

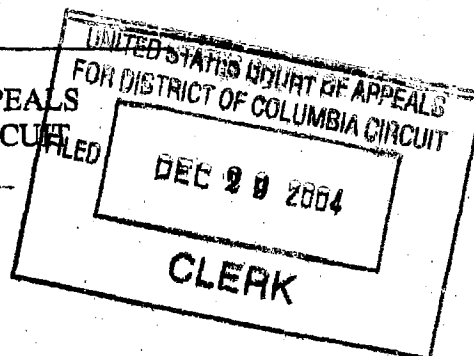
UNITED STATES COURT OF APPEALS  
FOR DISTRICT OF COLUMBIA CIRCUIT

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ORAL ARGUMENT SCHEDULED FOR MARCH 8, 2005]  
No. 04-5393

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



SALIM AHMED HAMDAN,

Petitioner-Appellee,

v.

DONALD H. RUMSFELD, U.S. SECRETARY OF DEFENSE, ET AL.,

Respondents-Appellants.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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BRIEF FOR APPELLEE

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**CERTIFICATE AS TO PARTIES, RULINGS, AND  
RELATED CASES**

**A. *Parties and Amici***

1. The Petitioner-Appellee is Salim Ahmed Hamdan. The habeas petition was originally brought in the name of Hamdan's appointed counsel, Charles Swift, in his capacity as Hamdan's "next friend." The petition has since been amended to be in Hamdan's name only.

2. The named Respondents-Appellants are: Donald H. Rumsfeld, United States Secretary of Defense; John D. Altenburg, Jr., Appointing Authority for Military Commissions, Department of Defense; Brigadier General Thomas L. Hemingway, Legal Advisor to the Appointing Authority for Military Commissions; Brigadier General Jay Hood, Commander Joint Task Force, Guantanamo, Camp Echo, Guantanamo Bay, Cuba; George W. Bush, President of the United States.

3. *Amici* appearing in the District Court were: Washington Legal Foundation and Allied Educational Foundation; 271 United Kingdom and European Parliamentarians; International Law Professors in Support of Petitioner (William J. Aceves; Jeffrey F. Addicott, Donna E. Arzt, M. Cherif Bassiouni, Robert W. Benson, Arthur L. Berney, Christopher Lee Blakesley,

Carolyn Patty Blum, Bartram S. Brown, Daniel H. Derby, Sherri Burr, Laura Dickinson, Father Robert F. Drinan, Steven D. Jamar, Walter J. Kendall, III, Saul Mendlovitz, Jennifer Moore, Makau Mutua, Paula Rhodes, Leila Nadya, Nadine Strossen, A. Dan Tarlock, Mark E. Wojcik); Sixteen Law Professors (Bruce Ackerman, Rosa Ehrenreich Brooks, Sarah H. Cleveland, William S. Dodge, Martin S. Dodge, Martin S. Flaherty, Ryan Goodman, Oona Hathaway, Derek Jinks, Kevin R. Johnson, Jennifer S. Martinez, Judith Resnik, David Scheffer, Anne-Marie Slaughter, David Sloss, Carlos M. Vazquez, David C. Vladeck); General David M. Brahms, Admiral Lee F. Gunn, Admiral John D. Hutson and General Richard O'Meara in Support of Petitioner; and The Center for International Human Rights of Northwestern University School of Law (Louise Doswald-Beck, Guy S. Goodwin-Gill, Frits Kalshoven, and Marco Sassoli).

4. *Amici* appearing thus far in the Court of Appeals are Washington Legal Foundation and Allied Educational Foundation; and the American Center for Law and Justice.

## **B. Rulings Under Review**

The present appeal is from the District Court's order in *Hamdan v. Rumsfeld, et al.*, No. 04-CV-1519, 2004 WL 2504508 (D.D.C. Nov. 8, 2004)

(Robertson, J.). Respondents-Appellants filed the notice of appeal on November 12, 2004.

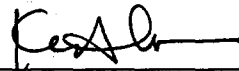
### **C. Related Cases**

The following cases that have been brought by other detainees at the Guantanamo Naval Base are 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.) (J. Kollar-Kotelly)
2. *Al-Odah v. United States*, No. 02-CV-0828 (D.D.C.) (J. Kollar-Kotelly)
3. *Habib v. Bush*, No. 02-CV-1130 (D.D.C.) (J. Kollar-Kotelly)
4. *Kurnaz v. Bush*, No. 04-CV-1135 (D.D.C.) (J. Huvelle)
5. *O.K. v. Bush*, No. 04-CV-1136 (D.D.C.) (J. Bates)
6. *Begg v. Bush*, No. 04-CV-1137 (D.D.C.) (J. Collyer)
7. *Khalid (Benchellali) v. Bush*, No. 04-CV-1142 (D.D.C.) (J. Leon)
8. *El-Banna v. Bush*, No. 04-CV-1144 (D.D.C.) (J. Roberts)
9. *Gherebi v. Bush*, No. 04-CV-1164 (J. Walton)
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12. *Almurbati v. Bush*, No. 04-CV-1227 (J. Walton)
13. *Abdah v. Bush*, No. 04-CV-1245 (D.D.C.) (J. Kennedy)
14. *Belmar v. Bush*, No. 04-CV-1997 (D.D.C.) (J. Collyer)
15. *Al-Qosi v. Bush*, No. 04-CV-1937 (D.D.C.) (J. Friedman)
16. *Al-Marri v. Bush*, No. 04-CV-2035 (J. Kessler)
17. *Paracha v. Bush*, No. 04-CV-2022 (J. Friedman)
18. *Zemiri v. Bush*, No. 04-CV-2046 (J. Kollar-Kotelly)

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



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## GLOSSARY

Addendum .....	Appellee's Addendum filed herewith
App. Br. ....	Appellants' Brief to this Court
CSRT .....	Combatant Status Review Tribunal
GPW .....	Third Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949
Hamdan Reply Br. ....	Respondent-Appellee Hamdan's Reply Brief in the District Court in this Circuit
JA .....	Joint Appendix
JAG .....	Judge Advocate General
Military Order .....	Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (Nov. 13, 2001)
POW .....	Prisoner of War
UCMJ .....	Uniform Code of Military Justice

[ORAL ARGUMENT SCHEDULED FOR MARCH 8, 2005]

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

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No. 04-5393

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SALIM AHMED HAMDAN,

Petitioner-Appellee,

v.

DONALD H. RUMSFELD, U.S. SECRETARY OF DEFENSE, ET AL.,

Respondents-Appellants.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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BRIEF FOR APPELLEE

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## **STATEMENT OF THE ISSUES**

1. Whether the District Court erred in determining not to abstain from exercising jurisdiction over Petitioner-Appellee Hamdan's petition by construing the laws, treaties, and Constitution of the United States.

2. Whether the District Court erred in determining that the 1949 Geneva Conventions, as ratified treaties of the United States, constitute the law of the land applicable in this case.

3. Whether the District Court erred in holding that, until a competent tribunal determines that Hamdan is not entitled to POW status under the Geneva Conventions, he may be tried only by court-martial for the offense with which he is charged.

4. Whether the District Court erred in holding that Hamdan's Military Commission lacks jurisdiction because it violates rights of confrontation and presence guaranteed by the UCMJ, military law, international law, common law, and the Constitution.

5. Whether the President has unilateral power to create military commissions, including those that contravene military law and the laws of war.

## **RELEVANT STATUTES AND REGULATIONS**

Relevant statutes and regulations are set forth, in pertinent part, in the Addendum filed herewith.

## **STATEMENT OF THE CASE**

This case involves a petition for a writ of mandamus and habeas corpus filed by Salim Ahmed Hamdan. The petition challenges Hamdan's pretrial detention at Guantanamo Bay Naval Base, and, among other things, the validity of the military commission that was to try him. The District Court found that the commission was inconsistent with the laws and treaties of the United States, specifically, the UCMJ and the Geneva Conventions.

## **STATEMENT OF THE FACTS**

On November 13, 2001, the President issued a Military Order to create military commissions.

The rules that govern these commissions do not provide the fundamental protections mandated for an accused in the UCMJ. Commission rules permit the exclusion of the accused from portions of his trial, 32 C.F.R. §9.6(b)(3); deny him the ability to represent himself, and permit the admission of unsworn statements in lieu of testimony, §9.6(d)(3). The rules further provide that the limited protections



available to defendants, such as the presumption of innocence and the right to not testify, are not "enforceable" in any way and can be stripped at any time. 32 C.F.R. §9.10-11.

In late November 2001, Hamdan was captured by Afghani militia forces while attempting to flee Afghanistan and return his family to his native country of Yemen. After being turned over to American forces, Hamdan was taken to Guantanamo Bay, where he was placed with the general detainee population at Camp Delta. On July 3, 2003, the President announced that there was "reason to believe" that Hamdan was subject to trial by commission. Hamdan was then placed in solitary confinement in Camp Echo, where he remained from December 2003 until late October 2004 (approximately four days before this case was argued in the District Court). JA 374-75. While in solitary, Hamdan exhibited symptoms consistent with acute mental injury including suicidal inclinations. JA 168-72.

In December 2003, Lieutenant Commander Swift was detailed, at the prosecution's request, to serve as Hamdan's counsel for the limited purpose of negotiating a plea. JA 154-55. On February 12, 2004, Hamdan filed a demand with the Appointing Authority for charges and a speedy trial under the UCMJ. The Appointing Authority rejected Hamdan's demand, concluding that the UCMJ does not apply. Hamdan filed this Petition in April 2004. In July 2004, approximately

thirty-two months after Hamdan was detained and eight months after the beginning of his solitary confinement, Appellants charged Hamdan with conspiracy.

### **SUMMARY OF ARGUMENT**

Correctly characterized, the decision below is not "extraordinary," "unprecedented" or "counterintuitive." The District Court construed the laws and treaties of the United States. It did not "overrule" the President, other than in the sense that any federal court might do so in determining that Executive action did not comply with the laws and treaties of the United States. The District Court did not limit the Commander-in-Chief powers in the absence of Congressional authority; rather, it found that Congress in the UCMJ and the Geneva Conventions set forth rules governing the treatment of Hamdan.

Although this case undoubtedly raises issues of national and international importance, the court below did not unduly restrict the powers of the Executive as historically recognized by the courts; it simply did not acquiesce to claims for the substantial broadening of those powers at the expense of traditional functions reposed in the Judicial Branch and Congress.

Whenever a federal court construes the Constitution, statutes or treaties, the court, to a degree, impinges upon Executive and Legislative prerogatives. That it does so is inherent in the nature of our tripartite form of government. Only in the

most rare and extreme cases does the exercise of the judicial function cause serious tensions between the branches of government. The decision of the court below is not one of those cases. It would have been such a case only if the District Court had concluded that the Executive's interpretation of the UCMJ and the Geneva Conventions urged by Appellants was superior to and could not be reviewed by the judiciary.

The District Court correctly determined that the commission lacks jurisdiction to try Hamdan because it violates his right to be present and the right to confront witnesses. The right to be present at all stages in criminal proceedings is fundamental, guaranteed by military law, common law, constitutional law, and international law. Even without the UCMJ, a commission that denied these rights would be dismissed for want of jurisdiction. The UCMJ codifies this longstanding tradition of justice.

Hamdan's rights have already been abridged, as he has been excluded from portions of the *voir dire*. The commission rules permit Hamdan to be excluded from portions of the trial as well, and the Prosecutor has announced his intention to exclude Hamdan for two days of testimony. These actions violate the longstanding guarantee of confrontation, one "founded on natural justice." *Crawford v.*

*Washington*, 124 S.Ct. 1354, 1363 (2004) (quoting *State v. Webb*, 2 N.C. 104 (1794)).

The court below correctly concluded that abstention was not appropriate under *Schlesinger v. Councilman*, 420 U.S. 738 (1975) and *New v. Cohen*, 129 F.3d 639 (CA DC 1997). It did so because the courts in *Councilman* and *New* were asked to defer to courts-martial, the very process that the Government rejects for Hamdan. Unlike a court-martial, the commission Hamdan faces was not created by Congress. It is not equipped to construe the Constitution, laws and treaties at issue; nor is it an established or mature system designed to protect the rights of the accused. The commission, an *ad hoc* body tainted by command influence, is not due comity.

The District Court also observed that *Councilman* and *New* repeated the determination in *Noyd v. Bond*, 395 U.S. 683, 696 n.8 (1969), that it would be "especially unfair to require exhaustion . . . when the complainants raised substantial question whether the military may try them at all." Having determined that Hamdan raised that substantial question, the District Court held that abstention was neither required nor appropriate.

In reaching this conclusion, the District Court reviewed the policy factors favoring abstention set forth in *Parisi v. Davidson*, 405 U.S. 34 (1972), and recited

in *New*. Deferring to the commission would not "aid[] the military judiciary in its task of maintaining order and discipline in the armed services," would not "eliminate[] needless friction between the federal civilian and military judicial systems," and would not deny "due respect to the autonomous military judicial system created by Congress." JA 379.

### **STANDARD OF REVIEW**

A district court's abstention decision is reviewed for abuse of discretion. *See Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984); *Handy v. Shaw*, 325 F.3d 346, 349 (CADC 2003).

### **ARGUMENT**

#### **I. THE DISTRICT COURT CORRECTLY REACHED THE MERITS**

Abstention "is the exception, not the rule" "because of 'the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.'" *Bridges v. Kelly*, 84 F.3d 470, 475 (CADC 1996) (citation omitted); *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992) (abstention "rarely should be invoked").

Abstention is *required* only when Congress states "in clear, unequivocal terms that the judiciary is barred from hearing an action until the administrative agency has come to a decision." *Avocados Plus v. Veneman*, 370 F.3d 1243, 1248

(CADC 2004) (quotation omitted). Congress has said nothing about abstention in this case, let alone in the requisite "[s]weeping and direct statutory language." *Id.*

**A. *Councilman* Does Not Support Abstention Here**

The government's reliance on *Councilman* is misplaced and ironic. *Councilman* emphasized that in creating the modern court-martial, Congress carefully balanced military necessities against procedural fairness. It is precisely this system that Appellants reject. This rejection has significant consequences for abstention and its underlying elements of comity, competence, exigency, and equity.

**1. Comity**

The commission lacks the factual predicate of abstention, a system "established by Congress and carefully designed to protect not only military interests but [the defendant's] legitimate interests as well." *Councilman*, 420 U.S. at 760; *see also New*, 129 F.3d at 643; JA 379.

*Councilman* and *New* did not challenge the process's fairness and legality; Hamdan does. As this Court has held, without "proceedings that would have afforded appellants a full and fair opportunity to litigate their [federal] claims, the predicate for *Younger* abstention [i]s simply absent." *Bridges*, 84 F.3d at 478 (citation omitted).

Appellants have acknowledged they are "plowing new ground" in conducting the first military commissions since 1948. *Plowing New Ground in Military Commissions*, [http://www.defenselink.mil/news/Aug2004/n08232004\\_2004082301.html](http://www.defenselink.mil/news/Aug2004/n08232004_2004082301.html). Notions of comity are simply inapposite when the tribunal's legitimacy is itself at issue.

Appellants cannot harvest the comity benefits of court-martial cases like *Councilman* and simultaneously claim they are not bound by court-martial rules. As noted above, *supra* pages 3-4, the supposed "rights" Appellants highlight are not "rights" at all and can be taken away at any time. Only Presidential fiat constrains this commission.

Abstention to courts-martial is built on the rock of a fair system established by Congress. This commission, a purely Executive creation, cannot make similar appeals to comity. Consider two examples.

**a. Delay**

Unlike courts-martial, commissions have no time limits. Appellants insist that Hamdan lacks court-martial speedy-trial rights. Under the current commission rules, Hamdan's trial may not take place for years, if ever.

If a trial eventually took place and the commissioners found Hamdan not guilty, the Appointing Authority and Review Board can send his case back to the

commission.<sup>1</sup> If Hamdan were found guilty, review by the Secretary of Defense and the President would occur. That review has absolutely no timetable or fixed guidelines. (It took nearly three years to simply charge Hamdan.)

Abstention principles are inapplicable when there is "an unreasonable or indefinite timeframe for administrative action." *McCarthy v. Madigan*, 503 U.S. 140, 147 (1992); see *Gibson v. Berryhill*, 411 U.S. 564, 575 n.14 (1973) (administrative remedy inadequate "[m]ost often . . . because of delay by the agency"); *Coit v. FSLIC*, 489 U.S. 561, 587 (1989) (because "regulations do not place a reasonable time limit on FSLIC's consideration of claims, Coit cannot be required to exhaust those procedures"); *Walker v. Southern Ry.*, 385 U.S. 196, 198 (1966); *Smith v. Ill. Bell Tel.*, 270 U.S. 587 (1926).

Commissions do not meet *Younger's* premise of being the "most appropriate forum for the resolution of constitutional contentions." *Huffman v. Pursue*, 420 U.S. 592, 609 (1975). Permitting the military's process to run its course is only appropriate where there is process in the first place and where that process

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<sup>1</sup> While the Review Panel cannot directly turn a finding of not guilty into a finding of guilty, the rules unjustly permit them to return the case for further proceedings simply because they are unhappy with the results. Compare 32 C.F.R. §9.5(p) with 10 U.S.C. §§844(a), 862(a)(1) (UCMJ provisions preventing double jeopardy).



comports with basic fairness. Neither is evident here. Even the mere CSRT finalization procedure was so opaque that Appellants' own counsel was unsure of it. JA 249. Appellants make procedures up as they go along, dragging out deliberations or finalizing them in whatever way prevents them from having to defend their actions. This suspect process is not entitled to presumptive legitimacy.

Even if the commission or the President acquitted Hamdan, *that* would not end the matter. Commission rules permit Hamdan to be charged with another offense (such as conspiring to commit some other offense, or even aiding and abetting the *same* object offenses for which he is currently charged). As long as the Military Order stands, Appellants can bring new charges—and subject Hamdan to new trials—until conviction. Therefore, Appellants' argument that Hamdan's conviction may not be affirmed is irrelevant; he will always be subject to yet another proceeding under the Military Order. Review of that Order is essential now.<sup>2</sup>

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<sup>2</sup> While *amicus* WLF "do not doubt" that that the federal courts would possess habeas jurisdiction after a conviction, Appellants offer no such assurance. The Military Order tries to preclude civilian review. When this Court abstained in *New*, it noted the variety of remedies available after the court-martial ended. 129 F.3d at 647-48. If the President keeps post-verdict review to a minimum, then federal courts must rule on the commission's legality and jurisdiction at the outset.

Unlike *Councilman*, this is not a case where the defendant is subjected to the period of uncertainty and anxiety attendant upon a typical prosecution. Hamdan is subjected to unending uncertainty. His case presents serious allegations of ongoing psychological damage, harm that is irreparable, "great and immediate." *Younger v. Harris*, 401 U.S. 37, 46 (1971); Lewis, *FBI Memos Criticized Practices at Guantanamo*, N.Y. Times, Dec. 7, 2004. Abstention could mean Hamdan is placed in solitary confinement again indefinitely to await further proceedings, creating irreparable psychological harm and eviscerating Hamdan's ability to defend himself at trial. Hamdan Reply Br. 15-16.

**b. Command Influence**

*Councilman* was premised on structural safeguards in the court-martial system and judges "completely removed from all military influence or persuasion." 420 U.S. at 758. The commissioners here (all hand-picked by Appellants) entirely lack this insulation. Even worse, the Prosecution has recognized that some have close personal connections with senior Pentagon officials who oversee the proceedings. Lewis, *Guantanamo Tribunal Process in Turmoil*, N.Y. Times, Sept. 26, 2004, A29. Command influence in a process that mixes adjudication of law and fact represents a "half-century leap backward in military legal norms."

Glazier, Note, *Kangaroo Court or Competent Tribunal?*, 89 Va. L.Rev. 2005, 2019 (2003).

Judicial insulation, another predicate of comity, is missing. "When after the Second World War, Congress became convinced of the need to assure direct civilian review over military justice, it deliberately chose to confide this power to a specialized Court of Military Appeals, so that *disinterested* civilian judges could gain *over time* a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces." *Noyd*, 395 U.S. at 694 (emphasis added).

Unlike that system, the Commission's *ad hoc* Review Board took oaths that excluded obeying the Constitution and laws. See Secretary Rumsfeld Swearing-In, Sept. 21, 2004, <http://www.defenselink.mil/transcripts/2004/tr20040921-secdef1323.html>; *JMM Corp. v. District of Columbia*, 378 F.3d 1117, 1123 (CADC 2004) (applying *Younger* because "there is no reason to presume that the courts of the District cannot be trusted to adequately protect federal constitutional rights"). "[T]he duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty," *Ex parte Quirin*, 317 U.S. 1, 19 (1942), should not be delegated to officials who claim the Constitution does not apply and take an oath to implement only the rules that they themselves have created.

The lack of safeguards against command influence is also evident in Appellants' defiance of 10 U.S.C. §3037(c), which provides:

The Judge Advocate General . . . shall receive, revise, and have recorded the proceedings of courts of inquiry and military commissions.

The JAG by statute is Presidentially appointed and Senate confirmed for this task. The commission therefore not only lacks the sanction of Congress present in *Councilman*, it actively flouts congressional rules.

"The Judge Advocate General adds integrity to the system of military justice by serving as a reviewing authority". Louis Fisher, *Military Tribunals and Presidential Power* 124 (2005). In the Civil War, JAG review led to invalidation of commission convictions, including for denying the right to be present:

[Judge Advocate General Holt] repeatedly overturned the decisions of trials by military commission...Holt reviewed the sentence of Mary Clemmens . . . [stating]: "Further, it is stated that the Commission was duly sworn—but does not add 'in the presence of the accused.' Nor does the Record show that the accused had any opportunity of challenge afforded her. These are particulars, in which it has always been held that the proceedings of a Military Commission should be assimilated to those of a Court-martial. And as these defects would be fatal in the latter case, they must be held to be so in the present instance."

Neely, *The Fate of Liberty* 162-63 (1991) (quoting Holt's opinion). The denial of this right to be present *has already happened to Hamdan*. JA 411.

Appellants are asking this Court to abstain to a process that denies basic rights and eliminates the advisory review required by Congress. These procedural failings counsel against application of comity and abstention.

## **2. Competence and Futility**

*Younger* "presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." *Gibson*, 411 U.S. at 577. Hamdan's commission is not competent to address the complex questions of constitutional law, international law, and jurisdiction present here. The commission's presumed knowledge of military operations is simply irrelevant.<sup>3</sup> The legal questions demand the competence and careful consideration of an Article III court. *McCarthy*, 503 U.S. at 148 (exhaustion not "required where the

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<sup>3</sup> The issue is how military officers will be used: in a commission whose rules are made up on the fly, or a court-martial whose procedures have been carefully crafted over two centuries by Congress. See William E. Birkhimer, *Military Government and Martial Law* 533-34 (1914) ("The customs of courts-martial are the teaching of ages. They have been transmitted from one generation of soldiers to another . . . besides, experience has demonstrated that changes, unless carefully made, are more apt to embarrass than to facilitate and render certain the administration of justice through military tribunals").

challenge is to the adequacy of the agency procedure itself"); *Allen v. Grand Central Aircraft*, 347 U.S. 535, 540 (1954).

In contrast to courts-martial, Hamdan's commission is conducted largely by non-lawyers and reviewed by executive-branch officials. Its legal rulings are unlikely to provide guidance to the federal courts. While the Court of Military Appeals may provide insights into the meaning of the Geneva Conventions, the commission proceedings will not.

Even with professional military judges, *Councilman* pointedly rejected the argument that "the expertise of military courts extended to the consideration of constitutional claims." 420 U.S. at 759 (quoting *Noyd, supra*). See also *McKart v. United States*, 395 U.S. 185, 197-98 (1969).

Moreover, because it is doubtful that commissions can declare their own existence unconstitutional, they "lack authority to grant the type of relief requested." *McCarthy*, 503 U.S. at 148. "[A]n agency . . . may be unable to consider whether to grant relief because it lacks institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute." *Id.* at 147-48; *Johnson v. Robison*, 415 U.S. 361, 368 (1974); *McNeese v. Board of Educ.*, 373 U.S. 668, 675 (1963).

In addition, abstention is not appropriate when the administrative body has "predetermined the issue." *McCarthy*, 503 U.S. at 148; *Gibson*, 411 U.S. at 577. Appellants have predetermined the issues in this case, namely, the legality and constitutionality of commissions, by promulgating the Military Order and accompanying regulations. Moreover, Appellants evidently rely on an Office of Legal Counsel opinion, which binds the entire federal government, stating that commissions are legal. Memorandum for Alberto Gonzales from Patrick Philbin, Office of Legal Counsel, *Legality of the Use of Military Commissions to Try Terrorists* (2001). Appellants also claim that a Presidential Order resolves the issue of whether the Geneva Conventions apply. App. Br. 40-46.

The President's recent statements underscore the futility of abstention:

[T]o the extent that people say, well, America is no longer a nation of laws -- that does hurt our reputation . . . [O]ur courts have made a ruling, they looked at the jurisdiction, the right of people in Guantanamo to have habeas review. . . . We want to fully vet the court decision, because I believe I have the right to set up military tribunals. And so the law is working to determine what Presidential powers are available and what's not available.

