To the victims of the September 11, 2001 terrorist attacks and to those killed and wounded in the cause of freedom.
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The tragic events of September 11, 2001 have had momentous legal as well as human and political consequences. Among them, a significant new field – the law of military commissions – has emerged rapidly and not without controversy. We are still uncertain of how widespread its practice will be or how deep its inroads upon the rights and guarantees afforded by our more traditional criminal and military justice systems. This second volume of the Military Commission Instructions Sourcebook, issued less than a year after the first volume, tells us both that the body of governing law, formal and informal, in this field is growing exponentially and that a formidable group of American legal and human rights organizations (NGOs) is vigilantly watching that growth spurt and exercising its rights to comment (when permitted) and to criticize the new structures and practices under which these commissions will operate. Their vigilance and their contributions are indispensable to the formulation of proceedings that are fair as well as expeditious.

The always delicate balance between the insistent pressures of national security and the irresistible demands of a free society teeter on the brink of irretrievable loss in precarious times, such as these. Military commissions are currently reserved for non-citizens accused of war crimes, crimes against humanity and related acts committed during the elusive war against terrorism. But that limitation could change and decisions and precedents set now in the narrower context may surface later in a broader one. It thus behooves lawyers and concerned Americans, civilians and military personnel, to engage as actively as they can in the dialogue surrounding these commissions, their scope and their procedures. This Sourcebook is an indispensable aid to that end.

In the end, military commissions may be the face of justice we project most vividly to the rest of the world. We would do well to make that image straight, transparent and clean.

Patricia M. Wald

Washington, D.C.
March 2004
This volume—issued as part of the National Institute of Military Justice's Military Commissions Documentation Project—supplements NIMJ's 2002 ANNOTATED GUIDE (published by and available from LexisNexis) and initial, June 2003, Sourcebook. It includes materials that were available through the end of 2003, such as the Federal Register versions of Military Commission Order No. 1 and MCIs 1-8, the final version of MCI 9, resolutions of bar organizations, and analyses by public interest and bar organizations of the MCIs issued to date. Because MCI 5 was informally amended after its original issuance in April 2003, a Supplemental Discussion by Matthew S. Freedus, Kevin J. Barry and Grant S. Lattin has been included, updating the one by Prof. Mary M. Cheh in the first Sourcebook. This volume also includes a Discussion of MCI 9, which was issued as 2003 drew to a close. Because the Department of Defense insisted on confidentiality when it circulated a draft of MCI 9 to a limited number of nongovernmental reviewers, that draft has been omitted. We hope to include it in a future Sourcebook.

The public record remains incomplete. NIMJ requested copies of all public comments on the Military Commission Orders and MCIs. Despite the passage of time, the quickening pace of developments, and the resulting heightened need for timely bar and public access to all background materials, the Department of Defense released only a handful of inconsequential documents, leading NIMJ to sue it under the Freedom of Information Act. Because there is no way of knowing when that case will be concluded, and because military commission trials now, at last, seem to be imminent, we have thought it best to go ahead with this volume, even though there will be further catching up to do once the FOIA litigation has run its course.

Looking ahead, the flow of source documents is certain to change both in nature and in volume. There will be pleadings and motions, rulings by military commissions, party and amicus briefs to and opinions by the Review Panel, reviews by the legal advisor to the Appointing Authority, actions by the Appointing Authority, the Secretary of Defense, and perhaps the President, and presumably decisions by the federal courts. There may also be additional MCIs and changes to those previously issued, as well as a "trial guide."

Eugene R. Fidell

Washington, D.C.
March 2004
Kevin J. Barry, an attorney in private practice in Chantilly, Virginia, is a director and co-founder of the National Institute of Military Justice. He served in the United States Coast Guard from 1966 to 1990, retiring in the grade of Captain. His military duty included service as a trial and appellate judge.

Eugene R. Fidell is president of the National Institute of Military Justice and a partner in the Washington, D.C., law firm of Feldesman Tucker Leifer Fidell LLP. He served in the United States Coast Guard from 1969 to 1972 and taught military justice at Yale Law School in 1993 and 1998. He has also served as a public member of the Code Committee on Military Justice.

Matthew S. Freedus is an associate at the Washington, D.C., law firm of Feldesman Tucker Leifer Fidell LLP. He served as a defense counsel in the United States Navy Judge Advocate General’s Corps from 1998 to 2001.

Elizabeth Lutes Hillman is Assistant Professor of Law, Rutgers University (Camden) School of Law and a member of the advisory board of the National Institute of Military Justice. She served in the United States Air Force from 1989 to 1996, and was Reporter for the Commission on the Fiftieth Anniversary of the Uniform Code of Military Justice.

Grant Lattin is a retired United States Marine Corps Lieutenant Colonel and judge advocate, currently practicing military law in Northern Virginia. He served as a member of the National Institute of Military Justice advisory board from 2001 to 2003, and chaired the Military Law Committee of the Bar Association of the District of Columbia during the same period.

Adele H. Odegard served 24 years as a United States Army judge advocate, retiring in January 2003 in the grade of colonel. She is a graduate of Princeton University and the Rutgers University (Camden) School of Law, and a member of the Pennsylvania and Virginia bars and the National Institute of Military Justice advisory board.

Patricia M. Wald served on the United States Court of Appeals for the District of Columbia Circuit from 1977 to 1999, and was Chief Judge from 1986 to 1991. She
served as a Judge of the International Criminal Tribunal for the Former Yugoslavia from 1999 to 2001.
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Dear President Bush,

The International Commission of Jurists (ICJ), which is an international non-governmental organisation, consists of judges and lawyers who represent all the regions and legal systems in the world working to uphold the rule of law and the legal protection of human rights.

At a general meeting of all Commissioners and network members, which coincidentally was held during the week of the 11 September terrorist attacks in the United States, the ICJ adopted a resolution expressing its horror at the devastating and inhuman terrorist attacks and its heartfelt sympathy for all the tragic victims and their families and to the American people. The ICJ also affirmed its condemnation of all acts of terrorism, which it considered to constitute a vicious violation and subversion of a world order on peace, justice, fundamental human rights and the rule of law. The ICJ urged all governments, all non-governmental organisations and all peoples dedicated to peace, human rights and the rule of law to stand in resolute and committed condemnation of all forms of terrorism.

The ICJ is impressed by the dedication and seriousness of purpose that the United States has brought to bear since the attacks in its effort to combat terrorism. Nonetheless, the ICJ is deeply concerned that certain measures presently being implemented or considered by your government may serve to undermine the very principles that they are aimed at protecting. Particularly troubling is the Executive Order issued by you on 13 November 2001, which
authorises the establishment of military commissions to try persons accused of terrorist activities. If implemented, the provisions of this Executive Order may serve to contravene a number of the most fundamental principles relating to the due process and separation of powers. Accordingly, the ICJ would ask that you give serious consideration to rescinding or amending the Executive Order in a manner consistent with the requirements of international law and the United States Constitution.

While the precise rules of procedures of any prospective military Commissions have yet to be announced, the ICJ believes their operation may fail to conform to the minimum standards under both United States and international law for the administration of justice, including the guarantees of liberty and to a fair trial. Among the most problematic features of the tribunals as set forth by the administration of justice, including the guarantees of liberty and to a fair trial. Among the most problematic features of the tribunals as set forth by the

- Lack of recognition of the right of detainees to be afforded access to legal counsel
- Lack of recognition of the right for detainees to be informed of charges against them
- Lack of recognition of the right of detainees to be brought before a judicial authority in order to determine the lawfulness of their detention
- No requirement that trials and other proceedings be open and public
- No requirement that judgements or records of proceedings be publicised
- Lack of recognition of the right of accused persons to be provided with the evidence against them
- The accused does not necessarily enjoy the presumption of innocence
- No evidentiary standard, such a "proof beyond a reasonable doubt", is necessary to secure convictions
- There is no role whatsoever provided for the judiciary in any phase of process
- The only appeal available is to the Executive
- The accused may be convicted by a mere two-thirds majority and may be subjected to the death penalty.
- No notice as to the particular offenses to be covered by the Executive order. (The Order mentions only "acts of international terrorism", without specifying the particular acts may consist in or in what sources of law they are to be found.)

You have no doubt received a great deal of comment from experts on the possible deficiencies that the Executive Order contains with regard to Constitutional and other domestic law requirements. The ICJ would therefore simply highlight certain of the international law obligations of the United States of which the proposed military commissions may well fail aforesaid. It is the opinion of the ICJ that each of potential features of the Military Commissions enumerated above may constitute breaches of such obligations.

The International Covenant on Civil and Political Rights (ICCPR), to which the United States is a Party, provides for the right to liberty and security of person, including the right to be free from arbitrary arrest or detention. Under the provisions of article 9, arrested persons must be informed of charges against them, must be brought promptly before a judicial authority, have the right to challenge the lawfulness of their detention, and are entitled to a trial or release within a reasonable time.

As you may be aware, the 1949 Geneva Conventions are among the most well established and widely subscribed to treaties in the international law canon. The United States is a long time party to the Conventions and has long been committed to its principles. Article 3, common to the four 1949 Geneva Conventions, sets forth certain minimum standards, including prohibiting at any time and in any place, the passing of sentences and the carrying out of executions without previous judgment pronounced by regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Article 14 of the ICCR enshrines the right of all persons to a fair and public hearing by a competent and independent and impartial tribunal established by law. The provisions spells out a number of elements of contained in this right, including the presumption of innocence, the right to defense by counsel of one's own choosing, the right to examine witnesses and equality of arms in the
examination of witnesses, and the right to review by a higher tribunal.

It remains unclear as to whether your Government considers itself to be under a state of emergency within the meaning of article 4 of the ICCPR, which would allow for the United States to undertake measures in derogation of some provisions of the ICCPR. Certainly no notification of such a state of emergency has been provided to the United Nations Secretary-General, as required under article 4 (3) of the ICCPR. If the United States were to proclaim a state of emergency, such emergency would have to be of such gravity as to threaten the life of the nation. Any derogating measure undertaken would have to be strictly required by the exigencies of the emergency situation.

The United Nations Human Rights Committee, the body responsible for supervising the implementation of the ICCPR, has commented that: as certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention must not be diminished by a State party’s decision to derogate from the Covenant. (CHR General Comment 29.)

The Committee also notes that judicial review of a detention and the right to habeas corpus must remain available even in an emergency situation.

The right to a fair trial no doubt is a guarantee directed to protect individuals charged with a criminal offense. However, it must be stressed that a principal reason that this right has become such a well entrenched principle within the jurisprudence of nations of the world is that without fair trials, the truth of events is unlikely to emerge. Absent the full safeguards afforded to accused individuals, innocent persons are likely to be convicted.

The ICJ is confident that the United States judicial system, among the most highly developed in the world, has the full capacity to conduct fair and effective trials in terrorist cases. Recent prosecutions of terrorists in civilian courts such as in the case of persons charges with the previous bombing of the World Trade Center and attacks on United States embassies in Tanzania and Kenya seem to bear this out. And if certain narrowly circumscribed components of the trial need for legitimate reason to be kept secret, there exist mechanisms through the ordinary judicial channels of the civilian court system that make such a procedure possible.

On a policy level, it seems that the United States would well serve both its own national values and the world community by setting an example in conducting trials in view of the world. Such an undertaking would be important not only to achieve justice in respect of grave crimes, but could also have an educative effect on the international community at large. By keeping most aspects of trials out of the public domain, the United States would be forgoing an opportunity to demonstrate the imperative of human society based on the rule of law, the very destruction of which the terrorists who conducted the 11 September attacks sought to achieve. As some governments and members of the public have expressed suspicions as to the true motives and intentions of your government in confronting terrorism, the conviction of public trials would pose an opportunity to clarify the record and would accord the legitimacy to the process that would no doubt be lacking through the use of military commissions.

In this regard, I would refer your attention to the observations of Mr. Justice Robert Jackson, a member of the US Supreme Court who was the United States Representative to the International Military Tribunal at Nuremberg during 1945-46. Facing judgment at Nuremberg were the authors of some of the most heinous criminal acts in recorded history. In his letter to President Truman of 7 October 1946, reporting on the outcome of the Nuremberg trials, Mr. Justice Jackson remarked:

In a world torn with hatreds and suspicions where passions are stirred by the "frantic boast and foolish word," the Four Powers [The United States, Great
Britain, France, the Soviet Union] have given the example of submitting their grievances against these men to a dispassionate inquiry on legal evidence. The atmosphere of the Tribunal never failed to make a strong and favorable impression on visitors from all parts of the world because of its calmness and the patience and attentiveness of every Member and Alternates of the tribunal. The nations have given the example of leaving punishment of individuals to the determination of independent judges, guided by principles of law, after hearing all of the evidence for the defense as well as the prosecution. It is not too much to hope that this example of full and fair hearing, and tranquil and discriminating judgment will do something toward strengthening the processes of justice in many countries.

It is with these considerations in mind that the ICJ would ask that you and the members of your administration rethink your position with regard to Military Commissions and ultimately opt to try accused terrorists before your country’s civilian courts.

Yours sincerely,

Louise Doswald-Beck
ICJ Secretary-General

Note: also refer to the Statement regarding the Executive Order issued by President Bush 13. November to Combat Terrorism made by ICJ affiliated organisation, the Norwegian Association of Judges.
Center for National Security Studies
Protecting civil liberties and human rights

Advisory Board Chair
Morton H. Halperin

Director
Kate Martin

Via Facsimile

Paul W. Cobb, Esq.
Deputy General Counsel
Department of Defense

Re: Military Commissions Order

Dear Mr. Cobb:

I appreciated the opportunity to speak with you and now write to outline further our suggestions regarding the procedures to implement the President’s order authorizing the creation of military commissions.

Given the public and congressional concern about whether the procedures will be fair, we urge the Department to publish its proposed procedures in draft form and seek public comment before adopting final rules. Because there are individuals already in custody, whom the Department may be considering trying before commissions, the comment period could be short enough to enable the rules to be finalized quickly.

We will not outline here the extensive objections that have been made to the broad terms of that order, nor the legal authorities supporting those objections, other than to note that we share many of those objections. Instead we outline our main concerns and offer what we hope will be constructive suggestions for finding solutions to those problems identified by the administration as requiring the convening of military commissions.

Scope of the Order.

The use of military commissions should be limited to trials of persons captured overseas in Afghanistan or other regions of armed conflict, who are engaged in armed conflict against the United States and are charged with crimes of war or other crimes against humanity targeted against Americans. We welcome the recent statements by the administration indicating its intention to so limit the jurisdiction of commissions as well as the decision to indict Z. Moussaoui in federal district court.

Detention under the order should be limited to individuals awaiting trial before commissions. None of the authorities relied upon in issuing the Military Order authorizes military detention of civilians arrested in the United States. Moreover, the President has no authority to order such detentions because Congress, in enacting extensive legislation setting forth when aliens may be detained on terrorism charges, most recently in the USA Patriot Act,
has occupied the field to the exclusion of any residual executive authority. Finally, military detentions of uncharged civilians in the United States would be an extraordinary extension of current Defense Department responsibilities and inconsistent with the historical mission and constitutional role of the Department and the armed forces.

Procedures for military commissions must ensure due process.

Both the Constitution and international law require the United States to provide all individuals with fundamental due process when bringing criminal charges. The Military Order recognizes that individuals must be accorded a “full and fair trial” before any commissions.

We believe that the appropriate starting place for the analysis of what procedures meet constitutional and international law requirements is the Uniform Code of Military Justice. We understand that the rules applied in the Quirin case were quite similar to the military courts martial rules in effect at the time. It is important to note that nothing in that case would sanction a departure from either constitutional or international law requirements in setting procedures for commission trials.

Since the Quirin case, both U.S. domestic law and international law have evolved in spelling out the particulars of what is required to accord due process and ensure a fair trial. If the Department believes that there are exigencies requiring and justifying departures from the existing procedures of the Uniform Code of Military Justice, it should specifically spell out such departures and the reasons therefor. (In this connection, we note that we cannot conceive of a justification for not requiring a unanimous verdict before sentencing an individual to imprisonment or death.) In all events, the procedures must comply with the international legal obligations of the United States by meeting the minimum standards spelled out in the Geneva Convention and the International Covenant on Civil and Political Rights. There is no better authority for interpreting U.S. obligations under the Convention than the Protocols to that Convention spelling out due process procedures, which were negotiated and signed by the United States.

Protection of classified information.

The administration has explained that the use of military commissions may be necessary to protect the confidentiality of especially sensitive information and has talked about secret trials. We recognize the importance of protecting especially sensitive information, whose disclosure would interfere with the military efforts against terrorism or compromise sensitive, important intelligence sources and methods. At the same time, the Supreme Court has made clear that the Constitution commands that individuals not be deprived of life or liberty without an opportunity to confront the evidence against them and to be apprised of exculpatory evidence in the hands of the government. See Jencks v. United States, 353 U.S. 657 (1957); Roviaro v. United States, 353 U.S. 53 (1957). And it needs no citation that secret trials are anathema to our most fundamental values.

We suggest the following as a solution that protects both interests.
December 21, 2001

**Classified evidence.** All evidence to be introduced against the accused must be shown to the accused and his lawyer and all exculpatory evidence must be provided to the accused and his lawyer. Keeping the prosecutor's evidence secret or withholding exculpatory evidence violates an individual's right to confront the evidence against him in the first instance and in both instances would be a fundamental violation of due process. It is not adequate to provide the lawyer, but not the accused, with evidence because the lawyer may not have the necessary information to challenge it.

However, in narrowly defined circumstances, with adequate procedural protections, truly sensitive evidence introduced against the accused could be kept secret from the public. Doing so would protect the national security interests that would be harmed by public disclosure of the evidence. The confidentiality of the evidence may be further protected by ordering the defense attorney to keep silent enforced with appropriately severe sanctions, and by imposing restrictions on communications of the accused. In this connection, we note that the Bureau of Prisons has adopted measures to prevent inmates from communicating classified information or planning terrorist activities from their cells. These measures include limiting the inmate's communications and visits with both outsiders and other inmates and by monitoring his communications. It is not beside the point that any accused, who is convicted of a capital offense, is likely to be put to death after seeing the classified evidence.

It is essential that such an extraordinary rule allowing closure of portions of a trial be limited to cases involving truly sensitive information. A possible formulation would allow closure, where the Secretary of Defense or the Director of Central Intelligence personally certifies that disclosure of the specific evidence will cause identifiable harm to the prosecution of military objectives in Afghanistan or elsewhere; interfere with the capture of members of Al Qaeda; or cause significant, identifiable harm to secret intelligence sources or methods.

**Public trials.** Any trials conducted by such commissions should be open, consistent with the requirements of military security necessary to secure the safety of observers, witnesses, commission judges, lawyers or personnel. Such security requirements could include the banning of cameras, which are not allowed in any event in most federal courtrooms, and by limiting the number of media and public representatives allowed into the courtroom. It is not legitimate however, to attempt to silence the words of the accused offered in his own defense in order to deny him a "propaganda platform". Consistent with orderly court procedures, an accused has the right to be heard and the world at large the right to be informed of his statements. The message conveyed by an open and fair trial will outweigh in the end whatever calls to terrorism might issue from a defendant.

The trials could be briefly closed for receipt of sensitive information as discussed above, in which case a public summary of the proceedings should be issued and a classified transcript kept.

Although such an approach is not available in federal criminal trials, we understand that it is contemplated by Rule 505(i)(5) of the UCMJ.
Pretrial proceedings and discovery. Consistent with the principles outlined above, rules for pretrial hearings and discovery can also be fashioned to protect both due process rights and sensitive information. As you know, that is the purpose of the Classified Information Procedures Act as incorporated in the Uniform Code of Military Justice and we are unaware of any instances in which those procedures failed to protect sensitive information. At the same time, discovery rules could be more flexible than in the usual cases and classified information could be shown to defense counsel but not to the accused, if it is not going to be admitted at trial.

Again, the starting point should be existing procedures under the UCMJ and any departures should be carefully justified with reference to the specific information at issue. The touchstone for all such procedures must be the basic requirements of due process: disclosure of exculpatory evidence and an opportunity to confront the evidence against one, including the information necessary to challenge its credibility or authenticity.

Thank you for your consideration of these suggestions. If we can provide further information or you would like to discuss these issues further, please call me or Morton Halperin at 202-994-7060 or during the next week, I can be reached at 202-244-1357.

Sincerely,

Kate Martin
WHEREAS, in response to the events of September 11, 2001, Congress enacted a Joint Resolution (Public Law 107-40) on September 18, 2001, authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons;" and

WHEREAS, on November 13, 2001, the President issued a Military Order, which, among other things, provides that non-citizens of the United States whom the President deems to be, or to have been, members of the al Qaida organization or to have engaged in, aided or abetted, or conspired to commit acts of international terrorism against the United States or its citizens or to have knowingly harbored such individuals, are subject to detention by military authorities and trial before a military commission; and

WHEREAS, the American Bar Association has appointed a Task Force on Terrorism and the Law, which on January 4, 2002, issued a Report and Recommendations on Military Commissions; and

WHEREAS, the Philadelphia Bar Association recognizes the need to respond effectively to the events of September 11, 2001, and the risks to the United States and its citizens posed by international terrorism, but believes it essential that the procedures for military commissions should assure, as the President directed in his Military Order, that all accused persons be afforded a "full and fair trial."

NOW, THEREFORE, BE IT RESOLVED that the Philadelphia Bar Association endorses all the recommendations of the ABA Task Force, including, without limitation, adoption of "appropriate principles of law and rules of procedures and evidence prescribed for courts-martial" (Manual for Courts-Martial, Preamble, Paragraph 2(b)(2) ) and procedures to conform with Article 14 of the International Covenant on Civil and Political Rights, which provides for an independent and impartial tribunal, with proceedings open to the press and public, except for specific and compelling reasons, and the following rights for the accused: the presumption of innocence; prompt notice of charges, and adequate time and facilities to prepare a defense; trial without undue delay; to be present, and to be represented by counsel of choice; to examine, or have examined, the witnesses against him and to obtain the attendance of witnesses in his behalf under the same conditions as the witnesses against him; to the free assistance of an interpreter; not be compelled to testify against himself or to confess guilt; and the review of any conviction and sentence by a higher tribunal; and

BE IT FURTHER RESOLVED, that the Philadelphia Bar Association specifically supports the additional recommendation of the ABA Task Force that any person subject to detention or trial by a military commission in the United States should be permitted to seek habeas corpus relief in United States court; trial observers, if available, who have appropriate security clearance should be permitted to attend
the proceedings of military commissions; and no sentence of death should be permitted on less than a unanimous vote of all the members of a military commission; and

BE IT FURTHER RESOLVED, that the Philadelphia Bar Association authorizes the Chancellor to take all necessary steps to publicize the Association's position as reflected in this Resolution and to inform the President, the Secretary of Defense and other officials of the importance of establishing rules and procedures for military commissions that incorporate these fundamental elements of a full and fair trial.

PHILADELPHIA BAR ASSOCIATION
BOARD OF GOVERNORS
ADOPTED: January 24, 2002
The Norwegian Association of Judges is concerned by the possible breach of human rights that may follow as a consequence of the Executive Order regarding detention and sentencing of foreign nationals charged with acts of international terrorism, signed by President Bush 13 November 2001.

The International Commission of Jurists (ICJ), which is a world wide non-governmental organization consisting of judges and lawyers, focusing on enhancing the rule of law and strengthening the protection of human rights, has criticized the Executive Order, re. Communique de presse of the 21st of November this year and statement of the 6th of November.

ICJ points out that the implementation of the Executive Order issued by the president may violate several international covenants to which both the United States and Norway are signatories, specifically UN’s International Covenant on Civil and Political Rights.

An individual tried under the new rules may be detained for an unlimited period of time without being informed about the charge against him. The defendant will not have the right to be represented by a lawyer and can be kept in detention secretly without the right to have his case tried before an ordinary court.

Trials against individuals accused of international terrorism will be conducted...
by Military Commissions that have the right to keep their proceedings and decisions secret. The indicted person can be denied access to the evidence against him and does not have the right to appeal the sentence to a higher court. The lack of the right of appeal is especially unfortunate because the indicted person risks death penalty. The decisions of the Military Commissions are final and can only be reviewed by the President.

Exception can be made from the obligations under The International Covenant on Civil and Political Rights in case of publicly announced state of emergency "which threatens the life of the nation", Art 4. Although the United States has proclaimed a national state of emergency, there is reason to believe that the conditions according to the Covenant are not met. The United States has not notified the Secretary-General of the United Nations as required by Art 4. The United Nations Committee on Human Rights set up according to the Covenant, is in any case of the opinion that basic guarantees protecting the rule of law can under no circumstances be set aside, not even during a state of war.

At the joint press conference held by President Bush and the Norwegian Prime Minister Bondevik in the White House on 5 December 2001, President Bush defended the rules set forth by the Executive Order by referring to the need to keep vital information regarding state security secret. This can be achieved however, by keeping part of the court hearings secret and not open to the public or by keeping part of the evidence presented before the court secret. The need for secrecy does not give sufficient reason to set aside the basic principles of the rule of law in the way that the President's executive order does.

The war against terrorism is international. After the 11 September terror attacks this year the United States has appealed to all other countries to help and to show solidarity. Norway has strongly supported the US position. The rules set forth by the Executive Order can make the cooperation between the US and Norway more complicated specifically when it comes to cases regarding extradition. Norway - and most other countries - do not extradite anyone to countries where they might face treatment that is in breach of the basic principles of the rule of law. In every terrorist case tried under the Executive Order the Norwegian courts have to examine the effects that the new rules may have.

The Norwegian Association of Judges is of the opinion that the United States should review the new rules set forth by the Executive Order given by President Bush on 13 November this year. We request the Norwegian government to raise this problem with the Government of the United States.

If we are not able to fight against terrorism without violating basic human rights, the rule of law and democracy will be undermined. It would be a paradox if the terrorists were to achieve that result.

Bergen, 21 December 2001
Oslo, 27 December 2001

Erik Elstad
Lars Oftedal Broch
February 19, 2002

Hon. William J. Haynes II
General Counsel
Department of Defense
1600 Defense Pentagon
Washington, DC 20301-1600

Re: Rules for Military Commissions

Dear Mr. Haynes:

I am writing in my capacity as president of the National Institute of Military Justice. Founded in 1991, NIMJ is dedicated to the fair administration of justice in the Armed Forces and to fostering improved public understanding of military justice. Our board consists of law professors and practitioners with long experience in and commitment to military justice. Over the years we have made a number of suggestions regarding, among other things, the military justice rule making process. As you know, we also sponsored the Commission on the Fiftieth Anniversary of the Uniform Code of Military Justice, chaired by Senior Judge Walter T. Cox III, whose report is under review by the Joint Service Committee on Military Justice.

NIMJ has taken no position on the legal or policy aspects of the President's decision as Commander in Chief to establish military commissions in connection with the struggle against terrorism. We do, however, believe it would be desirable (and consonant with the Department's standards for public comment on proposed changes in the law)
the Manual for Courts-Martial, see 32 C.F.R. § 152.4(c)(1)) to afford public notice and an opportunity for comment on the rules that will implement the President's November 13, 2001 Military Order. Given the current extraordinary circumstances as well as the time that has elapsed since issuance of that order, an abbreviated two-week comment period would appropriately reconcile the competing interests in public participation and prompt action.

On behalf of NIMJ, I hope favorable attention can be given to this suggestion.

Very truly yours,

Eugene R. Fidell

Advance copy by fax to (703) 693-7278
Mr. Eugene R. Fidell, Esq.
President
National Institute of Military Justice
c/o Feldesman, Tucker, Leifer,
Fidell & Bank LLP
2001 L Street, N.W., 2nd Floor
Washington, D.C. 20036-4910

Dear Mr. Fidell:

Thank you for your letter dated February 19, 2002, in which you suggest that Secretary Rumsfeld should afford public notice and an opportunity for comment on the rules that will implement the President’s military order governing “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.”

Although the Secretary has not yet made a determination regarding your suggestion, please be assured that the implementation procedures will comply with the President’s directive to provide a “full and fair trial” and will reflect our Nation’s commitment and dedication to uphold the highest traditions of the law.

Sincerely,

William J. Haynes I

[Signature]
March 15, 2002

Hon. William J. Haynes, II
General Counsel
Department of Defense
The Pentagon
1000 Defense
Washington, DC 20301

Dear Mr. Haynes:

The American Bar Association has been taking an active interest in the legal and policy issues arising from the President's November 13, 2001 Military Order on military commissions. An ABA task force established last fall published a thoughtful and scholarly analysis which has been previously shared with the Department of Defense. The Task Force's recommendations subsequently formed the basis for a resolution adopted as ABA policy last month by the Association's House of Delegates at its Mid-Year Meeting in Philadelphia. The House of Delegates consists of representatives of all state and major local bar associations; representatives of the wide ranging sections, divisions and other entities of the ABA, as well as representatives of affiliated organizations such as the National Association of Attorneys General and the Judge Advocates Association. The House of Delegates' resolution adopted last month was introduced by the voluntary bar associations of the cities of New York and Washington, D.C. and was co-sponsored by several other bar and ABA entities. A copy of that resolution is attached.

Recent articles in the media suggest that the Department's draft regulations are largely consistent with the recommendations of the ABA Task Force and with the Resolution recently adopted by the ABA House of Delegates, and we hope that this is the case. In addition, recent articles in the Miami Herald and the National Law Journal discuss a proposal of the National Institute of Military Justice (NIMJ) that we believe merits favorable consideration and action by the Department. This is NIMJ's recommendation that the Department employ notice-and-comment rulemaking procedures in connection with the rules that will implement the President's November 13 Order. We were pleased to read in those articles that the Department has this proposal under consideration, and we hope that ultimately it will be adopted.

The ABA has long favored notice and comment procedures in federal rulemaking including rulemaking in the military establishment. For example, ABA policy adopted
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Page 2

several years ago by its House of Delegates urges that courts-martial rulemaking procedures and changes to the Manual for Courts-Martial should not be finally promulgated until after there has been public notice and an opportunity for comments and analysis of comments as is done with other changes to important federal government rules and regulations published pursuant to the Administrative Procedure Act and the Federal Register Act. More specifically, ABA policy recommends a method of adopting rules for procedure and evidence at courts-martial which is generally consistent with the court rulemaking procedures in federal courts.

While we recognize that current law does not compel the use of notice-and-comment rulemaking procedures for either courts-martial or military commissions contemplated under the President's November 13th Order, we continue to believe that the use of such notice-and-comment procedures is in the general public interest, will undoubtedly generate thoughtful and constructive comments from a variety of perspectives that will be helpful to the Department, and will lead to improved public confidence in the result both in our own country and internationally. Notice-and-comment procedures would additionally be consistent with the actual practice of DOD with regard to changes in courts-martial procedures, even though that practice is not mandated by Congress. We recognize, of course, that the practical realities of the Department's need to move speedily in adopting regulations to govern any forthcoming tribunals under the President's Order is inconsistent with a lengthy notice-and-comment procedure. Nonetheless, we believe a balance can be struck between the two important goals of moving speedily and having public comment and that the NIMJ proposal for a brief comment period strikes that balance. Such a brief comment period is realistic and can be afforded without harm to the ongoing investigative and eventual prosecutorial processes.

Please do not hesitate to contact me if you would like to discuss this matter further.

Respectfully submitted,

Robert E. Hirshon
Robert E. Hirshon, Esquire
President
American Bar Association
750 North Lake Shore Drive
Chicago, Illinois 60611

Dear Mr. Hirshon:

Thank you for your letter dated March 15, 2002, on the subject of military commissions. As you know, Secretary Rumsfeld recently announced that the implementation procedures are mostly complete. Once the Secretary gives his final approval, it is likely the Department of Defense will release the procedures to the public, perhaps as early as this week.

I have reviewed the Resolution passed by the House of Delegates on February 4, 2002. Although the Resolution and the military commission procedures differ in some regards, I believe the ABA should be satisfied with the procedures as a whole.

As a final matter, please be advised that the Department gave consideration to employing notice-and-comment rulemaking procedures, but decided against the idea based on a variety of factors, including the need to move decisively and expeditiously in the ongoing war against terrorism.

Best Regards,

William J. Haynes II
DoD News Briefing on Military Commissions


Q: You're on the wrong side.

Rumsfeld: I don't feel right over here. (Laughter.) There's something wrong with this picture. (At the podium.)

Q: (Off mike) -- on the left.

Rumsfeld: Good afternoon.

Q: Good afternoon.

Rumsfeld: We were reminded last week, as the coalition forces battled Taliban and al Qaeda in the mountains, that we're still in the early stages of this dangerous and what promises to be long war. But while much of the difficult work remains, thanks to the courage and dedication of the soldiers and sailors and airmen and Marines, we've had some good success thus far.

On September 11th, the terrorists attacked the United States, killing thousands of innocent men, women and children. Less than a month later, the coalition countries responded and the Taliban had been driven from power. Hundreds of Taliban and al Qaeda terrorists have been killed, and hundreds more have been rounded up and detained by coalition forces.

This success has given us a glimpse into the future we face. As the president noted in his State of the Union address, we have found evidence, in caves and tunnels and safe houses in Afghanistan, of further terrorist plots to kill Americans and others, as well as terrorist efforts to acquire weapons of mass destruction, capabilities that, if they are successful, could help them kill not thousands more but tens of thousands more.

This is a dangerous and determined adversary for whom September 11th was an opening salvo in a long war against our country, our people and our way of life. Our task, our purpose must be to stop the terrorists; to find them, to root them out and get them off the street so that they cannot murder more American citizens.
One of the tools at our disposal to meet that challenge is the use of military commissions to try some of those who are captured in the conflict. Today we are announcing some of the procedures we plan to use to carry out the president's military order. Before discussing them, I want to mention some of the thinking that went into their development.

In the president's military order, he directed the Department of Defense to find ways to conduct commissions in a manner that would be consistent both with our national security interests and with the traditions of fairness and justice under law, on which this nation was founded, the very principles that the terrorists seek to attack and destroy.

In the months since the president issued his order, we have consulted with a number of experts from around the country, in and out of government, in and out of Washington, in an effort to come up with rules and procedures that will ensure just outcomes while protecting the American people from the dangers that are in fact posed by terrorists.

There's a powerful tension between getting a story fast and getting a story right. That's a fact. You all know that. It's important, I believe, to try to balance those competing pressures. Often the pressures of the moment for speed tend to overpower the desirability of getting it right. On and after September 11th, in reporting the number of people who were killed here at the Pentagon, DoD was criticized for being too slow, but we got it right. With respect to the global position device recently found in Afghanistan, DoD got it fast, but we now believe we got it wrong. On the development of the rules for the military commissions, DoD has been characterized by some as being slow. The fact is, I have been determined to try to get it right. It is an exceedingly important subject, and it's important for our country that we do it right.

I've taken some time, first because I wanted to do it well, but second because we had the time available. No individual has yet been assigned to be tried by a military commission. So despite the appetite for speed, it was more important to do it well than to do it fast.

Our approach has been based on two important principles. First, the president decided to establish military commissions because he wanted the option of a process that is different from those processes which we already have, namely, the federal court system in the United States and the military court system under the Uniform Code of Military Justice.

So when people take note of the fact that there are differences with respect to the procedures for the military commissions, they should understand that there is a reason for it. Those two systems have different rules and procedures, yet each produces just outcomes. It follows, therefore, that military commissions, which will have rules and procedures that are somewhat different from either of those two systems, can also produce just outcomes, despite the differences. An observer who may be more familiar with the federal court system or the military code of justice may try to evaluate the new approach being fashioned for military commissions against what they're familiar with and then raise questions about the rules and procedures for the military commissions. That's understandable.

But I want to be clear from the start. The commissions are intended to be different, and the reason is -- is because the president recognized that there had to be differences to deal with the unusual situation we face and that a different approach was needed for that reason, just as was the case during several previous conflicts in our country's history.

Our second guiding principle is related. Observers may be inclined to examine each separate provision and compare it to what they know of the federal criminal court system or the court-martial system, and feel that they might prefer a system that they were more comfortable with. I suggest that no one provision should be evaluated in isolation from the others. If one steps back from examining the procedures provision by provision, and instead drops a plumb line down through the center of them all, we believe
that most people will find that taken together, they are fair and balanced and that justice will be served in their application.

The general counsel, Jim Haynes, who has spent an enormous amount of time on this subject, and the undersecretary of Defense for Policy -- and needless to say, there's a mixture here of legal and political policy questions -- are here. They will come up to the podium and respond to technical questions after General Pace and I depart. They'll review the procedures and answer questions. However, I do want to highlight some of the main provisions.

The accused will enjoy a presumption of innocence; will not be required to testify or incriminate themselves at the trial. They will have the ability to discover information and to obtain witnesses and evidence needed for trial and be present at public trial. Cannot be tried for the same offense twice. Will be provided with military defense counsel at government expense, and will also be able to hire defense counsel of their choosing at their expense.

Further, proceedings will be open, unless the presiding officer determines it's necessary to close the proceedings to protect classified or sensitive information, or for another reason; namely, the safety of the trial participants.

The standard for conviction will be "beyond a reasonable doubt" and will require a two-thirds vote of the commission. The imposition of a death penalty will require a unanimous vote of the seven-member commission. After the trial, there will be an automatic post-trial process of appeal and review.

Let there be no doubt, commissions will conduct trials that are fair and impartial. At the same time while ensuring just outcomes, the procedures are also designed to respond to the unique circumstances for which they were established.

For example, military commissions will allow the use of classified information without endangering sources and methods. In a civilian trial, prosecutors could be faced with a situation where in order to avoid exposing classified information, they would have to either allow defendants to go free, or accept a lighter sentence, a situation that could be undesirable in the case of a hardened Taliban or al Qaeda terrorist.

The procedures allow us to protect civilian judges, juries, counsel and witnesses from ongoing terrorist threats. For example, the judge who handled the trial for the first World Trade Center attack is still under 24-hour protection by Federal Marshals, and may be for the rest of his life. That is unacceptable in the cases likely to be assigned to the commissions.

And the procedures permit more inclusive rules of evidence. In wartime, it may be difficult to locate witnesses or establish chains of custody for documents. Critical evidence that could protect the American people from dangerous terrorists should not be excluded simply because it was obtained under conditions of war.

Let me conclude. We are a nation of laws. We have been attacked by lawless terrorists. The manner in which we conduct trials under military commissions will speak volumes about our character as a nation, just as the manner in which we were attacked speaks volumes about the character of our adversaries. We have made every reasonable effort to establish a process that is just; one that protects both the rights of the defendant to a fair trial, but also protects the rights of the American people to their security and to live as they were meant to live, in freedom, and without free of terrorists.

I want to add a word of appreciation not just to Jim Haynes, who will be up here in a moment, but to a number of non-Defense Department individuals, most of them former government officials or judicial officials of various types, who have given a great deal of time to provide advice as we worked through
these many important issues.

(To staff) I believe we have their names that are going to be passed out in the materials?

Staff: Yes, sir.

Rumsfeld: Good.

After General Pace makes his remarks, we will be happy to take one or two questions, and then we're going to bring up the experts.

General Pete Pace, United States Marine Corps.

Pace: Thank you, sir.

I am personally very comfortable with these procedures. They are in fact fair, they are balanced, they are just. And I am also very proud of the process that we went through to get to these procedures. I personally sat in on hours and hours of deliberations with the secretary and his team, both from inside the Pentagon and, as he mentioned, experts from outside, and certainly experts from outside of government who were advising him, and the process itself was very reassuring to me and it should be to all of you.

It is well-suited to protect not only the rights of the accused, but also, as the secretary mentioned, the safety of the participants in the trials, and also to protect our intelligence in the ongoing war on global terrorism.

And finally, and very importantly, I have absolute faith in the men and women of our armed forces who, when called upon to participate in these commissions, will do their utmost to ensure a very fair, forthright, honest trial.

Thank you, sir.

Rumsfeld: On reflection, I would like to mention the names of the individuals who helped out. They did it without compensation because of their patriotism: Judge Griffin Bell, former attorney general; the Honorable Bill Coleman, former secretary of Transportation; the Honorable Lloyd Cutler, former counselor with the president -- two presidents; the Honorable Mark Hoffian, who served as general counsel of the Department of Defense and also secretary of the Army; Professor Bernard Meltzer -- Dr. Meltzer is University of Chicago law school and was involved in the Nuremberg trials; the Honorable Newt Minow, who was the -- President Kennedy's chairman of the Federal Communications Commission; the Honorable Terry O'Donnell, who's a former Department of Defense general counsel; Judge William Webster, former federal judge, former director of CIA and FBI; and Professor Ruth Wedgwood of Yale University and Johns Hopkins University. As I say, they didn't -- they don't -- none of them work for this department; they just volunteered to help out and have been enormously helpful.

A couple of questions. Charlie.

Q: Mr. Secretary, there are still critics who say that no matter how you cut it or couch it, that military trials are not as fair or as thorough as civilian trials, trials in civilian courts. Are you looking -- will these military trials guarantee simply more swift and sure justice than civilian courts? And are you worried about security -- someone throwing a hand grenade into a courtroom? Is that why you're going to military trials?

Rumsfeld: Charlie, there will always be critics. It's a free country! We learn from our critics. They say it's
your -- that all of that dialogue and discussion that takes place informs the public, informs the people in government, and it's helpful. Are we very, very pleased and satisfied that this will produce just outcomes? You bet. We also have the ability to amend it if, for some reason, we found that there was something that we hadn't thought of. We're plowing new ground here, to a certain extent. So the critics can be critics, and we can be government officials, and you can be members of the press. We'll all do our jobs and try to do them well.

Q: And regarding security, will military trials allow you to hold it, say, aboard ship or in more secluded places, where you will have more secure protection?

Rumsfeld: There's nothing in the military order that I can recall that discusses the location of the commission.

Q: You've made no decision on where these will be?

Rumsfeld: We have not decided it, because we do not have any candidates yet to be tried before commissions.

Shall we make this the last question? (Groans from the press corps.)

Q: Under what --

Q: No pressure!

Rumsfeld: No, leave her alone. Come on!

Q: How about a couple of quickies?

Q: There's a provision that says that you and -- or the president must give final approval to the findings and the sentencing. Under what conditions or circumstances do you think you will be overruling what the commission has found, or the sentence?

Rumsfeld: Oh, my goodness. You're asking -- first of all, we don't have any candidates for the commissions.

Q: What is the practical purpose of that for --

Rumsfeld: That's what the order provided, and there it is. The president's military order provided -- left it that way, and trying to speculate as to how some accused might or might not be handled down the road, I think, is beyond my ability. You can try Jim Haynes on that. Maybe he has a better answer.

And since I didn't answer that, I'll ask Pam to have the last question.

Q: (Sighs.) Again with the pressure!

Rumsfeld: Well, you can handle it. You can handle it.

Q: Yeah. Actually, I have sort of two big questions for you. One is something --

Rumsfeld: One question, not two.

Q: What if I do it in one long run-on sentence?
Rumsfeld: No. Won't work.

Q: You say that you have a commitment to having an open process, and in this fact sheet that you've given us, it talks about that. But at the same time, you say you need to be able to present national security information that cannot be expressed openly. So how are you going to balance those two? How can the people who will be following these proceedings be assured that they are impartial and fair, and not sort of kangaroo courts with a predetermined outcome, if they cannot have access to that?

Rumsfeld: There's that word. There's that word.

Q: I had to raise it.

Rumsfeld: You had to get that "kangaroo court" in there so that people would have that in their minds --

Q: (Off mike) -- opportunities to address --

Rumsfeld: -- in their minds, when we've just presented something that is the product of many months of effort. It is --

Q: So the other option --

Rumsfeld: -- it is balanced. It is fair. It is designed to produce just outcomes, which it will.

Q: How will you make it open?

Rumsfeld: And that characterization is so far from the mark that I am shocked -- sort of.

Q: Yes. So the other option is for us to just go get these quotes from people and not give you a chance to address it.

Rumsfeld: I understand. I --

Q: But how will you balance that openness? How can it be open if at the same time you're trying to protect national security?

Rumsfeld: Our country faces that already. We deal with classified material in court. It's done on a regular basis, and there are ways that it can be handled so that -- I happen to know the answer of this. To give it to you, it is -- it would get me down to a level of detail that I'd prefer not. But there is one way of knowing that -- is, I believe that the -- I'm going to let Jim do it. If the military counsel would be present during any period when anyone else who should not be present because of the sensitivity of classified material might be excluded from the process, nonetheless, the defendant's military counsel would, in fact, be present at all times.

Q (Inaudible) -- ask General Pace a question, sir?

Rumsfeld: Yeah. All right. (Laughs; soft laughter.)

Q: Thank you. I appreciate it.

General Pace, understanding we're not going to talk about any particular instance or -- this is not really a hypothetical: Is the Department of Defense -- the Pentagon and the U.S. military -- in fact, prepared to invoke the death penalty against -- in this process, against an accused person?
Pace: I'm not exactly sure why you would come specifically to me with that question, but as the rules of the court are laid out, it is well within the authority of a tribunal, when a person's brought before them, if they are charged with a capital crime, if they deem it appropriate to find that person guilty and if all seven vote unanimously that that person should be put to death, then that is well within their prerogative to do. And then, of course, it would go the process that the secretary laid out, as far as who would make the final decision.

Q: Can we do a follow-up on that?

Rumsfeld: Tell you what I'm going to do: I'm going to ask Jim Haynes and Doug Feith to come up. Jim is the general counsel; Doug Feith is the undersecretary for policy. They have been -- particularly Jim, but Doug to some extent -- have been deeply involved in this process. They are able to answer a whole host of questions at a level of detail, and I would think in a manner that would be very helpful to the folks here. And I'd prefer to have them take over at this time.

Thank you.

Q: Do you think any of those prisoners you captured are innocent? (Laughter.)

A: Trick question.

Rumsfeld: I haven't had a chance to look them over. That process is --

Q: Just wondering if you thought you'd captured any innocent people.

Rumsfeld: We've captured some innocent people and turned 'em loose from time to time, as you well know.

Q: Can I do a follow-up to the question just asked?

Haynes: May I say one thing first, just so you'll know? I am Haynes -- (laughter) -- and this is Feith.

(Cross talk.)

Haynes: I also would like to echo something the secretary said about the process. We were very careful about it, very deliberate. We reached out not just to those people identified, but also to the experts within the building -- the Judge Advocates General and the general counsels of the military department were very important in the development of these procedures. They will have substantial roles in implementing them. And we also, of course, consulted with other agencies. We considered everything that we heard on the Hill and in the press. It was very helpful to read about all of the things that you wrote, and we found that to be very helpful.

Furthermore, we don't intend this to be the end of that deliberate process. The rules provide that we will have full and fair trials, and I am very confident that those who are charged with executing that responsibility will do so.

Q: On the three-member review boards we're talking about, the president appoints those -- does the president appoint those boards? And does it automatically go --

Haynes: Let me say one thing. We gave some fact sheets at the outset. We will have the actual rules for you when you leave. And at a very quick time afterwards, if they're not already up, they'll be on the website.
Q: But the president can appoint civilian members to those review boards, can he not?

Haynes: There is a review panel of three members. Those members may be appointed by -- will be appointed by the Secretary of Defense. If any of the three is a civilian, then the president will appoint that civilian as a temporary military officer, under existing legislation.

Q: Do things go automatically to the review panel, or would a thing have to appeal?

Q: What would you say to the suggestion that -- which is coming from many quarters, as you know -- that the structure is designed simply to make it easier for you to win convictions, that that's the purpose of this whole thing, to make it easier to convict?

Feith: I would say that's wrong. This was a -- the process of putting together these procedures was a balancing process. We have a number of important objectives that we had to keep in mind as we developed the procedures. Clearly, as has been emphasized, one of the key objectives is providing a fair trial for the individuals. But we're in the middle of a war, and we had to design a procedure that would allow us to pursue justice for these individuals while at the same time prosecuting the war most effectively. And that means setting rules that would allow us to preserve our intelligence secrets, develop more information about terrorist activities that might be planned for the future so that we can take action to prevent terrorist attacks against the United States.

I mean, there was a constant balancing of the requirements of our war policy and the importance of providing justice for the individuals. And that's why the secretary refers to this plumb line. I mean, there were lots of considerations at play here, and each deviation from the standard kinds of rules that we have in our criminal courts was motivated by the desire to strike this balance between individual justice and the broader war policy.

Q: Can I ask a question about the openness of these proceedings? In the trial format, it says the trial proceedings will be open unless otherwise determined by the presiding officer; but in reading through this fact sheet, it seems to be weighed much more heavily toward closing the proceedings than having them open; number one. Number two, the presiding officer may also allow attendance by the public and press.

Well, if it's to be open, I mean, who besides the public and press would it be open to; number one? Number two, why doesn't it say that the proceedings will be open to the public and press?

Haynes: The procedures do say that the proceedings will be open to the maximum extent practicable, but under certain circumstances that are identified in the rules, such as the presentation of classified information or the safety of witnesses or the timing of the trials for particular reasons to be determined at the time, then they may be closed insofar that it's necessary to protect that information.

Q: But even -- if I could follow up -- but even the sentence, "The presiding officer may also allow," it's almost as if that's an afterthought --

Haynes: It's not an afterthought.

Q: -- as opposed to a ground rule that they will be open to the press and public and closed under only extraordinary circumstances. The way this is written is weighed far more in favor of closing the proceedings than having them open.

Haynes: I would suggest that you read the rules. And I know you don't have them now, but you'll have them soon.

Q: Is there appeal authority for --
Q: One thing you apparently have not addressed here, which I think is very germane: Are any of the members of these commissions going to be legally trained, coming from JAGs or what have you, or you don't consider that necessary?

And a follow-up to that is, how similar will any of these tribunals be to the Nuremberg trials at the end of World War II?

Haynes: To answer your first question, yes, people who will serve on the commissions must be competent to perform the duties. The presiding officer of the commission must be a judge advocate. The other members are not necessarily judge advocates, but they may be. Traditionally, military commissions—and this is true of courts-martial—are not necessarily legally trained, but they are competent and educated people and will be chosen on that basis.

Q: (Inaudible) --

Q: Wait a minute! What about the Nuremberg thing?

Haynes: Well, there are some similarities to Nuremberg and there are some dissimilarities to Nuremberg. These procedures are, frankly, much more detailed, and in many respects are more generous than what was done at Nuremberg.

Q: Under the procedures that you have outlined --

Q: But as far as --

Q: Sorry. Please, go ahead.

Q: As far as trials and procedures are concerned, are you in touch with any country, or if any country have asked any help or consultations in any way?

Haynes: We have received so much unsolicited and solicited help, and we've considered it all.

Q: Can you answer the question the secretary didn't answer about under what circumstances would he or the president be allowed to overrule the findings reached by the commission and a review board, and why is that needed, that last step of them approving it?

Haynes: Well, remember that the secretary's procedures are implementing the president's military order. The president's military order specifically provided that he would be the final approval authority, unless he specifies that the secretary of Defense will be.

Nevertheless, we do have in these procedures some specific instructions, including, for example, an acquittal or a finding of "not guilty," once it is final, may not be changed, even though the case will proceed up for final approval by the president or the secretary of the Defense.

Q: Do these procedures guarantee that if a defendant is acquitted, that the defendant will be set free?

Haynes: The procedures don't address the outcome of a trial, except to say that a sentence will be enforced quickly.

Q: Does that mean that if you are acquitted, there is a chance that you will not be set free?
Haynes: Well, it's -- as the secretary said, we're talking about hypothetical two or three times removed. If we had a trial right this minute, it is conceivable that somebody could be tried and acquitted of that charge, but may not necessarily automatically be released. The people that we are detaining, for example, in Guantanamo Bay, Cuba, are enemy combatants that we captured on the battlefield seeking to harm U.S. soldiers or allies, and they're dangerous people. At the moment, we're not about to release any of them unless we find that they don't meet those criteria. At some point in the future --

Q: But if you -- (off mike) -- convict them, if you can't find them guilty, you would still paint them with the brush that we find you dangerous even though we can't convict you, and continue to incarcerate them?

Feith: Part of the reason I don't think you can give an unqualified answer to that question is you couldn't do it even under our domestic criminal legal system. I mean, one could have circumstances where you're going to charge -- or somebody is charged with a number of offenses, and they might be tried for one and acquitted, but there still may be other reasons to hold the person. And so, I mean, you can't even say in a domestic court that if somebody gets acquitted of a particular charge he'll be let free. It depends on what else may be pending against the person.

Q: (Off mike) -- of other cases, though.

Haynes: May I say a couple things?

Feith: Sure.

Haynes: One thing we can say, that if a person is found not guilty, they will not be charged again for the same crime.

Q: Double jeopardy you have ruled out. But you haven't -- (laughs). But what is curious to me is, if you are acquitted, if you are found not guilty doesn't necessarily mean you're going to be released.

Haynes: Let me answer it in part this way. And I think the secretary's been very clear about this in other contexts. He is not interested in holding people gratuitously indefinitely. As I said at the outset, the people that we now hold in Guantanamo are held for a specific reason that is not tied specifically to any particular crime. They're not held -- they're not being held on the basis that they are necessarily criminals. It might be that as we investigate -- and that's what we're doing now -- that they will be appropriately charged with crimes, in which case we can address that. But there are two separate bases --

Q: One of the other issues about the defendants is when there is classified information being presented, is the defendant able to hear the evidence that is being presented against him when that evidence is classified, or does the defendant not get to hear what is being said about what he is accused of?

Haynes: Again, we need to remember that these will be individual trials involving individual people. So to generalize is something that I'm reluctant to do. But, you've asked the question, Is it possible? It is possible that there will be some evidence that will be so highly classified that we will not find it appropriate to have the accused present when the evidence is admitted. After all, the defendant might be found not guilty at some point and eventually, perhaps, released, and we would not want to provide classified information under those circumstances.

But even in those circumstances -- in fact, under all circumstances -- the rules are very, very clear that his defense counsel, his military defense counsel, must be present, must have access to all information considered by the commission, so he will be represented and protected under those circumstances.

Q: In attempting to ensure the security for those on the commission --
Haynes: Jim --

Q: May I ask a question, please?

Haynes: Just a second.

Q: Okay.

Q: Two questions, actually. Can you define what you mean by "competent"? For example, could a commission member come from any military career area? And number two, the list of people that can be tried by commission include those who would harbor terrorists. So what -- under what circumstances might you prosecute a foreign government official? And how would the process be affected by that fact?

Haynes: The procedures that we're releasing today implement the president's military order. The president's military order of November 13th specifically says that he must personally determine that an individual will be subject to the military order. The person may not be a United States citizen. But in this determination, the president would have -- would state that he has reason to believe that the person is a member of al Qaeda or, as you said, potentially harbored or assisted and aided and abetted such a person. Under those circumstances, these rules would apply.

We do not anticipate that would be trying somebody that's not currently in -- under the control of the United States government. So your hypothetical about a foreign government official, unless we have them or have that person, would not be subject to it.

Yeah, sir? Sorry.

Q: In attempting to ensure the security or safety of the members of the commission, even witnesses, does that simply mean that their identities will not be released, or does that mean that the proceedings would be closed to protect the security of those individuals?

Haynes: We don't write about every conceivable scenario in these rules you'll see. They're more detailed than we gave to you just as you came in, but there are some things that remain to be applied. We leave discretion to the presiding officer or the appointing authority in a particular case to decide how best to protect information or people under circumstances like what you've described.

But I'll point out, in our civil court system, it is widely accepted that judges have the ability to protect witnesses through various measures, including protecting their identity or masking their voices or otherwise. And I would think that a presiding officer, or appointing authority in this case, would consider the same range of things, consistent with the admonition that trials shall be open to the maximum extent practical.

Q: Including protection -- or the protection of the identity of those involved in the commission itself, if that were so deemed necessary?

Haynes: Conceivably. But we didn't specifically write about that.

Q: And could you describe the difference between a commission and tribunal? Because I know it was called a tribunal originally, then the Pentagon made a concerted effort to shift it to commission. And then yesterday we heard the president call it a tribunal once more. So is there a legal, technical difference between the two or are they just interchangeable?

Haynes: Sometimes they're interchangeable. But in the statutes that reference them, tribunals seem to
encompass commissions and courts-martial. But that’s not always the same.

Q: Mr. Haynes, could you -- let me ask, sir, a legal point. Is it correct that you have a legal reason to try and keep these proceedings outside of the United States in order -- we keep hearing this, and I just want to understand it -- in order to keep any appellate process outside of U.S. federal court jurisdiction? Is there a legal reason to physically, geometrically keep them outside of the United States to keep them out of the U.S. justice system? And is there any appellate process in this that is fully independent of the U.S. military or, you know, does the buck stop with the U.S. military in terms of an appellate process?

Haynes: Answering your first question, I will agree that there are consequences to holding trials in certain places. To say that we are acting in a particular way to avoid certain things I think would be an overstatement. Certainly, a number of things factor into decisions. But --

Q: Well what would be the consequences of holding them in the United States, the legal consequences?

Haynes: Well, it would depend on each case, and it would depend on who the defendants were, and it would depend on the method of trial, and so forth, and so on.

For example, the 1942 case involving the Nazi saboteurs, which was the employment of a military commissions, was held in the -- it was held in the Justice Department building downtown. The defendants were both foreign nationals and United States citizens. The court reviewed that all the way up to the Supreme Court and found that the president's order in that case was constitutional and properly applied. But it -- I would anticipate that there would be a different set of -- a different analysis that the Supreme Court, in this case, might use if the trial were held in, say Guantanamo or in Afghanistan or somewhere else. And I wouldn't want to make any predictions about that.

Q: (Inaudible) -- try and understand as clear as possible: If a detainee held by the United States -- and clearly, they all fall into the same fold -- a detainee -- if they --

Haynes: -- held in the United States, yeah.

Q: being held by the United States right now in Guantanamo or Afghanistan came before a U.S. military commission geometrically inside the United States, would that person then have jurisdiction...could you then be under the jurisdiction of the federal court system? Are you opening yourself to that possibility? And my question on the appellate process.

Haynes: The answer is that a -- yes a United States District Court would have jurisdiction to consider a petition by a defendant in that case for certain purposes. There has already been a habeas corpus petition considered in Los Angeles. There’s one pending now in the District Court of the District of Columbia. I would imagine that we will have more of those as we go forward.

Q: (Inaudible.)

Q: And is there any independent appellate process?

Haynes: Well, I’ll let you read the rules, but the --

Q: (Inaudible)

Haynes: The rules provide for the review panel that I described a few minutes earlier that will be selected by the secretary of Defense and will be charged with reviewing the record of the trial and any written submissions they seek from counsel. And they may return the case to the commission, or they may advise
the secretary for disposition. But they are not outside of the structure, other than what I’ve just described.

Q: Could you explain --

Q: Do the procedures allow for indefinite detentions without charges? And also, are intended for use against a select group of prisoners? Or are they intended for use against this whole body of prisoners who are in U.S. military custody?

Haynes: The procedures are strictly written for conduct of trials or conduct of commission proceedings. They don't -- they do not address detention outside the scope of a trial.

And secondly, as to the people to whom these procedures might apply, as I said, these implement the president’s military order so that people that may be tried by these commissions are those who the president has determined in writing are subject to the military order.

Q: But it's the intention to use them against only a select group of prisoners? (Off mike.)

Haynes: Well, the president's -- the president's order spells out the types of people that potentially can be subject to it. So, members of al Qaeda, persons who are otherwise involved in international --

Q: I guess -- I guess what I'm driving at is whether we can expect that this will be applied only to top al Qaeda leaders as opposed to, you know, people who were fighters in Afghanistan but not -- were not necessarily leaders of the organization. I know it could be applied to anybody that fit that definition, but in terms of what the administration intends to do here.

Feith: The decision as to who might be prosecuted in a military commission is the president's decision. And --

Q: But he needs advice from you, doesn't he?

Feith: But in answer to the question, the president has the authority to put people that he selects into the military commission process. No recommendations have been made with regard to anybody yet. And so it's too early to answer the question that you've posed.

Q: So --

Haynes: Let -- let me just add to that. We're very early in the process. We're still interrogating and talking to the people that we have detained. And they're -- I would say it's fair to say they're singularly uncooperative. So we have -- we have a lot of facts to find beforehand. It's not just from them that we'll necessarily find them. So to build a case takes time and takes evidence, and we'll have to see.

Q: To follow up on Jim's question --

Q: Could you explain why -- could you --

Q: Excuse me. Just for a minute. I want to follow just very briefly on Jim's question about how long you might hold people before you put them on trial.

Have you all made any attempt to address the question of due process, as there is in civilian courts, you know: doing -- bringing people to trial or releasing them in a timely fashion? Or -- or -- could you just hold these people for years just to keep them off the street without charging them? Has there been any attempt to address that question?
Haynes: Well, I tried to do it earlier in this press conference when I noted that the people we're holding in Guantanamo we're holding because we found them to be enemy combatants. That is totally different from a criminal justice system. That is a widely accepted and a historical concept of great depth and longevity that it's permissible to do that. When somebody's trying to kill you or your people, and you capture them, you can hold them. That's why we're holding the people in Guantanamo. The separate question about speedy trial and so forth doesn't apply to those people. So these rules do not address anything of that nature, except to charge the commission with conducting the proceedings expeditiously once they begin.

Q: So you could in fact hold these people for years without charging them, simply to keep them off the street, even if you don't charge them?

Haynes: Well, you're asking a separate question from what the rules provide. The rules don't say anything about that. So --

Q: No, I know that. But you could, in effect, do this, based on what you've said.

Haynes: We are within our rights, and I don't think anyone disputes it, that we may hold enemy combatants for the duration of the conflict. And the conflict is still going and we don't see an end in sight right now.

Q: Sir, could you explain with some specificity what the problems are with the UCMJ and with civilian courts that make you -- besides the fact that the president told you to do so -- that require setting up this new kind of legal system? The secretary addressed the question of national security, but he also said that there are already procedures in place to protect national security when such evidence is introduced in trials. He addressed the question of the physical security of the people involved, but already people are -- face that every day, especially in New York with mafia trials, there are judges that have round-the-clock protection. So those are two main reasons that have sort of already been asked and answered in other courts.

The cynical interpretation out there is that the main difference between this and the UCMJ is that the UCMJ allows people to appeal up to the Supreme Court, so the interpretation is that the department's or the administration's attempt is to keep this completely out of the Supreme Court's area of jurisdiction.

Haynes: That would be a cynical interpretation, and you --

Q: Can you explain how it's not that?

Haynes: Well, you shouldn't read this -- nor do we -- read this as an indictment or any dissatisfaction with existing judicial systems in the United States. Our federal judiciary is a fine institution to do what it does. The court-martial system, under the Uniform Code of Military Justice, is the best in the world.

This is an additional option for the president.

Q: Why is it necessary?

Haynes: It's necessary -- well, and it is also not new. It is consistent with American history; I mean the use of military commissions historically has been an option for the president.

This is a unique conflict. It is unique in several respects -- and Doug may have some comments about that as well. We've never been attacked quite like this before. We've never had the intersection of criminality and warlike acts in quite this way before. We've never had to face an organization whose principal mode of operation is to hide behind civilians and to attack innocent people indiscriminately on such a large
scale. The president needed to have this extra option for him to consider, to employ in appropriate circumstances.

Q: Can we go back to the question --

Haynes: I'm sorry. Did you have something?

Feith: No. I got -- well, I'll just add one point. The -- there has been for many years a debate about the nature of terrorism, and is it more in the nature of war or is it more in the nature of crime? And what was driven home on September 11th was obviously that it's both. And we are -- we're dealing -- when you ask, "Why do we need to have a new device or a new vehicle for these purposes," it is precisely because we find ourselves in a very unusual type of war. The enemy in this war, as opposed to past wars, is not, by and large, the regular armed forces of a country, wearing uniforms and attacking enemy armed forces. Here the enemy is a terrorist network with people who do not distinguish themselves as -- in uniforms as soldiers, and their principal targets of attack are not armed forces but civilians. And their principal method is by infiltrating into our country or into other, you know, friendly countries.

So -- and we are furthermore fighting a war that's going to last for a long time, and we want to try to bring justice to some of these individuals while the war is still under way. In many past cases, military commissions were after the war was over. One of the things that is on our minds here is this war is going to go on for a long time, and we want to make sure that these proceedings, which are going on in the middle of the war, do not interfere with our war effort and may -- because of the way we would be able to handle interrogations and intelligence information, may actually assist us in promoting our war aims.

So those, I think, are some of the motives that led the president to decide that he needs to use this well-established institution and apply it in new ways to this case.

Q: But why specifically exclude the Supreme Court from the process? That's just not an option in this process. Why --

Feith: I don't think you'll find anything that excludes the Supreme -- it's not within our power to exclude the Supreme Court from the process.

Q: It says that the -- under the UCMJ, you can appeal up to the Supreme Court. Here you appeal only to the president or the secretary of Defense after the review panel is done. They seem -- they are the highest.

Feith: That is the only appeal provided for in the rules that were prepared by the Defense Department. And as far as whether the Supreme Court gets involved in the process, that's beyond our authority to say.

Q: But is that still a possibility, that the Supreme Court could weigh in on this?

Haynes: Far be it from me to tell the Supreme Court not to do something. We anticipate that anybody that is tried will have vigorous, competent representation, and we expect that they will seek every avenue they can to protect the interests of their client. And we are confident that the rules will withstand any scrutiny and that we will produce a full and fair trial and a just result.

Q: Back to the question of openness, to follow up on the point that was made earlier, there does seem to be a presumption in this fact sheet that it would be more closed than more open, the sense that the presiding judge gets to decide whether to open it. And we've heard now several reasons that it could be closed. Confidential or classified information that reveals security sources. The secretary mentioned he doesn't want the panel presiding members to be under 24-hour watch, so you've got security now as an issue.
Give us your sense, based on what you know about these rules and the cases that are likely come before it: Do you expect to see most of these cases open, with little pieces closed when there's classified information, or most of them closed, with little pieces open when there's not classified information? What is your sense of how open these really are going to be?

Haynes: Well, recognizing that we're in the realm of complete speculation now, I will say that I would expect most of them would be mostly open. The rules provide that they shall be open to the maximum extent practicable. And that's what they'll do.

Sir?

You said that the secretary doesn't want to hold detainees gratuitously. Under what circumstances would detainees be extradited to their countries of citizenship?

Feith: We have had from the beginning a screening process to make sure that we do not take into our custody people that should not be held. Most of the people that we are holding were, I believe, captured not by American forces, in the first instance, but by Afghan forces. And the Afghan forces made available a number of these people to us. They were screened. We had specific criteria that applied to decide whether -- to allow our people to decide whether we wanted to take them into U.S. custody. And it had to do with whether they were higher-level people, whether they posed a particular threat to us, whether we had particular intelligence interests in them.

And there were thousands of people who were captured by Afghan forces, and yet we are holding only a fraction of that number. And the people that we're holding we are interrogating. And we're continually reviewing the information that we have about these people that we're getting from interrogations, that we're getting from other countries that are cooperating with us in the field of intelligence or in the field of law enforcement. And if we find that we're holding somebody who is not of intelligence interest to us, is not of law enforcement interest to us, is not a threat, in our view, to Americans, to the United States, to our interests, to our, you know, allies or friends as a terrorist, if we don't have any interest in holding the person, we'll let them go.

Your particular question was releasing people to -- I believe you were asking, releasing people to other countries that may want to hold and prosecute them. We are talking with various countries about the possibility of transferring people that we are holding after we are no longer interested in holding them to other countries that might be interested in prosecuting them. And we have a broad coalition that's fighting this war, and it serves the interests of the whole coalition if countries that have a desire and a basis for prosecuting the detainees are given an opportunity to do so.

Q: Are you concerned that, given the non-cooperativeness of these people, given the choppy nature of the paper trail and shadowy identities and so forth that even with these rules you're going to have a hard time getting convictions?

Haynes: It's too early to say. We don't --

Q: You -- you just said a moment ago that, you know, it's still very early, we haven't even -- you know, we're just beginning to build up a case, I mean, these -- there are a lot of -- this is -- these detentions have been going on for months. It's been a while. We've been hearing for weeks and weeks about U.S. forces collecting intelligence. Is there a concern that you're going to have great difficulty mounting a successful case against any of these people?

Feith: I wouldn't say there's a concern, but I would say that you're putting your finger on an enormously important point, which is that it is very difficult to collect information about many of these people. And
they -- if you look at the training manuals that have already been published, that al Qaeda and other terrorist groups use for their own operatives, you will see that there are deception and denial techniques that al Qaeda and other terrorist organizations teach their people. And -- I mean, we've seen these put into effect. And it takes a lot of digging, in many cases, just to find out basic information about the identity of people, let alone all of their activities. It is a hard slog. We're doing it very systematically. We're doing it very well. We're using all of the resources of the U.S. government, and we're using the resources of numerous other governments around the world that are cooperating with us. And we are developing a lot of useful information, but we've got a very long way to go.

