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Public Facing Advocacy Writing

HRW Responds to Questions from the Senate Armed Services Committee

After the Supreme Court's June ruling that the military commissions created by President Bush to try alleged enemy combatants accused of war crimes were unlawful, Congress held hearings in July to explore the future of the military commissions. On July 19, 2006 Katherine Newell Bierman, Counterterrorism Counsel for the U.S. Program, testified before the Senate Armed Services Committee, urging Congress to construct a system based on the UCMJ and MCM that respects the fair trial standards embodied in Common Article 3. She encouraged Congress to uphold the principles of fair justice and humane treatment and to win back the moral high ground that has long been the legacy of the United States' rule of law. Below are HRW's responses to follow up questions asked by the committee members.

Senate Armed Services Committee
Questions for the Record
Hearing on 7/19/06, #06-59

To continue to receive testimony on military commissions in light if the Supreme Court decision in Hamdan v. Rumsfeld"

Witnesses: Massimino, Newell Bierman, Fidell, Mernin, Carafano, Katyal, Schleuter, and Silliman

Responses from Newell Bierman on behalf of Human Rights Watch

Chairman John Warner

Common Article 3

7. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, in your opinion, does the statutory prohibition on cruel, inhumane, and degrading treatment or punishment enacted last year constitute sufficient legal guidance to ensure compliance with Common Article 3?

The Detainee Treatment Act (DTA) provided important legal guidance, reaffirming the U.S.s commitment to humane treatment and making clear that the prohibition on cruel, inhuman, and degrading treatment governs all U.S. officials and agents, including CIA and civilian contractors.

The U.S. military has considered itself bound by the principles of Common Article 3 in every conflict since the Geneva Conventions were ratified in 1949. The DOD Directive issued on July 7, 2006 by Gordon England restates DODs obligation to comply with Common Article 3 and makes clear that DOD policies, directives, executive orders, and doctrine all already comply with the standards of Common Article 3. As Major General Scott C. Black, Judge Advocate General of the Army, told the Senate Armed Service Committee the following week: [W]eve been training to [Common Article 3] and living to that standard since the beginning of our army. And we continue to do so. (7/13/06, SASC). The ranking Judge Advocate Generals of each of the other Armed Services agreed.

The U.S. military has never asked for guidance or complained about the vagueness of the humane treatment principles embodied in Common Article 3 in any of the conflicts it has fought over the past 50 years. The lack of clarity in the current conflict came about because the administration suggested that the Geneva Conventions, including Common Article 3, did not apply. Reaffirming a standard the military knows well the humane treatment standards of Common Article 3 would restore the clarity that has been lost. Congress should also exercise oversight to ensure that abuses like those that occurred at Abu Ghraib do not happen again, ensure that all those responsible for promoting abusive practices are held fully accountable, and require that the humane treatment requirements embodied in Common Article 3 and the DTA are fully respected and applied by every U.S. agency in every operation around the world.

8. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman,

would compliance with that statute constitute compliance with Common Article 3?

Unfortunately, no--not if that statute is given the interpretation put forth by the Bush administration, in various legal opinions. Common Article 3 has always been interpreted as imposing an absolute prohibition on all inhumane conduct, drawing a clear line between prohibited and permissible conduct. We believe that this is precisely what the Congress intended to do when it passed the DTA to forbid absolutely the kinds of abusive interrogation techniques we saw in Abu Ghraib.

The Bush administration, however, has interpreted the DTA as imposing a relative standard, creating a sliding scale of prohibited treatment. Applying a "shocks the conscience" test, the administration claims that what "shocks the conscience" depends on the need. This means conduct that would and should be prohibited under an absolute bar on inhumane treatment, including techniques such as waterboarding, use of snarling dogs, and exposure to extreme hot and cold, might be allowed in certain situations if the interrogator or other official could explain a sufficiently important need. This appears to be the reason why the administration is asking the Congress to interpret Common Article 3 by reference to the DTA.