Press Conference, Dec. 20, 2004, at <http://www.whitehouse.gov/news/releases/2004/12/20041220-3.html>; see also <http://www.whitehouse.gov/news/releases/>

2004/12/20041210-9.html; Remarks by Secretary of Defense, Feb. 13, 2004, <http://www.defenselink.mil/transcripts/2004/tr20040213-0445.html>.

The Military Order, OLC opinion, and other documents make clear that exhaustion is futile. *Houghton v. Shafer*, 392 U.S. 639, 640 (1968); *Hammond v. Lenfest*, 398 F.2d 705, 713 (CA2 1968) ("a court-martial would consider itself bound by the determination of the Chief of Naval Personnel"). Commissions have long been subject to this problem. *E.g.*, *Birkhimer*, *supra*, at 357 (a soldier "who assumes to question the order of his commander does so at his peril. This rule . . . leads to unquestioned obedience" so that officers feel bound to obey orders convening commissions).

In *Quirin*, Attorney General Biddle explained why exhaustion was futile. Responding to the defense's claim that "this court is invalid and unconstitutional," Biddle opened the first day of proceedings:

I cannot conceive that a military commission composed of high officers of the Army, under a commission signed by the Commander-in-Chief, would listen to argument on the question of its power under that authority to try these defendants . . . [T]he question of the law involved is a question, of course, to be determined by the civil courts . . . I cannot think it conceivable that any commission would listen to an argument that [enemy] armed forces . . . have any civil rights that you can listen to in this proceeding.



Proceedings ("Saboteur Tr.") at 5-6,

[http://www.soc.umn.edu/~samaha/nazi\\_saboteurs/nazi01.htm](http://www.soc.umn.edu/~samaha/nazi_saboteurs/nazi01.htm). Consistent with Biddle's logic, the commission was halted so that the federal case could be filed and decided.<sup>4</sup> The same result is required here.

### 3. No Exigency Requires Abstention

Appellants also renew the military-exigency claim that failed in *Reid v. Covert*, 354 U.S. 1 (1957). Deference to the President goes to the merits, not abstention. And no exigency exists. Hamdan has been in military custody for over three years and the government has stated it may detain Hamdan independently and indefinitely as an enemy combatant. Hamdan is also subject to court-martial and civilian trial. The needs of the military are protected.

*Councilman*, moreover, had nothing to do with deference to the exigencies of war, it was concerned exclusively with *internal* military discipline. 420 U.S. at 757. As *Toth v. Quarles*, 350 U.S. 11, 22 (1955), stated: "Army discipline will not be improved by court-martialing rather than trying by jury some civilian ex-soldier

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<sup>4</sup> See William Rehnquist, *All The Laws But One* 137 (1998); Saboteur Tr. at 2765 (adjourning commission so defendants could proceed in Supreme Court); *id.* at 2935 (JAG stating that Supreme Court "probably will straighten out the question as to whether this is a theater of operation").

who has been wholly separated from the service . . . [D]iscipline provide[s] no excuse for new expansion of court-martial jurisdiction." When the fighting function is not implicated, neither is abstention. *See Doe v. Rumsfeld*, 297 F. Supp.2d 119, 128 (D.D.C. 2003). Whether Hamdan is tried by commission or court-martial has no effect on discipline.

Appellants' delay also belies their claim that commissions are essential for security. Unlike past commissions, which dispensed quick justice, this commission took over two years to charge Hamdan, and almost three years to begin proceedings. Whatever benefits this commission may have for Appellants, speedy efficiency is not among them.

**4. As in *Quirin*, the Public Interest Requires Immediate Review**

Appellants' conduct at Guantanamo is the subject of intense interest and concern. As President Bush recently suggested, *see supra* Page 18, a good portion of the nation, indeed the world, is watching these proceedings.

This is the first commission since the World War II era. In the decades since, the Geneva Conventions were ratified and the UCMJ enacted. A clear, efficient, and just resolution of the questions presented is essential now. If commissions are worth doing, they are worth doing right the first time.

In *Quirin*, the Supreme Court reached the conclusion that equity required reaching the merits without delay:

In view of the public importance of the questions...and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay, we directed . . . a special term of this Court . . .

317 U.S. at 19. Even in the midst of World War, the Court understood that the cloud of legal uncertainty must be cleared before a commission's verdict. Antecedent civilian review avoided the far greater comity threat of courts setting aside commission verdicts. That is why a Nixon Administration DOD Report concluded that pre-trial habeas review would benefit the Government. *See Amici International Law Scholars' Brief* App. 9. The years since *Quirin* have seen dramatic changes in both domestic law and laws of war. "By definition, the law of war must be a concept which changes with the practice of war and the customs of nations." *United States v. Schultz*, 4 C.M.R. 104, 114 (C.M.A. 1952). As in *Quirin*, Article III courts must address the legality of commissions in light of these changes.

Appellants, not pleased with this aspect of *Quirin*, contend it was overruled by *Younger* and *Councilman*. But this is flatly wrong. Abstention law in 1942 did not look significantly different. See *Councilman*, 420 U.S. at 754-56; *Younger*, 401 U.S. at 45-46; *Reaves v. Ainsworth*, 28 App. D.C. 157 (CADC 1906). And again, *Councilman* dealt with the carefully designed Congressional system of military justice, which is precisely what Appellants reject.

#### **5. Private Equities Counsel Against Abstention**

When Hamdan filed suit, he had been languishing in solitary confinement for five months and detention for over two-and-one-half years with no commission and no charges. Before filing suit, he did everything possible to exhaust his claims, including requesting charges and a speedy trial.<sup>5</sup> His request was denied in a legal opinion that essentially rejected Hamdan's statutory and constitutional claims. JA 104.<sup>6</sup>

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<sup>5</sup> Appellants' July 27 filing stated that "the jurisdiction of the Court depends upon the state of things at the time of the action brought." *Grupo Dataflux v. Atlas Global Group*, 124 S.Ct. 1920, 1924 (2004). Events after the April 2004 petition do not concern jurisdiction.

<sup>6</sup> The opinion necessarily rejected the Nixon Pentagon Report conclusion that the UCMJ and Constitution apply to commissions, which found:

After refusing to apply the UCMJ, Appellants tried to derail this litigation. First, they asked the Court to hold the proceedings in abeyance pending *Padilla* and *Rasul* and then brought *post-hoc* charges to take advantage of *Councilman*. Second, although Hamdan has continuously warned of the irreparable psychological harm accruing each day of solitary confinement, Appellants waited until the eve of oral argument to move him and then highlighted that change at argument. JA 246-47, 261, 357. Third, well after filing their Return, Appellants launched a CSRT and concluded it a few days before oral argument but not soon enough to introduce any findings into the record or provide them to opposing counsel.

The procedural history of this case makes clear that it was the Government's own manipulations and not Judge Robertson's decision that created "needless friction" between the civilian and military systems. *Parisi*, 405 U.S. at 40. It is

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[T]he specific protections of the Bill of Rights, unless made inapplicable to military trials by the Constitution itself, have been held applicable to courts-martial. Both logic and precedent indicate that a lesser standard for military commissions would not be constitutionally permissible. In this regard, Winthrop stated: "Military commissions . . . are commonly conducted according to the rule and forms governing courts-martial."

Appellants that violated comity by trying to derail Hamdan's pre-existing federal case.

Reversal of the judgment below, moreover, may eviscerate *Rasul* by enabling Appellants to evade habeas review of *all* Guantanamo detainee cases for years by designating detainees eligible for commissions. See Golden, *After Terror, A Secret Rewriting of Military Law*, N.Y. Times, Oct. 24, 2004, at 1 (stating that Counsel to the Vice President "urged" the White House Counsel to "seek a blanket designation of all the detainees being sent to Guantanamo as eligible for trial under the president's order" and that White House Counsel "agreed").

**B. COUNCILMAN DOES NOT APPLY TO JURISDICTIONAL CHALLENGES**

**1. The System Cannot Determine Its Own Jurisdiction**

*Councilman* recognized that a military-court system needs an external determination of jurisdiction and power. It is "especially unfair to require exhaustion . . . when the complainants raise[] substantial arguments denying the right of the military to try them at all." 420 U.S. at 759 (citation omitted). This language from *Councilman* was quoted by this Circuit in *New*, 129 F.3d at 644,

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Quoted in Paust, *Antiterrorism Military Commissions*, 23 Mich. J. Int'l L. 1, 3-4

and tracks the longstanding rule. See *Guagliardo v. McElroy*, 259 F.2d 927, 929 (CA DC 1958) (previous exhaustion cases are "inapposite, for there court-martial jurisdiction over the accused unquestionably existed" and here "the question is whether appellant is subject to court-martial jurisdiction at all"), *aff'd*, 361 U.S. 281 (1960); *Kinsella v. Singleton*, 361 U.S. 234, 240-41 (1960) (rejecting Government's argument to consider a civilian's impact on discipline because "[t]he test for jurisdiction . . . is one of *status*"); *Hammond*, 398 F.2d at 714 (abstention inappropriate because government "fails to explain wherein lies [its] power to convene the court-martial"); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

*Councilman* upheld the denial of abstention in *Toth* and *Reid*, *supra*, because "[t]he constitutional question presented *turned on the status of the persons* as to whom the military asserted its power." 420 U.S. at 759 (emphasis added). The challenge in *Councilman*, by contrast, was brought under the fact-specific "ad hoc" 12-factor test of *Relford v. Commandant*, 401 U.S. 355, 366 (1971). Such factual determinations are irrelevant here, as in *Toth*, *Reid*, and *Guagliardo*.

The expansion of military jurisdiction is disfavored because it is harsh even at its best. Accordingly, federal courts always police the boundary at the outset.

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(2001).

Appellants try to flip the burden through manufacturing a new test: civilian status must be "undisputed." App. Br. 20. But *Councilman* and *New* both require only "substantial arguments." *Councilman*, 420 U.S. at 759; *New*, 129 F.3d at 646; *Andrews v. Heupel*, 29 M.J. 743, 747 (A.F.C.M.R. 1989). Abstention has been rejected when the Petitioner "colorably claim[ed]" that he was a civilian. *Machado v. Commanding Officer*, 860 F.2d 542, 546 (CA2 1988). New's claim of civilian status, in contrast, was so insubstantial that he abandoned it. 129 F.3d at 646.

Moreover, Appellants' portrayal of uncontested civilian status in *Toth* and *Reid* is revisionist history. The Solicitor General argued in *Toth* that "ninety years" of precedent explain why *Toth* was "not a civilian." Petr. Br., *Toth v. Quarles*, No. 3 (1955), at 12. The Solicitor General argued that Mrs. Reid was "part of the American military contingent abroad" and Congress made her "subject to discipline under American military law." App. Br., *Reid*, No. 701, at 31-32.

Appellants also assert, after failing to provide any evidence to the Court below, that Hamdan "clearly falls within the jurisdiction and authority of the military." App. Br. 20-21. The Solicitor General in *Toth* and *Reid* advanced that argument to no avail. Moreover, the question is not whether Hamdan is under the military's jurisdiction writ large, but whether the commission has jurisdiction. Under Appellants' reasoning, because *Councilman* and *New* were under "the



jurisdiction and authority of the military" they could be subjected to any "commission" the President created.

In fact, any difference between Hamdan and Toth cuts *against* Appellants. No civilian court had jurisdiction to prosecute Toth. Petr. Brief, *supra*, at 7. Hamdan does not ask for Toth's windfall. Judge Robertson did not grant Hamdan immunity; he required prosecution under procedures that comply with law.

Appellants also repeat their irrelevant assertions that Hamdan is not entitled to constitutional protection. *Councilman* focused not on constitutional rights, but fairness to a defendant's "interests." 420 U.S. at 757. Moreover, *Rasul v. Bush*, 124 S.Ct. 2686, 2698 (2004), made clear that "nothing in *Eisentrager* or in any of our other cases categorically excludes aliens detained in military custody outside the United States from the privilege of litigation." The Government must "make their response to the merits of petitioners' claims." *Id.* at 2699. Finally, footnote 15 of *Rasul* shows that the Constitution protects Hamdan. Hamdan Reply Br. 39-43.

## **2. The Rights at Stake Are Jurisdictional**

Hamdan "is contesting the very authority of the Government to hale him into court to face trial on the charge against him." *Abney v. United States*, 431 U.S. 651, 659 (1977). Abstention is inappropriate when a defendant asserts a right such

as Double Jeopardy, which protects against the unconstitutional trial process itself. *Gilliam v. Foster*, 75 F.3d 881, 904 (CA4 1996) (en banc); *Mannes v. Gillespie*, 967 F.2d 1310 (CA9 1992); *Showery v. Samaniego*, 814 F.2d 200 (CA5 1987).

In addition to his status-based claim, Hamdan raises several other jurisdictional challenges. In military courts, a defendant's presence at every stage of the trial is a jurisdictional requirement:

"[H]e has *the right* to be present, and must be present, during *the whole* of the trial, and until the final judgment. If he be absent . . . there is a want of jurisdiction over the person, and the court can not proceed with the trial, or receive the verdict, or pronounce the final judgment."

*Weirman v. United States*, 36 Ct. Cl. 236 (1901) (emphasis in original) (quoting Thomas M. Cooley, *A Treatise on the Constitutional Limitations* 319 (1868)). In military courts, a defendant's presence continues to be jurisdictional. *United States v. Day*, 48 C.M.R. 627 (1974); *United States v. Norsian*, 47 C.M.R. 209 (1973).

Likewise, the failure to follow statutory authorization is jurisdictional: "A court-martial is the creature of statute, and, as a body or tribunal, it must be convened and constituted in entire conformity with the provisions of the statute or else it is without jurisdiction." *McClaghry v. Deming*, 186 U.S. 49, 62 (1902).

*See also* Dudley, *Military Law* 13 (1910) ("The military commission . . . [has] jurisdiction only within the limits prescribed by law. Being courts of special jurisdiction, the fact that they have jurisdiction must appear in every case, because without it their acts are wholly void."); *Wilcox v. Jackson*, 38 U.S. 498, 510-11 (1839); *Williamson v. Berry*, 49 U.S. 495, 540-41 (1850).

*United States v. MacDonald*, 435 U.S. 850, 861 n.7 (1978) suggested that Sixth Amendment speedy-trial guarantees could be vindicated after trial, but the Court cautioned that its holding "is not to be confused with the quite distinct proposition that certain claims (because of the substance of the rights entailed, rather than the advantage to a litigant in winning his claim sooner) should be resolved before trial." *See Flanigan v. United States*, 465 U.S. 259, 266 (1984). Hamdan asserts a "right not to be tried." *MacDonald*, 435 U.S. at 861. Furthermore, *MacDonald's* Sixth Amendment analysis does not control UCMJ and the Geneva Conventions speedy-trial rights, which are far more extensive.

Finally, even rights that can be vindicated post-trial may be properly adjudicated without abstention when a patently severe violation occurs. *Younger*, 401 U.S. at 53-54.

## **II. HAMDAN'S COMMISSION VIOLATES THE GPW**

The District Court's GPW ruling should be affirmed. In challenging this ruling, Appellants disparage the Court's power under the Judiciary and Supremacy Clauses, mischaracterize the ruling below, and disregard the Suspension Clause.

### **A. Domestic Law Implements The GPW**

The GPW has been implemented, as no less than four separate provisions confirm.

#### **1. 10 U.S.C. §821**

The District Court correctly noted that "Hamdan has not asserted a 'private right of action' under the Third Geneva Convention." JA 394. It held that the GPW is implicated by a federal statute, 10 U.S.C. §821. The statute limits commissions to "offenders or offenses that . . . by the law of war may be tried by military commissions." *Quirin* held that the predecessor of §821 incorporated the law of war. 317 U.S. at 38. Appellants acknowledge that the law of war includes the GPW. JA 292; Addendum 29a.

Under GPW Article 5, when any doubt arises, a person "shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." Addendum 3a. Under Article 102, a POW

can be tried only "by the same courts according to the same procedures as in the case of members of the armed forces of the Detaining Power." Addendum 4a.

Appellants claim that §821, by referring to "offenders *or* offenses," permits trial by commission because "Conspiracy" violates the law of war. This is false, *see infra* Part IV.D.1, as well as far too expansive. Furthermore, under the "last in time" rule, any such reading of §821 was overruled by subsequent GPW ratification. *Cook v. United States*, 288 U.S. 102, 120 (1933).

## **2. The National Defense Authorization Act**

Implementation of the GPW is also evident in the National Defense Authorization Act, which provides:

It is the policy of the United States to . . . 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.

Pub. L. No. §108-375, §1091(b)(4), 118 Stat. 1811, 2068-69 (2004), Addendum 57a. Congress further directed in §1092(b)(3) that "all detainees [be provided] with information, in their own language, of the applicable protections afforded under the Geneva Conventions." *Id.* §1092(b)(3), 2069-70.

### 3. AR 190-8

Army Regulation 190-8 provides:

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.

190-8 §1-5(a)(2), Addendum 55a. Section 1-1(b) explicitly states that it implements international law and the GPW. AR 190-8 was "adopted to implement the Geneva Convention." *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2658 (2004) (Souter, J., concurring).

GPW Articles 5 and 102—the provisions the District Court relied on—are specifically implemented:

*a.* In accordance with Article 5, GPW, if *any doubt* arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to *any* of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present Convention *until* such time as their status has been determined by a competent tribunal.

*b.* A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who . . . *asserts* that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.

AR 190-8 §1-6 (emphasis added). Thus, the mere assertion of protected status is sufficient.

Section 3-7(b) implements Article 102, providing that "judicial proceedings . . . will be by courts-martial or by civil courts," that the UCMJ applies to courts-martial, and that POWs are to be treated like American soldiers in judicial proceedings.

These regulations and their predecessors have long been included in military-training manuals. U.S. Army Field Manual 27-10, *The Law of Land Warfare*, ch. 3 ¶71 (1956) ("[Article 5] applies to any person not appearing to be entitled to prisoner-of-war status . . . who asserts that he is entitled to treatment as a prisoner of war or concerning whom any other doubt of a like nature exists"); Judge Advocate General's School, *Operational Law Handbook* 22 (2003).

"It has been repeatedly held that authorized military regulations have the force of law." *United States v. Mead*, 16 M.J. 270, 273 (C.M.A. 1983). Courts enforce them, even against the military. *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959) ("Having chosen to proceed against petitioner on security grounds, the Secretary . . . was bound by the regulations which he himself had promulgated for dealing with such cases, even though without such regulations he could have discharged petitioner summarily"); *Service v. Dulles*, 354 U.S. 363, 388-89 (1957);

*Standard Oil Co. v. Johnson*, 316 U.S. 481, 484 (1942); *Nixon v. Sec'y of Navy*, 422 F.2d 934, 937 (CA2 1970) ("the Navy is bound by its own validly promulgated regulations, and the district courts are free to entertain suits by servicemen requesting compliance with such rules"); *United States v. Heffner*, 420 F.2d 809, 811 (CA4 1969); *Hammond*, 398 F.2d at 715 ("we agree with the District of Columbia Circuit that 'the District Court may review actions by military authorities which violate their own established regulations.'" (citation omitted)).

#### 4. M.C.M.

The M.C.M., promulgated by President Bush's Executive Order, limits military tribunals under the Geneva Conventions:

When a general court-martial exercises jurisdiction under the law of war, it may adjudge any punishment permitted by the law of war.

#### Discussion

Certain limitations on the discretion of military tribunals to adjudge punishment under the law of war are prescribed in international conventions. See, for example, Geneva Convention Relative to the Protection of Civilian Persons. . . .

M.C.M. 201(f)(1)(B)(ii).



**B. Hamdan May Challenge Appellants' Violation of Statutes and Regulations**

Given Appellants' violation of statutes and regulations, mandamus relief is appropriate. *Nixon*, 422 F.2d at 937 (mandamus available when Navy violated regulations). The same is true of habeas: "unless Congress acts to suspend it . . . the Great Writ . . . serv[es] as an important judicial check on the Executive's discretion in the realm of detentions." *Hamdi*, 124 S.Ct. at 2650 (plurality) (citing *INS v. St. Cyr*, 533 U.S. 289 (2001)).

In *Wang v. Ashcroft*, 320 F.3d 130 (CA2 2003), an alien sought habeas relief claiming that his deportation violated the Convention Against Torture (CAT). The Government claimed, and the petitioner did not dispute, that CAT was neither self-executing nor judicially enforceable. Nevertheless, the Court held that the violation of the implementing statute and regulations could be challenged in a habeas action, despite this statutory language: "[n]otwithstanding any other provision of law, . . . nothing in this section shall be construed as providing any court jurisdiction to consider or review claims under the [CAT] or this section." *Id.* at 140. Such language "does not speak with sufficient clarity to exclude CAT claims from §2241 jurisdiction," and that to conclude otherwise would create serious Suspension Clause issues. *Id.* at 142. Accord *Ogbudimkpa v. Ashcroft*,

342 F.3d 207, 221 (CA3 2003); *Saint Fort v. Ashcroft*, 329 F.3d 191, 202 (CA1 2003); *Singh v. Ashcroft*, 351 F.3d 435, 442 (CA9 2003). The court relied on *St. Cyr*, where "[T]he [Supreme] Court explained that at an absolute minimum, the Suspension Clause protects the writ as it existed in 1789, and at that time the use of the writ encompassed detentions based on errors of law, including the erroneous application or interpretation of statutes." *Wang*, 320 F.3d at 143.

Hamdan's claims are similar, indeed stronger, arising from his detention due to Appellants' erroneous interpretation of §821, the National Defense Authorization Act, and AR 190-8.

### **C. Hamdan's GPW Rights Are Also Enforceable Under the Supremacy Clause**

Even absent the implementing statutes and regulations, Hamdan has rights under the GPW that are judicially enforceable by virtue of the Supremacy Clause. This is because the GPW is self-executing and protects individual rights in a manner capable of judicial enforcement.

"In determining whether a treaty is self-executing courts look to the intent of the signatory parties as manifested by the language of the instrument, and, if the instrument is uncertain, recourse must be had to the circumstances surrounding its execution." *Diggs v. Richardson*, 555 F.2d 848, 851 (CA9 1976). Non-self-

executing treaty provisions typically "call upon governments to take certain action." *Id.* at 851. Treaties that "by their terms confer rights upon individual citizens" and can be given effect by courts without legislation are generally self-executing. *Id.* The GPW clearly speaks in terms of individual rights, as Appellants admit. JA 270.

Some provisions of a treaty may be self-executing and others non-self-executing. *Lidas v. United States*, 238 F.3d 1076, 1080 (CA9 2001); *United States v. Postal*, 589 F.2d 862, 884 (CA5 1979). Nothing in Articles 5 and 102 calls for future government action. "[I]t appears that very little in the way of new legislative enactments will be required to give effect to the provisions contained in the four [Geneva] conventions." S. Exec. Rep. No. 84-9 (1955) ("Ratifying Report") at 30. The Senate Foreign Relations Committee identified only four areas where additional legislation would be necessary to implement the GPW, none relevant here. *Id.*

Appellants no longer contend that the GPW is not self-executing. They acknowledge that it is in effect in domestic law. App. Br. 27, 31. However, they assert that the GPW does not contemplate judicial enforcement. That claim depends primarily on whether the treaty purports to protect individual rights or, by contrast, addresses itself only to governments. For example, the instrument in

*Diggs*—a UN resolution calling on states to embargo South Africa—was "not addressed to the judicial branch" and did not confer rights upon individuals. 555 F.2d at 851. However, the Court has made clear that certain treaty provisions are judicially enforceable:

A treaty, then, is a law of the land as an act of Congress is, whenever its provisions *prescribe a rule by which the rights of the private citizen or subject may be determined*. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

*Head Money Cases*, 112 U.S. 580, 598-99 (1884) (emphasis added).

Thus, if the GPW provides a rule to determine an individual's rights, courts will enforce it. *E.g.*, *Kolovrat v. Oregon*, 366 U.S. 187 (1961); *Jordan v. Tashiro*, 278 U.S. 123, 130 (1928); *Asakura v. Seattle*, 265 U.S. 332, 341 (1924); *United States v. Percheman*, 32 U.S. 51, 89 (1833). None of these cases ask whether a "private right of action" exists.

Moreover, the Court has repeatedly held that the habeas statute permits enforcement of treaty-based individual rights. *Factor v. Laubheimer*, 290 U.S. 276, 286 (1933); *Mali v. Keeper of Common Jail*, 120 U.S. 1 (1887) ("we see no reason why [petitioner] may not enforce his rights under the treaty by writ of habeas corpus in any proper court of the United States"); *United States v.*

*Rauscher*, 119 U.S. 407 (1886); *Chew Heong v. United States*, 112 U.S. 536 (1884); *Ogbudimkpa*, 342 F.3d at 218 n.22.

