No. 04-5393

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DONALD H. RUMSFELD, *et al.*,

Respondents-Appellants,

v.

SALIM AHMED HAMDAN,

Petitioner-Appellee.

On Appeal from the United States District Court
for the District of Columbia

AMICUS BRIEF OF

GENERAL DAVID M. BRAHMS (ret.), GENERAL JAMES P. CULLEN (ret.), GENERAL JOHN L. FUGH (ret.); ADMIRAL LEE F. GUNN (ret.), ADMIRAL JOHN D. HUTSON (ret.), GENERAL MERRILL A. MCPEAK (ret.), and GENERAL RICHARD O'MEARA (ret.)

IN SUPPORT OF PETITIONER-APPELLEE
IN SUPPORT OF AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici. Except for the additional retired flag officers who have joined this brief, the Brief for Appellants lists all parties, interveners, and amici appearing before the District Court and known to be appearing in this Court.

B. Rulings Under Review. This appeal is from the District Court's order in *Hamdan v. Rumsfeld, et. al.*, No. 04-CV-1519, 2004 WL 2504508 (D.D.C. November 8, 2004) (Robertson, J.).

C. Related Cases. As stated in the Brief for Appellants, there are several related cases brought by detainees at the Guantánamo Naval Base pending in the District Court in this Circuit:

1. *Hicks (Rasul) v. Bush,* S. Ct.; D.C. Cir. No. 02-5284; No. 02-CV-0299 (D.D.C.) (Kollar-Kotelly, J.)
2. *Al-Odah v. United States*, No. 02-CV-0828 (D.D.C.) (Kollar-Kotelly, J.)
3. *Habib v. Bush*, No. 02-CV-1130 (D.D.C.) (Kollar-Kotelly, J.)
4. *Kurnaz v. Bush*, No. 04-CV-1135 (D.D.C.) (Huvelle, J.)
5. *O.K. v. Bush*, No. 04-CV-1136 (D.D.C.) (Bates, J.)
6. *Begg v. Bush*, No. 04-CV-1137 (D.D.C.) (Collyer, J.)
7. *Khalid (Benchellali) v. Bush*, No. 04-CV-1142 (D.D.C.) (Leon, J.)
8. *El-Banna v. Bush*, No. 04-CV-1144 (D.D.C.) (Roberts, J.)

9. *Gherebi v. Bush*, No. 04-CV-1164 (Walton, J.)

10. *Boumediene v. Bush*, No. 04-CV-1166 (D.D.C.) (Leon, J.)

11. *Anam v. Bush*, No. 04-CV-1194 (D.D.C.) (Kennedy, J.)

12. *Almurbati v. Bush*, No. 04-CV-1227 (Walton, J.)

13. *Abdah v. Bush*, No. 04-CV-1254 (D.D.C.) (Kennedy, J.)

14. *Belmar v. Bush*, No. 04-CV-1997 (D.D.C.) (Collyer, J.)

15. *Al-Qosi v. Bush*, No. 04-CV-1937 (D.D.C.) (Friedman, J.)

16. *Jarallah Al-Marri v. Bush*, (recently filed in the federal district court in D.C.)

17. *Al-Marri v. Bush*, 04-CV-2035-GK (Kessler, J.)

18. *Paracha v. Bush*, 04-CV-2022-PLF (Friedman, J.)

19. *Zemiri v. Bush*, 04-CV-2046-CKK (Kollar-Kotelly, J.)

Counsel is not aware at this time of any other related cases within the meaning of D.C. Cir. Rule 28(a)(1)(C).

DATED: December 29, 2004

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TREATIES AND INTERNATIONAL MATERIALS

MISCELLANEOUS

GLOSSARY

CA1, CA2, etc.	1st Cir., 2nd Cir., etc.
CADC	D.C. Cir.
CSRT	Combatant Status Review Tribunal
GPW	Geneva Convention (III) Relative to the Treatment of Prisoners of War (August 12, 1949)
Mem.	*Hamdan v. Rumsfeld, et. al.*, No. 04-CV-1519 (D.D.C. November 8, 2004) (Robertson, J.).
POW	Prisoner of War
UCMJ	Uniform Code of Military Justice
NDAA	The Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005

INTEREST OF AMICI [2]

Amici are retired senior military officials with extensive experience in legal policy, the law of war, and armed conflict. Amici have spent their careers commanding troops at home and abroad and protecting the nation from attack. Amici believe that the United States, for the sake of its own soldiers, must afford the protections of the Geneva Conventions to all individuals seized in armed conflicts and held in its custody.

Brigadier General David M. Brahms served in the United States Marine Corps from 1963 through 1988, with a tour of duty in Vietnam. During the 1970s, he served as the principal legal advisor for POW matters at Marine Corps Headquarters, and in that capacity, he was directly involved in issues relating to the return of American POWs from Vietnam. General Brahms was the senior legal advisor for the Marine Corps from 1985 through 1988.

Brigadier General James P. Cullen served in the United States Army for 27 years as an active and reserve officer in the Judge Advocate General's Corps, retiring as the Chief Judge (IMA) of the Army Court of Criminal Appeals. Before

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[2] This brief is filed with the consent of the Parties. No counsel for a party authored this brief in whole or in part. This brief was prepared by amici and their counsel. No person other than amici and their counsel made a monetary contribution to the preparation or submission of this brief. The factual assertions in this brief either appear in Hamdan's petition or have been reported to amici by Hamdan's counsel.

that, General Cullen served as the Staff Judge Advocate of the 77th Army Reserve Command and the commander of the 4th Judge Advocate General Military Law Center, which had responsibility for the 150 Army Reserve legal officers, court reporters, and legal clerks headquartered between Boston and Philadelphia.

Major General John L. Fugh served in the United States Army from 1961 to 1993. From 1991 to 1993, he served as the Army's Judge Advocate General. Before that, General Fugh served as the Army's chief litigator in federal courts and acted as a legal policy advisor to the Department of Defense.

Vice Admiral Lee F. Gunn served in the United States Navy for 35 years. From 1997 to 2000, he served as the Department of the Navy Inspector General. Admiral Gunn commanded the USS Barbey, Destroyer Squadron Thirty-One, and Amphibious Group Three, composed of the 21 ships, 12 shore commands, and 15,000 Sailors and Marines of the Pacific Amphibious Forces. He served under General Anthony Zinni as Deputy Combined Forces Commander and Naval Forces Commander for Operation United Shield, the final withdrawal of United Nations peacekeeping forces from Somalia in 1995.

Rear Admiral John D. Hutson served in the United States Navy from 1973 to 2000. He was the Navy's Judge Advocate General from 1997 to 2000. Admiral Hutson now serves as President and Dean of the Franklin Pierce Law Center in Concord, New Hampshire.

General Merrill A. McPeak served in the United States Air Force from 1957 to 1994. From 1990 to 1994, he was the Chief of Staff for the Air Force, and was the senior officer responsible for a combined active duty, National Guard, Reserve, and civilian work force of more than 850,000 people serving at 1,300 locations in the United States and abroad.

Brigadier General Richard O'Meara retired from the United States Army after 36 years of service in the active and reserve components. He is a combat veteran and former Assistant to the Judge Advocate General for Operations (IMA). He is currently a professor of International Relations at Monmouth University in New Jersey and serves as adjunct faculty in the Defense Institute for International Legal Studies.

SUMMARY OF ARGUMENT

The United States ratified the Geneva Conventions to protect Americans captured in armed conflict. For more than 50 years, the United States has insisted on a broad, generous interpretation of the Conventions to assure the welfare of captured U.S. troops. If Appellants are permitted to deny the detainees the Conventions' protections, tyrants will hide their oppression under U.S. precedent and our servicemen and women will pay with their lives.

The District Court correctly ruled that the Guantánamo detainees are entitled to the protections of the Geneva Conventions. Federal courts have the power and duty to interpret treaties, even against the interpretations of the Executive Branch. Abstention was not appropriate because the very lawfulness of the military commissions is at issue.

The District Court correctly ruled that Hamdan is entitled to be treated as a POW under the GPW unless and until a "competent tribunal" determines otherwise. Because Hamdan is a presumptive POW, he may not be tried for war crimes except by a court-martial convened under the UCMJ.

Given the exceptional importance of this case and for the reasons stated in amici's brief to the Supreme Court in support of certiorari before judgment, Amici also support Appellee's motion for en banc consideration. *See http://goldsteinhowe.com/blog/files/HamdanAmicusCert.pdf*

ARGUMENT

I. AFFORDING GUANTÁNAMO DETAINEES THE PROTECTIONS OF THE GENEVA CONVENTIONS IS VITAL TO THE SAFETY OF AMERICANS CAPTURED IN ARMED CONFLICT.

As Navy Secretary Gordon England recently acknowledged, the detainees held at the Guantánamo Bay Naval Station "do have rights."[3] Among those rights are those afforded by the Geneva Conventions. Failing to recognize these rights endangers American soldiers. As the Legal Adviser to the State Department has observed:

> A decision that the Conventions do not apply to the conflict in Afghanistan in which our armed forces are engaged deprives our troops there of any claim to the protection of the Convention in the event they are captured and weakens the protections afforded by the Conventions to our troops in future conflicts.

Memorandum from William H. Taft IV, Legal Adviser, Department of State, to Counsel to the President (Feb. 2, 2002), *available at* http://www.fas.org/sgp/othergov/taft.pdf ("Taft Mem.") (last visited Dec. 27, 2004). Senator Biden has made the same point: "There's a reason why we sign these treaties: to protect my son in the military. That's why we have these treaties. So when Americans are captured, they are not tortured." *FOX News Sunday*, June

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[3] Associated Press, *Guantánamo Review To Free Second Man: Prisoner To Be Sent to Home Country*, Wash. Post, Dec. 21, 2004, at A22.

13, 2004, *available at* http://biden.senate.gov/pressapp/record.cfm?id=222640 (last visited Dec. 27, 2004).

The United States became a party to the Conventions to protect the safety and welfare of its own citizens. As Secretary of State Dulles stated during Senate consideration of the Conventions, America's "participation [in the Conventions] is needed to . . . enable us to invoke them for the protection of our nationals." *Geneva Conventions for the Protection of War Victims: Hearing Before the Senate Comm. on Foreign Relations*, 84th Cong., 1st Sess. 3-4 (1955). Senator Mansfield similarly urged that "acceptance of the standards provided for prisoners of war, civilians, and wounded and sick will insure improvement of the condition of our own people as compared with what had been their previous treatment." 101 Cong. Rec. 9960 (1955).

The United States has been steadfast in applying the Conventions – even to soldiers of governments that insisted the Conventions did not bind them, and even where the Conventions technically did not apply. Time and again the United States' adherence to the Conventions and its precursors has saved American lives.

