



The Military Commissions Act of 2006: Background and Proposed Amendments

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Summary

On November 13, 2001, President Bush issued a Military Order (M.O.) authorizing trial by military commission of certain non-citizens suspected of participating in the war against terrorism. The Supreme Court struck down military commissions established pursuant to the M.O. as inconsistent with the Uniform Code of Military Justice (UCMJ). To permit military commissions to go forward, Congress approved the Military Commissions Act of 2006 (MCA), conferring authority to promulgate rules that depart from the strictures of the UCMJ and possibly U.S. international obligations. DOD published regulations to govern military commissions pursuant to the MCA. Three prosecutions under those regulations resulted in convictions.

Shortly after taking office, President Obama took action to suspend the operation of military commissions pending a review of all Guantanamo detentions for the purpose of assessing options for the lawful disposition of each detainee. The Detention Policy Task Force set up to conduct the review issued a preliminary report announcing that while federal criminal court would be the preferred forum for trying enemy terrorists who are suspected of having violated U.S. criminal law, military commissions, with significant reforms, would remain an option for prosecuting violations of the law of war.

This report provides a background and analysis of military commissions rules under the MCA. After reviewing the history of the implementation of military commissions in the “global war on terrorism,” the report provides an overview of the procedural safeguards provided in the MCA. The report identifies pending legislation, including Senate-passed S. 1390, and describes proposals suggested by the Obama Administration. Finally, the report provides two charts comparing the MCA with proposed legislation. The first chart describes the composition and powers of the military tribunals, as well as their jurisdiction. The second chart, which compares procedural safeguards under the MCA with those established for courts-martial as well as proposed amendments to the MCA, follows the same order and format used in CRS Report RL31262, *Selected Procedural Safeguards in Federal, Military, and International Courts*, to facilitate comparison with safeguards provided in federal court and international criminal tribunals. For similar charts comparing military commissions as envisioned under the MCA to the rules that had been established by DOD for military commissions and to general military courts-martial conducted under the UCMJ, see CRS Report RL33688, *The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military Justice*, by Jennifer K. Elsea.

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Introduction

Shortly after combat operations began pursuant to the congressional authorization to use military force in response to the terrorist attacks of September 11, 2001,¹ President Bush issued a Military Order (M.O.) authorizing trial by military commission of non-citizens suspected of terrorist acts or associations who were to be designated as subject to the M.O.² President Bush subsequently determined that 20 of the detainees at the U.S. Naval Station in Guantánamo Bay held in connection with the conflict were subject to the M.O., and 10 were eventually charged for trial before military commissions.³ The M.O. specified that persons subject to it would have no recourse to the U.S. court system to appeal a verdict or obtain any other sort of relief, but the Supreme Court essentially invalidated that provision in its 2004 opinion, *Rasul v. Bush*.⁴

Military commissions are courts usually set up by military commanders in the field to try persons accused of certain offenses during war.⁵ They may also try persons for ordinary crimes in cases of martial law or military occupation, where regular civil courts are not able to function.⁶ Past military commissions trying enemy belligerents for war crimes directly applied the international law of war, without recourse to domestic criminal statutes, unless such statutes were declaratory of international law.⁷ Historically, military commissions have applied the same set of procedural rules that applied in courts-martial.⁸ By statute, military commissions have long been available to

¹ P.L. 107-40.

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

³ 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 August 13, 2007). 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 August 13, 2007). 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 August 13, 2007).

⁴ *Rasul v. Bush*, 542 U.S. 466 (2004). Persons subject to the M.O. were 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. M.O. at § 7(b). However, the Bush Administration shortly thereafter indicated that defendants were not intended to be precluded from petitioning a federal court for a writ of habeas. See Alberto R. Gonzales, *Martial Justice, Full and Fair*, NEW YORK TIMES (op-ed), November 30, 2001. The government did not rely on the M.O. as the legal basis for asserting detainees had no right to pursue writs of habeas corpus, but the Court’s opinion served as a warning that military commission verdicts would be subject to collateral review. For a summary of *Rasul* and related cases, see CRS Report RS21884, *The Supreme Court 2003 Term: Summary and Analysis of Opinions Related to Detainees in the War on Terrorism*, by Jennifer K. Elsea.

⁵ See CRS Report RL31191, *Terrorism and the Law of War: Trying Terrorists as War Criminals before Military Commissions*, by Jennifer K. Elsea (providing a general background of U.S. history of military commissions).

⁶ See *Hamdan v. Bush*, 548 U.S. 557, 595 (2006). In looking at historical precedent, the *Hamdan* Court suggested, it is important to distinguish which type of jurisdiction a military commission is exercising, although the distinction is often blurred. *Id.* at 597 & note 7.

⁷ See U.S. Army Field Manual (FM) 27-10, *The Law of Land Warfare*, section 505(e) [hereinafter “FM 27-10”].

⁸ 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).

try “offenders or offenses designated by statute or the law of war.”⁹ For the most part, military commissions have been employed where U.S. armed forces have established a military government or martial law, as in the war with Mexico, the Civil War, the Philippine Insurrection, and in occupied Germany and Japan after World War II.¹⁰

President Bush’s Military Order establishing military commissions to try suspected terrorists was 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 Bush Administration established rules prescribing detailed procedural safeguards for the tribunals.¹¹ These rules 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 did not go far enough.¹² Critics also noted that the rules did not address the issue of indefinite detention without charge, as appeared to be possible under the original M.O.,¹³ or that the Department of Defense may continue to detain persons who have been cleared by a military commission.¹⁴ The Pentagon reportedly stated that its Inspector General (IG) looked into allegations, made by military lawyers assigned as prosecutors to the military commissions, that the proceedings were rigged to obtain convictions, but the IG did not substantiate the charges.¹⁵

Congress took no action with respect to military commissions until after the Supreme Court’s *Rasul* decision. At the end of December 2005, Congress enacted the Detainee Treatment Act of 2005 (DTA).¹⁶ The DTA did not authorize military commissions, but amended title 28, U.S. Code

⁹ 10 U.S.C. § 821. There are only two statutory offenses under the Uniform Code of Military Justice (UCMJ) for which convening a military commission is explicitly recognized: aiding the enemy and spying (in time of war). 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* footnote 7, 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”).

¹⁰ For a review of military commission precedent, see David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT’L L. 5 (2005).

¹¹ Military Commission Order No. 1 (“M.C.O. No. 1”), *reprinted at* 41 I.L.M. 725 (2002). A revision was issued August 31, 2005. The Department of Defense (DOD) subsequently released ten “Military Commission Instructions” (“M.C.I. No. 1-10”) to elaborate on the set of procedural rules to govern military tribunals. The instructions set forth the elements of some crimes to be tried by military commission, established guidelines for civilian attorneys, and provided other administrative guidance and procedures for military commissions.

¹² *See* ACTL, Supplemental Report on Military Commissions for the Trial of Terrorists, October 2005, online at <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=2152>.

¹³ The Bush Administration did not explicitly use this authority; instead, it characterized the prisoners as “enemy combatants” detained pursuant to the law of war. *See, e.g.*, Response of the United States to Request for Precautionary Measures - Detainees in Guantanamo Bay, Cuba to the Inter-American Commission on Human Rights, Organization of American States 25 (2002) (“It is humanitarian law, and not human rights law, that governs the capture and detention of enemy combatants in an armed conflict.”)

¹⁴ *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 former DOD chief counsel William J. Haynes II to a New York Times reporter).

¹⁵ *See* Neil A. Lewis, *Two Prosecutors Faulted Trials For Detainees*, NY TIMES, August 1, 2005, at A1.

¹⁶ Title 10 of P.L. 109-148 and Title 14 of P.L. 109-163. For an analysis of the case, see CRS Report RS22466, *Hamdan v. Rumsfeld: Military Commissions in the “Global War on Terrorism,”* by Jennifer K. Elsea.

to revoke all judicial jurisdiction over habeas claims by persons detained as “enemy combatants,” and it 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, in *Hamdan v. Rumsfeld*,¹⁷ invalidated the military commission system established by presidential order, holding that although Congress had in general authorized the use of military commissions, such commissions were required to follow procedural rules as similar as possible to courts-martial proceedings, as required by the Uniform Code of Military Justice (UCMJ).¹⁸ In response, Congress promptly passed the Military Commissions Act of 2006 (MCA)¹⁹ to authorize military commissions and establish procedural rules that are modeled after, but depart from in some significant ways, the UCMJ.²⁰

The Department of Defense issued regulations for the conduct of military commissions pursuant to the MCA.²¹ One detainee, David Matthew Hicks of Australia, was convicted of material support to terrorism pursuant to a plea agreement in 2007.²² In 2008, Salim Hamdan was found guilty of one count of providing material support for terrorism and sentenced to 66 months’ imprisonment, but credited with five years’ time served.²³ Ali Hamza Ahmad Suliman al Bahlul of Yemen was found guilty of multiple counts of conspiracy and solicitation to commit certain war crimes and of providing material support for terrorism in connection with his role as al Qaeda’s “propaganda chief.”²⁴ He refused representation and boycotted most of his trial, and was subsequently sentenced to life imprisonment.

On January 22, 2009, President Barack Obama issued an Executive Order requiring that the Guantanamo detention facility be closed no later than a year from the date of the Order.²⁵ The Order requires specified officials to review all Guantanamo detentions to assess whether the detainee should continue to be held by the United States, transferred or released to another country, or be prosecuted by the United States for criminal offenses.²⁶ During the review period,

¹⁷ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), *rev’g* 415 F.3d 33 (D.C. Cir. 2005). For an analysis of the case, see CRS Report RS22466, *Hamdan v. Rumsfeld: Military Commissions in the “Global War on Terrorism,”* by Jennifer K. Elsea.

¹⁸ 10 U.S.C. § 801 *et seq.* Military commissions were said to be authorized pursuant to 10 U.S.C. §§ 821 and 836.

¹⁹ P.L. 109-366, 120 Stat. 2600, codified at chapter 47a of title 10, U.S. Code.

²⁰ The MCA also amended the DTA to eliminate jurisdiction for pending habeas cases, P.L. 109-366 § 7, but the Supreme Court held that provision to be unconstitutional. *Boumediene v. Bush*, 533 U.S. ___, 123 S. Ct. 2229 (2008)

²¹ Department of Defense, *The Manual for Military Commissions*, January 18, 2007, *available at* [http://www.defenselink.mil/news/MANUAL FOR MILITARY COMMISSIONS 2007 signed.pdf](http://www.defenselink.mil/news/MANUAL_FOR_MILITARY_COMMISSIONS_2007_signed.pdf).

²² Department of Defense, “Detainee Convicted of Terrorism Charge at Guantanamo Trial,” press release, March 30, 2007, <http://www.defenselink.mil/releases/release.aspx?releaseid=10678>. Hicks was sentenced to seven years’ confinement. As part of his pretrial agreement, his sentence was limited to nine months confinement to be served in Australia, with six years and three months suspended.

²³ Department of Defense, “Detainee Transfer Announced,” press release, November 28, 2008, <http://www.defenselink.mil/releases/release.aspx?releaseid=12372>.

²⁴ Department of Defense, “Detainee Sentenced To Life In Prison,” press release, November 3, 2008, <http://www.defenselink.mil/releases/release.aspx?releaseid=12331>.

²⁵ Executive Order 13492, “Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities,” 74 *Federal Register* 4897, January 22, 2009 [hereinafter “Executive Order”].

²⁶ *Id.* at § 4. The Order specifies that the review shall be conducted by the Attorney General (who shall also coordinate the review process), the Secretary of Defense, the Secretary of State, the Secretary of Homeland Security, the Director of National Intelligence, the Chairman of the Joint Chiefs of Staff, as well as other officers or full- or part-time employees of the U.S. government (as determined by the Attorney General, with the concurrence of the relevant department head) with intelligence, counterterrorism, military, or legal expertise.

the Secretary of Defense is required to take steps to ensure that all proceedings before military commissions and the United States Court of Military Commission Review are halted, although some pretrial proceedings have continued to take place. Fifteen detainees currently stand charged under the MCA, while charges were dismissed without prejudice against five other detainees,²⁷ one of whom has been ordered released by a federal judge. One case was moved to a federal district court.

In May, 2009, the Obama Administration announced that it was considering restarting the military commission system with some changes to the procedural rules.²⁸ The Department of Defense informed Congress about modifications to the Manual for Military Commissions, to take effect July 14, 2009.²⁹

President Obama's Detention Policy Task Force issued a preliminary report July 20, 2009, reaffirming that the White House considers military commissions to be an appropriate forum for trying some cases involving suspected violations of the laws of the war, although federal criminal court would be the preferred forum for trials of detainees.³⁰ The disposition of each case referred is to be assigned to a team comprised of DOJ and DOD personnel, including prosecutors from the Office of Military Commissions. Appended to the report was a set of criteria to govern the disposition of cases involving Guantanamo detainees. This protocol identifies three broad categories of factors to be taken into consideration:

- Strength of interest, namely, the nature and gravity of offenses or underlying conduct; identity of victims; location of offense; location and context in which individual was apprehended; and the conduct of the investigation.
- Efficiency, namely, protection of intelligence source and methods; venue; number of defendants; foreign policy concerns; legal or evidentiary problems; efficiency and resource concerns.
- Other prosecution considerations, namely, the extent to which the forum and offenses that can be tried there permit a full presentation of the wrongful conduct, and the available sentence upon conviction.

Federal prosecutors are to evaluate their cases under "traditional principles of federal prosecution."

The Military Commissions Act of 2006

The Military Commissions Act of 2006 ("MCA") grants the Secretary of Defense express authority to convene military commissions to prosecute those fitting the definition under the MCA of "alien unlawful enemy combatants."³¹ The Secretary delegated the authority to a

²⁷ Brookings Institute, *The Current Detainee Population of Guantánamo: An Empirical Study*, update posted June 23, 2009, available at http://www.brookings.edu/reports/2008/1216_detainees_wittes.aspx.

²⁸ Peter Finn, *Obama Set to Revive Military Commissions*, WASH. POST, May 9, 2009.

²⁹ Letter from Robert M. Gates, Secretary of Defense, to Senator Carl Levin, May 15, 2009. A copy is available at [http://www.nimj.org/documents/2009 DoD MMC Changes.pdf](http://www.nimj.org/documents/2009%20DoD%20MMC%20Changes.pdf).

³⁰ Memorandum from the Detention Policy Task Force to the Attorney General and the Secretary of Defense, July 20, 2009, <http://www.nimj.com/display.aspx?base=MilitaryCommissions&ID=255>.

