

Questions from Senator Edward M. Kennedy

1. Do you think that use of courts-martial can meet the standards the Supreme Court set in *Hamdan v. Rumsfeld* for detainee trials? Is there any reasonable barrier that prevents the Administration from moving forward this way? What are the practical benefits of using the court-martial system to try detainees?

Sir, the Supreme Court's decision in *Hamdan* unquestionably permits the use of courts-martial to try recognized war crimes in conjunction with the attacks of 9/11 and subsequent hostilities by al Qaeda.

The barriers to using courts-martial put forth by Assistant Attorney General Bradbury and DoD Deputy General Counsel Dell'Orto are either over-hyped or non-existent. My co-counsel, Professor Neal Katyal, set forth in his written testimony a careful analysis of the supposed barriers cited by the Administration. (Below) None of them would prevent a fair trial in Mr. Hamdan's case. Using a court-martial is a guarantee of justice now. Using anything less than a court-martial will unquestionably lead to further litigation, the delay of accountability of the crimes committed by al Qaeda members and perhaps the ultimate denial of justice to the victims of 9/11.

Professor Katyal's written testimony regarding the use of courts-martial:

a. Courts-Martial Have Tremendous Flexibility and International Respect

The existing court-martial system is already designed to handle terrorism cases.¹ We've had courts-martial on the battlefields of Afghanistan and Iraq. The "jury" hearing terrorism cases all have security clearances. Military rules already permit closure of the courtroom for sensitive national-security information, authorize trials on secure military bases far from civilians, enable substitutions of classified information by the prosecution, permit withholding of witnesses' identities, and the like. The UCMJ, in short, has flexible rules in place that permit trials under unique circumstances, and there is no reason to think that they cannot handle these cases today.

In *Curry v. Secretary of the Army*, 595 F.2d 873 (CA DC 1979), the D.C. Circuit rejected a constitutional challenge by a U.S. servicemember to certain structural aspects of the UCMJ. Noting that the UCMJ was designed to work in peace time and in war time, the court stated:

Obedience, discipline, and centralized leadership and control, including the ability to mobilize forces rapidly, are all essential if the military is to perform effectively. The system of military justice must respond to these needs for all branches of the service, at home and abroad, in time of peace, and in time of war. It must be practical, efficient, and flexible.

¹ Cf. *Hamdan* (slip op. at 49 n.41) ("That conspiracy is not a violation of the law of war triable by military commission does not mean the Government may not, for example, prosecute by court-martial or in federal court those caught 'plotting terrorist atrocities like the bombing of the Khobar Towers.'")

593 F.2d at 877. And when drafting the Code, its principal author, Edmund Morgan, emphasized that it struck a flexible balance between fairness for defendants and operation within a military scheme:

It was recognized from the beginning by the committee that a system of military justice which was only an instrumentality of the commander was as abhorrent as a system administered entirely by a civilian court was impractical....We were convinced that a Code of Military Justice cannot ignore the military circumstances under which it must operate but we were equally determined that it must be designated to administer justice. We, therefore, aimed at providing functions for command and appropriate procedures for the administration of justice. We have done our best to strike a fair balance, and believe that we have given appropriate recognition of each factor.

H.R. 2498 at 605-06 (1949) (Statement of Prof. Edmund Morgan). Those who have practiced within the military law system understand this well. As F. Lee Bailey once put it:

The fact is, if I were innocent, I would far prefer to stand trial before a military tribunal governed by the Uniform Code of Military Justice than by any court, state or federal. I suppose that if I were guilty and hoping to deceive a court into an acquittal or create a reasonable doubt in the face of muddled evidence, I would be fearful of a military court because their accuracy in coming to the "correct" result (in fact and not simply a legally correct result, which means only a fair trial, and not that guilty men are found guilty or that innocent men are acquitted) has a far better accuracy rate than any civilian court has ever approached.²

I have listened over the past week to testimony by various Administration officials, who now say what they have not been saying for the past four years, that courts-martial are unable to try these cases. I would strongly urge the committee to inquire, in detail (and perhaps in closed proceedings) about the 10 current indictments and why they think a court-martial cannot handle them. I know of no reason why a court-martial would be unable to handle a trial like that of Salim Hamdan, should an al Qaeda member be captured today. Indeed, the impracticability determination required by Section 836 would best stand up in court after empirical evidence is generated showing that current court-martial rules cannot be applied.