Q: Given that, do you think that it's going to be hard to even bring anybody before a military commission? Do you have any -- I mean, sort of a feeling right now on whether these things will be used rarely or occasionally?

Haynes: I think it's too early to tell. The impetus for this exercise was that we wanted to give the president a tool. And it's a useful tool for him. It is simply too early to say how often the tool's going to be used.

Q: (Inaudible) -- that these procedures would remain in place indefinitely, as an ongoing additional judicial system created by the executive branch?

Haynes: Well, the rules the secretary issued today do not have a sunset provision in them. So that's a partial answer to your question. I'd only observe that the war, we think, will last for a while. We'll just have to wait and see.

Q: Historically, these tribunals -- commissions have not been open-ended, have they?

Haynes: There are no currently open military commissions. That's a -- so that yes, they've all shut down in the past.

Q: So far, how many of them are you holding and from how many countries? And finally, when you said that when you are not interested or no longer interested in many of them, they will be sent back to particular countries. If any particular country has shown any interest, or are they in touch with you? (Isolated chuckle.)

Haynes: We're in touch with various countries who have expressed interest in people -- sometimes their own nationals, sometimes not their own nationals.

Q: Can you name some of them?

Feith: I'd prefer not to.

Staff: Let's take just two more.

Q: One of the absolute taboos in the military court system is command influence. And yesterday, when the president referred to these detainees as "killers," is that an improper command influence on the part of the commander in chief who, after all, is the ultimate commander over any military officers who would preside over these commissions? And will the president and secretary be advised to refrain from such public characterizations in the future to avoid any appearance of command influence?

Haynes: Let me just try to answer the question this way. You're right, military command influence is an important concept that all our military justice experts know very well and they know very well how to deal with it and how to avoid it. I can assure you that is something that we will continue to be vigilant about. And I'm not concerned at all that the commissions will do anything other than do what the president
has also instructed them to do, and that is a produce a full and fair trial.

Feith: And they are ordered to conduct impartial proceedings. I mean, it is --

Q: But I guess it could be argued that it could appear that the commander in chief has made up his mind.

Q: The president has publicly already declared them killers. (Laughter.) Would it be advisable -- and I'm not asking you to advise the president from this podium, and I understand you wouldn't do that. But as a lawyer, would you prefer that your clients not make those kind of public pronouncements, given the sensitivity of the procedures that are about to begin?

Haynes: I'm not concerned that we're not going to have full and fair trials.

Staff: All right, let's just do the last one.

Q: Two questions. One, a follow-up from before. Why not wait until the end of the war to do this? What is the desire to do this during the war? As you said, there are certain challenges that that poses.

And the other question is, you're saying that the administration reserves the right to do this because of the war. But war has not been declared by the Congress. And can I just get sort of legal analysis of that? I mean, how does he get all these rights if we're not officially, legally, under the Constitution at war?

Haynes: Well, first off, what we've done today is issue procedures. There's been no announcement that there will be a trial at any particular time. So your comment about why not wait until some later time, that remains to be seen when they'll be employed.

As far as the authority to issue these rules, they're not limited to wartime. That's one legal answer. It's an authority and responsibility under Article II of the Constitution, which is there during peace and war. So I'm not concerned about the fact that there's not been an official declaration of war by the Congress. There's no doubt that we are in a war situation.

Q: On these countries that you're talking with, the secretary has said people could be sent back to their countries of origin if those countries can be relied upon to punish them. Are your talks involving extracting some sort of promise or agreement from these countries? How will that be handled? A formal agreement that they will be punished?

Feith: We will have understandings with countries if we're going to make transfers of detainees to them. And we'll have understandings of various kind, not the least being that the basic humane treatment that we are committed to affording the detainees will be afforded by the country to whom we transfer them. But there will be a number of understandings that we will want to reach with any country to whom we transfer the detainees.

Q: So if you don't agree with the way they're going to punish them, that will be a factor as well in sending them back to those countries?

Feith: I mean, the --

Q: The treatment of the --

Feith: As I said, we -- well, one of the considerations is we want to ensure humane treatment. We are -- we feel committed to providing that, and we will make sure that we have an understanding with countries that we transfer any detainees to that they will provide humane treatment also.
Q: Would you want to ensure that they would prosecute them? Besides how they're treated, do you want to ensure that any detainee transferred to, let's say, his home country is prosecuted?

Haynes: Well, it would depend on the case.

Feith: It would depend on the case. If you -- one might transfer somebody that you've decided shouldn't be prosecuted. I mean, it depends.

Staff: Thank you, ladies and gentlemen.

Q: Thank you.

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NEW YORK STATE BAR ASSOCIATION  
COORDINATING COMMITTEE ON  
FEDERAL ANTI-TERRORISM MEASURES  

REPORT ON MILITARY COMMISSIONS
PERTINENT BACKGROUND

On September 11, 2001 terrorists using hijacked passenger aircraft as deadly missiles attacked the World Trade Center in New York City, and the Pentagon in Washington, D.C. and crashed into the Pennsylvania countryside. More than 3,000 civilians were killed in these incidents. The unprecedented terrorist attacks on the United States have brought vast changes to our nation, our world and to each of us personally. Suddenly, the nation confronted firsthand the terrible destruction of human life and property that can be caused by a group of terrorists who lived among us, enjoyed our constitutional freedoms but used those very freedoms to escape detection and hide their evil plans.

While much has changed in the wake of the September 11th attacks, not everything has changed. Our national response to the September 11th attacks, and to global terrorism generally, must not give the perpetrators of these vicious crimes against humanity victory in the form of our reduced commitment to the rule of law. The attackers’ hatred of our freedoms must not cause us to lose our faith and trust in the sanctity of human rights and civil liberties on which our nation was founded. The choice this nation confronts in the current war against terrorism is not between protecting liberty and preserving national security. Both objectives must be accomplished simultaneously. Liberty would be meaningless without security from both terrorist attacks and governmental abuse of civil rights.

This challenge can be met only if the structure of our government constituting the separation of powers works properly, if there is a genuine commitment by all three branches -- the President, Congress and the courts -- to the rule of law during a wartime emergency, and if
there is a careful weighing and balancing of competing interests in preserving constitutional liberties while protecting national security.

This nation has faced the same challenge to a greater or lesser degree throughout its history. President John Adams enforced the Alien and Sedition Acts during the quasi-war with France in the 1790s. President Abraham Lincoln suspended the writ of habeas corpus during the Civil War. President Woodrow Wilson rounded up resistors to the draft in World War I, and his Attorney General engaged in the infamous “Palmer raids” against suspected communists and anarchists. President Franklin D. Roosevelt ordered the detention of more than 70,000 Japanese Americans in internment camps during the Second World War. These examples of Presidential wartime initiatives, bolstered on some occasions by the active or passive support of Congress and decisions of the Supreme Court of the United States, such as in *Korematsu v. United States*, 323 U.S. 214 (1944), however, do not provide assurance that the challenge of preserving constitutional liberties while protecting national security will be met wisely or without “sacrificing our constitutional principles on the altar of public safety.”

Before September 11, these Presidential wartime initiatives were not viewed with pride by many of our nation’s legal scholars and lawyers. They were not considered to be our nation’s “finest hour” or decisions we would want to repeat if the occasion arose. Our constitution is neither a “suicide pact” nor a chameleon when confronting the difficult challenges that wartime emergencies present. Wars must be fought not only abroad against our nation’s enemies but also at home when emergency conditions challenge our commitment to preserving constitutional liberties while maintaining the rule of law.
A. The November 13th Order

On September 20, President Bush addressed Congress and the nation and promised that the perpetrators of the September 11th terrorist attacks would be brought to justice or justice would be brought to them. But exactly what form would this American meting out of justice take? On November 13, 2001, President Bush provided part of the answer when he issued a Military Order directing the Department of Defense to establish military commissions to determine the guilt or innocence of certain non-citizens suspected of involvement in the September 11th attacks and other terrorist activities (the November 13th Order).

The November 13th Order was issued under extraordinary circumstances. A state of national emergency was declared following the September 11th terrorist attacks. Several intentionally inflicted cases of anthrax infection were reported in Washington, D.C. and in Florida, New Jersey, Connecticut and New York whose source was and remains unknown. Armed conflict began in Afghanistan against al Qaeda and Taliban military forces. There was also an intelligence alert in October 2001 that terrorists were believed to have obtained a 10-kiloton nuclear weapon from the Russian arsenal and planned to smuggle it into and detonate it in New York City. The national government was apparently so certain of future terrorist attacks that it assigned 100 civilian government officials to 24-hour rotations in underground bunkers as part of a “shadow government” ready to operate in the event the government in Washington, DC was destroyed or disabled.

The President did not act alone in responding to the September 11th attacks. By Joint Resolution on September 14, Congress authorized the use of all necessary and appropriate force against those nations, organizations or persons that planned, authorized, committed or aided those terrorist acts or harbored such persons or organizations. Congress also passed the
USA Patriot Act which, among other things, greatly expanded the wiretapping and surveillance powers of federal law enforcement.

B. The March 21, 2002 Secretary of Defense Rules and Regulations

The President indicated in the November 13th Order that the Department of Defense would issue rules and regulations governing the “full and fair” trial to be conducted by military commissions. Secretary of Defense Donald Rumsfeld described the November 13th Order as an “option” the Government may “need,” and that it was a “blueprint made public so that... work would begin” in earnest to define jurisdiction and determine appropriate procedures. On March 21, 2002 Secretary Rumsfeld announced the rules and procedures for the conduct of military commissions.7

C. Who, if Anyone, is to be Tried by Military Commission Under The November 13th Order?

As of today, no military commission has been convened or scheduled. Moreover, no individual has been identified publicly as subject to trial before military commission. Several identified terrorists would appear at first blush to be candidates for trial before a military commission according to the terms of the November 13th Order. Yet, in each case, the Government has chosen to try them in federal court. Zacarias Moussaoui, a non-U.S. citizen suspected of planning and involvement in the September 11th terrorist attacks, the so-called “twentieth hijacker,” apprehended in Minnesota, will be tried in the United States District Court in Alexandria, Virginia. Richard Reid, the non-U.S. citizen accused of attempting to blow up a civilian airliner with explosives packed in his sneakers, who was apprehended in Boston, will also be tried in the same court.
The possible subjects of trial before a military commission appear to be the approximately 500 captured members of al Qaeda and the Taliban military apprehended in Afghanistan and brought to and being detained at the U.S. Naval Base at Guantanamo Bay, Cuba. This location was chosen not only because it allows for tight security of the detainees but also because it is outside the jurisdiction of any United State court. There are reports that interrogations of these detainees have not produced sufficient evidence to proceed to trial or, indeed, helpful intelligence in the war on terrorism. There are also reports that the Department of Defense is looking into whether membership in or support of al Qaeda could be an offense tried before a military commission. Secretary Rumsfeld has said that the United States wants to conduct as few military commissions as possible and to reserve the process for the most senior al Qaeda and Taliban leaders. In short, the use of military commission under the November 13th Order appears to be an "option" in the war on terrorism, as Secretary Rumsfeld described it, that may not be used in the near future or indeed, at all.

D. Scope of Report

Accordingly, now, before any military commission is convened, is an appropriate time to consider and comment upon the important constitutional issues raised by the November 13th Order. This report will cover only the "trial" provisions of the November 13th Order. It does not address the separate and distinct constitutional, legal and policy issues raised by the indefinite detention and treatment of persons who may be subject to the November 13th Order. No determinations have been made as to status of the detainees, such as whether they are "unlawful combatants" or "prisoners of war," or with respect to the duration of the "hostilities" triggering detention or in what forum these decisions will be made.
Military Commissions

Military commissions have been used throughout the nation's history to try persons not otherwise subject to military law for violations of the law of war or for offenses committed in territory under military occupation. The law of war or law of armed conflict, as currently defined by the Department of Defense, includes that “part of international law that regulates the conduct of armed hostilities ... including treaties and international agreements to which the United States is a party, and applicable customary international law. It prohibits war crimes and crimes against humanity, including the killing of noncombatant civilians, the execution, torture or mistreatment of prisoners of war, and aiding or harboring the enemy.8

Beginning with the trial of the spy, John Andre, that was ordered by General George Washington and continuing throughout the Revolutionary War, the Mexican War the Civil War (including the Lincoln assassination conspirators), the First World War and especially during and after the Second World War, military commissions have been convened to try individuals for violations of the law of war. Indeed, more than 1600 persons were tried in Germany and more than a thousand were tried in the Far East. Military commissions have been described by the Supreme Court as “our common-law war courts” and “constitutionally recognized agencies for meeting many urgent government responsibilities relating to war.”9

Constitutional authority for military commissions can be found in Congress’ Article I and the President’s Article II powers. The President has convened military commissions pursuant to his powers as Commander-in-Chief and Chief Executive. Congress’ powers with respect to military commissions include: “To ... Provide for the common Defense” (clause 1); “To constitute tribunals inferior to the Supreme Court,” “To Define and Punish Piracies on the High Seas, and Offenses Against the Law of Nations;” “To Declare War, Grant
Letters of Marquee and Reprisal, and Make Rules Concerning Captures on Land and Water;”
“To Raise and Support Armies ...;” “To Provide and Maintain a Navy;” “To Make Rules for the
Government and Regulation of Land and Naval Forces” (clause 9-14).

Congress has specifically granted jurisdiction to military commissions in Article 21 of the Uniform Code of Military Justice (“UCMJ”) to try offenses and offenders under the law of war. Further, Congress has expressly authorized the President in Article 106 of the UCMJ to try anyone acting as a spy before a military commission. Article 104 of UCMJ authorizes trial by military commissions of: “any person who aids, or attempts to aid, the enemy with ammunition, supplies, money or other things; or without proper authority, knowingly harbors or protects of gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, directly or indirectly.”

The rules and procedures governing the operation of military commissions throughout history have generally followed those used in court-martials. Article 36 of the UCMJ requires that procedures in court martial and military commissions “may not be contrary to or inconsistent with this chapter.” Paragraph 2(b)(2) of the Preamble to the Manual for Courts-Martial (2000) states that military commissions shall be “guided by the appropriate principles of law and rules of procedure and evidence prescribed for courts-martial.” However, there is a caveat in the UCMJ. Such guidance is “subject to any applicable rule of international law or to any regulations prescribed by the President or any other competent authority.” In the November 13th Order and the Secretary of Defense’s Rules, the Executive branch has determined that not all UCMJ rules and procedures ordinarily applied in court-martials will govern in military commissions.
Furthermore, the Supreme Court has emphasized that civilians and particularly U.S. citizens are not ordinarily subject to military justice and must be tried for federal crimes in United States courts if they are operating. In the landmark case of *Ex parte Milligan*, 71 U.S. 2 (1866), decided shortly after the end of the Civil War, and involving the trial of a citizen who was "a non-belligerent," and not "subject to the law of war," the Supreme Court held that military justice "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed."

However, there are exceptions to the holding in Milligan. The Supreme Court has consistently upheld the jurisdiction of military commissions to try individuals accused of war crimes, spying or aiding the enemy. In *Ex Parte Quirin*, 317 U.S. 1 (1942), the Court affirmed the jurisdiction of a military commission ordered by President Roosevelt to try eight saboteurs trained in Nazi Germany who had entered the United States surreptitiously in Long Island, New York and Jacksonville, Florida with the intention of blowing up manufacturing plants, railroads, industrial plants and utilities. The defendants were captured, held and tried in the United States, and six of the eight were executed following trial before the military commission who found them guilty of violations of the law or war on behalf of a hostile foreign power. One defendant claimed to be a United States citizen. All were classified as unlawful belligerents who were not entitled to prisoner of war status.

In *Application of Yamashita*, 327 U.S. 1 (1946), the Court upheld the jurisdiction of a military commission to try General Tomoyuki Yamashita for war crimes committed by members of his command against U.S. personnel, in the Philippines during World War II. The Supreme Court emphasized that the "trial and punishment of enemy combatants who have committed violations of the Law of War is thus not only part of the conduct of war operating as
preventative measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the Law of War."18

Following its decision in Quirin, the Supreme Court re-emphasized that "the jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language of Art. I, §§ 8, and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law."19 The Court further warned that "[e]very extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections."20
Analysis of The November 13\textsuperscript{th} Order
And
The Secretary of Defense's Rules and Regulations

The November 13\textsuperscript{th} Order applies to all non-citizens determined by the President: (1) to be members of the international organization known as al Qaeda; or (2) to have engaged in, aided or abetted or conspired to commit, acts of international terrorism or acts in preparation therefor that have caused, threaten to cause or have as their aim to cause injury or adverse affects on the United States, its citizens, national security, foreign policy or economy; or (3) to have intentionally harbored such persons. Such individuals are to be "detained at an appropriate location designated by the Secretary of Defense outside or within the United States." Whether detained or tried under the Order, these individuals are not permitted under its terms to seek "any remedy" or "maintain any proceeding" in any U.S. federal or state court, any foreign court or any international tribunal. There is no time period set forth in the November 13\textsuperscript{th} Order with respect to detention; nor is there any sunset provision for the Order itself. The Order authorizes the creation of military commissions to try such persons, when and if they are to be subject to prosecution.\textsuperscript{21}

A. Threshold Considerations

In deciding to issue the November 13\textsuperscript{th} Order, the President confronted unchartered waters with some but not many navigational aids. Congress had not declared war. The individuals apparently responsible for the September 11\textsuperscript{th} attacks, members of al Qaeda, appear to be civilians without explicit support by a foreign government although they trained in and were given financial and other support by the Taliban regime in Afghanistan. The acts committed by the terrorists were certainly criminal, but it is arguable whether they were also war
crimes or violations of the law of war. In the past the United States had treated individuals accused of terrorism, such as the perpetrators of the 1993 World Trade Center bombing and the 1998 Kenyan and Tanzanian bombings, as civilians and had subjected them to trial in federal courts with the full panoply of due process rights provided by the Constitution.

Some of these challenges were easily addressed; others raise difficult and complicated issues of constitutional and international law. First, the September 11th attacks involved the deliberate kidnapping and killing of noncombatant civilians and, thus, were certainly violations of law of war as defined in Common Article 3 of the Geneva Convention of 1949. Second, the law of war applies to individual actors who may not be associated with a state, such as rebel groups or insurgents within a state. Third, a credible argument can be made that the terrorists planning and conducting the September 11th attacks were “unlawful belligerents,” in that they failed to satisfy any of the requirements for being treated as “lawful combatants,” such as wearing a uniform or other “fixed emblem recognizable at a distance or carrying their arms openly.” Unlawful belligerency is itself a war crime. Fourth, there is a sufficient level of armed hostilities between the United States military forces and those of the Taliban government members of al Qaeda in Afghanistan to satisfy the requirements under international law and the Constitution that a state of war exists.

B. Separation of Powers Issues

In the November 13th Order the President created an alternative system of justice within which to prosecute and try suspected terrorists. In this new system of justice, the Executive Branch defines the offenses, apprehends and tries the suspects and serves as the exclusive source of appellate relief. Congress has not been involved at any step in the process—whether in authorizing military commissions or commenting upon the rules and regulations for
their conduct. Congress, however, has exclusive authority under the Constitution, to declare war and commit armed forces to hostilities, to create courts inferior to the Supreme Court and to define and punish “offenses against the law of Nations,” which include violations of the law of war.

1. The President’s Authority As Commander-In-Chief To Establish Military Commissions

President Bush based his November 13th Order on three sources of authority:

1. The President’s Authority as Commander-in-Chief of the Annual Forces;

2. The Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stal. 224); and

3. Sections 821 and 836 of Title 10, United States Code (Uniform Code of Military Justice).23

In evaluating President Bush’s claim to authority to create military commissions, some commentators have emphasized that there is no formal declaration of war by Congress against al Qaeda or global terrorists in general, and that this important omission means that the November 13th Order violates the doctrine of separation of powers. Moreover, according to these critics, this omission undermines the precedential authority of Quirin and Yamashita where there was a formal declaration of war.24 These critics point out that in Quirin the Supreme Court recognized that it was “unnecessary for present purposes to determine to what extent the President as Commander-in-Chief has constitutional power to create military commissions without the support of congressional legislation. For here Congress has authorized trial of offenses against the Law of War before such commissions.”25

The scope of the President’s power to act alone with respect to military commission has not been well developed in the case law. However, the President’s inherent
power as Commander-in-Chief, especially in times of national crisis or war, can reasonably be interpreted to include the power to create military commissions to try those accused of violations of the law of war. In this regard, military tribunals have been used in armed conflicts that were not formally declared wars, such as The Indian Wars, the Mexican War and the Civil War. Moreover, as the Supreme Court recognized in Quirin: "An important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the Law of War."

The issue of the President's inherent power as Commander-in-Chief to convene military commissions to try enemy combatants for violations of the law of war, while probably supportable as a matter of constitutional law, need not be resolved because the President has been joined in the exercise of his war powers here by Congress by virtue of the Joint Resolution. Congress' grant of authority to the President to use "all necessary and appropriate force" includes the authority to implement Article 21 of the UCMJ (which does not require a declaration of war) for violations of the law of war related to the September 11th attacks. Furthermore, both the Supreme Court and Congress have recognized that a state of war can exist without a formal declaration of war by Congress. In this regard, Congress, despite the requirement for explicit approval of the use of U.S. armed forces in cases of imminent hostilities under the War Powers Resolution of 1973, has felt constitutionally comfortable with resolutions rather than formal declarations of war. Even during the Persian Gulf War, Congress used a resolution authorizing military action rather than declare war. Here, the Joint Resolution stated that it was "intended to constitute specific statutory authorization within the meaning of Section 5(h) of the War Powers Resolution." While the Joint Resolution said nothing about the right to
convene military commissions or forums and procedures with which to deal with enemy combatants, such a right in emergency circumstances or de facto wartime conditions is implicit in the authorization of the use of military force itself.

2. **Other Limitations On the President’s Right to Convene Military Commissions Without Specific Congressional Authorization.**

The November 13th Order extends well beyond the authorization given by Congress. The Joint Resolution’s authorization was limited to those persons involved in the September 11th terrorist attacks. The text of the November 13th Order, however, reaches not only members of the organization known as al Qaeda, claimed to be responsible for planning, funding and executing the September 11th attacks, but also individuals complicit in “acts of international terrorism” or who have “harbored” such persons. Thus, according to the November 13th Order, an IRA or Hamas supporter or member of any other recognized terrorist group could possibly be subject to this Order. There is no indication that Congress would permit this extension of the authority given in the Joint Resolution. In order to try individuals accused of terrorist acts which were not part of the September 11th attacks before a military commission, specific congressional authorization would appear to be required.

The November 13th Order fails to set forth a definition of “international terrorism.” Moreover, there does not appear to be a recognized definition of what acts would be included within the term “international terrorism.” Thus, the Order provides no limitations regarding the acts that may be covered. For example, mere membership in al Qaeda or aiding of al Qaeda by funding its operations or harboring them are not violations of the law of war. This is a threshold problem of definition that must be corrected by Congress if the Order is to have any effect.
While military commissions may constitute a proper forum for the trial of violations by the law of war, the Order also purports to include violations by terrorists of all "other applicable laws." On its face, this language reaches potential state and federal crimes that are not violations of the law of war as well as being beyond the scope of the authority granted by Congress in the Joint Resolution. Specific authority from Congress is needed to make specific acts of terrorism violations of the law of war rather than federal and state crimes.

Finally, a reasonable reading of the November 13th Order allows potential prosecution of resident aliens (legal or illegal) who are accused of involvement in the September 11th attacks or international terrorism. Resident aliens, however, are generally entitled to all of the due process protections as citizens, and, thus, subjecting them to trial by military commission would appear to require specific congressional authority beyond the Joint Resolution. The one possible exception would appear to be a resident alien determined to be an "unlawful belligerent" involved in committing an act of war within the United States who, under Quirin, could be subject to trial by military commission.

C. The Secretary of Defense's Rules and Regulations for the Conduct of Military Commissions

On March 21 Defense Secretary Rumsfeld announced that suspected terrorists have the right at military commissions: (1) to the presumption of innocence; (2) to choose counsel and to see the prosecution's evidence; (3) to trial in public though classified information will be kept secret; and (4) to remain silent with no adverse inference to be drawn. Prosecutors will be required to prove guilt beyond a reasonable doubt. There will be no double jeopardy. There is no jury; instead, there is a panel of military judges (three to seven members) who can convict on only two-thirds majority but must be unanimous in any decision imposing the death
penalty. Verdicts and sentences are not final until they are approved by the President and the Secretary of Defense. A verdict of not guilty shall not be changed.

Any appeal will be to a panel of three judges appointed to or by the military. The appellate panel reviews the military commission's findings. It may approve and forward a ruling to the Secretary of Defense or send the matter back to the military commission's appointing authority for further action. The appellate panel is limited to reviewing issues of fact and law in accordance with the military commission's rules. Finally, hearsay will be accepted as evidence, and the rules of evidence are liberalized to the extent that evidence which has "probative value to a reasonable person" is admissible.\footnote{30}

The Secretary of Defense's announced rules and regulations appear to have alleviated the concerns of many critics of military commissions with respect to the fairness of the proceedings. The rules and regulations, to be sure, do provide many of the rights to the accused that have come to be thought of as comprising fundamental fairness. In this regard, the rules and regulations compare favorably to those afforded in courts-martial conducted under the UCMJ and required by the International Convention Civil and Political Rights (ICCPR) to which the United States acceded on June 8, 1992. The UCMJ addresses trials of war crimes. The ICCPR does not expressly apply to trials of war crimes or military commissions. However, the ICCPR has been taken into account in war crimes prosecutions conducted by United Nations' special tribunals in the Former Yugoslavia and Rwanda.

There are several rights, however, that are missing from the Defense Secretary's list. The first is the right to habeas corpus relief. This right would allow persons tried before a military commission to challenge the constitutionality of the November 13\textsuperscript{th} Order and the power
of the military commission to try the petitioner for the offense charged, but not the guilt or innocence of the accused which is left to the military authorities alone to review. The November 13th Order precludes any remedy or proceedings by or on behalf of persons subject to the Order "in any court of the United States." The apparent objective of such language is to eliminate habeas corpus review by persons subject to the order. However, under the Constitution, only the Congress, not the President, can suspend the writ of habeas corpus.31

In any event, in Quirin the Supreme Court held that habeas relief cannot be denied to those tried by military commission. Interpreting language virtually identical to the November 13th Order, the Supreme Court held there was a right to judicial review "for determining [President Roosevelt's Order's] applicability to the particular case" and "petitioners' contentions that ... laws of the United States constitutionally enacted forbid their trial by military commission."32 The military commission in Quirin was conducted in Washington, D.C. and, unlike the al Qaeda and Taliban detainees at the U.S. Naval Base at Guantanamo, Cuba, the German saboteurs had access to federal courts. The Guantanamo Bay Naval Base is leased indefinitely to the United States but remains Cuban territory.33 Captured enemy belligerents who are not held on the sovereign territory of the United States cannot petition for habeas corpus relief.34

Another right missing from the Defense Secretary's list is the right to an appeal on the merits of the military commission's rulings to an independent body. Under the Defense Secretary's rules, the appeal permitted is only to a Review Panel (of three military officers, although a civilian may be appointed to this panel). No review by civilians outside the military system is permitted, including review by the Supreme Court through a writ of certiorari. By way of contrast, the UCMJ provides for review by the Court of Appeals for the Armed Forces and by
the Supreme Court through a writ of certiorari. The ICCPR also requires that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." However, there is no specific requirement that appeals be permitted to the civilian court system.

Finally, it is unclear what the right to an open or public trial means under the November 13th Order. The Defense Secretary's rules permit him or the presiding officer of the military commission to close the proceedings to the public or the press when either determines it is necessary to safeguard classified information and sources or to protect the safety of the military judges, prosecutors or prospective witnesses. Rule 806 of the Rules for Courts-Martial, however, recognizes that opening proceedings to "public scrutiny reduces the chance of arbitrary or capricious decisions and enhances public confidence." Thus, there is legitimate concern about the possibility that arbitrary and capricious decisions may result from closed trials before the military commissions. Indeed, the scenario that most concerns the critics of military commissions is that military defense counsel might be forced to keep certain information secret from his client and civilian co-counsel at the request of the government and that information leads to the conviction of the suspect who is then sentenced to death. In this regard, classified information and sources have been discussed and adequately protected under the Classified Information Procedures Act in federal court where criminal trials of terrorists have been conducted as well as in other military trials.

The foregoing rights that are missing from the Defense Secretary's list are important components of due process and the fundamental fairness afforded members of the U.S. military under the UCMJ. The Geneva Convention adopted in 1949 (seven years after the
discussion in *Quirin*) requires that the same due process rights guaranteed to U.S. soldiers tried in military courts be accorded to accused standing trial before military courts.
SUMMARY AND RECOMMENDATIONS

The issuance of the November 13th Order unleashed a firestorm of criticism both here and abroad. Some criticism claims that use of military commissions is inconsistent with this nation’s commitment to civil rights and civil liberties and that the Government appears to be looking for a judicial vehicle it controls so that certain and quick convictions can be achieved. Other critics emphasize that there is no need for military commissions because civilian courts have amply demonstrated that they can successfully try terrorists while protecting confidential intelligence sources and information and preserve the security of judge and jury. Still other critics have asserted that the international policy interests are implicated and there is a certain hypocrisy in the United States’ reliance upon military commissions after having objected to other nation’s use of military tribunals to try its own and U.S. citizens. Finally, some critics opine that the establishment of military tribunals may interfere with the international effort to wage the war on global terrorism.

Some of the criticism of the proposed military commissions is unfair, and much of it involves issues on which reasonable minds can differ. However, some of the criticism is fair because the November 13th Order has several significant flaws, particularly the absence of specific congressional authorization and its overbreath in terms of the persons and offenses to be tried. The core of the November 13th Order – the President’s convening of military commissions under de facto wartime emergency conditions to try non-citizens outside the United States for alleged violations of the law of war – is a valid exercise of his constitutional war powers as Commander in Chief and Chief Executive that finds ample support in case law and historical tradition. With respect to the remainder of the November 13th Order, however, it runs afoul of
the separation of powers, and specific Congressional authorization is required before it should be implemented.

We therefore recommend that: Military commissions should be convened under the November 13th Order only in narrow circumstances, that is, where: (a) there are compelling national security interests to use such a tribunal rather than existing Article III or state courts; (b) the persons to be tried are suspected or accused of taking actions that violate the law of war or were involved in the September 11th terrorist attacks; (c) the persons to be tried are non-citizens apprehended and appropriately detained outside the United States; and (d) the trials take place outside the United States. We further recommend that: The Congress of the United States should take immediate steps to consider the extent to which military commissions should be convened, and/or special courts should be created under Article I of the United States Constitution, for any other purpose relating to the defense against terrorism.

Furthermore, the Secretary of Defense’s rules and regulations for a “full and fair” trial before a military commission go a long way, but not the entire way, towards achieving the fundamental fairness required in connection with such trials. The principal shortcomings in these rules and procedures, particularly the absence of adequate appellate review and protection of the right to habeas corpus relief, can and should be corrected by Congress (or by the President or Secretary of Defense). At a minimum, the rules of procedures and evidence of the Uniform Code of Military Justice and the Manual for Courts Martial and the rights to habeas corpus
relief and appeal, including by writ of certiorari to the United States Supreme Court, should be
made applicable to trials before a military commission.

JOHN C. MALONEY, JR.
Chair

June 12, 2002
1 Testimony of Professor Laurence H. Tribe before U.S. Senate Judiciary Committee, December 2, 2001, at p. 2.


4 The November 13th Order concerns the “Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism.” A copy appears in Appendix A.

5 “Can We Stop the Next Attack,” Time, March 3, 2002, at 3.

6 Congressional Resolution Authorization for Use of Military Force, September 14, 2001. A copy appears in Appendix B.

7 Department of Defense Military Commission Order No. 1, March 21, 2002. A copy of the “Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism” appears in Appendix C.


16 131 U.S. at 121.

17 317 U.S. at 37.

18 327 U.S. at 11.

19 Reid v. Covert, 354 U.S. 1, 21 (1952).

20 Id.

21 See Appendix A.


23 See Appendix A.


27 317 U.S. at 27.

28 See, e.g., Bas v. Tingy, 4 U.S. 37, 43 (1800); Talbot v. Seeman, 5 U.S. 1, 28 (1801); The Pedro, 175 U.S. 354, 363 (1899).

29 See Appendix B.

30 See Appendix C.

31 U.S. Constitution, Art. I, Section 9, clause 2.

32 317 U.S. at 24-25

33 Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 16-23, 1903, U.S.-Cuba, T.S. No. 418.


Resolution on Military Commissions

Preamble: On September 11, 2001, terrorists attacked the Pentagon and the World Trade Center and crashed a civilian aircraft in western Pennsylvania causing massive numbers of deaths and injuries to United States citizens and citizens of other countries, and substantial destruction of property. In the wake of these attacks and continuing threats of terrorism, the President of the United States proclaimed a national emergency on September 14, 2001 and, on that date by resolution, Congress authorized the use of all necessary and appropriate force against those nations, organizations or persons that planned, authorized, committed or aided those terrorist attacks or harbored such persons or organizations.

The September 11 terrorist attacks resulted in several U.S. Government initiatives to combat terrorism. On November 13, 2001, the President issued a military order providing for the detention, treatment and trial by military commission of certain non-citizens as part of this nation's war against terrorism (the "November 13th Order"), followed by the Secretary of Defense's issuance on March 21, 2002 of regulations purporting to insure "a full and fair trial" by military commissions that may be convened pursuant to the November 13th Order. The Order and regulations raise important constitutional, legal and policy issues, particularly involving the separation of powers and due process.

In times of national emergency and war, it is especially challenging to maintain the rule of law and the delicate constitutional balance of protecting national security and civil liberties while giving high regard to both.

Article I of the United States Constitution confers upon Congress, and not the President, the powers to "constitute Tribunals inferior to the Supreme Court" (Clause 9), to "define and punish Piracies and Felonies committed on the High Seas, and Offences against the Law of Nations" (Clause 10), to "repel Invasions" (Clause 15), and to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers" (Cause 18).

As of the date of this resolution, no military commission has been convened or announced for the trial of an individual who the President or the Secretary of Defense has determined is subject to prosecution under the Order, and no such individual has been so identified publicly.

It is appropriate for the members of the New York State Bar Association, as both citizens and lawyers, to study and comment upon the constitutional, legal and policy issues raised by the anticipated use of military commissions, and for this Association to adopt, publish and distribute those comments.

Resolution: On June 22, 2002, the House of Delegates of the New York Bar Association adopted the following resolution, urging and recommending the following:

1. Military commissions should be convened under the November 13th Order
only in narrow circumstances, that is, where: (a) there are compelling national security interests to use such a tribunal rather than existing Article III or state courts; (b) the persons to be tried are accused of taking actions that violate the law of war or were involved in the September 11th terrorist attacks; (c) the persons to be tried are non-citizens apprehended and appropriately detained outside the United States; and (d) the trials take place outside the United States.

2. Any military commission convened under the November 13th Order should afford due process at a minimum matching that provided in the Uniform Code of Military Justice, and should apply the rules of evidence applicable under that Code. Procedures governing military commissions should provide for habeas corpus relief and the right of appeal, including by writ of certiorari, to the United States Supreme Court.

3. The Congress of the United States should take immediate steps to consider the extent to which military commissions should be convened, and/or special courts should be created under Article I of the United States Constitution, for any other purpose relating to defense against terrorism.
The Constitution Project

Recommendations for the Use of MILITARY COMMISSIONS

Released by the Liberty and Security Initiative of the Constitution Project

September 18, 2002
Recommendations for the Use of Military Commissions
Released by the Liberty and Security Initiative of the
Constitution Project

September 18, 2002

Preface
Virginia E. Sloan, Executive Director, the Constitution Project
Joseph Onek, Senior Counsel and Director, Liberty and Security Initiative

In the wake of the tragic events of September 11, 2001, the Constitution Project established a Liberty and Security Initiative and invited a number of prominent Americans, including members of the legal, military, government, media, academic, law enforcement and civil liberties communities, to examine and seek consensus on the line between security and civil liberties.

It is the hope of the Constitution Project that the expertise and ideological diversity of this broad-based committee will contribute to the national dialogue on issues such as military commissions and the military's role in homeland security; First Amendment and government secrecy; detentions and criminal justice; and privacy and technology.

The Constitution Project will issue interim reports on each of these subjects; a final publication will contain all the recommendations we hope will advance proposals for protecting civil liberties while at the same time preserving security in a time of war or other national emergency.

No one has yet been tried by the military tribunals proposed by the Administration, and perhaps no one ever will be. But the proposed use of military tribunals has generated enormous controversy because it throws into question our country’s commitment to due process and the rule of law. The report of the Constitution Project’s Liberty and Security Initiative delineates the concerns raised by the proposal and recommends ways to allay those concerns.

The central recommendation of the Initiative's blue ribbon panel is that the jurisdiction of the military tribunals be limited to trials of combatants captured overseas on the battlefield. This limitation establishes a bright line between cases that may be heard by tribunals and those that will remain in the civilian court system that is a hallmark of our democracy. The need for such a bright line has been highlighted in a related context by the military detention of Jose Padilla. The treatment of Padilla, who was arrested in Chicago as a suspected terrorist and is now being held by the military without charges and without access to counsel, demonstrates the danger of not clearly defining the limits of military authority.

The report also recommends that the United States comply with the requirement of the Geneva Conventions and the U.S. Army's own regulations by giving the Guantanamo detainees an opportunity to show that they are entitled to POW status. Under the Geneva Conventions, detainees who are POWs could not be tried by the proposed tribunals because members of the U.S. armed forces are not subject to the tribunals for comparable violations of the laws of war.
The report's other recommendations focus on assuring that persons tried by the tribunals receive protections similar to those provided by the U.S. courts martial. The report calls for the right to an appeal to a civilian court, the right to have civilian defense counsel serve as lead counsel (provided such counsel has obtained the appropriate security clearance), and the right to have access to evidence used by the prosecution. It suggests more generally that in cases where it is decided not to rely on civilian courts, the government should use the well-established court martial system rather than military tribunals.

The Constitution Project thanks Juliette Kayyem, Executive Director, Executive Session on Domestic Preparedness, Kennedy School of Government, Harvard University, for her expert and insightful assistance in preparing the report, and the law firm of Arnold & Porter for its invaluable research and advice. We are also grateful to the Nathan Cummings, Public Welfare, and Deer Creek Foundations, and the Open Society Institute, for their generous support for this initiative, and to the following members of the blue ribbon panel for carefully reviewing and endorsing the report:

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Recommendations for the Use of Military Commissions
Released by the Liberty and Security Initiative of the
Constitution Project

September 18, 2002

At-a-Glance

**Recommendation 1:** The military commissions should have jurisdiction only over persons who are captured in the course of an armed conflict and who are charged with violating the laws of war or committing crimes against humanity.

**Recommendation 2:** There should be a fair and impartial process to determine whether a person is a prisoner of war; detainees in Afghanistan or other parts of the world should be treated as POWs pending final resolution of their status.

**Recommendation 3:** Military commission decisions should be appealable to a civilian judicial body; the right to habeas corpus should not be abrogated.

**Recommendation 4:** Commission procedures should conform to those of the Uniform Code of Military Justice.
Recommendations for the Use of Military Commissions
Released by the Liberty and Security Initiative of the
Constitution Project

September 18, 2002

This report addresses the proposed use of military commissions (popularly called "tribunals") to try persons suspected of terrorism. It reflects the committee's belief that national security interests do not require sacrificing constitutional principles. Among those principles are adherence to due process and support for an independent civilian judiciary that protects individual rights against overreaching by the political branches. While military trials may be appropriate in certain circumstances, we must be careful not to undermine our commitment to strong civilian courts and to judicial review.

This report also reflects the committee's recognition that the way we use the proposed military commissions may have an important impact on our relations with other nations. The United States may be less able to persuade other nations to extradite terrorist suspects if our commissions are perceived by other countries as unfair. We may be less able to dissuade other nations from inappropriately using military commissions, against our citizens or their own, if our use of commissions is too broad. More generally, our efforts to promote the rule of law and judicial independence throughout the world may be undermined if our prosecution of suspected terrorists does not adhere to the high standards we set for others.

On November 13, 2001, President Bush issued a "Military Order" regarding "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." The Order authorizes the creation of military commissions to try any non-citizens determined by the President (1) to be members of the international organization known as al Qaeda; or (2) to have engaged in, aided or abetted or conspired to commit, acts of international terrorism or acts in preparation therefor that have caused, threaten to cause or have as their aim to cause injury or adverse affects on the United States, its citizens, national security, foreign policy or economy; or (3) to have intentionally harbored such persons.

Perhaps no other aspect of this country's war on terrorism has generated so much controversy. Congress, legal scholars and commentators have debated the military commission provisions, their constitutionality, their compliance with our treaty obligations, and their potential impact on the international effort to end terrorism. The Order provides that the Secretary of Defense shall establish appropriate rules for the military commissions, and on March 21 the Department of Defense (DoD) issued the regulations implementing the Order. These regulations do not resolve all the issues and concerns raised by the Order and are subject both to amendment by DoD and, possibly, congressional action. Thus, the Liberty and Security Initiative believes that it is timely and important to suggest limits on the scope of the Order and appropriate safeguards for those who may become subject to it.

The Initiative's recommendations should not be understood as an endorsement of the use of military commissions or as a legal conclusion on the constitutionality of commissions in the current context. Members of the Initiative have differing views as to the advisability and legality of using
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commissions. Further, unless otherwise specified, the Initiative does not contend that its recommendations are necessarily required by the Constitution.

The Initiative also notes that the President’s Order, and the DoD regulations, do not have explicit congressional approval. In Ex parte Quirin, the Supreme Court upheld a military commission’s jurisdiction over German saboteurs who arrived on U.S. soil and were in violation of the laws of war. Quirin was decided during WWII, a declared war, and Congress had authorized the use of military commissions. The Court expressly left open the question whether the President’s constitutional authority alone was sufficient to establish a military commission. The Initiative has left unresolved the question whether prior congressional authorization is required before the United States utilizes military commissions in the present conflict and whether, in light of the Joint Resolution enacted by Congress after September 11, it has been given. The Initiative does believe, however, that the President’s authority is most clear, and least open to dispute, when Congress has explicitly acted.

**Recommendation 1: The military commissions should have jurisdiction only over persons who are captured in the course of an armed conflict and who are charged with violating the laws of war or committing crimes against humanity.**

The DoD regulations did not limit the jurisdiction of military commissions as set forth in the President’s Order. The jurisdiction of the military commissions should be limited to trials of persons charged with offenses against the laws of war or crimes against humanity who are captured overseas in the course of armed conflict. This limited scope ensures that military commissions will be used as ancillary to the conduct of military operations and that they do not unduly undermine the authority of civilian United States courts. It draws a bright line between the use of military commissions and civilian courts and thereby protects the ability of the United States to argue against the inappropriate use of military tribunals by other countries.

Initiative members did not agree on whether the jurisdiction of the commissions should be limited to persons who are not citizens or resident aliens. Some believe that such a limitation, which is not required by the Supreme Court’s decision in Quirin, is discriminatory and unjustified. Others believe that such a limitation would appropriately underscore that the commissions constitute a very narrow exception to civilian court jurisdiction. Still others believe that Quirin was wrongly decided, and that Fourth, Fifth and Sixth Amendment protections extend to citizens and resident aliens who might otherwise fall within a commission’s jurisdiction.

**Recommendation 2: There should be a fair and impartial process to determine whether a person is a prisoner of war; detainees in Afghanistan or other parts of the world should be treated as POWs pending final resolution of their status.**

Under the Geneva Conventions, prisoners of war (POWs) are afforded certain rights that are not afforded other detainees. Significantly for present purposes, a detainee of the United States who qualifies for prisoner of war status must be tried under regular court-martial procedures or in American civilian courts in the same manner as members of the United States armed forces and thus cannot be brought before the proposed military commissions.
The Third Geneva Convention, Article 5, and United States Army regulations require that captured persons who may be POWs are to be treated as POWs pending final resolution of their status by a competent tribunal. The Initiative believes this presumption is important both as a guide to U.S. armed forces in the field and as a protection for U.S. forces who may be captured. Army regulations, consistent with the Geneva Conventions, call for a three-member panel of military officers to determine the status of captured persons who assert prisoner of war status and grant those persons, inter alia, the right to attend all open sessions of the panel and to testify. DoD should adhere to these regulations.

The Administration’s decision to deny POW status to all Taliban captives raises particular concerns. Many Taliban units appear to be the type of armed force entitled to POW status under the Geneva Conventions. In addition, in some cases it is difficult to determine whether a given person was fighting for al Qaeda or the Taliban. Thus all captives asserting POW status should be granted the individualized determinations envisaged by Army regulations.

**Recommendation 3: Military commission decisions should be appealable to a civilian judicial body; the right to habeas corpus should not be abrogated.**

All military tribunals are subject to the danger of “command influence,” the potential for bias created by the fact that prosecutors, judges and, in many cases, defense counsel are part of a hierarchical military structure. This danger is particularly great under the President’s Order because the President himself, as Commander in Chief, will choose the individuals who are to be tried by military commissions.

A primary protection against command influence in military tribunals is some type of independent civilian appeal mechanism. The President’s Order, however, bars appellate review by any state or federal court. The DoD regulations do not protect against command influence because they provide for review by a panel that consists only of military officers or civilians commissioned as military officers. Moreover, this military panel lacks many of the indicia of an appellate court. It can make recommendations to the Secretary of Defense or call for further proceedings, but does not have the power to dismiss charges against the accused. It is not required to issue written opinions explaining its decisions. In addition, the Secretary of Defense may appoint a different review panel in every case; thus a panel that decides in favor of an accused runs the risk of non-reappointment.

The Initiative believes that the availability of an appeal to an independent civilian body, which is provided in American court martial proceedings, is crucial to ensure the integrity and impartiality of the commission process. It is a safeguard that the United States government, including the military, promotes in other countries; it should not be abandoned here.

The President’s Order also appears to bar resort to habeas corpus proceedings, although White House counsel has subsequently disavowed that position. The DoD regulations are silent on this issue. The Initiative’s view is that the Order cannot constitutionally and should not as a matter of policy be interpreted to deny habeas corpus jurisdiction where it is otherwise available. The Initiative notes further that Article 9 of the International Covenant on Civil and Political Rights, to which the United States is a party, requires that resort to a court for habeas-like proceedings be available to all detainees.
Recommendation 4: Commission procedures should conform to those of the Uniform Code of Military Justice.

As provided by the President's Order, the DoD regulations establish the procedural rules for the military commissions. In important respects, the regulations clarify the rights to be accorded the accused. The Initiative endorses those provisions of the regulations that guarantee the presumption of innocence, require that guilt be established beyond a reasonable doubt, affirm the right against self-incrimination and require a unanimous verdict for imposition of the death penalty.

The regulations, however, raise many concerns. They give the government broad and unreviewable discretion to close proceedings to the public. They also give the government broad discretion to designate information as "protected" and on that basis deny accused persons access to evidence that may be material to their cases. Similar limitations on access to information are placed on any counsel retained by the accused, even when such counsel has been granted a security clearance by DoD, but not on military defense counsel appointed by the government. This disparity relegates civilian counsel to second-class status and is contrary to the practice in courts-martial where civilian counsel who obtain a security clearance are ordinarily accorded access to classified information and are able to serve as lead counsel. While the Initiative recognizes the sensitivity of intelligence information, sources and methods in the current struggle, it believes that the accused must not be denied the right to a vigorous defense.

These and other concerns could be remedied if the procedures for military commissions conformed to those of the Uniform Code of Military Justice. The UCMJ procedures assure protection for the rights of the accused and for national security interests. The Code has provisions for protecting classified information, intelligence sources and methods, witnesses and judges. Significantly, the Preamble to the Manual for Courts-Martial states that "...subject to...any regulations prescribed by the President..., military commissions and provost courts shall be guided by the appropriate principles of law and rules and procedures and evidence prescribed in courts martial." The United States military promotes the UCMJ as a model for countries throughout the world; it should also be the model for military commissions.

The Initiative notes that jurisdiction over violations of the laws of war is vested in courts martial to the same extent as in military commissions. Since the Initiative's recommendations, taken together, call for a military commission process similar to already established procedures for courts martial, it makes considerable sense to use courts martial rather than newly created commissions whenever resort to civilian courts is rejected.
The Constitution Project
Virginia E. Sloan, Executive Director

The Constitution Project is a bipartisan, not-for-profit organization, based at Georgetown University's Public Policy Institute. The Constitution Project promotes dialogue across ideological and partisan lines, bringing together prominent Americans to achieve long-term consensus on a variety of legal and governance issues.

In addition to its Liberty and Security Initiative, other Constitution Project programs include: the Election Reform Initiative, the Courts Initiative, the Death Penalty Reform Initiative and the Constitutional Amendments Initiative.

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IMMEDIATE RELEASE

October 2, 2002

DOD RESPOND TO ABA ENEMY COMBATANT REPORT

Department of Defense General Counsel William J. Haynes II last week asserted the president's authority to detain enemy combatants in response to an American Bar Association report critical of the policy.

In a letter to ABA President Alfred P. Carlton regarding conclusions in the recently released "Preliminary Report of the ABA Task Force on Treatment of Enemy Combatants," Haynes said, "Mr. Hirshon was kind enough to send me the August 8, 2002 Preliminary Report ('Report') of the ABA Task Force on Treatment of Enemy Combatants ('Task Force'). The Task Force asks the Administration to explain the basis and scope of its authority to detain U.S. citizens as enemy combatants (pp. 20-21). We have explained our position in various filings and arguments before federal courts, and elsewhere. Nevertheless, I am happy to respond now, especially since the Report contains legal errors that I am sure the Task Force will want to correct before the ABA considers whether to endorse the Report.

"There are many areas in which the Task Force's Report concurs with the government's analysis of its authority to detain enemy combatants. First, the Report acknowledges that the United States is currently in a state of war with al Qaeda, one that triggers Executive Branch authority to prevent further attacks. Second, the Report recognizes that the United States government possesses wartime authority to detain enemy combatants in order to prevent them from furthering enemy attacks on the United States in the future. Finally, the Report concludes that a state of war necessarily confers upon the government additional authority that it does not possess in time of peace.

"My comments address the two central issues in the Report: (1) The President's authority to detain enemy combatants during wartime; and (2) Judicial review of the President's determination of enemy combatant status.

"Without question, the President can detain enemy combatants, including those who are U.S. citizens, during wartime. See Ex parte Quirin, 317 U.S. 1, 31, 37 (1942); Colepaugh v. Looney, 235 F. 2d 429, 432 (10th Cir. 1956); In re Territo, 156 F. 2d 142, 145 (9th Cir. 1946). The Fourth Circuit recently reaffirmed this proposition. See Hamdi v. Rumsfeld, 296 F.3d 278, 281, 283 (4th Cir. 2002). The purposes of detaining enemy combatants during wartime are, among other things, to gather intelligence and to ensure that detainees do not return to assist the enemy. Presidents have detained enemy combatants in every major conflict in the Nation's history, including recent conflicts such as the Gulf, Vietnam, and Korean wars. During World War II, the United States detained hundreds of thousands of prisoners of war in the United States (some of whom were U.S. citizens) without trial or counsel. Then, as now, the purpose of detention was not to punish, but to protect.
"Article II of the Constitution is the primary basis for the President's authority to detain enemy combatants. Article II vests the 'executive Power' in the President and provides that he 'shall be Commander in Chief of the Army and Navy of the United States.' U.S. Const. art. II, § 1, cl. 1; id., § 2, cl. 1. These provisions invest the President alone . . . with the entire charge of hostile operations' during wartime. Hamilton v. Dillin, 88 U.S. (21 Wall.) 73, 87 (1874); see also Johnson v. Eisentrager, 339 U.S. 763, 788 (1950). The determination that an individual should be detained as an enemy combatant has traditionally been one of the President's most fundamental military judgments.

"While Article II is a sufficient basis for the President's authority to detain enemy combatants, in the current conflict the President also enjoys the support of Congress. In its Joint Resolution of September 18, 2001, Congress authorized 'the President . . . to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.' Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (emphasis added); see also 10 U.S.C. § 956. Congress thus specifically authorized the President not only to use deadly force, but also any lesser force needed to capture and detain enemy combatants to prevent them from engaging in continued hostilities against the United States. The President's constitutional power is at its apex when he enjoys such support from Congress, especially in the field of foreign affairs. See Dames & Moore v. Regan, 453 U.S. 654, 674 (1981); Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 635-37 & n. 2 (1952) (Jackson, J., concurring).

"The Report incorrectly suggests (p. 9) that the absence of a 'formal Congressional 'Declaration of War' somehow affects the President's power to detain enemy combatants. As explained above, Article II alone gives the President the power to detain enemies during wartime, regardless of congressional action. In any event, Congress's September 18, 2001 Joint Resolution provides ample congressional sanction. It has long been settled that congressional approval of presidential military action need not take the form of a declaration, see, e.g., Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801); Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800). Indeed, the vast majority of U.S. military actions have not been preceded by a congressional declaration of war. The President has exercised the power to detain enemy combatants in many wars that lacked a formal declaration from Congress, including, most recently, the Gulf, Vietnam, and Korean wars. And the Fourth Circuit recently confirmed that the government currently possesses the authority to detain enemy combatants even though Congress has not declared war against al Qaida. See Hamdi, 296 F.3d at 283.

"The Report also errs in suggesting (p. 9) that the President may detain only enemy combatants who wear uniforms. This position was implicitly rejected in Quirin, a case involving enemy saboteurs captured wearing civilian clothes. See Quirin, 317 U.S. at 31 ('Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention . . . .'). Any other rule would reward enemy combatants for violating the traditional law of war requirement to wear uniforms or a distinctive insignia as a condition of lawful combat.

"Finally, the President's authority to detain enemy combatants is not affected by 18 U.S.C. § 4001. Section 4001 requires that 'no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an act of Congress.' The text and legislative history of Section 4001, as well as its placement in Title 18 of the U.S. Code, demonstrate that Congress intended Section 4001(a) to govern only the administration of federal civilian prisons, and not to restrict the President's constitutional authority as Commander in Chief to detain enemy combatants. Moreover, as explained above, there is an act of Congress that supports the detentions - the September 18, 2001 Joint Resolution. If Section 4001 nonetheless purported to apply to enemy combatant detentions, it would impinge on the President's..."
constitutional powers under Article II. Section 4001 should be read to avoid this constitutional difficulty. See, e.g., Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992) (citations omitted).

"The Report suggests that the government's position in the Hamdi and Padilla habeas litigation is that 'with no meaningful judicial review, an American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the Government's say-so.' That statement warrants three comments.

"First, the government welcomes meaningful judicial review of its detention in the United States of 'enemy combatants.' As part of its Returns in Hamdi and Padilla, the government submitted ample factual evidence supporting its determinations that Hamdi and Padilla are enemy combatants. These executive branch submissions to the judiciary are literally unprecedented in our nation's long history of wartime detentions of enemy combatants, and demonstrate our commitment to judicial review in this context. The Fourth Circuit reaffirmed that the judiciary owes the executive branch 'considerable' deference in the context of foreign relations and national security, especially when the President acts with congressional support, and that this considerable deference 'extends to military designations of individuals as enemy combatants in times of active hostilities, as well as to their detention after capture on the field of battle.' Hamdi, 296 F.3d at 281.

"Second, I am puzzled about the basis for the Report's recommendation (pp. 23-24) that a detainee should be given counsel for purposes of seeking habeas relief. The Report correctly acknowledges (p. 23) that 'the 6th Amendment right to counsel does not technically attach to &charged enemy combatants,' and that giving detainees access to counsel may sometimes be 'unwise, impractical, or dangerous.' But the Report goes on to argue for a right to counsel on the basis of a vague and unexplained reference (p. 24) to 'full Due Process rights.' There is no due process or any other legal basis, under either domestic or international law, that entitles enemy combatants to legal counsel. And providing such counsel as a matter of discretion at this time would threaten national security in at least two respects: It would interfere with ongoing efforts to gather and evaluate intelligence about the enemy. And it might enable detained enemy combatants to pass concealed messages to the enemy. Al Qaida training manuals emphasize the 'importance,' when detained, of 'mastering the art of hiding messages,' and teach that al Qaida detainees should '[t]ake advantage of visits to communicate with brothers outside prison and exchange information that may be helpful to them in their work outside prison . . . .' See Birmingham UK Al Qaida Manual, page 16, para. 6, available at http://www.usdoj.gov/ig/manualpart1_4.pdf; cf. United States v. Ahmed Abdel Sattar, et al., Indictment 02 Crim. 395, 7, 16, 30 (Grand Jury Indictment, S.D.N.Y., April 9, 2002) (attorney for member of terrorist group related to al Qaida indicted for passing messages to and from convicted terrorist Sheik Omar Abdel-Rahman).

"Third, the Report misleadingly asserts that Hamdi and Padilla are being detained 'indefinitely.' The suggestion appears to be that Hamdi and Padilla are being detained lawlessly and without limit. That is not true. As I just explained, the constitutional power to detain during wartime is well settled. In addition, international law - including the Third Geneva Convention - unambiguously permits a government to detain enemy combatants at least until hostilities cease. I appreciate that there may be uncertainty about when hostilities cease in the novel conflict with al Qaida. But I believe that disquiet about indefinite detention is misplaced for two reasons. First, the concern is premature. In prior wars combatants (including U.S. prisoners of war) have been legally detained for years. We have not yet approached that point in the current conflict. And second, the government has no interest in detaining enemy combatants any longer than necessary, and is reviewing the requirement for their continued detention on a case-by-case basis. But as long as hostilities continue and the detainees retain intelligence value or present a threat, no law requires that the detainees be released, and it would be imprudent to do so.

"Much of the foregoing analysis responds to your query about the basis of presidential power to detain
enemy combatants during wartime. But there is more at work here than the exercise of prerogatives. The Constitution confers extraordinary power on the President to enable him to carry out his ultimate responsibility of ensuring that the American people are safe and secure. To fail to exercise this power would be to fail to discharge this most basic of all presidential responsibilities.

"I agree with the Report (p. 4) that '[h]ow we deal with citizens suspected of terroristic activity will say much about us as a society committed to the rule of law.' This is one of the many reasons why the government has paid such careful attention to the legal basis for its actions. In our view, the detention of enemy combatants is authorized by the Constitution, by Congress, by long historical practice, by the laws and customs of war, by Supreme Court precedent, and by lower court precedent. In this light, the Report's ubiquitous suggestion that the detention of Hamdi and Padilla is inconsistent with the rule of law is misplaced. I hope that an examination of the precedents and arguments above will lead the Task Force to rethink its analysis and conclusions.

"One final request: Please publicize this reply with your membership and the public in the same fashion that you publicized your preliminary Report. Though Mr. Hirshon invited my comments on the Report, the ABA published the Report on its website and through press releases well before I saw it and was able to respond. I recognize that the ABA Annual Meeting provided an attractive opportunity to broadcast the Task Force's analysis. On the other hand, the issues addressed by the Task Force are vitally important, and the ABA should have a comprehensive and balanced presentation of legal authorities before deciding whether to endorse the Task Force's views. Thank you."

November 26, 2002

Hon. William J. Haynes II
General Counsel
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Washington, DC 20301-1600

Re: Procedures for Trials by Military Commissions: Implementing Regulations

Dear Mr. Haynes:

Earlier this year, the National Institute of Military Justice suggested that it would be desirable and consonant with the Department's standards for public comment on proposed changes in the Manual for Courts-Martial to afford public notice of and an opportunity for comment on the rules implementing the President's November 13, 2001 Military Order. Although that suggestion was not followed in connection with the March 21, 2002 Procedures for Trials by Military Commissions, I respectfully offer it again with regard to the implementing rules that I understand from recent newspaper articles are currently being prepared. Affording an opportunity for public comment on those rules prior to their going into effect would not only provide insights that I am sure would prove useful, but, equally importantly, would also contribute powerfully to public confidence in the results.

I hope favorable attention can be given to this suggestion.

Very truly yours,

Eugene R. Fidell

Advance copy by fax to (703) 693-7278
THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

December 30, 2002

Hon. Donald H. Rumsfeld
Secretary of Defense
1400 Defense Pentagon
Washington, DC 20301-1600

Re: Procedures for Trial by Military Commissions: Implementing Regulations

Dear Mr. Secretary:

Earlier this year, the American Bar Association and the National Institute of Military Justice called on the Department to afford public notice and an opportunity for comment on the rules implementing the President's November 13, 2001 Military Order. The Bar Association of the District of Columbia (BADC) took note of these suggestions and thought the concept a desirable one that would likely benefit both the process and the ultimate product. We note that over the past decade or so the Department has moved toward notice and comment rulemaking in promulgating changes to the Manual for Courts-Martial. We favor this evolution in the military justice arena, and believed it would be of substantial benefit in the military commission context as well.

We are aware that the Department did not choose to use this public notice process in the promulgation of its Military Commission Order on March 21, 2001, in part due to the desire not to delay the promulgation of the regulations.

Once again, the opportunity for the Department to benefit from a more public process now appears to present itself. The Wall Street Journal on December 10, 2002, reported that the Department is drafting regulations to define crimes that may be tried before military commissions. BADC urges that you require public notice and an opportunity—a brief period not exceeding 30 days would be more than adequate—for public comment on the rules currently under preparation.

There are a number of benefits from following a public process. The Department would benefit from the comments received and the multitude of perspectives brought to bear, improving the end product. Even more important, however, is the confidence in America's system of justice that would ensue from such an endeavor, both here and abroad. The United States has come under some criticism from both friends and others in the past fifteen months for sometimes being perceived to act without giving sufficient consideration to concerns of those affected by our actions. The Department now has an opportunity not only to avoid such criticism regarding regulations for trials by military commission, but to put a positive perspective on our efforts to bring terrorists to justice.

Thank you for your consideration. Please feel free to contact me at 202-639-6676 or Grant Lattin, Chair of BADC's Military Law Committee, at 703-490-0000.

Sincerely,

William E. Lawler, III
President, Bar Association of the District of Columbia

co: Grant Lattin
American College of Trial Lawyers

REPORT ON MILITARY COMMISSIONS FOR THE TRIAL OF TERRORISTS

Approved by the Board of Regents
March, 2003
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REPORT ON MILITARY COMMISSIONS FOR THE TRIAL OF TERRORISTS*

Introduction

In the wake of the September 11, 2001 attacks by Islamic extremists, the President and the Department of Defense issued orders prescribing trials by military commission of certain non-citizens connected with those attacks or related in some way to al Qaeda. This report analyzes the major issues raised by these orders. The first section discusses the various policy interests that must be balanced in evaluating mechanisms for trying suspected terrorists. The second section summarizes the orders of the President and the Department of Defense. The third section discusses the threshold issues of legal authorization for the orders and the classes of persons potentially subject to them. The fourth section addresses the adequacy of the procedures prescribed for trial by military commission. The fifth section contrasts the procedures with those to be applied in the International Criminal Court and discusses the relative advantages and disadvantages of trying suspected terrorists in international tribunals. The sixth section summarizes the committee's recommendations regarding the procedures and instructions governing trials by military commission.

I. POLICY INTERESTS

When devising the orders, the President and the Department of Defense were required to balance a variety of competing policy interests. Many of those interests militate against scrupulous adherence to norms that apply to criminal defendants in federal district courts:

- Deterrence of future acts of terrorism through punishment of the September 11 perpetrators and incarceration of others who might commit terrorist acts;
- Gathering intelligence regarding the planning of future terrorist acts;
- Protecting the secrecy of classified information and intelligence sources and methods;
- Speed and efficiency of adjudication; and
- Ensuring that trials do not provide terrorists with a "bully pulpit" from which they might incite others to acts of terrorism.

Countervailing interests would suggest that greater care should be taken to ensure the fairness of military commission procedures:

- American traditions of fairness and transparency in the judicial process, both for the sake of the accused and also to preserve the integrity of our justice system;
- Constitutional protections for resident aliens;

* The authors of this report are Richard T. Franch, of Chicago, Illinois, a member of the International Committee of The American College of Trial Lawyers, which sponsored this report, and his partner, Patricia A. Bronte, assisted by Allan V. Abinoja, Denise Kirkowski Bowler, Zubair A. Kahn, Oliver J. Larson and John T. Ruskusky.
Longstanding U.S. State Department objections to trials by military tribunals in other countries (e.g., China, Colombia, Egypt, Malaysia, Peru, Sudan, and Turkey);¹ 
Maximizing the likelihood that U.S. soldiers will receive fair treatment from other countries; and 
Compliance with international treaty obligations and customary law to promote extradition of terrorists to the U.S. and international support for the war on terrorism.

This report does not attempt to second-guess the policy choices that resulted from this balancing process by the President and the Secretary of Defense. Rather, this report identifies and discusses the principal legal issues raised by the orders.

II. SUMMARY OF ORDERS GOVERNING MILITARY COMMISSIONS
A. The President's Order

On November 13, 2001, President George W. Bush issued a Military Order for the “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism” (the “Order”). 66 F.R. 57833 (Nov. 16, 2001). The order authorizes the Secretary of Defense to detain and try by military commission any non-citizen whom the President determines in writing (a) is a current or former member of al Qaeda, or (b) has aided or abetted terrorist acts against the U.S., or (c) has knowingly harbored persons described in (a) or (b), provided that the President also determines that “it is in the interest of the United States that such individual be subject to this order.” Order, § 2(a). The Order provides that such individuals shall be “detained at an appropriate location . . . outside or within the United States,” but the Order does not specify any limitation on the term of detention. Id. at § 3(a). The Order provides that such individuals be prosecuted “for any and all offenses triable by military commission[]” Id. at § 4(a).

The Order contains general guidelines that grant the Secretary of Defense wide latitude in relaxing evidentiary rules, permitting secret evidence and closed proceedings, and imposing the death penalty by a less-than-unanimous vote of a three-person military commission. Id. at §§ 4(b) and (c). The Order provides for review of the military commission’s decisions by the President or the Secretary of Defense, and it purports to exclude review by any state, federal, foreign, or international court. Id. at §§ 4(8) and 7(b)(2).

Immediately after the September 11 attacks, government officials detained many resident aliens, mostly Muslims, for questioning and/or immigration violations. In January 2002, U.S. armed forces began transporting selected persons captured during military operations in Afghanistan to the U.S. Naval Base at Guantanamo Bay, Cuba. As of January 2003, there were over 600

detainees from 38 countries at Guantanamo, and military officials have not said whether or when charges might be brought against them.\(^2\)

**B. The Defense Department's Trial Procedures**

On March 21, 2002, the Department of Defense promulgated "Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism" (the "Procedures"). The Procedures purport to establish jurisdiction of the military commissions over "violations of the laws of war and all other offenses triable by military commission." Procedures, § 3(B).\(^3\) Under the Procedures, the Secretary of Defense or his designee will appoint for each commission between three and seven members, including one Presiding Officer, and one or two alternate members. *Id.* at §4(A). All members of the commissions will be commissioned U.S. military officers, and the Presiding Officer will also be a judge advocate (i.e., military lawyer). *Id.* The Presiding Officer will be responsible for making initial evidentiary and pre-trial rulings, preserving order, and presiding over trial and sentencing proceedings. *Id.* at § 4(A)(5).

1. Rights of the Accused

Every person tried before a military commission will be represented by an appointed military lawyer (the "Detailed Defense Counsel"). *Id.* at § 4(C)(2). The accused person may choose another military lawyer to serve in place of the appointed Detailed Defense Counsel or, with the approval of the Secretary of Defense or his designee, as an additional Detailed Defense Counsel. *Id.* at § 4(C)(3)(a). In addition, the accused person may retain, at his own expense, a civilian attorney who is eligible for access to information classified as secret and who agrees in writing to comply with all applicable rules for the proceedings. *Id.* at § 4(C)(3)(b). The accused person must be represented at all times by Detailed Defense Counsel, and the Procedures do not permit accused persons to represent themselves. *Id.* at § 4(C)(4).