Given the administrations interpretation of the DTA, if Congress were to agree to this proposal, it would be seen around the world as the U.S. taking a reservation to the Geneva Conventions attempting to unilaterally redefine its terms and limit its protections. No country in the world has ever before formally renounced its humane treatment requirements under Common Article 3 or suggested that the absolute prohibition on inhumane treatment should be replaced with a sliding scale. Such a step would send a message that Americas enemies would all-too willingly amplify and mimic: that the United States affirmatively seeks to limit the scope of the humane treatment requirements.

Senator John McCain

Common Article 3

9. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, the Supreme Court found that Geneva Common Article 3, which bars cruel and humiliating treatment, including outrages upon personal dignity, applies to al-Qaeda. In response, some have argued that the terms included in Common Article 3 are vague and undefined in law of war doctrine. In Tuesdays Senate Judiciary Committee hearing, for example, the head of the Department of Justices Office of Legal Counsel said that some of the terms are inherently vague. Is this your understanding?

As stated in the answer to question 7, the military has long understood, trained to, and applied the humane treatment requirements of Common Article 3, without ever raising concerns about its vagueness. The DOD Directive issued on July 7, 2006 by Gordon England restates DODs obligation to comply with Common Article 3 and affirms that DOD policies, directives, executive orders, and doctrine all already comply with the standards of Common Article 3. The provisions of the Third and Fourth Geneva Conventions -- including Common Article 3 -- are incorporated as required conduct for the armed services in Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and other Detainees, and similar regulations for other services. As Major General Scott C. Black, Judge Advocate General of the Army, told the Senate Armed Service Committee the following week: [W]eve been training to [Common Article 3] and living to that standard since the beginning of our army. And we continue to do so. (7/13/06, SASC). The ranking Judge Advocate Generals of each of the other Armed Services agreed. As these military leaders make clear, the standards of Common Article 3 have long been deemed sufficiently clear for the military to mandate, teach, and apply. No more vague than other guiding principles, the standards of Common Article 3 have been given concrete meaning through usage over time.

10. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, is there a body of opinion that defines Common Article 3?

Yes. There is a well-defined body of law, based on U.S. legal opinions, International Committee of the Red Cross (ICRC) commentary and jurisprudence from international criminal tribunals that defines the nature and scope of the obligations under Common Article 3. U.S. courts have interpreted Common Article 3 in the context of civil litigation brought against human rights abusers under the Alien Tort Claims Act. In Kadic v. Karadic, 70 3d 232 (2d Cir. 1995), for example, the Second Circuit applied the law of Common Article 3 to conclude that the offenses alleged by the appellants -- rape, torture, summary execution would violate the most fundamental norms of the law of war embodied in common article 3. Id. at 243 International criminal tribunals, and commentators, particularly the International Committee of Red Cross (ICRC) have also defined the scope of Common Article 3. The ICRC commentaries have defined the humane treatment standards of Common Article 3 as concern[ing] acts which world public opinion finds particularly revolting acts which were committed frequently during World War II. The case law of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) also provides useful guidance on the definition of a Common Article 3 crime. In examining offences of either cruel treatment or outrages upon personal dignity, the tribunals have made clear that the humiliation suffered must be real and serious and must be so intense that the reasonable person would be outraged and have consistently limited individual criminal liability to serious violations of the humane treatment standards of Common Article 3. The statute for the International Criminal Court (ICC) in article 8 2 (c) defines war crimes as serious violations of Common Article 3, and the ICTY has said that serious violations of Common Article 3 are prosecutable as war crimes Kunarac (Appeals Chamber), June 12, 2002 para. 68. The Court has also repeatedly set the standard that for a breach of IHL to be a war crime the violation must be serious it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Tadic, (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995.

11. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, does the vagueness of these terms require a change in Americas relationship to the Geneva Conventions?

Absolutely not. The U.S. has endorsed , upheld, and promoted the humane treatment standards embodied in Geneva since it was ratified in 1949. As explained in the answers to questions 7 and 9, the U.S. military has long trained to and sought to apply these standards without any complaints about vagueness. Any attempt to redefine the United States relationship with Geneva will undoubtedly be seen as the U.S. attempting to unilaterally redefine its terms and limit its protections. No country in the world has ever before formally renounced or sought to define away its humane treatment and fair trial obligations under Common Article 3. Such a step would send a

message that Americas enemies would all-too willingly amplify and mimic: that the United States affirmatively seeks to limit the scope of the humane treatment requirements. Carving out exceptions now would set a dangerous precedent, undermining humane treatment standards that protect U.S. soldiers if captured by the enemy in future conflicts.

