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

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Summary

Military commissions began in November, 2004, against four persons declared eligible for trial pursuant to President Bush's Military Order (M.O.) of November 13, 2001, pertaining to the detention, treatment, and trial of certain non-citizens in the war against terrorism, but proceedings have been suspended after a federal district court found one of the defendants could not be tried under the rules established by the Department of Defense. The government has appealed the case, *Hamdan v. Rumsfeld*, to the D.C. Circuit on an expedited basis, while the petitioners seek to take the matter directly to the Supreme Court.

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

This report provides a background and analysis comparing military commissions as envisioned under M.C.O. No. 1 to general military courts-martial conducted under the UCMJ. The report notes some of the criticism directed at the President's M.O., and explains how those concerns are addressed by the military commission orders and instructions. The report provides two charts to compare the regulations issued by the Department of Defense and standard procedures for general courts-martial under the Manual for Courts-Martial. The second chart, which compares procedural safeguards incorporated in the regulations with established procedures in courts-martial, follows the same order and format used in CRS Report RL31262, *Selected Procedural Safeguards in Federal, Military, and International Courts*, in order to facilitate comparison with safeguards provided in federal court and the International Criminal Court.

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Introduction

Rasul v. Bush, issued by the U.S. Supreme Court at the end of its 2003 - 2004 term, clarified that U.S. courts do have jurisdiction to hear petitions for *habeas corpus* on behalf the approximately 550 persons detained at the U.S. Naval Station in Guantanamo Bay, Cuba, in connection with the war against terrorism.[1] It appears that federal courts will play a role in determining whether the military commissions, established pursuant to President Bush's Military Order (M.O.) of November 13, 2001,[2] are valid under U.S. constitutional and statutory law, and possibly under international law. More than a dozen petitions for *habeas corpus* are pending before the federal District Court for the District of Columbia. In one case, a federal judge ruled that a detainee is entitled to be treated as a prisoner of war until a competent tribunal has decided otherwise, and may not be tried by a military commission as currently constituted under the Administration's regulations.[3] The government has appealed this decision and temporarily suspended the operation of military tribunals.[4]

The Department of Defense (DoD) in 2003 released eight "Military Commission Instructions" ("MCI No. 1-8")[5] to elaborate on the set of procedural rules to govern military tribunals. Those rules are set forth in Military Commission Order No. 1

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[1] Rasul v. Bush, 124 S. Ct. 2686 (2004). For a summary of *Rasul* and related cases, see *The Supreme Court and Detainees in the War on Terrorism: Summary and Analysis of Recent Decisions*, CRS Report RS21884.

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

[3] Hamdan v. Rumsfeld, 344 F.Supp.2d 152 (D.D.C.,2004).

[4] The government argues that the district court should not have interfered in the military commission prior to its completion, that Hamdan is not entitled to protection from the Geneva Conventions, and that the President has inherent authority to establish military commissions, which need not conform to statutes regulating military courts-martial. *See* Brief for Appellants, Hamdan v. Rumsfeld, No. 04-5393 (D.C. Cir.).

[5] Department of Defense ("DoD") documents related to military commissions are available online at [http://www.defenselink.mil/news/commissions.html] (last visited Jan. 15, 2005).

("M.C.O. No. 1"), issued in March, 2002.[6] The instructions set forth the elements of some crimes that may be tried by military commission, establish guidelines for civilian attorneys, and provide other administrative guidance and procedures for military commissions. Additionally, Major General John D. Altenburg, Jr. (retired), the Appointing Authority for the commissions, has issued several Appointing Authority Regulations, governing disclosure of communications, interlocutory motions, and professional responsibility.

President Bush has determined that fifteen of the detainees at the U.S. Naval Station in Guantánamo Bay are subject to the M.O. and may consequently be charged and tried before military commissions.[7] Six detainees declared eligible in 2003 included two citizens of the U.K. and one Australian citizen.[8] After holding discussions with the British and Australian governments regarding the trial of their citizens, the Administration agreed that none of those three detainees will be subject to the death penalty.[9] The Administration has agreed to modify some of the rules with respect to trials of Australian detainees,[10] but has agreed to return the U.K. citizens, including two who had been declared eligible for trial by military commission, to Great Britain.[11] The Administration agreed to return one Australian citizen, but another, David Hicks has been charged with conspiracy to commit war crimes; attempted murder by an unprivileged belligerent and aiding the enemy.[12] One citizen from Yemen and one from the Sudan were formally charged with conspiracy to commit certain violations of the law of war (and other crimes triable by military

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[6] *Reprinted at* 41 I.L.M. 725 (2002).

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

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

[9] *See* Press Releases, Department of Defense, Statements on Detainee Meetings (July 23, 2003), *available at* [http://www.defenselink.mil/news/Aug2004/commissions_releases.html] (last visited Jan. 18, 2005).

[10] *See* Press Release, Department of Defense, U.S. and Australia Announce Agreements on Guantanamo Detainees (Nov. 25, 2003), *available at* [http://www.defenselink.mil/releases/2003/nr20031125-0702.html](last visited Jan. 14, 2005).

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

[12] *See* Press Release, Department of Defense, Guantanamo Detainee Charged (June 10, 2004), *available at* [http://www.defenselink.mil/releases/2003/nr20040610-0893.html](last visited Jan. 14, 2005).

commission).[13] Salim Ahmed Hamdan of Yemen, whose case is now in federal court, is accused of providing physical security for Osama bin Laden and other high ranking al Qaida members and was charged with conspiracy to attack civilians, murder by an unprivileged belligerent and terrorism.[14]

The M.O. has been the focus of intense debate both at home and abroad. Critics argue that the tribunals could violate the rights of the accused under the Constitution as well as international law, thereby undercutting the legitimacy of any verdicts rendered by the tribunals. The Administration initially responded that the M.O. provided only the minimum requirements for a full and fair trial, and that the Secretary of Defense intended to establish rules prescribing detailed procedural safeguards for tribunals established pursuant to the M.O. The procedural rules released in March 2002 were praised as a significant improvement over what might have been permitted under the language of the M.O., but some have continued to argue that the enhancements do not go far enough, and that the checks and balances of a separate rule-making authority and an independent appellate process are necessary.[15] The release of the Military Commission Instructions sparked renewed debate, especially concerning the restrictions on civilian attorneys,[16] resulting in further modifications to the rules. Critics have noted that the rules do not address the issue of indefinite detention without charge, as appears to be possible under the

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[13] Press Release, Department of Defense, Two Guantanamo Detainees Charged (Feb. 24, 2004), *available at* [http://www.defenselink.mil/releases/2004/nr20040224-0363.html](last visited Jan. 17, 2005). The two defendants are charged with "willfully and knowingly joining an enterprise of persons who shared a common criminal purpose and conspired with Osama bin Laden and others to commit the following offenses: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism." One of the detainees has filed for a writ of prohibition and writ of mandamus with the U.S. Court of Appeals for the Armed Forces in an effort to halt the military commission proceedings, [http://www.NIMJ.com/al-qosi_.pdf] (last visited Jan. 17, 2005).

[14] Press Release, Department of Defense, Additional Military Commission Charges Referred (July 14, 2004), *available at* [http://www.defenselink.mil/releases/2004/nr20040714-1030.html](last visited Jan. 17, 2005).

[15] *See* Letter from Timothy H. Edgar, ACLU Legislative Counsel, *Military Commission Order No. 1, March 21, 2002* (April 16, 2002), *available at* [http://www.aclu.org/NationalSecurity/NationalSecurity.cfm?ID=10150&c=111] (last visited Jan. 18, 2005); American College of Trial Lawyers, Report on Military Commissions for the Trial of Terrorists, March 2003 [hereinafter "ACTL"],a*vailable at* [http://www.actl.com/PDFs/MilitaryCommissions.pdf](last visited Jan. 17, 2005).

[16] The president of the National Association of Criminal Defense Lawyers (NACDL) announced that NACDL "cannot advise its members to act as civilian counsel" because it deems the rules too restrictive to allow for zealous and professional representation on their part. *See* Lawrence Goldman, *Guantanamo: Little Hope for Zealous Advocacy*, NACDL CHAMPION, July 2003, at 4, *available at* [http://www.nacdl.org] (last visited Aug. 14, 2003).

original M.O.,[17] or that the Department of Defense may continue to detain persons who have been cleared by a military commission.[18]

Military Commissions are courts usually set up by military commanders in the field to try persons accused of certain offenses during war.[19] They are distinct from military courts-martial, which are panels set up to try U.S. service members (and during declared wars, civilians accompanying the armed forces) under procedures prescribed by Congress in the Uniform Code of Military Justice (UCMJ).[20] U.S. service members charged with a war crime are normally tried before courts-martial, but may also be tried by military commission or in federal court, depending on the nature of the crime charged.[21] All three options are also available to try certain other persons for war crimes. Federal and state criminal statutes and courts are available to prosecute specific criminal acts related to terrorism that may or may not be triable by military commission.

Military commissions trying enemy belligerents for war crimes directly apply the international law of war, without recourse to domestic criminal statutes, unless such statutes are declaratory of international law.[22] Historically, military commissions have applied the same set of procedural rules that applied in courts-martial.[23] Some critics of the current plan to use military commissions believe the rules are modeled more closely after the military commissions held during World War II than today's courts-martial.[24]

M.C.O. No. 1 sets forth procedural rules for the establishment and operation of military commissions convened pursuant to the November 13, 2001, M.O. It addresses the jurisdiction and structure of the commissions, prescribes trial procedures, including standards for admissibility of evidence and procedural

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

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

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

[20] 10 U.S.C. § 801 *et seq*.

