109th Congress, 2d Session – – – – – – – – – – – – – House Document 109–133

PROPOSED LEGISLATION: MILITARY COMMISSIONS ACT OF 2006

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

A DRAFT OF PROPOSED LEGISLATION ENTITLED THE "MILITARY COMMISSIONS ACT OF 2006".

SEPTEMBER 7, 2006.—Message and accompanying papers referred to the Committees on Armed Services, the Judiciary, and International Relations and ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE

49–011 WASHINGTON : 2006

To the Congress of the United States:

I transmit for the consideration of the Congress draft legislation entitled the "Military Commissions Act of 2006." This draft legislation responds to the Supreme Court of the United States decision in Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006), by establishing for the first time in our Nation's history a comprehensive statutory structure for military commissions that would allow for the fair and effective prosecution of captured members of al Qaeda and other unlawful enemy combatants. The Act also addresses the Supreme Court's holding that Common Article 3 of the Geneva Conventions applies to the conflict with al Qaeda by providing definitions rooted in United States law for the standards of conduct prescribed by Common Article 3.

The military commission procedures contained in this draft legislation reflect the result of an extended deliberation both within the executive branch and between representatives of my Administration and Members of Congress. The draft legislation would establish a Code of Military Commissions that tracks the courts-martial procedures of the Uniform Code of Military Justice, but that departs from those procedures where they would be impracticable or inappropriate for the trial of unlawful enemy combatants captured in the midst of an ongoing armed conflict, under circumstances far different from those typically encountered by military prosecutors.

Five years after the mass murders of 9/11, it is time for the United States to begin to prosecute captured al Qaeda members for the serious crimes that many of them have committed against United States citizens and our allies abroad. As we provide terrorists the justice and due process that they denied their victims, we demonstrate that our Nation remains committed to the rule of law.

I ask that the Congress carefully consider this legislation and respectfully urge its speedy passage for enactment into law.

GEORGE W. BUSH.

THE WHITE HOUSE, *September 6, 2006.*

SUMMARY OF "MILITARY COMMISSIONS ACT OF 2006"

The Military Commissions Act of 2006 responds to the Supreme Court's decision in Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006), by establishing military commissions for the trial of captured members of al Qaeda and other unlawful enemy combatants. The procedures establishing commissions under the Act take the Uniform Code of Military Justice ("UCMJ") as a starting point, but depart from those procedures to reflect the unique context of the prosecution of unlawful enemy combatants captured all over the globe under circumstances far different from those encountered by domestic law enforcement. The commissions established under this Act will provide full and fair trials to unlawful enemy combatants accused of serious offenses and will satisfy all relevant provisions of United States law and international treaties. In addition, the Act addresses the implications of the Supreme Court's holding that Common Article 3 applies to the conflict with al Qaeda by providing definitions rooted in United States law as to the standards of conduct that will apply in United States courts.

SECTION 1. SHORT TITLE. This section provides that the title of the Act shall be the "Military Commissions Act of 2006."

SEC. 2. FINDINGS. The findings explain the circumstances that occasion the need for the Act.

SEC. 3. AUTHORIZATION FOR MILITARY COMMISSIONS. This section provides the explicit statutory authorization for the establishment of the military commissions described by this Act. The section makes clear that the affirmative establishment of commissions here does not deprive the President of his general authority, recognized by Article 21 of the UCMJ, to establish commissions under other circumstances as dictated by military necessity.

SEC. 4. MILITARY COMMISSIONS. Subsection (a) creates procedures governing commissions that parallel those in the UCMJ, Chapter 47 of Title 10, United States Code. Subsection (b) requires the Secretary of Defense to submit to the Armed Services Committees of the Senate and House of Representatives supplemental regulations promulgated to govern the procedures and rules of evidence to be applied before military commissions. It is anticipated that the Department of Defense will issue a Manual for Military Commissions generally tracking the Manual for Courts-Martial. The Secretary is also required to submit any modifications to the initial manual 60 days before they go into effect. The Detainee Treatment Act of 2005 ("DTA") imposed a similar reporting requirement on the procedures governing Combatant Status Review Tribunals.

The provisions of subsection (a) are detailed below. That subsection establishes the "Code of Military Commissions," which will be codified after the UCMJ as Chapter 47A of Title 10, United States Code, §§ 948a-950x.

CHAPTER 47A—MILITARY COMMISSIONS
SUBCHAPTER I—GENERAL PROVISIONS

§ 948a. Definitions. This section defines terms for Chapter 47A. Most significant is the definition of "unlawful enemy combatants," which identifies those alien enemy combatants subject to prosecution by military commissions. This definition largely tracks the one employed in the context of Combatant Status Review Tribunals, but it is broader, in that it includes not only al Qaeda members, but also those who are part of or associated with any force or organization (including an international terrorist organization) engaged in armed conflict against the United States in violation of the laws of war. At the same time, the definition expressly excludes those who abide by the laws of war, such as members of legitimate armed forces, as well as non-combatants under the Geneva Conventions.

§ 948b. Military commissions generally. This section outlines the purpose of this chapter and makes clear that while the procedures here track the UCMJ, there are material differences reflecting the new challenges arising out the prosecution of international terrorists. Therefore, courts should not treat existing court-martial procedures, or court precedents interpreting them, as binding authority, nor should they otherwise be unduly influenced by those precedents. In addition, the section makes clear that the procedures for military commissions satisfy Common Article 3's requirement of "regularly constituted courts" for all purposes under federal law.

§ 948c. Persons subject to military commissions. This section describes the category of persons subject to trial by military commission. While courts-martial try the uniformed members of the Armed Services, commissions established under this chapter try unlawful combatants as defined by section 948a. This section parallels UCMJ Art. 2.

§ 948d. Jurisdiction of military commissions. This section sets out the jurisdiction of military commissions. Military commissions shall have personal jurisdiction over alien unlawful enemy combatants as that term is defined in section 948a and subject matter jurisdiction over all offenses provided for in this chapter. This section parallels UCMJ Art. 17 and 18.

SUBCHAPTER II—COMPOSITION OF MILITARY COMMISSIONS

§ 948h. Who may convene military commissions. This section parallels UCMJ Art. 22, which provides that courts-martial may be convened by the President, the Secretary of Defense, or any commanding military officer. The military commissions under this Act will be convened by the Secretary of Defense or a person operating pursuant to his authority.

§ 948i. Who may serve on military commissions. This section closely parallels UCMJ Art. 25 and provides that the members of a military commission shall be commissioned officers in the Armed Forces.

§ 948j. Military judge of a military commission. This section provides that the same military judges who preside over courts-martial shall preside over military commissions. This section tracks UCMJ Art. 26 and contains the same protections for judicial independence. The section departs from existing practice under military commissions by providing that the military judge is not a voting member of the commission for any purpose, and he may not consult with members of the commission outside the presence of counsel and (except for circumstances described in section 949d) the accused.

§ 948k. Detail of trial and defense counsel. This section provides for the appointment of JAG attorneys to serve as the prosecution ("trial counsel") and defense counsel. The section makes clear that defense counsel shall be appointed for the accused as soon as practicable after charges are sworn. The qualifications and modes of appointment of counsel parallel UCMJ Art. 27 with the exception that, for military commissions, civilian prosecutors may also participate, at the discretion of the Secretary of Defense.

§ 948*l*. Detail or employment of reporters and interpreters. This section provides for the appointment of court reporters and interpreters for commission proceedings. The section closely parallels UCMJ Art. 28 but makes clear that the accused shall have the right to an interpreter to assist him in working with defense counsel.

§ 948m. Number of members; excuse of members; absent and additional members. This section tracks UCMJ Art. 29 in requiring a minimum of five members of the commission (except for death penalty cases, where twelve are required) and providing for the replacement of members who are excused based on disability or good cause.

SUBCHAPTER III—PRE-TRIAL PROCEDURE

§ 948q. Charges and specifications. This section tracks UCMJ Art. 30 in requiring that the charges and specifications against the accused be sworn. Under the UCMJ, the swearing of charges leads to an Article 32 investigation, a pre-charging proceeding that is akin to, but considerably more protective than, the civilian grand jury. Such a proceeding is unnecessary and inappropriate for the trial of captured terrorists, who are already subject to detention under the laws of war. Upon swearing of charges, the accused shall be informed of the charges and provided with counsel as soon as practicable.

§ 948r. Compulsory self-incrimination prohibited; statements obtained by torture. This section makes clear that the accused shall not be required to testify

against himself at a commission proceeding. UCMJ Art. 31 provides even broader protection than exists in civilian investigations, requiring that the accused be given *Miranda* warnings before facing any interrogation at all. This generous protection is provided to those who serve in our Nation's armed forces, but it is inappropriate for the trial of terrorists and could frustrate interrogations that are necessary for the national security. This section therefore does not include a *Miranda* requirement.

The section also provides the statements obtained by torture shall not be admissible against the accused before a military commission. Consistent with United States treaty obligations, subsection (b) makes clear that evidence obtained by torture shall be inadmissible, except against a person accused of torture as evidence that the statement was made.

Subsection (c) addresses statements obtained by allegedly coercive tactics falling short of torture. This section provides that a statement allegedly obtained by coercion shall not be admitted if the military judge finds that the circumstances under which the statement was made render it unreliable or lacking in probative value. Because "coercion" is a notoriously difficult concept to define under the law, this subsection directs the military judge to focus upon how the circumstances impact the statement's reliability and relevance, rather than whether or not those circumstances would satisfy any particular legal test for "coercion."

§ 948s. Service of charges. Tracking UCMJ Art. 35, this section requires that trial counsel serve upon the accused a copy of the charges in English and in the accused's native language.

SUBCHAPTER IV—TRIAL PROCEDURE

§ 949a. Rules. This section makes clear that, as under UCMJ Art. 36, the procedures established in this Act are only a starting point. The Secretary of Defense shall promulgate a Manual for Military Commissions, akin to the Manual for Courts-Martial, which will supplement the Act with rules of procedure and evidence that to be employed in military commissions.

UCMJ Art. 36 requires court-martial procedures to track the civilian rules so far as the President deems practicable. Because civilian rules, particularly evidentiary rules, often will not be practicable, section 949a does not contain a specific requirement. The Manual for Military Commission will likely track existing procedures in the military justice system in many instances, but the Act does not provide for a "uniformity" requirement that would make the practicality of any such departure from court-martial procedures subject to litigation. Congress also will be able to review these procedures, because section 4(b) requires the Secretary to submit the initial Manual for Military Commissions and

any subsequent modifications to the Armed Services Committees of the House of Representatives and the Senate.

