

Senator Leahy:

1. Were senior officials from the Pentagon, including the Judge Advocate Generals, consulted with respect to the President's Military Order of November 13, 2001, regarding military commissions?

I cannot address what consultations may have occurred with respect to the formulation of the President's Military Order of November 13, 2001.

2. According to DoD's own numbers, of the approximately 760 people who have been held at GTMO, 310 have been transferred to other countries and another 120 are awaiting transfer. How many of those who have been released from GTMO have reappeared on the battlefield? Is it possible that the unreliability of CSRTs is putting our armed service members at risk?

ANSWER: The United States has no desire to hold detainees any longer than necessary, but transfers are not without risk. We make a determination about the transfer of a detainee based on the best information and evidence available at the time, both classified and unclassified. Remember, some of these individuals are highly skilled in concealing the truth. Al Qaeda's training manual, a.k.a. the Manchester Manual, stresses the importance of deception tactics, techniques, and procedures. Once the individual is transferred, that person becomes the responsibility of their home country and is subject to that country's laws. About 15 detainees who have been released are reported to have returned to the fight.

The question confuses the purpose of the CSRTs and ARBs. Between August 2004 and January 2005, various Combatant Status Review Tribunals (CSRTs) reviewed the status of all individuals detained at Guantanamo, in a fact-based proceeding, to determine whether the individual is still classified as an enemy combatant. As reflected in the Order establishing the CSRTs, an enemy combatant is "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." Each detainee had the opportunity to contest such designation. In addition, the detention of each Guantanamo detainee is reviewed annually by an Administrative Review Board (ARB). The ARB assesses whether an enemy combatant continues to pose a threat to the United States or its allies, or whether there are other factors bearing on the need for continued detention. The process permits the detainee to appear in person before an ARB panel of three military officers to explain why the detainee is no longer a threat to the United States or its allies, and to provide information to support the detainee's release. The recommendation of the ARB panel is provided to the Designated Civilian Official (DCO), who then makes a determination as to whether a particular enemy combatant should continue to be detained, be transferred, or released.

3. In response to a question from Senator Feinstein, you stated that the detainee population in the war on terror is approximately 1,000. You further stated that about 450 are being held at Guantanamo Bay.

(A) Where are the other 550 held, and how many of them are being held by the Department of Defense?

ANSWER: The Department of Defense also detains detainees at its Theater Internment Facility at Bagram, Afghanistan. The Department of Defense has approximately 500 detainees under its control at this facility. Note that these numbers are in constant flux as new detainees are seized and some detainees are released from U.S. control. Additionally, in September 2005, the Department of Defense provided this information to the Senate Armed Services Committee and the House Armed Services Committee in compliance with the Ronald Reagan National Defense Authorization Act of Fiscal Year 2005, section 1093(c)(2)(C). The aggregate summary of the number of persons detained by the Department of Defense as enemy prisoners of war, civilian internees, and unlawful combatants was provided in a classified annex.

(B) Of those detainees not held by the Department of Defense, does the Administration acknowledge that Common Article 3 of the Geneva Conventions applies to them and they are being treated accordingly? If the Administration does not acknowledge that Common Article 3 applies to detainees held by agencies other than the Department of Defense, on what basis does it disagree?

ANSWER: I represent the Department of Defense and cannot speak on behalf of the Administration. Regarding detainees under Department of Defense control, the Supreme Court has resolved the question of its applicability to the conflict with al Qaeda. Detainees under Department of Defense control will continue to be treated humanely and in compliance with the provisions of the Detainee Treatment Act of 2005 and Common Article 3.

4. You testified on July 11 that Congress should simply “ratify” the military commission procedures established by the Bush-Cheney Administration and struck down by the Supreme Court. Two days later, at a Senate Armed Services Committee hearing, MG Scott C. Black, Rear Admiral James E. McPherson, MG Jack L. Rives, and BG Kevin M. Soundkulher (sic) all testified that these procedures should not be ratified by Congress.

