

Questions from Senator Russell D. Feingold

1. Mr. Dell'Orto argued in his testimony that the court-martial system contains a number of added protections not present in civilian courts. For example, he expressed concern that the UCMJ provides for "a thorough and impartial investigation open to the public and the media," rather than an indictment by a grand jury. Are you concerned about the application of this provision to trials of Guantanamo detainees?

Sir, I am not concerned about the application of Article 32 of the Uniform Code of Military Justice. First, the dangers of opening such an investigation to the public and media are not actually present. There is ample precedent for closing an Article 32 investigation to the public and media when national security considerations are at stake. Second, such an investigation is not going to disrupt other combat operations. The government is only required to call or produce witnesses if they are reasonably available. When witnesses are reasonably available, it benefits the government to call them since their testimony is subject to cross-examination and if the witnesses are later unavailable, it may be used in a subsequent non-capital trial pursuant to Article 49 of the UCMJ. Finally, the independent investigation does not only comments on whether there is sufficient evidence for a trial, it also considers whether the evidence is likely to be admissible. Such comments would be particularly valuable here because under the law of war the government can wait until the conflict is over before being obligated to hold a war crimes trial. Thus, the Article 32 Hearing provides an opportunity for independent advice as to whether such a trial is likely to require the disclosure of classified or sensitive information that might jeopardize U.S. operations and therefore should be delayed until it can be held without such jeopardy. Also, an Article 32 addresses the adequacy of charges. Given that a plurality of the Supreme Court struck down the charge against Mr. Hamdan, the immediate value of independent advice concerning the adequacy of charges is readily apparent. Additionally, many a court-martial case has been resolved by a plea bargain because the defense saw the strength of the government's case at the Article 32 investigation.

2. The possible "*Miranda*" rights of Guantanamo Bay detainees were discussed at length during the hearing. Mr. Dell'Orto even argued that the courts-martial rules "would obligate the soldier on the field. . . to advise that detainee of his rights if he believed that detainee to have committed a crime." Is this a valid concern when an individual is detained for intelligence purposes or as part of armed hostilities, as was the case for the Guantanamo Bay detainees?

Sir, the question of Miranda Warnings was addressed by my co-counsel, Professor Neal Katyal in his written testimony to the Senate Judiciary. I am in complete concurrence with his answer and provide it here.

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.

3. Mr. Bradbury argued that the UCMJ “require[s] that prosecutors share classified information with the accused if the information will be introduced as evidence at trial.” Is this accurate? Are the UCMJ rules dealing with the discovery of classified information adequate for proceeding with trials of the Guantanamo detainees?

Sir, Mr. Bradbury’s answer is incomplete. While the UCMJ requires that the accused see all evidence against him, that does not mean that the prosecution is necessarily obligated to turn over classified evidence. The question of classified evidence was also addressed by Professor Katyal in his written testimony and I am again in complete agreement with it and provide it here.

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).

4. Mr. Bradbury’s written testimony states: “Court-martial rules require that the chain of custody for evidence be preserved, and that all documents admitted be painstakingly authenticated. But it is extremely difficult during an armed conflict to gather evidence in a way that meets strict criminal procedure requirements, whether collected on the battlefield, during

military intelligence operations, or during interrogations of detainees.” Do you agree? Does the UCMJ appropriately account for battlefield realities?

The UCMJ was designed for use on the battlefield. Military Rules of Evidence 901 to 903 dealing with the authentication of evidence are actually quite flexible and permit the Military Judge great leeway so long as he finds there is sufficient reason to believe that the evidence is what its proponent purports it to be. The reasoning put forth by Mr. Bradbury would necessarily mean that the evidence supporting crimes and alleged crimes committed by U.S. servicemen on the battlefields of Iraq and Afghanistan could not be introduced because of lack of authentication. The experience, of course, of battlefield trials to date is a testament to the flexibility of the fairness of the courts-martial system. Indeed, from 2003 through June 2006, the Army alone tried 373 courts-martial in Iraq and Afghanistan. During the same period, of course, there was not a single successful prosecution by military commission. The UCMJ is demonstrably suited to operation on the battlefield. Professor Katyal addressed this question in detail and I provide his answer below.

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, 2004) *available at*
<http://www.un.org/icty/milosevic/trialc/decision-e/040614.htm>.

5. Do you think that the court-martial rules for admission of hearsay evidence would need to be revised for trials of Guantanamo Bay detainees? Do the hearsay rules used by the International Criminal Tribunals for the former Yugoslavia and Rwanda provide a good model?