Although most rules of evidence will be left to regulation, subsection (b) makes clear that military commissions generally shall apply a broad rule of admissibility, admitting all evidence that would have a probative value to a reasonable person. As in courts-martial and civilian courts, the judge may exclude otherwise admissible evidence where its probative value is substantially outweighed by the danger of unfair prejudice.

A broad rule of admissibility is necessary because commissions must try crimes based on evidence collected everywhere from the battlefields in Afghanistan to foreign terrorist safe houses. Rules of evidence that may be workable under peacetime circumstances may break down during the exigencies of war. International war crimes tribunals, such as the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, have similarly recognized that broad rules of admissibility are appropriate when dealing with evidence gathered in the midst of an armed conflict. This section therefore provides for the introduction of all probative evidence, including hearsay evidence where such evidence is reliable. It is imperative that military commissions have the opportunity to consider reliable hearsay statements because many witnesses are likely to be foreign nationals who are not amenable to process, and other witnesses may be unavailable because of military necessity, incarceration, injury, or death.

§ 949b. Unlawfully influencing action of military commission. To ensure the independence of the commission, this section protects members, military judges, and counsel from any adverse consequences based upon actions undertaken during the military commission. The provisions here are identical in substance to those set out under UCMJ Art. 37, which apply to courts-martial.

§ 949c. Duties of trial counsel and defense counsel. This section tracks UCMJ Art. 38 in laying out the duties of trial counsel and defense counsel. The accused shall be represented by a detailed military lawyer and may be represented by a civilian counsel, if retained by the accused. To ensure that civilian counsel may be trusted in dealing with the accused and with the sensitive and potentially classified evidence that will often be at issue, the section requires that civilian counsel be a United States citizen admitted to the practice of law and in good standing, be eligible for a security clearance of Secret or higher, and have signed a written agreement to comply with the rules of the military commission proceedings. This section also makes clear that defense counsel shall have the right to cross-examine all witnesses who testify before the commission.

§ 949d. Sessions. This section is adapted from UCMJ Art. 39. Like the UCMJ, this section provides that the military judge may call the commission into session, outside the presence of its members, to address motions, receive the pleas of the accused, and to rule on evidentiary and procedural issues. The members shall

deliberate and vote on guilt and sentences in closed session, outside the presence of anyone but the members. Except as expressly provided in this section, all other proceedings before the commission shall be open and in the presence of the members, counsel, and the accused.

Because military commissions may have to consider highly sensitive intelligence that cannot reasonably be shared with captured terrorists, the bill also contains special procedures that, under narrowly defined circumstances, would permit the introduction of classified evidence outside the presence of the accused. Unlawful enemy combatants should not be allowed to exploit court procedures to gain information that might assist them or their associates in perpetrating future attacks against the United States and its allies.

International war crimes tribunals have similarly recognized that it is appropriate to protect information against disclosure to the accused where it is necessary to protect the safety of others. For instance, the International Criminal Tribunal for the Former Yugoslavia has ruled that the accused's rights to a fair trial and to cross-examination are not violated when, out of concern for the safety of a witness, the court permits a witness to testify before the court while shielding the identity of the witness from the accused and defense counsel.

Military Rule of Evidence 505, which permits the substitution of redacted or summarized evidence for classified information in courts-martial, would not be practicable for military commissions. That rule does not permit the judge under any circumstance to admit classified evidence that is not also shared with the accused. If the Government cannot substitute redacted or summarized evidence for classified evidence, then the Government must choose between disclosing classified evidence to the accused or avoiding introducing the evidence altogether. Putting the Government to that choice may be entirely appropriate when it comes to the trial of American soldiers in courts-martial, but it is neither necessary nor appropriate for trials of unlawful enemy combatants for violations of the law of war. This section therefore grants the military judge the discretion, under carefully defined and extraordinary circumstances, to admit classified evidence that is not shared with the accused.

Excluding the accused under this subsection will be an extraordinary occurrence and is to be carefully limited. There will be no "secret trials" without the accused. Instead, the section provides that before any classified evidence may be introduced outside the accused's presence, the head of the department or agency responsible for classifying that information must personally certify that the disclosure of the information to the accused could reasonably be expected to harm national security and that the information at issue has been declassified to the maximum extent possible. The military judge then must make specific findings to confirm that the exclusion is warranted to protect classified information; that the contemplated exclusion is no broader than necessary; and that the exclusion would not violate the accused's right to a full and fair trial. The accused's

defense counsel will remain present and able to represent the accused in all proceedings, and the accused will be provided with unclassified summaries or a redacted transcript of the proceedings, whenever possible. In addition, this provision makes clear that the accused must always be given access to any statements that he himself made during an interrogation if the Government wishes to use such statements in the proceedings.

§ 949e. Continuances. This section provides the military judge with the authority to grant continuances, as is provided at courts-martial by UCMJ Art. 40.

§ 949f. Challenges. This section provides for the challenges of members of the commission. It is substantially the same as that provided for courts-martial under UCMJ Art. 41.

§ 949g. Oaths. This section closely tracks UCMJ Art. 42 and requires that commission officers takes oaths prior to their respective duties.

§ 949h. Former jeopardy. This section grants the accused the protection against double jeopardy that is provided by UCMJ Art. 44. Art. 44 provides that double jeopardy should prevent a retrial if a case is dismissed because of the failure of available evidence. Because of the difficulties associated with gathering and presenting evidence for military commissions, this section avoids a blanket rule requiring jeopardy to attach under all such circumstances.

§ 949i. Pleas of the accused. This section tracks UCMJ Art. 45 and addresses the receipt of the accused's pleas. UCMJ Art. 45 prohibits the accused from pleading guilty to an offense for which the death penalty may be adjudged. This additional restriction, however, is not a feature of federal criminal trials and is not a necessary safeguard should the accused seek to plead guilty to avoid a trial by military commission. Where the accused pleads guilty to an offense for which the death penalty is sought, however, the commission would still have to conduct a trial as to sentence is contemplated that there would still have to be a formal proceeding to allow the military commission to determine whether death is the appropriate sentence.

§ 949j. Opportunity to obtain witnesses and other evidence. UCMJ Art. 46 provides that the prosecution and defense shall have an "equal opportunity" to obtain witnesses and other evidence, but leaves the exact discovery procedures to regulation. Because it is unclear what "equal opportunity" would mean in the military commission context, subsection (a) guarantees defense counsel a "reasonable opportunity" to obtain witnesses and other evidence. Like the UCMJ, however, this section leaves the exact contours of the discovery rules to elaboration in the rulemaking process.

Subsection (b) requires that trial counsel disclose to the defense the existence of any exculpatory evidence known to trial counsel. The Act's express inclusion of

a disclosure obligation with respect to exculpatory evidence is not intended, and should not be understood, to suggest that this is the only disclosure or discovery obligation that the United States will have to the accused. To the contrary, it is expected that the Secretary of Defense will issue a comprehensive set of rules delineating the disclosure and discovery obligations that the parties will have in military commission proceedings.

Trial counsel's obligation to disclose exculpatory evidence includes any exculpatory classified evidence. Such evidence shall not be provided to the accused in classified form, but rather shall be provided in redacted or summary form to the extent possible. Before any classified evidence is withheld from the accused, the original classification authority must certify that it has been declassified to the maximum extent possible. At least one defense counsel shall have access to any exculpatory evidence withheld from the accused. Subsection (c)(5) makes clear that defense counsel may not share classified evidence with the accused, overriding any duty of communication that may be imposed by federal or state law.

§ 949k. Defense of lack of mental responsibility. This section permits the accused to raise the defense of lack of mental responsibility and provides standards and procedure for when that defense is raised. It is identical in substance to UCMJ Art. 50A.

§ 949*l*. Voting and rulings. Subsection (a) makes clear that members of the commission shall vote on the findings and sentences by secret ballot. Subsection (b) provides the military judge with the same authority that the judge has at a court-martial to issue rulings on questions of law and the admissibility of the evidence. Subsection (c) requires the military judge to instruct the commission, before deliberations, that the accused shall be presumed innocent unless trial counsel proves the case beyond reasonable doubt. These instructions are the same as are applied in the court-martial process, as codified under UCMJ Art. 51.

§ 949m. Number of votes required. This section tracks UCMJ 52 and provides, as in courts-martial, that two-thirds of the members of the commission must vote for conviction to find the accused guilty of an offense. With respect to the sentence, this section tracks the UCMJ by requiring that no person may be sentenced to life imprisonment or confinement for more than ten years except with the concurrence of three-fourths of the members of the commission. No person may be sentenced to death without the unanimous vote of the commission on both guilt and sentence, and absent military exigency, the commission must have a minimum of twelve members where in cases in which the death penalty is sought, as is provided for courts-martial by UCMJ Art. 25A.

§ 949n. Commission to announce action. This section tracks UCMJ Art. 53 in requiring the commission to announce its finding and sentences as soon as it is determined.

§ 949o. Record of trial. This section tracks UCMJ Art. 54 and requires that the commission keep an authenticated, substantially verbatim record of commission proceedings.

§ 949s. Cruel or unusual punishments prohibited. This section tracks UMCJ Art. 55 and prohibits cruel or unusual forms of punishment, such as flogging, branding, and the use of irons.

§ 949t. Maximum limits. This section tracks UCMJ Art. 56 and requires that punishments imposed by military commissions not exceed those limits imposed by the statute or by regulation.

§ 949u. Execution of confinement. This section tracks UCMJ Art. 58 and provides that the Secretary shall, by regulation, prescribe how and where a sentence of confinement may be carried out.

SUBCHAPTER VI—POST-TRIAL PROCEDURE AND REVIEW OF MILITARY COMMISSIONS

§ 950a. Error of law; lesser included offense. This section tracks UCMJ Art. 59 and provides that military commission decisions shall not be overturned based upon errors of law unless the error materially prejudices the rights of the accused. A reviewing authority that sets aside a guilty finding shall have the authority to impose a lesser included offense, where applicable.

§ 950b. Review by the convening authority. This section permits the convening authority to modify the findings and sentence of a military commission to the benefit of the accused. The accused's right to seek such discretionary action is in addition to his appellate rights and parallels the procedures established under UCMJ Art. 60.

§ 950c. Waiver or withdrawal of appeal. This section, which parallels UCMJ Art. 61, recognizes the accused's right to waive or withdraw his appeals to the Court of Military Commission Review, except in cases in which the accused has been sentenced to death.

