109TH CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPT. 109–664
Part 1

AMENDING TITLE 10, UNITED STATES CODE, TO AUTHORIZE TRIAL BY MILITARY COMMISSION FOR VIOLATIONS OF THE LAW OF WAR, AND FOR OTHER PURPOSES

R E P O R T

OF THE

COMMITTEE ON ARMED SERVICES
HOUSE OF REPRESENTATIVES

ON

H.R. 6054

together with

ADDITIONAL AND DISSENTING VIEWS

[Including cost estimate of the Congressional Budget Office]

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MILITARY COMMISSIONS ACT OF 2006

SEPTEMBER 15, 2006.—Ordered to be printed

Mr. HUNTER, from the Committee on Armed Services, submitted the following

R E P O R T

together with

ADDITIONAL AND DISSENTING VIEWS

[To accompany H.R. 6054]

[Including cost estimate of the Congressional Budget Office]

The Committee on Armed Services, to whom was referred the bill (H.R. 6054) to amend title 10, United States Code, to authorize trial by military commission for violations of the law of war, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments (stated in terms of the page and line numbers of the introduced bill) are as follows:

Page 4, after line 18, insert the following new paragraph (and redesignate the succeeding paragraphs accordingly):

> "(2) LAWFUL ENEMY COMBATANT.—The term 'lawful enemy combatant' means an individual determined by or under the authority of the President or Secretary of Defense (whether on an individualized or collective basis) to be—
>
> "(A) a member of the regular forces of a State party engaged in hostilities against the United States or its co-belligerents;
>
> "(B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinc-

tive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or

"(C) a member of a regular armed forces who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.

Page 6, after line 15, insert the following new subsection (and redesignate the succeeding subsection accordingly):

"(b) LAWFUL ENEMY COMBATANTS.—Military commissions under this chapter shall not have jurisdiction over lawful enemy combatants. Lawful enemy combatants who violate the law of war are subject to chapter 47 of this title. Courts martial established under that chapter shall have jurisdiction to try a lawful enemy combatant for any offense made punishable under this chapter.

Page 34, line 15, insert "classifed" after "who receives".

Page 80, after line 24, add the following new section:

SEC. 9. AMENDMENTS TO UNIFORM CODE OF MILITARY JUSTICE.

(a) APPLICABILITY TO LAWFUL ENEMY COMBATANTS.—Section 802(a) of title 10, United States Code (article 2(a) of the Uniform Code of Military Justice), is amended by adding at the end the following new paragraph:

"(13) Lawful enemy combatants who violate the law of war.".

(b) EXCLUSION OF CHAPTER 47A COMMISSIONS.—Section 821 of such title (article 21 of such Code) is amended by adding at the end the following new sentence: "This section does not apply to military commissions established under chapter 47A of this title.".

(c) INAPPLICABILITY OF REQUIREMENT FOR UNIFORM REGULATIONS.—Section 36(b) of such title (article (36) of such Code) is amended by inserting before the period at the end ", except insofar as applicable to military commissions established under chapter 47A of this title".

PURPOSE AND SUMMARY

The purpose of H.R. 6054, the "Military Commissions Act of 2006", is to amend title 10, United States Code, to authorize trial by military commission for violations of the law of war by alien unlawful enemy combatants. In this legislation Congress would authorize standards and procedures for military commissions in a new separate chapter of Title 10, United States Code. While this new chapter, designated Chapter 47A, is based upon the Uniform Code of Military Justice, it would create an entirely new structure for these trials.

Chapter 47A would provide standards for the admission of evidence, including hearsay evidence and other statements, which are adapted to military exigencies and provide the military judge the necessary discretion to determine if the evidence is reliable and probative. This new chapter would allow the introduction of sensitive classified information into evidence outside the presence of the accused in certain narrowly limited circumstances, including a

determination by the military judge that the evidence is probative and that admission of the evidence will not deny the accused a full and fair trial. This step is taken only if the military judge determines this extraordinary step is necessary to protect national security, and after a determination by the judge that any redactions, substitutions, or alternative means cannot protect the evidence. The accused will always have an attorney who is provided with this classified evidence. Chapter 47A would ensure that military commission decisions are reviewed as a matter of right by a new Court of Military Commission Review, by the United States Court of Appeals for the District of Columbia Circuit, and the Supreme Court if *writ of certiorari* is granted. These courts would certify that the judge's decision will not deprive the accused of a full and fair trial. These rules would protect classified evidence while preserving a fair trial. During an ongoing conflict, sharing sensitive intelligence sources, methods, and other classified information with terrorist detainees could be highly dangerous to national security.

