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The Department of Defense Rules for Military Commissions: Analysis of Procedural Rules and Comparison with Proposed Legislation and the Uniform Code of Military Justice

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Jennifer K. Elsea
Legislative Attorney
American Law Division

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Summary

November 13, 2001, President Bush issued a Military Order (M.O.) pertaining to the detention, treatment, and trial of certain non-citizens in the war against terrorism. Military commissions pursuant to the M.O. began in November, 2004, against four persons declared eligible for trial, but proceedings were suspended after a federal district court found one of the defendants could not be tried under the rules established by the Department of Defense. The D.C. Circuit Court of Appeals reversed that decision, *Rumsfeld v. Hamdan*, but the Supreme Court granted review and reversed the decision of the Court of Appeals. Military commissions will not be able to go forward until the Department of Defense revises its rules to conform with the Supreme Court's *Hamdan* opinion or Congress approves legislation conferring authority to promulgate rules that depart from the strictures of the Uniform Code of Military Justice (UCMJ) and U.S. international obligations.

The M.O. has been the focus of intense debate both at home and abroad. Critics argued that the tribunals could violate the rights of the accused under the Constitution as well as international law, thereby undercutting the legitimacy of any verdicts rendered by the tribunals. The Administration responded by publishing a series of military orders and instructions clarifying some of the details. The procedural aspects of the trials were published in Military Commission Order No. 1 ("M.C.O. No. 1"). The Department of Defense also released two more orders and nine "Military Commission Instructions," which set forth the elements of some crimes that may be tried, establish guidelines for civilian attorneys, and provide other administrative guidance. These rules were praised as a significant improvement over what might have been permitted under the M.O., but some argued that the enhancements do not go far enough, and the Supreme Court held that the amended rules did not comply with the UCMJ.

This report provides a background and analysis comparing military commissions as envisioned under M.C.O. No. 1 to general military courts-martial conducted under the UCMJ. A summary of the *Hamdan* case follows, in particular the shortcomings identified by the Supreme Court. The report provides an overview of legislation (H.R. 6054, S. 3901, S. 3930, S. 3861, and S. 3886). Finally, the report provides two charts to compare the regulations issued by the Department of Defense to standard procedures for general courts-martial under the Manual for Courts-Martial and to proposed legislation. The second chart, which compares procedural safeguards incorporated in the regulations with established procedures in courts-martial, follows the same order and format used in CRS Report RL31262, *Selected Procedural Safeguards in Federal, Military, and International Courts*, in order to facilitate comparison with safeguards provided in federal court and international criminal tribunals.

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Introduction

Rasul v. Bush, issued by the U.S. Supreme Court at the end of its 2003-2004 term, clarified that U.S. courts do have jurisdiction to hear petitions for habeas corpus on behalf of the approximately 550 persons detained at the U.S. Naval Station in Guantanamo Bay, Cuba, in connection with the war against terrorism,[1] establishing a role for federal courts to play in determining the validity of the military commissions convened pursuant to President Bush's Military Order (M.O.) of November 13, 2001.[2] After dozens of petitions for habeas corpus were filed in the federal District Court for the District of Columbia, Congress passed the Detainee Treatment Act of 2005 (DTA),[3] revoking federal court jurisdiction over habeas claims, at least with respect to those not already pending, and created jurisdiction in the Court of Appeals for the District of Columbia Circuit to hear appeals of final decisions of military commissions. The Supreme Court overturned a decision by the D.C. Circuit that had upheld the military commissions, *Hamdan v. Rumsfeld*,[4] holding instead that although Congress has authorized the use of military

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[1] Rasul v. Bush, 124 S. Ct. 2686 (2004). For a summary of *Rasul* and related cases, see CRS Report RS21884, *The Supreme Court and Detainees in the War on Terrorism: Summary and Analysis of Recent Decisions*; CRS Report RS22466, *Hamdan v. Rumsfeld: Military Commissions in the 'Global War on Terrorism,'* by Jennifer K. Elsea.

[2] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism §1(a), 66 Fed. Reg. 57,833 (Nov. 16, 2001) (hereinafter "M.O.").

[3] P.L. 109-148, §1005(e)(1) amends 28 U.S.C. § 2441 to provide that "no court … shall have jurisdiction to hear or consider … an application for … habeas corpus filed by … an alien detained … at Guantanamo Bay." However, it creates new, albeit limited, jurisdiction in the D.C. Cir. to hear challenges of "any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant" as well as reviews of "final decisions of military commissions," which are discretionary unless the sentence is greater than ten years or involves the death penalty. DTA § 1005(e)(2-3).

[4] Hamdan v. Rumsfeld, 548 U.S. __ (2006), *rev'g 415* F.3d 33 (D.C. Cir. 2005). The Court found that the DTA does not apply to Hamdan's petition, which was an appeal of an interlocutory ruling rather than the final decision of a military commission, but did not resolve whether it affects other pending cases that fall under the DTA's provisions regarding final review of Combatant Status Review Tribunals. Slip op. at 19, and n.14.

commissions, such commissions must follow procedural rules as similar as possible to courts-martial proceedings, in compliance with the Uniform Code of Military Justice (UCMJ).[5]

Military Commissions: General Background. Military commissions are courts usually set up by military commanders in the field to try persons accused of certain offenses during war.[6] They are distinct from military courts-martial, which are panels set up to try U.S. service members (and during declared wars, civilians accompanying the armed forces) under procedures prescribed by Congress in the UCMJ. U.S. service members charged with a war crime are normally tried before courts-martial but may also be tried by military commission or in federal court, depending on the nature of the crime charged.[7] All three options are also available to try certain other persons for war crimes. Federal and state criminal statutes and courts are available to prosecute specific criminal acts related to terrorism that may or may not be triable by military commission.

Military commissions trying enemy belligerents for war crimes directly apply the international law of war, without recourse to domestic criminal statutes, unless such statutes are declaratory of international law.[8] Historically, military commissions have applied the same set of procedural rules that applied in courts-martial.[9]

Military Commissions at Guantánamo Bay. The President's Military Order establishing military commissions to try suspected terrorists has been the focus of intense debate both at home and abroad. Critics argued that the tribunals could violate any rights the accused may have under the Constitution as well as their rights under international law, thereby undercutting the legitimacy of any verdicts rendered by the tribunals. The Administration initially responded that the M.O. provided only the minimum requirements for a full and fair trial, and that the Secretary of Defense intended to establish rules prescribing detailed procedural safeguards for tribunals established pursuant to the M.O. The procedural rules released in March 2002 were praised as a significant improvement over what might have been permitted under the language of the M.O., but some continued to argue that the enhancements do not go far enough and that the checks and balances of a separate rule-making authority and

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[5] 10 U.S.C. § 801 *et seq*.

[6] See CRS Report RL31191, *Terrorism and the Law of War: Trying Terrorists as War Criminals before Military Commissions* (providing a general background of U.S. history of military commissions), by Jennifer Elsea.

[7] *See* 10 U.S.C. § 818; 18 U.S.C. §2441.

[8] *See* U.S. Army Field Manual (FM) 27-10, The Law of Land Warfare, section 505(e) [hereinafter "FM 27-10"].

[9] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 841-42 (2d ed. 1920)(noting that "in the absence of any statute or regulation," the same principles and procedures commonly govern, though possibly more "liberally construed and applied"); David Glazier, Note, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005 (2003).

an independent appellate process are necessary.[10] The release of the Military Commission Instructions sparked renewed debate, especially concerning the restrictions on civilian attorneys,[11] resulting in further modifications to the rules. Critics noted that the rules do not address the issue of indefinite detention without charge, as appears to be possible under the original M.O.,[12] or that the Department of Defense may continue to detain persons who have been cleared by a military commission.[13] The Pentagon has stated that its Inspector General (IG) looked into allegations, made by military lawyers assigned as prosecutors to the military commissions, that the proceedings are rigged to obtain convictions, but the IG did not substantiate the charges.[14]

The Department of Defense (DOD) has released ten "Military Commission Instructions" ("M.C.I. No. 1-10")[15] to elaborate on the set of procedural rules to govern military tribunals. Those rules are set forth in Military Commission Order No. 1 ("M.C.O. No. 1"), issued in March 2002 and amended in 2005.[16] The instructions set forth the elements of some crimes that may be tried by military commission, establish guidelines for civilian attorneys, and provide other administrative guidance and procedures for military commissions. Additionally, Major General John D. Altenburg, Jr. (retired), the Appointing Authority for the commissions, issued several Appointing Authority Regulations, governing disclosure of communications, interlocutory motions, and professional responsibility.

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[10] *See* Letter from Timothy H. Edgar, ACLU Legislative Counsel, *Military Commission Order No. 1, March 21, 2002* (April 16, 2002), *available at* [http://www.aclu.org/National Security/NationalSecurity.cfm?ID=10150&c=111] (last visited July 21, 2006); American College of Trial Lawyers, Report on Military Commissions for the Trial of Terrorists, March 2003 [hereinafter "ACTL"], a*vailable at* [http://www.actl.com/AM/Template.cfm ?Section=All_Publications&Template=/CM/ContentDisplay.cfm&ContentFileID=63] (last visited July 21, 2006); ACTL, Supplemental Report on Military Commissions for the Trial of Terrorists, Oct. 2005, online at [http://www.actl.com/AM/Template.cfm?Section=Home &template=/CM/ContentDisplay.cfm&ContentID=2152] (last visited July 21, 2006).

[11] The president of the National Association of Criminal Defense Lawyers (NACDL) announced that NACDL "cannot advise its members to act as civilian counsel" because it deems the rules too restrictive to allow for zealous and professional representation on their part. *See* Lawrence Goldman, *Guantanamo: Little Hope for Zealous Advocacy*, NACDL CHAMPION, July 2003, at 4, *available at* [http://www.nacdl.org/public.nsf/Champion Articles/A0307p04?OpenDocument] (last visited July 21, 2006).

[12] The Administration has not explicitly used this authority; instead, it says the prisoners are being held as "enemy combatants" pursuant to the law of war.

[13] *See* Bruce Zagaris, *U.S. Defense Department Issues Order on Military Commissions*, 18 No. 5 INT'L ENFORCEMENT L. REP 215 (2002) (citing comments by DOD chief counsel William J. Haynes II to a New York Times reporter).

[14] *See* Neil A. Lewis, *Two Prosecutors Faulted Trials For Detainees*, NEW YORK TIMES, August 1, 2005, at A1.

[15] Department of Defense ("DOD") documents related to military commissions are available online at [http://www.defenselink.mil/news/commissions.html] (last visited July 24, 2006).

[16] *Reprinted at* 41 I.L.M. 725 (2002). The most recent version was issued Aug. 31, 2005.

In August 2005, DOD amended M.C.O. No. 1 to make the presiding officer function more like a judge and to have other panel members function more like a jury. Under the new rules, the presiding officer was assigned the responsibility of determining most questions of law while the other panel members were to make factual findings and decide any sentence, similar to courts-martial proceedings. Other provisions were modified to clarify the accused's privilege to be present except when necessary to protect classified information and only in instances where the presiding officer concludes that the admission of such evidence would not prejudice a fair trial and to require that the presiding officer exclude any evidence that would result in the denial of a full and fair trial from lack of access to the information.[17]

President Bush determined that twenty of the detainees at the U.S. Naval Station in Guantánamo Bay are subject to the M.O. and may consequently be charged and tried before military commissions.[18] Six detainees declared eligible in 2003 included two citizens of the U.K. and one Australian citizen.[19] After holding discussions with the British and Australian governments regarding the trial of their citizens, the Administration agreed that none of those three detainees will be subject to the death penalty.[20] The Administration agreed to modify some of the rules with respect to trials of Australian detainees[21] and agreed to return the U.K. citizens, including the two who had been declared eligible for trial by military commission, to Great Britain.[22] The Administration agreed to return one Australian citizen, but another, David Hicks has been charged with conspiracy to commit war crimes; attempted

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[17] *See* Press Release, Department of Defense, Secretary Rumsfeld Approves Changes to Improve Military Commission Procedures (Aug. 31, 2005), *available at* [http://www.defenselink.mil/releases/2005/nr20050831-4608.html] (last visited July 21, 2006).

[18] *See* Press Release, Department of Defense, President Determines Enemy Combatants Subject to His Military Order (July 3, 2003), *available at* [http://www.defenselink.mil/releases/2003/nr20030703-0173.html] (last visited July 21, 2006). According to the Defense Department, that determination is effectively "a grant of [military] jurisdiction over the person." *See* John Mintz, *6 Could Be Facing Military Tribunals*, WASH. POST, July 4, 2003, at A1. In 2004, nine additional detainees were determined to be eligible. *See* Press Release, Department of Defense, Presidential Military Order Applied to Nine more Combatants (July 7, 2004), *available at* [http://www.defenselink.mil/releases/2004/nr20040707-0987.html] (last visited July 21, 2006). In November 2005, five more detainees were charged. *See* Press Release, Department of Defense, Military Commission Charges Approved (November 7, 2005), *available at* [http://www.defenselink.mil/releases/2005/nr20051107-5078.html] (last visited July 21, 2006).

[19] *See* John Mintz and Glenn Frankel, *2 Britons, Australian Among Six Facing Trial*, WASH. POST, July 5, 2003, at A13.

[20] *See* Press Releases, Department of Defense, Statement on British Detainee Meetings and Statement on Australian Detainee Meetings (July 23, 2003), *available at* [http://www.defenselink.mil/news/Aug2004/ commissions_releases.html] (last visited July 21, 2006).

[21] *See* Press Release, Department of Defense, U.S. and Australia Announce Agreements on Guantanamo Detainees (Nov. 25, 2003), *available at* [http://www.defenselink.mil/releases/2003/nr20031125-0702.html] (last visited July 21, 2006).

[22] *See* Ed Johnson, *British Guantanamo Detainees to Be Freed,* AP, Jan. 11, 2005.

murder by an unprivileged belligerent and aiding the enemy.[23] One citizen from Yemen and one from the Sudan were formally charged with conspiracy to commit certain violations of the law of war (and other crimes triable by military commission).[24] Salim Ahmed Hamdan of Yemen, accused of providing physical security for Osama bin Laden and other high ranking Al Qaeda members and charged with conspiracy to attack civilians, commit murder by an unprivileged belligerent and terrorism,[25] provided the Supreme Court its first opportunity to address the validity of the military commissions.

Hamdan v. Rumsfeld

Salim Ahmed Hamdan, who was captured in Afghanistan and is alleged to have worked for Osama Bin Laden as a body guard and driver, brought this challenge to the lawfulness of the Secretary of Defense's plan to try him for alleged war crimes before a military commission,[26] arguing that the military commission rules and procedures were inconsistent with the UCMJ[27] and that he had the right to be treated as a prisoner of war under the Geneva Conventions.[28] U.S. District Judge Robertson agreed, finding no inherent authority in the President as Commander-in-Chief of the Armed Forces to create such tribunals outside of the existing statutory authority, with which the military commission rules did not comply. He also concluded that the Geneva Conventions apply to the whole of the conflict in Afghanistan, including

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[23] *See* Press Release, Department of Defense, Guantanamo Detainee Charged (June 10, 2004), *available at* [http://www.defenselink.mil/releases/2004/nr20040610-0893.html] (last visited July 21, 2006). Justice Stevens found for a plurality in the *Hamdan* case that "conspiracy" is not an "offense triable by military commission" within the meaning of the UCMJ.

[24] Press Release, Department of Defense, Two Guantanamo Detainees Charged (Feb. 24, 2004), *available at* [http://www.defenselink.mil/releases/2004/nr20040224-0363.html] (last visited July 21, 2006). The two defendants are charged with "willfully and knowingly joining an enterprise of persons who shared a common criminal purpose and conspired with Osama bin Laden and others to commit the following offenses: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism." One of the detainees filed for a writ of prohibition and writ of mandamus with the U.S. Court of Appeals for the Armed Forces (CAAF) in an effort to halt the military commission proceedings, but the CAAF dismissed the petition without prejudice in January, 2005. Al Qosi v. Altenburg, 60 M.J. 461(2005).

[25] Press Release, Department of Defense, Additional Military Commission Charges Referred (July 14, 2004), *available at* [http://www.defenselink.mil/releases/2004/nr20040714-1030.html] (last visited July 21, 2006).

[26] 344 F.Supp.2d 152 (D. D.C. 2004), *rev'd* 415 F.3d 33 (D.C. Cir. 2005), *cert. granted* 2005 U.S. LEXIS 8222 (Nov. 7, 2005).

[27] 10 U.S.C. §§ 801 *et seq.*

[28] There are four Conventions, the most relevant of which is The Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3317 (hereinafter "GPW").

under their protections all persons detained in connection with the hostilities there,[29] and that Hamdan was thus entitled to be treated as a prisoner of war until his status was determined to be otherwise by a competent tribunal, in accordance with article 5 of the Third Geneva Convention (prisoners of war).

Interpreting the UCMJ in light of the Geneva Conventions, which permits the punishment of prisoners of war "only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power,"[30] Judge Robertson found no congressional authority for Hamdan's trial under the DOD's rules for military commissions. Hamdan, he ruled, was not "an offender triable by military tribunal under the law of war" within the meaning of UCMJ art 21.[31] Further, he found the rules established by DOD to be fatally inconsistent with the UCMJ, contrary to UCMJ art. 36[32] because they give military authorities the power to exclude the accused from hearings and deny him access to evidence presented against him.[33]

The government appealed, arguing that the district court should not have interfered in the military commission prior to its completion, that Hamdan is not entitled to protection from the Geneva Conventions, and that the President has inherent authority to establish military commissions, which need not conform to statutes regulating military courts-martial.[34] The D.C. Circuit Court of Appeals rejected the government's argument that the federal courts had no jurisdiction to interfere in ongoing commission proceedings, but otherwise agreed with the government. Writing for a unanimous court, Judge Randolph reversed the lower court's finding, ruling that the Geneva Conventions are not judicially enforceable,[35] that even if they were, Hamdan is not entitled to their protections, and that in any event, the military commission would qualify as a "competent tribunal" where Hamdan may challenge his non-POW status, within the meaning of U.S. Army regulations implementing the Conventions.[36]

The appellate court did not accept the government's argument that the President has inherent authority to create military commissions without any authorization from Congress, but found such authority in the Authorization to Use Military Force

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[29] 344 F.Supp.2d at 161.

[30] GPW art. 102.

[31] 344 F.Supp.2d at 158-59.

[32] 10 U.S.C. § 836 (procedures for military commissions may not be "contrary to or inconsistent with" the UCMJ).

[33] 344 F.Supp.2d at 166.

[34] *See* Brief for Appellants, Hamdan v. Rumsfeld, No. 04-5393 (D.C. Cir.).

[35] Rumsfeld v. Hamdan, 415 F.3d 33, 39-40 (D.C. Cir. July 15, 2005).

[36] *Id*. at 19.

(AUMF),[37] read together with UCMJ arts. 21 and 36.[38] The court interpreted art. 36 to mean that military commission rules have only to be consistent with those articles of the UCMJ that refer specifically to military commissions, and not that Congress meant to incorporate procedural rules for courts-martial into those applicable to military commissions. However, because the procedural rules to be used by the military commissions did not, in its view, affect jurisdiction, the court found it unnecessary to resolve the issue at the interlocutory stage of the case.

With respect to the Geneva Conventions, the D.C. Circuit cited to a footnote from the World War II *Eisentrager*[39] opinion that expresses doubt that the Court could grant relief based directly on the 1929 Geneva Convention:

> We are not holding that these prisoners have no right which the military authorities are bound to respect. The United States, by the Geneva Convention of July 27, 1929, 47 Stat. 2021, concluded ... an agreement upon the treatment to be accorded captives. These prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention.[40]

Judge Williams wrote a concurring opinion, agreeing with the government's conception of the conflict with Al Qaeda as separate from the conflict with the Taliban but construing Common Article 3 to apply to any conflict with a non-state actor, without regard to the geographical confinement of such a conflict within the borders of a signatory state. Supreme Court nominee John G. Roberts concurred in the opinion without writing separately.

The Supreme Court granted review and reversed.

Before reaching the merits of the case, the Supreme Court dispensed with the government's argument that Congress had, by passing the Detainee Treatment Act

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[37] Authorization for Use of Military Force ("the AUMF"), P.L. 107-40, 115 Stat. 224 (2001).

[38] *Hamdan*, 415 F.3d at 37.

[39] Johnson v. Eisentrager, 339 U.S. 763 (1950) (holding that the federal courts did not have jurisdiction to hear a petition on behalf of German citizens who had been convicted by U.S. military commissions in China because the writ of habeas corpus was not available to "enemy alien[s], who at no relevant time and in no stage of [their] captivity [have] been within [the court's] jurisdiction"). The Supreme Court, in *Rasul v. Bush*, declined to apply *Eisentrager* to deny Guantánamo detainees the right to petition for habeas corpus. *See Rasul* at 2698 (finding authority for federal court jurisdiction in 28 U.S.C. § 2241, which grants courts the authority to hear applications for habeas corpus "within their respective jurisdictions," by any person who claims to be held "in custody in violation of the Constitution or laws or treaties of the United States").

[40] 339 U.S. at 789 n.14.

of 2005 (DTA),[41] stripped the Court of its jurisdiction to review habeas corpus challenges by or on behalf of Guantanamo detainees whose petitions had already been filed.[42] The government's argument that the petitioner had no rights conferred by the Geneva Conventions that could be adjudicated in federal court likewise did not persuade the Court to dismiss the case. Regardless of whether the Geneva Conventions provide rights that are enforceable in Article III courts, the Court found that Congress, by incorporating the "law of war" into UCMJ art. 21,[43] brought the Geneva Conventions within the scope of law to be applied by courts. The Court disagreed that the *Eisentrager* case requires another result, noting that the Court there had decided the treaty question on the merits based on its interpretation of the Geneva Convention of 1929 and that the 1949 Conventions were drafted to reject that interpretation.[44] Justice Scalia, joined by Justices Thomas and Alito, dissented, arguing that the DTA should be interpreted to preclude the Court's review.