In World War II, "[t]he American Red Cross attributed the fact of the survival of 99 percent of the American prisoners of war held by Germany . . . to compliance with the [1929] Convention." Howard S. Levie, *Prisoners of War in International Armed Conflict* 10 n.44 (1977). The fact that millions of POWs

returned home was "due exclusively to the observance of the Geneva Prisoners of War Convention." Josef L. Kunz, *The Chaotic Status of the Laws of War and the Urgent Need for Their Revision*, 45 Am. J. Int'l L. 37, 45 (1951). The significantly higher mortality rate suffered by Soviet soldiers held by Germany can be explained by the fact that the 1929 Convention was not "technically applicable" and was not applied to those prisoners. Levie, *supra*, at 10 n.44.

Thousands of American soldiers taken prisoner during the Vietnam War also benefited from the United States' commitment to the Geneva Conventions. Although North Vietnam insisted that the Conventions did not apply to American prisoners, whom it labeled "war criminals," the United States afforded all enemy POWs the protections of the Conventions to secure "reciprocal benefits for American captives." Maj. Gen. George S. Prugh, *Vietnam Studies, Law at War: Vietnam 1964-73* 63 (1975). The United States afforded those protections not only to North Vietnamese soldiers but also to the Viet-Cong, who did not follow the "laws of war." *Id.* President Nixon demanded that the North Vietnamese apply the Conventions to ease "the plight of American prisoners of war in North Viet-Nam." Dep't of State Bull. 10 (Jan. 4, 1971).

These efforts paid off. As Senator McCain explained:

> The Geneva Conventions and the Red Cross were created in response to the stark recognition of the true horrors of unbounded war. And I thank God for that. I am thankful for those of us whose dignity,

> health and lives have been protected by the Conventions . . . . I am certain we all would have been a lot worse off if there had not been the Geneva Conventions around which an international consensus formed about some very basic standards of decency that should apply even amid the cruel excesses of war.

Senator John McCain, Speech to the American Red Cross Promise of Humanity Conference (May 6, 1999), *available at* http://mccain.senate.gov/index.cfm?fuseaction=Newscenter.ViewPressRelease&Content_id=820 (last visited Dec. 27, 2004).

Since the Vietnam War, the United States has continued to insist on broad adherence to the Geneva Conventions. The emergent features of modern conflict – including peacekeeping operations and police actions against warlords and terrorist networks – have not diminished the importance to the United States of adherence to the Geneva Conventions.

For example, following the capture of U.S. Warrant Officer Michael Durant in 1993 by forces loyal to Somali warlord Mohamed Farah Aideed, the United States demanded assurances that Durant's treatment would be consistent with the Geneva Conventions. The United States made this demand even though, "[u]nder a strict interpretation of the Third Geneva Convention's applicability, Durant's captors would not be bound to follow the convention because they were not a 'state.'" Neil McDonald & Scott Sullivan, *Rational Interpretation in Irrational*

Times: The Third Geneva Convention and the "War on Terror", 44 Harv. Int'l L.J. 301, 310 (2003).

As part of its negotiations on behalf of Durant, the United States stressed that Somali fighters captured by the United States would be treated as POWs under the GPW, even though Somalia had no functioning government and thus was not a "state" within the meaning of the GPW. *See* Paul Lewis, *U.N., Urged by U.S., Refuses to Exchange Somalis*, N.Y. Times, Oct. 8, 1993, at A16. This approach bore fruit: "Following these declarations by the United States, heavy-handed interrogations of Durant appeared to cease, the Red Cross was allowed to visit him and observe his treatment, and he was subsequently released." McDonald & Sullivan, *supra*, at 310.

Denying Guantánamo detainees the protections of the Geneva Conventions weakens the United States' ability to demand that the Conventions be applied to Americans captured during armed conflicts abroad. Such erosion is already occurring as other governments have begun citing United States policy to justify their repressive policies:

- **Liberia.** President Taylor imprisoned and tortured a respected journalist, labeling him an "unlawful combatant."
- **Zimbabwe.** A spokesman for President Mugabe called for full investigation and prosecution of "media terrorism."

- **Eritrea.** The government suspended independent newspapers and jailed 21 journalists and opposition politicians, citing links with Osama Bin Laden.
- **China.** The government applied a new terrorism charge against a U.S. permanent resident and democracy activist.
- **Russia.** The government linked its brutal tactics in Chechnya to Sept. 11.

Lawyer's Committee for Human Rights, *Assessing the New Normal: Liberty and Security for the Post-September 11 United States* (Fiona Doherty & Deborah Pearlstein eds., 2003).

II. THE DISTRICT COURT CORRECTLY HELD GUANTÁNAMO DETAINEES ARE ENTITLED TO THE PROTECTIONS OF THE GENEVA CONVENTIONS.

A. Federal Courts May Compel the Executive Branch To Conform Its Actions to the Requirements of Treaties, as Judicially Construed.

It has long been the province and duty of Article III courts to interpret treaties. The power to do so is conferred by U.S. Const. art. III, cl. 2, ¶ 1, which provides that "the judicial Power" extends to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." This power is also embedded in the Supremacy Clause, which provides that "[t]his Constitution, and the Laws of the

United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const., art. VI, cl. 2. As Alexander Hamilton explained in The Federalist No. 22:

> Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations.

The Federalist Papers 150 (Clinton Rossiter ed., 1961).

The Supreme Court recognized the power of Article III courts to interpret treaties in *Owings v. Norwood's Lessee*, 9 U.S. (5 Cranch) 344 (1809). Writing for the Court, Chief Justice Marshall stated: "The reason for inserting [art. VI, cl. 2] in the constitution was, that all persons who have real claims under a treaty should have their causes decided by the national tribunals." *Id.* at 348. Although Hamilton and Chief Justice Marshall were focused on the need to reserve treaty interpretation to federal rather than state courts, case law has since made clear that this reservation applies against the other Branches.

In *Jones v. Meehan*, 175 U.S. 1 (1899), the Court held – in the teeth of a contrary interpretation by Congress and the Executive Branch – that a treaty between the United States and a Chippewa tribe had granted a tribal chief title to certain land. The Court broadly affirmed that "[t]he construction of treaties is the

peculiar province of the judiciary." *Id.* at 32. Since then, the Court has often confirmed the ultimate authority of the Judicial Branch in treaty interpretation. *See, e.g., Perkins v. Elg*, 307 U.S. 325 (1939) (overruling State Department interpretation of citizenship treaty); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) ("courts interpret treaties for themselves"); *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) ("courts have the authority to construe treaties and executive agreements").

The cases relied upon by Appellants do not suggest otherwise. Govt. Br. 24-25. In *Z. & F. Assets Realization Corp. v. Hull*, 114 F.2d 464, 471 (CADC 1940), this Court stated only that "when the alleged controversies arising out of treaty relationships are political in nature they are . . . not subject to judicial determination." Whether Guantánamo detainees are entitled to the protections of the Geneva Conventions is a controversy that is quintessentially judicial, not political. Similarly, in the *Head Money Cases*, 112 U.S. 580 (1884), although the Court indeed stated that a "treaty is primarily a compact between independent Nations," it also stated that "a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country." *Id.* at 598. Likewise, in *Whitney v. Robertson*, 124 U.S. 190 (1888), the

Court stated that some treaty violations may only be remedied through diplomacy, but that "[i]f the treaty contains stipulations which are self-executing . . . to that extent they have the force and effect of a legislative enactment." *Id.* at 194. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), also makes clear that treaty violations may be remedied directly by courts. *Id.* at 314-15.

The rest of the cases relied upon by Appellants involved situations far removed from this one. *See Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (CADC 1988) (holding that judgments of the International Court of Justice may be overridden by subsequent Congressional statutes); *Charlton v. Kelly*, 229 U.S. 447 (1913) (Government's waiver of a *foreign nation*'s treaty violations was nonjusticiable); *Holmes v. Laird*, 459 F.2d 1211 (CADC 1972) (same); *Canadian Transp. Co. v. United States*, 663 F.2d 1081 (CADC 1980) (shipping company could not sue the United States for monetary damages under a shipping treaty because the treaty did not waive Respondent's sovereign immunity).

B. Courts Are Particularly Ready To Enforce Treaties Against the Executive Branch When Fundamental Rights Are Implicated or Executive Branch Interpretations Have Been Inconsistent.

A core function of the Judicial Branch is to define the limits of powers granted to the Political Branches. Although the "reasonable" construction of a treaty by the Executive Branch, *El Al Israel Airlines v. Tseng*, 525 U.S. 155, 168

(1999), when "consistently adhered to by the Executive Department of the Government," *Sullivan v. Kidd*, 254 U.S. 433, 442 (1921), is "of weight," it is "not conclusive upon courts called upon to construe" the treaty, *Factor v. Laubenheimer*, 290 U.S. 276, 295 (1933).

Accordingly, federal courts – including this Court – have frequently overruled Executive Branch treaty interpretations and ordered the Executive Branch to conform its actions to those treaties as judicially construed. In *Johnson v. Browne*, 205 U.S. 309 (1907), the Supreme Court interpreted an extradition treaty to prohibit the imprisonment of a defendant for one crime when extradition from Canada had been sought for another. And in *British Caledonian Airways Ltd. v. Bond*, 665 F.2d 1153 (CADC 1981), this Court invalidated an FAA regulation as contrary to the Convention on International Civil Aviation. *See also Chan v. KAL*, 490 U.S. 122 (1989) (overruling an Executive Branch interpretation and finding no sanction in the Warsaw Convention for an improperly printed warning on an airline ticket).

Judicial willingness to overturn Executive Branch interpretations of treaties is especially marked when individual liberty or fundamental rights are implicated, even in areas where deference is traditionally due. *See, e.g., Johnson v. Browne*; *United States v. Decker*, 600 F.2d 733, 738 (CA9 1979) (liberty interest of accused weighed against holding dispute over a fishing treaty non-justiciable); *Perkins*, 307

U.S. 325 (overturning Secretary of State's interpretation of a naturalization treaty with Sweden). And when, as here, the Executive Branch has not maintained a consistent interpretation of a treaty, the Judicial Branch has been particularly undeferential. *See, e.g., id.* at 347; *Clark v. Allen*, 331 U.S. 503, 513 (1947); *United States v. California*, 381 U.S. 139, 161-67 (1965).

C. Judicial Enforcement of the Geneva Conventions Does Not Depend on Further Action by Congress.

This Court may affirm the District Court's decision on any of four grounds, each of which requires Executive Branch compliance with the GPW, and therefore the UCMJ.

1. Hamdan Has Not Asserted a Private Right of Action Under the Geneva Conventions.

Hamdan has not asserted a private right of action under the GPW. Mem. 22. Rather, he has sought federal habeas relief on the ground that he has been held in "custody in violation of the Constitution or laws or *treaties* of the United States." 28 U.S.C. §2241(c)(3) (emphasis added). Thus, even if the Conventions are deemed not to be self-executing, "the non-self-executing nature of a treaty is not fatal to an assertion of jurisdiction under it, provided that the cause of action over which jurisdiction is asserted already exists in some other statute – as is the case for habeas petitions." Vladeck, Comment, *Non-Self-Executing Treaties and the Suspension Clause After St. Cyr*, 113 Yale L.J. 2007, 2011-12 (2004).

