

Questions from Senator Patrick Leahy

1. After reviewing the transcript from the July 11 hearing, are there any legal or factual assertions made by Mr. Bradbury or Mr. Dell'Orto with respect to the UCMJ, the operation of courts-martial or the operation of military commissions with which you disagree?

Sir, I disagree with the assertions made that: (1) Article 31(b) would prevent intelligence gathering; (2) the UCMJ requires soldiers to obtain warrants on the battlefield; (3) courts-martial would require the disclosure of classified information and jeopardize national security; (4) hearsay testimony is admitted in all cases by the Yugoslavian and Rwandan tribunals; and (5) chain of custody requirements are overly burdensome and could not be complied with by soldiers on the field. My co-counsel, Professor Katyal, in his written testimony to the Senate Armed Services Committee provided a detailed analysis of why Mr. Bradbury and Mr. Dell'Orto were incorrect in each of these assertions.

- *Miranda Warnings.* Article 31(b) of the UCMJ does contain a heightened *Miranda* requirement. But our nation's highest military court has held that an interrogation for purposes of intelligence gathering was not subject to this requirement, and that evidence obtained without a 31(b) warning can be admitted into a court-martial proceeding. *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992). Military appellate courts have repeatedly held Article 31(b) warnings are required only for "a law-enforcement or disciplinary investigation." *See, e.g., United States v. Loukas*, 29 M.J. 385, 387 (C.M.A. 1990). They are not required when questioning is conducted for "operational" reasons. *Id.* at 389. The notion that soldiers in the field would be required to give Article 31(b) warnings to potential enemy combatants whom they encounter or detain is simply not true. Nor would U.S. personnel interrogating potential enemy combatants for intelligence purposes be required to provide Article 31(b) rights.
- *Hearsay.* The 800 series of the Military Rules of Evidence generally track the Federal Rules of Evidence, though the military's business records exception is far broader than the civilian rule, expressly allowing the admission of such records as "forensic laboratory reports" and "chain of custody documents." The hearsay rules, including Military Rule of Evidence 807's residual hearsay exception, are actually quite flexible. They are designed to promote accuracy by allowing in forms of hearsay that are reliable and excluding forms of hearsay that are unreliable. These rules should be embraced, not feared.

In his testimony before both the Senate Armed Services Committee and the House Armed Services Committee, Assistant Attorney General Bradbury said that both the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) allowed hearsay evidence. For example, he told the Senate Armed Services Committee that "a good example to look to 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."

As I understand it, however, the rules of both ICTY and ICTR include an important and major restriction to the rule allowing hearsay to the point of making it virtually irrelevant for the current military commissions debate - an exception that Acting Assistant Attorney General Bradbury did not mention. Under Rule 92 bis of both ICTY's and ICTR's rules, the trial chamber may choose to admit "a written statement in lieu of oral testimony" unless such a statement would prove "acts and conduct of the accused as charged in the indictment." The trial chamber trying Slobodan Milosevic emphasized that "regardless of how repetitive [written statement] evidence is, it cannot be admitted if it goes directly to the acts or conduct of the accused." *Prosecutor v. Milosevic*, ICTY Case No. IT-02-54, P 8 (Mar. 21, 2002).¹

- *Warrants*. Under Military Rule of Evidence 315(e)(4), evidence obtained during a search in a foreign country will be admissible even if it is seized without a warrant. Additionally, under Mil. R. Evid. 314(g)(4) if the Constitution does not require a warrant then the court-martial will not require one either.
- *Protection of Witnesses*. Mil. R. Evid. 507 allows protection of identity of witnesses.
- *Chain of Custody*. Mil. R. Evid. 901-903 deal with the admission of documents – and these rules make introduction of evidence easy, not difficult. The proponent of evidence can use various methods to authenticate it and is not tied to any rigid step-by-step authentication techniques. Stephen A. Saltzburg et al., *Military Rules of Evidence Manual* 9-4 (5th ed. 2003). Military Rule of Evidence 901 requires only a showing of authenticity through either direct or circumstantial evidence. *Id.* Under the identical Federal Rule 901(a), "There is no single way to authenticate evidence. In particular, the direct testimony of a custodian or a percipient witness is not a *sine qua non* to the authentication of a writing. Thus, a document's appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances, can, in cumulation, even without direct testimony, provide sufficient indicia of reliability to permit a finding that it is authentic." *United States v. Holmquist*, 36 F.3d 154, 167 (1st Cir. 1994) (citations and internal quotation marks omitted), *cert. denied*, 514 U.S.

¹ "There is also a brand new Rule 92bis providing for the admission of a witness's written statement, so long as it does not go to proof of the conduct or acts of the accused." Patricia M. Wald, To "Establish Incredible Events by Credible Evidence": The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings, 42 Harv. Int'l L.J. 535, 548 (2001). As the Appeals Chamber made clear in *Prosecution v. Galic*, "There is a clear distinction to be drawn between (a) the acts and conduct of those others who commit the crimes for which the indictment alleges that the accused is individually responsible, and (b) the acts and conduct of the accused as charged in the indictment which establish his responsibility for the acts and conduct of those others. It is only a written statement which goes to proof of the latter acts and conduct which Rule 92 bis (A) excludes from the procedure laid down in that rule." *Prosecutor v. Galic*, ICTY Case No. IT-98-29-AR73.2, at 1 (June 7, 2002) (ICTY Judicial Supplement No. 34, decision on interlocutory appeal concerning Rule 92 bis (C)).

The Appeals Chamber also emphasized that "the purpose of Rule 92 bis is to restrict the admissibility of this very special type of hearsay to that which falls within its terms, and a party is not permitted to tender a written statement given by a prospective witness to an investigator of the Office of the Prosecutor under Rule 89(C) in order to avoid the stringency of Rule 92 bis." *Id.* (footnote omitted).

1084 (1995). Additionally, "[m]ere breaks or gaps in the chain [of custody] affect only the weight of the evidence, and not its admissibility." Saltzburg, *supra*, at 9-8; see also *United States v. Hudson*, 20 M.J. 607 (A.F.C.M.R. 1985) (noting the trial judge has broad discretion in ruling on chain of custody matters and that all that is required is that it be reasonably certain that the "exhibit has not been changed in any important aspect."). Military courts will dispense with any requirement for a chain of custody for items that are unique in appearance. See, e.g., *United States v. Thomas*, 38 M.J. 614 (A.F.C.M.R. 1993); *United States v. Parker*, 10 M.J. 415 (C.M.A. 1981).

Indeed, the International Criminal Tribunal for the Former Yugoslavia (ICTY), even though it is structured without a judge and jury, uses an authentication rule similar to Military Rule of Evidence 901. See *Prosecutor v. Mucic*, Trial Chamber Decision on the Motion of the Prosecution for the Admissibility of Evidence (Jan. 19, 1998) available at <http://www.un.org/icty/celebici/trialc2/decision-e/80119EV21.htm>. The ICTY considers the issue of authentication so important that in some cases the court employs its own experts in determining the authenticity of evidence. See *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Trial Chamber III Final Decision of the Admissibility of Intercepted Communications in the case of (June 14, 2004) available at <http://www.un.org/icty/milosevic/trialc/decision-e/040614.htm>.

- **Classified Evidence.** 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).