In response to the holding by the court below that Hamdan, as a putative member of al Qaeda, was not entitled to any of the protections accorded by the Geneva Conventions, the Court concluded that at the very least, Common Article 3 of the Geneva Conventions applies, even to members of al Qaeda, according to them a minimum baseline of protections, including protection from the "passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[45] Although recognizing that

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[41] P.L. 109-148, §1005(e)(1) provides that "no court … shall have jurisdiction to hear or consider … an application for … habeas corpus filed by … an alien detained … at Guantanamo Bay." The provision was not yet law when the appellate court decided against the petitioner, Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005), *rev'd* 548 U.S. __ (2006). At issue was whether this provision applies to pending cases. The Court found that the provision does not apply to Hamdan's petition, but did not resolve whether it affects other cases that fall under the DTA's provisions regarding final review of Combatant Status Review Tribunals. Slip op. at 19, and n.14.

[42] *Id*. at 7. To resolve the question, the majority employed canons of statutory interpretation supplemented by legislative history, avoiding the question of whether the withdrawal of the Court's jurisdiction would constitute a suspension of the Writ of Habeas Corpus, or whether it would amount to impermissible "court-stripping." Justice Scalia, joined by Justices Alito and Thomas in his dissent, interpreted the DTA as a revocation of jurisdiction.

[43] 10 U.S.C. § 821 ("The provisions of [the UCMJ] conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals."). The *Hamdan* majority concluded that "compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted." *Hamdan*, slip op. at 63.

[44] *Hamdan*, slip op. at 63-65.

[45] GPW art. 3 § 1(d). The identical provision is included in each of the four Geneva Conventions and applies to any "conflict not of an international character." The majority declined to accept the President's interpretation of Common Article 3 as inapplicable to the conflict with al Qaeda and interpreted the phrase "in contradistinction to a conflict between

(continued...)

Common Article 3 "obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict" and that "its requirements are general ones, crafted to accommodate a wide variety of legal systems," the Court found that the military commissions under M.C.O. No. 1 do not meet these criteria. In particular, the military commissions are not "regularly constituted" because they deviate too far, in the Court's view, from the rules that apply to courts-martial, without a satisfactory explanation of the need for such deviation.[46]

With respect to the authority to create the military commissions, the Court held that any power to create them must flow from the Constitution and must be among those "powers granted jointly to the President and Congress in time of war."[47] It disagreed with the government's position that Congress had authorized the commissions either when it passed the Authorization to Use Military Force (AUMF)[48] or the DTA. Although the Court assumed that the AUMF activated the President's war powers, it did not view the AUMF as expanding the President's powers beyond the authorization set forth in the UCMJ. The Court also noted that the DTA, while recognizing the existence of military commissions, does not specifically authorize them. At most, these statutes "acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the 'Constitution and laws,' including the law of war."[49]

In addition to limiting military commissions to trials of offenders and offenses that are by statute or by the law of war consigned to such tribunals, the UCMJ provides limitations with respect to the procedural rules that may be employed. Article 36 (10 U.S.C. § 836) authorizes the President to prescribe rules for "pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals." Such rules are to "apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts" insofar as the President "considers practicable" but that "may not be contrary to or inconsistent" with the UCMJ. In addition, rules made pursuant to this authority "shall be uniform insofar as practicable." The President had determined with respect to the military commissions that "it is impracticable to apply the rules and principles

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[45] (...continued)
nations," which the Geneva Conventions designate a "conflict of international character." *Hamdan*, slip op. at 67.

[46] *Id*. at 70 (plurality opinion); *Id.* (Kennedy, J., concurring) at 10. Justice Stevens, joined by Justices Ginsburg, Breyer, and Souter, further based their conclusion on the basis that M.C.O. No. 1 did not meet all criteria of art. 75 of Protocol I to the Geneva Conventions of 1949, adopted in 1977 (Protocol I). While the United States is not party to Protocol I, the plurality noted that many authorities regard it as customary international law.

[47] *Hamdan*, slip op. at 27 (citing Congress's powers to "declare War ... and make Rules concerning Captures on Land and Water," Art. I, §8, cl. 11, to "raise and support Armies," id., cl. 12, to "define and punish ... Offences against the Law of Nations," id., cl. 10, and "To make Rules for the Government and Regulation of the land and naval Forces," id., cl. 14.).

[48] P.L. 107-40, 115 Stat. 224 (2001).

[49] *Hamdan*, slip op. at 30.

of law that govern 'the trial of criminal cases in the United States district courts'" but made no determination with respect to the practicability of applying rules different from those that apply in courts-martial.[50]

The Court interpreted article 36 to provide the President discretion to determine which federal court rules need not be applied by various military tribunals[51] due to their impracticability. However, the Court read the uniformity requirement as according less discretion to the President to determine what is practicable when providing different rules for courts-martial, military commissions, and other military tribunals.[52] Unlike the requirement for rules to track closely with federal court rules, which the President need follow only insofar as *he deems* practicable, the Court reasoned, the uniformity requirement applies unless its application is demonstrably impracticable. Thus, less deference was found owing, and the Court found that the government had failed to demonstrate that circumstances make any courts-martial rules impracticable for use in military commissions. Further, the Court found that some of the rules provided in the Defense Department rules set forth in Military Commission Order No. 1 ("M.C.O. No. 1"), in particular the provision allowing the exclusion of the defendant from attending portions of his trial or hearing some of the evidence against him, deviated substantially from the procedures that apply in courts-martial in violation of UCMJ article 36.[53]

Department of Defense Rules for Military Commissions

M.C.O. No. 1 sets forth procedural rules for the establishment and operation of military commissions convened pursuant to the November 13, 2001, M.O. It addresses the jurisdiction and structure of the commissions, prescribes trial procedures, including standards for admissibility of evidence and procedural safeguards for the accused, and establishes a review process. The *Hamdan* Court found the rules insufficient to meet UCMJ standards and noted that the review process was not sufficiently independent of the armed services to warrant the Court's abstention until the petitioner's case was finally decided. M.C.O. No. 1 also contains various mechanisms for safeguarding sensitive government information, which the Court found problematic in that they could have permitted evidence to be withheld from the accused but nevertheless considered by the military commission. The *Hamdan* Court left open the possibility that the rules established by M.C.O. No. 1 would be valid if Congress were to explicitly approve them.

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[50] The government took the position that the "contrary to or consistent with" language applies only with respect to parts of the UCMJ that make specific reference to military commissions.

[51] The term "military tribunal" in the UCMJ should be interpreted to cover all forms of military courts, encompassing courts-martial as well as military commissions.

[52] *Hamdan*, slip op. at 59.

[53] *Id* at 61. Regarding the defendant's right to be present during trial, the Court stated, "[w]hether or not that departure technically is 'contrary to or inconsistent with' the terms of the UCMJ, 10 U. S. C. §836(a), the jettisoning of so basic a right cannot lightly be excused as 'practicable.'"

Other orders and instructions may also call for specific congressional approval to remain valid. M.C.O. No. 3, "Special Administrative Measures for Certain Communications Subject to Monitoring," establishes procedures for authorizing and controlling the monitoring of communications between detainees and their defense counsel for security or intelligence-gathering purposes. M.C.O. No. 2 and 4 designate appointing officials.

M.C.I. No. 1 provides guidance for interpretation of the instructions as well as for issuing new instructions. It states that the eight M.C.I. apply to all DOD personnel as well as prosecuting attorneys assigned by the Justice Department and all civilian attorneys who have been qualified as members of the pool. Failure on the part of any of these participants to comply with any instructions or other regulations "may be subject to the appropriate action by the Appointing Authority, the General Counsel of the Department of Defense, or the Presiding Officer of a military commission."[54] "Appropriate action" is not further defined, nor is any statutory authority cited for the power.[55] M.C.I. No. 1 also reiterates that none of the instructions is to be construed as creating any enforceable right or privilege.

Jurisdiction. The President's M.O. has been criticized as overly broad in its assertion of jurisdiction, because it could be interpreted to cover non-citizens who have no connection with Al Qaeda or the terrorist attacks of September 11, 2001. It has been argued that the constitutional and statutory authority of the President to establish military tribunals does not extend any further than Congress' authorization to use armed force in response to the attacks.[56] Under a literal interpretation of the M.O., however, the President may designate as subject to the order any non-citizen he believes has ever engaged in any activity related to international terrorism, no matter when or where these acts took place. A person subject to the M.O. may be detained and possibly tried by military tribunal for violations of the law of war and "other applicable law."[57]

M.C.O. No. 1 does not explicitly limit its coverage to the scope of the authorization of force, but it clarifies somewhat the ambiguity with respect to the offenses covered. M.C.O. No. 1 establishes that commissions may be convened to try aliens who are designated by the President as subject to the M.O., whether

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[54] M.C.I. No. 1 at § 4.C.

[55] M.C.I. No. 1 lists 10 U.S.C. § 898 as a reference. That law, Article 98, UCMJ, Noncompliance with procedural rules, provides:

> Any person subject to this chapter who -
> (1) is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this chapter; or
> (2) knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused;
> shall be punished as a court-martial may direct

[56] P.L. 107-40, 115 Stat. 224 (2001) (authorizing military force against those who "planned, authorized, committed, [or] aided" the Sept. 11 attacks or who "harbored such ... persons").

[57] M.O. § 1(e) (finding such tribunals necessary to protect the United States and for effective conduct of military operations).

captured overseas or on U.S. territory, for violations of the law of war and "all other offenses triable by military commissions." Although this language is somewhat narrower than "other applicable law," it remains vague. However, the statutory language recognizing the jurisdiction of military commissions is similarly vague, such that the M.C.O. does not appear on its face to exceed the statute with respect to jurisdiction over offenses. Justice Stevens, joined in that portion of the *Hamdan* opinion by only three other Justices, undertook an inquiry of military commission precedents to determine that "conspiracy" is not a valid charge. M.C.O. No. 1 does not resolve the issue of whether the President may, consistent with the Constitution, direct that criminal statutes defined by Congress to be dealt with in federal court be redefined as "war crimes" to be tried by the military, but the *Hamdan* decision may be interpreted to counsel against such an interpretation.

By statute, military tribunals may be used to try "offenders or offenses designated by statute or the law of war."[58] There are only two statutory offenses for which convening a military commission is explicitly recognized: aiding the enemy and spying (in time of war).[59] It appears that "offenses designated by the law of war" are not necessarily synonymous with "offenses *against* the law of war." Military tribunals may also be used to try civilians in occupied territory for ordinary crimes.[60] During a war, they may also be used to try civilians for committing belligerent acts, even those for which lawful belligerents would be entitled to immunity under the law of war, but only where martial law or military government may legally be exercised or on the battlefield,[61] where civilian courts are closed.[62] Such acts are not necessarily

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[58] 10 U.S.C. § 821.

[59] 10 U.S.C. §§ 904 and 906, respectively. The circumstances under which civilians accused of aiding the enemy may be tried by military tribunal have not been decided, but a court interpreting the article may limit its application to conduct committed in territory under martial law or military government, within a zone of military operations or area of invasion, or within areas subject to military jurisdiction. *See* FM 27-10, *supra* note 8, at para. 79(b)(noting that treason and espionage laws are available for incidents occurring outside of these areas, but are triable in civil courts). Spying is not technically a violation of the law of war, however, but violates domestic law and traditionally may be tried by military commission. *See id.* at para. 77 (explaining that spies are not punished as "violators of the law of war, but to render that method of obtaining information as dangerous, difficult, and ineffective as possible").

[60] *See, e.g.*, United States v. Schultz, 4 C.M.R. 104, 114 (1952)(listing as crimes punishable under the law of war, in occupied territory as murder, manslaughter, robbery, rape, larceny, arson, maiming, assaults, burglary, and forgery).

[61] *See* WINTHROP, *supra* note 9, at 836. *See* NATIONAL INSTITUTE OF MILITARY JUSTICE, ANNOTATED GUIDE: PROCEDURES FOR TRIALS BU MILITARY COMMISSIONS OF CERTAIN NON-UNITED STATES CITIZENS IN THE WAR AGAINST TERRORISM 10-11 (hereinafter "NIMJ")(noting that civilians in occupied Germany after World War II were sometimes tried by military commission for ordinary crimes unrelated to the laws of war). Military trials of civilians for crimes unrelated to the law of war on U.S. territory under martial law are permissible only when the courts are not functioning. *See* Duncan v. Kahanamoku, 327 U.S. 304 (1945).

[62] *See id*. (citing *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866)). Winthrop notes that the (continued...)

offenses against the law of war (that is, they do not amount to an international war crime), but are merely *unprivileged* under it, although courts and commentators have tended to use the terms interchangeably. Justice Stevens opined for the plurality that military commissions in the present circumstances have jurisdiction only for belligerent offenses and that martial law and military occupation courts will not serve as precedent for jurisdiction purposes.[63]

Some argue that civilians, including unprivileged combatants unaffiliated with a state (or other entity with "international personality" necessary for hostilities to amount to an "armed conflict"), are not directly subject to the international law of war and thus may not be prosecuted for violating it.[64] They may, however, be prosecuted for most belligerent acts under ordinary domestic law, irrespective of whether such an act would violate the international law of war if committed by a soldier. Under international law, those offenders who are entitled to prisoner of war (POW) status under the Third Geneva Convention ["GPW"] are entitled to be tried by court-martial and may not be tried by a military commission offering fewer safeguards than a general court-martial, even if those prisoners are charged with war crimes.[65] In the case of a non-international conflict, Common Article 3 of the Geneva Conventions protects even non-POWs from the "passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[66]

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[62] (...continued)
limitations as to place, time, and subjects were not always strictly followed, mentioning a Civil War case in which seven persons who had conspired to seize a U.S. merchant vessel at Panama were captured and transported to San Francisco for trial by military commission. *Id.* at 837 (citing the pre-*Milligan* case of T.E. Hogg).

[63] *Hamdan*, slip op. at 33-34.

[64] *See* Leila Nadya Sadat, *Terrorism and the Rule of Law*, 3 WASH. U. GLOBAL STUD. L. REV. 135 (2004)(arguing that no armed conflict exists with respect to terrorists, making the law of war inapplicable to them).

[65] The Geneva Convention Relative to the Treatment of Prisoners of War [hereinafter "GPW"] art. 102 states:

> A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.

6 U.S.T. 3317. The Supreme Court finding to the contrary in *In re* Yamashita, 327 U.S. 1 (1946), is likely superceded by the 1949 Geneva Convention. For more information about the treatment of prisoners of war, see CRS Report RL31367, *Treatment of "Battlefield Detainees" in the War on Terrorism*.

[66] GPW art. 3 § 1(d). The identical provision is included in each of the four Geneva Conventions and applies to any "conflict not of an international character." The *Hamdan* majority declined to accept the President's interpretation of Common Article 3 as inapplicable to the conflict with al Qaeda and interpreted the phrase "in contradistinction to a conflict between nations," which the Geneva Conventions designate a "conflict of international character". *Hamdan*, slip op. at 67. The Court did not expressly decide whether the Global War on Terror (GWOT) is international or non-international for the (continued...)

Subject-Matter Jurisdiction. M.C.I. No. 2, Crimes and Elements for Trials by Military Commission, details some of the crimes that might be subject to the jurisdiction of the commissions. Unlike the rest of the M.C.I. issued so far, this instruction was published in draft form by DOD for outside comment. The final version appears to have incorporated some of the revisions, though not all, suggested by those who offered comments.[67] The revision clarifies that the burden of proof is on the prosecution, precludes liability for *ex post facto* crimes,[68] adds two new war crimes, and clearly delineates between war crimes and "other offenses triable by military commission."

M.C.I. No. 2 clarifies that the crimes and elements derive from the law of war, but does not provide any references to international treaties or other sources that comprise the law of war. The instruction does not purport to be an exhaustive list; it is intended as an illustration of acts punishable under the law of war[69] or triable by military commissions.[70] "Aiding the enemy" and "spying" are included under the latter group, but are not defined with reference to the statutory authority in UCMJ articles 104 and 106 (though the language is very similar).[71] Terrorism is also

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[66] (...continued)
purposes of the Geneva Convention, but merely that it is one or the other.

[67] *See* NATIONAL INSTITUTE OF MILITARY JUSTICE, MILITARY COMMISSION INSTRUCTIONS SOURCEBOOK 95 (2003) [hereinafter "SOURCEBOOK"]. DOD has not made public an exact account of who provided comments to the instruction, but some of them are published in the Sourcebook.

[68] *See* M.C.I. No. 2 § 3(A) ("No offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question.").

[69] Crimes against the law of war listed in M.C.I. No. 2 are: 1) Willful Killing of Protected Persons; 2) Attacking Civilians; 3) Attacking Civilian Objects; 4) Attacking Protected Property; 5) Pillaging; 6) Denying Quarter; 7) Taking Hostages; 8) Employing Poison or Analogous Weapons; 9) Using Protected Persons as Shields; 10) Using Protected Property as Shields; 11) Torture; 12) Causing Serious Injury; 13) Mutilation or Maiming; 14) Use of Treachery or Perfidy; 15) Improper Use of Flag of Truce; 16) Improper Use of Protective Emblems; 17) Degrading Treatment of a Dead Body; and 18) Rape.

[70] Crimes "triable by military commissions" include 1) Hijacking or Hazarding a Vessel or Aircraft; 2) Terrorism; 3) Murder by an Unprivileged Belligerent; 4) Destruction of Property by an Unprivileged Belligerent; 5) Aiding the Enemy; 6) Spying; 7) Perjury or False Testimony; and 8) Obstruction of Justice Related to Military Commissions. Listed as "other forms of liability and related offenses" are: 1) Aiding or Abetting. 2) Solicitation; 3) Command/Superior Responsibility - Perpetrating; 4) Command/Superior Responsibility - Misprision; 5) Accessory After the Fact; 6) Conspiracy; and 7) Attempt.

[71] Ordinarily, the charge of "aiding the enemy" would require the accused have allegiance to the party whose enemy he has aided. DOD added a comment to this charge explaining that the wrongfulness requirement may necessitate that "in the case of a lawful belligerent, the accused owe allegiance or some duty to the United States or an ally or coalition partner..." such as "citizenship, resident alien status, or a contractual relationship with [any of these countries]." M.C.I. No.2 §6(A)(5)(b)(3). It is unclear what is meant by limiting the requirement to "a lawful belligerent." It could be read to make those persons considered the "enemy" also subject to trial for "aiding the enemy,"as is the case with Australian detainee
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defined without reference to the statutory definition in title 18, U.S. Code.[72] Although the Supreme Court long ago stated that charges of violations of the law of war tried before military commissions need not be as exact as those brought before regular courts,[73] it appears that the current Court will look more favorably on prosecutions where charges are fully supported by precedent.

It appears that "offenses triable by military commissions" in both the M.O. and M.C.O. No. 1 could cover ordinary belligerent acts carried out by unlawful combatants, regardless of whether they are technically war crimes. The draft version of M.C.I. No. 2 made explicit that

> Even an attack against a military objective that normally would be permitted under the law of armed conflict could serve as the basis for th[e] offense [of terrorism] if the attack itself constituted an unlawful belligerency (that is, if the attack was committed by an accused who did not enjoy combatant immunity).

Thus, under the earlier draft language, it appeared that a Taliban fighter who attacked a U.S. or coalition soldier, or perhaps even a soldier of the Northern Alliance prior to the arrival of U.S. forces, for example, could be charged with "terrorism" and tried by a military tribunal.[74]

However, the final version of M.C.I. No.2 substituted the following language:

> The requirement that the conduct be wrongful for this crime necessitates that the conduct establishing the offense not constitute an attack against a lawful military objective undertaken by military forces of a State in the exercise of their official duties.

The change appears to have eliminated the possibility that Taliban fighters could be charged with "terrorism" in connection with combat activities; however, under the DOD rules, such a fighter could still be charged with murder or destruction of

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[71] (...continued)
David Hicks. *See* United States v. Hicks, Charge Sheet, *available online at* [http://www.defenselink.mil/news/Jun2004/d20040610cs.pdf] (last visited July 21, 2006).

[72] 18 U.S.C. § 2331 *et seq.* defines and punishes terrorism, providing exclusive jurisdiction to federal courts. *See id.* at 35 (letter from National Association of Criminal Defense Lawyers (NACDL) noting that Congress has defined war crimes in 18 U.S.C. § 2441 with reference to specific treaties).

[73] 327 U.S. at 17 ("Obviously charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment.").

[74] M.C.I. No. 2 § 6(18). One of the elements of the crime of terrorism is that the "accused did not enjoy combatant immunity or an object of the attack was not a military objective." Another element required that "the killing or destruction was an attack or part of an attack designed to intimidate or coerce a civilian population, to influence the policy of a government by intimidation or coercion, or to affect the conduct of a government." The final version of the M.C.I. omits the reference to "affect[ing] the conduct of a government."

property "by an unprivileged belligerent"[75] for participating in combat, as long as the commission finds that the accused "did not enjoy combatant immunity," which, according the to the instruction, is enjoyed only by "lawful combatants."[76] "Lawful combatant" is not further defined. Inasmuch as the President had declared that all of the detainees incarcerated at Guantánamo Bay, whether members of the Taliban or members of Al Qaeda, are unlawful combatants, it appears unlikely that the defense of combat immunity would be available.[77] It is unclear whether other defenses, such as self-defense or duress, would be available to the accused. M.C.I. No. 2 states that such defenses *may* be available, but that "[i]n the absence of evidence to the contrary, defenses in individual cases are presumed not to apply."[78]

Temporal and Spatial Jurisdiction. The law of war has traditionally applied within the territorial and temporal boundaries of an armed conflict between at least two belligerents.[79] It has not traditionally been applied to conduct occurring on the territory of neutral states or on the territory of a belligerent that lies outside the zone of battle, to conduct that preceded the outbreak of hostilities, or to conduct during hostilities that do not amount to an armed conflict. With respect to the international conflict in Afghanistan, in which coalition forces ousted the Taliban government, it appears relatively clear when and where the law of war would apply. The war on terrorism, however, does not have clear boundaries in time or space,[80] nor

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[75] M.C.I. No. 2 § 6(19).