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

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

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

[24] *See* Kevin J. Barry, *Military Commissions: American Justice on Trial*, FED LAW., July 2003, at 24.

safeguards for the accused, and establishes a review process. It contains various mechanisms for safeguarding sensitive government information. M.C.O. No. 3, "Special Administrative Measures for Certain Communications Subject to Monitoring," establishes procedures for authorizing and controlling the monitoring of communications between detainees and their defense counsel for security or intelligence-gathering purposes. M.C.O. No. 2 and 4 designate appointing officials.

MCI No. 1 provides guidance for interpretation of the instructions as well as for issuing new instructions. It states that the eight MCI apply to all DoD personnel as well as prosecuting attorneys assigned by the Justice Department and all civilian attorneys who have been qualified as members of the pool. Failure on the part of any of these participants to comply with any instructions or other regulations "may be subject to the appropriate action by the Appointing Authority, the General Counsel of the Department of Defense, or the Presiding Officer of a military commission."[25] "Appropriate action" is not further defined, nor is any statutory authority cited for the power.[26] MCI No. 1 also reiterates that none of the instructions is to be construed as creating any enforceable right or privilege.

Jurisdiction

The President's M.O. has been criticized as overly broad in its assertion of jurisdiction, because it could be interpreted to cover non-citizens who have no connection with Al Qaeda or the terrorist attacks of September 11, 2001. It has been argued that the constitutional and statutory authority of the President to establish military tribunals does not extend any further than Congress' authorization to use armed force in response to the attacks.[27] Under a literal interpretation of the M.O., however, the President may designate as subject to the order any non-citizen he believes has ever engaged in any activity related to international terrorism, no matter when or where these acts took place. A person subject to the M.O. may be detained and possibly tried by military tribunal for violations of the law of war and "other applicable law."[28]

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

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[25] MCI No. 1 at § 4.C.

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

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

[27] P.L. 107-40.

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

captured overseas or on U.S. territory, for violations of the law of war and "all other offenses triable by military commissions." While this language is somewhat narrower than "other applicable law," it remains vague. However, the statutory language recognizing the jurisdiction of military commissions is similarly vague, such that the M.C.O. does not appear on its face to exceed the statute with respect to jurisdiction over offenses. It does not resolve the issue of whether the President may, consistent with the Constitution, direct that criminal statutes defined by Congress to be dealt with in federal court be redefined as "war crimes" to be tried by the military.

By statute, military tribunals may be used to try "offenders or offenses designated by statute or the law of war."[29] There are only two statutory offenses for which convening a military commission is explicitly recognized: aiding the enemy and spying (in time of war).[30] It appears that "offenses designated by the law of war" are not necessarily synonymous with "offenses *against* the law of war." Military tribunals may also be used to try civilians in occupied territory for ordinary crimes.[31] During a war, they may also be used to try civilians for committing belligerent acts, even those for which lawful belligerents would be entitled to immunity under the law of war, but only where martial law or military government may legally be exercised or on the battlefield,[32] where civilian courts are closed.[33] Such acts are not necessarily offenses against the law of war (that is, they do not amount to an international war crime), but are merely *unprivileged* under it, although courts and commentators have tended to use the terms interchangeably.

Some argue that civilians, including unprivileged combatants unaffiliated with a state (or other entity with "international personality" necessary for hostilities to amount to an "armed conflict"), are not directly subject to the international law of

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[29] 10 U.S.C. § 821.

[30] 10 U.S.C. §§ 904 and 906, respectively. The circumstances under which civilians accused of aiding the enemy may be tried by military tribunal have not been decided, but a court interpreting the article may limit its application to conduct committed in territory under martial law or military government, within a zone of military operations or area of invasion, or within areas subject to military jurisdiction. *See* FM 27-10, *supra* note 20, at para. 79(b) (noting that treason and espionage laws are available for incidents occurring outside of these areas, but are triable in civil courts). Spying is not technically a violation of the law of war, however, but violates domestic law and traditionally may be tried by military commission. *See id.* at para. 77 (explaining that spies are not punished as "violators of the law of war, but to render that method of obtaining information as dangerous, difficult, and ineffective as possible").

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

[32] *See* WINTHROP, *supra* note 21, at 836.

[33] *See id.* (citing *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866)). Winthrop notes that the limitation as to place, time and subjects were not always strictly followed, mentioning a Civil War case in which seven persons who had conspired to seize a U.S. merchant vessel at Panama were captured and transported to San Francisco for trial by military commission. *Id.* at 837 (citing the pre-*Milligan* case of T.E. Hogg).

war and thus may not be prosecuted for violating it.[34] They may, however, be prosecuted for most belligerent acts under ordinary domestic law, irrespective of whether such an act would violate the international law of war if committed by a soldier. Under international law, those offenders who are entitled to prisoner of war (POW) status under the Geneva Convention are entitled to be tried by court-martial and may not be tried by a military commission offering fewer safeguards than a general court-martial, even if those prisoners are charged with war crimes.[35]

Presumably, "offenses triable by military commission" would not include acts triable by military commissions only in the context of a military occupation or martial law.[36] On the other hand, the language could be interpreted to reserve to the military the discretion of determining what crimes may be tried. The Supreme Court has stated that charges of violations of the law of war tried before military commissions need not be as exact as those brought before regular courts.[37] The Administration appears to take the view that the executive branch may determine which acts violate the law of war and may be tried by military commission.[38] According to this view, a military tribunal may need only to determine the existence of some nexus between the offense and the military to establish its jurisdiction.

Subject-Matter Jurisdiction. MCI No. 2, Crimes and Elements for Trials by Military Commission, details some of the crimes that might be subject to the jurisdiction of the commissions. Unlike the rest of the MCI issued so far, this instruction was published in draft form by DoD for outside comment. The final

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

[35] The Geneva Convention Relative to the Treatment of Prisoners of War art. 102 states:

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

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

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

[37] 327 U.S. at 17 ("Obviously charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment.").

[38] *See* Philip A. Gagner, *The Bush Administration's Claim That Even Citizens Can Be Brought Before Military Tribunals, and Why it Should Never Be Put into Practice, available at* [http://writ.news.findlaw.com/commentary/20011226_gagner.html] (last visited Jan. 18, 2005) (describing Administration position set forth in court documents in the case of Dr. Samuel Mudd).

version appears to have incorporated some of the revisions, though not all, suggested by those who offered comments.[39] The revision clarifies that the burden of proof is on the prosecution, precludes liability for *ex post facto* crimes,[40] adds two new war crimes, and clearly delineates between war crimes and "other offenses triable by military commission."

MCI No. 2 clarifies that the crimes and elements derive from the law of war, but does not provide any references to international treaties or other sources that comprise the law of war. The instruction does not purport to be an exhaustive list; it is intended as an illustration of acts punishable under the law of war[41] or triable by military commissions.[42] "Aiding the enemy" and "spying" are included under the latter group, but are not defined with reference to the statutory authority in UCMJ articles 104 and 106 (though the language is very similar).[43] Terrorism is also defined without reference to the statutory definition in title 18, U.S. Code.[44]

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

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

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

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

[43] Ordinarily, the charge of "aiding the enemy" would require the accused have allegiance to the party whose enemy he has aided. DoD added a comment to this charge explaining that the wrongfulness requirement may necessitate that "in the case of a lawful belligerent, the accused owe allegiance or some duty to the United States or an ally or coalition partner..." such as "citizenship, resident alien status, or a contractual relationship with [any of these countries]." MCI No.2 §6(A)(5)(b)(3). It is unclear what is meant by limiting the requirement to "a lawful belligerent." It could be read to make those persons considered the "enemy" also subject to trial for "aiding the enemy,"as is the case with Australian detainee David Hicks. *See* United States v. Hicks, Charge Sheet, *available at* [http://www.defenselink.mil/news/Jun2004/d20040610cs.pdf](last visited Jan. 14, 2005).

[44] 18 U.S.C. § 2331 *et seq*. defines and punishes terrorism, providing exclusive jurisdiction to federal courts. *See id*. at 35 (letter from National Association of Criminal Defense Lawyers (NACDL) noting that Congress has defined war crimes in 18 U.S.C. § 2441 with reference to specific treaties).

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

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

Thus, under the draft language, it appeared that a Taliban fighter who attacked a U.S. or coalition soldier, or perhaps even a soldier of the Northern Alliance prior to the arrival of U.S. forces, for example, could be charged with "terrorism" and tried by a military tribunal.[45]

However, the final version of MCI No.2 substituted the following language:

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

The change appears to eliminate the possibility that Taliban fighters could be charged with "terrorism" in connection with combat activities; however, such a fighter could still be charged with murder or destruction of property "by an unprivileged belligerent"[46] for participating in combat, as long as the commission finds that the accused "did not enjoy combatant immunity," which, according the instruction, is enjoyed only by "lawful combatants."[47] "Lawful combatant" is not further defined. Inasmuch as the President has already declared that all of the detainees incarcerated at Guantánamo Bay, whether members of the Taliban or members of Al Qaeda, are unlawful combatants, it appears unlikely that the defense of combat immunity would be available.[48] It is unclear whether other defenses, such as self-defense or duress,

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

[46] MCI No. 2 § 6(19).