³¹ 10 U.S.C. § 948h.

specially appointed “convening authority,” who has responsibility for accepting or rejecting charges referred by the prosecution team, convening military commissions for trials, detailing military commission members and other personnel, approving requests from trial counsel to communicate with the media, approving requests for expert witnesses, approving plea agreements, carrying out post-trial reviews and forwarding cases for review, along with other duties spelled out in the MCA or in DOD’s Regulation for Trial by Military Commission.³²

The MCA eliminates the requirement for military commissions to conform to either of the two uniformity requirements in article 36, UCMJ, which President Bush’s military commissions were held in *Hamdan* to violate. Instead, it establishes chapter 47A in title 10, U.S. Code and excepts military commissions under this chapter from the requirements in article 36.³³ It provides that the UCMJ “does not, by its terms, apply to trial by military commissions except as specifically provided in this chapter.” While declaring that the enacted chapter is “based upon the procedures for trial by general courts-martial under [the UCMJ],” it establishes that “[t]he judicial construction and application of [the UCMJ] are not binding on military commissions established under this chapter.”³⁴ It expressly exempts these military commission from UCMJ articles 10 (speedy trial), 31 (self-incrimination warnings) and 32 (pretrial investigations), and amends articles 21, 28, 48, 50(a), 104, and 106 of the UCMJ to except military commissions under chapter 47A.³⁵ Other provisions of the UCMJ are to apply to trial by military commissions under chapter 47A only to the extent provided therein.³⁶

Jurisdiction

The MCA establishes jurisdiction for military commissions somewhat more narrowly than that asserted in President Bush’s M.O. The M.O. was initially criticized by some as overly broad in its assertion of jurisdiction, because it could be interpreted to cover non-citizens who had no connection with Al Qaeda or the terrorist attacks of September 11, 2001, as well as offenders or offenses not triable by military commission pursuant to statute or the law of war.³⁷ A person designated by the President as subject to the M.O. was amenable to detention and possible trial by military tribunal for violations of the law of war and “other applicable law.”³⁸ The MCA largely validated the President’s jurisdictional scheme for military commissions.

³² Available at http://www.defenselink.mil/news/Apr2007/Reg_for_Trial_by_mcm.pdf.

³³ MCA § 4 (adding to 10 U.S.C. § 836(a) the words “except as provided in chapter 47A of this title” and to § 836(b) the words “except insofar as applicable to military commissions established under chapter 47A of this title”).

³⁴ 10 U.S.C. § 948a (as added by the MCA).

³⁵ MCA § 4 (amending 10 U.S.C. §§ 821 (jurisdiction of general courts-martial not exclusive), 828 (detail or employment of reporters and interpreters), 848 (power to punish contempt), 850(a) (admissibility of records of courts of inquiry), 904 (aiding the enemy), and 906 (spying)).

³⁶ 10 U.S.C. § 948b(d)(2).

³⁷ For a discussion of criticism related to the M.O. and M.C.O. No. 1, see CRS Report RL31600, *The Department of Defense Rules for Military Commissions: Analysis of Procedural Rules and Comparison with Proposed Legislation and the Uniform Code of Military Justice*, by Jennifer K. Elsea, see NATIONAL INSTITUTE OF MILITARY JUSTICE, ANNOTATED GUIDE: PROCEDURES FOR TRIALS BY MILITARY COMMISSIONS OF CERTAIN NON-UNITED STATES CITIZENS IN THE WAR AGAINST TERRORISM 10-11(2004)(hereinafter “NIMJ”).

³⁸ M.O. § 1(e) (finding such tribunals necessary to protect the United States and for effective conduct of military operations).

Personal Jurisdiction

The MCA authorizes military commissions to try any “unlawful enemy combatant,” which includes:

- (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or
- (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.³⁹

Thus, persons who do not directly participate in hostilities, but “purposefully and materially” support hostilities, are subject to treatment as an “unlawful enemy combatant” under the MCA. Citizens who fit the definition of “unlawful enemy combatant” are not amenable to trial by military commission under the MCA, but their detention is not expressly precluded.⁴⁰

The MCA does not define “hostilities” or explain 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 MCA might run afoul of the courts’ historical aversion to trying civilians before military tribunals when other courts are available.⁴¹ It is unclear whether this principle would apply to aliens captured and detained overseas, but the MCA does 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*⁴² for unlawful belligerents, to the extent such persons enjoy constitutional protections, would likely raise significant constitutional questions. To date, no resident aliens have been charged for trial before a military commission under the MCA.

The MCA did not specifically identify who makes the determination that defendants meet the definition of “unlawful enemy combatant.” The government sought to establish jurisdiction based

³⁹ 10 U.S.C. § 948a(1). Some judges in the U.S. District Court for the District of Columbia have adopted a more restrictive definition to describe persons who are amenable to detention under the laws of war, termed “enemy combatants” by the Bush Administration. See *Mattan v. Obama*, 618 F. Supp.2d 24 (D.D.C. 2009) (Government’s detention authority covers individuals who are “part of” enemy forces, but does not extend to those who “supported” such forces, although evidence of such support would be considered in determining whether a detainee should be considered “part of” the forces); *Hamlily v. Obama*, 616 F.Supp.2d 63 (D.D.C. 2009) (neither AUMF nor the law of war authorizes government’s detention of individual who substantially supports, but is not part of, targeted organization, nor to those who have only directly supported hostilities); *Gherebi v. Obama*, 609 F. Supp.2d 43 (D.D.C.2009) (President has the authority to detain persons who were part of, or substantially supported, the Taliban or al-Qaeda forces that are engaged in hostilities against the United States or its coalition partners, provided that the terms ‘substantially supported’ and ‘part of’ are interpreted to encompass only individuals who were members of the enemy organization’s armed forces, as that term is intended under the laws of war, at the time of their capture.”).

⁴⁰ For analysis of the authority to detain U.S. citizens, see CRS Report RL31724, *Detention of American Citizens as Enemy Combatants*, by Jennifer K. Elsea.

⁴¹ See, e.g., *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Duncan v. Kahanamoku*, 327 U.S. 304 (1945).

⁴² 317 U.S. 1 (1942).

on the determinations of Combatant Status Review Tribunals (CSRTs), set up by the Pentagon to determine the status of detainees using procedures similar to those the Army uses to determine POW status during traditional wars.⁴³ The CSRTs, however, are not empowered to determine whether the enemy combatants are unlawful or lawful, which led two military commission judges to hold that CSRT determinations are inadequate to form the basis for the jurisdiction of military commissions.⁴⁴ One of the judges determined that the military commission itself is not competent to make the determination, while the other judge appears to have determined that the government's allegations did not set forth sufficient facts to conclude that the defendant, Salim Hamdan, was an unlawful enemy combatant.⁴⁵ The Court of Military Commission Review (CMCR) reversed.⁴⁶ While it agreed that the CSRT determinations are insufficient by themselves to establish jurisdiction, it found the military judge erred in declaring that the status determination had to be made by a competent tribunal other than the military commission itself.

In denying the government's request to find that CSRT determinations are sufficient to establish jurisdiction over the accused, the CMCR interpreted the MCA to require more than establishing membership in Al Qaeda or the Taliban. The CMCR found:

no support for [the government's] claim that Congress, through the M.C.A., created a "comprehensive system" which sought to embrace and adopt all prior C.S.R.T. determinations that resulted in "enemy combatant" status assignments, and summarily turn those designations into findings that persons so labeled could also properly be considered "unlawful enemy combatants." Similarly, we find no support for [the government's] position regarding the parenthetical language contained in § 948a(1)(A)(i) of the M.C.A.—"including a person who is part of the Taliban, al Qaeda, or associated forces." We do not read this language as declaring that a member of the Taliban, al Qaeda, or associated forces is *per se* an "unlawful enemy combatant" for purposes of exercising criminal jurisdiction before a military commission. We read the parenthetical comment as simply elaborating upon the sentence immediately preceding it. That is, that a member of the Taliban, al Qaeda, or associated forces *who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents* will also qualify as an "unlawful enemy combatant" under the M.C.A. (emphasis added [by the court]).⁴⁷

The CMCR further explained that executive branch memoranda defining "enemy combatant" status were implemented solely for purposes of continued detention of personnel captured during hostilities and applicability of the Geneva Conventions. By contrast:

Congress in the M.C.A. was carefully and deliberately defining status for the express purpose of specifying the in personam criminal jurisdiction of military commission trials. In

⁴³ See Department of Defense (DOD) Fact Sheet, "Combatant Status Review Tribunals," available at <http://www.defenselink.mil/news/Jul2004/d20040707factsheet.pdf>. CSRT proceedings are modeled on the procedures of Army Regulation (AR) 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (1997), which establishes administrative procedures to determine the status of detainees under the Geneva Conventions and prescribes their treatment in accordance with international law. It does not include a category for "unlawful" or "enemy" combatants, who would presumably be covered by the other categories.

⁴⁴ See Josh White and Shailagh Murray, *Guantanamo Ruling Renews The Debate Over Detainees*, WASH. POST, June 6, 2007, at A3.

⁴⁵ The orders are available on the DOD website at <http://www.defenselink.mil/news/courtformilitarycommissionreview.html>.

⁴⁶ *United States v. Khadr*, CMCR 07-001 (September 24, 2007), available online at [http://www.defenselink.mil/news/Sep2007/KHADR%20Decision%20\(24%20Sep%2007\)\(25%20pages\).pdf](http://www.defenselink.mil/news/Sep2007/KHADR%20Decision%20(24%20Sep%2007)(25%20pages).pdf).

⁴⁷ *Id.* at 13.

defining what was clearly intended to be limited jurisdiction, Congress also prescribed serious criminal sanctions for those members of this select group who were ultimately convicted by military commissions.⁴⁸

Further, because detainees could not have known when their CSRT reviews were taking place that the determination could subject them to the jurisdiction of a military commission, the CMCR suggested that the use of CSRT determinations to establish jurisdiction would undermine Congress's intent that military commissions operate as "regularly constituted court[s], affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of Common Article 3 of the Geneva Conventions."⁴⁹

As a consequence of the decision, the prosecution has had the burden of proving jurisdiction over each person charged for trial by a military commission. The Manual for Military Commissions was amended in May 2009 to reflect this practice.⁵⁰

Subject Matter Jurisdiction

The MCA provides jurisdiction to military commissions over "any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant...."⁵¹ Crimes to be triable by military commission are defined in subchapter VII (10 U.S.C. §§ 950p - 950w). Offenses include the following: murder of protected persons; attacking civilians, civilian objects, or protected property; pillaging; denying quarter; taking hostages; employing poison or similar 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; sexual assault or abuse; hijacking or hazarding a vessel or aircraft; terrorism; providing material support for terrorism; wrongfully aiding the enemy; spying; contempt; perjury and obstruction of justice. 10 U.S.C. § 950v. Conspiracy (§ 950v(b)(28)), attempts (§ 950t), and solicitation (§ 950u) to commit the defined acts are also punishable.

The MCA adopted the list of offenses DOD had authorized for trial by military commission under the presidential order.⁵² That list was not meant to be exhaustive. Rather, it was intended as an illustration of acts punishable under the law of war⁵³ or triable by military commissions.⁵⁴ The regulations contained an express prohibition of trials for *ex post facto* crimes.⁵⁵

⁴⁸ *Id.*

⁴⁹ *Id.* at 15 (citing 10 U.S.C. § 948b(f)).

⁵⁰ Gates letter, *supra* footnote 29.

⁵¹ 10 U.S.C. § 948d.

⁵² Military Commission Instruction (M.C.I.) No. 2, Crimes and Elements for Trials by Military Commission. M.C.I. No. 2 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. See NATIONAL INSTITUTE OF MILITARY JUSTICE, MILITARY COMMISSION INSTRUCTIONS SOURCEBOOK 95 (2003) [hereinafter "SOURCEBOOK"].

⁵³ Crimes against the law of war listed in M.C.I. No. 2 were: 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.

Although many of the crimes defined in the MCA seem to be well established offenses against the law of war, at least in the context of an international armed conflict,⁵⁶ a court might 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.⁵⁷ 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

(...continued)

⁵⁴ Crimes “triable by military commissions” included 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.

⁵⁵ 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.”).

⁵⁶ For example, 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.

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.

⁵⁷ *Hamdan v. Rumsfeld*, 548 U.S. 557, 611 (2006).

have implied that the killing of a combatant is not a war crime.⁵⁸ While one military commission judge found that Congress could reasonably conclude that “murder in violation of the law of war” constitutes a common law violation of the law of war,⁵⁹ another read the crime to consist of two elements: “the [attempted] killings . . . were committed by an unlawful enemy combatant AND (2) that the method, manner or circumstances used violated the law of war.”⁶⁰

Similarly, defining as a war crime the “material support for terrorism”⁶¹ does not appear to be supported by historical precedent. The military judge in the *Hamdan* military commission case deferred to Congress’s determination in the MCA that “material support for terrorism” describes a traditional offense against the law of war, citing Civil War precedents for trying crimes such as cooperating with guerrillas or “guerrilla-marauders.”⁶² Yet the Supreme Court’s decision in *Ex parte Milligan*⁶³ may have limited the extent to which such crimes may be tried by military commissions where martial law has not been established. Many persons were tried by military commissions during the Philippine Insurrection for consorting with insurgents or other armed outlaws, but only after the commanding general issued a proclamation to the public explaining its obligation under the law of military occupation (a subset of the law of war analogous to martial law) to refrain from such activity.⁶⁴ In any event, the Obama Administration has expressed misgivings as to whether the crime of “material support for terrorism” amounts to an *ex post facto* law, and recommended the offense be eliminated from the MCA.⁶⁵ All detainees against whom charges have been filed so far have had at least one count of “material support for terrorism”

⁵⁸ Prosecutor v. Kvočka *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. Jelisić, 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. Blaskić, 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.”).

⁵⁹ United States v. Khadr, Ruling on Defense Motion to Dismiss Charge One for Failure to State an Offense and for Lack of Subject Matter Jurisdiction (D-008) (April 21, 2008). Military Commission orders through June 1, 2009, are available from the National Institute of Military Justice, 1 Military Commission Reporter, http://www.nimj.com/documents/reporter_june_19_i.pdf.

⁶⁰ United States v. Jawad, Ruling on Defense Motion to Dismiss – Lack of Subject Matter Jurisdiction (D-007) (September 24, 2008).

⁶¹ 10 U.S.C. § 950v(b)(25)(incorporating the definition found in 18 U.S.C. § 2339(A)).

⁶² United States v. Hamdan, Ruling on Motion to Dismiss (Ex Post Facto) D-012 (July 14, 2008), *available at* <http://howappealing.law.com/HamdanRulingMotionsToDismissExPostFacto.pdf>

⁶³ 71 U.S. (4 Wall.) 2 (1866).

⁶⁴ U.S. Congress, Senate Committee on the Philippines, *Affairs in the Philippine Islands*, 57th Cong., 1st sess., April 10, 1902, S.Hrg. 57-331 (Washington: GPO, 1902), pp. 1943-1946 (Statement explaining martial law and reprint of proclamation by Gen. Arthur McArthur of Dec. 10, 1900). It appears that the terms “martial law” and the “law of hostile [or belligerent] occupation” were used interchangeably.

⁶⁵ U.S. Congress, Senate Committee on Armed Services, *Military Commissions*, 111th Cong., 1st sess., July 7, 2009 (Submitted statement of David Kris, Assistant Attorney General)(“[T]here are serious questions as to whether material support for terrorism or terrorist groups is a traditional violation of the law of war. The President has made clear that military commissions are to be used only to prosecute law of war offenses. Although identifying traditional law of war offenses can be a difficult legal and historical exercise, our experts believe that there is a significant risk that appellate courts will ultimately conclude that material support for terrorism is not a traditional law of war offense, thereby reversing hard-won convictions and leading to questions about the system’s legitimacy.”)

among them,⁶⁶ although in most cases the allegations underlying the charge appear under other charges as well.