[76] Under M.C.I. No. 2, the lack of combatant immunity is considered an element of some of the crimes rather than a defense, so the prosecutor has the burden of proving its absence.

[77] Whether the prisoners at Guantánamo Bay should be considered lawful combatants with combatant immunity is an issue of some international concern. See generally CRS Report RL31367, *Treatment of 'Battlefield Detainees' in the War on Terrorism.* DOD's original draft included the requirement that a lawful combatant be part of the "armed forces of a legitimate party to an armed conflict." The Lawyers' Committee for Human Rights (now known as Human Rights First or "HRF") and Human Rights Watch ("HRW") urged DOD to revise the definition in line with the Geneva Convention. *See* SOURCEBOOK, *supra* note 67, at 50-51 and 59. The revised version leaves ambiguous who might be a "lawful combatant."

[78] M.C.I. No. 2 § 4(B). The American Civil Liberties Union (ACLU) objected to this provision in its comments on the DOD draft, remarking that it "not only places the ordinary burden on the accused to going forward with evidence that establishes affirmative defense, but it also appears to place an unprecedented burden on the accused to overcome the presumption that the defenses do not apply." *See* SOURCEBOOK, *supra* note 67, at 69.

[79] *See* WINTHROP, *supra* note 9, at 773 (the law of war "prescribes the rights and obligations of belligerents, or ... define[s] the status and relations not only of enemies — whether or not in arms — but also of persons under military government or martial law and persons simply resident or being upon the theatre of war, and which authorizes their trial and punishment when offenders"); *id* at 836 (military commissions have valid jurisdiction only in theater of war or territory under martial law or military government).

[80] It may be argued that no war has a specific deadline and that all conflicts are in a sense indefinite. In traditional armed conflicts, however, it has been relatively easy to identify when hostilities have ended; for example, upon the surrender or annihilation of one party, an annexation of territory under dispute, an armistice or peace treaty, or when one party to

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is it entirely clear who the belligerents are. The broad reach of the M.O. to encompass conduct and persons customarily subject to ordinary criminal law evoked criticism that the claimed jurisdiction of the military commissions exceeds the customary law of armed conflict, which M.C.I. No. 2 purports to restate.[81] Any military commissions established to comply with *Hamdan* will likely have a better chance of withstanding court scrutiny if they are supported by ample precedent or explicit statutory definition.

A common element among the crimes enumerated in M.C.I. No.2 is that the conduct "took place in the context of and was associated with armed conflict." The instruction explains that the phrase requires a "nexus between the conduct and armed hostilities,"[82] which has traditionally been a necessary element of any war crime. However, the definition of "armed hostilities" is broader than the customary definition of war or "armed conflict." "Armed hostilities" need not be a declared war or "ongoing mutual hostilities."[83] Instead, any hostile act or attempted hostile act might have sufficient nexus if its severity rises to the level of an "armed attack," or if it is intended to contribute to such acts. Some commentators have argued that the expansion of "armed conflict" beyond its customary bounds improperly expands the jurisdiction of military commissions beyond those that by statute or under the law of war are triable by military commissions.[84] The Supreme Court has not clarified the scope of the "Global War on Terrorism" but seems to have demonstrated a willingness to address the issue rather than deferring to the President's interpretation.

The definition for "Enemy" provided in M.C.I. No. 2 raises similar issues. According to § 5(B), "Enemy" includes

> any entity with which the United States or allied forces may be engaged in armed conflicts or which is preparing to attack the United States. It is not limited to foreign nations, or foreign military organizations or members thereof. "Enemy" specifically includes any organization of terrorists with international reach.

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[80] (...continued)
the conflict unilaterally withdraws its forces. *See* GERHARD VON GLAHN, LAW AMONG NATIONS 722-730 (6th ed. 1992).

[81] *See* Human Rights First, Trial Under Military Order, A Guide to the Final Rules for Military Commissions (revised May 2006)[hereinafter "HRF"], *available at* [http://www.humanrightsfirst.org/us_law/PDF/detainees/trials_under_order0604.pdf]] (last visited July 21, 2006); Sadat, *supra* note 64, at 146 (noting possibly advantageous domestic aspects of treating terrorist attacks as war crimes, but identifying possible pitfalls of creating a new international legal regime).

[82] M.C.I. No. 2 § 5(C).

[83] *Id.*

[84] *See* SOURCEBOOK, *supra* note 67, at 38-39 (NACDL comments); *id*. at 51 (Human Rights Watch (HRW) comments); *id.* at 59-60 (LCHR). However, M.C.I. No. 9 lists among possible "material errors of law" for which the Reviewing Panel might return a finding for further procedures, "a conviction of a charge that fails to state an offense that by statute or the law of war may be tried by military commission. ..." M.C.I. No. 9 § 4(C)(2)(b).

Some observers argue that this impermissibly subjects suspected international criminals to the jurisdiction of military commissions in circumstances in which the law of armed conflict has never applied.[85] The distinction between a "war crime," traditionally subject to the jurisdiction of military commissions, and a common crime, traditionally the province of criminal courts, may prove to be a matter of some contention during some of the proceedings.[86]

Composition and Powers. Under M.C.O. No. 1, the planned military commissions consist of a panel of three to seven military officers as well as one or more alternate members who had been "determined to be competent to perform the duties involved" by the Secretary of Defense or his designee,[87] and could include reserve personnel on active duty, National Guard personnel in active federal service, and retired personnel recalled to active duty. The rules also permit the appointment of persons temporarily commissioned by the President to serve as officers in the armed services during a national emergency.[88] The presiding officer is required to be a judge advocate in any of the U.S. armed forces, but not necessarily a military judge.[89]

The presiding officer is vested with the authority to decide evidentiary matters and interlocutory motions, or to refer them to the commission or certify them to Appointing Authority for decision. The presiding officer has the power to close any portion of the proceedings in accordance with M.C.O. No. 1, and "to act upon any contempt or breach of Commission rules and procedures," including disciplining any individual who violates any "laws, rules, regulations, or other orders" applicable to the commission, as the presiding officer saw fit. Presumably this power was to include not only military and civilian attorneys but also any witnesses who had been summoned under order of the Secretary of Defense pursuant to M.C.O. No. 1 § 5(A)(5).[90] The UCMJ authorizes military commissions to punish contempt with a fine of $100, confinement for up to 30 days, or both.[91] Under the UCMJ, a duly subpoenaed witness who is not subject to the UCMJ and who refuses to appear before a military commission may be prosecuted in federal court.[92] To the extent that

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[85] *See id.* at 38 (NACDL comments).

[86] *See id.* at 98 (commentary of Eugene R. Fidell and Michael F. Noone).

[87] M.C.O. No. 1 § 4(A)(3).

[88] *See* 10 U.S.C. § 603, listed as reference (e) of M.C.O. No. 1.

[89] M.C.O. No. 1 § 4(A)(4). *See* NIMJ, *supra* note 61, at 17 (commenting that the lack of a military judge to preside over the proceedings is a significant departure from the UCMJ). A judge advocate is a military officer of the Judge Advocate General's Corps of the Army or Navy (a military lawyer). A military judge is a judge advocate who is certified as qualified by the JAG Corps of his or her service to serve in a role similar to civilian judges.

[90] *See* M.C.O. No. 1 § 3(C) (asserting jurisdiction over participants in commission proceedings "as necessary to preserve the integrity and order of the proceedings").

[91] *See* 10 U.S.C. § 848.

[92] *See* 10 U.S.C. § 847. It is unclear how witnesses are "duly subpoenaed;" 10 U.S.C. § 846 empowers the president of the court-martial to compel witnesses to appear and testify and

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M.C.O. No. 1 would allow disciplinary measures against civilian witnesses who refuse to testify or produce other evidence as ordered by the commission, M.C.O. No. 1 would appear to be inconsistent with the UCMJ.

One of the perceived shortcomings of the M.O. has to do with the problem of command influence over commission personnel. M.C.O. No. 1 provides for a "full and fair trial," but contains few specific safeguards to address the issue of impartiality. Under the rules as presently written, the President would have complete control over the proceedings. He or his designee decide which charges to press, select the members of the panel, the prosecution and the defense counsel, select the members of the review panel, and approve and implement the final outcome. The procedural rules remain entirely under the control of the President or his designees, who are vested with authority to write them, interpret them, enforce them, and amend them at any time. All commission personnel other than the commission members themselves are under the supervision of the Secretary of Defense, directly or through the DOD General Counsel.[93] The Secretary of Defense acted as the direct supervisor of Review Panel members.[94] Originally, both the Chief Prosecutor and the Chief Defense Counsel were to report ultimately to the DOD General Counsel, which led some critics to warn that defense counsel were insufficiently independent from the prosecution.[95] DOD subsequently amended the instructions so that the Chief Prosecutor reports to the Legal Advisor to the Appointing Authority, but as Justice Kennedy noted in his concurring opinion, the concentration of authority in the Appointing Authority remains a significant departure from the structural safeguards Congress has built into the military justice system.[96]

The following sections summarize provisions of the procedural rules meant to provide appropriate procedural safeguards.

Procedures Accorded the Accused. The military commissions established pursuant to M.C.O. No. 1 have procedural safeguards similar to many of those that apply in general courts-martial, but the M.C.O. does not specifically adopt any procedures from the UCMJ, even those that explicitly apply to military commissions.[97] The M.C.O. provides that only the procedures it prescribes or any

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[92] (...continued)
to compel production of evidence, but this statutory authority does not explicitly apply to military commissions. The subpoena power extends to "any part of the United States, or the Territories, Commonwealth and possessions."

[93] M.C.I. No. 6.

[94] *Id.* § 3(A)(7).

[95] *Cf* United States v. Wiesen, 56 M.J. 172 (2001), *aff'd on reconsideration*, 57 M.J. 48 (2002)(noting that command relationships among participants in court-martial proceeding may give rise to "implied bias").

[96] *Hamdan*, slip op. at 11-16 (Kennedy, J. concurring).

[97] *See* 10 U.S.C. § 836 (providing military commission rules "may not be contrary to or inconsistent with [the UCMJ]"). *But see In re* Yamashita, 327 U.S. 1, 19-20 (1946)(finding Congress did not intend the language "military commission" in Article 38 of the Articles of
(continued...)

supplemental regulations that may be established pursuant to the M.O., *and no others* shall govern the trials,[98] perhaps precluding commissions from looking to the UCMJ or other law to fill in any gaps. The M.C.O. does not explicitly recognize that accused persons have rights under the law. The procedures that are accorded to the accused do not give rise to any enforceable right, benefit or privilege, and are not to be construed as requirements of the U.S. Constitution.[99] The accused has no opportunity to challenge the interpretation of the rules or seek redress in case of a breach.[100]

The procedural safeguards are for the most part listed in section 5. The accused is entitled to be informed of the charges sufficiently in advance of trial to prepare a defense,[101] shall be presumed innocent until determined to be guilty beyond a reasonable doubt by two thirds of the commission members,[102] shall have the right not to testify at trial unless he so chooses, shall have the opportunity to present evidence and cross-examine witnesses for the prosecution, and may be present at every stage of proceeding unless it is closed for security concerns or other reasons.[103] The presumption of innocence and the right against self-incrimination will result in an entered plea of "Not Guilty" if the accused refuses to enter a plea or enters a "Guilty" plea that is determined to be involuntary or ill informed.[104]

Open Hearing. The trials themselves are to be conducted openly except to the extent the Appointing Authority or presiding officer closes proceedings to protect classified or classifiable information or information protected by law from unauthorized disclosure, the physical safety of participants, intelligence or law enforcement sources and methods, other national security interests, or "for any other reason necessary for the conduct of a full and fair trial."[105] DOD invited members of

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[97] (...continued)
War, the precursor to UCMJ Art. 36, to mean military commissions trying enemy combatants). On the other hand, President Bush explicitly invoked UCMJ art. 36 as statutory authority for the M.O., and included a finding, "consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." M.O. § 1(g). However, the Supreme Court rejected the finding as unsupported by the record and read the "uniformity" clause of UCMJ art. 36 as requiring that military commissions must follow rules as close as possible to those that apply in courts-martial.

[98] M.C.O. No. 1 § 1.

[99] *Id.* § 10.

[100] *Id.;* M.C.I. No. 1 § 6 (Non-Creation of Right).

[101] M.C.O. No. 1 § 5(A).

[102] *Id.* §§ 5(B-C); 6(F).

[103] *Id.* §§ 4(A)(5)(a); 5(K); 6B(3).

[104] *Id.* §§ 5(B) and 6(B).

[105] M.C.O. No. 1 § 6(D)(5).

the press to apply for permission to attend the trials,[106] although it initially informed Human Rights Watch and other groups that logistical issues would likely preclude their attendance.[107] However, at the discretion of the Appointing Authority, "open proceedings" need not necessarily be open to the public and the press.[108] Proceedings may be closed to the accused or the accused's civilian attorney, but not to detailed defense counsel. Furthermore, counsel for either side must obtain permission from the Appointing Authority or the DOD General Counsel in order to make a statement to the press.[109]

Because the public, and not just the accused, has a constitutionally protected interest in public trials, the extent to which trials by military commission are open to the press and public may be subject to challenge by media representatives.[110] The First Amendment right of public access extends to trials by court-martial,[111] but is not absolute. Trials may be closed only where the following test is met: the party seeking closure demonstrates an overriding interest that is likely to be prejudiced; the closure is narrowly tailored to protect that interest; the trial court has considered reasonable alternatives to closure; and the trial court makes adequate findings to support the closure.[112] Because procedures established under M.C.O. No. 1 appear to allow the exclusion of the press and public based on the discretion of the Appointing Authority without any consideration of the above requirements with respect to the specific exigencies of the case at trial, the procedures may implicate the First Amendment rights of the press and public.

Although the First Amendment bars government interference with the free press, it does not impose on the government a duty "to accord the press special access to information not shared by members of the public generally."[113] The reporters' right to gather information does not include an absolute right to gain access to areas not

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[106] *See* DOD Press Release, DOD Announces Media Coverage Opportunities for Military Commissions (Feb. 11, 2004), *available at* [http://www.defenselink.mil/advisories/2004/pa20040211-0205.html] (last visited July 24, 2006).

[107] *See* Toni Locy, *Human Rights Groups Denied Seats at Tribunals*, USA TODAY, Feb. 24, 2004, at A3.

[108] M.C.O. No. 1 at § 6(B)(3)("Open proceedings may include, at the discretion of the Appointing Authority, attendance by the public and accredited press, and public release of transcripts at the appropriate time."). In courts-martial, "public" is defined to include members of the military as well as civilian communities. Rules for Court-Martial (R.C.M.) Rule 806.

[109] M.C.I. No. 3 § 5(C) (Prosecutor's Office); M.C.I. No. 4 § 5(C) (Defense counsel, including members of civilian defense counsel pool).

[110] *See* Globe Newspaper Co. v. Super. Ct., 457 U.S. 596, 602 (1982)(newspaper had standing to challenge court order closing portions of criminal trial).

[111] United States v. Hershey, 20 M.J. 433 (C.M.A.1985), *cert. denied*, 474 U.S. 1062 (1986); United States v. Grunden, 2 M.J. 116 (C.M.A.1977). The press has standing to challenge closure of military justice proceedings. ABC, Inc. v. Powell, 47 M.J. 363, 365 (1997).

[112] *See* Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501 (1984).

[113] Pell v. Procunier, 417 U.S. 817, 822-24 (1974).

open to the public. Thus, if the military commissions were to sit in areas off-limits to the public for other valid reasons, media access may be restricted for reasons of operational necessity.[114] Access of the press to the proceedings of military commissions may be an issue of contention for the courts ultimately to decide, even if those tried by military commission are determined to lack the protection of the Sixth Amendment right to an open trial or means to challenge the trial.[115]

Right to Counsel. Once charges are referred,[116] the defendant will have military defense counsel assigned free of cost, but may request another JAG officer, who will be provided as a replacement if available in accordance with any applicable instructions or supplementary regulations that might later be issued.[117] The accused does not have the right to refuse counsel in favor of self-representation.[118] M.C.I. No. 4 requires detailed defense counsel to "defend the accused zealously within the bounds of the law ... notwithstanding any intention expressed by the accused to represent himself."[119]

The accused may also hire a civilian attorney at his own expense, but must be represented by assigned defense counsel at all relevant times, even if he retains the services of a civilian attorney. Civilian attorneys may apply to qualify as members of the pool of eligible attorneys, or may seek to qualify *ad hoc* at the request of an accused. Some critics argue the rules provide disincentives for the participation of civilian lawyers.[120] Civilian attorneys must agree that the military commission representation will be his or her primary duty, and are not permitted to bring any assistants, such as co-counsel or paralegal support personnel, with them to the defense team. Originally, all defense and case preparation was to be done on site, and civilian attorneys were not to share documents or discuss the case with anyone but the detailed counsel or the defendant. These restrictions, read literally, might have prevented civilian defense counsel from conducting witness interviews or

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[114] *See* Juan R. Torruella, *On the Slippery Slopes of Afghanistan: Military Commissions and the Exercise of Presidential Power*, 4 U. PA. J. CONST. L. 648, 718 (2002) (noting that proceedings, if held at the Guantánamo Bay Naval Station, may be *de facto* closed due to the physical isolation of the facility).

[115] *Cf.* Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir.2002), (finding closure of immigration hearings based on relation to events of Sept. 11 unconstitutional infringement on the First Amendment right to free press). *But see* North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002) *cert denied* 538 U.S. 1056 (2003)(no presumption of openness for immigration hearings).

[116] In practice, some of the detainees have been assigned counsel upon their designation as subject to the President's M.O.

[117] M.C.O. No. 1 § 4(C). M.C.I. No. 4 § 3(D) lists criteria for the "availability" of selected detailed counsel.

[118] *But see* Faretta v. California , 422 U.S. 806 (1975) (Const. Amend. VI guarantees the right to self-representation).

[119] M.C.I. No. 4 § 3(C).

[120] *See* HRF, *supra* note 81, at 2-3; Vanessa Blum, *Tribunals Put Defense Bar in Bind*, LEGAL TIMES, July 14, 2003, at 1 (reporting that only 10 civilian attorneys had applied to join the pool of civilian defense lawyers).

seeking advice from experts in humanitarian law, for example.[121] However, the Pentagon later released a new version of M.C.I. No. 5 that loosened the restrictions to allow communications with "individuals with particularized knowledge that may assist in discovering relevant evidence."[122]

Civilian attorneys must meet strict qualifications to be admitted before a military commission. The civilian attorney must be a U.S. citizen (except for those representing Australian detainees[123]) with at least a SECRET clearance,[124] who is admitted to the bar of any state or territory. Furthermore, the civilian attorney may not have any disciplinary record, and must agree in writing to comply with all rules of court.[125] The civilian attorney is not guaranteed access to closed hearings or information deemed protected under the rules, which may or may not include classified information.[126]

The requirement that civilian counsel must agree that communications with the client may be monitored has been modified to require prior notification and to permit the attorney to notify the client when monitoring is to occur.[127] Although the government will not be permitted to use information against the accused at trial, some argue the absence of the normal attorney-client privilege could impede communications between them, possibly decreasing the effectiveness of counsel. Civilian attorneys are bound to inform the military counsel if they learn of information about a pending crime that could lead to "death, substantial bodily harm,

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[121] *See* SOURCEBOOK, *supra* note 67, at 136-37.

[122] M.C.I. No. 5, Annex B, "Affidavit and Agreement by Civilian Defense Counsel," at § II(E)(1). The communications are subject to restrictions on classified or "protected" information. *Id.*

[123] *See* DOD Press Release, *supra* note 21.

[124] Originally, civilian attorneys were required to pay the costs associated with obtaining a clearance. M.C.I. No. 5 §3(A)(2)(d)(ii). DOD has waived the administrative costs for processing applications for TOP SECRET clearances in cases that would require the higher level of security clearance. *See* DOD Press Release No. 084-04 , New Military Commission Orders, Annex Issued (Feb. 6, 2004), *available at* [http://www.defenselink.mil/releases/2004/nr20040206-0331.html] (Last visited July 24, 2006).

[125] M.C.O. No. 1 § 4(C)(3)(b).

[126] *Id.; see* Edgar, *supra* note 10 (emphasizing that national security may be invoked to close portions of a trial irrespective of whether classified information is involved).

[127] *See* M.C.O. No. 3, "Special Administrative Measures for Certain Communications Subject to Monitoring." The required affidavit and agreement annexed to M.C.I. No. 3 was modified to eliminate the following language:

> I understand that my communications with my client, even if traditionally covered by the attorney-client privilege, may be subject to monitoring or review by government officials, using any available means, for security and intelligence purposes. I understand that any such monitoring will only take place in limited circumstances when approved by proper authority, and that any evidence or information derived from such communications will not be used in proceedings against the Accused who made or received the relevant communication.

or a significant impairment of national security."[128] M.C.I. No. 5 provides no criteria to assist defense counsel in identifying what might constitute a "significant impairment of national security."

All defense counsel are under the overall supervision of the Office of the Chief Defense Counsel, which is entrusted with the proper management of personnel and resources the duty to preclude conflicts of interest.[129] The M.C.O. further provides that "in no circumstance shall accommodation of counsel be allowed to delay proceedings unreasonably."[130] The Appointing Authority may revoke any attorney's eligibility to appear before any commission.[131]

Some attorneys' groups have voiced opposition to the restrictions and requirements placed on civilian defense counsel, arguing the rules would not allow a defense attorney ethically to represent any client. The board of directors for the National Association of Criminal Defense Lawyers issued an ethics statement saying that it is unethical for a lawyer to represent a client before a military tribunal under the current rules and that lawyers who choose to do so are bound to contest the unethical conditions."[132] The House of Delegates of the American Bar Association (ABA) took no position on whether civilian lawyers should participate in the tribunals, but urged the Pentagon to relax some of the rules, especially with respect to the monitoring of communications between clients and civilian attorneys.[133] The National Institute of Military Justice, while echoing concerns about the commission rules, has stated that lawyers who participate will be performing an important public service.[134]

Discovery. The accused has the right to view evidence the Prosecution intends to present as well as any exculpatory evidence known, as long as it is not deemed to be protected under Sec. 6(D)(5).[135] In courts-martial, by contrast, the accused has the right to view any documents in the possession of the Prosecution

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[128] M.C.I. No. 5, Annex B § II(J).

