CHANGES TO MANUAL FOR MILITARY COMMISSIONS

JONATHAN TRACY & MARY WELD

The National Institute of Military Justice compared the differences between the 2010 and 2007 Manual for Military Commissions. This document highlights those changes. A few of the major changes include:

- Learned counsel required in death penalty cases (R.M.C. 506, 601, 901)
- Right to self-representation (R.M.C. 506)
- Pleading guilty precludes a death sentence (R.M.C. 811 and 901)
- Detention prior to the military commission may not be applied to time served for sentencing (R.M.C. 1001(g))
- Deletion of two aggravating factors for death sentence (R.M.C. 1004)
- Changes to the Court of Military Commission Review (C.M.C.R.) (R.M.C. 1201)
- Privilege against self-incrimination (M.C.R.E. 301)
- Confessions (M.C.R.E. 304)
- Hearsay Rule (M.C.R.E. 803)
- Additional element and comment to the offense of spying (27)
- Additional comment about offenses in violation of the law of war: intentionally causing serious bodily injury (13), murder in violation of the law of war (15), destruction of property in violation of the law of war (16), and intentionally causing serious bodily injury (16), Crimes and Offenses

RULES FOR MILITARY COMMISSIONS

Rule 103 Definitions and rules of construction:

- The 2010 Rules reflect the change in nomenclature from “unlawful enemy combatant” to “unprivileged enemy belligerent”
- The “Geneva Convention Relative to the Treatment of Prisoners of War” is added to the definition section.

Rule 104 Unlawfully influencing the action of military commissions and the United States Court of Military Commission Review:

- This Rule was expanded to include the C.M.C.R.

Rule 106 Delivery of unlawful enemy combatants to civilian authorities:

- In the 2010 Manual, this section has been "reserved." In the 2007 Manual it read, "Under such regulations as the Secretary of Defense may prescribe, unlawful enemy combatants may be delivered upon request to civilian authorities, foreign or domestic, for trial."

Rule 201 Jurisdiction in general:

- The nature of the jurisdiction of military commissions has been changed from "penal or disciplinary" to "penal".

Rule 202 Persons subject to the jurisdiction of the military commissions:

- The military commission is now a competent tribunal to determine whether an accused is a person subject to the commission's jurisdiction. The 2007 Manual gave such authority to the Combatant Status Review Tribunal. This change reflects the *United States v. Omar Khadr*, 1 M.C. 443 (2007) decision in the C.M.C.R. and the updated language in the 2009 MilitaryCommissions Act (M.C.A.).

Rule 203 Jurisdiction over the offense:

- This rule previously included only offenses under the M.C.A. and the law of war. It now includes offenses under the M.C.A., the law of war, and Articles 104 and 106 of the Uniform Code of Military Justice (U.C.M.J.). The additional U.C.M.J. offenses are Aiding the Enemy and Spying.

Rule 307 Swearing of charges:

- This rule now includes a section called "Capital offenses," reading:

> "If the offenses charged are offenses for which the maximum possible punishment is death, the trial counsel will make a recommendation as to whether the convening authority should refer the case to a capital military commission. The trial counsel will include in the transmittal letter which aggravating factor(s) the prosecution intends to prove or rely on to pursue a death sentence pursuant to R.M.C. 1004(b)(1) and (c)."

Rule 308 Notification to the accused:

- Recommendations a trial counsel submits to the convening authority to refer the case to a capital military commission shall be included in the notification to the accused.

Rule 401 Forwarding and disposition of charges in general:

- An added sentence permits superior convening authorities to prohibit inferiors from disposing of charges. The term "convening authority" is defined in Rule 103 as the Secretary of Defense or his delegate, and the terms "superior convening authority" and "superior competent authority" are used interchangeably in Rule 602(f).

Rule 503 Detailing members, military judges, and counsel:

- The requirement that military judges have at least two years' experience as judges has been deleted from this rule.

Rule 505 Changes of members, military judge, and counsel:

- Additional language in the rule provides that members may be substituted after trial

begins, provided the record is read aloud in the presence of the substitute members, the judge, the accused, and counsel.