Part IV of the Manual for Military Commissions (M.M.C.) sets forth the elements of crimes defined by the MCA. There are few substantive differences between the M.M.C. definitions and those previously set forth DOD regulations for military commissions prior to the MCA. The M.M.C. definition of “Aiding the Enemy” incorporates the element of wrongfulness added by 10 U.S.C. § 950v(26), necessitating a new finding that the accused owed some form of allegiance to the United States at the time the conduct took place. Two crimes, “mutilation or maiming” and “causing serious injury,”⁶⁷ were altered to remove the element that required that the victim was in the custody or control of the accused. The crime “murder by an unprivileged belligerent” was broadened in the definition of “murder in violation of the law of war” to include not just killing, but also deaths resulting from an act or omission of the accused, where the accused intended to kill the victim or victims.

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.⁶⁸ It traditionally has not been applied to conduct occurring on the territory of neutral states or on territory not under the control of a belligerent, to conduct that preceded the outbreak of hostilities, or to conduct during hostilities that do not amount to an armed conflict. Unlike the conflict in Afghanistan, the conflict related to the September 11 attacks does not have clear boundaries in time or space,⁶⁹ nor is it entirely clear who the belligerents are.

The broad reach of President Bush’s M.O. to encompass conduct and persons customarily subject to ordinary criminal law evoked criticism that the claimed jurisdiction of the military commissions exceeded the customary law of armed conflict, although DOD regulation purported to restate customary law.⁷⁰ The MCA provides jurisdiction to military commissions over covered offenses “when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.”⁷¹ The elements of crimes set forth in the Manual for Military Commissions include a

⁶⁶ Charge sheets are available at <http://www.defenselink.mil/news/commissions.html>.

⁶⁷ 10 U.S.C. § 950v(b)(13-14). For “serious bodily injury,” the MCA specifically includes “lawful combatants” as possible victims.

⁶⁸ See WINTHROP, *supra* footnote 8, 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).

⁶⁹ Some may argue 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 the conflict unilaterally withdraws its forces. See GERHARD VON GLAHN, *LAW AMONG NATIONS* 722-730 (6th ed. 1992).

⁷⁰ 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; See Leila Nadya Sadat, *Terrorism and the Rule of Law*, 3 WASH. U. GLOBAL STUD. L. REV. 135, 146 (2004) (noting possibly advantageous domestic aspects of treating terrorist attacks as war crimes, but identifying possible pitfalls of creating a new international legal regime).

⁷¹ 10 U.S.C. § 948d.

nexus to an armed conflict, but neither the manual nor the MCA contains a definition. The Supreme Court has not clarified the scope of the conflict authorized by Congress in 2001, but it has not simply deferred to the President's interpretation.

In enacting the MCA, Congress seems to have provided the necessary statutory definitions of criminal offenses to overcome previous objections with respect to subject matter jurisdiction of military commissions. However, questions may still arise with respect to the necessity for conduct to occur in the context of an armed conflict in order to be triable by military commission. There is no express requirement to that effect in the MCA. The overall purpose of the statute together with the elements of some of the crimes arguably may be read to require a nexus. In 2008, the military judge in the *Hamdan* case concluded as much, holding that a charge of "[m]embership in a conspiracy that planned and carried out the attacks of September 11th, 2001 will be deemed to be in violation of the law of war; membership in a conspiracy that planned or carried out other attacks long before that date and unrelated to hostilities will not."⁷²

Composition and Powers

The DOD regulations for military commissions prior to the MCA provided for military commissions to consist of panels 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,⁷³ 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 permitted the appointment of persons temporarily commissioned by the President to serve as officers in the armed services during a national emergency.⁷⁴ The presiding officer was required to be a judge advocate in any of the U.S. armed forces, but not necessarily a military judge.⁷⁵

The MCA provides for a qualified military judge to preside over panels of at least five military officers, except in the cases in which the death penalty is sought, in which case the minimum number of panel members is twelve.⁷⁶ Procedures for assigning military judges as well as the particulars regarding the duties they are to perform are left to the Secretary of Defense to prescribe, except that the military judge may not be permitted to consult with members of the panel outside of the presence of the accused and counsel except as prescribed in 10 U.S.C. § 949d. The military judge has the authority to decide matters related to the admissibility of evidence, including the treatment of classified information, but has no authority to compel the government to produce classified information.

Like the previous DOD rules, the MCA empowers military commissions to maintain decorum during proceedings. Previously, the presiding officer was authorized "to act upon any contempt or breach of Commission rules and procedures," including disciplining any individual who violates

⁷² *United States v. Hamdan*, Ruling on Motion to Dismiss (Res Judicata) (April 2, 2008).

⁷³ M.C.O. No. 1 § 4(A)(3).

⁷⁴ See 10 U.S.C. § 603, listed as reference (e) of M.C.O. No. 1.

⁷⁵ M.C.O. No. 1 § 4(A)(4). See NIMJ, *supra* footnote 37, 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 relevant service's JAG Corps to serve in a role similar to civilian judges.

⁷⁶ 10 U.S.C. §§ 948m and 949m.

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.⁷⁷ The MCA, 10 U.S.C. § 950w authorizes the military commissions to “punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder.” It is unclear whether this section is meant to expand the jurisdiction of military commissions to cover non-enemy combatant witnesses or civilian observers, but the M.M.C. expressly provides for jurisdiction over all persons, including civilians, and permits military judges to sentence those convicted with both fines and terms of confinement.⁷⁸ In the case of military commissions established under the UCMJ, there is statutory authority for military commissions to punish contempt with a fine of \$100, confinement for up to 30 days, or both.⁷⁹ Neither the MCA nor the M.M.C. sets any limit on punishment for contempt.

The MCA provides that military commissions have the same power as a general court-martial to compel witnesses to appear in a manner “similar to that which courts of the United States having criminal jurisdiction may lawfully issue.”⁸⁰ However, rather than providing that the trial counsel and the defense are to have equal opportunity to obtain witnesses and evidence, as is the case in general courts-martial, the MCA provides the defense a “reasonable opportunity” to obtain witnesses and evidence. The M.M.C. provides the trial counsel with responsibility for producing witnesses requested by the defense, unless trial counsel determines the witness’s testimony is not required, but the defense counsel may appeal the determination to the convening authority or, after referral, the military judge.⁸¹

Under article 47 of 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.⁸² Presumably, this article could be used to prosecute civilians residing in U.S. territory who refuse to comply with a subpoena issued under the MCA. The M.M.C. provides the military judge or any person designated to take evidence authority to issue a subpoena to compel the presence of a witness or the production of documents. As is the case with general courts-martial, the military judge may issue a warrant of attachment to compel the presence of a witness who refuses to comply with a subpoena.⁸³ Subpoena authority under the UCMJ may not be used to compel a civilian witness to travel abroad in order to provide testimony,⁸⁴ so the corresponding authority under the MCA be insufficient to compel civilian witnesses to travel to Cuba. Testimony by video transmission may be permitted in such cases.⁸⁵

⁷⁷ 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”).

⁷⁸ Rule for Military Commissions (R.M.C.) 809.

⁷⁹ See 10 U.S.C. § 848. This section is made inapplicable to military commissions in chapter 47a by MCA § 4.

⁸⁰ 10 U.S.C. § 949j.

⁸¹ R.M.C. 703.

⁸² See 10 U.S.C. § 847. It is unclear how witnesses are “duly subpoenaed” for military commissions established under the UCMJ. 10 U.S.C. § 846 empowers the president of a court-martial to compel witnesses to appear and testify and 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.”

⁸³ R.M.C. 703; R.C.M. 703.

⁸⁴ DAVID SCHLEUTER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* § 11-2(D)(2) (5th ed. 1999); *United States v. Bennett*, 12 M.J. 463 (C.M.A. 1982).

⁸⁵ R.M.C. 611(d).

One of the perceived shortcomings of the M.O. had to do with the problem of command influence over commission personnel. M.C.O. No. 1 provided for a “full and fair trial,” but contained few specific safeguards to address the issue of impartiality. The President or his designee were empowered to decide which charges to press; to select the members of the panel, the prosecution and the defense counsel, and the members of the review panel; and to approve and implement the final outcome. The President or his designees had the authority to write procedural rules, interpret them, enforce them, and amend them. Justice Kennedy remarked in his concurring opinion in *Hamdan v. Rumsfeld* that the concentration of authority in the Appointing Authority was a significant departure from the structural safeguards Congress has built into the military justice system.⁸⁶

The MCA, by providing requirements for the procedural rules to guard against command influence, may alleviate these concerns. In particular, the MCA prohibits the unlawful influence of military commissions and provides that neither the military commission members nor military counsel may have adverse actions taken against them in performance reviews. Many of the procedural rules are left to the discretion of the Secretary of Defense or his designee, more so than is the case under the UCMJ. Rule 104 of the Rules for Military Commissions (R.M.C.) prohibits command influence in terms similar to those in the Manual for Courts-Martial, except that they apply more broadly to “all persons” rather than only to “all persons subject to the [UCMJ].”

On the other hand, it has been argued that the multiple roles assigned to the convening authority, the DOD official who decides which charges to bring, allocates resources among the parties, and then approves or disapproves the findings of the military commission, create an inherent risk of unfairness (or the perception of unfairness).⁸⁷ While the convening authority for courts-martial also plays multiple roles, these functions serve as commanders’ tools for enforcing discipline among subordinates, a context that arguably differs in important ways from bringing criminal cases against alleged enemies.⁸⁸ Improper influence by the legal advisor to the convening authority has been alleged at a few military commission proceedings, prompting military judges to issue orders in some cases granting relief.⁸⁹ Executive branch control over who serves as military judges has also led to charges of unfairness.⁹⁰

⁸⁶ *Hamdan*, 647-51 (Kennedy, J. concurring).

⁸⁷ Gregory S. McNeal, *Beyond Guantánamo, Obstacles and Options*, 103 NW. U. L. REV. COLLOQUY 29, 32 (2008) (blaming “conflicting statutory provisions” for perceived undue influence at military commissions under the MCA).

⁸⁸ See *id.* at 34; U.S. Congress, House Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, *Proposals for Reform of the Military Commissions System*, 111th Cong., 1st sess., July 30, 2009 (statement of Peter R. Masciola, USAFG, Chief Defense Counsel Office of Military Commissions-Defense Washington, DC), available at <http://judiciary.house.gov/hearings/pdf/Masciola090730.pdf>.

⁸⁹ *United States v. Hamdan*, RULING ON MOTION TO DISMISS

(UNLAWFUL INFLUENCE)

(D-026) (May 9, 2008) (Ordering substitute legal advisor be appointed for reviewing the case); *United States v. Jawad*, Ruling on Motion to Dismiss – Unlawful Influence (D-004) (Aug. 14, 2008) (finding the Legal Advisor’s public expression of support for the military commission process and alignment with the prosecution to have “compromised the objectivity necessary to dispassionately and fairly evaluate the evidence and prepare the post-trial recommendation,” consequently disqualifying the legal advisor from carrying out post-trial responsibilities in the case); *United States v. al Darbi*, Ruling on Defense Motion to Dismiss (D-011) (October 2, 2008) (denying as moot request for relief, while noting activities of previous Legal Advisor may have compromised objectivity in necessary to fairly evaluate evidence and prepare post-trial recommendation).

⁹⁰ *United States v. Khadr*, Ruling on Defense Motion to Dismiss (D-076) (Aug. 15, 2008) (denying relief where military judge was replaced after expiration of recall to active duty);

Procedures Accorded the Accused

The MCA lists a minimum set of rights to be afforded the accused in any trial, and provides the accused an opportunity to appeal adverse verdicts based on “whether the final decision was consistent with the standards and procedures specified” in the MCA, and “to the extent applicable, the Constitution and the laws of the United States.” The MCA provides that the accused is to be informed of the charges as soon as practicable after the charges and specifications are referred for trial.⁹¹ The accused is to be presumed innocent until determined to be guilty. The presumption of innocence and the right against self-incrimination are to 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.⁹² The accused has the right not to testify at trial and to have the opportunity to present evidence and cross-examine witnesses for the prosecution.⁹³

Open Hearing

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.⁹⁴ The First Amendment right of public access extends to trials by court-martial,⁹⁵ but is not absolute. 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.”⁹⁶ The reporters’ right to gather information does not include an absolute right to gain access to areas not open to the public.⁹⁷ In general, 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.⁹⁸

The MCA provides that the military judge may close portions of a trial only to protect information from disclosure where such disclosure could reasonably be expected to cause damage to the national security, such as information about intelligence or law enforcement sources, methods, or activities; or to ensure the physical safety of individuals.⁹⁹ The information to be protected from disclosure does not necessarily have to be classified. To the extent that the exclusion of the press and public is based on the discretion of the military judge without consideration of the constitutional requirements relative to the specific exigencies of the case at

⁹¹ 10 U.S.C. § 948q.

⁹² M.C.O. No. 1 §§ 5(B) and 6(B); 10 U.S.C. § 949i.

⁹³ 10 U.S.C. § 949a(b).

⁹⁴ 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).

⁹⁵ *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).

⁹⁶ *Pell v. Procunier*, 417 U.S. 817, 822-24 (1974).

⁹⁷ 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 held at the Guantánamo Bay Naval Station may be *de facto* closed due to the physical isolation of the facility).

⁹⁸ See *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984).

⁹⁹ 10 U.S.C. § 949d(d).

trial, the procedures may implicate the First Amendment rights of the press and public. The M.M.C. provides, in Rule 806, that the military judge may close proceedings only to protect information designated for such protection by a government agency or to secure the physical safety of individuals. However, the rule also provides that “in order to maintain the dignity and decorum of the proceedings or for other good cause, the military judge may reasonably limit the number of spectators in, and the means of access to, the courtroom, and exclude specific persons from the courtroom.” Such limitations must be supported by written findings.

Another method military judges have adopted to protect classified information is to employ a time-delay on the audio feed of the proceedings to the public in the gallery in order to permit the judge or other authorized person to turn off the audio in the event classified information has been or is about to be disclosed.¹⁰⁰ The measure was said to be necessary because the statements of the accused are presumptively classified. If the switch is activated, the judge was to order a halt to the proceedings to evaluate the nature of the information or to permit the prosecution to assert a national security privilege.

Right to be Present

Under UCMJ art. 39,¹⁰¹ the accused at a court-martial has the right to be present at all proceedings other than the deliberation of the members. Under the DOD rules for military commissions prior to the MCA, the accused or the accused’s civilian attorney could be precluded from attending portions of the trial for reasons involving national security, but a detailed defense counsel was to be present for all hearings.¹⁰² The MCA does not provide for the exclusion of the accused from portions of his trial, and does not allow classified information to be presented to panel members that is not disclosed to the accused. The accused may be excluded from trial proceedings (other than panel deliberations) by the military judge only upon a determination that the accused persists in disruptive or dangerous conduct.¹⁰³ However, the accused may be excluded from *in camera* considerations regarding classified information.¹⁰⁴ The accused may not waive the right to be present at his trial, but may forfeit it through disruptive behavior or refusal to attend proceedings.¹⁰⁵

Right to Counsel

As is the case in military courts-martial, an accused before a military commission under the MCA has the right to have military counsel assigned free of charge. The right to counsel attaches much earlier in the regular military justice system, where the accused has a right to request an attorney prior to being interrogated about conduct relating to the charges contemplated. Under the MCA, at least one qualifying military defense counsel is to be detailed “as soon as practicable after the

¹⁰⁰ *E.g.*, United States v. Hamdan, Protective Order #3 (June 4, 2008).

¹⁰¹ 10 U.S.C. § 839.