Second, H.R. 6054 would amend title 18, United States Code to define a war crime under United States law as any serious violation of Common Article 3 of the Geneva Conventions (Common Article 3). Conduct, which would constitute a serious violation of Common Article 3, would include torture, cruel or inhuman treatment, murder, mutilation or maiming, intentionally causing great suffering or serious injury, and taking hostages. This section would also identify and criminalize three serious and clear outrages upon personal dignity: biological experimentation, rape and sexual assault.

Third, this legislation would amend title 28, United States Code, to allow judicial review within the United States Court of Appeals for the District of Columbia Circuit of the military commissions and of an individual's status as an enemy combatant.

Fourth, this legislation would establish that compliance with section 1003 of the Detainee Treatment Act (DTA) of 2005 (Public Law 109–148) fully satisfies the obligations of the United States with regard to section 1 of Common Article 3 of the Geneva Conventions, and would prohibit 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. However, the committee must emphasize that the DTA itself specifically provides for the protections of the Fifth, Eighth, and Fourteenth Amendments of the Constitution of the United States, which are the very heart of the basic human rights that U.S. law provides to its citizens. Therefore, a provision stating that treatment under the DTA satisfies the Geneva Convention is the same as saying that fundamental United States standards of treatment satisfy our treaty obligations.

Finally, this legislation would clarify 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.

BACKGROUND

On November 13, 2001, President George W. Bush signed an executive order regarding "Detention, Treatment, and Trial of Cer-

tain Non-Citizens in the War Against Terrorism." One purpose of this order was to authorize the Secretary of Defense to establish military commissions that would provide full and fair trials to foreign individuals, who were members of the al Qaeda terrorist organization or who engaged in, aided or abetted, or conspired to commit, the attacks against the United States on September 11, 2001.

In January 2002, the United States began detaining foreign individuals captured in the global war on terror as "enemy combatants" at United States military facilities at Guantanamo Bay, Cuba. Upon an individual's arrival at Guantanamo, United States officials assess whether that individual should be released or transferred to the custody of his government. After Supreme Court decisions to give individuals a method to contest their detention, the United States Government established in July 2004 "Combatant Status Review Tribunal" procedures that provide for a one-time review of an individual's combatant status. The United States Government also created an Administrative Review Board procedure to consider each individual's status on an annual basis. Finally, United States courts have held that each individual has access to counsel and the United States judicial system, and in 2004, the United States Supreme Court ruled that the United States District Court for the District of Columbia Circuit has jurisdiction to consider *habeas corpus* challenges to the legality of the detention of foreign nationals at Guantanamo. That ruling, in concert with other related rulings, has resulted in further proceedings at the federal trial and appellate court levels.

Aside from establishing procedures to address individuals' status as "enemy combatants", the United States Government noted that nations have traditionally used military commissions, which are recognized by the Geneva Convention, to prosecute violations of the law of war. The United States Government chose to prosecute certain foreign individuals for such violations using military commission procedures established by the Secretary of Defense as authorized by executive order in November 2001. Some defendants in these cases have chosen to bring charges against United States officials; one such case was Hamdan v. Rumsfeld.

On June 29, 2006, the United States Supreme Court ruled, in a 5–3 vote on *Hamdan* v. *Rumsfeld*, 548 US at ——; 165 L.Ed.723 (2006), that the President's military commissions lacked authority to proceed because they do not comply with the Uniform Code of Military Justice (UCMJ) and Common Article 3. The Court's essential determinations were that: such a military commission requires specific congressional authorization; the structure and procedures of the Hamdan-related military commission violated the UCMJ; and the procedures adopted to try Hamdan did not meet the Common Article 3 requirement that sanctions must be pronounced by "a regularly constituted court affording all judicial guarantees which are recognized as indispensable by civilized peoples."

Although the Court declared the military commissions as constituted to be illegal, it left open the possibility that changes to commissions' rules or new legislation could bring the commissions within the law of war and conform with the UCMJ. The Court also suggested that the President could ask the United States Congress to authorize commission rules that diverge from the UCMJ, pro-

vided that they were consistent with the Constitution and other laws.