[129] M.C.O. No 1 § 4(C)(1); *see* Torruella, *supra* note 114, at 719 (noting that the civilian criminal defense system has no equivalent to this system, in which the accused has no apparent choice over the supervision of the defense efforts).

[130] M.C.O. No 1 § 4(A)(5)(c).

[131] *Id.* § 4(A)(5)(b).

[132] *See* NACDL Ethics Advisory Committee Opinion 03-04 (August 2003), *available at* [http://www.nacdl.org] (Last visited July 24, 2006)*; Participation in Secret Military Terror Trials Unethical, U.S. Lawyers Say*, AP Aug. 2, 2003 (quoting incoming NACDL president Barry Scheck).

[133] *See U.S. May Ease Tribunal Rules*, NEWSDAY, Aug. 14, 2003, at A18.

[134] *See* NIMJ Statement on Civilian Attorney Participation as Defense Counsel in Military Commissions, July 13, 2003, *available at* [http://www.nimj.com/documents/NIMJ_Civ_Atty_Participation_Statement(1).pdf] (last visited July 24, 2006).

[135] *Id.* § 5(E).

related to the charges, and evidence that reasonably tends to negate the guilt of the accused, reduce the degree of guilt or reduce the punishment.[136]

The accused may also obtain witnesses and documents "to the extent necessary and reasonably available as determined by the Presiding Officer" and subject to secrecy determinations. The Appointing Authority shall make available to the accused "such investigative or other resources" deemed necessary for a full and fair trial.[137] Access to other detainees who might be able to provide mitigating or exculpatory testimony may be impeded by the prohibition on defense counsel from entering into agreements with "other Accused or Defense Counsel that might cause them or the Accused they represent to incur an obligation of confidentiality with such other Accused or Defense Counsel or to effect some other impediment to representation."[138] In other words, communications with potential witnesses would not be privileged and could be used against the witness at his own trial.

The overriding consideration with regard to whether the accused or defense counsel (including detailed defense counsel) may gain access to information appears to be the need for secrecy. The presiding officer may delete specific items from any information to be made available to the accused or defense counsel, or may direct that unclassified summaries of protected information be prepared.[139] However, no evidence may be admitted for consideration by the rest of the commission members unless it has been made available to at least the detailed defense counsel.[140] Information that was reviewed by the presiding officer *ex parte* and *in camera* but withheld from the defense over defense objection will be sealed and annexed to the record of the proceedings for review by the various reviewing authorities.[141] Nothing in the M.C.O. limits the purposes for which the reviewing authorities may use such material.

Right to Face One's Accuser. The presiding officer may authorize any methods appropriate to protect witnesses, including telephone or other electronic means, closure of all or part of the proceedings and the use of pseudonyms.[142] The commission may consider sworn or unsworn statements, and these apparently may be read into evidence without meeting the requirements for authentication of depositions and without regard to the availability of the witness under the UCMJ, as

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[136] *See* R.C.M. 701(a)(6); NIMJ, *supra* note 61, at 31-32.

[137] M.C.O. No. 1 § 5(H). Civilian defense counsel must agree not to submit any claims for reimbursement from the government for any costs related to the defense. M.C.I. No. 5 Annex B.

[138] M.C.I. No. 4 § 5.

[139] *Id.* § 6(D)(5)(b). Some observers note that protected information could include exculpatory evidence as well as incriminating evidence, which could implicate 6th Amendment rights and rights under the Geneva Convention, if applicable. *See* HRF, *supra* note 81, at 3.

[140] *Id.*

[141] *Id.* § 6(D)(5)(d).

[142] *Id.* § 6(D)(2)(d).

these provisions expressly apply to military commissions.[143] UCMJ articles 49 and 50 could be read to apply to military commissions the same rules against hearsay used at courts-martial; however, the Supreme Court has declined to apply similar provisions to military commissions trying enemy combatants.[144]

It was the provision for the use of secret evidence and for the exclusion of the accused from portions of the hearings that the district court found most troubling in *Hamdan.*[145] The court declared "[i]t is obvious beyond the need for citation that such a dramatic deviation from the confrontation clause could not be countenanced in any American court ..." and found it apparent that "the right to trial 'in one's presence' is established as a matter of international humanitarian and human rights law."[146] Under UCMJ art. 39,[147] the accused at a court-martial has the right to be present at all proceedings other than the deliberation of the members.

Admissibility of Evidence. The standard for the admissibility of evidence remains as it was stated in the M.O.; evidence is admissible if it is deemed to have "probative value to a reasonable person."[148] This is a significant departure from the

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[143] *See* 10 U.S.C. §§ 849 -50. UCMJ art. 49 states:

> (d) A duly authenticated deposition taken upon reasonable notice to the other parties, so far as otherwise admissible under the rules of evidence, may be read in evidence or, in the case of audiotape, videotape, or similar material, may be played in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or military board, if it appears —
> (1) that the witness resides or is beyond the State, Territory, Commonwealth, or District of Columbia in which the court, commission, or board is ordered to sit, or beyond 100 miles from the place of trial or hearing;
> (2) that the witness by reason of death, age, sickness, bodily infirmity, imprisonment, military necessity, nonamenability to process, or other reasonable cause, is unable or refuses to appear and testify in person at the place of trial or hearing; or
> (3) that the present whereabouts of the witness is unknown.
> (e) Subject to subsection (d), testimony by deposition may be presented by the defense in capital cases.
> (f) Subject to subsection (d), a deposition may be read in evidence or, in the case of audiotape, videotape, or similar material, may be played in evidence in any case in which the death penalty is authorized but is not mandatory, whenever the convening authority directs that the case be treated as not capital, and in such a case a sentence of death may not be adjudged by the court-martial.

[144] *See In re* Yamashita, 327 U.S. 1, 19 (1946) (declining to apply art. 25 of the Articles of War, which is substantially the same as current UCMJ art. 49, to trial by military commission of an enemy combatant). The *Yamashita* Court concluded that Congress intended the procedural safeguards in the Articles of War to apply only to persons "subject to military law" under article 2. *But see id.* at 61-72 (Rutledge, J. dissenting)(arguing the plain language of the statute does not support that interpretation).

[145] Hamdan v. Rumsfeld, 344 F.Supp.2d 152, 167-68 (D.D.C. 2004).

[146] *Id.* at 168.

[147] 10 U.S.C.§ 839.

[148] M.C.O. No. 1 § 6(D)(1).

Military Rules of Evidence (Mil. R. Evid.),[149] which provide that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States [and other applicable statutes, regulations and rules]."[150] In a court-martial, relevant evidence may be excluded if its probative value is substantially outweighed by other factors.[151]

"Probative value to a reasonable man" is a seemingly lax standard for application to criminal trials.[152] A reasonable person could find plausible sounding rumors or hearsay to be at least somewhat probative, despite inherent questions of reliability and fairness that both federal and military rules of evidence are designed to address. Furthermore, defendants before military commissions do not appear to have the right to move that evidence be excluded because of its propensity to create confusion or unfair prejudice, or because it was unlawfully obtained or coerced through the use of measures less severe than torture. In March 2006, DOD released M.C.I. No. 10 prohibiting prosecutors from introducing, and military commissions from admitting, statements established to have been made as a result of torture.

Sentencing. The prosecution must provide in advance to the accused any evidence to be used for sentencing, unless good cause is shown. The accused may present evidence and make a statement during sentencing proceedings; however, this right does not appear to mirror the right to make an unsworn statement that military defendants may exercise in regular courts-martial.[153] Statements made by the accused during the sentencing phase appear to be subject to cross-examination.

Possible penalties include execution,[154] imprisonment for life or any lesser term, payment of a fine or restitution (which may be enforced by confiscation of property subject to the rights of third parties), or "such other lawful punishment or condition of punishment" determined to be proper. Detention associated with the accused's status as an "enemy combatant" will not count toward serving any sentence imposed.[155] If the sentence includes confinement, it is unclear whether or how the conditions of imprisonment will differ from that of detention as an "enemy

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[149] The Military Rules of Evidence (Mil. R. Evid.) are contained in the Manual for Courts-Martial (M.C.M.), established as Exec. Order No. 12473, Manual for Courts-Martial, United States, 49 Fed. Reg 17,152, (Apr. 23, 1984), as amended. The M.C.M. also contains the procedural rules for courts-martial, known as the Rules For Courts-Martial (R.C.M.).

[150] Mil. R. Evid. 402.

[151] Mil. R. Evid. 403.

[152] *See* Torruella, *supra* note 114, at 715; ACTL, *supra* note 10, at 11.

[153] *See* NIMJ, *supra* note 61, at 37 (citing United States v. Rosato, 32 M.J. 93, 96 (C.M.A. 1991)).

[154] The method of execution used by the Army to carry out a death sentence by military commission is lethal injection. *See* U.S. Army Correctional System: Procedures for Military Executions, AR 190-55 (1999). It is unclear whether DOD will follow these regulations with respect to sentences issued by these military commissions, but it appears unlikely that any such sentences would be carried out at Ft. Leavenworth, in accordance with AR 190-55.

[155] M.C.I. No. 7 § 3(A).

combatant." Sentences agreed in plea agreements are binding on the commission, unlike regular courts-martial, in which the agreement is treated as the maximum sentence. Similar to the practice in military courts-martial, the death penalty may only be imposed upon a unanimous vote of the Commission.[156] In courts-martial, however, both conviction for any crime punishable by death and any death sentence must be by unanimous vote.[157] None of the rules specify which offenses might be eligible for the death penalty, but the Pentagon announced the death penalty will not be sought in the cases brought so far.

Post-Trial Procedure. One criticism leveled at the language of the M.O. was that it does not include an opportunity for the accused to appeal a conviction, and appears to bar habeas corpus relief. Another was that it appears to allow the Secretary of Defense (or the President) the discretion to change the verdict, and does not protect persons from double jeopardy.[158] M.C.O. No.1 addresses these issues in part.

Review and Appeal. The rules provide for the administrative review of the trial record by the Appointing Authority, who forwards the record, if found satisfactory, to a review panel consisting of three military officers, one of whom must have experience as a judge. The Bush Administration has announced its intent to commission four individuals to active duty to serve on the Military Commission Review Panels.[159] They are Griffin Bell, a former U.S. attorney general and judge of the U.S. Court of Appeals for the 5th Circuit; Edward Biester, a former Member of the U.S. House of Representatives and current judge of the Court of Common Pleas of Bucks County, Pennsylvania; the Honorable William T. Coleman Jr., a former Secretary of Transportation; and Chief Justice Frank Williams of the Rhode Island Supreme Court.

There is no opportunity for the accused to appeal a conviction in the ordinary sense. The review panel may, however, at its discretion, review any written submissions from the prosecution and the defense, who do not appear to have an opportunity to view or rebut the submission from the opposing party.[160] If the review panel forms a "firm and definite conviction that a material error of law occurred," it returns the case to the Appointing Authority for further proceedings. If the review panel determines that one or more charges should be dismissed, the Appointing

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[156] M.C.O. No. 1 § 6(F).

[157] 10 U.S.C. § 851.

[158] *See* Laurence H. Tribe, *Trial by Fury*, THE NEW REPUBLIC, Dec. 10, 2001.

[159] *See* Press Release, Military Commission Review Panel Members to be Designated and Instruction Issued (Dec. 30, 2003), *available at* [http://www.defenselink.mil/releases/2003/nr20031230-0822.html] (last visited July 24, 2006). 10 U.S.C. § 603 permits the President, during war or national emergency, to appoint any qualified person as a military officer in the grade of major general or below.

[160] The convening authority of a general court-martial is required to consider all matters presented by the accused. 10 U.S.C. § 860.

Authority is bound to do so.[161] For other cases involving errors, the Appointing Authority is required to return the case to the military commission. Otherwise, the case is forwarded to the Secretary of Defense with a written recommendation. (Under the UCMJ, the trial record of a military commission would be forwarded to the appropriate JAG first.)[162]

After reviewing the record, the Secretary of Defense may forward the case to the President or return it for further proceedings for any reason, not explicitly limited to material errors of law. The M.C.O. does not indicate what "further proceedings" may entail. If the Secretary of Defense is delegated final approving authority, he can approve or disapprove the finding, or mitigate or commute the sentence. The rules do not clarify what happens to a case that has been "disapproved." It is unclear whether a disapproved finding is effectively vacated and remanded to the military commission for a rehearing.

The UCMJ forbids rehearings or appeal by the government of verdicts amounting to a finding of Not Guilty, and prohibits the invalidation of a verdict or sentence due to an error of law unless the error materially prejudices the substantial rights of the accused.[163] The M.C.O. does not contain any such explicit prohibitions, but M.C.I. No. 9 defines "Material Error of Law" to exclude variances from the M.O. or any of the military orders or instructions promulgated under it that would not have had a material effect on the outcome of the military commission.[164] M.C.I. No. 9 allows the review panel to recommend the disapproval of a finding of Guilty on a basis other than a material error of law.[165] It does not indicate what options the review panel would have with respect to findings of Not Guilty.

M.C.O. No. 1 does not provide a route for a convicted person to appeal to any independent authority. Persons subject to the M.O. are described as not privileged to "seek any remedy or maintain any proceeding, directly or indirectly" in federal or state court, the court of any foreign nation, or any international tribunal.[166] However, a defendant may petition a federal court for a writ of habeas corpus to challenge the jurisdiction of the military commission.[167]

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[161] M.C.I. No. 9 § 4(C).

[162] 10 U.S.C. § 8037 (listing among duties of Air Force Judge Advocate General to "receive, revise, and have recorded the proceedings of ... military commissions"); 10 U.S.C. § 3037 (similar duty ascribed to Army Judge Advocate General).

[163] 10 U.S.C. § 859.

[164] M.C.I. No. 9 § 4(C)(2)(a).

[165] M.C.I. No. 9 § 4(C)(1)(b).

[166] M.O. at § 7(b).

[167] *See* Alberto R. Gonzales, *Martial Justice, Full and Fair*, NEW YORK TIMES (op-ed), Nov. 30, 2001 (stating that the original M.O. was not intended to preclude habeas corpus review). *Rasul v. Bush* clarified that the detainees at Guantanamo Bay have access to federal courts, but the extent to which the findings of military commissions will be reviewable remains unclear. 124 S. Ct. 2686 (2004).

Protection against Double Jeopardy. The M.C.O. provides that the accused may not be tried for the same charge twice by any military commission once the commission's finding on that charge becomes final (meaning once the verdict and sentence have been approved).[168] Therefore, apparently, jeopardy does not attach — there has not been a "trial" — until the final verdict has been approved by the President or the Secretary of Defense. In contrast, at general courts-martial, jeopardy attaches after the first introduction of evidence by the prosecution. If a charge is dismissed or is terminated by the convening authority after the introduction of evidence but prior to a finding, through no fault of the accused, or if there is a finding of Not Guilty, the trial is considered complete for purposes of jeopardy, and the accused may not be tried again for the same charge by any U.S. military or federal court without the consent of the accused.[169] Although M.C.O. No. 1 provides that an authenticated verdict[170] of Not Guilty by the commission may not be changed to Guilty,[171] either the Secretary of Defense or the President may disapprove the finding and return the case for "further proceedings" prior to the findings' becoming final, regardless of the verdict. If a finding of Not Guilty is referred back to the commission for rehearing, double jeopardy may be implicated.[172]

Another double jeopardy issue that might arise is related to the requirements for the specification of charges.[173] M.C.O. No. 1 does not provide a specific form for the charges, and does not require an oath or signature.[174] If the charge does not adequately describe the offense, another trial for the same offense under a new description is not as easily prevented. M.C.I. No. 2, setting forth elements of crimes triable by the commissions, may provide an effective safeguard; however, new crimes may be added to its list at any time.

The M.O. also left open the possibility that a person subject to the order might be transferred at any time to some other governmental authority for trial.[175] A federal criminal trial, as a trial conducted under the same sovereign as a military commission, could have double jeopardy implications if the accused had already been

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[168] M.C.O. No. 1 § 5(P). The finding is final when "the President or, if designated by the President, the Secretary of Defense makes a final decision thereon pursuant to Section 4(c)(8) of the President's Military Order and in accordance with Section 6(H)(6) of [M.C.O. No. 1]." Id. § 6(H)(2).

[169] 10 U.S.C. § 844. Federal courts and U.S. military courts are considered to serve under the same sovereign for purposes of double (or former) jeopardy.

[170] In regular courts-martial, the record of a proceeding is "authenticated," or certified as to its accuracy, by the military judge who presided over the proceeding. R.C.M. 1104. None of the military orders or instructions establishing procedures for military commissions explains what is meant by "authenticated finding."

[171] M.C.O. No. 1 § 6(H)(2).

[172] The UCMJ does not permit rehearing on a charge for which the accused is found on the facts to be not guilty.

[173] *See* NIMJ, *supra* note 61, at 39.

[174] *See* M.C.O. No. 1 § 6(A)(1).

[175] M.O. § 7(e).

tried by military commission for the same crime or crimes, even if the commission proceedings did not result in a final verdict. The federal court would face the issue of whether jeopardy had already attached prior to the transfer of the individual from military control to other federal authorities.

Conversely, the M.O. provides the President may determine at any time that an individual is subject to the M.O., at which point any state or federal authorities holding the individual would be required to turn the accused over to military authorities. If the accused were already the subject of a federal criminal trial under charges for the same conduct that resulted in the President's determination that the accused is subject to the M.O., and if jeopardy had already attached in the federal trial, double jeopardy could be implicated by a new trial before a military commission. M.C.O. No. 1 does not explicitly provide for a double jeopardy defense under such circumstances.

Military Commission Legislation

The Bush Administration has presented to Congress a proposal to be cited as the "Military Commissions Act of 2006." Senator Frist introduced very similar legislation, the "Bringing Terrorists to Justice Act of 2006," as S. 3861 and as title I of S. 3886, the "Terrorist Tracking, Identification, and Prosecution Act of 2006." The Senate Armed Services Committee reported favorably a bill, "Military Commissions Act of 2006" (S. 3901), which is in most respects similar to the Administration's proposal, but varies with respect to jurisdiction and some rules of evidence. The House Armed Services Committee approved H.R. 6054, also called the "Military Commissions Act of 2006," which closely tracks the Administration's proposal. After reaching an agreement with the White House with respect to several provisions in S. 3901, Senator McConnell introduced S. 3930, also entitled the "Military Commissions Act of 2006."

All of these bills would authorize the trials of "alien unlawful combatants" by military commissions for a set of enumerated crimes and provide the accused with certain rights. All of the bills would add a new chapter 47a after the UCMJ in title 10, U.S. Code. They leave intact the President's authority to establish military commissions under the UCMJ, but the Senate bills would seemingly expand that authority by removing the limitation of such trials to offenses and offenders triable by military commission pursuant to "statute or the law of war."[176] All of the bills would amend article 36, UCMJ (10 U.S.C. § 836) to exclude military commissions from the need to comply to the extent the President deems practicable with the procedural rules that apply in federal district courts.[177]

To various degrees, the bills clarify that the UCMJ does not apply to military commissions. S. 3901 and S. 3930 provide that "[e]xcept as otherwise provided [in the bill or in the UCMJ], the procedures and rules of evidence applicable in trials by

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[176] S. 3901 and S. 3930 § 5(b)(2); S. 3886 § 108(d); S. 3861 § 8(d).

[177] H.R. 6054 § 3(b); S. 3901 and S. 3930 § 5(b)(3) apply this exception only to military commissions under new chapter 47a; S. 3886 § 108(e); S. 3861 § 8(e) would except all military commissions.

general courts-martial of the United States shall apply in trials by military commission under this chapter." (Proposed § 949a(a)). However, they permit the Secretary of Defense, in consultation with the Attorney General, to make such exceptions in the applicability in trials by military commission under this chapter from the procedures and rules of evidence otherwise applicable in general courts-martial as may be required by the unique circumstances of the conduct of military and intelligence operations during hostilities or by other practical need." (Proposed § 949a(b)). S. 3901 notes that some provisions of the UCMJ do not apply by their terms, and that "[t]he judicial construction and application of chapter 47 of this title, while instructive, is therefore not of its own force binding on military commissions...." S. 3930 and the other bills provide that the judicial application and construction of the UCMJ does not bind the interpretation of the new chapter. (Proposed 10 U.S.C. § 948b(b)).

The bills each declare that the military commissions are "regularly constituted affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of common Article 3 of the Geneva Conventions."[178] However, all of the bills provide that the Geneva Conventions may not be invoked as a source of rights in any U.S. court.[179]

Personal Jurisdiction. S. 3901 and S. 3930 define "unlawful enemy combatant" to mean "an individual engaged in hostilities against the United States who is not a lawful enemy combatant." (Proposed § 948a(4)). Jurisdiction of military commissions would extend to any "alien unlawful enemy combatant engaged in hostilities or having supported hostilities against the United States." (Proposed 948c). Aliens who have supported hostilities without having actually engaged in hostilities would not seem to fit within the definition of unlawful enemy combatant, and yet the jurisdiction section appears to contemplate their trial by military commission.

H.R. 6054, S. 3861, and S. 3886 define "unlawful enemy combatant" to mean an individual determined by the President or the Secretary of Defense ... to be part of or affiliated with a force or organization ... that is engaged in hostilities against the United States or its co-belligerents in violation of the law of war"; or "to have committed a hostile act in aid of" or "to have supported hostilities in aid of such a force or organization so engaged." Lawful combatants, such as prisoners of war, are excluded from the jurisdiction of military commissions in all three bills. H.R. 6054 also excludes protected persons within the meaning of the Fourth Geneva Convention from the jurisdiction of military commissions. If the armed conflict is non-international in nature, as many interpret the Supreme Court's *Hamdan* opinion to establish, then no person can qualify for POW status under the third Geneva Convention or "protected person" status within the meaning of article 4 of the Fourth

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[178] S. 3901 § 2(6)(findings); S. 3861, S. 3930, and S. 3861 948b(d); H.R. 6054 948b(c).