Rule 506 Accused's right to counsel:

- The rule includes changes adopted in the 2009 M.C.A. An accused may now choose his military counsel, if reasonably available.
- 506(b) requires at least one counsel "learned" in death penalty litigation represent an accused in a capital military commission.
- Additional changes in the right to self-representation are included in 506(d). The waiver of counsel must be knowing, does not affect the detailing of military defense counsel, and, subsequent to the waiver, the accused must "conform the accused's deportment and the conduct of the defense to the rules of evidence, procedure, and decorum applicable to trials by military commission." If the accused fails to follow these conditions, the detailed counsel will perform the functions necessary for the defense.

Rule 601 Referral:

- The new rule uses the phrase "superior convening authority" instead of "Secretary of Defense" as someone who can cause charges to be transmitted for further consideration.
- If the military commission is capital, charges may not be referred until an appropriate learned counsel in death penalty litigation has been provided to the accused.

Rule 701 Discovery:

- 701(e) adds three requirements to the trial counsel's duty to disclose exculpatory evidence:

> "(2) The trial counsel shall, as soon as practicable after referral of charges, disclose to the defense the existence of evidence that reasonably tends to impeach the credibility of a witness whom the government intends to call at trial.
> (3) The trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence that is not subject to paragraph (1) or paragraph (2) but that reasonably may be viewed as mitigation evidence at sentencing.
> (4) The disclosure obligations under this subsection encompass evidence that is known or reasonably should be known to any government officials who participated in the investigation and prosecution of the case against the accused."

Rule 703 Production of witnesses and evidence:

- The new rule includes a discussion noting that the right should be comparable to that in Article III courts.
- 703(e)(C) adds "the Chief Prosecutor or his designee" to the list of who may issue subpoenas.
- 703(f)(4)(C) includes minor changes to the "relief" available in the event that a party believes production orders or subpoenas are unreasonable or oppressive.

Rule 707 Timing of pretrial matters:

- The old rule contained a provision stipulating that continuances could only be granted in the interests of justice. The new 707(b)(4)(E) stipulates that continuances may now be granted as long as they "appear just."
- The language has also been changed so that, instead of being presumptively non-excludable, these delays are presumptively excludable for speedy trial purposes.

Rule 803 Military commission sessions without members:

- The rule provides greater detail concerning the circumstances under which sessions can be convened without members.
- The members shall be the only persons present during their deliberations.

Rule 804 Presence of the accused at trial proceedings:

- The rule includes a new section:
    - "(b) *Exclusion of accused from certain proceedings.* The military judge may exclude the accused from any portion of a proceeding upon a determination that, after being warned by the military judge, the accused persists in conduct that justifies exclusion from the courtroom: (1) to ensure the physical safety of individuals; or (2) to prevent disruption of the proceedings by the accused."

Rule 806 Public Trial:

- The rule allows a judge to close the proceedings "based upon a presentation, including a presentation *ex parte* or *in camera*, by either trial or defense counsel."
- The discussion inserts *United States v. Kaspers*, 47 M.J. 176 (C.M.A. 1997) as additional authority for closing the proceedings to the public. This precedent allows a military judge to close a hearing in "unusual circumstances" warranting an *ex parte* session.

Rule 810 Procedures for rehearings, new trials, and other trials:

- The new rule adds this section:

"(1) *Scope of Rehearing.* Upon a rehearing—
(A) the accused may not be tried for any offense of which the accused was found not guilty by the first military commission; and
(B) no sentence in excess of or more than the original sentence may be imposed unless—
(i) the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings; or
(ii) the sentence prescribed for the offense is mandatory"

Rule 811 Stipulations:

- The new rule offers more discussion pertinent to cases where an accused pleads not guilty but stipulates to facts that meet all of the elements of the crime:

"If the stipulation practically amounts to a confession to an offense to which a not guilty plea is outstanding, it may not be accepted unless the military judge ascertains: (A) from the accused that the accused understands the right not to stipulate and that the

stipulation will not be accepted without the accused's consent; that the accused understands the contents and effect of the stipulation; that a factual basis exists for the stipulation; and that the accused, after consulting with counsel, consents to the stipulation; and (B) from the accused and counsel for each party whether there are any agreements between the parties in connection with the stipulation, and, if so, what the terms of such agreements are.

"A stipulation practically amounts to a confession when it is the equivalent of a guilty plea, that is, when it establishes, directly or by reasonable inference, every element of a charged offense and when the defense does not present evidence to contest any potential remaining issue of the merits. Thus, a stipulation which tends to establish, by reasonable inference, every element of a charged offense does not practically amount to a confession if the defense contests an issue going to guilt which is not foreclosed by the stipulation. Whenever a stipulation establishes the elements of a charged offense, the military judge should conduct an inquiry as described above."