Put another way, the costs of any change would be great and the benefits few to none. When Senator Graham asked the ranking Judge Advocate Generals of each of the armed services at the July 13 hearing before this committee, Can we win the war and still live within Common Article 3?, all answered with an unequivocal yes. Former Judge Advocate General of the Navy, Rear Admiral John Hutson added: In fact, Id turn it around. I dont think we can win the war unless we live within Common Article 3. (7/13, SASC Hearing).

12. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, some have suggested that we put in statute that the prohibitions contained in Common Article 3 are identical to the prohibition against cruel, inhumane, and degrading treatment contained in last years Detainee Treatment Act. In that bill, we defined cruel, inhumane, and degrading treatment with reference to the 5th, 8th, and 14th amendments to the U.S. Constitution. Is this a good idea?

Absolutely not. As explained in the answer to question 8, Common Article 3 has always been interpreted as imposing an absolute prohibition on all inhumane conduct, drawing a clear line between prohibited and permissible conduct. The DTA, in comparison, has been interpreted by this administration as imposing a relative standard, a sliding scale of prohibited treatment. Applying a "shocks the conscience" test, the administration claims that what "shocks the conscience" depends on the need.

Some have suggested that defining the humane treatment standards of Common Article 3 in accordance with the DTA would add clarity to uncertain language in Common Article 3. But what is cruel, inhuman, and degrading is not inherently more clear than what is humiliating and degrading. In contrast, an absolute standard which establishes definitive boundaries between prohibited and approved conduct is certainly clearer and easier to teach and train to than a standard which varies according to the circumstances. In fact, as both Gordon England's July 7 memo - and the statements of the JAGs have made clear - the military has long been teaching and training to the Common Article 3 standards. The military has never concluded that the standard was too unclear to teach, train to, and apply.

13. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, what are the implications of our redefining Common Article 3 in this way?

See answers to questions 8 and 11.

How Congress Should Proceed

14. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, and Mr. Schleuter, in Mr. Sillimans prepared testimony, he stated his view that, as a matter of domestic law, Congress could restrict the application of Common Article 3, but that doing so might not pass judicial muster and would invite additional litigation and more years of legal uncertainty. Could you explain to us why the Supreme Court might not uphold such legislation as Professor Silliman suggests?

When the U.S. affirmed and ratified the Geneva Conventions in 1949, it committed to applying the humane treatment and fair justice requirements of Common Article 3. Common Article 3 is part of customary international law. Kunarc (Appeals Chamber) June 12, 2002 para. 68. The legislative authorization of military commissions that fail to meet the fair justice requirements of Common Article 3 would put the U.S. out of compliance with its treaty obligations and would be illegal under a set of core customary international law norms.

15. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, and Mr. Schleuter, and could you also give the Committee a more detailed explanation of how such legislation would create more litigation and legal uncertainty?

The president authorized the use of military commissions in March, 2002. For the past four years, the military commissions rather than accused terrorists have been on trial, and appropriately so. In Hamdan, the Supreme Court laid out basic principles of fair justice, none of which are reflected in the military commission rules: the tribunal must be fair and impartial; the accused has the right to be present at trial and provided all of the evidence presented to the factfinder; the accused cannot be convicted on the basis of unreliable evidence that he has not been able to confront, such as evidence obtained through torture; and the accused is entitled to an independent appeal of any finding of guilt. If Congress were to authorize commissions that violated these basic fair trial standards, it would undoubtedly lead to another round of litigation, thus delaying even longer the time when the U.S. holds accountable those who have committed war crimes.

16. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman in his prepared testimony, Professor Schleuter states that it is appropriate for Congress to map out only broad policy guidelines for implementing military commissions, and leave to the President and the Department of Defense (DOD) the task of more specifically setting out the procedures and rules to be used. Mr. Fidell from the National Institute of Military Justice (NIMJ) seems to agree with that approach. Could the panel address why Congress should set specifically the procedures and rules to be used for military commissions?