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

[48] Whether the prisoners at Guantánamo Bay should be considered lawful combatants with combatant immunity is an issue of some international concern. See generally CRS Report RL31367, *Treatment of 'Battlefield Detainees' in the War on Terrorism*. DoD's original draft included the requirement that a lawful combatant be part of the "armed forces of a legitimate party to an armed conflict." The Lawyers' Committee for Human Rights (LCHR) and Human Rights Watch (HRW) urged DoD to revise the definition in line with the Geneva Convention. *See* SOURCEBOOK, *supra* note 37, at 50-51 and 59. The revised version leaves

(continued...)

would be available to the accused. MCI No. 2 states that such defenses *may* be available, but that "[i]n the absence of evidence to the contrary, defenses in individual cases are presumed not to apply."[49]

Temporal and Spatial Jurisdiction. The law of war has traditionally applied within the territorial and temporal boundaries of an armed conflict between at least two belligerents.[50] It has not traditionally been applied to conduct occurring on the territory of neutral states or on the territory of a belligerent that lies outside the zone of battle, to conduct that preceded the outbreak of hostilities, or to conduct during hostilities that do not amount to an armed conflict. With respect to the international conflict in Afghanistan, in which coalition forces ousted the Taliban government, it appears relatively clear when and where the law of war would apply. The war on terrorism, however, does not have clear boundaries in time or space,[51] nor is it entirely clear who the belligerents are. The broad reach of the M.O. to encompass conduct and persons customarily subject to ordinary criminal law has evoked criticism that the claimed jurisdiction of the military commissions exceeds the customary law of armed conflict, which MCI No. 2 purports to restate.[52]

A common element among the crimes enumerated in MCI No.2 is that the conduct "took place in the context of and was associated with armed conflict." The instruction explains that the phrase requires a "nexus between the conduct and armed

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[48] (...continued)
ambiguous who might be a "lawful combatant."

[49] MCI. No. 2 § 4(B). The American Civil Liberties Union (ACLU) objected to this provision in its comments on the DoD draft, remarking that it "not only places the ordinary burden on the accused to going forward with evidence that establishes affirmative defense, but it also appears to place an unprecedented burden on the accused to overcome the presumption that the defenses do not apply." *See* SOURCEBOOK, *supra* note 37, at 69.

[50] *See* WINTHROP, *supra* note 21, at 773 (the law of war "prescribes the rights and obligations of belligerents, or ... define the status and relations not only of enemies – whether or not in arms – but also of persons under military government or martial law and persons simply resident or being upon the theatre of war, and which authorizes their trial and punishment when offenders"); *id* at 836 (military commissions have valid jurisdiction only in theater of war or territory under martial law or military government).

[51] It may be argued that no war has a specific deadline and that all conflicts are in a sense indefinite. In traditional armed conflicts, however, it has been relatively easy to identify when hostilities have ended; for example, upon the surrender or annihilation of one party, an annexation of territory under dispute, an armistice or peace treaty, or when one party to the conflict unilaterally withdraws its forces. *See* GERHARD VON GLAHN, LAW AMONG NATIONS 722-730 (6th ed. 1992).

[52] *See* Lawyers Committee for Human Rights, Trial Under Military Order, A Guide to the Final Rules for Military Commissions (2003)[hereinafter "LCHR"], *available at* [http://www.lchr.org/us_law/a_guide_to_the_final_rules.pdf](last visited Jan. 17, 2005); Sadat, *supra* note 32, at 146 (noting possibly advantageous domestic aspects of treating terrorist attacks as war crimes, but identifying possible pitfalls of creating a new international legal regime).

hostilities,"[53] which has traditionally been a necessary element of any war crime. However, the definition of "armed hostilities" is broader than the customary definition of war or "armed conflict." "Armed hostilities" need not be a declared war or "ongoing mutual hostilities."[54] Instead, any hostile act or attempted hostile act might have sufficient nexus if its severity rises to the level of an "armed attack," or if it is intended to contribute to such acts. Some commentators have argued that the expansion of "armed conflict" beyond its customary bounds improperly expands the jurisdiction of military commissions beyond those that by statute or under the law of war are triable by military commissions.[55]

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

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

Some observers argue that this impermissibly subjects suspected international criminals to the jurisdiction of military commissions in circumstances in which the law of armed conflict has never applied.[56] The distinction between a "war crime," traditionally subject to the jurisdiction of military commissions, and a common crime, traditionally the province of criminal courts, may prove to be a matter of some contention during some of the proceedings.[57]

Composition and Powers

Under M.C.O. No. 1, the military commissions will consist of a panel of three to seven military officers as well as one or more alternate members who have been "determined to be competent to perform the duties involved" by the Secretary of Defense or his designee.[58] These may include reserve personnel on active duty, National Guard personnel in active federal service, and retired personnel recalled to active duty. They may also include persons temporarily commissioned by the President to serve as officers in the armed services during a national emergency.[59]

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[53] MCI No. 2 § 5(C).

[54] *Id.*

[55] *See* SOURCEBOOK, *supra* note 37, at 38-39 (NACDL comments); *id*. at 51 (Human Rights Watch (HRW) comments); *id*. at 59-60 (LCHR). However, MCI No. 9 lists among possible "material errors of law" for which the Reviewing Panel might return a finding for further procedures, "a conviction of a charge that fails to state an offense that by statute or the law of war may be tried by military commission. ..." MCI No. 9 § 4(C)(2)(b).

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

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

[58] M.C.O. No. 1 § 4(A)(3).

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

The presiding officer must be a judge advocate in any of the U.S. armed forces, but need not be a military judge.[60]

The presiding officer has the authority to decide evidentiary matters and interlocutory motions, or to refer them to the commission or certify them to Appointing Authority for decision. The presiding officer has the power to close any portion of the proceedings in accordance with M.C.O. No. 1, and "to act upon any contempt or breach of Commission rules and procedures," including disciplining any individual who violates any "laws, rules, regulations, or other orders" applicable to the commission, as the presiding officer sees fit. Presumably this power includes not only military and civilian attorneys but also any witnesses who have been summoned under order of the Secretary of Defense pursuant to M.C.O. No. 1 § 5(A)(5).[61] The UCMJ authorizes military commissions to punish contempt with a fine of $100, confinement for up to 30 days, or both.[62] Under the UCMJ, a duly subpoenaed witness who is not subject to the UCMJ and who refuses to appear before a military commission may be prosecuted in federal court.[63] To the extent that M.C.O. No. 1 would allow disciplinary measures against civilian witnesses who refuse to testify or produce other evidence as ordered by the commission, M.C.O. No. 1 would appear to be inconsistent with the UCMJ.

One of the perceived shortcomings of the M.O. has to do with the problem of command influence over commission personnel. M.C.O. No. 1 provides for a "full and fair trial," but contains few specific safeguards that appear to address the issue of impartiality. The President appears to have complete control over the proceedings. He or his designee decide which charges to press, select the members of the panel, the prosecution and the defense counsel, select the members of the review panel, and approve and implement the final outcome. The procedural rules are entirely under the control of the President or his designees, who write them, interpret them, enforce them, and may amend them at any time. All commission personnel other than the commission members themselves are under the supervision of the Secretary of Defense, directly or through the DoD General Counsel.[64] The Secretary of Defense

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[60] M.C.O. No. 1 § 4(A)(4). *See* NIMJ, *supra* note 34, at 17 (commenting that the lack of a military judge to preside over the proceedings is a significant departure from the UCMJ). A judge advocate is a military officer of the Judge Advocate General's Corps of the Army or Navy (a military lawyer). A military judge is a judge advocate who is certified as qualified by the JAG Corps of his or her service to serve in a role similar to civilian judges.

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

[62] *See* 10 U.S.C. § 848.

[63] *See* 10 U.S.C. § 847. It is unclear how witnesses are "duly subpoenaed;" 10 U.S.C. § 846 empowers the president of the court-martial to compel witnesses to appear and testify and to compel production of evidence, but this statutory authority does not explicitly apply to military commissions. The subpoena power extends to "any part of the United States, or the Territories, Commonwealth and possessions."

[64] MCI No. 6.

is the direct supervisor of Review Panel members.[65] Originally, both the Chief Prosecutor and the Chief Defense Counsel were to report ultimately to the DoD General Counsel, which led some critics to warn that defense counsel were insufficiently independent from the prosecution.[66] However, DoD amended the instructions so that the Chief Prosecutor now reports to the Legal Advisor to the Appointing Authority.

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

Procedures Accorded the Accused

The military commissions established pursuant to M.C.O. No. 1 will have procedural safeguards similar to many of those that apply in general courts-martial, but the M.C.O. does not specifically adopt any procedures from the UCMJ, even those that explicitly apply to military commissions.[67] The M.C.O. provides that only the procedures it prescribes or any supplemental regulations that may be established pursuant to the M.O., *and no others* shall govern the trials,[68] perhaps precluding commissions from looking to the UCMJ or other law to fill in any gaps. The M.C.O. does not explicitly recognize that accused persons have rights under the law. The procedures that are accorded to the accused do not give rise to any enforceable right, benefit or privilege, and are not to be construed as requirements of the U.S. Constitution.[69] The accused has no opportunity to challenge the interpretation of the rules or seek redress in case of a breach.[70]

The procedural safeguards are for the most part listed in section 5. The accused is entitled to be informed of the charges sufficiently in advance of trial to prepare a defense,[71] shall be presumed innocent until determined to be guilty beyond a

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[65] *Id.* § 3(A)(7).