Four Circuits have stated that habeas relief is available only if the treaty is self-executing,[4] but they did so with little discussion and their decisions are not persuasive. A treaty has legal effect whether or not it provides a private right of action. *See, e.g., Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 427-29 (2003). Moreover, the habeas statute does not distinguish between self-executing and non-self-executing treaties; it provides that no person may be held in violation of any treaty. A construction of §2241(c)(3) to exclude claims under non-self-executing treaties would raise serious issues under the Suspension Clause and should therefore be avoided. *See INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001); *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 216 (CA3 2003).

2. The President Has Authority To Try Hamdan Only Under the Law of War.

Appellants seek to try Hamdan before a military tribunal that violates the laws of war. But 10 U.S.C. §821 limits military tribunals to "offenders . . . triable under the law of war." Because the GPW is foundational to the laws of war, *see Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2641 (2004) (plurality opinion) (citing the GPW as law of war), and §821 authorizes only trials that comply with the laws of

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[4] *Bannerman v. Snyder*, 325 F.3d 722, 724 (CA6 2003); *Wang v. Ashcroft*, 320 F.3d 130, 140 (CA2 2003); *Wesson v. United States Penitentiary*, 305 F.3d 343, 348 (CA5 2002); *Perez v. Warden*, 286 F.3d 1059,1063 (CA8 2002).

war, Appellants may not try detainees before tribunals that fail to comply with the GPW.

Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004), is not to the contrary. The Court ruled that the International Covenant on Civil and Political Rights (ICCPR) was not enforceable under the Alien Tort Statute because Congress understood, at the time it ratified the ICCPR, that the treaty "did not itself create obligations enforceable in the federal courts." *Id.* at 2767. The same cannot be said of the 1949 Conventions. *Geneva Conventions for the Protection of War Victims: Report of the Senate Comm. on Foreign Relations*, S. Rep. No. 9, 84th Cong. 1st Sess. 30 (1955) ("Senate Report").

3. The Geneva Conventions Are "Self-Executing."

For 50 years, the Executive Branch has implemented the GPW without questioning the lack of Congressional execution. *See United States v. Stuart*, 489 U.S. 353, 366 (1989). Regulations jointly promulgated by the armed services have consistently treated the Conventions as binding. *See* Army Regulation 190-8, §1-5 (a)(2) (1997); Dep't of the Army, Field Manual no. 27-10, The Law of Land Warfare, ch. 3, §I ¶ 71 (1956) ("FM27-10") (adopting GPW, art. 5 verbatim). Army Regulation 190-8 cites the GPW, rather than any federal statute or implied power, as the legal basis for the military's authority to promulgate the regulation.

Appellants argue that the drafters must have intended to preclude private enforcement in domestic courts because the Conventions include provisions allowing nations to resolve their differences by diplomatic means. Under Appellants' logic, individuals from nations with scant bargaining power (such as Yemen), and individuals captured fighting on behalf of a regime that no longer exists (such as the former government of Afghanistan) would be left without a remedy. And Appellants' interpretation would render certain provisions nonsensical. For example, GPW, art. 7 states that "[POWs] may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention." It is unclear why the GPW would allow individuals to waive rights they cannot enforce. Rather, the GPW's focus on individual rights demonstrates that they were intended to be enforceable in domestic courts. *See Head Money Cases*, 112 U.S. at 598-99.

Appellants make much of the Supreme Court's conclusion in *Johnson v. Eisentrager* that the 1929 Conventions were "vindicated . . . only through protests and intervention of protecting powers." 339 U.S. 763, 789 n. 14 (1950). The 1949 Geneva Conventions, however, diverge substantially from their predecessors and, in fact, were written to correct the "clearly demonstrated [ ] deficiencies which existed in the 1929 Geneva Conventions" with respect to the scope of their application and enforceability. 59 *International Law Studies: Prisoners of War in*

International Armed Conflict 1, 9-10 (Naval War College Press, 1978). Whether the 1929 Conventions were self-executing has no bearing on whether the 1949 Conventions provide rights that can be enforced by the judiciary, especially in light of the Senate's conclusion that no implementing legislation was necessary to give force to the 1949 Conventions. Senate Report, *supra*, at 30.

Enforcing the GPW will not "indisputably encumber the President's authority as Commander in Chief." Govt Br. 32. The military commissions were scheduled to take place far from combat, three years after Hamdan's capture. Congress, moreover, has decided that upholding the Conventions is worth any such encumbrance. *See* NDAA, Pub. L. No. 108-375, §1091(b)(4), 118 Stat 1811, 2069 (2004) (providing that the policy of the United States is to follow the GPW).

4. The Federal Statute Governing Military Commissions Requires Compliance with the Geneva Conventions.

"[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.); *accord McCulloch v. Sociedad Nacional de Marineros*, 372 U.S. 10, 21-22 (1963). "This rule of construction reflects principles of customary international law – law that [a court must assume] Congress ordinarily seeks to follow." *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 2366 (2004).

The UCMJ authorizes the President to write procedures for military commissions. 10 U.S.C. §836. Under the *Charming Betsy* canon, a court must construe this authority to preclude any procedures that violate the law of nations, including the Geneva Conventions.

III. THE DISTRICT COURT CORRECTLY HELD THAT ABSTENTION IS NOT APPROPRIATE.

Hamdan has languished in Appellants' custody for nearly three years. He has spent much of that time in solitary confinement – deprived of sunlight, exercise, medical care and other basic human needs. His health has deteriorated dangerously. Appellants nevertheless insist that the District Court was required to ignore Hamdan's plight and abstain from adjudicating his claims until the commission completes its work. Appellants are mistaken.

A. Abstention Is Not Appropriate Because Hamdan Challenges Executive Branch Authority.

Hamdan asserts that the military commission established by the President to try him violates the GPW. Abstention therefore is not appropriate. *Parisi v. Davidson*, 405 U.S. 34 (1972).

The core function of the Judicial Branch – policing the limits of the authority of the Political Branches – cannot be assumed by the other Branches. As the plurality stated in *North Pipeline Constr. Co. v. Marathon Pipe Line Co.*, "[t]he

judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III." 458 U.S. 50, 59 (1982).

Courts have consistently granted access to judicial tribunals despite government appeals for deference to military tribunals. *See Reid v. Covert*, 354 U.S. 1 (1957) (military spouse not subject to prosecution under the UCMJ); *McElroy v. Guarliardo*, 361 U.S. 281 (1960) (overseas civilian employee not subject to court-martial in time of peace); *Toth v. Quarles*, 350 U.S. 11 (1955) (serviceman not subject to court-martial for crimes committed while in the military). In each of these cases, the Court determined that adjudication of petitioner's claim should proceed immediately in the Article III court and not await further proceedings by the military tribunal. As in *Reid*, *McElroy* and *Toth*, this Court may vindicate Hamdan's claims "without requiring exhaustion of military remedies" because "the expertise of military courts [does not extend] to the consideration of constitutional claims of the type presented." *Noyd v. Bond*, 395 U.S. 683, 696 n.8 (1969).

Appellants argue that Hamdan cannot rely on *Reid, Toth,* or *McElroy* because he is not a citizen of the United States. Govt Br. 21. As the Supreme Court recognized in *Rasul v. Bush*, however, Guantánamo is United States territory for all practical purposes, and aliens in United States territory may assert federal rights. 124 S. Ct 2686, 2696, 2700-01. In any event, the question is not whether

Hamdan may assert a federal right, but whether the District Court should abstain from entertaining the claim.

B. Abstention Is Not Appropriate Because Hamdan Raises Substantial Arguments Challenging the Jurisdiction of the Military Commissions.

A person need not submit to a trial before a military tribunal "if the military court has no jurisdiction over him." *New v. Cohen*, 129 F.3d 639, 644 (CADC 1997). Thus, a federal court need not abstain in deference to military commissions (and a petitioner need not exhaust his claims before the military tribunal) where the petitioner "rais[es] substantial arguments denying the right of the military to try [him] at all." *Id.* (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 759 (1975)).

Appellants assert that this exception does not apply unless it is "undisputed that the persons subject to the court-martials never ha[ve] been or no longer [are], in the military." Govt Br. 20. It is clear from the context of *New*, however, that the Court was referring to members of the United States' military who commit crimes over which the military courts have jurisdiction. In any event, this Court held in *New* that Article III courts have the authority to consider *all* "substantial" arguments challenging the jurisdiction of military tribunals. *New*, 129 F.3d at 644. The Court in *New* rejected the petitioner's jurisdictional challenge to the military tribunal only *after* considering the merits of the challenge. *Id.* at 646.

C. *Councilman* Did Not Require the District Court To Abstain.

In *Schlesinger v. Councilman*, 420 U.S. 738 (1975), the Supreme Court held that an Article III court should not enjoin a pending court-martial proceeding against a service member charged with committing a criminal offense while on active duty. *Id.* at 746. The Court gave three reasons for its decision: (1) the courts-martial set up by Congress adequately balanced protections for defendants against security needs, (2) military discipline, and (3) military expertise. 420 U.S. at 758-60. None of these rationales apply.

Hamdan is not a member of the United States' military. First, the Commissions were not set up by Congress nor do they balance individual rights. Second, Hamdan's alleged offenses have no bearing on the military's "primary business" to "fight or be ready to fight wars should the occasion arise," or the "military discipline, morale, and fitness" of our armed services. *Id.* at 757, 760. Finally, Hamdan's claims go to the lawfulness of the commissions, a question about which the commissions lack expertise.

IV. THE DISTRICT COURT CORRECTLY HELD THAT THE MILITARY COMMISSION SYSTEM VIOLATES HAMDAN'S RIGHTS UNDER THE GENEVA CONVENTIONS.

A. The Geneva Conventions Apply to Hamdan.

1. The Geneva Conventions Apply to Hamdan Because He Was Captured During an International Armed Conflict.

The Geneva Conventions apply broadly to protect all involved in international armed conflicts. Article 2 ("Common Article 2") provides that the Conventions are applicable in "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." GPW, art. 2. Because Hamdan was captured during an armed conflict between the United States and Afghanistan (two "High Contracting Parties" to the Conventions), Hamdan must be treated in accordance with the GPW.

Ignoring the breadth of Common Article 2, Appellants argue that Hamdan was captured not during the United States' armed conflict with Afghanistan but during a "separate" conflict with al Qaeda – a conflict that the United States happened to be fighting at the same time, on the same soil, using the same troops, and with the same objectives. The conflict with al Qaeda can no more be separated from the conflict with Afghanistan than the conflict between Germany and the French Resistance in World War II could be separated from the conflict between Germany and France. In any case, Hamdan was captured by Afghan paramilitary forces allied with the United States and fighting the Taliban, not al Qaeda. *See* Hamdan Aff. at 10.