§ 950d. Appeal by the United States. This section, which parallels UCMJ Art. 62, grants the United States the right to take an interlocutory appeal based upon the military judge's decision to terminate commission proceedings on any charge, to exclude evidence that is substantial proof of a military fact, or to decline to close the proceeding and/or to exclude the accused under section 949d(c). The United States may not appeal a judgment of acquittal.

§ 950e. Rehearings. This section tracks UCMJ Art. 63 in providing for procedures for rehearing, should the accused be successful on appeal. The

commission shall be composed of new members, and the commission may not find guilt or impose a greater sentence as to any offense previously adjudged on the merits by the prior commission.

§ 950f. Review by Court of Military Commission Review. This section creates a Court of Military Commission Review within the Department of Defense. This court functions like the Court of Criminal Appeals under Article 66 of the UCMJ. The members of that court shall be military judges or civilians with comparable qualifications, and the court shall review questions of law arising from interlocutory appeals or final decisions of the military commission.

§ 950g. Review by the United States Court of Appeals for the District of Columbia Circuit and the Supreme Court of the United States. This section grants the accused the right to appeal his conviction to the United States Court of Appeals for the District of Columbia Circuit under the standard established by DTA. UCMJ Art. 67 places appellate review in the Court of Appeals for the Armed Forces ("CAAF"). Congress, however, has already determined that review of military commission judgments should lie in the D.C. Circuit, which in contrast to the CAAF, is an Article III court. The D.C. Circuit has acquired experience in recent years handling cases brought by individuals detained at Guantanamo Bay, such as the *Hamdan* case, and it is anticipated that the most important appellate questions to come will involve military commission procedures, such as those concerning the limited exclusion of the accused, that may have no clear analogue with the UCMJ procedures that are the special expertise of the CAAF. Therefore, the Act preserves existing review procedures under the DTA, but expands the right to permit an appeal regardless of the length of his sentence. The Supreme Court shall have authority to review decisions of the D.C. Circuit through petitions for certiorari.

§ 950h. Appellate Counsel. This section tracks UCMJ Art. 70 and provides for the appointment of appellate counsel to represent the accused and the United States in any appeal or review under this chapter.

§ 950i. Execution of sentence; suspension of sentence. This section tracks UCMJ Art. 71 and provides that a death sentence may not be executed until the judgment is final and approved by the President.

§ 950j. Finality of proceedings, findings, and sentences. This section tracks UCMJ Art. 76 and provides that a judgment under this chapter is final and conclusive in any tribunal in the United States. This chapter provides the exclusive procedures for review of any claims relating to the prosecution, trial, or judgment of a military commission.

SUBCHAPTER VII—PUNITIVE MATTERS

§ 950p. Substantive offenses generally. UCMJ subchapter X codifies a list of a offenses triable by courts-martial. Although the offenses subject to trial by

military commissions have generally been identified based upon the common law of armed conflict, this Act codifies a list of offenses triable by military commissions. The list of offenses tracks those provided for under Military Commission Instruction No. 2, which in turn relied upon international treaties and U.S. criminal law. The offenses defined here are not new crimes, but rather reflect the codification of the law of war into the United States Code pursuant to Congress's constitutional authority to "Define and Punish ... Offences against the Law of Nations." U.S. Const. art. I, § 8. Because the provisions are declarative of existing law, they should not preclude trial for crimes that occurred prior to the Act's effective date.

§ 950q. Principals. This section, which tracks UCMJ Art. 77, provides that an individual may be guilty as a principal if he commits an offense, is an accessory to an offense, or directs the commission of an offense. In addition, under the principle of "command responsibility," a commander may be guilty of a war crime where he knew, or should have known, that his subordinate was about to commit, or had committed, an offense, yet failed to take the necessary and reasonable measures to prevent or punish the offense.

§ 950r. Accessory after the fact. This section, which tracks UCMJ Art. 78, provides for punishment as an accessory after the fact.

§ 950s. Conviction of a lesser offense. This section, which tracks UCMJ Art. 79, provides that an individual may be convicted of a lesser include offense, where appropriate.

§ 950t. Attempts. This section, which tracks UCMJ Art. 80, provides for the circumstances under which an individual may be convicted of an attempt to commit an offense under this chapter.

§ 950u. Solicitation. This section, which tracks UCMJ Art. 81, provides that an individual may be convicted for the crime of solicitation if he solicits or advises another to commit one or more substantive offenses triable by military commission.

§ 950v. Crimes triable by military commission. This section enumerates twenty-seven substantive offenses triable by military commission. In light of the common law origins of war crimes, no list of offenses is likely to be entirely complete. But this list represents an effort to codify offenses hitherto recognized as offenses triable by military commissions or international courts. Most of the listed offenses constitute clear violations of the Geneva Conventions and/or the Hague Convention. Several constitute "modern-day war crimes," such as hijacking and terrorism, which constitute practices contrary to the law of nations that can, and hereby do, have the same status as traditional war crimes.

In *Hamdan*, the Supreme Court left open the question as to whether conspiracy to commit a war crime itself constituted a substantive offense. For the reasons stated in Justice Thomas's opinion, the bill views conspiracy as a separate offense punishable by military commissions.

§ 950w. Perjury and obstruction of justice. As an incident to the power to protect the integrity of their proceedings, the military commission shall have the authority to try perjury and obstruction of justice related to military commissions and offenses triable by commission. This section tracks UCMJ Art. 131.

§ 950x. Contempts. This section provides for the commission's authority to punish contempt of its proceedings, tracking UCMJ Art. 48.

SEC. 5. JUDICIAL REVIEW. This section responds to the Supreme Court's decision in *Hamdan* by amending the judicial review provisions of the Detainee Treatment Act, which are now codified at 28 U.S.C. § 2241. The Detainee Treatment Act provided that the United States Court of Appeals for the District of Columbia Circuit shall have jurisdiction over determinations of Combatant Status Review Tribunals and final judgments of military commissions, and that courts otherwise shall be foreclosed from hearing habeas petitions or other civil actions brought by enemy combatants in United States custody. This section makes clear that the limits of review apply to all petitions and civil actions, no matter whether they are pending or filed after the enactment of this Act, relating to the detention, transfer, treatment, or conditions of confinement of any alien detained by the United States as an unlawful combatant subject to this Act. Except for the specific review provided by the Act, this section forecloses any legal claim whatsoever, including applications for writ of habeas corpus, brought by or on behalf of detainees. Although it is not clear that the Suspension Clause of the Constitution applies in this context, the writ of habeas corpus would not be suspended by this provision; instead, judicial review of detention and military commission decisions is channeled through the adequate alternative procedures provided by this Act and the DTA.

SEC. 6. SATISFACTION OF TREATY OBLIGATIONS. In order to implement the treaty obligations of the United States under the Geneva Conventions, subsection (a) establishes that compliance with the so-called McCain Amendment, section 1003 of the Detainee Treatment Act of 2005, fully satisfies the obligations of the United States with regard to section 1 of Common Article 3 of the Geneva Conventions. Like the McCain Amendment, Common Article 3 provides a baseline standard for detainees in armed conflicts where it applies. Several of its provisions are vague, however, particularly its prohibition upon "outrages upon personal dignity, in particular humiliating and degrading treatment." This measure defines Common Article 3's treatment standards by reference to the McCain Amendment, which is based upon the familiar standards of the U.S. Constitution. Subsection 1(b), concerning the taking of hostages, and subsection 1(d), concerning the passing of sentences by regularly constituted courts, do not concern detainee treatment and therefore are specifically excepted from this provision.

Subsection (b) prohibits any court from treating the Geneva Conventions as a source of rights, directly or indirectly, making clear that the Geneva Conventions are not judicially enforceable in any court of the United States. This provision does not affect the obligations of the United States under the Geneva Conventions; to the contrary, the political branches of the United States remain fully bound by, and will continue to honor, the Conventions whenever and wherever they apply.

SEC. 7. WAR CRIMES ACT AMENDMENT. This section is designed to clarify subsection (c) of the War Crimes Act of 1996, 18 U.S.C. § 2441. United States treaty obligations require that the United States criminalize the grave breaches of the Geneva Conventions, which include certain serious violations of Common Article 3. The War Crimes Act goes further and makes any violation of Common Article 3 a war crime. The statutes, however, gives no more specific guidance as to what conduct constitutes a violation. The Supreme Court held in *Hamdan* that Common Article 3 applies to the conflict against al Qaeda; therefore, it is imperative that the statute provide clear notice to United States personnel charged with interrogating detainees. This section therefore provides clarity and certainty with respect to the serious violations of Common Article 3 that are punishable as war crimes under 18 U.S.C. § 1441(c). Those offenses include torture, cruel, or inhuman treatment, murder, mutilation or maiming, intentionally causing great suffering, and the taking of hostages. The Act does not specifically provide for a general crime of "outrages upon personal dignity," because it nearly impossible define an "outrage" as a general matter without resorting to the very kind of vague language that this provision seeks to replace. Instead, this section identifies and criminalizes three serious and clear outrages upon personal dignity: biological experimentation, rape, and sexual assault. The statute similarly does not criminalize the passing of a sentence absent a regularly constituted court because of the difficulty in defining what constitutes a "regularly constituted court"; an execution carried out pursuant to the sentence of an irregular tribunal would clearly be proscribed under this section as murder.

SEC. 8. CONFORMING AMENDMENTS. This section makes a series of amendments to other parts of the United States Code in order to resolve inconsistencies created by the Act. In particular, this section makes several amendments to the DTA. These amendments include replacing references to the President's Military Commission Order No. 1 of August 31, 2005 with references to military commissions constituted under this Act. Other provisions expand judicial review to the final orders of Combatants Status Review Tribunals or military commissions when the persons affected are detained in places other than Guantanamo Bay, Cuba, to provide for review in the event that detainees are moved from the Guantanamo Bay facility to other facilities in the United States.

This section also amends references to military commission in the UCMJ to take into account the extensive statutory procedures provided by this Act. Section 821 of Title 10 is amended to make clear that the savings clause preserves jurisdiction over military commissions without restriction. Section 836 of title 10 is amended explicitly to exempt military commissions from any requirement that its procedures be uniform with those of

the UCMJ. This uniformity provision was intended to require that courts-martial be as uniform as possible among the armed services, but the Supreme Court in *Hamdan* applied that language to military commission procedures as well. This amendment makes clear that, particularly in light of this Act's detailed prescription of military commission procedures, such a restriction is not warranted.