Section 5 of the Procedures itemizes the specific procedural safeguards and rights to be afforded persons tried by military commission, including the presumption of innocence, proof of guilt beyond a reasonable doubt, the accused's right not to testify and not to have adverse inferences drawn therefrom, the prosecution's duty to provide the defense with exculpatory evidence and evidence to be introduced against the accused, the right to present evidence and cross-examine prosecution witnesses, and protection against double jeopardy. *Id.* at § 5.

2. Evidence

The commissions may admit a wide array of evidence that would not be admissible in criminal trials in federal courts or courts martial, such as unworn statements and other hearsay evidence, arguably coerced confessions, and unauthenticated physical evidence. The Procedures permit the Presiding Officer to admit any evidence that "would have probative value to a reasonable person." *Id.* at § 6(D)(1). In addition, the commission may consider "any other evidence


\(^3\) The Procedures also provide that the Order shall prevail if it conflicts with the Procedures. *Id.* § 7(b).
including... sworn or unsworn written statements, physical evidence, or scientific or other reports.” *Id.* at § 6(D)(3). Witnesses may be permitted to testify by “telephone, audiovisual means, or other means,” but all witnesses are subject to cross-examination. *Id.* at §§ 6(D)(2)(a), 6(D)(2)(c). The commission may call witnesses not requested by the prosecution or the defense and may question any witness. *Id.* at §§ 6(D)(2)(a), 6(D)(2)(c). The Presiding Officer rules on all evidentiary issues unless another member of the commission requests that the entire commission decide an issue, in which case the majority opinion of the commission shall prevail. *Id.* at § 6(D)(1).

The Procedures authorize, at the discretion of the Secretary of Defense, his designee, or the Presiding Officer, various steps to safeguard witnesses or confidential, classified, state secret, intelligence, or law enforcement information or “information concerning other national security interests.” *Id.* at §§ 6(D)(5), 9. These steps include excluding the accused, his civilian attorney, and the public from part or all of the proceedings; withholding from the defense exculpatory or inculpatory evidence; and limiting the defense’s ability to investigate the case and obtain witnesses and documents. *Id.* at §§ 5(E), 5(H), 5(K), 5(O), 6(B)(3), 6(D)(5). Detailed Defense Counsel may not be excluded from any commission proceedings, and evidence withheld from Detailed Defense Counsel may not be considered in determining the guilt of the accused. *Id.* at §§ 6(B)(3), 6(D)(5)(b). Unless authorized by the Presiding Officer, however, Detailed Defense Counsel is prohibited from revealing to his client or the civilian attorney “any information presented during a closed session” of the commission. *Id.* at § 6(B)(3). In addition, the prosecution is not obliged to provide any defense counsel, including Detailed Defense Counsel, with exculpatory information deemed protected on national security or other grounds. *Id.* at § 6(D)(5)(b).

3. **Verdict and Sentencing**

There is no right to trial by jury before the military commission. A two-thirds majority vote of the commission is required for a finding of guilt. *Id.* at § 6(F). The commission may convict the accused of a lesser-included offense but not of an offense more serious than that charged. *Id.*

A two-thirds majority of the commission determines the sentence to be imposed, except that the death penalty may only be imposed by unanimous vote of a seven-member commission. *Id.* at §§ 6(F), 6(G). The Procedures do not specify any sentencing guidelines or factors in aggravation or mitigation to be considered when imposing the death penalty. *Id.* at § 6(G).

4. **Post-Trial Procedures**

Every commission trial and sentence will be reviewed by a Review Panel of three military officers, including one with judicial experience. *Id.* at § 6(H)(4). Civilians may be appointed to serve on a Review Panel by special commission. *Id.* The commission must prepare a verbatim record of the trial and sentencing proceedings “as soon as practicable at the conclusion of a trial.” *Id.* at §§ 6(B)(5), 6(H)(1). The record will also include all exhibits admitted into evidence, as well as any classified or otherwise protected evidence that was reviewed *in camera* by the Presiding Officer but withheld from the defense. *Id.* at §§ 6(D)(5)(d), 6(H)(1). The Review
Panel has the discretion but is not required to permit written submissions by the prosecution or defense, and the Procedures do not provide for oral argument. *Id.* at § 6(H)(4).

Within 30 days after receiving the trial record, the Review Panel will either recommend a disposition to the Secretary of Defense or, if “a majority of the Review Panel has formed a definite and firm conviction that a material error of law occurred,” return the case for further proceedings. *Id.* The Procedures specifically direct the Review Panel to “disregard any variance from [the Procedures] that would not materially have affected the outcome of the trial[.]” *Id.*

The Secretary of Defense will review the trial record and the Review Panel’s recommendation and make his own recommendation to the President, unless the President has delegated final decision making authority to the Secretary. *Id.* at §§ 6(H)(5), 6(H)(6). Any sentence of imprisonment will begin immediately after the trial. *Id.* at § 6(H)(2). The Procedures also call for the prompt execution of any sentence (including, presumably, the death penalty) once it becomes final by action of the President or the Secretary of Defense. *Id.* The Procedures do not provide for independent review of final decisions by civilian courts.

C. Draft Military Commission Instruction

On February 28, 2003, the Department of Defense issued a draft Military Commission Instruction (“Instruction”) identifying 24 substantive offenses that may be tried by military commissions authorized by the Order. *Id.* § 6(A). The Instruction further identified seven “other forms of liability and related offenses” that may be tried by military commissions. *Id.* § 6(B). The Instruction does not purport to be an exhaustive list of offenses triable by military commission. *Id.* § 3(C). In its press release, the Department stated that the list was designed to incorporate crimes that are recognized, under both international and domestic law, as violations of the law of war.6

The Instruction states that defenses such as self-defense, mistake of fact, duress, combat immunity and lack of mental responsibility may be raised. *Id.* § 4(B). The burden of going forward with these defenses falls upon the accused. *Id.* The Instruction confirms that “[o]nce an applicable defense of an issue of lawful justification or excuse is fairly raised by the evidence presented, except for lack of mental responsibility, the burden is on the prosecution to establish beyond a reasonable doubt that the conduct was wrongful or that the defense does not apply.” *Id.* If this defense is not raised, the charged conduct is presumed to have been wrongful. *Id.* For the defense of lack of mental responsibility, “the accused has the burden of proving by clear and

4 These offenses are: willful killing of protected persons; attacking civilians; attacking civilian objects; attacking protected property; pillaging; denying quarter; taking hostages; employing poison or analogous weapons; using protected persons as shields; using protected property as shields; mutilation or maiming; use of treachery or perfidy; improper use of flag of truce; improper use of protective emblems; degrading treatment of a dead body; rape; hijacking or hazarding a vessel or aircraft; terrorism; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; aiding the enemy; spying; perjury or false testimony; and obstruction of justice related to military commissions.

5 These offenses are: aiding and abetting; solicitation; command/superior responsibility — perpetrating; command/superior responsibility — misprision; accessory after the fact; conspiracy; and attempt.

convincing evidence, that, as a result of severe mental disease or defect, the accused was unable to appreciate the nature and quality of the wrongfulness of the accused's acts." \textit{Id.}

The offenses identified by the Instruction are not subject to any statute of limitations. \textit{Id. \S 4(C).} The Instruction "does not preclude trial for crimes that occurred prior to its effective date [February 28, 2003]." \textit{Id. \S 3(A).}

\textbf{III. THRESHOLD ISSUES RAISED BY THE ORDERS}

\textbf{A. Constitutional and Legislative Authorization for the Orders}

Both the President's Order and the Defense Department's Procedures were carefully crafted in light of Supreme Court precedent. They reflect an aggressive stance in asserting executive authority, but most of the provisions of the Order and the Procedures fall within the bounds of executive authority defined by Supreme Court decisions dating from World War II.

The Supreme Court has never decided whether or to what extent the President, acting without Congressional authorization, has the constitutional power to establish military commissions. \textit{See Ex parte Quirin}, 317 U.S. 1, 28-29, 63 S. Ct. 2,11 (1942). Here, Congress has authorized the use of military commissions at least in a narrow range of cases. The President's Order cites three specific acts of Congress as such authority:

- a joint resolution (Pub. L. 107-40) authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001" or those who harbored them;

- Section 821 of the Uniform Code of Military Justice ("UCMJ"), which preserves the common law jurisdiction of military commissions "with respect to offenders or offenses that by statute or by the law of war" are triable by military commission, 10 U.S.C. \S 821; and

- Section 836 of the UCMJ, which authorizes the President to prescribe "regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter." 10 U.S.C. \S 836.

Under the National Emergencies Act, 50 U.S.C. \S 1631, the Congressional grant of authority to the President is limited to these cited sources. The Supreme Court has construed UCMJ Section 821 as authorizing prosecutions of violations of the law of war before military commissions. \textit{Quirin}, 317 U.S. at 26-27, 63 S. Ct. at 10. This provision, together with Congress' joint resolution, appear to provide ample authority for the President to establish military commissions for the trials of those accused of violating the law of war.
The fact that Congress has not formally declared war should not diminish the President's authority to establish military commissions. Congress has authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons" that were involved in the September 11 attacks or that harbored the perpetrators. Thus, the United States is probably in a state of war even without a declaration of war by Congress. See Bas v. Tingy, 4 U.S. 37, 1 L. Ed. 731 (1800) (holding that U.S. was at war with France despite lack of formal declaration by Congress).

The President's Order and the Defense Department’s Procedures apply only to non-citizens, who do not enjoy the full panoply of constitutional protections accorded to U.S. citizens. Resident aliens enjoy some constitutional rights, such as due process and habeas corpus. Zadvydas v. David, 553 U.S. 678, 688-90, 121 S. Ct. 2491, 2498-2500 (2001). Aliens residing outside the United States have the least entitlement to constitutional safeguards. Johnson v. Eisentrager, 339 U.S. 763, 776, 70 S. Ct. 936, 943 (1950) (holding that alien enemies who were never on American soil have no right to petition U.S. courts for writ of habeas corpus); but see United States v. Tiede, 86 F.R.D. 227, 228 (U.S. Ct. Berlin 1979) (non-resident aliens had constitutional rights, including right to jury trial). By limiting the scope of his Order to non-citizens and detaining suspects outside the U.S., the President has minimized the objections that may be asserted against the military commissions’ procedures and decisions.

There are only three areas in which the Order and the Procedures are subject to serious challenge as exceeding executive authority. First, the Order and the Procedures attempt to preclude independent review of military commission decisions by civilian courts, through habeas corpus petitions or otherwise. Second, the President and the Defense Department have suggested that they may attempt to expand the jurisdiction of the military commissions beyond trials for violations of the law of war. Third, the Order and the Procedures specify procedures contrary to and inconsistent with the Uniform Code of Military Justice, in apparent conflict with UCMJ Section 836. These issues are discussed below.

1. Lack of Judicial Review

Under Article I of the Constitution, only Congress has the power to suspend the writ of habeas corpus. Congress may grant the President the authority to do so, but the President is bound by the limits of this authorization specified by Congress. See Ex parte Milligan, 71 U.S. 2, 115, 126, 18 L. Ed. 281, 294, 297 (1866). The USA Patriot Act of 2001 prescribes specific procedures for the detention of aliens suspected of terrorist activities, and specifically authorizes judicial review

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7 Even U.S. citizens deemed unlawful belligerents may be tried by military commission for violating the laws of war. Quirin, 317 U.S. at 37, 63 S. Ct. at 15; Colepaugh v. Looney, 235 F.2d 429, 432 (10th Cir. 1956), cert. denied, 352 U.S. 1014 (1957).

8 The detention provisions of the Order are outside the scope of this report. Note, however, that the Order may violate the Constitution and the USA Patriot Act if construed to permit the indefinite detention of resident aliens. Zadvydas, 533 U.S. at 690, 121 S. Ct. at 2500; USA Patriot Act of 2001, Pub. L. 107-56, § 412(a); see also Ex parte Milligan, 71 U.S. 2, 115, 126, 18 L. Ed. 281, 294, 297 (1866) (holding that neither the Constitution nor the Habeas Corpus Act of 1863 authorized indefinite detentions and that executive branch was required to comply with specific procedures mandated by the Act).
of alien detentions and related decisions by habeas corpus proceedings. USA Patriot Act of 2001, Pub. L. 107-56, § 412(a) and (b).

In contrast, the President’s Order (§ 7(b)) explicitly excludes review of military commission decisions by civilian courts, and the Defense Department Procedures (§ 6(H)(2)) implicitly do the same thing. Two other presidents, Abraham Lincoln and Franklin Roosevelt, issued orders establishing military commissions and attempting unsuccessfully to preclude judicial review of the commissions via the writ of habeas corpus. See Milligan, 71 U.S. 2, 18 L. Ed. 281; Quirin, 317 U.S. at 25, 63 S. Ct. at 9 (“[N]either the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners’ contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission.”); In re Yamashita, 327 U.S. 1, 66 S. Ct. 340 (1946). In Milligan, Quirin, and Yamashita, the Supreme Court rejected the presidents’ attempts to foreclose habeas review of military commission decisions by issuing an order forbidding such review. Nevertheless, the Court in all three cases upheld the jurisdiction and the decisions of the military commissions, thus demonstrating that executive overreaching on the habeas corpus issue does not render invalid the other aspects of a Presidential order. These cases also demonstrate the great deference that the Supreme Court historically has shown toward the Commander-in-Chief during times of conflict.

Milligan involved a U.S. citizen living in Indiana; Quirin involved eight German-born persons, including one alleging U.S. citizenship, who entered the United States surreptitiously; and Yamashita involved a Japanese citizen who was captured in the Philippines. In Johnson v. Eisentrager, 339 U.S. 763, 70 S. Ct. 936 (1950), the Supreme Court held that alien enemies who were neither captured nor detained on American soil have no right to petition U.S. courts for a writ of habeas corpus. Based on this holding, two federal courts have upheld the dismissal of habeas corpus petitions brought on behalf of Guantanamo detainees. Al Odah v. United States, Civ. Nos. 02-5251, 02-5284 & 02-5288, 2003 WL 938861, *7 (D.C. Cir. March 11, 2003) (“[N]o court in this country has jurisdiction to grant habeas relief, under 28 U.S.C. § 2241, to the Guantanamo detainees, even if they have not been adjudicated enemies of the United States. We cannot see why, or how, the writ [of habeas corpus] may be made available to aliens abroad when basic constitutional protections are not.”)9; Coalition of Clergy v. Bush, 310 F. 3d 1153, 1165 (9th Cir. 2002) (dismissing complaint on the basis that Coalition lacked standing). The district court in Al Odah noted that Eisentrager established two separate tests for habeas jurisdiction: a permissible one for citizens, wherever located, and a stringent one for non-citizens. “If an alien is outside the country’s sovereign territory, then courts have generally concluded that the alien is not permitted access to the courts of the United States to enforce the Constitution.” Rasul v. Bush, 215 F. Supp. 2d 55, 68 (D.D.C. 2002).

The U.S. government attempted unsuccessfully to expand that rule to encompass U.S. citizens whom the military has designated “enemy combatants,” arguing that this designation by executive or military authorities is a non-reviewable political decision. See Hamdi v. Rumsfeld, 296 F.3d 278, 282-83 (4th Cir. 2002); United States v. Lindh, 212 F. Supp. 2d 541, 545 (E.D. Va.
2002). The Fourth Circuit Court of Appeals firmly rejected the notion that, “with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government’s say-so.” 

Hamdi, 296 F. 3d at 283. The Fourth Circuit ultimately dismissed Hamdi’s petition, holding that “further judicial inquiry is unwarranted when the government has responded to [habeas] petition by setting forth factual assertions which would establish a legally valid basis for the petitioner’s detention” as an enemy combatant. 

Hamdi v. Rumsfeld, 316 F.3d 450, 476 (4th Cir. 2003); see also Padilla v. Bush, 233 F. Supp. 2d 564, 607-08 (S.D.N.Y. 2002) (concluding that President “is operating under maximum authority [under the] constitution” and that court will require only “some evidence to support his conclusion that Padilla was [an enemy combatant]”). Similarly, the Lindh court rejected the government’s argument for the non-reviewability of the President’s designation of Taliban forces as unlawful combatants, but the court analyzed the question under a deferential standard and upheld the President’s designation. 

Lindh, 212 F. Supp. 2d at 554-558; see Hamdi, 316 F.3d at 475-76 (concluding that U.S. citizen who took up arms abroad against the United States could be held as enemy combatant).

It appears that the content of the Order and the Procedures, particularly the exclusion of U.S. citizens from their reach and the placement of the detainees at Guantanamo, were carefully designed to evade judicial scrutiny and to test the limits of the President’s constitutional authority. Either Eisentrager will insulate the military commission decisions from habeas corpus (or any other judicial) review, or the Supreme Court will determine that the exclusion of habeas review contravenes the USA Patriot Act and Milligan, Quirin, and Yamashita – in which case the Court will review the remaining provisions of the Order and the Procedures under a deferential standard.

2. Jurisdiction Beyond War Crimes

Both the Order (§§ 1(e), 4(a)) and the Procedures (§ 3(B)) suggest that military commissions might be called upon to try cases involving offenses other than violations of the law of war. On February 28, 2003, the Department of Defense issued a draft Military Commission Instruction identifying 24 substantive offenses that “may be tried by military commissions” authorized by the Order. In its press release, the Department stated that the list, while not intended to be

10 The Bush administration is exploring other options regarding U.S. citizens who are deemed terrorists. The proposed Domestic Security Enhancement Act of 2003 (“DSEA”), a potential successor bill to the Patriot Act, would make it easier for the government to strip U.S. citizens of their citizenship. Currently, a citizen has to state their intent to relinquish his citizenship. The DSEA would allow intent to be inferred from conduct. See Charles Lane, U.S. May Seek Wider Anti-Terror Powers, WASH. POST, Feb. 8, 2003.

11 The Court ordered that Padilla’s appointed counsel have access to Padilla in preparation for this “some evidence” hearing. Id. at 610. The government moved to reconsider this order, arguing, based on Hamdi, that a declaration from a government official stating that Padilla was an enemy combatant was sufficient to overcome the “some evidence” standard. See Padilla v. Rumsfeld, 02 Civ. 4445, at 7 (S.D.N.Y. March 11, 2003). The government contended that this standard “focuses exclusively on the evidence relied on by the executive,” and thus, Padilla’s own factual showing was irrelevant. Id. at 26. The Court denied the government’s motion for reconsideration, holding that “Padilla must have the opportunity to present evidence that undermines the [government’s] declaration,” and the “only practicable way to present evidence” is through counsel, requiring that Hamdi be allowed to consult with counsel. Id. at 29-30. The Court distinguished Hamdi on the basis that Padilla was not captured “in a zone of active combat operations abroad,” and thus, the court was not required to “second-guess[] battlefiel decisions.” Id. at 32, 34.
exhaustive, was designed to incorporate crimes that are recognized as violations of the law of war under both international and domestic law. The majority of offenses identified in the Instruction are indeed war crimes and, therefore, would fall within the jurisdiction of the military commissions.

Early press reports had indicated that investigators were having difficulty gathering evidence of war crimes by the Guantanamo detainees and, as a result, the administration was considering charging detainees with an offense based solely or primarily on membership in al Qaeda. Some analysts had questioned the validity of this type of status crime under Supreme Court precedent. In releasing the draft Instruction, the Department of Defense has now made clear that it does not intend to try persons before military commissions based solely on their membership in al Qaeda.

The first 18 offenses identified in the draft Instruction are widely acknowledged as violations of the law of war. Some of the offenses, however, may not constitute war crimes and therefore would not be subject to the military commission's jurisdiction. For example, the draft Instruction identifies spying as a violation of the law of war. International law recognizes "the well-established right of belligerents to employ spies and other secret agents for obtaining information of the enemy. Resort to that practice involves no offense against international law." Section 821 of the UCMJ preserves the traditional jurisdiction of military commissions over "offenders or offenses that by statute or by the law of war may be tried by military commissions." No statute permits trial by military commission of offenses other than violations of the law of war. See 10 U.S.C. § 904 (permitting military commissions to try offense of aiding and abetting war crimes). The Supreme Court has approved military commission trials only for violations of the law of war or in other limited circumstances not present here. Yamashita, 327 U.S. at 13 ("Neither congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge preferred against him is of a violation of the law of war."). Accordingly, the use of military commissions for trials of offenses other than war crimes likely exceeds the authority that Congress granted to


13 Neil A. Lewis, U.S. Weighing New Doctrine for Tribunals, N.Y. TIMES, Apr. 21, 2002; Frank Davies, U.S. Reads Tribunals for Terrorism Trials, MIAMI HERALD, Dec. 26, 2002 (quoting anonymous lawyer familiar with tribunal discussions that "cases will amount to 'membership plus'—allegiance to al Qaeda along with additional evidence").

14 Department of Defense, supra at n.12.

15 These offenses are willful killing of protected persons; attacking civilians; attacking civilian objects; attacking protected property; pillaging; denying quarter; taking hostages; employing poison or analogous weapons; using protected persons as shields; using protected property as shields; mutilation or maiming; use of treachery or perfidy; improper use of flag of truce; improper use of protective emblems; degrading treatment of a dead body; rape; hijacking or hazardizing a vessel or aircraft; and terrorism.


17 Military commissions also may be used during post-war occupations of foreign countries and periods of martial law when civilian courts are unable to function. Mudd v. Caldera, 26 F. Supp. 2d 113, 121 (D.D.C. 1998).
the President. The Committee recommends that the Order and draft Instruction be clarified to limit military commission trials to alleged violations of the law of war.

3. Procedures Inconsistent with UCMJ

Section 836 of the UCMJ provides that “Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter . . . triable in . . . military commissions . . . may be prescribed by the President by regulations which . . . may not be contrary to or inconsistent with [the Uniform Code of Military Justice].” 10 U.S.C. § 836. A number of the procedures authorized by the President’s Order and set forth in the Procedures are, in fact, contrary to or inconsistent with the UCMJ. For example,

- The standard for admission of evidence before the military commissions is greatly relaxed. Evidence may be admitted if it “would have probative value to a reasonable person.”18 The Procedures specifically permit the introduction of unsworn written statements and physical and other evidence that would not be considered reliable enough to be admitted in federal district courts or in courts martial.19

- The Procedures permit the prosecutor to withhold from the defense, including Detailed Defense Counsel, exculpatory evidence and investigatory resources on the ground that it might compromise classified or other sensitive information or “other national security interests.”

- The Procedures permit Detailed Defense Counsel to attend closed commission proceedings but prohibit Detailed Defense Counsel from disclosing those proceedings to his client or the civilian attorney.

Each of these examples (and those discussed in Section IV) represents a departure from the procedures for courts martial and, taken together, these departures could dramatically alter the fairness of the proceedings.

Despite the Order’s explicit reference to Section 836, however, an argument could be made that the Section does not apply to military commissions under the President’s Order. By its terms, Section 836 now applies to “cases arising under” the Uniform Code of Military Justice. The Supreme Court in Yamashita held that an enemy combatant was not subject to the predecessor of the UCMJ and, therefore, was not entitled to its procedural benefits. Yamashita, 327 U.S. at 20, 66 S. Ct. at 350. At the time of the Yamashita decision, the predecessor of Section 836 did not refer to cases arising under the UCMJ but rather referred to “cases before courts martial, courts of inquiry, military commissions, and other military tribunals[,]” Id. at 61, 66 S. Ct. at 369 n.29. The Yamashita Court reasoned that Section 821 preserves the jurisdiction of military

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18 This is almost identical to the standard approved in Yamashita, 327 U.S. at 18, 66 S. Ct. at 349 (“would have probative value in the mind of a reasonable man.”).

19 The UCMJ mandates evidentiary rules quite similar to the Federal Rules of Evidence.
commissions without distinguishing between the two classes of offenders: U.S. military personnel and their dependents, and other persons (including enemy combatants) triable by military commission. \textit{Id.} at 19, 66 S. Ct. at 349. According to the Court, Section 836 draws a distinction between the two classes of offenders and extends procedural protections only to the former. \textit{Id.} at 20, 66 S. Ct. at 350. Justices Rutledge and Murphy dissented, noting the majority’s strained interpretation of the UCMJ. \textit{Id.} at 64-65, 66 S. Ct. at 370.

**B. Classes of Persons Potentially Subject to Trial by Military Commission**

President Bush’s November 13 Order has been described by Lawrence Tribe, in a statement to the Senate Judiciary Committee on December 4, 2001, as a Sword of Damocles that hangs over an unreasonably large number of people potentially within its scope. To many of its critics, the breadth of the President’s Order is its greatest fault. The Order puts tremendous discretion in the hands of the President to determine who is subject to its terms. Furthermore, even though there is a specific provision in the Order that addresses who qualifies under it, the language used in this provision is defined very broadly, if at all. Finally, whereas the Department of Defense Procedures clarified the process by which the military commissions are to be formed and the procedures they must follow, they did little to address the Order’s unclear and potentially sweeping scope.

**1. The President’s Order**

Section 1(e) of President Bush’s Order provides that “it is necessary for individuals subject to this order . . . to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.” The term “individual subject to this order” is defined in Section 2. There are three major components to this definition. First, an “individual subject to this order” means any individual who is not a United States citizen. Order, § 2(a).

Thus, the Order can apply to citizens of every nation in the world except the United States. It can also apply to both legal and illegal aliens within the United States, including roughly 18 million aliens lawfully residing in the country. Second, the President must find that there is “reason to believe” that such an individual, “at the relevant times,” did one of the following three things: (i) is or was a member of al Qaeda; (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation thereof; or (iii) has knowingly harbored one or more individuals described in subparagraph (i) or (ii). \textit{Id.} at § 2(a)(1). Third, it must be “in the interest of the United States that such individual be subject to this Order.” \textit{Id.} at § 2(a)(2).

Of the three requirements, only the first, regarding citizenship, involves an objective determination. The Order allows President Bush to be the sole judge of whether an individual meets the second and third requirements. The only limitation placed on the President’s discretion is that he make these determinations “from time to time in writing.” \textit{Id.} at § 2(a).

The crux of who qualifies as an “individual subject to this order” is the second part of the definition: the requirement that the individual has “engaged in, aided or abetted, or conspired to commit acts of international terrorism.” \textit{See id.} at § 2(a)(1)(ii). President Bush’s Order does not include a definition of “international terrorism.” However, Section 2(a)(1)(ii) goes on to require
that such acts of international terrorism "have caused, threatened to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy." It is unclear whether this provision provides a complete definition for "international terrorism" or merely supplements what is meant by the term.

2. Other Definitions of International Terrorism

Other sources of law provide a more thorough definition of "international terrorism." These definitions may be incorporated by reference into the President's Order. Specifically, 18 U.S.C. § 2331 includes a three-part definition of what constitutes “international terrorism.” See 18 U.S.C.A. § 2331 (West 2002). Section 2331 was substantially amended by the USA Patriot Act, which was passed on October 26, 2001, in response to the September 11 terrorist attacks. See USA Patriot Act of 2001, Pub. L. 107-56, § 802.

According to 18 U.S.C. § 2331, the term "international terrorism" means engaging in activities that satisfy three requirements. First, the activities must involve violent acts or acts dangerous to human life which are a violation of the criminal laws of the United States (or that would be a criminal violation if committed within the jurisdiction of the United States). See 18 U.S.C. § 2331(1)(A). Second, the acts must "appear to be intended" for one of the following purposes: (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping. See 18 U.S.C. § 2331(1)(B). Third, the acts must occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries through the way in which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which the actors operate or seek asylum. See 18 U.S.C. § 2331(1)(C).

Even if one incorporates the Patriot Act's definition of "international terrorism," President Bush's November 13 Order can still sweep broadly. First, all aliens residing in the United States and all citizens of any other country are potentially subject to its terms. Next, a broad range of "acts" may trigger the statute: any act that causes or threatens to cause injury to the United States, its citizens, national security, foreign policy, or economy can potentially be an act of "international terrorism." Many forms of civil disobedience, including legitimate and peaceful protests, may fall within this definition. If one incorporates the Patriot Act's definition of "international terrorism," the scope of acts that trigger the use of military tribunals is somewhat narrowed. The Patriot Act requires that acts of international terrorism be violent or dangerous to human life, as well as criminal. See 18 U.S.C. § 2331(1)(A). Under this definition, some forms of civil disobedience may not qualify as acts of international terrorism. However, as discussed above, the Patriot Act's definition of "international terrorism" is not specifically referenced in the President's Order; therefore, it is unclear whether any additional limitations on the definition apply. Finally, the only time frame identified in the Order is that an individual commit the required acts "at the relevant times." See § 2(a)(1). Combined with other sections of the Order, this means that someone can be subject to trial by military commission based on aiding or harboring someone years, or even decades, ago.

The Instruction's elements for the offense of terrorism are similar to these first two requirements. Instruction § 6(A)(18).
In constitutional law, a statute is void for vagueness if a normal individual cannot discern to whom the statute applies or which behaviors the statute prohibits. The President’s Order may contain both of these faults. As of yet, it is unclear who the Administration plans to try with the military commissions authorized by President Bush’s Order: the captured leaders and top officials of the al Qaeda network and the Taliban; other members of al Qaeda or the Taliban currently held in Guantanamo Bay, Cuba; or other individuals living within the United States or abroad who have varying ties to al Qaeda, the Taliban, or the September 11 attacks. What is clear, however, is that the scope of President Bush’s Order grants the Administration the authority to try before military commissions individuals from all three of these categories. The committee recommends clarification of the meaning of “international terrorism” for purposes of the Order.

IV. ISSUES RAISED BY MILITARY COMMISSION PROCEDURES

The Procedures contain evidentiary, trial, sentencing, and post-trial rules to be applied by military commissions for “violations of the laws of war and all other offenses triable by military commission.” The trier of fact (the military commission members) and some of the substantive, procedural, and evidentiary rules differ from traditional criminal and court martial proceedings. The Procedures also adopt a sentencing structure that allows for more discretion than a typical criminal trial. This section addresses these Procedures, their similarities and differences to traditional criminal and court martial proceedings, and recommends some revisions that would enhance the fairness of military commission proceedings.

A. Independent Tribunal

The Procedures state that each commission shall consist of between three and seven members named by the Appointing Authority (the Secretary of Defense or a designee). Procedures, § 4(A)(1)-(2). The Appointing Authority presumably has the power to remove commission members, although this power is not granted explicitly. Commission members must be commissioned officers of the United States armed forces, including active reserve personnel, active National Guard personnel in Federal service, and retired personnel recalled to active duty. Id. at § 4(A)(3). The Presiding Officer of the commission must be a judge advocate of the U.S. armed forces. Id. at § 4(A)(4). The commission is directed to proceed impartially and expeditiously to guarantee a full and fair trial of the charges, excluding irrelevant evidence, and preventing any unnecessary interference or delay. Id. at § 6(B)(2).

Despite this broad, protective language, some critics argue that the Procedures are inadequate to assure the impartiality of commissions made up of current or former military officers. See Universal Declaration of Human Rights, 1948, art. 10 (“Everyone is entitled . . . to a fair and public hearing by an independent and impartial tribunal”); Geneva Conventions of 1949, Protocol I (1978), art. 75(4) [hereinafter Geneva Protocol] (persons accused of war crimes entitled to trial before “impartial and regularly constituted court”); International Covenant on Civil and Political Rights, 1976, art. 14, 999 U.N.T.S. 171 [hereinafter ICCPR] (“everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”). These critics argue that military officers cannot be objective when judging
enemy fighters. Critics also point out that the President or the Secretary of Defense has the power to name those who will be tried, to appoint and to remove the commission members who will try them, to appoint the panel that will review convictions, and to make final decisions on convictions and sentencing. Commission members effectively serve at the pleasure of the primary prosecuting decision maker and, therefore, the commission cannot be considered an independent tribunal.21

Other commentators argue that these concerns are unfounded. They point to the 85% conviction rate (less than the conviction rate in most federal courts) in more than 2500 military trials of Japanese and German soldiers after World War II. They also argue that the court martial system (which admittedly differs in some ways from the Procedures) has fairly used military personnel as the trier of fact for years, and commission members will face no less or different pressure than civilian jurors in a federal or state trial.22

The trier of fact in general courts martial is markedly more independent than a military commission. Courts martial judges belong to an independent judiciary. They do not report to, and their performance is not evaluated by, prosecutors or the appointing authority convening the court martial. Military officers and enlisted personnel serve as “members,” the court martial equivalent of the jury. The members are subject to a voir dire procedure similar to that of federal district courts, wherein the prosecution and defense have the opportunity to evaluate the members’ possible biases. The military judge will excuse members whose impartiality is placed in doubt. In addition, the prosecution and defense each may exercise one peremptory challenge. The UCMJ also contains extensive rules to prevent “Unlawful Command Influence,” which is defined as improper influence in a military justice case by senior military personnel, either intentionally or otherwise.

The committee recommends that the Procedures be clarified to prohibit the removal of commission members or to limit the circumstances under which they may be removed. The committee also recommends that the Defense Department issue a regulation adopting the Unlawful Command Influence rules for military commission proceedings.

B. Defense Counsel

The accused is guaranteed “[at] least one Detailed Defense Counsel . . . .” Procedures, § 5(D). Detailed Defense Counsel must be a military officer and judge advocate of any branch of the United States armed forces. Id. at § 4(C)(2). The accused may select a different Detailed

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21 See Peter Ford, Videotape aired yesterday bolsters case on bin Laden, CHRISTIAN SCIENCE MONITOR, Dec. 14, 2001 (noting Spain’s refusal to extradite 14 al Qaeda suspects without assurances that they would not be tried by military tribunals); Kathleen Knox, Death Penalty. Military Trials Complicating Al Qaeda Suspects’ Extradition from Europe, RADIO FREE EUROPE/RADIO LIBERTY, Nov. 28, 2001 (noting European concern that “military judges may not be independent.”); Bad Example: Military Tribunals for Afghanistan Prisoners Turn the U.S. Into Judge, Jailer, Prosecutor, Newsday, Apr. 24, 2002, at A34; James Griffith, Mock Justice, Chicago Tribune, Apr. 1, 2002, at A16 (contending that “no officer, hoping for a promotion, would be foolish enough to vote for an acquittal in the face of an indication from his or her superior officer that a conviction was sought”).

Defense Counsel to replace his assigned Detailed Defense Counsel or to serve as an additional Detailed Defense Counsel. *Id.* at § 4(C)(3)(a). The accused also may hire a civilian attorney ("Civilian Defense Counsel") of his choosing (at no expense to the United States Government) provided that the attorney: (1) is a U.S. citizen; (2) is properly admitted to a State or Federal Court; (3) has not been disciplined by any court or bar for "relevant misconduct;" (4) is eligible to access at least SECRET information; and (5) has signed an agreement to comply with the commission's procedures. *Id.* at § 4(C)(3)(b).

The accused must be represented at all times by Detailed Defense Counsel. *Id.* at § 4(C)(4). As set forth more fully below, this requirement is necessary because Civilian Defense Counsel (and the accused) may be faced with situations in which only Detailed Defense Counsel will have access to certain evidence or witnesses. *See id.* at § 4(c)(3)(b) ("qualification of a Civilian Defense Counsel does not guarantee that person's presence at closed commission proceedings or that person's access to any information protected under section 6(D)(5)"). Thus, trial attorneys serving as Civilian Defense Counsel should be prepared to play a secondary role in any commission proceedings.

C. Pretrial Disclosure and Investigation

The Procedures require that investigative or other resources be made available to the defense as the Appointing Authority deems necessary for a full and fair trial. Procedures, § 5(H). Nonetheless, trial attorneys may face difficulties in their investigations due to national security issues. The prosecution of John Walker Lindh provides some insight into these potential roadblocks. Lindh's attorneys have sought to personally question about 20 detainees who may have trained or served alongside Lindh in the Taliban. The government argued that face-to-face or telephone questioning posed threats to national security interests and would delay the government's interrogation of these detainees. In a May 30, 2002 order, U.S. District Judge T.S. Ellis denied Lindh's request for face-to-face or telephone interviews of Guantanamo detainees. Judge Ellis ruled that the Fifth Amendment guarantees all defendants the right to pretrial access to potential witnesses, but that this right was not absolute and did not always mandate face-to-face access. Rather, the court ordered Lindh's attorneys to submit written questions to the Department of Defense, who reviewed the questions, and then allowed some or all of the questions to be posed by Defense Department interpreters. The Department of Defense then would videotape the interviews and provide a copy to Lindh's attorneys. *See United States v. Lindh*, 2002 WL 1298601 (E.D. Va. May 30, 2002). 23 Trial attorneys can expect to face similar, or even more severe, limitations on their investigative efforts for the detainees, who may not have the Fifth Amendment rights possessed by Mr. Lindh. 24  

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23 Lawyers for Zacarias Moussaoui, also facing trial in the Eastern District of Virginia relating to the September 11 attacks, reportedly were ordered to receive access to Ramzi Binlabib, a detainee currently held abroad named as an unindicted co-conspirator in Moussaoui's indictment. In response, the government filed a notice to appeal the judge's order and asked that proceedings be halted until this appellate issue is resolved. Jerry Markon, *Justice Dept. Wants Moussaoui Trial Put on Hold*, WASH. POST, February 7, 2003.

to defense counsel that may “confer with any witnesses for the defense, including prisoners of war.”

Defense counsel also may face difficulties obtaining exculpatory evidence from the government because of national security and other concerns. Trial attorneys will be allowed document discovery “to the extent necessary and reasonably available as determined by the Presiding Officer,” and subject to the “[national security] requirements of Section 6(D)(5) and . . . section 9.” Procedures, § 5(H). Indeed, the Procedures are clear that “[n]othing in this Order shall be construed to authorize disclosure of state secrets to any person not authorized to receive them.” Id. at § 9. Thus, defense counsel may be denied access to certain evidence or prohibited from confirming or rebutting that evidence through other witnesses.

Detailed Defense Counsel is entitled to access all evidence considered by the commission in determining the guilt of the accused, but the prosecution may withhold exculpatory evidence from the defense for national security reasons. See Procedures, §§ 5(E), 5(H). This aspect of the Procedures raises significant concerns. Indeed, without appropriate safeguards, it may result in conviction even though the government knows, or has evidence that indicates, that the defendant may not be guilty. When the government invokes the state secrets privilege as to evidence that may be material to the defense in a criminal proceeding before an Article III federal court, there are statutory procedures to balance the defendant’s rights with national security interests. See 18 U.S.C. App.3, §1, et seq. And, the remedy may be dismissal. See United States v. Reynolds, 345 U.S. 1, 12 (1953), and cases cited therein.

Prosecutorial discretion should be carefully exercised when evidence is withheld from the defense. Furthermore, safeguards should be adopted and enforced to enable the Presiding Officer and the Review Panel to deter any abuse of prosecutorial discretion. To some degree, the Procedures provide safeguards because they require any withheld evidence to be provided to the Presiding Officer and to be included in the record before the Review Panel. See above, § II.B.4. Other safeguards should also be considered. See below, §IV.D.3.

D. Trial Issues

The President’s November Order provided little detail about the conduct of trials by military commission, instead requiring the Secretary of Defense to draft appropriate regulations. See Order, § 4(b)-(c). And, where the Order contained more detail, concerns arose due to apparent restrictions on the fair trial rights that would apply in trials by military commission. For example, the Order found “that it is not practicable to apply in military commissions . . . the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.” Id. at § 1(f). The Order dismissed traditional evidence standards, allowing “admission of such evidence as would . . . have probative value to a reasonable person.” Id. at § 4(c)(3). The Order also dispensed with the traditional requirement of a unanimous verdict, allowing “conviction only upon concurrence of two-thirds of the members of the commission.” Id. at 4(c)(6). This combination of explicit limitations and wide latitude to draft the Procedures was troubling for many legal commentators.
1. **Procedural and Substantive Rights of the Accused**

The Procedures alleviated some of these concerns. Indeed, the Procedures provide a lengthy list of rights similar to those guaranteed in civilian criminal trials. The Procedures profess to ensure:

- The presumption of innocence until found guilty beyond a reasonable doubt. Procedures, § 5(B)-(C).

- The right to counsel "sufficiently in advance of trial to prepare a defense." *Id.* at §§ 5(D), 4(C)(3).

- The right against self-incrimination: The accused may, but need not, testify at trial on his own behalf (and no adverse inference may be drawn from an accused's decision not to testify). *Id.* §§ 5(F)-(G).

- The right to present witnesses and evidence (to the extent necessary and reasonably available as determined by the Presiding Officer and consistent with national security concerns). *Id.* at §§ 5(H); 6(D)(2)(a) (allowing admissible and non-cumulative evidence).

- The right to contest witnesses and evidence (subject to limitations on badgering the witness and introduction of immaterial issues). *Id.* at §§ 5(I); 6(D)(2)(c).

- The right to exculpatory evidence (consistent with national security concerns). *Id.* at § 5(E).

- The right to an open and public trial (except proceedings closed by the Presiding Officer consistent with national security or other concerns). *Id.* at § 5(O); see *id.* at § 6(B)(3) ("Proceedings should be open to the maximum extent practicable (including discretionary press attendance.")"

Other Procedures provide protections in the context of this unique situation, allowing the testimony of defendants (and witnesses) who are not English speakers or who are unwilling to swear an oath in court. For example, the Procedures provide:

- "[T]he substance of the charges, the proceedings, and any documentary evidence [will be] provided in English and, if appropriate, in another language that the Accused understands," and interpreters may be provided "to assist the Defense, as necessary." *Id.* at § 5(F).

- Testimony of witnesses is allowed "by telephone, audiovisual means, or other means; however, the Commission shall consider the ability to test the veracity of that testimony in evaluating the weight to be given to the testimony of the witness." *Id.* at § 6(D)(2)(a).
Witnesses need not "swear an oath or make a solemn undertaking; however, the Commission shall consider the refusal to swear an oath or give an affirmation in evaluating the weight to be given to the testimony of the witness." *Id.* at § 6(D)(2)(b).

Thus, the Procedures provide a number of important, traditional safeguards for the detainees.

### 2. Limitations on Defense Rights

A closer examination of the above protections, however, reveals some important departures from traditional criminal practice in federal courts and general courts martial. First, evidentiary standards have been relaxed to allow evidence if it "would have probative value to a reasonable person." *Id.* at § 6(D)(1). Numerous groups, including the American Bar Association, have expressed concern over this relaxed standard.25 The Procedures also allow the consideration of "any other evidence including, but not limited to . . . sworn or unsworn statements . . . ." *Id.* at § 6(D)(3). These relaxed standards likely allow for the admission of the infamous Osama Bin Laden "confession" videotape, despite authenticity and chain of custody issues, a likely common problem for evidence collected abroad in abandoned towns or caves or from foreign governments or individuals. Commentators have suggested that this relaxation is a reasonable accommodation that reflects the reality of the situation. They point out that significant evidence gathering is occurring in a foreign country, in a war setting, and by soldiers or non-U.S. citizens, not trained evidence technicians or law enforcement personnel. Commentators also note that the Procedures are consistent with the World War II military commissions which allowed for unauthenticated documents and photographs.

Second, although the Procedures give the accused the right to be represented by legal counsel, they do not explicitly protect the confidentiality of any information exchanged between the accused and his lawyers. Section 6(D)(5)(a)(ii) permits the Presiding Officer to issue protective orders to safeguard "Protected Information," including "information protected by law or rule from unauthorized disclosure[.]" The context of that section indicates, however, that it is directed only at information that the government seeks to protect from disclosure. Thus, the argument could be made that attorney-client communications would be admissible at trial as "evidence [that] would have probative value to a reasonable person." *Id.* at § 6(D)(1); *but cf.* *Army Field Manual*, ¶ 181, 505(b) (defense counsel must be allowed to interview accused war criminal "in private."). Obviously, the lack of any attorney-client privilege would seriously undermine the accused's right to legal representation. The committee recommends that the Department of Defense issue a regulation clarifying that confidential communications between the accused and his counsel are protected by the attorney-client privilege and are neither discoverable nor admissible at trial.

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25 Margaret Graham Tebo, *Qualified Praise: ABA Reps See Things They Like In Tribunal Rules, Still Have Some Legal Concerns*, *ABA Journal*, May 2002, at 59; Nat Henthoff, *This Is Not America's Way Of Justice*, SAN DIEGO UNION-TRIBUNE, Apr. 15, 2002, at B6; Jonathan Turley, *Military Tribunal Rules Put Our Values to the Test*, BALTIMORE SUN, Mar. 25, 2002, at A7 ("It is obvious that these are rules that only a prosecutor would love — hardly a surprise since the prosecutors were allowed to write the rules that would govern their own prosecutions.").
Third, the Procedures make clear that, during custodial interrogation, the accused has no right to remain silent or to seek the advice of counsel. The right to counsel does not attach until after a trial has been scheduled, and the privilege against self-incrimination applies only to statements made at trial. Procedures, §§ 5(D) (right to advice of counsel "sufficiently in advance of trial to prepare a defense") and 5(F) (right not to testify "during trial," but accused's pretrial statements and conduct are admissible).

Fourth, the Procedures conspicuously do not prohibit the use of coerced confessions in obtaining convictions. See id. at § 5(F) ("This subsection shall not preclude admission of evidence of prior statements or conduct of the Accused."). Statements made by the accused under physical or mental duress are admissible if "the evidence would have probative value to a reasonable person." Id. at § 6(D)(1). The Secretary of Defense undoubtedly wished to avoid protracted pretrial suppression hearings, particularly in light of press reports of inhumane conditions and coercive methods of interrogation at Guantanamo. The committee recommends that the Defense Department issue a regulation directing the commission to exclude evidence of statements by the accused made in response to physical force or the threat thereof.

Fifth, the inability to procure the presence of witnesses may hamper the defense. As in the Lindh prosecution, witnesses may be fellow detainees or foreigners living (or held captive) abroad. The Presiding Officer may not allow such defense witnesses to testify in person because of national security, cost, or other concerns. As a result, the government's refusal to procure the physical presence of defense witnesses could lessen the weight accorded their testimony and thereby prejudice the defense. Id. at § 6(D)(2)(a); contra Geneva Protocol, art. 75(4)(g) (accused war criminal has the right "to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him"); accord ICCPR, art. 14(3)(e). The committee recommends that the Defense Department issue regulations requiring that any limitations on procuring the attendance of witnesses be applied equally to the prosecution and the defense.

3. National Security Interests

The Procedures prohibit access to certain evidence or witnesses in the name of national security. Section 6(D)(5)(b) provides:

The Presiding Officer, upon motion of the Prosecution or sua sponte, shall, as necessary to protect the interests of the United States and consistent with Section 9, direct (i) the deletion of specific items of Protected Information from documents to be made available to the Accused, Detailed Defense Counsel, or Civilian Defense Counsel; (ii) the substitution of a portion or a summary of the information for such Protected Information; or (iii) the substitution of a statement of the relevant facts that the Protected Information would tend to prove.

Section 9 further provides that "[n]othing in this Order shall be construed to authorize disclosure of state secrets to any person not authorized to receive them." Thus, in the case of documents (including exculpatory information), the Procedures allow evidence to be redacted or substituted in the name of national security, with neither the accused, civilian counsel, or Detailed Defense Counsel having access to these materials in their original form. See Procedures, §§ 5(E), 5(H).
The commission may not consider this Protected Information unless it is presented to Detailed Defense Counsel, but the defense could be compromised if significant exculpatory evidence were withheld from the defense. *Id.* at § 6(D)(5)(b).

Similar measures are statutorily authorized to protect classified information from disclosure in criminal proceedings in federal courts under the Classified Information Procedures Act, 18 U.S.C. App. 3 §§ 4 and 6(c)(1) (1980). The Procedures differ, however, from the Classified Information Procedures Act in two significant ways. First, the Procedures authorize protective measures with respect to a broad spectrum of information designated as “Protected,” including both classified and “classifiable” information, information “which may endanger the physical safety of . . . prospective witnesses,” “information concerning intelligence and law enforcement sources, methods, or activities,” and the vague category of “information concerning other national security interests.” Procedures, § 6(D)(5)(a). The Classified Information Procedures Act, on the other hand, applies only to “classified information” designated as such by “Executive order, statute, or regulation . . . for reasons of national security.” 18 U.S.C. App. 3 § 1.

Second, the Procedures merely direct the Presiding Officer to consider “the interests of the United States.” Procedures, § 6(D)(5)(b). In contrast, the Classified Information Procedures Act requires the court to consider the defendant’s interests and to authorize substitutions for classified information “if it finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosures of the specific classified information.” 18 U.S.C. App. 3 § 6(c)(1). The committee recommends that the Department of Defense provide by regulation that, in making a determination under § 6(D)(5)(b) of the Procedures, the Presiding Officer must balance the accused’s ability to make his defense against the national security interests involved.

National security interests may also limit a trial attorney’s access to witnesses. The Procedures mandate that the Presiding Officer consider the safety of witnesses and others in determining the appropriate methods of receiving testimony. Procedures, § 6(D)(2)(d). The prosecution or the defense may make an *ex parte, in camera* presentation regarding the safety of potential witnesses to aid this determination. *Id.* Thus, the Presiding Officer may allow “testimony by telephone, audiovisual means, or other electronic means; closure of the proceedings; [or] introduction of prepared declassified summaries of evidence.” *Id.* (emphasis added). The Procedures do not address whether this last term, prepared declassified summaries of evidence, could include summaries of witness testimony absent cross-examination. And earlier provisions only require cross-examination for a witness “presented by the Prosecution *who appears before the Commission.*” *Id.* at § 5(I) (emphasis added). Thus, trial attorneys might be unable to cross-examine key prosecution witnesses, including sources of such declassified summaries.

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26 This raises questions about the argument that military commission trials are necessary in order to safeguard classified information for reasons of national security.

27 Press reports note that “federal judges say the main terrorism fear facing them is . . . that a court could be targeted as a consequence of holding a trial of terrorists.” Charles Lane, *Reprisal From Terrorism Trial No. 1 Fear For Federal Judges*, PITTSBURGH POST, Apr. 14, 2002, A16; see Vernon Loeb, *Rumsfeld Announces New Military Tribunal Rules*, WASHINGTON POST, Mar. 21, 2002 (noting that the federal judge who presided over the first trial of the individuals convicted of the 1993 World Trade Center bombing remains under 24-hour guard).
Finally, the Procedures also allow the exclusion of the accused and his civilian counsel (though not Detailed Defense Counsel) from certain stages of the trial in accordance with section 6(B).

Section 6(B) broadly states that closure may be ordered to safeguard Protected Information. Id at § 5(K). Closure, in whole or part, can occur sua sponte by the Presiding Officer or based upon a presentation, including an ex parte, in camera presentation, by either the Prosecution or the Defense. Id. Detailed Defense Counsel may not disclose any information presented during a closed session to individuals excluded from such proceeding or part thereof, including his own client and civilian co-counsel. Id; contra Geneva Protocol, art. 75(4)(e) ("Anyone charged with an offence shall have the right to be tried in his presence"); accord ICCPR, art. 14(3)(d).

E. Sentencing Issues

The sentencing provisions of the Procedures take a pragmatic approach to sentencing, giving the Commissions wide discretion to impose the sentence deemed appropriate by them. The appropriate role of discretion in a sentencing scheme has been long debated. In any sentencing scheme, there are two goals which are always in tension: on the one hand, the desire to tailor a punishment to fit the offense and the offender, and, on the other hand, the desire to ensure that like offenses and like offenders receive sentences which are consistent and proportional. Discretion generally favors the former goal over the later. U.S. courts, and in particular the federal courts, have engaged and remain engaged in a laborious struggle to reconcile these policy goals. It is unrealistic to think that the commissions will have any more success grappling with these issues. It is also impossible to say that the approach taken in the Procedures is wrong. The committee therefore takes the position, with the exception of capital cases, that the commissions may properly be given a wide measure of discretion in sentencing without affecting the fundamental fairness of the proceedings.

1. The Death Penalty

The President made clear in his November 13, 2001 Order that persons convicted by the military commissions would be subject to the death penalty. Order, § 4(a). Indeed, the Order purported to authorize the imposition of the death penalty upon a less-than-unanimous verdict of a three-person military commission. Id. The Defense Department Procedures provide, however, that the death penalty may only be imposed by a unanimous vote of a seven-member commission. Procedures, §§ 6(F), 6(G). Even so, the ability of the military commissions to impose the death penalty has serious practical and legal implications.

The availability of the death penalty in military commission proceedings has drawn the ire of traditional allies of the U.S. in western Europe and elsewhere and, in some cases, has prompted those allies to limit their cooperation with U.S. anti-terrorism investigations and prosecutions. The 15 members of the European Union and the 43 members of the Council of Europe are

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28 The accused also may be barred for disruptive conduct. Id at § 5(K). This provision is not surprising, given the pre-trial issues involving accused terrorist Zacarias Moussaoui. Moussaoui, in an April 22, 2002 court appearance, denounced the U.S. and Israel in an hour-long diatribe in which he announced his intent to defend himself. Andrew Cohen, On Second Thought, How About a Tribunal?, WASHINGTON POST, Apr. 28, 2002, at B2.
signatories of the European Convention on Human Rights, which prohibits the death penalty. The European Court of Human Rights has ruled that member states may not extradite suspects to jurisdictions where they might face the death penalty. Accordingly, Spain, Britain, Germany, Belgium, and France have refused U.S. requests to extradite suspected terrorists in their custody unless the U.S. agrees not to seek their execution. Courts in Canada and South Africa have announced that they would do the same. Historically the U.S. has agreed not to seek the death penalty in order to obtain extraditions of particular suspects. It is not clear whether the U.S. is willing to waive the possibility of the death penalty for persons accused of international terrorism.²⁹

Perhaps more troubling, France and Germany have announced that they will not disclose information to U.S. law enforcement authorities if that information could be used to convict an alleged terrorist who might then be subject to the death penalty. Germany reportedly has information linking Zacarias Moussaoui to the September 11 hijackers, but has refused to share this information without assurances that it will not be used to convict Moussaoui on the four capital charges he faces.³⁰ The information possessed by the German authorities may be relevant to wider ongoing terrorism investigations, not just to Moussaoui’s prosecution. Moreover, other European countries may follow Germany’s example, not only with respect to present prosecutions but also with respect to future trials of the Guantanamo detainees. These possibilities jeopardize U.S. success in its fight against international terrorism.

2. Guidelines for Imposing the Death Penalty

Putting aside the question of whether the risk of international noncooperation with the war on terrorism is justified in order to permit military commissions to impose the death penalty, the availability of death sentences raises serious due process issues under U.S. law. The committee believes that additional procedures and substantive rules must be implemented to guide the commissions. To a large extent, the committee defers in this area to the jurisprudence of the Supreme Court, which has held that such procedures and substantive rules are necessary to ensure the fundamental fairness of death sentences. The committee recognizes there is a tension in approving the Procedures’ wide discretion in non-capital sentences while recommending against the same measure of discretion in capital sentences. However, this tension exists as a matter of Supreme Court jurisprudence, which has held that the distinction must be drawn because “death is different.” However intellectually unsatisfying, there is certainly moral weight in this distinction – implicitly recognized, for instance, in the Procedures’ enhanced requirement that capital sentences be imposed only upon the unanimous approval of a commission of seven members. Moreover, given the distinct possibility that Article III federal courts will exercise habeas jurisdiction over persons convicted by the commissions, it is prudent to enact procedures


and substantive rules which have already passed muster with the Supreme Court. The committee suggests applying the same procedures for the determination of eligibility and sentence in capital cases as are applied in capital cases tried in U.S. criminal courts. This involves establishing eligibility factors for capital sentences and mandating consideration of the aggravating and mitigating circumstances of a particular offense and offender.

The Order does not specify what offenses would qualify defendants to receive the death penalty. The Procedures simply provide that “the commission shall impose a sentence that is appropriate to the offense or offenses for which there was a finding of Guilty, which sentence may include death.” Procedures, § 6(G). Presumably, there are offenses over which the commission would exercise jurisdiction that would not render a defendant eligible for the death penalty. Supreme Court jurisprudence and modern norms of fairness clearly limit the applicability of the death penalty to cases involving only the most egregious offenses.

3. Supreme Court Capital Jurisprudence

Beginning with Furman v. Georgia, 408 U.S. 238 (1972), the Supreme Court created a body of capital jurisprudence which requires that capital sentencing schemes permit individualized consideration of the circumstances of an offense and offender and provide procedures that safeguard against the arbitrary and capricious imposition of the death penalty.

The Supreme Court has rejected sentencing schemes that mandate the death penalty for any class of offenses, and requires that capital sentencing schemes permit individualized consideration of the offense and offender. Roberts v. Louisiana, 428 U.S. 325, 333 (1976) (plurality opinion). The requirement of individualized consideration of the circumstances of the offense and offender “stems from our society’s rejection of the belief that “every offense in a like category calls for an identical punishment without regard to the past life and habits of a particular offender.” Id.

The Supreme Court has also mandated that sentencing schemes provide the fact finders with rules and procedures which “safeguard against the arbitrary and capricious imposition of death sentences.” Roberts, 428 U.S. at 334. The sentencing schemes which have been approved by the Supreme Court have all involved the consideration and weighing of aggravating and mitigating circumstances. See, e.g., Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976).

There is no reason to believe the Supreme Court would alter its capital sentencing jurisprudence for cases prosecuted in the military commissions. While its relevant decisions are grounded in the Eighth and Fourteenth Amendments, it seems unlikely the Supreme Court would approve a capital sentencing scheme which under its jurisprudence results in cruel and unusual punishments, deprives the accused of due process, or results in arbitrary and capricious sentences simply because the accused was not a U.S. citizen. To do so would endorse a system that lacks fundamental fairness, a concern even if the Constitution is not applied.

31 The Instruction also fails to designate which offenses may be subject to capital punishment.
If anything, the non-U.S. citizenship of the accused before the military commissions might make federal courts more suspicious of capital sentences rendered by the tribunals. Justice Douglas’ concurrence in *Furman* focuses heavily on the history of capital punishment in Anglo-American jurisprudence prior to the adoption of the Eighth Amendment and English Bill of Rights, where “the tool of capital punishment was used with vengeance against the opposition and those unpopular with the regime. One cannot read this history without realizing that the desire for equality was reflected in the ban against ‘cruel and unusual punishments’ contained in the Eighth Amendment.” *Furman*, 408 U.S. at 255. The unpopularity of a defendant, or the group to which a defendant belongs, is clearly not an appropriate factor to consider in determining the punishment to be meted out. Supreme Court jurisprudence is obvious in its concern that capital sentencing schemes provide safeguards to minimize the role that the unpopularity of a defendant’s political or religious views plays in determining whether the defendant is sentenced to death. No group is so unpopular with Americans as those groups that will likely appear before the commissions – the Taliban and al Qaeda. Both as a matter of constitutional law and good sense, the Defense Department should adopt capital sentencing schemes analogous to those used in U.S. criminal courts.

4. Recommended Capital Sentencing Scheme

The scheme adopted for capital sentencing should require two things: (1) an eligibility determination; and (2) a weighing of aggravating and mitigating circumstances of an offense and offender.

The Department of Defense should enact substantive rules for determining who is eligible for the death penalty and procedures for determining eligibility. Present federal death penalty statutes provide for a variety of eligibility factors that the Secretary can use as models. With the exception of treason, these factors generally require a finding that the defendant acted intentionally to kill another person, or intentionally inflicted grave bodily injury resulting in death, intentionally engaged in an act of lethal force causing death, or intentionally engaged in an act of violence knowing it created great risk of death which in fact caused the death of another person. 18 U.S.C.A. § 3591 (2000). The federal controlled substances act also provides for the death penalty in cases involving a continuing criminal enterprise where the defendant intentionally kills or counsels, commands, induces, procures or causes the intentional killing of an individual. 18 U.S.C.A. § 3591(b)(2). Similar language could no doubt be employed for use in sentencing members of terrorist organizations.

Once an eligibility determination is made, a procedure should be created to permit the weighing of aggravating and mitigating circumstances. Federal law presently provides for seven mitigating factors by statute: impaired capacity, duress, minor participation, equally culpable defendants, no prior criminal record, disturbance, and victim’s consent – as well as a catch-all factor which permits the consideration of any other circumstance that mitigates against the imposition of the death penalty. 18 U.S.C.A. § 3592. The committee recommends that the Defense Department adopt these mitigating factors. Federal law also provides for numerous aggravating factors. See e.g., 18 U.S.C.A. §§ 3592 (b), (c), and (d). The committee recommends that the Defense Department review these factors and develop an appropriate set of aggravating factors.
Procedurally, the committee recommends that after conviction, the Commission adopt a procedure by which the sentencing panel makes special findings of a defendant's eligibility to receive the death penalty, if the death penalty is requested by the prosecution. If necessary, a separate hearing should be held to determine eligibility. If the defendant is found eligible, a hearing would be held in which the prosecution and defense would present evidence of aggravating and mitigating circumstances. The panel would impose the death penalty only upon a unanimous finding that the aggravating circumstances outweigh the mitigating circumstances. A split panel, even if a majority favors the death penalty, would result in a non-capital sentence.

F. Review of Convictions and Sentences

Unlike procedures for federal criminal courts and general courts martial, which specifically provide for appellate review, the President’s Order purports to exclude any review of military commission trials by civilian courts. Order, § 7(b); contra Army Field Manual, ¶¶ 182, 505(b) (a person accused of war crimes is entitled to “have, in the same manner as the members of the armed forces of the [U.S.], the right of appeal or petition from any sentence pronounced upon him”). Instead, the Procedures call for expedited review of commission decisions by another military panel. Procedures, § 6(H)(4). Each Review Panel is directed to affirm the commission decision unless “a majority of the Review Panel has formed a definite and firm conviction that a material error of law occurred.” Id. The accused has no right to oral argument, and written submissions are allowed only at the discretion of the Review Panel. Id. The Review Panel must submit its recommendation to the Secretary of Defense within 30 days of receiving the trial record. Id. If the President has delegated final decision making authority to the Secretary of Defense, his decision must be executed “promptly.” Id. at § 6(H)(2).

Certain aspects of these review procedures are problematic. First, the truncated nature of the review – the 30-day limitation, the probable lack of post-trial briefing, and the limited standard of review – may well prevent any meaningful review. Given the time limitation alone, the likelihood is high that Review Panel decisions will be regarded as rubber stamps. Also, a lack of briefing by defense counsel makes it unlikely that the Review Panel would find flaws in the commission verdict within the time allotted.

Perhaps the most troubling feature of the Procedures is the severe restriction of the Review Panel’s authority to meaningfully review the commission decision. Review Panels are expressly precluded from any review of the commissions’ factual determinations and most procedural rulings. Further, the Procedures suggest that mixed questions of law and fact may fall outside the scope of review. The review is limited to “material error[s] of law,” even though (a) the commission is not required to issue oral or written findings of fact or conclusions of law, (b) commission deliberations must remain secret and do not become part of the trial record, (c) only one of the Panel members must have legal training, (d) the Review Panel may prevent defense counsel from making any written submission which could alert the Review Panel to errors in the proceedings below, and (e) the Procedures’ lax evidentiary standards virtually negate the possibility of any challenge to evidentiary rulings. Under these circumstances, it is

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32 For most offenses, the UCMJ provides three levels of appeals from convictions in general courts martial: a Court of Criminal Appeals, the Court of Appeals of the Armed Forces, and the U.S. Supreme Court. See 10 U.S.C. §§ 866-867a.
difficult to imagine that a Review Panel would have any basis for concluding that the commission committed a "material error of law."

Moreover, although the Procedures purport to require Review Panels to review sentencing determinations, such a review is virtually impossible. The Review Panel may not review issues of fact, and there are no sentencing rules or guidelines by which to judge the appropriateness of any particular sentence. Because sentencing decisions are inherently factual determinations, they are effectively beyond the reach of the Review Panel.

Finally, the combination of the 30-day limit for review and the possibility that the Secretary of Defense might have final decision making authority means that death sentences might be carried out less than two months after the military commission ruling and within days after the Review Panel decision. This leaves almost no time for the accused to seek habeas relief in federal court. The Al Odah and Coalition of Clergy courts refused to exercise habeas jurisdiction to review the detention of persons at Guantanamo, but that does not exclude the possibility that a federal court might review death sentences imposed on such persons. Indeed, the lack of capital sentencing guidelines, the inadequacies of the review procedures, and a perceived undue haste in executing detainees render habeas review more likely than not.

The committee recognizes the administration’s desire to avoid unnecessary delays in the review process. This goal must be balanced, however, with traditional notions of fairness and due process. For the reasons stated above, the committee recommends that the Department of Defense promulgate regulations:

1. Requiring the military commissions to issue findings of fact and conclusions of law;
2. Permitting the prosecution and defense each to submit written briefs within 10 days after receiving the trial record, with such limitations as to length and form as the Review Panel deems appropriate;
3. Permitting the Review Panel the discretion to extend the 30-day limitation on the review period, at least in capital cases;
4. Providing that the Review Panel shall be entitled to review commission determinations as to mixed questions of law and fact; and
5. Specifying that review of sentencing decisions shall not be limited to "material error[s] of law."

V. INTERNATIONAL TRIBUNALS

Many international commentators have suggested that the Guantanamo detainees should be prosecuted before an international criminal tribunal rather than U.S. military commissions. Specialized international tribunals were used after World War II in Nuremberg and Tokyo, and more recently in the aftermath of civil strife in the former Yugoslavia and Rwanda. The
International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") were established in 1993 and 1994, respectively, and they represent an attempt to address violations of international human rights law in an international forum devoid of the potential bias and prejudice of national trials. The Rome Statute of the International Criminal Court (the "Rome Treaty") was adopted in 1998 and became effective in July 2002, establishing the first permanent International Criminal Court ("ICC"). The ICC will have jurisdiction to hear cases of alleged genocide, crimes against humanity, war crimes, and crimes of aggression against citizens of countries that have ratified the Treaty or involving crimes committed within such countries. Rome Treaty, art. 5(1), 12(2). The U.S. announced in May 2002 that it will not ratify the Rome Treaty. In any event, the ICC cannot prosecute the Guantanamo detainees because the Rome Treaty applies prospectively only, and the detainees were captured prior to the effective date of the Treaty. Id. at art. 11(1), 22(1), 24(1). Nevertheless, having been ratified by 60 countries and approved by twice that number, the Rome Treaty provides a useful measure of internationally recognized norms for fairly prosecuting alleged violations of the law of war.

This section discusses the procedures established in the Rome Treaty and outlines the arguments for and against trying the Guantanamo detainees before a specialized international tribunal.

A. ICC Rules and Procedures

U.S. jurisprudence and legal scholarship have exerted a strong influence in the development of international norms of due process and a fair trial. Thus, many of the rights afforded to defendants in U.S. courts have become a part of customary international law. Not surprisingly, then, many of the procedural protections memorialized in the Rome Treaty mirror those enjoyed by criminal defendants in U.S. federal and state courts. Provisions of the Rome Treaty that differ from the military commission Procedures are outlined below.

1. Rights During Custodial Interrogation

If the ICC Prosecutor has reason to believe that a person has committed a war crime, then prior to being questioned, that person must be informed of his rights to remain silent and to the assistance of counsel. Rome Treaty, art. 55(2).

2. Rights to Exculpatory Evidence and Investigative Resources

During the investigation, the ICC Prosecutor must disclose to the accused such evidence as "he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence." Id., art. 67(2). In addition, the accused is entitled "to have adequate time and facilities for the preparation of the defense[.]" Id., art. 67(1)(b).

The Rome Treaty provides extensive measures to resolve national security concerns raised by countries that are requested to disclose information relevant to the prosecution or defense of an ICC case. Id., art. 72. However, the right of the accused to receive exculpatory evidence is not limited by national security or other concerns. Once the information becomes available to the
ICC and the Prosecutor, it is available to the accused as well. Similarly, the Rome Treaty places no limits on the accused’s investigation based on issues of national security.

3. **Right to a Public Trial**

ICC trials are held in public unless the Court determines that certain portions of the proceedings should be closed to the public in order to protect victims, witnesses, or confidential or sensitive information. *Id.,* art. 64(7). Even when the proceedings are closed, however, the accused and his counsel have the right to be present. *Id.,* art. 67(1).

4. **Evidentiary Issues**

Under the Rome Treaty, the ICC must judge the relevance or admissibility of evidence based on “the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness[.]” *Id.,* art. 69(4). In addition, the ICC must respect evidentiary privileges such as the attorney-client privilege. *Id.,* art. 67(1)(b), 69(5). Finally, evidence obtained in violation of the Treaty or “internationally recognized human rights” is inadmissible if “the violation casts substantial doubt on the reliability of the evidence,” or “the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.” *Id.,* art. 69(7). The Treaty prohibits obtaining evidence, including a confession, through “any form of coercion, duress or threat.” *Id.,* art. 55(1)(b).