Appellant's "attempt to separate the Taliban from al Qaeda for [GPW] purposes finds no support in the structure of the Conventions themselves, which

are triggered by the place of the conflict, and not by what particular faction a fighter is associated with." Mem. 15. Secretary of State Powell reached the same conclusion, stating soon after the United States invaded Afghanistan that the GPW apply to both al Qaeda and Taliban fighters. Rowan Scarborough, *Powell Wants Detainees to the Declared POWs*, Wash. Times, Jan. 26, 2002. His Legal Advisor explained:

> [The suggestion that there is a] . . . distinction between our conflict with al Qaeda and our conflict with the Taliban does not conform to the structure of the Conventions. The Conventions call for a decision whether they apply to the conflict in Afghanistan. If they do, their provisions are applicable to all persons involved in the conflict – al Qaeda, Taliban, Northern Alliance, U.S. troops, civilians, etc. If the Conventions do not apply to the conflict, no one involved in it will enjoy the benefit of their protections as a matter of law.

Taft Mem., *supra*, ¶ 3.

Appellants' cramped interpretation of Common Article 2 bears a disturbing resemblance to the interpretation of predecessor conventions adopted by Nazi Germany. Exploiting "technicalities" and "ambiguities" in the 1929 Conventions, the Nazis refused to afford POW status to soldiers of occupied countries, arguing that those prisoners were no longer soldiers of any existing state. *See* Levie, *supra*, at 12. Responding to this brazen evasion of the Conventions, Common Article 2 was written "as a catchall, to include every type of hostility which might occur without being 'declared war,'" Oscar M. Uhler et al., *Commentary IV: Geneva*

Convention Relative to the Protection of Civilian Persons in Time of War 14-15 (Jean S. Pictet ed., 1958), thus ensuring that "nobody in enemy hands can be outside the law," *id.* at 51. Its expansive language was intended to "deprive belligerents, in advance, of the pretexts they might in theory put forward for evading their obligations." *Id.*

2. Hamdan Is Entitled To Be Treated as a POW Until a Competent Tribunal Determines Otherwise.

Article 5 of the GPW and United States military regulations require prisoners to be afforded full POW status as long as there is any doubt about their status. Article 5 provides:

> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

See AR 190-8; FM 27-10. These and the other military regulations cited in this brief express the interpretation of the GPW by the United States. *See* FM 27-10, ch. 3, §I ¶ 71(b) (explaining that AR 190-8 is the military's interpretation of Article 5).

Doubt about Hamdan's status starts with his capture by bounty-hunting Afghan paramilitary forces. McGirk, *Pakistani Writes of His US Ordeal*, Boston Globe, Nov. 17, 2002, at A30. Further, Hamdan was captured by the Northern

Alliance in a war zone. The GPW creates a presumption that a prisoner who is captured in a war zone is a POW. *See* Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 847 Int'l Rev. Red Cross 571, 571 (2002). Finally, Army regulations provide that a detainee's status is "in doubt" under Article 5 whenever the detainee *claims* that he is entitled to POW status, as Hamdan has done. *See* Hamdan Pet. ¶¶ 36-42; AR 190-8, §1-6(b) (providing a "competent tribunal shall determine the status of any person not appearing to be [a POW] . . . who asserts that he or she is entitled to treatment as a [POW]"). Navy regulations provide that even "individuals captured as spies or illegal combatants have the right to assert their claim of entitlement to [POW] status before a judicial tribunal and to have the question adjudicated." NWP 1-14M: The Commander's Handbook on the Law of Naval Operations §11-7 (1995).

Appellants assert that no doubt exists concerning Hamdan's status because a CSRT and the President have found him to be an "enemy combatant." The CSRT, however, was not established to determine a detainee's status under the Geneva Conventions, but only to determine "whether the detainee is properly detained as an enemy combatant." Mem. 18. The President cannot decide Hamdan's status, because "the president is not a tribunal and cannot substitute for a tribunal under Article 5." Aldrich, *supra*, at 897.

The President's categorical refusal to provide POW protections to any detainee also violates Article 5's requirement that prisoners receive individualized status determinations. When large numbers of people are rounded up, civilians, soldiers, and even "enemy combatants" are easily mistaken. After the Gulf War, the United States, as it had done following every conflict since the ratification of the Geneva Conventions, convened tribunals for detainees with unclear status. Of 1,196 tribunals convened, almost three quarters (886) resulted in a finding that the detainee was not a combatant at all, but a displaced civilian. Dep't of Defense, *Conduct of the Persian Gulf War: Final Report to Congress*, at 528, 619 (1992), *available at* http://www.ndu.edu/library/epubs/cpgw.pdf (last visited Dec. 28, 2004); *see also* Note, *Safeguarding the Enemy Within*, 71 Fordham L. Rev. 2565, 2574 (2003) (noting U.S. Army's establishment of widespread Article 5 tribunals in Vietnam to adjudicate POW status of enemy detainees).

B. The Commissions Violate the Geneva Conventions.

1. The Geneva Conventions Require that Hamdan Be Allowed To Confront the Evidence Presented Against Him.

Appellants do not dispute that the commission process prohibits Hamdan from confronting the evidence presented against him. Nor do Appellants dispute that the right to confront evidence is fundamental to a fair trial. *See Crawford v. Washington*, 24 S. Ct. 1354, 1371, 1373 (2004); *Maryland v. Craig*, 497 U.S. 836,

846 (1990). Appellants instead assert that the Commission is not *required* to allow Hamdan even this most fundamental right because Military Commissions can apply whatever "procedures [ ] the President has deemed fit." Govt Br. 53. Appellants' argument ignores the plain language of the Conventions.

Article 102 of the GPW provides that a "[POW] 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." The Convention thus requires that Hamdan, as a presumed POW, be tried only before tribunals that apply the same procedural safeguards the United States provides in trials of its own service men and women. Appellants' commissions fail to meet this standard.

Although the UCMJ provides that evidence presented at court-martial proceedings against United States military men and women must be presented "in the presence of the accused," *see* 10 U.S.C. §839(b), the procedures adopted for the Commissions provide that Hamdan may be excluded from proceedings. 32 C.F.R. §§9.6(b)(3),(d) (5). Appellants may present evidence against Hamdan that he will never be able to dispute because he is not permitted to hear the evidence, and his lawyer is not permitted to discuss the evidence with him. *Id.*

Amici understand Appellants' need to shield classified or "protected" information from disclosure to detainees. The military has developed procedures,

however, for dealing with classified information in court-martial proceedings. *See* Mil. R. Evid. 505. Appellants have not explained why these procedures are insufficient to protect the classified or protected information at issue in this case.

2. The Geneva Conventions Require that Hamdan Be Afforded the Right To Appeal to a Civilian Court.

Under article 106 of the GPW, "[e]very [POW] shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him, with a view to the quashing or revising of the sentence or the reopening of the trial." For U.S. military personnel, referral to a Court of Criminal Appeals of court-martial cases is mandatory for any member of the U.S. military who receives a sentence of confinement for one year unless this appeal has been waived. 10 U.S.C. §866(b). Discretionary review by the Court of Appeals for the Armed Forces and the Supreme Court of the United States is available. *Id.* §§867(a)-a(a). The Court of Appeals for the Armed Forces is composed of five civilian judges, appointed by the President with the advice and consent of the Senate for a term of 15 years, and removable only for cause. 10 U.S.C. § 942. Hamdan, by contrast, has no recourse to a true judicial body.

CONCLUSION

Two centuries ago, Justice Story wrote that the President "cannot lawfully transcend the rules of warfare established among civilized nations. He cannot lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims." *Brown v. United States*, 12 U.S. (8 Cranch) 110, 153 (1814) (Story, J., dissenting). Hamdan is entitled to the protections of the GPW. The judgment of the District Court should be affirmed.

Respectfully submitted,

DATED: December 29, 2004

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32 (a)(7)(B), as amended by Circuit Rule 32, because it contains 6,839 words, excluding parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32 (a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

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CERTIFICATE PURSUANT TO CIRCUIT RULE 29(D)

The retired flag officers represented by the undersigned have spent their careers commanding troops at home and overseas and protecting the nation. They are uniquely qualified to explain why Hamdan is entitled to the protections of the Geneva Conventions, why the military commissions established by the President -- by which the Government propose to try Hamdan as an "enemy combatant" -- violate the Geneva Conventions, and why withholding the protections of the Geneva Conventions from the Guantánamo detainees would place the safety and welfare of American soldiers at risk.

Although the undersigned coordinated with counsel for other amici to the extent possible to avoid duplication, the retired flag officers' unique perspective rendered further consolidation impossible.

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Certificate of Service

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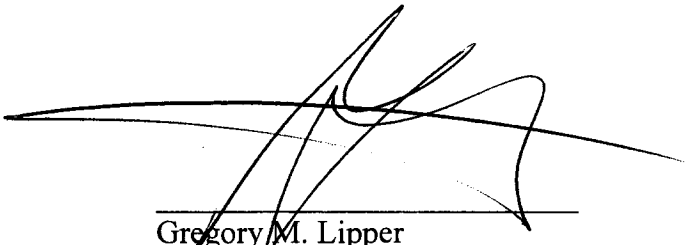

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STATUTORY ADDENDUM

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Except for the following, all applicable statutes, etc., are contained in the Brief for the Government.

Geneva Convention (III) Relative to the Treatment of Prisoners of War
August 12, 1949

ARTICLE 7

Prisoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be.

*****

ARTICLE 106

Every prisoner of war shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him, with a view to the quashing or revising of the sentence or the reopening of the trial. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so.

10 U.S.C. § 866

(a) Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Criminal Appeals established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

(b) The Judge Advocate General shall refer to a Court of Criminal Appeals the record in each case of trial by court-martial--

(1) in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more; and

(2) except in the case of a sentence extending to death, the right to appellate review has not been waived or an appeal has not been withdrawn under section 861 of this title (article 61).

(c) In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(d) If the Court of Criminal Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) The Judge Advocate General shall, unless there is to be further action by the President, the Secretary concerned, the Court of Appeals for the Armed Forces, or the Supreme Court, instruct the convening authority to take action in accordance with the decision of the Court of Criminal Appeals. If the Court of Criminal Appeals has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(f) The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Criminal Appeals and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the offices of the Judge Advocates General and by Courts of Criminal Appeals.

(g) No member of a Court of Criminal Appeals shall be required, or on his own initiative be permitted, to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another Court of Criminal Appeals, an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty.

(h) No member of a Court of Criminal Appeals shall be eligible to review the record of any trial if such member served as investigating officer in the case or served as a member of the court-martial before which such trial was conducted, or served as military judge, trial or defense counsel, or reviewing officer of such trial.