Rule 901 Opening Session:

- The new rule adds two sections detailing what a military judge must inquire about during the opening session:

> (B) In capital cases, inform the accused of the right to at least one additional counsel who is learned in applicable law relating to capital cases and who, if necessary, may be a civilian and compensated in accordance with regulations prescribed by the Secretary of Defense;
>
> (C) Inform the accused that, if afforded requested individual military counsel, the accused may request retention of detailed counsel as associate counsel, which request may be granted or denied in the sole discretion of the authority who detailed the counsel;

Rule 905 Motions generally:

- 905(b)(6) adds that objections about refusal to detail a specific military attorney must be raised before trial.
- Under 905(c)(2), in the event of motions to dismiss for lack of jurisdiction or lack of a speedy trial, the burden will be on the prosecution. In the 2007 Manual, the prosecution only had the burden if the motion was for lack of jurisdiction.

Rule 906 Motions for Appropriate Relief:

- The new rule added this paragraph under grounds for appropriate relief:

> "(b)(2) *Record of denial of individual military counsel or of denial of request to retain detailed counsel when a request for individual military counsel was granted*. If a request for military counsel was denied, which denial was upheld on appeal (if available) or if a request to retain detailed counsel was denied when the accused is represented by individual military counsel, and if the accused so requests, the military judge shall ensure that a record of the matter is included in the record of trial, and may make findings. The trial counsel may request a continuance to inform the convening authority of those findings. The military judge may not dismiss the charges or otherwise effectively prevent further proceedings based on the issue. However, the military judge may grant reasonable continuances until the requested military counsel can be made

available if the unavailability results from temporary conditions or if the decision of unavailability is in the process of review in administrative channels."

Rule 908 Appeals by United States:

- The "Procedure" section is split into two sections, respectively entitled "Procedure for appeals under subsection (a)(1),(a)(2), or (a)(3)" and "Procedure for appeals under subsection (a)(4)".
- Section (a)(4) deals with issues arising out of dismissal with respect to classified information. The discussion notes that this process mirrors the Classified Information Procedures Act (CIPA). Such appeals should be forwarded to the person designated by the Secretary of Defense as Appellate Counsel for the U.S. Appeal shall be filed with the C.M.C.R. The C.M.C.R. shall hear such appeals within four days. The government may appeal that court's ruling to the D.C. Court of Appeals.
- Other language has been re-ordered, to make it clearer that a ruling of "not guilty" on a given charge may not be appealed.

Rule 910 Pleas:

- The rule includes important new language in the discussion section subsequent to Section (a)(1) dealing with an accused who wishes to plead guilty in a capital military commission:

  "In the discussion under this rule in the 2007 Manual for Military Commissions, the following sentence appeared: "The M.C.A. permits an accused to plead guilty to a capital offense referred to a capital military commission, at which trial death remains an authorized sentence, notwithstanding the accused's plea of guilty." That sentence has been omitted in the 2010 Manual. The omission of that sentence, however, does not suggest that an accused cannot accept responsibility for guilt in a capital case. In the event an accused desires to accept responsibility and avoid a lengthy proceeding on the question of guilt or innocence, an accused may choose, for example, not to contest the admission of evidence by the prosecution or may choose not to enter evidence on his behalf. An accused may also enter into stipulations of fact or expected testimony, including confessional stipulations. See R.M.C. 811(c)."

Rule 912 Challenge of selection of members; examination and challenges of members:

- The new rule does not include the list of items the trial counsel and defense counsel may include in questionnaires to the members. Now, questionnaire items are subject to the approval of the military judge.

Rule 916 Defenses:

- The word "assault" is replaced with language relating to "threat or infliction of bodily injury."

Rule 1001 Presentencing procedure:

- The new rule adds 1001(g), precluding credit for time served:

  "(g) *Detention.* The physical custody of alien enemy belligerents captured during hostilities does not constitute pretrial confinement for purposes of sentencing and the military judge shall not grant credit for pretrial detention."

Rule 1003 Punishments:

- Additional language is included at 1003(b)(1):

  "For an offense under the law of war not listed in Part IV of this Manual, nor included in or closely related to an offense listed therein, a military commission may adjudge any punishment not prohibited by the law of war."

