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Office of the Chief of
Naval Operations
Cent. of the Navy

SEN Durbin
Navy JAG -
RADM MacDonald
SJC, 2 Aug 06
War Crimes & Title 18
Q 1 - Q 14
Approved by:
CAPT Quinn - JAG EA

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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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.

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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.

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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 (mock execution) legal?

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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.

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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."

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

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

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

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

Answer: Yes.

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

Answer. Yes.

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

Answer 1c. Yes.

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

Answer 1d. Yes.

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

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.

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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.

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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.

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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?
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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?

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Answer. No.

Question 11b: In your personal opinion, is waterboarding humane?

Answer. No.

Question 11c: In your personal opinion, is waterboarding consistent with Common Article 3?

Answer. No.

Question 11d: In your personal opinion, is waterboarding consistent with the Army Field Manual?

Answer. No.

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

Answer. Yes.

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

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

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

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

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

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

Answer. Yes.

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

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

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

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

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

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

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Office of Security Review
Department of Defense

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

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

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

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

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

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

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

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

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

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

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

Hearing Date: August 2, 2006
Committee: SJC
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2. Question: On February 7, 2002, President Bush issued a memorandum stating, "As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely, and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva." To your knowledge, has the Department of Defense provided any guidance on the meaning of humane or inhumane treatment?

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

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Hearing Date: August 2, 2006
Committee: SJC
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3. Question: The Schmidt-Furlow Report on the Investigation into FBI Allegations of Detainee Abuses at Guantanamo Bay concluded that an interrogation "resulted in degrading and abusive treatment but did not rise to the level of being inhumane treatment." Do you agree that the treatment of a detainee could be degrading and abusive but not inhumane?

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

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

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

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

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Office of Security Review
Department of Defense

06-C 0055/1

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

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

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

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Department of Defense

06-C-0855/1

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Committee: SJC
Member: Senator Durbin
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10. Please respond to each subpart of this question separately.

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

Answer: Mock execution is not legal.

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

Answer: Mock execution is not humane.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

c. Do you believe the UCMJ is constitutional?

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

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Member: Senator Durbin
Witness: MG Scott C. Black

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

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

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

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Member: Senator Durbin
Witness: MG Scott C. Black

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

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

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

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06-C-0855/1

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
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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
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06-C-0855/3

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

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

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

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

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

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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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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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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 than just simple abuse, or degrading treatment.

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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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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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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 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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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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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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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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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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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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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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Hearing Date: April 2, 2006
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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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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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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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Department of Defense

06-C-0855/3

Hearing Date: April 2, 2006

Committee: SJC

Member: Senator Durbin

Witness: BGen Sandkuhler

Question #: 9a

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

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

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

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

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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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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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Office of Security Review
Department of Defense

06-G 0855/3

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

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

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

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

Answer: No.

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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 #: 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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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 #: 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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Office of Security Review
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

06-C-0855/3

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

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

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

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

Answer: No.

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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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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 #: 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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06-C-0855/3

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

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

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

b. In your personal opinion, is waterboarding humane?

Answer: No.

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06-c-0855/3

Hearing Date: April 2, 2006

Committee: SJC

Member: Senator Durbin

Witness: BGen Sandkuhler

Question #: 11c

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

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

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

Answer: No.

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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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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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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 #: 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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06-C-0855/3

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

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

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

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

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

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06-C-0855/3

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

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

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

c. Do you believe the UCMJ is constitutional?

Answer: Yes.

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06-C-0855/3

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

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

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

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

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

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

Answer: General Rives – Yes.

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

Answer: General Rives –

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

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

Answer: General Rives –

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

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

Answer: General Rives - Yes.

QUESTION FOR THE RECORD
SENATE COMMITTEE ON THE JUDICIARY
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AIR FORCE WITNESS: MAJOR GENERAL JACK L. RIVES, AIR FORCE JUDGE
ADVOCATE GENERAL
AUGUST 2, 2006
COMMITTEE NUMBER QFR 2

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

Answer: General Rives –

It is possible that degrading and abusive treatment might not rise to the level of inhumane treatment. While the terms cruel, inhumane, and degrading may overlap and are often used together, the terms should not be understood to be interchangeable. For example, degrading treatment may involve causing a feeling of fear, anguish, or inferiority that is humiliating and debasing. Inhuman or inhumane treatment may involve causing intense physical or mental suffering that falls short of torture.