SEC. 9. RETROACTIVE APPLICATION. This section makes clear that the Act retroactively applies "to any aspect of detention, treatment or trial of any alien detained at any time since September 11, 2001." This section further states that the Act applies to any case, pending or not, whether filed before or after the effective date of the Act. This provision is designed to make clear that jurisdiction inconsistent with this Act is removed for all pending cases and that the standards prescribed in this Act shall apply to all future cases, no matter when the conduct at issue occurred.

SEC. 10. SEVERABILITY. This section explicitly provides that if any application of a provision of this Act is held to be unconstitutional, it shall not result in the invalidation of any other application or provision of this Act.

109TH CONGRESS
2D SESSION

To facilitate bringing to justice terrorists and other unlawful enemy combatants through full and fair trials by military commissions, and for other purposes.

IN THE OF THE UNITED STATES

introduced the following bill; which was read twice and referred to the Committee on

A BILL

To facilitate bringing to justice terrorists and other unlawful enemy combatants through full and fair trials by military commissions, and for other purposes.

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

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the "Military Commis-
3 sions Act of 2006".

4 **SEC. 2. FINDINGS.**

5 Congress makes the following findings:

6 (1) For more than 10 years, the al Qaeda ter-
7 rorist organization has waged an unlawful war of
8 violence and terror against the United States and
9 its allies. Al Qaeda was involved in the bombing

of the World Trade Center in New York City in 1993, the bombing of the United States Embassies in Kenya and Tanzania in 1998, and the attack on the *U.S.S. Cole* in Yemen in 2000. On September 11, 2001, al Qaeda launched the most deadly foreign attack on United States soil in history. Nineteen al Qaeda operatives hijacked four commercial aircraft and piloted them into the World Trade Center Towers in New York City and the headquarters of the United States Department of Defense at the Pentagon, and downed United Airlines Flight 93. The attack destroyed the Towers, severely damaged the Pentagon, and resulted in the deaths of approximately 3,000 innocent people.

(2) Following the attacks on the United States on September 11th, Congress recognized the existing hostilities with al Qaeda and affiliated terrorist organizations and, by the Authorization for the Use of Military Force Joint Resolution (Public Law 107-40), recognized that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States" and authorized the President "to use all necessary and appropriate force against those nations, organizations, or per-

1 sons he determines planned, authorized, commit-
2 ted, or aided the terrorist attacks that occurred on
3 September 11, 2001 . . . in order to prevent any fu-
4 ture acts of international terrorism against the
5 United States by such nations, organizations or
6 persons."
7 (3) The President's authority to convene
8 military commissions arises from the Constitu-
9 tion's vesting in the President of the executive
10 power and the power of Commander in Chief of
11 the Armed Forces. As the Supreme Court of the
12 United States recognized in *Madsen v. Kinsella*,
13 343 U.S. 341, 346-48 (1952), "[s]ince our nation's
14 earliest days, such commissions have been consti-
15 tutionally recognized agencies for meeting many
16 urgent governmental responsibilities related to
17 war. . . . They have taken many forms and borne
18 many names. Neither their procedure nor their ju-
19 risdiction has been prescribed by statute. It has
20 been adapted in each instance to the need that
21 called it forth."
22 (4) In exercising the authority vested in the
23 President by the Constitution and laws of the
24 United States, including the Authorization for Use
25 of Military Force Joint Resolution, and in accor-

1 dance with the law of war, the President has de-
2 tained enemy combatants in the course of this
3 armed conflict and issued the Military Order of
4 November 13, 2001, to govern the "Detention,
5 Treatment, and Trial of Certain Non-Citizens in
6 the War Against Terrorism." This Order author-
7 ized the Secretary of Defense to establish military
8 commissions to try individuals subject to the Order
9 for any offenses triable by military commission
10 that such individuals are alleged to have commit-
11 ted.
12 (5) The Supreme Court in *Hamdan v. Rums-*
13 *feld*, 126 S. Ct. 2749 (2006), held that the military
14 commissions established by the Department of De-
15 fense under the President's Military Order of No-
16 vember 13, 2001, were not consistent with certain
17 aspects of United States domestic law. The Con-
18 gress may by law, and does by enactment of this
19 statute, eliminate any deficiency of statutory au-
20 thority to facilitate bringing terrorists with whom
21 the United States is engaged in armed conflict to
22 justice for violations of the law of war and other
23 offenses triable by military commissions. The
24 prosecution of such individuals by military com-
25 missions established and conducted consistent with

1 this Act fully complies with the Constitution, the
2 laws of the United States, treaties to which the
3 United States is a party, and the law of war.
4 (6) The use of military commissions is par-
5 ticularly important in this context because other al-
6 ternatives, such as the use of courts-martial, gener-
7 ally are impracticable. The terrorists with whom
8 the United States is engaged in armed conflict have
9 demonstrated a commitment to the destruction of
10 the United States and its people, to the violation of
11 the law of war, and to the abuse of American legal
12 processes. In a time of ongoing armed conflict, it
13 generally is neither practicable nor appropriate for
14 combatants like al Qaeda terrorists to be tried be-
15 fore tribunals that include all of the procedures as-
16 sociated with courts-martial.
17 (7) Many procedures for courts-martial
18 would not be practicable in trying the unlawful en-
19 emy combatants for whom this Act provides for
20 trial by military commission. For instance, court-
21 martial proceedings would in certain circum-
22 stances—
23 (A) compel the Government to share
24 classified information with the accused,
25 even though members of al Qaeda cannot be

1 trusted with our Nation's secrets and it
2 would not be consistent with the national se-
3 curity of the United States to provide them
4 with access to classified information;
5 (B) exclude the use of hearsay evi-
6 dence even though such evidence often will
7 be the best and most reliable evidence that
8 the accused has committed a war crime. For
9 example, many witnesses in military com-
10 mission trials are likely to be foreign nation-
11 als who are not amenable to process or may
12 be precluded for national security reasons
13 from entering the United States or Guan-
14 tanamo Bay to testify. Other witnesses may
15 be unavailable because of military necessity,
16 incarceration, injury, or death. In short, ap-
17 plying the hearsay rules from the Manual for
18 Courts-Martial or from the Federal Rules of
19 Evidence would make it virtually impossible
20 to bring terrorists to justice for their viola-
21 tions of the law of war;
22 (C) specify speedy trials and technical
23 rules for sworn and authenticated statements
24 when, due to the exigencies of wartime, the
25 United States cannot safely require members

of the armed forces to gather evidence on the battlefield, including civilian eyewitness testimony, as though they were police officers. Nor can the United States divert members from the front lines and their duty stations to attend military commission proceedings. Therefore, strict compliance with such rules for evidence gathered on the battlefield would be impracticable, given the preeminent focus on military operations and the chaotic nature of combat.

(8) The exclusive judicial review for which this Act, and the Detainee Treatment Act of 2005, provides is without precedent in the history of armed conflicts involving the United States, exceeds the scope of judicial review historically provided for by military commissions, and is channeled in a manner appropriately tailored to—

(A) the circumstances of the conflicts between the United States and international terrorist organizations; and

(B) the need to ensure fair treatment of those detained as enemy combatants, to minimize the diversion of members of the armed forces from other wartime duties, and

1 to protect the national security of the United
2 States.
3 (9) In early 2002, as memorialized in a
4 memorandum dated February 7, 2002, the Presi-
5 dent determined that common Article 3 of the Ge-
6 neva Conventions did not apply with respect to the
7 United States conflict with al Qaeda because al
8 Qaeda was not a party to those treaties and the
9 conflict with al Qaeda was an armed conflict of an
10 international character. That was the interpretation
11 of the United States prior to the Supreme Court's
12 decision in *Hamdan* on June 29, 2006. *Hamdan*'s
13 statement to the contrary makes it appropriate to
14 clarify the standards imposed by common Article
15 3. This Act makes clear that the prohibitions
16 against cruel, inhuman, and degrading treatment
17 found in the Detainee Treatment Act of 2005 fully
18 satisfy the obligations of the United States with re-
19 spect to the standards for detention and treatment
20 established by section 1 of common Article 3, ex-
21 cept for those obligations arising under paragraphs
22 (b) and (d). In addition, the Act makes clear that
23 the Geneva Conventions are not a source of judi-
24 cially enforceable individual rights, thereby reaf-
25 firming that enforcement of the obligations im-

1 posed by the Conventions is a matter between the
2 nations that are parties to them.

3 **SEC. 3. AUTHORIZATION FOR MILITARY COMMIS-**
4 **SIONS.**

5 (a) IN GENERAL.—The President is authorized to
6 establish military commissions for violations of the law
7 of war and other offenses triable by military commissions
8 as provided in section 4 of this Act (chapter 47A of title
9 10).

10 (b) CONSTRUCTION.—The authority granted in
11 subsection (a) shall not be construed to limit the authority
12 of the President under the Constitution of the United
13 States or the laws thereof to establish military commis-
14 sions on the battlefield, in occupied territories, or in other
15 armed conflicts should circumstances so require.

16 (c) SCOPE OF PUNISHMENT AUTHORITY.—A mili-
17 tary commission established pursuant to subsection (a)
18 shall have authority to impose upon any person found
19 guilty after a proceeding under this Act a sentence that is
20 appropriate to the offense or offenses for which there was
21 a finding of guilt, which sentence may include death
22 where authorized by this Act, imprisonment for life or a
23 term of years, payment of a fine or restitution, or such
24 other lawful punishment or condition of punishment as
25 the commission shall determine to be proper.

1 (d) EXECUTION OF PUNISHMENT.—The Secretary of
2 Defense shall be authorized to carry out a sentence of
3 punishment decreed by a military commission pursuant
4 to subsection (a) in accordance with such procedures as
5 the Secretary may prescribe.
6 (e) ANNUAL REPORT ON TRIALS BY MILITARY
7 COMMISSION.—
8 (1) ANNUAL REPORT REQUIRED.—Not later
9 than December 31 each year, the Secretary of De-
10 fense shall submit to the Armed Services Commit-
11 tees of the House of Representatives and the Sen-
12 ate an annual report on the conduct of trials by
13 military commissions established pursuant to sub-
14 section (a) during such year.
15 (2) FORM.—Each such report shall be sub-
16 mitted in unclassified form, with classified annex,
17 if necessary and consistent with national security.
18 **SEC. 4. MILITARY COMMISSIONS**
19 (a) MILITARY COMMISSIONS.—
20 (1) IN GENERAL.—Subtitle A of title 10,
21 United States Code, is amended by inserting after
22 chapter 47 the following new chapter:
23 **"CHAPTER 47A—MILITARY COMMISSIONS**
24 "SUBCHAPTER I—GENERAL PROVISIONS

"Sec.
"948a. Definitions.
"948b. Military commissions generally.