- Further additional language at1003(b)(2) reads:

  "Cruel or unusual punishments prohibited. Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a military commission under chapter 47A of title 10, United States Code, or inflicted under chapter 47A of title 10, United States Code, upon any person subject to that chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited under chapter 47A of title 10, United States Code."

Rule 1004 Capital Cases:

- The new rule deletes two aggravating factors from the list of factors needed to authorize a death sentence:

  "That the accused was convicted of an offense, referred as capital, that is a violation of the law of war;" and
  "That the accused committed Offense 27 (Spying)."

Rule 1005 Instructions on Sentence:

- The new rule deletes this required instruction:

  "(5) In the event of a pretrial agreement under Rule 705, in which a range of punishment is specified as a condition of the agreement, the military judge shall instruct the members, without informing them of the existence of a pretrial agreement, as to the minimum permissible punishment (as reflected in the quantum agreed to by the accused and the convening authority), and the maximum permissible punishment (also as reflected in the quantum portion)."

Rule 1101 Report of result of trial; post-trial restraint; deferment of confinement and fine:

- The discussion under (b)(3), authorizing continued detention of a person on proper grounds other than the offenses for which the accused was tried at the military commission, has changed from "This section acknowledges that even in the face of an acquittal, continued detention may be appropriate under the law of war" to "This section acknowledges that even in the face of an acquittal, continued detention may be authorized by statute, such as the 2001 Authorization for Use of Military Force, as informed by the laws of war."

Rule 1103 Preparation of the Record of Trial:

- The rule includes an additional discussion note:

  "Where appropriate, and as provided in regulations prescribed by the Secretary of Defense, copies other than the complete record of the proceedings and testimony of a military commission may contain an index of classified materials in lieu of classified materials that are part of the record of proceedings."

Rule 1107 Action by the Convening Authority:

- The new rule adds more instruction on when a convening authority may order a rehearing:

> "(e)(1) *In general*. A rehearing may be ordered by the convening authority if the convening authority disapproves the findings and sentence and states the reasons for disapproval of the findings. If the convening authority disapproves the finding and sentence and does not order a rehearing, the convening authority shall dismiss the charges. A rehearing as to the findings may not be ordered by the convening authority when there is a lack of sufficient evidence in the record to support the findings. A rehearing as to the sentence may be ordered by the convening authority if the convening authority disapproves the sentence."

Rule 1113 Execution of Sentences:

- After the statement that death sentences may only be ordered executed by the President, an additional instruction regarding death sentences is included:

> "(c) A punishment of death may be ordered executed only by the President. In such a case, the President may commute, remit, or suspend the sentence, or any part thereof, as he sees fit.
>
> "(1) *Final judgment.*
>
> (A) If the sentence of a military commission under chapter 47A of title 10, United States Code, extends to death, the sentence may not be executed until there is a final judgment as to the legality of the proceedings (and with respect to death, approval under subparagraph (b) of this rule).
>
> (B) A judgment as to legality of proceedings is final for purposes of subparagraph (c)(1)(A) of this rule when review is completed in accordance with the judgment of the United States Court of Military Commission Review and—
>
> (i) the time for the accused to file a petition for review by the United States Court of Appeals for the District of Columbia Circuit has expired, the accused has not filed a timely petition for such review, and the case is not otherwise under review by the Court of Appeals; or
>
> (ii) review is completed in accordance with the judgment of the United States Court of Appeals for the District of Columbia Circuit and—
>
> (a) a petition for a writ of certiorari is not timely filed;
>
> (b) such a petition is denied by the Supreme Court; or
>
> (c) review is otherwise completed in accordance with the judgment of the Supreme Court."

Rule 1201 The United States Court of Military Commission Review:

- The new rule includes some minor changes in the appointment of judges that reflect changes in the 2009 M.C.A.
- The Chief Judge now makes regulations for submission of written briefs. (It was previously the Secretary of Defense).
- New language reads:

"The Court may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved**.** In considering the record, the Court may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the military commission saw and heard the witnesses. If the Court sets aside the findings and sentence, the Court may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If the Court sets aside the findings or sentence and does not order a rehearing, it shall order that the charges be dismissed."

- Language from the old rule that does not appear in the new rule:
  "No relief may be granted unless an error of law prejudiced a substantial trial right of the accused." More new language: "*Lesser included offense*. Any reviewing authority with the power to approve or affirm a finding of guilty by a military commission under chapter 47A of title 10, United States Code, may approve or affirm, instead, so much of the finding as includes a lesser included offense."