5. **Findings of Fact and Conclusions of Law**

The decision of the ICC Trial Chamber must be written and “shall contain a full and reasoned statement of the Trial Chamber’s findings on the evidence and conclusions.” *Id.,* art. 74(5). Further, the Trial Chamber must “give reasons for any rulings it makes on evidentiary matters” and incorporate those reasons into the trial record. Rule 64(2), Finalized Draft Text of the Rules of Procedure and Evidence, Report of the Preparatory Commission for the International Criminal Court, Nov. 2, 2000.

6. **Independent Appellate Review**

A person convicted by the ICC Trial Chamber has the right to appeal to the Appeals Chamber on the grounds of procedural error, factual error, legal error, or “any other ground that affects the fairness or reliability of the proceedings or decision.” Rome Treaty, art. 81(1)(b). The Appeals Chamber may reverse or amend the trial ruling or remand the case for a new trial before a different Trial Chamber if it finds the proceedings below “were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error.” *Id.,* art. 83(2).

B. **Advantages of an International Tribunal**

International public opinion strongly favors trial of suspected terrorists before an international court. (See Section IV.E.1 above.) Whether justified or not, distrust in the world community must be considered when determining a strategy to defend against future terrorist acts. The
distrust would be lessened if the prosecutions were conducted under treaties and agreements that were widely accepted around the world, and under procedures that were internationally recognized as fair. National courts of a country involved in an international conflict are more likely to prioritize national objectives over the worldwide implications of a particular prosecution. National judges are also more likely to be influenced by the political climate existing in their country in a time of war. The potential for bias, or at least an international perception of bias, is increased by the open-ended language in both the Department of Defense Procedures and the President’s Order with regard to the jurisdiction and procedures of the military commissions. The United Nations could promulgate a statute that is much more specific as to the jurisdiction of the international tribunal, the crimes to be prosecuted, and the procedures applying to such prosecutions.

C. Disadvantages of an International Tribunal

The principal disadvantage to prosecuting alleged terrorists before an international tribunal is the possibility that national security interests could be compromised. If international authorities were responsible for investigating, prosecuting, and guaranteeing the rights of the accused, it is entirely possible that information the U.S. regards as secret or sensitive would be publicly disclosed, to the possible detriment of national or international security.

Although international tribunals could address some of the concerns surrounding the legitimacy of a national prosecution of the detainees, their infancy is a decided disadvantage. There are relatively few examples of an effective administration of international tribunals because they face many constraints that would not be present in U.S. courts or military commissions. Timing is another important factor. The Rome Treaty was approved in 1998, it only became effective in 2002, and the ICC may not prosecute its first case until 2003 or later. Another problem that could face an international tribunal might be lack of funds to operate efficiently. The ICTY faced significant financial hurdles in relying upon the United Nations for its operating income. This severely hampered the ongoing investigations and trial preparation.33 Another related drawback of an international prosecuting body is that it can only be as effective as the enforcement mechanisms it has to back it up. In order to arrest, extradite, and detain individuals from different countries, it must have the proper political and military power.34 The financial and enforcement challenges facing an international tribunal could probably be met if the United States and the United Nations Security Council gave their full support.

The plight of the victims of the September 11 attacks and their families is another important consideration. Although an international tribunal may give a just trial to the defendants, it may not be the best forum for the victims to feel that the criminals have been adequately punished. An international tribunal would not impose the death penalty; many U.S. citizens might be dissatisfied with any lesser punishment. The need for retribution or acknowledgment of the crime is not only for the victims’ families and friends, but also the nation as a whole. The nation


that suffered the tragedy of September 11 must feel satisfied with the creation and performance of the tribunal. The difficult fact may be that, as in Rwanda, an international tribunal might not enjoy the benefit of the doubt that the average U.S. citizen might afford to a U.S. tribunal, like a military commission. The families of the victims may not feel that their story was heard and their losses acknowledged. These needs felt by the victims and the nation as a whole may not be met if the verdict is put in the hands of what may be perceived as a foreign, ad hoc body. They may not give the tribunal's decision the finality and respect that would help them close the chapter on a horrible event.

It is clear that the attacks of September 11 violated international law. The more difficult question is whether the forum should be domestic or international. There are legal, political, and practical benefits and drawbacks to both options.

VI. RECOMMENDATIONS

Throughout this report, the committee analyzed the President's Order and the Defense Department's Procedures for trials by military commission from a trial lawyer's perspective, and the committee made modest recommendations that would make the proceedings somewhat more evenhanded without sacrificing the government's aims of protecting national security and providing swift justice for international terrorists. These recommendations are consistent with the Order and the Procedures and therefore could be implemented almost immediately by promulgating supplementary regulations pursuant to Section 7(A) of the Procedures. The committee believes that further revisions would be needed to bring the military commission proceedings into conformity with U.S. treaty obligations, customary international law, and the fundamental fairness that is the foundation of the U.S. justice system. Implementing these modest recommendations would be an important first step in that direction.

The committee recommends the following supplementary regulations:

- Limiting military commission prosecutions to alleged violations of the law of war;
- Clarifying the meaning of "international terrorism;"
- Prohibiting the removal of commission members or limiting the circumstances under which they may be removed;
- Adopting the Unlawful Command Influence rules for military commission proceedings;
- Clarifying that confidential communications between the accused and his counsel.

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are protected by the attorney-client privilege and are neither discoverable nor admissible at trial;

- Directing the commission to exclude evidence of statements by the accused made in response to physical force or the threat thereof;

- Requiring that any limitations on procuring the attendance of witnesses be applied equally to the prosecution and the defense;

- Requiring the Presiding Officer, when making a determination under § 6(D)(5)(b) of the Procedures, to balance the accused's ability to make his defense against the national security interests involved;

- Adopting a procedure for capital sentencing that includes an eligibility determination and a weighing of aggravating and mitigating circumstances of an offense and offender;

- Requiring the military commissions to issue findings of fact and conclusions of law;

- Permitting the prosecution and defense each to submit written briefs within 10 days after receiving the trial record, with such limitations as to length and form as the Review Panel deems appropriate;

- Permitting the Review Panel the discretion to extend the 30-day limitation on the review period, at least in capital cases;

- Providing that the Review Panel shall be entitled to review commission determinations as to mixed questions of law and fact; and

- Clarifying review standards to state that review of sentencing decisions is not limited to "material error[s] of law."

**Conclusion**

The President's Order and the Department of Defense's Procedures for trials by military commissions have generated considerable debate nationally and internationally. This debate will intensify if and when military commissions actually try and sentence alleged terrorists. The Procedures depart in significant ways from rules that govern trials in U.S. civilian and military courts and international tribunals, and some of these procedural differences affect the fundamental rights of persons who may be tried by military commissions and the fundamental fairness of the proceedings. Whether the Order and Procedures are justified by the extraordinary circumstances that gave rise to them, trial lawyers in the United States should voice their concerns in the public debate and stand ready to assist in trials before the military commissions, when and if they occur.
March 21, 2003

Re: Comments on Military Commission Instruction – Crimes and Elements for Trials by Military Commissions (the “Instruction”)

Dear Mr. Haynes,

We commend the General Counsel of the Department of Defense for making the Instruction available for public comment. Considering the brief time made available for comments on a subject encompassing nearly the full range of the law of war, we confine our remarks to the following salient points:

The Instruction “provides guidance” and is “declarative” of provisions of the common law of war, “illustrative of applicable principles” and not “an exclusive enumeration”. Nonetheless, it is entitled an “Instruction” and purports to “define” the elements of crimes. It should be made clearer that the Instruction is not intended as binding on the members of commissions or defendants with respect to the definition of crimes to the extent that it is determined that a provision is inconsistent with the common law of war. Moreover, given the authority reserved to the Congress “to define and punish Offenses against the Law of Nations”, Article I, Section 8 of the Constitution (emphasis added), language stating that the Instruction “defines” the elements of crimes within the purview of military commissions should be amended in favor of language that characterizes the definitions as reflecting existing common law.
Beyond the classic crimes of the law of war within the traditional jurisdiction of military commissions trying members of an enemy force, the Instructions go on to define "related offenses" of Aiding and Abetting, Solicitation, Accessory after the Fact and Conspiracy. Such offenses are susceptible to expanding the subject matter jurisdiction of military commissions to conduct beyond the established purview of the law of war, especially where the defendant is not a member of an armed enemy. Such expansion would not only exceed the self-limitation of the Military Order to "violations of the law of war and all other offenses triable by military commissions", Military Commission Order No. 1, Section 3B, but, if applied to non-combatant defendants found in the United States, would potentially violate the Constitutional right to trial by jury of civilians not members of an enemy force and triable by the regular courts. See Ex parte Milligan, 71 U.S. 2 (1866).

Three provisions are of particular concern with respect to potential overreaching. First, under the Instruction the offense of "terrorism", a relatively new offense to the law of war without substantial customary law, would be committed by causing property damage without regard to conduct causing or threatening loss of life. It is submitted that this offense be limited to the commission of "violent acts or acts dangerous to human life", as in 18 USC §2331. Property damage alone is properly covered by a distinct crime more familiar to the law of war. Secondly, because the offense of "aiding the enemy" would appear to extend to an individual, e.g., a foreign national, owing no duty to the United States; we recommend that there be included a reference to such a duty. Finally, the clause in Paragraph 6.B.6a(1) of the Instruction referring to persons who "joined an enterprise of persons who shared a common criminal purpose" could improperly extend to ordinary crimes beyond the law of war; it should be deleted or rephrased.

Given the unfamiliar and controversial nature of military commissions, which have not been used in any of America's armed conflicts of the last fifty years, it is respectfully submitted that military commissions will be most effective and attain the greatest legitimacy under the rule of law if they are confined to the trial of defendants who are clearly enemy combatants charged with direct complicity in heinous crimes.

Subject to these comments, we believe that the Instructions will be a useful, and even essential, tool for members of commissions, and prosecutors and defense counsel practicing before them.

Very truly yours,

Miles P. Fischer, Chair
Committee on Military Affairs & Justice
Association of the Bar of the City of New York
June 18, 2003

William Haynes
General Counsel
Department of Defense
1600 Defense Pentagon
Washington, D.C. 20330-1600

Dear Mr. Haynes:

I am writing to request Defense Department authorization for representatives of the Lawyers Committee for Human Rights to attend military commission trials as observers, pursuant to Section 6(B) of DOD Military Commission Order No. 1 (March 21, 2002). We welcome the Department's assurances that military commission proceedings will be open to the public. This commitment to open proceedings reflects an understanding of the fundamental importance of public access to the perception that these proceedings are legitimate and just. Holding criminal proceedings open to the public is an important guarantee of a fair trial. (Article 14(1) International Covenant on Civil and Political Rights, UN General Assembly resolution 2200A (XXI), December 16, 1966, entered into force March 23, 1976.)

The Lawyers Committee has worked for a quarter century to advance justice, human dignity and respect for the rule of law in the United States and abroad. We have conducted numerous trial observation missions around the world, including many which involved national security issues. We have commented on the military commission regulations that you and your staff have drafted, and have followed closely the development of the legal structure for the military commissions. Interest in these proceedings, both internationally and in the United States, is high. One important issue is whether these procedures comport with due process and international fair trial standards. Having the opportunity to observe the proceedings directly will enhance our ability to provide detailed and thoughtful comment on these issues.

If, as is widely assumed, the military commission trials are held in Guantanamo Bay or some other remote site outside the United States, logistical factors alone will make it extremely difficult for members of the public at large to attend. This makes informed monitoring by the Lawyers Committee and other impartial professionals all the more important.
Press reports indicate that military commission trials may be commencing in the near future. We would therefore appreciate your assistance in helping to ensure that arrangements for our presence at military commission trials may be put in to place as expeditiously as practicable.

Thank you for your attention to this request. I look forward to hearing from you at your earliest convenience.

Sincerely,

Elisa Massimino
Department of Defense
Military Commission Order No. 2

June 21, 2003

SUBJECT: Designation of Deputy Secretary of Defense as Appointing Authority

(b) Military Commission Order No. 1 (Mar. 21, 2002)
(c) 32 C.F.R. sec. 341.1

1. PURPOSE

This Order implements policy and assigns responsibilities under references (a) and (b) for trials before military commissions of individuals subject to the President's Military Order.

2. DESIGNATION OF APPOINTING AUTHORITY

In accordance with the President's Military Order and Military Commission Order No. 1, the Deputy Secretary of Defense, Dr. Paul D. Wolfowitz, is designated as the Appointing Authority.

3. RE-DESIGNATION OF APPOINTING AUTHORITY

The Deputy Secretary of Defense shall not re-designate another as the Appointing Authority without the approval of the Secretary of Defense.

4. EFFECTIVE DATE

This Order is effective immediately.

Donald H. Rumsfeld
Secretary of Defense
Functions (67 FR 71606), the President delegated to CITA the authority to determine whether yarns or fabrics cannot be supplied by the domestic industry in commercial quantities in a timely manner under the AGOA, the CBTPA, or the ATPDEA. On March 6, 2001, CITA published procedures that it will follow in considering requests (66 FR 13902).

On June 5, 2003, the Chairman of CITA received a petition from Alston & Bird, L.P., on behalf of their client, Ge-Ray Fabrics, Inc., alleging that yarns that are supplied by the domestic industry in commercial quantities in a timely manner are substitutable for this yarn for purposes of the intended use. Also relevant is whether other yarns that are supplied by the domestic industry in commercial quantities in a timely manner are substitutable for this yarn for purposes of the intended use. Comments must be received no later than June 27, 2003. Interested persons are invited to submit six copies of such comments or information to the Chairman, Committee for the Implementation of Textile Agreements, room 3100, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC 20230.

If a comment alleges that this yarn can be supplied by the domestic industry in commercial quantities in a timely manner, CITA will closely review any supporting documentation, such as a signed statement by a manufacturer of the yarn stating that it produces the yarn that is the subject of the request, including the quantities that can be supplied and the time necessary to fill any applications for this yarn. CITA will protect any business confidential information that is marked business confidential from disclosure to the full extent permitted by law. CITA will make available to the public non-confidential versions of the request and non-confidential versions of any public comments received with respect to a request in room 3100 in the Herbert Hoover Building, 14th and Constitution Avenue, NW., Washington, DC 20230. Persons submitting comments on a request are encouraged to include a non-confidential version and a non-confidential summary.

James C. Leonard III, Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 03-14958 Filed 6-10-03; 12:47 pm]
BILLING CODE 3510-DR-S

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Notice of Availability of Funds for Parent Drug Corps Program

AGENCY: Corporation for National and Community Service.

ACTION: Notice of funding availability.

SUMMARY: The Corporation for National and Community Service (hereinafter the "Corporation") announces the availability of approximately $4,167,000 in grant funds for a nonprofit organization to implement the Parent Drug Corps Program ("the Parent Corps Program"). The purpose of the grant is to fund a national training system and develop a network of volunteer parents engaged in a nationwide substance abuse prevention effort. This estimate is a projection for the guidance of potential applicants. The Corporation is not bound by any estimate in this notice. These funds are available under authority provided in Public Law 108–7, the Omnibus Appropriations Act for fiscal year 2003. The program is a special volunteer program under section 122 of the Domestic Volunteer Service Act of 1973, as amended (42 U.S.C. 4992). Applicable regulations include the uniform administrative requirements for grants and agreements with institutions of higher education, hospitals, and other nonprofit organizations, 45 CFR part 2543.

Eligible nonprofit organizations, including community organizations (faith-based and secular), are encouraged to apply. The Corporation anticipates receiving fewer than ten applications for this solicitation, and anticipates making one grant award under this announcement. The Corporation will make an award covering a period not to exceed three years. The grant proposal must include a proposed budget and proposed activities for the performance period. The Corporation is uncertain as to whether additional funds will be made available for Parent Drug Corps program grants in subsequent years, and has no obligation to provide additional funding beyond the period of this grant. Future funding is contingent on performance and the availability of appropriations.

Note: This Notice is not a complete description of the activities to be funded or of the application requirements. For supplementary information and application guidelines go to the Corporation's Web site at http://www.cns.gov/whatsnew/notices.html.

DATES: We must receive your application by 5 p.m. on July 14, 2003. We anticipate announcing selections under this Notice no later than August 20, 2003.

ADDRESSES: Submit your application to the following address: Corporation for National and Community Service, Attn: Nancy Talbot, 1201 New York Avenue, NW., Box PDC, Washington, DC 20525. Due to delays in delivery of regular mail to government offices, there is no guarantee that an application sent by regular mail will arrive in time to be considered. We therefore suggest that you use U.S.P.S. priority mail or a commercial overnight delivery service to make sure that you meet the deadline. We will not accept an application that is submitted via email or facsimile.

FOR FURTHER INFORMATION CONTACT: Nancy Talbot at 202–606–5000, ext. 470 (ntalbot@cns.gov). The TDD number is 202–565–2799. For a printed copy of this NOFA and the supplementary information and application guidelines (available on-line), contact Ms. Shanika Ratliff at 202–606–5000 ext. 164 (sratliff@cns.gov). Upon request, this information will be made available in alternate formats for people with disabilities.


Robin Dean,
Program Manager, Department of Research and Policy Development.

[FR Doc. 03–14870 Filed 6–12–03; 8:45 am]
BILLING CODE 0595–14–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Privacy Act of 1974; System of Records

AGENCY: Office of the Secretary, DoD.

ACTION: Notice to add systems of records.

SUMMARY: The Office of the Secretary of Defense proposes to add a system of...
records notice to its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: The changes will be effective on July 14, 2003 unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to Directives and Records Division, Directives and Records Branch, Washington Headquarters Services, 1155 Defense Pentagon, Washington, DC 20301–1155.

FOR FURTHER INFORMATION CONTACT: Mr. Dan Cragg at (703) 601–4722.

SUPPLEMENTARY INFORMATION: The Office of the Secretary of Defense notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the Federal Register and are available from the address above.

The proposed systems reports, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, were submitted on May 28, 2003, to the House Committee on Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, 'Federal Agency Responsibilities for Maintaining Records About Individuals,' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Patricia L. Toppings,
Alternate OSD Federal Register Liaison Officer, Department of Defense.

System name:
Qualification of Civilian Defense Counsel for Military Commissions.

SYSTEM LOCATION:

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:
Civilian Defense Counsel seeking admission to practice before Military Commissions in accordance with Military Commission Instruction No. 5.

CATEGORIES OF RECORDS IN THE SYSTEM:
Records relating to the professional qualifications of civilian counsel to practice before Military Commissions. Records include full name of the individual, work address and phone number; Social Security Number; proof of U.S. citizenship; certificate showing good standing with the bar of a qualifying jurisdiction; statement detailing all sanctions or disciplinary actions pending or final, to which he/she has been subject; information required to conduct a background investigation for security clearance; a properly executed ‘Authorization for Release of Information’ and ‘Affidavit and Agreement by Civilian Defense Counsel’; and a one-page resume from the civilian defense counsel that will be provided to the detainee.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:
5 U.S.C. 301, Departmental Regulations; 5 U.S.C. 113, Secretary of Defense; Military Commission Instruction No. 5, Qualification of Civilian Defense Counsel; section 4C(3)(b) of Military Commission Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism; Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism; and E.O. 9397 (SSN).

PURPOSE(S): The information is collected for the purpose of determining whether the individual meets prescribed eligibility criteria to serve as civilian defense counsel for an accused who will appear before a Military Commission. Routine uses of records maintained in the system, including categories of users and the purposes of such uses: In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To accused for purposes of furnishing information on individuals who are qualified to appear before a Military Commission as a civilian defense counsel.

The DoD “Blanket Routine Uses” set forth at the beginning of OSD’s compilation of systems of records notices apply to this system.

Policies and practices for storing, retrieving, accessing, retaining, and disposing of records in the system:

STORAGE: Records are stored as paper files only.

RETRIEVABILITY: Retrieved by the individual’s full name.

 Safeguards: Records are maintained in a secure, limited access or monitored area. Physical entry by unauthorized persons is restricted by the use of locks, guards, or administrative procedures. Access to personal information is limited to those who require the records to perform their official duties. All personnel whose official duties require access to the information are trained in the proper safeguarding and use of the information.

RETENTION AND DISPOSAL:
Disposition pending. Until the National Archives and Records Administration has approved the retention and disposition of these records, treat records as permanent.

SYSTEM MANAGER(S) AND ADDRESS:

NOTIFICATION PROCEDURE:
Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to the Chief Defense Counsel, Office of Military Commissions, Office of the General Counsel, Department of Defense, 1600 Defense Pentagon, Washington, DC 20301–1600.

Requests for information should contain the individual’s full name.

RECORDS ACCESS PROCEDURES:
Individuals seeking to access information about themselves contained in this system of records should address written inquiries to the Chief Defense Counsel, Office of Military Commissions, Office of the General Counsel, Department of Defense, 1600 Defense Pentagon, Washington, DC 20301–1600.

Requests for information should contain the individual’s full name.

CONTESTING RECORD PROCEDURES:
The OSD rules for accessing records, for contesting contents and appealing initial agency determinations are published in OSD Administrative Instruction 81; 32 CFR part 311; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:
The source of record is from the individuals concerned and State Bar Associations.

EXEMPTIONS CLAIMED FOR THE SYSTEM:
None.
[FR Doc. 03–14815 Filed 6–11–03; 8:45 am]
BILLING CODE 5001–06–P
Federal Register / Vol. 68, No. 125 / Monday, June 30, 2003 / Rules and Regulations

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[CGD09-03-223]

RIN 1625-AA00

Safety Zone; Lake Michigan, Chicago, IL

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for the taste of Chicago fireworks in Chicago, Illinois. This safety zone is necessary to protect vessels and spectators from potential airborne hazards during a planned fireworks display over Lake Michigan. The safety zone is intended to restrict vessels from a portion of Lake Michigan off Chicago, Illinois.

DATES: This rule is effective from 9 p.m. (local) to 10 p.m. (local), July 3, 2003.

ADDRESSES: Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are available for inspection or copying at Marine Safety Office Chicago, 215 W. 83rd Street, Suite D, Burr Ridge, Illinois 60527, between 7:30 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT:

MST2 Kenneth Broockhouse, U.S. Coast Guard Marine Safety Office Chicago, at (630) 989-2125.

SUPPLEMENTARY INFORMATION:

Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing an NPRM. The permit application was not received in time to publish an NPRM followed by a final rule before the effective date. Delaying this rule would be contrary to the public interest of ensuring the safety of spectators and vessels during this event and immediate action is necessary to prevent possible loss of life or property. For the same reasons, under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the Federal Register. The Coast Guard has not received any complaints or negative comments previously with regard to this event.
Tuesday,
July 1, 2003

Part III

Department of Defense

Office of the Secretary

32 CFR Parts 9, 10, 11, et al.
Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism; Military Commission Instructions, et al.; Final Rules
ACTION: 32 CFR Part 9

DEPARTMENT OF DEFENSE
Office of the Secretary

32 CFR Part 9

Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism

AGENCY: Department of Defense.

SUMMARY: This rule implements policy, assigns responsibilities, and prescribes procedures under the United States Constitution, Article 11, section 2 and the President's Military Order of November 13, 2001, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” for trials before military commissions of individuals subject to the President's Military Order. These procedures shall be implemented and required by the President's Military Order or this part, the procedures prescribed herein and no others shall govern such trials.

EFFECTIVE DATE: March 21, 2002.

FOR FURTHER INFORMATION CONTACT: Office of Military Commission Spokesperson, 703-693-1115.

SUPPLEMENTARY INFORMATION: Although exempt from administrative procedures for rulemaking, publication of the final rule in the Federal Register is deemed appropriate under 5 U.S.C. 552(a)(1)(C). Certifications follow:

Administrative Procedures Act (Sec. 1, Pub. L. 89-544)

Section 1 provides that the final rule was not subject to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities.

Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. 601)

Section 2 provides that this rule does not impose any reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35).

Federalism (Executive Order 13132)

Section 3 provides that this rule does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

- The States;
- The relationship between the national government and the States; or
- The distribution of power and responsibilities among the various levels of government.

§9.1 Purpose.

This part implements policy, assigns responsibilities, and prescribes procedures under the United States Constitution, Article II, section 2 and Military Order of November 13, 2001, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism” (3 CFR, 2001 comp., p. 918, 66 FR 57833), for trials before military commissions of individuals subject to the President's Military Order. These procedures shall be implemented and construed so as to ensure that any such individual receives a full and fair trial before a military commission, as required by the President's Military Order. Unless otherwise directed by the Secretary of Defense, and except for supplemental procedures established pursuant to the President's Military Order or this part, the procedures prescribed herein and no others shall govern such trials.

§9.2 Establishment of Military Commissions.

In accordance with the President's Military Order, the Secretary of Defense or a designee ("Appointing Authority") may issue orders from time to time appointing one or more military commissions to try individuals subject to the President's Military Order and appointing any other personnel necessary to facilitate such trials.

§9.3 Jurisdiction.

(a) Over persons. A military commission appointed under this part ("Commission") shall have jurisdiction over only an individual or individuals ("the Accused");

(1) Subject to the President's Military Order; and

(2) Alleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority.

(b) Over offenses. Commissions established hereunder shall have jurisdiction over violations of the laws of war and all other offenses triable by military commission.

(c) Maintaining integrity of commission proceedings. The Commission may exercise jurisdiction over participants in its proceedings as necessary to preserve the integrity and order of the proceedings.

§9.4 Commission personnel.

(a) Members—(1) Appointment. The Appointing Authority shall appoint the members and the alternate member or members of each Commission. The alternate member or members shall attend all sessions of the Commission, but the absence of an alternate member shall not preclude the Commission from conducting proceedings. In case of incapacity, resignation, or removal of any member, an alternate member shall take the place of that member. Any vacancy among the members or alternate members occurring after a trial has begun may be filled by the Appointing Authority, but the substance of all prior proceedings and evidence taken in that case shall be made known.
to that new member or alternate member before the trial proceeds.

(2) Number of members. Each Commission shall consist of at least three but no more than seven members, the number being determined by the Appointing Authority. For each such Commission, there shall also be one or two alternate members, the number being determined by the Appointing Authority.

(3) Qualifications. Each member and alternate member shall be a commissioned officer of the United States armed forces ("Military Officer"), including without limitation reserve personnel on active duty, National Guard personnel on active duty in Federal service, and retired personnel recalled to active duty. The Appointing Authority shall appoint members and alternate members determined to be competent to perform the duties involved. The Appointing Authority may remove members and alternate members for good cause.

(4) Presiding Officer. From among the members of each Commission, the Appointing Authority shall designate a Presiding Officer to preside over the proceedings of that Commission. The Presiding Officer shall be a Military Officer who is a judge advocate of any United States armed force.

(5) Duties of the Presiding Officer. (i) The Presiding Officer shall admit or exclude evidence at trial in accordance with section 6(d) of this part. The Presiding Officer shall have authority to close proceedings or portions of proceedings in accordance with §9.6(b)(3) of this part and for any other reason necessary for the conduct of a full and fair trial.

(ii) The Presiding Officer shall ensure that the discipline, dignity, and decorum of the proceedings are maintained, shall exercise control over the proceedings to ensure proper implementation of the President’s Military Order and this part, and shall have authority to act upon any contempt or breach of Commission rules and procedures. Any attorney authorized to appear before a Commission who is thereafter found not to satisfy the requirements for eligibility or who fails to comply with laws, rules, regulations, or other orders applicable to the Commission proceedings or any other individual who violates such laws, rules, regulations, or orders may be disciplined by the Presiding Officer deems appropriate, including but not limited to revocation of eligibility to appear before that Commission. The Appointing Authority may further revoke that attorney’s or any other person’s eligibility to appear before any other Commission convened under this part.

(iii) The Presiding Officer shall ensure the expeditious conduct of the trial. In no circumstance shall accommodation of counsel be allowed to delay proceedings unreasonably.

(iv) The Presiding Officer shall certify all interlocutory questions, the disposition of which would effect a termination of proceedings with respect to a charge, for decision by the Appointing Authority. The Presiding Officer may certify other interlocutory questions to the Appointing Authority as the Presiding Officer deems appropriate.

(b) Prosecution—(1) Office of the Chief Prosecutor. The Chief Prosecutor shall be a judge advocate of any United States armed force, shall supervise the overall prosecution efforts under the President’s Military Order, and shall ensure proper management of personnel and resources.

(2) Prosecutors and Assistant Prosecutors. (i) Consistent with any applicable regulations or instructions issued under §9.7(a), the Chief Prosecutor shall detail a Prosecutor and, as appropriate, one or more Assistant Prosecutors to prepare charges and conduct the prosecution for each case before a Commission ("Prosecutors"). Prosecutors and Assistant Prosecutors shall be: (A) Military Officers who are judge advocates of any United States armed force, or (B) Special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States.

(ii) The duties of the Prosecution are: (A) To prepare charges for approval and referral by the Appointing Authority; (B) To conduct the prosecution before the Commission of all cases referred for trial; and (C) To represent the interests of the Prosecution in any review process.

(c) Defense—(1) Office of the Chief Defense Counsel. The Chief Defense Counsel shall be a judge advocate of any United States armed force, shall supervise the overall defense efforts under the President’s Military Order, shall ensure proper management of personnel and resources, shall preclude conflicts of interest, and shall facilitate proper representation of all Accused.

(2) Detailed Defense Counsel. Consistent with any supplementary regulations or instructions issued under §9.7(a), the Chief Defense Counsel shall detail one or more Military Officers who are judge advocates of any United States armed force to conduct the defense for each case before a Commission ("Detailed Defense Counsel"). The duties of the Detailed Defense Counsel are:

(i) To defend the Accused zealously within the bounds of the law without regard to personal opinion as to the guilt of the Accused; and (ii) To represent the interests of the Accused in any review process as provided by this part.

(iii) Choice of Counsel. (A) The Accused may select a Military Officer who is a judge advocate of any United States armed force to replace the Accused’s Detailed Defense Counsel, provided that Military Officer has been determined to be available in accordance with any applicable regulations or instructions issued under §9.7(a). After such selection of a new Detailed Defense Counsel, the original Detailed Defense Counsel will be relieved of all duties with respect to that case. If requested by the Accused, however, the Appointing Authority may allow the original Detailed Defense Counsel to continue to assist in representation of the Accused as another Detailed Defense Counsel.

(B) The Accused may also retain the services of a civilian attorney of the Accused’s own choosing and at no expense to the United States Government (“Civilian Defense Counsel”), provided that attorney: (1) Is a United States citizen; (2) Is admitted to the practice of law in a State, district, territory, or possession of the United States, or before a Federal court; (3) Has not been the subject of any sanction or disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct; (4) Has been determined to be eligible for access to information classified at the level SECRET or higher under the authority of and in accordance with the procedures prescribed in DoD 5200.2-R; and (5) Has signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the course of proceedings.

Civilian attorneys may be pre-qualified as members of the pool of available attorneys if, at the time of application, they meet the relevant criteria, or they may be pre-qualified on an ad hoc basis after being requested by an Accused. Representation by Civilian Defense Counsel will not relieve Detailed Defense Counsel of the duties specified
in paragraph (c)(2) of this section. The qualification of a Civilian Defense Counsel does not guarantee that person's presence at closed Commission proceedings or that person's access to any information protected under § 9.6(d)(5).

(4) **Continuity of representation.** The Accused must be represented at all relevant times by Detailed Defense Counsel. Detailed Defense Counsel and Civilian Defense Counsel shall be herein referred to collectively as "Defense Counsel." The Accused and Defense Counsel shall be herein referred to collectively as "the Defense."

(d) **Other Personnel.** Other personnel, such as court reporters, interpreters, security personnel, bailiffs, and clerks may be detailed or employed by the Appointing Authority, as necessary.

§ 9.5 **Procedures accorded the accused.**

The following procedures shall apply with respect to the Accused:

(a) The Prosecution shall furnish to the Accused, sufficiently in advance of trial to prepare a defense, a copy of the charges in English and, if appropriate, in another language that the Accused understands.

(b) The Accused shall be presumed innocent until proven guilty.

(c) A Commission member shall vote for a finding of Guilty as to an offense if and only if that member is convinced beyond a reasonable doubt, based on the evidence admitted at trial, that the Accused is guilty of the offense.

(d) At least one Detailed Defense Counsel shall be made available to the Accused sufficiently in advance of trial to prepare a defense and until any findings and sentence become final in accordance with § 9.6(b)(2).

(e) The Prosecution shall provide the Defense with access to evidence the Prosecution intends to introduce at trial open to the public (except proceedings closed by the Presiding Officer) to witnesses and other persons and to obtain evidence.

(1) Except by order of the Commission to ensure a full and fair trial in accordance with this part and subject to a Commission in the name of the Department of Defense over the signature of the Presiding Officer in a manner calculated to give reasonable notice to persons required to take action in accordance with that process.

(2) **Referral to the Commission.** The Accused may be present at trial to prepare a defense, to the extent necessary and reasonably available as determined by the Presiding Officer. Such access shall be consistent with the requirements of § 9.6(d)(5) and subject to § 9.9. The Appointing Authority shall order that such investigatory or other resources be made available to the Defense as the Appointing Authority deems necessary for a full and fair trial.

(i) The Accused may have Defense Counsel present evidence at trial in the Accused's defense and cross-examine each witness presented by the Prosecution who appears before the Commission.

(j) The Prosecution shall ensure that the substance of the charges, the proceedings, and any documentary evidence are provided in English and, if appropriate, in another language that the Accused understands.

(k) The Accused may be present at every stage of the trial before the Commission, consistent with § 9.6(b)(3), unless the Accused engages in disruptive conduct that justifies exclusion by the Presiding Officer. Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof.

(l) Except by order of the Commission for good cause shown, the Prosecution shall provide the Defense with access before sentencing proceedings to evidence the Prosecution intends to present in such proceedings. Such access shall be consistent with § 9.6(d)(5) of this part and subject to § 9.9.

(m) The Accused may make a statement during sentencing proceedings.

(n) The Accused may have Defense Counsel submit evidence to the Commission during sentencing proceedings.

(o) The Accused shall be afforded a trial open to the public (except proceedings closed by the Presiding Officer), consistent with § 9.6(b).

(p) The Accused shall not again be tried by any Commission for a charge once a Commission's finding on that charge becomes final in accordance with § 9.6(h)(2).

§ 9.6 **Conduct of the trial.**

(a) **Preliminary procedures—(1) Preparation of the Charges.** The Prosecution shall prepare charges for approval by the Appointing Authority, as provided in § 9.4(b)(2)(1).

(2) **Referral to the Commission.** The Appointing Authority may approve and refer for trial any charge against an individual or individuals within the jurisdiction of a Commission in accordance with § 9.3(a) and alleging an offense within the jurisdiction of a Commission in accordance with § 9.3(b).

(3) **Notification of the accused.** The Prosecution shall provide copies of the charges approved by the Appointing Authority to the Accused and Defense Counsel. The Prosecution also shall submit the charges approved by the Appointing Authority to the Presiding Officer of the Commission to which they were referred.

(4) **Plea Agreements.** The Accused, through Defense Counsel, and the Prosecution may submit for approval to the Appointing Authority a plea agreement mandating a sentence limitation or any other provision in exchange for an agreement to plead guilty, or any other consideration. Any agreement to plead guilty must include a written stipulation of fact, signed by the Accused, that confirms the guilt of the Accused and the voluntary and informed nature of the plea of guilty. If the Appointing Authority approves the plea agreement, the Commission will, after determining the voluntary and informed nature of the plea agreement, admit the plea agreement and stipulation into evidence and be bound to adjudge findings and a sentence pursuant to that plea agreement.

(b) **Issuance and service of process; obtaining evidence.** (i) The Commission shall have power to:

(A) Summon witnesses to attend trial and testify;

(B) Administer oaths or affirmations to witnesses and other persons and to question witnesses;

(C) Require the production of documents and other evidentiary material; and

(D) Designate special commissioners to take evidence.

(ii) The Presiding Officer shall exercise these powers on behalf of the Commission at the Presiding Officer's own initiative, or at the request of the Prosecution or the Defense, as necessary to ensure a full and fair trial in accordance with the President's Military Order and this part. The Commission shall issue its process in the name of the Department of Defense over the signature of the Presiding Officer. Such process shall be served as directed by the Presiding Officer in a manner calculated to give reasonable notice to persons required to take action in accordance with that process.

(b) **Duties of the Commission during trial.** The Commission shall:

(1) Provide a full and fair trial.

(2) Proceed impartially and expeditiously, strictly confining the proceedings to a full and fair trial of the charges, excluding irrele vant evidence.
and preventing any unnecessary interference or delay.

(3) Hold open proceedings except where otherwise decided by the Appointing Authority or the Presiding Officer in accordance with the President's Military Order and this part. Grounds for closure include the protection of information classified or classifiable under Executive Order 12958; information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests. The Presiding Officer may decide to close all or part of a proceeding on the Presiding Officer's own initiative or based upon a presentation, including an ex parte, in camera presentation by either the Prosecution or the Defense. A decision to close a proceeding or portion thereof may include a decision to exclude the Accused, Civilian Defense Counsel, or any other person, but Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof. Except with the prior authorization of the Presiding Officer and subject to section 9 of this part, Defense Counsel may not disclose any information presented during a closed session to individuals excluded from such proceeding or part thereof. Open proceedings may include, at the discretion of the Appointing Authority, attendance by the public and accredited press, and public release of transcripts at the appropriate time. Proceedings should be open to the maximum extent practicable. Photography, video, or audio broadcasting, or recording of or at Commission proceedings shall be prohibited, except photography, video, and audio recording by the Commission pursuant to the direction of the Presiding Officer as necessary for preservation of the record of trial.

(4) Hold each session at such time and place as may be directed by the Appointing Authority. Members of the Commission may meet in closed conference at any time.

(5) As soon as practicable at the conclusion of a trial, transmit an authenticated copy of the record of trial to the Appointing Authority.

(c) Oaths. (1) Members of a Commission, all Prosecutors, all Defense Counsel, all court reporters, all security personnel, and all interpreters shall take an oath to perform their duties faithfully.

(2) Each witness appearing before a Commission shall be examined under oath, as provided in paragraph (d)(2)(i) of this section.

(3) An oath includes an affirmation. Any formulation that appeals to the conscience of the person to whom the oath is administered and that binds that person to speak the truth, or, in the case of one other than a witness, properly to perform certain duties, is sufficient.

(d) Evidence—(1) Admissibility. Evidence shall be admitted if, in the opinion of the Presiding Officer (or in the case of a member of the Commission as authorized by the Presiding Officer), and to be given to the testimony of the witness. Testimony of witnesses shall be given under oath or affirmation. The Commission may still hear a witness who refuses to swear an oath or make a solemn undertaking; however, the Commission shall consider the refusal to swear an oath or to give an affirmation in evaluating whether to be given to the testimony of the witness.

(ii) Examination of witnesses. A witness who testifies before the Commission is subject to both direct examination and cross-examination. The Presiding Officer shall maintain order in the proceedings and shall not permit badgering of witnesses or questions that are not material to the issues before the Commission. Members of the Commission may question witnesses at any time.

(iv) Protection of witnesses. The Presiding Officer shall consider the safety of witnesses and others, as well as the safeguarding of Protected Information as defined in paragraph (d)(5)(i) of this section, in determining the appropriate methods of receiving testimony. The Presiding Officer may hear any presentation by the Prosecution or the Defense, including an ex parte, in camera presentation, regarding the safety of potential witnesses before determining the ways in which witnesses and evidence will be protected. The Presiding Officer may authorize any methods appropriate for the protection of witnesses and evidence. Such methods may include, but are not limited to: testimony by telephone, audiovisual means, or other electronic means; closure of the proceedings; introduction of prepared declassified summaries of evidence; and the use of pseudonyms.

(3) Other evidence. Subject to the requirements of paragraph (d)(1) of this section concerning admissibility, the Commission may consider any other evidence including, but not limited to, testimony from prior trials and proceedings, sworn or unsworn written statements, physical evidence, or scientific or other reports.

(4) Notice. The Commission may, after affording the Prosecution and the Defense an opportunity to be heard, take conclusive notice of facts that are not subject to reasonable dispute either because they are generally known or are capable of determination by resort to sources that cannot reasonably be contested.

(5) Protection of Information—(i) Protective Order. The Presiding Officer may issue protective orders as necessary to carry out the Military Order and this part, including to safeguard "Protected Information," which includes:

(A) Information classified or classifiable pursuant to Executive Order 12958;
(B) Information protected by law or rule from unauthorized disclosure;
(C) Information the disclosure of which may endanger the physical safety of participants in Commission proceedings, including prospective witnesses;
(D) Information concerning intelligence and law enforcement sources, methods, or activities; or
(E) Information concerning other national security interests. As soon as practicable, counsel for either side will notify the Presiding Officer of any intent to offer evidence involving Protected Information.

(ii) Limited disclosure. The Presiding Officer, upon motion of the Prosecution or sua sponte, shall, as necessary to protect the interests of the United States and consistent with §9.9, direct:

(A) The deletion of specified items of Protected Information from documents to be made available to the Accused, Civilian Defense Counsel, or Civilian Defense Counsel;
(B) The substitution of a portion or summary of the information for such Protected Information; or
(C) The substitution of a statement of the relevant facts that the Protected
Information would tend to prove. The Prosecution’s motion and any materials submitted in support thereof or in response thereto shall, upon request of the Prosecution, be considered by the Presiding Officer ex parte, in camera, but no Protected Information shall be admitted into evidence for consideration by the Commission if not presented to Detailed Defense Counsel.

(iii) Closure of proceedings. The Presiding Officer may direct the closure of proceedings in accordance with paragraph (b)(3) of this section.

(iv) Protected information as part of the record of trial. All exhibits admitted as evidence but containing Protected Information shall be sealed and annexed to the record of trial. Additionally, any Protected Information not admitted as evidence but reviewed in camera and subsequently withheld from the Defense over Defense objection shall, with the associated motions and responses and any materials submitted in support thereof, be sealed and annexed to the record of trial as additional exhibits. Such sealed material shall be made available to reviewing authorities in closed proceedings.

(e) Proceedings during trial. The proceedings at each trial will be conducted substantially as follows, unless modified by the Presiding Officer to suit the particular circumstances:

(1) Each charge will be read, or its substance communicated, in the presence of the Accused and the Commission.

(2) The Presiding Officer shall ask each Accused whether the Accused pleads “Guilty” or “Not Guilty.” Should the Accused refuse to enter a plea, the Presiding Officer shall enter a plea of “Not Guilty” on the Accused’s behalf. If the plea to an offense is “Guilty,” the Presiding Officer shall enter a finding of Guilty on that offense after conducting sufficient inquiry to form an opinion that the plea is voluntary and informed. Any plea of Guilty that is not determined to be voluntary and informed shall be changed to a plea of Not Guilty. Plea proceedings shall then continue as to the remaining charges. If a plea of “Guilty” is made on all charges, the Commission shall proceed to sentencing proceedings; if not, the Commission shall proceed to trial as to the charges for which a “Not Guilty” plea has been entered.

(3) The Prosecution shall make its opening statement.

(4) The witnesses and other evidence for the Prosecution shall be heard or received.

(5) The Defense may make an opening statement after the Prosecution’s opening statement or prior to presenting its case.

(6) The witnesses and other evidence for the Defense shall be heard or received.

(7) Thereafter, the Prosecution and the Defense may introduce evidence in rebuttal and any materials its case. The opening statement or prior to presenting a sentence that is appropriate to the offense or offenses for which there was a finding of Guilty, which sentence may include death, imprisonment for life or for any lesser term, payment of a fine or restitution, or such other lawful punishment or condition of punishment as the Commission shall determine to be proper. Only a Commission of seven members may sentence an Accused to death. A Commission may (subject to rights of third parties) order confiscation of any property of a convicted Accused, deprive that Accused of any stolen property, or order the delivery of such property to the United States for disposition.

(h) Post-trial procedures—(1) Record of Trial. Each Commission shall make a verbatim transcript of its proceedings, apart from all Commission deliberations, and preserve all evidence admitted in the trial (including any sentencing proceedings) of each case brought before it, which shall constitute the record of trial. The court reporter shall prepare the official record of trial and submit it to the Presiding Officer for authentication upon completion. The Presiding Officer shall transmit the authenticated record of trial to the Appointing Authority. If the Secretary of Defense is serving as the Appointing Authority, the record shall be transmitted to the Review Panel constituted under paragraph (b)(4) of this section

(2) Finality of findings and sentence. A Commission finding as to a charge and any sentence of a Commission becomes final when the President or, if designated by the President, the Secretary of Defense is serving as the Appointing Authority. If the Secretary of Defense is serving as the Appointing Authority, the Appointing Authority shall promptly perform an administrative review of the record of trial. If satisfied that the proceedings of the Commission were administratively complete, the Appointing Authority shall transmit the record of trial to the Review Panel constituted under paragraph (h)(4) of this section. If not so satisfied, the Appointing Authority shall return the case for any necessary supplementary proceedings.
(4) **Review Panel.** The Secretary of Defense shall designate a Review Panel consisting of three Military Officers, which may include civilians commissioned pursuant to section 603 of title 10, United States Code. At least one member of each Review Panel shall have experience as a judge. The Review Panel shall review the record of trial and, in its discretion, any written submissions from the Prosecution and the Defense and shall deliberate in a closed conference. The Review Panel shall disregard any variance from procedures specified in this part or elsewhere that would not materially have affected the outcome of the trial before the Commission. Within thirty days after receipt of the record of trial, the designated Review Panel shall either:

(i) Forward the case to the Secretary of Defense with a recommendation as to disposition, or

(ii) Return the case to the Appointing Authority for further proceedings, provided that a majority of the Review Panel has formed a definite and firm conviction that a material error of law occurred.

(5) **Review by the Secretary of Defense.** The Secretary of Defense shall review the record of trial and the recommendation of the Review Panel and either return the case for further proceedings or, unless making the final decision pursuant to a Presidential designation under section 4(c)(8) of the President’s Military Order, forward it to the President with a recommendation as to disposition.

(6) **Final decision.** After review by the Secretary of Defense, the record of trial and all recommendations will be forwarded to the President for review and final decision (unless the President has designated the Secretary of Defense to perform this function). If the President has so designated the Secretary of Defense, the Secretary may approve or disapprove findings or change a finding of Guilty to a finding of Guilty to a lesser-included offense, or mitigate, commute, defer, or suspend the sentence imposed or any portion thereof. If the Secretary of Defense is authorized to render the final decision, the review of the Secretary of Defense under paragraph (b)(5) of this section shall constitute the final decision.

§9.7 Regulations.

(a) **Supplementary regulations and instructions.** The Appointing Authority shall, subject to approval of the General Counsel of the Department of Defense if the Appointing Authority is not the Secretary of Defense, publish such further regulations consistent with the President’s Military Order and this part as are necessary or appropriate for the conduct of proceedings by Commissions under the President’s Military Order. The General Counsel shall issue such instructions consistent with the President’s Military Order and this part as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions, including those governing the establishment of Commission-related offices and performance evaluation and reporting relationships.

(b) **Construction.** In the event of any inconsistency between the President’s Military Order and this part, including any supplementary regulations or instructions issued under paragraph (a) of this section, the provisions of the President’s Military Order shall govern. In the event of any inconsistency between this part and any regulations or instructions issued under paragraph (a) of this section, the provisions of this part shall govern.

§9.8 Authority.

Nothing in this part shall be construed to limit in any way the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons. Nothing in this part shall affect the authority to constitute military commissions for a purpose not governed by the President’s Military Order.

§9.9 Protection of State secrets.

Nothing in this part shall be construed to authorize disclosure of state secrets to any person not authorized to receive them.

§9.10 Other.

This part is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person. No provision in this part shall be construed to be a requirement of the United States Constitution. Section and subsection captions in this document are for convenience only and shall not be used in construing the requirements of this part. Failure to meet a time period specified in this part, or supplementary regulations or instructions issued under §9.7(a), shall not create a right to relief for the Accused or any other person. DoD Directive 5025.1 shall not apply to this part or any supplementary regulations or instructions issued under §9.7(a).

§9.11 Amendment.

The Secretary of Defense may amend this part from time to time.

§9.12 Delegation.

The authority of the Secretary of Defense to make requests for assistance under section 5 of the President’s Military Order is delegated to the General Counsel of the Department of Defense. The Executive Secretary of the Department of Defense shall provide such assistance to the General Counsel as the General Counsel determines necessary for this purpose.


Patricia L. Toppings,
Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 03-16377 Filed 6-28-03; 12:40 pm]
BILLING CODE 5001-06-P
Executive Order 12866, "Regulatory Planning and Review"

It has been certified that 32 CFR part 10 pertains to military functions other than procurement and import-export licenses and is exempt from Office of Management and Budget review under section 3, para (d)(2).

Unfunded Mandates Reform Act (Sec. 202, Pub. L. 104-4)

It has been certified that 32 CFR part 10 does not contain a Federal mandate that may result in the expenditure by State, local and tribal governments, in aggregates, or by the private sector, of $100 million or more in any one year.

Public Law 96-354, "Regulatory Flexibility Act" (5 U.S.C. 601)

It has been determined that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities.


It has been certified that 32 CFR part 10 does not impose any reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35).

Federalism (Executive Order 13132)

It has been determined that 32 CFR part 10 does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

1. The States;
2. The relationship between the national government and the States; or
3. The distribution of power and responsibilities among the various levels of government.

List of Subjects in 32 CFR Part 10

Military law.

 Accordingly, 32 CFR part 10 is added to Subtitle A, Chapter I, Subchapter B to read as follows:

PART 10—MILITARY COMMISSION INSTRUCTIONS

Sec.
10.1 Purpose.
10.2 Authority.
10.3 Applicability.
10.4 Policies and procedures.
10.5 Construction.
10.6 Non-creation of right.
10.7 Reservation of authority.
10.8 Amendment.

Authority: 10 U.S.C. 113(d) and 140(b).

§ 10.1 Purpose.


§ 10.2 Authority.

This part is issued pursuant to 32 CFR 9.7(a) and in accordance with 10 U.S.C. 113(d) and 140(b).

§ 10.3 Applicability.

This part, and, unless stated otherwise, all other Military Commission Instructions apply throughout the Department of Defense, including to the Office of the Secretary of Defense, the Military Departments, the Chairman and Vice Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the Department of Defense Field Activities, and all other organizational entities within the Department of Defense, to any special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States to serve as a prosecutor in trials before military commissions pursuant to 32 CFR 9.4(b)(2), to any civilian attorney who seeks qualification as a member of the pool of qualified Civilian Defense Counsel authorized in 32 CFR 9.4(c)(3)(ii), and to any attorney who has been qualified as a member of that pool.

§ 10.4 Policies and procedures.

(a) Promulgation. Military Commission Instructions will be issued by the General Counsel of the Department of Defense (hereinafter General Counsel). Each Instruction will issue over the signature of the General Counsel and, unless otherwise specified therein, shall take effect upon the signature of the General Counsel. Instructions will be numbered in sequence.

(b) Professional responsibility. Compliance with these Instructions shall be deemed a professional responsibility obligation for the practice of law within the Department of Defense.

(c) Compliance breaches. Failure to adhere to these Instructions or any other failure to comply with any rule, regulation, or instruction applicable to trials by military commission convened pursuant to 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," may be subject to appropriate action by the Appointing Authority, the General Counsel of the Department of Defense, or the Presiding Officer of a military commission. Such action may include permanently barring an individual from participating in any military commission proceeding convened pursuant to 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," punitive measures imposed under 10 U.S.C. 898, and any other lawful sanction.

§ 10.5 Construction.

Military Commission Instructions shall be construed in a manner consistent with 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." Nothing in these Military Commission Instructions applies with respect to the trial of crimes by military commissions convened under other authority. In the event of an inconsistency, the provisions of 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," shall govern as provided in Section 7(B) of Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." Pronouns referring to the male gender shall be construed as applying to both male and female.

§ 10.6 Non-creation of right.

Neither this part nor any Military Commission Instruction issued hereafter, is intended to and does not create any right, benefit, privilege, substantive or procedural, enforceable by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person. Alleged noncompliance with an instruction does not, of itself, constitute error, give rise to judicial review, or establish a right to relief for the Accused or any other person.

§ 10.7 Reservation of authority.

Neither this part nor any Military Commission Instruction issued hereafter shall be construed to limit, impair, or otherwise affect any authority granted by the Constitution or laws of the United States or Department of Defense regulation or directive.
§10.6 Amendment.

The General Counsel may issue, supplement, amend, or revoke any Military Commission Instruction at any time.

Patricia L. Toppings,
Alternate OSD Federal Register Liaison Officer, Department of Defense.
[FR Doc. 03–16374 Filed 6–26–03; 12:40 pm]
BILLING CODE 5061–08–P

DEPARTMENT OF DEFENSE
Office of the Secretary

32 CFR Part 11
Crimes and Elements of Trials by Military Commission

AGENCY: Department of Defense.

ACTION: Final rule.

SUMMARY: This rule provides guidance with respect to crimes that may be tried by military commissions established pursuant to regulations on, Procedures for Trials by Military Commission of Certain Non-United States Citizens in the War Against Terrorism, and Military Order of November 13, 2001, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” and enumerates the elements of those crimes.


FOR FURTHER INFORMATION CONTACT: Office of Military Commission Spokesperson, 703–693–1115.

SUPPLEMENTARY INFORMATION: Although exempt from administrative procedures for rulemaking, publication of the final rule in the Federal Register is deemed appropriate under 5 U.S.C. 552(a)(1)(C). Certifications follow:

Administrative Procedures Act (Sec. 1, Pub. L. 89–544)

It has been certified that 32 CFR part 11 is as a military function of the United States and exempt from administrative procedures for rule making.

Executive Order 12866, “Regulatory Planning and Review”

It has been certified that 32 CFR part 11 pertains to military functions other than procurement and import-export licenses and is exempt from Office of Management and Budget review under section 3, para (d)(2).

Unfunded Mandates Reform Act (Sec. 202, Pub. L. 104–4)

It has been certified that 32 CFR part 11 does not contain a Federal Mandate that may result in the expenditure by State, local and tribal governments, in aggregate, or by the private sector, of $100 million or more in any one year.


It has been determined that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities.

Public Law 96–511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)

It has been certified that 32 CFR part 11 does not impose any reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 34).

Federalism (Executive Order 13132)

It has been certified that 32 CFR part 11 does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

(1) The States;
(2) The relationship between the national government and the States; or
(3) The distribution of power and responsibilities among the various levels of government.

List of Subjects in 32 CFR Part 11
Military law.

Accordingly, 32 CFR part 11 is added to subtitle A, chapter I, subchapter B to read as follows:

PART 11—CRIMES AND ELEMENTS FOR TRIALS BY MILITARY COMMISSION

Sec.
11.1 Purpose.
11.2 Authority.
11.3 General.
11.4 Applicable principles of law.
11.5 Definitions.
11.6 Crimes and elements.

Authority: 10 U.S.C. 821.

§11.1 Purpose.

This part provides guidance with respect to crimes that may be tried by military commissions established pursuant to 32 CFR part 9, and Military Order of November 13, 2001, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” (3 CFR, 2001 comp., p. 918, 66 FR 57833) and enumerates the elements of those crimes.

§11.2 Authority.

This part is issued pursuant to 32 CFR 9.7(a) and in accordance with Military Order of November 13, 2001, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” (66 FR 57833) and 10 U.S.C. 113(d), 140(b), and 821. The provisions of 32 CFR part 10 are applicable to this part.

§11.3 General.

(a) Background. The following crimes and elements thereof are intended for use by military commissions established pursuant to 32 CFR part 9, and Military Order of November 13, 2001, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” the jurisdiction of which extends to offenses or offenders that by statute or the law of armed conflict may be tried by military commission as limited by Military Order of November 13, 2001, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.” No offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question. These crimes and elements derive from the law of armed conflict, a body of law that is sometimes referred to as the law of war. They constitute violations of the law of armed conflict or offenses that, consistent with that body of law, are triable by military commission. Because this document is declarative of existing law, it does not preclude trial for crimes that occurred prior to its effective date.

(b) Effect of other laws. No conclusion regarding the applicability or persuasive authority of other bodies of law should be drawn solely from the presence, absence, or similarity of particular language in this part as compared to other articulations of law.

(c) Non-exclusivity. This part does not contain a comprehensive list of crimes triable by military commission. It is intended to be illustrative of applicable principles of the common law of war but not to provide an exclusive enumeration of the punishable acts recognized as such by that law. The absence of a particular offense from the corpus of those enumerated herein does not preclude trial for that offense.

§11.4. Applicable principles of law.

(a) General intent. All actions taken by the Accused that are necessary for completion of a crime must be performed with general intent. This intent is not listed as a separate element. When the mens rea required for culpability attaches involves an intent that a particular consequence occur, or some other specific intent, an intent element is included. The necessary relationship between such intent element and the conduct constituting the actus reus is not articulated for each
§11.5. Definitions.

(a) Combatant immunity. Under the law of armed conflict, only a lawful combatant enjoys “combatant immunity” or “belligerent privilege” for the lawful conduct of hostilities during armed conflict.

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

(c) In the context of and was associated with armed conflict. Elements containing this language require a nexus between the conduct and armed conflict. This nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus (e.g., murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if temporally and geographically associated with armed conflict, is not “in the context of” the armed conflict).

(d) The accused knew or should have known. The focus of this element is not the nature or characterization of the conflict, but the nexus to it. This element does not require a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an “armed attack” or an “act of war,” or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

(e) Object of the attack. “Object of the attack” refers to the person, place, or thing intentionally targeted. In this regard, the term includes either collateral damage or incidental injury or death.

(f) Protected property. “Protected property” refers to property specifically protected by the law of armed conflict such as buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals, or places where the sick and wounded are collected, provided they are not being used for military purposes or are not otherwise military objectives. Such property would include objects properly identified by one of the distinctive emblems of the Geneva Conventions but does not include all civilian property.

§11.6. Crimes and elements.

(a) Substantive offenses—war crimes. The following enumerated offenses, if applicable, should be charged in separate counts. Elements are drafted to reflect conduct of the perpetrator. Each element need not be specifically charged.

(i) Wilful killing of protected persons—Elements. (A) The accused killed one or more persons;

(B) The accused intended to kill such person or persons;

(C) Such person or persons were protected under the law of war;

(D) The accused knew or should have known of the factual circumstances that established that protected status; and

(E) The killing took place in the context of and was associated with armed conflict.

(ii) Comments. The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

(ii) Attacking civilians.—Elements. (A) The accused engaged in an attack;

(B) The object of the attack was a civilian population as such or
individual civilians not taking direct or active part in hostilities;

(C) The accused intended the civilian population as such or individual civilians not taking direct or active part in hostilities to be an object of the attack; and

(D) The attack took place in the context of and was associated with armed conflict.

(ii) Comments. The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

(3) Attacking civilian objects—(i) Elements. (A) The accused engaged in an attack;

(B) The object of the attack was civilian property, that is, property that was not a military objective;

(C) The accused intended such property to be an object of the attack;

(D) The accused knew or should have known that such property was not a military objective; and

(E) The attack took place in the context of and was associated with armed conflict.

(iii) Comments. The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

(4) Attacking Protected Property—(i) Elements. (A) The accused engaged in an attack;

(B) The object of the attack was protected property;

(C) The accused intended such property to be an object of the attack;

(D) The accused knew or should have known of the factual circumstances that established that protected status; and

(E) The attack took place in the context of and was associated with armed conflict.

(ii) Comments. The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

(5) Pillaging—(i) Elements. (A) The accused appropriated or seized certain property;

(B) The accused intended to appropriate or seize such property for private or personal use;

(C) The appropriation or seizure was without the consent of the owner of the property or other person with authority to permit such appropriation or seizure; and

(D) The appropriation or seizure took place in the context of and was associated with armed conflict.

(ii) Comments. As indicated by the use of the term "private or personal use," legitimate captures or appropriations, or seizures justified by military necessity, cannot constitute the crime of pillaging.

(6) Denying quarter—(i) Elements. (A) The accused declared, ordered, or otherwise indicated that there shall be no survivors or surrender accepted;

(B) The accused thereby intended to threaten an adversary or to conduct hostilities such that there would be no survivors or surrender accepted;

(C) It was foreseeable that circumstances would be such that a practicable and reasonable ability to accept surrender would exist;

(D) The accused was in a position of effective command or control over the subordinate forces to which the declaration or order was directed; and

(E) The conduct took place in the context of and was associated with armed conflict.

(ii) Comments. (A) The "death or serious damage to health" required by paragraph (a)(6)(I)(B) of this section must be a direct result of the substance's effect or effects on the human body (e.g., asphyxiation caused by the depletion of atmospheric oxygen secondary to a chemical or other reaction would not give rise to this offense).

(B) The clause "serious damage to health" does not include temporary incapacitation or sensory irritation.

(C) The use of the "substance or weapon" at issue must be proscribed under the law of armed conflict. It may include chemical or biological agents.

(D) The specific intent element for this offense precludes liability for mere knowledge of potential collateral consequences (e.g., mere knowledge of a secondary asphyxiating or toxic effect would be insufficient to complete the offense).

(9) Using protected persons as shields—(i) Elements. (A) The accused positioned, or took advantage of the location of, one or more civilians or persons protected under the law of war;

(B) The accused intended to use the civilian or protected nature of the person or persons to shield a military objective from attack or to shield, favor, or impede military operations; and

(C) The conduct took place in the context of and was associated with armed conflict.

(ii) (Reserved)

(10) Using protected property as shields—(i) Elements. (A) The accused positioned, or took advantage of the location of, civilian property or property protected under the law of war;

(B) The accused intended to shield a military objective from attack or to shield, favor, or impede military operations; and

(C) The conduct took place in the context of and was associated with armed conflict.

(ii) (Reserved)

(11) Torture—(i) Elements. (A) The accused inflicted severe physical or mental pain or suffering upon one or more persons;

(B) The accused intended to inflict such severe physical or mental pain or suffering;

(C) Such person or persons were in the custody or under the control of the accused; and

(D) The conduct took place in the context of and was associated with armed conflict.

(ii) Comments. (A) Consistent with § 11.4(b), this offense does not include pain or suffering arising only from, inherent in, or incidental to, lawfully imposed punishments. This offense does not include the incidental
infliction of pain or suffering associated with the legitimate conduct of hostilities.

(ii) Comments. Paragraph (a)(1)(ii) of this section precludes prosecution for actions justified by military necessity.

(16) Rape—(i) Elements. (A) The accused invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the accused with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;

(ii) Comments. Paragraph (a)(17)(i)(B) of this section recognizes that consensual conduct does not give rise to this offense.

(B) The accused intended to commit the offense and was associated with armed conflict.

(iii) Comments. The concept of “invasion” is gender neutral.

(b) Substantive offenses—other offenses triable by military commission. The following enumerated offenses, if applicable, should be charged in separate counts. Elements are drafted to reflect conduct of the perpetrator. Each element need not be specifically charged.

(1) Hijacking or hazarding a vessel or aircraft—(i) Elements. (A) The accused seized, exercised control over, or endangered the safe navigation of a vessel or aircraft;

(B) The accused intended to seize, exercise control over, or endanger such vessel or aircraft;

(C) The conduct took place in the context of and was associated with armed conflict.

(ii) Comments. A seizure, exercise of control, or endangerment required by military necessity, or against a lawful military objective undertaken by military forces of a State in the exercise of their official duties, would not satisfy the wrongfulness requirement for this crime.

(2) Terrorism—(i) Elements. (A) The accused killed or inflicted bodily harm on one or more persons or property;

(B) The accused:

(1) Intended to kill or inflict bodily harm on one or more persons; or

(2) Intentionally engaged in an act that is inherently dangerous to another
and evinces a wanton disregard of human life;

(C) The killing, harm or destruction was intended to intimidate or coerce a civilian population, or to influence the policy of a government by intimidation or coercion; and

(D) The killing, harm or destruction took place in the context of and was associated with armed conflict.

(ii) Comments. (A) Paragraph (b)(2)(i)(A) of this section includes the concept of causing death or bodily harm, even if indirectly.

(B) The requirement that the conduct be wrongful for this crime necessitates that the accused act without proper authority. For example, furnishing enemy combatants detained during hostilities with subsistence or quarters in accordance with applicable orders or policy is not aiding the enemy.

(C) The requirement that the conduct be wrongful for this crime may necessitate that, in the case of a lawful belligerent, the accused owe allegiance or some duty to the United States of America or to an ally or coalition partner. For example, citizenship, resident alien status, or a contractual relationship in or with the United States or an ally or coalition partner is sufficient to satisfy this requirement so long as the relationship existed at a time relevant to the offense alleged.

(D) The accused took place in the context of and was associated with armed conflict.

(ii) Comments. (A) The term “kill” includes intentionally causing death, whether directly or indirectly.

(B) Unlike the crimes of willful killing committed by a lawful belligerent, the accused owe allegiance or some duty to the United States of America or to an ally or coalition partner. For example, citizenship, resident alien status, or a contractual relationship in or with the United States or an ally or coalition partner is sufficient to satisfy this requirement so long as the relationship existed at a time relevant to the offense alleged.

(C) The accused intended to or knew that, in the case of a lawful belligerent, the accused owe allegiance or some duty to the United States of America or to an ally or coalition partner. For example, citizenship, resident alien status, or a contractual relationship in or with the United States or an ally or coalition partner is sufficient to satisfy this requirement so long as the relationship existed at a time relevant to the offense alleged.

(D) The conduct took place in the context of and was associated with armed conflict.

(ii) Comments. (A) Means of accomplishing paragraph (b)(5)(i)(A) of this section include, but are not limited to: providing arms, ammunition, supplies, money, other items or services to the enemy; harboring or protecting the enemy; or giving intelligence or other information to the enemy.

(B) The requirement that conduct be wrongful for this crime necessitates that the accused act without proper authority. For example, furnishing enemy combatants detained during hostilities with subsistence or quarters in accordance with applicable orders or policy is not aiding the enemy.

(C) The requirement that conduct be wrongful for this crime necessitates that, in the case of a lawful belligerent, the accused owe allegiance or some duty to the United States of America or to an ally or coalition partner. For example, citizenship, resident alien status, or a contractual relationship in or with the United States or an ally or coalition partner is sufficient to satisfy this requirement so long as the relationship existed at a time relevant to the offense alleged.

(D) The conduct took place in the context of and was associated with armed conflict.

(ii) Comments. (A) The term “aided or abetted” in paragraph (c)(1)(i)(A) of this section includes: assisting, encouraging, advising, instigating, counseling,
ordering, or procuring another to commit a substantive offense; assisting, encouraging, advising, counseling, or ordering another in the commission of a substantive offense; and in any other way facilitating the commission of a substantive offense.

(B) In some circumstances, inaction may render one liable as an aider or abettor. If a person has a legal duty to prevent or thwart the commission of a substantive offense, but does not do so, that person may be considered to have aided or abetted the commission of the offense if such noninterference is intended to and does operate as an aid or encouragement to the actual perpetrator.

(C) An accused charged with aiding or abetting should be charged with the related substantive offense as a principal.

(2) Solicitation—(i) Elements. (A) The accused solicited, ordered, induced, or advised a certain person or persons to commit one or more substantive offenses triable by military commission; and

(B) The accused intended that the offense actually be committed.

(ii) Comments. (A) The offense is complete when a solicitation is made or advice is given with the specific wrongful intent to induce a person or persons to commit any offense triable by military commission. It is not necessary that the person or persons solicited, ordered, induced, advised, or assisted agree to or act upon the solicitation or advice. If the offense solicited is actually committed, however, the accused is liable under the law of armed conflict for the substantive offense. An accused should not be convicted of both solicitation and the substantive offense solicited if criminal liability for the substantive offense is based upon the solicitation.

(B) Solicitation may be by means other than speech or writing. Any act or conduct that reasonably may be construed as a serious request, order, inducement, advice, or offer of assistance to commit any offense triable by military commission may constitute solicitation. It is not necessary that the accused act alone in the solicitation, order, inducement, advising, or assistance. The accused may act through other persons in committing this offense.

(C) An accused charged with solicitation of a completed substantive offense should be charged for the substantive offense as a principal. An accused charged with solicitation of an uncompleted offense should be charged for the separate offense of solicitation. Solicitation is not a lesser-included offense of the related substantive offense.

(3) Command/superior responsibility—perpetrating—(i) Elements. (A) The accused had command and control, or effective authority and control, over one or more subordinates;

(B) One or more of the accused's subordinates committed, attempted to commit, conspired to commit, solicited to commit, or aided or abetted the commission of one or more substantive offenses triable by military commission;

(C) The accused either knew or should have known that subordinate or subordinates were committing, attempting to commit, conspiring to commit, soliciting, or aiding or abetting such offense or offenses; and

(D) The accused failed to take all necessary and reasonable measures within his power to prevent or repress the commission of the offense or offenses.