[179] H.R. 6054 § 6(b); S. 3901 § 7 (applicable only in civil actions); S. 3861 § 6(b)(1); S. 3886 § 106(b)(1); S. 3930 § 7(a) (applicable only in civil actions). S. 3930 additionally provides that the accused would not be permitted to invoke the Geneva Conventions "as a source of rights" in any military commission. Proposed 10 U.S.C. § 948b(f).

Geneva Convention. All persons in captivity would be entitled to protected status within the meaning of Common Article 3, however.

None of the bills defines "hostilities" or explains what conduct amounts to "supporting hostilities." To the extent that the jurisdiction is interpreted to include conduct that falls outside the accepted definition of participation in an armed conflict, the bills might run afoul of the courts' historical aversion to trying civilians before military tribunal when other courts are available.[180] It is unclear whether this constitutional principle applies to aliens captured and detained overseas, but the bills do not appear to exempt from military jurisdiction permanent resident aliens captured in the United States who might otherwise meet the definition of "unlawful enemy combatant." It is generally accepted that aliens within the United States are entitled to the same protections in criminal trials that apply to U.S. citizens. Therefore, to subject persons to trial by military commission who do not meet the exception carved out by the Supreme Court in *ex parte Quirin*[181] for unlawful belligerents, to the extent such persons enjoy constitutional protections, would likely raise significant constitutional questions.

Subject Matter Jurisdiction. All of the bills set forth a detailed list of crimes that may be tried by military commission when committed by alien unlawful combatants, provided, except in the case of H.R. 6054, that the offense is committed "in the context of and associated with armed conflict." The bills (except S. 3901) each declare that they merely codify offenses that have traditionally been triable by military commissions, implying that no retroactively punishable offenses are created in violation of the Constitution's prohibition against *ex post facto* crimes and punishments or the analogous principle applicable under international law.

Although many of the crimes seem to be well-established offenses against the law of war, at least in the context of an international armed conflict,[182] a court might

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[180] *See, e.g., Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866), Duncan v. Kahanamoku, 327 U.S. 304 (1945).

[181] 317 U.S. 1 (1942)

[182] For example, see Article 3 of the Statute governing the International Criminal Tribunal for the former Yugoslavia (ICTY) includes the following as violations of the laws or customs of war in non-international armed conflict.

> Such violations shall include, but not be limited to:
> (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
> (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
> (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
> (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
> (e) plunder of public or private property.

(continued...)

conclude that some of the listed crimes are new. For example, a plurality of the Supreme Court in *Hamdan* agreed that conspiracy is not a war crime under the traditional law of war.[183] The crime of "murder in violation of the law of war," which punishes persons who, as unprivileged belligerents, commit hostile acts that result in the death of any persons, including lawful combatants, may also be new. While it appears to be well-established that a civilian who kills a lawful combatant is triable for murder and cannot invoke the defense of combatant immunity, it is not clear that the same principle applies in armed conflicts of a non-international nature, where combatant immunity does not apply. The International Criminal Tribunal for the former Yugoslavia (ICTY) has found that war crimes in the context of non-international armed conflict include murder of civilians, but that the killing of a combatant is not a war crime.[184]

Evidentiary Rules. All of the bills provide for the admission of evidence under rules that are more permissive than the Military Rules of Evidence.

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[182] (...continued)
UN Doc. S/Res/827 (1993), art. 3. The ICTY Statute and procedural rules are available at [http://www.un.org/icty/legaldoc-e/index.htm]. The Trial Chamber in the case Prosecutor v. Naletilic and Martinovic, (IT-98-34)March 31, 2003, interpreted Article 3 of the Statute to cover specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as grave breaches by those Conventions; (iii) violations of [Common Article 3) and other customary rules on internal conflicts, and (iv) violations of agreements binding upon the parties to the conflict" *Id*. at para. 224. *See also* Prosecutor v. Tadic, (IT-94-1) (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 86-89.
The Appeals Chamber there set forth factors that make an offense a "serious" violation necessary to bring it within the ICTY's jurisdiction:

> (i) the violation must constitute an infringement of a rule of international humanitarian law;
> (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met ...;
> (iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. ...
> (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

Id. at para. 94

[183] Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2785 (2006).

[184] Prosecutor v. Kvocka *et al*., Case No. IT-98-30/1 (Trial Chamber), November 2, 2001, para. 124: ("An additional requirement for Common Article 3 crimes under Article 3 of the Statute is that the violations must be committed against persons 'taking no active part in the hostilities.'"); Prosecutor v. Jelisic, Case No. IT-95-10 (Trial Chamber), December 14, 1999, para. 34 ("Common Article 3 protects "[p]ersons taking no active part in the hostilities" including persons "placed *hors de combat* by sickness, wounds, detention, or any other cause."); Prosecutor v. Blaskic, Case No. IT-95-14 (Trial Chamber), March 3, 2000, para. 180 ("Civilians within the meaning of Article 3 are persons who are not, or no longer, members of the armed forces. Civilian property covers any property that could not be legitimately considered a military objective.").

Hearsay. S. 3901 would provide for the admission of hearsay evidence that would not be permitted under the Manual for Courts-Martial. The hearsay evidence is admissible only if the proponent of the evidence notifies the adverse party sufficiently in advance of the intention to offer the evidence, as well as the "particulars of the evidence (including information on the general circumstances under which the evidence was obtained)," and the military judge finds that "the totality of the circumstances render the evidence more probative on the point for which it is offered than other evidence which the proponent can procure through reasonable efforts, taking into consideration the unique circumstances of the conduct of military and intelligence operations during hostilities." (S. 3901, Proposed 10 U.S.C. § 949a(b)(3)). S. 3930 eliminates the latter consideration, but provides that the evidence is inadmissible if the party opposing its admission "clearly demonstrates that the evidence is unreliable or lacking in probative value."

H.R. 6054, S. 3886, and S. 3861 are similar to S. 3930, providing that "Hearsay evidence is admissible unless the military judge finds that the circumstances render the evidence unreliable or lacking in probative value. However, such evidence may be admitted only if the proponent of the evidence makes the evidence known to the adverse party in advance of trial or hearing." The language does not indicate whether the any information about the source of the evidence must be provided.

Coerced Testimony. All five bills prohibit the use of statements obtained through torture as evidence in a trial, except as proof of torture against a person accused of committing torture. S. 3901 also provides for the exclusion of statements elicited through cruel, inhuman, or degrading treatment, and the exclusion of statements elicited through coercive methods not rising to the level of cruel, inhuman or degrading treatment as defined in the Detainee Treatment Act (DTA) only if the military judge finds that the totality of circumstances render it reliable and probative, and the interests of justice would best be served by allowing the commission members to hear the evidence.

S. 3930 provides a different standard for the admissibility of statements obtained through coercion that does not amount to torture depending on whether the statement was obtained prior to or after the enactment of the DTA. Statements elicited through such methods prior to the DTA would be admissible if the military judge finds the "totality of circumstances under which the statement was made renders it reliable and possessing sufficient probative value" and "the interests of justice would best be served" by admission of the statement. Statements taken after passage of the DTA would be admissible if, in addition to the two criteria above, the military judge finds that "the interrogation methods used to obtain the statement do not violate the cruel, unusual, or inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution."

H.R. 6054, S. 3881, and S. 3861 provide that "[a]n otherwise admissible statement, including a statement allegedly obtained by coercion, shall not be admitted in evidence in a military commission under this chapter if the military judge finds that the circumstances under which the statement was made render the statement unreliable or lacking in probative value."

Classified Evidence. All of the bills under discussion include provisions for the protection of classified information,[185] generally permitting the substitution of redacted documents, unclassified summaries of documents, or statements setting forth what the classified information would tend to prove.

S. 3901 contains procedures that are similar to those provided in Military Rule of Evidence 505 for application at courts-martial. Classified information is to be protected during all stages of proceedings and is privileged from disclosure for national security purposes. Whenever the original classification authority or head of the agency concerned certifies in writing that particular evidence and its sources have been declassified to the maximum extent possible, the military judge may authorize, "to the extent practicable in accordance with the rules applicable in trials by court-martial," the "deletion of specified items of classified information from documents made available to the accused"; the substitution of a "portion or summary of the information"; or "the substitution of a statement admitting relevant facts that the classified information would tend to prove." The military judge must consider a claim of privilege and review any supporting materials *in camera*, and is not permitted to disclose the privileged information to the accused. Proposed 10 U.S.C. § 949d(c)(4). Similar substitutions would be permissible in the context of discovery (see *infra*). Proposed 10 U.S.C. § 949j(c).

S. 3901 provides a guarantee that the accused must have the right to "examine and respond to all evidence considered by the military commission on the issue of guilt or innocence and for sentencing," and to "be present at all sessions of the military commission (other than those for deliberations or voting), except when excluded under section 949d of this title." Proposed 10 U.S.C. § 949a. Section 949d permits the exclusion of the accused only for disruptive behavior.

S. 3930 retains these provisions, and also includes a new subsection (e) to provide for the use of classified evidence at trial, to replace the provisions for classified information under proposed § 949(c) in S. 3901. Under the procedures outlined, the government would be permitted to claim a privilege with respect to information if the head of an executive or military department or agency asserts the information is properly classified and disclosure would be detrimental to the national security, without requiring a certification that such information had been declassified to the maximum extent possible. When the government claims such a privilege, the military judge may authorize, "to the extent practicable," the "deletion of specified items of classified information from documents made available to the accused"; the substitution of a "portion or summary of the information"; or "the substitution of a statement admitting relevant facts that the classified information would tend to prove." Proposed § 949d(e)(2). The provision specifically allows the introduction of such alternative evidence to protect classified "sources, methods, or activities by which the United States acquired the evidence" as long as the evidence is "reliable."

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[185] Defined in proposed § 948a as "[a]ny information or material that has been determined by the United States Government pursuant to statute, Executive order, or regulation to require protection against unauthorized disclosure for reasons of national security" and "restricted data, as that term is defined in section 11y of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y))."

The military judge may require that the defense and the commission members be permitted to view an unclassified summary of the sources, methods, or activities, to the extent practicable and consistent with national security. Proposed 10 U.S.C. § 949d(e)(2). It does not appear that the defense counsel or the accused is permitted to present arguments to the military judge in opposition to the government's claim of privilege.

H.R. 6054, S. 3886, and S. 3861 provide for the exclusion of the accused from portions of his trial in order to allow classified information to be presented to panel members but not disclosed to the accused. Under these bills, the military judge would have authority to prevent the accused from attending a portion of the trial only after specifically finding that the exclusion of the accused is necessary to prevent "identifiable damage to the national security, including [by disclosing] intelligence or law enforcement sources, methods, or activities"; or is "necessary to ensure the physical safety of individuals"; or is necessary "to prevent disruption of the proceedings by the accused"; and that the exclusion of the accused "is no broader than necessary"; and "will not deprive the accused of a full and fair trial." Proposed 10 U.S.C. § 949d(e).

Discovery and Mandatory Provision of Exculpatory Information. Each of the bills provides that defense counsel is to be afforded a reasonable opportunity to obtain witnesses and other evidence, including evidence in the possession of the United States, as specified in regulations prescribed by the Secretary of Defense. The military commission is authorized to compel witnesses under U.S. jurisdiction to appear. The military judge may authorize discovery in accordance with rules prescribed by the Secretary of Defense to redact classified information or to provide an unclassified summary or statement describing the evidence. Proposed 10 U.S.C. § 949j.

Under H.R. 6054, S. 3861 and S. 3886, the trial counsel is obligated to disclose exculpatory evidence of which he is aware to the defense, but such information, if classified, is available to the accused only in a redacted or summary form, and only if making the information available is possible without compromising intelligence sources, methods, or activities, or other national security interests. Classified information is to be provided to military defense counsel, but civilian counsel is to have access only if he or she has the appropriate security clearance and such access is consistent with any procedures the Secretary of Defense implements for the protection of classified information. Defense counsel would not be able to share such information with the accused, which many observers assert could impair the defense's ability to refute any such evidence.

S. 3901 requires trial counsel to make available to the defense not only exculpatory information, but also any that would tend to "reduce the degree of guilt of the accused." It further provides that the military judge may authorize substitutions for classified information pursuant to rules similar to the rules that apply in courts-martial, to the extent practicable. Proposed 10 U.S.C. § 949j.

S. 3930 provides for the mandatory provision of exculpatory information only (defined as exculpatory evidence that the prosecution would be required to disclose

in a general court-martial[186]), and does not permit defense counsel or the accused to view classified information. The military judge would be authorized to permit substitute information, including when trial counsel moves to withhold information pertaining to the sources, methods, or activities by which the information was acquired. The military judge may (but need not) require that the defense and the commission members be permitted to view an unclassified summary of the sources, methods, or activities, to the extent practicable and consistent with national security. Proposed 10 U.S.C. § 949j.

Post-Trial Procedure and Interlocutory Appeals. The DTA introduced an appellate mechanism for limited review of Combatant Status Review Tribunal (CSRT) determinations and final decisions of military commissions.[187] S. 3901 would modify the DTA so that appeals would be heard in the Court of Appeals for the Armed Forces (CAAF) rather than the Court of Appeals for the District of Columbia Circuit. Proposed 10 U.S.C. § 950f. The CAAF would have the authority to review appeals of final decisions by the accused or interlocutory appeals by the government of military commission rulings that terminate proceedings of the military commission, exclude material evidence, or relate to the closure of hearings, the exclusion of the accused from proceedings, or the provision of substitute evidence to protect classified information. Proposed 10 U.S.C. § 950d. The defense would not have an opportunity to submit an interlocutory appeal in the event of rulings that are unfavorable to the accused. The government would not be permitted to appeal any ruling of a military commission that amounts to a finding of not guilty of any charge or specification. The scope of review would be limited to matters of law, and decisions could only be overturned if an error of law "materially prejudices the substantial rights of the accused." Proposed 10 U.S.C. §§ 950a and 950f.

S. 3930, S. 3861, S. 3886, and H.R. 6054 would provide for similar appellate rules, but would route appeals through the Court of Military Commission Review (CMCR), a new body to be established by the Secretary of Defense, who would have the authority to promulgate procedural rules governing its operation. The CMCR would be comprised of appellate military judges who meet the same qualifications as military judges or comparable qualifications for civilian judges. Once the CMCR has approved the final decision of a military commission, the accused would have the right to petition for a determination by the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit), pursuant to the section 1005(e)(3) of the DTA. The government would be permitted to submit interlocutory appeals to the

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[186] It is not clear what information would be required to be provided under this subsection. Discovery at court-martial is controlled by R.C.M. 701, which requires trial counsel to provide to the defense any papers accompanying the charges, sworn statements in the possession of trial counsel that relate to the charges, and all documents and tangible objects within the possession or control of military authorities that are material to the preparation of the defense or that are intended for use in the prosecution's case-in-chief at trial. Exculpatory evidence appears to be a subset of "evidence favorable to the defense," which includes evidence that tends to negate the guilt of the accused of an offense charged, reduce the degree of guilt, or reduce the applicable punishment.

[187] For more information about the DTA provisions concerning appellate review and *habeas corpus* actions, see CRS Report RL33180, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*, by Jennifer K. Elsea and Kenneth Thomas.

CMCR of adverse rulings pertaining to the admission of evidence or that terminates commission proceedings with respect to a charge or specification (except for a ruling that amounts to a finding of not guilty), and in the event of an adverse ruling by the CMCR, would be permitted to appeal to the D.C. Circuit. The accused would not be permitted to appeal an adverse interlocutory ruling.

The following charts provide a comparison of the proposed military tribunals under the regulations issued by the Department of Defense, standard procedures for general courts-martial under the Manual for Courts-Martial, and military tribunals as proposed by H.R. 6054 and S. 3886, and S. 3901. Table 1 compares the legal authorities for establishing military tribunals, the jurisdiction over persons and offenses, and the structures of the tribunals. Table 2, which compares procedural safeguards incorporated in the DOD regulations and the UCMJ, follows the same order and format used in CRS Report RL31262, *Selected Procedural Safeguards in Federal, Military, and International Courts*, in order to facilitate comparison of the proposed legislation to safeguards provided in federal court, the international military tribunals that tried World War II crimes at Nuremberg and Tokyo, and contemporary ad hoc tribunals set up by the UN Security Council to try crimes associated with hostilities in the former Yugoslavia and Rwanda.

Table 1. Comparison of Courts-Martial and Military Commission Rules

	General Courts Martial	Military Commission Order No. 1 (M.C.O.)	H.R. 6054	S. 3901/S. 3930	S. 3886/S. 3861
Authority	U.S. Constitution, Article I, § 8.	U.S. Constitution, Article II; Presidential Military Order of Nov. 13, 2001 (M.O).	U.S. Constitution, Article I, § 8.	U.S. Constitution, Article I, § 8.	U.S. Constitution, Article I, § 8.
Procedure	Rules are provided by the Uniform Code of Military Justice (UCMJ), chapter 47, title 10, and the Rules for Courts-Martial (R.C.M.) and the Military Rules of Evidence (Mil. R. Evid.), issued by the President pursuant to art. 36, UCMJ. 10 U.S.C. § 836.	Rules are issued by the Secretary of Defense pursuant to the M.O. No other rules apply (presumably excluding the UCMJ). § 1. The President declared it "impracticable" to employ procedures used in federal court, pursuant to 10 U.S.C. § 836.	The Secretary of Defense may prescribe rules of evidence and procedure for trial by a military commission. Proposed 10 U.S.C. § 949a(a). Congressional notice is required not later than 60 days prior to the effective date of any change in procedures. Proposed 10 U.S.C. §	The Secretary of Defense may prescribe rules of evidence and procedure for trial by a military commission. The rules may not be inconsistent with the new chapter 47a of title 10, and rules of procedure and evidence applicable to courts-martial under the UCMJ are to apply to military commissions except	The Secretary of Defense may prescribe rules of evidence and procedure for trial by a military commission. Proposed 10 U.S.C. § 949a(a).

	General Courts Martial	Military Commission Order No. 1 (M.C.O.)	H.R. 6054	S. 3901/S. 3930	S. 3886/S. 3861
			949a(c).	where otherwise specified. Proposed 10 U.S.C. § 949a(a). The Secretary of Defense, in consultation with the Attorney General, may make exceptions to UCMJ procedural rules "as may be required by the unique circumstances of the conduct of military and intelligence operations during hostilities or by other practical need." Proposed § 949a(b). However, the rules must include certain rights as listed in §	

	General Courts Martial	Military Commission Order No. 1 (M.C.O.)	H.R. 6054	S. 3901/S. 3930	S. 3886/S. 3861
				949a(b)(2). Specific UCMJ provisions the Secretary may except are listed in § 949a(b)(3).	
Jurisdiction over Persons	Members of the armed forces, cadets, midshipmen, reservists while on inactive-duty training, members of the National Guard or Air National Guard when in federal service, prisoners of war in custody of the armed forces, civilian employees accompanying the armed forces in time of declared war, and certain others,	Individual subject to M.O., determined by President to be: 1. a non-citizen, and 2. a member of Al Qaeda or person who has engaged in acts related to terrorism against the United States, or who has harbored one or more such individuals and is referred to the commission by the Appointing Authority. § 3(A).	Any "alien unlawful combatant" is subject to trial by military commission. Proposed 10 U.S.C. § 948c. An "unlawful enemy combatant" is an individual determined under the authority of the President of the Secretary of Defense "to be part of or affiliated with a force or organization (including al Qaeda,	Covers "alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses specifically made triable by military commission as provided in chapter 47 of title 10, United States Code, and chapter 47A of title 10, United States Code (as enacted by this Act)."	Covers unlawful enemy combatants, proposed 10 U.S.C. § 948c, defined as any person who has been determined to be "part of or affiliated with a force or organization, including but not limited to al Qaeda, the Taliban, any international terrorist organization, or associated forces, engaged in hostilities against the United States or its

	General Courts Martial	Military Commission Order No. 1 (M.C.O.)	H.R. 6054	S. 3901/S. 3930	S. 3886/S. 3861
	including "persons within an area leased by or otherwise reserved or acquired for the use of the United States." 10 U.S.C. § 802; United States v. Averette, 17 USCMA 363 (1968) (holding "in time of war" to mean only wars declared by Congress. Individuals who are subject to military tribunal jurisdiction under the law of war may also be tried by general court martial. 10 U.S.C. § 818.		the Taliban, any international terrorist organization, or associated forces) that is engaged in hostilities against the United States or its co-belligerents in violation of the law of war; to have committed a hostile act in aid of such a force or organization so engaged; or to have supported hostilities in aid of such a force or organization so engaged," including any individual previously determined by a Combatant Status Review Tribunal "to have	§ 3; Proposed 10 U.S.C. § 948c. An "'unlawful enemy combatant' means an individual engaged in hostilities against the United States who is not a lawful enemy combatant." Proposed 10 U.S.C. § 948a(4). "Lawful combatant" is defined in terms of GPW Art. 4. Proposed 10 U.S.C. § 948a(3).	cobelligerents in violation of the law of war; to have committed a hostile act in aid of such a force or organization so engaged; or to have supported hostilities in aid of such a force or organization so engaged"; including any individual previously determined by a Combatant Status Review Tribunal "to have been properly detained as an enemy combatant"; but excluding persons determined to be lawful combatants, or prisoners of war or

	General Courts Martial	Military Commission Order No. 1 (M.C.O.)	H.R. 6054	S. 3901/S. 3930	S. 3886/S. 3861
			been properly detained as an enemy combatant"; but excluding persons determined to be lawful combatants, or prisoners of war or protected persons within the meaning of the Geneva Conventions. Proposed 10 U.S.C. § 948a.		protected persons within the meaning of the Geneva Conventions. Proposed 10 U.S.C. § 948a.
Jurisdiction over Offenses	Any offenses made punishable by the UCMJ; offenses subject to trial by military tribunal under the law of war. 10 U.S.C. § 818.	Offenses in violation of the laws of war and all other offenses triable by military commission. § 3(B). M.C.I. No. 2 clarifies that terrorism and related crimes are "crimes triable by	Offenses include the following: murder of protected persons; attacking civilians, civilian objects, or protected property; pillaging; denying quarter; taking hostages; employing poison or analogous	Defined crimes are the following, when committed in the context of an armed conflict: murder of protected persons; attacking civilians, civilian objects, or protected property; pillaging; denying	Offenses include the following "when committed in the context of and associated with armed conflict": murder of protected persons; attacking civilians, civilian objects, or protected property;

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		military commission." These include (but are not limited to): willful killing of protected persons; attacking civilians; attacking civilian objects; attacking protected property; pillaging; denying quarter; taking hostages; employing poison or analogous weapons; using protected persons as shields; using protected property as shields; torture; causing serious injury; mutilation or maiming; use of treachery or perfidy; improper use of flag	weapons; using protected persons or property as shields; torture, cruel or inhuman treatment; intentionally causing serious bodily injury; mutilating or maiming; murder in violation of the law of war; destruction of property in violation of the law of war; using treachery or perfidy; improperly using a flag of truce or distinctive emblem; intentionally mistreating a dead body; rape; hijacking or hazarding a vessel or aircraft; terrorism; providing material	quarter; taking hostages; employing poison or similar weapons; using protected persons or property as shields; torture, cruel, unusual, or inhumane treatment or punishment; intentionally causing serious bodily injury; mutilating or maiming; murder in violation of the law of war; destruction of property in violation of the law of war; using treachery or perfidy; improperly using a flag of truce or distinctive emblem; intentionally	pillaging; denying quarter; taking hostages; employing poison or analogous weapons; using protected persons or property as shields; torture, cruel or inhuman treatment; intentionally causing serious bodily injury; mutilating or maiming; murder in violation of the law of war; destruction of property in violation of the law of war; using treachery or perfidy; improperly using a flag of truce or distinctive emblem; intentionally mistreating a dead

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		of truce; improper use of protective emblems; degrading treatment of a dead body; and rape; hijacking or hazarding a vessel or aircraft; terrorism; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; aiding the enemy; spying; perjury or false testimony; and obstruction of justice; aiding or abetting; solicitation; command/superior responsibility - perpetrating;	support for terrorism; wrongfully aiding the enemy; spying, contempt; perjury and obstruction of justice. Proposed 10 U.S.C. § 950v. Conspiracy (§ 950v(27)), attempts (§ 950t), and solicitation (§ 950u) to commit the defined acts are also punishable.	mistreating a dead body; rape; hijacking or hazarding a vessel or aircraft; terrorism; providing material support for terrorism; wrongfully aiding the enemy; spying, contempt; perjury and obstruction of justice. Conspiracy, attempts, and solicitations to commit the defined acts is also punishable. Proposed 10 U.S.C. § 950aa *et seq*.	body; rape; hijacking or hazarding a vessel or aircraft; terrorism; providing material support for terrorism; wrongfully aiding the enemy; spying, contempt; perjury and obstruction of justice. Proposed 10 U.S.C. § 950v. Conspiracy (§ 950v(27)), attempts (§ 950t), and solicitation (§ 950u) to commit the defined acts are also punishable.