"948c. Persons subject to military commissions.
"948d. Jurisdiction of military commissions.

1 **"§ 948a. Definitions**

2 "In this chapter:

3 "(1) ALIEN.—The term 'alien' means an in-
4 dividual who is not a citizen of the United States.

5 "(2) CLASSIFIED INFORMATION.— The term
6 'classified information' means the following—

7 "(A) Any information or material that
8 has been determined by the United States
9 Government pursuant to statute, Executive
10 order, or regulation to require protection
11 against unauthorized disclosure for reasons
12 of national security.

13 "(B) Any restricted data, as that term
14 is defined in section 11 y. of the Atomic En-
15 ergy Act of 1954 (42 U.S.C. 2014(y)).

16 "(3) COMMISSION.—The term 'commission'
17 means a military commission established pursuant
18 to chapter 47A of title 10, United States Code.

19 "(4) CONVENING AUTHORITY.—The term
20 'convening authority' shall be the Secretary of De-
21 fense or his designee.

22 "(5) LAWFUL ENEMY COMBATANT.—The
23 term 'lawful enemy combatant' means an individ-
24 ual determined by or under the authority of the

1 President or Secretary of Defense (whether on an
2 individualized or collective basis) to be: (i) a
3 member of the regular forces of a State party en-
4 gaged in hostilities against the United States or its
5 co-belligerents; (ii) a member of a militia, volun-
6 teer corps, or organized resistance movement be-
7 longing to a State party engaged in such hostilities,
8 which are under responsible command, wear a
9 fixed distinctive sign recognizable at a distance,
10 carry their arms openly, and abide by the law of
11 war; or (iii) a member of a regular armed forces
12 who professes allegiance to a government engaged
13 in such hostilities, but not recognized by the
14 United States.
15 "(6) SECRETARY.—The term 'Secretary'
16 means the Secretary of Defense.
17 "(7) UNLAWFUL ENEMY COMBATANT.—The
18 term 'unlawful enemy combatant' means an indi-
19 vidual determined by or under the authority of the
20 President or the Secretary of Defense—
21 "(A) to be part of or affiliated with a
22 force or organization—including but not
23 limited to al Qaeda, the Taliban, any interna-
24 tional terrorist organization, or associated
25 forces—engaged in hostilities against the

1 United States or its co-belligerents in viola-
2 tion of the law of war;
3 "(B) to have committed a hostile act
4 in aid of such a force or organization so en-
5 gaged; or
6 "(C) to have supported hostilities in
7 aid of such a force or organization so en-
8 gaged.
9 "This definition includes any individual de-
10 termined by a Combatant Status Review Tribunal,
11 before the effective date of this Act, to have been
12 properly detained as an enemy combatant, but ex-
13 cludes any alien determined by the President or the
14 Secretary of Defense (whether on an individual-
15 ized or collective basis), or by any competent tri-
16 bunal established under their authority, to be (i) a
17 lawful enemy combatant (including a prisoner of
18 war), or (ii) a protected person whose trial by these
19 military commissions would be inconsistent with
20 Articles 64-76 of the Geneva Convention Relative
21 to the Protection of Civilian Persons in Time of
22 War of August 12, 1949. For purposes of this sec-
23 tion, the term "protected person" refers to the cate-
24 gory of persons described in Article 4 of the Ge-

1 neva Convention Relative to the Protection of Ci-
2 vilian Persons in Time of War of August 12, 1949.
3 "(6) GENEVA CONVENTIONS.—The term
4 'Geneva Conventions' means the international
5 conventions signed at Geneva on August 12, 1949,
6 including common Article 3.
7 **"§ 948b. Military commissions generally**
8 "(a) PURPOSE.—This chapter codifies and estab-
9 lishes procedures governing the use of military commis-
10 sions to try unlawful enemy combatants for violations of
11 the law of war and other offenses triable by military
12 commissions. Although military commissions tradition-
13 ally have been constituted by order of the President, the
14 decision of the Supreme Court in *Hamdan v. Rumsfeld*
15 makes it both necessary and appropriate to codify proce-
16 dures for military commissions as set forth herein.
17 "(b) RULE OF CONSTRUCTION.—The procedures for
18 military commissions set forth in this chapter are mod-
19 eled after the procedures established for courts-martial in
20 the Uniform Code of Military Justice. However, it would
21 be neither desirable nor practicable to try unlawful en-
22 emy combatants by court-martial procedures. The trial of
23 such persons by military commission presents new chal-
24 lenges that require that interpretations of this Act not be
25 unduly influenced by the rules and procedures developed

1 for courts-martial. Therefore, no construction or applica-
2 tion of chapter 47 of this title shall be binding in the con-
3 struction or application of this chapter.

4 "(c) Alien unlawful enemy combatants may be
5 tried for violations of the law of war and other offenses
6 triable by military commissions committed against the
7 United States or its co-belligerents before, on, or after
8 September 11, 2001.

9 "(d) A military commission established under this
10 chapter is a regularly constituted court, affording all the
11 necessary 'judicial guarantees which are recognized as
12 indispensable by civilized peoples' for purposes of com-
13 mon Article 3 of the Geneva Conventions.

14 **"§ 948c. Persons subject to military commissions**

15 "Alien unlawful enemy combatants, as defined in
16 section 948a of this title, shall be subject to trial by mili-
17 tary commissions as set forth in this chapter.

18 **"§ 948d. Jurisdiction of military commissions**

19 "(a) Military commissions shall have jurisdiction
20 to try any offense made punishable under this chapter,
21 when committed by an alien unlawful enemy combatant.
22 Military commissions shall not have jurisdiction over
23 lawful enemy combatants. Lawful enemy combatants
24 who violate the law of war are subject to chapter 47 of
25 Title 10, United States Code. Courts-martial established

1 under chapter 47 shall have jurisdiction to try a lawful
2 enemy combatant for any offense made punishable under
3 this chapter.

4 "(b) Military commissions shall not have jurisdic-
5 tion over any individual determined by the President or
6 the Secretary of Defense (whether on an individualized
7 or collective basis), or by any competent tribunal estab-
8 lished under their authority, to be a "protected person"
9 whose trial by these military commissions would be in-
10 consistent with Articles 64-76 of the Geneva Convention
11 Relative to the Protection of Civilian Persons in Time of
12 War of August 12, 1949. Such persons shall be tried in
13 courts-martial or other tribunals consistent with their
14 status under the Geneva Conventions. For purposes of
15 this section, the term "protected person" refers to the
16 category of persons described in Article 4 of the Geneva
17 Convention Relative to the Protected of Civilian Persons
18 in Time of War of August 12, 1949.

19 "(c) Military commissions may, under such limita-
20 tions as the Secretary of Defense may prescribe, adjudge
21 any punishment not forbidden by this chapter, including
22 the penalty of death where authorized by this chapter.

23 "SUBCHAPTER II—COMPOSITION OF MILITARY
24 COMMISSIONS

"Sec.
"948h. Who may convene military commissions.
"948i. Who may serve on military commissions.

"948j. Military judge of a military commission.
"948k. Detail of trial counsel and defense counsel.
"948l. Detail or employment of reporters and interpreters.
"948m. Number of members; excuse of members; absent and additional members.

1 **"§ 948h. Who may convene military commissions**

2 "(a) The Secretary may issue orders convening
3 military commissions to try individuals under this chap-
4 ter.

5 "(b) The Secretary may delegate his authority to
6 convene military commissions or to promulgate any
7 regulations under this chapter.

8 **"§ 948i. Who may serve on military commissions**

9 "(a) IN GENERAL.—Any commissioned officer of
10 the United States armed forces on active duty is eligible
11 to serve on a military commission. Eligible commis-
12 sioned officers shall include, without limitation, reserve
13 personnel on active duty, National Guard personnel on
14 active duty in Federal service, and retired personnel re-
15 called to active duty.

16 "(b) DETAIL OF MEMBERS.—When convening a
17 commission, the convening authority shall detail as
18 members thereof such members of the armed forces as, in
19 his opinion, are fully qualified for the duty by reason of
20 age, education, training, experience, length of service,
21 and judicial temperament. No member of an armed force
22 shall be eligible to serve as a member of a commission

1 when he is the accuser or a witness for the prosecution or
2 has acted as an investigator or counsel in the same case.
3 "(c) EXCUSE OF MEMBERS.—Before a commission
4 is assembled for the trial of a case, the convening author-
5 ity may excuse a member of the commission from par-
6 ticipating in the case.
7 **"§ 948j. Military judge of a military commission**
8 "(a) DETAIL OF A MILITARY JUDGE.—A military
9 judge shall be detailed to each commission. The Secre-
10 tary shall prescribe regulations providing for the manner
11 in which military judges are detailed to such commis-
12 sions. The military judge shall preside over each com-
13 mission to which he has been detailed. The convening
14 authority shall not prepare or review any report concern-
15 ing the effectiveness, fitness, or efficiency of the military
16 judge so detailed relating to his performance of duty as a
17 military judge.
18 "(b) ELIGIBILITY.—A military judge shall be a
19 commissioned officer of the armed forces who is a mem-
20 ber of the bar of a Federal court or a member of the bar
21 of the highest court of a State, and who is certified to be
22 qualified for duty as a military judge by the Judge Advo-
23 cate General of the armed force of which such military
24 judge is a member. A commissioned officer who is certi-
25 fied to be qualified for duty as a military judge of a

1 commission may perform such other duties as are as-
2 signed to him by or with the approval of that Judge Ad-
3 vocate General or his designee.

4 "(c) INELIGIBILITY OF CERTAIN INDIVIDUALS.—No
5 person is eligible to act as military judge in any case in
6 which he is the accuser or a witness or has acted as inves-
7 tigator or a counsel in the same case.

8 "(d) CONSULTATION WITH MEMBERS; INELIGIBILITY
9 TO VOTE.—Except as provided in section 949d of this ti-
10 tle, the military judge detailed to the commission may not
11 consult with the members of the commission except in
12 the presence of the accused, trial counsel, and defense
13 counsel, nor may he vote with the members of the com-
14 mission.

15 **"§ 948k. Detail of trial counsel and defense counsel**

16 "(a) DETAIL OF COUNSEL GENERALLY.—

17 "(1) Trial counsel and military defense
18 counsel shall be detailed for each commission.

19 "(2) Assistant trial counsel and assistant and
20 associate military defense counsel may be detailed
21 for each commission.