Indeed, the Executive Branch has itself acknowledged that the GPW provides rules of decision that can be invoked by enemy detainees in a habeas action. *United States v. Noriega*, 808 F. Supp. 791, 797 (S.D. Fla. 1992) ("The government has maintained that if General Noriega feels that the conditions in any facility in which the BOP imprisons him do not meet the Geneva III requirements, he can file a *habeas corpus* action under 28 U.S.C. 2255"); U.S. Army, *Law of War Workshop Deskbook* 85 (2000) (prisoners of war "have standing to file a Habeas Corpus action . . . to seek enforcement of their GPW rights").<sup>7</sup>

#### **D. The 1949 GPW Does Not Rely Only on Diplomacy**

Appellants mistakenly assume that diplomacy is the exclusive means of enforcement. The fact that the GPW does not expressly mandate judicial domestic enforcement is not unusual given the variety of legal regimes in place among signatories. Carlos Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89

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<sup>7</sup> Available at [https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf/0/fc6fd99c6c0745e185256a1d00467742/\\$FILE/LOW%20Deskbook%202000.pdf](https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf/0/fc6fd99c6c0745e185256a1d00467742/$FILE/LOW%20Deskbook%202000.pdf).

Am.J. Int'l L. 695, n.36, n.63 (1995). The GPW contemplates the most scrupulous enforcement by whatever means are constitutionally appropriate. Its very first Article requires the Parties "to respect and to ensure respect for the present Convention in all circumstances."

By undertaking this obligation at the very outset, the Contracting Parties drew attention to the fact that it is not merely an engagement concluded on a basis of reciprocity. . . . It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties. Each State contracts obligations vis-à-vis itself and at the same time vis-à-vis the others.

The Contracting Parties do not undertake merely to respect the Convention, but also to ensure respect for it. It is self-evident that it would not be enough for a Government to give orders or directions and leave the military authorities to arrange as they pleased for their detailed execution. It is for the Government to supervise the execution of the orders it gives.

Int'l Comm. Red Cross, *Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War* 17-18 (1960). Its framers intended signatories to employ all necessary internal mechanisms for domestic compliance, and to use diplomacy to promote compliance abroad. In our country, the Constitution's structural reliance on courts entails their participation to "ensure respect for the [GPW] in all circumstances."

Appellants also fail to recognize that the 1949 Conventions, unlike the 1929 treaty, protect *individual* rights:

It was not until the Conventions of 1949 . . . that the existence of "rights" conferred on prisoners of war was affirmed.

*Id.* at 90-91. Nothing in the GPW suggests that it is enforceable only through diplomatic protest, which was a flaw in the 1929 treaty that the GPW sought to remedy. Best, *War and Law Since 1945*, at 80-114 (1994).

In ratifying the GPW, the Senate looked at the 1939-45 failures of the earlier Convention and sought to provide "greater and more effective protection for the persons whom they were intended to benefit." Ratifying Report at 1-2. "To tighten up the obligations of the parties," *id.* at 6, the GPW replaced ineffective diplomatic protest with legally binding injunctions. The Senate Committee hailed the GPW as a "landmark" in the protection of human rights, cautioning "[w]e should not be dissuaded by the possibility that at some later date a contracting party may invoke specious reasons to evade compliance." *Id.* at 32.

The task of interpreting the GPW rests ultimately with the Courts. While an interpretation urged by the Executive is "of weight," it is well settled that "the construction of a treaty by the political department of the government [is] not conclusive upon courts called upon to construe it." *Factor*, 290 U.S. at 295.

Appellants' interpretation ignores the GPW's spirit and purpose, disregards canons of interpretation, and offends the Suspension and Supremacy Clauses.

"According to the accepted canon, we should construe the treaty liberally to give effect to the purpose which animates it. Even where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred." *Bacardi v. Domenech*, 311 U.S. 150, 163 (1940); accord *United States v. Stuart*, 489 U.S. 353, 368 (1989); *Chew Heong*, 112 U.S. at 540. "After all, the ultimate goal of Geneva III is to ensure humane treatment of POWs—not to create some amorphous, unenforceable code of honor among the signatory nations." *Noriega*, 808 F. Supp. at 799; *United States v. Lindh*, 212 F. Supp. 2d 541, 554 (E.D.Va. 2002).<sup>8</sup>

Finally, even had the GPW denied the right to judicial review (which it does not), domestic statutes and regulations create one. *Ogbudimkpa*, 342 F.3d at 228; *Saint Fort*, 329 F.3d at 201; *Wang*, 320 F.3d at 141.

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<sup>8</sup> Judge Bork's concurrence in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 809 (CA4 1984), concerned a claim for damages and did not comment on the provisions at issue in this case. Its conclusions regarding the GPW are not controlling. Nor are those of *Hamdi v. Rumsfeld*, 316 F.3d 450, 468-68 (CA4 2003), which was vacated, 124 S.Ct. 2633.



#### **E. The District Court Correctly Interpreted GPW Article 2**

The District Court's ruling was not based on "determinations" that only the Executive may make. Rather, it was based on three facts that were *not disputed* by Appellants below: (1) Hamdan was captured in Afghanistan during hostilities after 9/11, (2) he has asserted a right to protection under the GPW, and (3) Appellants have not convened a competent tribunal.

Appellants now challenge facts (2) and (3), but those challenges are not part of the record and can easily be disposed of. First, Hamdan has clearly claimed protected GPW status. JA 57-59, 65. It is true that he denies he was a combatant, but the GPW by its terms protects persons not directly involved in hostilities. GPW Articles 3, 4, 5.

Second, with respect to Article 5, Appellants admitted that the CSRT had no bearing on POW status and had "zero effect" on their motion to dismiss. JA 250-51. Appellants now contend that the CSRT was the functional equivalent of an Article 5 hearing. Yet the CSRT determines enemy combatancy, not POW status. Memorandum from Secretary of the Navy, <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>. Appellants have stated that CRSTs are not Article 5 tribunals. Defense Dep't. Background Briefing on CSRTs, <http://defenselink.mil/transcripts/2004/tr20040707-0981.html>. In any

event, Hamdan's CSRT findings are not part of the Record in this case and have not been given to Hamdan's lawyers (who hold security clearances). JA 294-95.

The cases cited by Appellants do not remotely stand for the proposition that a federal court cannot interpret a treaty to determine whether it applies to undisputed facts. For example, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), did not even involve a treaty. It dealt with an Executive Order implementing a joint resolution of Congress. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), rejected the Executive's argument that Cuba should be refused access to U.S. courts, establishing that the judiciary will not be marginalized by Executive claims about foreign-policy prerogatives. Likewise, *Doe v. Braden*, 57 U.S. 635 (1853), merely held that the Executive determines whether a foreign government ratified a treaty:

[T]he Constitution declares that all treaties made under the authority of the United States should be the supreme law of the land.

The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States. It is their duty to interpret it and administer it according to its terms.

*Id.* at 657 (emphasis added).

Furthermore, the District Court's Article 2 determination is correct. Afghanistan and the United States are GPW High-Contracting Parties. U.S. Armed Forces invaded Afghanistan "to wage a military campaign against al Qaeda and the Taliban regime that had supported it." *Rasul*, 124 S.Ct. at 2690. The Taliban controlled the Afghan state. Thus, the U.S. was in armed conflict with a High Contracting Party and occupied its territory.

Appellants' contention that the Afghani conflict was actually two separate conflicts is strained, reminiscent of the "specious reasons to evade compliance" decried in the Ratifying Report. These alleged "separate conflicts" were fought against forces working in concert, on the same territory, at the same time, arrayed against the same American and allied forces. Appellant Rumsfeld stated: "With respect to the Taliban . . . they were tied tightly at the waist to al Qaeda. They behaved like them, they worked with them, they functioned with them, they cooperated with respect to communications, they cooperated with respect to supplies and ammunition. . . ." Rumsfeld Statement, [www.defenselink.mil/news/Jan2002/t01282002\\_t0127sd2.html](http://www.defenselink.mil/news/Jan2002/t01282002_t0127sd2.html). Application of the GPW in these circumstances is consistent American military practice in every major conflict. Jennifer Elsea, Congressional Research Service, *Treatment of "Battlefield*

*Detainees" in the War on Terrorism* 29 (2002),  
<http://fpc.state.gov/documents/organization/9655.pdf>.

Appellants concede that the Geneva Conventions apply in the conflict against the Taliban. See White House Fact Sheet, <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html>. Because Hamdan was captured in that conflict, the GPW applies.

As the District Court found, "doubt" of Hamdan's POW status arises from multiple circumstances, including his denial that he is al Qaeda, his assertion of protected status, the civil war in Afghanistan, and the fact, undisputed by Appellants, that he was seized by an Afghan militia and exchanged for a bounty. JA 153.

Moreover, AR 190-8 makes clear that the mere *assertion* of POW status requires a tribunal. "The United States has in the past interpreted [Article 5] as requiring an individual assessment of status before privileges can be denied. Any individual who claims POW status is entitled to an adjudication of that status." Elsea, *supra*, at 29.

Furthermore, it is arguable that even al Qaeda members can receive GPW protections, and need not meet Article 4(a)(2)'s criteria if they are "members of militias or volunteer corps forming part of [a Party's] armed forces." GPW 4(a)(1);

D. Jinks and D. Sloss, *Is the President Bound by the Geneva Conventions?*, 90 Cornell L.Rev. 97, n.79 (2004). The District Court did not need to reach this question because Hamdan did not receive an Article 5 hearing.

Finally, Appellants' argument about GPW Article 2, ¶ 3's reference to "mutual relations" is irrelevant. Appellants cannot rely on their allegation that Hamdan is "affiliated" with al Qaeda to deny him GPW protections. The GPW, a federal statute, and Army regulations each require an Article 5 hearing first.

**F. Appellants Have Violated Common Article 3**

The District Court's holding that Article 3 applies should be affirmed. JA 388, 391. The court cited authorities establishing that Article 3 sets forth the "most fundamental requirements of the law of war." *Kadic v. Karadzic*, 70 F.3d 232, 243 (CA2 1995). While invoking the law of war as authorizing Hamdan's commission, Appellants disregard other aspects of that law constraining their conduct. One such constraint is Article 3's requirement of "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

Appellants argue that Article 3 does not apply because the conflict against al Qaeda is international. This argument "is plainly incorrect as a matter of law." Jinks and Sloss, *supra*, at n.87. In fact, as *Kadic* and the other authorities cited by

the District Court establish, Article 3 is binding in all conflicts, on all parties, as a minimum standard. Indeed, American courts have found individuals liable for "violations of Common Article 3 and the customary international humanitarian norms embodied in those provisions." *Mehinovic v. Vuckovic*, 198 F. Supp.2d 1322, 1351 (N.D.Ga. 2002).

Hamdan's *ad hoc* commission is not regularly constituted because it is established in violation of statutes, the GPW, the Constitution, and the laws of war; compromised by command influence; and not competent to address the complex issues presented. It fails to afford adequate judicial guarantees, denying confrontation and other basic rights while not providing independent and impartial review.

While the District Court correctly recognized that Article 3 applies, it abstained from ruling further. JA 398-99. However, this Court can and should affirm the court below because of Appellants' Article 3 violation. *Freeman v. B&B Assocs.*, 790 F.2d 145, 151 (CA DC 1986) (appellate court "will freely consider any argument by an appellee that supports the judgment of the district court including arguments rejected by the district court"); *In re Swine Flu Immunization Prods. Liability Litig.*, 880 F.2d 1439, 1444 (CA DC 1989).

### **III. HAMDAN'S COMMISSION, WHICH HAS ALREADY DENIED THE RIGHT TO BE PRESENT, LACKS JURISDICTION**

Appellants contend that the President can shape the proceedings as he chooses, unconstrained by the UCMJ and fundamental principles of law. They have already abridged Hamdan's right to be present by barring him from portions of his *voir dire*. JA 131-32. In addition, the prosecution has stated that it will put on two days of testimony without Hamdan present. *Id.*

The involuntary exclusion of the accused from trial proceedings is universally rejected and unprecedented in military justice. As noted above, the failure to guarantee the right to presence is jurisdictional; indeed the judgment of a military commission during the Civil War was dismissed for violating presence rights. *See supra* pages 15-16, 29. In World War II, the United States even *prosecuted* Japanese officers who conducted a military commission that abridged the defendant's right to participate.

The right to be present is foundational in the UCMJ, international law, military law, common law, and the Constitution. Each provides an independent basis to void the commission.

First, UCMJ provisions 821 and 836 require commissions to conform to the laws of war and the UCMJ, respectively.

Second, even before the UCMJ's enactment, commissions could not take actions contrary to the laws of war. *See infra* Part IV. The laws of war also establish a rule by which Sections 821 and 836 should be interpreted. "[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The Charming Betsy*, 6 U.S. 64, 118 (1804).

Third, Presidential rules for military tribunals must follow "well-recognized principle[s] of military law." *United States v. Rodriguez*, 37 M.J. 448, 454 (C.M.A. 1993). Appellants state that commissions are "commonlaw war courts." App. Br. 55. They are bound by that common law, too.

Fourth, the constitutional right to be present is fundamental and cannot be denied in Guantanamo. *See Rasul, supra*, at n.15.

#### **A. The UCMJ constrains the President**

10 U.S.C. §821 permits the President only to punish in conformity with the laws of war. *See supra* Part II.A.1. But denial of the right to be present not only removes the commission from established law-of-war principles, it creates a grave breach of them.

An independent UCMJ provision, 10 U.S.C. §836(a), limits Presidential power:



Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

Based on this Congressional mandate that the UCMJ is a procedural baseline, the District Court properly held that the commission cannot try Hamdan. JA 414. The plain language of 10 U.S.C. §836, historical practice, and military-court interpretation all support that decision.

The fundamental principle of statutory interpretation is to follow the text. *Ardestanti v. I.N.S.*, 502 U.S. 129, 135 (1991). This Court need go no further than the UCMJ's text. Section 836 does not say "contrary to or inconsistent with" rules in the UCMJ that specify military commissions; it says "this chapter." The President expressly relied on §836 to establish this commission. Addendum 13a. He cannot invoke words in §836 that empower him and simultaneously ignore words that constrain him.

Even if the UCMJ did not exist, the President could not depart from fundamental court-martial rules. Prior to the UCMJ, commissions followed the same procedures as courts-martial with the exception of the number of members:

[Commissions] while in general even less technical than a court-martial, will ordinarily and properly be governed, upon all important questions, by the established rules and principles of law and evidence. Where essential, indeed, to a full investigation or to the doing of justice, these rules and principles will be liberally construed and applied.

2 William Winthrop, *Military Law and Precedents*, 842 (2d ed. 1920). Accord Glenn, *Army and Law* 42 (1918) ("in all matters of procedure, [commissions] are governed by the practice obtaining in regular courts-martial"); Ives, *Treatise on Military Law* 284 (1879) ("The forms of procedure are the same as before courts-martial"); *id.*, at 281; George B. Davis, *A Treaty on the Military Law of the United States* 309 (1913) ("the rules which apply in these particulars to general courts-martial have almost uniformly been applied to military commissions"); Benet, *Treatise on Military Law* 15 (1862) (commissions must "be conducted according to the same general rules as courts-martial in order to prevent abuses which might otherwise arise."); Instructions No. 5, Hunt, 4 American Mil. Govt. of Occupied Germany, 1918-1920, 50 (1920) (commission procedure in occupied Germany would "be in substance the same as in trial by General Court-Martial").

Appellants point to General Crowder's "authoritative" testimony, App. Br. 35, neglecting to mention that Crowder's next sentence is that commissions and courts-martial "*have the same procedure.*" S. Rep. 64-582 at 40 (1916).

Section 836 reflects this traditional equivalence. As the District Court noted, it permits procedures for courts-martial to differ from commissions in some respects, but subordinates both to fundamental UCMJ principles.

The District Court's reading is not a "death knell" for Presidential flexibility. Rules for commissions *can* differ from the rules for courts-martial when they are consistent with the UCMJ. JA 406.<sup>9</sup>

Appellants contend that §836 only prevents the President from prescribing procedural rules that are contrary to the nine UCMJ sections where "military commissions" are specifically mentioned. App. Br. 53-54. Yet only three of these nine sections specify procedural rights: 10 U.S.C. §828 (requiring court reporter and, where necessary, interpreters); §849(d) (permitting authenticated depositions); §850(a) (permitting prior sworn statements). Appellants' position is, quite simply, that the only procedural rules it must provide are the presence of a court reporter and interpreter, and the ability to read into evidence prior sworn statements or deposition testimony. This is an absurd statutory reading that not only defies the

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<sup>9</sup> For example, Commission Rule 32 C.F.R. §9.5(m) permits, in contrast to R.C.M. 1001(c), "the Accused to make a statement during sentencing proceedings." Although these rules differ, neither is contrary to 10 U.S.C. §856 or other UCMJ provisions. Commission Rule §13.3(c)(3) gives defense counsel

plain meaning of §836(a), but also ignores §836(b), which states: "All rules and regulations made under this Article shall be uniform insofar as practicable."

Appellants claim that the District Court made the nine commission mentions surplusage, neglecting that their reading renders §836 entirely superfluous. If the President has the inherent authority to set up commissions as he pleases, §836 is a nullity. Appellants' reading creates a second layer of superfluity, too, since "contrary to" has a narrower meaning than "inconsistent with." The latter looks to the animating purpose and spirit. *Black's Law Dictionary* 322, 766 (1990). Appellants' surplusage argument fails for other reasons as well, Glazier, *supra*, at 2022; *Lamie v. United States Trustee*, 124 S.Ct. 1023, 1031 (2004).

Appellants' reliance on *Yamashita* and *Madsen* is misplaced. As the District Court noted, *Yamashita* was decided five years before extension of UCMJ jurisdiction over "persons within an area leased by or otherwise reserved or acquired for the use of the United States." §802(a)(12); JA 407-408. Indeed, when proposed, ¶12 was criticized for greatly expanding Article 2. General Green, the Army JAG, stated:

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primary responsibility for identifying conflicts-of-interest; R.C.M. 901(d)(4)(D) makes the military judge primarily responsible. Neither violates §838.

Article 2(12) is not limited to time of war or national emergency, nor does it exclude purely military offenses. Its effect would be to make subject to military law, without limitation or qualification, any person residing in or visiting a base area at any time. The enactment . . . will inevitably lead to international complications.

Statement, U.S. Senate, Armed Services Committee, 5/9/1949, at 266. Despite this criticism, ¶12 was adopted without the limitations in §1201. The UCMJ applies under ¶12, as well as ¶¶9,10.

Appellants' misleading quotation of four words from *Madsen's* description of the *history* of commissions does not enlarge its holding, which was merely that commissions may try civilians under circumstances not present here. *See infra* Part IV.C. *Madsen* touched on procedure only in passing because procedure was not challenged, but that dicta undermines Appellants. *Id.* at 358-59 ("The rights of individuals were safeguarded by a code of criminal procedure dealing with warrants, summons, preliminary hearings, trials, evidence, witnesses, findings, sentences, contempt, review of cases and appeals."). Of most relevance, the Commission Rules in *Madsen* explicitly guaranteed "the rights . . . To be present" and to "cross-examine any witness." *Id.* at 360 n.24.

The District Court's holding is consistent with judicial enforcement of §836 in courts-martial. *United States v. Douglas*, 1 M.J. 354, 356 (C.M.A. 1976)

(M.C.M. provision contrary to 10 U.S.C. §854 "exceeds the President's authority under Article 36, UCMJ, and is inoperative."). "Under [Article 36] a variety of Manual provisions have been invalidated, although it has occasionally been difficult to perceive the exact textual conflict between the Code and Manual provisions." Eugene Fidell, *Judicial Review of Presidential Rulemaking Under Article 36: The Sleeping Giant Stirs*, 4 Mil. L.Reptr. 6049, 6051 (1976) (footnote/citations omitted).

**B. The Denial of Presence and Confrontation Destroys the Commission's Jurisdiction**

The District Court correctly concluded that commission rule 32 C.F.R. §9.6(b), which permits portions of Hamdan's trial to be conducted outside of his presence and robs him of the right to confront witnesses, destroys the commission's jurisdiction. JA 403-405.

Section 839(b) reflects a fundamental truth: A trial without the accused present is a sham. "In cases of felony our courts, with substantial accord, have regarded [the right to be present] as extending to every stage of the trial, inclusive of the empanelling of the jury and the reception of the verdict, *and as being scarcely less important to the accused than the right of trial itself.*" *Diaz v. United States*, 223 U.S. 442, 455 (1912) (emphasis added); *Lewis v. United States*, 146

U.S. 370, 372, 375 (1892) ("A leading principle *that pervades the entire law of criminal procedure* is that, after indictment found, nothing shall be done in the absence of the prisoner."); *id.* (right to be present is of "peculiar sacredness" and it would be "*contrary to the dictates of humanity*" to allow defendant to waive it) (emphasis added); *United States v. Washington*, 705 F.2d 489, 497 (CA DC 1983) ("the defendant's presence is fundamental to the basic legitimacy of the criminal process.") (citations omitted).

While presence rights for disruptive defendants has been cut back, *e.g.*, *Illinois v. Allen*, 397 U.S. 337 (1970), no case questions the fundamental common law proposition that absent waiver, the accused must be present during *voir dire*. The presence of counsel is not enough. *Lewis*, 146 U.S. at 373-74 (specifically addressing exclusion from *voir dire* and stating that defendant's "life or liberty may depend upon the aid which, by his personal presence, he may give to counsel. . . . The necessities of the defense may not be met by the presence of his counsel only."); *Faretta v. California*, 422 U.S. 806, 819 (1975). This Court, for example, reversed a conviction when a defendant was not present during *voir dire*, finding the right to be present fundamental at both common law and in the Constitution:

During *voir dire*, for example, "what may be irrelevant when heard or seen by [defendant's] lawyer may tap a memory or association of the defendant's which in turn may be of some use

to his defense”....A defendant's presence at *voir dire* is essential not only because it is necessary to the appearance of impartiality but, "because the defendant has unique knowledge which is important at all stages of trial, including the *voir dire*. ....He may also have knowledge of facts about himself or the alleged crime which may not have seemed relevant to him in the tranquility of his lawyer's office, and thus may not have been disclosed, but which may become important as the individual prejudices or inclinations of the jurors are revealed.”

*United States v. Gordon*, 829 F.2d 119, 124-25 (CA DC 1987) (citations omitted).

Military courts require presence for a trial to comport with the UCMJ. *United States v. Dean*, 13 M.J. 676, 678 (A.F.C.M.R. 1982) ("The accused must be present at all stages of his trial. The integrity of the military justice system is jeopardized . . . without all parties to the trial being present."); *United States v. Daulton*, 45 M.J. 212, 219 (U.S.A.F. 1996) ("§839(b)[ ]requires that all proceedings, except deliberations and voting of members, be conducted in the accused's presence."). See also Army, Military Judges Benchbook for Trial of Enemy Prisoners of War, Oct. 2004, at 202 (pattern instruction for judge to defendant, "you have the right to be present at every stage of your trial").

Similarly, international law recognizes the right to be present as fundamental. This fact is confirmed by the rules for Iraqi tribunals, written by Appellants. They provided as "minimum guarantees" that the accused will be "tried without undue delay" and "*tried in his presence.*"



Art. 20(d), [http://www.cpa-iraq.org/regulations/20031210\\_CPAORD\\_48\\_IST\\_and\\_Appendix\\_A.pdf](http://www.cpa-iraq.org/regulations/20031210_CPAORD_48_IST_and_Appendix_A.pdf). As the Fourth Geneva Convention, Art. 67, specifies, an occupying power may only prescribe rules of trial that are *required* by international law, and presence is one such required rule.

Tribunals for war crimes in Rwanda and the former Yugoslavia also guarantee the right to be present. Yugoslavia Art. 21, <http://www1.umn.edu/humanrts/icty/statute.html>; Rwanda Art. 20, <http://www.ictr.org/ENGLISH/basicdocs/statute.html>. GPW Article 75, Protocol I of the GPW, recognized as binding,<sup>10</sup> similarly guarantees defendants:

an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include . . . . the right to be tried in his presence . . . . [and] the right to examine, or have examined, the witnesses against him

During World War II, when Japanese Judge-Advocates tried our soldiers in a military commission that, *inter alia*, deprived American soldiers of the right to participate and violated Japanese rules for courts-martial, America responded by

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<sup>10</sup> Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am.U.J. Int'l L.&Pol'y 419 (1987).

prosecuting the Japanese. *United States v. Uchiyama Tr.*, Case 35-36, War Crimes Branch, JAG Records, at 20 (Prosecution's opening statement: "[The accused] applied to them a special type of summary procedure which failed to afford them the minimal safeguards for the guarantee of their fundamental rights which were given them both by the written and customary laws of war."). The defense unsuccessfully made the same argument voiced by the Government in this case-- that "there is no standard of procedures" for war criminals in commissions and that the Americans had no legal rights.

Everything from common law to modern international law, *Uchiyama* to the UCMJ, the Civil War to contemporary Iraq, is aligned in guaranteeing the right to be present. No authority relied on by Appellants suggests that the President can dictate rules that violate international law or military principles.