Rule 1202 Appellate Counsel:

- The new rule provides much greater detail on the appointment of appellate counsel for the government and the accused.

Rule 1205 Further Review:

- The accused can now waive review by the C.M.C.R.
- The new rule also includes a section allowing the government to petition the United States Court of Appeals for the District of Columbia Circuit within 20 days after the date on which written notice of the final decision of the C.M.C.R. is served on the government.

MILITARY COMMISSION RULES OF EVIDENCE

Rule 102 Purpose and construction:

- The new rule is expanded with the following language:
  "The rules for military commissions set forth in chapter 47A, title 10, United States Code, and this Manual are based upon the rules for trial by general courts-martial under chapter 47 of title 10 (the Uniform Code of Military Justice). Chapter 47 of title 10 does not, by its terms, apply to trial by military commission except as specifically provided therein or in chapter 47A of title 10, and many of the provisions of chapter 47 of title 10 are by their terms inapplicable to military commissions. The judicial construction and application of chapter 47 of title 10, while instructive, is therefore not of its own force binding on military commissions established under chapter 47A of title 10, United States Code."

Rule 104 Preliminary questions:

- The new rule includes additional language as follows:
  "(f) *Statements of the accused*. A statement of the accused that is otherwise admissible shall not be excluded from trial by military commission on grounds of alleged coercion or compulsory self-incrimination so long as the evidence

complies with the provisions of Mil. Comm. R. Evid. 301 and 304."

Rule 301 Privilege concerning compulsory self-incrimination:

- The discussion following part (a) of this Rule has been modified to include the words "At a minimum," in the following context:

  "At a minimum, alien unprivileged enemy belligerents have a statutory privilege against self incrimination under 10 U.S.C. § 948r (b). Other witnesses, such as United States citizens, may invoke privileges under the U.S. Constitution or Article 31 of the U.C.M.J., to the extent they apply."

- This discussion was deleted:

  "If the accused voluntarily introduces his own prior hearsay statements through the direct examination of a defense witness, but the accused exercises his right not to testify himself at the proceeding, the military judge shall instruct the members prior to the beginning of their deliberations: "The accused has the absolute right to testify as a witness or to choose not to testify in this proceeding. That the accused exercised (his)(her) right not to testify should not be held against (him)(her). However, in this case, the accused has voluntarily offered his prior statements as part of (his)(her) defense by eliciting those statements through other defense witnesses. At the same time, the accused, by electing not to testify in the proceeding, has prevented the Government from subjecting those statements to cross-examination. In evaluating the weight to be accorded to the accused's hearsay statements, you may consider the fact that the accused chose not to be cross-examined on those statements and that those statements were not sworn testimony."

- The new rule changes this discussion note by deleting the underlined portion:

  References to the Fifth Amendment of the U.S. Constitution and Article 31 of the U.C.M.J. that can be found in Mil. R. Evid. 301 have been deleted as inapposite. Under the M.C.A., an alien unlawful enemy belligerent's privilege against self-incrimination is limited to his testimony before a military commission. *See* 10 U.S.C. § 948r(a).

Rule 304 Confessions, Admissions, and Other Statements:

- The new rule contains several significant changes that mirror changes made in the 2009 M.C.A.
- Under the "General Rules" section, statements obtained by torture, or cruel, inhuman, or degrading treatment are defined by reference to the Detainee Treatment Act, whereas the 2007 Manual referred to the 2006 M.C.A. It is also noted that it is irrelevant whether the statements were obtained under color of law or not.
- With regard to statements by the accused other than those described in the paragraph above, this is the new language:

  "*Other Statements of the Accused.* A statement of the accused may be admitted in evidence in a military commission only if the military judge finds—

  (A) that the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and

  (B) that—

  (i) the statement was made incident to lawful conduct during military operations at the point of capture or during closely related

active combat engagement, and the interests of justice would best be served by admission of the statement into evidence; or
(ii) the statement was voluntarily given."

- With regard to statements made by persons other than the accused, the language is similar:

> "*Statements from persons other than the accused allegedly produced by coercion*. When the degree of coercion inherent in the production of a statement from a person other than the accused offered by either party is disputed, such statement may only be admitted if the military judge finds that—
>
> (A) the totality of the circumstances renders the statement reliable and possessing sufficient probative value;
> (B) the interests of justice would best be served by admission of the statement into evidence; and
> (C) the statement was not obtained through the use of torture or cruel, inhuman, or degrading treatment as defined in section 1003(d) of the Detainee Treatment Act, Pub. L. 109-148 (2005) (codified at 42 U.S.C. 2000dd(d))."