10 U.S.C. § 867(a)

(a) The Court of Appeals for the Armed Forces shall review the record in--

(1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;

(2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review; and

(3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

(b) The accused may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals within 60 days from the earlier of--

(1) the date on which the accused is notified of the decision of the Court of Criminal Appeals; or

(2) the date on which a copy of the decision of the Court of Criminal Appeals, after being served on appellate counsel of record for the accused (if any), is deposited in the United States mails for delivery by first-class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in his official service record.

The Court of Appeals for the Armed Forces shall act upon such a petition promptly in accordance with the rules of the court.

(c) In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals. In a case which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces, that action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review. The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.

(d) If the Court of Appeals for the Armed Forces sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) After it has acted on a case, the Court of Appeals for the Armed Forces may direct the Judge Advocate General to return the record to the Court of Criminal Appeals for further review in accordance with the decision of the court. Otherwise, unless there is to be further action by the President or the Secretary concerned, the Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the court has ordered a rehearing, but

the convening authority finds a rehearing impracticable, he may dismiss the charges.

10 U.S.C. § 867a

(a) Decisions of the United States Court of Appeals for the Armed Forces are subject to review by the Supreme Court by writ of certiorari as provided in section 1259 of title 28. The Supreme Court may not review by a writ of certiorari under this section any action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review.

(b) The accused may petition the Supreme Court for a writ of certiorari without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28.

10 U.S.C. § 942

(a) Number.--The United States Court of Appeals for the Armed Forces consists of five judges.

(b) Appointment; qualification.--(1) Each judge of the court shall be appointed from civilian life by the President, by and with the advice and consent of the Senate, for a specified term determined under paragraph (2). A judge may serve as a senior judge as provided in subsection (e).

(2) The term of a judge shall expire as follows:

(A) In the case of a judge who is appointed after March 31 and before October 1 of any year, the term shall expire on September 30 of the year in which the fifteenth anniversary of the appointment occurs.

(B) In the case of a judge who is appointed after September 30 of any year and before April 1 of the following year, the term shall expire fifteen years after such September 30.

(3) Not more than three of the judges of the court may be appointed from the same political party, and no person may be appointed to be a judge of the court unless the person is a member of the bar of a Federal court or the highest court of a State.

(4) For purposes of appointment of judges to the court, a person retired from the armed forces after 20 or more years of active service (whether or not such person is on the retired list) shall not be considered to be in civilian life.

(c) Removal.--Judges of the court may be removed from office by the President, upon notice and hearing, for--

(1) neglect of duty;

(2) misconduct; or

(3) mental or physical disability.

A judge may not be removed by the President for any other cause.

(d) Pay and allowances.--Each judge of the court is entitled to the same salary and travel allowances as are, and from time to time may be, provided for judges of the United States Courts of Appeals.

(e) Senior judges.--(1)(A) A former judge of the court who is receiving retired pay or an annuity under section 945 of this title (article 145) or under subchapter III of chapter 83 or chapter 84 of title 5 shall be a senior judge. The chief judge of the court may call upon an individual who is a senior judge of the court under this subparagraph, with the consent of the senior judge, to perform judicial duties with the court--

(i) during a period a judge of the court is unable to perform his duties because of illness or other disability;

(ii) during a period in which a position of judge of the court is vacant; or

(iii) in any case in which a judge of the court recuses himself.

(B) If, at the time the term of a judge expires, no successor to that judge has been appointed, the chief judge of the court may call upon that judge (with that judge's consent) to continue to perform judicial duties with the court until the vacancy is filled. A judge who, upon the expiration of the judge's term, continues to perform judicial duties with the court without a break in service under this subparagraph shall be a senior judge while such service continues.

(2) A senior judge shall be paid for each day on which he performs judicial duties with the court an amount equal to the daily equivalent of the annual rate of pay provided for a judge of the court. Such pay shall be in lieu of retired pay and in lieu of an annuity under section 945 of this title (article 145), subchapter III of chapter 83 or subchapter II of chapter 84 of title 5, or any other retirement system for employees of the Federal Government.

(3) A senior judge, while performing duties referred to in paragraph (1), shall be provided with such office space and staff assistance as the chief judge considers appropriate and shall be entitled to the per diem, travel allowances, and other allowances provided for judges of the court.

(4) A senior judge shall be considered to be an officer or employee of the United States with respect to his status as a senior judge, but only during periods the senior judge is performing duties referred to in paragraph (1). For the purposes of section 205 of title 18, a senior judge shall be considered to be a special government employee during such periods. Any provision of law that prohibits or limits the political or business activities of an employee of the United States shall apply to a senior judge only during such periods.

(5) The court shall prescribe rules for the use and conduct of senior judges of the court. The chief judge of the court shall transmit such rules, and any amendments to such rules, to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives not later than 15 days after the issuance of such rules or amendments, as the case may be.

(6) For purposes of subchapter III of chapter 83 of title 5 (relating to the Civil Service Retirement and Disability System) and chapter 84 of such title (relating to the Federal Employees' Retirement System) and for purposes of any other Federal Government retirement system for employees of the Federal Government--

(A) a period during which a senior judge performs duties referred to in paragraph (1) shall not be considered creditable service;

(B) no amount shall be withheld from the pay of a senior judge as a retirement contribution under section 8334, 8343, 8422, or 8432 of title 5 or under any other such retirement system

for any period during which the senior judge performs duties referred to in paragraph (1);

(C) no contribution shall be made by the Federal Government to any retirement system with respect to a senior judge for any period during which the senior judge performs duties referred to in paragraph (1); and

(D) a senior judge shall not be considered to be a reemployed annuitant for any period during which the senior judge performs duties referred to in paragraph (1).

(f) Service of article III judges.--(1) The Chief Justice of the United States, upon the request of the chief judge of the court, may designate a judge of a United States court of appeals or of a United States district court to perform the duties of judge of the United States Court of Appeals for the Armed Forces--

(A) during a period a judge of the court is unable to perform his duties because of illness or other disability;

(B) in any case in which a judge of the court recuses himself; or

(C) during a period when there is a vacancy on the court and in the opinion of the chief judge of the court such a designation is necessary for the proper dispatch of the business of the court.

(2) The chief judge of the court may not request that a designation be made under paragraph (1) unless the chief judge has determined that no person is available to perform judicial duties with the court as a senior judge under subsection (e).

(3) A designation under paragraph (1) may be made only with the consent of the designated judge and the concurrence of the chief judge of the court of appeals or district court concerned.

(4) Per diem, travel allowances, and other allowances paid to the designated judge in connection with the performance of duties for the court shall be paid from funds available for the payment of per diem and such allowances for judges of the court.

(g) Effect of vacancy on court.--A vacancy on the court does not impair the right of the remaining judges to exercise the powers of the court.

28 U.S.C. § 2241

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005
Pub. L. No. 108-375, 118 Stat. 1181 (2004)

An Act To authorize appropriations for fiscal year 2005 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe personnel strengths for such fiscal year for the Armed Forces, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

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SEC. 1091. SENSE OF CONGRESS AND POLICY CONCERNING PERSONS DETAINED BY THE UNITED STATES.

(a) SENSE OF CONGRESS.--It is the sense of Congress that--

(1) the abuses inflicted upon detainees at the Abu Ghraib prison in Baghdad, Iraq, are inconsistent with the professionalism, dedication, standards, and training required of individuals who serve in the United States Armed Forces;

(2) the vast majority of members of the Armed Forces have upheld the highest possible standards of professionalism and morality in the face of illegal tactics and terrorist attacks and attempts on their lives;

(3) the abuse of persons in United States custody in Iraq is appropriately condemned and deplored by the American people;

(4) the Armed Forces are moving swiftly and decisively to identify, try, and, if found guilty, punish persons who perpetrated such abuse;

(5) the Department of Defense and appropriate military authorities must continue to undertake corrective action, as appropriate, to address chain-of-command deficiencies and the systemic deficiencies identified in the incidents in question;

(6) the Constitution, laws, and treaties of the United States and the applicable guidance and regulations of the United States Government prohibit the torture or cruel, inhuman, or degrading treatment of foreign prisoners held in custody by the United States;

(7) the alleged crimes of a handful of individuals should not detract from the commendable sacrifices of over 300,000 members of the Armed Forces who have served, or who are serving, in Operation Iraqi Freedom; and

(8) no detainee shall be subject to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of United States.

(b) POLICY.--It is the policy of the United States to--

(1) ensure that no detainee shall be subject to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States;

(2) investigate and prosecute, as appropriate, all alleged instances of unlawful treatment of detainees in a manner consistent with the international obligations, laws, or policies of the United States;

(3) ensure that all personnel of the United States Government understand their obligations in both wartime and peacetime to comply with the legal prohibitions against torture, cruel, inhuman, or degrading treatment of detainees in the custody of the United States;

(4) ensure that, in a case in which there is doubt as to whether a detainee is entitled to prisoner of war status under the Geneva Conventions, such detainee receives the protections accorded to prisoners of war until the detainee's status is determined by a competent tribunal; and

(5) expeditiously process and, if appropriate, prosecute detainees in the custody of the United States, including those in the custody of the United States Armed Forces at Guantanamo Bay, Cuba.

(c) DETAINEES.--For purposes of this section, the term "detainee" means a person in the custody or under the physical control of the United States as a result of armed conflict.

32 C.F.R. § 9.6

(a) Pretrial procedures--

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

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

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

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

(5) Issuance and service of process; obtaining evidence.

(i) The Commission shall have power to:

(A) Summon witnesses to attend trial and testify;

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

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

(D) Designate special commissioners to take evidence.

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

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

(1) Provide a full and fair trial.

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

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

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

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

(c) Oaths.

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

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

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

(d) Evidence--

(1) Admissibility. Evidence shall be admitted if, in the opinion of the Presiding Officer (or instead, if any other member of the Commission so requests at the time the Presiding Officer renders that opinion, the opinion of the Commission rendered at that time by a majority of the Commission), the evidence would have probative value to a reasonable person.

(2) Witnesses--

(i) Production of witnesses. The Prosecution or the Defense may request that the Commission hear the testimony of any person, and such testimony shall be received if found to be admissible and not cumulative. The Commission may also summon and hear witnesses on its own initiative. The Commission may permit the testimony of witnesses by telephone, audiovisual means, or other means; however, the Commission shall consider the ability to test the veracity of that testimony in evaluating the weight to be given to the testimony of the witness.

(ii) Testimony. Testimony of witnesses shall be given under oath or affirmation. The Commission may still hear a witness who refuses to swear an oath or make a solemn undertaking; however, the Commission shall consider the refusal to swear an oath or give an affirmation in evaluating the weight to be given to the testimony of the witness.

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

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

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

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

not reasonably be contested.