In response to proposed legislation from the President and after conducting three hearings on the topic of military commissions, the committee considered H.R. 6054, which addresses the scope, jurisdiction, and procedures of military commissions in which the United States could prosecute alien unlawful enemy combatants for violations of the law of war, and other offenses.

LEGISLATIVE HISTORY

H.R. 6054 was introduced on September 12, 2006, and referred to the Committee on Armed Services and in addition to the Committees on the Judiciary and International Relations, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned.

On September 13, 2006, the Committee on Armed Services held a mark-up session to consider H.R. 6054. After general discussion of the resolution, Ranking Member Skelton offered an amendment in the nature of a substitute. Mr. Meehan then offered a second degree amendment striking section 6 of the Skelton substitute. The Meehan amendment failed on a show of hands. The Skelton amendment failed on a record vote of 26 ayes to 32 noes with 1 voting present. The committee reported favorably the bill, as amended, by a record vote of 52 ayes to 8 noes with 1 voting present, a quorum being present.

HEARINGS

Committee consideration of the matter contained in the Military Commissions Act of 2006, results from three full committee hearings conducted on July 12, July 26, and September 7, 2006.

SECTION-BY-SECTION ANALYSIS

The following is a section-by-section analysis of those sections of H.R. 6054 as amended by the Armed Services Committee.

Section 1—Short title; table of contents

This section would establish the short title of the bill as the "Military Commissions Act of 2006."

Section 2—Construction of Presidential authority to establish military commissions

This section would clarify that establishing military commissions under Chapter 47A of title 10, United States Code (as authorized under Section 3 of this Act) does not alter or limit the authority of the President under the Constitution to establish military commissions on the battlefield or in occupied territories.

Section 3—Military commissions

This section would amend Title 10 of the United States Code by inserting after Chapter 47 a new chapter, 47A for military commissions, which includes the following sections:

SUBCHAPTER I—GENERAL PROVISIONS

Section 948a—Definitions

The section would define the terms "Unlawful Enemy Combatant", "Lawful Enemy Combatant", "Geneva Conventions", and "Classified Information" under this chapter.

The committee notes that the most significant definition here is that of "unlawful enemy combatants," which identifies those alien enemy combatants subject to prosecution by military commissions. This definition, which is similar to the definition employed in the context of Combatant Status Review Tribunals, 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 hostilities against the United States in violation of the laws of war. The committee does not believe that the United States must be engaged in armed conflict to try an alien unlawful enemy combatant engaged in hostilities against the United States. At the same time, the definition would expressly exclude those who abide by the laws of war, such as members of legitimate armed forces, as well as non-combatants under the Geneva Conventions.

Section 948b—Military Commissions Generally

This section would authorize the President to establish military commissions for violations of offenses triable by military commission as provided in this chapter. While the procedures for military commissions created in this chapter are based on the procedures for trial by courts-martial under Chapter 47, title 10, United States Code, the committee considers the commissions authorized by this chapter constitute a separate, independent commission system not contemplated in Chapter 47, title 10, United States Code. Therefore, this section would state that Chapter 47, and any construction or application of such chapter and any administrative practice under such chapter, does not apply to trial by military commission under this chapter. Finally, this section would state that the Congress considers the military commissions established in this chapter is a regularly constituted court, affording all the necessary "judicial guarantees which are recognized as indispensable by civilized peoples" for purposes of common Article 3 of the Geneva Conventions.

Section 948c—Persons Subject to Military Commissions

This section would authorize use of military commissions created under this chapter to only those individuals who are alien unlawful enemy combatants.

Section 948d—Jurisdiction of Military Commissions

This section would give jurisdiction to military commissions under this chapter to try only those offenses made punishable by this chapter when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001. The jurisdiction provided in this section, would not therefore, extend to lawful enemy combatants. Lawful enemy combatants who violate the law of war

are subject to Chapter 47, title 10, United States Code, and courts martial established under chapter 47 would continue to have jurisdiction to try a lawful enemy combatant for any offense made punishable under Chapter 47. Finally, this section would allow, subject to limitations the Secretary of Defense may prescribe, the military commissions under this chapter to adjudge any punishment not forbidden by this chapter, including the penalty of death when authorized under this chapter.