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

[67] *See* 10 U.S.C. § 836 (providing military commission rules "may not be contrary to or inconsistent with [the UCMJ]"). *But see In re* Yamashita, 327 U.S. 1, 19-20 (1946)(finding Congress did not intend the language "military commission" in Article 38 of the Articles of War, the precursor to UCMJ Art. 36, to mean military commissions trying enemy combatants). On the other hand, President Bush explicitly invoked UCMJ art. 36 as statutory authority for the M.O., and included a finding, "consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." M.O. § 1(g).

[68] M.C.O. No. 1 § 1.

[69] *Id.* § 10.

[70] *Id.;* MCI No. 1 § 6 (Non-Creation of Right).

[71] M.C.O. No. 1 § 5(A).

reasonable doubt by two thirds of the commission members,[72] shall have the right not to testify at trial unless he so chooses, shall have the opportunity to present evidence and cross-examine witnesses for the prosecution, and may be present at every stage of proceeding unless it is closed for security concerns or other reasons.[73] The presumption of innocence and the right against self-incrimination will result in an entered plea of "Not Guilty" if the accused refuses to enter a plea or enters a "Guilty" plea that is determined to be involuntary or ill informed.[74]

Open Hearing. The trials themselves will be conducted openly except to the extent the Appointing Authority or presiding officer closes proceedings to protect classified or classifiable information or information protected by law from unauthorized disclosure, the physical safety of participants, intelligence or law enforcement sources and methods, other national security interests, or "for any other reason necessary for the conduct of a full and fair trial."[75] DoD invited members of the press to apply for permission to attend the trials,[76] although it initially informed Human Rights Watch and other groups that logistical issues would likely preclude their attendance.[77] However, at the discretion of the Appointing Authority, "open proceedings" need not necessarily be open to the public and the press.[78] Proceedings may be closed to the accused or the accused's civilian attorney, but not to detailed defense counsel. Furthermore, counsel for either side must obtain permission from the Appointing Authority or the DoD General Counsel in order to make a statement to the press.[79]

Because the public, and not just the accused, has a constitutionally protected interest in public trials, the extent to which trials by military commission are open to the press and public may be subject to challenge by media representatives.[80] The

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[72] *Id.* §§ 5(B-C); 6(F).

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

[74] *Id.* §§ 5(B) and 6(B).

[75] M.C.O. No. 1 § 6(D)(5).

[76] *See* DoD Press Release, DoD Announces Media Coverage Opportunities for Military Commissions (Feb. 11, 2004), *available at* [http://www.defenselink.mil/advisories/2004/pa20040211-0205.html] (last visited Jan. 18, 2005).

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

[78] *Id.* at § 6(B)(3)("Open proceedings may include, at the discretion of the Appointing Authority, attendance by the public and accredited press, and public release of transcripts at the appropriate time.") In courts-martial, "public" is defined to include members of the military as well as civilian communities. R.C.M. 806.

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

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

First Amendment right of public access extends to trials by court-martial,[81] but is not absolute. Trials may be closed only where the following test is met: the party seeking closure demonstrates an overriding interest that is likely to be prejudiced; the closure is narrowly tailored to protect that interest; the trial court has considered reasonable alternatives to closure; and the trial court makes adequate findings to support the closure.[82] Because procedures established under M.C.O. No. 1 appear to allow the exclusion of the press and public based on the discretion of the Appointing Authority without any consideration of the above requirements with respect to the specific exigencies of the case at trial, the procedures may implicate the First Amendment rights of the press and public.

Although the First Amendment bars government interference with the free press, it does not impose on the government a duty "to accord the press special access to information not shared by members of the public generally."[83] The reporters' right to gather information does not include an absolute right to gain access to areas not open to the public. Thus, if the military commissions were to sit in areas off-limits to the public for other valid reasons, media access may be restricted for reasons of operational necessity.[84] Access of the press to the proceedings of military commissions may be an issue of contention for the courts ultimately to decide, even if those tried by military commission are determined to lack the protection of the Sixth Amendment right to an open trial or means to challenge the trial.[85]

Right to Counsel. Once charges are referred,[86] the defendant will have military defense counsel assigned free of cost, but may request another JAG officer, who will be provided as a replacement if available in accordance with any applicable instructions or supplementary regulations that might later be issued.[87] The accused

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

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

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

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

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

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

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

does not have the right to refuse counsel in favor of self-representation.[88] MCI No. 4 requires detailed defense counsel to "defend the accused zealously within the bounds of the law ... notwithstanding any intention expressed by the accused to represent himself."[89]

The accused may also hire a civilian attorney at his own expense, but must be represented by assigned defense counsel at all relevant times, even if he retains the services of a civilian attorney. Civilian attorneys may apply to qualify as members of the pool of eligible attorneys, or may seek to qualify *ad hoc* at the request of an accused. Some critics argue the rules provide disincentives for the participation of civilian lawyers.[90] Civilian attorneys must agree that the military commission representation will be his or her primary duty, and are not permitted to bring any assistants, such as co-counsel or paralegal support personnel, with them to the defense team. Originally, all defense and case preparation was to be done on site, and civilian attorneys were not to share documents or discuss the case with anyone but the detailed counsel or the defendant. These restrictions, read literally, might have prevented civilian defense counsel from conducting witness interviews or seeking advice from experts in humanitarian law, for example.[91] However, the Pentagon later released a new version of MCI No. 5 that loosened the restrictions to allow communications with "individuals with particularized knowledge that may assist in discovering relevant evidence."[92]

Civilian attorneys must meet strict qualifications to be admitted before a military commission. The civilian attorney must be a U.S. citizen (except for those representing Australian detainees[93]) with at least a SECRET clearance,[94] who is admitted to the bar of any state or territory. Furthermore, the civilian attorney may not have any disciplinary record, and must agree in writing to comply with all rules

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

[89] MCI No. 4 § 3(C).

[90] *See* LCHR, *supra* note 50, at 2-3; Vanessa Blum, *Tribunals Put Defense Bar in Bind*, LEGAL TIMES, July 14, 2003, at 1 (reporting that only 10 civilian attorneys had applied to join the pool of civilian defense lawyers).

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

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

[93] *See* DoD Press Release, *supra* note 11.

[94] Originally, civilian attorneys were required to pay the costs associated with obtaining a clearance. MCI No. 5 §3(A)(2)(d)(ii). DoD has waived the administrative costs for processing applications for TOP SECRET clearances in cases that would require the higher level of security clearance. *See* DoD Press Release No. 084-04 , New Military Commission Orders, Annex Issued (Feb. 6, 2004), *available at* [http://www.defenselink.mil/ releases/2004/nr20040206-0331.html] (Last visited Jan. 17, 2005).

of court.[95] The civilian attorney is not guaranteed access to closed hearings or information deemed protected under the rules, which may or may not include classified information.[96]

The requirement that civilian counsel must agree that communications with the client may be monitored has been modified to require prior notification and to permit the attorney to notify the client when monitoring is to occur.[97] Although the government will not be permitted to use information against the accused at trial, some argue the absence of the normal attorney-client privilege could impede communications between them, possibly decreasing the effectiveness of counsel. Civilian attorneys are bound to inform the military counsel if they learn of information about a pending crime that could lead to "death, substantial bodily harm, or a significant impairment of national security."[98] MCI No. 5 provides no criteria to assist defense counsel in identifying what might constitute a "significant impairment of national security."

All defense counsel are under the overall supervision of the Office of the Chief Defense Counsel, which is entrusted with the proper management of personnel and resources the duty to preclude conflicts of interest.[99] The M.C.O. further provides that "in no circumstance shall accommodation of counsel be allowed to delay proceedings unreasonably."[100] The Appointing Authority may revoke any attorney's eligibility to appear before any commission.[101]

Some attorneys' groups have voiced opposition to the restrictions and requirements placed on civilian defense counsel, arguing the rules would not allow a defense attorney ethically to represent any client. The board of directors for the National Association of Criminal Defense Lawyers issued an ethics statement saying that it is unethical for a lawyer to represent a client before a military tribunal under

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[95] M.C.O. No. 1 § 4(C)(3)(b).

[96] *Id.; see* Edgar, *supra* note 13 (emphasizing that national security may be invoked to close portions of a trial irrespective of whether classified information is involved).

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

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

[98] MCI No. 5, Annex B § II(J).

[99] M.C.O. No 1 § 4(C)(1); *see* Torruella, *supra* note 84, at 719 (noting that the civilian criminal defense system has no equivalent to this system, in which the accused has no apparent choice over the supervision of the defense efforts).

[100] M.C.O. No 1 § 4(A)(5)(c).