There is nothing inherently wrong with legislation that sets policy guidelines and delegates decision-making regarding precise rules and procedures. But any delegation should be made to an independent body of experts, such as the current and former ranking Judge Advocate Generals, with the experience required to design rules that are both fair and lawful and not to the president and DOD. The President and DOD have already proven far too willing to do away with basic fair trial standards to be entrusted with the responsibility of crafting commission rules and procedures. Twice, the administration crafted rules and procedures to govern military commissions first in March, 2002, and then again in August, 2005. Neither system withstood Supreme Court scrutiny. Now, rather than adapting in response to the Supreme Court decision, the administration has circulated a draft proposal that incorporates many of the same deficiencies of the earlier systems that were identified by the Supreme Court. At this point, the administration should not be entrusted with the task of designing a system that is sufficiently fair to pass judicial scrutiny.

17. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, could each of you comment on Mr. Mernins recommendation that Congress pass legislation appointing an expert panel with the mandate of

advising Congress about the best way to establish a military commission system that would respond to the Supreme Court's decision in Hamdan?

The process of creating a fair system of justice is complex and confusing, with interacting rules and procedures, and requires great care. The creation of an independent and expert panel to advise Congress is an excellent idea that would give any commissions established by Congress greater legitimacy. A body of experts would be able to dispel the myth that the UCMJ and MCM do not provide a workable system of justice to try those accused of war crimes.

Attorney General Gonzaless Testimony on Hamdan

18. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, in testimony before the Senate Judiciary Committee, Attorney General Gonzales stated that the existing military commissions that were struck down by Hamdan take into account the situational difficulties of the war on terrorism and thus provide a useful basis for Congresss consideration of modified procedures. Do you agree with the suggestion that the commissions should be the starting point for legislation?

No. The commissions that the Attorney General continues to champion have failed to bring a single accused terrorist to justice in their four years of operation, even as the Department of Justice has reported having prosecuted over 260 terrorism cases in federal court during the same time period. Moreover, the Commissions flaws are both structural and procedural affecting the entire system - and cannot provide a useful starting point for legislation. Even the military commissions own prosecutors have complained that the commissions were unfair. The Appointing Authority convened the commission, brought the charges, selected the panel determining guilt or innocence, oversaw the prosecutor and decided dispositive issues of law that arose in the middle of trial. This is the equivalent as the executive acting as judge, prosecutor, and jury. Moreover, as the Supreme Court concluded, the commissions denied the most basic fair trial rights to defendants, including the right to be present and to confront the evidence presented against them.

19. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, why would someone suggest that the commissions and not the Uniformed Code of Military Justice (UCMJ) should be the starting point for legislation?

It is unclear why someone would suggest this. When Senator Graham asked the ranking Judge Advocate Generals of each of the armed services: We need to have military commissions as uniformed as possible with the Uniform Code of Military Justice, because thats the root source of the law of military commissions. Is that correct? (7/13, SASC), all answered yes. Enacting legislation based on the military commissions rather than the UCMJ will undoubtedly lead to a whole new round of litigation. Military commissions rather than suspected terrorists remain on trial. The UCMJ, in contrast, is a tried and true system, approved by the Supreme Court, and created in response to concerns about the inadequacies of military commissions hastily put together during World War II. It provides the appropriate starting point for any Congressional legislation.

20. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, in testimony before the Senate Judiciary Committee, Attorney General Gonzales stated that no one can expect members of our military to read Miranda warnings to terrorists captured on the battlefield, or provide terrorists on the battlefield immediate access to counsel, or maintain a strict chain of custody for evidence. Nor should terrorist trials compromise sources and methods for gathering intelligence, or prohibit the admission of probative hearsay evidence. Mr. Gonzales suggests that each of these examples would happen if the UCMJ were used as the basis for detainee trials. Do you agree with Mr. Gonzaless assessment?