As with presence, the right to confront witnesses reflects a protection fundamental to the common law, military law, and international law. As Justice Scalia put it: "It is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross-examine." *Crawford v. Washington*, 124 S.Ct. 1354, 1363 (2004) (quoting *Webb*, *supra*); *Coy v. Iowa*, 487 U.S. 1012, 1017n.2 (1988) (referring to "both the antiquity and currency of the human feeling that a criminal trial is not just unless

one can confront his accusers"); *Pointer v. Texas*, 380 U.S. 400, 405 (1965) ("fundamental requirement for . . . fair trial"); *Mattox v. United States*, 156 U.S. 237, 243 (1895) ("general rule of law defended since the days of Magna Charta"). Unsurprisingly, given its bedrock nature, military courts interpret §839(b) to guarantee confrontation. *Daulton*, 45 M.J. at 219 (witness' testimony outside the presence of the accused violated Article 39). UCMJ §849(d) and §850(a) have been similarly interpreted.

Appellants offer no justification for their unprecedented denial of confrontation rights. Assuming it is based on the need to protect classified information, alternative procedures exist. *United States v. Rezaq*, 134 F.3d 1121, 1142 (CA DC 1998) (applying Classified Information Procedures Act). Moreover, trials with a significant political dimension, such as Hamdan's, provide a stronger, not weaker, rationale for these confrontation rights. *Crawford*, 124 S.Ct. at 1373-74 (in securing confrontation rights, "the Framers had an eye toward politically charged cases like Raleigh's—great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear").

Appellants do not dispute that excluding Hamdan and denying his confrontation rights is "contrary to or inconsistent with" §839(b). Appellants' only argument is that §836 permits the President to ignore any UCMJ provision that

does not expressly mention commissions, even if that means denying Hamdan the right to attend his own trial or cross-examine his accusers. The District Court properly rejected this interpretation, and its ruling should be affirmed.

#### **IV. THIS COMMISSION VIOLATES SEPARATION OF POWERS**

The commissions blatantly violate statutory requirements such as UCMJ §3037(c), *supra* Part I.A.2.b, as well as the UCMJ. As the District Court found, these defects place them in the last, most restrictive, category of *Youngstown*. JA 384-85.

The animating assumption of the Government's appeal is a never-accepted notion of inherent Presidential power. *See Quirin*, 317 U.S. at 29. They believe that the President has the absolute discretion to determine international law, the jurisdiction of commissions, and common-law requirements. "Such blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers." *Reid*, 354 U.S. at 39 (plurality); *Toth*, 350 U.S. at 17.

##### **A. Text**

Article I, §8 grants Congress the power to "constitute Tribunals inferior to the supreme Court" and "define and punish . . . Offences against the Law of

Nations." It speaks with specificity; Article II does not. *See In re Yamashita*, 327 U.S. 1, 7 (1946) (referring to "define and punish" clause); *id.* at 8-10.

## **B. History**

Appellants' examples undermine their point.

*Washington.* Even in the pre-founding and pre-separation-of-powers era, General Washington urged "the necessity of enforcing the articles of war in all its parts," because they preserve "the rights and liberties of the people against the arbitrary proceedings of the military officers." 1 *Writings of George Washington* 467 (Fitzpatrick ed. 1931). Washington also disapproved a court-martial for an offense similar to the one at issue here because "the Civil authority of that State has made provision for the punishment of persons taking Arms with the Enemy." 11 *id.* 262.

1818. The House Committee on Military Affairs stated that it could find "no law of the United States authorizing a trial before a military court" for the convicted offenses, including piracy. *Annals*, 15th Cong., 2d Sess. 515-27 (1819). Appellants' own authority states that Jackson's order "was wholly arbitrary and illegal. For such an order and its execution a military commander would now be indictable for murder." Winthrop, *supra*, at 465.

1847. During a declared war, General Scott convened battlefield commissions out of bare necessity "until Congress could be stimulated to legislate on the subject." 2 *Memoirs of Lieutenant-General Scott* 392-93 (1864). The Order specifically applied court-martial rules and procedures. *Id.* at 540-44. It stated that punishment must be "in conformity with known punishments" in State law. It further provided "no military commission shall try any case clearly cognizable by any court-martial." *Id.*

*The Civil War.* Congress explicitly authorized commissions. The "general rule" was to use commissions "only for cases which cannot be tried by a court-martial or by a proper civil tribunal." 1 *The War of the Rebellion* 242 (1894). General Order 1 required commissions to

[B]e constituted in a similar manner and their proceedings be conducted according to the same general rules as courts-martial in order to prevent abuses which might otherwise arise.

*Id.* at 248 (emphasis added). Despite such limitations, *Milligan* found commissions impermissible. Appellants fail their own historical practice test.

### C. Precedent

Today, no clear statement by Congress exists to supplant civilian courts or courts-martial. See *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991); *Coleman v.*

*Tennessee*, 97 U.S. 509, 514 (1878) (applying rule to military justice); Katyal & Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L.J. 1259 (2002).<sup>11</sup> Congress has authorized "force," which has as its incident *prospective* detention, not *retrospective* punishment. Congress did not authorize commissions by implication, which had not been used in a half-century and even then in far more restrained circumstances.

While *Quirin* and *Yamashita* found the predecessor to 10 U.S.C. §821 permitted commissions, those commissions were in war zones, and the Court relied on 50 U.S.C. §38, which has been repealed. *Yamashita*, 327 U.S. at 7; *Quirin*, 317 U.S. at 27. The Court's interpretation of §821 was confined to declared wars, tracking the longstanding military-justice rule about jurisdiction. *E.g.*, *United States v. Averette*, 19 U.S.C.M.A. 363, 366 (1970) (finding that the Vietnam conflict was not a time of war because general terminology "should not serve as a shortcut for a formal declaration of war, at least in the sensitive area of subjecting civilians to military jurisdiction"); *Cole v. Laird*, 468 F.2d 829, 831 n.2 (CA5 1972); *Robb v. United States*, 456 F.2d 768, 771 (Ct. Cl. 1972).

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<sup>11</sup> *Hirota v. MacArthur*, 338 U.S. 197, 198 (1948), stated that federal courts could not review international tribunals. *Id.* at 208 (Douglas, J., concurring).

In *Quirin*, Biddle stressed that the Eastern seaboard "was declared to be under the control of the Army." Saboteur Tr. at 79. The Court agreed. 317 U.S. at 22 n.1. It cited Winthrop repeatedly, which states:

Jurisdiction. . . The place must be the theatre of war or a place where military government or martial law may legally be exercised; otherwise a military commission (unless specially empowered by statute) will have no jurisdiction of offense committed there.

Winthrop, *supra*, at 836; Dudley, *supra*, 313 (same). No court has ever, to Appellee's knowledge, upheld commissions in places that are not occupied territory or zones of war. Accordingly, the commission is not properly constituted and must be struck down. Paust, *supra*, at 1363; *Ex Parte Milligan*, 71 U.S. 2, 127 (1866) ("confined to the locality of actual war").<sup>12</sup>

*Madsen* concerned occupation courts. Its holding was limited to "territory occupied by Armed Forces" "in time of war". 343 U.S. at 348, 355. Guantanamo does not qualify. Indeed, *Reid* held that dependents away from conquered territory could not be subject to military trial, in spite of Article 15 and treaties authorizing it: "*Madsen* [] is not controlling here. It concerned trials in enemy territory which



had been conquered and held by force of arms and which was being governed at the time by our military forces." 354 U.S. at 35 n.63.<sup>13</sup> The government claimed the "battlefront" was worldwide due to "present threats to peace" and "world tension." *Id.* at 33-35. The Court rejected this argument: "exigencies which have required military rule on the battlefield are not present in areas where no conflict exists." *Id.* at 35.

"Throughout history many transgressions by the military have been called 'slight' and have been justified as 'reasonable' in light of the 'uniqueness' of the times," but "[w]e should not break faith with this nation's tradition of keeping military power subservient to civilian authority, a tradition . . . firmly embodied in the Constitution." *Id.* at 40. *Accord* *Duncan v. Kahanamoku*, 327 U.S. 304 (1946); *Toth*, 350 U.S. at 23.

The *Hamdi* plurality's recent invocation of *Quirin* is descriptive and does not answer *what body* must try unlawful combatants. *See* 124 S.Ct. at 2660. It also strongly rejected a similar executive-deference argument, looked to the GPW to

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<sup>12</sup> Involving civilians in the commission, perhaps for the first time in history, creates separation-of-powers difficulties as well. Winthrop, *supra*, at 835.

outline Government powers, and weakened the Government's equal protection claim here. *Id.* at 2641, 2650, 2461.

The Government's putative fifth vote, Justice Thomas's dissent, dealt only with detention, mentioning it forty-six times. *See id.* at 2674, 2677-85. He found *punishment* stands on entirely different footing, isolating *Milligan*: "the punishment-nonpunishment distinction harmonizes all of the precedent." *Id.* at 2682 (citations omitted).

The President has neither the authority to defy Congressional restrictions on commissions nor the authority to establish *this* commission under present circumstances. This is the first commission insulated from a theater of war. War has not been declared, years have elapsed since Hamdan's capture, necessity is lacking, courts-martial and civilian courts are open, the offense is not authorized for commission trial, and the commission flouts court-martial rules and the laws of war themselves. While such a commission may be possible in some other country, it is most assuredly not in a regime under law, dedicated to dividing power instead of concentrating it in the Executive.

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<sup>13</sup> *Reid* commanded a plurality, three years later a majority affirmed and expanded it when "critical areas of occupation" were not involved. *Singleton*, 361 U.S. at 244.

**D. The District Court Order Should Also Be Affirmed on Alternative Grounds**

The District Court's decision should also be affirmed because the commission lacks subject-matter and personal jurisdiction. Both defects demonstrate an undue expansion of presidential power and distinguish *Quirin*.

**1. Subject-Matter Jurisdiction**

*Quirin* held that a court must examine whether "constitutional power" exists to try an offense. 317 U.S. at 29. The first inquiry is "whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial." *Id.*

By statute, only two offenses are triable by commission, aiding the enemy and spying. See 10 U.S.C. §§904,906. Yet rather than employ these carefully crafted statutes, the Government invents an offense, conspiracy, unknown to the laws of war. *Quirin*'s offenders were charged, *inter alia*, under the predecessor versions of §§904,906.

Conspiracy is not triable by commission. It is not mentioned in the Geneva Conventions or the other treaties identified by Congress to define war crimes. Hamdan Reply Br. 64-66. Furthermore, Appellants' definition of conspiracy does not require its essential elements—agreement and specific intent. *Id.*

## 2. Personal Jurisdiction

Appellants have introduced no evidence in their Return or elsewhere to rebut Hamdan's claim that he is not an unlawful combatant. The petitioners in *Quirin*, by contrast, admitted they received sabotage training, were members of German armed forces, came ashore with explosives, and shed their German uniforms. 317 U.S. at 20-21. *Quirin* held the commission had jurisdiction "upon the conceded facts." *Id.* at 46. See *Hamdi*, 124 S.Ct. at 2670 (Scalia, J., dissenting).

Even if Appellants' allegations are taken at face value, Mr. Hamdan resembles Mr. Milligan, not Mr. Quirin. The Solicitor General argued that Milligan "conspired with and armed others," and "plotted to seize" arsenals. *Milligan*, 71 U.S. at 17. The Court struck down the commission nevertheless, *id.* at 130; *id.* at 132 (separate opinion). Appellants' attempt to downplay *Milligan* is undermined by what the Court said after *Quirin*:

[T]he founders of this country are not likely to have contemplated complete military dominance within the limits of a Territory made part of this country and *not recently taken from an enemy*. They were *opposed* to governments that placed in the hands of one man the power to make, interpret and enforce the laws. . . . *Ex parte Milligan*. Legislatures and courts are not merely cherished American institutions; they are indispensable to our government.

*Duncan*, 327 U.S. at 322 (emphasis added); 354 U.S. at 30 (*Milligan* is "one of the great landmarks in this Court's history").

Appellants have had numerous opportunities to provide facts showing that Hamdan resembles the *Quirin* saboteurs. At every turn, they have failed. Their recitation of "facts," many of them for the first time before this Court, is too little, too late. To permit the President, on his say-so, to label anyone subject to a commission is to countenance an expansion of Presidential authority that this nation has never before seen.

## CONCLUSION

For the reasons stated above, the district court ruling should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)  
OF THE FEDERAL RULES OF APPELLATE PROCEDURE**

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a type face of 14 point and contains 13,991 words (which does not exceed the applicable 14,000 word limit).

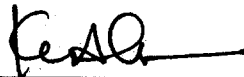
/s/  
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## **CERTIFICATE OF SERVICE**

I hereby certify that on this day, December 29, 2004, I caused copies of the foregoing brief to be sent by hand delivery to the Court and the following counsel of record:

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**Geneva Convention Relative to the Treatment of Prisoners of War**  
Aug. 12, 1949, 6 U.S.T. 3316

**Part I. General Provisions**

**Article 1.** The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

**Article 2.** In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to 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.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

**Article 3.** In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

#### **Article 4.**

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, fulfil 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 favourable treatment under any other provisions of international law.
- (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, 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 favourable 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 non-belligerent 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.**

**Article 5.** 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.

\* \* \* \* \*

**Article 8.** The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties.

The Parties to the conflict shall facilitate to the greatest extent possible the task of the representatives or delegates of the Protecting Powers.

The representatives or delegates of the Protecting Powers shall not in any case exceed their mission under the present Convention. They shall, in particular, take account of the imperative necessities of security of the State wherein they carry out their duties.

\* \* \* \* \*

**Article 11.** In cases where they deem it advisable in the interest of protected persons, particularly in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement.

For this purpose, each of the Protecting Powers may, either at the invitation of one Party or on its own initiative, propose to the Parties to the conflict a meeting of their representatives, and in particular of the authorities responsible for prisoners of war, possibly on neutral territory suitably chosen. The Parties to the conflict shall be bound to give effect to the proposals made to them for this purpose. The Protecting Powers may, if necessary, propose for approval by the Parties to the conflict a person belonging to a neutral Power, or delegated by the International Committee of the Red Cross, who shall be invited to take part in such a meeting.

\* \* \* \* \*

### **Part III. Juridicial Proceedings**

\* \* \* \* \*

**Article 102.** A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.

\* \* \* \* \*

### **Part VI. Execution of the Convention**

#### **Section I. General Provisions**

**Article 126.** Representatives or delegates of the Protecting Powers shall have permission to go to all places where prisoners of war may be, particularly to places of internment, imprisonment and labour, and shall have access to all premises occupied by prisoners of war; they shall also be allowed to go to the places of departure, passage and arrival of prisoners who are being transferred. They shall be able to interview the prisoners, and in particular the prisoners' representatives, without witnesses, either personally or through an interpreter.

Representatives and delegates of the Protecting Powers shall have full liberty to select the places they wish to visit. The duration and frequency of these visits shall not be restricted. Visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure.

The Detaining Power and the Power on which the said prisoners of war depend may agree, if necessary, that compatriots of these prisoners of war be permitted to participate in the visits.

The delegates of the International Committee of the Red Cross shall enjoy the same prerogatives. The appointment of such delegates shall be submitted to the approval of the Power detaining the prisoners of war to be visited.

**Article 127.** The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to all their armed forces and to the entire population.

Any military or other authorities, who in time of war assume responsibilities in respect of prisoners of war, must possess the text of the Convention and be specially instructed as to its provisions.

**Article 128.** The High Contracting Parties shall communicate to one another through the Swiss Federal Council and, during hostilities, through the Protecting Powers, the official translations of the present Convention, as well as the laws and regulations which they may adopt to ensure the application thereof.

**Article 129.** The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the present Convention.



**Article 130.** Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

**Article 131.** No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article.

**Article 132.** At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.

If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed.

Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.

**10 U.S.C. 821 provides:**

**§ 821. Art. 21. Jurisdiction of courts-martial not exclusive**

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

**10 U.S.C. 836 provides:**

**§ 836. Art. 36. President may prescribe rules**

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable.

**10 U.S.C. 839 provides:**

**§ 839. Art. 39. Sessions**

(a) At any time after the service of charges which have been referred for trial to a court-martial composed of a military judge and members, the military judge may, subject to section 835 of this title (article 35), call the court into session without the presence of the members for the purpose of--

(1) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty;

(2) hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later

consideration or decision by the members of the court;

(3) if permitted by regulations of the Secretary concerned, holding the arraignment and receiving the pleas of the accused; and

(4) performing any other procedural function which may be performed by the military judge under this chapter or under rules prescribed pursuant to section 836 of this title (article 36) and which does not require the presence of the members of the court.

These proceedings shall be conducted in the presence of the accused, the defense counsel, and the trial counsel and shall be made a part of the record. These proceedings may be conducted notwithstanding the number of members of the court and without regard to section 829 of this title (article 29).

(b) When the members of a court-martial deliberate or vote, only the members may be present. All other proceedings, including any other consultation of the members of the court with counsel or the military judge, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and, in cases in which a military judge has been detailed to the court, the military judge.

Public Law 107-40  
107th Congress

Joint Resolution

Sept. 18, 2001  
(S.J. Res. 23)

To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and

Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,*

Authorization for  
Use of Military  
Force.  
50 USC 1541  
note.

SECTION 1. SHORT TITLE.

This joint resolution may be cited as the "Authorization for Use of Military Force".

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

President.

(a) IN GENERAL.—That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

(b) WAR POWERS RESOLUTION REQUIREMENTS.—

(1) SPECIFIC STATUTORY AUTHORIZATION.—Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

PUBLIC LAW 107-40—SEPT. 18, 2001

115 STAT. 225

(2) **APPLICABILITY OF OTHER REQUIREMENTS.**—Nothing in this resolution supercedes any requirement of the War Powers Resolution.

Approved September 18, 2001.

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**LEGISLATIVE HISTORY—S.J. Res. 23 (H.J. Res. 64):**

**CONGRESSIONAL RECORD**, Vol. 147 (2001):

Sept. 14, considered and passed Senate and House.

**WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS**, Vol. 37 (2001):

Sept. 18, Presidential statement.

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THE WHITE HOUSE  
WASHINGTON

February 7, 2002

MEMORANDUM FOR THE VICE PRESIDENT  
THE SECRETARY OF STATE  
THE SECRETARY OF DEFENSE  
THE ATTORNEY GENERAL  
CHIEF OF STAFF TO THE PRESIDENT  
DIRECTOR OF CENTRAL INTELLIGENCE  
ASSISTANT TO THE PRESIDENT FOR NATIONAL  
SECURITY AFFAIRS  
CHAIRMAN OF THE JOINT CHIEFS OF STAFF

SUBJECT: Humane Treatment of al Qaeda and Taliban Detainees

1. Our recent extensive discussions regarding the status of al Qaeda and Taliban detainees confirm that the application of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (Geneva) to the conflict with al Qaeda and the Taliban involves complex legal questions. By its terms, Geneva applies to conflicts involving "High Contracting Parties," which can only be states. Moreover, it assumes the existence of "regular" armed forces fighting on behalf of states. However, the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our Nation recognizes that this new paradigm -- ushered in not by us, but by terrorists -- requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva.
2. Pursuant to my authority as Commander in Chief and Chief Executive of the United States, and relying on the opinion of the Department of Justice dated January 22, 2002, and on the legal opinion rendered by the Attorney General in his letter of February 1, 2002, I hereby determine as follows:
  - a. I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva.
  - b. I accept the legal conclusion of the Attorney General and the Department of Justice that I have the authority under the Constitution to suspend Geneva as between the United States and Afghanistan, but I decline to

NSC DECLASSIFICATION REVIEW (E.O. 12958 as amended)  
DECLASSIFIED IN FULL ON 6/17/2004  
by R.Soubers

Reason: 1.5 (d)  
Declassify on: 02/07/12

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exercise that authority at this time. Accordingly, I determine that the provisions of Geneva will apply to our present conflict with the Taliban. I reserve the right to exercise this authority in this or future conflicts.

- c. I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to "armed conflict not of an international character."
- d. Based on the facts supplied by the Department of Defense and the recommendation of the Department of Justice, I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.
3. Of course, our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our Nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.
4. The United States will hold states, organizations, and individuals who gain control of United States personnel responsible for treating such personnel humanely and consistent with applicable law.
5. I hereby reaffirm the order previously issued by the Secretary of Defense to the United States Armed Forces requiring that the detainees be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.
6. I hereby direct the Secretary of State to communicate my determinations in an appropriate manner to our allies, and other countries and international organizations cooperating in the war against terrorism of global reach.

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**Presidential Documents**

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Title 3—

Military Order of November 13, 2001

The President

**Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism**

By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224) and sections 821 and 836 of title 10, United States Code, it is hereby ordered as follows:

**Section 1. Findings.**

(a) International terrorists, including members of al Qaeda, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.

(b) In light of grave acts of terrorism and threats of terrorism, including the terrorist attacks on September 11, 2001, on the headquarters of the United States Department of Defense in the national capital region, on the World Trade Center in New York, and on civilian aircraft such as in Pennsylvania, I proclaimed a national emergency on September 14, 2001 (Proc. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks).

(c) Individuals acting alone and in concert involved in international terrorism possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government.

(d) The ability of the United States to protect the United States and its citizens, and to help its allies and other cooperating nations protect their nations and their citizens, from such further terrorist attacks depends in significant part upon using the United States Armed Forces to identify terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support such attacks.

(e) To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.

(f) Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

(g) Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense



purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.

**Sec. 2. Definition and Policy.**

(a) The term "individual subject to this order" shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:

(1) there is reason to believe that such individual, at the relevant times,

(i) is or was a member of the organization known as al Qaida;

(ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or

(iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and

(2) it is in the interest of the United States that such individual be subject to this order.

(b) It is the policy of the United States that the Secretary of Defense shall take all necessary measures to ensure that any individual subject to this order is detained in accordance with section 3, and, if the individual is to be tried, that such individual is tried only in accordance with section 4.

(c) It is further the policy of the United States that any individual subject to this order who is not already under the control of the Secretary of Defense but who is under the control of any other officer or agent of the United States or any State shall, upon delivery of a copy of such written determination to such officer or agent, forthwith be placed under the control of the Secretary of Defense.

**Sec. 3. Detention Authority of the Secretary of Defense.** Any individual subject to this order shall be —

(a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States;

(b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria;

(c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;

(d) allowed the free exercise of religion consistent with the requirements of such detention; and

(e) detained in accordance with such other conditions as the Secretary of Defense may prescribe.

**Sec. 4. Authority of the Secretary of Defense Regarding Trials of Individuals Subject to this Order.**

(a) Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.

(b) As a military function and in light of the findings in section 1, including subsection (f) thereof, the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section.

(c) Orders and regulations issued under subsection (b) of this section shall include, but not be limited to, rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys, which shall at a minimum provide for—

(1) military commissions to sit at any time and any place, consistent with such guidance regarding time and place as the Secretary of Defense may provide;

(2) a full and fair trial, with the military commission sitting as the triers of both fact and law;

(3) admission of such evidence as would, in the opinion of the presiding officer of the military commission (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), have probative value to a reasonable person;

(4) in a manner consistent with the protection of information classified or classifiable under Executive Order 12958 of April 17, 1995, as amended, or any successor Executive Order, protected by statute or rule from unauthorized disclosure, or otherwise protected by law, (A) the handling of, admission into evidence of, and access to materials and information, and (B) the conduct, closure of, and access to proceedings;

(5) conduct of the prosecution by one or more attorneys designated by the Secretary of Defense and conduct of the defense by attorneys for the individual subject to this order;

(6) conviction only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present;

(7) sentencing only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present; and

(8) submission of the record of the trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defense if so designated by me for that purpose.

**Sec. 5. *Obligation of Other Agencies to Assist the Secretary of Defense.***

Departments, agencies, entities, and officers of the United States shall, to the maximum extent permitted by law, provide to the Secretary of Defense such assistance as he may request to implement this order.

**Sec. 6. *Additional Authorities of the Secretary of Defense.***

(a) As a military function and in light of the findings in section 1, the Secretary of Defense shall issue such orders and regulations as may be necessary to carry out any of the provisions of this order.

(b) The Secretary of Defense may perform any of his functions or duties, and may exercise any of the powers provided to him under this order (other than under section 4(c)(8) hereof) in accordance with section 113(d) of title 10, United States Code.

**Sec. 7. *Relationship to Other Law and Forums.***

(a) Nothing in this order shall be construed to—

(1) authorize the disclosure of state secrets to any person not otherwise authorized to have access to them;

(2) limit the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons; or

(3) limit the lawful authority of the Secretary of Defense, any military commander, or any other officer or agent of the United States or of any State to detain or try any person who is not an individual subject to this order.

(b) With respect to any individual subject to this order—

(1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and

(2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or

proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

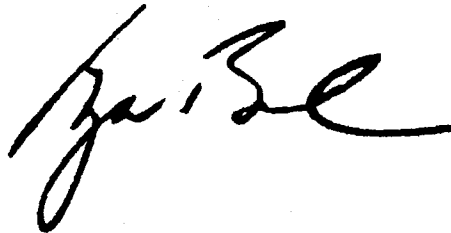
(c) This order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable at law or equity by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

(d) For purposes of this order, the term "State" includes any State, district, territory, or possession of the United States.

(e) I reserve the authority to direct the Secretary of Defense, at any time hereafter, to transfer to a governmental authority control of any individual subject to this order. Nothing in this order shall be construed to limit the authority of any such governmental authority to prosecute any individual for whom control is transferred.