(A) What is the Administration’s official position on this question?

ANSWER: I am not in a position to speak for the Administration. I can, however, address the views of the Department of Defense. I stated numerous times in my testimony that the most *expeditious* way of moving forward would be to essentially ratify the military commissions process that is already in place (p. 25 and 26). I also stated that we should take a look at the commission procedures as they're laid out, and to the extent that Congress believes that they demonstrate what the president has set out as the standard -- that is, a full and fair trial - those procedures should be ratified (p. 51). However, I made it very clear in my testimony that this Department stood ready to work with Congress to assess the best way forward in addressing these critical matters (p. 6). And in fact, the Military Commissions Act of 2006, which the Department supports, is the product of that collaborative effort.

(B) Please identify any specific facts, arguments, or opinions offered by these officers at the Armed Services hearing with which you disagree.

ANSWER: As indicated above, I did not state that Congress should simply “ratify” the military commission procedures; I said that it would be the most expeditious way forward. However, I do not believe the views expressed by the Judge Advocates General are inconsistent with my testimony. Everyone agreed that we needed to review the procedures and determine which procedures met the standards and which needed to be modified. Even amongst the Judge Advocates General, there were varying views on the best way to undertake that task. Major General Black stated that it would be a monumental task to start with the Uniform Code of Military Justice (“UCMJ”) as a baseline and modify it; he suggested starting with the current commissions process and incorporating aspects of other sources. (p. 54) Brigadier General Sandkuhler testified that the outcome should be a balance between current commission procedures and the “gold standard” of the UCMJ and that whichever method Congress chooses “require[s] detailed examination.” (p. 11) Rear Admiral McPherson stated that where we end up is more important than where we start. (p. 36) Finally, Major General Rives indicated that the UCMJ provides a great structural starting point, as it is a tremendous system and model. (p. 11) Everyone agreed that regardless of where you start in creating the new process, you will end up somewhere in the middle, and the Military Commissions Act of 2006 is such a moderate product.

5. A recent New York Times article called attention to the infiltration of neo-Nazis in the military. A Defense Department investigator was quoted as saying that recruiters know they are allowing white supremacists to join the armed forces, but the pressure on recruiters is so great due to the unpopularity of the war in Iraq that recruiters let them in. That is alarming by itself, but what concerned me even more was that this Defense Department investigator says that even when he provided evidence on the presence of extremists--320 in the past year from one investigator--commanders will not remove them. What is the Department of Defense doing to prevent extremists from entering the military in the first place, and why are they not being removed when they are discovered?

ANSWER: The Department of Defense policy regarding participation by military personnel in extremist groups is as follows and has remained the same for ten years: Military personnel must reject participation in organizations that espouse supremacist causes; attempt to create illegal discrimination based on race, creed, color, sex, religion, or national origin; advocate the use of force or violence; or otherwise engage in efforts to deprive individuals of their civil rights. Active participation, such as publicly demonstrating or rallying, fund raising, recruiting and training members, organizing or leading such organizations, or otherwise engaging in activities in relation to such organizations or in furtherance of the objectives of such organizations that are viewed by command to be detrimental to the good order, discipline, or mission accomplishment of the unit, is incompatible with military service, and is, therefore, prohibited. Commanders have authority to employ the full range of administrative procedures, including separation or appropriate disciplinary action, against military personnel who actively participate in such groups. Functions of command include vigilance about the existence of such activities; active use of investigative authority to include a prompt and fair complaint process; and use of administrative powers, such as counseling, reprimands, orders, and performance

evaluations to deter such activities. The Military Departments are charged with ensuring that this policy on prohibited activities is included in initial active duty training, pre-commissioning training, professional military education, commander training, and other appropriate Service training programs.

I am unaware of any changes in either recruiting or separation policy or practice since September 11, 2001, regarding members of extremist groups.

