to each subpart of this question separately.**

c. In your personal opinion, is waterboarding consistent with Common Article 3 of the Geneva Conventions?

Answer: No.

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Department of Defense

06-c-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 11d

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

Question: **Please respond to each subpart of this question separately.**

d. In your personal opinion, is waterboarding consistent with the US Army Field Manual on Intelligence Interrogation (FM 34-52)?

Answer: No.

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Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 11e

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

Question: **Please respond to each subpart of this question separately.**

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

Answer: Yes

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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 12a

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

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

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

Answer: Yes.

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Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 12b

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

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

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

Answer: The President is not listed under Article 2 of the UCMJ as a "person subject to this chapter." Further interpretation of how the UCMJ applies specifically to the President is more appropriate for response by DOJ.

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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 12c

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

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c. Do you believe the UCMJ is constitutional?

Answer: Yes.

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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 13

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

Question: The Working Group Report on Detainee Interrogations in the Global War on Terrorism states, "Any effort by Congress to regulate the interrogation of unlawful combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President." Do you agree? In your personal opinion, does Congress have authority to regulate the interrogation of unlawful combatants?

Answer: The Congress has taken steps to regulate the interrogation of unlawful combatants by passing the Detainee Treatment Act. Whether this was constitutional or not would need to be decided by the Supreme Court of the United States. Congress has already acted by passing the Torture Statute, as well as the UCMJ, which prescribes the conduct of US Service Members.

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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Durbin
Witness: BGen Sandkuhler
Question #: 14

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

Question: The Working Group Report states, "In order to respect the President's inherent constitutional authority to manage a military campaign, 18 U.S.C.A. Sec. 2340A (the prohibition against torture) as well as any other potentially applicable statute must be construed as inapplicable to interrogations undertaken pursuant to his Commander-in-Chief authority." Do you agree? In your personal opinion, is 18 U.S.C.A. Sec. 2340A unconstitutional when applied to interrogations pursuant to the President's Commander-in-Chief authority?

Answer: In the past, we did not view the Torture Statute as being inapplicable to interrogations conducted by US Service Members. In fact, one of our objections to the USSOUTHCOM request for certain counter-resistance techniques was that several of the techniques were arguably in violation of the Torture Statute (18 U.S.C.A. Sec. 2340A). Whether the Torture Statute would be considered unconstitutional when applied to interrogations pursuant to the President's Commander-in-Chief authority is an issue for the Supreme Court of the United States to decide.

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Office of Security Review
Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Specter
Witness: BGen Sandkuhler
Question #: 1

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

Question: In your Senate Armed Services testimony on July 13th, you said that you would look into whether there is a document that defines inhumane treatment or humiliating acts. Have you been able to find such a document?

Answer: No. I have found no document which defines inhumane treatment or humiliating acts with specificity. However, we do currently look to Army Field Manual 34-52 (FM 34-52), which sets forth as doctrine a highly protective standard for interrogation of detainees, in order to make reasoned determinations. Under FM 34-52, "[t]he use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind is prohibited by law and is neither authorized nor condoned by the US Government." It also states that "the use of force is a poor technique as it yields unreliable results."

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Office of Security Review
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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Specter
Witness: BGen Sandkuhler
Question #: 2

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

Question: How can we edit the existing UCMJ to provide for a solution within the parameters of the *Hamdan* decision? Can you touch on topics such as the complexity of discovery, the ability to provide witnesses given that apprehensions take place on the battlefield and how to protect classified information?

Answer: Complexity of discovery. UCMJ rules and practice amount to what is often characterized as "open file" discovery. In balancing the UCMJ with the original commission rules, I believe that we can devise rules for discovery which are practicable and guarantee fundamental fairness. The primary concern here is how we treat classified evidence requested by an accused. Assuming the process is presided over by a military judge (which it should be), then he or she, upon a sufficient showing, should have the discretion to authorize the government counsel to delete specified items of classified information from documents to be provided the accused through discovery. Where applicable, the military judge should also have the discretion to order the substitution of an unclassified summary of information for classified documents, or the substitution of an unclassified statement which admits the relevant facts that the subject classified information would tend to prove.

Providing witnesses. Generally, process issued in military commissions to compel witnesses to appear and testify should be similar to that which US courts having criminal jurisdiction may lawfully issue. Process should run to any place where the United States has jurisdiction. As suggested in the question, the battlefield presents a challenging environment. It may be impracticable for the government to locate some foreign national witnesses. Additionally, it may be impracticable to physically produce coalition members due to operational commitments. So the rules must take these intricacies into account. The ability to use statements in lieu of physical testimony (as a rule, not an exception) will be a necessary aspect of the military commission process.