**Sec. 8. Publication.**

This order shall be published in the Federal Register.



THE WHITE HOUSE,  
November 13, 2001.

[PR Doc. 01-20904  
Filed 11-15-01; 8:56 am]  
Billing code 3195-01-P

Federal Regulations Governing Military Commissions, 32 C.F.R.  
pts. 9 through 17 provides:

32 C.F.R. pt. 9:

SUBCHAPTER B—MILITARY COMMISSIONS

PART 9—PROCEDURES FOR TRIALS  
BY MILITARY COMMISSIONS OF  
CERTAIN NON-UNITED STATES  
CITIZENS IN THE WAR AGAINST  
TERRORISM

Sec.

- 9.1 Purpose.
- 9.2 Establishment of Military Commissions.
- 9.3 Jurisdiction.
- 9.4 Commission personnel.
- 9.5 Procedures accorded the accused.
- 9.6 Conduct of the trial.
- 9.7 Regulations.
- 9.8 Authority.
- 9.9 Protection of State secrets.
- 9.10 Other.
- 9.11 Amendment.
- 9.12 Delegation.

AUTHORITY: 5 U.S.C. 552(1)(a)(1)(C) and (D).

SOURCE: 68 FR 39374, July 1, 2003, unless otherwise noted.

§ 9.1 Purpose.

This part implements policy, assigns responsibilities, and prescribes procedures under the United States Constitution, Article II, section 2 and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism" (3 CFR, 2001 comp., p. 918, 68 FR 57833), for trials before military commissions of individuals subject to the President's Military Order. These procedures shall be implemented and construed so as to ensure that any such individual receives a full and fair trial before a military commission, as required by the President's Military Order. Unless otherwise directed by the Secretary of Defense, and except for supplemental procedures established pursuant to the President's Military Order or this part, the procedures prescribed herein and no others shall govern such trials.

§ 9.2 Establishment of Military Commissions.

In accordance with the President's Military Order, the Secretary of Defense or a designee ("Appointing Authority") may issue orders from time to time appointing one or more military commissions to try individuals

subject to the President's Military Order and appointing any other personnel necessary to facilitate such trials.

§ 9.3 Jurisdiction.

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

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

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

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

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

§ 9.4 Commission personnel.

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

(2) Number of members. Each Commission shall consist of at least three but

no more than seven members, the number being determined by the Appointing Authority. For each such Commission, there shall also be one or two alternate members, the number being determined by the Appointing Authority.

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

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

(5) *Duties of the Presiding Officer.* (i) The Presiding Officer shall admit or exclude evidence at trial in accordance with section 6(d) of this part. The Presiding Officer shall have authority to close proceedings or portions of proceedings in accordance with §9.5(b)(3) of this part and for any other reason necessary for the conduct of a full and fair trial.

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

of eligibility to appear before that Commission. The Appointing Authority may further revoke that attorney's or any other person's eligibility to appear before any other Commission convened under this part.

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

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

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

(2) *Prosecutors and Assistant Prosecutors.* (i) Consistent with any supplementary regulations or instructions issued under §9.7(a), the Chief Prosecutor shall detail a Prosecutor and, as appropriate, one or more Assistant Prosecutors to prepare charges and conduct the prosecution for each case before a Commission ("Prosecution"). Prosecutors and Assistant Prosecutors shall be:

(A) Military Officers who are judge advocates of any United States armed force, or

(B) Special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States.

(ii) The duties of the Prosecution are:

(A) To prepare charges for approval and referral by the Appointing Authority;

(B) To conduct the prosecution before the Commission of all cases referred for trial; and

(C) To represent the interests of the Prosecution in any review process.

(c) *Defense*—(1) *Office of the Chief Defense Counsel.* The Chief Defense Counsel shall be a judge advocate of any

United States armed force, shall supervise the overall defense efforts under the President's Military Order, shall ensure proper management of personnel and resources, shall preclude conflicts of interest, and shall facilitate proper representation of all Accused.

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

(i) To defend the Accused zealously within the bounds of the law without regard to personal opinion as to the guilt of the Accused; and

(ii) To represent the interests of the Accused in any review process as provided by this part.

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

(B) The Accused may also retain the services of a civilian attorney of the Accused's own choosing and at no expense to the United States Government ("Civilian Defense Counsel"), provided that attorney:

(1) Is a United States citizen;

(2) Is admitted to the practice of law in a State, district, territory, or possession of the United States, or before a Federal court;

(3) Has not been the subject of any sanction or disciplinary action by any court, bar, or other competent govern-

mental authority for relevant misconduct;

(4) Has been determined to be eligible for access to information classified at the level SECRET or higher under the authority of and in accordance with the procedures prescribed in DoD 5200.2-R<sup>1</sup>; and

(5) Has signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the course of proceedings. Civilian attorneys may be pre-qualified as members of the pool of available attorneys if, at the time of application, they meet the relevant criteria, or they may be qualified on an *ad hoc* basis after being requested by an Accused. Representation by Civilian Defense Counsel will not relieve Detailed Defense Counsel of the duties specified in paragraph (c)(2) of this section. The qualification of a Civilian Defense Counsel does not guarantee that person's presence at closed Commission proceedings or that person's access to any information protected under §9.6(d)(5).

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

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

#### §9.5 Procedures accorded the accused.

The following procedures shall apply with respect to the Accused:

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

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

(c) A Commission member shall vote for a finding of Guilty as to an offense if and only if that member is convinced

<sup>1</sup> Available from [www.ditc.mil/wahs/directives](http://www.ditc.mil/wahs/directives).

beyond a reasonable doubt, based on the evidence admitted at trial, that the Accused is guilty of the offense.

(d) At least one Detailed Defense Counsel shall be made available to the Accused sufficiently in advance of trial to prepare a defense and until any findings and sentence become final in accordance with §9.8(h)(2).

(e) The Prosecution shall provide the Defense with access to evidence the Prosecution intends to introduce at trial and with access to evidence known to the Prosecution that tends to exculpate the Accused. Such access shall be consistent with §9.6(d)(5) and subject to §9.9.

(f) The Accused shall not be required to testify during trial. A Commission shall draw no adverse inference from an Accused's decision not to testify. This subsection shall not preclude admission of evidence of prior statements or conduct of the Accused.

(g) If the Accused so elects, the Accused may testify at trial on the Accused's own behalf and shall then be subject to cross-examination.

(h) The Accused may obtain witnesses and documents for the Accused's defense, to the extent necessary and reasonably available as determined by the Presiding Officer. Such access shall be consistent with the requirements of §9.6(d)(5) and subject to §9.9. The Appointing Authority shall order that such investigative or other resources be made available to the Defense as the Appointing Authority deems necessary for a full and fair trial.

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

(j) The Prosecution shall ensure that the substance of the charges, the proceedings, and any documentary evidence are provided in English and, if appropriate, in another language that the Accused understands. The Appointing Authority may appoint one or more interpreters to assist the Defense, as necessary.

(k) The Accused may be present at every stage of the trial before the Commission, consistent with §9.6(b)(3), unless the Accused engages in disruptive

conduct that justifies exclusion by the Presiding Officer. Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof.

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

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

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

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

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

#### §9.8 Conduct of the trial.

(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)(1).

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

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

(4) *Plea Agreements*. The Accused, through Defense Counsel, and the Prosecution may submit for approval to the Appointing Authority a plea agreement mandating a sentence limitation or any other provision in exchange for an agreement to plead guilty, or any other consideration. Any agreement to plead

guilty must include a written stipulation of fact, signed by the Accused, that confirms the guilt of the Accused and the voluntary and informed nature of the plea of guilty. If the Appointing Authority approves the plea agreement, the Commission will, after determining the voluntary and informed nature of the plea agreement, admit the plea agreement and stipulation into evidence and be bound to adjudge findings and a sentence pursuant to that plea agreement.

(5) *Issuance and service of process; obtaining evidence.* (1) 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.

(11) 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; in-

formation 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)(11) 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*—(1) *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, audio-visual 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)(3)(1) 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, audio-visual means, or other electronic means; closure of the proceedings; introduction of prepared declassified summaries of evidence; and the use of pseudonyms.

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

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

(5) *Protection of Information*—(1) *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 delibera-

tions, 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.

#### **§9.7 Regulations.**

(a) *Supplementary regulations and instructions.* The Appointing Authority shall, subject to approval of the General Counsel of the Department of Defense if the Appointing Authority is not the Secretary of Defense, publish such further regulations consistent with the President's Military Order and this part as are necessary or appro-

priate for the conduct of proceedings by Commissions under the President's Military Order. The General Counsel shall issue such instructions consistent with the President's Military Order and this part as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions, including those governing the establishment of Commission-related offices and performance evaluation and reporting relationships.

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

#### **§9.8 Authority.**

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

#### **§9.9 Protection of State secrets.**

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

#### **§9.10 Other.**

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

part, or supplementary regulations or instructions issued under §9.7(a), shall not create a right to relief for the Accused or any other person. DoD Directive 5025.1<sup>2</sup> shall not apply to this part or any supplementary regulations or instructions issued under §9.7(a).

#### §9.11 Amendment.

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

#### §9.12 Delegation.

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

32 C.F.R. pt. 10:

## PART 10—MILITARY COMMISSION INSTRUCTIONS

### Sec.

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

AUTHORITY: 10 U.S.C. 1132d and 140(b).

SOURCE: 68 FR 39380, July 1, 2003, unless otherwise noted.

#### §10.1 Purpose.

This part establishes policies for the issuance and interpretation of Military Commission Instructions promulgated pursuant to 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," (3 CFR, 2001 comp., p. 918, 68 FR 57833).

#### §10.2 Authority.

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

#### §10.3 Applicability.

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

#### §10.4 Policies and procedures.

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

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

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

#### §10.5 Construction.

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

#### §10.6 Non-creation of right.

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

#### §10.7 Reservation of authority.

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

#### §10.8 Amendment.

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

### 32 C.F.R. pt. 11:

## PART 11—CRIMES AND ELEMENTS FOR TRIALS BY MILITARY COMMISSION

### Sec.

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

AUTHORITY: 10 U.S.C. 821.

SOURCE: 66 FR 39381, July 1, 2003, unless otherwise noted.

#### §11.1 Purpose.

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

#### §11.2 Authority.

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

#### §11.3 General.

(a) *Background.* The following crimes and elements thereof are intended for use by military commissions established pursuant to 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," the jurisdiction of which extends to offenses or offenders that by statute or the law of armed

conflict may be tried by military commission as limited by Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." No offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question. These crimes and elements derive from the law of armed conflict, a body of law that is sometimes referred to as the law of war. They constitute violations of the law of armed conflict or offenses that, consistent with that body of law, are triable by military commission. Because this document is declarative of existing law, it does not preclude trial for crimes that occurred prior to its effective date.

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

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

#### **§ 11.4 Applicable principles of law.**

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

(b) *The element of wrongfulness and defenses.* Conduct must be wrongful to constitute one of the offenses enumerated herein or any other offense triable by military commission. Conduct is

wrongful if it is done without justification or excuse cognizable under applicable law. The element of wrongfulness (or the absence of lawful justification or excuse), which may be required under the customary law of armed conflict, is not repeated in the elements of crimes in § 11.6. Conduct satisfying the elements found herein shall be inferred to be wrongful in the absence of evidence to the contrary. Similarly, this part does not enunciate defenses that may apply for specific offenses, though an Accused is entitled to raise any defense available under the law of armed conflict. Defenses potentially available to an Accused under the law of armed conflict, such as self-defense, mistake of fact, and duress, may be applicable to certain offenses subject to trial by military commission. In the absence of evidence to the contrary, defenses in individual cases shall be presumed not to apply. The burden of going forward with evidence of lawful justification or excuse or any applicable defense shall be upon the Accused. With respect to the issue of combatant immunity raised by the specific enumeration of an element requiring the absence thereof, the prosecution must affirmatively prove that element regardless of whether the issue is raised by the defense. Once an applicable defense or an issue of lawful justification or lawful excuse is fairly raised by the evidence presented, except for the defense of lack of mental responsibility, the burden is on the prosecution to establish beyond a reasonable doubt that the conduct was wrongful or that the defense does not apply. With respect to the defense of lack of mental responsibility, the Accused has the burden of proving by clear and convincing evidence that, as a result of a severe mental disease or defect, the Accused was unable to appreciate the nature and quality of the wrongfulness of the Accused's acts. As provided in 32 CFR 9.5(c), the prosecution bears the burden of establishing the Accused's guilt beyond a reasonable doubt in all cases tried by a military commission. Each element of an offense enumerated herein must be proven beyond a reasonable doubt.

(c) *Statute of limitations.* Violations of the laws of war listed herein are not subject to any statute of limitations.

#### §11.5 Definitions.

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

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

(c) *In the context of and was associated with armed conflict.* Elements containing this language require a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus (e.g., murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if temporally and geographically associated with armed conflict, is not "in the context of" the armed conflict). The focus of this element is not the nature or characterization of the conflict, but the nexus to it. This element does not require a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war," or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

(d) *Military Objective.* "Military objectives" are those potential targets during an armed conflict which, by their nature, location, purpose, or use, effectively contribute to the opposing force's war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a military advantage to the attacker under the circumstances at the time of the attack.

(e) *Object of the attack.* "Object of the attack" refers to the person, place, or thing intentionally targeted. In this regard, the term includes neither collateral damage nor incidental injury or death.

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

(g) *Protected under the law of war.* The person or object in question is expressly "protected" under one or more of the Geneva Conventions of 1949 or, to the extent applicable, customary international law. The term does not refer to all who enjoy some form of protection as a consequence of compliance with international law, but those who are expressly designated as such by the applicable law of armed conflict. For example, persons who either are *hors de combat* or medical or religious personnel taking no active part in hostilities are expressly protected, but other civilians may not be.

(h) *Should have known.* The facts and circumstances were such that a reasonable person in the Accused's position would have had the relevant knowledge or awareness.

#### §11.6 Crimes and elements.

(a) *Substantive offenses—war crimes.* The following enumerated offenses, if applicable, should be charged in separate counts. Elements are drafted to



reflect conduct of the perpetrator. Each element need not be specifically charged.

(1) *Willful killing of protected persons—*

(i) *Elements.* (A) The accused killed one or more persons;

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

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

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

(E) The killing took place in the context of and was associated with armed conflict.

(ii) *Comments.* The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

(2) *Attacking civilians.—(i) Elements.*

(A) The accused engaged in an attack;

(B) The object of the attack was a civilian population as such or individual civilians not taking direct or active part in hostilities;

(C) The accused intended the civilian population as such or individual civilians not taking direct or active part in hostilities to be an object of the attack; and

(D) The attack took place in the context of and was associated with armed conflict.

(ii) *Comments.* The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

(3) *Attacking civilian objects.—(i) Elements.* (A) The accused engaged in an attack;

(B) The object of the attack was civilian property, that is, property that was not a military objective;

(C) The accused intended such property to be an object of the attack;

(D) The accused knew or should have known that such property was not a military objective; and

(E) The attack took place in the context of and was associated with armed conflict.

(ii) *Comments.* The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

(4) *Attacking Protected Property.—(i)*

*Elements.* (A) The accused engaged in an attack;

(B) The object of the attack was protected property;

(C) The accused intended such property to be an object of the attack;

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

(E) The attack took place in the context of and was associated with armed conflict.

(ii) *Comments.* The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

(5) *Pillaging.—(i) Elements.* (A) The accused appropriated or seized certain property;

(B) The accused intended to appropriate or seize such property for private or personal use;

(C) The appropriation or seizure was without the consent of the owner of the property or other person with authority to permit such appropriation or seizure; and

(D) The appropriation or seizure took place in the context of and was associated with armed conflict.

(ii) *Comments.* As indicated by the use of the term "private or personal use," legitimate captures or appropriations, or seizures justified by military necessity, cannot constitute the crime of pillaging.

(6) *Denying quarter.—(i) Elements.* (A) The accused declared, ordered, or otherwise indicated that there shall be no survivors or surrender accepted;

(B) The accused thereby intended to threaten an adversary or to conduct hostilities such that there would be no survivors or surrender accepted;

(C) It was foreseeable that circumstances would be such that a practicable and reasonable ability to accept surrender would exist;

(D) The accused was in a position of effective command or control over the subordinate forces to which the declaration or order was directed; and

(E) The conduct took place in the context of and was associated with armed conflict.

(ii) *Comments.* Paragraph (a)(6)(i)(C) of this section precludes this offense

from being interpreted as limiting the application of lawful means or methods of warfare against enemy combatants. For example, a remotely delivered attack cannot give rise to this offense.

(7) *Taking Hostages*—(i) *Elements*. (A) The accused seized, detained, or otherwise held hostage one or more persons;

(B) The accused threatened to kill, injure, or continue to detain such person or persons;

(C) The accused intended to compel a State, an international organization, a natural or legal person, or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of such person or persons; and

(D) The conduct took place in the context of and was associated with armed conflict.

(ii) *Comments*. Consistent with §11.4(b), this offense cannot be committed by lawfully detaining enemy combatants or other individuals as authorized by the law of armed conflict.

(8) *Employing poison or analogous weapons*—(i) *Elements*. (A) The accused employed a substance or a weapon that releases a substance as a result of its employment;

(B) The substance was such that exposure thereto causes death or serious damage to health in the ordinary course of events, through its asphyxiating, poisonous, or bacteriological properties;

(C) The accused employed the substance or weapon with the intent of utilizing such asphyxiating, poisonous, or bacteriological properties as a method of warfare;

(D) The accused knew or should have known of the nature of the substance or weapon; and

(E) The conduct took place in the context of and was associated with armed conflict.

(ii) *Comments*. (A) The "death or serious damage to health" required by paragraph (a)(8)(i)(B) of this section must be a direct result of the substance's effect or effects on the human body (e.g., asphyxiation caused by the depletion of atmospheric oxygen secondary to a chemical or other reaction would not give rise to this offense).

(B) The clause "serious damage to health" does not include temporary incapacitation or sensory irritation.

(C) The use of the "substance or weapon" at issue must be proscribed under the law of armed conflict. It may include chemical or biological agents.

(D) The specific intent element for this offense precludes liability for mere knowledge of potential collateral consequences (e.g., mere knowledge of a secondary asphyxiating or toxic effect would be insufficient to complete the offense).

(9) *Using protected persons as shields*—

(i) *Elements*. (A) The accused positioned, or took advantage of the location of, one or more civilians or persons protected under the law of war;

(B) The accused intended to use the civilian or protected nature of the person or persons to shield a military objective from attack or to shield, favor, or impede military operations; and

(C) The conduct took place in the context of and was associated with armed conflict.

(ii) [Reserved]

(10) *Using protected property as shields*—(i) *Elements*. (A) The accused positioned, or took advantage of the location of, civilian property or property protected under the law of war;

(B) The accused intended to shield a military objective from attack or to shield, favor, or impede military operations; and

(C) The conduct took place in the context of and was associated with armed conflict.

(ii) [Reserved]

(11) *Torture*—(i) *Elements*. (A) The accused inflicted severe physical or mental pain or suffering upon one or more persons;

(B) The accused intended to inflict such severe physical or mental pain or suffering;

(C) Such person or persons were in the custody or under the control of the accused; and

(D) The conduct took place in the context of and was associated with armed conflict.

(ii) *Comments*. (A) Consistent with §11.4(b), this offense does not include pain or suffering arising only from, inherent in, or incidental to, lawfully imposed punishments. This offense does

not include the incidental infliction of pain or suffering associated with the legitimate conduct of hostilities.

(B) Severe "mental pain or suffering" is the prolonged mental harm caused by or resulting from:

(1) The intentional infliction or threatened infliction of severe physical pain or suffering;

(2) The administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(3) The threat of imminent death; or  
(4) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

(C) "Prolonged mental harm" is a harm of some sustained duration, though not necessarily permanent in nature, such as a clinically identifiable mental disorder.

(D) Paragraph (a)(11)(C) of this section does not require a particular formal relationship between the accused and the victim. Rather, it precludes prosecution for pain or suffering consequent to a lawful military attack.

(12) *Causing serious injury*—(1) *Elements*. (A) The accused caused serious injury to the body or health of one or more persons;

(B) The accused intended to inflict such serious injury;

(C) Such person or persons were in the custody or under the control of the accused; and

(D) The conduct took place in the context of and was associated with armed conflict.

(ii) *Comments*. "Serious injury" includes fractured or dislocated bones, deep cuts, torn members of the body, and serious damage to internal organs.

(13) *Mutilation or maiming*—(1) *Elements*. (A) The accused subjected one or more persons to mutilation, in particular by permanently disfiguring the person or persons, or by permanently disabling or removing an organ or appendage;

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

(C) The conduct caused death or seriously damaged or endangered the physical or mental health or appearance of such person or persons.

(D) The conduct was neither justified by the medical treatment of the person or persons concerned nor carried out in the interest of such person or persons;

(E) Such person or persons were in the custody or control of the accused; and

(F) The conduct took place in the context of and was associated with armed conflict.

(ii) [Reserved]

(14) *Use of treachery or perfidy*—(1) *Elements*. (A) The accused invited the confidence or belief of one or more persons that they were entitled to, or were obliged to accord, protection under the law of war;

(B) The accused intended to betray that confidence or belief;

(C) The accused killed, injured, or captured one or more persons;

(D) The accused made use of that confidence or belief in killing, injuring, or capturing such person or persons; and

(E) The conduct took place in the context of and was associated with armed conflict.

(ii) [Reserved]

(15) *Improper use of flag of truce*—(1) *Elements*. (A) The accused used a flag of truce;

(B) The accused made such use in order to feign an intention to negotiate, surrender, or otherwise to suspend hostilities when there was no such intention on the part of the accused; and

(C) The conduct took place in the context of and was associated with armed conflict.

(ii) [Reserved]

(16) *Improper use of protective emblems*—(1) *Elements*. (A) The accused used a protective emblem recognized by the law of armed conflict;

(B) The accused undertook such use for combatant purposes in a manner prohibited by the law of armed conflict;

(C) The accused knew or should have known of the prohibited nature of such use; and

(D) The conduct took place in the context of and was associated with armed conflict.

(ii) *Comments.* "Combatant purposes," as used in paragraph (a)(16)(i)(B) of this section, means purposes directly related to hostilities and does not include medical, religious, or similar activities.

(17) *Degrading treatment of a dead body.*—(i) *Elements.* (A) The accused degraded or otherwise violated the dignity of the body of a dead person;

(B) The accused intended to degrade or otherwise violate the dignity of such body;

(C) The severity of the degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity; and

(D) The conduct took place in the context of and was associated with armed conflict.

(ii) *Comments.* Paragraph (a)(17)(i)(B) of this section precludes prosecution for actions justified by military necessity.

(18) *Rape.*—(i) *Elements.* (A) The accused invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the accused with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;

(B) The invasion was committed by force, threat of force or coercion, or was committed against a person incapable of giving consent; and

(C) The conduct took place in the context of and was associated with armed conflict.

(ii) *Comments.* (A) Paragraph (a)(18)(i)(B) of this section recognizes that consensual conduct does not give rise to this offense.

(B) It is understood that a person may be incapable of giving consent if affected by natural, induced, or age-related incapacity.

(C) The concept of "invasion" is linked to the inherent wrongfulness requirement for all offenses. In this case, for example, a legitimate body cavity search could not give rise to this offense.

(D) The concept of "invasion" is gender neutral.

(b) *Substantive offenses—other offenses triable by military commission.* The following enumerated offenses, if applicable, should be charged in separate counts. Elements are drafted to reflect conduct of the perpetrator. Each element need not be specifically charged.

(1) *Hijacking or hazarding a vessel or aircraft.*—(i) *Elements.* (A) The accused seized, exercised control over, or endangered the safe navigation of a vessel or aircraft;

(B) The accused intended to so seize, exercise control over, or endanger such vessel or aircraft; and

(C) The conduct took place in the context of and was associated with armed conflict.

(ii) *Comments.* A seizure, exercise of control, or endangerment required by military necessity, or against a lawful military objective undertaken by military forces of a State in the exercise of their official duties, would not satisfy the wrongfulness requirement for this crime.

(2) *Terrorism.*—(i) *Elements.* (A) The accused killed or inflicted bodily harm on one or more persons or destroyed property;

(B) The accused:

(1) Intended to kill or inflict bodily harm on one or more persons; or

(2) Intentionally engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life;

(C) The killing, harm or destruction was intended to intimidate or coerce a civilian population, or to influence the policy of a government by intimidation or coercion; and

(D) The killing, harm or destruction took place in the context of and was associated with armed conflict.

(ii) *Comments.* (A) Paragraph (b)(2)(i)(A) of this section includes the concept of causing death or bodily harm, even if indirectly.

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

(B) Solicitation may be by means other than speech or writing. Any act or conduct that reasonably may be construed as a serious request, order, inducement, advice, or offer of assistance to commit any offense triable by military commission may constitute solicitation. It is not necessary that the accused act alone in the solicitation, order, inducement, advising, or assistance. The accused may act through other persons in committing this offense.

(C) An accused charged with solicitation of a completed substantive offense should be charged for the substantive offense as a principal. An accused charged with solicitation of an uncompleted offense should be charged for the separate offense of solicitation. Solicitation is not a lesser-included offense of the related substantive offense.

