

LEVIN'S FIFTH QUESTION: CHAIN OF COMMAND UNDER TITLE 10

I was planning on spending the morning using Twitter to juxtapose the Chuck Hagel confirmation hearing, the ongoing decline of the 9/11 trial into Kangaroo status, and the opening of the Rios Montt trial in Guatemala. Sadly, Twitter failed.

So instead, I began to read Hagel's confirmation questionnaire.

And I'm particularly interested in the fifth question.

Section 162(b) of title 10, United States Code, provides that the chain of command runs from the President to the Secretary of Defense and from the Secretary of Defense to the combatant commands. Section 163(a) of title 10 further provides that the President may direct communications to combatant commanders be transmitted through the Chairman of the Joint Chiefs of Staff and may assign duties to the Chairman to assist the President and the Secretary of Defense in performing their command function.

Do you believe that these provisions facilitate a clear and effective chain of command?

I believe that having a clear and effective chain of command is essential to successful military operations, and that these provisions of law lay the foundation for such a chain of command.

In your view, do these provisions enhance or degrade civilian control of the military?

In my view, these provisions significantly enhance civilian control by codifying the placement of the President, as Commander-in-Chief, and his principal assistant for military matters, the Secretary of Defense, where they can best exercise civilian control of the military: in the top two positions of the military chain of command.

Are there circumstances in which you believe it is appropriate for U.S. military forces to be under the operational command or control of an authority outside the chain of command established under title 10, United States Code?

I believe that all military forces normally should operate under the chain of command established under section 162 of title 10, United States Code. However, in certain sensitive operations a temporary exception to that chain of command may be appropriate. I understand that only the President may approve such an exception and the President retains overall command responsibility, as also recognized in section 162. Any military personnel supporting such sensitive operations remain accountable to the military chain of command, including the Uniform Code of Military Justice. If confirmed, I will provide the President with my best advice regarding any operation where an exception to the established chain of command may be appropriate.

While I can't tell how strongly Carl Levin—whose staffers I assume wrote these questions—objects to the practice or not, he seems to be asking about Obama's practice (exercised under the Osama bin Laden raid and probably many other covert ops) of putting DOD personnel—usually JSOC—under Title 50 authority.

And while Hagel seems okay with the practice (remember, Hagel has presumably been overseeing some of these operations as a member of the President's Intelligence Advisory Board), he does say two things.

First, the President must approve this Title 50 shell game. While I'm sure that's meant to reassure Levin that the civilian Chain of Command remains intact, it also puts Obama solidly in the middle of this shell game.

Also Hagel insists that anyone involved in this shell game remains subject to UMCJ. Perhaps this is meant to address the danger of prisoner abuse (JSOC was one of the worst offenders as Levin, with his SASC report on abuse, knows as well as anyone). But I wonder if it presents an opportunity for better oversight than we're getting over these operations right now?