As described in my testimony, these are all red herrings. First, the UCMJ does not require the military to read Miranda warnings or provide counsel to those captured on the battlefield. Under the UCMJ, Miranda warnings and access to counsel are only required when an individual is being interrogated for law enforcement purposes. They are not required when an individual is questioned for interrogation purposes, and certainly are not required to be given when capturing suspected terrorists on the battlefield. Second, the UCMJ and Manual for Court Martial (MCM), which contains the rules of evidence, do not require strict chain of custody for evidence to be introduced at trial. They do, however, require some sort of showing that the evidence is what it is purported to be a standard that should apply in any trial that is fair. Third, the UCMJ and MCM protect against the disclosure of any evidence that would compromise intelligence gathering and give the government broad latitude to introduce substitute forms of classified evidence to protect intelligence sources and methods. Fourth, the UCMJ and MCM include 24 exceptions to the prohibition against hearsay, including a residual exception designed to allow in statements of any witness who is unavailable. These rules provide broad latitude to admit hearsay.

Specific Trial Procedures

21. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, in testimony last week before the Senate Judiciary Committee, Steven Bradbury from the Department of Justice (DOJ) stated that a good example to look to for an acceptable hearsay rule is the international criminal tribunals, for example, for the former Yugoslavia and for Rwanda, which regularly allow the use of hearsay evidence, as long as the evidence is probative and reliable in the determination of the fact-finder, and as long as it is not outweighed by undue prejudice. Do you believe that this is an acceptable hearsay rule?

As explained in my testimony, on page 11, these rules cannot be considered in isolation. While the international tribunals allow the fact-finder to admit any relevant evidence that he or she deems to have probative value, other rules protect against the use of unreliable evidence and the introduction of statements obtained through torture or coercion. Importantly, both the ICTY and ICTR contain an additional important protection, Rule 92 bis, which ensures that hearsay evidence can only be used as corroborating evidence, and cannot be used to establish the central facts of the case - acts or conduct of the accused that go to proof of the wrongdoing charged. Moreover, the ICC and ICTY both contain clear prohibitions on evidence that is obtained by a violation of internationally recognized human rights norms, such as a prohibition against evidence obtained through torture. And these international tribunals are made up of legally trained judges who have experience making fine distinctions on the reliability and value of different forms of evidence that a jury or even a panel of non-lawyer officers simply wont have.

In sum, the ICTY and ICTR hearsay rule would not be acceptable unless accompanied by other critical protections, including, at a

minimum, a prohibition against evidence obtained through torture and cruel, inhuman, and degrading treatment; a prohibition on the use of hearsay evidence to establish the central facts of the case; and a meaningful opportunity to challenge a statements reliability.

22. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, is this how the hearsay rule used by the international criminal tribunals works?

See answer to question 21.

23. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, does the UCMJ and specifically Military Rule of Evidence 505, adequately protect classified evidence? If not, what do we need to do to enhance the protection of classified information in detainee trials?

Yes. There is widespread agreement among experienced practitioners, judge advocate generals, and academics that the Military Rules of Evidence provide strong protections against the disclosure of classified evidence. If disclosure of classified evidence would harm national security, the government is entitled to submit a wide array of substitute forms of the same information, including a redacted version of the classified information, a summary of the information, or even a summary of the facts that the evidence would tend to prove. The rules ensure that no classified evidence is provided to the accused if its disclosure would in any way harm national security.

24. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, in testimony before the Senate Judiciary Committee and the Senate Armed Services Committee last week, much was made of the potential problems posed by Article 31(b) of the UCMJ which essentially sets up the militarys Miranda rights in the context of detainee trials. Is it the case that this Article ties our hands with respect to intelligence gathering?

No. As stated in my testimony on pages 11-13 and in answer to question 20, Miranda warnings are not required when a detainee is being interrogated for intelligence purposes. They are only required when someone is being interrogated for law enforcement purposes. The claims that Article 31(b) would impose an obligation on troops to give Miranda warnings before they capture and question suspected terrorists on the battlefield is a straw man, put forth to mislead and confuse the committee.

25. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, if the militarys Miranda rule is truly problematic, how should we fix it?

The UCMJ Miranda rule is not problematic. It ensures that the accused are not coerced into incriminating themselves when being interrogated for law enforcement purposes, while leaving interrogators free to question detainees for intelligence purposes without issuing Miranda warnings. Moreover, any statements that are elicited during intelligence interrogations can still be admissible in court, even if no Miranda warnings have been given.

26. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, at the House Armed Services Committee hearing on Hamdan, Mr. Bradbury of the Justice Departments Office of Legal Counsel said the Administration wishes to maintain flexibility in introducing evidence coerced from detainees. Specifically, he said, We do not use as evidence in military commissions evidence that is determined to have been obtained through torture. But when you talk about coercion and statements obtained through coercive questioning, there's obviously a spectrum, a gradation of what some might consider pressuring or coercion short of torture, and I dont think you can make an absolute rule. Is Mr. Bradbury correct in his analysis of coercion and the need to introduce coerced evidence in detainee trials?

As Major General Scott C. Black, Judge Advocate General of the Army told the Senate Judiciary Committee: I dont believe that a statement that is obtained under coercive, under torture, certainly, and under coercive measures should be admissible. (8/2, Sen. Hearing). All of the other ranking Judge Advocate Generals agreed. This rule is particularly important given the administrations extremely narrow definition of torture, which does not even include waterboarding (a form of mock drowning). The governments proposed rule would allow the use of evidence obtained through a wide array of cruel and inhuman practices that dont meet the governments definition of torture use of snarling dogs, naked pyramids of prisoners, prolonged exposure to extremes of heat and cold. Congress would be effectively sanctioning such practices, inviting their continued use. As Senator McCain stated in the August 2, 2006 hearing before this committee: I think that if you practice illegal, inhumane treatment and allow that to be admissible in court, that would be a radical departure from any practice [of] this nation.

Specific Trial Procedures

27. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, in a letter dated July 10, 2006, and addressed to Chairman John Warner of the Senate Armed Services Committee and Chairman Arlen Specter of the Senate Judiciary Committee, a group of retired Judge Advocates state that we should bring accused terrorists to justice in military trials based on the UCMJ and Manual for Courts Martials (MCM). The letter goes on to say that, in developing legislation to address the Hamdan ruling, it should start from the premise that the United States already has the best system of military justice in the world but that narrowly targeted amendments to the UCMJ to accommodate specific difficulties in gathering evidence during the time of war would be acceptable. If the current rules are not adequate, what changes need to be made to those rules?

The claims that the UCMJ is not equipped to handle the difficulties of trying individuals captured during wartime are largely overstated. In fact, the UCMJ is designed explicitly to dispense military justice for conduct during armed conflict, including the prosecution of prisoners of war who commit abuses during times of war. Any changes to the UCMJ should be narrowly tailored, limited, and based on demonstrated necessity.

28. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, how, in your view, can Congress best fashion legislation that will stand up to Supreme Court scrutiny?

The Supreme Court laid out a way forward. The UCMJ and MCM constitute a tried and true system and should serve as the starting

point for any legislation. Any deviations from the UCMJ and MCM need to be narrowly tailored and carefully crafted to respond to an identified need.

29. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, the Hamdan Court appeared to be concerned about an accused and his civilian counsel being excluded from, and precluded from ever learning what evidence was presented during, any part of the military commission trial. How should this concern be addressed?

This concern is adequately dealt with in Rule 505 of the MCM, dealing with classified evidence. As explained in the answer to question 23, these rules allow for all kinds of substitute evidence to be provided in the place of classified evidence. But the bottom line rule still applies: Whatever substitute version of the evidence is shared with the accused is the same evidence that is presented to the factfinder. No one should be convicted on the basis of evidence that he was never provided and had no opportunity to contest.

30. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, Dr. Carafano suggested in his testimony that to win the war of ideas in the war on terrorism Congress should essentially ratify the military commissions that have been overturned by the Supreme Court. I would suggest that there are some here who believe that the exact opposite is true: That to win the war of ideas we need to put in place a system that is based on the UCMJ and that respects Common Article 3, and that only that way will we show the world that we are truly different from our enemy in this war. Would the panel care to comment?

These trials will undoubtedly be some of the most scrutinized trials in the world. It is a chance for the United States to showcase to the world its respect for the rule of law, its principles of fair justice and humane treatment and to win back the moral high ground. A system based on the UCMJ and MCM that respects the fair trial standards embodied in Common Article 3 is the right way forward.