- The rule includes a new section entitled "The Determination of Voluntariness" at (a)(4). The judge is instructed to take into account the military context, "the characteristics of the accused, such as military training, age, and education level", and the "lapse of time, change of place, or change in identity of the questioners between the statement sought to be admitted and any prior questioning of the accused."
- Another new section is "Derivative evidence" at (a)(5). Evidence derived from a statement that would be excluded under section (a)(1) (torture or cruel, inhuman or degrading treatment) may not be received in evidence unless the military judge determines it would have been obtained anyway, or if the admission thereof is in the "interests of justice."
- Finally, a new section called "Evidence Derived from other Excludable Statements of the Accused" at (a)(5)(B), provides that evidence may not be admitted if the accused makes a timely objection to the introduction thereof, unless the totality of the circumstances suggests the evidence is reliable and probative and admission is in the interests of justice.
- A significant section from the 2007 rule was replaced by the paragraphs above; the deleted section distinguished between statements allegedly obtained by coercion prior to December 30, 2005 (the entry into law of the Detainee Treatment Act) and those obtained after the D.T.A. went into effect. A subsidiary discussion of the D.T.A.'s impact on military commissions has been deleted from the 2010 Manual.
- The new rule also includes changes to the definition of cruel, inhuman or degrading treatment" in paragraph (b). This is now defined as cruel, unusual, or inhuman treatment under the $5^{th}/8^{th}/14^{th}$ Amendments, as defined in the US Reservations to the Convention Against Torture, "without geographical limitation."
- Section (c), the procedure section, references the protections of Mil. Com. R. Evid. 505 (Classified information) and 506 (Government information other than classified information), rather than 505 alone.
- Paragraph (f), "Completeness," also refers to 505 and 506, rather than 505 alone.
- An "Impeachment" section has been added at (f)(3), with the following content:

> "*Impeachment*. Statements of the accused that would be excluded under this rule may not be used to impeach by contradiction the in-court testimony of the accused."

Rule 306 Statements by one of several accused:

- This rule has been reserved. It used to read:

  "When two or more accused are tried at the same trial, evidence of a statement made by one of them which is admissible only against him or her or only against some but not all of the accused may not be received in evidence unless all references inculpating an accused against whom the statement is inadmissible are deleted effectively or the maker of the statement is subject to cross-examination."

Rule 501 General Rule:

- Section (d) has been added:

  "Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity."

Rule 505 Classified Information:

- This rule contains extensive changes reflecting the 2009 M.C.A.
- The new rule adds these lines to (a)(1):

  "Under no circumstances may a military judge order the release of classified information to any person not authorized to receive such information."
  "(a)(2) *Access to Evidence.* Any information admitted into evidence pursuant to any rule, procedure, or order by the military judge shall be provided to the accused. "
  "(3) *Declassification*. Trial counsel shall work with the original classification authorities for evidence that may be used at trial to ensure that such evidence is declassified to the maximum extent possible, consistent with the requirements of national security. A decision not to declassify evidence under this section shall not be subject to review by a military commission or upon appeal."
  "(4) *Construction of Provisions*. The judicial construction of the Classified Information Procedures Act (18 U.S.C. App.) shall be authoritative in the interpretation of this rule, except to the extent that such construction is inconsistent with the specific requirements of this rule."
- The section in the 2007 Manual entitled "In camera presentation," located in the "Definitions" section of this rule, has been deleted from the 2010 Manual.
- With regard to pretrial conferences about the protection of classified information, language has been added specifying that they may be held *ex parte*, in keeping with the practice of federal courts and CIPA.
- A section has been inserted about questions of timing settled in the pretrial conference, such as the timing of discovery, the provision of notice for Rule 505(g) and (h), and noting that in the pretrial conference the judge can handle any business relating to the introduction of classified information, or anything that is in the interest of a fair trial.
- Language is added stipulating that admissions made by an accused during a pretrial conference cannot be used against him or her unless made in writing, signed by the accused and co-signed by counsel.
- Language is inserted in paragraph (e), "protective orders" to protect classified information that was not disclosed by the prosecution to the defense, but that the defense obtained

through other means.