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		command/superior responsibility - misprision; accessory after the fact; conspiracy; and attempt.			
Composition	A military judge and not less than five members, or if requested, except in capital cases, a military judge alone. R.C.M. 501.	From three to seven members, as determined by the Appointing Authority. § 4(A)(2).	A military judge and at least five members, proposed 10 U.S.C. § 948m, unless the death penalty is sought, in which case no fewer than 12 members must be included, proposed § 949m(c).	A military judge and at least five members, proposed 10 U.S.C. § 948m, unless the death penalty is sought, in which case no fewer than 12 members must be included, proposed § 949m(c).	A military judge and at least five members, proposed 10 U.S.C. § 948m, unless the death penalty is sought, in which case no fewer than 12 members must be included, proposed § 949m(c).

Source: Congressional Research Service.

Table 2. Comparison of Procedural Safeguards

	General Courts Martial	Military Commission Order No. 1 (M.C.O.)	H.R. 6054	S. 3901	S. 3930	S. 3886/S. 3861
Presumption of Innocence	If the defendant fails to enter a proper plea, a plea of not guilty will be entered. R.C.M. 910(b). Members of court martial must be instructed that the "accused must be presumed to be innocent until the accused's guilt is established by legal and competent evidence beyond a reasonable doubt." R.C.M. 920(e).	The accused shall be presumed innocent until proven guilty. § 5(B). Commission members must base their vote for a finding of guilty on evidence admitted at trial. §§ 5(C); 6(F). The Commission must determine the voluntary and informed nature of any plea agreement submitted by the accused and approved by the Appointing	Before a vote is taken on the findings, the military judge must instruct the commission members "that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt." Proposed 10 U.S.C. § 949*l*. If an accused refuses to enter a plea or pleads guilty but provides	Before a vote is taken on the findings, the military judge must instruct the commission members "that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt." Proposed 10 U.S.C. § 949*l*. If an accused refuses to enter a plea or pleads guilty but provides	Before a vote is taken on the findings, the military judge must instruct the commission members "that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt." Proposed 10 U.S.C. § 949*l*. If an accused refuses to enter a plea or pleads guilty but provides	Before a vote is taken on the findings, the military judge must instruct the commission members "that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt." Proposed 10 U.S.C. § 949*l*. If an accused refuses to enter a plea, a plea of not guilty is entered. If an

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	The accused shall be properly attired in uniform with grade insignia and any decorations to which entitled. Physical restraint shall not be imposed unless prescribed by the military judge. R.C.M. 804.	Authority before admitting it as stipulation into evidence. § 6(B).	inconsistent testimony, or if it appears that he lacks proper understanding of the meaning and effect of the guilty plea, the commission must treat the plea as denying guilt. Proposed 10 U.S.C. § 949i.	inconsistent testimony, or if it appears that he lacks proper understanding of the meaning and effect of the guilty plea, the commission must treat the plea as denying guilt. Proposed 10 U.S.C. § 949i.	inconsistent testimony, or if it appears that he lacks proper understanding of the meaning and effect of the guilty plea, the commission must treat the plea as denying guilt. Proposed 10 U.S.C. § 949i.	accused enters a plea of guilty but provides testimony inconsistent with the plea, or if it appears that he lacks proper understanding of the meaning and effect of the guilty plea, the commission must treat the plea as denying guilt. Proposed 10 U.S.C. § 949i.
Right to Remain Silent	Coerced confessions or confessions made in custody without statutory equivalent of Miranda warning are not admissible as evidence, unless a narrow "public safety" exception	Not provided. Neither the M.O. nor M.C.O. requires a warning or bars the use of statements made during military interrogation, or any coerced statement,	Statements elicited through torture may not be entered into evidence except to prove a charge of torture. Evidence allegedly obtained by coercion is inadmissible if the	Article 31, UCMJ, is expressly made inapplicable. Proposed 10 U.S.C. § 948b(c). Confessions allegedly elicited through coercion or	Article 31, UCMJ, is expressly made inapplicable. Proposed 10 U.S.C. § 948b(c). Confessions allegedly elicited through coercion or	Statements elicited through torture may not be entered into evidence except to prove a charge of torture. Evidence allegedly obtained by coercion is inadmissible if the

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	applies. Art. 31, UCMJ, 10 U.S.C. § 831. Once a suspect is in custody or charges have been preferred, the suspect or accused has the right to have counsel present for questioning. Once the right to counsel is invoked, questioning material to the allegations or charges must stop. Mil. R. Evid. 305(d)(1). The prosecutor must notify the defense of any incriminating	from military commission proceedings. Art. 31(a), UCMJ (10 U.S.C. § 831) bars persons subject to it from compelling any individual to make a confession, but there does not appear to be a remedy in case of violation. No person subject to the UCMJ may compel any person to give evidence before any military tribunal if the evidence is not material to the issue and may tend to degrade him. 10 U.S.C. § 831.	military judge finds it to be unreliable or lacking in probative value. Proposed 10 U.S.C. § 948r. Statements made by the accused during an interrogation, including questioning by foreign or U.S. military, intelligence, or criminal investigative personnel, are admissible only if the accused is present for its admission or the evidence is "otherwise provided	compulsory self-incrimination that are otherwise admissible are not to be excluded at trial unless violates section 948r, which provides for the exclusion of statements extracted through practices amounting to torture or cruel, inhuman, or degrading, treatment, except as evidence against a person charged with such treatment. Proposed 10 U.S.C. § 949a(a)(3)(B). Statements obtained through methods	compulsory self-incrimination that are otherwise admissible are not to be excluded at trial unless violates section 948r. Proposed 10 U.S.C. § 949a(b)(3)(B). Section 948r provides that statements elicited through torture may not be entered into evidence except to prove a charge of torture. With respect to statements obtained through coercion that does not amount to torture, the bill	military judge finds it to be unreliable or lacking in probative value. Proposed 10 U.S.C. § 948r. Procedural rules may provide that otherwise admissible statements by the accused shall not be excluded on the grounds of coercion or compulsory self-incrimination so long as the evidence is admissible under proposed § 948r. Proposed 10 U.S.C. § 949a(b)(3)(B). Statements made by

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	statements made by the accused that are relevant to the case prior to the arraignment. Motions to suppress such statements must be made prior to pleading. Mil. R. Evid. 304. Interrogations conducted by foreign officials do not require warnings or presence of counsel unless the interrogation is instigated or conducted by U.S. military personnel. Mil. R. Evid. 305.		to the accused." Proposed 10 U.S.C. § 949d(f).	that do not amount to cruel, inhuman or degrading treatment under the DTA, are admissible only if the totality of circumstances render it reliable and probative, and the interests of justice would best be served by allowing the members to hear the evidence. Proposed 10 U.S.C. § 948r.	applies a different standard depending on whether the statements were obtained prior to the enactment of the DTA, in which case statements would be admissible if the military judge finds the "totality of circumstances under which the statement was made renders it reliable and possessing sufficient probative value" and "the interests of justice would best be served" by admission of the statement. Statements taken	the accused during an interrogation, including questioning by foreign or U.S. military, intelligence, or criminal investigative personnel, are admissible only if the accused is present for its admission or the evidence is "otherwise provided to the accused." Proposed 10 U.S.C. § 949d(f).

	General Courts Martial	Military Commission Order No. 1 (M.C.O.)	H.R. 6054	S. 3901	S. 3930	S. 3886/S. 3861
					after passage of the DTA would be admissible if, in addition to the two criteria above, the military judge finds that "the interrogation methods used to obtain the statement do not violate the cruel, unusual, or inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution." Proposed 10 U.S.C. § 948r.	

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Freedom from Unreasonable Searches & Seizures	"Evidence obtained as a result of an unlawful search or seizure ... is inadmissible against the accused ..." unless certain exceptions apply. Mil. R. Evid. 311. "Authorization to search" may be oral or written, and may be issued by a military judge or an officer in command of the area to be searched, or if the area is not under military control, with authority over persons subject to military law or the	Not provided; no exclusionary rule appears to be available. However, monitored conversations between the detainee and defense counsel may not be communicated to persons involved in prosecuting the accused or used at trial. M.C.O. No. 3. No provisions for determining probable cause or issuance of search warrants are included.	Not provided. Evidence is generally permitted if it has probative value to a reasonable person, unless it is obtained under circumstances that would render it unreliable. Proposed 10 U.S.C. §§ 948r, 949a.	Procedural rules may provide that evidence gathered outside the United States without authorization or a search warrant may be admitted into evidence. Proposed 10 U.S.C. § 949a.	Procedural rules may provide that evidence gathered outside the United States without authorization or a search warrant may be admitted into evidence. Proposed 10 U.S.C. § 949a.	Not provided. Evidence is generally permitted if it has probative value to a reasonable person, unless it is obtained under circumstances that would render it unreliable. Proposed 10 U.S.C. §§ 948r, 949a.

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	law of war. It must be based on probable cause. Mil. R. Evid. 315. Interception of wire and oral communications within the United States requires judicial application in accordance with 18 U.S.C. §§ 2516 *et seq.* Mil. R. Evid. 317. A search conducted by foreign officials is unlawful only if the accused is subject to "gross and brutal treatment." Mil. R.	Insofar as searches and seizures take place outside of the United States against non-U.S. persons, the Fourth Amendment may not apply. United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).				

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	Evid. 311(c).					
Assistance of Effective Counsel	The defendant has a right to military counsel at government expense. The defendant may choose counsel, if that attorney is reasonably available, and may hire a civilian attorney in addition to military counsel. Art 38, UCMJ, 10 U.S.C. § 838. Appointed counsel must be certified as qualified and may not be someone who has taken any part in the investigation or	M.C.O. 1 provides that the accused must be represented "at all relevant times" (presumably, once charges are approved until findings are final — but not for individuals who are detained but not charged) by detailed defense counsel. § 4(C)(4). The accused is assigned a military judge advocate to serve as counsel, but may request to replace or augment	At least one qualifying military defense counsel is to be detailed "as soon as practicable after the swearing of charges…." Proposed 10 U.S.C. § 948k. The accused may also hire a civilian attorney who is a U.S. citizen, is admitted to the bar in any state, district, or possession, has never been disciplined, has a SECRET clearance (or higher, if necessary for a	At least one qualifying military defense counsel is to be detailed "as soon as practicable after the swearing of charges…." Proposed 10 U.S.C. § 948k. The accused may also hire a civilian attorney who is a U.S. citizen, is admitted to the bar in any state, district, or possession, has never been disciplined, has a SECRET clearance (or higher, if necessary for a	At least one qualifying military defense counsel is to be detailed "as soon as practicable after the swearing of charges…." Proposed 10 U.S.C. § 948k(a)(3). The accused may also hire a civilian attorney who is a U.S. citizen, is admitted to the bar in any state, district, or possession, has never been disciplined, has a SECRET clearance (or higher, if necessary for a	At least one qualifying military defense counsel is to be detailed "as soon as practicable after the swearing of charges…." Proposed 10 U.S.C. § 948k. The accused may also hire a civilian attorney who is a U.S. citizen, is admitted to the bar in any state, district, or possession, has never been disciplined, has a SECRET clearance (or higher, if necessary for a

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	prosecution, unless explicitly requested by the defendant. Art. 27, UCMJ, 10 U.S.C. § 827. In espionage cases or other cases in which classified information may be necessary to prove a charge or defense, the defense is permitted to request the information and to have the military judge review *in camera* information for which the government asserts a privilege. The accused and the	the detailed counsel with a specific officer, if that person is available. § 4(C)(3)(a). The accused may also hire a civilian attorney who is a U.S. citizen, is admitted to the bar in any state, district, or possession, has a SECRET clearance (or higher, if necessary for a particular case), and agrees to comply with all applicable rules. The civilian attorney does not replace the detailed counsel, and is not	particular case), and agrees to comply with all applicable rules. If civilian counsel is hired, the detailed military counsel serves as associate counsel. Proposed 10 U.S.C. § 949c(b). Defense attorneys are not permitted to share classified information with their clients or with any other person not entitled to receive it. Proposed 10 U.S.C. § 949j(d)(5). Military defense counsel must be	particular case), and agrees to comply with all applicable rules. If civilian counsel is hired, the detailed military counsel serves as associate counsel. Proposed 10 U.S.C. § 949c(b). Classified information is to be treated in accordance with the rules applicable in general courts-martial for making such information available to the accused. Proposed 10 U.S.C. § 949j(c).	particular case), and agrees to comply with all applicable rules. If civilian counsel is hired, the detailed military counsel serves as associate counsel. Proposed 10 U.S.C. § 949c(b). Self-representation is permitted if the right to counsel is waived and the accused obeys trial rules. Proposed 10 U.S.C. § 949a(b)(2)(D). Trial counsel need not provide defense counsel with any	particular case), and agrees to comply with all applicable rules. If civilian counsel is hired, the detailed military counsel serves as associate counsel. § 949c(b). Defense attorneys are not permitted to share classified information with their clients or with any other person not entitled to receive it. Proposed 10 U.S.C. § 949j(c)(5). Military defense counsel must be present for all

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	defense attorney are entitle to be present for such *in camera* hearings, and although the government is not generally required to give them access to the classified information itself, the military judge may disapprove of any summary the government provides for the purpose of permitting the defense to prepare adequately for the hearing, and may subject the government to sanctions if it	guaranteed access to classified evidence or closed hearings. § 4(C)(3)(b). Defense Counsel may present evidence at trial and cross-examine witnesses for the prosecution. § 5(I). The Appointing Authority must order such resources be provided to the defense as he deems necessary for a full and fair trial." § 5(H). Communications between defense	present for all proceedings and have access to all classified evidence admitted. Civilian defense counsel is permitted to be present and to participate in all trial proceedings, and is to be given access to classified evidence to be admitted at trial if they have the necessary security clearances and "such presence and access are consistent with regulations that the Secretary may prescribe to protect classified	There is no provision similar to § 949d(e) of the Administration's proposal to allow the exclusion of the accused from portions of the trial where classified information is presented. No attorney-client privilege is mentioned. Adverse personnel actions may not be taken against defense attorneys because of the zeal with which such officer, in acting as counsel, represented	evidence that is classified, but in the case the trial counsel moves for permission to introduce evidence without disclosing the intelligence sources and methods by which such evidence was acquired, the military judge may require that the defense be permitted to view an unclassified summary of the sources, methods, or activities by which the United States acquired the evidence, to the	proceedings and have access to all classified evidence admitted. Civilian defense counsel is permitted to be present and to participate in all trial proceedings, and is to be given access to classified evidence to be admitted at trial if they have the necessary security clearances and "such presence and access are consistent with regulations that the Secretary may prescribe to protect classified information."

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	declines to make the necessary information available. Mil. R. Evid. 505. The military judge may order all persons requiring security clearances to cooperate with investigatory personnel in any investigations which are necessary to obtain the security clearance necessary to participate in the proceedings. Mil. R. Evid. 505(g).	counsel and the accused are subject to monitoring by the government. Although information obtained through such monitoring may not be used as evidence against the accused, M.C.I. No. 3, the monitoring could arguably have a chilling effect on attorney-client conversations, possibly hampering the ability of defense counsel to provide effective representation.	information." Proposed 10 U.S.C. § 949d(e). At all times, the accused must have defense counsel with the appropriate clearance to participate in proceedings. Proposed 10 U.S.C. § 949d(e)(4)(D). No attorney-client privilege is mentioned. Adverse personnel actions may not be taken against defense attorneys because of the zeal	any accused before a military commission…" Proposed 10 U.S.C. § 949b(b).	extent practicable and consistent with national security. It does not appear that the defense counsel or the accused is permitted to present argument to the military judge in opposition to the government's claim of privilege. Proposed 10 U.S.C. § 949d(e)(2). No attorney-client privilege is mentioned. Adverse personnel actions may not be taken against defense attorneys because of the zeal	Proposed 10 U.S.C. § 949d(e). No attorney-client privilege is mentioned. Adverse personnel actions may not be taken against defense attorneys because of the zeal with which such officer, in acting as counsel, represented any accused before a military commission.…" Proposed 10 U.S.C. § 949b.