22 "(3) Military defense counsel shall be de-
23 tailed as soon as practicable after the swearing of
24 charges against the person accused.

1 "(4) The Secretary shall prescribe regula-
2 tions providing for the manner in which counsel
3 are detailed for military commissions and for the
4 persons who are authorized to detail counsel for
5 such military commissions.
6 "(b) TRIAL COUNSEL.—Subject to subsection (d),
7 trial counsel detailed for a military commission under
8 this chapter must be—
9 "(1) a judge advocate (as that term is defined
10 in section 801 of this title) who is—
11 "(A) a graduate of an accredited law
12 school or is a member of the bar of a Federal
13 court or of the highest court of a State; and
14 "(B) certified as competent to perform
15 duties as trial counsel before general courts-
16 martial by the Judge Advocate General of
17 the armed force of which he is a member; or
18 "(2) a civilian who is—
19 "(A) a member of the bar of a Federal
20 court or of the highest court of a State; and
21 "(B) otherwise qualified to practice
22 before the commission pursuant to regula-
23 tions prescribed by the Secretary.
24 "(c) MILITARY DEFENSE COUNSEL.—Subject to
25 subsection (d), military defense counsel detailed for a

1 military commission under this chapter must be a judge
2 advocate (as so defined) who is—
3 "(1) a graduate of an accredited law school
4 or a member of the bar of a Federal court or of the
5 highest court of a State; and
6 "(2) certified as competent to perform duties
7 as defense counsel before general courts-martial by
8 the Judge Advocate General of the armed force of
9 which he is a member.
10 "(d) INELIGIBILITY OF CERTAIN INDIVIDUALS.—No
11 person who has acted as an investigator, military judge,
12 or member of a military commission under this chapter
13 may act later as trial counsel or defense counsel in the
14 same case. No person who has acted for the prosecution
15 may act later in the same case for the defense, nor may
16 any person who has acted for the defense act later in the
17 same case for the prosecution.
18 **"§ 948*l*. Detail or employment of reporters and inter-**
19 **preters**
20 "(a) COURT REPORTERS.—Under such regulations
21 as the Secretary may prescribe, the convening authority
22 of a military commission shall detail or employ qualified
23 court reporters, who shall record the proceedings of and
24 testimony taken before that commission.

1 "(b) INTERPRETERS.—Under like regulations the
2 convening authority may detail or employ interpreters
3 who shall interpret for the commission, and, as necessary,
4 for trial counsel and defense counsel.
5 "(c) TRANSCRIPT; RECORD.—The transcript shall
6 be under the control of the convening authority, which is
7 responsible for preparing the record of the proceedings.

8 **"§ 948m. Number of members; excuse of members;**
9 **absent and additional members**

10 "(a) NUMBER OF MEMBERS.—(1) A military com-
11 mission under this chapter shall, except as provided in
12 paragraph (2), have at least five members.
13 "(2) In a case in which the death penalty is sought,
14 the military commission shall have the number of mem-
15 bers prescribed by section 949m(c) of this title.
16 "(b) EXCUSE OF MEMBERS.—No member of a mili-
17 tary commission may be absent or excused after the
18 commission has been assembled for the trial of the ac-
19 cused unless excused—
20 "(1) as a result of challenge;
21 "(2) by the military judge for physical dis-
22 ability or other good cause; or
23 "(3) by order of the convening authority for
24 good cause.

1 "(c) ABSENT AND ADDITIONAL MEMBERS.—
2 Whenever a military commission is reduced below the
3 requisite number of members, the trial may not proceed
4 unless the convening authority details new members suf-
5 ficient to provide not less than the requisite number. The
6 trial may proceed with the new members present after the
7 recorded evidence previously introduced before the
8 members of the commission has been read to the com-
9 mission in the presence of the military judge, the accused
10 (except as provided by section 949d of this title), and
11 counsel for both sides.

12 "SUBCHAPTER III—PRE-TRIAL PROCEDURE

"Sec.
"948q. Charges and specifications.
"948r. Compulsory self-incrimination prohibited; statements obtained by torture.
"948s. Service of charges.

13 **"§ 948q. Charges and specifications**

14 "(a) CHARGES AND SPECIFICATIONS.—Charges and
15 specifications against an accused shall be signed by a
16 person subject to chapter 47 of this title under oath before
17 a commissioned officer of the armed forces authorized to
18 administer oaths and shall state—

19 "(1) that the signer has personal knowledge
20 of, or reason to believe, the matters set forth
21 therein; and

22 "(2) that they are true in fact to the best of
23 his knowledge and belief.

1 "(b) NOTICE TO ACCUSED.—Upon the swearing of
2 the charges and specifications in accordance with subsec-
3 tion (a), the accused shall be informed of the charges and
4 specifications against him as soon as practicable.

5 **§ 948r. Compulsory self-incrimination prohibited;**
6 **statements obtained by torture**

7 "(a) IN GENERAL.—No person shall be required to
8 testify against himself at a commission proceeding.

9 "(b) STATEMENTS OBTAINED BY TORTURE.—A
10 statement obtained by use of torture, as defined in 18
11 U.S.C. § 2340, whether or not under color of law, shall
12 not be admissible against the accused, except against a
13 person accused of torture as evidence the statement was
14 made.

15 "(c) STATEMENTS NOT OBTAINED BY TORTURE.—
16 No otherwise admissible statement may be received in
17 evidence, including statements allegedly obtained by co-
18 ercion, if the military judge finds that the circumstances
19 under which the statement was made render it unreliable
20 or lacking in probative value.

21 **"§ 948s. Service of charges**

22 "The trial counsel assigned to the case shall cause
23 to be served upon the accused and counsel a copy of the
24 charges upon which trial is to be had in English and, if
25 appropriate, in another language that the accused under-

1 stands, sufficiently in advance of trial to prepare a de-
2 fense.

3 "SUBCHAPTER IV—TRIAL PROCEDURE

"Sec.
"949a. Rules.
"949b. Unlawfully influencing action of military commission.
"949c. Duties of trial counsel and defense counsel.
"949d. Sessions.
"949e. Continuances.
"949f. Challenges.
"949g. Oaths.
"949h. Former jeopardy.
"949i. Pleas of the accused.
"949j. Opportunity to obtain witnesses and other evidence.
"949k. Defense of lack of mental responsibility.
"949l. Voting and rulings.
"949m. Number of votes required.
"949n. Military commission to announce action.
"949o. Record of trial.

4 **"§ 949a. Rules**

5 "(a) PROCEDURES.—Pretrial, trial, and post-trial
6 procedures, including elements and modes of proof, for
7 cases triable by military commission under this chapter
8 shall be prescribed by the Secretary, but may not be con-
9 trary to or inconsistent with this chapter.

10 "(b) RULES OF EVIDENCE.—Subject to such excep-
11 tions and limitations as the Secretary may provide by
12 regulation, evidence in a military commission shall be
13 admissible if the military judge determines that the evi-
14 dence would have probative value to a reasonable person.

15 "(c) HEARSAY EVIDENCE.—Hearsay evidence is
16 admissible, unless the military judge finds that the cir-
17 cumstances render it unreliable or lacking in probative

1 value, provided that the proponent of the evidence makes
2 the evidence known to the adverse party in advance of
3 trial or hearing.

4 "The military judge shall exclude any evidence the
5 probative value of which is substantially outweighed by
6 the danger of unfair prejudice, confusion of the issues, or
7 misleading the members of the commission, or by con-
8 siderations of undue delay, waste of time, or needless
9 presentation of cumulative evidence.

10 **"§ 949b. Unlawfully influencing action of military**
11 **commission**

12 "(a) IN GENERAL.—(1) No authority convening a
13 military commission under this chapter may censure, rep-
14 rimand, or admonish the commission or any member,
15 military judge, or counsel thereof, with respect to the
16 findings or sentence adjudged by the commission, or with
17 respect to any other exercises of its or his functions in the
18 conduct of the proceedings.

19 "(2) No person may attempt to coerce or, by any
20 unauthorized means, influence the action of a commis-
21 sion or any member thereof, in reaching the findings or
22 sentence in any case, or the action of any convening, ap-
23 proving, or reviewing authority with respect to his judi-
24 cial acts.

"(3) The foregoing provisions of this subsection shall not apply with respect to—

"(A) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of military commissions; or

"(B) statements and instructions given in open proceedings by the military judge or counsel.

"(b) PROHIBITION ON CONSIDERATION OF ACTIONS ON COMMISSION IN EVALUATION OF FITNESS. In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a commissioned officer of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of any such officer or in determining whether any such officer should be retained on active duty, no person may—

"(1) consider or evaluate the performance of duty of any member of a military commission under this chapter; or

"(2) give a less favorable rating or evaluation to any commissioned officer because of the zeal with which such officer, in acting as counsel,

1 represented any accused before a military commis-
2 sion under this chapter.

3 **"§ 949c. Duties of trial counsel and defense counsel**

4 "(a) TRIAL COUNSEL.—The trial counsel of a mili-
5 tary commission shall prosecute in the name of the
6 United States.

7 "(b) DEFENSE COUNSEL.—(1) The accused shall be
8 represented in his defense before a military commission
9 as provided in this subsection.

10 "(2) The accused shall be represented by military
11 counsel detailed under section 948k of this title.