Section 948e—Annual Report to Congressional Committees

This section would direct the Secretary of Defense to submit to the Senate Committee on Armed Services and the House Committee on Armed Services an annual report on any trials conducted by military commissions under this chapter. The report should provide a summary of each trial conducted by the military commission that identifies the case brought by the prosecution, the ruling by the commission, and, in the event the case is reviewed by the Court of Military Commission Review, the Court of Appeals for the District of Columbia Circuit, or the Supreme Court, the report should summarize the holdings and rationale of each appeals court.

SUBCHAPTER II—COMPOSITION OF MILITARY COMMISSIONS

Section 948h—Who May Convene Military Commissions

This section would permit the Secretary of Defense, or any officer or official of the United States designated by the Secretary, to convene military commissions under this chapter.

Section 948i—Who May Serve on Military Commissions

This section would make any commissioned officer of the armed forces on active duty eligible to serve as a panel member on a military commission under this chapter. This section would further require the convening authority to detail members of the commission that are fully qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. The section would ensure that a member of a military commission is not the accuser or a witness for the prosecution or has acted as an investigator or counsel in the same case. Finally, the section would permit the convening authority to excuse a member from participating so long as he is excused before the military commission is assembled.

Section 948j—Military Judges

This section would require that a military judge shall be detailed to each military commission under this chapter. This section would further require the Secretary of Defense to prescribe regulations providing for the manner in which military judges are detailed to military commissions. The section would ensure that a military judge preside over each military commission to which he is detailed. This section would also require that a military judge shall be a commissioned officer of the armed forces who is a member of the bar of a federal court or a member of the bar of the highest court of a State, and who is certified to be qualified for duty under section 826 of title 10, United States Code as a military judge in

general courts-martial by the Judge Advocate General of the armed force of which the military judge is a member. The section would also provide that any accuser, witness, counsel or investigator is ineligible to be the military judge in the same case. This section would further require that a military judge may not consult with the members of the commission outside the presence of the accused or counsel except as provided for in Section 949d regarding procedures for the admissibility of classified evidence. This section would also prohibit the military judge from voting with the members of the commission. This section would also permit a military judge assigned to a military commission to perform other duties assigned to him by the Judge Advocate General. Finally, this section would prohibit the convening authority from preparing or evaluating any fitness report which relates to the performance of duty for a military judge assigned to a military commission under this chapter.

Section 948k—Detail of Trial Counsel and Defense Counsel

This section would require that trial counsel and military defense counsel shall be detailed for each military commission under this chapter. The section would also provide that assistant trial counsel and assistant and associate defense counsel may be detailed. The section would further require that military defense counsel should be detailed as soon as practicable after the swearing of charges against the accused. The section requires the Secretary of Defense to prescribe regulations regarding the detail of counsel to military commissions under this chapter.

This section would require that a trial counsel must be (1) a judge advocate as defined in section 801 of title 10, United States Code, (2) a graduate of an accredited law school or a member of the bar of a federal court or of the highest court of a State, and (3) certified as competent to perform duties before general courts-martial by the Judge Advocate General of the armed force of which he is a member. The section would permit civilian counsel who is a member of the bar of a federal court or of the highest court of a state and otherwise qualified to practice before the military commission pursuant to regulations prescribed by the Secretary of Defense.

This section would also require that a military defense counsel must be a graduate of an accredited law school or a member of the bar of a federal court or of the highest court of a State, and certified as competent to perform duties before general courts-martial by the Judge Advocate General of the armed force of which he is a member.

The section would ensure that a trial counsel or military defense counsel may not have previously acted as an investigator, military judge or member of a military commission in the same case. The section would prohibit a person who has acted for the prosecution in a case from later acting for the defense in the same case. Finally, the section would prohibit a person who has acted for the defense in a case from later acting for the prosecution in the same case.

Section 948l—Detail or Employment of Reporters and Interpreters

This section would require the Secretary of Defense to prescribe regulations authorizing the convening authority to detail qualified court report reporters and interpreters for military commissions. The section would require the court reporter to make a verbatim recording of the proceedings and testimony taken before military commissions under this chapter. The section would also require the Secretary of Defense to prescribe regulations authorizing the convening authority to detail or employ interpreters for the commission, trial counsel and defense counsel. The section would further require the convening authority to prepare the record of proceedings. Finally this section would require that any transcript of a military commission under this chapter will be under the control of the convening authority.