(5) Protection of Information--

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

(A) Information classified or classifiable pursuant to Executive Order 12958;

(B) Information protected by law or rule from unauthorized disclosure;

(C) Information the disclosure of which may endanger the physical safety of participants in Commission proceedings, including prospective witnesses;

(D) Information concerning intelligence and law enforcement sources, methods, or activities; or

(E) Information concerning other national security interests. As soon as practicable, counsel for either side will notify the Presiding Officer of any intent to offer evidence involving Protected Information.

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

(A) The deletion of specified items of Protected Information from documents to be made available to the Accused, Detailed Defense Counsel, or Civilian Defense Counsel;

(B) The substitution of a portion or summary of the information for such Protected Information; or

(C) The substitution of a statement of the relevant facts that the Protected Information would tend to prove. The Prosecution's motion and any materials submitted in support thereof or in response thereto shall, upon request of the Prosecution, be considered by the Presiding Officer ex parte, in camera, but no Protected Information shall be admitted into evidence for consideration by the Commission if not presented to Detailed Defense Counsel.

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

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

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

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

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

(3) The Prosecution shall make its opening statement.

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

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

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

(7) Thereafter, the Prosecution and the Defense may introduce evidence in rebuttal and surrebuttal.

(8) The Prosecution shall present argument to the Commission. Defense Counsel shall be permitted to present argument in response, and then the Prosecution may reply in rebuttal.

(9) After the members of the Commission deliberate and vote on findings in closed conference, the Presiding Officer shall announce the Commission's findings in the presence of the Commission, the Prosecution, the Accused, and Defense Counsel. The individual votes of the members of the Commission shall not be disclosed.

(10) In the event a finding of Guilty is entered for an offense, the Prosecution and the Defense may present information to aid the Commission in determining an appropriate sentence. The Accused may testify and shall be subject to cross-examination regarding any such testimony.

(11) The Prosecution and, thereafter, the Defense shall present argument to the Commission regarding sentencing.

(12) After the members of the Commission deliberate and vote on a sentence in closed conference, the Presiding Officer shall announce the Commission's sentence in the presence of the Commission, the Prosecution, the Accused, and Defense Counsel. The individual votes of the

members of the Commission shall not be disclosed.

(f) Voting. Members of the Commission shall deliberate and vote in closed conference. A Commission member shall vote for a finding of Guilty as to an offense if and only if that member is convinced beyond a reasonable doubt, based on the evidence admitted at trial, that the Accused is guilty of the offense. An affirmative vote of two-thirds of the members is required for a finding of Guilty. When appropriate, the Commission may adjust a charged offense by exceptions and substitutions of language that do not substantially change the nature of the offense or increase its seriousness, or it may vote to convict of a lesser-included offense. An affirmative vote of two-thirds of the members is required to determine a sentence, except that a sentence of death requires a unanimous, affirmative vote of all of the members. Votes on findings and sentences shall be taken by secret, written ballot.

(g) Sentence. Upon conviction of an Accused, the Commission shall impose a sentence that is appropriate to the offense or offenses for which there was a finding of Guilty, which sentence may include death, imprisonment for life or for any lesser term, payment of a fine or restitution, or such other lawful punishment or condition of punishment as the Commission shall determine to be proper. Only a Commission of seven members may sentence an Accused to death. A Commission may (subject to rights of third parties) order confiscation of any property of a convicted Accused, deprive that Accused of any stolen property, or order the delivery of such property to the United States for disposition.

(h) Post-trial procedures--

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

(2) Finality of findings and sentence. A Commission finding as to a charge and any sentence of a Commission becomes final when the President or, if designated by the President, the Secretary of Defense makes a final decision thereon pursuant to section 4(c)(8) of the President's Military Order and in accordance with paragraph (h)(6) of this section. An authenticated finding of Not Guilty as to a charge shall not be changed to a finding of Guilty. Any sentence made final by action of the President or the Secretary of Defense shall be carried out promptly. Adjudged confinement shall begin immediately following the trial.

(3) Review by the Appointing Authority. If the Secretary of Defense is not the Appointing Authority, the Appointing Authority shall promptly perform an administrative review of the record of trial. If satisfied that the proceedings of the Commission were administratively complete, the Appointing Authority shall transmit the record of trial to the Review Panel constituted under paragraph (h)(4) of this section. If not so satisfied, the Appointing Authority shall return

the case for any necessary supplementary proceedings.

(4) Review Panel. The Secretary of Defense shall designate a Review Panel consisting of three Military Officers, which may include civilians commissioned pursuant to section 603 of title 10, United States Code. At least one member of each Review Panel shall have experience as a judge. The Review Panel shall review the record of trial and, in its discretion, any written submissions from the Prosecution and the Defense and shall deliberate in closed conference. The Review Panel shall disregard any variance from procedures specified in this part or elsewhere that would not materially have affected the outcome of the trial before the Commission. Within thirty days after receipt of the record of trial, the Review Panel shall either:

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

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

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

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

Army Regulation 190-8

1–5. General protection policy

a. U.S. policy, relative to the treatment of EPW, CI and RP in the custody of the U.S. Armed Forces, is as follows:

(1) All persons captured, detained, interned, or otherwise held in U.S. Armed Forces custody during the course of conflict will be given humanitarian care and treatment from the moment they fall into the hands of U.S. forces until final release or repatriation.

(2) All persons taken into custody by U.S. forces will be provided with the protections of the GPW until some other legal status is determined by competent authority.

(3) The punishment of EPW, CI and RP known to have, or suspected of having, committed serious offenses will be administered IAW due process of law and under legally constituted authority per the GPW, GC, the Uniform Code of Military Justice and the Manual for Courts Martial.

(4) The inhumane treatment of EPW, CI, RP is prohibited and is not justified by the stress of combat or with deep provocation. Inhumane treatment is a serious and punishable violation under international law and the Uniform Code of Military Justice (UCMJ).

b. All prisoners will receive humane treatment without regard to race, nationality, religion, political opinion, sex, or other criteria. The following acts are prohibited: murder, torture, corporal punishment, mutilation, the taking of hostages, sensory deprivation, collective punishments, execution without trial by propr authority, and all cruel and degrading treatment.

c. All persons will be respected as human beings. They will be protected against all acts of violence to include rape, forced prostitution, assault and theft, insults, public curiosity, bodily injury, and reprisals of any kind. They will not be subjected to medical or scientific experiments. This list is not exclusive. EPW/RP are to be protected from all threats or acts of violence.

d. Photographing, filming, and video taping of individual EPW, CI and RP for other than internal Internment Facility administration or intelligence/counterintelligence purposes is strictly prohibited. No group, wide area or aerial photographs of EPW, CI and RP or facilities will be taken unless approved by the senior Military Police officer in the Internment Facility commander's chain of command.

e. A neutral state or an international humanitarian organization, such as the ICRC, may be designated by the U.S. Government as a Protecting Power (PP) to monitor whether protected persons are receiving humane treatment as required by the Geneva Conventions. The text of the Geneva Convention, its annexes, and any special agreements, will be posted in each camp in the language of the EPW, CI and RP.

f. Medical Personnel. Retained medical personnel shall receive as a minimum the benefits and protection given to EPW and shall also be granted all facilities necessary to provide for the medical care of EPW. They shall continue to exercise their medical functions for the benefit of EPW, preferably those belonging to the armed forces upon which they depend, within the scope of the military laws and regulations of the United States Armed Forces. They shall be provided with necessary transport and allowed to periodically visit EPW situated in working detachments or in hospitals outside the EPW camp. Although subject to the internal discipline of the camp in which they are retained such personnel may not be compelled to carry out any work other than that concerned with their medical duties. The senior medical officer shall be responsible to the

camp military authorities for everything connected with the activities of retained medical personnel.

g. Religion.

(1) EPW, and RP will enjoy latitude in the exercise of their religious practices, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by the military authorities. Adequate space will be provided where religious services may be held.

(2) Military chaplains who fall into the hands of the U.S. and who remain or are retained to assist EPW, and RP, will be allowed to minister to EPW, RP, of the same religion. Chaplains will be
allocated among various camps and labor detachments containing EPW, RP, belonging to the same forces, speaking the same language, or practicing the same religion. They will enjoy the necessary facilities, including the means of transport provided in the Geneva Convention, for visiting the EPW, RP, outside their camp. They will be free to correspond, subject to censorship, on matters concerning their religious duties with the ecclesiastical authorities in the country of detention and with international religious organizations. Chaplains shall not be compelled to carry out any work other than their religious duties.

(3) Enemy Prisoners of War, who are ministers of religion, without having officiated as chaplains to their own forces, will be at liberty, whatever their denomination, to minister freely to the members of their faith in U.S. custody. For this purpose, they will receive the same treatment as the chaplains retained by the United States. They are not to be obligated to do any additional work.

(4) If EPW, RP, do not have the assistance of a chaplain or a minister of their faith. A minister belonging to the prisoner's denomination, or in a minister's absence, a qualified layman, will be appointed, at the request of the prisoners, to fill this office. This appointment, subject to approval of the camp commander, will take place with agreement from the religious community of prisoners concerned and, wherever necessary, with approval of the local religious authorities of the same faith. The appointed person will comply with all regulations established by the United States.

Dep't of the Army, Field Manual No. 27-10, The Law of Land Warfare, ch. 3, § 1

CHAPTER 3
PRISONERS OF WAR

Section I. PERSONS ENTITLED TO BE TREATED AS PRISONERS OF WAR; RETAINED MEDICAL PERSONNEL

60. General Division of Enemy Population
The enemy population is divided in war into two general classes:
a. Persons entitled to treatment as prisoners of war upon capture, as defined in Article 4, *GPW* (par. 61).
b. The civilian population (exclusive of those civilian persons listed in *GPW, art. 4*), who benefit to varying degrees from the provisions of GC (see chs. 5 and 6 herein). Persons in each of the foregoing categories have distinct rights, duties, and disabilities. Persons who are not members of the armed forces, as defined in Article 4, *GPW*, who bear arms or engage in other conduct hostile to the enemy thereby deprive themselves of many of the privileges attaching to the members of the civilian population (see sec. II of this chapter).

61. Prisoners of War Defined
A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
(a) that of being commanded by a person responsible for his subordinates;
(b) that of having a fixed distinctive sign recognizable at a distance;
(c) that of carrying arms openly;
(d) that of conducting their operations in accordance with the laws and customs of war.
(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.
(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favorable treatment under any other provisions of international law.
(6) Inhabitants of a nonoccupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading force, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of

war.
B. The following shall likewise be treated as prisoners of war under the present Convention:
(1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.
(2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favorable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or nonbelligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.
C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention. (GPW, art. 4.)

62. Combatants and Noncombatants
The armed forces of the belligerent parties may consist of combatants and noncombatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war. (HR, art. 3.)

63. Commandos and Airborne Troops
Commando forces and airborne troops, although operating by highly trained methods of surprise and violent combat, are entitled, as long as they are members of the organized armed forces of the enemy and wear uniform, to be treated as prisoners of war upon capture, even if they operate singly.