12 "(3) The accused may be represented by civilian
13 counsel if retained by him, provided that civilian coun-
14 sel—

15 "(A) is a United States citizen;

16 "(B) is admitted to the practice of law in a
17 State, district, territory, or possession of the United
18 States, or before a Federal court;

19 "(C) has not been the subject of any sanction
20 of disciplinary action by any court, bar, or other
21 competent governmental authority for relevant
22 misconduct;

23 "(D) has been determined to be eligible for
24 access to information classified at the level Secret
25 or higher; and

1 "(E) has signed a written agreement to com-
2 ply with all applicable regulations or instructions
3 for counsel, including any rules of court for con-
4 duct during the proceedings.
5 "Civilian defense counsel shall protect any classi-
6 fied information received during the course of their rep-
7 resentation of the accused in accordance with all applica-
8 ble law governing the protection of classified informa-
9 tion, and shall not divulge such information to any person
10 not authorized to receive it.
11 "(4) If the accused is represented by civilian coun-
12 sel, military counsel detailed shall act as associate coun-
13 sel.
14 "(5) The accused is not entitled to be represented
15 by more than one military counsel. However, the person
16 authorized under regulations prescribed under section
17 948k of this title to detail counsel in his sole discretion
18 may detail additional military counsel.
19 "(6) Defense counsel may cross-examine each wit-
20 ness for the prosecution who testifies before the commis-
21 sion.
22 **"§ 949d. Sessions**
23 "(a) SESSIONS WITHOUT PRESENCE OF MEMBERS.—
24 (1) At any time after the service of charges which have
25 been referred for trial by military commission, the mili-

1 tary judge may call the commission into session without
2 the presence of the members for the purpose of—
3 "(A) hearing and determining motions rais-
4 ing defenses or objections which are capable of de-
5 termination without trial of the issues raised by a
6 plea of not guilty;
7 "(B) hearing and ruling upon any matter
8 which may be ruled upon by the military judge un-
9 der this chapter, whether or not the matter is ap-
10 propriate for later consideration or decision by the
11 members of the commission;
12 "(C) if permitted by regulations of the Sec-
13 retary, receiving the pleas of the accused; and
14 "(D) performing any other procedural func-
15 tion which may be performed by the military judge
16 under this chapter or under rules prescribed pursu-
17 ant to section 949a of this title and which does not
18 require the presence of the members of the com-
19 mission.
20 "(2) Except as provided in subsection (e), any pro-
21 ceedings under paragraph (1) shall be conducted in the
22 presence of the accused, defense counsel, and trial coun-
23 sel, and shall be made part of the record.
24 "(b) PROCEEDINGS IN PRESENCE OF ACCUSED.—
25 Except as provided in subsections (c) and (e), all pro-

1 ceedings of a military commission under this chapter
2 shall be in the presence of the accused, defense counsel,
3 and trial counsel, and shall be made a part of the record.
4 "(c) DELIBERATIONS OR VOTE OF MEMBERS.—
5 When the members of the commission deliberate or vote,
6 only the members may be present.
7 "(d) PUBLIC PROCEEDINGS.—(1) The military
8 commission shall hold open and public proceedings.
9 "(2) The military judge may close to the public all
10 or a part of the proceedings of a military commission un-
11 der this chapter only upon making a specific finding that
12 such closure is necessary to—
13 "(A) protect information the disclosure of
14 which could reasonably be expected to cause iden-
15 tifiable damage to the public interest or the na-
16 tional security, including intelligence or law en-
17 forcement sources, methods, or activities; or
18 "(B) ensure the physical safety of individu-
19 als.
20 "(e) LIMITED EXCLUSION OF THE ACCUSED FOR THE
21 PROTECTION OF CLASSIFIED INFORMATION.—(1) The mili-
22 tary judge may, subject to the provisions of this subsec-
23 tion, permit the admission in a military commission un-
24 der this chapter of classified information outside the
25 presence of the accused.

"(2) The military judge shall not exclude the accused from any portion of the proceeding except upon a specific finding that extraordinary circumstances exist such that—

"(A) the exclusion of the accused—

"(i) is necessary to protect classified information the disclosure of which to the accused could reasonably be expected to cause identifiable damage to the national security, including intelligence or law enforcement sources, methods, or activities; or

"(ii) is necessary to ensure the physical safety of individuals; or

"(iii) is necessary to prevent disruption of the proceedings by the accused; and

"(B) the exclusion of the accused—

"(i) is no broader than necessary; and

"(ii) will not deprive the accused of a full and fair trial.

"(3)(A) A finding under paragraph (2) may be based upon a presentation, including an ex parte or in camera presentation, by either trial counsel or defense counsel.

"(B) Before trial counsel may make a presentation described in subparagraph (A) requesting the admission

of classified evidence outside the presence of the accused, the head of the executive or military department or governmental agency which has control over the matter (after personal consideration by that officer) shall certify in writing to the military judge that—

"(i) the disclosure of such classified information to the accused could reasonably be expected to prejudice the national security; and

"(ii) such evidence has been declassified to the maximum extent possible, consistent with the requirements of national security.

"(4)(A) No evidence shall be admitted if the accused is not present for its admission or the evidence is not otherwise provided to the accused, unless the evidence is classified information and the military judge makes a specific finding that—

"(i) consideration of the evidence by the commission, without the presence of the accused, is warranted; and

"(ii) admission of an unclassified summary or redacted version of that evidence would not be an adequate substitute and, in the case of testimony, alternative methods to obscure the identity of the witness are not adequate; and

1 "(iii) admission of the evidence would not
2 deprive the accused of a full and fair trial.
3 "(B) If the accused is excluded from a portion of
4 the proceeding, the accused shall be provided with a re-
5 dacted transcript of the proceeding and, to the extent
6 practicable, an unclassified summary of any evidence in-
7 troduced. Under no circumstances shall such a summary
8 or redacted transcript compromise the interests warrant-
9 ing the exclusion of the accused under this subsection.
10 "(5)(A) Military defense counsel shall be present
11 and able to participate in all trial proceedings, and shall
12 be given access to all evidence admitted under subpara-
13 graph (4).
14 "(B) Civilian defense counsel shall be permitted to
15 be present and to participate in all trial proceedings, and
16 shall be given access to evidence admitted under sub-
17 paragraph (4), provided that civilian defense counsel has
18 obtained the necessary security clearances and that such
19 presence and access are consistent with regulations that
20 the Secretary may prescribe to protect classified informa-
21 tion.
22 "(C) Notwithstanding any other provision of law,
23 any defense counsel who receives classified information
24 admitted pursuant to subparagraph (4) shall not be obli-

1 gated to, and may not, disclose that evidence to the ac-
2 cused.
3 "(f) ADMISSION OF STATEMENTS OF ACCUSED.—(1)
4 Notwithstanding any other provision in this chapter, no
5 statement made by the accused during an interrogation,
6 even if otherwise classified, may be admitted into evi-
7 dence in a military commission under this chapter unless
8 the accused is present for its admission or the evidence is
9 otherwise provided to the accused.
10 "(2) For purposes of this subsection, a 'statement'
11 is a statement communicated knowingly and directly by
12 the accused in response to questioning by foreign or
13 United States military, intelligence, or criminal investiga-
14 tive personnel. This paragraph shall not be construed to
15 prevent the redaction of intelligence sources or methods,
16 which do not constitute statements of the accused, from
17 any document provided to the accused or admitted into
18 evidence.
19 **"§ 949e. Continuances**
20 "The military judge may, for reasonable cause,
21 grant a continuance to any party for such time, and as of-
22 ten, as may appear to be just.
23 **"§ 949f. Challenges**
24 "(a) CHALLENGES AUTHORIZED.—The military
25 judge and members of the commission may be chal-

1 lenged by the accused or the trial counsel for cause stated
2 to the commission. The military judge shall determine
3 the relevance and validity of the challenges for cause,
4 and may not receive a challenge to more than one person
5 at a time. Challenges by the trial counsel shall ordinarily
6 be presented and decided before those by the accused are
7 offered.

8 "(b) PEREMPTORY CHALLENGES.—Each accused
9 and the trial counsel is entitled to one peremptory chal-
10 lenge, but the military judge may not be challenged ex-
11 cept for cause.

12 "(c) CHALLENGES AGAINST ADDITIONAL MEM-
13 BERS.—Whenever additional members are detailed to the
14 court, and after any challenges for cause against such ad-
15 ditional members are presented and decided, each ac-
16 cused and the trial counsel are entitled to one peremptory
17 challenge against members not previously subject to per-
18 emptory challenge.

19 **"§ 949g. Oaths**

20 "(a) IN GENERAL.—(1) Before performing their re-
21 spective duties, military judges, members of commis-
22 sions, trial counsel, defense counsel, reporters, and inter-
23 preters shall take an oath to perform their duties faith-
24 fully.

"(2) The form of the oath required by paragraph (1), the time and place of the taking thereof, the manner of recording the same, and whether the oath shall be taken for all cases in which these duties are to be performed or for a particular case, shall be as prescribed in regulations of the Secretary. These regulations may provide that—

"(A) an oath to perform faithfully duties as a military judge, trial counsel, or defense counsel, may be taken at any time by any judge advocate or other person certified to be qualified or competent for duty; and

"(B) if such an oath is taken it need not again be taken at the time the judge advocate, or other person is detailed to that duty.

"(b) WITNESSES.—Each witness before a military commission under this chapter shall be examined on oath.

"(c) OATH DEFINED.—As used in this section, "oath" includes an affirmation.

"§ 949h. Former jeopardy

"(a) IN GENERAL.—No person may, without his consent, be tried by a commission a second time for the same offense.

1 "(b) SCOPE OF TRIAL.—No proceeding in which
2 the accused has been found guilty by military commis-
3 sion upon any charge or specification is a trial in the
4 sense of this section until the finding of guilty has be-
5 come final after review of the case has been fully com-
6 pleted.

7 **"§ 949i. Pleas of the accused**

8 "(a) PLEA OF NOT GUILTY.—If an accused after a
9 plea of guilty sets up matter inconsistent with the plea, or
10 if it appears that he has entered the plea of guilty through
11 lack of understanding of its meaning and effect, or if he
12 fails or refuses to plead, a plea of not guilty shall be en-
13 tered in the record, and the commission shall proceed as
14 though he had pleaded not guilty.

15 "(b) FINDING OF GUILT AFTER GUILTY PLEA.—
16 With respect to any charge or specification to which a
17 plea of guilty has been made by the accused and accepted
18 by the military judge, a finding of guilty of the charge or
19 specification may be entered immediately without a vote.
20 This finding shall constitute the finding of the commis-
21 sion unless the plea of guilty is withdrawn prior to an-
22 nouncement of the sentence, in which event the proceed-
23 ings shall continue as though the accused had pleaded not
24 guilty.