The Administration witnesses thus far have listed a parade of horrors that supposedly follow from the UCMJ. But, in the four days since this Committee has invited me to testify, I have learned based on just a quick examination that each is considerably overstated:

- *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.

² F. Lee Bailey, *For the Defense* 38 (1976).

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).³

³ "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)).

- *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. 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,

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).

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).

The most troubling thing about the testimony that Administration officials have provided over the past week is that they have read the UCMJ in the most selective, condemning manner possible. Their reading is in considerable tension with the way they have been reading other statutes for the past four years, including the 1978 Foreign Intelligence Surveillance Act and the 2001 Authorization for the Use of Military Force. In those settings, they have emphasized the flexibility and open-endedness of statutes, and supplemented their readings with caselaw interpreting the provisions. But here, they are reading the statutes the way Earl Warren on steroids would have read them – as somehow hamstringing their ability to bring cases and reading them in the most restrictive way possible. Nothing they have said thus far justifies this skepticism. And before this body accepts such skepticism, it should have some empirical evidence showing that courts-martial cannot try these cases, instead of a rather questionable projection by a prosecuting branch.

2. How could the Uniform Code of Military Justice be implemented for trials of detainees in the war on terror? More specifically, given our shared concern about preventing future terrorist attacks, how should Congress appropriately address Uniform Code of Military Justice Article 31(b), which you described as the “military equivalent to Miranda,” and the protection of classified information? Are there cases interpreting the Uniform Code of Military Justice that shed light on these issues? If so, how are these cases applicable to trials of detainees?

The Uniform Code of Military Justice requires no change to be used at present to try war crimes. Specific concerns regarding Article 31(b) and the protection of classified information are addressed by either case law or the Military Rules of Evidence. Regarding Article 31(b), as detailed in Professor Katyal's testimony above, the Court of Appeals for the Armed Forces has previously found in *United States v. Lonetree* and *United States v. Loukas*, 29 M.J. 385 (C.M.A. 1990), that Article 31(b) does not require an accused to be advised of his rights when the interrogation is conducted for either intelligence or operational reasons. Thus, Assistant Attorney General Bradbury's concern regarding the protection of intelligence gathering has already been addressed and answered as part of the jurisprudence of military justice. Additionally, M.R.E. 505 preserves and protects classified information in much the same way as CIPA. In fact, as Professor Katyal's testimony above details, M.R.E. 505 is actually a more broad and flexible protection for classified information and certainly workable here.

3. In discussing the use of classified information in the trials of Guantanamo detainees, Paul Cobb testified, "[T]here are going to be rare but important instances when the defendant cannot be given personal access" to the classified evidence used in their trials. In your experience as a defense lawyer in the military commissions at Guantanamo, is it "rare" for evidence to be withheld from a defendant? Does withholding evidence from the defendant impede the goal of offering detainees the basic protections of a full and fair trial? If so, how?

My experience has been that withholding classified information from Mr. Hamdan has been the rule, not the exception. The government has not permitted Mr. Hamdan to view or be present when any potentially classified information has been either provided in discovery or presented at trial. This includes statements allegedly made by Mr. Hamdan and the questioning of the members for his trial regarding their roles in Afghanistan and his movement to Guantanamo. The disadvantage is clear immediately. When presented with an alleged oral statement of the accused, the first thing that any defense counsel does is ask the accused if they made the statement, whether the statement accurately reflects what the accused said, and under what conditions was the statement made. Without this basic knowledge that the accused alone possesses, there is simply no way to confront the government witness or contradict the report of interrogation that the government is seeking to introduce.

It has also been my experience that classified information is rarely, if ever, crucial to the prosecution of a commission case is consistent with court-martial practice as well. As Senator Graham observed at the August 2, 2006 Senate Armed Services Committee hearing, "I have been in hundreds of military trials. And I can assure you the situation where [classified information is] the only evidence to prosecute somebody is one in a million. And we need not define ourselves by the one in a million."