64. Qualifications of Members of Militias and Volunteer Corps
The requirements specified in Article 4, paragraphs A (2) (a) to (d), GPW (par. 61) are satisfied in the following fashion:
a. Command by a Responsible Person. This condition is fulfilled if the commander of the corps is a commissioned officer of the armed forces or is a person of position and authority or if the members of the militia or volunteer corps are provided with documents, badges, or other means of identification to show that they are officers, noncommissioned officers, or soldiers so that there may be no doubt that they are not persons acting on their own responsibility. State recognition, however, is not essential, and an organization may be formed spontaneously and elect its own officers.
b. Fixed Distinctive Sign. The second condition, relative to the possession of a fixed distinctive sign recognizable at a distance is satisfied by the wearing of military uniform, but less than the complete uniform will suffice. A helmet or headdress which would make the silhouette of the

individual readily distinguishable from that of an ordinary civilian would satisfy this requirement. It is also desirable that the individual member of the militia or volunteer corps wear a badge or brassard permanently affixed to his clothing. It is not necessary to inform the enemy of the distinctive sign, although it may be desirable to do so in order to avoid misunderstanding.
c. Carrying Arms Openly. This requirement is not satisfied by the carrying of weapons concealed about the person or if the individuals hide their weapons on the approach of the enemy.
d. Compliance With Law of War. This condition is fulfilled if most of the members of the body observe the laws and customs of war, notwithstanding the fact that the individual member concerned may have committed a war crime. Members of militias and volunteer corps should be especially warned against employment of treachery, denial of quarters, maltreatment of prisoners of war, wounded, and dead, improper conduct toward flags of truce, pillage, and unnecessary violence and destruction.

65. The Levée en Masse
If the enemy approaches an area for the purpose of seizing it, the inhabitants, if they defend it, are entitled to the rights of regular combatants as a levée en masse (see GPW, art. 4, par. A (6); par. 61 herein), although they wear no distinctive sign. In such a case all the inhabitants of the area may be considered legitimate enemies until the area is taken. Should some inhabitants of a locality thus take part in its defense, it might be justifiable to treat all the males of military age as prisoners of war. Even if inhabitants who formed the levée en masse lay down their arms and return to their normal activities, they may be made prisoners of war.

66. Wounded and Sick
Subject to the provisions of Article 12, the wounded and sick of a belligerent who fall into enemy hands shall be prisoners of war, and the provisions of international law concerning prisoners of war shall apply to them. (GWS, art. 14.)

67. Medical Personnel and Chaplains
Medical personnel exclusively engaged in the search for, or collection, transport or treatment of the wounded or sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces, shall be respected and protected in all circumstances. (GWS, art. 24.) Members of the medical personnel and chaplains while retained by the Detaining Power with a view to assisting prisoners of war, shall not be considered as prisoners of war. They shall, however, receive as a minimum the benefits and protection of the present Convention, and shall also be granted all facilities necessary to provide for the medical care of and religious ministration to prisoners of war. They shall continue to exercise their medical and spiritual functions for the benefit of prisoners of war, preferably those belonging to the armed forces upon which they depend, within the scope of the military laws and regulations of the Detaining Power and under the control of its competent services, in accordance with their professional etiquette. They shall also benefit by the following facilities in the exercise of their medical or spiritual functions:
(a) They shall be authorized to visit periodically prisoners of war situated in working detachments or in hospitals outside the camp. For this purpose, the Detaining Power shall place at their disposal the necessary means of transport.
(b) The senior medical officer in each camp shall be responsible to the camp military authorities for everything connected with the activities of retained medical personnel. For

this purpose, Parties to the conflict shall agree at the outbreak of hostilities on the subject of the corresponding ranks of the medical personnel, including that of societies mentioned in Article 26 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949. This senior medical officer, as well as chaplains, shall have the right to deal with the competent authorities of the camp on all questions relating to their duties. Such authorities shall afford them all necessary facilities for correspondence relating to these questions.
(c) Although they shall be subject to the internal discipline of the camp in which they are retained, such personnel may not be compelled to carry out any work other than that concerned with their medical or religious duties. During hostilities the Parties to the conflict shall agree concerning the possible relief of retained personnel and shall settle the procedure to be followed. None of the preceding provisions shall relieve the Detaining Power of its obligations with regard to prisoners of war from the medical or spiritual point of view. (GPW, art. 33.)
(See also GWS, arts. 27 and 32; pars. 229 and 233 herein.)

68. Persons Temporarily Performing Medical Functions
Members of the armed forces specially trained for employment, should the need arise, as hospital orderlies, nurses, or auxiliary stretcher-bearers, in the search for or the collection, transport or treatment of the wounded and sick * * * who have fallen into the hands of the enemy, shall be prisoners of war, but shall be employed on their medical duties in so far as the need arises. (GWS, arts. 25 and 29.)

69. Personnel of Aid Societies
The staff of National Red Cross Societies and that of other Voluntary Aid Societies, duly recognized and authorized by their Governments, who may be employed on the same duties as the personnel named in Article 24, are placed on the same footing as the personnel named in the said Article, provided that the staff of such societies are subject to military laws and regulations. Each High Contracting Party shall notify to the other, either in time of peace, or at the commencement of or during hostilities, but in any case before actually employing them, the names of the societies which it has authorized, under its responsibility, to render assistance to the regular medical service of its armed forces. (GWS, art. 26.)

70. Enumeration Not Exhaustive
The enumeration of persons entitled to be treated as prisoners of war is not exhaustive and does not preclude affording prisoner-of-war status to persons who would otherwise be subject to less favorable treatment.

71. Interim Protection
a. Treaty Provision.
The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal. (GPW, art. 5.)
b. Interpretation. The foregoing provision applies to any person not appearing to be entitled to

prisoner-of-war status who has committed a belligerent act or has engaged in hostile activities in aid of the armed forces and who asserts that he is entitled to treatment as a prisoner of war or concerning whom any other doubt of a like nature exists.

c. Competent Tribunal. A "competent tribunal" of the United States for the purpose of determining whether a person of the nature described in a above is or is not entitled to prisoner-of-war status is a board of not less than three officers acting according to such procedure as may be prescribed for tribunals of this nature.

d. Further Proceedings. Persons who have been determined by a competent tribunal not to be entitled to prisoner-of-war status may not be executed, imprisoned, or otherwise penalized without further judicial proceedings to determine what acts they have committed and what penalty should be imposed therefore.

Dep't of the Navy, NWP 1-14M: The Commander's Handbook on the Law of Naval Operations § 11-7 (1995)

11.7 PRISONERS OF WAR

Combatants cease to be subject to attack when they have individually laid down their arms to surrender, when they are no longer capable of resistance, or when the unit in which they are serving or embarked has surrendered or been captured. However, the law of armed conflict does not precisely define when surrender takes effect or how it may be accomplished in practical terms. Surrender involves an offer by the surrendering party (a unit or individual combatant) and an ability to accept on the part of the opponent. The latter may not refuse an offer of surrender when communicated, but that communication must be made at a time when it can be received and properly acted upon--an attempt to surrender in the midst of a hard-fought battle is neither easily communicated nor received. The issue is one of reasonableness.

Combatants that have surrendered or otherwise fallen into enemy hands are entitled to prisoner-of-war status and, as such, must be treated humanely and protected against violence, intimidation, insult, and public curiosity. When prisoners of war are given medical treatment, no distinction among them will be based on any grounds other than medical ones. (See paragraph 11.4 for further discussion of the medical treatment to be accorded captured enemy wounded and sick personnel.) Prisoners of war may be interrogated upon capture but are required to disclose only their name, rank, date of birth, and military serial number. Torture, threats, or other coercive acts are prohibited.

Persons entitled to prisoner-of-war status upon capture include members of the regular armed forces, the militia and volunteer units fighting with the regular armed forces, and civilians accompanying the armed forces. Militia, volunteers, guerrillas, and other partisans not fighting in association with the regular armed forces qualify for prisoner-of-war status upon capture, provided they are commanded by a person responsible for their conduct, are uniformed or bear a fixed distinctive sign recognizable at a distance, carry their arms openly, and conduct their operations in accordance with the law of armed conflict.

Should a question arise regarding a captive's entitlement to prisoner-of-war status, that individual should be accorded prisoner-of-war treatment until a competent tribunal convened by the captor determines the status to which that individual is properly entitled. Individuals captured as spies or as illegal combatants have the right to assert their claim of entitlement to prisoner-of-war status before a judicial tribunal and to have the question adjudicated. Such persons have a right to be fairly tried for violations of the law of armed conflict and may not be summarily executed.

11.7.1 Trial and Punishment. Prisoners of war may not be punished for hostile acts directed against opposing forces prior to capture, unless those acts constituted violations of the law of armed conflict. Prisoners of war prosecuted for war crimes committed prior to or after capture are entitled to be tried by the same courts as try the captor's own forces and are to be accorded the same procedural rights. At a minimum, these rights must include the assistance of lawyer counsel, an interpreter, and a fellow prisoner.

Although prisoners of war may be subjected to disciplinary action for minor offenses committed during captivity, punishment may not exceed 30 days confinement. Prisoners of war may not be subjected to collective punishment nor may reprisal action be taken against them.

11.7.2 Labor. Enlisted prisoners of war may be required to engage in labor having no military character or purpose. Noncommissioned officers may be required to perform only supervisory work. Officers may not be required to work.

11.7.3 Escape. Prisoners of war may not be punished for acts committed in attempting to escape, unless they cause death or injury to someone in the process. Disciplinary punishment may, however, be imposed upon them for the escape attempt. Prisoners of war who make good their escape by rejoining friendly forces or leaving enemy controlled territory, may not be subjected to such disciplinary punishment if recaptured. However, they remain subject to punishment for causing death or injury in the course of their previous escape.

11.7.4 Temporary Detention of Prisoners of War, Civilian Internees, and Other Detained Persons Aboard Naval Vessels. International treaty law expressly prohibits "internment" of prisoners of war other than in premises on land, but does not address temporary stay on board vessels. U.S. policy permits detention of prisoners of war, civilian internees, and detained persons on naval vessels as follows:

1. When picked up at sea, they may be temporarily held on board as operational needs dictate, pending a reasonable opportunity to transfer them to a shore facility or to another vessel for evacuation to a shore facility.

2. They may be temporarily held on board naval vessels while being transported between land facilities.

3. They may be temporarily held on board naval vessels if such detention would appreciably improve their safety or health prospects.

Detention on board vessels must be truly temporary, limited to the minimum period necessary to evacuate such persons from the combat zone or to avoid significant harm such persons would face if detained on land. Use of immobilized vessels for temporary detention of prisoners of war, civilian internees, or detained persons is not authorized without NCA approval.

Military Rule of Evidence 505

(a) General rule of privilege. Classified information is privileged from disclosure if disclosure would be detrimental to the national security.

(b) Definitions. As used in this rule:

(1) Classified information. "Classified information" means any information or material that has been determined by the United States Government pursuant to an executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security, and any restricted data, as defined in 42 U.S.C. § 2014(y).