[101] *Id* § 4(A)(5)(b).

the current rules and that lawyers who choose to do so are bound to contest the unethical conditions."[102] The House of Delegates of the American Bar Association (ABA) took no position on whether civilian lawyers should participate in the tribunals, but urged the Pentagon to relax some of the rules, especially with respect to the monitoring of communications between clients and civilian attorneys.[103] The National Institute of Military Justice, while echoing concerns about the commission rules, has stated that lawyers who participate will be performing an important public service.[104]

Discovery. The accused has the right to view evidence the Prosecution intends to present as well as any exculpatory evidence known, as long as it is not deemed to be protected under Sec. 6(D)(5).[105] In courts-martial, by contrast, the accused has the right to view any documents in the possession of the Prosecution related to the charges, and evidence that reasonably tends to negate the guilt of the accused, reduce the degree of guilt or reduce the punishment.[106]

The accused may also obtain witnesses and documents "to the extent necessary and reasonably available as determined by the Presiding Officer" and subject to secrecy determinations. The Appointing Authority shall make available to the accused "such investigative or other resources" deemed necessary for a full and fair trial.[107] Access to other detainees who might be able to provide mitigating or exculpatory testimony may be impeded by the prohibition on defense counsel from entering into agreements with "other Accused or Defense Counsel that might cause them or the Accused they represent to incur an obligation of confidentiality with such other Accused or Defense Counsel or to effect some other impediment to representation."[108] In other words, communications with potential witnesses would not be privileged and could be used against the witness at his own trial.

The overriding consideration with regard to whether the accused or defense counsel (including detailed defense counsel) may gain access to information appears to be the need for secrecy. The presiding officer may delete specific items from any information to be made available to the accused or defense counsel, or may direct

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[102] *See* NACDL Ethics Advisory Committee Opinion 03-04 (August 2003), *available at* [http://www.nacdl.org] (Last visited Jan. 14, 2005)*; Participation in Secret Military Terror Trials Unethical, U.S. Lawyers Say,* AP Aug. 2, 2003 (quoting incoming NACDL president Barry Scheck).

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

[104] *See* NIMJ Statement on Civilian Attorney Participation as Defense Counsel in Military Commissions, July 13, 2003, *available at* [http://www.nimj.com/documents/NIMJ_Civ_Atty_Participation_Statement.pdf] (last visited Jan. 18, 2005).

[105] *Id* § 5(E).

[106] *See* R.C.M. 701(a)(6); NIMJ, *supra* note 34, at 31-32.

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

[108] MCI No. 4 § 5.

that unclassified summaries of protected information be prepared.[109] However, no evidence may be admitted for consideration by the rest of the commission members unless it has been made available to at least the detailed defense counsel.[110] Information that was reviewed by the presiding officer *ex parte* and *in camera* but withheld from the defense over defense objection will be sealed and annexed to the record of the proceedings for review by the various reviewing authorities.[111] Nothing in the M.C.O. limits the purposes for which the reviewing authorities may use such material.

Right to Face One's Accuser. The presiding officer may authorize any methods appropriate to protect witnesses, including telephone or other electronic means, closure of all or part of the proceedings and the use of pseudonyms.[112] The commission may consider sworn or unsworn statements, and these apparently may be read into evidence without meeting the requirements for authentication of depositions and without regard to the availability of the witness under the UCMJ, as these provisions expressly apply to military commissions.[113] UCMJ articles 49 and 50 could be read to apply to military commissions the same rules against hearsay used at courts-martial, however, the Supreme Court has declined to apply similar provisions to military commissions trying enemy combatants.[114]

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[109] *Id* § 6(D)(5)(b). Some observers note that protected information could include exculpatory evidence as well as incriminating evidence, which could implicate 6th Amendment rights and rights under the Geneva Convention, if applicable. *See* LCHR, *supra* note 50, at 3.

[110] *Id.*

[111] *Id.* § 6(D)(5)(d).

[112] *Id.* § 6(D)(2)(d).

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

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

[114] *See In re* Yamashita, 327 U.S. 1, 19 (1946) (declining to apply art. 25 of the Articles of War, which is substantially the same as current UCMJ art. 49, to trial by military commission of an enemy combatant). The *Yamashita* Court concluded that Congress

(continued...)

It is the provision for the use of secret evidence and for the exclusion of the accused from portions of the hearings that the court found most troubling in *Hamdan.*[115] The court declared "[i]t is obvious beyond the need for citation that such a dramatic deviation from the confrontation clause could not be countenanced in any American court . . ." and found it apparent that "the right to trial 'in one's presence' is established as a matter of international humanitarian and human rights law."[116] Under UCMJ art. 39,[117] the accused at a court-martial has the right to be present at all proceedings other than the deliberation of the members.

Admissibility of Evidence. The standard for the admissibility of evidence remains as it was stated in the M.O.; evidence is admissible if it is deemed to have "probative value to a reasonable person."[118] This is a significant departure from the Military Rules of Evidence (Mil. R. Evid.), which provide that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States [and other applicable statutes, regulations and rules]"[119] In a court-martial, relevant evidence may be excluded if its probative value is substantially outweighed by other factors.[120]

"Probative value to a reasonable man" is a seemingly lax standard for application to criminal trials.[121] A reasonable person could find plausible sounding rumors or hearsay to be at least somewhat probative, despite inherent questions of reliability and fairness that both federal and military rules of evidence are designed to address. Furthermore, defendants before military commissions do not appear to have the right to move that evidence be excluded because of its propensity to create confusion or unfair prejudice, or because it was unlawfully obtained or coerced.

Sentencing. The prosecution must provide in advance to the accused any evidence to be used for sentencing, unless good cause is shown. The accused may present evidence and make a statement during sentencing proceedings, however, this right does not appear to mirror the right to make an unsworn statement that military defendants may exercise in regular courts-martial.[122] Statements made by the accused during the sentencing phase appear to be subject to cross-examination.

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[114] (...continued)
intended the procedural safeguards in the Articles of War to apply only to persons "subject to military law" under article 2. *But see id.* at 61-72 (Rutledge, J. dissenting)(arguing the plain language of the statute does not support that interpretation).

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

[116] *Id.* at 168.

[117] 10 U.S.C.§ 839.

[118] M.C.O. No. 1 § 6(D)(1).

[119] Mil. R. Evid. 402.

[120] Mil. R. Evid. 403.

[121] *See* Torruella, *supra* note 84, at 715; ACTL, *supra* note 13, at 11.

[122] *See* NIMJ, *supra* note 34, at 37 (citing United States v. Rosato, 32 M.J. 93, 96 (C.M.A. 1991)).

Possible penalties include execution,[123] imprisonment for life or any lesser term, payment of a fine or restitution (which may be enforced by confiscation of property subject to the rights of third parties), or "such other lawful punishment or condition of punishment" determined to be proper. Detention associated with the accused's status as an "enemy combatant" will not count toward serving any sentence imposed.[124] If the sentence includes confinement, it is unclear whether or how the conditions of imprisonment will differ from that of detention as an "enemy combatant." Sentences agreed in plea agreements are binding on the commission, unlike regular courts-martial, in which the agreement is treated as the maximum sentence. Similar to the practice in military courts-martial, the death penalty may only be imposed upon a unanimous vote of the Commission.[125] In courts-martial, however, both conviction for any crime punishable by death and any death sentence must be by unanimous vote.[126] None of the rules specify which offenses might be eligible for the death penalty, but the Pentagon announced the death penalty will not be sought in the cases brought so far.

Post-Trial Procedure

One criticism leveled at the language of the M.O. was that it does not include an opportunity for the accused to appeal a conviction, and appears to bar habeas corpus relief. Another was that it appears to allow the Secretary of Defense (or the President) the discretion to change the verdict, and does not protect persons from double jeopardy.[127] M.C.O. No.1 addresses these issues in part.

Review and Appeal. The rules provide for the administrative review of the trial record by the Appointing Authority, who forwards the record, if found satisfactory, to a review panel consisting of three military officers, one of whom must have experience as a judge. The Bush Administration has announced its intent to commission four individuals to active duty to serve on the Military Commission Review Panels.[128] They are Griffin Bell, a former U.S. attorney general and judge of the U.S. Court of Appeals for the 5th Circuit; Edward Biester, a former Member of the U.S. House of Representatives and current judge of the Court of Common Pleas

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

[124] MCI No. 7 § 3(A).

[125] M.C.O. No. 1 § 6(F).

[126] 10 U.S.C. § 851.

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

[128] *See* Press Release, Military Commission Review Panel Members to be Designated and Instruction Issued (Dec. 30, 2003), *available at* [http://www.defenselink.mil/releases/2003/nr20031230-0822.html] (last visited Jan. 18, 2005). 10 U.S.C. § 603 permits the President, during war or national emergency, to appoint any qualified person as a military officer in the grade of major general or below.

of Bucks County, Pennsylvania; the Honorable William T. Coleman Jr., a former Secretary of Transportation; and Chief Justice Frank Williams of the Rhode Island Supreme Court.

There is no opportunity for the accused to appeal a conviction in the ordinary sense. The review panel may, however, at its discretion, review any written submissions from the prosecution and the defense, who do not appear to have an opportunity to view or rebut the submission from the opposing party.[129] If the review panel forms a "firm and definite conviction that a material error of law occurred," it returns the case to the Appointing Authority for further proceedings. If the review panel determines that one or more charges should be dismissed, the Appointing Authority is bound to do so.[130] For other cases involving errors, the Appointing Authority is required to return the case to the military commission. Otherwise, the case is forwarded to the Secretary of Defense with a written recommendation. (Under the UCMJ, the trial record of a military commission would be forwarded to the appropriate JAG first).[131]

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

The UCMJ forbids rehearings or appeal by the government of verdicts amounting to a finding of Not Guilty, and prohibits the invalidation of a verdict or sentence due to an error of law unless the error materially prejudices the substantial rights of the accused.[132] The M.C.O. does not contain any such explicit prohibitions, but MCI No. 9 defines "Material Error of Law" to exclude variances from the M.O. or any of the military orders or instructions promulgated under it that would not have had a material effect on the outcome of the military commission.[133] MCI No. 9 allows the review panel to recommend the disapproval of a finding of Guilty on a basis other than a material error of law.[134] It does not indicate what options the review panel would have with respect to findings of Not Guilty.