- A section entitled "Protection of the fairness of the proceeding" has been deleted. This provision empowered the judge, upon the discovery of Government abuse of these alternative disclosure rules, to take corrective measures, including the dismissal of charges with prejudice.
- A new section called "Reciprocity" has been inserted. This section requires that, if the judge allows the introduction by the accused of classified information, the government shall disclose the evidence it plans to use in rebuttal, and if the government refuses, the judge may forbid the government's rebuttal.

Rule 802 Hearsay rule:

- This rule is now reserved. In the 2007 Manual, it read:

> "Hearsay may be admitted on the same terms as any other form of evidence except as provided by these rules or by any Act of Congress applicable in trials by military commissions."
> "Discussion"
> "The M.C.A. recognizes that hearsay evidence shall be admitted on the same terms as other evidence because many witnesses in a military commission prosecution are likely to be foreign nationals who are not amenable to process, and other witnesses may be unavailable because of military necessity, incarceration, injury, or death. Because hearsay is admissible on the same terms as other evidence, the proponent still has the burden of demonstrating that the evidence is admissible under Mil. Comm. R. Evid. 401 and 403."

Rule 803 Admissibility of hearsay:

- The language in the new rule reflects changes made in the 2009 M.C.A. It has been amended so that hearsay can be admitted if notice is given to the adverse party, and the judge finds that a) the statement is relevant, b) the statement is probative, c) direct testimony is not readily available, and d) the goals of the rules of evidence and justice are best served by introduction.

Crimes and Elements

- New language at the beginning of this section is as follows:

> "Elements of offenses for cases triable by military commission under chapter 47A of title 10, United States Code, may be prescribed by the Secretary of Defense. Such procedures may not be contrary to or inconsistent with chapter 47A of title 10, United States Code."

Section 1 Definitions:

- The section entitled "(Section 950v) – Crimes triable by military commissions" has been replaced by a section entitled "Definitions." Definitions for "construction of certain offenses," "common circumstances," and "effect" have been added to the 2007 definitions of "military objective," "protected person," and "protected property."

Section 5 Crimes triable by military commission

- Throughout the "Crimes and Elements" section, the phrase "armed conflict" has been

replaced with the word “hostilities.”

- “Attempts” and “Solicitation” are now listed with the other offenses, rather than before them.
- “(12) Cruel or inhuman treatment” has been changed. An element of the offense is now listed as behavior that was a grave breach of Common Article 3 of the Geneva Conventions. Also, a lengthy section called “Definitions” in the 2007 Manual has been deleted from this section.
- “(13) Intentionally causing serious bodily injury” has a different comment section. The old language said that the accused must not be a lawful combatant. The new language is as follows:

  > “d. *Comment*. For purposes of offenses (13), (15), (16), and (27) in Part IV of this Manual (corresponding to offenses enumerated in paragraphs (13), (15), (16), and (27) of § 950t of title 10, United States Code), an accused may be convicted in a military commission for these offenses if the commission finds that the accused employed a means (e.g., poison gas) or method (e.g., perfidy) prohibited by the law of war; intentionally attacked a “protected person” or “protected property” under the law of war; or engaged in conduct traditionally triable by military commission (e.g., spying; murder committed while the accused did not meet the requirements of privileged belligerency) even if such conduct does not violate the international law of war.”

  - The comment that was deleted from the 2007 Manual is as follows: “d. *Comment.* For the accused to have been acting in violation of the law of war, the accused must have taken acts as a combatant without having met the requirements for lawful combatancy. It is generally accepted international practice that unlawful enemy combatants may be prosecuted for offenses associated with armed conflicts, such as murder; such unlawful enemy combatants do not enjoy combatant immunity because they have failed to meet the requirements of lawful combatancy under the law of war.”
  - The substitutionof the older comment to this rule with the newer comment is also made, verbatim, in offense 15 (Murder in violation of the law of war), offense 16 (Destruction of property in violation of the law of war), and offense 27 (Spying).
- “20 Intentionally mistreating a dead body” includes the following additional language:

  > “(3) The term ‘necessary’ as used in this section means ‘necessity.’

- “(27) Spying” includes an added element: a requirement that “The conduct was in violation of the law of war.” The section has also replaced the old comment with a new comment in a manner identical to that described in the changes to Rule 13, Intentionally causing serious bodily injury, above.
- “(31) Contempt” has been added, with the following language:

  > “A military commission under this chapter may 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.”