(ii) Comments. (A) The phrase "effective authority and control" in paragraph (c)(4)(ii)(A) of this section includes the concept of relative authority over the subject matter or activities associated with the perpetrator's conduct. This may be relevant to a civilian superior who cannot be held responsible under this offense for the behavior of subordinates involved in activities that have nothing to do with such superior's sphere of authority.

(B) A commander or superior charged with failing to take appropriate punitive or investigatory action subsequent to the perpetration of a substantive offense triable by military commission should not be charged for the substantive offense as a principal. Such commander or superior should be charged for the separate offense of failing to submit the matter for investigation and/or prosecution as detailed in these elements. This offense is not a lesser-included offense of the related substantive offense.

(4) Accessory after the fact—(i) Elements. (A) The accused received, comforted, or assisted a certain person;

(B) Such person had committed an offense triable by military commission;

(C) The accused knew that such person had committed such offense or behavior such person assisted a similar or closely related offense; and

(D) The accused intended to hinder or prevent the apprehension, trial, or punishment of such person.

(ii) Comments. Accessory after the fact should be charged separately from the related substantive offense. It is not a lesser-included offense of the related substantive offense.

(5) Conspiracy—(i) Elements. (A) The accused entered into an agreement with one or more persons to commit one or more substantive offenses triable by military commission or otherwise joined an enterprise of persons who shared a common criminal purpose that involved, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission;

(B) The accused knew the unlawful purpose of the agreement or the common criminal purpose of the enterprise and joined in it willfully, that is, with the intent to further the unlawful purpose; and

(C) One of the conspirators or enterprise members, during the existence of the agreement or enterprise, knowingly committed an overt act in order to accomplish some objective or purpose of the agreement or enterprise.
(ii) Comments. (A) Two or more persons are required in order to have a conspiracy. Knowledge of the identity of co-conspirators and their particular connection with the agreement or enterprise need not be established. A person may be guilty of conspiracy although incapable of committing the intended offense. The joining of another conspirator after the conspiracy has been established does not create a new conspiracy or affect the status of the other conspirators. The agreement or common criminal purpose in a conspiracy need not be in any particular form or manifested in any formal words.

(B) The agreement or enterprise must, at least in part, involve the commission or intended commission of one or more substantive offenses triable by military commission. A single conspiracy may embrace multiple criminal objectives. The agreement need not include knowledge that any relevant offense is in fact "triable by military commission."

(C) The overt act must be done by one or more of the conspirators, but not necessarily the accused, and it must be done to effectuate the object of the conspiracy or in furtherance of the common criminal purpose. The accused need not have entered the agreement or criminal enterprise at the time of the overt act.

(D) The overt act need not be in itself criminal, but it must advance the purpose of the conspiracy. It is not essential that any substantive offense be committed.

(E) Each conspirator is liable for all offenses committed pursuant to or in furtherance of the conspiracy by any of the co-conspirators, after such conspirator has joined the conspiracy and while the conspiracy continues and such conspirator remains a party to it.

(F) A party to the conspiracy who withdraws from or abandons the agreement or enterprise before the commission of an overt act by any conspirator is not guilty of conspiracy. An effective withdrawal or abandonment must consist of affirmative conduct that is wholly inconsistent with adherence to the unlawful agreement or common criminal purpose and that shows that the party has severed all connection with the conspiracy. A conspirator who effectively withdraws from or abandons the conspiracy after the performance of an overt act by one of the conspirators remains guilty of conspiracy and of any offenses committed pursuant to the conspiracy up to the time of the withdrawal or abandonment. The withdrawal of a conspirator from the conspiracy does not affect the status of the remaining members.

(G) That the object of the conspiracy was impossible to effect is not a defense to this offense.

(H) Conspiracy to commit an offense is a separate and distinct offense from any offense committed pursuant to or in furtherance of the conspiracy, and both the conspiracy and any related offense may be charged, tried, and punished separately. Conspiracy should be charged separately from the related substantive offense. It is not a lesser-included offense of the substantive offense.

(7) Attempt—(i) Elements. (A) The accused committed an act;

(B) The accused intended to commit one or more substantive offenses triable by military commission;

(C) The act amounted to more than mere preparation; and

(D) The act apparently tended to effect the commission of the intended offense.

(ii) Comments. (A) To constitute an attempt there must be a specific intent to commit the offense accompanied by an act that tends to accomplish the unlawful purpose. This intent need not involve knowledge that the offense is in fact "triable by military commission."

(B) Preparation consists of devising or arranging means or measures apparently necessary for the commission of the offense. The act need not be the last act essential to the consummation of the offense. The combination of specific intent to commit an offense, plus the commission of an act apparently tending to further its accomplishment, constitutes the offense of attempt. Failure to complete the offense, whatever the cause, is not a defense.

(C) A person who purposely engages in conduct that would constitute the offense if the attendant circumstances were as that person believed them to be is guilty of an attempt.

(D) It is a defense to an attempt offense that the person voluntarily and completely abandoned the intended offense, solely because of the person's own sense that it was wrong, prior to the completion of the substantive offense. The voluntary abandonment defense is not allowed if the abandonment results, in whole or in part, from other reasons, for example, the person feared detection or apprehension, decided to await a better opportunity for success, was unable to complete the crime, or encountered unanticipated difficulties or unexpected resistance.

(E) Attempt is a lesser-included offense of any substantive offense triable by military commission and need not be charged separately. An accused may be charged with attempt without being charged with the substantive offense.
PART 12—RESPONSIBILITIES OF THE
CHIEF PROSECUTOR, PROSECUTORS, AND ASSISTANT
PROSECUTORS

Sec. 12.1 Purpose.
12.2 Authority.
12.3 Office of the Chief Prosecutor.
12.4 Duties and responsibilities of the prosecution.
12.5 Policies.

Authority: 10 U.S.C. 113(d) and 140(b).

§ 12.1 Purpose.

This part establishes the responsibilities of the Office of the Chief Prosecutor and components thereof.

§ 12.2 Authority.

This part is issued pursuant to 32 CFR 9.7(a) and in accordance with Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," (3 CFR 2001 comp., p. 918, 66 FR 57833) and 10 U.S.C. 113(d) and 140(b). The provisions of 32 CFR part 10 are applicable to this part.

§ 12.3 Office of the Chief Prosecutor.

(a) General. The Office of the Chief Prosecutor shall be a component of the Office of Military Commissions and shall be comprised of the Chief Prosecutor, Prosecutors, and other persons properly under the supervision of the Chief Prosecutor.

(b) Chief Prosecutor. (1) The Chief Prosecutor shall be a judge advocate of any United States armed force and shall be designated by the General Counsel of the Department of Defense.

(2) The Chief Prosecutor shall report directly to the Deputy General Counsel (Legal Counsel) of the Department of Defense.

(3) The Chief Prosecutor shall have authority to subpoena any individual to appear as a witness to testify, or to produce any evidence in a case referred to military commissions or in a criminal investigation associated with a case that may be referred to a military commission.

(4) The Chief Prosecutor shall direct the overall prosecution effort pursuant to 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," ensuring proper supervision and management of all personnel and resources assigned to the Office of the Chief Prosecutor.

(5) The Chief Prosecutor shall ensure that all personnel assigned to the Office of the Chief Prosecutor review, and attest that they understand and will comply with, 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," and all Supplementary Regulations and Instructions issued in accordance therewith.

(6) The Chief Prosecutor shall inform the Deputy General Counsel (Legal Counsel) of all requirements for personnel, office space, equipment, and supplies to ensure the successful functioning and mission accomplishment of the Office of the Chief Prosecutor.

(7) The Chief Prosecutor shall supervise all Prosecutors and other personnel assigned to the Office of the Chief Prosecutor including any special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States.

(8) The Chief Prosecutor, or his designee, shall fulfill applicable performance evaluation requirements associated with Prosecutors and other personnel properly under the supervision of the Office of the Chief Prosecutor.

(9) The Chief Prosecutor shall detail a Prosecutor and, as appropriate, one or more Assistant Prosecutors to perform the duties of the prosecution as set forth in 32 CFR 9.4(b)(2). The Chief Prosecutor may detail himself to perform such duties.

(10) The Chief Prosecutor shall ensure that all Assistant Prosecutors faithfully represent the United States in discharging their prosecutorial duties before military commissions conducted pursuant to 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."

(11) The Chief Prosecutor shall ensure that all Prosecutors and Assistant Prosecutors have taken an oath to perform their duties faithfully.

(12) The Chief Prosecutor shall ensure that all personnel properly under the supervision of the Office of the Chief Prosecutor possess the appropriate security clearances.

(c) Prosecutors. (1) Prosecutors shall be detailed by the Chief Prosecutor and may be either judge advocates of any United States armed force or special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States.

(2) Prosecutors shall represent the United States as Prosecutors or Assistant Prosecutors as directed by the Chief Prosecutor and in accordance with 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."

(3) Prosecutors shall fulfill all responsibilities detailed in 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," those set forth in this part, and those assigned by the Chief Prosecutor.

(4) Prosecutors shall ensure that all court reporters, security personnel, and interpreters who are to perform duties in relation to a military commission proceeding have taken an oath to perform their duties faithfully. As directed by the Presiding Officer, Prosecutors also shall administer appropriate oaths to witnesses during military commission proceedings.

§ 12.4 Duties and responsibilities of the prosecution.

(a) Regular duties. The Prosecution shall perform all duties specified or implied in 32 CFR part 9 as responsibilities of the Prosecution.

(b) Administrative duties. The Prosecution shall, as directed by the Presiding Officer or the Appointing Authority, prepare any documentation necessary to facilitate the conduct of military commissions proceedings. The Prosecution shall, as directed by the Deputy General Counsel (Legal Counsel), prepare a trial guide to provide a standardized administrative plan for the conduct of military commission proceedings. Unless directed otherwise by the Appointing Authority, the Presiding Officer may, in
his discretion, depart from this guide as appropriate.

(c) Special duties. The Prosecution shall perform all other functions, consistent with 32 CFR part 9, and Military Order of November 13, 2001, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” as may be directed by the Appointing Authority or the General Counsel of the Department of Defense.

§ 12.5 Policies.


(b) Prohibition on certain disclosures. All Prosecutors must strictly comply with 32 CFR 9.6(d)(3) and 9.9 to ensure they do not improperly disclose classified information, national security information, or state secrets to any person not specifically authorized to receive such information.

(c) Statements to the media. Consistent with DoD Directive 5122.5, the Assistant Secretary of Defense for Public Affairs shall serve as the sole release authority for DoD information and audiovisual materials regarding military commissions. Personnel assigned to the Office of the Chief Prosecutor may communicate with news media representatives regarding cases and other matters related to military commissions only when approved by the Appointing Authority or the General Counsel of the Department of Defense.


Patricia L. Toppings,
Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 03–16380 Filed 6–26–03; 12:40 pm]

BILLING CODE 6001–08–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 13

Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel

AGENCY: Department of Defense.

ACTION: Final rule.

SUMMARY: This rule establishes the responsibilities of the Office of the Chief Defense Counsel and components thereof.


FOR FURTHER INFORMATION CONTACT: Office of Military Commission Spokesperson, (703) 693–1115.

SUPPLEMENTARY INFORMATION: Although exempt from administrative procedures for rule making, publication of the final rule in the Federal Register is deemed appropriate under 5 U.S.C. 552(a)(1)(C). Certifications follow:

Administrative Procedures Act (Sec. 1, Pub. L. 89–546)

It has been certified that 32 CFR part 13 is as a military function of the United States and exempt from administrative procedures for rule making.

Executive Order 12866, “Regulatory Planning and Review”

It has been certified that 32 CFR part 13 pertains to military functions other than procurement and import-export licenses and is exempt from Office of Management and Budget review under Section 3, Para (d)(2).

Unfunded Mandates Reform Act (Sec. 202, Pub. L. 104–4)

It has been certified that 32 CFR part 13 does not contain a Federal Mandate that may result in the expenditure by State, local and tribal governments, in aggregate, or by the private sector, of $100 million or more in any one year.


It has been determined that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities.

Public Law 96–511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)

It has been certified that 32 CFR part 13 does not impose any reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 44).

Federalism (Executive Order 13132)

It has been certified that 32 CFR part 13 does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

(1) The States;

(2) The relationship between the National Government and the States; or

(3) The distribution of power and responsibilities among the various levels of government.

List of Subjects in 32 CFR Part 13

Military law.

Accordingly, 32 CFR part 13 is added to Subtitle A, Chapter I, Subchapter B to read as follows:

PART 13—RESPONSIBILITIES OF THE CHIEF DEFENSE COUNSEL, DETAILED DEFENSE COUNSEL, AND CIVILIAN DEFENSE COUNSEL

Sec.

13.1 Purpose.

13.2 Authority.


13.4 Duties and responsibilities of the defense.

13.5 Policies.

Authority: 10 U.S.C. 113(d) and 140(b).

§ 13.1 Purpose.

This part establishes the responsibilities of the Office of Chief Defense Counsel and components thereof.

§ 13.2 Authority.

This part is issued pursuant to 32 CFR 9.7(a) and in accordance with Military Order of November 13, 2001, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” (3 CFR, 2001 comp. p. 918, 66 FR 57633) and 10 U.S.C. 113(d) and 140(b). The provisions of 32 CFR part 10 are applicable to this part.


(a) General. The Office of the Chief Defense Counsel shall be a component of the Office of Military Commissions and shall be comprised of the Chief Defense Counsel, Defense Counsel, and other such persons properly under the supervision of the Chief Defense Counsel.

(b) Chief Defense Counsel. (1) The Chief Defense Counsel shall be a judge advocate of any United States armed force and shall be designated by the General Counsel of the Department of Defense.

(2) The Chief Defense Counsel shall report directly to the Deputy General Counsel (Personnel and Health Policy) of the Department of Defense.

(3) The Chief Defense Counsel shall supervise all defense activities and the efforts of Detailed Defense Counsel and other office personnel and resources pursuant to 32 CFR part 9, and Military Order of November 13, 2001, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” ensuring proper supervision and management of all personnel and resources assigned to the Office of the Chief Defense Counsel and facilitating the proper representation of all Accused referred to trial before a military commission appointed pursuant to 32 CFR part 9, and Military Order of
Defense Counsel shall assist in performing the duties of the Detailed Defense Counsel.

(ii) The Chief Defense Counsel may structure the Office of the Chief Defense Counsel so as to include subordinate supervising attorneys who may incur confidentiality obligations in the context of fulfilling their supervisory responsibilities with regard to Detailed Defense Counsel.

(iii) The Chief Defense Counsel shall take appropriate measures to preclude Defense Counsel conflicts of interest arising from the representation of Accused before military commissions. The Chief Defense Counsel shall be provided sufficient information (potentially including protected information) to fulfill this responsibility.

(iv) The Chief Defense Counsel shall take appropriate measures to ensure that each Detailed Defense Counsel is capable of zealous representation, unencumbered by any conflict of interest. In this regard, the Chief Defense Counsel shall monitor the activities of all Defense Counsel (Detailed and Civilian) and take appropriate measures to ensure that Defense Counsel do not enter into agreements with other Accused or Defense Counsel that might cause them or the Accused they represent to incur an obligation of confidentiality with such other Accused or Defense Counsel or to effect some other impediment to representation.

(v) The Chief Defense Counsel shall ensure that an Accused tried before a military commission pursuant to 32 CFR part 9, and Military Order of November 13, 2001, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” is represented at all relevant times by Detailed Defense Counsel.

(vi) The Chief Defense Counsel shall administer all requests for replacement Detailed Defense Counsel requested in accordance with 32 CFR 9.4(c)(3). He shall determine the availability of such counsel in accordance with this part.

(vii) The Chief Defense Counsel shall administer the civilian Defense Counsel pool, screening all requests for pre-qualification and ad hoc qualification, making qualification determinations and recommendations in accordance with 32 CFR part 9, this part, and 32 CFR part 14, and ensuring appropriate notification to an Accused of civilian attorneys available to represent Accused before a military commission.

(viii) The Chief Defense Counsel shall ensure that all Detailed Defense Counsel and Civilian Defense Counsel who are to perform duties in relation to a military commission have taken an oath to perform their duties faithfully.

(ix) The Chief Defense Counsel shall ensure that all personnel properly under the supervision of the Office of the Chief Defense Counsel possess the appropriate security clearances.

(c) Detailed Defense Counsel. (1) Detailed Defense Counsel shall be judge advocates of any United States armed force.

(2) Detailed Defense Counsel shall represent the Accused before military commissions when detailed in accordance with 32 CFR part 9, and Military Order of November 13, 2001, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.” In this regard, Detailed Defense Counsel shall: defend the Accused to whom detailed zealously within the bounds of the law and without regard to personal opinion as to guilt; represent the interests of the Accused in any review process as provided by 32 CFR part 9; and comply with the procedures accorded the Accused pursuant to 32 CFR 9.5 and 9.6. Detailed Defense Counsel shall serve notwithstanding any intention expressed by the Accused to represent himself.

(3) Detailed Defense Counsel shall have primary responsibility to prevent conflicts of interest related to the handling of the cases to which detailed.


(d) Selected Detailed Defense Counsel. (1) The Accused may select a judge advocate of any United States armed force to replace the Accused’s Detailed Defense Counsel, provided that judge advocate has been determined to be available by the Chief Defense Counsel in consultation with the Judge Advocate General of that judge advocate’s military department.

(2) A person determined not to be available if assigned duties: as a general or flag officer; as a military judge; as a prosecutor in the Office of Military Commissions; as a judge advocate assigned to the Department of Defense Criminal Investigation Task Force or Joint Task Force Guantanamo; as a principal legal advisor to a command, organization, or agency; as an instructor or student at a service school, academy, college or university; or in any other capacity that the Judge Advocate General of the Military Department
Defense Counsel of the duties specified in 32 CFR part 9, and Military Order of November 13, 2001, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” and the mission of the Office of the Chief Defense Counsel, as may be directed by the Appointing Authority or the General Counsel of the Department of Defense.

§ 13.5 Policies.
(a) Prohibition on certain agreements. No Defense Counsel may enter into agreements with any detainees other than his client, or such detainee’s Defense Counsel, that might cause him or the client he represents to incur an obligation of confidentiality with such other detainee or Defense Counsel or to effect some other impediment to representation.
(b) Prohibition on certain disclosures. All Defense Counsel must strictly comply with 32 CFR 9.6(d)(5) and 9.9 to ensure they do not improperly disclose classified information, national security information, or state secrets to an Accused or potential Accused or to any other person not specifically authorized to receive such information.
(c) Statements to the media. Consistent with DoD Directive 5122.51, the Assistant Secretary of Defense for Public Affairs shall serve as the sole release authority for DoD information and audiovisual materials regarding military commissions. Personnel assigned to the Office of the Chief Defense Counsel, as well as all members of the Civilian Defense Counsel pool and associated personnel, may communicate with news media representatives regarding cases and other matters related to military commissions only when approved by the Appointing Authority or the General Counsel of the Department of Defense.

Patricia L. Toppins,
Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 03-16381 Filed 6-26-03; 12:40 pm]
BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE
Office of the Secretary
32 CFR Part 14
Qualification of Civilian Defense Counsel

AGENCY: Department of Defense.

ACTION: Final rule.

SUMMARY: This rule establishes policies and procedures for the creation and management of the pool of qualified Civilian Defense Counsel authorized in regulations on Procedures for Trials by Military Commission of Certain Non-United States Citizens in the War Against Terrorism in accordance with Military Order of November 13, 2001, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.”


FOR FURTHER INFORMATION CONTACT: Office of Military Commission Spokesperson, (703) 693-1115.

SUPPLEMENTARY INFORMATION: Although exempt from administrative procedures for rule making, publication of the final rule in the Federal Register is deemed appropriate under 5 U.S.C. 552(a)(1)(C). Certifications follow:

Administrative Procedures Act (Sec. 1, Pub. L. 89-544)

It has been certified that 32 CFR part 14 is as a military function of the United States and exempt from administrative procedures for rule making.

Executive Order 12866, “Regulatory Planning and Review”

It has been certified that 32 CFR part 14 pertains to military functions other than procurement and import-export licenses and is exempt from Office of Management and Budget review under Section 3, Para (d)(2).

Unfunded Mandates Reform Act (Sec. 202, Pub. L. 104-4)

It has been certified that 32 CFR part 14 does not contain a Federal Mandate that may result in the expenditure by State, local and tribal governments, in aggregate, or by the private sector, of $100 million or more in any one year.

Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. 601)

It has been determined that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities.

Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)

It has been certified that 32 CFR part 14 does not impose any reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 44).

Federalism (Executive Order 13132)

It has been certified that 32 CFR part 14 does not have federalism implications, as set forth in Executive
Appendix A to Part 14—United States of America Authorization for Release of Information

14.1 Purpose.


14.2 Authority.

This part is issued pursuant to 32 CFR 9.7(a) and in accordance with Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," and 10 U.S.C. 113(d) and 140(b). The provisions of 32 CFR part 10 are applicable to this part.

14.3 Policies and procedures.

(a) Application procedures. (1) Civilian attorneys may be prequalified as members of the pool of attorneys eligible to represent Accused before military commissions at no expense to the United States if, at the time of application, they meet the eligibility criteria set forth in 32 CFR 9.4(c)(3)(ii) as further detailed in this part, or they may be qualified on an ad hoc basis after being requested by an Accused. In both cases, qualification results in membership in the pool of available Civilian Defense Counsel.

(2) An attorney seeking qualification as a member of the pool of available Civilian Defense Counsel shall submit an application, by letter, to: Office of the General Counsel, Department of Defense, (Attn: Chief Defense Counsel, Office of Military Commissions), 1600 Defense Pentagon, Washington, DC 20301-1600. Applications will be comprised of the letter requesting qualification for membership, together with the following documents that demonstrate satisfaction of the criteria set forth in 32 CFR 9.4(c)(3)(ii):

(i) Civilian Defense Counsel shall be United States citizens (32 CFR 9.4(c)(3)(i)(A)). Applicants will provide proof of citizenship (e.g., certified true copy of passport, birth certificate, or certificate of naturalization).

(ii) Civilian Defense Counsel shall be admitted to the practice of law in a State, district, territory or possession of the United States, or before a Federal court (32 CFR 9.4(c)(3)(i)(ii)(B)). Applicants will submit an official certificate showing that the applicant is an active member in good standing with the bar of a qualifying jurisdiction. The certificate must be dated within three months of the date of Chief Defense Counsel’s receipt of the application.

(iii) Civilian Defense Counsel shall not have been the subject of any sanction or disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct (32 CFR 9.4(c)(3)(ii)(iii)). An applicant shall submit a statement detailing all sanctions or disciplinary actions, pending or final, to which he has been subject, whether by a court, bar or other competent governmental authority, for misconduct of any kind. The statement shall identify the jurisdiction or authority that imposed the sanction or disciplinary action, together with any explanation deemed appropriate by the applicant. Additionally, the statement shall identify and explain any formal challenge to the attorney’s fitness to practice law, regardless of the outcome of any subsequent proceedings. In the event that no sanction, disciplinary action or challenge has been imposed on or made against an applicant, the statement shall so state.

Further, the applicant’s statement shall identify each jurisdiction in which he has been admitted or to which he has applied to practice law, regardless of whether the applicant maintains a current active license in that jurisdiction, together with any dates of admission to or rejection by each such jurisdiction and, if no longer admitted, the date of and basis for inactivation. The information shall be submitted either in the form of a sworn notarized statement or as a declaration under penalty of perjury of the laws of the United States. The sworn statement or declaration must be executed and dated within three months of the date of the Chief Defense Counsel’s receipt of the application.

(B) Further, applicants shall submit a properly executed Authorization for Release of Information (Appendix A to this part), authorizing the Chief Defense Counsel or his designee to obtain information relevant to qualification of the applicant as a member of the Civilian Defense Counsel pool from each jurisdiction in which the applicant has been admitted or to which he has applied to practice law.

(iv) Civilian Defense Counsel shall be determined to be eligible for access to information classified at the level SECRET or higher under the authority of and in accordance with the procedures described in Department of Defense, DoD 5200.2-R, “Personnel Security Program.” (3 CFR 9.4(c)(2)(iv))

(A) Civilian Defense Counsel applicants who possess a valid current security clearance of SECRET or higher shall provide, in writing, the date of their background investigation, the date such clearance was granted, the level of the clearance, and the adjudicating authority.

(B) Civilian Defense Counsel applicants who do not possess a valid current security clearance of SECRET or higher shall state in writing their willingness to submit to a background investigation in accordance with DoD 5200.2-R and to pay any actual costs associated with the processing of the same. The security clearance application, investigation, and adjudication process will not be initiated until the applicant has submitted an application that otherwise fully complies with this part and the Chief Defense Counsel has determined that the applicant would otherwise be qualified for membership in the Civilian Defense Counsel pool. Favorable adjudication of the applicant’s personnel security investigation must be completed before an applicant will be qualified for membership in the pool of Civilian Defense Counsel. The Chief Defense Counsel may, at his discretion, withhold qualification on the recommendation of the Chief Defense Counsel to initiate the security clearance process until such time as the Civilian Defense Counsel’s services are likely to be sought.

(v) Civilian Defense Counsel shall have signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the course of proceedings (32 CFR 9.4(c)(2)(v)). This requirement shall be satisfied by the execution of the

1 Available at http://www.dtic.mil/whs/directives.
Affidavit And Agreement By Civilian Defense Counsel at Appendix B to this part. The Affidavit And Agreement By Civilian Defense Counsel shall be executed and agreed to without change, (i.e., no omissions, additions or substitutions). Proper execution shall require the notarized signature of the applicant. The Affidavit And Agreement By Civilian Defense Counsel shall be dated within three months of the date of the Chief Defense Counsel's receipt of the application.

(3) Applications mailed in a franked U.S. Government envelope or received through U.S. Government distribution will not be considered. Telefaxed or electronic mail application materials will not be accepted. Failure to provide all of the requisite information and documentation may result in rejection of the application. A false statement in any part of the application may preclude qualification and/or render the applicant liable for disciplinary or criminal sanction, including under 18 U.S.C. 1001.

(b) Application review. (1) The Chief Defense Counsel or his designee shall review all Civilian Defense Counsel pool applications for compliance with 32 CFR part 9 and Military Order of November 13, 2001, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” and with this part.

(2) The Chief Defense Counsel shall consider all applicants for qualification as members of the Civilian Defense Counsel pool without regard to race, religion, color, sex, age, national origin, or other non-disqualifying physical or mental disability.

(3) The Chief Defense Counsel may reject any Civilian Defense Counsel application that is incomplete or otherwise fails to comply with 32 CFR part 9 and Military Order of November 13, 2001, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” or with this part.

(4) Subject to review by the General Counsel of the Department of Defense, the Chief Defense Counsel shall determine the number of qualified attorneys that shall constitute the pool of available Civilian Defense Counsel. Similarly, subject to review by the General Counsel of the Department of Defense, the Chief Defense Counsel shall determine the qualification of applicants for membership in such pool. This shall include determinations as to whether any sanction, disciplinary action, or challenge is related to relevant misconduct that would disqualify the Civilian Defense Counsel applicant.

(5) The Chief Defense Counsel's determination as to each applicant's qualification for membership in the pool of qualified Civilian Defense Counsel shall be date-stamped effective as of the date of the Chief Defense Counsel's written notification publishing such determination to the applicant. Subsequent to this notification, the retention of qualified Civilian Defense Counsel is effected upon written entry of appearance, communicated to the military commission through the Chief Defense Counsel.

(6) The Chief Defense Counsel may reconsider his determination as to an individual's qualification as a member of the Civilian Defense Counsel pool on the basis of 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, or the matter may be referred to the Appointing Authority or the General Counsel of the Department of Defense, who may revoke or suspend the qualification of any member of the Civilian Defense Counsel pool.

Appendix A to Part 14—United States of America Authorization for Release of Information

United States of America

Authorization for Release of Information (Carefully read this authorization to release information about you, then sign and date it in ink.)

I authorize the Chief Defense Counsel, Office of Military Commissions, Department of Defense, his designee or other duly authorized representative of the Department of Defense who may be charged with assessing or determining my qualification for membership in the pool of Civilian Defense Counsel available to represent Accused before military commissions, to obtain any information from any court, the bar of any State, locality, district, territory or possession of the United States, or from any other governmental authority. This information may include, but is not limited to, information relating to: Any application for a security clearance; my admission or application for admission to practice law in any jurisdiction, including action by the jurisdiction upon such application; together with my current status with regard to the practice of law in such jurisdiction; any sanction or disciplinary action to which I have been subject for misconduct of any kind; and any formal challenge to my fitness or practice law, regardless of the outcome of subsequent proceedings.

I authorize custodians of such records or information and other sources of information pertaining to me at the request of the officials named above, regardless of any previous agreement to the contrary.

I understand that for certain custodians or sources of information a separate specific release may be required and that I may be contacted for the purposes of executing such a later date.

I understand that the records or information released by custodians and other sources of information are for official use by the Department of Defense, only for the purposes provided herein, and that they may be redisclosed by the Department of Defense only as authorized by law.

I authorize or that show my signature are as valid as the original signed by me. This authorization is valid for five (5) years from the date signed or upon termination of my affiliation with the Department of Defense, whichever is later.

Signature (sign in ink) SSN Date

Appendix B to Part 14—Affidavit and Agreement by Civilian Defense Counsel

Affidavit and Agreement by Civilian Defense Counsel

Pursuant to Section 4(C)(3)(b) of Department of Defense Military Commission Order No. 1, “Procedures for Trials by Military Commission to be Given Certain Non-Unites States Citizens in the War Against Terrorism,” dated March 21, 2002 (“MCO No. 1”), Military Commission Instructions No. 4, “Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel” (“MCI No. 4”) and No. 5, “Qualification of Civilian Defense Counsel” (“MCI No. 5”), and in accordance with the President's Military Order of November 13, 2001, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” 66 FR 57833 (Nov. 16, 2001) (“President's Military Order”), I [Name of Civilian Attorney], make this Affidavit and Agreement for the purpose of applying for qualification as a member of the pool of Civilian Defense Counsel available to represent Accused before military commissions and serving in that capacity.

I. Oaths or Affirmations. I swear or affirm that the following information is true to the best of my knowledge and belief:

A. I have read and understand the President's Military Order, MCO No. 1, MCI No. 4, MCI No. 5, and all other Military Commission Orders and Instructions concerning the rules, regulations and instructions applicable to trial by military commissions. I will read all future Orders and Instructions applicable to trials by military commissions.

B. I am aware that my qualification as a Civilian Defense Counsel does not guarantee my presence at closed military commission proceedings or guarantee my access to any information to be protected under Section 6(D)(5) or Section 6 of MCO No. 1.

II. Agreements. I hereby agree to comply with all applicable regulations and instructions for counsel pertaining to any rules of court for conduct during the course of proceedings, and specifically agree, without limitation, to the following:

A. I will notify the Chief Defense Counsel and, as applicable, the relevant Presiding Officer immediately if, after the execution of
this Affidavit and Agreement but prior to the conclusion of proceedings (defined as the review and final decision of the President or, if designated, the Secretary of Defense), if there is any change in any of the information provided in my application, including this Affidavit and Agreement, for qualification as member of the civilian Defense Counsel pool. I understand that such notification shall be in writing and shall set forth the substantive nature of the changed information.

B. I will be well-prepared and will conduct the defense zealously, representing the Accused throughout the military commission process, from the inception of my representation through the completion of any post trial proceedings as detailed in Section 6(H) of MCO No. 1. I will ensure that these proceedings are my primary duty. I will not seek to delay or to continue the proceedings for reasons relating to matters that arise in the course of my law practice or other professional or personal activities that are not related to military commission proceedings.

C. The Defense Team shall consist entirely of myself, Detailed Defense Counsel, and other personnel provided by the Chief Defense Counsel, the Presiding Officer, or the Appointing Authority. I will make no claim against the U.S. Government for any fees or costs associated with my conduct of the defense or related activities or efforts.

D. Recognizing that my representation does not relieve the Detailed Defense Counsel of duties specified in Section 4(C)(2) of MCO No. 1, I will work cooperatively with such counsel to ensure coordination of efforts and to ensure such counsel is capable of conducting the defense independently if necessary.

E. During the pendency of the proceedings, unless I obtain approval in advance from the Presiding Officer to do otherwise, I will comply with the following restrictions on my travel and communications:

1. I will not travel or transmit documents from the site of the proceedings without the approval of the Appointing Authority or the Presiding Officer. The Defense Team and I will otherwise perform all of our work relating to the proceedings, including any electronic or other research, at the site of the proceedings (except that this shall not apply during post-trial proceedings detailed in Section 6(H) of MCO No. 1).

2. I will not discuss or otherwise communicate or share documents or information about the case with anyone except persons who have been designated as members of the Defense Team in accordance with this Affidavit and Agreement and other applicable rules, regulations and instructions.

F. At no time, to include any period subsequent to the conclusion of the proceedings, will I make any public or private statements regarding any closed sessions of the proceedings or any classified information or material, or document or material constituting protected information under MCO No. 1.

G. I understand and agree to comply with all rules, regulations and instructions governing the handling of classified information and material. Furthermore, no

DEPARTMENT OF DEFENSE
Office of the Secretary
32 CFR Part 15
Reporting Relationships for Military Commission Personnel

AGENCY: Department of Defense.

ACTION: Final rule.

SUMMARY: This rule establishes supervisory and performance evaluation relationships for military commission personnel.


FOR FURTHER INFORMATION CONTACT: Office of Military Commission Spokesperson, 703-693-1115.

SUPPLEMENTARY INFORMATION: Although exempt from administrative procedures for rule making, publication of the final rule in the Federal Register is deemed appropriate under 5 U.S.C. 552(a)(1)(C). Certifications follow:

Administrative Procedures Act (Sec. 1, Pub. L. 89-544)

It has been certified that 32 CFR part 15 is as a military function of the United States and exempt from administrative procedures for rule making.

Executive Order 12866, "Regulatory Planning and Review"

It has been certified that 32 CFR part 15 pertains to military functions other than procurement and import-export licenses and is exempt from Office of Management and Budget review under Section 3, Pura (d)(2).

Unfunded Mandates Reform Act (Sec. 202, Pub. L. 104-4)

It has been certified that 32 CFR part 15 does not contain a Federal Mandate that may result in the expenditure by State, local and tribal governments, in aggregate, or by the private sector, of $100 million or more in any one year.

Public Law 96-354, "Regulatory Flexibility Act" (5 U.S.C. 601)

It has been determined that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities.

Public Law 96-511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35)

It has been certified that 32 CFR part 15 does not impose any reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 44).

Federalism (Executive Order 13132)

It has been certified that 32 CFR part 15 does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

1. The States;

2. The relationship between the National Government and the States; or

3. The distribution of power and responsibilities among the various levels of government.
General Counsel (Legal Counsel) of the Department of Defense and then to the General Counsel of the Department of Defense.

(4) Prosecutors and Assistant Prosecutors: Prosecutors and Assistant Prosecutors shall report to the Chief Prosecutor and then to the Deputy General Counsel (Legal Counsel) of the Department of Defense.

(5) Chief Defense Counsel: The Chief Defense Counsel shall report to the Deputy General Counsel (Personnel and Health Policy) of the Department of Defense and then to the General Counsel of the Department of Defense.

(6) Detailed Defense Counsel: Detailed Defense Counsel shall report to the Chief Defense Counsel and then to the Deputy General Counsel (Personnel and Health Policy) of the Department of Defense.


(8) Commission members: Commission members shall continue to report to their parent commands. The consideration or evaluation of the performance of duty as a member of a military commission is prohibited in preparing effectiveness, fitness, or evaluation reports of a commission member.

(9) Other personnel: All other military commission personnel, such as court reporters, interpreters, security personnel, bailiffs, and clerks detailed or employed by the Appointing Authority pursuant to 32 CFR 9.7(a), and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," shall be subject to the relationships set forth in paragraphs (a)(1) through (a)(9) of this section. Unless stated otherwise, the person to whom an individual "reports," as set forth in paragraphs (a)(1) through (a)(9) of this section, shall be deemed to be such individual's supervisor and shall, to the extent possible, fulfill all performance evaluation responsibilities normally associated with the function of direct supervisor in accordance with the subordinate's Military Service performance evaluation regulations.

(1) Appointing Authority: Any Appointing Authority designated by the Secretary of Defense pursuant to 32 CFR part 9 and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," shall be subject to the relationships set forth in paragraphs (a)(1) through (a)(9) of this section. Unless stated otherwise, the person to whom an individual "reports," as set forth in paragraphs (a)(1) through (a)(9) of this section, shall be deemed to be such individual's supervisor and shall, to the extent possible, fulfill all performance evaluation responsibilities normally associated with the function of direct supervisor in accordance with the subordinate's Military Service performance evaluation regulations.

(2) Legal Advisor to Appointing Authority: The Legal Advisor to the Appointing Authority shall report to the Appointing Authority.

(3) Chief Prosecutor: The Chief Prosecutor shall report to the Deputy

DEPARTMENT OF DEFENSE
Office of the Secretary
32 CFR Part 16
Sentencing
AGENCY: Department of Defense.
ACTION: Final rule.
SUMMARY: This rule promulgates policy, assigns responsibilities, and prescribes procedures for matters related to sentencing of persons with regard to whom a finding of guilty is entered for an offense referred for trial by a military commission appointed pursuant to regulations on Procedures for Trials by Military Commission of Certain Non-United States Citizens in the War Against Terrorism, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."
FURTHER INFORMATION CONTACT: Office of Military Commission Spokesperson, 703-693-1115.
SUPPLEMENTARY INFORMATION: Although exempt from administrative procedures for rule making, publication of the final rule in the Federal Register is deemed appropriate under 5 U.S.C. 552(a)(1)(C).
Certifications follow:
Administrative Procedures Act (Sec. 1, Pub. L. 89-544)
It has been certified that 32 CFR part 16 is a military function of the United States and exempt from administrative procedures for rule making.
Executive Order 12866, "Regulatory Planning and Review"
It has been certified that 32 CFR part 16 pertains to military functions other than procurement and import-export licenses and is exempt from Office of Management and Budget review under Section 3, Para (d)(2).
Unfunded Mandates Reform Act (Sec. 202, Pub. L. 104-4)
It has been certified that 32 CFR part 16 does not contain a Federal Mandate that may result in the expenditure by State, local and tribal governments, in aggregate, or by the private sector, of $100 million or more in any one year.
Public Law 96-354, "Regulatory Flexibility Act" (5 U.S.C. 601)
It has been determined that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities.
Public Law 96-511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35)

It has been certified that 32 CFR part 16 does not impose any reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 44).

Federalism (Executive Order 13132)

It has been certified that 32 CFR part 16 does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

(1) The States;
(2) The relationship between the National Government and the States; or
(3) The distribution of power and responsibilities among the various levels of government.

List of Subjects in 32 CFR Part 16
Military law.

Accordingly, 32 CFR part 16 is added to Subtitle A, Chapter I, Subchapter B to read as follows:

PART 16—SENTENCING

Sec. 16.1 Purpose.
16.2 Authority.
16.3 Available sentences.
16.4 Sentencing procedures.
Authority: 10 U.S.C. 113(d) and 140(b).

§16.1 Purpose.

This part promulgates policy, assigns responsibilities, and prescribes procedures for matters related to sentencing of persons with regard to whom a finding of guilt is entered for an offense referred for trial by a military commission appointed pursuant to 32 CFR part 9 and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism" (3 CFR 2001 Comp. p. 918, 66 FR 57833).

§16.2 Authority.

This part is issued pursuant to 32 CFR 9.7(a) and in accordance with Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," and 10 U.S.C. 113(d) and 140(b). The provisions of 32 CFR part 10 are applicable to this part.

§16.3 Available sentences.

(a) General. 32 CFR part 9 permits a military commission wide latitude in sentencing. Any lawful punishment or condition of punishment is authorized, including death, so long as the prerequisites detailed in 32 CFR part 9 are met. Detention associated with an individual's status as an enemy combatant shall not be considered to fulfill any term of imprisonment imposed by a military commission. The sentence determination should be made while bearing in mind that there are several principal reasons for a sentence given to those who violate the law. Such reasons include: protection of the wrongdoer; protection of society from the wrongdoer; deterrence of the wrongdoer and those who know of his crimes and sentence from committing the same or similar offenses; and rehabilitation of the wrongdoer. In determining an appropriate sentence, the weight to be accorded any or all of these reasons rests solely within the discretion of commission members. All sentences should, however, be grounded in a recognition that military commissions are a function of the President's war-fighting role as Commander-in-Chief of the Armed Forces of the United States and of the broad deterrent impact associated with a sentence's effect on adherence to the laws and customs of war in general.

(b) Conditions of imprisonment.

Decisions regarding the location designated for any imprisonment, the conditions under which a sentence to imprisonment is served, or the privileges accorded one during any period of imprisonment should generally not be made by the commission. Those decisions and actions, however, may be appropriate subjects for recommendation to the person making a final decision on the sentence in accordance with of 32 CFR 9.6(b).

(c) Prospective recommendations for sentence modification. A sentence imposed by commission may be accompanied by a recommendation to suspend, remit, commute or otherwise modify the adjudged sentence in concert with one or more conditions upon which the suspension, remission, commutation, or other modification is contingent (usually relating to the performance or behavior of the Accused). Unless otherwise directed, a decision or action in accordance with such a recommendation will be effected by direction or delegation to the Appointing Authority by the official making a final decision on the sentence in accordance with of 32 CFR 9.6(b).

§16.4 Sentencing procedures.

(a) General. 32 CFR part 9 permits the military commission substantial discretion regarding the conduct of sentencing proceedings. Sentencing proceedings should normally proceed expeditiously. In the discretion of the Presiding Officer, as limited by the Appointing Authority, reasonable delay between the announcement of findings and the commencement of sentencing proceedings may be authorized to facilitate the conduct of proceedings in accordance with of 32 CFR 9.6(b).

(b) Information relevant to sentencing.

32 CFR 9.6(e)(10) permits the Prosecution and Defense to present information to aid the military commission in determining an appropriate sentence. Such information may include a recommendation of an appropriate sentence, information regarding sentence ranges for analogous offenses (e.g., the sentencing range under the Federal Sentencing Guidelines that could be applicable to the Accused for the most analogous federal offenses), and other relevant information. Regardless of any presentation by the Prosecution or Defense, the military commission shall consider any evidence admitted for consideration prior to findings regarding guilt. The Presiding Officer may limit or require the presentation of certain information consistent with 32 CFR part 9 and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism".

(c) Cases involving plea agreements.

In accordance with 32 CFR 9.6(a)(4), after determining the voluntary and informed nature of a plea agreement approved by the Appointing Authority, the military commission is bound to adjudge findings and a sentence pursuant to that plea agreement. Accordingly, the Presiding Officer may exercise the authority granted in of 32 CFR 9.6(e) to curtail or preclude the presentation of information and argument relative to the military commission's determination of an appropriate sentence.

(d) Special duties. In cases involving plea agreements or recommendations for certain conditions of imprisonment or prospective sentence modification, the Prosecution and Defense shall provide whatever post-trial information or recommendation as is relevant to any subsequent decision regarding such condition or suspension, remission, commutation, or other modification recommendation associated with the sentence.

Patricia L. Topilngs,
Alternate OSD Federal Register Liaison Officer, Department of Defense.
[FR Doc. 03-16386 Filed 6-26-03; 12:40 pm]
BILLING CODE 5001-45-P
DEPARTMENT OF DEFENSE
Office of the Secretary
32 CFR Part 17

ADMINISTRATIVE PROCEDURES

AGENCY: Department of Defense.

ACTION: Final rule.

SUMMARY: This rule promulgates policy, assigns responsibilities, and prescribes procedures for the conduct of trials by a military commission appointed pursuant to regulations on Procedures for Trials by Military Commission of Certain Non-United States Citizens in the War Against Terrorism, and Military Order of November 13, 2001, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism”.


FOR FURTHER INFORMATION CONTACT: Office of Military Commission Spokesperson, 703-693-1115.

SUPPLEMENTARY INFORMATION: Although exempt from administrative procedures for rule making, publication of the final rule in the Federal Register is deemed appropriate under 5 U.S.C. 552(a)(1)(C). Certifications follow:

Administrative Procedures Act (Sec.1, Pub. L. 89-544)

It has been certified that 32 CFR part 17 is as a military function of the United States and exempt from administrative procedures for rule making.

Executive Order 12866, “Regulatory Planning and Review”

It has been certified that 32 CFR part 17 pertains to military functions other than procurement and import-export licenses and is exempt from Office of Management and Budget review under Section 3, Para (d)(2).

Unfunded Mandates Reform Act (Sec. 202, Pub. L. 104-4)

It has been certified that 32 CFR part 17 does not contain a Federal Mandate that may result in the expenditure by State, local and tribal governments, in aggregate, or by the private sector, of $100 million or more in any one year.

Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. 601)

It has been determined that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities.

Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)

It has been certified that 32 CFR part 17 does not impose any reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 44).

Federalism (Executive Order 13132)

It has been certified that 32 CFR part 17 does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

(1) The States;

(2) The relationship between the National Government and the States; or

(3) The distribution of power and responsibilities among the various levels of government.

List of Subjects in 32 CFR Part 17

Military law.

Accordingly, 32 CFR part 17 is added to Subtitle A, Chapter I, Subchapter B to read as follows:

PART 17—ADMINISTRATIVE PROCEDURES

Sec.

17.1 Purpose.

17.2 Authority.

17.3 Commission personnel.

17.4 Interlocutory questions.

17.5 Implied duties of the presiding officer.

17.6 Disclosures.

Authority: 10 U.S.C. 113(d) and 140(b).

§17.1 Purpose.

This part promulgates policy, assigns responsibilities, and prescribes procedures for the conduct of trials by a military commission appointed pursuant to 32 CFR part 9 and Military Order of November 13, 2001, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” 66 FR 57833).

§17.2 Authority.

This part is issued pursuant to 32 CFR 9.7(a) and in accordance with Military Order of November 13, 2001, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” and 10 U.S.C. 113(d) and 140(b). The provisions of 32 CFR part 10 are applicable to this part.

§17.3 Commission personnel.

(a) Appointment and removal of Commission members. (1) In accordance with 32 CFR part 9, the Appointing Authority shall appoint at least three but no more than seven members and one or two alternate members. The Appointing Authority may remove members and alternate members for good cause. In the event a member (or alternate member) is removed for good cause, the Appointing Authority may replace the member, direct that an alternate member serve in the place of the original member, direct that proceedings simply continue without the member, or convene a new commission. In the absence of guidance from the Appointing Authority regarding replacement, the Presiding Officer shall select an alternate member to replace the member in question.

(2) The Presiding Officer shall determine if it is necessary to conduct or permit questioning of members (including the Presiding Officer) on issues of whether there is good cause for their removal. The Presiding Officer may permit questioning in any manner he deems appropriate. Consistent with 32 CFR part 9, any such questioning shall be narrowly focused on issues pertaining to whether good cause may exist for the removal of any members.

(3) From time to time, it may be appropriate for a Presiding Officer to forward to the Appointing Authority information and, if appropriate, a recommendation relevant to the question of whether a member (including the Presiding Officer) should be removed for good cause. While awaiting the Appointing Authority’s decision on such matter, the Presiding Officer may elect either to hold proceedings in abeyance or to continue. The Presiding Officer may issue any appropriate instructions to the member whose continued service is in question. A military commission shall not engage in deliberations on findings or sentences prior to the Appointing Authority’s decision in any case in which the Presiding Officer has recommended a member’s removal.

(b) Military commission security officer. The Appointing Authority may detail a Security Officer to advise a military commission on matters related to classified and protected information. In addition to any other duties assigned by the Appointing Authority, the Security Officer shall ensure that all classified or protected evidence and information is appropriately safeguarded at all times and that only personnel with the appropriate clearances and authorizations are present when classified or protected materials are presented before military commissions.

(c) Other military commission personnel. The Appointing Authority may detail court reporters, interpreters, security personnel, bailiffs, clerks, and any other personnel to a military commission as deemed necessary. In the absence of a detailing by the Appointing Authority, the Presiding Officer may detail personnel for use in the military commission.
Authority, the Chief Prosecutor shall be responsible to ensure the availability of necessary or appropriate personnel to facilitate the impartial and expeditious conduct of full and fair trials by military commission.

§17.4 Interlocutory questions.

(a) Certification of interlocutory questions. The Presiding Officer shall generally adjudicate all motions and questions that arise during the course of a trial by military commission. In accordance with 32 CFR 9.4(a)(3)(iv), however, the Presiding Officer shall certify all interlocutory questions, the disposition of which would effect a termination of proceedings with respect to a charge, for decision by the Appointing Authority. In addition, the Presiding Officer may certify other interlocutory questions to the Appointing Authority as the Presiding Officer deems appropriate.

(b) Submission of interlocutory questions. The Presiding Officer shall determine what, if any, documentary or other materials should be forwarded to the Appointing Authority in conjunction with an interlocutory question.

(c) Effect of interlocutory question certification on proceedings. While decision by the Appointing Authority is pending on any certified interlocutory question, the Presiding Officer may elect either to hold proceedings in abeyance or to continue.

§17.5 Implied duties of the presiding officer.

The Presiding Officer shall ensure the execution of all ancillary functions necessary for the impartial and expeditious conduct of a full and fair trial by military commission in accordance with 32 CFR part 9. Such functions include, for example, scheduling the time and place of convening of a military commission, ensuring that an oath or affirmation is administered to witnesses and military commission personnel as appropriate, conducting appropriate in camera meetings to facilitate efficient trial proceedings, and providing necessary instructions to other commission members. The Presiding Officer shall rule on appropriate motions or, at his discretion consistent with 32 CFR part 9, may submit them to the commission for decision or to the Appointing Authority as a certified interlocutory question.

§17.6 Disclosures.

(a) General. Unless directed otherwise by the Presiding Officer upon a showing of good cause or for some other reason, counsel for the Prosecution and the Defense shall provide to opposing counsel, at least one week prior to the scheduled convening of a military commission, copies of all information intended for presentation as evidence at trial, copies of all motions the party intends to raise before the military commission, and names and contact information of all witnesses a party intends to call. Motions shall also be provided to the Presiding Officer at the time they are provided to opposing counsel. Unless directed otherwise by the Presiding Officer, written responses to any motions will be provided to opposing counsel and the Presiding Officer no later than three days prior to the scheduled convening of a military commission.

(b) Notifications by the prosecution. The Prosecution shall provide the Defense with access to evidence known to the Prosecution that tends to exculpate the Accused as soon as practicable, and in no instance later than one week prior to the scheduled convening of a military commission.

(c) Notifications by the defense. The Defense shall give notice to the Prosecution of any intent to raise an affirmative defense to any charge at least one week prior to the scheduled convening of a military commission.

(d) Evidence related to mental responsibility. If the Defense indicates an intent to raise a defense of lack of mental responsibility or introduce expert testimony regarding an Accused's mental condition, the prosecution may require that the Accused submit to a mental examination by a military psychologist or psychiatrist, and both parties shall have access to the results of that examination.


Patricia L. Toppings,
Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 03-16385 Filed 6-26-03; 12:40 pm]
Department of Defense Fact Sheet

Military Commission Procedures

- Military Commissions have historically been used to prosecute enemy combatants who violate the laws of war; the last time the United States used the Military Commission process was during World War II.

- Military Commissions provide:
  - A full and fair trial;
  - Protection for classified and sensitive information; and
  - Protection and safety for all personnel participating in the process, including the accused.

- In accordance with his Military Order of November 13, 2001, the President must determine if an individual is subject to his Military Order. This decision is the jurisdictional basis for prosecution; until the President determines that an individual is subject to his Military Order, no prosecution is possible. However, this determination does not require that criminal charges be brought against the individual, that decision is made by the Appointing Authority (currently the Deputy Secretary of Defense) after the Chief Prosecutor recommends that charges be approved.

- An individual may be subject to the President’s Military Order if the individual is not a U.S. citizen and the President determines that there is a reason to believe that the individual:
  - Is or was a member of al Qaeda;
  - Has engaged in, aided or abetted, or conspired to commit acts of international terrorism against the United States; or
  - Knowingly harbored one or more of the individuals described above; and
  - It is the interest of the United States that such individual be subject to this order.

- The Chief Prosecutor will draft charges, when appropriate, on individuals subject to the President’s Military Order.

- The Appointing Authority approves and refers appropriate charges to a Military Commission and appoints Military Commission members.

- Each Military Commission panel has a minimum of three and a maximum of seven military officer members. One of the members must be a Judge Advocate who will serve as the Presiding Officer. All members of the Military Commission
panel, including the Presiding Officer, vote on findings and, if necessary, on a sentence.

- Each accused tried by a Military Commission has the following procedural safeguards:
  - the presumption of innocence,
  - proof of guilt beyond a reasonable doubt,
  - the right to call and cross examine witnesses (subject to the rules regarding production of witnesses and protection of information),
  - nothing said by an accused to his attorney, or anything derived therefrom, may be used against him at trial,
  - no adverse inference for remaining silent,
  - and the overall requirement that any military commission proceeding be full and fair.
  - Finally, to assist him in preparing a defense, each accused has Military Defense Counsel provided at no cost to him.

- The accused may also hire a civilian defense counsel at no cost to the government as long as that counsel:
  - Is a United States citizen;
  - Is admitted to practice in a United States jurisdiction;
  - Has not been the subject of sanction or disciplinary action;
  - Is eligible for and obtains at least a SECRET level clearance; and
  - Agrees to follow the Military Commission rules.

- The Presiding Officer may admit any evidence that "would have probative value to a reasonable person." This standard of evidence takes into account the unique battlefield environment that is different than traditional peacetime law enforcement practices in the U.S. For example, soldiers are not required to obtain a search warrant when someone is shooting at them from a cave. This standard of evidence allows both the defense and the prosecution to admit evidence that was acquired during military operations.

- A finding of guilt and the imposition of a sentence must be with the concurrence of two-thirds of the Military Commission panel members.

- If there is a finding of guilt, the Military Commission panel members may impose any appropriate sentence, including death. A sentence of death requires a unanimous vote from a seven-member Military Commission panel.

- After the panel has delivered its verdict and imposed a sentence:
o All records of trial must be reviewed by the Appointing Authority who may return the case to the Military Commission for further proceedings if he determines it is not administratively complete.

o A three-member Review Panel of Military Officers, one of whom must have prior experience as a judge, will review all cases for material errors of law, and may consider matters submitted by the Prosecution and Defense. Review Panel members may be civilians who were specifically commissioned to serve on the panel. If a majority of the Review Panel members believe a material error of law has occurred, they may return the case to the Military Commission for further proceedings.

o The Secretary of Defense will review the record of trial and, if appropriate, may return it to the Military Commission for further proceedings, or forward the case to the President with a recommendation as to disposition.

o The President may either return the case to the Military Commission for further proceedings or make the final decision as to its disposition.
  - The President may delegate final decision authority to the Secretary of Defense, in which case the Secretary may approve or disapprove the findings or change a finding of Guilty to a finding of Guilty to a lesser-included offense, or mitigate, commute, defer, or suspend the sentence imposed, or any portion thereof. A finding of Not Guilty as to a charge shall not be changed to a finding of Guilty.

• After a Final Decision is made, a sentence shall be carried out promptly.
Commission Process

DoD Capture & Detention → President Determines Individual is Subject to Military Order → Department of Army Criminal Investigation

 prosecution & Defense Discovery or Plea Negotiation → Appointing Authority Approval of Charges, Appointment of Commission, Referral of Charges → Prosecution Preparation of Charges

Military Commission Trial Verdict Sentence (if appropriate) → Appointing Authority Review of Record → Review Panel Review and recommendation to SecDef (or remand)

DoD Impose Sentence, Continue Detention, or Release → President Final review & order → Secretary of Defense Review of verdict & sentence (final if delegated)
Trials Under Military Order:
A Guide to the Final Rules for Military Commissions

BRIEFING PAPER
June 2003
ABOUT US

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ACKNOWLEDGEMENTS

We wish to thank the following contributors whose generous funding made this report possible: The Atlantic Philanthropies, Matthew Dontzin, and the Open Society Institute.

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Trials Under Military Order:
A Guide to the Final Rules for Military Commissions
The Lawyers Committee for Human Rights
Briefing Paper
June 2003

This briefing paper analyzes the main provisions of the most substantive and lengthy of the military commission rules issued by the U.S. Department of Defense – Military Commission Instruction No. 2, which enumerates the crimes over which the military commissions will have jurisdiction – and provides a summary and commentary on the other seven Military Commission Instructions.

To assist in understanding the specific analysis of the individual Military Commission Instructions, it is useful to begin by reviewing the four overarching themes that encapsulate the issues raised by the military commissions:

1) Overbroad Jurisdiction
2) Disincentives for Civilian Legal Participation
3) Secret Trials; Secret Evidence
4) Lack of Independent Appeal Process Outside Military Chain of Command

Overbroad Jurisdiction of the Military Commissions

In general, the range of substantive offenses that are presented as “triable by military commission” is quite broad. The breadth of jurisdictional reach is largely achieved because Military Commission Instruction No. 2 expands the notion of “armed conflict” to include isolated incidents – and even attempted crimes. By doing this,
crimes that would – until now – have fallen outside military jurisdiction, can now, for purpose of the military commissions, be included under the mantle of “laws of war.”

**Disincentives for Civilian Participation in Military Commissions**

As for administration of the military commissions, the most noteworthy issues concern potential civilian defense attorneys, specifically the fact that the constraints imposed on these lawyers make it highly unlikely that competent lawyers will be willing – or financially able – to become involved with what they might otherwise have considered a significant and professionally valuable pro bono experience.

Unlike the military prosecutors involved in the commissions, civilian defense lawyers will face rigid constraints on their normal personal and professional life. First, they will themselves largely be confined to the premises of military commission proceedings (presumably at Guantanamo or a similarly inaccessible offshore location). They will also face significant out-of-pocket expenses and opportunity costs: during the proceedings, the civilian lawyers will be required to subordinate the rest of their professional activities to the military commissions while they are defending a case and they must pay for their own security clearance investigations and other expenses.

In addition to these adverse practical matters, the civilian defense lawyers will be hampered in their ability to mount a robust defense. Under Military Instruction No. 5, civilian defense attorneys:

- Are subject to Defense Department monitoring of communications with their clients;
- Are barred from speaking about the proceedings to anyone, particularly the press, except as approved by the Defense Department;
- May be excluded from all material parts of the proceedings and denied access to “protected information” (including potential exculpatory evidence\(^1\)) if “necessary to protect the interests of the United States”;
- Are required to reveal to the Defense Department “information related to the representation...to the extent [they] reasonably believe necessary to prevent the commission of a future criminal act that [they] believe is likely to result in death or substantial bodily harm, or significant impairment of national security”\(^2\).

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1 Potentially exculpatory evidence not introduced into the proceeding may be withheld even from assigned military defense counsel. See discussion (below) of “Secret Evidence; Secret Trials.”
2 In this memorandum, language in bold italics is always quoted, as indicated by context, from either the February 2003 draft of Military Commission Instruction No. 2, or the April 2003 final version of that or another of the Military Commission Instructions.
Secret Evidence; Secret Trials

Though the Pentagon’s newly appointed Chief Defense Counsel has promised to push for trials to be as open as possible, the government has broad discretion to close proceedings to protect what it determines to be “national security interests.”

The March 21, 2002 Military Commission Order No. 1 permits the Prosecution to deny a defendant and his chosen civilian counsel access to unclassified and even unclassifiable “Protected Information” that the Prosecution intends to use in the trial. Indeed, the March Order authorizes the court, for unspecified “national security” reasons, to conduct the entire trial in secret, without the presence of the accused or his chosen civilian counsel. Military Commission Instruction No. 5 reinforces this principle by requiring a civilian attorney to acknowledge under oath that his “qualification as a Civilian Defense Counsel does not guarantee [his or her] presence at closed military commission proceedings or guarantee [his or her] access to any [protected] information....” (Annex B to Military Commission Instruction No. 2, Section I(B)).

Even though assigned military defense counsel will be entitled to be present when secret evidence is presented at trial, without court authorization, he or she “may not disclose any information presented during a closed session to individuals excluded from such proceeding or part thereof” — including the civilian defense counsel and the defendant. (March 21, 2002 Military Commission Order No. 1, Section (6(B)(3)). It may, of course, be difficult for the military lawyer to appraise the significance of, or devise a response to, such “Protected Information” without the assistance of the defendant.

Moreover, while “Protected Information” would be excluded from consideration by the tribunal unless made available to the defendant’s assigned military counsel, potentially exculpatory evidence could be withheld even from the military lawyer under Section 6(D)(5)(b) of the March 21, 2002 Military Commission Order No. 1.

These restrictions violate a defendant’s rights under the Constitution’s Sixth Amendment “to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor.” They also violate the defendant’s rights under Article 105 of the Third Geneva Convention (relating to prisoners of war) to “defense by...counsel of his own choice”; the “calling of witnesses” and access to the “[p]articulars of the...charges...as well as the documents which are generally communicated to the accused by virtue of the laws in force in the armed forces in the Detaining Power.” While Article 105 does permit a trial

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3 March 21, 2002 Military Commission Order No. 1, Sections 6(B)(3) and 6(D)(5)(a).
4 Convention (III) Relative to the Treatment of Prisoners of War, Geneva, August 12, 1949.
5 Under the Uniform Code of Military Justice, which governs normal courts martial, the “trial counsel [military prosecutor], the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence...Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue....” 10 U.S.C. 846.
Trials Under Military Order
Lawyers Committee for Human Rights

to be "held in camera" (excluding the public), as an exceptional matter, "in the interest of State security," no mention is made of excluding the defendant or his lawyer.6

Lack of Independent Appeal Process Outside Military Chain of Command

The March Order confirms that the military commission structure will be an entirely closed system, subject to the control of the President or Secretary of Defense, with no appeal to any civilian court. Officials all in the same chain of command create the rules governing the military commissions, define the crimes to be tried by them, and staff the panels sitting in judgment (including review panels).7 This circumstance—"the accumulation of all powers, legislative, executive, and judiciary in the same hands"—constitutes what James Madison pronounced "the very definition of tyranny."8

By contrast, normal courts martial under the Uniform Code of Military Justice provide U.S. military defendants an appeal as of right to the Court of Appeals for the Armed Forces, a civilian panel outside the military command structure. The failure to provide such an independent appeal to military commission defendants directly contravenes Article 106 of the Third Geneva Convention, which mandates a right of appeal "in the same manner as the members of the armed forces of the Detaining Power."9

6 By reason of Article 129 of the Third Geneva Convention and Article 146 of Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, August 12, 1949 (Fourth Geneva Convention), Article 105 (and Article 106 referred to below) applies "[i]n all circumstances" to all "persons" accused of "grave breaches" under the Geneva Conventions; and so, even to individuals the administration determines to be ineligible for "prisoner of war" status. The secret trial features of the November Order would also be in violation of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Geneva, 1977 (Additional Protocol I), for example, Article 75(4)(a) (right "to be informed without delay of the particulars of the offence alleged...[and right to] all necessary rights and means of defense"); and Article 75(4)(g) ("right to examine or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him"). Article 75 is expressly intended to protect "persons accused of war crimes or crimes against humanity...who do not benefit from more favourable treatment under the [Geneva] Conventions or this Protocol, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol." (Article 75(7)). Though the United States is not a party to the Additional Protocol I, the United States accepts Article 75 of Additional Protocol I as either "legally binding as customary international law or acceptable practice though not legally binding." See 2003 U.S. Operational Law Handbook (JAG School), p. 11.

7 Members of the military commission are appointed by the Secretary of Defense "or a designee." (March 21, 2002 Order, Section 2 and Section 4(A)(1)).

8 The Federalist No. 47 (James Madison).

9 As noted above, by reason of Article 129 of the Third Geneva Convention and Article 146 of the Fourth Geneva Convention, Article 106 applies "[i]n all circumstances" even to individuals the administration determines to be ineligible for "prisoner of war" status. Denial of an impartial tribunal and/or appeal is also in violation Article 75 of Additional Protocol I. See, e.g., Article 75(4) (requiring "an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure..."; and Article 75(4)(j) (requiring that a "convicted person shall be advised on conviction of his judicial and other remedies").
ANALYSIS OF MILITARY COMMISSION INSTRUCTIONS

This analysis begins with Military Commission Instruction No. 2, since it is the most substantive and lengthy. Following that discussion, Instructions Nos. 1, and 3 through 8 are addressed.

MILITARY COMMISSION INSTRUCTION NO. 2:
CRIMES AND ELEMENTS FOR TRIALS BY MILITARY COMMISSION

War Crimes and Other Offenses Triable by Military Commission

After the November 13, 2001 Military Order was issued, the Lawyers Committee and other commentators noted a particularly grave concern: that the intended purpose of the military commissions – to try alleged terrorists – indicated that commissions would be used to expand military jurisdiction into areas never before considered subject to military law or military courts.

Bush Administration spokesmen were quick to dismiss concerns regarding the plan to bypass ordinary civilian and military courts for alleged foreign terrorists as "wrong and... based on misconceptions about what the president's order does and how it will function." White House Counsel Alberto Gonzales insisted that "[t]he order only covers foreign enemy war criminals... people [who will] be tried by military commission... must be chargeable with offenses against the international laws of war."10

Concerns about the potentially broad scope of the military commissions' jurisdiction now appear to have been well founded. In general, the overriding problem with Military Commission Instruction No. 2, on Crimes and Elements – both in the original draft and the final version – is the attempt to shoehorn crimes such as terrorism and hijacking, which have always been considered civilian crimes, into the rubric of military jurisdiction; this is true, notwithstanding the claim that the Instructions are not intended to create new law, but merely to re-state, or "declar[e] existing law" (Section 3(A)).

The original draft included terrorism, hijacking and other such offenses within the category of war crimes. These crimes, however, have never before been recognized as war crimes under international law. The drafters of the instructions seem to recognize this problem, though the military instruction documents do not acknowledge it. The final version attempts to finesse the issue by putting recognized war crimes into one category – "Substantive Offenses – War Crimes" (Section 6(A)) – and then creating a second category of “other” crimes that are also purportedly triable by military commissions: "Substantive Offenses – Other Offenses Triable by Military Commission" (Section 6(B)).

11 Ibid.
These "Other Offenses" include:

- Hijacking or Hazarding a Vessel or Aircraft
- Terrorism
- Murder by an Unprivileged Belligerent
- Destruction of Property by an Unprivileged Belligerent
- Aiding the Enemy
- Spying
- Perjury or False Testimony
- Obstruction of Justice Related to Military Commissions\(^\text{12}\)

To link these crimes to the "law of war"—as they must in order to fall within the jurisdiction of a military commission—each crime includes, as an element, the following condition: "[i]f the conduct took place in the context of and was associated with armed conflict."\(^\text{13}\)

The attempt to squeeze these crimes into the "law of war" rubric, however, requires expanding the definition of "armed conflict" to the breaking point. As a result, the jurisdiction of the military commissions becomes so broad as potentially to encompass almost any serious unlawful conduct whatsoever.

**Armed Conflict.**

The White House assured the public that "under the [November 13, 2001] order, the president will refer to military commissions only non-citizens who are members or active supporters of Al Qaeda or other international terrorist organizations targeting the United States."\(^\text{14}\)

In fact, in Military Commission Instruction No. 2, there is no requirement that the necessary "Armed Conflict" involve Al Qaeda or a foreign terrorist organization. This means, as the military commission instructions are written, virtually any significant criminal act by a non-citizen committed within, or otherwise affecting the United States risks being qualified as "[taking] place in the context of and [being] associated with armed conflict." By satisfying the 'associated with armed conflict' test, the normal civilian crime becomes a war crime, subject to a special military commission.

Section 5(C) explains that:

\(^{12}\) The first five of these offenses are particularly problematic from this point of view. (Arguably, the latter two offenses might be considered to fall under some form of inherent ancillary jurisdiction of the tribunal to address violations against itself.)

\(^{13}\) This is not true for the crimes "Perjury or False Testimony" and "Obstruction of Justice Related to Military Commissions."

This element does not require a declaration of war, ongoing mutual hostilities, or a confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus [between 'armed conflict' and a particular offense] so long as its magnitude or severity rises to the level of an 'armed attack' or an 'act of war,' or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

This means a single act of terrorism, if sufficiently large – or even a single unsuccessful attempt – could be deemed to qualify as an “armed conflict” for purposes of the military commissions.