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

[130] MCI No. 9 § 4(C).

[131] 10 U.S.C. § 8037 (listing among duties of Air Force Judge Advocate General to "receive, revise, and have recorded the proceedings of ... military commissions"); 10 U.S.C. § 3037 (similar duty ascribed to Army Judge Advocate General).

[132] 10 U.S.C. § 859.

[133] MCI No. 9 § 4(C)(2)(a)

[134] MCI No. 9 § 4(C)(1)(b).

M.C.O. No. 1 does not provide a route for a convicted person to appeal to any independent authority. Persons subject to the M.O. are described as not privileged to "seek any remedy or maintain any proceeding, directly or indirectly" in federal or state court, the court of any foreign nation, or any international tribunal.[135] However, a defendant may petition a federal court for a writ of habeas corpus to challenge the jurisdiction of the military commission.[136]

Protection against Double Jeopardy. The M.C.O. provides that the accused may not be tried for the same charge twice by any military commission once the commission's finding on that charge becomes final (meaning once the verdict and sentence have been approved).[137] Therefore, apparently, jeopardy does not attach – there has not been a "trial" – until the final verdict has been approved by the President or the Secretary of Defense. In contrast, at general courts-martial, jeopardy attaches after the first introduction of evidence by the prosecution. If a charge is dismissed or is terminated by the convening authority after the introduction of evidence but prior to a finding, through no fault of the accused, or if there is a finding of Not Guilty, the trial is considered complete for purposes of jeopardy, and the accused may not be tried again for the same charge by any U.S. military or federal court without the consent of the accused.[138] Although M.C.O. No. 1 provides that an authenticated verdict[139] of Not Guilty by the commission may not be changed to Guilty,[140] either the Secretary of Defense or the President may disapprove the finding and return the case for "further proceedings" prior to the findings' becoming final, regardless of the verdict. If a finding of Not Guilty is referred back to the commission for rehearing, double jeopardy may be implicated.[141]

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[135] M.O. at § 7(b).

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

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

[138] 10 U.S.C. § 844. Federal courts and U.S. military courts are considered to serve under the same sovereign for purposes of double (or former) jeopardy.

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

[140] M.C.O. No. 1 § 6(H)(2).

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

Another double jeopardy issue that might arise is related to the requirements for the specification of charges.[142] M.C.O. No. 1 does not provide a specific form for the charges, and does not require an oath or signature.[143] If the charge does not adequately describe the offense, another trial for the same offense under a new description is not as easily prevented. MCI No. 2, setting forth elements of crimes triable by the commissions, may provide an effective safeguard; however, new crimes may be added to its list at any time.

The M.O. also left open the possibility that a person subject to the order might be transferred at any time to some other governmental authority for trial.[144] A federal criminal trial, as a trial conducted under the same sovereign as a military commission, could have double jeopardy implications if the accused had already been tried by military commission for the same crime or crimes, even if the commission proceedings did not result in a final verdict. The federal court would face the issue of whether jeopardy had already attached prior to the transfer of the individual from military control to other federal authorities.

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

Role of Congress

The President's order appears to be broader than the authority exercised by previous Presidents and may cover aliens in the United States legally who are citizens of countries with which the nation is at peace. M.C.O. No. 1 clarifies that the commissions will have jurisdiction only over violations of the law of war but does not expressly limit jurisdiction to coincide with Congress' authorization for the use of force. It does not limit the provisions appearing to allow for the indefinite detention of non-citizens, whether or not they are accused of having committed a violation of the law of war, based solely on the President's determination that there is reason to believe the individual is a member of the class of persons subject to the order, in possible contradiction to the USA PATRIOT Act.[145] It does not clarify whether the President intends to use the statutory definitions of "acts of international terrorism" to determine who is subject to the order.

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[142] *See* NIMJ, *supra* note 34, at 39.

[143] *See* M.C.O. No. 1 § 6(A)(1).

[144] M.O. § 7(e).

[145] P.L. 107-56 § 412 (requiring aliens detained as suspected terrorists must be charged with a crime, subjected to removal proceedings under the Immigration and Naturalization Act, or released with seven days).

Congress has the authority to regulate the operation of military commissions, but has not in the past prescribed procedural regulations.[146] Congress may also draft legislation defining offenses against the law of war triable by military commissions. Because the draft regulations appear to provide some of the safeguards critics argued were missing from the original M.O., supporters of the Administration's policy will likely urge Congress not to interfere. Notably, M.C.O. No 1 is subject to amendment without notification to Congress, and the Secretary of Defense has the authority to direct that some other procedures be used.[147] M.C.O. No. 1 also states that no "other rules" will govern, which could mean that the rules are not to be construed with reference to the UCMJ or any other statute. Indeed, M.C.O. No. 1 § 10 states that "[n]o provision in [the] Order shall be construed to be a requirement of the United States Constitution." Finally, an act of Congress would appear necessary to enable the federal courts to take appellate jurisdiction over the military commissions.[148]

Several bills were introduced in the 108th Congress to address military commissions. The Military Tribunal Authorization Act of 2003, introduced in the Senate as Title I, subtitle C of S. 22 (Justice Enhancement and Domestic Security Act of 2003), and in the House of Representatives as H.R. 1290, would have authorized the establishment of extraordinary tribunals for offenses arising from the September 11, 2001 attacks. The bill would have narrowed the field of potential defendants from that stated in the M.O., expanded the minimum procedural requirements to be established by the Secretary of Defense, and provided for appeal to the Court of Appeals for the Armed Forces and review by the Supreme Court on writ of certiorari. H.R. 2428 would have provided for congressional review and possible disapproval of regulations relating to military tribunals. None of these bills advanced beyond referral to committee.

The following charts provide a comparison of the proposed military tribunals under the regulations issued by the Department of Defense and standard procedures for general courts-martial under the Manual for Courts-Martial. Table 1 compares the legal authorities for establishing military tribunals, the jurisdiction over persons and offenses, and the different structures of the tribunals. Table 2, which compares procedural safeguards incorporated in the DoD regulations and the UCMJ, follows the same order and format used in CRS Report RL31262, *Selected Procedural Safeguards in Federal, Military, and International Courts*, in order to facilitate comparison of the proposed legislation to safeguards provided in federal court and the International Criminal Court.

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[146] *See* 10 U.S.C. § 836 (delegating authority to the President).

[147] *See* M.C.O. No. 1 §. 1.

[148] *See In re* Yamashita, 327 U.S. 1, 8 (1946); *Ex parte* Vallandigham, 68 (1 Wall.) 243 (1863).

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

	General Courts Martial	Military Commission Order No. 1 (MCO)
Authority	U.S. Constitution, Article I, § 8.	U.S. Constitution, Article II; Presidential Military Order of Nov. 13, 2001 (M.O).
Procedure	Rules are provided by the Uniform Code of Military Justice (UCMJ), chapter 47, title 10, and the Rules for Courts-Martial (R.C.M.) and the Military Rules of Evidence (Mil. R. Evid.), issued by the President pursuant to art. 36, UCMJ. 10 U.S.C. § 836.	Rules are issued by the Secretary of Defense pursuant to the M.O. No other rules apply (presumably excluding the UCMJ). § 1. The President has declared it "impracticable" to employ procedures used in federal court, pursuant to 10 U.S.C. § 836.
Jurisdiction over Persons	Members of the armed forces, cadets, midshipmen, reservists while on inactive-duty training, members of the National Guard or Air National Guard when in federal service, prisoners of war in custody of the armed forces, civilian employees accompanying the armed forces in time of declared war, and certain others, including "persons within an area leased by or otherwise reserved or acquired for the use of the United States." 10 U.S.C. § 802; United States v. Averette, 17 USCMA 363 (1968) (holding "in time of war" to mean only wars declared by Congress. Individuals who are subject to military tribunal jurisdiction under the law of war may also be tried by general court martial. 10 U.S.C. § 818.	Individual subject to M.O., determined by President to be: 1. a non-citizen, and 2. a member of Al Qaeda or person who has engaged in acts related to terrorism against the United States, or who has harbored one or more such individuals and is referred to the commission by the Appointing Authority. § 3(A).
Jurisdiction over Offenses	Any offenses made punishable by the UCMJ; offenses subject to trial by military tribunal under the law of war. 10 U.S.C. § 818.	Offenses in violation of the laws of war and all other offenses triable by military commission. § 3(B). M.C.I. No. 2 clarifies that terrorism and related crimes are "crimes triable by military commission." *See supra* note 42.
Composition	A military judge and not less than five members. R.C.M. 501.	From three to seven members, as determined by the Appointing Authority. § 4(A)(2).