¹⁰² That the accused could be excluded from portions of own trial and prevented from learning what evidence was introduced was among the factors that the *Hamdan* Court found most troubling about the military commissions established pursuant to President Bush’s M.O. 548 U.S. at 614.

¹⁰³ 10 U.S.C. § 949d(e).

¹⁰⁴ United States v. Khadr, Ruling on Defense Motion for Appropriate Relief (D-015) (Feb. 21, 2008).

¹⁰⁵ R.M.C. 804 (discussion).

swearing of charges....”¹⁰⁶ 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 particular case), and agrees to comply with all applicable rules. If civilian counsel is hired, the detailed military counsel serves as associate counsel.¹⁰⁷ Unlike the DOD rules, the MCA provides that the accused has the right to self-representation.¹⁰⁸

Previous DOD rules provided that defense counsel was to be assigned free of cost once charges were referred, but permitted the accused to request another JAG officer to be assigned as a replacement if available in accordance with any applicable instructions or supplementary regulations that might later be issued.¹⁰⁹ The MCA does not expressly provide the accused an opportunity to request a specific JAG officer to act as counsel. However, under the DOD regulations, the accused may request a specific military attorney from the defense team at the beginning of the proceedings, and may request a replacement counsel from the Chief Defense Counsel if he believes his detailed counsel has been ineffective or if he is otherwise materially dissatisfied with his assigned counsel.¹¹⁰ If the accused retains the services of a civilian attorney, the MCA provides that military defense counsel is to act as associate counsel.¹¹¹ The M.M.C. provides that, in the event the accused elects to represent himself, the detailed counsel shall serve as “standby counsel,”¹¹² and the military judge may require that such defense counsel remain present during proceedings.¹¹³

The MCA requires civilian attorneys defending an accused before military commission to meet the same strict qualifications that applied under DOD rules.¹¹⁴ A civilian attorney must be a U.S. citizen with at least a SECRET clearance with membership in any state or territorial bar and no disciplinary record.¹¹⁵ The MCA does not set forth in any detail what rules might be established to govern the conduct of civilian counsel. Under the present regulation, the Chief Defense Counsel has the responsibility of determining the eligibility of civilian defense counsel, and may reconsider the determination based on subsequently discovered information indicating material nondisclosure or misrepresentation in the application, or material violation of obligations of the civilian defense counsel, or other good cause.”¹¹⁶ Alternatively, the Chief Defense Counsel may refer the matter to either the convening authority or the DOD Deputy General Counsel (Personnel

¹⁰⁶ 10 U.S.C. § 948k.

¹⁰⁷ 10 U.S.C. § 949c(b); R.M.C. 804.

¹⁰⁸ 10 U.S.C. § 949a(b)(2)(D). M.C.I. No. 4 required detailed defense counsel to “defend the accused zealously within the bounds of the law ... notwithstanding any intention expressed by the accused to represent himself.” M.C.I. No. 4 § 3(C).

¹⁰⁹ M.C.O. No. 1 § 4(C). M.C.I. No. 4 § 3(D) listed criteria for the “availability” of selected detailed counsel.

¹¹⁰ Regulation for Trial by Military Commissions, Para. 9-2. The accused may request a specific JAG officer from the cadre of officers assigned to the Defense Counsel’s Office, but does not have a right to choose. The Rules for Military Commissions, Rule 506 was amended to provide the accused an opportunity to choose military defense counsel from among military counsel assigned to the Office of Military Commissions as defense counsel. Gates letter, *supra* footnote 29.

¹¹¹ 10 U.S.C. § 949c(b)(5).

¹¹² R.M.C. 501.

¹¹³ R.M.C. 506(c).

¹¹⁴ 10 U.S.C. § 949c(b).

¹¹⁵ 10 U.S.C. § 949c, R.M.C. 502(d)(3).

¹¹⁶ Regulation for Trial by Military Commissions, Para. 9-5(c).

and Health Policy), who may revoke or suspend the qualification of any member of the civilian defense counsel pool.

The MCA does not address the monitoring of communications between the accused and his attorney, and does not provide for an attorney-client privilege. Rule 502 of the Military Commission Rules of Evidence (Mil. Comm. R. Evid.) provides for substantially the same lawyer-client privilege that applies in courts-martial.¹¹⁷ With respect to the monitoring of attorney-client communications, the previous DOD rules for military commissions initially provided that civilian counsel were required to agree that communications with the client were subject to monitoring. That requirement was later modified to require prior notification and to permit the attorney to notify the client when monitoring is to occur.¹¹⁸ Although the government was not permitted to use information against the accused at trial, some argued that the absence of the normal attorney-client privilege could impede communications between them, possibly decreasing the effectiveness of counsel. Civilian attorneys were bound to inform the military counsel upon learning of information about a pending crime that could lead to “death, substantial bodily harm, or a significant impairment of national security.”¹¹⁹ The required agreement under the present regulations imposes a similar duty to inform, but does not mention monitoring of communications.¹²⁰

Evidentiary Matters

The Sixth Amendment to the U.S. Constitution guarantees that those accused in criminal prosecutions have the right to be “confronted with the witnesses against [them]” and to have “compulsory process for obtaining witnesses in [their] favor.”¹²¹ The Supreme Court has held that “[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.”¹²² In courts-martial, the Military Rules of Evidence (Mil. R. Evid.)¹²³ 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].”¹²⁴

¹¹⁷ Mil. R. Evid. 502.

¹¹⁸ 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.

¹¹⁹ M.C.I. No. 5, Annex B § II(J).

¹²⁰ Regulation for Trial by Military Commissions, Figure 9.2. Affidavit and Agreement by Civilian Defense Counsel, II(J).

¹²¹ U.S. CONST. Amdt. VI applies in courts-martial. *E.g.* United States v. Scheffer, 523 U.S. 303 (1998).

¹²² Maryland v. Craig, 497 U.S. 836, 845 (1990).

¹²³ 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, (April 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.).

¹²⁴ Mil. R. Evid. 402.

Relevant evidence is excluded if its probative value is outweighed by other factors.¹²⁵ The accused has the right to view any documents in the possession of the prosecution 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,¹²⁶ with some allowance for protecting non-relevant classified information.¹²⁷

Supporters of the use of military commissions to try suspected terrorists have viewed the possibility of employing evidentiary standards that vary from those used in federal courts or in military courts-martial as a significant advantage over those courts. The Supreme Court seemed to indicate that the previous DOD rules were inadequate under international law, remarking that “various provisions of Commission Order No. 1 dispense with the principles, articulated in Article 75 [of Protocol I to the Geneva Conventions] and indisputably part of the customary international law, that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him.”¹²⁸

The MCA provides that the “accused shall be permitted to present evidence in his defense, to cross-examine the witnesses who testify against him, and to examine and respond to evidence admitted against him on the issue of guilt or innocence and for sentencing.”¹²⁹ It is not clear what evidence might be excluded from this requirement as irrelevant to the issues of guilt, innocence, or appropriate punishment. A possible issue will be whether evidence relevant to the credibility of a witness or the authenticity of a document is permitted to be excluded from the accused’s right to examine and respond to evidence, unless expressly provided elsewhere in the MCA.

Discovery

The MCA 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.¹³⁰ It does not guarantee the defense equal opportunity with the prosecution to obtain such evidence, as is the case at general courts-martial.¹³¹ Unlike the previous DOD rules in M.C.O. No. 1, the MCA does not expressly direct the prosecution to provide to the accused all of the evidence trial counsel intends to present.¹³² However, as noted above, the accused is entitled to examine and respond to evidence relevant to establishing culpability. The MCA provides that the accused is entitled to exculpatory

¹²⁵ Mil. R. Evid. 403 (relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence”).

¹²⁶ See R.C.M. 701(a)(6).

¹²⁷ Mil. R. Evid. 505 provides procedures similar to the Classified Information Protection Act (CIPA) that applies in civilian court.

¹²⁸ *Hamdan v. Rumsfeld*, 548 U.S. 557, 635 (2006) (while accepting that the government “has a compelling interest in denying [the accused] access to certain sensitive information,” stating that “at least absent express statutory provision to the contrary, information used to convict a person of a crime must be disclosed to him”).

¹²⁹ 10 U.S.C. § 949a.

¹³⁰ 10 U.S.C. § 949j.

¹³¹ 10 U.S.C. § 846.

¹³² M.C.O. No. 1, § 5(E) (requiring such information, as well as any exculpatory evidence known by the prosecution, to be provided to the accused as long as such information was not deemed to be protected under Sec. 6(D)(5)).

information known to the prosecution, with procedures permitting some variance for security concerns.

The MCA provides for the protection of national security information during the discovery phase of a trial. The military judge must 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.¹³³ However, where M.C.O. No. 1 permitted the withholding of any “Protected Information,”¹³⁴ the MCA permits the government to withhold only properly classified information that has been determined by the head of a government agency or department to require protection because its disclosure could result in harm to the national security. 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.¹³⁵ The MCA does not provide defense counsel with access to the classified information that serves as the basis for substitute or redacted proffers.

The MCA provides for the mandatory production of exculpatory information known to trial counsel (defined as exculpatory evidence that the prosecution would be required to disclose in a general court-martial¹³⁶), but does not permit defense counsel or the accused to view classified information. The military judge is authorized to permit substitute information, in particular when trial counsel moves to withhold information pertaining to the sources, methods, or activities by which the information was acquired. If the military judge finds that evidence is classified, he or she must authorize the trial counsel to protect the sources and methods by which such evidence was acquired.¹³⁷ 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.¹³⁸

R.M.C. 701(e) provides that trial counsel must provide exculpatory evidence that he would be required to produce in general courts-martial, subject to exceptions where the government asserts a national security privilege. In such a case, the military judge may issue a protective order, but the defense is entitled to an adequate substitute for the information.¹³⁹ Such a substitute may involve, to the extent practicable, the deletion of specified items of classified information from

¹³³ 10 U.S.C. § 949j.

¹³⁴ M.C.O. No. 1, § 6 (defining “Protected Information” to include classified or classifiable information, information protected “by law or rule from unauthorized disclosure,” information that could endanger trial participants, intelligence and law enforcement sources, methods or activities, or “information concerning other national security interests”).

¹³⁵ 10 U.S.C. § 949d(f)(2)(A).

¹³⁶ 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 is not defined, but it appears to be encompassed under “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. The M.M.C. defines “exculpatory evidence” in those same terms. R.M.C. 701(e).

¹³⁷ R.M.C. 701(f)(3).

¹³⁸ 10 U.S.C. § 949j.

¹³⁹ R.M.C. 701(f)(5). Protective orders are covered under Mil. Comm. R. Evid. 505, and include orders that limit the scope of direct examination and cross examination of witnesses.

documents made available to the defense; the substitution of a portion or summary of the information for such classified documents; or the substitution of a statement admitting relevant facts that the classified information would tend to prove.¹⁴⁰

In the event the military judge determines that the government's proposed substitute would be inadequate or impracticable for use in lieu of evidence that the government seeks to introduce at trial, evidence that is exculpatory, or evidence that is necessary to enable the defense to prepare for trial, and the government objects to methods the judge deems appropriate, the judge is required to "issue any order that the interests of justice require."¹⁴¹ Such an order must give the government an opportunity to comply to avoid a sanction, and may include striking or precluding all or part of a witness's testimony, declaring a mistrial, ruling against the government on any issue as to which the evidence is probative and material to the defense, or dismiss charges, or at least those charges or specifications to which the evidence relates, with or without prejudice.¹⁴²

Admissibility of Evidence

Evidence is admissible at military commissions under the MCA if it is deemed to have "probative value to a reasonable person."¹⁴³ The Secretary of Defense is permitted to provide by regulation that the military judge is to exclude evidence if its probative value is substantially outweighed by the "danger of unfair prejudice, confusion of the issues, or misleading the commission"; or by "considerations of undue delay, waste of time, or needless presentation of cumulative evidence,"¹⁴⁴ and has done so.¹⁴⁵

Coerced Statements

The MCA prohibits the use of statements obtained through torture as evidence in a trial, except as proof of torture against a person accused of committing torture. For information obtained through coercion that does not amount to torture, the MCA provides a different standard for admissibility 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 are 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 are admissible if, in addition to the two criteria above, the military judge finds that "the interrogation methods used to

¹⁴⁰ R.M.C. 701(f)(2).

¹⁴¹ Mil. Comm. R. Evid. 505(e)(4).

¹⁴² *Id.* The corresponding rule for courts-martial, Mil. R. Evid. 505, provides that the military judge, upon finding that the lack of production of information would materially prejudice a substantial right of the accused, must "dismiss the charges or specifications or both to which the classified information relates."

¹⁴³ M.C.O. No. 1 § 6(D)(1). At courts-martial, evidence is admitted if it is "relevant," meaning "tending to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Mil. R. Evid. 401. At military commissions, evidence meets the standard of "probative to a reasonable person" if "a reasonable person would regard the evidence as making the existence of any fact that is of consequence to a determination of the commission action more probable or less probable than it would be without the evidence." Mil. Comm. R. Evid. 403.

¹⁴⁴ 10 U.S.C. § 949a(b)(2)(F).

¹⁴⁵ Mil. Comm. R. Evid. 403.

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.”

Accordingly, Mil. Comm. R. Evid. 304 provides that an accused’s statements that were elicited by torture may not be admitted against him if he makes a timely motion to suppress or an objection to the evidence. Initially, statements introduced by any party that were allegedly produced by lesser forms of coercion, where the degree of coercion is disputed, could only be introduced after the military judge made the appropriate findings according to the above formula. With changes to the regulations made in May, 2009, however, the military judge will be required to preclude any evidence elicited through cruel, inhuman or degrading treatment, without regard to when the statement was made.¹⁴⁶ The defense is required to make any objections to the proposed use of any statements by the accused prior to entering a plea, if the trial counsel has disclosed the intent to use the statement, otherwise the objection will be deemed to have been waived.¹⁴⁷ The military judge may require the defense to establish the grounds for excluding the statement. However, the government has the burden of establishing the admissibility of the evidence. If the statement is ruled admissible, the defense is permitted to present evidence with respect to the voluntariness of the statement, and the military judge must instruct the members to consider that factor in according weight to the evidence. Testimony given by the accused for the purpose of denying having made a statement or for disputing the admissibility of a statement is not to be used against him for any purpose other than in prosecution for perjury or false statements.¹⁴⁸

Mil. Comm. R. Evid. 304 is modeled on Mil. R. Evid. 304, which prescribes rules for courts-martial to provide for the admission into evidence of confessions and admissions (self-incriminating statements not amounting to an admission of guilt). Under court-martial rules, such a statement and any evidence derived as a result of such a statement are admissible only if the statement was made voluntarily. Involuntary statements are those elicited through coercion or other means in violation of constitutional due process. To be used as evidence of guilt against the accused at court martial, a confession or admission must be corroborated by independent evidence. There is no requirement for corroboration of such statements at military commissions; however, the military judge may take the existence of corroborating evidence into consideration in determining the probative value and reliability of the statement.

In one case before a military commission, the military judge ordered a detainee’s statements to Afghan officials at the time of his capture suppressed on the basis of death threats against the detainee as well as his family.¹⁴⁹ Such treatment is regarded as torture under the Military Commission Rules of Evidence.¹⁵⁰ Further, the military judge ruled that statements subsequently made by the accused to U.S. interrogators likewise were required to be suppressed because they were taken under circumstances that did not sufficiently dissipate the coercive effect of the earlier

¹⁴⁶ Gates letter, *supra* footnote 29.