Senator Feinstein:

1. In response to one of my questions, you indicated that the United States currently detains about 1,000 enemy combatants. Only about 450 of those, however, are at Guantanamo. Can you confirm these numbers, and also whether that includes detainees in Iraq? Does this figure of 1,000 include persons held by the CIA, DIA, or other intelligence agencies?

ANSWER: See my response to Senator Leahy's question 3. Additionally, these numbers included detainees under Department of Defense control in Afghanistan and at Guantanamo Bay, Cuba, and not Iraq.

2. If the United States creates exceptions to Common Article 3 of the Geneva Conventions, or declares that certain protections it provides are not enforceable in our courts or military commissions, what limitations, if any, will exist on other countries' abilities to create exceptions to their own to Common Article 3, or the Geneva Conventions generally, when trying their own officials and troops in their courts or military commissions?

ANSWER: Reciprocity in practices among States who are parties to the same treaty is an important consideration. The Geneva Conventions require States parties, among other things, to take the necessary steps to ensure compliance with their obligations. Such compliance is a matter of state action.

The United States implements its obligations under the Geneva Conventions in a variety of ways, both statute and policy based. For example, the War Crimes Act, 18 U.S.C. § 2441, makes a grave breach of the Geneva Conventions a criminal offense. But neither the conventions nor U.S. statutes create rights for individuals to seek to enforce U.S. Geneva Convention provisions in U.S. courts.

U.S. Armed Forces personnel captured in the course of an armed conflict have the status of prisoner of war under the Third Geneva Convention. The full scope of that convention's provisions and protections would apply in those circumstances, not the more limited protections of Common Article 3. In every armed conflict, the United States has demanded always that captured U.S. personnel be afforded all the rights and privileges of their lawful status. It has not always been the case, however, that other nation parties to the Geneva Conventions have afforded our personnel such protections. Recall the experience of U.S. POWs held by the North Vietnamese.

3. What international consequences do you foresee, if any, if Congress were to place new limitations on the applicability or enforceability of Common Article 3 of the Geneva Conventions.

ANSWER: The standards governing the treatment of detainees by United States personnel in the War on Terror should be certain, and those standards should be defined clearly by U.S. law, consistent with our international obligations. The Military Commissions Act of

2006 defines Common Article 3 of the Geneva Conventions; it does not create new limitations on its applicability or enforceability.

4. Is it your understanding that the UCMJ was intended to cover non-POWs? From the time when the UCMJ was enacted until 2001, was UCMJ protections ever denied to prisoners, or placed into a separate category any particular type of enemy? During the Vietnam War, did the United States give the protections of the Geneva Conventions to the Viet Cong, even though they did not follow the laws of war? If so, why would similar procedures not suffice in the al Qaeda context?

ANSWER: The United States provided captured Viet Cong and North Vietnamese forces with prisoner of war protections out of our interest in protecting captured U.S. military personnel and civilians, following the murder of three U.S. military personnel in Viet Cong hands. Captured U.S. personnel did not benefit from this policy decision, however, and they suffered confinement under brutal conditions, torture, malnourishment, and other hardship up to and including murder at the hands of their captors.

An historical and fundamental premise of the law of war is that private citizens may not engage in combatant acts. No law of war treaty requires that a State provide prisoner of war status or protections to civilians who unlawfully take up arms against that State. Doing so would place innocent civilians at greater jeopardy, and would reward terrorists for their violations of the law of war.

The attack of civilian objects and the death of almost 3,000 innocent civilians on September 11, 2001; the illegal attack of other civilian objects, such as United Nations and International Committee of the Red Cross facilities in Iraq; and the subsequent kidnapping, torture and murder of innocent U.S. and foreign civilians, such as the May 11, 2004, beheading of Nicholas Berg, provides no expectation of even limited application of the law of war by al Qaeda.