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	The attorney-client privilege is honored. Mil. R. Evid. 502.		with which such officer, in acting as counsel, represented any accused before a military commission.…" Proposed 10 U.S.C. § 949b.		with which such officer, in acting as counsel, represented any accused before a military commission…" Proposed 10 U.S.C. § 949b(b).	
Right to Indictment and Presentment	The right to indictment by grand jury is explicitly excluded in "cases arising in the land or naval forces." Amendment V. However, a process similar to a grand jury is required by article 32, UCMJ. 10 U.S.C. § 832.	Probably not applicable to military commissions, provided the accused is an enemy belligerent. *See Ex parte* Quirin, 317 U.S. 1 (1942). The Office of the Chief Prosecutor prepares charges for referral by the Appointing	Charges and specifications against an accused are to be signed by a person subject to UCMJ swearing under oath that the signer has "personal knowledge of, or reason to believe, the matters set forth therein," and that they are "true in fact to the best of his knowledge and	Article 32, UCMJ, hearings are expressly made inapplicable. Proposed 10 U.S.C. § 948b(c). Charges and specifications against an accused are to be signed by a person subject to UCMJ swearing under oath that the signer has "personal	Article 32, UCMJ, hearings are expressly made inapplicable. Proposed 10 U.S.C. § 948b(c). Charges and specifications against an accused are to be signed by a person subject to UCMJ swearing under oath that the signer has "personal	Charges and specifications against an accused are to be signed by a person subject to UCMJ swearing under oath that the signer has "personal knowledge of, or reason to believe, the matters set forth therein;" and that they are "true in fact to the best of his knowledge and

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	Whenever an offense is alleged, the commander is responsible for initiating a preliminary inquiry and deciding how to dispose of the offense. R.C.M. 303-06. The accused must be informed of the charges as soon as practicable. Art. 30, UCMJ, 10 U.S.C. § 830.	Authority. § 4(B). There is no requirement for an impartial investigation prior to a referral of charges. The Commission may adjust a charged offense in a manner that does not change the nature or increase the seriousness of the charge. § 6(F).	belief." The accused is to be informed of the charges and specifications against him as soon as practicable after charges are sworn. Proposed 10 U.S.C. § 948q.	knowledge of, or reason to believe, the matters set forth therein;" and that they are "true in fact to the best of his knowledge and belief." The accused is to be informed of the charges and specifications against him as soon as practicable after charges are sworn. Proposed 10 U.S.C. § 948q.	knowledge of, or reason to believe, the matters set forth therein;" and that they are "true in fact to the best of his knowledge and belief." The accused is to be informed of the charges and specifications against him as soon as practicable after charges are sworn. Proposed 10 U.S.C. § 948q.	belief." The accused is to be informed of the charges and specifications against him as soon as practicable after charges are sworn. Proposed 10 U.S.C. § 948q.
Right to Written Statement of Charges	Charges and specifications must be signed under oath and made known to the accused as soon	Copies of approved charges are provided to the accused and Defense Counsel in English and another	The trial counsel assigned is responsibility for serving counsel a copy of the charges	The trial counsel assigned is responsibility for serving counsel a copy of the charges	The trial counsel assigned is responsibility for serving counsel a copy of the charges	The trial counsel assigned is responsibility for serving counsel a copy of the charges

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	as practicable. Art. 30, UCMJ, 10 U.S.C. § 830.	language the accused understands, if appropriate. § 5(A).	upon the accused, in English and, if appropriate, in another language that the accused understands, "sufficiently in advance of trial to prepare a defense." Proposed 10 U.S.C. § 948s.	upon the accused, in English and, if appropriate, in another language that the accused understands, "sufficiently in advance of trial to prepare a defense." Proposed 10 U.S.C. § 948s.	upon the accused, in English and, if appropriate, in another language that the accused understands, "sufficiently in advance of trial to prepare a defense." Proposed 10 U.S.C. § 948s.	upon the accused, in English and, if appropriate, in another language that the accused understands, "sufficiently in advance of trial to prepare a defense." Proposed 10 U.S.C. §948s.
Right to be Present at Trial	The presence of the accused is required during arraignment, at the plea, and at every stage of the court-martial unless the accused waives the right by voluntarily absenting him or	The accused may be present at every stage of trial before the Commission unless the Presiding Officer excludes the accused because of disruptive conduct or for security reasons, or "any	The military judge may prevent the accused from attending a portion of the trial only after specifically finding that the exclusion of the accused is necessary to prevent	The accused may be excluded from attending portions of the proceeding if the military judge determines that the accused persists in disruptive or dangerous conduct. Proposed 10 U.S.C.	The accused has the right to be present at all sessions of the military commission except deliberation or voting, unless exclusion of the accused is permitted under § 949d. Proposed 10 U.S.C.	The military judge may prevent the accused from attending a portion of the trial only after specifically finding that the exclusion of the accused is necessary to prevent "identifiable

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	herself from the proceedings after the arraignment or by persisting in conduct that justifies the trial judge in ordering the removal of the accused from the proceedings. R.C.M. 801. The government may introduce redacted or summarized versions of evidence to be substituted for classified information properly claimed under privilege, but there is no provision that would allow	other reason necessary for the conduct of a full and fair trial." §§ 4(A)(5)(a); 5(K); 6B(3).	"identifiable damage to the national security, including [by disclosing] intelligence or law enforcement sources, methods, or activities"; or is "necessary to ensure the physical safety of individuals"; or is necessary "to prevent disruption of the proceedings by the accused"; and the exclusion of the accused "is no broader than necessary"; and "will not deprive the accused of a full and fair trial." Proposed	§ 949d(d).	§ 949a(b)(2)(B). The accused may be excluded from attending portions of the proceeding if the military judge determines that the accused persists in disruptive or dangerous conduct. Proposed 10 U.S.C. § 949d(d). Proposed § 949d(e) (introduction of classified information) does not expressly permit the exclusion of the accused from any portion of the trial, but does not	damage to the national security, including [by disclosing] intelligence or law enforcement sources, methods, or activities"; or is "necessary to ensure the physical safety of individuals"; or is necessary "to prevent disruption of the proceedings by the accused"; and the exclusion of the accused "is no broader than necessary"; and "will not deprive the accused of a full and fair trial." Proposed 10 U.S.C. § 949d.

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	court-martial members (other than the non-voting military judge) to view evidence that is not seen by the accused. Mil. R. Evid. 505.		10 U.S.C. § 949d.		expressly preclude it, and mandates that the military judge "take suitable action to safeguard ... classified information," which "may include the review of trial counsel's claim of privilege by the military judge *in camera* and on an *ex parte* basis," and the "delaying of procedures to permit trial counsel to consult with the department or agency concerned...." The Secretary of Defense may	

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					prescribe additional regulations "consistent with this section." Proposed 10 U.S.C. § 949d(e).	
Prohibition against Ex Post Facto Crimes	Courts-martial will not enforce an ex post facto law, including increasing amount of pay to be forfeited for specific crimes. Unite States v. Gorki, 47 M.J. 370 (1997).	Not provided, but may be implicit in restrictions on jurisdiction over offenses. *See* § 3(B). M.C.I. No. 2 § 3(A) provides that "no offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question."	Crimes punishable by military commissions under the new chapter are contained in subchapter VII. It includes the crime of conspiracy, which a plurality of the Supreme Court in *Hamdan v. Rumsfeld* viewed as invalid as a charge of war crimes. 126 S.Ct. 2749 (2006).	Crimes punishable by military commissions under the new chapter are contained in subchapter VII. It includes the crime of conspiracy, which a plurality of the Supreme Court in *Hamdan v. Rumsfeld* viewed as invalid as a charge of war crimes. 126 S.Ct. 2749 (2006).	Crimes punishable by military commissions under the new chapter are contained in subchapter VII. It includes the crime of conspiracy, which a plurality of the Supreme Court in *Hamdan v. Rumsfeld* viewed as invalid as a charge of war crimes. 126 S.Ct. 2749 (2006).	Crimes punishable by military commissions under the new chapter are contained in subchapter VII. It includes the crime of conspiracy, which a plurality of the Supreme Court in *Hamdan v. Rumsfeld* viewed as invalid as a charge of war crimes. 126 S.Ct. 2749 (2006).

	General Courts Martial	Military Commission Order No. 1 (M.C.O.)	H.R. 6054	S. 3901	S. 3930	S. 3886/S. 3861
			The bill declares that it "codif[ies] offenses that have traditionally been triable by military commissions," and that "because the [the defined crimes] (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crimes that occurred before the date of enactment." Proposed 10 U.S.C. § 950p.		The bill declares that it "codif[ies] offenses that have traditionally been triable by military commissions," and that it "does not establish new crimes that did not exist before its establishment." Proposed 10 U.S.C. § 950bb.	The bill declares that it "codif[ies] offenses that have traditionally been triable by military commissions," and that it "does not establish new crimes that did not exist before its establishment." Proposed 10 U.S.C. § 950p.

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			The bill expressly provides jurisdiction over the defined crimes, whether committed prior to, on or after September 11, 2001. Proposed 10 U.S.C. § 948d.			
Protection against Double Jeopardy	Double jeopardy clause applies. See Wade v. Hunter, 336 US 684, 688-89 (1949). Art. 44, UCMJ prohibits double jeopardy, provides for jeopardy to attach after introduction of evidence. 10 U.S.C. § 844. General court-	The accused may not be tried again by any Commission for a charge once a Commission's finding becomes final. (Jeopardy appears to attach when the finding becomes final, at least with respect to subsequent U.S. military commissions.)	"No person may, without his consent, be tried by a commission a second time for the same offense." Jeopardy attaches when a guilty finding becomes final after review of the case has been fully completed. Proposed 10 U.S.C. § 949h.	"No person may, without his consent, be tried by a commission a second time for the same offense." Jeopardy attaches when a guilty finding becomes final after review of the case has been fully completed. Proposed 10 U.S.C. § 949h.	"No person may, without his consent, be tried by a commission a second time for the same offense." Jeopardy attaches when a guilty finding becomes final after review of the case has been fully completed. Proposed 10 U.S.C. § 949h.	"No person may, without his consent, be tried by a commission a second time for the same offense." Jeopardy attaches when a guilty finding becomes final after review of the case has been fully completed. Proposed 10 U.S.C. § 949h.

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	martial proceeding is considered to be a federal trial for double jeopardy purposes. Double jeopardy does not result from charges brought in state or foreign courts, although court-martial in such cases is disfavored. U. S. v. Stokes, 12 M.J. 229 (C.M.A. 1982). Once military authorities have turned service member over to civil authorities for trial, military may have waived	§ 5(P). However, although a finding of Not Guilty by the Commission may not be changed to Guilty, either the reviewing panel, the Appointing Authority, the Secretary of Defense, or the President may return the case for "further proceedings" prior to the findings' becoming final. If a finding of Not Guilty is vacated and retried, double jeopardy may be implicated.	The convening authority may not revise findings or order a rehearing in any case to reconsider a finding of not guilty of any specification or a ruling which amounts to a finding of not guilty, or reconsider a finding of not guilty of any charge, unless there has been a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation. The convening authority may not increase the severity	The convening authority may not revise findings or order a rehearing in any case to reconsider a finding of not guilty of any specification or a ruling which amounts to a finding of not guilty, or reconsider a finding of not guilty of any charge, unless there has been a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation. The convening authority may not increase the severity	The convening authority may not revise findings or order a rehearing in any case to reconsider a finding of not guilty of any specification or a ruling which amounts to a finding of not guilty, or reconsider a finding of not guilty of any charge, unless there has been a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation. The convening authority may not increase the severity	The convening authority may not revise findings or order a rehearing in any case to reconsider a finding of not guilty of any specification or a ruling which amounts to a finding of not guilty, or reconsider a finding of not guilty of any charge, unless there has been a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation. The convening authority may not increase the severity

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	jurisdiction for that crime, although it may be possible to charge the individual for another crime arising from the same conduct. *See* 54 AM. JUR. 2D, Military and Civil Defense §§ 227-28.	The order does not specify whether a person already tried by any other court or tribunal may be tried by a military commission under the M.O. The M.O. reserves for the President the authority to direct the Secretary of Defense to transfer an individual subject to the M.O. to another governmental authority, which is not precluded by the order from prosecuting the individual. This subsection could be	of the sentence unless the sentence prescribed for the offense is mandatory. Proposed 10 U.S.C. § 950b(d)(2)(B).	of the sentence unless the sentence prescribed for the offense is mandatory. Proposed 10 U.S.C. § 950b(d)(2)(B).	of the sentence unless the sentence prescribed for the offense is mandatory. Proposed 10 U.S.C. § 950b(d)(2)(B).	of the sentence unless the sentence prescribed for the offense is mandatory. Proposed 10 U.S.C. § 950b(d)(2)(B).

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		read to authorize prosecution by federal authorities after the individual was subject to trial by military commission, although a federal court would likely dismiss such a case on double jeopardy grounds. M.O. § 7(e).				
Speedy & Public Trial	In general, accused must be brought to trial within 120 days of the preferral of charges or the imposition of restraint, whichever date is earliest. R.C.M. 707(a).	The Commission is required to proceed expeditiously, "preventing any unnecessary interference or delay." § 6(B)(2). Failure to meet a	There is no right to a speedy trial, although the military judge may exclude evidence to avoid unnecessary delay. Proposed 10 U.S.C. § 949a.	There is no right to a speedy trial. Article 10, UCMJ, 10 U.S.C. § 810, is expressly made inapplicable to military commissions. Proposed 10 U.S.C.	There is no right to a speedy trial. Article 10, UCMJ, 10 U.S.C. § 810, is expressly made inapplicable to military commissions. Proposed 10 U.S.C.	There is no right to a speedy trial, although the military judge may exclude evidence to avoid unnecessary delay. Proceedings are to be open to the public except where

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	The right to a public trial applies in courts-martial but is not absolute. R.C.M. 806. The military trial judge may exclude the public from portions of a proceeding for the purpose of protecting classified information if the prosecution demonstrates an overriding need to do so and the closure is no broader than necessary. United States v. Grunden, 2 M.J. 116 (CMA 1977); Mil. R. Evid. 505(j).	specified deadline does not create a right to relief. § 10. The rules do not prohibit detention without charge, or require charges to be brought within a specific time period. Proceedings "should be open to the maximum extent possible," but the Appointing Authority has broad discretion to close hearings, and may exclude the public or accredited press from open proceedings. § 6(B)(3).	The military judge may close all or part of a trial to the public only after making a determination that such closure is necessary to protect information, the disclosure of which would be harmful to national security interests or to the physical safety of any participant. Proposed 10 U.S.C. § 949d.	§ 948b(c). Procedural rules are to provide for the right of the accused to suppress evidence that would cause undue delay. Proposed 10 U.S.C. § 949a. The military judge may close all or part of a trial to the public only after making a determination that such closure is necessary to protect information, the disclosure of which would be harmful to national security interests or to the	§ 948b(c). Procedural rules are to provide for the right of the accused to suppress evidence that would cause undue delay. Proposed 10 U.S.C. § 949a. The military judge may close all or part of a trial to the public only after making a determination that such closure is necessary to protect information, the disclosure of which would be harmful to national security interests or to the	the military judge determines that closure of all or part of a proceeding is necessary "to protect information the disclosure of which could reasonably be expected to cause identifiable damage to the public interest or the national security, including intelligence or law enforcement sources, methods, or activities" or "to ensure the physical safety of individuals." Proposed 10 U.S.C. § 949d.

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				physical safety of any participant. Proposed 10 U.S.C. § 949d.	physical safety of any participant. Proposed 10 U.S.C. § 949d(c).	
Burden & Standard of Proof	Members of court martial must be instructed that the burden of proof to establish guilt is upon the government and that any reasonable doubt must be resolved in favor of the defendant. R.C.M. 920(e).	Commission members may vote for a finding of guilty only if convinced beyond a reasonable doubt, based on evidence admitted at trial, that the accused is guilty. §§ 5(C); 6(F). The burden of proof of guilt is on the prosecution, § 5(C); however, M.C.I. No. 2 states that element of wrongfulness of an offense is to be	Commission members are to be instructed that the accused is presumed to be innocent until his "guilt is established by legal and competent evidence beyond reasonable doubt"; that any reasonable doubt as to the guilt of the accused must be "resolved in favor of the accused and he must be acquitted"; that reasonable doubt as to the degree of	Commission members are to be instructed that the accused is presumed to be innocent until his "guilt is established by legal and competent evidence beyond reasonable doubt"; that any reasonable doubt as to the guilt of the accused must be "resolved in favor of the accused and he must be acquitted"; that reasonable doubt as to the degree of guilt	Commission members are to be instructed that the accused is presumed to be innocent until his "guilt is established by legal and competent evidence beyond reasonable doubt"; that any reasonable doubt as to the guilt of the accused must be "resolved in favor of the accused and he must be acquitted"; that reasonable doubt as to the degree of guilt	Commission members are to be instructed that the accused is presumed to be innocent until his "guilt is established by legal and competent evidence beyond reasonable doubt"; that any reasonable doubt as to the guilt of the accused must be "resolved in favor of the accused and he must be acquitted"; that reasonable doubt as to the degree of guilt

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		inferred absent evidence to the contrary. M.C.I. No. 2 § 4(B).	guilt must be resolved in favor of the lower degree as to which there is no reasonable doubt; and that the burden of proof is upon the United States. Proposed 10 U.S.C. § 949*l* Two-thirds of the members must concur on a finding of guilty, except in capital cases. Proposed 10 U.S.C. § 949m. The military judge is to exclude any	must be resolved in favor of the lower degree as to which there is no reasonable doubt; and that the burden of proof is upon the United States. Proposed 10 U.S.C. § 949*l*. Two-thirds of the members must concur on a finding of guilty, except in capital cases. Proposed 10 U.S.C. § 949m. The procedural rules are to provide for	must be resolved in favor of the lower degree as to which there is no reasonable doubt; and that the burden of proof is upon the United States. Proposed 10 U.S.C. § 949*l*. Two-thirds of the members must concur on a finding of guilty, except in capital cases. Proposed 10 U.S.C. § 949m. The procedural rules are to provide for	must be resolved in favor of the lower degree as to which there is no reasonable doubt; and that the burden of proof is upon the United States. Proposed 10 U.S.C. § 949*l*. Two-thirds of the members must concur on a finding of guilty, except in capital cases, in which case the verdict must be unanimous. Proposed 10 U.S.C. § 949m. "The military judge shall exclude any

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			evidence the probative value of which is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members of the commission, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Proposed 10 U.S.C. § 949a.	the exclusion of any evidence the probative value of which is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members of the commission, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Proposed 10 U.S.C. § 949a.	the exclusion of any evidence the probative value of which is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members of the commission, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Proposed 10 U.S.C. § 949a.	evidence the probative value of which is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members of the commission, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Proposed 10 U.S.C. § 949a.
Privilege Against Self-Incrimination	No person subject to the UCMJ may compel any person to answer	The accused is not required to testify, and the commission may draw no	"No person shall be required to testify against himself at a commission	"No person shall be required to testify against himself at a commission	"No person shall be required to testify against himself at a commission	"No person shall be required to testify against himself at a commission

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	incriminating questions. Art. 31(a) UCMJ, 10 U.S.C. § 831(a). Defendant may not be compelled to give testimony that is immaterial or potentially degrading. Art. 31(c), UCMJ, 10 U.S.C. § 831(c). No adverse inference is to be drawn from a defendant's refusal to answer any questions or testify at court-martial. Mil. R. Evid. 301(f). Witnesses may not be compelled to	adverse inference from, a refusal to testify. § 5(F). However, there is no rule against the use of coerced statements as evidence. There is no specific provision for immunity of witnesses to prevent their testimony from being used against them in any subsequent legal proceeding; however, under 18 U.S.C. §§ 6001 *et seq.*, a witness required by a military tribunal to	proceeding." Proposed 10 U.S.C. § 948r. Adverse inferences drawn from a failure to testify are not expressly prohibited; however, members are to be instructed that "the accused must be presumed to be innocent until his guilt is established by legal and competent evidence" Proposed 10 U.S.C. § 949*l*. There does not appear to be a provision for	proceeding." Proposed 10 U.S.C. § 948r. Adverse inferences drawn from a failure to testify are not expressly prohibited; however, members are to be instructed that "the accused must be presumed to be innocent until his guilt is established by legal and competent evidence." Proposed 10 U.S.C. § 949*l*. There does not appear to be a provision for	proceeding." Proposed 10 U.S.C. § 948r. Adverse inferences drawn from a failure to testify are not expressly prohibited; however, members are to be instructed that "the accused must be presumed to be innocent until his guilt is established by legal and competent evidence." Proposed 10 U.S.C. § 949*l*. There does not appear to be a provision for	proceeding." Proposed 10 U.S.C. § 948r. Adverse inferences drawn from a failure to testify are not expressly prohibited; however, members are to be instructed that "the accused must be presumed to be innocent until his guilt is established by legal and competent evidence." Proposed 10 U.S.C. § 949*l*. There appears to be no specific provision for

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	give testimony that may be incriminating unless granted immunity for that testimony by a general court-martial convening authority, as authorized by the Attorney General, if required. 18 U.S.C. § 6002; R.C.M. 704.	give incriminating testimony is immune from prosecution in any criminal case, other than for perjury, giving false statements, or otherwise failing to comply with the order. 18 U.S.C. §§6002; 6004.	immunity of witnesses.	immunity of witnesses.	immunity of witnesses.	immunity of witnesses to prevent their testimony from being used against them in any subsequent legal proceeding.
Right to Examine or Have Examined Adverse Witnesses	Hearsay rules apply as in federal court. Mil. R. Evid. 801 *et seq*. In capital cases, sworn depositions may not be used in lieu of witness, unless court-martial is treated as non-	Defense Counsel may cross-examine the prosecution's witnesses who appear before the Commission. § 5(I). However, the Commission may also permit	"Defense counsel may cross-examine each witness for the prosecution who testifies before the commission." Proposed 10 U.S.C. § 949c. The accused may be	"Defense counsel may cross-examine each witness for the prosecution who testifies before the commission." Proposed 10 U.S.C. § 949c. In the case of	"Defense counsel may cross-examine each witness for the prosecution who testifies before the commission." Proposed 10 U.S.C. § 949c. In the case of	"Defense counsel may cross-examine each witness for the prosecution who testifies before the commission." Proposed 10 U.S.C. § 949c. The accused may be

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	capital or it is introduced by the defense. Art. 49, UCMJ, 10 U.S.C. § 849. The government may claim a privilege not to disclose classified evidence to the accused, and the military judge may authorize the deletion of specified items of classified information, substitute a portion or summary, or statement admitting relevant facts that the evidence would tend to prove, unless the military judge determines that	witnesses to testify by telephone or other means not requiring the presence of the witness at trial, in which case cross-examination may be impossible. § 6(D)(2). In the case of closed proceedings or classified evidence, only the detailed defense counsel may be permitted to participate. Hearsay evidence is admissible as long as the Commission determines it would have probative value to a reasonable	excluded from hearing testimony that is classified if the military judge finds that "an unclassified summary or redacted version of that evidence would not be an adequate substitute and … alternative methods to obscure the identity of the witness are not adequate." Proposed 10 U.S.C. § 949d(e)(3).	classified information, the military judge may authorize the government to delete specified portions of evidence to be made available to the accused, or may allow an unclassified summary or statement setting forth the facts the evidence would tend to prove, to the extent practicable in accordance with the rules used at general courts-martial. Proposed 10 U.S.C. § 949d(c)(3)(C).	classified information, the military judge may authorize the government to delete specified portions of evidence to be made available to the accused, or may allow an unclassified summary or statement setting forth the facts the evidence would tend to prove, to the extent practicable in accordance with the rules used at general courts-martial. Proposed 10 U.S.C. § 949d(c)(3)(C).	excluded from hearing testimony that is classified if the military judge finds that "an unclassified summary or redacted version of that evidence would not be an adequate substitute and … alternative methods to obscure the identity of the witness are not adequate." Proposed 10 U.S.C. § 949d(e)(3)(B)(4).