¹⁴⁷ Mil. Com. R. Evid. 304(d).

¹⁴⁸ Mil. Com. R. Evid. 304(f).

¹⁴⁹ United States v. Jawad, ruling on Defense Motion to Suppress Out-of-Court Statements of the Accused to Afghan Authorities (D-022) (October 28, 2008).

¹⁵⁰ Mil. R. Evid. 304.

threats.¹⁵¹ The government sought to appeal the latter ruling, but has since dropped the charges against the detainee after he prevailed in his habeas petition.¹⁵²

Hearsay

Hearsay evidence is an out-of-court statement, whether oral, written, or conveyed through non-verbal conduct, introduced into evidence to prove the truth of the matter asserted. M.C.O. No. 1 did not exclude hearsay evidence. The MCA allows for the admission of hearsay evidence that would not be permitted under the Manual for Courts-Martial¹⁵³ only if the proponent of the evidence notifies the adverse party sufficiently in advance of trial of the intention to offer the evidence, as well as the “particulars of the evidence (including [unclassified] information on the general circumstances under which the evidence was obtained).”¹⁵⁴ Originally, the evidence was to be inadmissible only if the party opposing its admission “clearly demonstrates that the evidence is unreliable or lacking in probative value.”¹⁵⁵ The May, 2009 changes to the regulations reverse the burden of demonstrating reliability to the proponent of the evidence.¹⁵⁶

The rule regarding hearsay is provided in Mil. Comm. R. Evid. 801 to 807. In contrast to the relatively restrictive rule applied in courts-martial, where hearsay is not admissible except as permitted by a lengthy set of exceptions,¹⁵⁷ the military commission rules provide that hearsay is admissible on the same basis as any other form of evidence except as provided by these rules or an act of Congress. The rules do not set forth any prohibitions with respect to hearsay evidence. Mil. Comm. R. Evid. 803 provides that hearsay may be admitted if it would be admissible at courts-martial. Alternatively, hearsay is admissible if the party proffering it notifies the adverse party thirty days in advance of trial or hearing of its intent to offer such evidence and provides any materials in its possession regarding the time, place, and conditions under which the statement was procured. Absent such notice, the military judge is responsible for determining whether the opposing party has been provided a “fair opportunity under the totality of the circumstances.”¹⁵⁸ Hearsay evidence is admissible only if the proponent demonstrates by a preponderance of the evidence that such hearsay is reliable under the totality of the circumstances.¹⁵⁹

¹⁵¹ United States v. Jawad, ruling on Defense Motion to Suppress Out-of-Court Statements of the Accused Made While in U.S. Custody (D-021) (November 19, 2008).

¹⁵² “Military officially drops charges against Mohammed Jawad,” *McClatchy*, July 31, 2009, online edition.

¹⁵³ Mil. R. Evid. 801-807 provide procedures for determining the admissibility of hearsay evidence in courts-martial. It is unclear how, under the MCA, it is to be determined whether certain hearsay evidence would be admissible in a general court-martial.

¹⁵⁴ 10 U.S.C. § 949a(b)(3).

¹⁵⁵ 10 U.S.C. § 949a(2)(E) (rules that may be prescribed by the Secretary of Defense).

¹⁵⁶ Gates letter, *supra* footnote 29.

¹⁵⁷ Mil. R. Evid. 803 (exceptions for which the availability of the declarant is immaterial); Mil. R. Evid. 804 (exceptions applicable when declarant is unavailable); Mil. R. Evid. 807 (residual exception, which permits all other hearsay not covered by express exceptions when there are “equivalent circumstantial guarantees of trustworthiness” and the military judge determines the statement relates to a material fact, is more probative to that fact than other reasonably obtainable evidence, and that its introduction into evidence “serves the general purposes of the rules and the interest of justice”).

¹⁵⁸ Mil. Comm. R. Evid. 803(b)(2).

¹⁵⁹ Mil. Comm. R. Evid. 803(c) (as modified).

Classified Evidence

At military commissions convened pursuant to the MCA, classified information is to be protected during all stages of proceedings and is privileged from disclosure for national security purposes.¹⁶⁰ Whenever the original classification authority or head of the agency concerned determines that information is properly classified and its release would be detrimental to the national security, the military judge “shall 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.” 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.¹⁶¹

With respect to the protection of intelligence sources and methods relevant to specific evidence, the military judge is required to permit trial counsel to introduce otherwise admissible evidence before the military commission without disclosing the “sources, methods, or activities by which the United States acquired the evidence” if the military judge finds that such information is classified and that the evidence is reliable.¹⁶² The military judge may (but need not) require trial counsel to present an unclassified summary of such information to the military commission and the defense, “to the extent practicable and consistent with national security.”¹⁶³

The MCA does not explicitly provide an opportunity for the accused to contest the admissibility of substitute evidence proffered under the above procedures. It does not appear to permit the accused or his counsel to examine the evidence or a proffered substitute prior to its presentation to the military commission. If constitutional standards required in the Sixth Amendment are held to apply to military commissions, the MCA may be open to challenge for affording the accused an insufficient opportunity to contest evidence. An issue may arise as to whether, where the military judge is permitted to assess the reliability of evidence based on ex parte communication with the prosecution, adversarial testing of the reliability of evidence before the panel members meets constitutional requirements. If the military judge’s determination as to reliability is conclusive, precluding entirely the opportunity of the accused to contest its reliability, the use of such evidence may serve as grounds to challenge the verdict.¹⁶⁴ On the other hand, if evidence resulting from classified intelligence sources and methods contains “‘particularized guarantees of trustworthiness’ such that adversarial testing would be expected to add little, if anything, to [its] reliability,”¹⁶⁵ it may be admissible and survive challenge.

¹⁶⁰ Defined in 10 U.S.C. §948a(4) 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)).”

¹⁶¹ 10 U.S.C. § 949d(f)(3).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Cf. Crane v. Kentucky*, 476 U.S. 683 (1986)(evidence about the manner in which a confession was obtained should have been admitted as relevant to its reliability and credibility despite court’s determination that the confession was voluntary and need not be suppressed).

¹⁶⁵ *Cf. Ohio v. Roberts*, 448 U.S. 56, 66 (1980)(admissibility of hearsay evidence), *but cf. Crawford v. Washington*, 541 U.S. 36 (2004)(“Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.... [The Confrontation Clause] commands ... that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”).

Classified evidence is privileged under Mil. Comm. R. Evid. 505. Commentary to the rule notes that, because the defense has had no opportunity to evaluate the evidence to formulate any objections, “the military judge’s consideration must encompass a broad range of potential objections.”¹⁶⁶ During the examination of witnesses at trial, the trial counsel may make an objection to any question or motion that might lead to the disclosure of classified information. The military judge is required to take appropriate action, such as reviewing the matter in camera or granting a delay to allow the trial counsel to confer with the relevant agency officer to determine whether the privilege should be asserted. The judge may order that only parts of documents or other materials be entered into evidence, or permit proof of the contents of such materials without requiring introduction into evidence of the original or a duplicate.¹⁶⁷ In the event the defense reasonably expects to disclose classified information at trial, defense counsel must notify the trial counsel and the judge, and is precluded from disclosing information known or believed to be classified until the government has had a reasonable opportunity to move for an in camera determination as to protective measures.¹⁶⁸ Mil. Comm. R. Evid. 505 is modeled after the corresponding rule that applies in general courts-martial,¹⁶⁹ which in turn are modeled after the procedures that apply in federal criminal court, the Classified Information Procedures Act.¹⁷⁰

Sentencing

The MCA provides that military commissions may adjudge “any punishment not forbidden by [it or the UCMJ], including the penalty of death....”¹⁷¹ It specifically proscribes punishment “by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, ... or [by the] use of irons, single or double.”¹⁷² A vote of two-thirds of the members present 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, both as to guilt and to the sentence, by all members present for the vote.

In cases 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, in which case no fewer than nine are required), with all members present for the vote agreeing on the sentence. The death penalty must be expressly authorized for the offense,¹⁷³ and the charges referred to the commission must have expressly sought the penalty of death.¹⁷⁴ The death sentence may not be executed until the commission proceedings have been finally adjudged lawful and all appeals are exhausted,¹⁷⁵ and after the

¹⁶⁶ M.M.C. at III-26.

¹⁶⁷ Mil. Comm. R. Evid. 505(f). Similar procedures are permitted courts-martial. Mil. R. Evid. 505(j).

¹⁶⁸ Mil. Comm. R. Evid. 505(g). This rule is virtually identical to Mil. R. Evid. 505(h).

¹⁶⁹ Mil. R. Evid. 505.

¹⁷⁰ P.L. 96-456, Oct. 15, 1980, codified at 18 U.S.C. App.

¹⁷¹ 10 U.S.C. § 948d.

¹⁷² 10 U.S.C. § 949s.

¹⁷³ The MCA permits the death penalty for convictions of murder of a protected person or murder in violation of the law of war, or spying; and if death results, any of the following crimes: attacking civilians, taking hostages, employing poison or similar weapon, using protected persons as a shield, torture or cruel or inhuman treatment, intentionally causing serious bodily injury, maiming, using treachery or perfidy, hijacking or hazarding a vessel or aircraft, terrorism, and conspiracy to commit any of the crimes enumerated in 10 U.S.C. § 950v.

¹⁷⁴ 10 U.S.C. § 949m.

¹⁷⁵ An accused sentenced to death may neither waive his right to appeal nor withdraw an appeal. 10 U.S.C. § 950c.

President approves the sentence.¹⁷⁶ The President is permitted to “commute, remit, or suspend [a death] sentence, or any part thereof, as he sees fit.”¹⁷⁷ For sentences other than death, the Secretary of the Defense or the convening authority are permitted to adjust the sentence downward.¹⁷⁸

Chapter X of the Rules for Military Commissions covers sentencing. “Aggravating factors” that may be presented by the trial counsel include evidence that “any offense of which the accused has been convicted comprises a violation of the law of war.”¹⁷⁹ Unlike the rules for courts-martial, there is no express opportunity for the trial counsel to present evidence regarding rehabilitative potential of the accused. However, the rules provide that the accused may make a sworn or unsworn statement to present mitigating or extenuating circumstances or to rebut evidence of aggravation submitted by the trial counsel. In the case of an unsworn statement, which may be written or oral, the accused is not subject to cross-examination by the trial counsel.¹⁸⁰

The death penalty may only be adjudged if expressly authorized for the offense listed or if it is authorized under the law of war; and all twelve members of the commission voted to convict the accused; and found that at least one of the listed aggravating factors exists, agreed that such factors outweigh any extenuating or mitigating circumstances, and voted to impose the death penalty. Aggravating factors include that “the accused was convicted of an offense, referred as capital, that is a violation of the law of war,” that the offense resulted in the death of or substantially endangered the life of one or more other persons, the offense was committed for the purpose of receiving money or a thing of value, the offense involved torture or certain other mistreatment, the accused was also found guilty of another capital crime, the victim was below the age of fifteen, or that the victim was a protected person.¹⁸¹ Other aggravating circumstances include specific law-of-war violations, which, except for spying, are not to be applied to offenses of which they are already an element.

Post-Trial Procedure

Subchapter VI of the MCA prescribes post-trial procedure and appeals, similar to procedures DOD had implemented. It provides for an administrative review of the trial record by the convening authority followed by a review panel.

Review and Appeal

The MCA codified the establishment of the review body set up under the previous DOD rules for military commissions.¹⁸² The Court of Military Commission Review (CMCR) is comprised of appellate military judges who meet the same qualifications as military judges or comparable

¹⁷⁶ 10 U.S.C. § 950i(b)-(c).

¹⁷⁷ 10 U.S.C. § 950i(b).

¹⁷⁸ 10 U.S.C. § 950i(d).

¹⁷⁹ R.M.C. 1001(b)(2). Otherwise, aggravating factors are similar to those listed in R.C.M. 1001(b)(5)(D) for courts-martial.

¹⁸⁰ R.M.C. 1001(c)(2)(D). The trial counsel may rebut the statement. This procedure does not appear to differ substantially from that used in courts-martial.

¹⁸¹ R.M.C. 1004(c).

¹⁸² M.C.I. No. 9 § 4(C).

qualifications for civilian judges.¹⁸³ The accused may appeal a final decision of the military commission with respect to issues of law to the CMCR. Like the UCMJ, the MCA 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.¹⁸⁴ If the CMCR approves the verdict, the accused may appeal the final decision to the United States Court of Appeals for the District of Columbia Circuit.¹⁸⁵ Appellate court decisions may be reviewed by the Supreme Court under writ of certiorari.¹⁸⁶

Post-trial procedures for military commissions are set forth in Chapter XI of the Rules for Military Commissions. Post-trial proceedings may be conducted to correct errors, omissions, or inconsistencies, where the revision can be accomplished without material prejudice to the accused.¹⁸⁷ Sessions without members may be ordered to reconsider any trial ruling that substantially affects the legal sufficiency of any findings of guilt or the sentence.

Once the record is authenticated and forwarded to the convening authority, the accused is permitted, within 20 days unless additional time is approved, to submit matters relevant to whether to approve the sentence or disapprove findings of guilt.¹⁸⁸ The convening authority is required to consider written submissions. If the military commission has made a finding of guilty, the legal advisor also reviews the record and provides recommendations to the convening authority.¹⁸⁹ The convening authority may not take an action disapproving a finding of not guilty or a ruling that amounts to a finding of not guilty.¹⁹⁰ However, in the case of a finding of not guilty by reason of lack of mental responsibility, the convening authority may commit the accused to a suitable facility for treatment pending a hearing to determine whether the accused may be released or detained under less than the most stringent circumstances without posing a danger to others.¹⁹¹

Rehearings of guilty findings may be ordered at the discretion of the convening authority, except where there is a lack of sufficient evidence to support the charge or lesser included offense. Rehearings are permitted if evidence that should not have been admitted can be replaced by an admissible substitute.¹⁹² Any part of a sentence served pursuant to the military commission's original holding counts toward any sentence that results from a hearing for resentencing.¹⁹³

¹⁸³ 10 U.S.C. § 950f.

¹⁸⁴ 10 U.S.C. § 859; 10 U.S.C. § 950a(a).

¹⁸⁵ 10 U.S.C. § 950g. No collateral attack on the verdict is permitted. 10 U.S.C. § 949j(b) provides that

Except as otherwise provided in this chapter and notwithstanding any other provision of law (including section 2241 of title 28 or any other habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.

¹⁸⁶ 10 U.S.C. § 950g.

¹⁸⁷ R.M.C. 1102(b).

¹⁸⁸ R.M.C. 1105.

¹⁸⁹ R.M.C. 1106.

¹⁹⁰ R.M.C. 1107.

¹⁹¹ R.M.C. 1102A.

¹⁹² R.M.C. 1107(e).

¹⁹³ R.M.C. 1107(f)(5).