Source: Congressional Research Service

Table 2. Comparison of Procedural Safeguards

	General Courts-Martial	Military Commission Order No. 1 (MCO)
Presumption of Innocence	If the defendant fails to enter a proper plea, a plea of not guilty will be entered. R.C.M. 910(b). Members of court martial must be instructed that the "accused must be presumed to be innocent until the accused's guilt is established by legal and competent evidence beyond a reasonable doubt." R.C.M. 920(e). The accused shall be properly attired in uniform with grade insignia and any decorations to which entitled. Physical restraint shall not be imposed unless prescribed by the military judge. R.C.M. 804.	The Accused shall be presumed innocent until proven guilty. § 5(B). Commission members must base their vote for a finding of guilty on evidence admitted at trial. §§ 5(C); 6(F). The Commission must determine the voluntary and informed nature of any plea agreement submitted by the Accused and approved by the Appointing Authority before admitting it as stipulation into evidence. § 6(B).
Right to Remain Silent	Coerced confessions or confessions made without statutory equivalent of Miranda warning are not admissible as evidence. Persons subject to the UCMJ are prohibited from compelling any individual to make a confession 10 U.S.C. § 831. The prosecutor must notify the defense of any incriminating statements made by the accused that are relevant to the case prior to the arraignment. Motions to suppress such statements must be made prior to pleading. Mil. R. Evid. 304.	Not provided. Neither the M.O. nor MCO requires a warning or bars the use of statements made during military interrogation, or any coerced statement, from military commission proceedings. Art. 31(a), UCMJ (10 U.S.C. § 831) bars persons subject to it from compelling any individual to make a confession, but there does not appear to be a remedy in case of violation. No person subject to the UCMJ may compel any person to give evidence before any military tribunal if the evidence is not material to the issue and may tend to degrade him. 10 U.S.C. § 831.
Freedom from Unreasonable Searches & Seizures	"Evidence obtained as a result of an unlawful search or seizure ... is inadmissible against the accused ..." unless certain exceptions apply. Mil. R. Evid. 311. "Authorization to search" may be oral or written, and may be issued by a military judge or an officer in command of the area to be searched, or if the area is not under military control, with authority over persons subject to military law or the law of war. It must be based on probable cause. Mil. R. Evid. 315.	Not provided; no exclusionary rule appears to be available. However, monitored conversations between the detainee and defense counsel may not be communicated to persons involved in prosecuting the accused or used at trial MCO No. 3. No provisions for determining probable cause or issuance of search warrants are included. Insofar as searches and seizures take place outside of the United

	General Courts-Martial	Military Commission Order No. 1 (MCO)
	Interception of wire and oral communications within the United States requires judicial application in accordance with 18 U.S.C. §§ 2516 *et seq.* Mil. R. Evid. 317. A search conducted by foreign officials is unlawful only if the accused is subject to "gross and brutal treatment." Mil. R. Evid. 311(c).	States against non-U.S. persons, the Fourth Amendment may not apply. *See* United States v. Verdugo Urquidez, 494 U.S. 259 (1990).
Assistance of Effective Counsel	The right to an attorney attaches during the investigation phase under art. 32, UCMJ. 10 U.S.C. § 832. The defendant has a right to military counsel at government expense. The defendant may choose counsel, if that attorney is reasonably available, and may hire a civilian attorney in addition to military counsel. 10 U.S.C. § 838. Appointed counsel must be certified as qualified and may not be someone who has taken any part in the investigation or prosecution, unless explicitly requested by the defendant. 10 U.S.C. § 827. The attorney-client privilege is honored. Mil. R. Evid. 502.	MCO 1 provides that the Accused must be represented "at all relevant times" (presumably, once charges are approved until findings are final – but not for individuals who are detained but not charged) by detailed defense counsel. § 4(C)(4). The Accused is assigned a military judge advocate to serve as counsel, but may request to replace or augment the detailed counsel with a specific officer, if that person is available. § 4(C)(3)(a). The Accused may also hire a civilian attorney who is a U.S. citizen, is admitted to the bar in any state, district, or possession, has a SECRET clearance (or higher, if necessary for a particular case), and agrees to comply with all applicable rules. The civilian attorney does not replace the detailed counsel, and is not guaranteed access to classified evidence or closed hearings. § 4(C)(3)(b). Defense Counsel may present evidence at trial and cross-examine witnesses for the prosecution. § 5(I). The Appointing Authority must order such resources be provided to the defense as he deems necessary for a "full and fair trial." § 5(H). Communications between defense counsel and the accused are subject to monitoring by the government. Although information obtained through such monitoring may not be used as evidence against the accused, MCI No. 3, the monitoring could have a chilling

	General Courts-Martial	Military Commission Order No. 1 (MCO)
		effect on attorney-client conversations, possibly hampering the ability of defense counsel to provide effective representation.
Right to Indictment and Presentment	The right to indictment by grand jury is explicitly excluded in "cases arising in the land or naval forces." U.S. Constitution, Amendment V. Whenever an offense is alleged, the commander is responsible for initiating a preliminary inquiry under art. 32, UCMJ, and deciding how to dispose of the offense. 10 U.S.C. § 832; R.C.M. 303-06. The Accused must be advised of the charges brought against him and has the right to an attorney during the investigation and hearing proceedings. 10 U.S.C. § 832.	Probably not applicable to military commissions, provided the accused is an enemy belligerent. *See Ex parte* Quirin, 317 U.S. 1 (1942). The Office of the Chief Prosecutor prepares charges for referral by the Appointing Authority. § 4(B). There is no requirement for an impartial investigation prior to a referral of charges. The Commission may adjust a charged offense in a manner that does not change the nature or increase the seriousness of the charge. § 6(F).
Right to Written Statement of Charges	Charges and specifications must be signed under oath and made known to the accused as soon as practicable. 10 U.S.C. § 830.	Copies of approved charges are provided to the Accused and Defense Counsel in English and another language the Accused understands, if appropriate. § 5(A).
Right to be Present at Trial	The presence of the accused is required during arraignment, at the plea, and at every stage of the court-martial unless the accused waives the right by voluntarily absenting him or herself from the proceedings after the arraignment or by persisting in conduct that justifies the trial judge in ordering the removal of the accused from the proceedings. R.C.M. 801.	The Accused may be present at every stage of trial before the Commission unless the Presiding Officer excludes the Accused because of disruptive conduct or for security reasons, or "any other reason necessary for the conduct of a full and fair trial." §§ 4(A)(5)(a); 5(K); 6B(3).
Prohibition against Ex Post Facto Crimes	Courts-martial will not enforce an ex post facto law, including increasing amount of pay to be forfeited for specific crimes. U.S. v. Gorki, 47 M.J. 370 (1997).	Not provided, but may be implicit in restrictions on jurisdiction over offenses. *See* § 3(B). MCI No. 2 § 3(A) provides that "no offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question."
Protection against Double Jeopardy	Double jeopardy clause applies. *See* Wade v. Hunter, 336 US 684, 688-89 (1949). Art. 44, UCMJ prohibits double jeopardy, provides for jeopardy to	The Accused may not be tried again by any Commission for a charge once a Commission's finding becomes final. (Jeopardy appears to attach when the finding becomes final, at least with respect to

	General Courts-Martial	Military Commission Order No. 1 (MCO)
	attach after introduction of evidence. 10 U.S.C. § 844. General court-martial proceeding is considered to be a federal trial for double jeopardy purposes. Double jeopardy does not result from charges brought in state or foreign courts, although court-martial in such cases is disfavored. U. S. v. Stokes, 12 M.J. 229 (C.M.A. 1982). Once military authorities have turned service member over to civil authorities for trial, military may have waived jurisdiction for that crime, although it may be possible to charge the individual for another crime arising from the same conduct. *See* 54 AM. JUR. 2D, Military and Civil Defense §§ 227-28. The government may only appeal orders or rulings that do not amount to a finding of not guilty. 10 U.S.C. § 862. The judge advocate only reviews cases in which there has been a finding of guilty. 10 U.S.C. § 864.	subsequent U.S. military commissions.) § 5(P). However, although a finding of Not Guilty by the Commission may not be changed to Guilty, either the reviewing panel, the Appointing Authority, the Secretary of Defense, or the President may return the case for "further proceedings" prior to the findings' becoming final. If a finding of Not Guilty is vacated and retried, double jeopardy may be implicated. The order does not specify whether a person already tried by any other court or tribunal may be tried by a military commission under the M.O. The M.O. reserves for the President the authority to direct the Secretary of Defense to transfer an individual subject to the M.O. to another governmental authority, which is not precluded by the order from prosecuting the individual. This subsection could be read to authorize prosecution by federal authorities after the individual was subject to trial by military commission. M.O. § 7(e).
Speedy & Public Trial	In general, accused must be brought to trial within 120 days of the preferral of charges or the imposition of restraint, whichever date is earliest. R.C.M. 707(a). Charges must be referred within eight days of arrest or confinement, unless it is not practicable to do so. 10 U.S.C. § 835. The right to a public trial applies in courts-martial but is not absolute. R.C.M. 806. The military trial judge may exclude the public from portions of a proceeding for the purpose of protecting classified information if the prosecution demonstrates an overriding need to do so and the closure is no broader than necessary. United States v. Grunden, 2 M.J. 116 (CMA 1977).	The Commission is required to proceed expeditiously, "preventing any unnecessary interference or delay." § 6(B)(2). Failure to meet a specified deadline does not create a right to relief. § 10. The rules do not prohibit detention without charge, or require charges to be brought within a specific time period. Proceedings "should be open to the maximum extent possible," but the Appointing Authority has broad discretion to close hearings, and may exclude the public or accredited press from open proceedings. § 6(B)(3).