Article 16 of the Convention Against Torture prohibits the “cruel, inhuman or degrading treatment or punishment which do not amount to torture.” The Detainee Treatment Act of 2005 refers to the US Reservation to Article 16, which states that the US considers itself bound “only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.”

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

Question: Senator Durbin – At a July 13 hearing of the Senate Armed Services Committee, you testified, “Some of the techniques that have been authorized and used in the past have violated Common Article 3.”

Please provide examples of authorized techniques that violate Common Article 3.

Answer: General Rives –

My response to the question in the July 13th Senate Armed Services Committee testimony related specifically to Paragraph 1(c) of Common Article 3, which provides that it's a violation of Common Article 3 if an individual commits an outrage upon personal dignity, in particular humiliating and degrading treatment. At that hearing, a number of Senators were concerned with some of the broad, expansive definitions that have been given to that particular provision. The authorized techniques that I referred to were those that have been fairly well-publicized that amount to humiliating and degrading treatment. Some of those techniques that were conducted with at least implicit authorization included forced nakedness and sexual humiliation by female interrogators.

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AIR FORCE WITNESS: MAJOR GENERAL JACK L. RIVES, AIR FORCE JUDGE
ADVOCATE GENERAL
AUGUST 2, 2006
COMMITTEE NUMBER QFR 5

Question: Senator Durbin – I recently visited Guantanamo Bay. The chief interrogator at Guantanamo told me that the Geneva Conventions provide sufficient flexibility to interrogate detainees effectively.

Do you agree?

Answer: General Rives – Yes.

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QUESTION FOR THE RECORD
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CRIME PROVISIONS OF TITLE 18
AIR FORCE WITNESS: MAJOR GENERAL JACK L. RIVES, AIR FORCE JUDGE
ADVOCATE GENERAL
AUGUST 2, 2006
COMMITTEE NUMBER QFR 6

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

Answer: General Rives –

I have no record or memory that anyone in my office saw a copy in advance or was consulted on the specific recommendations Mr. Haynes made in his memorandum to Secretary Rumsfeld on November 27, 2002. Prior to that memorandum, my office was tasked to provide comments to the Chairman of the Joint Chiefs of Staff by November 4, 2002, on a list of three categories of proposed interrogation techniques. In his memorandum to Secretary Rumsfeld, Mr. Haynes recommended a subset from that same list of techniques.

The Air Force provided three critical comments to the Chairman. First, we raised “serious concerns regarding the legality of many of the proposed techniques, particularly those under Category III.” Second, we raised the concern that use of coercive interrogation techniques may preclude the ability to prosecute the individuals interrogated in the future because the requirements of humane treatment and coercive nature may render any statements inadmissible. Third, we raised the concern that approval of the proposed techniques would require a change in Presidential policy on the treatment of detainees that President Bush outlined on February 7, 2002.

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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 7

Question: Senator Durbin – please respond to each subpart of this question separately.

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

Answer: General Rives –

When a stress position becomes cruel, inhumane, or torture, it is clearly illegal under both domestic and international law. A directive to a subject to “sit up straight” or “stand at attention” for reasonable periods is likely not a “stress position” under ordinary circumstances. Moreover, what might be called a “stress position” may be legal when done for a brief period of time for a legitimate purpose such as an inspection for contraband. When a stress position is prolonged and conducted for the purpose of improperly coercing a subject prior to interrogation, it is likely illegal.

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

Answer: General Rives –

Recognizing that not every direction involving a physical position is necessarily a “stress position” there are plainly circumstances where forcing a subject to assume certain positions would be inhumane. For example, the excessive and prolonged use of a stress position for interrogation purposes would be inhumane.

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

Answer: General Rives –

The prolonged use of a stress position for interrogation purposes would violate common Article 3 at a point where it rose to a level of cruel treatment or torture.

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

Answer: General Rives –

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No. While under revision, Army FM 34-52, *Intelligence Interrogation* (September 28, 1992) does not authorize stress positions.

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

Answer: General Rives –

Yes. Stress positions used on prisoners of war would violate Article 17 of the Third Geneva Convention, which prohibits coercion and "any unpleasant or disadvantageous treatment of any kind."