(2) National security. "National Security" means the national defense and foreign relations of the United States.

(c) Who may claim the privilege. The privilege may be claimed by the head of the executive or military department or government agency concerned based on a finding that the information is properly classified and that disclosure would be detrimental to the national security. A person who may claim the privilege may authorize a witness or trial counsel to claim the privilege on his or her behalf. The authority of the witness or trial counsel to do so is presumed in the absence of evidence to the contrary.

(d) Action prior to referral of charges. Prior to referral of charges, the convening authority shall respond in writing to a request by the accused for classified information if the privilege in this rule is claimed for such information. The convening authority may:

(1) Delete specified items of classified information from documents made available to the accused;

(2) Substitute a portion or summary of the information for such classified documents;

(3) Substitute a statement admitting relevant facts that the classified information would tend to prove;

(4) Provide the document subject to conditions that will guard against the compromise of the information disclosed to the accused; or

(5) Withhold disclosure if actions under (1) through (4) cannot be taken without causing identifiable damage to the national security.

Any objection by the accused to withholding of information or to the conditions of disclosure shall be raised through a motion for appropriate relief at a pretrial session.

(e) Pretrial session. At any time after referral of charges and prior to arraignment, any party may move for a session under Article 39(a) to consider matters relating to classified information that may arise in connection with the trial. Following such motion or sua sponte, the military judge promptly shall hold a session under Article 39(a) to establish the timing of requests for discovery, the provision of notice under subdivision (h), and the initiation of the procedure under subdivision (i). In addition, the military judge may consider any other matters that relate to classified information or that may promote a fair and expeditious trial.

(f) Action after referral of charges. If a claim of privilege has been made under this rule with respect to classified information that apparently contains evidence that is relevant and necessary

to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence in the court-martial proceeding, the matter shall be reported to the convening authority. The convening authority may:

(1) Institute action to obtain the classified information for use by the military judge in marking a determination under subdivision (i);

(2) Dismiss the charges;

(3) Dismiss the charges or specifications or both to which the information relates; or

(4) Take such other action as may be required in the interests of justice.

If, after a reasonable period of time, the information is not provided to the military judge in circumstances where proceeding with the case without such information would materially prejudice a substantial right of the accused, the military judge shall dismiss the charges or specifications or both to which the classified information relates.

(g) Disclosure of classified information to the accused.

(1) Protective order. If the Government agrees to disclose classified information to the accused, the military judge, at the request of the Government, shall enter an appropriate protective order to guard against the compromise of the information disclosed to the accused. The terms of any such protective order may include provisions:

(A) Prohibiting the disclosure of the information except as authorized by the military judge;

(B) Requiring storage of material in a manner appropriate for the level of classification assigned to the documents to be disclosed;

(C) Requiring controlled access to the material during normal business hours and at other times upon reasonable notice;

(D) Requiring appropriate security clearances for persons having a need to examine the information in connection with the preparation of the defense;

(E) Requiring the maintenance of logs regarding access by all persons authorized by the military judge to have access to the classified information in connection with the preparation of the defense;

(F) Regulating the making and handling of notes taken from material containing classified information; or

(G) Requesting the convening authority to authorize the assignment of government security personnel and the provision of government storage facilities.

(2) Limited disclosure. The military judge, upon motion of the Government, shall authorize (A) the deletion of specified items of classified information from documents to be made available to the defendant, (B) the substitution of a portion or summary of the information for such classified documents, or (C) the substitution of a statement admitting relevant facts that the classified information would tend to prove, unless the military judge determines that disclosure of the classified information itself is necessary to enable the accused to prepare for trial. The Government's motion and any materials submitted in support thereof shall, upon request of the Government, be considered by the military judge in camera and shall not be disclosed to the accused.

(3) Disclosure at trial of certain statements previously made by a witness.

(A) Scope. After a witness called by the Government has testified on direct examination, the military judge, on motion of the accused, may order production of statements in the possession of the United States under R.C.M. 914. This provision does not preclude discovery or assertion of a privilege otherwise authorized under these rules or this Manual.

(B) Closed session. If the privilege in this rule is invoked during consideration of a motion under R.C.M. 914, the Government may deliver such statement for the inspection only by the military judge in camera and may provide the military judge with an affidavit identifying the portions of the statement that are classified and the basis for the classification assigned. If the military judge finds that disclosure of any portion of the statement identified by the Government as classified could reasonably be expected to cause damage to the national security in the degree required to warrant classification under the applicable executive order, statute, or regulation and that such portion of the statement is consistent with the witness' testimony, the military judge shall excise the portion from the statement. With such material excised, the military judge shall then direct delivery of such statement to the accused for use by the accused. If the military judge finds that such portion of the statement is inconsistent with the witness' testimony, the Government may move for a proceeding under subdivision (i).

(4) Record of trial. If, under this subdivision, any information is withheld from the accused, the accused objects to such withholding, and the trial is continued to an adjudication of guilt of the accused, the entire unaltered text of the relevant documents as well as the Government's motion and any materials submitted in support thereof shall be sealed and attached to the record of trial as an appellate exhibit. Such material shall be made available to reviewing authorities in closed proceedings for the purpose of reviewing the determination of the military judge.

(h) Notice of the accused's intention to disclose classified information.

(1) Notice by the accused. If the accused reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with a court-martial proceeding, the accused shall notify the trial counsel in writing of such intention and file a copy of such notice with the military judge. Such notice shall be given within the time specified by the military judge under subdivision (e), or, if no time has been specified, prior to arraignment of the accused.

(2) Continuing duty to notify. Whenever the accused learns of classified information not covered by a notice under (1) that the accused reasonably expects to disclose at any such proceeding, the accused shall notify the trial counsel and the military judge in writing as soon as possible thereafter.

(3) Content of notice. The notice required by this subdivision shall include a brief description of the classified information.

(4) Prohibition against disclosure. The accused may not disclose any information known or believed to be classified until notice has been given under this subdivision and until the Government has been afforded a reasonable opportunity to seek a determination under subdivision (i).

(5) Failure to comply. If the accused fails to comply with the requirements of this subdivision, the military judge may preclude disclosure of any classified information not made the subject of notification and may prohibit the examination by the accused of any witness with respect to any such information.

(i) In camera proceedings for cases involving classified information.

(1) Definition. For purposes of this subdivision, an "in camera proceeding" is a session under Article 39(a) from which the public is excluded.

(2) Motion for in camera proceeding. Within the time specified by the military judge for the filing of a motion under this rule, the Government may move for an in camera proceeding concerning the use at any proceeding of any classified information. Thereafter, either prior to or during trial, the military judge for good cause shown or otherwise upon a claim of privilege under this rule may grant the Government leave to move for an in camera proceeding concerning the use of additional classified information.

(3) Demonstration of national security nature of the information. In order to obtain an in camera proceeding under this rule, the Government shall submit the classified information for examination only by the military judge and shall demonstrate by affidavit that disclosure of the information reasonably could be expected to cause damage to the national security in the degree required to warrant classification under the applicable executive order, statute, or regulation.

(4) In camera proceeding.

(A) Procedure. Upon finding that the Government has met the standard set forth in subdivision (i)(3) with respect to some or all of the classified information at issue, the military judge shall conduct an in camera proceeding. Prior to the in camera proceeding, the Government shall provide the accused with notice of the information that will be at issue. This notice shall identify the classified information that will be at issue whenever that information previously has been made available to the accused in connection with proceedings in the same case. The Government may describe the information by generic category, in such form as the military judge may approve, rather than identifying the classified information when the Government has not previously made the information available to the accused in connection with pretrial proceedings. Following briefing and argument by the parties in the in camera proceeding the military judge shall determine whether the information may be disclosed at the court-martial proceeding. Where the Government's motion under this subdivision in filed prior to the proceeding at which disclosure is sought, the military judge shall rule prior to the commencement of the relevant proceeding.

(B) Standard. Classified information is not subject to disclosure under this subdivision unless the information is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence.

(C) Ruling. Unless the military judge makes a written determination that the information meets the standard set forth in (B), the information may not be disclosed or otherwise elicited at a court-martial proceeding. The record of the in camera proceeding shall be sealed and attached to the record of trial as an appellate exhibit. The accused may seek reconsideration of the determination prior to or during trial.

(D) Alternatives to full disclosure. If the military judge makes a determination under this subdivision that would permit disclosure of the information or if the Government elects not to contest the relevance, necessity, and admissibility of any classified information, the Government may proffer a statement admitting for purposes of the proceeding any relevant facts such information would tend to prove or may submit a portion or summary to be used in lieu of the information. The military judge shall order that such statement, portion, or summary be used by the

accused in place of the classified information unless the military judge finds that use of the classified information itself is necessary to afford the accused a fair trial.

(E) Sanctions. If the military judge determines that alternatives to full disclosure may not be used and the Government continues to object to disclosure of the information, the military judge shall issue any order that the interests of justice require. Such an order may include an order:

(i) Striking or precluding all or part of the testimony of a witness;

(ii) Declaring a mistrial;

(iii) Finding against the Government on any issue as to which the evidence is relevant and material to the defense;

(iv) Dismissing the charges, with or without prejudice; or

(v) Dismissing the charges or specifications or both to which the information relates.

Any such order shall permit the Government to avoid the sanction for nondisclosure by permitting the accused to disclose the information at the pertinent court-martial proceeding.

(i) Introduction of classified information.

(1) Classification status. Writings, recordings, and photographs containing classified information may be admitted into evidence without change in their classification status.

(2) Precautions by the military judge. In order to prevent unnecessary disclosure of classified information, the military judge may order admission into evidence of only part of a writing, recording, or photograph or may order admission into evidence of the whole writing, recording, or photograph with excision of some or all of the classified information contained therein.

(3) Contents of writing, recording, or photograph. The military judge may permit proof of the contents of a writing, recording, or photograph that contains classified information without requiring introduction into evidence of the original or a duplicate.

(4) Taking of testimony. During the examination of a witness, the Government may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be relevant and necessary to the defense. Following such an objection, the military judge shall take such suitable action to determine whether the response in admissible as will safeguard against the compromise of any classified information. Such action may include requiring the Government to provide the military judge with a proffer of the witness' response to the question or line of inquiry and requiring the accused to provide the military judge with a proffer of the nature of the information the accused seeks to elicit.

(5) Closed session. If counsel for all parties, the military judge, and the members have received appropriate security clearances, the military judge may exclude the public during that portion of the testimony of a witness that discloses classified information.

(6) Record of trial. The record of trial with respect to any classified matter will be prepared under R.C.M. 1103(h) and 1104(b)(1)(D).

(k) Security procedures to safeguard against compromise of classified information disclosed to courts-martial. The Secretary of Defense may prescribe security procedures for protection against the compromise of classified information submitted to courts-martial and appellate authorities.