This broad definition in Military Commission Instruction No. 2 stands in sharp contrast to the much more limited notion of armed conflict under established international law, which considers international armed conflict as a conflict between states;\(^\text{15}\) and, with regard to non-state actors, covers only “protracted”\(^\text{16}\) armed conflict between governmental authorities and organized armed groups or between such groups [...] and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.”\(^\text{17}\)

The military commissions’ elastic definition of “armed conflict” could, in some circumstances, be construed to consider purely domestic crimes committed by non-citizens as involvement in “armed conflict.” It takes little imagination, for example, to picture military commission trials of non-citizen alleged drug traffickers apprehended in the course of the “war on drugs” and charged with being foot soldiers for the Cali cartel.

While the jurisdiction of military commissions remains limited to non-citizen defendants, the “armed conflict” that allows for the military commission trials need not involve a foreign entity. Thus a U.S. permanent resident taking part in what turned out to be a violent anti-abortion demonstration, environmental or animal rights protest, or action against military shelling in the island of Vieques could find him or herself brought before a military commission.

Moreover, even acts that would normally be lawful conduct – a demonstration, suspicious-seeming library research, a loan or contribution of money, assistance to someone dealing with immigration formalities, a visit to a conflict zone – could be construed as intended to “initiate or contribute to such hostile act or hostilities,” so long as the President found some basis on which to link such person’s conduct to a significant violent action (or apparent intent to commit such an action) of a group generally advocating a cause that the person might be identified with.

\(^{15}\) Third Geneva Convention, Art. 2.

\(^{16}\) In this memorandum, underlining represents the author’s added emphasis.

\(^{17}\) Rome Statute of the International Criminal Court, Art. 8(2)(f).
To elaborate on this point: the Justice Department has shown a tendency to label as "terrorism" cases charges not considered such by even the prosecutors involved. "In the first two months of [2003], the Justice Department filed charges against 56 people, labeling all the cases as "terrorism." .... [A]t least 41 of them had nothing to do with terrorism - a point that prosecutors of the cases themselves acknowledge." Among the purported "terrorism" cases were "28 Latinos charged with working illegally at [an airport] most of them using phony Social Security numbers"; "eight Puerto Ricans charged with trespassing on Navy property on the island of Vieques"; "a Middle Eastern man indicted ...for allegedly passing bad checks who has the same name as a Hezbollah leader" and "a Middle Eastern college student charged ...with paying a stand-in to take his college English-proficiency tests." 18

Operating under even less transparency and legislative oversight than the Justice Department, the military commission system will run a serious risk of comparable or greater laxness in definition.

In addition, because the "enemy," for purposes of the military commissions, includes "any entity with which the United States or allied forces may be engaged in armed conflict," 19 non-citizen financial or political supporters of self-professed national liberation movements having little to do with the United States, but in conflict with U.S. allies (say in Northern Island, or the Spanish Basque country, or possibly even Tibet or Chechnya) could also find themselves subject to military commission jurisdiction.

It is important to understand that the issue here is not whether intentional acts genuinely constituting participation, conspiracy or material support to terrorist activities should be criminalized: U.S. civilian law does provide for criminal sanction of just such acts. See, e.g., 18 U.S.C. 2331-2339B (section of criminal code defining crime of terrorism and related crimes, for trial in civilian courts). The question is whether such offenses are war crimes, and whether defendants charged with such acts, including longstanding U.S. residents, should be sidelined from the civilian criminal justice system, and so denied the normal rights associated with the presumption of innocence.

Moreover, while the military commissions authorized under the current orders only cover non-citizens, it should be kept in mind that the administration's pleadings in the cases of U.S. citizen alleged "enemy combatants" José Padilla and Yaser Hamdi have made clear the administration's view that it could broaden jurisdiction to cover U.S. citizens with the stroke of a Presidential pen.

18 See Mark Fazlollah, "Reports of Terror Crimes Inflated," Philadelphia Inquirer, May 15, 2003. See also Thomas Ginsberg, "The War on...Liberty?", Philadelphia Inquirer, June 15, 2003: "The Government... has labeled hundreds...as 'terrorists' or 'unlawful combatants' who before 9/11 would have been treated as common criminals, illegal immigrants or enemy soldiers. Last year [2002], 60 Middle Eastern students were convicted of cheating on college English-equivalency tests. The Justice Department counted them among 174 'international terrorism' cases. In January, the General Accounting Office said three-fourths of these were in fact nonterrorism convictions."

19 Military Commission Instruction No. 2, Section 5(B).
Improvements and Clarifications

The final version of the "Crimes and Elements" document does incorporate some changes that had been proposed by the Lawyers Committee for Human Rights and others. For the most part, these were clarifications of concepts that may have been intended but not clearly stated. Some changes, though, did address, at least in part, substantive matters that had raised concerns for the Lawyers Committee and for others. By comparison with the earlier draft, the final version is now clearer on several points. Examples include:

- **Ex Post Facto Liability.** A fundamental principle of due process, included, for example, in Article I, Sections 9 and 10 of the Constitution, is the prohibition against holding a person criminally responsible for conduct that was not prohibited by law at the time it was committed. Military Commission Instruction No. 2 now expressly disallows this as well: "No offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question." (Section 3(A));

- **Burden of Proof.** The burden of proof for all elements of an offense (except "lack of mental responsibility") is – as it should be – on the prosecutor (Section 4(B));

- **Defenses.** A defendant "is entitled to raise any defense available under the law of armed conflict" (Section 4(B)); and

- **"Combatant Immunity."** Combatant immunity is the right of a combatant in an armed conflict to commit violent acts against hostile combatant forces, within the limits of the laws of war. Military Commission Instruction No. 2 now confirms that any "lawful combatant" enjoys combatant immunity (Section 5(A)).

Substantive Problematic Areas Remain

While there were some improvements, most of the issues on which the Lawyers Committee expressed concern remain problematic. As with the broadened definition of "armed conflict," the concepts retained in the final document generally reflect the intent to carve out as much room as possible for the exercise of discretion by the military commission prosecutor. Such wide discretion is particularly susceptible to abuse because the entire process is limited to one branch of government (the executive) with no meaningful independent oversight or review by either the judiciary or the legislature, and none of the participants has both standing and an interest to challenge possible abuses. This dynamic is magnified in a political environment characterized by a strong penchant for executive secrecy.
The absence of independent review in the military commission system is in strong contrast to the normal military justice system, in which convictions can be appealed to civilian judges in the Court of Appeals for the Armed Forces.\(^\text{20}\)

Accordingly, the definitions used for specifying the crimes “triable by military commission” are cast quite broadly, in many cases extending significantly beyond current standards of international and even U.S. law. For example:

- **"Enemy."** Consistent with the broad definition of “armed conflict,” the term “Enemy” is also expanded substantially beyond customary usage, and could potentially cover almost any armed criminal organization, whether domestic or foreign. The term “Enemy” is defined to “include[s] any entity with which the United States or allied forces may be engaged in armed conflict ... not limited to foreign nations, or foreign organizations or members thereof.” In fact, the final version of Military Commission Instruction No. 2 substantially broadens the concept of “Enemy” even further, by comparison with the earlier draft, by extending it to cover also “any entity...which is preparing to attack the United States.” (Section 5(B)).

- **“Aiding the Enemy.”** There is no materiality requirement in the crime of “Aiding the Enemy (Section 6(B)(5)). That is, even relatively insignificant acts can result in substantial culpability – loan of a car or money; providing access to a computer; renting a room. The act need not be unlawful in itself.

- **“Spying.”** There is no materiality requirement in the crime of “Spying,” which applies to the collection of undefined “certain information.” (Indeed, there appears to be no requirement that the relevant information be secret or that its communication to the “Enemy” be harmful to the United States.) (Section 6(B)(6)).

- **“Obstruction of Justice.”** This offense is particularly vaguely defined. There need not even be a trial (only reason for the defendant to believe there is an investigation), and the criminal act could be as little as a newspaper commentary or a public speech, if the military commission concludes that the defendant “intended to influence, impede, or otherwise obstruct the due administration of justice.” Unlike the corresponding U.S. civilian criminal provision,\(^\text{21}\) there is no requirement that an act constituting “Obstruction of Justice” involve corruption or threats of force. (Section 6(B)(8)).

- **“Conspiracy.”** The conspiracy provisions allow military commission trials where the defendant had no idea that the alleged behavior bore any relation to terrorism or war. Thus a defendant may be tried before a military commission

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\(^{20}\) 10 U.S.C. 942(b)(1). Decisions of the Court of Appeals for the Armed Forces are also subject to Supreme Court review by writ of certiorari. 10 U.S.C. 867a(a).

for "Conspiracy," or for membership in an "enterprise of persons who share a common criminal purpose...[involving], at least in part, the commission or intended commission of one or more substantive offenses triable by military commission." This is so even if the unlawful offense(s), taken as a whole, are essentially outside of military jurisdiction, and even if the alleged agreement did "not include knowledge that any relevant offense is in fact 'triable by military commission.'" (Section 6(C)(6)).

**Mental Competency.**

While there is, appropriately, express acknowledgement of the possible defense of "lack of mental responsibility," there is no mention of a requirement that the defendant be mentally competent at trial. (Section 4(B)). Nor is there any restriction on the trial of children.

THE FOLLOWING SECTION ANALYZES MILITARY COMMISSION INSTRUCTIONS NOS. 1 AND 3-8

**MILITARY COMMISSION INSTRUCTION NO. 1:**

**MILITARY COMMISSION INSTRUCTIONS**

**Non-creation of Rights**

The main substantive provision in this instruction is Section 6, concerning "Non-Creation of Right [sic]." This provision denies a defendant a remedy for violation of any procedural or other protections in the Military Commission Instructions that might

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22 Where the definitions do not broaden but, rather, narrow jurisdiction, by comparison with international law, they tend to undermine rather than affirm international standards. For example:

- "Torture." With regard to "Torture," the definition of "severe mental pain or suffering" contains the requirement (absent from international law) that the mental harm be "prolonged" (Section 6(A)(11));
- "Rape." The crime of "Rape" requires that the bodily invasion be committed by use or threat of force or coercion (or be inflicted upon a "person incapable of giving consent"); more in tune with current international law would be a standard turning on lack of consent (for example, where coercion may be implicit); suggestions to incorporate this concept were rejected. (Section 6(A)(18)).

23 In addition, the final version does not reflect our suggestion to include recognition, as formulated by the American Law Institute, that "[e]vidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind that is an element of the offense," American Law Institute, Model Penal Code, Section 4.02(1).

benefit him, whether committed by the prosecutor, the military commission, or the defendant's own military or civilian defense lawyer.25

Section 6 specifies that none of the Military Commission Instructions "create any right, benefit, privilege, substantive or procedural, enforceable by any party, against the United States, its departments, agencies or other entities, its officers or employees, or any other person." This is an almost verbatim repetition of the court-stripping provision in Section 7(C) of the November 13, 2002 Military Order.

Section 6 goes on to provide that "[a]lleged noncompliance with an Instruction does not, of itself, constitute error, give rise to judicial review, or establish a right to relief for the Accused or any other person."26

MILITARY COMMISSION INSTRUCTION NO. 3:
RESPONSIBILITIES OF THE CHIEF PROSECUTOR, PROSECUTORS, AND ASSISTANT PROSECUTORS

Chief Prosecutor

The Chief Prosecutor is a judge advocate designated by the DOD General Counsel. He reports directly to the DOD "Deputy General Counsel (Legal Counsel)." He has the authority to subpoena any individual to testify or produce evidence "in a case referred to military commissions or in a [civilian] criminal investigation associated with a case that may be referred to a military commission." (Section 3(B)(1)-(3)).

Contrary to the rules of civilian trials and ordinary military trials, defense counsel in military commissions lack a corresponding power of subpoena; nor is there any basis recognized for quashing an improper subpoena. Moreover, there are no apparent controls on retention or use of subpoenaed material, whether or not used in a trial. Accordingly, there would be no checks against abuse of military commission subpoena power to obtain information that might otherwise be legally unobtainable in a civilian investigation even under the relaxed standards created under the PATRIOT Act; or abuse of such

25 Section 4(C) of Military Instruction No. 1 does provide that failure to adhere to applicable rules and regulations (including the Military Commission Instructions) "may be subject to appropriate action" by the Secretary of Defense (or designee), the DOD General Counsel, or the Presiding Officer of a military commission. But Section 6 denies standing to the only party likely to have a direct interest in uncovering and sanctioning such failures.

26 The White House insisted, in November 2001, that "[t]he [November 13 military] order preserves judicial review in civilian courts. Under the order, anyone arrested, detained or tried in the United States by a military commission will be able to challenge the lawfulness of the commission's jurisdiction through a habeas corpus proceeding in a federal court," Alberto R. Gonzales, Counsel to President Bush, "Martial Justice, Full and Fair," New York Times, November 30, 2001. But since then the administration has forcefully maintained that "unlawful combatant" detainees in Guantanamo have no right to be heard in a U.S. court, and has never indicated the slightest intent to hold military commission trials within the territorial United States. In light of the administration's positions on these issues, Counsel Gonzales' assurances about civilian judicial oversight of military commissions ring hollow.
information for other purposes extraneous to an authorized military commission investigation or prosecution.

**Prosecutors**

Prosecutors will be assigned to a case ("detailed") by the Chief Prosecutor, and may be either judge advocates or "special trial counsel of the Department of Justice who may be made available by the Attorney General." (Section 3(C)(1)).

**Statements to the Media**

Prosecutors and staff "may communicate with news media representatives regarding cases and other matters related to military commissions only when approved by the Appointing Authority" or the General Counsel of the Department of Defense." (Section 5(C)). (Media communications are discussed below in the context of Military Commission Instruction No. 4.)

**MILITARY COMMISSION INSTRUCTION NO. 4:** RESPONSIBILITIES OF THE CHIEF DEFENSE COUNSEL, DETAILED DEFENSE COUNSEL, AND CIVILIAN DEFENSE COUNSEL

**Chief Defense Counsel**

The Chief Defense Counsel is a judge advocate designated by the DOD General Counsel. He reports directly to the DOD "Deputy General Counsel (Personnel and Health Policy)." (Section 3(B)(1)-(2)).

He "may not detail himself to perform the duties of Detailed [assigned military] Defense Counsel, nor does he form an attorney-client relationship with an accused person or incur any concomitant confidentiality obligations," though he may "structure the Office of the Chief Defense Counsel so as to include subordinate supervising attorneys who may incur confidentiality obligations in the context of fulfilling their supervisory responsibilities with regard to Detailed Defense Counsel." (Section 3(B)(1)-(2), (8)).

Accordingly, both the civilian defense lawyer (if any) and the assigned military defense lawyer in a particular case will be supervised by an officer, the Chief Defense Counsel, who will have no obligation to maintain confidentiality regarding the defendant's case. Moreover, that same officer will be responsible for discovering and sanctioning alleged breaches of applicable rules by the defense lawyers, particularly alleged breaches regarding "Protected Information." 27

27 *I.e.*, the Secretary of Defense or a designee. Military Commission Order No. 1 (March 21, 2002), Section 2.

28 The Chief Defense Counsel "shall supervise all Defense Counsel and other personnel assigned to the Office of the Chief Defense Counsel." (Section 3(B)(6); 3(B)(10)). This includes both Detailed [assigned
These arrangements are virtually guaranteed to assure an atmosphere of distrust between the civilian lawyer, on the one hand, and the military lawyer and the Chief Defense Counsel, on the other; they equally undermine the likelihood of candid communication between the defendant and his lawyer(s).

Another responsibility of the Chief Defense Counsel is to police a prohibition on possible defense strategies involving "Common Interest Arrangements." Such arrangements, common in federal multi-defendant cases, allow counsel to discuss their views and evidence candidly with co-defendants and co-defendants' counsel. Among other things, the prohibition of Common Interest Arrangements prevents counsel from discussing with each other even purely legal strategy without waiving privilege, and also from pooling resources, such as hiring of legal or other expertise or fact investigators, a particularly significant disability for civilian defense lawyers, who will almost certainly be covering their own expenses. It could also prevent a defendant possessing exculpatory information from sharing it with another similarly situated defendant.

Detailed Defense Counsel

Detailed [assigned military] Defense Counsel will be judge advocates who are detailed to a case by the Chief Defense Counsel. (Section 3(B)(8)). Such counsel "shall" represent an Accused "notwithstanding any intention expressed by the Accused to represent himself." (Section 3(C)(2)).

This is another abridgement of defense rights regarding a matter (pro se representation) obviously of high sensitivity to the government (which should be viewed in light of the Administration's frustrations in the federal trial of Zacarias Moussaoui).

Detailed [assigned military] Defense Counsel shall monitor all qualified Civilian Defense Counsel for compliance with all rules, regulations, and instructions governing military commissions...[and] will report all instances of noncompliance with [such] rules, regulations, and instructions...to the Appointing Authority and to the General Counsel of the Department of Defense with recommendation as to any appropriate action..." (Section 5(E)(5)).

Section 3(B)(10) mandates the Chief Defense Counsel to "ensure that Defense Counsel do not enter into agreements with other Accused or Defense Counsel that might cause them or the Accused they represent to incur an obligation of confidentiality with such other Accused or Defense Counsel or to effect some other impediment to representation." (See also Section 5(A.).) The ethical propriety of Common Interest Arrangements, and the reciprocal relation of privilege established by them between one defendant and his lawyer and the other defendant and his lawyer, is well established. See, for example, Section 76 of the American Law Institute's Restatement of the Law Governing Lawyers (2000), which provides: "(1) If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged under Sections 68-72 that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication....." See also the draft Code of Conduct & Disciplinary Procedure of the International Criminal Bar (2003), Art. 7, substantially to the same effect.
The principle of right to representation by counsel of one's choice naturally encompasses the right to represent oneself. Though often deemed imprudent by lawyers, defendants since the time of Socrates have found rational reasons for choosing to be their own attorneys. A defendant might easily consider the absence of effective attorney-client privilege alone as sufficient grounds for choosing to dispense with services of a defense counsel.

**Selected Detailed Defense Counsel**

"The Accused may select a judge advocate... to replace the Accused's Detailed [assigned military] Defense Counsel, provided that judge advocate has been determined to be available by the Chief Defense Counsel in consultation with the Judge Advocate General of that judge advocate's military department." (Section 3(D)1)).

**Qualified Civilian Defense Counsel**

At no expense to the United States, an Accused may retain a civilian attorney of the Accused's choosing "to assist in the conduct of his defense... provided that the civilian attorney retained has been determined to be qualified pursuant to Section 4(C)(3)(b) of [the March 21, 2002 Military Commission Order No. 1]." 31

As noted above, the Civilian Defense Counsel will answer to the Chief Defense Counsel, who will, however, not be bound by legal privilege (Section 3(B)(6); 3(E)(5)); and the Chief Defense Counsel will also be the one who "administer[s] the Civilian Defense Counsel pool, screening all requests for pre-qualification and ad hoc qualification, making qualification determinations and recommendations... and ensuring appropriate notification to an Accused of civilian attorneys available to represent Accused before a military commission." (Section 3(B)(13)). The right of the Accused to select Qualified Civilian Defense Counsel is hampered further by the condition that "retention of Civilian Defense Counsel shall not unreasonably delay military commission proceedings." (Section 3(E)(2)).

**Access to Protected Information**

"Neither qualification of a Civilian Defense Counsel for membership in the pool of available Civilian Defense Counsel nor the entry of appearance in a specific case

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30 See, e.g., Para. II(l) of the Civilian Defense Counsel's compulsory Affidavit (Appendix B to Military Commission Instruction No. 5) (discussed below), which provides for monitoring of attorney-client communications by government officials, without, apparently, notice to lawyer or client.

31 The qualification conditions set out in the March 21 Military Commission Order are elaborated on in Military Commission Instruction No. 5: Qualification of Civilian Defense Counsel, discussed below. "Civilian attorneys may be prequalified as members of the pool of attorneys eligible to represent Accused before military commissions at no expense to the United States, if, at the time of application, they meet the eligibility criteria... [as] detailed in [Military Commission Instruction No. 5], or they may be qualified on an ad hoc basis after being requested by an accused." (Military Commission Instruction No. 5, Section3(A)(1)).
guarantees that counsel's presence at closed military commission proceedings or access to information protected under Section 6(D)(5) of [the March 21, 2002 Military Commission Order No. 1].” (Section 3(E)(4)).

Civilian Defense Counsel may also be denied access to undefined “state secrets” under Section 9 of the March 21, 2002 Military Commission Order No. 1. When the President's original November 13, 2001 Military Order was issued, White House Counsel Alberto Gonzales assured the public that the contemplated “[m]ilitary commission trials are not secret....The president’s order authorizes the secretary of defense to close proceedings to protect classified information [but does not require secret proceedings].”32 The definition of “Protected Information,” under the referenced sections of Military Commission Order No. 1, however, is far broader, and much less clearly defined, than “classified information.” In addition to the vague “state secrets,” “Protected Information” includes not just “classified” but also “classifiable” information, as well as “information concerning other [undefined] national security interests.” Defense counsel will have no standard, and no procedure, by which they can challenge withholding of information, and, in many cases, will likely not even know of the existence of such information.

Statements to the Media

As with Prosecutors, “[p]ersonnel assigned to the Office of the Chief Defense Counsel, as well as members of the Civilian Defense Counsel pool and associated personnel may communicate with news media representatives regarding cases and other matters related to military commissions only when approved by the Appointing Authority or the General Counsel of the Department of Defense.”

Inclusion of members of the civilian lawyer “pool” even if they are not involved in a case, and application of this gag rule not only to case-related communications but to “other matters related to military commissions” as well, could severely limit the universe of knowledgeable lawyers allowed to speak publicly regarding military commission proceedings. These free-speech restrictions seem particularly difficult to justify even on an expansive interpretation of national security requirements. While government officials familiar with, but not directly involved in, a prosecution – including the Secretary of Defense and the DOD General Counsel – will be free to provide to the media the government's interpretation of the proceedings, media access to the defense perspective will be strictly limited.33

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33 Section 5(C) of Military Commission Instruction No. 3 imposes similar communications restrictions only upon “[p]ersonnel assigned to the Office of the Chief Prosecutor.”
MILITARY COMMISSION INSTRUCTION NO. 5: QUALIFICATION OF CIVILIAN DEFENSE COUNSEL

Qualification Conditions

As set out in Section 4(C)(3)(b) of the March 21, 2002 Military Commission Order No. 1, and further elaborated in Section 3(A)(2) of Military Commission Instruction No. 5, the following conditions apply, whether the applicant seeks membership in the pool of eligible attorneys, or qualification on an ad hoc basis after being requested by an Accused:

1. U.S. citizenship.
2. Admission to practice of law in a State, district, territory or possession of the United States, or before a Federal court.
3. Absence of any sanction or disciplinary action by any court, bar, or other competent governmental authority for “relevant misconduct.”
4. Determination of eligibility for access to information classified at the level SECRET or higher. (Those not already eligible must consent to a background investigation and “pay any actual costs associated with the processing of the same.”)
5. Written agreement to comply with all applicable regulations or instructions for counsel, including any rule of court (as set out in a signed affidavit in the form attached as Annex B to Military Commission Instruction No. 5).

Application materials are reviewed and approved or rejected by the Chief Defense Counsel, “[subject to review by the General Counsel of the Department of Defense.”

The Chief Defense Counsel’s review in particular “include[s] determinations as to whether any sanction, disciplinary action, or challenge is related to relevant misconduct that [in the view of the Chief Defense Counsel or the Defense Department General Counsel] would disqualify the Civilian Defense Counsel applicant.” (Section 3(B)(4)). There appears to be no provision for appeal by the applicant (or his potential client) of an adverse determination.

Affidavit and Agreement by Civilian Defense Counsel (Appendix B to Military Commission Instruction No. 5).

Among other agreements and undertakings, the Civilian Defense Counsel agrees and/or acknowledges that:

1. Qualification as a Civilian Defense Counsel “does not guarantee [Counsel’s] presence at closed military commission proceedings or guarantee...access to any[protected] information.” (Para. I(A)).
2. Civilian Defense Counsel "will ensure that these proceedings are [his or her] primary duty....[and] will not seek to delay or to continue the proceedings for reasons relating to matters that arise in the course of [his or her] law practice or other professional or personal activities that are not related to military commission proceedings." (Para. II(B)). This could prevent a defense lawyer from taking on any other employment for the duration of a military commission trial (the precise dating of which may be unpredictable). This restriction seems an unreasonably burdensome condition to impose on civilian lawyers who will likely be working without receiving a fee and without reimbursement for expenses.34

3. "Recognizing that [his or her] representation does not relieve Detailed [assigned military] Defense Counsel of [his or her] duties... [Civilian Defense Counsel] will work cooperatively with such [Detailed Defense] counsel to ensure coordination of efforts and to ensure such counsel is capable of conducting the defense independently if necessary." (Para. II(D)). The military defense counsel must be fully included in the preparation and conduct of the trial even when the client has expressed a preference not to be represented by the military lawyer.35

4. Civilian Defense Counsel agrees that "[d]uring the pendency of the proceedings, unless [he or she] obtain[s] approval in advance from the Presiding Officer [of the military commission] to do otherwise, [he or she] will comply with [specified] restrictions on...travel and communications.... [Defense Counsel] will not travel or transmit documents from the site of the proceedings without the approval of the Appointing Authority or the Presiding Officer. [The Defense Counsel and the Defense Team] will otherwise perform all of [their] work relating to the proceedings, including any electronic or other research, at the site of the proceedings [except for post-trial proceedings]." (Para. II(E)(1)). Civilian defense lawyers could find themselves virtual prisoners at Guantanamo or some other distant site.

5. Civilian Defense Counsel "will not discuss or otherwise communicate or share documents or information about the case with anyone except persons who have been designated as members of the Defense Team in accordance with... applicable rules, regulations and instructions....At no time, to include any period subsequent to the conclusion of the proceedings, will [Civilian Defense Counsel] make any public or private statements regarding any closed sessions of the proceedings or any classified [or other protected]...information...."

34 Civilian Defense Counsel must agree to "make no claim against the U.S. Government for any fees or costs associated with [their] conduct of the defense or related activities or efforts." (Para. II(C)).
35 Military Commission Instruction No. 4, Section 3(C)(2).
Civilian Defense Counsel agrees that, in addition to him or herself, "the Defense Team shall consist entirely of... Detailed [military] Defense Counsel, and other personnel provided by the Chief Defense Counsel, the Presiding Officer, or the Appointing Authority." (Para. II(C), (E)(2) and (F)). Civilian Defense Counsel will thus be prohibited from consulting with other lawyers, law professors or similar experts regarding even purely legal issues, unless such individuals have agreed — and been accepted by the Chief Defense Counsel — to participate as official members of the legal team. Moreover, Civilian Defense Counsel will have no right to engage technical experts of their choice — in forensic medicine, accounting, ballistics, theology, regional studies or other relevant disciplines; and there is no indication that the Defense Department will be willing, or even able, to make experts in such fields available to a Defense Team. In addition, these restrictions appear to foreclose discussions even with potential or actual defense witnesses.

6. "[T]here may be reasonable restrictions on the time and duration of contact [Civilian Defense Counsel] may have with [his or her] client, as imposed by the Appointing Authority, the Presiding Officer, detention authorities, or regulation." (Para. II(H)).

7. "Communications with [the] 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.... [A]ny such monitoring will only take place in limited circumstances when approved by proper authority, and... any evidence or information derived from such communications will not be used in proceedings against the Accused who made or received the relevant communication.... [C]ommunications are not protected if they would facilitate criminal acts or a conspiracy to commit criminal acts, or if those communications are not related to the seeking or providing of legal advice." (Para. II(I)). The "proper authority" charged with approving such monitoring is not identified, nor does it appear that in a particular case such authority need be identified to the civilian lawyer. There appears to be no requirement of notice to the attorney or client that such monitoring is occurring or has occurred.

8. Civilian Defense Counsel also undertakes to "reveal to the Chief Defense Counsel and any other appropriate authorities information relating to the representation of [the] client to the extent that [Civilian Defense Counsel] reasonably believe[s] is likely to result in death or substantial bodily harm, or significant impairment of national security." (Para. II(J)). Together with the monitoring of attorney-client communications, and particularly in light of the vagueness of the phrase "significant impairment of national security," this provision can be expected to place a serious chill over both parties in attorney-client consultations.
MILITARY COMMISSION INSTRUCTION NO. 6:
REPORTING RELATIONSHIPS FOR MILITARY COMMISSION PERSONNEL

This instruction largely sets forth reporting relationships referred to in the other
Military Commission Instructions, the more important of which are mentioned
above in this memorandum. The Instruction does specify that military
commission panel members continue to report to their parent commands; and it
properly stipulates that "[t]he consideration or evaluation of the performance of
duty as a member of a military commission is prohibited in preparing
effectiveness, fitness, or evaluation reports of a commission member," a helpful if
inadequate affirmation of the principle of impartiality. (Para. 3(A)(8)).

MILITARY COMMISSION INSTRUCTION NO. 7:
SENTENCING

Sentencing

As specified in Section 6(F) and (G) of the March 21, 2002 Military Commission
Order No. 1, voting is on a standard of "beyond a reasonable doubt," and
convictions - including for capital offenses - require two-thirds vote of the
commission members. Sentences are voted on separately from verdicts, with all
sentences except death requiring two-thirds vote. A sentence of death requires a
unanimous vote. Only a panel of seven members may sentence an Accused to
death.

Military Commission Instruction No. 7 provides that "wide latitude in sentencing"
is permitted. "The sentence determination should be made while bearing in mind
that there are several principal reasons for a sentence given to those who violate
the law. Such reasons include: punishment of the wrongdoer; protection of
society from the wrongdoer; deterrence of the wrongdoer and those who know of
his crimes and sentence from committing the same or similar offenses; and
rehabilitation of the wrongdoer..."[T]he weight to be accorded any or all of these
reasons rests solely within the discretion of commission members." (Section
3(A)).

Plea Bargaining

Any plea agreement must be approved by the Appointing Authority (Secretary of
Defense or his designee); and any approved plea agreement must be complied
with by the military commission, subject to the commission's determination that
the agreement is voluntary and informed. (Section 4(C)).
MILITARY COMMISSION INSTRUCTION NO. 8: ADMINISTRATIVE PROCEDURES

Appointment and Removal of Commission Members

The Appointing Authority appoints panels of three to seven members (plus one or two alternates). Members may be removed by the Appointing Authority for good cause. (Section 3(A)(1)).

Interlocutory Questions

Generally, the Presiding Officer adjudicates all motions and questions arising during the course of a trial. The Presiding Officer shall, however, certify for decision by the Appointing Authority "all interlocutory questions, the disposition of which would effect a termination of proceedings with respect to a charge"; and may certify any other interlocutory questions he "deems appropriate." (Section 4(A)).

Motions

"The Presiding Officer shall rule on appropriate motions or, at his discretion...may submit them to the commission for decision or to the Appointing Authority as a certified interlocutory question." (Section 5).

Exculpatory Information

Section 6(B) of Military Commission Instruction No. 8 states that "[t]he Prosecution shall provide the Defense with access to evidence known to the Prosecution that tends to exculpate the Accused as soon as practicable, and in no instance later than one week prior to the scheduled convening of a military commission." Unfortunately, this promise is undercut by the March 21, 2002 Military Commission Order No. 1, which permits withholding of "Protected Information" — including potentially exculpatory evidence — from even the military defense counsel, if the Prosecution does not intend to introduce such evidence at trial.36

Section 6(D)(5)(b)) of the March 21, 2002 Military Commission Order No. 1 provides that "[t]he Presiding Officer, upon a motion of the Prosecution or sua sponte, shall, as necessary to protect the interests of the United States, direct (i) the deletion of specified items of Protected Information from documents to be made available to the Accused, Detailed Defense Counsel, or Civilian Defense Counsel; (ii) the substitution of a portion or summary of the information for such

36 Section 7(B) of the March 21, 2002 Military Commission Order No. 1 establishes that that Order prevails in the event of any inconsistency between it and any subsequent regulations and instructions.
Protected Information; or (iii) the substitution of a statement of the relevant facts that the Protected Information would tend to prove.” Such a Prosecution motion “shall, upon request of the Prosecution, be considered by the Presiding Officer ex parte [without the presence of defendant or defense counsel] in camera [in secret], but no Protected Information shall be admitted into evidence for consideration by the Commission if not presented to Detailed [assigned military] Defense Counsel.”

This means that both the substance — and even the existence — of potentially exculpatory information may be withheld from the defendant and the entire Defense team if the commission finds its non-disclosure, as Protected Information, appropriate.

37 Commenting on Section 6(D)(5)(b) of the March 21, 2002 Military Commission Order No. 1, the National Institute of Military Justice notes that “Allowing an accused to be convicted on the basis of information he or she has not seen raises concerns under the Sixth Amendment’s Confrontation Clause. The military courts have long held that the Confrontation Clause applies to trials by court-martial.” National Institute of Military Justice, Annotated Guide, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (2002), pp. 58-59 (citations omitted).
The U.S. government is moving closer to convening the military commissions authorized by President Bush in November 2001 to try suspected terrorists. Despite President Bush's oft-repeated insistence that the war on terror is a war to affirm and protect basic human rights, the rules for the proposed commissions fall far short of international due process standards.

If the proposed commissions try terrorist suspects under the existing military orders and instructions, the trials will undermine the basic rights of defendants to a fair trial; yield verdicts – possibly including death sentences – of questionable legitimacy; and deliver a message worldwide that the fight against terrorism need not respect the rule of law.

The Department of Defense has issued a series of orders and instructions governing most aspects of the commissions, from their basic organization, to the crimes to be prosecuted.1 These rules incorporate certain due process safeguards into the commissions, including the presumption of innocence, proceedings open to the public, and the presentation of evidence and cross examination of witnesses. Important as they are, these provisions cannot overcome the cumulative impact of other provisions that militate against fairness. They provide a patina of due process to proceedings that are otherwise deeply flawed.

Under the current rules, the commissions will:

- Deprive defendants of a trial by an independent court.
- Improperly subject criminal suspects to military justice.
- Try prisoners of war (POWs) in a manner that violates the 1949 Geneva Conventions.
- Provide lower due process standards for non-citizens.
- Restrict the right to choose one's defense counsel.
- Deprive defense counsel the means to prepare an effective defense.
- Impose a gag order on defense counsel.

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1 Since President Bush issued Military Order of November 13, 2001 authorizing military commissions, the Department of Defense has released several instructions setting out the applicable law and procedure: Military Commission Order No. 1 (MCO No. 1), issued March 21, 2002; a draft set of crimes and elements released on February 28, 2003 for public comment; and a set of eight final Military Commission Instructions (MClS) released on April 30, 2003.
Under the military commission rules, an offense prosecutable by the commissions must have taken place "in the context of and was associated with armed conflict." The definition of an armed conflict under the commission rules is so broad, however, that virtually any terrorist act anywhere in the world would be within the commission's jurisdiction. The defendant's conduct need only be distantly or vaguely related to a traditional battlefield. According to the rules, the nexus between the defendant and armed conflict:

could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities.... This element does not require a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war," or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force.

This explanation leaves open the possibility that the Bush administration—which has stated it is engaged in a global war against terrorism—might well consider any violent act by any suspected member of al-Qaeda anywhere in the world to be "associated with armed conflict." For instance, a non-U.S. national living in the United States could be tried by a military commission for the crime of "aiding the enemy" if he sent funds to al-Qaeda. The question is not whether such conduct can properly be criminalized, but rather which court should exercise jurisdiction.

Under the commission rules, criminal acts that should be prosecuted by a U.S. civilian court can easily be deemed to have the necessary nexus to an armed conflict and thus be prosecutable by the military commissions. Such a misuse of military courts to try civilians would be an evasion of U.S. obligations to conduct fair trials under international human rights law.

Military Commission Jurisdiction Over POWs

The U.S. military order and instructions are inconsistent with provisions of the 1949 Geneva Conventions relating to the prosecution of prisoners of war (POWs). Under the Third Geneva Convention, a POW can be validly sentenced only if tried by "the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power," and "shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him."

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7 MCI, No. 2, 5(C).
9 MCI, No. 2, 5(C).
10 MCI No. 2, 6(B)(5).
12 Ibid: art. 106.
prosecuted before them. We are concerned, however, that it will be extremely difficult for a court under the direct authority of the executive branch to reach an independent and impartial finding on this issue.

Second-Class Justice for Non-Citizens

The President's Military Order authorizing the commissions restricts their jurisdiction to persons who are not U.S. citizens. U.S. citizens may not be tried before the commissions, regardless of whether they were combatants who committed war crimes. This exclusion presumably reflects a political judgment that the U.S. public would not accept the truncated justice of commission proceedings for U.S. citizens. International human rights law, however, does not permit countries to discriminate between citizens and non-citizens with regard to their fair trial rights.\(^{18}\) The fact that a person is not a U.S. citizen should not be used as an excuse to weaken protections for their internationally recognized rights.

Right to Counsel of Choice

The military commission instructions provide for the mandatory appointment of a military defense counsel for the defendant, who would have the right to request a different military counsel. The defendant may also retain, at his own expense, private counsel, but military counsel would remain assigned to the defense team. As the instructions state, the “\[a\]ccused must be represented at all relevant times by Detailed Defense Counsel [military defense counsel].”\(^{19}\)

The right to counsel of choice is an integral component of a fair trial – one recognized in international and U.S. law, including the rules for courts-martial. Nevertheless, the Department of Defense instructions for military commissions violate this fundamental right by requiring the defendant to accept a military lawyer and by denying the defendant the right to either represent himself or to be represented solely by private counsel.\(^{20}\)

In the United States, low-income defendants who cannot afford to retain their own private counsel as a practical matter must accept lawyers assigned to them by a public defender or legal services organizations. Yet these lawyers are independent of the government. In the case of the military commissions, however, the defendants will be compelled to conduct a defense with counsel provided by, and under the ultimate authority of, the executive branch that is prosecuting and judging them.

We do not question the ability or willingness of military defense lawyers to represent zealously and competently anyone brought to trial before the military commissions. But there is no lawful basis for denying a defendant tried before military commissions the ability of conducting a

\(^{18}\) ICCPR, art. 14 (“All persons shall be equal before the courts and tribunals”).

\(^{19}\) MCO No. 1, (4)(C)(4).

\(^{20}\) Article 14 of the ICCPR provides that everyone charged with a criminal offense shall have the right “to communicate with counsel of his own choosing.” The Human Rights Committee has interpreted this to include a right of persons to defend themselves. See Human Rights Committee, Hill and Hill v. Spain (526/1993).
paralegals and other lawyers to work on aspects of the case that do not entail protected or classified information.

Defense Travel Restrictions: Defense attorneys must also obtain permission from military authorities to travel to and from the site of the proceedings and to transmit documents from there unless they receive prior approval from the Presiding Officer, the head of the commission.26

The rules suggest that the Presiding Officer may give approval to modify these travel and communication restrictions. Nevertheless, they give scant guidance as to the criteria by which the Presiding Officer should respond to defense attorney requests.27 Nothing requires a Presiding Officer, for example, to exercise discretion according to the criteria of enabling a meaningful defense. Leaving the ability of the defense team to develop the facts necessary to represent their client to the unfettered discretion of the commission violates the most basic notion of the right to a defense.

On June 4, 2003 Human Rights Watch spoke with Major John Smith, the Judge Advocate Spokesman in the Office of Military Commissions at the Department of Defense concerning the travel and communications restrictions. Major Smith acknowledged that the literal language of the rules could be read research off-site and limiting attorney communications beyond what is necessary to protect national security information. He stated that the issue was currently under review for clarification so that the language would “not be read with unintended results.”

Attorney-Client Confidentiality: Defense counsel must represent their clients knowing that any communications with them may be monitored by government officials for “security and intelligence purposes.”28 Such conversations are traditionally covered by the attorney-client privilege of confidentiality, to encourage clients to confide openly with their attorneys. The ability to communicate candidly and effectively with one’s attorney is inherent in the right to counsel, which in turn, helps secure the overarching right of due process and a fair trial. The U.S. government’s willingness to profoundly compromise these rights is deeply troubling. Moreover, it forces attorneys who represent defendants before the military commissions to do so knowing the applicable rules are likely to impede the open communication essential for constructing a proper defense.

Security Restrictions on Civilian Defense Lawyers: The military commission rules deny civilian counsel with appropriate security clearance the same access to protected information as military counsel. They authorize the Secretary of Defense or his designate, or the Presiding Officer, to close proceedings on broad grounds, such as to protect “intelligence and law enforcement sources, methods, or activities; and other national security interests.”29 Civilian defense counsel, unlike military counsel, may be excluded from closed military commission proceedings.30 The commission rules also authorize the Presiding Officer to issue protective orders to safeguard

26 MCI No. 5, Annex B, II(E).
27 Military Commission Order No. 1 charges the Presiding Officer with ensuring the “expeditious conduct of the trial.” MCO No. 1, 4(A)(5)(c).
28 MCI No. 5, Annex B, II(I).
29 MCO No. 1, 6(B)(3).
30 MCI No. 4, 3(E)(4).
rules imposed by the commission rules on defense attorneys silence far more than the disclosure of such information. For example, the rules would prohibit defense attorneys from stating to the press that commission evidentiary rulings were prejudicial to their client. The rules also would prohibit defense attorneys from ever commenting on whether closed proceedings were conducted in ways that safeguarded defendants’ due process interests – even if no classified or protected information would be disclosed in such comments – or even noting publicly how much of the trial consisted of closed proceedings.

While the rules suggest defense attorneys may seek prior approval for public statements that would otherwise be prohibited, they do not contain any criteria to guide military authorities considering such requests. There is, for example, no requirement that any such request must be granted as long as protected national security information is not revealed.

**Conclusion**

All of the problems we have outlined above can be corrected. All of them should be. The United States should ensure that those tried before military commissions receive trials that are a credit to American justice, not a stain on its history.
ANNEX B to Department of Defense Military Commission Instruction No. 5, "Qualification of Civilian Defense Counsel"

AFFIDAVIT AND AGREEMENT BY CIVILIAN DEFENSE COUNSEL

Pursuant to Section 4(C)(3)(b) of Department of Defense Military Commission Order No. 1, "Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism," dated March 21, 2002 ("MCO No. 1"), Military Commission Instructions No. 4, "Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel" ("MCI No. 4") and No. 5, "Qualification of Civilian Defense Counsel" ("MCI No. 5"), and in accordance with the President's Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (Nov. 16, 2001) ("President's Military Order"), I [Name of Civilian Attorney], make this Affidavit and Agreement for the purposes of applying for qualification as a member of the pool of Civilian Defense Counsel available to represent Accused before military commissions and serving in that capacity.

I. **Oaths or Affirmations.** I swear or affirm that the following information is true to the best of my knowledge and belief:

A. I have read and understand the President's Military Order, MCO No. 1, MCI No. 4, MCI No. 5, and all other Military Commission Orders and Instructions concerning the rules, regulations and instructions applicable to trial by military commissions. I will read all future Orders and Instructions applicable to trials by military commissions.

B. I am aware that my qualification as a Civilian Defense Counsel does not guarantee my presence at closed military commission proceedings or guarantee my access to any information protected under Section 6(D)(5) or Section 9 of MCO No. 1.
II. **Agreements.** I hereby agree to comply with all applicable regulations and instructions for counsel, including any rules of court for conduct during the course of proceedings, and specifically agree, without limitation, to the following:

A. I will notify the Chief Defense Counsel and, as applicable, the relevant Presiding Officer immediately if, after the execution of this Affidavit and Agreement but prior to the conclusion of proceedings (defined as the review and final decision of the President or, if designated, the Secretary of Defense), if there is any change in any of the information provided in my application, including this Affidavit and Agreement, for qualification as member of the Civilian Defense Counsel pool. I understand that such notification shall be in writing and shall set forth the substantive nature of the changed information.

B. I will be well-prepared and will conduct the defense zealously, representing the Accused throughout the military commission process, from the inception of my representation through the completion of any post trial proceedings as detailed in Section 6(H) of MCO No. 1. I will ensure that these proceedings are my primary duty. I will not seek to delay or to continue the proceedings for reasons relating to matters that arise in the course of my law practice or other professional or personal activities that are not related to military commission proceedings.

C. The Defense Team shall consist entirely of myself, Detailed Defense Counsel, and other personnel provided by the Chief Defense Counsel, the Presiding Officer, or the Appointing Authority. I will make no claim against the U.S. Government for any fees or costs associated with my conduct of the defense or related activities or efforts.

D. Recognizing that my representation does not relieve Detailed Defense Counsel of duties specified in Section 4(C)(2) of MCO No. 1, I will work cooperatively with such counsel...
to ensure coordination of efforts and to ensure such counsel is capable of conducting the defense independently if necessary.

E. During my representation of an Accused before military commissions, unless I obtain approval in advance from the Appointing Authority or the Presiding Officer to do otherwise, I will comply with the following restrictions on my travel and communications:

1. I will not discuss, transmit, communicate, or otherwise share documents or information specific to the case with anyone except as is necessary to represent my client before a military commission. In this regard, I will limit such discussion, transmission, communication or sharing to: (a) persons who have been designated as members of the Defense Team in accordance with applicable, rules, regulations, and instructions; (b) commission personnel participating in the proceedings; (c) potential witnesses in the proceedings; or (d) other individuals with particularized knowledge that may assist in discovering relevant evidence in the case. In the case of doubt, I understand that I have an affirmative duty to request clarification from the Appointing Authority or Presiding Officer before discussing, transmitting, communicating, or otherwise sharing documents or information. I understand that nothing in this agreement allows me to disregard any laws, rules, regulations, or instructions governing the handling of classified information and material, or other Protected Information.

2. Once proceedings have begun, I will not travel from the site of the proceedings without the approval of the Appointing Authority or the Presiding Officer.
F. At no time, to include any period subsequent to the conclusion of the proceedings, will I make any public or private statements regarding any closed sessions of the proceedings or any classified information or material, or document or material constituting protected information under MCO No. 1.

G. I understand and agree to comply with all rules, regulations and instructions governing the handling of classified information and material or other Protected Information.

H. I understand that there may be reasonable restrictions on the time and duration of contact I may have with my client, as imposed by the Appointing Authority, the Presiding Officer, detention authorities, or regulation.

I. 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. I further understand that communications are not protected if they would facilitate criminal acts or a conspiracy to commit criminal acts, or if those communications are not related to the seeking or providing of legal advice.

J. I agree that I shall reveal to the Chief Defense Counsel and any other appropriate authorities, information relating to the representation of my client to the extent that I reasonably believe necessary to prevent the commission of a future criminal act that I believe is likely to result in death or substantial bodily harm, or significant impairment of national security.
K. I understand and agree that nothing in this Affidavit and Agreement creates any substantive, procedural, or other rights for me as counsel or for my client(s).

/s/ __________________________
Print Name: ____________________
Address: ______________________
Date: _________________________

STATE OF

) )

COUNTY OF

) )

Sworn to and subscribed before me, by _______________, this ___ day of
__ ______, 20__.  
Notary
My commission expires:
Letter to Department of Defense General Counsel Haynes

Urging Revision of Rules that Restrict the Right to Counsel and to Present a Defense before U.S. Military Commissions

June 10, 2003

William Haynes
General Counsel
Department of Defense
1600 Defense Pentagon
Washington, DC 20301-1600

Dear Mr. Haynes:

We write regarding the rules that pertain to legal representation for defendants before military commissions.

The U.S. military justice system has long recognized that fair trials cannot occur without the ability of defendants to be represented by counsel of their choice and that such counsel must be able to mount a vigorous defense, including by the production of witnesses and evidence on their clients’ behalf. Consistent with this tradition and international human rights and humanitarian law, the right to counsel is one of the due process safeguards incorporated in the military commissions proceedings authorized by President Bush for the trial of suspected terrorists.

Yet the rules for the military commissions, contained in both Military Commission Order No. 1, issued March 21, 2002, and the set of eight Military Commission Instructions, issued on April 30, 2003, include significant and, in our view, wholly unwarranted limitations on the right to counsel. We understand that certain restrictions on counsel may be necessary to protect classified or sensitive national security information. The instructions, however, extend restrictions that are far broader than necessary for that purpose.

We urge you to clarify or amend the instructions to ensure any restrictions on counsel are consistent with the right to counsel and its crucial role in fair trials and are crafted as narrowly as possible to meet legitimate government interests. The specific restrictions that are of concern to us are the following:

1. Right to Counsel of Choice

The military commission instructions provide for the mandatory appointment of a military defense counsel for the defendant, who would have the right to request a different military counsel. The defendant may also retain, at his own expense, private counsel, but military counsel would remain assigned to the defense team. As the instructions state, the “[a]ccused must be represented at all relevant times by Detailed Defense Counsel [military defense counsel].”

The right to counsel of one’s choice is an integral component of a fair trial - one recognized in international and U.S. law, including the rules for courts-martial. Nevertheless, the Department of Defense instructions for military commissions violate this fundamental right by requiring the defendant to accept a military lawyer and by denying the defendant the right to either represent himself or to be represented solely by private counsel.

In the United States, low-income defendants who cannot afford to retain their own private counsel as a practical matter must accept lawyers assigned to them by a public defender or legal services organizations. Yet these lawyers are independent of the government. In the case of the military commissions, however, the defendants will be compelled to conduct a defense with counsel provided by, and under the ultimate authority...
of, the executive branch that is prosecuting and judging them.

We do not question the ability or willingness of military defense lawyers to represent zealously and competently anyone brought to trial before the military commissions. There is no lawful basis, however, for denying a defendant the ability to conduct a defense without the participation of military defense lawyers. The ability to represent oneself or to be represented solely by private counsel takes on added significance in the context of foreign persons who were captured in Afghanistan or other countries and held as military prisoners at Guantánamo. For reasons of culture, personal history, and the conditions of their imprisonment, many of those detainees may never fully trust or cooperate with U.S. military counsel assigned to them. Such trust and cooperation are, of course, vital to an effective defense.

2. Restrictions on Effective Defense

The military commission rules impose severe limitations on the ability of defense counsel - both military and civilian lawyers - to mount an effective defense of their clients. Restrictions on travel, research, and communications "during the pendency of the proceedings" are spelled out in the affidavit civilian lawyers for the commissions are required to sign and with which military defense counsel must comply. Taking the rules at face value, defense representation could be limited to concocting legal arguments from a room in Guantánamo, with no leeway to interview witnesses or gather evidence elsewhere.

Evidence Gathering: Counsel may not "discuss or otherwise communicate or share documents or information about the case with anyone" except members of the "Defense Team." The provision is far broader than necessary to meet legitimate national security concerns, e.g. to ensure that classified documents or information obtained during the trial proceedings are not passed on to terrorist organizations. The excessive breadth of the restriction on attorney communications significantly limits the ability of counsel to mount a meaningful defense. Read literally, the provision would prevent lawyers from trying to locate and talk to prospective witnesses, conversations that would necessarily include discussion of at least some aspects of a case.

In addition, the rules mandate that all work by defense lawyers relating to the commission proceedings, including electronic or other research, be done at the site of the proceedings. Requiring all defense work to be done at Guantánamo or other site of commission proceedings makes constructing an effective defense nearly impossible. On their face, these rules prevent members of the defense team from leaving Guantánamo to locate and interview potentially exculpatory eyewitnesses in Afghanistan or other countries. They would not be able to travel to locate and review useful documents. They would not be able to investigate the scene of the alleged conduct. In addition, the rules would prevent civilian attorneys from using stateside paralegals and other lawyers to work on aspects of the case that do not entail protected or classified information.

Defense Travel Restrictions: Defense attorneys must also obtain permission from military authorities to travel to and from the site of the proceedings and to transmit documents from there unless they receive prior approval from the Presiding Officer. The rules suggest that the Presiding Officer may modify these travel and communication restrictions. Nevertheless, they give scant guidance as to the criteria by which the Presiding Officer should respond to defense attorney requests. Nothing requires a Presiding Officer, for example, to exercise discretion according to the criteria of enabling a meaningful defense. Leaving the ability of the defense team to develop the facts necessary to represent their client to the unfettered discretion of the commission violates the most basic notion of the right to a defense.

3. Attorney-Client Confidentiality

Defense counsel must represent their clients knowing that any communications with them may be monitored by government officials for "security and intelligence purposes." There is no requirement that a military judge authorize the monitoring of any such communications.

The confidentiality of attorney-client conversations encourages clients to confide openly with their attorneys. The ability to communicate candidly and effectively with one's attorney is inherent in the right to counsel, which in turn, helps secure the overarching right of due process and a fair trial. It would be profoundly troubling for the United States to monitor conversations between attorneys and their clients as they develop a defense in any commission proceedings. Indeed, we question whether attorneys could ethically agree to represent any such defendants under these conditions.
4. Security Restrictions on Civilian Defense Lawyers

Civilian counsel may not represent defendants before the military commission unless they have received security clearance of "SECRET" or higher. This rule is not in and of itself unreasonable. We question, however, why the rules require that attorneys who do not already possess a security clearance must pay "any actual costs associated with processing" the security clearance. We note also that the rules do not commit the government to trying to expedite security clearances for civilian attorneys seeking to represent defendants before the commissions. These requirements may limit the ability of civilian attorneys to take cases before the commissions.

We are more troubled by the fact that private attorneys are not guaranteed access to all materials presented in a case before the commissions even if they possess the requisite high-security clearance. The Military Commission Order No. 1 authorizes the Secretary of Defense or his designate, or the Presiding Officer, to close proceedings on broad grounds, such as to protect "intelligence and law enforcement sources, methods, or activities; and other national security interests." Civilian defense counsel, unlike military counsel, may be excluded from closed military commission proceedings. The commission rules also authorize the Presiding Officer to issue protective orders to safeguard "protected information," including orders to delete the information from documents made available to the defendant or the defense team. The commission may not consider protected information unless it is presented to the military defense counsel. But civilian defense counsel may be denied access to such information even when it is admitted into evidence.

5. Gag Order for Defense Counsel

While the commission proceedings are presumptively open to the public and press, the commission rules nonetheless contain various provisions that would prevent defense counsel from speaking publicly about their cases or commission proceedings. Collectively, these rules impose a gag order on defense attorneys, a dictate of silence that contradicts the fair trial purposes of open proceedings.

One commission rule, discussed above, prevents defense counsel from discussing information about the case with anyone except the defense team. In addition to limiting defense counsel investigations, this rule precludes defense counsel from talking to the press or public at large about their case. Another commission rule prohibits defense counsel from making statements about cases or other matters relating to the commissions to the news media, unless they have received approval from the Appointing Authority (Secretary of Defense or designee) or the General Counsel of the Secretary of Defense. This rule imposes unwarranted censorship on counsel communications with the media. Another rule prohibits defense attorneys from ever making any public or private statements regarding any closed sessions of the proceedings.

Human Rights Watch understands that the counsel's right to speak and the public's right to know must be balanced against the legitimate Department of Defense goal of protecting national security information. Indeed, one of the commission rules commits attorneys to never make public or private statements regarding classified or protected information. The other restrictions on defense attorneys, however, silence far more than the disclosure of such information. For example, the rules would prohibit defense attorneys from ever commenting on whether closed proceedings were conducted in ways that safeguarded defendants' due process interests or even noting publicly how much of the trial consisted of closed proceedings.

While the rules suggest defense attorneys may seek prior approval for public statements that would otherwise be prohibited, they do not contain any criteria to guide military authorities considering such requests. There is, for example, no requirement that any such request be granted as long as protected national security information is not revealed.

Conclusion

On June 4, 2003, Human Rights Watch spoke with Major John Smith, the Judge Advocate Spokesperson in the Office of Military Commissions at the Department of Defense, concerning the restrictions on defense counsel's ability to travel and communicate with others in the course of developing their clients' defense. Major Smith acknowledged that the literal language of the rules could be read as preventing any research off-site and limiting attorney communications beyond what is necessary to protect national security information. He stated that the issue was currently under review for clarification so that the language would "not be read with unintended results."
We indeed hope that the Department of Defense will clarify or amend the commissions instructions to remove restrictions on counsel that are inconsistent with international fair trial standards, including the right to counsel.

Sincerely,

Jamie Fellner
Director, U.S. Program

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1 MCO No. 1, (4)(C)(4).

2 Article 14 of the ICCPR provides that everyone charged with a criminal offense shall have the right "to communicate with counsel of his own choosing." The Human Rights Committee has interpreted this to include a right of persons to defend themselves. See Human Rights Committee, *Hill and Hill v. Spain* (526/1993).

3 Persons tried by U.S. courts-martial may conduct their defense *pro se* or proceed solely with civilian counsel if they so choose.

4 Military defense counsel are directed to conduct their activities consistent with the "prescriptions and proscriptions" specified in the Affidavit and Agreement by Civilian Defense Counsel. MCI No. 4, 3(B)(4).

5 MCI No. 5, Annex B, II(E)(2).

6 Defense lawyers are already bound by a separate provision never to make any statements regarding classified information or material. MCI No. 5, Annex B, II(F).

7 MCI No. 5, Annex B, II(E)(2).

8 MCI No. 5, Annex B, II(E).

9 Military Commission Order No. 1 charges the Presiding Officer with ensuring the "expeditious conduct of the trial." MCO No. 1, 4(A)(5)(c).

10 MCI No. 5, Annex B, II(I).

11 MCI No. 5, 3(A)(2)(d)(ii).

12 MCI No. 5, 3(A)(2)(d)(ii).

13 MCO No. 1, 6(B)(3).

14 MCI No. 4, 3(E)(4).

15 As the Manual for Courts-Martial states, opening proceedings "to public scrutiny reduces the chance of arbitrary or capricious decisions and enhances public confidence." RCM 806(b) (discussion).

16 MCI No. 5, Annex B, II (E) (2).

17 MCI No. 4 (5)(C).

18 MCI No. 5, Annex B, II(F).

19 MCI No. 5, Annex B, II (F).
After releasing MCIs 1-8 on April 30, 2003, and publishing them in the Federal Register on July 1, 2003, 68 FED. REG. 39,374, DoD modified Annex B of MCI 5 without formally announcing that it had done so. Instead, it simply replaced the original version of MCI 5 on its website with a revised version that continues to bear the original April 30 date, despite the fact that it is actually Change 1.

The changes to Annex B relax, to some extent, the restrictions that the original version imposed on civilian defense counsel and the defense team with respect to working conditions and the ability to travel and communicate. See MILITARY COMMISSION INSTRUCTIONS SOURCEBOOK 136-37. In particular, the original version required civilian counsel to promise not to share any documents or any information “about the case” with “anyone” except those designated as “members of the Defense Team.” Id. On its face, that would prohibit defense counsel from conducting witness interviews and discussing any aspect of the case with other individuals who could assist the defense. The original Annex B also provided that all of civilian counsel’s pretrial and trial work on the case had to be done at the site of proceedings.

The revised Annex B expands the scope of defense communications by permitting defense team members to discuss the case with “commissioned personnel participating in the proceedings,” “potential witnesses in the proceedings,” and “other individuals with particularized knowledge that may assist in discovering relevant evidence in the case.” Second, the revised Annex B no longer contains the requirement that the defense team perform all “work relating to the proceedings, including any electronic or other research, at the site of the proceedings.” See MILITARY COMMISSION INSTRUCTIONS SOURCEBOOK 129-33. As a result, it appears that the defense may now perform case-related work, such as research, investigation, and witness interviews, from offsite locations, notwithstanding the other restrictions on communication and handling of information.

July 11, 2003
NATIONAL INSTITUTE OF MILITARY JUSTICE

STATEMENT ON CIVILIAN ATTORNEY PARTICIPATION AS DEFENSE COUNSEL IN MILITARY COMMISSIONS

July 11, 2003

NIMJ has examined in detail both the March 21, 2002 Procedures for Trials by Military Commissions and the April 30, 2003 Military Commission Instructions.

An important issue has arisen as to whether civilian counsel should participate in trials by military commission. In a variety of significant ways, the Secretary of Defense's procedures treat civilian defense counsel differently from the way they are treated in federal and state courts and in courts-martial. Many members of the bar and the public both here and overseas are concerned, as we are, that those procedures could materially affect counsel's ability to fully and adequately represent military commission accuseds. These concerns may have dissuaded some lawyers, who might otherwise have volunteered their services in the interest of justice, from doing so.

The question whether to participate in proceedings when one believes that the governing procedures are an unwarranted departure from due process norms must be decided according to each individual's conscience and professional values. But it would be as unfortunate for the American justice system for competent civilian defense counsel to make themselves unavailable in military commissions as it would be if civilians were formally precluded from participation. Military lawyers have proven over many years that they can and will provide zealous representation, even for highly unpopular clients. Nonetheless, and whatever else may be said of military commissions, public confidence in the administration of justice would be ill-served by a boycott by the civilian bar. Public esteem for the bar would also suffer.

The preamble to the American Bar Association's Model Rules of Professional Conduct provides in relevant part: "[a] lawyer, as a member

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The question whether to participate in proceedings when one believes that the governing procedures are an unwarranted departure from due process norms must be decided according to each individual's conscience and professional values. But it would be as unfortunate for the American justice system for competent civilian defense counsel to make themselves unavailable in military commissions as it would be if civilians were formally precluded from participation. Military lawyers have proven over many years that they can and will provide zealous representation, even for highly unpopular clients. Nonetheless, and whatever else may be said of military commissions, public confidence in the administration of justice would be ill-served by a boycott by the civilian bar. Public esteem for the bar would also suffer.

The preamble to the American Bar Association's Model Rules of Professional Conduct provides in relevant part: "[a] lawyer, as a member
of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice," and “[a]s a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession.”

Even where a lawyer personally believes that the procedures adopted by a tribunal are unfair, unwise, unconstitutional, or contrary to international norms, the lawyer nonetheless performs an important public service by representing accused persons before that tribunal. The lawyer has the opportunity—and, where warranted, the duty—to challenge the validity of the procedures, to suggest changes, to make a record of any disadvantages suffered by the accused as a result of the procedures, and to use his or her knowledge, experience and skill to provide the best possible defense in the circumstances. To date, no State bar has ruled that ethical considerations preclude civilian attorney participation in military commissions as currently structured.

If experienced and talented lawyers are willing to volunteer their services, some of the procedures that have been prescribed for military commissions may well be deemed unnecessary. If, for example, lawyers make clear that they will not share attorney-client information with third parties, there may be no need for the government to monitor all lawyer-client conversations. Annex B to Military Commission Instruction No. 5 (April 30, 2003) contains an affidavit and agreement that civilian defense counsel must sign to participate in trials by military commissions. Although paragraph I provides that attorney-client communications “may be subject to monitoring,” there is no requirement for monitoring, and there is the opportunity for civilian defense counsel to persuade government officials that monitoring is unnecessary and may damage the attorney-client relationship between civilian defense counsel and the accused.

Military commissions have been used in wartime in the past. But we now face a new use of these tribunals as part of the war on terrorism—a struggle that pits the country against individuals and groups rather than other nations, and does so without the prospect of a clearly defined end-date. As military commissions commence their work, new law will be made, precedents will be created, verdicts will be rendered, and sentences will be imposed upon conviction.
The absence of competent civilian defense counsel from military commissions would mean that talent and experience that might improve the quality of justice and promote confidence in the fairness and integrity of the proceedings will be missing. There is an argument, of course, that by abstaining from military commissions, civilian lawyers will demonstrate their rejection of the procedures chosen for these tribunals. But as long as those accused face trial by commission, abstention by the civilian bar cannot increase the likelihood that they will receive justice or at least as much justice as might be obtained with help of civilian counsel.

Like the military bar, the civilian bar has a role to play. It has a voice with which to speak. It has the talent and breadth of experience to use the tools of direct and cross-examination to help put the government to its proof, to demonstrate the unreliability of various kinds of hearsay, and to muster facts favorable to the defense. The civilian bar knows how to argue for procedural fairness and to make a record documenting procedural unfairness.

None of the procedural rules that govern military commissions are immune to change. Indeed, modest changes have already been made. The participation of civilian lawyers might well result in improved procedures. There is, of course, no guarantee that arguments for change will prevail. It is certain, however, that there will be no change without argument.

Mindful of the fact that the decision to participate may be a function of deeply held and, in many instances, conflicting personal and professional values, and that reasonable people may well differ on the matter, we recommend that attorneys who are otherwise qualified for the civilian defense counsel pool, and have the time, give serious consideration to submitting their names. The highest service a lawyer can render in a free society is to provide quality independent representation for those most disfavored by government.

Neither this Statement nor the participation of any individual attorney should be construed as an endorsement of the use of military commissions or the procedures and instructions that have been prescribed by the government.
NIMJ STATEMENT ON CIVILIAN ATTORNEY PARTICIPATION AS DEFENSE COUNSEL IN MILITARY COMMISSIONS

NACDL ETHICS ADVISORY COMMITTEE
Opinion 03-04 (August 2003)
Approved by the Board of Directors at the
NACDL Annual Meeting, Denver, CO, August 2, 2003

Question Presented:

The NACDL Ethics Advisory Committee has been asked by the NACDL Military Law Committee the following question: Given the restrictions placed on civilian defense counsel, what are a criminal defense attorney's duties to the client before a Military Commission at Guantanamo Bay under Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (Nov. 16, 2001), and its implementing instructions issued April 30, 2003?

Digest:

It is NACDL's position, by unanimous vote of the Board of Directors on August 2, 2003 having considered MCI-5's Annex B and debating the question, that it is unethical for a criminal defense lawyer to represent a person accused before these military commissions because the conditions imposed upon defense counsel before these commissions make it impossible for counsel to provide adequate or ethical representation. Defense counsel cannot contract away his or her client's rights, including the right to zealous advocacy, before a military commission, which is what the government seeks in Annex B, although it says it is not, in spite of the clear language of the MCI's.

NACDL will not condemn criminal defense lawyers who undertake to represent persons accused before military commissions because some may feel an obligation to do so. If defense counsel undertakes representation and can abide by these rules, counsel must seek to raise, with knowledge of the serious and unconscionable risks involved in violating Annex B, including possible indictment, see note 35, infra, every conceivable good faith argument concerning the jurisdiction of the military commission, the legality of denial of application of the Uniform Code of Military Justice (UCMJ), international treaties, and due process of law, including resort to the civilian courts of the United States to determine whether the proceedings are constitutional.

A military or civilian lawyer representing an accused person before a military commission at Guantanamo Bay under the 2001 Military Order must provide a zealous and independent defense, notwithstanding the severe limitations imposed on counsel and the denials of due process and attorney-client confidentiality and privilege by the Military Commission Instructions. The problem with these military commissions is that full zealous representation likely will not and cannot be achieved because of severe and unreasonable limits on counsel imposed by the government, in violation of the UCMJ and treaties the United States has signed guaranteeing rights to the accused before these commissions. Criminal defense lawyers are severely disadvantaged in their duties to represent their clients. The loss of rights can only help insure unjust and unreliable
A military or civilian lawyer appearing before a military commission at Guantanamo Bay under the 2001 Military Order should not be involved unless the lawyer is qualified to handle death penalty cases in the lawyer’s local jurisdiction or in the federal or military courts. Counsel must assume that every one of these cases is presumptively a death penalty case, even though the rules do not require, as in the civilian courts, that the government provide timely notice that it is a death penalty case or even allege an aggravating circumstance to support the death penalty that the government will seek to prove beyond a reasonable doubt.

If counsel appearing before a military commission has an ethical quandary that cannot be resolved, the lawyer should consult with their state bars. Defense counsel are cautioned, however, that if defense counsel seeks outside ethical assistance on an ethical problem, defense counsel must take care in seeking that advice not to reveal matters that defense counsel swore to keep secret because a breach of security could lead to defense counsel being indicted. One must assume that defense counsel’s calls from Guantanamo Bay will be monitored, too.

A nation founded on due process of law must provide due process of law to everyone it prosecutes and incarcerates. If it does not, it is no better than the persons it is prosecuting, and it gains no respect from the international community, and even its own citizens.