In all cases in which the convening authority approves a finding of guilty, the record is forwarded to the CMCR, unless the accused (where the sentence does not include death) waives review.¹⁹⁴ No relief may be granted by the CMCR unless an error of law prejudiced a substantial trial right of the accused.¹⁹⁵ The accused has 20 days after receiving notification of the CMCR decision to submit a petition for review with the U.S. Court of Appeals for the District of Columbia Circuit. Within two years after a military commission conviction becomes final, an accused may petition the convening authority for a new trial on the ground of newly discovered evidence or fraud on the military commission.¹⁹⁶

Protection against Double Jeopardy

Prior to the MCA, DOD regulations for military commissions provided that the accused could not be tried for the same charge twice by any military commission once the commission's finding on that charge became final (meaning once the verdict and sentence had been approved).¹⁹⁷ However, the regulations appeared to permit revisions of a verdict prior to its becoming final in ways that might have resulted in double jeopardy.¹⁹⁸

The MCA provides that “[n]o person may, without his consent, be tried by a military commission under this chapter a second time for the same offense.”¹⁹⁹ Jeopardy attaches when a guilty finding becomes final after review of the case has been fully completed. The MCA prevents double jeopardy by expressly eliminating the possibility that a finding that amounts to a verdict of not guilty is subject to reversal by the convening authority or to review by the CMCR or the D.C. Circuit. The severity of a sentence adjudged by the military commission cannot be increased on rehearing unless the sentence prescribed for the offense is mandatory.²⁰⁰ These protections are covered in Chapter XI of the Rules for Military Commission. Proceedings are not authorized to reconsider any ruling that amounts to a finding of not guilty as to any charge or specification, except with respect to a charge where the record indicates guilt as to a specification that may be charged as a separate offense under the MCA.²⁰¹ Proceedings for increasing the severity of a sentence are not permitted unless the commission failed to adjudge a proper sentence under the MCA or the sentence was less than that agreed to in a plea agreement.²⁰²

The inadequacy of an indictment in specifying charges could raise double jeopardy concerns. If the charge does not adequately describe the offense, another trial for the same offense under a new description is not as easily prevented. The MCA requires that charges and specifications be

¹⁹⁴ R.M.C. 1111. Courts-martial findings are first forwarded to the Judge Advocate General of the particular service for legal review, R.C.M. 1112.

¹⁹⁵ R.M.C. 1201.

¹⁹⁶ R.M.C. 1210.

¹⁹⁷ M.C.O. No. 1 § 5(P). The finding was to become 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).

¹⁹⁸ See CRS Report RL33688, *The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military Justice*.

¹⁹⁹ 10 U.S.C. § 949h.

²⁰⁰ 10 U.S.C. § 950b(d)(2)(B).

²⁰¹ R.M.C. 1102(c).

²⁰² *Id.* At courts-martial, sessions to increase the severity of a sentence are permitted only if the sentence is mandatory. R.C.M. 1102(c).

signed under oath by a person with personal knowledge or reason to believe that matters set forth therein are true,²⁰³ and requires that they be served on the accused written in a language he understands.²⁰⁴ There is no express requirement regarding the specificity of the charges in the MCA, but the Rules for Military Commission provide that the charge must state the punitive article of the act, law of war, or offense as defined in the Manual for Military Commissions that the accused is alleged to have violated.²⁰⁵ A specification must allege every element of the charged offense expressly or by necessary implication.²⁰⁶ The Rules for Military Commissions make the trial counsel responsible for causing the accused to be served a copy of the charges in English and another language that the accused understands, where appropriate.²⁰⁷ After the accused is arraigned, the military judge may permit minor changes in the charges and specifications before findings are announced if no substantial right of the accused is prejudiced, but no major changes may be made over the objection of the accused without a new referral.²⁰⁸

President Bush's 2001 Military Order 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, or that a person already charged for crimes in federal courts could be made subject to the Order and transferred for trial by military commission.²⁰⁹ Double jeopardy might have arisen in either event, depending on whether jeopardy had attached prior to transfer, even if the trial did not result in a final verdict. The MCA does not expressly address such transfers or prohibit trial in another forum. The Rules for Military Commissions, however, provide the accused a waivable right to move to dismiss charges on the basis that he has previously been tried by a federal civilian court for the same offense.²¹⁰

Proposed Legislation

One bill has been introduced in the 111th Congress to amend the MCA. For additional legislation pertaining to detainees and habeas corpus, see CRS Report R40419, *Analysis of Selected Legislative Proposals Addressing Guantanamo Detainees*, by Anna C. Henning.

Sec. 1031 of the National Defense Authorization Act for FY2010 ("NDAA FY2010"), S. 1390, 111th Cong, 1st Sess. (2009), (as passed by the Senate), would replace chapter 47a of title 10, U.S. Code, as enacted by the MCA 2006. Some key differences between § 1031 of S. 1390 and the MCA 2006 include:

- Military commissions would have jurisdiction over "alien unprivileged enemy belligerents," defined somewhat differently from "alien unlawful enemy combatants" in the current law. The definition eliminates references to Al Qaeda

²⁰³ 10 U.S.C. § 948q.

²⁰⁴ 10 U.S.C. § 948s.

²⁰⁵ R.M.C. 307.

²⁰⁶ *Id.*

²⁰⁷ R.M.C. 602.

²⁰⁸ *Id.*

²⁰⁹ M.O. § 7(e).

²¹⁰ R.M.C. 907.

and the Taliban. Military commissions would have express authority to determine their own jurisdiction.

- While MCA offenses remain substantially unchanged, the amendment requires that offenses occurred “in the context of and associated with armed conflict.” Crimes that occurred prior to enactment of the bill would be prosecutable only to the extent that they are codifications of crimes traditionally triable by military commissions. (The MCA currently declares all covered offenses to be codifications of existing crimes).
- Confessions allegedly elicited through cruel, inhuman, or degrading treatment prohibited by section 1003 of the Detainee Treatment Act of 2005 (42 U.S.C. § 2000dd) would be inadmissible, regardless of when the statement was made. The MCA bars the use of such confessions only if they were made after the enactment of section 1003. (This change codifies an amendment to the Manual for Military Commission already made under the Obama Administration).
- In the case of hearsay evidence, the party offering the evidence would have the burden of demonstrating that it is reliable, whereas under current law, the opponent has the burden of proving that it is unreliable. (This change also codifies an amendment to regulations already made under the Obama Administration).
- The Court of Appeals of the Armed Services (CAAF) rather than the Court of Military Commission Review would serve as the exclusive appellate court. All trials that produce a guilty verdict would be referred automatically for review by the CAAF, unless waived where permitted.²¹¹ The CAAF’s scope of review would include questions of fact as well as law, and the CAAF would have the authority to order charges dismissed. The Court of Appeals for the D.C. Circuit would have no appellate role. The Supreme Court would retain discretionary jurisdiction through writ of certiorari.
- The obligation to disclose exculpatory information would include mitigating evidence, and the obligation would extend to all information that is known or reasonably should be known to any government officials who participated in the investigation and prosecution of the case. This amendment essentially codifies the rules in the Manual for Military Commissions applicable to discovery, which defines “exculpatory information” to include evidence that tends to reduce the degree of guilt of the accused of an offense charged or reduce the punishment. Further, “evidence known to trial counsel,” includes evidence that the prosecution would be required to disclose in a trial by general court-martial, which covers information under the control of the government.²¹²

The Obama Administration has proposed some amendments to section 1031 of S. 1390.

²¹¹ The Court of Appeals for the Armed Forces is established by title 10, U.S. Code to hear appeals of certain court-martial cases from the military services Courts of Criminal Appeals. Review by the CAAF is discretionary in most cases, and a denial of review by the CAAF prevents the appellant from petitioning for review at the Supreme Court. For information related to the appellate process available to service members undergoing court martial, see CRS Report RL34697, *Supreme Court Appellate Jurisdiction Over Military Court Cases*, by Anna C. Henning.

²¹² R.C.M. 701.

- It proposes excluding all involuntarily given statements by the accused, rather than just those obtained through the use of torture or cruel, inhuman, or degrading treatment. The voluntariness standard would entail taking into account the “challenges and realities of the battlefield and armed conflict.” It does not propose a requirement that battlefield captives be warned that their statements can be used against them, as is the case in ordinary criminal prosecutions in U.S. courts.
- The Obama Administration would retain language asserting that offenses are codifications of the common law of war, but would eliminate the material support charge.
- The Administration supports the Senate proposal for treating hearsay evidence, but would adopt a somewhat different standard as to when the exception should apply, based on whether the hearsay evidence is more probative than other evidence that could be procured through reasonable efforts, rather than strictly on the availability of the witness to testify.
- The Administration proposes keeping the present appellate structure intact, but modifying the role of the Court of Military Commissions Review to make it more like one of the services Courts of Criminal Appeals, empowering it to address questions of fact as well as law.
- The Administration would include a 5 year sunset provision for the M.C.A.

The following charts provide a comparison of the 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 authorized by the Military Commissions Act of 2006. Chart 1 compares the legal authorities for establishing military tribunals, the jurisdiction over persons and offenses, and the structures of the tribunals. Chart 2, which compares procedural safeguards incorporated in the MCA to court-martial procedures and to proposed amendments, follows the same order and format used in CRS Report RL31262, *Selected Procedural Safeguards in Federal, Military, and International Courts*, by Jennifer K. Elsea, 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. For a comparison with previous rules established under President Bush’s Military Order, refer to CRS Report RL33688, *The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military Justice*, by Jennifer K. Elsea.

Chart 1. Comparison of Military Commission Rules

Authority

General Courts Martial	Military Commissions Act of 2006	Sec. 1031 of S. 1390	White House Proposed Amendments to S. 1390
U.S. Constitution, Article I, § 8, in particular cl. 14 “To make Rules for the Government and Regulation of the land and naval Forces.”	U.S. Constitution, Article I, § 8, in particular, cl. 10, “To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;” cl. 11, “To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water”; and cl. 14.	Same as for MCA.	No changes.

Procedure

General Courts Martial	Military Commissions Act of 2006	Sec. 1031 of S. 1390	White House Proposed Amendments to S. 1390
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.	<p>The Secretary of Defense may prescribe rules of evidence and procedure for military commissions not inconsistent with the MCA. Rules applicable to courts-martial under the UCMJ are to apply except as otherwise specified. 10 U.S.C. § 949a(a).</p> <p>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.” 10 U.S.C. § 949a(b).</p> <p>The rules must include certain rights as listed in § 949a(b)(2), but need not include procedural rules listed in § 949a(b)(3).</p> <p>Pursuant to the above authority, the Secretary of Defense published the Manual for Military Commissions (M.M.C.), including the Rules for Military Commissions (R.M.C.) and the Military Commission Rules of Evidence (Mil. Comm. R. Evid.).</p>	<p>The Secretary of Defense may prescribe rules of procedure for military commissions. Such rules may not be inconsistent with the MCA (as amended). Procedural rules for general courts-martial are to apply unless the MCA or UCMJ provide otherwise. Consultation with the Attorney General is required only in cases of exceptions, which continue to be permissible “as may be required by the unique circumstances of the conduct of military and intelligence operations during hostilities or by other practical need.”</p> <p>10 U.S.C. § 949a (amended as proposed).</p> <p>Suppression of certain evidence is a required right rather than an optional rule (see Chart 2 specific rights). The right to representation by civilian counsel is included. The procedural rules may no longer provide that evidence shall be admissible if the military judge determines that it would have “probative value to a reasonable person”.</p> <p>10 U.S.C. § 949a(b) (amended as proposed).</p>	In addition to the amendments included in S. 1390, the White House proposal would not permit the Secretary of Defense to provide an exception for the admission of evidence procured through coercion or compulsory self-incrimination that otherwise complies with 10 U.S.C. § 948r. (See Chart 2 heading “Right to Remain Silent” for proposed changes to § 948r).

Jurisdiction over Persons

General Courts Martial	Military Commissions Act of 2006	Sec. 1031 of S. 1390	White House Proposed Amendments to S. 1390
<p>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 or contingency operation, and certain others, including “persons within an area leased by or otherwise reserved or acquired for the use of the United States.”</p> <p>10 U.S.C. § 802.</p> <p>Individuals who are subject to military tribunal jurisdiction under the law of war may also be tried by general court martial.</p> <p>10 U.S.C. § 818.</p>	<p>Any “alien unlawful combatant” is subject to trial by military commission.</p> <p>10 U.S.C. § 948c.</p> <p>An “unlawful enemy combatant” is “a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents”; or a person determined to be an unlawful enemy combatant by a CSRT or other competent tribunal established under the authority of the President or the Secretary of Defense, which determination is dispositive of status. 10 U.S.C. §§ 948a and 948d(c).</p> <p>“Lawful combatant” is defined in terms of the Geneva Convention for the Treatment of Prisoners of War (GPW) Art. 4. 10 U.S.C. § 948a(2).</p> <p>R.M.C. 201 and 202 provide for jurisdictional requirements of military commissions in accordance with the MCA.</p>	<p>“Unprivileged enemy belligerents” having engaged in hostilities or having supported hostilities against the United States is subject to trial by military commission.</p> <p>10 U.S.C. § 948c (amended as proposed).</p> <p>The term ‘unprivileged enemy belligerent’ is defined to mean “an individual (other than a privileged belligerent) who has engaged in hostilities against the United States or its coalition partners; or has purposefully and materially supported hostilities against the United States or its coalition partners....” “Privileged belligerent” is defined in terms of GPW Art. 4.</p> <p>10 U.S.C. § 948a(6-7) (amended as proposed).</p>	<p>No changes.</p>

Jurisdiction over Offenses

General Courts Martial	Military Commissions Act of 2006	Sec. 1031 of S. 1390	White House Proposed Amendments to S. 1390
<p>Any offenses made punishable by the UCMJ; offenses subject to trial by military tribunal under the law of war. 10 U.S.C. § 818.</p>	<p>A military commission has jurisdiction to try any offense made punishable by the MCA or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.</p> <p>10 U.S.C. § 948d(a). Offenses listed in 10 U.S.C. §§ 950q-w and Par IV of the M.M.C. include the following: murder of protected persons; attacking civilians, civilian objects, or protected property; pillaging; denying quarter; taking hostages; employing poison or similar 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; sexual assault or abuse; hijacking or hazarding a vessel or aircraft; terrorism; providing material support for terrorism; wrongfully aiding the enemy; spying, contempt; perjury and obstruction of justice.</p> <p>10 U.S.C. § 950v. Conspiracy (§ 950v(b)(28)), attempts (§ 950t), and solicitation (§ 950u) to commit the defined acts are also punishable.</p>	<p>A military commission has jurisdiction over persons subject to the MCA for offenses made punishable by the MCA, arts. 104 and 106 of the UCMJ, or the law of war. Military commissions are expressly authorized to determine their own jurisdiction.</p> <p>10 U.S.C. § 948d (amended as proposed).</p> <p>MCA offenses remain substantially unchanged, except that there is an express requirement that offenses occurred “in the context of and associated with armed conflict,” Crimes that occurred prior to the enactment of the bill are not precluded to the extent that they are codifications of crimes traditionally triable by military commissions.</p> <p>10 U.S.C. § 950p. (amended as proposed).</p> <p>The definition of “cruel or inhuman treatment” is modified to refer to treatment that constitutes a grave breach of common Article 3 of the Geneva Conventions, regardless of where the crime takes place or the nationality of the victim. (The current definition refers to 18 U.S.C. § 2340(2)).</p> <p>10 U.S.C. § 950w(12) (amended as proposed).</p>	<p>No changes to 10 U.S.C. § 948 (as amended by Senate bill).</p> <p>The proposal would eliminate language requiring offenses to have occurred in the context of an armed conflict to be triable by a military commission, and would retain MCA language declaring that the defined offenses are merely codifications of preexisting law. (See Chart 2 section on the prohibition of ex post facto laws).</p> <p>10 U.S.C. § 950p.</p> <p>The MCA (chapter 47a of title 10, U.S. Code) would sunset five years from enactment of the NDAA FY2010 with respect to new cases).</p>