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

Answer: General Rives –

Yes, if the stress position is "specifically intended to inflict severe physical or mental pain or suffering" as required by the definition of torture provided in 18 U.S.C. § 2340.

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AIR FORCE WITNESS: MAJOR GENERAL JACK L. RIVES, AIR FORCE JUDGE
ADVOCATE GENERAL
AUGUST 2, 2006
COMMITTEE NUMBER QFR 8

Question: Senator Durbin – please respond to each subpart of this question separately.

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

Answer: General Rives – The use of dogs for guard duty and protection is not illegal even though their use in such contexts may produce stress in some detainees. The fear of the animal may properly deter misconduct and enhance good order and discipline among detainees. However, I do not know of any use of dogs in an interrogation setting for other than guard and protection purposes as outlined above that would be proper in my opinion.

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

Answer: General Rives – As I've indicated above, the use of dogs to deter misconduct and enhance good order and discipline may be proper and humane depending upon the precise facts and circumstances of their employment. However, when dogs are used in interrogation settings for other purposes such use of the animals can be inhumane.

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

Answer: General Rives –

No. Any use of dogs other than guard duty and protection could violate common Article 3 by being inhumane or degrading. The use of dogs may be inhumane if it causes intense physical or mental suffering, and it may be degrading if it causes the detainee fear that is humiliating or debasing based on a religious or cultural belief.

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

Answer: General Rives – Except as outlined above for guard and protection purposes, I do not believe their use in interrogation settings is consistent with the Field Manual.

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

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Answer: General Rives –

Yes, using dogs to induce stress on prisoners of war in interrogation settings except for guard and protection purposes would likely violate Article 17 of the Third Geneva Convention.

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AIR FORCE WITNESS: MAJOR GENERAL JACK L. RIVES, AIR FORCE JUDGE
ADVOCATE GENERAL
AUGUST 2, 2006
COMMITTEE NUMBER QFR 9

Question: Senator Durbin – please respond to each subpart of this question separately.

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

Answer: General Rives – Requiring a subject, for example, to remove his hat in the presence of a senior officer may be legal as would, for example, a requirement to remove clothing that may present a security threat to the interrogator. Under no circumstances, however, would it be lawful to, for example, require a subject to remove clothing for the purpose of degrading or humiliating the subject.

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

Answer: General Rives –

Removal of clothing is more likely to be considered to be humiliating or degrading, not inhumane. However, I would not rule out particular circumstances where such a directive could rise to the level of being inhumane.

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

Answer: General Rives –

I would not object to an interrogator or subject removing a hat or protective gear as a means of generating trust and respect. However, the lewd or suggestive removal of clothing as an interrogation technique is improper. Specifically, the removal of clothing for the purpose of humiliating or degrading the subject is very likely a violation of common Article 3.

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

Answer: General Rives – No.

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

Answer: General Rives –

Yes, except as outlined above, I believe the removal of clothing as an interrogation technique for prisoners of war would violate Article 17 of the Third Geneva Convention.

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AIR FORCE WITNESS: MAJOR GENERAL JACK L. RIVES, AIR FORCE JUDGE
ADVOCATE GENERAL
AUGUST 2, 2006
COMMITTEE NUMBER QFR 10

Question: Senator Durbin – please respond to each subpart of this question separately.

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

Answer: General Rives –

The use of such mock execution scenarios appears to fit squarely within the definition of torture in 18 U.S.C. § 2340 and is clearly prohibited. It is not improper, however, to tell a subject the penalty for unlawful acts and to use that fact as a means to garner cooperation.

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

Answer: General Rives – No.

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

Answer: General Rives – No.

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

Answer: General Rives – No.

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

Answer: General Rives – Yes.

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ADVOCATE GENERAL
AUGUST 2, 2006
COMMITTEE NUMBER QFR 11

Question: Senator Durbin – please respond to each subpart of this question separately.

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

Answer: General Rives –

No. An interrogation technique that is specifically intended to cause severe mental suffering involving a threat of imminent death by asphyxiation is torture under 18 U.S.C. § 2340.

- b. In your personal opinion, is waterboarding humane?

Answer: General Rives – No.

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

Answer: General Rives – No.

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

Answer: General Rives – No.

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

Answer: General Rives – Yes.

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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 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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ADVOCATE GENERAL
AUGUST 2, 2006
COMMITTEE NUMBER QFR 13

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

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

Answer: General Rives – Yes

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