Ethical Rules, Federal Regulations, Statutes, and Constitutional Provisions Involved:

U.S. Const., Art. I, § 8 (war powers in Congress) & Art. II, § 2 (President is commander-in-chief)
“Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” 66 F.R. 57833 (Nov. 16, 2001)
28 U.S.C. § 530B
28 C.F.R. § 77.3
Uniform Code of Military Justice, 10 U.S.C. § 801 et seq.
Geneva Conventions of 1949, III (GPW), IV (civilians)
Military Commission Order No. 1 (March 21, 2002)
Military Commission Instructions (April 30, 2003):
   No. 4: Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel
   No. 5: Qualification of Civilian Defense Counsel and Annex B (Affidavit and Agreement of Civilian Defense Counsel) (as amended, undated)
   Preamble: A Lawyer’s Responsibilities
   Rule 1.1 (competence)
   Rule 1.6 (confidentiality)
   Rule 1.7(b) (personal conflict of interest)
   Rule 1.16 (declining or terminating representation)
ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (rev. ed. 2003)

Opinion:

I. INTRODUCTION

A. NACDL’s Previous Committee Positions on The Question Presented

The Military Law Committee has raised a difficult question that has been touched on in an NACDL Board of Directors resolution of May 4, 2002 (quoted infra), and is related to our comments to the Department of Justice in opposition to the adoption of 28 C.F.R. § 501.3 in December 2001 and Ethics Advisory Opinion of November 2002 involving the duty of an attorney to a client when the attorney learns that attorney-client communications are subject to monitoring under § 501.3. We concluded as to the latter:

A criminal defense attorney has an ethical and constitutional duty to take affirmative action to protect the confidentiality of attorney client communications from government surveillance. This includes seeking relief from the jailers, if possible, or judicial review and seeking of protective orders. Defense counsel should argue that the Sixth Amendment right to counsel and a fair trial and the Fifth Amendment right to due process and a fair trial protects attorney-client communications from disclosure to the government.

NACDL Ethics Advisory Committee Op. 02-01, at 1 (Nov. 2002).

B. NACDL Board Resolution on Military Commissions, May 4, 2002

The NACDL Board of Directors passed the following resolution on Military Commissions on May 4, 2002 where we have already questioned the constitutionality, violations of human rights treaties, and fundamental fairness of the government’s plan for the current system of military commissions:

Resolution of the NACDL Board of Directors Regarding Military Commissions


WHEREAS the National Association of Criminal Defense Lawyers, whose members have dedicated their professional lives to defending the Constitution of the United States, supports efforts to bring to justice those responsible for the September 11, 2001 attack on our country;

WHEREAS the rest of the world will note how we treat those persons captured by American forces in the military actions against terrorism;

WHEREAS it is imperative not only that the United States set an example for fair and humane treatment, but that our efforts be perceived as fair and just;

WHEREAS the United States cannot be, or be viewed as being, willing to depart from its own laws and principles;

WHEREAS the international view of the United States as being willing to depart from its own laws and principles imperils our country’s men and women in uniform across the world;

WHEREAS our dedication to the rule of law drives our positions on the creation of military commissions and the rules that will govern them;

WHEREAS we object to the creation of the particular military commissions reflected in the Presidential Order of November 13, 2001, on the basis that the President was not empowered by law to unilaterally create these commissions;

WHEREAS moreover, that position unchanged, the procedures announced as governing such commissions, as promulgated by the Secretary of Defense on March 21, 2002, are also inadequate as a matter of fundamental fairness;

WHEREAS the Preamble to the Manual for Courts-Martial (2000), Paragraph 2(b)(2), states that such commissions . . . shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial;”

WHEREAS NACDL supports the principle articulated in the Preamble to the Manual for Courts-Martial (2000), Paragraph 2(b)(2), and the procedures promulgated by the Secretary of Defense do not comply with the provisions of the Manual for Courts-Martial,

THEREFORE BE IT RESOLVED that NACDL opposes implementation of the procedures promulgated by the Secretary of Defense for these commissions;

IT IS HEREBY FURTHER RESOLVED that NACDL shall urge the President and the Congress of the United States, as well as appropriate judicial tribunals, to find that these procedures promulgated by the Administration to date violate principles of fundamental fairness, and threaten our country’s stature and the welfare of its
military personnel throughout the world, and thus that such rules should be revised by the Secretary of Defense through amendment of his Order of March 21, 2002, to make applicable to such commissions the Uniform Code of Military Justice and the Manual for Courts-Martial.

APPROVED this 4th day of May, 2002
Cincinnati, Ohio

We are not alone in questioning the constitutionality and fundamental fairness of these proceedings. Several law review articles by distinguished scholars on constitutional and military law find these military commissions are: an unconstitutional exercise of the War Power reserved to Congress; U.S. Const., Art. I, § 8; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 643-46 (1952); an unconstitutional suspension of the writ of habeas corpus, fundamentally unfair and a denial of due process, and a violation of human rights under international law. We cannot add to them here, so we merely cite and rely on them.

We share the concern of these scholars and others that the stature of the United States as a world power is denigrated by these closed proceedings that are fundamentally flawed in their obvious potential for denial of a fair trial and the appearance of impropriety for failure to follow our own law and international law and utilize the UCMJ for trials before Military Commissions. While the government publicly seeks to assure a fair trial, and we know that defense counsel will zealously defend, as is their sworn duty, the limits on defense counsel, the secrecy of the proceedings, the due process flaws, including the denial of applicability of the UCMJ and protections of double jeopardy and all other rights we hold as U.S. citizens, all will lead the rest of the world to believe that the persons tried before these commissions were not treated in accord with our national

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5 In addition, newspaper and magazine articles and columns too numerous to cite have raised the same concerns.


beliefs in the "Rule of Law," due process of law, or international law. In a World War II war crimes trial, two dissenting Justices of the U.S. Supreme Court were taken aback by our disregard for "elementary due process" and international law. See Application of Yamashita, 327 U.S. 1, 27-28, 49 (1946) (Justices Murphy and Rutledge dissenting, respectively).

Therefore, our own service members and citizens captured by an "enemy" abroad are even more likely to be subjected to similar denials of due process or atrocities in foreign lands. We are

8 One cannot help but note that the "Rule of Law" was politically invoked to impeach the last President for lying about a private sexual matter, but now is being ignored for political convenience by many of the same persons who relied on it before in the name of "national security." The President takes the following oath: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States." All federal officials take a similar oath. These military commissions do not "preserve, protect and defend the Constitution of the United States"—they make a mockery of it.

9 The application of the UCMJ to military commissions would provide due process. The current regime does not.

10 For example, Art. 84 of the Geneva Convention requires that a prisoner of war be tried in a military or civilian court. Manuel Noriega was prosecuted in a civilian court for drug crimes and RICO offenses after he was captured during the Panama invasion. United States v. Noriega, 746 F.Supp. 1506, 1525-26 (S.D. Fla. 1990), later opinion, 808 F.Supp. 741, 796 (S.D. Fla. 1992) (Noriega was a "prisoner of war" under the Geneva Convention; he was allowed to wear his military uniform during the trial), aff'd, 117 F.3d 1206 (11th Cir. 1997), cert. denied, 523 U.S. 1060 (1998).

11 See Noriega, 808 F.Supp. at 803:

[T]hose charged with that determination [Noriega's confinement location and status] must keep in mind the importance to our own troops of faithful and, indeed, liberal adherence to the mandates of Geneva III. Regardless of how the government views this Defendant as a person, the implications of a failure to adhere to the Convention are too great to justify departures.

In the turbulent course of international events . . . the relatively obscure issues in this case may seem unimportant. They are not. The implications of a less-than-strict adherence to Geneva III are serious and must temper any consideration of the questions presented. (bracketed material added)

This happened in both the Vietnam conflict and the 1991 Gulf War. In Vietnam, our captured service members were treated as an invading force and denied the benefits of the Geneva Convention. In the 1991 Gulf War, a female pilot and her crew were shot down, and she was repeatedly raped, tortured, and otherwise degraded. Zimmermann, note 7, supra, at 54. Many other of our shot down POWs were tortured, including men threatened with rape and sexual abuse,
not "leading by example" as a free nation should. Our government is demonstrating a disregard for the protections of our own legal system and moral principles by circumventing established domestic and international law. See Yamashita, 327 U.S. at 81 (Justice Rutledge dissenting), quoted infra. One cannot help but feel that secret trials with secret evidence, evidence sometimes even presented in secret from the accused and defense counsel, with little restrictions on the admissibility of evidence and ignoring the requirement that the protections and procedures of the UCMJ are applicable to military commissions and Geneva Convention will lead to unjust and unreliable results that will lead to these proceedings being viewed as a mere way station on the way to an inevitable conviction and probable execution.

A nation founded on due process of law must provide due process of law to everyone it prosecutes and incarcerates. If it does not, it is no better than the persons it is prosecuting, and it garners no respect from the international community, and even its own citizens.


12 MANUAL FOR COURTS-MARTIAL, Preamble ¶ 2(b)(2) (2000) requires that military commissions "... shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial."

UCMJ, Art. 36, 10 U.S.C. § 836, provides:

Art. 36. President may prescribe rules

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable.

The question then is: May the DoD determine that special rules are required for military commissions that are actually "contrary to or inconsistent with the" UCMJ? We believe not. Congress mandated that application of the procedures of the UCMJ to commissions and tribunals be consistent with it, and the President cannot simply ignore Congress, in his capacity as Commander-in-Chief.

13 At the request of the British Prime Minister, our government recently decided to waive the death penalty for two British citizens in the initial six to be tried by the Military Commission and to permit them to have British counsel. Our government is now treating citizens of favored nations differently and granting them more rights than the others accused. A denial of equal protection is a denial of due process under American law and international law.
II. WHAT ETHICAL LAW GOVERNS LAWYERS BEFORE COMMISSIONS?

When a military or civilian lawyer appears before a military commission or tribunal, what ethical law governs? It is clear that lawyers before a military commission must adhere to the Rules of Professional Conduct and are mandated to provide independent and zealous representation.

The problem with these military commissions is that full zealous representation likely will not and cannot be achieved because of limits on counsel imposed by the government.


The RULES FOR COURTS MARTIAL 502(d)(6)(B) (2000) provides that defense counsel in a military proceeding shall provide zealous representation the same as required of civilian lawyers:

*General duties of defense counsel.* Defense counsel must: guard the interests of the accused zealously within the bounds of the law without regard to personal opinion as to the guilt of the accused; disclose to the accused any interest defense counsel may have in connection with the case, any disqualification, and any other matter which might influence the accused in the selection of counsel; represent the accused with undivided fidelity and may not disclose the accused’s secrets or confidences except as the accused may authorize (see also Mil. R. Evid. 502). A defense counsel designated to represent two or more co-accused in a joint or common trial or in allied cases must be particularly alert to conflicting interests of those accused. Defense counsel should bring such matters to the attention of the military judge so that the accused’s understanding and choice may be made a matter of record. See R.C.M. 901(d)(4)(D).

All prior versions of the MANUAL FOR COURTS MARTIAL or the RULES FOR COURTS MARTIAL required defense counsel to provide zealous, independent representation.

B. 28 U.S.C. § 530B

The “McDade Amendment,” 28 U.S.C. § 530B(a), provides as follows:

An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties to the same extent and in the same manner as other attorneys in that State.\(^{14}\)

28 C.F.R. § 77.3 is in accord:

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In all criminal investigations and prosecutions, in all civil investigations and litigation (affirmative and defensive), and in all civil law enforcement investigations and proceedings, attorneys for the government shall conform their conduct and activities to the state rules and laws, and federal local court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State, as these terms are defined in Sec. 77.2 of this part.15

15 See also 28 C.F.R. § 77.4 on “guidance”:

(a) Rules of the court before which a case is pending. A government attorney shall, in all cases, comply with the rules of ethical conduct of the court before which a particular case is pending.

(b) Inconsistent rules where there is a pending case.

(1) If the rule of the attorney's state of licensure would prohibit an action that is permissible under the rules of the court before which a case is pending, the attorney should consider:

(i) Whether the attorney's state of licensure would apply the rule of the court before which the case is pending, rather than the rule of the state of licensure;

(ii) Whether the local federal court rule preempts contrary state rules; and

(iii) Whether application of traditional choice-of-law principles directs the attorney to comply with a particular rule.

(2) In the process of considering the factors described in paragraph (b)(1) of this section, the attorney is encouraged to consult with a supervisor or Professional Responsibility Officer to determine the best course of conduct.

(c) Choice of rules where there is no pending case.

(1) Where no case is pending, the attorney should generally comply with the ethical rules of the attorney's state of licensure, unless application of traditional choice-of-law principles directs the attorney to comply with the ethical rule of another jurisdiction or court, such as the ethical rule adopted by the court in which the case is likely to be brought.

(2) In the process of considering the factors described in paragraph (c)(1) of this section, the attorney is encouraged to consult with a supervisor or Professional Responsibility Officer to determine the best course of conduct.

(d) Rules that impose an irreconcilable conflict. If, after consideration of traditional choice-of-law principles, the attorney concludes that multiple rules may apply to particular conduct and that such rules impose irreconcilable obligations on the attorney, the attorney should consult with a supervisor or Professional Responsibility Officer to determine the best course of conduct.

(e) Supervisory attorneys. Each attorney, including supervisory attorneys, must assess his or her ethical obligations with respect to particular conduct.

C. Military Regulations


D. State Bar Influences and Control Under Military Law


Department attorneys shall not direct any attorney to engage in conduct that violates section 530B. A supervisor or other Department attorney who, in good faith, gives advice or guidance to another Department attorney about the other attorney's ethical obligations should not be deemed to violate these rules.

(f) Investigative Agents. A Department attorney shall not direct an investigative agent acting under the attorney's supervision to engage in conduct under circumstances that would violate the attorney's obligations under section 530B. A Department attorney who in good faith provides legal advice or guidance upon request to an investigative agent should not be deemed to violate these rules.


Contra: Col. E. Albertson, Rules of Professional Conduct for the Navy Judge Advocate, 35 FED. B.J. 334, 336 (1988) ("when conflict exists between the state rule and the JAG rule, the latter prevails") (but, this article pre-dates the McDade Amendment and 28 C.F.R. § 77.3, so the Supremacy Clause is no longer an argument).

E. Duty of Zealous Advocacy under Military Law


III. Duties Before Military Commissions

Because of the foreign nature of these military commissions established under the March 21, 2002 Department of Defense Military Commission Order No. 1 (MCO-1), criminal defense lawyers are severely disadvantaged in their duties to represent their clients. The loss of rights can only help insure unjust and unreliable convictions. The government on one hand states that zealous representation is required of detailed military counsel or civilian counsel, and then puts severe limits on counsel's ability to provide a complete defense.19

17 In addition, Rules for Courts Martial 104(b)(1)(B) prohibits giving any defense counsel a less favorable rating or evaluation "because of the zeal with which such counsel represented any accused."

18 Secretary of Defense Rumsfeld admitted in a press release with the adoption of the directive that these rules were new "to a certain extent." "DoD Presents Procedural Guidelines For Military Commissions," http://www.defenselink.mil/news/Mar2002/n03212002_200203213.html. This is an understatement.

19 "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294 (1973). "Few rights are more fundamental than that of an accused to present witnesses in his own defense." Id., 410 U.S. at 302.

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamen-
There are thus far seven Military Commission Instructions (MCIs) issued April 30, 2003 under MCO-1. The first appears at http://www.defenselink.mil/news/May2003/d20030430 milcominstn01.pdf, and they are consecutively numbered; e.g., ~no2.pdf, ~no3.pdf, etc. We are primarily concerned with MCI-4 & -5.

A. MCO-1, the MCIs, Assigned Military or Civilian Defense Counsel, and Their Duties

1. Defense counsel in general

MCO-1 provides as to defense counsel in ¶ 4(C):

(2) Detailed Defense Counsel.

Consistent with any supplementary regulations or instructions issued under Section 7(A), the Chief Defense Counsel shall detail one or more Military Officers who are judge advocates of any United States armed force to conduct the defense for each case before a Commission ("Detailed Defense Counsel"). The duties of the Detailed Defense Counsel are:

(a) To defend the Accused zealously within the bounds of the law without regard to personal opinion as to the guilt of the Accused; and

(b) To represent the interests of the Accused in any review process as provided by this Order.

(3) Choice of Counsel

(a) The Accused may select a Military Officer who is a judge advocate of any United States armed force to replace the Accused’s Detailed Defense Counsel, provided that Military Officer has been determined to be available in accordance with any applicable supplementary regulations or instructions issued under Section 7(A). . . .

(b) The Accused may also retain the services of a civilian attorney of the Accused’s own choosing and at no expense to the United States Government ("Civilian Defense Counsel"), provided that attorney:

...tual element of due process of law.


Our national view of due process does not apply to these military commissions, even though law; Manual for Courts Martial, Preamble ¶ 2(b)(2); and the Geneva Convention and other human rights treaties require it.
NATIONAL INSTITUTE OF MILITARY JUSTICE

(i) is a United States citizen; (ii) is admitted to the practice of law in a State, district, territory, or possession of the United States, or before a Federal court; (iii) has not been the subject of any sanction or disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct; (iv) has been determined to be eligible for access to information classified at the level SECRET or higher under the authority of and in accordance with the procedures prescribed in reference (c); and (v) has signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the course of proceedings. Civilian attorneys may be prequalified as members of the pool of available attorneys if, at the time of application, they meet the relevant criteria, or they may be qualified on an ad hoc basis after being requested by an Accused. Representation by Civilian Defense Counsel will not relieve Detailed Defense Counsel of the duties specified in Section 4(C)(2). The qualification of a Civilian Defense Counsel does not guarantee that person's presence at closed Commission proceedings or that person's access to any information protected under Section 6(D)(5). (emphasis added)

The second italicized portion refers to MCI-5, Annex B, infra. What the government gives in ¶ 4(C)(2) as to Detailed Defense Counsel it takes away as to civilian defense counsel under ¶ 4(C)(3)(b)(v).

2. Office of Chief Defense Counsel for the Military Commissions

MCI-4 ¶ 3 establishes the Office of Chief Defense Counsel and it delineates its duties in assigning Detailed Defense Counsel. Chief Defense Counsel must insure that the accused is always represented by Detailed Defense Counsel even if civilian counsel also represents an accused. Id. ¶ 3(B)(11). Chief Defense Counsel will also monitor counsel to seek to ensure zealous representation but also to ensure that defense counsel do not enter into joint defense agreements that create confidentiality obligations beyond the accused.20 Id. ¶ 3(B)(10). Moreover, ¶ 3(C)(2) provides:

2) Detailed Defense Counsel shall represent the Accused before military commissions when detailed in accordance with references (a) [MCO-1] and (b) [Military Order of November 13, 2001, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” 66 F.R. 57833 (Nov. 16, 2001)]. In this regard, Detailed Defense Counsel shall: defend the Accused to whom detailed zealously within the bounds of the law and without regard to personal opinion as to guilt . . . . (emphasis and bracketed material added)

20 This is ironic because of a lack of confidentiality, discussed infra.
Detailed Defense Counsel, however, are in the same position as civilian defense counsel except that they may not be barred from the courtroom, but they cannot discuss with their civilian co-counsel what happened in a "closed session."

3. Civilian Defense Counsel

Civilian Defense Counsel are governed by MCI-5. The burdens on a civilian becoming eligible to serve as defense counsel before a military commission are onerous. To become a defense counsel, civilian lawyers are required to execute an Affidavit and Agreement by Civilian Defense Counsel, MCI-5, Annex B. It provides in pertinent part in ¶ II under "Agreements":

B. I will be well-prepared and will conduct the defense zealously, representing the accused through the military commission process, from inception of my representation through the completion of any post trial proceedings . . . .

... 

H. I understand that there may be reasonable restrictions on the time and duration of contact I may have with my client, as imposed by the Appointing Authority, the Presiding Officer, detention authorities, or regulation.

I. 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. I further understand that communications are not protected if they would facilitate criminal acts or a conspiracy to commit criminal acts, or if those communications are not related to the seeking or providing of legal advice.

J. I agree that I shall reveal to the Chief Defense Counsel and any other appropriate authorities, information relating to the representation of my client to the extent that I reasonably believe necessary to prevent the commission of a future criminal act that I believe is likely to result in death or substantial bodily harm, or significant impairment of national security.

K. I understand and agree that nothing in this Affidavit and Agreement creates any substantive, procedural, or other rights for me as counsel or for my client(s).²¹

²¹ MCI-5 also provides that civilian defense counsel, inter alia:
It should be apparent to all that the purpose of forcing defense counsel to sign this agreement is so violations of the agreement may be prosecuted under 18 U.S.C. § 1001, as happened in the Stewart case. *United States v. Stewart*, 2002 WL 1300059 (S.D.N.Y. 2002), later opinion *United States v. Sattar*, 2003 WL 21698266, *16-17 (S.D.N.Y. July 22, 2003) (dismissal of § 1001 count denied; even if the government could not have asked the question, it had to be answered truthfully or objected to before hand). Her co-defendant’s case is *United States v. Sattar*, 2002 WL 1836755 (S.D.N.Y. 2002), later opinion, 2003 WL 21698266 (S.D.N.Y. July 22, 2003).

B. The Duty of Zealous Representation

The DoD repeatedly tells us that it expects all defense counsel to zealously defend. We have no doubt that defense counsel will do so, in the highest traditions of duty of American criminal defense lawyers and military lawyers. The problem with MCI-4 & -5 is that it makes it impossible for defense counsel to provide a zealous and ethical defense before these military commissions.

We give three examples, two involving military tribunals, of lawyers taking highly unpopular cases:

1. **The Boston Massacre Criminal Trial (1770)**

The British garrisoned troops in Boston starting in 1768. On March 5, 1770, a lone guard was attacked by a mob (estimated to be between 30-60 men and young men). First came shouting and insults. Then they threw objects. One British soldier standing alone was hit first by snowballs, and then by chunks of ice, coal, rocks, paving stones, and sticks. He called for reinforcements, and other troops came to his aid. Only the troops were armed. When a soldier was hit with a stick, he fired into the crowd, and others did, too. Five died and several were injured. Of course, a furor will not be paid by the U.S. government (*id. ¶ 3(A)(1))

- must have a SECRET or higher security clearance which they have to pay for (*id. ¶3(A)(2)(d))
- ensure the commission proceedings are counsel’s primary duty and no matter in counsel’s private practice or personal life can interfere with the commission’s proceedings (*id.)
- once proceedings have begun, counsel will not leave the site of the proceedings without approval of the Appointing Authority or Presiding Officer (*id. ¶ II(E)(2))
- will make no public or private statements regarding closed sessions or about classified material (*id. ¶ II(F))
- agree to abide by all rules and regulations concerning classified material (*id. ¶ II (G)).

22 Indictment: [http://news.findlaw.com/hdocs/docs/terrorism/ussattar040902ind.pdf](http://news.findlaw.com/hdocs/docs/terrorism/ussattar040902ind.pdf). The government’s theory is that the lawyer made a false affirmation under SAMs to the government that she would not disclose certain things learned from the client. Indictment ¶s 7 (attorney signed affirmations) & 10 (attorney violated SAMs).
erupted in Boston. The popular sentiment was immediately obvious: this was murder, and the officer in charge, British Capt. Thomas Preston, had ordered the shooting. Eight soldiers and Capt. Preston were turned over to the Sheriff of Suffolk County, Massachusetts.

On March 6th, a friend of Preston’s came to lawyer John Adams’s office and asked him to undertake their defense because Preston did not order the shooting. Adams, a busy lawyer at the time, took the case. Before he could get involved, however, an inquest was held, and Preston gave a lengthy deposition. 3 LEGAL PAPERS OF JOHN ADAMS 4 (Butterworth, ed., 1965, Atheneum).

An indictment soon followed in the name of the British government, but the case was pursued in the Superior Court of Suffolk County, Massachusetts, Rex v. Preston and Rex v. Wemms. Id. at 46-47. Adams and Robert Auchmuty, Jr. and Josiah Quicy, lawyers for the soldiers, stalled the trials as long as they could so tempers would cool and a fair trial would be more likely. Seven months later, the case came to trial before a Boston and Suffolk County jury. Id. at 48. After a week’s testimony (id. at 50-86), Adams persuaded the jury that the witnesses that put Preston outside ordering his troops to fire were mistaken or lying—Preston only ordered the troops to stop shooting (id. at 86-88), and Preston was acquitted.

The soldiers were tried separately less than three weeks later. At the end of the second trial, six of the soldiers were acquitted, and two were convicted of manslaughter.23

Adams’s career was not harmed by his taking the case, although he admitted that his practice dropped off for over a year. He went on to become the second President of the United States. Adams’s diary account of why he took the case is pertinent to us today:

The Part I took in Defence of Cptn. Preston and the Soldiers, procured me Anxiety, and Obloquy enough. It was, however, one of the most gallant, generous, manly and disinterested Actions of my whole Life, and one of the best Pieces of Service I ever rendered my Country. Judgment of Death against those Soldiers would have been as foul a Stain upon this Country as the Executions of the Quakers or Witches, anciently. As the Evidence was, the Verdict of the Jury was exactly right.24

2. The Nazi Saboteurs Military Tribunal (1942)

In late June 1942, eight “Nazi Saboteurs” entered the United States in civilian clothing allegedly to engage in, what would be called today, domestic terrorism. One of them turned himself in to the FBI and he gave the locations of the rest. The arrests were all made by June 23d. The one who turned himself in apparently was fleeing Nazi Germany and was using this surreptitious entry as a method of gaining asylum. J. Edgar Hoover of the FBI, however, gave the impression that they made the case and captured the saboteurs by their own investigation and actions for

23 Their trial comprises the balance of id. vol. 3.

the benefit of Germany so they would think that further such invasions would fail. The government gave the impression to the one who came in that it would give him leniency, but it reneged. All eight were charged with being saboteurs subject to trial before a military commission since they entered the country as spies. On July 2d, President Roosevelt issued his proclamation for a military tribunal, and the rules of procedure for the trial were issued on July 7th. The secret trial began on July 11th.

During the trial, defense counsel sought habeas review in the U.S. District Court for the District of Columbia and certiorari in the U.S. Supreme Court, and the trial had a hiatus while the Supreme Court considered the case on an expedited basis, hearing argument starting the day the briefs were filed and carrying over to a following half day, and it promptly denied relief on July 29th with an opinion following months later. *Ex Parte Quirin*, 317 U.S. 1 (1942). The trial resumed immediately and ended on August 1st with convictions and death sentences for six and life for two. The President reviewed the findings and refused to stop the executions. The six were electrocuted in the D.C. Jail on August 8th: Forty-six days from arrest to execution, including a three week trial. The other were granted clemency to a 10 year sentence in the 1950's.

Military defense counsel assigned to the case were Col. Cassius M. Dowell and Col. Kenneth Royall. Col. Carl L. Ristine was shortly appointed to represent the one who came in first because of an apparent conflict of interest, so Dowell and Royall had the other seven (two were arguably U.S. citizens, but that was found irrelevant). By all accounts of the proceedings, many believe that defense counsel provided zealous representation in the face of a trial that was a foregone conclusion, designed to result in conviction, challenging the constitutionality of the proceedings, futilely seeking a writ of habeas corpus challenging the jurisdiction of a military tribunal, and putting on a full (to the extent allowed by the rules) and zealous defense in a completely secret trial held in Washington in the Department of Justice building. The quality of their representation was not known until years later when the papers of the proceeding were released to the public. See generally LOUIS FISHER, NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL & AMERICAN LAW ch. 3 (Univ. Press of Kansas, 2003).

The outcome of the trial was foreordained by Hoover himself, believing that swift trial and execution of the saboteurs would lead the Nazis to believe in the invincibility of the FBI in the saboteurs' capture, but the defense lawyers apparently did all they could for their clients. They did what was expected of American military criminal lawyers and criminal defense lawyers in general: they defended their clients with zeal, creativity, and utmost vigor under undisputably bad circumstances, and they sought civilian review of what they believed was an unconstitutional process. Their reputations as lawyers were not harmed by their zeal, either. After retirement, Col. Royall was appointed Secretary of War by President Truman.


After the surrender of Japan at the end of World War II, Japanese General Tomoyuki Yamashita was brought before an American military tribunal sitting in the Philippines. He was charged barely three weeks after surrender. He was assigned six American military lawyers to defend him, and only one had extensive trial experience, Capt. Frank Reel. The others proved their
The tribunal was obviously organized to convict General Yamashita because of the gross
denials of due process of law visited upon him. Nevertheless, the defense lawyers served hero-
ically, if nothing else, fighting the government every step of the way, seeking to show that General
Yamashita could not be held accountable for what was happening all over the Philippines, in light
of how the American invasion fragmented his forces and he could not communicate with them.
Essentially, he was being held responsible for the actions of troops under his command, even
though he was unable to command them at the time of many of the acts they were accused of.

From the Philippines, Capt. Reel dispatched a handwritten petition for writ of habeas corpus to the U.S. Supreme Court, and it was actually heard, but, of course, rejected. Application of Yamashita, 327 U.S. 1 (1946). The Supreme Court found the tribunal to be constitutional, but one cannot appreciate what defense counsel and the accused had to endure without reading the dissenting opinions of Justices Murphy, 327 U.S. at 26-41, and Rutledge, 327 U.S. at 41-81.

Justice Murphy found that the tribunal violated virtually every tenet of law argued on behalf of the accused Japanese general:

The significance of the issue facing the Court today cannot be overempha-
sized. An American military commission has been established to try a fallen mili-
tary commander of a conquered nation for an alleged war crime. The authority for
such action grows out of the exercise of the power conferred upon Congress by
Article I, § 8, Cl. 10 of the Constitution to "define and punish * * * Offenses again-
st the Law of Nations * * *.” The grave issue raised by this case is whether a
military commission so established and so authorized may disregard the procedural
rights of an accused person as guaranteed by the Constitution, especially by the due
process clause of the Fifth Amendment.

The answer is plain. The Fifth Amendment guarantee of due process of law applies to “any person” who is accused of a crime by the Federal Government or any of its agencies. No exception is made as to those who are accused of war crimes or as to those who possess the status of an enemy belligerent. Indeed, such an exception would be contrary to the whole philosophy of human rights which makes the Constitution the great living document that it is. The immutable rights of the individual, including those secured by the due process clause of the Fifth Amendment, belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, color or be-


Compare the differing proceedings before the International Tribunal for the Far East (ITFE) where due process actually was accorded, and the results for the individual persons accused were better in T. Maga, Judgment at Tokyo: The Japanese War Crimes Trial (U. Ky. Press 2001).

26 They had no typewriters or other basic things to conduct such a trial.
lief. They rise above any status of belligerency or outlawry. They survive any popular passion or frenzy of the moment. No court or legislature or executive, not even the mightiest army in the world, can ever destroy them. Such is the universal and indestructible nature of the rights which the due process clause of the Fifth Amendment recognizes and protects when life or liberty is threatened by virtue of the authority of the United States.

The existence of these rights, unfortunately, is not always respected. They are often trampled under by those who are motivated by hatred, aggression or fear. But in this nation individual rights are recognized and protected, at least in regard to governmental action. They cannot be ignored by any branch of the Government, even the military, except under the most extreme and urgent circumstances.

The failure of the military commission to obey the dictates of the due process requirements of the Fifth Amendment is apparent in this case. . . .

*Yamashita*, 327 U.S. at 26-27 (Justice MURPHY dissenting). There were no evidentiary or constitutional protections available to the accused (similar to these commissions).

In my opinion, such a procedure is unworthy of the traditions of our people or of the immense sacrifices that they have made to advance the common ideals of mankind. The high feelings of the moment doubtless will be satisfied. But in the sober afterglow will come the realization of the boundless and dangerous implications of the procedure sanctioned today. No one in a position of command in an army, from sergeant to general, can escape those future implications. Indeed, the fate of some future President of the United States and his chiefs of staff and military advisers may well have been sealed by this decision. But even more significant will be the hatred and ill-will growing out of the application of this unprecedented procedure. That has been the inevitable effect of every method of punishment disregarding the element of personal culpability. The effect in this instance, unfortunately, will be magnified infinitely for here we are dealing with the rights of man on an international level. To subject an enemy belligerent to an unfair trial, to charge him with an unrecognized crime, or to vent on him our retributive emotions only antagonizes the enemy nation and hinders the reconciliation necessary to a peaceful world.

*Id.* at 28-29 (bracketed material added).

Justice RUTLEDGE was less kind to the government. *Id.* at 41-42 (Justice RUTLEDGE dissenting):

More is at stake than General Yamashita's fate. There could be no possible sympathy for him if he is guilty of the atrocities for which his death is sought. But there can be and should be justice administered according to law. In this stage of war's aftermath it is too early for Lincoln's great spirit, best lighted in the Second Inaugural, to have wide hold for the treatment of foes. It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none
older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents. It can become too late.

... With all deference to the opposing views of my brethren, whose attachment to that tradition needless to say is no less than my own, I cannot believe in the face of this record that the petitioner has had the fair trial our Constitution and laws command. Because I cannot reconcile what has occurred with their measure, I am forced to speak. At bottom my concern is that we shall not forsake in any case, whether Yamashita’s or another’s, the basic standards of trial which, among other guaranties, the nation fought to keep; that our system of military justice shall not alone among all our forms of judging be above or beyond the fundamental law or the control of Congress within its orbit of authority; and that this Court shall not fail in its part under the Constitution to see that these things do not happen.

Justice Rutledge found the military commission to be unconstitutional, (1) in significant part because of the deficiencies in the rules of evidence that allowed ex parte evidence without authentication (id. at 48-49 & n. 9; id. at 52-53), something shared by today’s military commissions, (2) the lack of an opportunity to prepare a defense to defend against 64 specifications, including the government adding 59 more specifications on the day the trial started (id. at 56-61); and a denial of a continuance to prepare a defense (id. at 60-61); (3) ignoring of the Articles of War (now the UCMJ) for the trial as required by statute (id. at 61-69); (4) ignoring the Geneva Convention of 1929 (id. at 72-78); (5) denying application of the due process clause of the Fifth Amendment to Yamashita (id. at 78-81).

Justice Rutledge closed as follows:

I cannot accept the view that anywhere in our system resides or lurks a power so unrestrained to deal with any human being through any process of trial. What military agencies or authorities may do with our enemies in battle or invasion, apart from proceedings in the nature of trial and some semblance of judicial action, is beside the point. Nor has any human being heretofore been held to be wholly beyond elementary procedural protection by the Fifth Amendment. I cannot consent to even implied departure from that great absolute.

It was a great patriot who said:

"He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach himself."

42. 2 THE COMPLETE WRITINGS OF THOMAS PAINE (edited by Foner, 1945) 588.

Id. at 81.

Justice Rutledge thus states our concern today: American soldiers and civilians are at risk of being similarly denied due process as happened in Iraq in 1991; Acree, supra; if they are cap-
tured because of our example of a trial without minimal due process in violation of our own law and international law.

C. Comparison to Today's Criminal Defense Bar

The kind of defense afforded one accused of crime is an integral part of the American legal tradition, and it is NACDL's mission:

Ensure justice and due process for persons accused of crime . . .

Foster the integrity, independence and experience of the criminal defense profession . . .

Promote the proper and fair administration of criminal justice.

NACDL Bylaws, Art. II, § 1.

The public and the courts expect criminal defense lawyers to provide a zealous defense to every client, no matter how unpopular that client may be. Representing the unpopular is the job of the criminal defense lawyer, and it is necessary to insure that the rights of all of us are protected and maintained. This has been recognized for hundreds of years. See Lord Brougham's closing argument in 2 TRIAL OF QUEEN CAROLINE 7-8 (1821), quoted in DAVID MELLINKOFF, THE CONSCIENCE OF A LAWYER 188-89 (1973); GEORGE SHARSWOOD, PROFESSIONAL ETHICS 84-84 (1884); McCoy v. Court of Appeals, 486 U.S. 429, 435 (1988); United States v. Wade, 388 U.S. 218, 256-58 (1967) (Justice WHITE, concurring and dissenting). It is imbedded in the ethical rules by RPC Rule 1.1 (duty to be competent), Rule 1.3 (duty to be diligent), Rules 1.7-1.10 (duty to be independent), and Rule 2.1 (candid advice). See also RPC Rule 1.16(b) (duty to withdraw if counsel cannot zealously defend).

If representation of a particular person is or becomes morally repugnant to the lawyer, or simply impossible under the circumstances; RPC Rule 1.7(a)(2), the lawyer should not take the case or may withdraw in a proper case. RPC Rule 1.16(b); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 32, and Comment (2000); Tenn. Op. 96-F-140. Indeed, a lawyer that cannot give the client his or her all should not be in the case because that creates a personal conflict of interest under Rule 1.7(a)(2). A lawyer's personal conscience or moral code is a valid consideration in determining whether or how to proceed. RPC Preamble ¶ 6. See also id. ¶ 14:

The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can
be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

Any criminal defense lawyer needs to keep in mind that the government will contend that no law but the MCO and MCIs will apply and that the accused has only the rights the government chooses to give. Defense counsel may feel it necessary to seek civilian court review, as happened in *Ex Parte Quirin* and *Application of Yamashita* even if counsel believes that the courts will unlikely intervene. The scholars uniformly believe that the President has exceeded his authority as Commander-in-Chief when the War Powers Clause of the Constitution resides that power in the Congress. U.S. Const., Art. I, § 8, cl. 11; see *Youngstown Sheet & Tube*, supra. An independent judiciary may, and should, agree.

D. ABA’s Proposed Recommendation

NACDL also endorses the American Bar Association’s proposed Recommendation from its Task Force on Treatment of Enemy Combatants from the ABA’s Criminal Justice Section and the Section of Individual Rights and Responsibilities. That recommendation states:

FURTHER RESOLVED, that the American Bar Association endorses the following principles for the conduct of any military commission trials that may take place:

1. The government should not monitor privileged conversations, or interfere with confidential communications, between defense counsel and client;


28 There is a difficult jurisdictional issue here, too: NACDL believes that Guantanamo Bay, Cuba, was picked for the forum for these military commissions to enable the government to defeat any effort at an accused person obtaining civilian court jurisdiction over him. These “enemy combatants” are not being tried in the place of their alleged crimes as required by the Law of War. Guantanamo Bay has a unique status as leased land which the government claims foils any civilian court’s efforts to assert jurisdiction over the detainees. *See* *Odah v. United States*, 355 U.S.App.D.C. 189, 321 F.3d 1134 (2003).

29 This provision was separately unanimously adopted on August 6, 2003, by the NACDL Executive Committee which acts for NACDL between meetings of the Board of Directors.

30 It is also endorsed by the Association of the Bar of the City of New York and the Beverly Hills Bar Association.
2. The government should ensure that CDC who have received appropriate security clearances are permitted to be present at all stages of commission proceedings and are afforded full access to all information necessary to prepare a defense, including potential exculpatory evidence, whether or not used, or intended to be used, at a trial;

3. The government should ensure that CDC are able to consult with other attorneys, seek expert assistance, advice, or counsel outside the defense team, and conduct all professionally appropriate factual and legal research, subject to their duty not to reveal or disseminate classified or protected information or to such other conditions as a military commission may determine are required by the circumstances in a particular case after notice and hearing;

4. The government should not limit the ability of CDC to speak publicly, consistent with their obligations under the Model Rules of Professional Conduct, and subject to their duty not to reveal or disseminate classified or protected information, or to such other conditions as a military commission may determine are required by the circumstances in a particular case after notice and hearing;

5. The government should provide for travel, lodging, and required security clearance background investigations for CDC, and should consider the professional and ethical obligations of CDC in scheduling of proceedings.

6. The Government should permit non-U.S. citizen lawyers with appropriate qualifications to participate in the defense.

7. To the extent that the government seeks modification of any of the foregoing on the basis of national security concerns, it should be required to do so on a case-by-case basis in a proceeding before a neutral officer and with defense participation.

FURTHER RESOLVED, that Congress and the Executive Branch should develop rules and procedures to ensure that any military commission prosecution in which the death penalty may be sought complies fully with the provisions of the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (rev. ed. 2003).


E. Duties of Defense Counsel in a Military Commission

It appears from the rules under which these commissions will operate that defense counsel will be severely disadvantaged. Defense counsel has no ability to share information with co-
defendant's counsel or witnesses to attempt to put on a common defense, defense counsel likely will be limited in counsel's ability to even meet with the client, and attorney-client communications will be monitored.\footnote{31}

A military lawyer detailed to take the case likely has no choice to get involved, but the military lawyer should refuse to sign the military version of Annex B,\footnote{32} but civilian counsel does have a choice to not apply to be counsel.\footnote{33}

We also believe that no military or civilian defense lawyer should apply to handle such cases unless qualified to handle death penalty cases in their local jurisdictions or in federal or military courts. These military commission cases must presumptively be considered death penalty cases, but, under the rules of the military commission, counsel and the accused may not learn that the case is being pursued as a death penalty case until the opening statement since there is no fundamental fairness requirement, as in the civilian system, of notice and the pleading of an aggravating circumstance so the accused can prepare for a penalty phase.

It is NACDL's position, by unanimous vote of the Board of Directors having viewed MCI-5's Annex B and debating the question, that it is unethical for a criminal defense lawyer to represent a person accused before these military commissions because the conditions imposed upon defense counsel before these commissions make it impossible for counsel to provide adequate or ethical representation. Defense counsel cannot contract away his or her client's rights, including the right to zealous advocacy, before a military commission, which is what the government seeks

\footnote{31}{Defense counsel most certainly will need an interpreter to communicate with the client, and the interpreter will likely be provided by the CIA, DIA, or other governmental entity, and the communications \textit{will} be monitored and likely will be recorded. The government insists that the information so obtained will not be used against the accused in that proceeding, and the future crime exception applies. (MCI-5, Annex B, ¶ II(I) & (J) (defense counsel must reveal future crimes likely to result in death or seriously bodily harm or impair national security; \textit{compare} RPC Rule 1.6(b)(2))

Since there is no double jeopardy protection in these military commissions, admissions of the accused to counsel could be used in another trial over the same facts or a related trial.

\footnote{32}{We take no position on a military lawyer's obligation to refuse to execute what he or she believes is an unlawful order. \textit{See generally} 10 U.S.C. § 892. We leave it to the individual military defense counsel involved, although NACDL through its Military Law and Ethics Advisory Committees will address specific cases on the request of NACDL members.

\footnote{33}{Civilian counsel has to be a U.S. citizen under the MCO and MCIs (except for British counsel given special status). If a U.S. lawyer is sought to be retained, the lawyer is cautioned that the Office of Foreign Assets Control operating under the International Economic Emergency Powers Act (IEEPA), 50 U.S.C. § 1701 \textit{et seq.}, will determine that the defense lawyer cannot be paid under the Taliban Sanctions, 31 C.F.R. § 545, and the Global Terrorism Sanctions, 31 C.F.R. § 594. \textit{Compare} United States \textit{v. Lindh}, 212 F.Supp.2d 541 (E.D.Va. 2002) (Lindh's lawyers, however, were not paid with foreign funds).}
NACDL will not condemn criminal defense lawyers who undertake to represent persons accused before military commissions. If defense counsel undertakes representation and can abide by these rules, counsel must seek to raise, with knowledge of the extraordinarily serious and unconscionable risks involved in violating Annex B just by doing what we do everyday,\textsuperscript{34} raising every conceivable good faith argument concerning the jurisdiction of the military commission, the legality of denial of application of the UCMJ, treaties, and due process of law, including resort to the civilian courts of the United States to determine whether the proceedings are constitutional.\textsuperscript{35}

If counsel appearing before a military commission has an ethical quandary that they cannot resolve, they need to consult with their state bars. Military case law has already settled that issue (as noted above), and 28 U.S.C. § 530B and 28 C.F.R. § 77.3 makes all government lawyers subject to regulation by their state bars.\textsuperscript{36}

NACDL members can also consult with the Ethics Advisory Committee. NACDL will stand behind its members to insure that they can give their clients the best defense possible.

One final note, if defense counsel seeks outside ethical assistance on an ethical problem, defense counsel must take care in seeking that advice not to reveal matters that defense counsel swore to keep secret—it could lead to counsel being indicted. One can assume that defense counsel's calls to outside counsel from Guantanamo Bay will be monitored, too.\textsuperscript{37}

\textbf{Notice}

This is an opinion only of the Ethics Advisory Committee of the National Association of Criminal Defense Lawyers, as approved by the NACDL Board of Directors. NACDL is a voluntary association of nearly 11,000 criminal defense attorneys with more than 80 state and local affiliates. This opinion is intended to be the Committee's best interpretation of the Model Rules of Professional Conduct and the rules, statutes, and constitutional provisions involved as they apply to

\textsuperscript{34} We strongly caution, however, that counsel must keep in mind that signing Annex B and then refusing to abide by its terms likely will be treated by the government as a crime under 18 U.S.C. § 1001. The government has done so as to Special Administrative Measures agreements in the Bureau of Prisons.

\textsuperscript{35} By signing Annex B, defense counsel waives the ability to test the constitutionality of the proceedings in a civilian court. Defense counsel cannot waive such a fundamental client right.

\textsuperscript{36} While it varies from state-to-state, state bar ethics opinions may be binding on the lawyer seeking the opinion, or they may be merely advisory.

\textsuperscript{37} The government then will seek to impose secrecy requirements on counsel that defense counsel consults.
the written facts presented to the Committee, and it is not binding on anyone other than to show the lawyer's good faith in reliance on it.
RESOLVED, that the American Bar Association calls upon Congress and the Executive Branch to ensure that all defendants in any military commission trials that may take place have the opportunity to receive the zealous and effective assistance of Civilian Defense Counsel (CDC), and opposes any qualification requirements or rules that would restrict the full participation of CDC who have received appropriate security clearances, and

FURTHER RESOLVED, that the American Bar Association endorses the following principles for the conduct of any military commission trials that may take place:

1. The government should not monitor privileged conversations, or interfere with confidential communications, between any defense counsel and client;

2. The government should ensure that CDC who have received appropriate security clearances are permitted to be present at all stages of commission proceedings and are afforded full access to all information necessary to prepare a defense, including potential exculpatory evidence, whether or not used, or intended to be used, at a trial;

3. The government should ensure that CDC are able to consult with other attorneys, seek expert assistance, advice, or counsel outside the defense team, and conduct all professionally appropriate factual and legal research, subject to their duty not to reveal or disseminate classified or protected information or to such other conditions as the presiding officer of a military commission may determine are required by the circumstances in a particular case after notice and hearing;

4. The government should not limit the ability of CDC to speak publicly, consistent with their obligations under the Model Rules of Professional Conduct, and subject to their duty not to reveal or disseminate classified or protected information, or to such other conditions as the presiding officer of a military commission may determine are required by the circumstances in a particular case after notice and hearing;
5. The government should provide for travel, lodging, and required security clearance background investigations for CDC, and should consider the professional and ethical obligations of CDC in scheduling of proceedings.

6. The Government should permit non-U.S. citizen lawyers with appropriate qualifications to participate in the defense.

7. To the extent that the government seeks modification of any of the foregoing on the basis of national security concerns, it should be required to do so on a case-by-case basis in a proceeding before a neutral officer and with defense participation.

FURTHER RESOLVED, that Congress and the Executive Branch should develop rules and procedures to ensure that any military commission prosecution in which the death penalty may be sought complies fully with the provisions of the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. (rev. ed. 2003).
REPORT

I. INTRODUCTION

In response to the horrific attacks of September 11, 2001, the President undertook a series of extraordinary steps to bring Al Qaeda terrorists to justice and protect the American homeland. One of the most controversial was a Military Order issued by the President on November 12, 2001, which authorized the detention and trial by military commissions of Al Qaeda terrorists and others.

The structure and procedures for the proposed military commissions drew immediate and widespread criticism. Senator Patrick Leahy (D-VT), who chaired Senate Judiciary Committee hearings on the Military Order, received a letter signed by over 400 law professors and noted that legal "experts around the country are concerned that the President's Order does not comport with either constitutional or international standards of due process."1

The controversy intensified this year, as the Department of Defense (DoD) issued detailed procedural rules for the operation and conduct of military commission proceedings and named a military Chief Prosecutor and a Chief Defense Counsel. Media reports indicated that court facilities, more permanent prison facilities, and even an execution chamber, were being constructed at Camp X-Ray on the Guantanamo Bay Naval Base in Cuba, where more than 680 detainees from at least 40 countries were being held.2

On July 3, 2003, the White House announced that six Guantanamo detainees had been declared "eligible" for prosecution by a military commission.3 While the six detainees were not officially identified by name, reports quickly surfaced that at least two were British and Australian citizens. A firestorm of criticism erupted in both countries. Members of Parliament called the planned proceedings a "charade of justice" and a "kangaroo court"4 and 218 Members of Parliament -- one third of the lower House of Commons -- "signed a petition asserting that the British detainees

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could not get a fair trial from U.S. military tribunals and calling for their repatriation.\(^5\)

One of the major criticisms of the military commissions is that the fate of each detainee is wholly in the hands of their captors. The military serves as accuser, jailer, prosecutor, defense lawyer, judge, jury, and appellate authority, and are not subject even to the *procedural* rules governing courts martial, which include the right of appeal to a higher court and, ultimately, to the Supreme Court of the United States.

The rules and procedures for military commissions do allow detainees to seek the assistance of Civilian Defense Counsel (CDC) but, unlike the military justice system, the detailed (military) defense lawyer cannot be discharged, regardless of the wishes of the detainee or the CDC.

Moreover the rules, as now drafted, do not sufficiently guarantee that CDC will be able to render zealous, competent, and effective assistance of counsel to detainees.

Indeed, on August 2, 2003, the Board of Directors of the National Association of Criminal Defense Lawyers (NACDL) -- a cosponsor of this Recommendation -- decided by a unanimous vote that it would be unethical for a criminal defense lawyer to represent an accused before these military commissions because the restrictions imposed upon defense counsel make it impossible for counsel to provide adequate or ethical representation.\(^6\)

Because the unwarranted restrictions on CDC raise serious questions about whether military commissions will be, and will be perceived by the international community to be, fundamentally fair and consistent with the high standards of American justice, the ABA Task Force on Treatment of Enemy Combatants was asked to examine the issues.\(^7\)

Our review of the relevant Military Commission Instructions convinces us that the American Bar Association should call upon Congress and the Executive Branch to ensure that all defendants in any military commission trials that may take place have the opportunity to receive the zealous and effective assistance of CDC, and should oppose any qualification requirements or rules that would


\(^6\) We do not, by these recommendations, question the dedication of military defense lawyers. Lawyers in the military, like their civilian counterparts, are expected to give independent and zealous representation, without regard to personal consequences. Rules for Courts Martial 502(b)(6)(B). In addition, rule 104(b)(1)(B) prohibits giving any defense counsel a less favorable rating or evaluation because of the zeal with which such counsel represented any accused. Zealous criminal defense is a military tradition and duty.

\(^7\) The Task Force previously examined the detention of United States citizens designated as enemy combatants, resulting in policy approved by the House of Delegates in February, 2003.
restrict the full participation of CDC who have received appropriate security clearances.

II.
BACKGROUND

A. **The President's Military Order**

On November 13, 2001, President Bush issued a "Military Order" regarding "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism"\(^8\)

The President's Military Order (hereafter APMO) cited his authority as President and Commander in Chief of the Armed Forces, the Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224), and Title 10, U.S.C. "82\(^9\) and 836,\(^10\) and found that "for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof\(^1\) to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals."

The PMO directed the Secretary of Defense to "issue...orders and regulations... for the appointment of one or more military commissions"\(^12\) as well as rules for the conduct of such proceedings, "including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys..."\(^13\)

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\(^9\) 10 U.S.C. §821, which is Article 21 of the Uniform Code of Military Justice (UCMJ), provides that the "provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commission, provost court, or other military tribunals."

\(^10\) 10 U.S.C. §836, Article 36 of the UCMJ, authorizes the President to prescribe procedures "in courts-martial, military commissions and other military tribunals" and "so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter."

\(^11\) Pursuant to §2(a), any non-citizen whom the President determined was a current or former member of al Qaeda, or had aided or abetted terrorist acts against the United States, or had knowingly harbored such persons, would be subject to detention and prosecution.

\(^12\) PMO, §4(b).

\(^13\) PMO, §4(c) (emphasis supplied).
The language of the PMO authorized a lower standard of admissibility of evidence,14 permitted secret evidence and closed proceedings, and allowed convictions -- including the imposition of the death penalty -- by a less-than-unanimous vote. Moreover, the PMO excluded review by any state, federal, foreign, or international court.15

B. The ABA Response to the President’s Military Order

1. ABA Task Force on Terrorism and the Law

Shortly after the 9/11 attacks, the ABA had formed a task force of experts in diverse areas of the law “to offer counsel to the country’s political leaders as they consider legislation in the wake of the September 11 terrorist attacks.”16 Thus, the ABA Task Force on Terrorism and the Law (hereafter TFTL) was asked to examine the PMO, and it issued a Report on January 4, 2002.17

While the TFTL found historical authority supporting the establishment of military commissions in wartime under the Constitution and laws of the United States, and noted that military commissions had been used in periods other than declared war, its Report cautioned that:

Trying individuals by military commission would be a controversial step. Military commissions probably will not afford the same procedural protections as civilian courts. The United States has protested the use of military tribunals to try its citizens in other countries. If conducted under reasonable procedures, however, military commissions can deliver justice with due process. Nevertheless, regardless of their actual fairness, many will view the verdict of a military commission with skepticism.

TFTL Report, supra, at pp. 13-14. The TFTL Report urged that procedures for military commissions “be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial, Manual for Courts-Martial, Preamble, paragraph 2(b)(2), and . . . conform to Article 14 of the International Covenant on Civil and Political Rights”18 Id. at pp. 16-17.

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14 Pursuant to 4(c)(3) of the PMO, evidence would be admissible if it has “probative value to a reasonable person.”

15 Id. at §§ 4(c)(8) and 7(b)(2).


18 The Report set forth the procedures in Article 14, which include: an independent and impartial tribunal, with the proceedings open to the press and public, except for specific and compelling reasons, and the following rights for the defendant: presumption of innocence; prompt notice of charges, and adequate time and
2. Action of the ABA House of Delegates

Since the TFTL Report did not represent official policy of the ABA until approved by the ABA House of Delegates, a group of bar associations and ABA entities\(^{19}\) submitted a more formal Recommendation and Report to the House of Delegates at the 2002 MidYear Meeting the following month.

Report \(8C^{20}\) urged that "procedures for trials and appeals be governed by the Uniform Code of Military Justice . . . and provide the rights afforded in courts-martial thereunder, including but not limited to, provision for certiorari review by the Supreme Court of the United States (in addition to the right to petition for a writ of habeas corpus), the presumption of innocence, proof beyond a reasonable doubt, and unanimous verdicts in capital cases."

Report \(8C\) also urged that procedures "comply with Articles 14 and 15(1) of the International Covenant on Civil and Political Rights, including but not limited to, provisions regarding prompt notice of charges, representation by counsel of choice, adequate time and facilities to prepare the defense, confrontation and examination of witnesses, assistance of an interpreter, the privilege against self-incrimination, the prohibition of ex post facto application of law, and an independent and impartial tribunal, with the proceedings open to the public and press or, when proceedings may be validly closed to the public and press, trial observers, if available, who have appropriate security clearances." \(^{Id}\)

C. Military Commission Order No. 1

The first implementation of the President's Order took the form of a March 21, 2002 Department of Defense Military Commission Order No. 1, "Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism" ("MCO No. 1")\(^{21}\)

MCO No. 1 provided for some "choice of counsel" by allowing an accused to select a

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\(^{19}\) The primary sponsoring entities included: The Bar Association of the District of Columbia; The Association of the Bar of the City of New York; The Bar Association of San Francisco; The Beverly Hills Bar Association; and the ABA Section of Individual Rights and Responsibilities.

\(^{20}\) http://www.abanet.org/poladv/letters/107th/militarytrib8c.pdf

"Military Officer who is a judge advocate of any United States armed force to replace the Accused's Detailed Defense Counsel..." and contained a further provision regarding civilian attorneys:

(b) The Accused may also retain the services of a civilian attorney of the Accused's own choosing and at no expense to the United States Government ("Civilian Defense Counsel"), provided that attorney: (i) is a United States citizen; (ii) is admitted to the practice of law in a State, district, territory, or possession of the United States, or before a Federal court; (iii) has not been the subject of any sanction or disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct; (iv) has been determined to be eligible for access to information classified at the level SECRET or higher under the authority of and in accordance with the procedures prescribed in reference (c); and (v) has signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the course of proceedings.* **

Representation by Civilian Defense Counsel will not relieve Detailed Defense Counsel of the duties specified in Section 4(C)(2). The qualification of a Civilian Defense Counsel does not guarantee that person's presence at closed Commission proceedings or that person's access to any information protected under Section 6(D)(5).

See MCO No. 1, §4(C)(3)(b). The Order did not include the form of the "written agreement" required to be signed, nor did it elaborate on the provisions of the "applicable regulations or instructions for counsel, including any rules of court for conduct during the course of proceedings" with which civilian attorneys would have to comply.

The provisions of MCO No. 1, adopted many of the recommendations that had been made by the ABA House of Delegates in Report 8C a month earlier. As ABA Robert Hirshon observed, the improvements included "basic standards of due process such as the presumption of innocence, proof beyond a reasonable doubt, unanimous verdicts in capital cases and representation by counsel of choice." However, President Hirshon stated:

We are concerned, however, with other provisions, most notably the relaxation of the rules of evidence and the lack of an appeal to an independent appellate body with the right to certiorari review by the U.S. Supreme Court. *** We urge the Department to work with the Congress to clarify these issues before actually implementing the regulations. *** We commend the Defense Department for its efforts and look forward to a continuing dialogue.

E. ** The Military Commission Instructions **

http://www.abanet.org/media/mar02/hirshoncomments.html
On February 28, 2003, DoD released a draft Military Commission Instruction that detailed the crimes and elements for prosecutions before military commissions and invited public comment. A variety of organizations and individuals provided thoughtful comments in response.

On April 30, 2003, thirteen months after the issuance of MCO No. 1, the DoD issued the final Military Commission Instruction for Trials and Elements for Trials by Military Commission to "facilitate the conduct of possible future military commissions." At the same time, the DoD issued seven other Military Commission Instructions (MCI) which had never been released in draft form for comments. The full package of eight MCIs encompassed crimes and elements of offenses, administrative guidance, and procedures for Military Commission participants.

III.
THE MILITARY COMMISSION INSTRUCTIONS DO NOT ENSURE THAT 
DETAINEES WILL HAVE THE OPPORTUNITY TO RECEIVE ZEALOUS AND 
EFFECTIVE ASSISTANCE OF CIVILIAN DEFENSE COUNSEL

These recommendations focus on the issue of whether MCI No. 5, "Qualification of Civilian Defense Counsel," unduly restricts the ability of CDC to render zealous and effective assistance of counsel to detainees who may be tried by military commissions.

23 The MCIs were described by DoD Deputy General Counsel Whit Cobb as "another step... towards being prepared to conduct full and fair military commissions." See, DoD News Release, May 2, 2003, at: http://www.dod.gov/news/May2003/b05022003 bt297-03.html.

24 What had been draft MCO No. 1 appeared in final form as MCI No. 2. The National Institute of Military Justice (NIMJ) recently produced an authoritative analysis of all of the MCIs which includes copies of many of the comments submitted to DoD. In their discussion of MCI No. 2, Eugene R. Fidell and Michael F. Noone demonstrate that many of the comments were incorporated into the final Instruction. See Annotated Guide: Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (2002), available from http://www.nimi.org.

25 The full set of military instructions include: MCI No. 1 - Guidance on Military Commission Instructions; MCI No. 2 - Crimes and Elements for Trials by Military Commission; MCI No. 3 - Responsibilities of the Chief Prosecutor, Prosecutors, and Assistant Prosecutors; MCI No. 4 - Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel; MCI No. 5 - Qualification of Civilian Defense Counsel; MCI No. 6 - Reporting Relationships for Military Commission Personnel; MCI No. 7 - Sentencing; and MCI No. 8 - Administrative Procedures.

26 As noted above, the American Bar Association has previously urged that trials and appeals be governed by the UCMJ, with the rights afforded in courts-martial and provision for certiorari review by the Supreme Court of the United States in addition to the right to petition for a writ of habeas corpus, and that trials comply with Articles 14 and 15(1) of the International Covenant on Civil and Political Rights. It is regrettable and unsatisfactory that the MCIs have failed to meet those standards of fairness and due process.
A. The Requirements of MCI No. 5

MCI No. 5 "establishes policies and procedures for the creation and management of the pool of qualified Civilian Defense Counsel" authorized by MCO No. 1. It not only provides the basis for civilian lawyers to establish their qualifications and eligibility to serve as CDC, it also enumerates critical limitations on lawyers who may seek to serve in that capacity.

The requirements for service as CDC are set forth in the Instruction and also in an "Affidavit and Agreement by Civilian Defense Counsel" attached as Annex B to MCI No. 5, which "shall be executed and agreed to without change (i.e., no omissions, additions, or substitutions)." Those requirements, and the language of the Affidavit place unwarranted limitations upon the ability of lawyers to serve as CDC and render zealous and effective advocacy to their clients.

While the Affiant must acknowledge that "nothing in this Affidavit and Agreement creates any substantive, procedural, or other rights for me as counsel or for my client(s)," a later violation of the terms of the Affidavit could support a federal criminal prosecution for violation of 18 U.S.C. § 1001, as happened in the Lynne Stewart case.

We will deal with each of those unduly burdensome limitations in the context of each of the principles the Recommendation endorses for the conduct of any military commission trials that may take place.

1. The government should not monitor privileged conversations, or interfere with confidential communications, between defense counsel and client

Section II (I) of MCI No. 5, Annex B, the Affidavit, requires CDC to attest to the following provision:

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.

27 MCI No. 5, §1.

28 MCI No. 5, §3(A)(2)(e). MCI No. 5 and the Affidavit, Annex B, also reference other Instructions and Orders. We focus on this Instruction, however, because the Affidavit, a prerequisite to qualification, is what binds the CDC to abide by all of the other rules.

29 MCI No. 5, Annex B, §II(K).

30 United States v. Stewart, 2002 WL 1300059 (S.D.N.Y. 2002), later opinion United States v. Sattar, 2003 WL 21698266, *16-17 (S.D.N.Y. July 22, 2003) (dismissal of § 1001 count denied; even if the government could not have asked the question, it had to be answered truthfully or objected to before hand).
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. I further understand that communications are not protected if they would facilitate criminal acts or a conspiracy to commit criminal acts, or if those communications are not related to the seeking or providing of legal advice.

That provision, which forces CDC to agree to an "invasion of the defense camp" by the government as a condition of service, clearly violates the attorney-client privilege, chills the attorney-client relationship of trust and confidence, and forces CDC to contravene the requirements of the Model Rules of Professional Conduct.

The ABA has long played a leading role in developing policies and standards governing the attorney-client privilege, the attorney-client relationship, and the preservation of client confidences. The ABA Model Rules of Professional Conduct (e.g., MR 1.6 and 3.8) and the ABA Standards for Criminal Justice, Prosecution Function and Defense Function (e.g., Standard 4-3.1), as well as many other ABA policies, are premised upon the fundamental principle that the attorney-client relationship and the attorney-client privilege are essential elements of a system of justice and have real meaning only when clients are free to have full and frank communications with their lawyers.

The core purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). It is the oldest confidential communications privilege known to the common law, United States v. Zolin, 491 U.S. 554, 562 (1989).

The privilege serves the interests not only of those charged with crimes, but also of society as a whole. It reflects pragmatic considerations and serves utilitarian ends. It proceeds from the recognition that the interests of justice are best served when attorneys are fully informed of all facts relating to the legal issues confronting their client.

The privilege is necessary because many clients – both the innocent and the guilty – would be afraid to speak frankly with their attorneys if the information they provided could be disclosed to others. See Upjohn Co. v. United States, supra, ("assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure"); United States v. Chen, 99 F.3d 1495, 1499 (9th Cir. 1996) ("[T]o get useful advice, [clients] have to be able to talk to their lawyers candidly without fear that what they say to their own lawyers will be transmitted to the government.").

The guarantee of confidentiality afforded attorney-client consultations therefore serves not only the client's interest in receiving well-informed legal advice, but also the broader public interest in ensuring that the legal system produces just and accurate results.
CDC will already face daunting challenges in attempting to establish a relationship of trust and confidence with clients, because language and cultural barriers, and the clients' distrust of the military commission process. These difficulties will be exacerbated if CDC must inform the client that even confidential and privileged conversations may be monitored without notice, and that the very officials who serve as their captors, jailers, accusers, and prosecutors will be listening to all their communications with their attorneys. Under such circumstances, the barriers to effective representation may become virtually insurmountable.

Moreover, the monitoring provision in MCI No. 5 may actually be counterproductive to the purpose behind the decision to monitor these privileged conversations. In a letter commenting on a similar Bureau of Prisons (BOP) regulation promulgated by the Attorney General in October 2001, the ABA wrote:

... the monitoring will have a chilling effect on legitimate attorney-client communications that could actually harm public safety. Some detainees may well have valuable information concerning past or future terrorist activities that it would be important for the government to obtain. If the detainee cannot be assured of a confidential consultation with his or her attorney, the detainee will likely not let the attorney know that he or she has this information. As a result, the monitoring may cause the government to lose swift access to valuable information that could save lives or bring terrorists who are still at large to justice.

Those observations are equally relevant to the monitoring of military commission detainees. Such monitoring is unwarranted and unnecessary, and will severely limit the ability of civilian lawyers to serve as CDC and to effectively represent detainees. The government should not monitor privileged conversations, or interfere with confidential communications, between defense counsel and client.

2. The government should ensure that CDC who have received appropriate security clearances are permitted to be present at all stages of commission proceedings and are afforded full access to all information necessary to prepare a defense, including potential exculpatory evidence, whether or not used, or intended to be used, at a trial

Section I (B) of MCI No.5, Annex B, the Affidavit, requires CDC to attest to the following provision:

I am aware that my qualification as a Civilian Defense Counsel does not guarantee

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31 CDC would be ethically bound to advise the client of the monitoring provision. ABA Standards for Criminal Justice, Prosecution Function and Defense Function (3d ed.), Standard 4-3.1 (Commentary) ("Because it is critical to a healthy lawyer client relationship that a client not be surprised by the revelation of confidences made by an attorney sometime in the future, counsel should fully and clearly explain to the client the applicable extent of (and limitations upon) confidentiality in the relevant jurisdiction.")
my presence at closed military commission proceedings or guarantee my access to any information protected under Section 6(D)(5) or Section 9 of MCO No. 1.

This provision seriously hampers the ability of CDC to represent the client. He must acknowledge, and by the terms of the Affidavit, agree, that he can be excluded from critical portions of the trial and that the military defense counsel, who can not be so excluded, can not even inform him – or the client – of what transpired. Moreover, pursuant to MCI No. 4, CDC can be denied access to “protected information” admitted against the client.

Such closed, secret proceedings are inconsistent with American standards of fairness and due process. As one prominent commentator observed:

. . . the civilian counsel is not guaranteed presence at closed sessions of the commission and may be denied access to "protected information" admitted against the client, which would be revealed only to the detailed defense counsel, who would be prohibited from sharing that information with the civilian counsel (and possibly with the client as well -- raising issues of conviction on the basis of information to which the accused has been denied access). This provision denying counsel of choice access to critical evidence is perhaps the most important of the limitations imposed by these instructions and one that clearly has an impact on the ability of counsel to provide effective representation.

Since a fundamental prerequisite for service as CDC is that lawyers “must possess a valid current security clearance of SECRET or higher," the need to exclude CDC from closed portions of trials and from access to “protected information” is not readily apparent.

Indeed, in federal criminal cases involving classified information, the Classified Information Procedures Act, 18 U.S.C. App. III. Sections 1-16 ("CIPA"), has been able to balance the need to protect classified information and the right to a full and fair defense. Adoption of the procedures employed in CIPA cases would strike a better balance between ding lawyers from proceedings or barring them from effectively defending against evidence admitted at trial.

3. The government should ensure that CDC are able to consult with other attorneys, seek expert assistance, advice, or counsel outside the defense team, and conduct all professionally appropriate factual and legal research, subject to their duty not to reveal or disseminate classified or protected information or to such other conditions as a military commission may determine are required by the circumstances in a particular case after notice and hearing

Section I (B) of MCI No.5, Annex B, the Affidavit, requires CDC to attest to the following provision:

I will not discuss, transmit, communicate, or otherwise share documents or
information specific to the case with anyone except as is necessary to represent my client before a military commission. In this regard, I will limit such discussion, transmission, communication or sharing to: (a) persons who have been designated as members of the Defense Team in accordance with applicable, rules, regulations, and instructions; (b) commission personnel participating in the proceedings; (c) potential witnesses in the proceedings; or (d) other individuals with particularized knowledge that may assist in discovering relevant evidence in the case.