No Sir. The present hearsay rules were developed to permit the admission of hearsay evidence under circumstances where it has been found by Congress in the Federal Rules of Evidence and by the President and the Military Rules of Evidence to be reliable. These rules give broad authority to admit evidence and normally do not pose undue restrictions on the prosecution of crime. The flexibility of the rules of evidence is [flexibility . . . is demonstrated] are demonstrated in the example given by Mr. Bradbury. Mr. Bradbury suggested that hearsay would prevent the introduction of evidence gained through intelligence monitoring. Actually, such evidence is likely to be admitted as either a *present sense impression*, M.R.E. 803 (1); *excited utterance*, M.R.E. 803 (2); or *then-existing mental, emotional, or physical condition*. M.R.E. 803(3). Additionally, such statements if made by the accused or others working with the accused are admissions by party opponents and not considered hearsay at all, and even if they were made by someone independent of the accused, they might still be admissible if the declarant is unavailable, i.e. killed or at large, as a *statement against penal interest* M.R.E. 804 b(3). Indeed, were Mr. Bradbury's assertions that hearsay rules would prevent the introduction of intercepted communications true, the government would not be able to introduce wiretaps and other evidence it routinely collects in support of a criminal prosecution because such evidence would also be hearsay. In point of fact, as Professor Katyal points out in his written testimony, "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."

If Congress chooses to amend hearsay rules, then the Yugoslavian and Rwanda tribunals' rules of evidence are the absolute minimum that should be used. Contrary to Assistant Attorney General Bradbury's testimony, these rules do not permit the blanket admission of hearsay evidence. Professor Katyal's testimony below details what the Yugoslavian and Rwandan tribunals actually permit:

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

6. Concerns were expressed at the hearing about the right of the accused under the UCMJ to be present at the trial, to call his own witnesses, and to cross-examine government witnesses. Possible disadvantages mentioned include disclosure of classified information, and possible disruption of military operations by requiring individuals from the battlefield to appear at trial. How would these UCMJ provisions function in a trial of a Guantanamo detainee? Do you believe these concerns are valid?

Sir, the right to be present at trial, call witnesses in your defense, and cross-examine government witnesses are the bedrock due process principles on which our system of justice has been built. They are equally reflected in the laws of war as illustrated by the Yugoslavian and Rwandan tribunals. To compromise these rights is to compromise the trial. Providing these rights, however, does not mean combat operations have to cease. Trials in the military are routinely scheduled around the deployments of military service members. Where the coordination of all witnesses is not possible, the taking of testimony by deposition is permitted in all non-capital cases under Article 49 the UCMJ. If there is inconvenience to the government here, it is of its own making, by choosing to transport the detainees to a location remote from the battlefield and choosing to hold trials years after they were initially detained. The government has created a situation where it might be inconvenient and expensive to call some of the relevant witnesses. But justice cannot be sacrificed for convenience, especially where the hardships are created by the government's own actions.

7. Mr. Bradbury argued that the military commission system authorized by the President had an important safeguard – that a military commission is required to determine if any evidence substitutions or removal of the accused from the proceedings would “call into question the fundamental fairness of the proceedings.” Is this an effective safeguard?

No Sir, it is not because the standard is totally completely subjective. Our system of justice has always considered that the right of the accused to be present and see the evidence

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).

against him is a component is required of the fundamental fairness of any proceeding. To write a rule that steps outside of the fundamental tenets of justice is not only cynical, it opens the doors to the most unhappy and repudiated examples of Anglo-Saxon jurisprudence, the Star Chamber and the trial of Sir Walter Raleigh. These trials were the result of political decisions and justified as necessary to preserve national security. As Justice Scalia had observed; "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

Oliver Wendell Holmes taught us that "the life of the law has not been logic; it has been experience." Oliver Wendell Holmes, *The Common Law* 1 (1881). Experience in the commission system has taught us that the presiding judicial officer cannot be entrusted to make sound decisions on the admissibility of evidence based on an amorphous probativeness standard. For example, Army Colonel Peter Brownback, the Chief Presiding Officer of the Military Commission system, was questioned during voir dire about whether he would admit evidence obtained by torture. He responded, "If you're asking me to say I'm going to exclude evidence that was obtained by someone sticking a red hot poker in someone's eye, well, the prosecution is going to have the burden of presenting it. It doesn't sound likely that I would let it in, but I'm not going to promise because I don't know. I just don't know." Record, *United States v. al Bahlul* at 225, Case No. 04003 (March). A military commission system should not leave a military judge guessing as to whether to admit evidence obtained by such barbaric processes. A fair military commission system would clearly preclude a military judge from doing so.