(3) *Command/superior responsibility—perpetrating—(i) Elements.* (A) The accused had command and control, or effective authority and control, over one or more subordinates;

(B) One or more of the accused's subordinates committed, attempted to commit, conspired to commit, solicited to commit, or aided or abetted the commission of one or more substantive offenses triable by military commission;

(C) The accused either knew or should have known that the subordinate or subordinates were committing, attempting to commit, conspiring to commit, soliciting, or aiding or abetting such offense or offenses; and

(D) The accused failed to take all necessary and reasonable measures within his power to prevent or repress the commission of the offense or offenses.

(ii) *Comments.*

(A) The phrase "effective authority and control" in paragraph (c)(3)(i)(A) of this section includes the concept of relative authority over the subject matter or activities associated with the perpetrator's conduct. This may be relevant to a civilian superior who should not be held responsible for the behavior of subordinates involved in activities that have no relationship to such superior's sphere of authority. Subject matter authority need not be demonstrated

for command responsibility as it applies to a military commander.

(B) A commander or other military or civilian superior, not in command, charged with failing adequately to prevent or repress a substantive offense triable by military commission should be charged for the related substantive offense as a principal.

(4) *Command/superior responsibility—misprision—(i) Elements.* (A) The accused had command and control, or effective authority and control, over one or more subordinates;

(B) One or more of the accused's subordinates had committed, attempted to commit, conspired to commit, solicited to commit, or aided or abetted the commission of one or more substantive offenses triable by military commission;

(C) The accused knew or should have known that the subordinate or subordinates had committed, attempted to commit, conspired to commit, solicited, or aided or abetted such offense or offenses; and

(D) The accused failed to submit the matter to competent authorities for investigation or prosecution as appropriate.

(ii) *Comments.*

(A) The phrase, "effective authority and control" in paragraph (c)(4)(i)(A) of this section includes the concept of relative authority over the subject matter or activities associated with the perpetrator's conduct. This may be relevant to a civilian superior who cannot be held responsible under this offense for the behavior of subordinates involved in activities that have nothing to do with such superior's sphere of authority.

(B) A commander or superior charged with failing to take appropriate punitive or investigative action subsequent to the perpetration of a substantive offense triable by military commission should not be charged for the substantive offense as a principal. Such commander or superior should be charged for the separate offense of failing to submit the matter for investigation and/or prosecution as detailed in these elements. This offense is not a lesser-included offense of the related substantive offense.

(5) *Accessory after the fact*—(1) *Elements.* (A) The accused received, comforted, or assisted a certain person;

(B) Such person had committed an offense triable by military commission;

(C) The accused knew that such person had committed such offense or believed such person had committed a similar or closely related offense; and

(D) The accused intended to hinder or prevent the apprehension, trial, or punishment of such person.

(11) *Comments.* Accessory after the fact should be charged separately from the related substantive offense. It is not a lesser-included offense of the related substantive offense.

(6) *Conspiracy*—(1) *Elements.* (A) The accused entered into an agreement with one or more persons to commit one or more substantive offenses triable by military commission or otherwise joined an enterprise of persons who shared a common criminal purpose that involved, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission;

(B) The accused knew the unlawful purpose of the agreement or the common criminal purpose of the enterprise and joined in it willfully, that is, with the intent to further the unlawful purpose; and

(C) One of the conspirators or enterprise members, during the existence of the agreement or enterprise, knowingly committed an overt act in order to accomplish some objective or purpose of the agreement or enterprise.

(11) *Comments.* (A) Two or more persons are required in order to have a conspiracy. Knowledge of the identity of co-conspirators and their particular connection with the agreement or enterprise need not be established. A person may be guilty of conspiracy although incapable of committing the intended offense. The joining of another conspirator after the conspiracy has been established does not create a new conspiracy or affect the status of the other conspirators. The agreement or common criminal purpose in a conspiracy need not be in any particular form or manifested in any formal words.

(B) The agreement or enterprise must, at least in part, involve the com-

mission or intended commission of one or more substantive offenses triable by military commission. A single conspiracy may embrace multiple criminal objectives. The agreement need not include knowledge that any relevant offense is in fact "triable by military commission."

(C) The overt act must be done by one or more of the conspirators, but not necessarily the accused, and it must be done to effectuate the object of the conspiracy or in furtherance of the common criminal purpose. The accused need not have entered the agreement or criminal enterprise at the time of the overt act.

(D) The overt act need not be in itself criminal, but it must advance the purpose of the conspiracy. It is not essential that any substantive offense be committed.

(E) Each conspirator is liable for all offenses committed pursuant to or in furtherance of the conspiracy by any of the co-conspirators, after such conspirator has joined the conspiracy and while the conspiracy continues and such conspirator remains a party to it.

(F) A party to the conspiracy who withdraws from or abandons the agreement or enterprise before the commission of an overt act by any conspirator is not guilty of conspiracy. An effective withdrawal or abandonment must consist of affirmative conduct that is wholly inconsistent with adherence to the unlawful agreement or common criminal purpose and that shows that the party has severed all connection with the conspiracy. A conspirator who effectively withdraws from or abandons the conspiracy after the performance of an overt act by one of the conspirators remains guilty of conspiracy and of any offenses committed pursuant to the conspiracy up to the time of the withdrawal or abandonment. The withdrawal of a conspirator from the conspiracy does not affect the status of the remaining members.

(G) That the object of the conspiracy was impossible to effect is not a defense to this offense.

(H) Conspiracy to commit an offense is a separate and distinct offense from any offense committed pursuant to or in furtherance of the conspiracy, and

both the conspiracy and any related offense may be charged, tried, and punished separately. Conspiracy should be charged separately from the related substantive offense. It is not a lesser-included offense of the substantive offense.

(7) Attempt—(1) Elements. (A) The accused committed an act;

(B) The accused intended to commit one or more substantive offenses triable by military commission;

(C) The act amounted to more than mere preparation; and

(D) The act apparently tended to effect the commission of the intended offense.

(11) Comments. (A) To constitute an attempt there must be a specific intent to commit the offense accompanied by an act that tends to accomplish the unlawful purpose. This intent need not involve knowledge that the offense is in fact "triable by military commission."

(B) Preparation consists of devising or arranging means or measures apparently necessary for the commission of the offense. The act need not be the last act essential to the consummation of the offense. The combination of specific intent to commit an offense, plus the commission of an act apparently tending to further its accomplishment, constitutes the offense of attempt. Failure to complete the offense, whatever the cause, is not a defense.

(C) A person who purposely engages in conduct that would constitute the offense if the attendant circumstances were as that person believed them to be is guilty of an attempt.

(D) It is a defense to an attempt offense that the person voluntarily and completely abandoned the intended offense, solely because of the person's own sense that it was wrong, prior to the completion of the substantive offense. The voluntary abandonment defense is not allowed if the abandonment results, in whole or in part, from other reasons, for example, the person feared detection or apprehension, decided to await a better opportunity for success, was unable to complete the crime, or encountered unanticipated difficulties or unexpected resistance.

(E) Attempt is a lesser-included offense of any substantive offense triable by military commission and need not

be charged separately. An accused may be charged with attempt without being charged with the substantive offense.

**PART 12—RESPONSIBILITIES OF THE  
CHIEF PROSECUTOR, PROSECU-  
TORS, AND ASSISTANT  
PROSECUTORS**

**Sec.**

**12.1 Purpose.**

**12.2 Authority.**

**12.3 Office of the Chief Prosecutor.**

**12.4 Duties and responsibilities of the prosecution.**

**12.5 Policies.**

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

**SOURCE:** 68 FR 39388, July 1, 2003, unless otherwise noted.

**§12.1 Purpose.**

This part establishes the responsibilities of the Office of the Chief Prosecutor and components thereof.

**§12.2 Authority.**

This part is issued pursuant to 32 CFR 9.7(a) and in accordance with Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." (3 CFR, 2001 comp., p. 918, 66 FR 57833) and 10 U.S.C. 113(d) and 140(b). The provisions of 32 CFR part 10 are applicable to this part.

**§12.3 Office of the Chief Prosecutor.**

(a) *General.* The Office of the Chief Prosecutor shall be a component of the Office of Military Commissions and shall be comprised of the Chief Prosecutor, Prosecutors, and other persons properly under the supervision of the Chief Prosecutor.

(b) *Chief Prosecutor.* (1) The Chief Prosecutor shall be a judge advocate of any United States armed force and shall be designated by the General Counsel of the Department of Defense.

(2) The Chief Prosecutor shall report directly to the Deputy General Counsel (Legal Counsel) of the Department of Defense.

(3) The Chief Prosecutor shall have authority to subpoena any individual to appear as a witness, to testify, or to produce any evidence in a case referred to military commissions or in a criminal investigation associated with a



case that may be referred to a military commission.

(4) The Chief Prosecutor shall direct the overall prosecution effort pursuant to 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," ensuring proper supervision and management of all personnel and resources assigned to the Office of the Chief Prosecutor.

(5) The Chief Prosecutor shall ensure that all personnel assigned to the Office of the Chief Prosecutor review, and attest that they understand and will comply with, 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," and all Supplementary Regulations and Instructions issued in accordance therewith.

(6) The Chief Prosecutor shall inform the Deputy General Counsel (Legal Counsel) of all requirements for personnel, office space, equipment, and supplies to ensure the successful functioning and mission accomplishment of the Office of the Chief Prosecutor.

(7) The Chief Prosecutor shall supervise all Prosecutors and other personnel assigned to the Office of the Chief Prosecutor including any special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States.

(8) The Chief Prosecutor, or his designee, shall fulfill applicable performance evaluation requirements associated with Prosecutors and other personnel properly under the supervision of the Office of the Chief Prosecutor.

(9) The Chief Prosecutor shall detail a Prosecutor and, as appropriate, one or more Assistant Prosecutors to perform the duties of the prosecution as set forth in 32 CFR 9.4(b)(2). The Chief Prosecutor may detail himself to perform such duties.

(10) The Chief Prosecutor shall ensure that all Prosecutors and Assistant Prosecutors faithfully represent the United States in discharging their prosecutorial duties before military commissions conducted pursuant to 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treat-

ment, and Trial of Certain Non-Citizens in the War Against Terrorism."

(11) The Chief Prosecutor shall ensure that all Prosecutors and Assistant Prosecutors have taken an oath to perform their duties faithfully.

(12) The Chief Prosecutor shall ensure that all personnel properly under the supervision of the Office of the Chief Prosecutor possess the appropriate security clearances.

(c) Prosecutors. (1) Prosecutors shall be detailed by the Chief Prosecutor and may be either judge advocates of any United States armed force or special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States.

(2) Prosecutors shall represent the United States as Prosecutors or Assistant Prosecutors as directed by the Chief Prosecutor and in accordance with 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."

(3) Prosecutors shall fulfill all responsibilities detailed in 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," those set forth in this part, and those assigned by the Chief Prosecutor.

(4) Prosecutors shall ensure that all court reporters, security personnel, and interpreters who are to perform duties in relation to a military commission proceeding have taken an oath to perform their duties faithfully. As directed by the Presiding Officer, Prosecutors also shall administer appropriate oaths to witnesses during military commission proceedings.

#### **§12.4 Duties and responsibilities of the prosecution.**

(a) *Regular duties.* The Prosecution shall perform all duties specified or implied in 32 CFR part 9 as responsibilities of the Prosecution.

(b) *Administrative duties.* The Prosecution shall, as directed by the Presiding Officer or the Appointing Authority, prepare any documentation necessary to facilitate the conduct of military commissions proceedings. The Prosecution shall, as directed by the Deputy

General Counsel (Legal Counsel), prepare a trial guide to provide a standardized administrative plan for the conduct of military commission proceedings. Unless directed otherwise by the Appointing Authority, the Presiding Officer may, in his discretion, depart from this guide as appropriate.

(c) *Special duties.* The Prosecution shall perform all other functions, consistent with 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," as may be directed by the Appointing Authority or the General Counsel of the Department of Defense.

#### **§12.5 Policies.**

(a) *Prohibition on Prosecutors serving as Defense Counsel.* Judge advocates assigned to the Office of the Chief Prosecutor shall be deemed unavailable for service as Defense Counsel under 32 CFR 9.4(c)(3)(i).

(b) *Prohibition on certain disclosures.* All Prosecutors must strictly comply with 32 CFR 9.6(d)(5) and 9.9 to ensure they do not improperly disclose classified information, national security information, or state secrets to any person not specifically authorized to receive such information.

(c) *Statements to the media.* Consistent with DoD Directive 5122.5<sup>1</sup>, the Assistant Secretary of Defense for Public Affairs shall serve as the sole release authority for DoD information and audiovisual materials regarding military commissions. Personnel assigned to the Office of the Chief Prosecutor may communicate with news media representatives regarding cases and other matters related to military commissions only when approved by the Appointing Authority or the General Counsel of the Department of Defense.

**PART 13—RESPONSIBILITIES OF THE  
CHIEF DEFENSE COUNSEL, DE-  
TAILED DEFENSE COUNSEL, AND  
CIVILIAN DEFENSE COUNSEL**

**Sec.**

**13.1 Purpose.**

**13.2 Authority.**

**13.3 Office of the Chief Defense Counsel.**

**13.4 Duties and responsibilities of the de-  
fense.**

**13.5 Policies.**

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

**SOURCE:** 68 FR 39389, July 1, 2003, unless  
otherwise noted.

**§ 13.1 Purpose.**

This part establishes the responsibil-  
ities of the Office of Chief Defense  
Counsel and components thereof.

**§ 13.2 Authority.**

This part is issued pursuant to 32  
CFR 9.7(a) and in accordance with Military  
Order of November 13, 2001, "De-  
tention, Treatment, and Trial of Cer-  
tain Non-Citizens in the War Against  
Terrorism." (3 CFR, 2001 comp., p. 918,  
68 FR 57833) and 10 U.S.C. 113(d) and  
140(b). The provisions of 32 CFR part 18  
are applicable to this part.

**§ 13.3 Office of the Chief Defense  
Counsel.**

(a) *General.* The Office of the Chief  
Defense Counsel shall be a component  
of the Office of Military Commissions  
and shall be comprised of the Chief De-  
fense Counsel, Defense Counsel, and  
other such persons properly under the  
supervision of the Chief Defense Coun-  
sel.

(b) *Chief Defense Counsel.* (1) The  
Chief Defense Counsel shall be a judge  
advocate of any United States armed  
force and shall be designated by the  
General Counsel of the Department of  
Defense.

(2) The Chief Defense Counsel shall  
report directly to the Deputy General  
Counsel (Personnel and Health Policy)  
of the Department of Defense.

(3) The Chief Defense Counsel shall  
supervise all defense activities and the  
efforts of Detailed Defense Counsel and  
other office personnel and resources  
pursuant to 32 CFR part 9, and Military  
Order of November 13, 2001, "Detention,  
Treatment, and Trial of Certain Non-  
Citizens in the War Against Ter-  
rorism," ensuring proper supervision  
and management of all personnel and  
resources assigned to the Office of the  
Chief Defense Counsel and facilitating  
the proper representation of all Ac-  
cused referred to trial before a military  
commission appointed pursuant to 32

CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."

(4) The Chief Defense Counsel shall ensure that all personnel assigned to the Office of the Chief Defense Counsel review, and attest that they understand and will comply with, 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," and all Supplementary Regulations and Instructions issued in accordance therewith. Furthermore, the Chief Defense Counsel shall regulate the conduct of Detailed Defense Counsel as deemed necessary, consistent with 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," and subordinate instructions and regulations, and specifically shall ensure that Detailed Defense Counsel have been directed to conduct their activities consistent with applicable prescriptions and prescriptions specified in Section II of the Affidavit And Agreement By Civilian Defense Counsel at Appendix B to 32 CFR part 14.

(5) The Chief Defense Counsel shall inform the Deputy General Counsel (Personnel and Health Policy) of the Department of Defense of all requirements for personnel, office space, equipment, and supplies to ensure the successful functioning and mission accomplishment of the Office of the Chief Defense Counsel.

(6) The Chief Defense Counsel shall supervise all Defense Counsel and other personnel assigned to the Office of the Chief Defense Counsel.

(7) The Chief Defense Counsel, or his designee, shall fulfill applicable performance evaluation requirements associated with Defense Counsel and other personnel properly under the supervision of the Chief Defense Counsel.

(8) The Chief Defense Counsel shall detail a judge advocate of any United States armed force to perform the duties of the Detailed Defense Counsel as set forth in 32 CFR 9.4(c)(2) and shall detail or employ any other personnel as directed by the Appointing Authority or the Presiding Officer in a par-

ticular case. The Chief Defense Counsel may not detail himself to perform the duties of Detailed Defense Counsel, nor does he form an attorney-client relationship with accused persons or incur any concomitant confidentiality obligations.

(9) The Chief Defense Counsel may, when appropriate, detail an additional judge advocate as Assistant Detailed Defense Counsel to assist in performing the duties of the Detailed Defense Counsel.

(10) The Chief Defense Counsel may structure the Office of the Chief Defense Counsel so as to include subordinate supervising attorneys who may incur confidentiality obligations in the context of fulfilling their supervisory responsibilities with regard to Detailed Defense Counsel.

(11) The Chief Defense Counsel shall take appropriate measures to preclude Defense Counsel conflicts of interest arising from the representation of Accused before military commissions. The Chief Defense Counsel shall be provided sufficient information (potentially including protected information) to fulfill this responsibility.

(12) The Chief Defense Counsel shall take appropriate measures to ensure that each Detailed Defense Counsel is capable of zealous representation, unencumbered by any conflict of interest. In this regard, the Chief Defense Counsel shall monitor the activities of all Defense Counsel (Detailed and Civilian) and take appropriate measures to ensure that Defense Counsel do not enter into agreements with other Accused or Defense Counsel that might cause them or the Accused they represent to incur an obligation of confidentiality with such other Accused or Defense Counsel or to effect some other impediment to representation.

(13) The Chief Defense Counsel shall ensure that an Accused tried before a military commission pursuant to 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," is represented at all relevant times by Detailed Defense Counsel.

(14) The Chief Defense Counsel shall administer all requests for replacement Detailed Defense Counsel requested in

accordance with 32 CFR 9.4(c)(3). He shall determine the availability of such counsel in accordance with this part.

(13) The Chief Defense Counsel shall administer the Civilian Defense Counsel pool, screening all requests for pre-qualification and ad hoc qualification, making qualification determinations and recommendations in accordance with 32 CFR part 9, this part, and 32 CFR part 14, and ensuring appropriate notification to an Accused of civilian attorneys available to represent Accused before a military commission.

(14) The Chief Defense Counsel shall ensure that all Detailed Defense Counsel and Civilian Defense Counsel who are to perform duties in relation to a military commission have taken an oath to perform their duties faithfully.

(15) The Chief Defense Counsel shall ensure that all personnel properly under the supervision of the Office of the Chief Defense Counsel possess the appropriate security clearances.

(c) *Detailed Defense Counsel.* (1) Detailed Defense Counsel shall be judge advocates of any United States armed force.

(2) Detailed Defense Counsel shall represent the Accused before military commissions when detailed in accordance with 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." In this regard Detailed Defense Counsel shall defend the Accused to whom detailed zealously within the bounds of the law and without regard to personal opinion as to guilt; represent the interests of the Accused in any review process as provided by 32 CFR part 9; and comply with the procedures accorded the Accused pursuant to 32 CFR 9.5 and 9.6. Detailed Defense Counsel shall so serve notwithstanding any intention expressed by the Accused to represent himself.

(3) Detailed Defense Counsel shall have primary responsibility to prevent conflicts of interest related to the handling of the cases to which detailed.

(4) Detailed Defense Counsel shall fulfill all responsibilities detailed in 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."

those set forth in this part, and those assigned by the Chief Defense Counsel.

(d) *Selected Detailed Defense Counsel.*

(1) The Accused may select a judge advocate of any United States armed force to replace the Accused's Detailed Defense Counsel, provided that judge advocate has been determined to be available by the Chief Defense Counsel in consultation with the Judge Advocate General of that judge advocate's military department.

(2) A judge advocate shall be determined not to be available if assigned duties: as a general or flag officer; as a military judge; as a prosecutor in the Office of Military Commissions; as a judge advocate assigned to the Department of Defense Criminal Investigation Task Force or Joint Task Force Guantanamo; as a principal legal advisor to a command, organization, or agency; as an instructor or student at a service school, academy, college or university; or in any other capacity that the Judge Advocate General of the Military Department concerned may determine not to be available because of the nature or responsibilities of their assignments, exigent circumstances, military necessity, or other appropriate reasons.

(3) Consistent with 32 CFR 9.6(b), the selection and replacement of new Detailed Defense Counsel shall not unreasonably delay military commission proceedings.

(4) Unless otherwise directed by the Appointing Authority or the General Counsel of the Department of Defense, the Chief Defense Counsel will, after selection of a new Detailed Defense Counsel, relieve the original Detailed Defense Counsel of all duties with respect to that case.

(e) *Qualified Civilian Defense Counsel.*

(1) The Accused may, at no expense to the United States, retain the services of a civilian attorney of the Accused's own choosing to assist in the conduct of his defense before a military commission, provided that the civilian attorney retained has been determined to be qualified pursuant to 32 CFR 9.4(c)(3)(ii).

(2) Consistent with 32 CFR 9.6(b), the retention of Civilian Defense Counsel shall not unreasonably delay military commission proceedings.

(3) Representation by Civilian Defense Counsel will not relieve Detailed Defense Counsel of the duties specified in 32 CFR 9.4(c)(2).

(4) Neither qualification of a Civilian Defense Counsel for membership in the pool of available Civilian Defense Counsel nor the entry of appearance in a specific case guarantees that counsel's presence at closed military commission proceedings or access to information protected under 32 CFR 9.6(d)(5).

(5) The Chief Defense Counsel shall monitor the conduct of all qualified Civilian Defense Counsel for compliance with all rules, regulations, and instructions governing military commissions. The Chief Defense Counsel will report all instances of noncompliance with the rules, regulations, and instructions governing military commissions to the Appointing Authority and to the General Counsel of the Department of Defense with a recommendation as to any appropriate action consistent with 32 CFR part 9 and this part.

#### **§13.4 Duties and responsibilities of the defense.**

(a) *Regular duties.* The Defense shall perform all duties specified or implied in 32 CFR part 9 as responsibilities of the Defense.

(b) *Special duties.* The Office of the Chief Defense Counsel shall perform such other functions, consistent with 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," and the mission of the Office of the Chief Defense Counsel, as may be directed by the Appointing Authority or the General Counsel of the Department of Defense.

#### **§13.5 Policies.**

(a) *Prohibition on certain agreements.* No Defense Counsel may enter into agreements with any detainee other than his client, or such detainee's Defense Counsel, that might cause him or the client he represents to incur an obligation of confidentiality with such other detainee or Defense Counsel or to effect some other impediment to representation.

(b) *Prohibition on certain disclosures.* All Defense Counsel must strictly comply with 32 CFR 9.6(d)(5) and 9.9 to ensure they do not improperly disclose classified information, national security information, or state secrets to an Accused or potential Accused or to any other person not specifically authorized to receive such information.

(c) *Statements to the media.* Consistent with DoD Directive 5122.5<sup>1</sup>, the Assistant Secretary of Defense for Public Affairs shall serve as the sole release authority for DoD information and audiovisual materials regarding military commissions. Personnel assigned to the Office of the Chief Defense Counsel, as well as all members of the Civilian Defense Counsel pool and associated personnel may communicate with news media representatives regarding cases and other matters related to military commissions only when approved by the Appointing Authority or the General Counsel of the Department of Defense.

### **32 C.F.R. pt 14:**

#### **PART 14—QUALIFICATION OF CIVILIAN DEFENSE COUNSEL**

##### **Sec.**

##### **14.1 Purpose.**

##### **14.2 Authority.**

##### **14.3 Policies and procedures.**

**APPENDIX A TO PART 14—UNITED STATES OF AMERICA AUTHORIZATION FOR RELEASE OF INFORMATION**

**APPENDIX B TO PART 14—AFFIDAVIT AND AGREEMENT BY CIVILIAN DEFENSE COUNSEL**

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

**SOURCE:** 68 FR 39392, July 1, 2003, unless otherwise noted.

##### **§14.1 Purpose.**

This part establishes policies and procedures for the creation and management of the pool of qualified Civilian Defense Counsel authorized in 32 CFR 9.4 (c)(3)(ii) in accordance with Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," (3 CFR 2001 Comp., 918, 66 FR 57833).

#### § 14.2 Authority.

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

#### § 14.3 Policies and procedures.

(a) *Application procedures.* (1) Civilian attorneys may be prequalified as members of the pool of attorneys eligible to represent Accused before military commissions at no expense to the United States if, at the time of application, they meet the eligibility criteria set forth in 32 CFR 9.4(c)(3)(ii) as further detailed in this part, or they may be qualified on an ad hoc basis after being requested by an Accused. In both cases, qualification results in membership in the pool of available Civilian Defense Counsel.