5. In his written testimony, Lt. Commander Swift spent much of his time outlining abuses that have occurred during the military commissions. In addition, he has provided emails from some military prosecutors that discussed serious allegations of misconduct. Has there been any investigation into these charges? If so, what has been done? Please also produce a copy of any report or investigation into these allegations.

ANSWER: The Department of Defense Inspector General conducted an investigation into the allegations contained in the e-mails mentioned and completed that investigation in April 2004. The investigation did not substantiate any of the explicit or implied criminal allegations contained in the e-mails. Further, the investigation found no evidence of suppression or destruction of evidence. Following an operational assessment of the Office of the Chief Prosecutor, changes were made in personnel assigned and supervisory responsibilities. A redacted copy of the Department of Defense Inspector General's report is located at:

6. Is this “war on terror” different than a conventional war? What do you consider a triggering moment or event that would allow the United States to declare that the “war on terror” has come to an end? If this war on terror continues for decades, can our Government hold individuals detained at Guantanamo without charges for 10 years?, 20 years, 50 years?, even indefinitely?

ANSWER: The war on terror is different than a conventional war because the United States is at war against al Qaeda, an international terrorist organization. Al Qaeda is not a state party to the Geneva Conventions and does not conduct its operations in accordance with the customs and laws of war.

The law in regard to this matter is the law of war. It is certainly our hope that hostilities will not continue for decades, but the law permits detaining enemy combatants until the cessation of hostilities.

Senator Kennedy:

1. After your discussions with Marion Bowman, did you discuss these abuse allegations with Mr. Haynes? What actions did he take in response to the FBI allegations? Did Mr. Haynes discuss these matters with the Army's Criminal Investigation Command? Did he direct the Army not to investigate these allegations?

ANSWER: I did not meet with the FBI General Counsel or any attorney from that office. My recollection is that I had a telephone conversation with Marion Bowman from the FBI Office of General Counsel in the summer of 2003. During that telephone call, I ascertained that the time frame of the concerns being expressed was prior to January 2003, the month during which the Secretary of Defense responded to Mr. Haynes' reports about concerns brought to his attention by an official within the Department of Defense by suspending a number of the interrogation techniques being employed with respect to one detainee at Guantanamo. Mr. Bowman did not report specific techniques or detainees to me or report any concerns about techniques employed after January 15, 2003. I asked him to provide me with any details or additional information if he later learned of any. I do not recall discussing this telephone call with Mr. Haynes. In the absence of further specifics relating to the concerns expressed and given the time frame of the interrogations that appeared to be the source of the FBI concerns, there was nothing more to be done since the Secretary had taken clear action in January 2003 to limit the types of lawful techniques to be used at Guantanamo and again in April 2003 to direct a new set of techniques for use at Guantanamo that also were well within the law and based on a solid policy foundation.

2. Did Mr. Haynes approve the techniques to which the FBI objected? Specifically, did he approve the practices listed below (address each practice individually): DoD interrogators impersonating FBI agents? Sexual humiliation? Intense isolation for over three months?

ANSWER: See answer above.

As stated above, I do not recall discussing this phone call with Mr. Haynes.

Additionally, the General Counsel of the Department of Defense does not approve interrogation techniques. The interrogation techniques authorized by the Secretary of Defense on December 2, 2002, and whose authorization was rescinded on January 13, 2003, did not include the interrogation techniques listed in your question.

3. Please provide us with a copy of the May 30, 2003 electronic communication that Marion Bowman discussed with you.

ANSWER: I am not aware of such an electronic communication.

Naval Criminal Investigative Service Reports of Abuse

Alberto Mora, the Navy General Counsel, met with you on January 13, 2003, to discuss Naval Criminal Investigative Service reports of abuse at Guantanamo, including dressing

detainees in female underwear, use of stress positions, and coercive psychological procedures. He relayed to both you and Mr. Haynes that such techniques were unlawful and contrary to American values.