1 **"§ 949j. Opportunity to obtain witnesses and other**
2 **evidence**
3 "(a) IN GENERAL.—(1) Defense counsel in a mili-
4 tary commission under this chapter shall have a reason-
5 able opportunity to obtain witnesses and other evidence,
6 including evidence in the possession of the United States,
7 as specified in regulations prescribed by the Secretary.
8 "(2) Process issued in military commissions to
9 compel witnesses to appear and testify and to compel the
10 production of other evidence—
11 "(A) shall be similar to that which courts of
12 the United States having criminal jurisdiction may
13 lawfully issue; and
14 "(B) shall run to any place where the United
15 States shall have jurisdiction thereof.
16 "(b) TREATMENT OF CERTAIN ITEMS.—The military
17 judge in a military commission under this chapter may,
18 upon a sufficient showing, authorize trial counsel in mak-
19 ing documents available to the defense through discovery
20 conducted pursuant to such rules as the Secretary shall
21 prescribe—
22 "(1) to delete specified items of classified
23 information from such documents;
24 "(2) to substitute an unclassified summary of
25 the information for such classified documents; or

1 "(3) to substitute an unclassified statement
2 admitting relevant facts that classified information
3 would tend to prove.
4 "(c) DISCLOSURE OF EXCULPATORY EVIDENCE.—
5 (1) As soon as practicable, trial counsel in a military
6 commission under this chapter shall disclose to the de-
7 fense the existence of any evidence known to trial coun-
8 sel that reasonably tends to exculpate the accused.
9 "(2) Exculpatory evidence that is classified may be
10 provided solely to defense counsel, and not the accused,
11 after *in camera* review by the military judge.
12 "(3) Before classified evidence may be withheld
13 from the accused under this subsection, the executive or
14 military department or governmental agency which has
15 control over the matter shall ensure and shall certify in
16 writing to the military judge that the disclosure of such
17 evidence to the accused could reasonably be expected to
18 prejudice the national security and that such evidence has
19 been declassified to the maximum extent possible, con-
20 sistent with the requirements of national security.
21 "(4) Any classified exculpatory evidence that is
22 not disclosed to the accused under this subsection—
23 "(A) shall be provided to military defense
24 counsel; and

1 "(B) shall be provided to civilian defense
2 counsel, provided that civilian defense counsel has
3 obtained the necessary security clearances and ac-
4 cess to such evidence is consistent with regulations
5 that the Secretary may prescribe to protect classi-
6 fied information; and
7 "(C) shall be provided to the accused in a
8 redacted or summary form, if it is possible to do so
9 without compromising intelligence sources, meth-
10 ods, or activities, or other national security inter-
11 ests.
12 "(5) Notwithstanding any other provision of law,
13 any defense counsel who receives evidence under this
14 subsection shall not be obligated to, and may not, dis-
15 close that evidence to the accused.
16 **"§ 949k. Defense of lack of mental responsibility**
17 "(a) AFFIRMATIVE DEFENSE.—It is an affirmative
18 defense in a trial by military commission that, at the time
19 of the commission of the acts constituting the offense, the
20 accused, as a result of a severe mental disease or defect,
21 was unable to appreciate the nature and quality or the
22 wrongfulness of the acts. Mental disease or defect does
23 not otherwise constitute a defense.

1 "(b) BURDEN OF PROOF.—The accused has the
2 burden of proving the defense of lack of mental responsi-
3 bility by clear and convincing evidence.
4 "(c) FINDINGS FOLLOWING ASSERTION OF DE-
5 FENSE.—Whenever lack of mental responsibility of the
6 accused with respect to an offense is properly at issue,
7 the military judge shall instruct the members of the
8 commission as to the defense of lack of mental responsi-
9 bility under this section and shall charge them to find the
10 accused—
11 "(1) guilty;
12 "(2) not guilty; or
13 "(3) not guilty only by reason of lack of
14 mental responsibility.
15 "(d) MAJORITY VOTE REQUIRED FOR FINDING.—
16 The accused shall be found not guilty only by reason of
17 lack of mental responsibility under subsection (c)(3) only
18 if a majority of the members of the commission at the
19 time the vote is taken determines that the defense of lack
20 of mental responsibility has been established.
21 **"§ 949*l*. Voting and rulings**
22 "(a) VOTE BY SECRET WRITTEN BALLOT.—Voting
23 by members of a military commission on the findings and
24 on the sentence shall be by secret written ballot.

1 "(b) RULINGS.—(1) The military judge shall rule
2 upon all questions of law, including the admissibility of
3 evidence, and all interlocutory questions arising during
4 the proceedings.
5 "(2) Any such ruling made by the military judge
6 upon any question of law or any interlocutory question
7 other than the factual issue of mental responsibility of the
8 accused is conclusive and constitutes the ruling of the
9 commission. However, the military judge may change
10 his ruling at any time during the trial.
11 "(c) INSTRUCTIONS PRIOR TO VOTE.—Before a vote
12 is taken of the findings, the military judge shall, in the
13 presence of the accused and counsel, instruct the mem-
14 bers of the commission as to the elements of the offense
15 and charge them—
16 "(1) that the accused must be presumed to be
17 innocent until his guilt is established by legal and
18 competent evidence beyond reasonable doubt;
19 "(2) that in the case being considered, if
20 there is a reasonable doubt as to the guilt of the ac-
21 cused, the doubt must be resolved in favor of the
22 accused and he must be acquitted;
23 "(3) that, if there is reasonable doubt as to
24 the degree of guilt, the finding must be in a lower

1 degree as to which there is no reasonable doubt;
2 and
3 "(4) that the burden of proof to establish the
4 guilt of the accused beyond a reasonable doubt is
5 upon the United States.
6 **"§ 949m. Number of votes required**
7 "(a) CONVICTION.—No person may be convicted of
8 any offense, except as provided in section 949i(b) of this
9 title or by concurrence of two-thirds of the members pre-
10 sent at the time the vote is taken.
11 "(b) SENTENCES.—(1) Except as provided in para-
12 graphs (2) and (3), sentences shall be determined by a
13 military commission by the concurrence of two-thirds of
14 the members present at the time the vote is taken.
15 "(2) No person may be sentenced to suffer death,
16 except insofar as—
17 "(A) death has been expressly authorized
18 under this Act for an offense of which the accused
19 has been found guilty;
20 "(B) the charges referred to the commission
21 expressly sought the penalty of death;
22 "(C) the accused was convicted of the of-
23 fense by the concurrence of all the members of the
24 military commission present at the time the vote is
25 taken; and

1 "(D) all members of the military commis-
2 sion present at the time the vote was taken con-
3 curred in the sentence of death.
4 "(3) No person may be sentenced to life imprison-
5 ment or to confinement for more than 10 years, except by
6 the concurrence of three-fourths of the members at the
7 time the vote is taken.
8 "(c) NUMBER OF MEMBERS REQUIRED FOR PEN-
9 ALTY OF DEATH.—(1) Except as provided in paragraph
10 (2), in a case in which the penalty of death is sought, the
11 number of members shall be not less than 12.
12 "(2) In any case described in paragraph (1) in
13 which 12 members are not reasonably available because
14 of physical conditions or military exigencies, the conven-
15 ing authority shall specify a lesser number of members
16 for the military commission (but not fewer than 5 mem-
17 bers), and the military commission may be assembled
18 and the trial held with not fewer than the number of
19 members so specified. In such a case, the convening au-
20 thority shall make a detailed written statement, to be ap-
21 pended to the record, stating why a greater number of
22 members were not reasonably available.
23 **"§ 949n. Military commission to announce action**
24 "A military commission shall announce its find-
25 ings and sentence to the parties as soon as determined.

1 **"§ 949o. Record of trial**

2 "(a) RECORD; AUTHENTICATION.—Each military
3 commission shall keep a separate, substantially verbatim,
4 record of the proceedings in each case brought before it,
5 and the record shall be authenticated by the signature of
6 the military judge. If the record cannot be authenticated
7 by the military judge by reason of his death, disability, or
8 absence, it shall be authenticated by the signature of the
9 trial counsel or by that of a member of the commission if
10 the trial counsel is unable to authenticate it by reason of
11 his death, disability, or absence. Where appropriate, and
12 as provided by regulation, the record of the military
13 commission may contain a classified annex.

14 "(b) COMPLETE RECORD REQUIRED.—A complete
15 record of the proceedings and testimony shall be pre-
16 pared in every military commission established under this
17 chapter.

18 "(c) PROVISION OF COPY TO ACCUSED.—A copy of
19 the record of the proceedings of each military commis-
20 sion shall be given to the accused as soon as it is authen-
21 ticated. Where the record contains classified informa-
22 tion, or a classified annex, the accused shall receive a re-
23 dacted version of the record. The appropriate defense
24 counsel shall have access to the unredacted record, as
25 provided by regulation.

1 "SUBCHAPTER V—SENTENCES

"Sec.
"949s. Cruel or unusual punishments prohibited.
"949t. Maximum limits.
"949u. Execution of confinement.

2 **"§ 949s. Cruel or unusual punishments prohibited**

3 "Punishment by flogging, or by branding, marking,
4 or tattooing on the body, or any other cruel or unusual
5 punishment, may not be adjudged by a military commis-
6 sion or inflicted upon any person subject to this chapter.
7 The use of irons, single or double, except for the purpose
8 of safe custody, is prohibited.

9 **"§ 949t. Maximum limits**

10 "The punishment which a military commission
11 may direct for an offense may not exceed such limits as
12 the President or Secretary may prescribe for that offense.

13 **"§ 949u. Execution of confinement**

14 "(a) IN GENERAL.—Under such regulations as the
15 Secretary may prescribe, a sentence of confinement ad-
16 judged by a military commission may be carried into exe-
17 cution by confinement—

18 "(1) in any place of confinement under the
19 control of any of the armed forces; or

20 "(2) in any penal or correctional institution
21 under the control of the United States or its allies
22 or which the United States may be allowed to use.

1 "(b) TREATMENT DURING CONFINEMENT BY OTHER
2 THAN THE ARMED FORCES.—Persons confined under sub-
3 section (a)(2) in a penal or correctional institution not
4 under the control of one of the armed forces are subject
5 to the same discipline and treatment as persons confined
6 or committed by the courts of the United States or of the
7 State, Territory, District of Columbia, or place in which
8 the institution is situated.

9 "SUBCHAPTER VI—POST-TRIAL PROCEDURE
10 AND REVIEW OF MILITARY COMMISSIONS

"Sec.
"950a. Error of law; lesser included offense.
"950b. Review by the convening authority.
"950c. Waiver or withdrawal of appeal.
"950d. Appeal by the United States.
"950e. Rehearings.
"950f. Review by Court of Military Commission Review.
"950g. Review by the United States Court of Appeals for the District of Columbia Circuit and the Supreme Court of the United States.
"950h. Appellate counsel.
"950i. Execution of sentence; suspension of sentence.
"950j. Finality or proceedings, findings, and sentences.

11 **"§ 950a. Error of law; lesser included offense**

12 "(a) ERROR OF LAW.—A finding or sentence of a
13 military commission may not be held incorrect on the
14 ground of an error of law unless the error materially
15 prejudices the substantial rights of the accused.

16 "(b) LESSER INCLUDED OFFENSE.—Any reviewing
17 authority with the power to approve or affirm a finding of
18 guilty may approve or affirm, instead, so much of the
19 finding as includes a lesser included offense.