Protecting classified information. I believe that the rules for courts-martial (RCM 505 and 506) and CIPA provide an excellent framework for protecting classified (and government information other than classified) information and the rights of an accused.

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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Specter
Witness: BGen Sandkuhler
Question #: 3

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

Question: Does the Uniform Code of Military Justice provide adequate measures to meet the requirements of national security? And if so how, in particular, do the investigative and evidentiary rules of the Uniform Code of Military Justice, specifically the immediate appointment of counsel, efficiently confront the current national security requirements in obtaining information from terror suspects?

Answer: As stated above, I do believe that the rules for courts-martial applicable to the UCMJ do provide adequate measures to meet national security requirements. I wish to provide slight clarification to the above assertion that the UCMJ mandates "immediate appointment of counsel." The appointment or "detailing" of counsel to an individual under the UCMJ is generally triggered by actually charging that individual with an offense under the Code. Thus, there is no immediate appointment of counsel when a person is questioned. Under Article 31(b) of the Code (in line with *Miranda*), when an individual invokes his right to speak with counsel, questioning must cease. Obviously, in the context of commissions designed to prosecute unlawful enemy combatants, Article 31 rights would be both impracticable and unnecessary. Therefore, there really is no "immediate appointment of counsel" concern that I see relative to obtaining information from terror suspects.

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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Specter
Witness: BGen Sandkuhler
Question #: 4

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

Question: Why, under the current Military Commission rules, are detainees not permitted access to an attorney at their Combat[ant] Status Review Tribunal or subsequent Annual [Administrative] Review Board hearings? Some individuals, who have been detained for two to three years and no longer can provide valuable information, are still denied the right to an attorney for national security reasons. Shouldn't these individuals have access to an attorney to challenge their status as enemy combatants?

Answer: The Combatant Status Review Tribunal (CSRT) and Administrative Review Board (ARB) processes are without precedent in history. They are not legal proceedings (for which access to an attorney should be a right), yet they provide an enumerated list of rights and procedures that Article 5 of the Geneva Conventions (requiring determination of status by a "competent tribunal") arguably never envisioned. Having visited Guantanamo Bay within the past year, I am not convinced that individuals who have been detained for two to three years necessarily can no longer provide valuable information. Those who can not, and who no longer pose threat, have the opportunity to demonstrate such at their ARB, and to be released accordingly. (Of course, detainees also have the right to a review of their CSRT determination by the Court of Appeals for the D.C. Circuit.)

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Office of Security Review
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06-C-0855/3

Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Feinstein
Witness: BGen Sandkuhler
Question #: 1

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

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

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

Answer: This document has not been altered to my knowledge. (Although dated January 22, 1985, it is included in the 2005 Manual for Courts-Martial as Appendix 3.) Plain reading of the Memorandum provides that DoD is responsible for maintaining discipline over its personnel. DoD will have jurisdiction over crimes committed off installation, if they are crimes over which DoD typically has jurisdiction. Though war crimes are not specifically mentioned, they would fall within the category of crimes over which DoD would typically have jurisdiction.

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Office of Security Review
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Hearing Date: April 2, 2006
Committee: SJC
Member: Senator Feinstein
Witness: BGen Sandkuhler
Question #: 2

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

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

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

Answer: Protocol II does assist in clarifying and augmenting CA3, but it does not eliminate all ambiguity. In my opinion, the drafters understood that attempts to define the terms in CA3 by detailing certain behaviors as prohibitive or listing specific examples of acceptable practices would risk defining the terms too narrowly. Further, such attempts would likely beget new terms, inviting more definitions.

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Member: Senator Feinstein
Witness: BGen Sandkuhler
Question #: 3

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

Question: It is your position that soldiers have historically had difficulty understanding and applying the principles of Common Article 3?

Answer: No.

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Question #: 4

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

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

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

Answer: Army Regulation (AR) 190-8, sect. 1-5, specifically sections (b) and (c), provide greater detail about the types of prohibited activities and conduct, *vis a vis* "prisoners" and "persons," whether interned or detained. The terms can be subject to different interpretations, because no objective bright line exists by which to measure them. However, looking at them in the context of the entire section can provide *reasonable* guidance about what they mean. (For example, the requirement to protect persons from "public curiosity" compared to the prohibition in the section against photographing for other than facility administration or intelligence/counterintelligence purposes.)

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Hearing Date: April 2, 2006
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Member: Senator Feinstein
Witness: BGen Sandkuhler
Question #: 5

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

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

Answer: No.

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