1. Mr. Mora expressed great concern over a December 2, 2002 memorandum in which Secretary Rumsfeld approved these harsh techniques. Were you involved in the drafting of that memorandum? Did you and Mr. Haynes discuss why the Department of Defense General Counsel was the principal drafter of these memos, instead of referring the request for harsh techniques to the Army JAG or the Legal Advisor to the Chairman of the Joint Chiefs?

ANSWER: The Commander of U.S. Southern Command forwarded Major General Dunlavey's request to the Chairman of the Joint Chiefs of Staff. I do not recall consulting with the Judge Advocates General on the request, nor do I know whether the Chairman's Legal Counsel consulted with them or their offices, but as an operational matter raised by a Combatant Commander, it would not have called for consultation with the Judge Advocates General. I did participate in the drafting of the November 27, 2002 memorandum.

2. Did you ever discuss Alberto Mora's allegations with Mr. Haynes? Did you have any reservations over the use of these techniques?

ANSWER: I believe Mr. Mora did not provide his views regarding the December 2, 2002, memo until approximately three weeks after the Secretary's approval of the use of additional interrogation techniques.

Mr. Haynes' action memo dated November 27, 2002, reflects that he discussed the Commander, U.S. Southern Command's request with the Deputy Secretary of Defense, the Chairman of the Joint Chiefs of Staff, and the Under Secretary of Defense for Policy before recommending that only a subset of the requested techniques be approved.

I did discuss Mr. Mora's concerns with Mr. Haynes. Our discussion contributed to Mr. Haynes' decision to inform the Secretary of Defense of the reports from Guantanamo of concerns about the method of interrogating one detainee.

Senator Kyl:

1. If the United States were forced to conduct war-crimes trials of Al Qaeda detainees under the UCMJ, what is the general default statute of limitations (i.e., other than for murder and rape) that would apply? What implications does this have for prosecution of those who organized and plotted the September 11 attacks?

ANSWER: Offenses under the Uniform Code of Military Justice (“UCMJ”) that are not punishable by death have a five-year statute of limitations. The general statute of limitations is found at 10 U.S.C. 843(b)(1), which states:

Except as otherwise provided in this section (article), a person charged with an offense is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command.

The UCMJ provides for several exceptions to this rule, some related to the unavailability of the accused and an exception related to the exigencies of a time of war.

10 U.S.C. 843(e) states that:

For an offense the trial of which in time of war is certified to the President by the Secretary concerned to be detrimental to the prosecution of the war or inimical to the national security, the period of limitation prescribed in this article is extended to six months after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress.

The statute of limitations may make such prosecutions problematic. Either the statute of limitations would run or, if the wartime certification were used, we would not be able to prosecute those individuals until after the cessation of hostilities, which may be a long time from now.

2. It is my understanding that, under the UCMJ, the right to counsel and the right to be informed of one’s rights attaches even earlier than it does in the civilian criminal-justice system. Please describe the UCMJ rules governing this area. Assuming that Al Qaeda detainees are “in custody” once they are captured by U.S. forces, and assuming that they are automatically under suspicion of criminal activity as soon as they are captured simply by the fact that they are members of a terrorist, criminal organization, what implications does application of the UCMJ have for the ability of military prosecutors to use statements obtained from these detainees since the time of their capture? What implications does application of the UCMJ have for the ability of prosecutors to introduce evidence obtained as a result of information elicited from such statements?

ANSWER: Article 31 of the UCMJ requires members of our Armed Services to provide *Miranda*-type warnings before questioning any individual subject to the UCMJ suspected of criminal wrongdoing, whenever that questioning may be deemed to be part of an official law-

enforcement investigation. These rights are broader than the rights afforded to criminal defendants in the civilian system. Indeed, unlike civilian *Miranda* rights warnings, military Article 31, UCMJ, rights warnings are required regardless of whether the suspect is in law enforcement custody. In addition, when the suspect is placed in custody and is to be questioned by law enforcement or other persons subject to the UCMJ, the suspect is entitled to be advised that he or she may consult with counsel and have such counsel present during the interrogation or questioning. When counsel is requested, counsel must be present before any subsequent custodial interrogation may proceed. The failure to provide a required rights warning, regardless of whether the statement is obtained for law enforcement or intelligence purposes, generally precludes the use of those statements as evidence, and may preclude the use of any additional evidence or information derived from those unwarned statements.