Section 948m—Number of Members; Excuse of Members; Absent and Additional Members

This section would require that a military commission under this chapter should have a minimum of five members and that in cases where the death penalty is sought, there should be the number of members required by section 949(m) of this chapter. The section would also provide that no member of a military commission may be absent or excused after the military commission has been assembled unless (1) as a result of a challenge, (2) excused by the military judge for physical disability or other good cause, or (3) by order of the convening authority for good cause. The section would also require that whenever a military commission is reduced below the amount required by this section, the trial may not proceed until the convening authority details a sufficient number of members. Finally, the section would provide that any trial may not proceed with any new members until the recorded evidence previously introduced has been read to the military commission in the presence of the military judge, the accused (except as provided in section 949d of this chapter) and counsel for both sides.

SUBCHAPTER III—PRE-TRIAL PROCEDURE

Section 948q—Charges and Specifications

This section would require that a person subject to chapter 47 of this title, under an oath before a commissioned officer of the armed forces authorized to administer oaths, sign charges and specifications against the accused in a military commission under this chapter. In making the charge against the accused, the officer must state that he has personal knowledge of, or reason to believe, the matters set forth in the charge, and that they are true in fact to the best of the signer's knowledge and belief. The section would also require that, upon the swearing of the charges, the accused be informed of the charges against him as soon as practicable.

Section 948r—Compulsory Self-Incrimination Prohibited; Treatment of Statements Obtained by Torture and Other Statements

The section would prohibit the accused from being required to testify against himself at a proceeding of a military commission

under this chapter. This section would also exclude from military commission proceedings statements obtained by use of torture (as defined in section 2340 of title 18, United States Code), except against a person accused of torture as evidence the statement was made. The committee notes that the "fruit of the poisonous tree" doctrine (see *Wong Sun Et Al.* v. *United States*, 371 U.S. 471 (1963)) does not apply to this section, and that evidence obtained as a result of such statements would be admissible evidence. Finally, this section would require the military judge, where a statement was allegedly obtained through coercion, to rule whether the circumstances under which the statement was obtained render the statement unreliable or lacking in probative value.

Section 948s—Service of Charges

The section would require the trial counsel assigned to a case before a military commission under this chapter to ensure that the accused and military defense counsel are served a copy of the charges, and that it is provided sufficiently in advance of trial so the accused can prepare a defense. The charges should be served in English and, if appropriate, in another language that the accused understands.

SUBCHAPTER IV—TRIAL PROCEDURE

Section 949a—Rules

This section would require the Secretary of Defense to prescribe pretrial, trial, and post-trial procedures that are not contrary to or inconsistent with this chapter, including elements and modes of proof, for cases triable by military commission under this chapter.

This section would also provide that evidence in a military commission under this chapter shall be admissible if the military judge determines that the evidence would have probative value to a reasonable person. The section would also provide that this rule is subject to such exceptions and limitations as the Secretary of Defense may prescribe by regulation. The committee notes that this standard for admission of evidence is similar to that used by international tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).[1]

This section would also provide that hearsay evidence is admissible unless the military judge would find that the circumstances render it unreliable or lacking in probative value. The section also would require that such evidence may be admitted only if there is notice to the adverse party in advance. The committee expects the defense to have the burden of persuasion with respect to the admission of any contested hearsay statement. Finally, the section would provide that the military judge must exclude any hearsay evidence if the probative value is substantially outweighed: (1) by the danger of unfair prejudice, confusion of the issues, or misleading the members or (2) by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[1] See ICTY Rules of Procedure and Evidence, Rule 89C (General Provisions) (adopted February 11, 1994), "A Chamber may admit any relevant evidence which it deems to have probative value." ICTR Rule 89C (May 21, 2005) is identical.

This section would also require that the Secretary of Defense notify and describe any modifications to the Senate Committee on Armed Services and the House Committee on Armed Services no later than sixty days before the date on which any proposed modification of the procedures in effect for military commissions under this chapter go into effect.

Section 949b—Unlawfully Influencing Action of Military Commission

This section would prohibit the convening authority from censuring, reprimanding, or admonishing the members of a military commission, trial counsel, defense counsel or military judge assigned under this chapter with respect to the findings or sentence adjudged by the military commission, or with respect to any other exercise of any functions in the conduct of the proceedings.