Composition

General Courts Martial	Military Commissions Act of 2006	Sec. 1031 of S. 1390	White House Proposed Amendments to S. 1390
<p>A military judge and not less than five members, or if requested, except in capital cases, a military judge alone. R.C.M. 501.</p>	<p>A military judge and at least five members, 10 U.S.C. § 948m; R.M.C. 501, unless the death penalty is sought, in which case no fewer than 12 members must be included. 10 U.S.C. § 949m(c).</p> <p>10 U.S.C. § 949m provides that, in death penalty cases where twelve members are not reasonably available because of physical conditions or military exigencies, the convening authority may approve a commission with as few as 9 members.</p>	<p>10 U.S.C. § 948m would remain unchanged. 10 U.S.C. § 949m is amended to reduce the required number of members to 5 in cases in which twelve members are not reasonably available.</p>	<p>No changes.</p>

Chart 2. Comparison of Procedural Safeguards

Presumption of Innocence

General Courts Martial	Military Commissions Act of 2006	Sec. 1031 of S. 1390	White House Proposed Amendments to S. 1390
<p>If the defendant fails to enter a proper plea, a plea of not guilty will be entered.</p> <p>R.C.M. 910(b).</p> <p>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.”</p> <p>R.C.M. 920(e).</p> <p>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.</p> <p>R.C.M. 804.</p>	<p>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.”</p> <p>10 U.S.C. § 949l.</p> <p>If an accused refuses to enter a plea or pleads guilty but provides 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.</p> <p>10 U.S.C. § 949i.</p>	<p>10 U.S.C. § 949l and 10 U.S.C. § 949i would remain unchanged.</p>	<p>No changes.</p>

Right to Remain Silent (Freedom from Coerced Statements)

General Courts Martial	Military Commissions Act of 2006	Sec. 1031 of S. 1390	White House Proposed Amendments to S. 1390
<p>Coerced confessions or confessions made in custody without statutory equivalent of Miranda warning are not admissible as evidence.</p> <p>Art. 31, UCMJ, 10 U.S.C. § 831.</p> <p>Rules of evidence provide that in most cases “an involuntary statement or any derivative evidence therefrom may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection to the evidence under this rule.”</p> <p>Mil. R. Evid. 304.</p> <p>The prosecutor must notify the defense of any incriminating 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.</p> <p>Mil. R. Evid. 304.</p> <p>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.</p> <p>Mil. R. Evid. 305.</p>	<p>Article 31, UCMJ, is expressly made inapplicable.</p> <p>10 U.S.C. § 948b(d).</p> <p>Confessions allegedly elicited through coercion or compulsory self-incrimination that are otherwise admissible are not to be excluded at trial unless it violates section 948r. 10 U.S.C. § 949a(b)(2)(C).</p> <p>Section 948r provides that statements elicited through torture may not be entered into evidence except to prove a charge of torture.</p> <p>A statement obtained prior to the enactment of the DTA through coercion that does not amount to torture is admissible if the military judge finds that</p> <ol style="list-style-type: none"> 1. the “totality of circumstances under which [it] was made renders it reliable and possessing sufficient probative value” and 2. “the interests of justice would best be served” by admission of the statement. <p>Statements taken after passage of the DTA would be admissible if the military judge also finds that</p> <p>“the interrogation methods used to obtain [them] do not violate the cruel, unusual, or inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution.”</p> <p>10 U.S.C. § 948r.</p> <p>Evidence derived from impermissible interrogation methods is not barred.</p>	<p>10 U.S.C. § 948b(d) remains unchanged.</p> <p>Confessions allegedly elicited through coercion or compulsory self-incrimination that are otherwise admissible would continue to be admitted at trial unless in violation of section 948r. 10 U.S.C. § 949a(b)(2)(C). The bill amends section 948r to provide for the exclusion of statements elicited through cruel, inhuman, or degrading treatment prohibited by section 1003 of the DTA (42 U.S.C. 2000dd), regardless of when the statement was made.</p>	<p>The proposal would amend §§ 949a & 948r to make inadmissible all statements elicited through torture or cruel, inhuman, or degrading treatment prohibited by 42 U.S.C. § 2000dd, except against a person accused of torture or such treatment. No statement of the accused would be admissible at trial unless the military judge finds the statement was voluntarily given, taking into consideration all relevant circumstances, including military and intelligence operations during hostilities; the accused’s age, education level, military training; and the change in place or identity of interrogator between that statement and any prior questioning of the accused.</p>

Freedom from Unreasonable Searches and Seizures

General Courts Martial	Military Commissions Act of 2006	Sec. 1031 of S. 1390	White House Proposed Amendments to S. 1390
<p>“Evidence obtained as a result of an unlawful search or seizure ... is inadmissible against the accused ...” unless certain exceptions apply.</p> <p>Mil. R. Evid. 311.</p> <p>“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 law of war. It must be based on probable cause.</p> <p>Mil. R. Evid. 315.</p> <p>Interception of wire and oral communications within the United States requires judicial application in accordance with 18 U.S.C. §§ 2516 et seq.</p> <p>Mil. R. Evid. 317.</p> <p>A search conducted by foreign officials is unlawful only if the accused is subject to “gross and brutal treatment.”</p> <p>Mil. R. Evid. 311(c).</p>	<p>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.</p> <p>10 U.S.C. §§ 948r, 949a.</p> <p>Procedural rules may provide that evidence gathered without authorization or a search warrant may be admitted into evidence.</p> <p>10 U.S.C. § 949a.</p>	<p>Amends 10 U.S.C. § 949a to authorize the Secretary of Defense to provide that “evidence seized outside the United States shall not be excluded from trial by military commission on the grounds that the evidence was not seized pursuant to a search warrant or other authorization.”</p>	<p>No changes.</p>

Effective Assistance of Counsel

General Courts Martial	Military Commissions Act of 2006	Sec. 1031 of S. 1390	White House Proposed Amendments to S. 1390
<p>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.</p> <p>Art. 38, UCMJ, 10 U.S.C. § 838.</p> <p>Appointed counsel must be certified as qualified and may not be someone who has taken any part in the investigation or prosecution, unless explicitly requested by the defendant.</p> <p>Art. 27, UCMJ, 10 U.S.C. § 827.</p> <p>The attorney-client privilege is honored.</p> <p>Mil. R. Evid. 502.</p>	<p>At least one qualifying military defense counsel is to be detailed “as soon as practicable after the swearing of charges....”</p> <p>10 U.S.C. § 948k.</p> <p>The accused may also hire a civilian attorney who</p> <ol style="list-style-type: none"> 1. is a U.S. citizen, 2. is admitted to the bar in any state, district, or possession, 3. has never been disciplined, 4. has a SECRET clearance (or higher, if necessary for a particular case), and 5. agrees to comply with all applicable rules. <p>10 U.S.C. § 949c(b)(3).</p> <p>If civilian counsel is hired, the detailed military counsel serves as associate counsel.</p> <p>10 U.S.C. § 949c(b)(5).</p> <p>No attorney-client privilege is mentioned.</p> <p>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....”</p> <p>10 U.S.C. § 949b.</p>	<p>Amends 10 U.S.C. § 948k to provide that military defense counsel for a military commission “is to be detailed as soon as practicable.” Amends 10 U.S.C. § 949c to permit the appointment of military counsel of the accused’s own selection, if reasonably available.</p> <p>10 U.S.C. § 949c, as it relates to the hiring of civilian counsel, remains substantially unchanged.</p> <p>10 U.S.C. § 949b, prohibiting adverse personnel actions against defense attorneys due to “the zeal with which such officer, in acting as counsel, represented any accused before a military commission....” also remains unchanged.</p>	<p>No changes.</p>

Right to Indictment and Presentment

General Courts Martial	Military Commissions Act of 2006	Sec. 1031 of S. 1390	White House Proposed Amendments to S. 1390
<p>The right to indictment by grand jury is explicitly excluded in “cases arising in the land or naval forces.”</p> <p>Amendment V.</p> <p>UCMJ Article 32 provides for an inquiry similar to grand jury proceedings in federal criminal court.</p> <p>10 U.S.C. § 832.</p> <p>Whenever an offense is alleged, the commander is responsible for initiating a preliminary inquiry and deciding how to dispose of the offense.</p> <p>R.C.M. 303-06.</p>	<p>UCMJ Article 32 hearings are expressly made inapplicable. 10 U.S.C. § 948b(d)(1)(C).</p> <p>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 belief.” The accused is to be informed of the charges and specifications against him as soon as practicable after charges are sworn.</p> <p>10 U.S.C. § 948q.</p>	<p>No substantial change to relevant sections of the MCA.</p>	<p>No changes.</p>

Right to Written Statement of Charges

General Courts Martial	Military Commissions Act of 2006	Sec. 1031 of S. 1390	White House Proposed Amendments to S. 1390
<p>Charges and specifications must be signed under oath and made known to the accused as soon as practicable.</p> <p>Art. 30, UCMJ, 10 U.S.C. § 830.</p>	<p>The trial counsel assigned is responsible for serving counsel a copy of the charges upon the accused, in English and, if appropriate, in another language that the accused understands, “sufficiently in advance of trial to prepare a defense.”</p> <p>10 U.S.C. § 948s.</p>	<p>No substantial change to relevant sections of the MCA.</p>	<p>No changes.</p>

Right to be Present at Trial

General Courts Martial	Military Commissions Act of 2006	Sec. 1031 of S. 1390	White House Proposed Amendments to S. 1390
<p>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 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.</p> <p>R.C.M. 801.</p>	<p>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.</p> <p>10 U.S.C. § 949a(b)(1)(B).</p> <p>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.</p> <p>10 U.S.C. § 949d(e).</p>	<p>No substantial change to relevant sections of the MCA.</p>	<p>No changes.</p>

Prohibition Against Ex Post Facto Crimes

General Courts Martial	Military Commissions Act of 2006	Sec. 1031 of S. 1390	White House Proposed Amendments to S. 1390
<p>Courts-martial will not enforce an ex post facto law, including increasing amount of pay to be forfeited for specific crimes.</p> <p>U.S. v. Gorki, 47 M.J. 370 (1997).</p>	<p>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 <i>Hamdan v. Rumsfeld</i> viewed as invalid as a charge of war crimes. 548 U.S. 557 (2006).</p> <p>The Act declares that it “codif[ies] offenses that have traditionally been triable by military commissions,” and that “because 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.”</p> <p>10 U.S.C. § 950p.</p> <p>The statute expressly provides jurisdiction over the defined crimes, whether committed prior to, on or after September 11, 2001.</p> <p>10 U.S.C. § 948d.</p>	<p>The conspiracy charge would remain available under 10 U.S.C. § 950u (amended as proposed).</p> <p>10 U.S.C. § 950p would be amended to provide that “[t]o the extent that the provisions of this subchapter codify offenses that have traditionally been triable under the law of war or otherwise triable by military commission, this subchapter does not preclude trial for offenses that occurred before the date of the enactment of the National Defense Authorization Act for Fiscal Year 2010.”</p> <p>The language that expressly provides jurisdiction without respect to when the conduct occurred is eliminated.</p>	<p>The proposal would eliminate the charge of “material support for terrorism,” 10 U.S.C. § 950w(25). It would reinstate the proviso that the offenses merely codify existing law regarding offenses that are traditionally triable by military commission, so that persons may be tried for conduct that occurred prior to the enactment of the original MCA.</p> <p>10 U.S.C. § 950p.</p>

Protection Against Double Jeopardy

General Courts Martial	Military Commissions Act of 2006	Sec. 1031 of S. 1390	White House Proposed Amendments to S. 1390
<p>Double jeopardy clause applies.</p> <p>See <i>Wade v. Hunter</i>, 336 US 684, 688-89 (1949).</p> <p>Art. 44, UCMJ prohibits former jeopardy, provides for jeopardy to attach after introduction of evidence.</p> <p>10 U.S.C. § 844.</p> <p>General court-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.</p> <p><i>U. S. v. Stokes</i>, 12 M.J. 229 (C.M.A. 1982).</p> <p>Once military authorities have turned service member over to civil authorities for trial, military may have waived jurisdiction for that crime, although it may be possible to charge the individual for another crime arising from the same conduct.</p> <p>See 54 AM. JUR. 2d, Military and Civil Defense §§ 227-28.</p> <p>In cases in which a rehearing is ordered, the accused may not be tried for any offense of which he was found not guilty, and a sentence cannot be increased unless there is a finding of guilty of an offense not considered in the original proceedings or the sentence prescribed for the offense is mandatory.</p> <p>Art. 63, UCMJ, 10 U.S.C. § 863.</p> <p>The United States may not appeal an order or ruling that amounts to a finding of not guilty.</p> <p>Art. 62, UCMJ, 10 U.S.C. § 862.</p>	<p>“No person may, without his consent, be tried by a military commission a second time for the same offense.” Jeopardy attaches when a guilty finding becomes final after review of the case has been completed.</p> <p>10 U.S.C. § 949h.</p> <p>The United States may not appeal an order or ruling that amounts to a finding of not guilty.</p> <p>10 U.S.C. § 950d(a)(2).</p> <p>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 of the sentence unless the sentence prescribed for the offense is mandatory.</p> <p>10 U.S.C. § 950b(d)(2)(B).</p>	<p>No substantial change to relevant sections of the MCA.</p>	<p>No changes.</p>

Speedy and Public Trial

General Courts Martial	Military Commissions Act of 2006	Sec. 1031 of S. 1390	White House Proposed Amendments to S. 1390
<p>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.</p>	<p>There is no right to a speedy trial. Article 10, UCMJ, 10 U.S.C. § 810, is expressly made inapplicable to military commissions.</p>	<p>No substantial change to relevant sections of the MCA.</p>	<p>No changes.</p>
<p>R.C.M. 707(a).</p>	<p>10 U.S.C. § 948b(d).</p>		
<p>The right to a public trial applies in courts-martial but is not absolute.</p>	<p>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.</p>		
<p>R.C.M. 806.</p>	<p>10 U.S.C. § 949d(d).</p>		
<p>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.</p>			
<p>United States v. Grunden, 2 M.J. 116 (CMA 1977).</p>			

Burden and Standard of Proof

General Courts Martial	Military Commissions Act of 2006	Sec. 1031 of S. 1390	White House Proposed Amendments to S. 1390
<p>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.</p> <p>R.C.M. 920(e).</p>	<p>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 result in acquittal; that reasonable doubt as to the degree of 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 on the government.</p> <p>10 U.S.C. § 949l.</p> <p>Two-thirds of the members must concur on a finding of guilty, except in capital cases. 10 U.S.C. § 949m.</p> <p>The Secretary of Defense may prescribe that the military judge is to exclude 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.</p> <p>10 U.S.C. § 949a.</p>	<p>No substantial change to relevant sections of the MCA, except that the provision for the exclusion of irrelevant, cumulative, or prejudicial evidence is expressly made a right of the accused rather than an optional rule subject to the discretion of the Secretary of Defense.</p> <p>10 U.S.C. § 949a (amended as proposed).</p>	<p>No changes.</p>