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	disclosure of classified information itself is necessary to enable the accused to prepare for trial. Mil. R. Evid. 505(g).	person. § 6(D)(1). The Commission may consider testimony from prior trials as well as sworn and unsworn written statements, apparently without regard to the availability of the declarant, in apparent contradiction with 10 U.S.C. § 849. § 6(D)(3).			Hearsay evidence not admissible under the rules of evidence applicable in trial by general courts-martial is admissible only "if the proponent of the evidence makes known to the adverse party, sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence, the proponent's intention to offer the evidence, and the particulars of the evidence (including information on the general	

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					circumstances under which the evidence was obtained)" unless the party opposing the admission of the evidence "clearly demonstrates that the evidence is unreliable or lacking in probative value." Proposed 10 U.S.C. § 949a(b)(3). If trial counsel seeks to claim a privilege to withhold classified information, the military judge may require that the defense be permitted to view an unclassified	

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					summary of the sources, methods, or activities by which the United States acquired the evidence, to the extent practicable and consistent with national security. It does not appear that the accused is permitted to present argument to the military judge in opposition to the government's claim of privilege. Proposed 10 U.S.C. § 949d(e)(2).	
Right to Compulsory	Defendants before court-martial have the right to compel	The accused may obtain witnesses and documents "to the	Defense counsel is to be afforded a reasonable	Defense counsel is to be afforded a reasonable	Defense counsel is to be afforded a reasonable	Defense counsel is to be afforded a reasonable

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Process to Obtain Witnesses	appearance of witnesses necessary to their defense. R.C.M. 703. Process to compel witnesses in court-martial cases is to be similar to the process used in federal courts. Art. 46, UCMJ, 10 U.S.C. § 846.	extent necessary and reasonably available as determined by the Presiding Officer." § 5(H). The Commission has the power to summon witnesses as requested by the defense. § 6(A)(5). The power to issue subpoenas is exercised by the Chief Prosecutor; the Chief Defense Counsel has no such authority. M.C.I. Nos. 3-4.	opportunity to obtain witnesses and other evidence, including evidence in the possession of the United States, as specified in regulations prescribed by the Secretary of Defense. The military commission is authorized to compel witnesses under U.S. jurisdiction to appear. The military judge may authorize discovery in accordance with rules prescribed by the Secretary of Defense to redact	opportunity to obtain witnesses and other evidence, including evidence in the possession of the United States, as specified in regulations prescribed by the Secretary of Defense. The military commission is authorized to compel witnesses under U.S. jurisdiction to appear. Trial counsel is obligated to disclose to the defense all known evidence that tends to exculpate or reduce the degree of guilt of the accused,	opportunity to obtain witnesses and other evidence, including evidence in the possession of the United States, as specified in regulations prescribed by the Secretary of Defense. The military commission is authorized to compel witnesses under U.S. jurisdiction to appear. The military judge may authorize discovery in accordance with rules prescribed by the Secretary of Defense to redact classified	opportunity to obtain witnesses and other evidence, including evidence in the possession of the United States, as specified in regulations prescribed by the Secretary of Defense. The military commission is authorized to compel witnesses under U.S. jurisdiction to appear. The military judge may authorize discovery in accordance with rules prescribed by the Secretary of Defense to redact classified

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			classified information or to provide an unclassified summary or statement describing the evidence. The trial counsel is obligated to disclose exculpatory evidence of which he is aware to the defense, but such information, if classified, is available to the accused only in a redacted or summary form, and only if making the information available is possible without compromising	treating classified information in accordance with rules that apply at general court-martial. Proposed 10 U.S.C. § 949j.	information or to provide an unclassified summary or statement describing the evidence. The trial counsel is obligated to disclose exculpatory evidence of which he is aware to the defense, but such information, if classified, is available to the accused only in a redacted or summary form, and only if making the information available is possible without compromising intelligence sources,	information or to provide an unclassified summary or statement describing the evidence. The trial counsel is obligated to disclose exculpatory evidence of which he is aware to the defense, but such information, if classified, is available to the accused only in a redacted or summary form, and only if making the information available is possible without compromising intelligence sources,

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			intelligence sources, methods, or activities, or other national security interests. Proposed 10 U.S.C. § 949j.		methods, or activities, or other national security interests. Proposed 10 U.S.C. § 949j.	methods, or activities, or other national security interests. Proposed 10 U.S.C. § 949j.
Right to Trial by Impartial Judge	A qualified military judge is detailed to preside over the court-martial. The convening authority may not prepare or review any report concerning the performance or effectiveness of the military judge. Art. 26, UCMJ, 10 U.S.C. § 826. Article 37, UCMJ, prohibits unlawful influence of courts-	The Presiding Officer is appointed directly by the Appointing Authority, which decides all interlocutory issues. There do not appear to be any special procedural safeguards to ensure impartiality, but challenges for cause have been permitted. § 4(A)(4).	Military judges must take an oath to perform their duties faithfully. Proposed 10 U.S.C. § 949g. The convening authority is prohibited from preparing or reviewing any report concerning the effectiveness, fitness, or efficiency of a military judge. Proposed 10 U.S.C. § 948j(a).	Military judges must take an oath to perform their duties faithfully. Proposed 10 U.S.C. § 949g. The convening authority is prohibited from preparing or reviewing any report concerning the effectiveness, fitness, or efficiency of a military judge. Proposed 10 U.S.C. § 948j.	Military judges must take an oath to perform their duties faithfully. Proposed 10 U.S.C. § 949g. The convening authority is prohibited from preparing or reviewing any report concerning the effectiveness, fitness, or efficiency of a military judge. Proposed 10 U.S.C. § 948j.	Military judges must take an oath to perform their duties faithfully. Proposed 10 U.S.C. § 949g. The convening authority is prohibited from preparing or reviewing any report concerning the effectiveness, fitness, or efficiency of a military judge. Proposed 10 U.S.C. § 948j.

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	martial through admonishment, censure, or reprimand of its members by the convening authority or commanding officer, or any unlawful attempt by a person subject to the UCMJ to coerce or influence the action of a court-martial or convening authority. Art. 37, UCMJ, 10 U.S.C. § 837.	The presiding judge, who decides issues of admissibility of evidence, does not vote as part of the commission on the finding of guilt or innocence. Article 37, UCMJ, provides that no person subject to the UCMJ "may attempt to coerce or, by any unauthorized means, influence the action of a court-martial *or any other military tribunal* or any member thereof, in reaching the findings or sentence in any case, or the action of any convening,	A military judge may not be assigned to a case in which he is the accuser, an investigator, a witness, or a counsel. § 948j(c). The military judge may not consult with the members of the commission except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the commission. § 948j(d). No convening authority may censure, reprimand,	A military judge may not be assigned to a case in which he is the accuser, an investigator, a witness, or a counsel. The military judge may not consult with the members of the commission except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the commission. § 948j. No convening authority may	A military judge may not be assigned to a case in which he is the accuser, an investigator, a witness, or a counsel. The military judge may not consult with the members of the commission except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the commission. § 948j. No convening authority may	A military judge may not be assigned to a case in which he is the accuser, an investigator, a witness, or a counsel. The military judge may not consult with the members of the commission except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the commission. § 948j. No convening authority may censure, reprimand,

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		approving, or reviewing authority with respect to his judicial acts." 10 U.S.C. § 837. M.C.I. No. 9 clarifies that Art. 37 applies with respect to members of the review panel. MCI No. 9 § 4(F).	or admonish the military judge with respect to the exercise of his functions in the conduct of military commission proceedings. No person may consider or evaluate the performance of duty of any member of a military commission in writing efficiency reports or any other document used for determining whether a commissioned officer of the armed forces is qualified to be advanced in grade, assigned or	censure, reprimand, or admonish the military judge with respect to the exercise of his functions in the conduct of military commission proceedings. No person may consider or evaluate the performance of duty of any member of a military commission in writing efficiency reports or any other document used for determining whether a commissioned officer of the armed forces is qualified to be advanced in grade, assigned or transferred, or	censure, reprimand, or admonish the military judge with respect to the exercise of his functions in the conduct of military commission proceedings. No person may consider or evaluate the performance of duty of any member of a military commission in writing efficiency reports or any other document used for determining whether a commissioned officer of the armed forces is qualified to be advanced in grade, assigned or transferred, or	or admonish the military judge with respect to the exercise of his functions in the conduct of military commission proceedings. No person may consider or evaluate the performance of duty of any member of a military commission in writing efficiency reports or any other document used for determining whether a commissioned officer of the armed forces is qualified to be advanced in grade, assigned or transferred, or retained on active

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			transferred, or retained on active duty. No person may attempt to coerce or use unauthorized means to influence the action of a commission or convening, approving, or reviewing authority with respect to judicial acts Proposed 10 U.S.C. § 949b. The military judge may be challenged for cause. Proposed 10 U.S.C. § 949f.	retained on active duty. Proposed 10 U.S.C. § 949b. The military judge may be challenged for cause. Proposed 10 U.S.C. § 949f.	retained on active duty. Proposed 10 U.S.C. § 949b. The military judge may be challenged for cause. Proposed 10 U.S.C. § 949f.	duty. Proposed 10 U.S.C. § 949b. The military judge may be challenged for cause. Proposed 10 U.S.C. § 949f.
Right to Trial By Impartial Jury	A military accused has no Sixth Amendment right to a trial by petit jury.	The commission members are appointed directly by the Appointing	Military commission members must take an oath to perform	Military commission members must take an oath to perform	Military commission members must take an oath to perform	Military commission members must take an oath to perform

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	Ex Parte Quirin, 317 U.S. 1, 39-40 (1942) (*dicta*). However, "Congress has provided for trial by members at a court-martial." United States v. Witham, 47 MJ 297, 301 (1997); Art. 25, UCMJ, 10 U.S.C. § 825. The Sixth Amendment requirement that the jury be impartial applies to court-martial members and covers not only the selection of individual jurors, but also their conduct during the	Authority. While the Commission is bound to proceed impartially, there do not appear to be any special procedural safeguards designed to ensure their impartiality. However, defendants have successfully challenged members for cause. § 6(B).	their duties faithfully. Proposed 10 U.S.C. § 949g. The accused may make one peremptory challenge, and may challenge other members for cause. Proposed 10 U.S.C. § 949f. No convening authority may censure, reprimand, or admonish the commission or any member with respect to the findings or sentence or the exercise of any other functions in the conduct of the	their duties faithfully. Proposed 10 U.S.C. § 949g. The accused may make one peremptory challenge, and may challenge other members for cause. Proposed 10 U.S.C. § 949f. No convening authority may censure, reprimand, or admonish the commission or any member with respect to the findings or sentence or the exercise of any other functions in the conduct of the	their duties faithfully. Proposed 10 U.S.C. § 949g. The accused may make one peremptory challenge, and may challenge other members for cause. Proposed 10 U.S.C. § 949f. No convening authority may censure, reprimand, or admonish the commission or any member with respect to the findings or sentence or the exercise of any other functions in the conduct of the	their duties faithfully. Proposed 10 U.S.C. § 949g. The accused may make one peremptory challenge, and may challenge other members for cause. Proposed 10 U.S.C. § 949f. No convening authority may censure, reprimand, or admonish the commission or any member with respect to the findings or sentence or the exercise of any other functions in the conduct of the

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	trial proceedings and the subsequent deliberations. United States v. Lambert, 55 M.J. 293 (2001). The absence of a right to trial by jury precludes criminal trial of civilians by court-martial. Reid v. Covert, 354 U.S. 1 (1957); Kinsella v. United States *ex rel*. Singleton, 361 U.S. 234 (1960).		proceedings. No person may attempt to coerce or, by any unauthorized means, influence the action of a commission or any member thereof, in reaching the findings or sentence in any case. Military commission duties may not be considered in the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purposes related to promotion, assignment or	proceedings. No person may attempt to coerce or, by any unauthorized means, influence the action of a commission or any member thereof, in reaching the findings or sentence in any case. Military commission duties may not be considered in the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purposes related to promotion, assignment or retention on active	proceedings. No person may attempt to coerce or, by any unauthorized means, influence the action of a commission or any member thereof, in reaching the findings or sentence in any case. Military commission duties may not be considered in the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purposes related to promotion, assignment or retention on active	proceedings. No person may attempt to coerce or, by any unauthorized means, influence the action of a commission or any member thereof, in reaching the findings or sentence in any case. Military commission duties may not be considered in the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purposes related to promotion, assignment or retention on active

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			retention on active duty. Proposed 10 U.S.C. § 949b.	duty. Proposed 10 U.S.C. § 949b.	duty. Proposed 10 U.S.C. § 949b.	duty. Proposed 10 U.S.C. § 949b.
Right to Appeal to Independent Reviewing Authority	Those convicted by court-martial have an automatic appeal to their respective service courts of appeal, depending on the severity of the punishment. Art. 66, UCMJ; 10 U.S.C. § 866. Decisions by service appellate courts are reviewable on a discretionary basis by the Court of Appeals for the Armed Forces (CAAF), a civilian court composed of five civilian judges	A review panel appointed by the Secretary of Defense reviews the record of the trial in a closed conference, disregarding any procedural variances that would not materially affect the outcome of the trial, and recommends its disposition to the Secretary of Defense. Although the Defense Counsel has the duty of representing the interests of the accused during any review process, the	The accused may submit matters for consideration by the convening authority with respect to the authenticated findings or sentence of the military commission. The convening authority must review timely submissions prior to taking action. Proposed 10 U.S.C. § 950b. The accused may appeal a final decision of the military commission with	The accused may submit matters for consideration by the convening authority with respect to the authenticated findings or sentence of the military commission. The convening authority must review timely submissions prior to taking action. Proposed 10 U.S.C. § 950b. The accused may appeal a final decision of the military commission to the Court of	The accused may submit matters for consideration by the convening authority with respect to the authenticated findings or sentence of the military commission. The convening authority must review timely submissions prior to taking action. Proposed 10 U.S.C. § 950b. The accused may appeal a final decision of the military commission with respect to	The accused may submit matters for consideration by the convening authority with respect to the authenticated findings or sentence of the military commission. The convening authority must review timely submissions prior to taking action. Proposed 10 U.S.C. § 950b. The accused may appeal a final decision of the military commission with respect to

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	appointed by the President. Art. 67, UCMJ; 10 U.S.C. § 867. CAAF decisions are subject to Supreme Court review by writ of certiorari. 28 U.S.C. § 1259. The writ of *habeas corpus* provides the primary means by which those sentenced by military court, having exhausted military appeals, can challenge a conviction or sentence in a civilian court. The scope of matters that a court will address is narrower than in	review panel need not consider written submissions from the defense, nor does there appear to be an opportunity to rebut the submissions of the prosecution. If the majority of the review panel forms a "definite and firm conviction that a material error of law occurred," it may return the case to the Appointing Authority for further proceedings. § 6(H)(4). The review panel recommendation does not appear to be binding. The	respect to issues of law (meaning only the provisions of the new chapter 47a of title 10, U.S. Code, related to military commissions) to the Court of Military Commission Review, a new body to be established by the Secretary of Defense, comprised of appellate military judges who meet the same qualifications as military judges or comparable qualifications for civilian judges. Proposed 10 U.S.C. § 950f.	Appeals for the Armed Forces on the basis of matters for which appeal is permitted under the § 1005(e)(3) of the DTA (42 U.S.C. § 801 note), and may seek review by the Supreme Court. Proposed 10 U.S.C. § 950f.	issues of law (meaning only the provisions of the new chapter 47a of title 10, U.S. Code, related to military commissions) to the Court of Military Commission Review, a new body to be established by the Secretary of Defense, comprised of appellate military judges who meet the same qualifications as military judges or comparable qualifications for civilian judges. Proposed 10 U.S.C. § 950f.	issues of law (meaning only the provisions of the new chapter 47a of title 10, U.S. Code, related to military commissions) to the Court of Military Commission Review, a new body to be established by the Secretary of Defense, comprised of appellate military judges who meet the same qualifications as military judges or comparable qualifications for civilian judges. Proposed 10 U.S.C. § 950f.

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	challenges of federal or state convictions. Burns v. Wilson, 346 U.S. 137 (1953).	Secretary of Defense may serve as Appointing Authority and as the final reviewing authority, as designated by the President. Although the M.O specifies that the individual is not privileged to seek any remedy in any U.S. court or state court, the court of any foreign nation, or any international tribunal, M.O. § 7(b), Congress established jurisdiction in the Court of Appeals for the D.C. Circuit to	Once these appeals are exhausted, the accused may appeal the final decision to the United States Court of Appeals for the District of Columbia Circuit. Appellate court decisions may be reviewed by the Supreme Court under writ of certiorari. Proposed 10 U.S.C. § 950g.	No action in habeas corpus or claim under any cause of action related to the prosecution, trial, or judgment of a military commission, including challenges to the lawfulness of	Once these appeals are exhausted, the accused may appeal the final decision to the United States Court of Appeals for the District of Columbia Circuit. Appellate decisions may be reviewed by the Supreme Court under writ of certiorari. Proposed 10 U.S.C. § 950g. No action in habeas corpus or claim under any cause of action related to the prosecution, trial, or judgment of a military commission, including challenges	Once these appeals are exhausted, the accused may appeal the final decision to the United States Court of Appeals for the District of Columbia Circuit. Appellate decisions may be reviewed by the Supreme Court under writ of certiorari. Proposed 10 U.S.C. § 950g. No other cause of action, including petitions for habeas corpus, would be permitted. Proposed 10 U.S.C. § 950j.

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		hear challenges to final decisions of military commissions. Detainee Treatment Act of 2005.		military commissions, is permissible in any court. Proposed 10 U.S.C. § 950i.	to the lawfulness of military commissions, is permissible in any court. Proposed 10 U.S.C. § 950i.	

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Protection against Excessive Penalties	The right to appeal a conviction resulting in a death sentence may not be waived. R.C.M. 1110. Death may only be adjudged for certain crimes where the defendant is found guilty by unanimous vote of court-martial members present at the time of the vote. Prior to arraignment, the trial counsel must give the defense written notice of aggravating factors the prosecution intends to prove. R.C.M. 1004. A conviction of spying during time	The accused is permitted to make a statement during sentencing procedures. § 5(M). The death sentence may be imposed only on the unanimous vote of a seven-member panel. § 6(F). The commission may only impose a sentence that is appropriate to the offense for which there was a finding of guilty, including death, imprisonment, fine or restitution, or "other such lawful	Military commissions may adjudge "any punishment not forbidden by [proposed chapter 47a, title 10, U.S. Code, and the UCMJ], including the penalty of death…." Proposed 10 U.S.C. § 948d. A vote two-thirds of the members present for the vote is required for sentences of up to 10 years. Longer sentences require the concurrence of three-fourths of the members present. The death penalty	Military commissions may adjudge "any punishment not forbidden by [proposed chapter 47a, title 10, U.S. Code, and the UCMJ], including the penalty of death…." Proposed 10 U.S.C. § 948d. A vote of two-thirds of the members present for the vote is required for sentences of up to 10 years. Longer sentences require the concurrence of three-fourths of the members present. The death penalty	Military commissions may adjudge "any punishment not forbidden by [proposed chapter 47a, title 10, U.S. Code, and the UCMJ], including the penalty of death…." Proposed 10 U.S.C. § 948d. "Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a military commission or inflicted upon any person subject	Military commissions may adjudge "any punishment not forbidden by [proposed chapter 47a, title 10, U.S. Code], including the penalty of death…." Proposed 10 U.S.C. § 948d. A vote of two-thirds of the members present for the vote is required for sentences of up to 10 years. Longer sentences require the concurrence of three-fourths of the members present. The death penalty

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	of war under article 106, UCMJ, carries a mandatory death penalty. 10 U.S.C. § 906.	punishment or condition of punishment as the commission shall determine to be proper." § 6(G). If the Secretary of Defense has the authority to conduct the final review of a conviction and sentence, he may mitigate, commute, defer, or suspend, but not increase, the sentence. However, he may disapprove the findings and return them for further action by the military commission. § 6(H).	must be approved unanimously. Where the death penalty is sought, a panel of 12 members is required (unless the convening authority certifies that 12 members are not "reasonably available" because of physical conditions or military exigencies), with all members present for the vote agreeing on the sentence. The death penalty must be expressly authorized for the offense, and the charges referred to the commission	must be approved unanimously. Where the death penalty is sought, a panel of 12 members is required (unless the convening authority certifies that 12 members are not "reasonably available" because of physical conditions or military exigencies), with all members present for the vote agreeing on the sentence. The death penalty must be expressly authorized for the offense, and the charges referred to the commission	to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited." Proposed 10 U.S.C. § 949s. A vote of two-thirds of the members present for the vote is required for sentences of up to 10 years. Longer sentences require the concurrence of three-fourths of the members present. The death penalty must be approved unanimously. Where the death penalty is sought, a	must be approved unanimously. Where the death penalty is sought, a panel of 12 members is required (unless the convening authority certifies that 12 members are not "reasonably available" because of physical conditions or military exigencies), with all members present for the vote agreeing on the sentence. The death penalty must be expressly authorized for the offense, and the charges referred to the commission

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			must have expressly sought the penalty of death. Proposed 10 U.S.C. § 949n.	must have expressly sought the penalty of death.Proposed 10 U.S.C. § 949n.	panel of 12 members is required (unless the convening authority certifies that 12 members are not "reasonably available" because of physical conditions or military exigencies), with all members present for the vote agreeing on the sentence. The death penalty must be expressly authorized for the offense, and the charges referred to the commission must have expressly sought the penalty of death. Proposed 10 U.S.C. § 949n.	must have expressly sought the penalty of death. Proposed 10 U.S.C. § 949n.

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			An accused who is sentenced to death may waive his appeal, but may not withdraw an appeal. Proposed 10 U.S.C. § 950c. The death sentence may not be executed until the commission proceedings have been finally adjudged lawful and the time for appeal has expired; or if the CAAF reviews the sentence, the time for filing a writ has expired or the writ has been denied; and the President approves	An accused who is sentenced to death may waive his appeal, but may not withdraw an appeal. Proposed 10 U.S.C. § 950c. The death sentence may not be executed until the commission proceedings have been finally adjudged lawful and the time for appeal has expired; or if the CAAF reviews the sentence, the time for filing a writ has expired or the writ has been denied; and the President approves the	An accused who is sentenced to death may waive his appeal, but may not withdraw an appeal. Proposed 10 U.S.C. § 950c. The death sentence may not be executed until the commission proceedings have been finally adjudged lawful and the time for appeal has expired; or if the CAAF reviews the sentence, the time for filing a writ has expired or the writ has been denied; and the President approves the	An accused who is sentenced to death may not waive his right to appeal. Proposed 10 U.S.C. § 950c. The death sentence may not be executed until the commission proceedings have been finally adjudged lawful and the President approves the sentence. Proposed 10 U.S.C. § 950i.

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			the sentence. Proposed 10 U.S.C. § 950i.	sentence. Proposed 10 U.S.C. § 950i.	sentence. Proposed 10 U.S.C. § 950i.	

Source: Congressional Research Service