This section would also prohibit any person from attempting to coerce or influence by any unauthorized means the actions of a military commission or member of a military commission in reaching the findings or sentence in any case or the action of any convening, approving or reviewing authority with respect to judicial acts.

The section would not prohibit: (1) enrollment in general instructional or information courses in military justice if such courses were designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of military commissions; or (2) general statements or instructions given in open proceedings by a military judge or counsel.

Finally, this section would prohibit consideration or evaluation of the performance of duty of any member of a military commission, or giving a less favorable rating or evaluation to any commissioned officer because of the zeal with which such officer, in acting as counsel, represented any accused before a military commission under this chapter for the following purposes: the preparation of any report or document used for the purpose of determining whether a commissioned officer of the armed forces is qualified to be advanced in grade, assigned to a new position, transferred or retained on active duty.

Section 949c—Duties of Trial Counsel and Defense Counsel

This section would provide that the trial counsel of a military commission under this chapter shall prosecute in the name of the United States.

This section would also provide that the accused should be represented in his defense before a military commission under this chapter as provided in this subsection. The section would provide that an accused shall be represented by military counsel detailed under section 948k of this title or by a civilian counsel who meets the requirements listed in this section.

This section would provide that the accused may be represented by civilian counsel if retained by the accused, but only if such civilian counsel: (1) is a United States citizen; (2) is admitted to the practice of law in a State, district, or possession of the United States or before a Federal court; (3) has not been the subject of any sanction of disciplinary action by any court, bar, or other competent

governmental authority for relevant misconduct; (4) has been determined to be eligible for access to classified information that is classified at the level Secret or higher; and (5) has signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the proceedings.

This section would also require civilian defense counsel to protect any classified information received during the course of representation of the accused in accordance with all applicable law governing the protection of classified information and prohibits divulging such information to any person not authorized to receive it.

This section would also provide that if the accused is represented by civilian counsel, military counsel detailed shall act as associate counsel.

This section would prohibit the accused from being represented by more than one military counsel unless by the person authorized under regulations prescribed under section 948k of this title, at his sole discretion, details additional military counsel to represent the accused.

Finally, this section would permit defense counsel to cross-examine each witness for the prosecution who testifies before a military commission under this chapter.

Section 949d—Sessions

This section would allow the military judge to call the military commission into session without the presence of the members at any time after the service of charges which have been referred for trial by military commission under this chapter, for the purpose of: (1) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty, (2) hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later consideration or decision by the members, (3) if permitted by regulations prescribed by the Secretary of Defense, receiving the pleas of the accused, and (4) performing any other procedural function which may be performed by the military judge under this chapter or under rules prescribed pursuant to section 949a of this title and which does not require the presence of the members. This section would also provide that these proceedings will be conducted in the presence of the accused, defense counsel, and trial counsel and be made part of the record except as provided in subsections (c), (d), and (e) of this section.

This section would also provide that all proceedings of the military commission in which members are present, including any consultation of the members with the military judge or counsel, shall be in the presence of the accused, defense counsel, and trial counsel and be made part of the record except as provided in subsections (c) and (e) of this section.

Subsection (c) of this section would provide that when the members of a military commission under this chapter deliberate or vote, only the members may be present.

Subsection (d) of this section would provide the military judge discretion to close to the public all or part of the proceedings of a military commission under this chapter under the following rules.

The military judge may close to the public all or a portion of the proceedings of a military commission or permit the admission of classified information outside the presence of the accused, based upon a presentation (including an *ex parte* or *in camera* presentation) by either the prosecution or the defense. The trial counsel may not make a presentation requesting the admission of classified information outside the presence of the accused unless the head of the department or agency which has control over the matter (after personal consideration by that officer) certifies in writing to the military judge that: (1) the disclosure of the classified information to the accused could reasonably be expected to prejudice the national security; and (2) that such evidence has been declassified to the maximum extent possible, consistent with the requirements of national security. Finally, the military judge may close to the public all or a portion of the proceedings of a military commission upon making a specific finding that such closure is necessary to: (1) protect information the disclosure of which could reasonably be expected to cause identifiable damage to the public interest or the national security, including intelligence or law enforcement sources, methods, or activities; or (2) ensure the physical safety of individuals.