	General Courts-Martial	Military Commission Order No. 1 (MCO)
Burden & Standard of Proof	Members of court martial must be instructed that the burden of proof to establish guilt is upon the government and that any reasonable doubt must be resolved in favor of the defendant. R.C.M. 920(e).	Commission members may vote for a finding of guilty only if convinced beyond a reasonable doubt, based on evidence admitted at trial, that the Accused is guilty. §§ 5(C); 6(F).
Privilege Against Self-Incrimination	No person subject to the UCMJ may compel any person to answer incriminating questions. 10 U.S.C. § 831(a). Defendant may not be compelled to give testimony that is immaterial or potentially degrading. 10 U.S.C. § 831(c). No adverse inference is to be drawn from a defendant's refusal to answer any questions or testify at court-martial. Mil. R. Evid. 301(f). Witnesses may not be compelled to give testimony that may be incriminating unless granted immunity for that testimony by a general court-martial convening authority, as authorized by the Attorney General, if required.18 U.S.C. § 6002; R.C.M. 704.	The Accused is not required to testify, and the commission may draw no adverse inference from a refusal to testify. § 5(F). However, there is no rule against the use of coerced statements as evidence. There is no specific provision for immunity of witnesses to prevent their testimony from being used against them in any subsequent legal proceeding, however, under 18 U.S.C. §§ 6001 *et seq*., a witness required by a military tribunal to give incriminating testimony is immune from prosecution in any criminal case, other than for perjury, giving false statements, or otherwise failing to comply with the order. 18 U.S.C. §§6002; 6004.

	General Courts-Martial	Military Commission Order No. 1 (MCO)
Right to Examine or Have Examined Adverse Witnesses	Hearsay rules apply as in federal court. Mil. R. Evid. 801 *et seq*. A duly authenticated deposition, or video or audio-taped testimony, may be used in lieu of a live witness only if the witness is beyond 100 miles from the place or trial, the witness is unavailable due to death, health reasons, military necessity, nonamenability to process, or other reasonable cause, or the whereabouts of the witness is unknown. In capital cases, sworn depositions may not be used in lieu of witness, unless court-martial is treated as non-capital or it is introduced by the defense. 10 U.S.C. § 849. The military judge may allow the government to use a summary of classified information, unless the use of the classified information itself is necessary to afford the accused a fair trial. Mil. R. Evid. 505.	Defense Counsel may cross-examine the Prosecution's witnesses who appear before the Commission. § 5(I). However, the Commission may also permit witnesses to testify by telephone or other means not requiring the presence of the witness at trial, in which case cross-examination may be impossible. § 6(D)(2). In the case of closed proceedings or classified evidence, only the detailed defense counsel may be permitted to participate. Hearsay evidence is admissible as long as the Commission determines it would have probative value to a reasonable person. § 6(D)(1). The Commission may consider testimony from prior trials as well as sworn and unsworn written statements, apparently without regard to the availability of the declarant, in apparent contradiction with 10 U.S.C. § 849. § 6(D)(3).
Right to Compulsory Process to Obtain Witnesses	Defendants before court-martial have the right to compel appearance of witnesses necessary to their defense. R.C.M. 703. Process to compel witnesses in court-martial cases is to be similar to the process used in federal courts. 10 U.S.C. § 846.	The Accused may obtain witnesses and documents "to the extent necessary and reasonably available as determined by the Presiding Officer." § 5(H). The Commission has the power to summon witnesses as requested by the Defense. § 6(A)(5). The power to issue subpoenas is exercised by the Chief Prosecutor; the Chief Defense Counsel has no such authority. MCI Nos. 3-4.

	General Courts-Martial	Military Commission Order No. 1 (MCO)
Right to Trial by Impartial Judge	A qualified military judge is detailed to preside over the court-martial. The convening authority may not prepare or review any report concerning the performance or effectiveness of the military judge. 10 U.S.C. § 826. Article 37, UCMJ, prohibits unlawful influence of courts-martial through admonishment, censure, or reprimand of its members by the convening authority or commanding officer, or any unlawful attempt by a person subject to the UCMJ to coerce or influence the action of a court-martial or convening authority. 10 U.S.C. § 837. Military defendants have the opportunity to challenge the military judge for cause. 10 U.S.C. § 41.	The Presiding Officer is appointed directly by the Appointing Authority, which decides all interlocutory issues. There do not appear to be any special procedural safeguards to ensure impartiality, but challenges for cause have been permitted. §4(A)(4). The presiding judge, who decides issues of admissibility of evidence, also votes as part of the commission on the finding of guilt or innocence. Article 37, UCMJ, provides that no person subject to the UCMJ "may attempt to coerce or, by any unauthorized means, influence the action of a court-martial *or any other military tribunal* or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts." 10 U.S.C. § 837. MCI No. 9 clarifies that Art. 37 applies with respect to members of the review panel. MCI No. 9 § 4(F).
Right to Trial By Impartial Jury	A military accused has no Sixth Amendment right to a trial by petit jury. *Ex Parte* Quirin, 317 U.S. 1, 39-40 (1942) (*dicta*). However, "Congress has provided for trial by members at a court-martial." United States v. Witham, 47 MJ 297, 301 (1997); 10 U.S.C. § 825. The Sixth Amendment requirement that the jury be impartial applies to court-martial members and covers not only the selection of individual jurors, but also their conduct during the trial proceedings and the subsequent deliberations. United States v. Lambert, 55 M.J. 293 (2001). Military defendants have the opportunity to exercise peremptory challenge and challenge panel members for cause. 10 U.S.C. § 41. The military judge does not take part in the deliberations of the panel, and cannot preside over cases in which he has taken part in any	Military tribunals probably do not require a jury trial. *See Ex Parte* Quirin, 317 U.S. 1, 39-40 (1942) (*dicta*). The commission members are appointed directly by the Appointing Authority. While the Commission is bound to proceed impartially, there do not appear to be any special procedural safeguards designed to ensure their impartiality. However, defendants have successfully challenged members for cause. § 6(B).

	General Courts-Martial	Military Commission Order No. 1 (MCO)
	investigation or acted as accuser or counsel. 10 U.S.C. § 26. The absence of a right to trial by jury precludes criminal trial of civilians by court-martial. Reid v. Covert, 354 U.S. 1 (1957); Kinsella v. United States *ex rel*. Singleton, 361 U.S. 234 (1960).	
Right to Appeal to Independent Reviewing Authority	The defendant has the right to appeal to the appropriate Court of Criminal Appeals, and then to the Court of Appeals for the Armed Forces. The writ of *habeas corpus* provides the primary means by which those sentenced by military court, having exhausted military appeals, can challenge a conviction or sentence in a civilian court. The scope of matters that a court will address is more narrow than in challenges of federal or state convictions. Burns v. Wilson, 346 U.S. 137 (1953).	There is no stated right to appeal outside the Defense Department. A review panel appointed by the Secretary of Defense reviews the record of the trial in a closed conference, disregarding any procedural variances that would not materially affect the outcome of the trial, and recommends its disposition to the Secretary of Defense. Although the Defense Counsel has the duty of representing the interests of the Accused during any review process, the review panel need not consider written submissions from the Defense, nor does there appear to be an opportunity to rebut the submissions of the prosecution. If the majority of the review panel forms a "definite and firm conviction that a material error of law occurred," it may return the case to the Appointing Authority for further proceedings. § 6(H)(4). The review panel recommendation does not appear to be binding. The Secretary of Defense may serve as Appointing Authority and as the final reviewing authority, as designated by the President. The individual is not privileged to seek any remedy in any U.S. court or state court, the court of any foreign nation, or any international tribunal. M.O. § 7(b). However, the Administration has indicated that the M.O. does not preclude petition for a writ of habeas corpus, which it also argues is unavailable to enemy belligerents outside the sovereign territory of the United States.
Protection against Excessive	Death may only be adjudged for certain crimes where the defendant is found guilty by unanimous vote of court-martial members present at the time of the vote. Prior to arraignment, the trial counsel must	The accused is permitted to make a statement during sentencing procedures. § 5(M).

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Penalties	give the defense written notice of aggravating factors the prosecution intends to prove. R.C.M. 1004. A conviction of spying during time of war under article 106, UCMJ, carries a mandatory death penalty. 10 U.S.C. § 906. Cruel and unusual punishment, including flogging, or branding or otherwise branding the body is prohibited against persons subject to the UCMJ. 10 U.S.C. § 855. The convicted person may appeal a sentence, and the sentence may be mitigated or commuted, but not increased, by the judge advocate reviewing the case. 10 U.S.C. §§ 864, 866, 867.	The death sentence may be imposed only on the unanimous vote of a seven-member panel. § 6(F). The commission may only impose a sentence that is appropriate to the offense for which there was a finding of guilty, including death, imprisonment, fine or restitution, or "other such lawful punishment or condition of punishment as the commission shall determine to be proper." § 6(G). If the Secretary of Defense has the authority to conduct the final review of a conviction and sentence, he may mitigate, commute, defer, or suspend, but not increase, the sentence. However, he may disapprove the findings and return them for further action by the military commission. § 6(H).

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