

Questions from Senator Arlen Specter

1. In your written testimony, you state that because the military prosecution has no obligation to give the defense counsel exculpatory evidence in the possession of other government agencies, one former military commission prosecutor told you that “government agencies intended to deliberately exploit this gap in discovery obligations to keep the defense from obtaining exculpatory evidence.” You also say that you have been told that “the military panel will be handpicked and will not acquit these detainees.” Is it your contention that the Defense Department wants to convict innocent persons?

Sir, my testimony relied on statements made by one of the commission prosecutors, copies of which have been provided to this committee regarding the fairness of the commissions. No Sir. It is not. My objection to the commission system generally is that the system presumes the guilt of those tried before it. I believe that this stems principally from the conviction of the Executive Branch that all those in Guantanamo are in the President’s words “All bad men” and that of the Secretary of Defense that they are “the worst of the worst.” The commission system does not provide an adequate opportunity to challenge these beliefs. This is not the fault of the military prosecutors, but rather the decision to abandon the time tested principles of military law set out in the Uniform Code of Military Justice.

2. In your written testimony, you are critical of the military prosecution’s use of classified/protected information, and its exclusion of the defendant from some parts of the trial. Do you believe that every piece of evidence used against a detainee must be available to the defendant? Do you believe that he should never be excluded from his trial? Aren’t you worried that military secrets, such as the identity of the local person cooperating the American military could get out and damage us or an innocent party?

Sir, I believe that the ability of the accused to see and confront the evidence against him is the bedrock principle of our system of justice. I am not alone in this belief, as Admiral McDonald, the Judge Advocate General of the Navy, recently testified before you.” As Rear Admiral McPherson, then the Judge Advocate General of the Navy, testified at the July 13, 2006 Senate Armed Services Committee hearing, “Common Article 3 requires that the individual have access to and the opportunity to review the evidence presented against them.”

Equally, I believe a non-disruptive accused must be present during his trial. The exclusion of such an accused has no precedence, save the notorious Star Chamber, in the history of Anglo-Saxon jurisprudence. As Major General Rives, the Judge Advocate General of the Air Force, testified at the August 2, 2006 hearing, “[I]t does not comport with my ideas of due process for an attorney to have information he can -- defense counsel to have information he cannot share with his client.” Every senior military lawyer who testified at that hearing agreed with Senator Graham that “it would be bad for this country to have a procedure where the trier of fact, the military jury could look at evidence to base their verdict upon that’s never shared with the defendant.” We need not fear the consequences of applying this bedrock principle at military commissions. At an August 2, 2006 Senate Armed Services Committee hearing, Senator Graham observed, “So the question may become for our nation, if the only way we can try this terrorist is disclose classified information and we can't share it with the accused, I would argue

don't do the trial. Just keep him. Because it could come back to haunt us. And I have been in hundreds of military trials. And I can assure you the situation where that's the only evidence to prosecute somebody is one in a million. And we need not define ourselves by the one in a million."

I am not persuaded that adhering to our fundamental values will compromise our national security. Our system for courts-martial is sufficiently flexible to protect for both the identity of witnesses and our national security without prejudicing the accused's fundamental right to a fair trial. My position is best supported by my co-counsel Professor Neal Katyal's written testimony before the Senate Arms Services Committee. Professor Katyal testified in part as follows:

A court-martial, unlike a civilian trial, can take place with a "jury" composed of individuals who possess security clearances. Existing rules permit courts-martial to be closed to the public and press. Mil. R. Evid 505(j); R.C.M. 806. If the accused at any stage of a trial seeks classified information, the government may ask for an *in camera* (closed) proceeding to discuss the use of the information in trial. Mil. R. Evid. 505(i). During this session, the military judge hears arguments from both sides on whether disclosure "reasonably could be expected" to harm national security prior to the accused or his lawyer being made privy to the classified information. Only "relevant and necessary" classified information to the prosecution's or accused's case can be made available. Mil. R. Evid. 505(i).

In one court-martial espionage case tried under Mil. R. Evid. 505's procedures, the military judge allowed an intelligence agent to testify under a pseudonym and his real name was never disclosed to the defense. The Court of Military Appeals upheld that procedure and the United States Supreme Court denied the accused's request to review that decision. *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992), *cert. denied*, 507 U.S. 1017 (1993).

The military rules of evidence already provide alternatives to disclosure of classified information, which include: redaction of the classified information; substitution of an unclassified description or summary of the classified information; substitution of a statement admitting the relevant facts the classified information would tend to prove; or full withholding of disclosure. Mil. R. Evid. 505(d). And courts-martial also grant broad privileges for withholding information when it is "detrimental to the public interest." Mil. R. Evid. 506(a).

3. Lt. Cmdr. Swift, you are testifying in favor of giving detainees all rights currently enjoyed by American citizens tried under courts martial or in civil courts.

a. Does according a so-called non-state actor the same rights and privileges as a citizen of a sovereign state have the potential of encouraging --- or at least not discouraging --- individuals from joining terrorist organizations?

Sir, I understand your question to mean belligerent forces of a sovereign state rather than simply citizens of a sovereign state as all of the persons detained in Guantanamo Bay are citizens

of a sovereign state. In the rhetoric surrounding the military commissions and the extension of fundamental protections of a fair trial to Mr. Hamdan and others has neglected a basic concept. Members of nation states enjoy military combatant immunity under which they cannot be tried for their acts of violence against another nation state unless these acts amount war crimes e.g willfully targeting civilian target, denying a prisoner a fair trial before punishment etc. This stands in stark contrast with members of a rebel or other non-state actor force, who enjoy no combatant immunity and may be tried for all acts of violence against the citizens of a sovereign state that they attacked. Maintaining the same principles to try either group for their unlawful acts of violence however, is essential to both the conduct and perception of fair proceedings. The failure to do so will inevitably paint the nation states conducting the trial as a force of oppression rather than justice.

4. An Amicus brief filed by your current post, the Office of Chief Defense Counsel, Office of Military Commissions on behalf of your client, notes, "Unlike the court-martial system, which Congress designed and which the Executive Branch implements, both the military commission system's procedures and substantive law were created and implemented solely by the Executive Branch."

a. If Congress designs a system for military commissions, would it satisfy your office's concerns with the constitutionality of the commission implemented to try your client?

Sir, I cannot speak for the Office of Chief Defense Counsel as a whole. On behalf of Mr. Hamdan, I would urge the Committee to take stake of the cautionary note sounded by Justice Kennedy. Outside of general claims of impossibility in dire predictions, the Executive Branch has not offered a cogent reason for proceeding with courts-martial. The Supreme Court noted that no justification had been put forward for departing from the normal rules. A close examination of the UCMJ, the Rules for Courts-Martial, the Military Rules of Evidence, and the Court of Appeals for the Armed Forces reveals that none of the concerns voiced by Mr. Del'Orto and Mr. Cobb are actually grounded in law.