

Senate Judiciary Committee
Hearing on Timothy E. Flanigan to be Deputy Attorney General
Tuesday, July 26, 2005

Responses to Written Questions Submitted by U.S. Senator Russell D. Feingold
to Timothy E. Flanigan

1. During your testimony before the Senate Judiciary Committee, you testified that in 2001 you did not seek the advice of experts in the military and other agencies to formulate procedures for trying suspected terrorists before military commissions because “the process was just taking too much time.” The military commissions, subsequently established by Executive Order, did not begin reviewing charges against Guantanamo detainees until June 29, 2004.

a. Given this delay, can you explain why you believed that it was necessary to expedite the issuance of the Executive Order in 2001?

ANSWER: Because war is inherently unpredictable and demands rapid responses, the necessary tools must be at the ready as soon as possible. Military commissions are an important one of these tools. Indeed, the Supreme Court has recognized military commissions as part of the conduct of war. Because no one could predict the course of events immediately following the attacks of September 11, it was important and prudent to get procedures in place as soon as practicable. Congress itself has recognized the propriety and importance of military commissions in the present war, as the Court of Appeals for the District of Columbia Circuit recently held in *Hamdan v. Rumsfeld*. In that case, the court of appeals upheld the establishment of military commissions in the current war on terrorism. *Hamdan v. Rumsfeld*, 415 F.3d 33, 38 (D.C. Cir. 2005). The court concluded that “it is impossible to see any basis for [the] claim that Congress has not authorized military commissions.” *Id.* Relying upon Supreme Court precedent, the congressional Authorization for Use of Military Force, and sections 821 and 836 of title 10, United States Code, the court held that “Congress authorized the military commission that will try” a Guantanamo detainee who admits to having been Osama bin Laden’s personal driver. *Id.*

a. The President’s Executive Order was heavily criticized as going too far, and subsequent Defense Department rules governing the military commission process included additional safeguards not contained in the President’s Executive Order, although those rules also have been criticized as not providing a fair process. Do you think the process of finalizing the commission procedures would have taken as long and been as controversial if you had involved military and State Department experts from the beginning?

ANSWER: As I stated in my testimony, I believe that we did have from the beginning the benefit of experts in the military and in the State Department and that we ultimately created a process that was largely in accordance with their views. The numerous safeguards included in

the Defense Department rules contain considerably more protections than were available under previous military commission procedures used at several points in our Nation's history, as I also suggested in my testimony. Each defendant enjoys the presumption of innocence; each defendant must be found guilty beyond a reasonable doubt; each defendant is informed of all charges against him; each defendant has the ability to procure evidence in his defense; each defendant is provided qualified military counsel; each defendant may obtain the additional assistance of civilian counsel; each defendant is guaranteed an appeal to a special panel of some of the most distinguished lawyers in America; and each case is reviewed either by the President or the Secretary of Defense. These safeguards, to the extent they are "additional" to those in the President's order, are not in tension with that order but rather expressly contemplated by it, as the President, in his Military Order, charged the Secretary of Defense with establishing procedures for the military commissions that would ensure each defendant a full and fair trial.

2. You testified that the military commissions now provide a fair trial. The rules governing these commissions do not prohibit the admission of testimony that was produced through torture or other coercive means.

a. Would such evidence be admissible?

b. Do you think that a trial that allows the use of such evidence is fair?

ANSWER: The President has recently and repeatedly reaffirmed the longstanding policy that the United States will not commit or condone torture under any circumstances. In addition, the President's Military Order, dated November 13, 2001, requires that each individual tried by military commission be given a full and fair trial. Consistent with this guidance from the President, it is my expectation that no statements will be obtained by torture and, hence, no statements obtained by torture will be offered or admitted as evidence in the military commission proceedings.

3. Stories in the New York Times and Wall Street Journal on August 1, 2005, reported that two members of the military prosecution team questioned the fairness of the military commission proceedings last year. According to the news stories, evidence that one of the defendants subject to trial by military commission had allegedly been tortured had been either lost or withheld from the defense. Do you believe that a trial may be fair even if a defendant is not provided access to evidence that may show the defendant had provided information after being subjected to coercive force?

ANSWER: I am not now in a position to evaluate the statements of the two prosecution team members. I note, however, that the *New York Times* and *Wall Street Journal* stories to which you refer state that, according to Department of Defense officials, several reviews, including one by a

Pentagon inspector general, found the allegations of unfairness unsubstantiated. These articles, moreover, make no mention of allegations that any evidence was obtained by torture.

4. You were quoted in a New York Times story last fall regarding your involvement in the Administration's decision to establish military commissions for prosecuting suspected terrorists, rather than military courts-martial or criminal trials. According to the Times, you said: "Are we going to go with a system that is really guaranteed to prevent us from getting information in every case or are we going to go another route?" Please explain what you meant by the statement quoted in the Times, and please explain whether you believe the Fifth Amendment right to be free from coercive interrogations undermines law enforcement.

ANSWER: Military commissions provide sufficient process for enemy combatants and are fully appropriate to protect classified information and to avoid an unreasonable burden and security risk for civil and military courts. Military commissions have been used throughout our Nation's history as a means of providing justice to combatants. The point of my statement was that rules established for the civil courts are not necessarily appropriate for proceedings involving enemy combatants in wartime. For example, as I stated at my hearing, serious national security concerns would arise if, for example, Osama bin Laden were tried in a United States District Court.

I believe that the Department can and must carry out its mission to enforce the law consistent with the Fifth Amendment to the Constitution.

5. In 2001, you were heavily involved in the development and drafting of the USA Patriot Act. Many members of Congress believe that the sunset provisions of the Patriot Act have been invaluable to Congress' ability to conduct oversight of that law. What is your current view of the sunset provisions?

ANSWER: While I certainly respect the views of those who believe that sunsets are necessary for oversight, I continue to believe that the burdens imposed by sunsets outweigh the benefits. In particular, I believe that sunsets call into question the durability of our commitment to provide law enforcement with the tools needed to carry on the fight against terrorism. Ultimately, however, I agree with the Attorney General's testimony that "the Department of Justice has exercised care and restraint in the use of these important authorities, because we are committed to the rule of law. We have followed the law, because it is the law, not because it is scheduled to sunset. With or without sunsets, our dedication to the rule of law will continue. The Department will strive to continue to carry out its work lawfully and appropriately, and as a citizen I expect Congress will continue its active oversight over our use of the PATRIOT Act, not because it sunsets, but because oversight is a constitutional responsibility of Congress."

6. According to documents released through a FOIA lawsuit, FBI officials have raised serious concerns with Justice Department officials about coercive interrogation techniques being employed at Guantanamo Bay by officers from other agencies, including some who reportedly impersonated FBI agents in the course of interrogations. As the number two official at the Justice Department, what would you do if FBI officials told you they thought other agencies were violating U.S. law in their interrogation techniques?

ANSWER: If FBI or other officials indicated to me that they thought other agencies were violating U.S. law in their interrogation techniques, I would ensure that the allegations were fully investigated and dealt with appropriately under the law. I would also ensure that the allegations were brought to the attention of senior officials of the involved agencies.