The Court of Military Appeals held in the *Lonetree* case that intelligence agents who were not members of our Armed Forces did not have to provide Article 31 warnings when conducting an interrogation wholly divorced from a military law-enforcement investigation. See *United States v. Lonetree*, 35 M.J. 396, 405 (C.M.A. 1992). But Article 31 may well apply to many situations in which members of our Armed Forces interrogate or interact with detainees suspected of having violated the law of war. Our troops should not be required to guess as to whether the situation they confront is sufficiently investigatory, nor should they be forced to choose between conducting effective interrogations and risking having confessions later deemed inadmissible. Congress appropriately determined in the MCA that Article 31 should not apply to military commission prosecutions.

3. Under Article 505, military prosecutors can protect classified information used in a court-martial by providing the defendant with a “suitable substitute” for the classified information. As a practical matter, how frequently (in general) is Article 505 invoked in courts-martial of U.S. soldiers, and how frequently (in general) can we expect it to be invoked in trials of Al Qaeda war criminals? Would any difference that exists pose practical problems for the military’s ability to conduct trials of Al Qaeda war criminals? Also, if the military is unable to provide the Al Qaeda war criminal with a “suitable substitute” for the classified information that still protects American intelligence sources and methods, what would be the result for the prosecution of the individual? And if it were necessary to routinely use such “suitable substitutes” in order to try Al Qaeda war criminals, what risk is there that the information in the substitutes, even if it poses no risk of disclosure of U.S. sources and methods in an individual case, might nevertheless over the course of many trials provide Al Qaeda with a picture of U.S. intelligence operations that would undermine U.S. intelligence-gathering activities?

ANSWER: I understand that relatively few courts-martial include classified information as evidence requiring the application of Military Rule of Evidence (MRE) 505. We believe that a much higher percentage of trials of members of Al Qaeda would include classified information. In every case under the UCMJ where classified information is involved, the government must assess the risk to national security from providing that information, or an unclassified substitute, to the accused. That assessment includes not only the risk in an individual case, but also the risk to national security from release in multiple cases. If the risk from disclosure outweighs the

benefit of successful prosecution, the government would either pursue charges that do not include the at-risk classified information (if any) or not pursue prosecution at all.

4. What evidence authentication procedures and chain-of-custody requirements apply under the UCMJ? Were the UCMJ used to prosecute Al Qaeda war criminals, would U.S. soldiers be required to follow such procedures when capturing Al Qaeda members on the battlefield? Have such procedures been used when capturing and collecting information about Al Qaeda members on the battlefield whom the United States now plans to try for war crimes? If not, what is the implication of the failure to follow such procedures for America's ability to try these Al Qaeda members under the UCMJ?

ANSWER: Evidence authentication procedures and chain-of-custody requirements under the UCMJ are very similar to those in civilian criminal courts. For evidence to be admissible, it must be shown to be what it purports to be and must be relevant and necessary to an issue at a trial. When evidence is fungible (not readily identifiable visually), the party seeking to introduce the evidence must show that the evidence it seeks to introduce is the same evidence obtained at a given time and place; the party normally does this by calling witnesses showing an unbroken chain of custody over the evidence.

Currently, U.S. soldiers do not follow evidence authentication procedures and chain-of-custody requirements when conducting combat operations on the battlefield. Longstanding Department of Defense policy is that doing so is incompatible with conducting combat operations. Military police and members of the Defense Criminal Investigative Agencies are present on the battlefield and, if soldiers conducting combat operations discover information regarding serious criminal conduct, may follow up on that discovery applying appropriate evidentiary rules. But when the initial search, seizure or detention is made, soldiers apply combat, not evidentiary, procedures.