(2) An attorney seeking qualification as a member of the pool of available Civilian Defense Counsel shall submit an application, by letter, to: Office of the General Counsel, Department of Defense, (Attn: Chief Defense Counsel, Office of Military Commissions), 1600 Defense Pentagon, Washington, DC 20301-1600. Applications will be comprised of the letter requesting qualification for membership, together with the following documents that demonstrate satisfaction of the criteria set forth in 32 CFR 9.4(c)(3)(ii):

(i) Civilian Defense Counsel shall be United States citizens (32 CFR 9.4(c)(3)(ii)(A)). Applicants will provide proof of citizenship (e.g., certified true copy of passport, birth certificate, or certificate of naturalization).

(ii) Civilian Defense Counsel shall be admitted to the practice of law in a State, district, territory or possession of the United States, or before a Federal court (32 CFR 9.4(c)(3)(ii)(B)). Applicants will submit an official certificate showing that the applicant is an active member in good standing with the bar of a qualifying jurisdiction. The certificate must be dated within three months of the date of the Chief Defense Counsel's receipt of the application.

(iii) Civilian Defense Counsel shall not have been the subject of any sanction or disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct (32 CFR 9.4(c)(2)(iii)).

(A) An applicant shall submit a statement detailing all sanctions or disciplinary actions, pending or final, to which he has been subject, whether by a court, bar or other competent governmental authority, for misconduct of any kind. The statement shall identify the jurisdiction or authority that imposed the sanction or disciplinary action, together with any explanation deemed appropriate by the applicant. Additionally, the statement shall identify and explain any formal challenge to the attorney's fitness to practice law, regardless of the outcome of any subsequent proceedings. In the event that no sanction, disciplinary action or challenge has been imposed on or made against an applicant, the statement shall so state. Further, the applicant's statement shall identify each jurisdiction in which he has been admitted or to which he has applied to practice law, regardless of whether the applicant maintains a current active license in that jurisdiction, together with any dates of admission to or rejection by each such jurisdiction and, if no longer active, the date of and basis for inactivation. The information shall be submitted either in the form of a sworn notarized statement or as a declaration under penalty of perjury of the laws of the United States. The sworn statement or declaration must be executed and dated within three months of the date of the Chief Defense Counsel's receipt of the application.

(B) Further, applicants shall submit a properly executed Authorization for Release of Information (Appendix A to this part), authorizing the Chief Defense Counsel or his designee to obtain information relevant to qualification of the applicant as a member of the Civilian Defense Counsel pool from each jurisdiction in which the applicant has been admitted or to which he has applied to practice law.

(iv) Civilian Defense Counsel shall be determined to be eligible for access to information classified at the level SECRET or higher under the authority of

and in accordance with the procedures described in Department of Defense Regulation, DoD 5200.2-R, "Personnel Security Program."<sup>1</sup> (32 CFR 9.4(c)(2)(iv))

(A) Civilian Defense Counsel applicants who possess a valid current security clearance of SECRET or higher shall provide, in writing, the date of their background investigation, the date such clearance was granted, the level of the clearance, and the adjudicating authority.

(B) Civilian Defense Counsel applicants who do not possess a valid current security clearance of SECRET or higher shall state in writing their willingness to submit to a background investigation in accordance with DoD 5200.2-R and to pay any actual costs associated with the processing of the same. The security clearance application, investigation, and adjudication process will not be initiated until the applicant has submitted an application that otherwise fully complies with this part and the Chief Defense Counsel has determined that the applicant would otherwise be qualified for membership in the Civilian Defense Counsel pool. Favorable adjudication of the applicant's personnel security investigation must be completed before an applicant will be qualified for membership in the pool of Civilian Defense Counsel. The Chief Defense Counsel may, at his discretion, withhold qualification and wait to initiate the security clearance process until such time as the Civilian Defense Counsel's services are likely to be sought.

(v) Civilian Defense Counsel shall have signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the course of proceedings (32 CFR 9.4(c)(2)(v)). This requirement shall be satisfied by the execution of the Affidavit And Agreement By Civilian Defense Counsel at Appendix B to this part. The Affidavit And Agreement By Civilian Defense Counsel shall be executed and agreed to without change, (i.e., no omissions, additions or substitutions). Proper execution shall require

the notarized signature of the applicant. The Affidavit And Agreement By Civilian Defense Counsel shall be dated within three months of the date of the Chief Defense Counsel's receipt of the application.

(3) Applications mailed in a franked U.S. Government envelope or received through U.S. Government distribution will not be considered. Telefaxed or electronic mail application materials will not be accepted. Failure to provide all of the requisite information and documentation may result in rejection of the application. A false statement in any part of the application may preclude qualification and/or render the applicant liable for disciplinary or criminal sanction, including under 18 U.S.C. 1001.

(b) *Application review.* (1) The Chief Defense Counsel or his designee shall review all Civilian Defense Counsel pool applications for compliance with 32 CFR part 9 and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," and with this part.

(2) The Chief Defense Counsel shall consider all applicants for qualification as members of the Civilian Defense Counsel pool without regard to race, religion, color, sex, age, national origin, or other non-disqualifying physical or mental disability.

(3) The Chief Defense Counsel may reject any Civilian Defense Counsel application that is incomplete or otherwise fails to comply with 32 CFR part 9 and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," or with this part.

(4) Subject to review by the General Counsel of the Department of Defense, the Chief Defense Counsel shall determine the number of qualified attorneys that shall constitute the pool of available Civilian Defense Counsel. Similarly, subject to review by the General Counsel of the Department of Defense, the Chief Defense Counsel shall determine the qualification of applicants for membership in such pool. This shall include determinations as to whether any sanction, disciplinary action, or

<sup>1</sup> Available at <http://www.dtic.mil/whs/directives>.



challenge is related to relevant misconduct that would disqualify the Civilian Defense Counsel applicant.

(5) The Chief Defense Counsel's determination as to each applicant's qualification for membership in the pool of qualified Civilian Defense Counsel shall be deemed effective as of the date of the Chief Defense Counsel's written notification publishing such determination to the applicant. Subsequent to this notification, the retention of qualified Civilian Defense Counsel is effected upon written entry of appearance, communicated to the military commission through the Chief Defense Counsel.

(6) The Chief Defense Counsel may reconsider his determination as to an individual's qualification as a member of the Civilian Defense Counsel pool on the basis of subsequently discovered information indicating material non-disclosure or misrepresentation in the application, or material violation of obligations of the Civilian Defense Counsel, or other good cause, or the matter may be referred to the Appointing Authority or the General Counsel of the Department of Defense, who may revoke or suspend the qualification of any member of the Civilian Defense Counsel pool.

#### APPENDIX A TO PART 14—UNITED STATES OF AMERICA AUTHORIZATION FOR RELEASE OF INFORMATION

##### *United States of America*

##### Authorization for Release of Information

(Carefully read this authorization to release information about you, then sign and date it in ink.)

I authorize the Chief Defense Counsel, Office of Military Commissions, Department of Defense, his designee or other duly authorized representative of the Department of Defense who may be charged with assessing or determining my qualification for membership in the pool of Civilian Defense Counsel available to represent Accused before military commissions, to obtain any information from any court, the bar of any State, locality, district, territory or possession of the United States, or from any other governmental authority.

This information may include, but is not limited to, information relating to: Any application for a security clearance; my admission or application for admission to practice law in any jurisdiction, including action by

the jurisdiction upon such application, together with my current status with regard to the practice of law in such jurisdiction; any sanction or disciplinary action to which I have been subject for misconduct of any kind; and any formal challenge to my fitness to practice law, regardless of the outcome of subsequent proceedings.

I authorize custodians of such records or information and other sources of information pertaining to me to release such at the request of the officials named above, regardless of any previous agreement to the contrary.

I understand that for certain custodians or sources of information a separate specific release may be required and that I may be contacted for the purposes of executing such at a later date.

I understand that the records or information released by custodians and other sources of information are for official use by the Department of Defense, only for the purposes provided herein, and that they may be redisclosed by the Department of Defense only as authorized by law.

Copies of this authorization that show my signature are as valid as the original signed by me. This authorization is valid for five (5) years from the date signed or upon termination of my affiliation with the Department of Defense, whichever is later.

Signature (sign in ink) SSN \_\_\_\_\_

Date \_\_\_\_\_

#### APPENDIX B TO PART 14—AFFIDAVIT AND AGREEMENT BY CIVILIAN DEFENSE COUNSEL

##### AFFIDAVIT AND AGREEMENT BY CIVILIAN DEFENSE COUNSEL

Pursuant to Section 4(C)(3)(b) of Department of Defense Military Commission Order No. 1, "Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism," dated March 21, 2002 ("MCO No. 1"), Military Commission Instructions No. 4, "Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel" ("MCI No. 4") and No. 5, "Qualification of Civilian Defense Counsel" ("MCI No. 5"), and in accordance with the President's Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 FR 57833 (Nov. 16, 2001) ("President's Military Order"), I [Name of Civilian Attorney], make this Affidavit and Agreement for the purpose of applying for qualification as a member of the pool of Civilian Defense Counsel available to represent Accused before military commissions and serving in that capacity.

I. *Oaths or Affirmations.* I swear or affirm that the following information is true to the best of my knowledge and belief:

A. I have read and understand the President's Military Order, MCO No. 1, MCI No. 4, MCI No. 5, and all other Military Commission Orders and Instructions concerning the rules, regulations and instructions applicable to trial by military commissions. I will read all future Orders and Instructions applicable to trials by military commissions.

B. I am aware that my qualification as a Civilian Defense Counsel does not guarantee my presence at closed military commission proceedings or guarantee my access to any information protected under Section 6(D)(3) or Section 9 of MCO No. 1.

II. *Agreements:* I hereby agree to comply with all applicable regulations and instructions for counsel, including any rules of court for conduct during the course of proceedings, and specifically agree, without limitation, to the following:

A. I will notify the Chief Defense Counsel and, as applicable, the relevant Presiding Officer immediately if, after the execution of this Affidavit and Agreement but prior to the conclusion of proceedings (defined as the review and final decision of the President or, if designated, the Secretary of Defense), if there is any change in any of the information provided in my application, including this Affidavit and Agreement, for qualification as member of the Civilian Defense Counsel pool. I understand that such notification shall be in writing and shall set forth the substantive nature of the changed information.

B. I will be well-prepared and will conduct the defense zealously, representing the Accused throughout the military commission process, from the inception of my representation through the completion of any post trial proceedings as detailed in Section 6(H) of MCO No. 1. I will ensure that these proceedings are my primary duty. I will not seek to delay or to continue the proceedings for reasons relating to matters that arise in the course of my law practice or other professional or personal activities that are not related to military commission proceedings.

C. The Defense Team shall consist entirely of myself, Detailed Defense Counsel, and other personnel provided by the Chief Defense Counsel, the Presiding Officer, or the Appointing Authority. I will make no claim against the U.S. Government for any fees or costs associated with my conduct of the defense or related activities or efforts.

D. Recognizing that my representation does not relieve Detailed Defense Counsel of duties specified in Section 4(C)(2) of MCO No. 1, I will work cooperatively with such counsel to ensure coordination of efforts and to ensure such counsel is capable of conducting the defense independently if necessary.

E. During the pendency of the proceedings, unless I obtain approval in advance from the Presiding Officer to do otherwise, I will comply with the following restrictions on my travel and communications:

1. I will not travel or transmit documents from the site of the proceedings without the approval of the Appointing Authority or the Presiding Officer. The Defense Team and I will otherwise perform all of our work relating to the proceedings, including any electronic or other research, at the site of the proceedings (except that this shall not apply during post-trial proceedings detailed in Section 6(H) of MCO No. 1).

2. I will not discuss or otherwise communicate or share documents or information about the case with anyone except persons who have been designated as members of the Defense Team in accordance with this Affidavit and Agreement and other applicable rules, regulations and instructions.

F. At no time, to include any period subsequent to the conclusion of the proceedings, will I make any public or private statements regarding any closed sessions of the proceedings or any classified information or material, or document or material constituting protected information under MCO No. 1.

G. I understand and agree to comply with all rules, regulations and instructions governing the handling of classified information and material. Furthermore, no document or material constituting protected information under MCO No. 1, regardless of its classification level, may leave the site of the proceedings.

H. I understand that there may be reasonable restrictions on the time and duration of contact I may have with my client, as imposed by the Appointing Authority, the Presiding Officer, detention authorities, or regulation.

I. I understand that my communications with my client, even if traditionally covered by the attorney-client privilege, may be subject to monitoring or review by government officials, using any available means, for security and intelligence purposes. I understand that any such monitoring will only take place in limited circumstances when approved by proper authority, and that any evidence or information derived from such communications will not be used in proceedings against the Accused who made or received the relevant communication. I further understand that communications are not protected if they would facilitate criminal acts or a conspiracy to commit criminal acts, or if those communications are not related to the seeking or providing of legal advice.

J. I agree that I shall reveal to the Chief Defense Counsel and any other appropriate authorities, information relating to the representation of my client to the extent that I reasonably believe necessary to prevent the

commission of a future criminal act that I believe is likely to result in death or substantial bodily harm, or significant impairment of national security.

K. I understand and agree that nothing in this Affidavit and Agreement creates any substantive, procedural, or other rights for me as counsel or for my client(s).

Print Name: \_\_\_\_\_  
Address: \_\_\_\_\_  
Date: \_\_\_\_\_

State of \_\_\_\_\_ )  
County of \_\_\_\_\_ )

Sworn to and subscribed before me, by  
this day of \_\_\_\_\_, 2003.

Notary

My commission expires: \_\_\_\_\_

## 32 C.F.R. pt. 15:

### PART 15—REPORTING RELATIONSHIPS FOR MILITARY COMMISSION PERSONNEL

#### Sec.

##### 15.1 Purpose.

##### 15.2 Authority.

##### 15.3 Policies and procedures.

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

SOURCE: 68 FR 39395, July 1, 2003, unless otherwise noted.

#### § 15.1 Purpose.

This part establishes supervisory and performance evaluation relationships for military commission personnel.

#### § 15.2 Authority.

This part is issued pursuant to 32 CFR 9.7(a) and in accordance with Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," (3 CFR 2001 Comp., p. 918, 66 FR 57833) and 10 U.S.C. 113(d) and 140(b). The provisions of 32 CFR part 10 are applicable to this part.

#### § 15.3 Policies and Procedures.

(a) *Supervisory and performance evaluation relationships.* Individuals appointed, assigned, detailed, designated or employed in a capacity related to the conduct of military commission proceedings conducted in accordance with 32 CFR part 9 and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," shall be subject to the rela-

tionships set forth in paragraphs (a)(1) through (a)(9) of this section. Unless stated otherwise, the person to whom an individual "reports," as set forth in paragraphs (a)(1) through (a)(9) of this section, shall be deemed to be such individual's supervisor and shall, to the extent possible, fulfill all performance evaluation responsibilities normally associated with the function of direct supervisor in accordance with the subordinate's Military Service performance evaluation regulations.

(1) *Appointing Authority:* Any Appointing Authority designated by the Secretary of Defense pursuant to 32 CFR part 9 shall report to the Secretary of Defense in accordance with 10 U.S.C. 113(d).

(2) *Legal Advisor to Appointing Authority:* The Legal Advisor to the Appointing Authority shall report to the Appointing Authority.

(3) *Chief Prosecutor:* The Chief Prosecutor shall report to the Deputy General Counsel (Legal Counsel) of the Department of Defense and then to the General Counsel of the Department of Defense.

(4) *Prosecutors and Assistant Prosecutors:* Prosecutors and Assistant Prosecutors shall report to the Chief Prosecutor and then to the Deputy General Counsel (Legal Counsel) of the Department of Defense.

(5) *Chief Defense Counsel:* The Chief Defense Counsel shall report to the Deputy General Counsel (Personnel and Health Policy) of the Department of Defense and then to the General Counsel of the Department of Defense.

(6) *Detailed Defense Counsel:* Detailed Defense Counsel shall report to the Chief Defense Counsel and then to the Deputy General Counsel (Personnel and Health Policy) of the Department of Defense.

(7) *Review Panel members:* Members of the Review Panel shall report to the Secretary of Defense.

(8) *Commission members:* Commission members shall continue to report to their parent commands. The consideration or evaluation of the performance of duty as a member of a military commission is prohibited in preparing effectiveness, fitness, or evaluation reports of a commission member.

(9) Other personnel: All other military commission personnel, such as court reporters, interpreters, security personnel, bailiffs, and clerks detailed or employed by the Appointing Authority pursuant to 32 CFR 9.4(d), if not assigned to the Office of the Chief Prosecutor or the Office of the Chief Defense Counsel, shall report to the Appointing Authority or his designee.

(b) *Responsibilities of supervisory/reporting officials.* Officials designated in this part as supervisory/reporting officials shall:

(1) Supervise subordinates in the performance of their duties.

(2) Prepare fitness or performance evaluation reports and, as appropriate, process awards and citations for subordinates. To the extent practicable, a reporting official shall comply with the rated subordinate's Military Service regulations regarding the preparation of fitness or performance evaluation reports and in executing related duties.

140(b). The provisions of 32 CFR part 10 are applicable to this part.

#### §16.3 Available sentences.

(a) *General.* 32 CFR part 9 permits a military commission wide latitude in sentencing. Any lawful punishment or condition of punishment is authorized, including death, so long as the prerequisites detailed in 32 CFR part 9 are met. Detention associated with an individual's status as an enemy combatant shall not be considered to fulfill any term of imprisonment imposed by a military commission. The sentence determination should be made while bearing in mind that there are several principal reasons for a sentence given to those who violate the law. Such reasons include: punishment of the wrongdoer; protection of society from the wrongdoer; deterrence of the wrongdoer and those who know of his crimes and sentence from committing the same or similar offenses; and rehabilitation of the wrongdoer. In determining an appropriate sentence, the weight to be accorded any or all of these reasons rests solely within the discretion of commission members. All sentences should, however, be grounded in a recognition that military commissions are a function of the President's war-fighting role as Commander-in-Chief of the Armed Forces of the United States and of the broad deterrent impact associated with a sentence's effect on adherence to the laws and customs of war in general.

(b) *Conditions of imprisonment.* Decisions regarding the location designated for any imprisonment, the conditions under which a sentence to imprisonment is served, or the privileges accorded one during any period of imprisonment should generally not be made by the commission. Those decisions and actions, however, may be appropriate subjects for recommendation to the person making a final decision on the sentence in accordance with of 32 CFR 9.6(h).

(c) *Prospective recommendations for sentence modification.* A sentence imposed by military commission may be accompanied by a recommendation to suspend, remit, commute or otherwise modify the adjudged sentence in concert with one or more conditions upon

32 C.F.R. pt. 16:

## PART 16—SENTENCING

### Sec.

16.1 Purpose.

16.2 Authority.

16.3 Available sentences.

16.4 Sentencing procedures.

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

SOURCE: 68 FR 39396, July 1, 2003, unless otherwise noted.

#### §16.1 Purpose.

This part promulgates policy, assigns responsibilities, and prescribes procedures for matters related to sentencing of persons with regard to whom a finding of guilty is entered for an offense referred for trial by a military commission appointed pursuant to 32 CFR part 9 and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism" (3 CFR 2001 Comp., p. 918, 66 FR 57833).

#### §16.2 Authority.

This part is issued pursuant to 32 CFR 9.7(a) and in accordance with Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," and 10 U.S.C. 113(d) and

which the suspension, remission, commutation, or other modification is contingent (usually relating to the performance, behavior or conduct of the Accused). Unless otherwise directed, a decision or action in accordance with such a recommendation will be effected by direction or delegation to the Appointing Authority by the official making a final decision on the sentence in accordance with of 32 CFR 9.6(h).

#### **§ 16.4 Sentencing procedures.**

(a) *General.* 32 CFR part 9 permits the military commission substantial discretion regarding the conduct of sentencing proceedings. Sentencing proceedings should normally proceed expeditiously. In the discretion of the Presiding Officer, as limited by the Appointing Authority, reasonable delay between the announcement of findings and the commencement of sentencing proceedings may be authorized to facilitate the conduct of proceedings in accordance with of 32 CFR 9.6(b).

(b) *Information relevant to sentencing.* 32 CFR 9.6(e)(10) permits the Prosecution and Defense to present information to aid the military commission in determining an appropriate sentence. Such information may include a recommendation of an appropriate sentence, information regarding sentence ranges for analogous offenses (e.g., the sentencing range under the Federal Sentencing Guidelines that could be applicable to the Accused for the most analogous federal offenses), and other relevant information. Regardless of any presentation by the Prosecution or Defense, the military commission shall consider any evidence admitted for consideration prior to findings regarding guilt. The Presiding Officer may limit or require the presentation of certain information consistent with 32 CFR part 9 and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism".

(c) *Cases involving plea agreements.* In accordance with 32 CFR 9.6(a)(4), after determining the voluntary and informed nature of a plea agreement approved by the Appointing Authority, the military commission is bound to adjudge findings and a sentence pursuant to that plea agreement. Accord-

ingly, the Presiding Officer may exercise the authority granted in of 32 CFR 9.6(e) to curtail or preclude the presentation of information and argument relative to the military commission's determination of an appropriate sentence.

(d) *Special duties.* In cases involving plea agreements or recommendations for certain conditions of imprisonment or prospective sentence modification, the Prosecution and Defense shall provide whatever post-trial information or recommendation as is relevant to any subsequent decision regarding such condition or suspension, remission, commutation, or other modification recommendation associated with the sentence.

### **32 C.F.R. pt. 17:**

#### **PART 17—ADMINISTRATIVE PROCEDURES**

##### **Sec.**

- 17.1 Purpose.
- 17.2 Authority.
- 17.3 Commission personnel.
- 17.4 Interlocutory questions.
- 17.5 Implied duties of the presiding officer.
- 17.6 Disclosures.

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

**SOURCE:** 66 FR 39397, July 1, 2001, unless otherwise noted.

##### **§ 17.1 Purpose.**

This part promulgates policy, assigns responsibilities, and prescribes procedures for the conduct of trials by a military commission appointed pursuant to 32 CFR part 9 and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," (3 CFR 2001 Comp., p. 918, 66 FR 57833).

##### **§ 17.2 Authority.**

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

##### **§ 17.3 Commission personnel.**

(a) *Appointment and removal of Commission members.* (1) In accordance with

32 CFR part 9, the Appointing Authority shall appoint at least three but no more than seven members and one or two alternate members. The Appointing Authority may remove members and alternate members for good cause. In the event a member (or alternate member) is removed for good cause, the Appointing Authority may replace the member, direct that an alternate member serve in the place of the original member, direct that proceedings simply continue without the member, or convene a new commission. In the absence of guidance from the Appointing Authority regarding replacement, the Presiding Officer shall select an alternate member to replace the member in question.

(2) The Presiding Officer shall determine if it is necessary to conduct or permit questioning of members (including the Presiding Officer) on issues of whether there is good cause for their removal. The Presiding Officer may permit questioning in any manner he deems appropriate. Consistent with 32 CFR part 9, any such questioning shall be narrowly focused on issues pertaining to whether good cause may exist for the removal of any member.

(3) From time to time, it may be appropriate for a Presiding Officer to forward to the Appointing Authority information and, if appropriate, a recommendation relevant to the question of whether a member (including the Presiding Officer) should be removed for good cause. While awaiting the Appointing Authority's decision on such matter, the Presiding Officer may elect either to hold proceedings in abeyance or to continue. The Presiding Officer may issue any appropriate instructions to the member whose continued service is in question. A military commission shall not engage in deliberations on findings or sentence prior to the Appointing Authority's decision in any case in which the Presiding Officer has recommended a member's removal.

(b) *Military commission security officer.* The Appointing Authority may detail a Security Officer to advise a military commission on matters related to classified and protected information. In addition to any other duties assigned by the Appointing Authority, the Security Officer shall ensure that all classified

or protected evidence and information is appropriately safeguarded at all times and that only personnel with the appropriate clearances and authorizations are present when classified or protected materials are presented before military commissions.

(c) *Other military commission personnel.* The Appointing Authority may detail court reporters, interpreters, security personnel, bailiffs, clerks, and any other personnel to a military commission as deemed necessary. In the absence of a detaching by the Appointing Authority, the Chief Prosecutor shall be responsible to ensure the availability of necessary or appropriate personnel to facilitate the impartial and expeditious conduct of full and fair trials by military commission.

#### §17.4 Interlocutory questions.

(a) *Certification of interlocutory questions.* The Presiding Officer shall generally adjudicate all motions and questions that arise during the course of a trial by military commission. In accordance with 32 CFR 9.4(a)(5)(iv), however, the Presiding Officer shall certify all interlocutory questions, the disposition of which would effect a termination of proceedings with respect to a charge, for decision by the Appointing Authority. In addition, the Presiding Officer may certify other interlocutory questions to the Appointing Authority as the Presiding Officer deems appropriate.

(b) *Submission of interlocutory questions.* The Presiding Officer shall determine what, if any, documentary or other materials should be forwarded to the Appointing Authority in conjunction with an interlocutory question.

(c) *Effect of interlocutory question certification on proceedings.* While decision by the Appointing Authority is pending on any certified interlocutory question, the Presiding Officer may elect either to hold proceedings in abeyance or to continue.