At the outset, we should note with some approval that the above quoted language represents a recent and positive modification of the original provisions of MCI No. 5, which barred CDC from any communication with persons who were not "designated as members of the Defense Team." In addition, the revision B no longer requires that CDC perform all "work relating to the proceedings, including any electronic or other research, at the site of the proceedings."

Nevertheless, the language regarding "other individuals with particularized knowledge" is still unclear. Does it limit contact to potential fact or expert witnesses, or does it allow, as it should, that CDC are free to consult with other attorneys and seek expert assistance, advice, or counsel outside the defense team?

Based on our informal discussions with DoD officials, we are hopeful that there is no intent to unduly restrict the ability of CDC to prepare. However, because this provision is contained in an Affidavit that CDC must sign before being qualified to serve, it is important that the language is clarified -- and be precise -- in accordance with the principle set forth above.

4. The government should not limit the ability of CDC to speak publicly, consistent with their obligations under the Model Rules of Professional Conduct, and subject to their duty not to reveal or disseminate classified or protected information, or to such other conditions as a military commission may determine are required by the circumstances in a particular case after notice and hearing.

Section II (F) of MCI No. 5, Annex B, the Affidavit, requires the following attestation:

At no time, to include any period subsequent to the conclusion of the proceedings, will I make any public or private statements regarding any closed sessions of the proceedings or any classified information or material, or document or material constituting protected information under MCO No. 1.

32 See Freedus, Barry, and Lattin, NIMJ Military Commission Instructions Sourcebook, supra, Supplemental Discussion of Military Commission Instruction No. 5 ("After releasing MCIs 1-8 on April 30, 2003, and publishing them in the Federal Register on July 1, 2003, 68 FED. REG. 39,374, DoD modified Annex B of MCI 5 without formally announcing that it had done so. Instead, it simply replaced the original version of MCI 5 on its website with a revised version that continues to bear the original April 30 date, despite the fact that it is actually Change 1.")

This seems to be a permanent gag order, covering a very wide range of material—for example the definition of "protected information" in ¶ 6(D)(5)(a) of the PTMC includes classifiable information, a term both broad and vague. Regrettably, the provision is not further explained or justified.

And, as Freedus, Barry, and Lattin, supra, observed:

The civilian lawyer is further silenced by his promise, applicable even after the proceedings have ended, not to make any statement "public or private" "regarding" any closed sessions or any classified information. This is very broad language and could cover statements such as "I think there were far too many closed sessions," or "The Accused was unduly hampered from putting on a case because he wasn't able to see most of the evidence which was, in my opinion, unnecessarily classified."

We believe that the government should not limit the ability of CDC to speak publicly, consistent with their obligations under the Model Rules of Professional Conduct, and subject to their duty not to reveal or disseminate classified or protected information, or to such other conditions as a military commission may determine are required by the circumstances in a particular case after notice and hearing. We urge DoD to modify this provision accordingly.

5. The government should provide for travel, lodging, and required security clearance background investigations for CDC, and should consider the professional and ethical obligations of CDC in scheduling of proceedings.

As noted above, CDC must possess a valid security clearance of SECRET or higher. If the CDC applicant does not currently possess such clearance, he or she is required to "submit to a background investigation" and "to pay any actual costs associated with the processing of the same." MCI No. 5, § 3(A)(2)(d)(ii).

There is little doubt that most civilian lawyers who volunteer to serve as CDC will be doing so pro bono, as a public service, since few of the detainees currently at Camp X-Ray will have the financial ability to retain private civilian counsel. The costs of a background investigation can run thousands of dollars, and the cost of travel and lodging at Guantanamo may also incur substantial costs.

A DoD official has indicated that CDC will be housed at hotel quarters on the Guantanamo base, but that the hotel facility normally charges non-military personnel. Since security clearance investigations will be done for the benefit of the government, and since travel may well be by military transport and lodging will be in government facilities, it does not seem burdensome to
suggest that the government should provide those "in kind" reimbursements to civilian lawyers, who will experience other financial hardships as a result of their service.

In addition, §1 (B) of MCI No.5, Annex B, the Affidavit, requires CDC to attest to the following provision:

I will ensure that these proceedings are my primary duty. I will not seek to delay or to continue the proceedings for reasons relating to matters that arise in the course of my law practice or other professional or personal activities that are not related to military commission proceedings.

The implications for the private practitioner with existing professional obligations to other courts and clients cannot be overstated, since few lawyers would wish sign an Affidavit which binds them to jettison or ignore existing clients and pending trial obligations.

DoD officials, in informal conversations, have indicated that there was no intent to require CDC to forego or abandon his or her professional and/or family obligations. We hope and trust that is the case, but we strongly believe that the language must be clarified and amended so that it is clear that CDC can and should expect appropriate consideration will be given in scheduling proceedings to accommodating conflicting professional and ethical obligations of CDC.

6. The Government should permit non-U.S. citizen lawyers with appropriate qualifications to participate in the defense.

MCI No. 5 currently requires United States citizenship as a qualification to serve as CDC. We believe that a blanket ban on participation by non-U.S. citizen lawyers who otherwise possess appropriate qualifications is unwise. The Guantanamo detainees come from more than forty countries, and many may wish to have assistance from a lawyer who practices in their home country.

We recognize that the nature and extent of participation by non-citizen lawyers may be complicated in some instances by difficulties in processing security clearances, additional costs of travel and lodging, and even issues of education, training, and familiarity with the English language, and we acknowledge that the government should have discretion and flexibility in such circumstances. We note, however, that arrangements were recently made for British and Australian lawyers to participate in the trials of detainees from those countries and we believe that similar consideration should also be given to qualified foreign lawyers for other detainees.

Finally, to the extent that the government seeks modification of any of the foregoing on the basis of national security concerns, it should be required to do so on a case-by-case basis in a proceeding before a neutral officer and with defense participation.
B. Congress and the Executive Branch should develop rules and procedures to ensure that any military commission prosecution in which the death penalty may be sought complies fully with the provisions of the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. (rev. ed. 2003).

In 1989, the ABA House of Delegates adopted Resolution 122, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("ABA Death Penalty Guidelines") which were designed to "amplify previously adopted Association positions on effective assistance of counsel in capital cases [and to] enumerate the minimal resources and practices necessary to provide effective assistance of counsel."33


These Guidelines apply from the moment the client is taken into custody and extend to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial, post-conviction review, clemency proceedings, and any connected litigation.

The Comment to that Guideline states:

The use of the term "jurisdiction" as now defined has the effect of broadening the range of proceedings covered. In accordance with current ABA policy, the Guidelines now apply to military proceedings, whether by way of court martial, military commission or tribunal, or otherwise.

* * *

These Guidelines, therefore, apply in any circumstance in which a detainee of the government may face a possible death sentence, regardless of whether formal legal proceedings have been commenced or the prosecution has affirmatively indicated that the death penalty will be sought.

The ABA Death Penalty Guidelines represent a consensus within the profession regarding the essential principles to guide capital defense counsel, and have been widely recognized by the courts, including the United States Supreme Court this term in Wiggins v. Smith, 123 S.Ct. 2527 (June 26, 2003).

33 see also ABA Standards for Criminal Justice: Providing Defense Services, Standard 5-1.2 cmt. at 12 (3d ed. 1992) ("ABA Providing Defense Services Standards") ("These guidelines are incorporated by reference into the [ABA Providing Defense Services Standards]."); ABA Standards for Criminal Justice: Prosecution Function and Defense Function, Standard 4-1.2(c) (3d ed. 1993) ("ABA Prosecution Function and Defense Function Standards") ("Defense counsel should comply with the [ABA Death Penalty Guidelines].").
The United States has long been criticized for imposing the death penalty in criminal cases, and many of those who face prosecution for death penalty offenses are citizens of those nations that have outlawed the death penalty. If, indeed, our government decides to proceed with death penalty prosecutions, every step must be taken to insure that those detainees will have competent lawyers who are qualified to defend capital cases, and that the ABA Death Penalty Guidelines are followed and honored.

IV

CONCLUSION

The commencement of military commission trials will not only be a milestone in this nation's war against terror, it will be a pivotal moment in our nation's history. The world will be watching us as we bring these accused terrorists to trial.

In our Report concerning U.S. citizen enemy combatants, we observed that the United States is a great nation not just because it is the most powerful, but because it is the most democratic. We must not create military commission trials that are inconsistent with fundamental due process and the Bill of Rights, the very fabric of our great democracy.

The ABA House of Delegates should adopt the proposed Recommendations. Ensuring that we do not dishonor our cherished Constitutional safeguards in the name of our war against terror and that we continue to strengthen the rule of law is vital to our standing in the world community – and to our nation's very soul

Respectfully submitted,

NEAL R. SONNETT
Chair
Task Force on Treatment of Enemy Combatants

August 2003
Ms. Jamie Fellner  
Human Rights Watch  
Director, U.S. Program  
1630 Connecticut Avenue, Suite 500  
Washington, DC 20009  

Dear Ms. Fellner:

Thank you for your June 10, 2003, letter regarding military commission rules. We consider your input on this subject very important. The Department of Defense is committed to ensuring a fair trial for those charged before a military commission. Your letter highlighted a few areas of concern that I may be able to help clarify.

First, although an Accused will be required to have a Detailed (Military) Defense Counsel, an Accused will have great say in the role that representation will take in relation to additional civilian defense counsel representation. Civilian defense counsel could certainly take the lead if an Accused so desired. The Detailed Defense Counsel is required in the event classified material is presented for which civilian defense counsel does not have the necessary clearance, as Detailed Defense Counsel may not be excluded from any closed session.

Second, you have previously received a copy of the clarified language in Military Commission Instruction No. 5, Annex B. You expressed concern that the previous language prevented defense counsel from investigating a case or preparing a defense. It was always DoD's intent for defense counsel to be able to investigate a case and prepare a defense, and I believe the current language clarifies that intent.

Third, you expressed concern about potential monitoring of attorney-client conversations. As stated in our instructions, nothing said between an Accused and his attorney, nor anything derived there from, may be used against that Accused in a military commission.

Fourth, you expressed concern over civilian attorneys paying for security clearances. The fee is approximately $224 for a SECRET clearance and $2,801 for a TOP SECRET clearance. These fees are akin to other fees that lawyers must pay prior to admission to a bar. Having a minimum SECRET clearance is a necessity to participate in military commissions. Our instructions require that if an Accused chooses to have additional representation beyond the Detailed Defense Counsel, who is provided free of charge, this additional representation must be at no expense to the U.S. government.
Finally, you expressed concern that defense counsel are unable to talk with the media and others about a case. Nothing in the rules, however, prevents a Defense Counsel from raising any and all appropriate issues in open court, which will be open to media, as long as protected information is not being discussed. Additionally, if a Defense Counsel believes there is something that cannot be said in court, he may request permission from the Appointing Authority or the General Counsel of the Department of Defense to speak to the media or the public.

I hope this information helps to alleviate your concerns. Again, thank you for your input in this process.

Sincerely,

[Signature]

Paul W. Cobb, Jr.
Deputy General Counsel
(Legal Counsel)
October 20, 2003

Paul W. Cobb, Jr.
Deputy General Counsel
Department of Defense
1600 Defense Pentagon
Washington, D.C. 20301-1600

Dear Mr. Cobb:

Thank you for your letter of August 20 regarding military commission rules for defense counsel. We appreciate your efforts to clarify the Department of Defense's views. Nevertheless, we remain concerned that certain rules impose unjustifiable limitations on the right to counsel and effective representation, and as such are inconsistent with principles firmly embedded in U.S. constitutional law, the rules for courts-martial, and international human rights law. Your letter's explanations either fail to address our core objections or offer justifications that do not withstand scrutiny.

As a preliminary matter, we want to acknowledge and welcome the change you made to Military Commission Instruction No. 5, Annex B, II (E). We had objected to the original language because it severely restricted the ability of defense counsel to prepare a defense. As rewritten, the rule now permits counsel to travel, undertake research and conduct interviews wherever necessary to build a case prior to the initiation of commission proceedings without having to seek approval from the Appointing Authority or the Presiding officer.

There remains one ambiguity in the new language, however. The revised rule permits counsel to communicate about the case with potential witnesses, members of the defense team, commission personnel, and "other individuals with particularized knowledge." It is not clear whether such individuals must have particularized knowledge of specific facts related to the case. Because criminal cases involve both factual and legal issues, we urge the Department of Defense to clarify that "other individuals" may include persons with legal or other expertise that might be useful to defense counsel. Indeed, in its discussions with the British government over its nationals detained at Guantanamo, the Defense Department already clarified that defense counsel consultation with British lawyers was permitted under the rules.

Despite this welcome clarification, we have several outstanding concerns regarding restrictions on defense counsel.

BRUSSELS GENEVA LONDON LOS ANGELES MOSCOW NEW YORK SAN FRANCISCO WASHINGTON
Right to Counsel of Choice

In your letter, you stated that the rule that all accused be represented by military defense counsel, even if he also has civilian defense counsel, was required "in the event classified material is presented for which civilian defense counsel does not have the necessary clearance, as Detailed Defense Counsel may not be excluded from any closed session." This is not a justification for rules that violate the right to counsel of choice – a fundamental component of a fair trial – by requiring the accused to accept representation by a military lawyer and by denying the defendant the right to either represent himself or to be represented solely by private counsel. As we noted in our letter to you of June 10, 2003, we do not question whether detailed military defense counsel would mount vigorous and competent defense of their clients. Nevertheless, because of culture, political belief, and their imprisonment, many of the detainees subject to trial by military commission may never fully trust or cooperate with U.S. military counsel assigned to them. Such trust and cooperation are, of course, vital for an effective defense.

Forcing military defense counsel on the accused is not the only way to balance the right to counsel with protection of classified information. For example, the Department of Defense could permit civilian counsel to have access to classified documents subject to serious penalties if they in fact divulge protected information. Both civilian courts and military courts martial can impose penalties for violating court orders to keep information confidential. Sensitive information can be protected by providing for such penalties in the commission rules. Moreover, existing rules of professional conduct preclude violation of confidentiality orders. The Department of Defense could also choose to use the procedures specified in the Classified Information Procedures Act that balance the need to protect classified information and the right to a full and fair defense.

Indeed, we question the very basis for restricting access to evidence and proceedings by civilian defense counsel who already have undergone a rigorous security clearance. All persons with access to classified information, whether civilians or members of the military, must protect that information. Yet, under the rules, civilian defense counsel may be excluded from critical portions of the trial and be denied access to protected information admitted against the client, even if they have a high-level security clearance. (MIC No. 5, Annex B, I (B)). These restrictions clearly impinge on the ability to provide effective representation. We strongly believe the Department of Defense should ensure that civilian counsel who have received a security clearance be given access to all commission proceedings, including closed sessions, and to all information necessary to their defense work.

Attorney-Client Communications

The rules require a civilian defense counsel to agree to monitoring of attorney-client conversations by U.S. officials for security or intelligence purposes. (MCI NO. 5, Annex B, II (I)). Such conversations are traditionally covered by the attorney-client privilege of confidentiality to encourage clients to confide openly with their attorneys. The ability to communicate candidly and fully with one's attorney is inherent in the right to counsel, which in turn, helps secure the overarching right of due process and a fair trial. The U.S. government's willingness to profoundly compromise these rights is deeply troubling. You offer as a defense of
the rule that "nothing said between an Accused and his attorney, nor anything derived there from, may be used against that Accused in a military commission." Restricting the use of information obtained from monitoring attorney-client conversations does not fully mitigate the harm from such monitoring. The mere fact that conversation may be monitored will likely inhibit candid conversations between the accused (whether guilty or innocent) and his attorney. The right to counsel and right to a fair trial are clearly jeopardized when the officials who are the captors, jailers, prosecutors, and judges of the accused can listen in to all their conversations with their attorneys, regardless of the subsequent use to which information gleaned from those conversations is put.

**Barriers to Representation by Civilian Counsel**

The Department of Defense should encourage qualified attorneys to serve as civilian counsel. Instead, the Pentagon has erected barriers to representation by civilians. It requires prospective civilian counsel to pay the costs of obtaining the security clearance required to participate as counsel before the commissions. While the $224 fee for a secret security clearance may not be a disincentive to many attorneys, the fee of $2,801 for a top secret clearance is a significant amount of money. Indeed, contrary to what you suggest, the latter amount is certainly not "akin to other fees that lawyers must pay prior to admission to a bar." A top secret clearance is necessary if civilian defense counsel are to maximize their access to material presented during a commission proceedings. The significant cost of obtaining that clearance may well deter attorneys from deciding to join the defense pool for the accused.

Requiring private attorneys to bear the costs of obtaining security clearances is, as you point out, consistent with your instructions that representation by civilian defense counsel should be at no expense to the U.S. government. Our position is that those instructions must be changed. There are plenty of other difficulties faced by civilian lawyers who may want to represent the accused, including the location of the commission proceedings at Guantanamo, restrictions on their ability to travel to and from the site, and the requirement in the commission rules that counsel agree that they will not seek delays in the commission proceedings because of other cases or commitments. In this context, the fee for security clearances constitutes another hurdle that, intentionally or not, may limit civilian representation. Given the unique nature of these proceedings and the national and international importance of ensuring these trials are scrupulously fair and meet international due process standards, the U.S. government should be willing to assume certain civilian defense counsel costs.

**Gag Rules on Civilian Defense Counsel**

Your letter offers no justification for the remarkable commission rule that expressly prohibits civilian defense counsel from communicating directly with the media regarding military commission cases unless they receive prior approval from the military. You suggest this rule is not troubling because defense counsel may speak in court and because they may seek permission from the Appointing Authority or the Department of Defense General Counsel to speak to the media out of court. While the option of seeking permission may be appropriate for military prosecutors who remain within the military chain of command – and the commission rules subject them to a similar gag rule – there is no basis for giving the Defense Department complete
control over what civilian counsel say outside of court. We know of no precedent in either
civilian courts or the rules of military justice for such a gag order. Judges sometimes impose gag
orders on attorneys in individual cases to protect the interests of justice, e.g., to ensure fair
proceedings before an unprejudiced jury. Prohibiting attorneys from revealing protected or
classified information to the public is also a familiar concept in the U.S. criminal justice system.
As currently written, however, the commission rule is not limited to protecting sensitive
information nor is it necessary to further the interests of justice.

The only apparent purpose of that gag rule is to control what the public may learn and
understand about commission proceedings. Such a purpose is inconsistent with right of the
public to have access to information about what its government is doing, a right that is
particularly significant in the context of such nationally and internationally important
proceedings. Limiting defense counsel’s ability to speak to journalists can only impede the
media’s — and hence the public’s — understanding of the significance of developments during the
proceedings. Moreover, this rule will undermine public confidence in the commission
proceedings in the eyes of a world that is already skeptical about the Department’s handling of
detentions at Guantanamo Bay.

For similar reasons, we continue to object to the additional requirement that civilian defense
counsel agree to never say anything publicly or privately about any closed sessions of the
proceedings. The breadth of this rule far exceeds any legitimate purpose. A prohibition on
disclosing protected or classified information is unobjectionable, but this particular gag rule
would prevent an attorney from providing important information to the public about the conduct
of these trials that is neither classified nor protected. For example, the rule would prevent
defense counsel from ever commenting on whether her exclusion from closed sessions affected
her ability to mount an effective defense or whether the rulings during closed sessions were fair.
The press and the public will not have access to closed sessions; their only ability to evaluate
whether justice was served in those sessions will be through comments made by defense counsel
or the prosecution. A perpetual gag order on defense counsel precluding any comments at all on
closed sessions will invariably be seen as an unwarranted effort to shield from public view what
may prove to be the most crucial parts of commission proceedings.

We urge you to take the steps necessary to revise the commission rules governing defense
counsel so that they better reflect the dictates of basic rights and due process. Although this
letter has only focused on defense counsel rules, we also continue to urge that the Defense
Department review the structure and rules of the commissions to ensure consistency with fair
trial and due process standards. Human Rights Watch remains extremely concerned that as
presently conceived, the commissions cannot meet the standards of justice that the United States
has traditionally sought to uphold. The lack of appeal to a truly independent body, the potential
violation of the rights of persons entitled to prisoner-of-war status who should therefore only be
tried by courts-martial, the possibility of a military trial of persons who are non-combatants —
these remain among the serious defects in the commissions, in addition to the rules governing
defense counsel. We have publicly stated before, and we reiterate here, that absent significant
change, no one should be tried before the commissions.
The world will be watching how the United States tries suspected terrorists before the military commissions. The United States should ensure those prosecuted receive trials that are a credit to American justice and testimony to the country’s long-standing commitment to human rights.

Sincerely,

/s/

Jamie Fellner, Esq.
Director, U.S. Program
October 3, 2003

Certified Mail—Return Receipt Requested

Directorate for Freedom of Information
and Security Review
Room 2C757
Department of Defense
1155 Defense Pentagon
Washington, DC 20301-1155

Re: Freedom of Information Act Request

Gentlemen:

On behalf of the National Institute of Military Justice (NIMJ), I request copies of all written or electronic communications that the Department (including the Secretary and General Counsel) has either sent to or received from anyone (other than an officer or employee of the United States acting in the course of his or her official duties) regarding the President's November 13, 2001 Military Order, the Secretary's Military Commission Orders, and the Military Commission Instructions. This request includes but is not limited to suggestions or comments on potential, proposed or actual terms of any of those Orders or Instructions and any similar, subsequent, superseding or related Orders or Instructions, whether proposed or adopted.

NIMJ, a District of Columbia nonprofit corporation, has published the Annotated Guide to the Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (LexisNexis 2002) and the Military Commission Instructions Sourcebook (2003). (There is no need to supply copies of documents reproduced in the
Sourcebook, a copy of which is enclosed for convenience.) We also have an extensive website, www.nimi.org. We collect, upload and otherwise disseminate documents concerning military commissions for the benefit of scholars, practitioners, the public and the news media. We anticipate publishing additional Sourcebook volumes.

In the circumstances, we respectfully request a waiver of any fees that might otherwise accrue for search and copying.

Because of the high level of public, professional and scholarly interest in military commissions, expedited consideration is respectfully requested.

Thank you for your cooperation.

Sincerely,

Eugene R. Fidell

Enclosure
GOVERNMENT ACCEPTS MILITARY COMMISSIONS FOR GUANTANAMO BAY DETAINEEES

The Government has reached an understanding with the US concerning procedures which would apply to possible military commission trials of the two Australians detained at Guantanamo Bay, David Hicks and Mamdouh Habib.

Mr Hicks was included in the list signed by President Bush on 3 July 2003 of the six detainees who have been declared eligible for trial at this stage. The US is expediting consideration of Mr Habib's case.

As part of the Government's extensive discussions with the US concerning military commission processes, the Minister for Justice and Customs, Senator the Hon Chris Ellison, visited Washington from 21 to 23 July 2003. As a result of the visit, the US made significant commitments on key issues, including that:

- Based upon the specific facts of his case, the US assured Australia it will not seek the death penalty in Mr Hicks' case.
- Australia and the US agreed to work towards putting arrangements in place to transfer Mr Hicks to Australia, if convicted, to serve any penal sentence in Australia in accordance with Australian and US law.
- Based upon his circumstances, conversations between Mr Hicks and his lawyers will not be monitored by the US.
- The prosecution in Mr Hicks' case does not intend to rely on evidence in its case-in-chief requiring closed proceedings from which the accused could be excluded.
- Subject to any necessary security restrictions, Mr Hicks' trial will be open, the media will be present, and Australian officials may observe proceedings.

The Government has since continued its high-level dialogue with the US. As a result, the US has made further important commitments, including that:

- The US has assured Australia that key commitments relating to Mr Hicks would also apply to Mr Habib, should he be listed as eligible for trial, including that he would not be subject to the death penalty given the circumstances of his case.
- The Government may make submissions to the Review Panel which would review either man's military commission trial.
- Should Mr Hicks or Mr Habib choose to retain an Australian lawyer with appropriate security clearances as a consultant to their legal teams following approval of military commission charges, that person may have direct face-to-face communications with their client.
- Mr Hicks and, if listed as eligible for trial, Mr Habib may talk to their families via telephone, and two family members would be able to attend their trials.
- An independent legal expert sanctioned by the Australian Government may observe a trial of Mr Hicks or Mr Habib.

The US Department of Defense is in the process of drafting clarifications and additional military commission rules that will incorporate the assurances given to Australia where appropriate. All people attending military commission trials would require appropriate background checks.
The US commitments are in addition to rights which would be afforded to Mr Hicks and Mr Habib under military commission rules, including a presumption of innocence, a standard of proof beyond a reasonable doubt, the right to defence counsel free of charge, and the right to remain silent, including a guarantee that no adverse inference will be drawn from the exercise of such a right.

The Government has been advised that Mr Hicks or Mr Habib could not be prosecuted successfully in Australia in relation to their activities in Afghanistan or Pakistan under Australian laws that applied at the time. The Government has also been advised that both men trained with Al Qaeda.

Australians who breach the laws of foreign countries while overseas, have no automatic right to be repatriated to Australia for trial.

In these circumstances, we accept Mr Hicks and Mr Habib could be tried by the US, provided that their trials are fair and transparent while protecting security interests. The Government believes that military commission processes will fulfil these criteria.

The US has assured the Government that Mr Hicks and Mr Habib will receive no less favourable treatment than other non-US detainees. We will remain in close contact with the US to ensure both men are treated fairly and appropriately at all times.

Media Contact:
Steve Ingram (Mr Ruddock) (02) 6277 7300 / 0419 278 715
Chris Kenny (Mr Downer) (02) 6277 7500 / 0419 206 890

Ministerial Statement
Government Accepts Military Commissions for Guantanamo Bay Detainees

The Government has reached an understanding with the US concerning procedures which would apply to any military commission trials of the two Australians detained at Guantanamo Bay, David Hicks and Mamdouh Habib.

Mr Hicks is included in the list of the six detainees who have been declared eligible for trial by military commission. That list was signed by President Bush on 3 July 2003. To date, charges have not been laid against Mr Hicks. The laying of charges is a matter for US authorities.

The US is expediting consideration of Mr Habib’s case. As the Government has said in the past, we would like to bring some certainty to Mr Habib’s situation.

The Government does not want either man to remain in detention without trial any longer than necessary.

The Government has been advised that Mr Hicks or Mr Habib could not be prosecuted in Australia in relation to their activities in Afghanistan or Pakistan under Australian laws that applied at the time. The Government has also been advised that Mr Hicks and Mr Habib both trained with Al Qaeda. That organisation has committed and sponsored terrorist acts around the world. These are serious matters that must be addressed.

In these circumstances, the Government accepts that Mr Hicks or Mr Habib could be tried by the US, provided that their trials are fair and transparent while protecting security interests.

The Government has held extensive discussions with the US concerning military commission processes. As a result, the US has made significant commitments on key issues of concern to the Government.

As part of the Government’s extensive discussions with the US concerning military commission processes, the Minister for Justice and Customs, Senator the Hon Chris Ellison, visited Washington from 21 to 23 July 2003. As a result of the visit, the US made important commitments on issues related to Mr Hicks’ possible trial, including that:

- Based upon the specific facts of his case, the US assured Australia it will not seek the death penalty in Mr Hicks’ case.
- Australia and the US agreed to work towards putting arrangements in place to transfer Mr Hicks to Australia, if convicted, to serve any penal sentence in Australia in accordance with Australian and US law.
- Based upon his circumstances, conversations between Mr Hicks and his lawyers will not be monitored by the US.
- The prosecution in Mr Hicks’ case does not intend to rely on evidence in its case-in-chief requiring closed proceedings from which the accused could be excluded.
- Subject to any necessary security restrictions, Mr Hicks’ trial will be open, the media will be present, and Australian officials may observe proceedings.

http://www.ag.gov.au/www/ministerruddockhome.nsf/Web+Pages/C8E45854478FB7E0CA256... 1/2/2004
The Government has continued its high-level dialogue with the US. As a result, the US has made further important commitments. These further commitments are now being finalised. They include:

- The US has assured Australia that key commitments made in relation to Mr Hicks would also apply to Mr Habib, should he be listed as eligible for trial, including that he would not be subject to the death penalty given the circumstances of his case.
- The Government may make submissions to the Review Panel which would review either man’s military commission trial.
- Should Mr Hicks or Mr Habib choose to retain an Australian lawyer as a consultant to their legal teams following approval of military commission charges, subject to security requirements, that person may have direct face-to-face communications with their client.
- Mr Hicks and, if listed as eligible for trial, Mr Habib may talk to their families via telephone, and two family members would be able to attend their trials.
- An independent legal expert sanctioned by the Australian Government, may observe a trial of Mr Hicks or Mr Habib.

The US Department of Defence is in the process of drafting clarifications and additional military commission rules that will incorporate the assurances given to Australia where appropriate. All people attending military commission trials would require appropriate background checks.

I would remind the honourable members that the rules governing the military commission trials provide fundamental guarantees for the accused. These guarantees are similar to those found in our own criminal procedures and in fact they are the basis upon which our criminal justice system is founded. The guarantees include: the right to representation by defence counsel, a presumption of innocence, the right to cross examine prosecution witnesses and the right to remain silent with no adverse inference being drawn from the exercise of that right.

The accused will be represented at all times by military defence counsel who have considerable expertise in military law and will provide a full and expert defence. An accused may also retain civilian defence counsel. To assume that military defence counsel will act other than in the best interests of their client has no basis in fact.

The rules of evidence applicable in Australian criminal proceedings do not apply to trial before US military commission. Those rules of evidence also do not apply before international tribunals. For example, the rule against hearsay does not apply in trials before the International Criminal Tribunal for the Former Yugoslavia (ICTY). Similarly, the rule against hearsay does not apply in many States with highly developed legal systems which are based on the civil law tradition.

Although certain rules of evidence do not apply to a military commission trial, provision is made to ensure that the accused can examine and refute the evidence presented against him. Under the rules of the military commissions, the defence shall be provided with access to evidence the prosecution intends to introduce at trial and evidence known by the prosecution that tends to exculpate the accused. In addition, the defence shall be able to present evidence in the accused’s defence and cross-examine each witness presented by the prosecution.

Government officials will attend any military commission trial of Australian citizens. In this way, we will monitor the military commission proceedings.

Military commissions are a recognised way of trying persons who may have committed offences against the laws of war. In the United States, military commissions have a long history of use. They were used extensively during the Mexican American War and the American Civil War. They were also used more recently during World War II. In fact, the United States Uniform Code of Military Justice recognises the jurisdiction of military commissions in certain cases.

Immediately after World War II, Australia established military tribunals to try Japanese prisoners of war charged with committing war crimes. Like the military commissions, those tribunals did not apply the usual procedures, including the normal appeal rights and rules of evidence, applicable in criminal trials at the time. However, those trials were still fair and transparent.

Far from the sustained indifference which some commentators have claimed the Government has shown towards Mr Hicks and Mr Habib, the Government has always been concerned for the welfare of Australian detainees held in United States custody at Guantanamo Bay. But Australians who breach the laws of foreign countries while overseas have no automatic right to be repatriated to Australia for trial. So long as their trial is fair and transparent, those who break foreign laws while overseas are liable for their offences.

The US has assured the Government that Mr Hicks and Mr Habib will receive no less favourable treatment before a military commission than other non-US detainees. We will remain in close contact with the US to ensure both men are treated fairly and appropriately at all times.

http://www.ag.gov.au/www/ministerruddockhome.nsf/Web+Pages/C8E45854478FB7E0CA256... 1/2/2004
December 19, 2003

Major John D. Smith  
Office of Military Commissions  
Department of Defense  
1600 Defense Pentagon  
Washington, D.C. 20301-1600

Dear Major Smith:

The ABA Task Force on Enemy Combatants greatly appreciates the opportunity to comment on the draft Military Commission Instruction, “Review of Trials by Military Commission.” You requested, as a condition of our review, that we not circulate the draft beyond our Task Force and that we not post the draft or our comments on any web sites prior to promulgation of the MCI in its final form.

We believe that the DoD would benefit from a short open public comment process, such as was provided for when the draft MCI on “Crimes and Elements for Trials by Military Commission” was issued in proposed form on February 28, 2003.1 Indeed, at a background briefing on May 2, 2003, when the MCI was released in final form, a Senior Defense Official acknowledged that it had been a “very useful process” which “allowed us to refine a lot of the language in Military Commission Instruction No. 2.”2

1 Task Force member Eugene R. Fidell abstained from the review of this draft Instruction because he believes that the government’s unexplained demand that it not be disseminated beyond the Task Force is indefensible. See generally Eugene R. Fidell, Military Commissions and Administrative Law, 6 Green Bag 2d 379 (2003); National Institute of Military Justice, Military Commission Instructions Sourcebook 95 (2003).

Nevertheless, we agreed to abide by those conditions and therefore circulation of the draft has been limited to a small group of Task Force members and advisors. The comments below are those of the reviewers and do not represent official policy of the ABA. As you know, the ABA House of Delegates has adopted two Resolutions regarding Military Commissions, and we continue to urge the DoD to adopt or amend rules for Military Commissions that conform with these resolutions.

Your transmittal stated that you “are trying ... to establish an independent review inside of the executive without undue influence for military commission records of trial.” While the ABA does not agree that review should be limited to “inside of the executive [branch],” we do wholeheartedly agree with the goal of “independent review ... without undue influence.” We will first offer some general comments, and then provide comments concerning specific provisions of the draft MCI.

GENERAL COMMENTS

We are pleased to note a number of provisions in the draft MCI that foster “independent review ... without undue influence,” in particular: §4.B.3. providing a form of tenure; §4.C.1.i, expressly requiring that charges be dismissed if the Review Panel so decides; §4.C.2.ii. expressly providing insufficiency of the evidence as a basis for relief; §4.C.5. and §4.F, providing for written decisions that will serve as precedent and will be published “consistent with national security;” and §§4.G. and H., a clear statement that Article 37 (the prohibition on unlawful command influence) applies to the Review Panel.

In some cases, we sense the drafters of the MCI felt constrained by MCO No. 1, (March 21, 2002). Some of the comments below relate not solely to the draft MCI, but also to the underlying MCO No. 1. We will point out such concerns, and, where appropriate, urge reconsideration of MCO No. 1.

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3 John S. Cooke, Albert J. Krieger, Stephen A. Saltzburg, and Neal R. Sonnett. Task Force member Suzanne E. Spaulding declined to participate because of her current service as Counsel to the House Permanent Select Committee on Intelligence.

4 Professor Scott L. Silliman, Executive Director of the Center on Law, Ethics and National Security at Duke University School of Law, and Douglas A. Stringer, former Trial Attorney with the Office of the Prosecutor, International Criminal Tribunal for the former Yugoslavia.

5 Revised Report 8C, adopted in February, 2002, called for “provision for certiorari review by the Supreme Court of the United States” in addition to the “right to petition for a writ of habeas corpus.”
Probably the most important issue concerns the composition of the Review Panel. The draft MCI is ambiguous regarding whether there will be one or several Review Panels. The draft MCI and MCO No. 1 each use the terms "a review panel" and "the review panel" indiscriminately. As the MCI and MCO are written, if there is more than one Review Panel, each would be an independent entity (although the Secretary could appoint different combinations of a small group of people to separate Review Panels, so that there would be overlap in membership). This could generate problems, given the provision in §3.C.5iii. that Review Panel decisions are binding precedent (a provision we endorse), because different Review Panels could have difficulty reconciling precedents — or overcoming a bad precedent, once set.

We therefore urge the creation of no more than one Review Panel, unless workload clearly demands more. In that case, we suggest consideration be given to the creation of a single Review Panel of, say five judges, from which three-member panels could be drawn according to some internal assignment mechanism. That would avoid the appearance of forum shopping in the selection of panels, and would allow more interaction among panelists, thus reducing the likelihood of conflicting precedents. Such a structure, however, might well require amending MCO No.1.

Another extremely important issue concerns who will serve on the Review Panel. The credibility of the Review Panel will hinge on the qualifications and stature of the panel members. We agree that prior judicial experience should be a requisite for at least one member (who, if the sole member with judicial experience, should be the president of the panel), and would strongly prefer that at least one panelist have experience as an Article III or equivalent state court judge. The requirement that the panelists be commissioned officers (including persons appointed from civilian life under 10 U.S.C. §603) could be a problem in this regard. Would a federal judge have to resign from that appointment to accept this position? See 10 U.S.C. §973. We can think of no reason why civilians should not be able to serve on the review panel without having to be commissioned.

SPECIFIC COMMENTS

We offer the following comments relating to specific paragraphs in the draft MCI.

Section 3.

Neither here nor in MCO No. 1, §6(H)(3), is "administrative review" defined, except insofar as both provisions oblige the Appointing Authority to determine whether the "proceedings of the Military Commission are administratively complete." This suggests that the Appointing Authority is not simply checking to ascertain that the record is complete, but that the proceedings were complete.

Completeness does not equal correctness, however. What does the Appointing Authority do if a major error is discovered? Apparently, it is sent on to the Review Panel. We understand that you do not want to build another layer of legal review into this system, but you may wish to consider whether to permit the Appointing Authority to correct an obvious error.
Also in §3, the Appointing Authority may not be a lawyer. We are aware that BG Thomas Hemingway (AF JAGC) has been recalled to active duty to serve as legal advisor to the Appointing Authority. We believe the rule should expressly refer to the legal advisor and outline his role.

Finally, we strongly recommend that §3 should provide for some written documentation of the Appointing Authority’s review and action, so it is clear that this procedural step has occurred and what action the Appointing Authority has directed.

Section 4.

Section 4.A. This provision states, “A Review Panel shall be a standing body of ... and shall commence upon the forwarding of a record....” but it does not define or explain what is a standing body. Does a Review Panel become a standing body upon appointment? Or upon receipt of its first record? Or each time it receives a record? (This also reflects the ambiguity about how many Review Panels there will be.) Read in conjunction with §4.B.3, this could be interpreted to mean that a two-year term begins to run, not on appointment, but upon receipt of the first case. Is this the intent? This paragraph does not seem necessary.

Section 4.B. 2.iii. and 3. We applaud these provisions providing tenure and non-eligibility for reappointment. They eliminate the potential appearance that aspiration for reappointment will affect someone’s decisions. One potential problem may arise with respect to a case not decided at the time a term expires, but this should not cause you to discard this salutary provision.

Section 4.C.3. This provision is another example of a problem with MCO No. 1. We believe that the 30-day time limit is entirely unrealistic. We realize that it flows from §6(H)(4) of MCO No. 1, so an appropriate resolution would require an amendment to that rule. But, given the opportunity for briefs and the potential for lengthy trial records, the Secretary will almost certainly be granting extensions in most cases.

Section C.4.i. Our comment here also goes to the language of MCO No. 1, since §6(H)(1)), provides that “a verbatim transcript of [the] proceedings ... and ... all evidence admitted in the trial ...shall constitute the record of trial.” By its terms, however, this does not include items like the charge sheet, convening orders, motions and briefs. It seems unlikely that such materials would not be forwarded, but why not expressly say so? Otherwise, it could give rise to an argument that the Review Panel may not consider them.

Section 4.C. 4.ii. Again, we see a problem which arises from MCO No. 1, §6(H)(4), which provides that the Review Panel “shall review ... in its discretion any submissions from the Prosecution and the Defense.” The draft MCI says the Review Panel “shall ordinarily review” such submissions. We think the drafters of the MCI are doing their best to “guide” the discretion MCO No. 1 gives them toward the right answer, which is to consider those submissions. It might be better to amend MCO No. 1 to require consideration of such briefs, subject to specific time and page limits for the submissions.
Section 4.D. This section raises an important issue. MCO No. 1, §4A(5)(d), provides:

The Presiding Officer shall certify all interlocutory questions, the disposition of which would effect a termination of the proceedings with respect to a charge, for decision by the Appointing Authority. The Presiding Officer may certify other interlocutory questions to the Appointing Authority as the Presiding Officer deems appropriate.

Thus, our understanding is that if the defendant moves to dismiss (or even to suppress important evidence), neither the Presiding Officer nor the Commission as a whole may decide that question, but must send it to the Appointing Authority – and may send other lesser questions as well.

In our view, this lack of authority in the Presiding Officer, or the Military Commission, is a fundamental defect which will raise serious questions about the independence, fairness, and credibility of the proceedings. Not only is it flawed from a policy standpoint, but it conflicts with the President’s Military Order establishing the basic authority for the commissions. That Order, at §4(c)(2), provides that the implementing orders to be issued by the Secretary, “shall at a minimum provide for ... a full and fair trial, with the military commission sitting as the triers of both fact and law....” (Emphasis added)

Section 4.D of the draft MCI ameliorates this problem somewhat by providing that the Appointing Authority will, at least, get the input from the Review Panel. (which Review Panel, if more than one? See above.) While this is an improvement over having the Appointing Authority decide such questions alone, it is potentially very cumbersome. It is likely that there will be a substantial number of motions filed, particularly with the first few commissions, and sending case-dispositive (or other) issues from the commission to the Appointing Authority to a Review Panel and back could be time-consuming and inefficient.

We would prefer to maintain this provision than to have the Appointing Authority act alone, but it serves to accentuate the limited authority of the commission and the Presiding Officer. We believe it would be a far better resolution to change MCO No. 1 to clearly invest the Presiding Officer of the Military Commission the authority to resolve interlocutory questions – with provision for appeal by the government to the Review Panel, parallel with the government’s right to appeal in courts-martial under Article 62, UCMJ.
Again, we are pleased to have the opportunity to provide these comments and we very much appreciate your willingness to consider them. We hope that you will continue to seek our views, and the views of others, and we look forward to continuing to work with you to insure that any Military Commission proceedings are, and are seen to be, “full and fair.”

Sincerely,

NEAL R. SONNETT
Chair, ABA Task Force on
Treatment of Enemy Combatants
Department of Defense
Military Commission Instruction No. 9

December 26, 2003

SUBJECT: Review of Military Commission Proceedings

References: (a) Military Commission Order No. 1 (Mar. 21, 2002)
(c) Section 113(d) of Title 10 of the United States Code
(d) Section 140(b) of Title 10 of the United States Code
(e) Section 603 of Title 10 of the United States Code
(f) Military Commission Instruction No. 1, current edition
(g) Military Commission Instruction No. 2, current edition

1. PURPOSE

This Instruction prescribes procedures and establishes responsibilities for the review of military commission proceedings.

2. AUTHORITY

This Instruction is issued pursuant to Section 7(A) of reference (a) and in accordance with references (b), (c), and (d). The provisions of reference (f) are applicable to this Instruction.

3. ADMINISTRATIVE REVIEW BY THE APPOINTING AUTHORITY

Pursuant to Section 6(H)(3) of reference (a), the Appointing Authority shall promptly perform an administrative review of the record of trial. Once satisfied that the proceedings of the military commission are administratively complete, the Appointing Authority shall transmit the record of trial to the Review Panel constituted under Section 6(H)(4) of reference (a) and in accordance with this Instruction. If not so satisfied, the Appointing Authority shall return the case to the
military commission for any necessary supplementary proceedings.

4. REVIEW PANEL

A. Generally. A Review Panel shall consist of three Military Officers and shall commence its review of a military commission case upon the forwarding of a record of trial by the Appointing Authority.

B. Members. The Secretary of Defense will designate three or more Military Officers, including civilians commissioned pursuant to reference (e), as eligible to serve on a Review Panel. With regard to the internal operations of a Review Panel, civilians appointed as officers shall have the same authority, duties, and responsibilities as any other member of the armed forces serving on the Review Panel. Such officers whose total service under reference (e) and otherwise to the United States is not expected to exceed 130 days during any period of 365 consecutive days shall be special Government employees for the purposes of 10 U.S.C. §§ 202, 203, 205, 207, 208, and 209. Section 973(b) of Title 10, U.S. Code, does not apply to such officers. At least one member of each Review Panel shall have experience as a judge.

1) Qualifications.
   a. In designating members as eligible to serve on a Review Panel, only individuals who are well qualified by virtue of their experience, impartiality, and judicial temperament shall be chosen.

   b. No person shall be eligible to serve on a Review Panel if such person:
      (1) Participated in the investigation of the case;
      (2) Served as a member of the military commission that heard the case;
      (3) Served as prosecutor or defense counsel before such commission; or
      (4) Is otherwise incapable of providing an impartial review of military commissions as determined by the Secretary of Defense.

   c. No person who has served a term of appointment as a member eligible to serve on a Review Panel may be reappointed to a second term.

2) Term of Appointment. The Secretary of Defense will prescribe the term of each Review Panel member, which normally shall not exceed two years. The Secretary of Defense may permanently remove a Review Panel member only for good cause. “Good cause” includes, but is not limited to, physical disability, military exigency, or other circumstances that render the member unable to perform his duties.

3) Review Panel Composition. The Military Officers designated by the Secretary of Defense shall select from among themselves the three members of each Review Panel. The three members of each Review Panel may select, at their discretion, one member to act as the President of that Review Panel.
NATIONAL INSTITUTE OF MILITARY JUSTICE

4) Oath of Office. An oath (or affirmation) of office shall be administered to each Review Panel member.

   a. Procedure for administering oath. The following oath (or affirmation) may be administered by the Secretary of Defense, the General Counsel of the Department of Defense, and any person duly authorized to administer oaths, "Do you (swear) (affirm) that you will faithfully and impartially perform, according to your conscience and the rules applicable to the review of trials by military commission, all the duties incumbent upon you as a member of this Review Panel (so help you God)?"

C. Post-Trial Review by the Review Panel.

1) Action on the Record of Trial. After it has completed its review, the Review Panel shall take action as specified in subparagraphs (a) or (b) below:

   a. Return the case to the Appointing Authority for further proceedings when a majority of the Review Panel has formed a definite and firm conviction that a material error of law occurred.

      (1) In cases where the only further proceedings necessitated by the Review Panel's conclusion that a material error of law occurred are proceedings where the charge(s) against the Accused shall be dismissed, the Appointing Authority shall dismiss the charge(s).

      (2) In all other cases, the Appointing Authority shall refer the Review Panel's conclusions to the military commission for proceedings consistent with those conclusions.

   b. Forward the case directly to the Secretary of Defense with a written opinion, consistent with Section 4(C)(5) of this Instruction, when a majority of the Review Panel has not formed a definite and firm conviction that a material error of law occurred.

      (1) As to each finding of Guilty, the Review Panel shall recommend that it be approved, disapproved, or changed to a finding of Guilty to a lesser-included offense. The Review Panel may recommend disapproval of findings of guilty on a basis other than a material error of law.

      (2) As to the sentence imposed or any portion thereof, the Review Panel shall recommend that it be approved, mitigated, commuted, deferred, or suspended.

2) Standard of Review.

   a. Material Error of Law. Variance from the procedures specified in reference (a) and its implementing Instructions that would not have had a material effect on the outcome of the military commission shall not constitute a material error of law.
b. Material errors of law may include but are not limited to the following:

(1) A deficiency or error of such gravity and materiality that it deprives the accused of a full and fair trial;

(2) Conviction of a charge that fails to state an offense that by statute or the law of armed conflict may be tried by military commission pursuant to references (a), (b), and (g);

(3) Insufficiency of the evidence as a matter of law; and

(4) A sentence that is not consistent with Section 6(G) of reference (a).

3) Timing of Post-Trial Review. The Review Panel shall complete its review and forward the record of trial within 30 days of receipt of the record of trial. The Appointing Authority shall ensure that the Review Panel has sufficient time to review the record of trial. Upon written application of the President of the Review Panel, the Secretary of Defense may grant extensions of time.

4) Scope of Post-Trial Review.

a. The Review Panel shall review the entire record of trial as defined by Section 6(H)(1) of reference (a), including decisions by the Appointing Authority.

(1) In making the determination specified in Section 4(C)(1)(a) of this Instruction and the recommendations required in Section 4(C)(1)(b) of this Instruction, the Review Panel may consider factual matters included in the record of trial.

(2) In making the determination specified in Section 4(C)(1)(a) of this Instruction and the recommendations required in Section 4(C)(1)(b) of this Instruction, the Review Panel may review sentences as part of its review of the record of trial.

b. The Review Panel shall ordinarily review submissions from the Prosecution and the Defense. In the event that the Review Panel reviews such written submissions, it may also in its discretion invite oral arguments on the written submissions.

c. The Review Panel may in its discretion review any amicus curiae submissions, particularly from the government of the nation of which the accused is a citizen. The Review Panel shall ordinarily review any such governmental submissions.

5) Written Opinions. The Review Panel shall issue a written opinion in every case, addressing the determination specified in Section 4(C)(1)(a) of this Instruction and the recommendations required in Section 4(C)(1)(b) of this Instruction.

a. The written opinion shall include a legal analysis in the form of a memorandum supporting the Review Panel's determination in Section 4(C)(1)(a) and recommendations in Section 4(C)(1)(b) of this Instruction and where it otherwise deems appropriate in the exercise of its discretion.
b. Members of the Review Panel may write a separate opinion concurring with or dissenting from the majority opinion.

c. The written opinions of each Review Panel shall constitute precedent for subsequent opinions of all Review Panels.

D. Deliberation. The members of the Review Panel shall deliberate in closed conference and shall not disclose the contents of their deliberations outside their closed conference.

E. Publication. Except as necessary to safeguard protected information (as defined by reference (a)), the written opinions of the Review Panel shall be published.


G. Effectiveness, Fitness, or Evaluation Reports. The consideration or evaluation of the substantive judicial decisions made by a member of a Review Panel is prohibited in preparing effectiveness, fitness, or evaluation reports of a Review Panel member.

H. Administrative Support. The Review Panel shall be provided any necessary administrative and logistical support required to perform its duties through the Office of the Appointing Authority.

5. REVIEW BY THE SECRETARY OF DEFENSE AFTER RECEIPT OF THE REVIEW PANEL’S RECOMMENDATION

Pursuant to Section 6(H)(5) of reference (a), the Secretary of Defense will review the record of trial and the recommendations of the Review Panel and either return the case for further proceedings or, unless making the final decision pursuant to a Presidential designation under Section 4(c)(8) of reference (b), forward it to the President with a recommendation as to disposition.

6. FINAL DECISION

Pursuant to Section 6(H)(6) of reference (a), after review by the Secretary of Defense, the record of trial and all recommendations will be forwarded to the President for review and final decision (unless the President has designated the Secretary of Defense to perform this function). If the President has so designated the Secretary of Defense: 1) The Secretary may approve or disapprove findings or change a finding of Guilty to a finding of Guilty to a lesser-included offense; or 2) The Secretary of Defense may mitigate, commute, defer, or suspend the sentence imposed or any portion thereof. If the Secretary of Defense is authorized to render the final decision, the review of the Secretary of Defense under Section 6(H)(5) of reference (a) shall constitute the final decision. Pursuant to Section 6(H)(2) of reference (a), an authenticated finding of Not Guilty as to a charge shall not be changed to a finding of Guilty.
7. EFFECTIVE DATE

This Instruction is effective immediately.

[Signature]
William J. Haynes II
General Counsel of the Department of Defense
DISCUSSION

Adele H. Odegard, Kevin J. Barry and Eugene R. Fidell

MCI 9 fills in important blanks in the architecture of the military commissions process. Regrettably, the Defense Department did not conduct an open rulemaking in this connection, despite the benefits of such a process in the case of MCI 2. Instead, it circulated a draft to the American Bar Association and an unknown number of other recipients, requesting that it not be further disseminated. The ABA's comments appear elsewhere in this Sourcebook. Until the pledge of confidentiality is lifted or the draft becomes available as a result of NIMJ's FOIA suit, National Institute of Military Justice v. U.S. Department of Defense, Civil No. 04-312 (D.D.C. filed Feb. 26, 2004), and until the other non-governmental comments become available, it will remain impossible to fully chart the reasons for any changes that occurred between the draft and final versions of MCI 9. Given the pace of the overall rulemaking process for military commissions, the decision to dispense with normal public rulemaking processes is indefensible and needlessly detracts from public confidence in the end product.


Need for Review

MCI 9 provides for two kinds of review: “administrative review” by the Appointing Authority and review for “material errors of law” by the Review Panel.

Appellate review of criminal cases is a familiar feature of Anglo-American jurisprudence. A right to such review is reflected in the International Covenant on Civil and Political Rights, ratified Sept. 8, 1992, art. 14, § 5; see www.unhchr.ch/html. MCI 9 prescribes that a Review Panel shall consist of three members (§ 4(A)). Mandatory review by a three-member panel is consistent with the Uniform Code of Military Justice, art. 66(b), UCMJ (requiring review in each case in which sentence includes death dismissal, punitive discharge, or imprisonment for one year or more). MCI 9 does not require that a notice of appeal be filed, as is required in the federal district courts and in many state systems. See, e.g., Fed. R. App. P. 3(a).

Notwithstanding the fact that the review procedure set forth in MCI 9 is automatic, it is significantly more limited than the direct appellate review provided
under the UCMJ and in the district courts. Both systems provide for multiple layers of review – the first appeal as of right (the service courts or the Circuit Courts of Appeals), and the second level a discretionary review (the United States Court of Appeals for the Armed Forces or the Supreme Court). The Review Panel's single level of review is the only appeal prescribed for military commission decisions.

MCI 9 is completely silent as to access to any forum other than the Review Panel for review of findings or sentence. The failure to provide access to the civil courts, either on direct or collateral review, presents a glaring distinction from any other jurisdiction, state or federal. Servicemembers who have petitioned for, and received, CAAF review have the right to seek additional review through filing of petitions for certiorari at the Supreme Court. Art. 67a, UCMJ. Persons convicted under state law and in state custody may petition for writs of habeas corpus in the federal district courts, seeking review of their convictions based on constitutional grounds. See 28 U.S.C. § 2254. Likewise, persons convicted in federal district court and under restraint may seek habeas relief. 28 U.S.C. § 2855.

Of course, the failure to provide for judicial review of a military commission conviction is consistent with the President's Military Order of November 13, 2001, which states that persons subject to military commission jurisdiction "shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly" in any United States court, court of any foreign nation, or any international tribunal. PMO § 7(b)(2). The Supreme Court has granted certiorari in cases testing the right of citizens detained as enemy combatants as well as Guantanamo Bay detainees to access to the federal courts. *Hamdi v. Rumsfeld*, 124 S. Ct. 981 (2004) (No. 03-6696); *Rumsfeld v. Padilla*, 72 U.S.L.W. 3488 (U.S. Feb. 20, 2004) (No. 03-1027); *Rasul v. Bush*, 124 S. Ct. 534 (2003) (No. 03-334).

Specific Issues Raised by Text

MCI 9 § 3 requires the Appointing Authority to conduct an "administrative review" to determine that the proceedings are "administratively complete." If the Appointing Authority determines that the proceedings in a case are not administratively complete, the Appointing Authority shall return the case to the Commission for "any necessary supplementary proceedings". These provisions duplicate MCO 1 § 6(H)(3) in requiring this administrative review.

Neither MCO 1 nor MCI 9 defines "administrative review" or sets forth the purpose for the Appointing Authority's review. Moreover, MCO 1 does not put limitations on a commission's "supplementary proceedings." In the absence of a definition of what constitutes administrative correctness, there is no restriction on returning a case to a commission with a view to taking additional testimony or
considering new evidence. Current military practice permits a convening authority to send a case back for a proceeding in revision or a rehearing, but the UCMJ provides strict limits for such proceedings. For example, Article 60(e)(3), UCMJ, permits a convening authority to order a rehearing, but specifically prohibits a rehearing on findings when there is insufficient evidence to support a finding of guilty.

The definition of "administrative correctness" can be elusive. However, so that it be clear that it is improper to return a case to a commission for the purpose of taking additional evidence on a charge, MCI 9 should define the term. The Appointing Authority's administrative review should be limited to nonsubstantive matters such as ensuring that the record is complete and accurate.

Standard of Review, and Vote Necessary for Reversal

MCI 9 § 4(C)(1)(a) states that the Review Panel shall return a case to the Appointing Authority for further proceedings when a majority of the Panel has "formed a definite and firm conviction that a material error of law occurred." This standard of review mirrors the Standard of Review set out in MCO 1 § 7(H)(4) right down to the "definite and firm conviction" language. MCI 9 also provides a non-exhaustive list of "material errors of law," which includes error that deprives the accused of a full and fair trial; conviction of a charge that fails to state an offense under the governing MCOs or the President's Military Order of November 13, 2001; or insufficiency of the evidence as a matter of law. See § 4(C)(2)(b). Section 4(C)(2) also states that variance from prescribed procedures "that would not have had a material effect on the outcome" does not constitute a material error of law. This standard echoes the provision in MCI 1 § 6, "Alleged noncompliance with an Instruction does not, of itself, constitute error, give rise to judicial review, or establish a right to relief...."

The "material error of law" standard is similar to the standard of review enunciated by the Court of Appeals for the Armed Forces. E.g., United States v. Armstrong, 53 M.J. 76 (2000), "whether the error itself had substantial influence" on the findings," quoting Kottekos v. United States, 328 U.S. 750, 765 (1946). "If so, or if one is left in grave doubt, the conviction cannot stand." Id.

What is unclear is whether the requirement that "definite and firm conviction" that a material error of law occurred is a different, higher, standard of review than that set in Kottekos. It well may be that the MCI 9 requirement for a "definite and firm conviction" that a material error of law has occurred is intended to permit reversal only when there is no doubt that the error of law directly caused the unjust result. If this were not the intent of the drafters, why would be "definite and firm conviction" language be included at all?
A fair reading of MCI 9 would be that the commission's verdict must stand unless a majority of the Review Panel is firmly convinced that the result is unwarranted, and an error of law directly led to that result. Such a standard of review is exceptionally deferential.

The Review Panel's standard of review is unusually important because the rules of procedure and evidence are relaxed for military commissions. Evidence, which might not be admissible in military or civilian courts, is permitted. See MCO 1 § 6(D)(1) (evidence "would have probative value to a reasonable person" is admissible). The combination of a deferential standard of review and relaxed procedures means that the Review Panel's power to overturn commission findings is extremely limited.

**Sentence Review**

Section 4(C)(4) permits, but does not require, the Review Panel to review sentences. In every case, however, the Review Panel must make a recommendation as to sentence. See MCI 9 § 4(C)(1)(b)(2).

In the military justice system, the service courts are vested with wide power to review sentences, including reviewing sentence appropriateness. Article 66(c), UCMJ, provides that a service court may approve only sentences which it finds correct in law and fact and, determines, on the basis of the entire record, should be approved. In the district courts, Federal Sentencing Guidelines prescribe upper and lower limits for sentences, but sentences may still be appealed on the basis that they fall outside the sentencing guidelines or otherwise were improperly imposed. 28 U.S.C. § 3742.

Military Commissions have broad latitude on imposing sentence. MCO 1 states that any appropriate sentence may be imposed, the only limitation being that only a commission comprised of seven members may impose a death sentence. MCO 1 § 6(G). MCI 2, which specifies offenses that may be tried by military commission, does not place any limits on sentences. Because there are no limitations on sentencing, and military commissions have no body of experience on which to draw in fashioning sentences, it is possible that commissions may impose quite disparate sentences for similar offenses. The Review Panel's power to review sentences and its discretionary ability to make recommendations regarding sentence, are thus a potentially important check on abuses. The Review Panel can raise the issue of disproportionately harsh sentencing with the Secretary and, by recommending that such sentences be reduced, attempt to obtain some measure of sentence consistency.
Experience/Qualifications of Review Officials/
Military Status of Review Officials

Section 4(B) states that the Secretary of Defense will designate military officers, including civilians commissioned pursuant to 10 U.S.C. § 603, to serve as Review Panel members. Section 603, in turn, permits the President “in time of war or national emergency” to appoint civilians as military officers for duty as reviewing officials. These officers are not subject to Senate confirmation. However, the statute limits the period of such appointments to six months after the conclusion of the emergency or two years, whichever comes first. MCI 9 states that the Secretary of Defense will prescribe the term for each Review Panel member, “which normally shall not exceed two years.” Quaere: are Review Panel members “inferior Officers” for purposes of the Appointments Clause? U.S. Const. art. II, § 2, cl. 2; see Edmond v. United States, 520 U.S. 651 (1997).

The principle of granting a fixed term of office to Review Panel members is consistent with United States Army policy for trial and appellate court judges. Army Regulation 27-10, Military Justice, Sept. 6, 2002, ¶¶ 8-1(g) (trial judges) and 13-13 (appellate judges). The enunciated two-year term may, however, be unrealistic, and does not contemplate a situation in which a case is still undergoing active review at the end of the Review Panel member’s term. This possibility should be addressed. A provision that requires a Review Panel member to remain (except for good cause such as illness) through the conclusion of proceedings in cases in which he/she has already begun review would be prudent. Congress may need to amend § 603 to permit longer terms for civilians appointed as military officers under that provision, or, better yet, make special provision for Review Panel appointments as part of overall military commission legislation (assuming Congress decides that the Review Panel approach is preferable to such alternatives as using the United States Court of Appeals for the Armed Forces as the appellate body).

MCI 9’s provision in § 4(B) that at least “one member” of each Review Panel have experience as a judge is consistent with MCO 1 § 6(H)(4). There is no requirement in either MCO 1 or MCI 9 that the other members have legal or judicial experience. These documents present a situation in which a three-member panel makes decisions on matters of law by majority vote, but only one must have legal experience. Because the Review Panel conducts the only independent review assessing errors of law in each case, it is essential that this review be conducted entirely by attorneys. There is no shortage of lawyers in the military, and there are many line officers, particularly in the Reserve Components, who are licensed attorneys. Nor is there a shortage of otherwise qualified individuals who have served as judges. A requirement for prior judicial experience would not be unwarranted.
Mechanism for Selecting “Panels” of Reviewers

The mechanism in MCI 9 § 4(B)(3) whereby Review Panel members select themselves for each case is unnecessary and can give the appearance of impropriety. Of course, where the potential pool of Review Panel members exceeds three, there must be a method for selecting members for each case. Rather than have members decide among themselves who will sit on each case, the better practice would be to have a mechanism under which they are formed into standing panels and cases are assigned by random selection or in predetermined order to each panel. An alternative is to select Review Panel members randomly for each case. Under the UCMJ, service court appellate judges sit in panels or several standing panels are created. Article 66(a), UCMJ. Any randomized selection system can be modified if an individual judge must recuse him or herself in a specific case, or is unable to sit for reasons of health or other unavailability.

MCI 9's provision that the Panel Members select the President for each Review Panel case is also unnecessary. Unless all the members of the Review Panel have the same rank and date of rank, the senior member should take responsibility as President. If the Panel Members all have the same rank and date of rank, the President should be selected by lot. Any provision that gives rise to an appearance of favoritism or disfavor against an accused should be avoided.

Defense Counsel

MCI 9 does not specify whether detailed defense counsel continues to represent an accused during review. MCO 1, however, states that detailed defense counsel “represent the interests of the accused” client through the review process. § 4(C)(2)(b). As a result, it should be presumed that the same counsel retain responsibility for representing each accused through the review process on to final action by the President. This practice differs from current military practice, which provides for separate appellate counsel under the aegis of the Judge Advocate General. Article 70, UCMJ.

There are advantages and disadvantages to having the same counsel who represented the accused at trial also represent the accused during the review process. Effective assistance of counsel on review may be difficult when the trial-level decisions or actions of defense counsel are at issue. For this reason consideration should be given to creating a mechanism for additional defense counsel to be appointed at the review level. However, MCI 4 §§ 3(B)(9) and (11), which require the Chief Defense Counsel to take measures to preclude conflicts of interest by defense counsel and to ensure that an accused is represented at all times by detailed defense counsel, arguably provide sufficient authority for new defense counsel to be appointed if the effectiveness of the trial defense counsel is at issue on
review. Where this occurs, questions of imputed disqualification of the entire Office of the Chief Defense Counsel may have to be addressed.

**Items for Review Panels to Consider**

Section 4(C)(4)(b) states that the Review Panel will "ordinarily" consider submissions from prosecution and defense. This provision is slightly more expansive than MCO 1 § 6(H)(4), which provides that the Review Panel has discretion to review written submissions from prosecution and defense. The choice of words is troubling. For an accused, the right of review clearly encompasses the right to present issues to the Review Authority. When would the Review Panel be justified in refusing to consider a defense submission? Appellate Authorities routinely, by rule or otherwise, prescribe the manner or length of an accused's submissions. There is no reason why the Review Panels cannot prescribe rules for submission, and it is recommended that MCI 9 be amended to permit the Review Panel to prescribe procedural rules.

Section 4(C)(4)(b) states that a Review Panel may in its discretion invite oral argument. Why not permit either party to request argument as is consistent with military practice, or provide a mechanism for requesting argument? See, e.g., Fed. R. App. P. 34. Permitting a party to request argument does not provide a right to argument but provides a mechanism whereby an accused or the government can supplement written submissions with oral argument.

Section 4(C)(4)(c) states that a Review Panel has discretion to review amicus curiae submissions, and provides that a Panel will "ordinarily" review amicus submissions from the government or the accused. Providing for amicus submissions is consistent with appellate practice in federal civil and military courts. See, e.g., C.A.A.F.R. 26. The government of the accused's country of citizenship has an important interest in the proceedings. A treaty may require communication. See generally Mutual Legal Assistance in Criminal Matters Treaties, http://travel.state.gov/lat.html. The provision regarding submissions from a government should be amended to state that the Review Panel will review submissions that are timely made, perhaps as defined in the Panel's procedural rules.

**Speed of Review**

The 30-day period for review prescribed in MCI 9 § 4(C)(3) is wholly unrealistic, especially if written submissions are to be considered. This provision echoes the 30-day period set in MCO 1 § 6(H)(4), as well as the 30-day period that Congress at one time imposed on the United States Court of Military Appeals for action on petitions for grant of review. See Eugene R. Fidell, Guide to the Rules of
Practice and Procedure for the United States Court of Appeals for the Armed Forces 115-16 (11th ed. 2003) (it "proved difficult to meet the deadline and the Court frequently had to enter orders enlarging the period"), citing In re Extension of Time Under Rule 19(a)(4), 16 M.J. 131 (1983). If the Review Panel's work is to be done conscientiously, and after receiving submissions, much more time than 30 days will be necessary in any case we can imagine, even those involving guilty pleas. The experience of the service courts of criminal appeals may not be a reliable guide to what is reasonable to expect in the military commissions sphere. Nonetheless, it is worth noting that those courts' basic norms, as reflected in the Judge Advocates General's joint rules, allow 60 days for an initial filing by an accused, with an additional 30 days for the prosecution's response. If those deadlines were used, they would represent an absolute bare minimum, and even then would likely be unworkable. See Diaz v. Judge Advocate General of the Navy, 59 M.J. 34 (2003); United States v. Brunson, 59 M.J. 41 (2003). Particularly given the language, cultural and other impediments with which counsel may have to struggle in framing issues and submissions for the review phase, any timeframe should be seen as a guideline only and subject to liberal extension for good cause shown or excusable neglect.

Thirty days is so manifestly unworkable for the Review Panel to conduct its work that the Secretary should amend MCO 1 with respect to the Review Panel. A period of 180 days for the Review Panel to receive submissions, conduct its review, and issue its written decision should be the minimum that the Secretary of Defense can require. Whatever period is prescribed in MCO 1 for Review Panel activity, there will always be cases that take longer. A provision for extensions similar to that set out in MCI 9 § 4(C)(3) will continue to be necessary.

Review Panel Opinions

Section 4(C)(5) of MCI 9 requires that the Review Panel provide in each case a written opinion addressing its conclusions and its recommendations as to sentence as well as findings. Separate opinions in concurrence or dissent are permitted. Opinions are precedential, and shall be published (except as necessary to safeguard protected information). These provisions are important from the standpoint of maximizing public confidence in the administration of justice. By requiring memorialization of the Review Panel's reasoning and holding that its opinions constitute precedent, MCI 9 will facilitate a measure of public scrutiny and public comment on commission-related actions. The resulting body of law will guide commission and Review Panel members, the Appointing Authority and his or her legal advisor, and practitioners (both prosecutors and military and civilian defense counsel), who in particular will be better able to anticipate issues in future proceedings.
MCI 9 provides a mechanism for a single, limited review prior to final approval of commission findings and sentences. This review is not the same as a full appeal of a criminal conviction, as is enjoyed by servicemembers under the UCMJ or individuals convicted in United States District Courts. Although the drafters have established procedures that permit Review Panel members to consider errors relating to findings and sentence, those procedures do not afford the same level of protection as does the UCMJ or other federal law. The failure to provide for review in the federal courts means that the sole review remains under the control of the President and the Secretary of Defense. Whether the federal courts will, at the end of the day, have a role to play—however narrow and deferential—notwithstanding the limitation sought to be imposed by the government remains to be seen.
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