The implication of the failure to follow evidentiary procedures by soldiers conducting combat operations depends upon the facts of each individual case. In a given case it may be possible, for example, for a documents/weapon/equipment seized by a soldier to be admitted at trial because the soldier could identify it by some clear characteristic and also testify that it is in the same condition at trial as it was when seized. But that possibility is, obviously, slim; the more likely result is that the seized evidence would not be admissible.

Senator Schumer:

1. Mr. Bradbury testified that it is part of his job to review the legality of Administration programs. However, the ordinary review the Administration conducted over the military commission program did not prevent the Supreme Court from rebuking the Administration's policies on the war on terror. Could you explain more fully why the Administration has demonstrated resistance toward a formal and extensive review of the Administration's counter-terror programs?

ANSWER: I am not in a position to know the Administration's position on a request for a formal and extensive review of the Administration's counter-terror programs.

2. Please identify any individuals in the Department of Justice, the Department of Defense, and any other agencies, to the extent you know, who are reviewing the legal justification for the President's various programs on the war on terror.

ANSWER: I cannot address the work of the Department of Justice or of other federal agencies. With respect to the Department of Defense, attorneys in a variety of legal positions within the Department review the operations of the Department to assess whether they comport with the law.

3. Please detail to what extent you believe the holding of *Hamdi* has survived the holding of *Hamdan*.

ANSWER: Although I defer to DOJ on the details of this issue, we believe the Supreme Court's decision in *Hamdan* has no effect on the Court's ruling in *Hamdi*. *Hamdan* expressly recognized that the President's authority to detain Hamdan was not at issue. As the Court held in *Hamdi*, the President continues to have the authority to detain enemy combatants for the duration of the hostilities, in order to prevent the enemy combatants from returning to the field of battle and again taking up arms.

4. On July 10, the Department of Justice responded to my request for an update of the Administration's legal justification with a letter that said, essentially, Hamdan changes nothing. However, commentators on both sides of the aisle vigorously disagree with that analysis...Given these arguments, first, do you stand by your July 10th letter? Second, how confident are you that the Supreme Court would uphold the legality and constitutionality of the program if it had an opportunity to address this issue?

ANSWER: I defer to DOJ to respond to the question.

Senator Feingold:

1. Please provide a complete list of each provision of the Uniform Code of Military Justice and the Manual for Courts-Martial that you believe should not apply in trials of Guantanamo detainees. For each individual provision that you object to, please explain:

- a. Why you believe the provision should not apply, including an analysis of the text of the provision and the case law interpreting that provision; and**
- b. The specific change to the provision that you would propose and why the change is necessary.**

ANSWER: The Military Commissions Act of 2006 provides the appropriate process for trying Guantanamo detainees in front of military commissions.

The Manual for Military Commissions, submitted to Congress on January 18, 2007, comports with the Military Commissions Act of 2006. The Manual provides a comprehensive set of rules that address the pre-trial, trial, and post-trial process associated with military commissions and the rules of evidence to be applied in those commissions. In addition, the Manual lists the crimes triable by military commissions and the elements of the crimes. In many respects, the Manual for Military Commissions mirrors the Manual for Courts-Martial. In those aspects in which they differ, that difference is often attributable to the express guidance provided by the Military Commissions Act of 2006. Explorations as to the differences often are provided in the Manual for Military Commissions provisions.

2. ...if Congress determines that legislation is necessary to authorize a new form of military commission, would you support allowing for pre-trial, expedited review of any new military commission structure?

ANSWER: Congress and the Executive Branch have worked together to create the Military Commissions Act of 2006. I support appropriate judicial review of the act. I also note that United States federal courts are prohibited from rendering advisory opinions.

Senator Specter:

1.a. In your opinion, can a detainee be afforded a “full and fair trial” while the DoD protects classified and sensitive information?