#### §17.5 Implied duties of the presiding officer.

The Presiding Officer shall ensure the execution of all ancillary functions necessary for the impartial and expeditious conduct of a full and fair trial by military commission in accordance

with 32 CFR part 9. Such functions include, for example, scheduling the time and place of convening of a military commission, ensuring that an oath or affirmation is administered to witnesses and military commission personnel as appropriate, conducting appropriate in camera meetings to facilitate efficient trial proceedings, and providing necessary instructions to other commission members. The Presiding Officer shall rule on appropriate motions or, at his discretion consistent with 32 CFR part 9, may submit them to the commission for decision or to the Appointing Authority as a certified interlocutory question.

**§17.6 Disclosures.**

(a) *General.* Unless directed otherwise by the Presiding Officer upon a showing of good cause or for some other reason, counsel for the Prosecution and the Defense shall provide to opposing counsel, at least one week prior to the scheduled convening of a military commission, copies of all information intended for presentation as evidence at trial, copies of all motions the party intends to raise before the military commission, and names and contact information of all witnesses a party intends to call. Motions shall also be provided to the Presiding Officer at the time they are provided to opposing

counsel. Unless directed otherwise by the Presiding Officer, written responses to any motions will be provided to opposing counsel and the Presiding Officer no later than three days prior to the scheduled convening of a military commission.

(b) *Notifications by the prosecution.* The Prosecution shall provide the Defense with access to evidence known to the Prosecution that tends to exculpate the Accused as soon as practicable, and in no instance later than one week prior to the scheduled convening of a military commission.

(c) *Notifications by the defense.* The Defense shall give notice to the Prosecution of any intent to raise an affirmative defense to any charge at least one week prior to the scheduled convening of a military commission.

(d) *Evidence related to mental responsibility.* If the Defense indicates an intent to raise a defense of lack of mental responsibility or introduce expert testimony regarding an Accused's mental condition, the prosecution may require that the Accused submit to a mental examination by a military psychologist or psychiatrist, and both parties shall have access to the results of that examination.

Army Regulation 190-8  
OPNAVINST 3461.6  
AFJI 31-304  
MCO 3461.1

Military Police

# **Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees**

Headquarters  
Departments of the Army,  
the Navy, the Air Force,  
and the Marine Corps  
Washington, DC  
1 October 1997

**UNCLASSIFIED**



Headquarters  
Departments of the Army,  
the Navy, the Air Force,  
and the Marine Corps  
Washington, DC  
1 October 1997

\*Army Regulation 190-8  
\*OPNAVINST 3461.6  
\*AFJI 31-304  
\*MCO 3461.1

Effective 1 November 1997

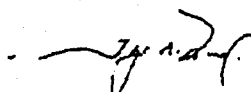
## Military Police

### Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees

By Order of the Secretary of  
the Navy:

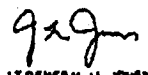
By Order of the Secretary of  
the Air Force:

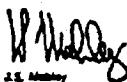
By Order of the Secretary of  
the Navy:

  
TODD G. WEST, JR.  
Secretary of the Army

J.L. JOHNSON  
Admiral, United States Navy  
Chief of Naval Operations  
Acting

RICHARD A. COLEMAN  
Colonel, USAF  
Chief of Security Police

  
LT GENERAL A.L. JONES, USMC  
Marine Corps Deputy Chief of Staff  
for Plans, Policies and Operations

  
J.S. Malley  
Rear Admiral, United States Navy  
Director, Navy Staff

**History.** This printing publishes a revision of this publication. Because the publication has been extensively revised the changed portions have not been highlighted.

**Summary.** This regulation implements Department Of Defense Directive 2310.1 and establishes policies and planning guidance for the treatment, care, accountability, legal status, and administrative procedures for Enemy Prisoners of War, Civilian Internees, Retained Persons, and Other Detainees. This regulation is a consolidation of Army Regulation 190-8 and Army Regulation 190-37 and incorporates SECNAV Instruction 3461.3 and Air Force Joint Instruction 31-304. Policy and procedures established herein apply to the services and their capabilities to the extent that they are resourced and organized for enemy prisoner of war operations.

**Applicability.** This is a multi-service regulation. It applies to the Army, Navy, Air Force and Marine Corps and to their Reserve components when lawfully ordered to active duty under the provisions of Title 10 United States Code.

**Proponent and exception authority.** The proponent of this regulation is the Deputy Chief of Staff for Operations and Plans. The proponent has the authority to approve

exceptions to this regulation that are consistent with controlling law and regulation. Proponents may delegate the approval authority, in writing, to a division chief within the proponent agency in the grade of colonel or the civilian equivalent.

**Army management control process.** The Regulation contains management control provisions in accordance with AR 11-2, but does not contain checklists for conducting management control. Reviews are used to accomplish assessment of management controls.

**Supplementation.** Army supplementation of this regulation and establishment of command or local forms is prohibited without prior approval from HQDA (DAMO-ODL), WASH DC 20310. Navy, Marine Corps and Air Force supplementation of this regulation is authorized, but is not required. If supplements are issued, major or second echelon commands will furnish one copy of each supplement to their headquarters, as follows: Navy, to the Chief of Naval Operations (NS11), 2000 Navy Pentagon, Washington DC 20350-2000, Marine Corps, to the Commandant of the Marine Corps, HQ USMC (POS-10) 2 Navy Annex, Washington DC, 20380-1775 11), and Air Force, to HQ USAF/SPO,

1340 Air Force Pentagon, Washington, DC 20330-1340.

**Suggested Improvements.** Users are invited to send comments and suggested improvements through channels as follows: HQDA (DAMO-ODL), WASH DC 20310-0440.

**Distribution.** Army: Distribution of this regulation is made in accordance with initial distribution number (IDN) 092120, intended for command levels A, B, C, D, and E for Active Army, Army National Guard, U. S. Army Reserve.

Navy: SNDL A (Navy Department); B5 (Coast Guard); (COMDTCCOGARD, only) 21A (Fleet Commanders in Chief); 22A (Fleet Commanders); 23 (Force Commanders); 24 (Type Commanders); 26A (Amphibious Groups); 28 (Squadron, Division, and Group Commanders—Ships); 41A (COM-SC); SECNAV/OPNAV Directives Control Office, Washington Navy Yard Bldg 200, 901 M Street SE, Washington DC 20374-3074

Air Force: F

Marine Corps: PCN 10203324000

\*This regulation supersedes AR 190-8, 1 June 1982, and rescinds AR 190-37, 4 March 1987. This regulation also rescinds DA Form 5451-R, August 1985; DA Form 5452-R, August 1985; and DA Form 5878, January 1991.

AR 190-8/OPNAVINST 3461.6/AFJI 31-304/MCO 3461.1 • 1 October 1997

UNCLASSIFIED

medical annex of OPLANs, OPORTDs and contingency plans includes procedures for treatment of EPW, CI, RP, and ODs. Medical support will specifically include:

(a) First aid and all sanitary aspects of food service including provisions for potable water, pest management, and entomological support.

(b) Preventive medicine.

(c) Professional medical services and medical supply.

(d) Reviewing, recommending, and coordinating the use and assignment of medically trained EPW, CI, RP and OD personnel and medical material.

(e) Establishing policy for medical repatriation of EPW, CI and RP and monitoring the actions of the Mixed Medical Commission.

h. U. S. Army Criminal Investigation Command (USACIDC). USACIDC will provide criminal investigative support to EPW, CI and RP Camp Commanders per AR 193-2.

#### 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 in accordance with 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 proper 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.

#### 1-8. Tribunals

a. In accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

b. A competent tribunal shall determine the status of 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 enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.

c. A competent tribunal shall be composed of three commissioned officers, one of whom must be of a field grade. The senior officer shall serve as President of the Tribunal. Another non-voting officer, preferably an officer in the Judge Advocate General Corps, shall serve as the recorder.

d. The convening authority shall be a commander exercising general courts-martial convening authority.

#### e. Procedures.

(1) Members of the Tribunal and the recorder shall be sworn. The recorder shall be sworn first by the President of the Tribunal. The recorder will then administer the oath to all voting members of the Tribunal to include the President.

(2) A written record shall be made of proceedings.

(3) Proceedings shall be open except for deliberation and voting by the members and testimony or other matters which would compromise security if held in the open.

(4) Persons whose status is to be determined shall be advised of their rights at the beginning of their hearings.

(5) Persons whose status is to be determined shall be allowed to attend all open sessions and will be provided with an interpreter if necessary.

(6) Persons whose status is to be determined shall be allowed to call witnesses if reasonably available, and to question those witnesses called by the Tribunal. Witnesses shall not be considered reasonably available if, as determined by their commanders, their presence at a hearing would affect combat or support operations. In these cases, written statements, preferably sworn, may be submitted and considered as evidence.

(7) Persons whose status is to be determined have a right to testify or otherwise address the Tribunal.

(8) Persons whose status is to be determined may not be compelled to testify before the Tribunal.

(9) Following the hearing of testimony and the review of documents and other evidence, the Tribunal shall determine the status of the subject of the proceeding in closed session by majority vote. Preponderance of evidence shall be the standard used in reaching this determination.

(10) A written report of the tribunal decision is completed in each case. Possible board determinations are:

(a) EPW.

(b) Recommended RP, entitled to EPW protections, who should be considered for certification as a medical, religious, or volunteer aid society RP.

(c) Innocent civilian who should be immediately returned to his home or released.

(d) Civilian internee who for reasons of operational security, or probable cause incident to criminal investigation, should be detained.

f. The recorder shall prepare the record of the Tribunal within three work days of the announcement of the tribunal's decision. The record will then be forwarded to the first Staff Judge Advocate in the internment facility's chain of command.

g. 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 proceedings to determine what acts they have committed and what penalty should be imposed. The record of every Tribunal proceeding resulting in a determination denying EPW status shall be reviewed for legal sufficiency when the record is received at the office of the Staff Judge Advocate for the convening authority.

#### 1-7. The National Prisoner of War Information Center (NPWIC)

The NPWIC will—

a. Forward blocks of ISNs to designated Branch PWIC in Theater and CONUS, as required.

b. Obtain and store information concerning EPW, CI and RP, and their confiscated personal property. Information will be collected and stored on each EPW, CI, and RP captured and detained by U.S. Armed Forces. This includes those EPW, RP, who were captured by the United States but are in custody of other powers and those who have been released or repatriated. EPW, CI and RP cannot be forced to reveal any information however they are required to provide their name, rank, serial number and date of birth. The Geneva Convention requires the NPWIC to collect and store the following information for EPW, RP:

- (1) Complete name.
- (2) ISN.
- (3) Rank.
- (4) Serial number.
- (5) Date of birth.
- (6) City of birth.
- (7) Country of birth.
- (8) Name and address of next of kin.
- (9) Date of capture.
- (10) Place of capture.

(11) Capturing unit.

(12) Circumstances of capture.

(13) Location of confiscated personal property.

(14) Nationality.

(15) General statement of health.

(16) Nation in whose armed services the individual is serving.

(17) Name and address of a person to be notified of the individual's capture.

(18) Address to which correspondence may be sent.

(19) Certificates of death or duly authenticated lists of the dead.

(20) Information showing the exact location of war graves together with particulars of the dead.

(21) Notification of capture.

(22) List of personal articles of value not restored upon repatriation.

c. Obtain and store information concerning CI and ODs who are kept in the custody of U.S. Armed Forces who are subjected to assigned residence, or who were interned and then released. The following information will be collected:

(1) Any particulars that may assist in the individual's identification. This information shall include at least the person's surname, first names, place and date of birth, nationality, last residence and distinguishing characteristics, the first name of the father and the maiden name of the mother, the date, place and nature of the action taken with regard to the individual, the address at which correspondence may be sent and the name and address of the person to be informed.

(2) The individual's personal data for notification of his or her internment, state of health, and changes to this data.

(3) Certificates of death or authenticated lists of the dead and information showing the location of graves.

(4) Authenticated lists of personal valuables left by these protected persons.

(5) Information pertaining to children living in territories occupied by the United States. This will include all data necessary for identifying children whose identity is in doubt.

d. Process all inquiries concerning EPW and RP captured by U.S. Armed Forces.

e. Make reports to the ICRC, the State Department, and other Federal agencies as required.

f. Provide to the adverse party via the ICRC's Central Tracing Agency (CTA) all pertinent information pertaining to EPW, CI, and RP, in custody of the U.S. Armed Forces.

g. Transmit via the CTA/ICRC/PP, all official documents and information on judicial proceedings concerning EPW and RP captured, interned, retained or detained by U.S. Armed Forces.

h. Information and Property Transfers.

(1) In response to an inquiry, the NPWIC will forward all information and documents to the CTA or PP.

(2) Valuables and personal property which can be returned to a released or repatriated person will be forwarded through the CTA or PP.

(3) Valuables and personal property of deceased EPW/RP, which can be released, will be forwarded to the next of kin through the CTA or PP.

i. The ICRC/PP transmits information, documents, and personal effects to the State it represents as follows:

(1) If civilians are concerned, to their countries of origin and/or residence.

(2) If combatants or EPW, CI, and RP are concerned, to their country of origin or to the Power on which they depend.

#### 1-8. The Branch PWIC

a. The Branch PWIC functions as the field operations agency for the NPWIC. It is the central agency responsible to maintain information on all EPW, CI and RP and their personal property within an assigned theater of operations or in CONUS.

b. The Branch PWIC serves as the theater repository for information pertaining to:

(1) Accountability of EPW, CI, and RP and implementation of DOD policy.

“(A) an energy conservation measure, as defined in section 551; or

“(B) a water conservation measure that improves the efficiency of water use, is life-cycle cost-effective, and involves water conservation, water recycling or reuse, more efficient treatment of wastewater or stormwater, improvements in operation or maintenance efficiencies, retrofit activities, or other related activities, not at a Federal hydro-electric facility.”

Deadline.  
42 USC 8287  
note.

(f) **REVIEW.**—Not later than 180 days after the date of the enactment of this Act, the Secretary of Energy shall complete a review of the Energy Savings Performance Contract program to identify statutory, regulatory, and administrative obstacles that prevent Federal agencies from fully utilizing the program. In addition, this review shall identify all areas for increasing program flexibility and effectiveness, including audit and measurement verification requirements, accounting for energy use in determining savings, contracting requirements, including the identification of additional qualified contractors, and energy efficiency services covered. The Secretary shall report these findings to Congress and shall implement identified administrative and regulatory changes to increase program flexibility and effectiveness to the extent that such changes are consistent with statutory authority.

42 USC 8287  
note.

(g) **EXTENSION OF AUTHORITY.**—Any energy savings performance contract entered into under section 801 of the National Energy Conservation Policy Act (42 U.S.C. 8287) after October 1, 2003, and before the date of enactment of this Act, shall be deemed to have been entered into pursuant to such section 801 as amended by subsection (a) of this section.

10 USC 801 note. **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.

**SEC. 1092. ACTIONS TO PREVENT THE ABUSE OF DETAINEES.**

10 USC 801 note.

(a) **POLICIES REQUIRED.**—The Secretary of Defense shall ensure that policies are prescribed not later than 150 days after the date of the enactment of this Act regarding procedures for Department of Defense personnel and contractor personnel of the Department of Defense intended to ensure that members of the Armed Forces, and all persons acting on behalf of the Armed Forces or within facilities of the Armed Forces, treat persons detained by the United States Government in a humane manner consistent with the international obligations and laws of the United States and the policies set forth in section 1091(b).

(b) **MATTERS TO BE INCLUDED.**—In order to achieve the objective stated in subsection (a), the policies under that subsection shall specify, at a minimum, procedures for the following:

(1) Ensuring that each commander of a Department of Defense detention facility or interrogation facility—

(A) provides all assigned personnel with training, and documented acknowledgment of receiving training, regarding the law of war, including the Geneva Conventions; and

(B) establishes standard operating procedures for the treatment of detainees.

(2) Ensuring that each Department of Defense contract in which contract personnel in the course of their duties interact with individuals detained by the Department of Defense on behalf of the United States Government include a requirement that such contract personnel have received training, and documented acknowledgment of receiving training, regarding the international obligations and laws of the United States applicable to the detention of personnel.

(3) Providing all detainees with information, in their own language, of the applicable protections afforded under the Geneva Conventions.

(4) Conducting periodic unannounced and announced inspections of detention facilities in order to provide continued oversight of interrogation and detention operations.

(5) Ensuring that, to the maximum extent practicable, detainees and detention facility personnel of a different gender are not alone together.

(c) **SECRETARY OF DEFENSE CERTIFICATION.**—The Secretary of Defense shall certify that all Federal employees and civilian contractors engaged in the handling or interrogation of individuals detained by the Department of Defense on behalf of the United States Government have fulfilled an annual training requirement on the law of war, the Geneva Conventions, and the obligations of the United States under international law.

**SEC. 1092. REPORTING REQUIREMENTS.**

(a) **TRANSMISSION OF REGULATIONS, ETC.**—Not later than 30 days after the date on which regulations, policies, and orders are first prescribed under section 1092(a), the Secretary of Defense shall transmit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives copies of such regulations, policies, or orders, together with a report on steps taken to the date of the report to implement section 1092.

(b) **ONE-YEAR IMPLEMENTATION REPORT.**—Not later than one year after the date on which regulations, policies, and orders are first prescribed under section 1092(a), the Secretary shall submit to such committees a report on further steps taken to implement section 1092 to the date of such report.

(c) **ANNUAL REPORT.**—Nine months after the date of the enactment of this Act and annually thereafter, the Secretary shall submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives a report for the preceding 12-months containing the following:

(1) Notice of any investigation into any violation of international obligations or laws of the United States regarding the treatment of individuals detained by the United States Armed Forces or by a person providing services to the Department of Defense on a contractual basis, if the notice will not compromise any ongoing criminal or administrative investigation or prosecution.

(2) General information on the foreign national detainees in the custody of the Department of Defense during the 12-month period covered by the report, including the following:

(A) The best estimate of the Secretary of Defense of the total number of detainees in the custody of the Department as of the date of the report.

## **COALITION PROVISIONAL AUTHORITY ORDER NUMBER 48**

### **DELEGATION OF AUTHORITY REGARDING AN IRAQI SPECIAL TRIBUNAL**

*Pursuant* to my authority as Administrator of the Coalition Provisional Authority (CPA), and under the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolution 1483 (2003), Resolution 1500 (2003), and Resolution 1511 (2003),

*Noting* the call in U.N. Security Council Resolution 1483 for accountability for the crimes and atrocities committed by the previous Iraqi regime,

*Acting* on the appeal by the U.N. Security Council in Resolution 1483 to Member States to deny safe haven to those members of the previous Iraqi regime who are alleged to be responsible for crimes and atrocities and to support actions to bring them to justice;

*Acknowledging* that the Governing Council, reflecting the general concerns and interests of the Iraqi people, has expressed a desire to establish a Special Tribunal to try members of the Ba'athist regime accused of atrocities and war crimes,

*Determined* to prevent any threat to public order by revenge actions or vigilantism and to promote the rule of law in accordance with applicable international law,

I hereby promulgate the following:

#### **Section 1 Delegation of Authority**

- 1) The Governing Council is hereby authorized to establish an Iraqi Special Tribunal (the "Tribunal") to try Iraqi nationals or residents of Iraq accused of genocide, crimes against humanity, war crimes or violations of certain Iraqi laws, by promulgating a statute, the proposed provisions of which have been discussed extensively between the Governing Council and the CPA and are set forth at Appendix A.
- 2) The statute shall establish the Tribunal, including its chambers, and set forth its jurisdiction, competence, and organization:
- 3) The statute shall provide rules for the appointment of qualified judges, prosecutors, and a director of administration.
- 4) The Governing Council shall be authorized to promulgate elements of crimes, the provisions of which shall be coordinated with the CPA.

5) The Governing Council may delegate to the judges of the Tribunal the power to promulgate rules of procedure, the provisions of which shall be coordinated with the Governing Council and the CPA.

6) The Administrator reserves the authority to alter the statute creating the Iraqi Special Tribunal, or any elements of crimes or rules of procedure developed for the Tribunal, if required in the interests of security.

## **Section 2**

### **Terms and Conditions**

The authority delegated under Section 1 of this Order shall be subject to the following terms and conditions:

1) The Governing Council will ensure that it promulgates a description of the elements that will apply to the crimes listed in the statute establishing the Tribunal, and that these elements are consistent with Iraqi law, as modified by CPA Orders, and international law.

2) The Governing Council will ensure that the Tribunal meets, at a minimum, international standards of justice.

3) In the event that, prior to the final transfer of governance authority to the transitional Iraqi administration, a conflict arises between any promulgation by the Governing Council or any ruling or judgment by the Tribunal and any promulgation of the CPA, the promulgation of the CPA shall prevail.

4) Non-Iraqi nationals may be appointed as judges of the Special Tribunal.

## **Section 3**

### **Effective Date**

This Order shall enter into force on the date of signature and shall remain in force unless rescinded in writing by me or until the establishment of a representative, internationally recognized government of Iraq.

 12/10/03  
L. Paul Bremer III  
Administrator

CPA/ORD/9 Dec 2003/48



**PART TWO**  
**Rights of the Accused**

**Article 20.**

- a) All persons shall be equal before the Tribunal.
- b) Everyone shall be presumed innocent until proven guilty before the Tribunal in accordance with the law.
- c) In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of the Statute and the rules of procedure made hereunder.
- d) In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to a fair hearing conducted impartially and to the following minimum guarantees:
  - 1. to be informed promptly and in detail of the nature, cause and content of the charge against him;
  - 2. to have adequate time and facilities for the preparation of his defense and to communicate freely with counsel of his own choosing in confidence. The accused is entitled to have non-Iraqi legal representation, so long as the principal lawyer of such accused is Iraqi;
  - 3. to be tried without undue delay;
  - 4. to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
  - 5. to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute and Iraqi law; and
  - 6. not to be compelled to testify against himself or to confess guilt, and to remain silent, without such silence being a consideration in the determination of guilt or innocence.

**SECTION EIGHT**  
**Trial Proceedings**

**Article 21.**

## **STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA**

....

### **Article 20: Rights of the Accused**

1. All persons shall be equal before the International Tribunal for Rwanda.
2. In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to Article 21 of the Statute.
3. The accused shall be presumed innocent until proven guilty according to the provisions of the present Statute.
4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
  - (a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
  - (b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;
  - (c) To be tried without undue delay;
  - (d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
  - (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
  - (f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal for Rwanda;
  - (g) Not to be compelled to testify against himself or herself or to confess guilt.

**Statute of the International Tribunal for the Prosecution of Persons  
Responsible for Serious Violations of International Humanitarian Law  
Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc.  
S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security  
Council on 25 May 1993, U.N. Doc. S/RES/827 (1993).**

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Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter referred to as "the International Tribunal") shall function in accordance with the provisions of the present Statute.

....

**Article 21**

**Rights of the accused**

1. All persons shall be equal before the International Tribunal.
2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.
3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
  - (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
  - (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
  - (c) to be tried without undue delay;
  - (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
  - (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;
  - (g) not to be compelled to testify against himself or to confess guilt.

10 U.S.C.A. § 3037

This document has been updated. Use KEYCITE.  
Effective: [See Text Amendments]

United States Code Annotated Currentness

Title 10. Armed Forces (Refs &amp; Annos)

Subtitle B. Army

Part I. Organization

Chapter 305. The Army Staff

→ § 3037. Judge Advocate General, Assistant Judge Advocate General, and general officers of  
Judge Advocate General's Corps: appointment; duties

(a) The President, by and with the advice and consent of the Senate, shall appoint the Judge Advocate General, the Assistant Judge Advocate General, and general officers of the Judge Advocate General's Corps, from officers of the Judge Advocate General's Corps who are recommended by the Secretary of the Army. An officer appointed as the Judge Advocate General or Assistant Judge Advocate General normally holds office for four years. However, the President may terminate or extend the appointment at any time. If an officer who is so appointed holds a lower regular grade, he shall be appointed in the regular grade of major general.

(b) The Judge Advocate General shall be appointed from those officers who at the time of appointment are members of the bar of a Federal court or the highest court of a State or Territory, and who have had at least eight years of experience in legal duties as commissioned officers.

(c) The Judge Advocate General, in addition to other duties prescribed by law--

(1) is the legal adviser of the Secretary of the Army and of all officers and agencies of the Department of the Army;

(2) shall direct the members of the Judge Advocate General's Corps in the performance of their duties; and

(3) shall receive, revise, and have recorded the proceedings of courts of inquiry and military commissions.

(d) Under regulations prescribed by the Secretary of Defense, the Secretary of the Army, in selecting an officer for recommendation to the President under subsection (a) for appointment as the Judge Advocate General or Assistant Judge Advocate General, shall ensure that the officer selected is recommended by a board of officers that, insofar as practicable, is subject to the procedures applicable to selection boards convened under chapter 36 of this title.

CREDIT(S)

(Aug. 10, 1956, c. 1041, 70A Stat. 164; Sept. 2, 1958, Pub.L. 85-861, § 33(a)(18), 72 Stat. 1565; Oct. 5, 1994, Pub.L. 103-337, Div. A, Title V, § 504(a), 108 Stat. 2750.)