Privilege Against Self-Incrimination (Freedom from Compelled Testimony)

General Courts Martial	Military Commissions Act of 2006	Sec. 1031 of S. 1390	White House Proposed Amendments to S. 1390
<p>No person subject to the UCMJ may compel any person to answer incriminating questions.</p> <p>Art. 31(a) UCMJ, 10 U.S.C. § 831(a).</p> <p>Defendant may not be compelled to give testimony that is immaterial or potentially degrading.</p> <p>Art. 31(c), UCMJ, 10 U.S.C. § 831(c).</p> <p>No adverse inference is to be drawn from a defendant's refusal to answer any questions or testify at court-martial.</p> <p>Mil. R. Evid. 301(f).</p> <p>Witnesses may not be compelled to 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.</p> <p>18 U.S.C. § 6002; R.C.M. 704.</p>	<p>"No person shall be required to testify against himself at a commission proceeding."</p> <p>10 U.S.C. § 948r.</p> <p>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"</p> <p>10 U.S.C. § 949l.</p> <p>There does not appear to be a provision for immunity of witnesses.</p>	<p>No substantial change to relevant sections of the MCA.</p>	<p>No changes.</p>

Right to Examine or Have Examined Adverse Witnesses (Hearsay Prohibition)

General Courts Martial	Military Commissions Act of 2006	Sec. 1031 of S. 1390	White House Proposed Amendments to S. 1390
<p>Rules of Evidence prohibit generally the introduction at trial of statements made out of court to prove the truth of the matter stated unless the declarant is available for cross-examination at trial (hearsay rule).</p> <p>Mil. R. Evid. 801 <i>et seq.</i></p> <p>Exceptions exist for cases in which the statement may be presumed to be reliable due to specific circumstances (Rule 803) or the witness is unavailable in court (Rule 804). There is also a “residual exception” (Rule 807), which covers statements not covered under other rules but having similar indicia of trustworthiness. Such statements are admissible if notice is provided to the adverse party sufficient to provide a fair opportunity to prepare to rebut it, and if the military judge determines the statement is more probative of the material fact for which it is offered than other reasonably available evidence and that its admission would serve the interests of justice.</p> <p>Mil. R. Evid. 801 <i>et seq.</i></p> <p>In capital cases, sworn depositions may not be used in lieu of witness, unless court-martial is treated as non-capital or it is introduced by the defense.</p> <p>Art. 49, UCMJ, 10 U.S.C. § 849.</p>	<p>“Defense counsel may cross-examine each witness for the prosecution who testifies before the commission.”</p> <p>10 U.S.C. § 949c.</p> <p>In the case of 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. 10 U.S.C. § 949d(f)(2)(A).</p> <p>Hearsay evidence not admissible under the rules of evidence applicable in trial by general courts-martial is admissible only if the proponent notifies the adverse party sufficiently in advance of its intention to offer the evidence and the particulars of the evidence (including information on the general 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.” 10 U.S.C. § 949a(b)(2)(E).</p>	<p>The right to cross-examine witnesses remains unchanged.</p> <p>The language addressing classified information is amended to alter the procedure for seeking protection for classified evidence, but the options for redaction or substitution remain unchanged. The military judge is required to order the use of a statement, portion, or summary if he determines that the measure “is consistent with affording the accused a fair trial.” The certification by the classifying authority or agency head that evidence and the sources thereof have been declassified to the maximum extent possible consistent with national security concerns is not subject to review or appeal.</p> <p>10 U.S.C. § 949d (amended as proposed).</p> <p>Hearsay evidence that would not be admissible at a general court-martial is admissible if adequate notice is given and the military judge determines that the statement is reliable and is offered as evidence of a material fact, that direct testimony from the witness is not available or would have an adverse impact on military or intelligence operations, and that the general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence. The burden on the opposing party to demonstrate unreliability or lack of probative value is eliminated, shifting the burden of persuasion to the profferer of the evidence.</p> <p>10 U.S.C. § 949a(b)(3) (amended as proposed).</p>	<p>No changes with respect to classified evidence.</p> <p>Hearsay evidence would be expressly admissible under the same rules governing courts-martial. Hearsay evidence not admissible under court-martial procedures “or otherwise inadmissible” could be admitted if the proponent gives adequate notice to the adverse party, including information on the circumstances under which the evidence was obtained; the hearsay is offered as evidence of a material fact; it is more probative than other reasonably available evidence; it is reliable, considering corroborating evidence and indicia of reliability; and the interests of justice will be served by admitting the statement into evidence. The availability of the witness would be immaterial to the admissibility under this exception.</p>

Right to Compulsory Process to Obtain Witnesses

General Courts Martial	Military Commissions Act of 2006	Sec. 1031 of S. 1390	White House Proposed Amendments to S. 1390
<p>Defendants before court-martial have the right to compel appearance of witnesses necessary to their defense.</p> <p>R.C.M. 703.</p> <p>Process to compel witnesses in court-martial cases is to be similar to the process used in federal courts. Moreover, the defense and prosecution “shall have equal opportunity to obtain witnesses and other evidence.”</p> <p>Art. 46, UCMJ, 10 U.S.C. § 846.</p>	<p>Defense counsel is to be afforded a reasonable opportunity to obtain witnesses and other evidence, including evidence in the possession of the United States, according to DOD regulations.</p> <p>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. 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.</p> <p>10 U.S.C. § 949j.</p>	<p>Defense counsel is to be afforded a reasonable opportunity to obtain witnesses and other evidence, including evidence in the possession of the United States, according to DOD regulations.</p> <p>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. The obligation to disclose exculpatory information is expanded to include mitigating evidence, and the obligation extends beyond information known to the trial counsel to include all information that is known or reasonably should be known to any government officials who participated in the investigation and prosecution of the case against the defendant. The military judge may authorize the prosecutor to disclose such information in a redacted or summary form, and shall authorize such alternative forms evidence when consistent with the interests of justice.</p> <p>10 U.S.C. § 949j (amended as proposed).</p>	<p>No changes.</p>

Right to Trial by Impartial Judge

General Courts Martial	Military Commissions Act of 2006	Sec. 1031 of S. 1390	White House Proposed Amendments to S. 1390
<p>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.</p> <p>Art. 26, UCMJ, 10 U.S.C. § 826.</p> <p>UCMJ Article 37 prohibits unlawful influence of courts-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.</p> <p>Art. 37, UCMJ, 10 U.S.C. § 837.</p>	<p>Military judges must take an oath to perform their duties faithfully.</p> <p>10 U.S.C. § 949g.</p> <p>The convening authority is prohibited from preparing or reviewing any report concerning the effectiveness, fitness, or efficiency of a military judge.</p> <p>10 U.S.C. § 948j(a).</p> <p>A military judge may not be assigned to a case in which he is the accuser, an investigator, a witness, or a counsel.</p> <p>10 U.S.C. § 948j(c).</p> <p>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.</p> <p>10 U.S.C. § 948j(d).</p> <p>Convening authority may not censure, reprimand, or admonish the military judge. No person may attempt to coerce or use unauthorized means to influence the action of a commission.</p> <p>10 U.S.C. § 949b.</p> <p>The military judge may be challenged for cause.</p> <p>10 U.S.C. § 949f.</p>	<p>No substantial change to relevant sections of the MCA.</p>	<p>No changes.</p>

Right to Trial by Impartial Jury

General Courts Martial	Military Commissions Act of 2006	Sec. 1031 of S. 1390	White House Proposed Amendments to S. 1390
<p>A military accused has no Sixth Amendment right to a trial by petit jury.</p> <p><i>Ex Parte Quirin</i>, 317 U.S. 1, 39-40 (1942) (dicta).</p> <p>However, “Congress has provided for trial by members at a court-martial.”</p> <p><i>United States v. Witham</i>, 47 M.J. 297, 301 (1997); Art. 25, UCMJ, 10 U.S.C. § 825.</p> <p>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 trial proceedings and the subsequent deliberations.</p> <p><i>United States v. Lambert</i>, 55 M.J. 293 (2001).</p> <p>The absence of a right to trial by jury precludes criminal trial of civilians by court-martial.</p> <p><i>Reid v. Covert</i>, 354 U.S. 1 (1957); <i>Kinsella v. United States ex rel. Singleton</i>, 361 U.S. 234 (1960).</p>	<p>Military commission members must take an oath to perform their duties faithfully.</p> <p>10 U.S.C. § 949g.</p> <p>The accused may make one peremptory challenge, and may challenge other members for cause.</p> <p>10 U.S.C. § 949f.</p> <p>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 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 report or any similar document with potential impact on career-advancement.</p> <p>10 U.S.C. § 949b.</p>	<p>No substantial change to relevant sections of the MCA.</p>	<p>No changes.</p>

Right to Appeal to Independent Reviewing Authority

General Courts Martial	Military Commissions Act of 2006	Sec. 1031 of S. 1390	White House Proposed Amendments to S. 1390
<p>The accused may submit matters concerning the findings and the sentence for consideration by the convening authority. The convening authority may approve, disapprove, commute, or suspend the sentence in whole or in part, set aside a finding of guilty or change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification.</p>	<p>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.</p>	<p>No substantial change to 10 U.S.C. § 950b.</p>	<p>The proposal would modify the appeals process to reinstate the Court of Military Commission Appeals in a role similar to that of the Services' respective Courts of Criminal Appeals, except that all cases in which the convening authority has approved a sentence are referred (unless waived by the accused) for review of the record with respect to any matter properly raised by the accused (including questions of fact as well as law).</p>
<p>Art. 60, UCMJ, 10 U.S.C. § 860.</p>	<p>10 U.S.C. § 950b.</p>	<p>The MCA is amended to substitute the Court of Appeals of the Armed Services (CAAF) rather than the Court of Military Commission Review as the exclusive appellate court. The CAAF's scope of review would include questions of fact as well as law, and the CAAF would have the authority to order charges dismissed. Any CAAF decision may be appealed to the Supreme Court through writ of certiorari.</p>	<p>The U.S. Court of Appeals for the District of Columbia Circuit would serve as the exclusive appellate jurisdiction, without the restrictions on scope and standard of review in the MCA as currently enacted. The CAAF would not have a role. Appeal to the Supreme Court through writ of certiorari would continue to be permitted pursuant to 28 U.S.C. § 1257.</p>
<p>Certain judgments of courts-martial, depending on the severity of the sentence, are directly appealable to the respective Service's Court of Criminal Appeals, which reviews the findings and sentence as approved by the convening authority, considering questions of both fact and law. In the event it sets aside a judgment, it may order a rehearing unless its act was based on insufficiency of evidence in the record to support the findings, in which case it must order a dismissal.</p>	<p>The accused may appeal a final decision of the military commission with respect to issues of law to the Court of Military Commission Review, a new body comprised of appellate military judges who meet the same qualifications as military judges or comparable qualifications for civilian judges.</p>	<p>10 U.S.C. §§ 950c – 950g (amended as proposed). Current 10 U.S.C. § 950f, establishing the Court of Military Commission Review, is repealed. The appellate role of the U.S. Court of Appeals for the District of Columbia Circuit is abolished.</p>	
<p>Art. 66, UCMJ, 10 U.S.C. § 866.</p>	<p>10 U.S.C. § 950f.</p>	<p>Language precluding habeas corpus and other judicial relief is eliminated.</p>	
<p>The accused may petition for review of a Court of Criminal Appeals decision to the Court of Appeals for the Armed Forces, a court of civilian judges that is empowered to act only with respect to matters of law.</p>	<p>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, which is limited to reviewing questions of law regarding "whether the final decision was consistent with the standards and procedures specified in [the MCA] and to the extent applicable, the Constitution and the laws of the United States." D.C. Cir. appellate decisions may be reviewed by the Supreme Court under writ of certiorari.</p>		
<p>Art. 67, UCMJ, 10 U.S.C. § 867.</p>	<p>10 U.S.C. § 950g.</p>		
<p>CAAF decisions, other than denials to hear a case, may be appealed to the Supreme Court through writ of certiorari.</p>	<p>Other review by a civilian court, including review on petition of habeas corpus, is expressly prohibited.</p>		
<p>Art. 67a, UCMJ, 10 U.S.C. § 867a.</p>	<p>10 U.S.C. § 950j (likely unconstitutional under <i>Boumediene v. Bush</i>, 533 U.S. ___, 123 S. Ct. 2229 (2008)(holding § 7 of the MCA to be invalid suspension of the writ of habeas corpus)).</p>		
<p>Burns v. Wilson, 346 U.S. 137 (1953).</p>			

Protection Against Excessive Penalties

General Courts Martial	Military Commissions Act of 2006	Sec. 1031 of S. 1390	White House Proposed Amendments to S. 1390
<p>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.</p> <p>R.C.M. 1004.</p> <p>A conviction of spying during time of war under UMCJ Article 106 carries a mandatory death penalty.</p> <p>10 U.S.C. § 906.</p> <p>Cruel and unusual punishments are prohibited.</p> <p>Art. 55, UCMJ, 10 U.S.C. § 855.</p> <p>In capital cases, “equal opportunity to obtain witnesses and other evidence” under Art. 46, U.C.M.J. may entitle the accused to expert assistance at the Government’s expense .</p> <p>United States v. Kreutzer, 61 M.J. 293 (CAAF 2005).</p> <p>If a sentence extends to death, dismissal, or a dishonorable or bad conduct discharge, that part of the sentence may not be executed until required approval is given and all appeals are exhausted or waived.</p> <p>Art. 71, UCMJ, 10 U.S.C. § 871.</p>	<p>Military commissions may adjudge “any punishment not forbidden by [the MCA] or the law of war, including the penalty of death....”</p> <p>10 U.S.C. § 948d.</p> <p>A vote of two-thirds of the members present 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 on a unanimous guilty verdict. Where the death penalty is sought, a panel of 12 members is required (unless not “reasonably available”). The death penalty must be expressly authorized for the offense, and the charges must have expressly sought the penalty of death.</p> <p>10 U.S.C. § 949m.</p> <p>An accused who is sentenced to death may waive his appeal, but may not withdraw an appeal.</p> <p>10 U.S.C. § 950c.</p> <p>The death sentence may not be executed until the commission proceedings have been finally adjudged lawful and the time for filing a writ has expired or the writ has been denied; and the President approves the sentence.</p> <p>10 U.S.C. § 950i.</p> <p>In capital cases, the accused is not entitled to assistance of counsel with expertise in death penalty cases.</p> <p>10 U.S.C. § 949a (civilian counsel only authorized if provided at no expense of the government).</p>	<p>Military commissions may adjudge “any punishment not forbidden by [the MCA], including the penalty of death when specifically authorized....”</p> <p>10 U.S.C. § 948d (amended as proposed).</p> <p>10 U.S.C. § 950m remains substantially the same, although the minimum number of panel members in capital cases is reduced from 9 to 5 where 12 members are not “reasonably available.”</p> <p>10 U.S.C. § 950c remains substantially unchanged, except for the substitution of the CAAF for the Court of Military Commission Review.</p> <p>The death sentence may not be executed until CAAF review is completed and a petition for a writ of certiorari is not timely filed, the Supreme Court has denied review or completed its review of the case, and the President approves the sentence.</p> <p>10 U.S.C. § 950h (amended as proposed).</p>	<p>No changes, other than technical amendments to reflect proposed appellate structure.</p>

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