ANSWER: Yes. In principle, by setting clear, defined limitations on when an accused can be excluded from viewing certain classified material, we may ensure a “full and fair trial” while protecting classified information. The Military Commissions Act of 2006 (“MCA”) goes further and provides that the accused will have access to all the evidence admitted before the trier of fact. *See* 10 U.S.C. § 949a(b)(1)(A). Moreover, subject to limited exceptions, the accused shall have the right to be present for all trial proceedings. *See id.* § 949a(b)(1)(B); *id.* § 949d(e). At the same time, the MCA contains robust protections to ensure that the United States can prosecute captured terrorists without compromising highly sensitive intelligence sources and methods. *See id.* § 949d(f). I believe the MCA strikes an appropriate balance between the rights of the accused and interests of our national security.

2.a. In light of the Supreme Court’s ruling in *Hamdan*, do you still believe that military commissions are the best procedure for determining the guilt or innocence of a detainee?

ANSWER: Yes. The *Hamdan* ruling does not indicate that military commissions per se are an inappropriate means of trying detainees. The Court, through the *Hamdan* ruling, indicated that Congress and the Executive Branch should work together to address the matters raised, including what would be appropriate procedures governing military commissions. The Military Commissions Act of 2006 represents the product of that joint effort.

2.b. Can you provide circumstances why the procedures for military courts-martial and federal courts would be impracticable?

ANSWER: There are numerous provisions within the Uniform Code of Military Justice and Manual for Courts-Martial (“UCMJ”) that are impracticable for the purposes of trying Guantanamo detainees. Below are two examples.

Article 31 of the UCMJ, privilege of the accused against self-incrimination, is incompatible with the trials that need to be conducted. Military operations generally necessitate battlefield and near battlefield interrogations to obtain intelligence. If a warning is required, the trial impact of any failure to provide such warning could be extremely burdensome and could result in the exclusion of statements taken during lawful interrogations used in military intelligence operations. In addition, this right against self-incrimination attaches at an extremely early stage of the process, earlier than even in the civilian system, and is accompanied by a right to counsel at those earliest of stages.

Article 46 of the UCMJ, equal opportunity to obtain witnesses and other evidence, would also be impracticable to apply to the trials of these detainees. Under Article 46, defendants have greater access to witnesses than under the federal rules, and when conducting trials away from the site of the offense, as would be the case here, that is problematic.

These are just a few examples of the ways in which certain courts-martial procedures are impracticable as a means of trying the detainees at Guantanamo.

Military commissions, like international war crimes tribunals, will have a strong need to consider reliable hearsay evidence. Hearsay statements comprise some of the best evidence against those we expect to try by military commission, and it would be impracticable or even impossible to successfully try some of those accused without the use of hearsay evidence. The Military Rules of Evidence generally prohibit hearsay evidence and carve out certain established exceptions where hearsay evidence has generally been recognized as more reliable. While some of the hearsay evidence used in military commissions cases will fall into the recognized hearsay exceptions, given the unusual nature of these cases, some valuable hearsay evidence will not. In particular, the “excited utterance” exception or the “present sense impression” exception—which permit the admission of hearsay statements about present or recent observations—are not likely to be broad enough to permit the admission of highly relevant reports concerning past events that reliable, but unavailable, foreign witnesses may have made to United States personnel. Thus, the Military Commissions Act of 2006 provides that hearsay evidence shall be admitted if it would be admissible in a court-martial proceeding, or if the judge otherwise finds the evidence probative and reliable. *See* 10 U.S.C. § 949a(b)(2)(E).

3. Can you provide some examples of how you would like to see legislation “revamp” the current commissions in a manner that would enable them to withstand judicial scrutiny as well as meet the goals of the administration?

ANSWER: The Military Commissions Act of 2006 meets the goals of the administration and we expect it and the military commissions conducted under it to withstand judicial scrutiny.