Subsection (e) of this section would provide that the military judge may not exclude the accused from any portion of the proceeding except upon a specific finding that the exclusion of the accused: (1) 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; (2) is necessary to ensure the physical safety of individuals; or (3) is necessary to prevent disruption of the proceedings by the accused. The military judge must also make a specific finding that the exclusion of the accused is no broader than necessary, and will not deprive the accused of a full and fair trial. This finding may be based upon a presentation, including a presentation *ex parte* or *in camera,* by either trial counsel or defense counsel. Before trial counsel may make a presentation requesting the admission of classified information that has not been provided to the accused, the head of the executive or military department or governmental agency concerned shall ensure, and shall certify in writing to the military judge, that such evidence has been declassified to the maximum extent possible, consistent with the requirements of national security.

Subsection (e) of the section would also provide that no evidence may be admitted that has not been provided to the accused unless the evidence is classified information and the military judge makes a specific finding that: (1) consideration of that evidence by the military commission, without the presence of the accused, is warranted; (2) 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 (3) admission of the evidence would not deprive the accused of a full and fair trial. If the accused is excluded from a portion of the proceedings, the accused shall be provided with a redacted transcript of the proceedings from which excluded and, to the extent practicable, an unclassified summary of any evidence introduced. Under no circumstances

would such a summary or redacted transcript compromise the interests warranting the exclusion of the accused under subsection (e). Military defense counsel would be present and able to participate in all trial proceedings and would be given access to all evidence admitted outside the presence of the accused. Civilian defense counsel would be permitted to be present and to participate in proceedings from which the accused is excluded under this subsection, and would be given access to classified information admitted under this subsection, if: (1) civilian defense counsel has obtained the necessary security clearances; and (2) the presence of civilian defense counsel or access of civilian defense counsel to such information, as applicable, is consistent with regulations to protect classified information that the Secretary of Defense may prescribe. Any defense counsel who receives classified information admitted under subsection (e) would not be obligated to, and may not, disclose that information to the accused. At all times the accused must have defense counsel with sufficient security clearance to participate in any proceeding, including an *ex parte* or *in camera* presentation, with respect to classified information. If evidence has been admitted under this subsection that has not been provided to the accused, the judge would instruct the members of the commission: (1) that such evidence was so admitted; and (2) that, in weighing the value of that evidence, the commission shall consider the fact that such evidence was admitted without having been provided to the accused.

Subsection (f) of this section would provide that a statement that is made by the accused during an interrogation, even if otherwise classified, may not be admitted into evidence in a military commission under this chapter unless the accused is present for the admission of the statement into evidence or the statement is otherwise provided to the accused. A statement of an accused for purposes of subsection (f) is a statement communicated knowingly and directly by the accused in response to questioning by United States or foreign military, intelligence, or criminal investigative personnel. However, the section would require that this subsection not be construed to prevent the redaction of intelligence sources or methods, which do not constitute statements of the accused, from any document provided to the accused or admitted into evidence.

The committee notes that because military commission may have to consider highly sensitive intelligence that cannot reasonably be shared with captured terrorists, it endorses these special procedures that, under narrowly defined circumstances, would permit the introduction of classified evidence outside the presence of the accused. The committee believes alien unlawful enemy combatants, who are engaged in a war with the United States, should not be allowed to exploit military commission procedures to gain information that might assist them or their associates in perpetrating future attacks against the United States and its allies. The committee believes that Military Rule of Evidence (MRE) 505, would not be practicable for military commissions. MRE 505 does not permit the judge to permit the admission of classified evidence unless it is 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 not introducing the evidence at all. Giving the gov-

ernment that choice is entirely appropriate when it comes to the trial of U.S. soldiers or lawful enemy combatants in a courts-martial, but it is neither necessary, nor appropriate for the trials of unlawful enemy combatants for violations of the law of war that occur during an ongoing conflict. This section therefore would grant the military judge the discretion, under carefully defined and extraordinary circumstances, to admit classified evidence that is not shared with the accused.

The committee believes that excluding the accused under this subsection will be an extraordinary occurrence, to be carefully limited. There will be no "secret trials" without the accused. Instead, the section would provide that before any classified evidence may be introduced outside the presence of the accused, 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 right to a full and fair trial for the accused. The defense counsel for the accused 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 section 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.

Section 949e—Continuances

This section would require that the military judge may grant reasonable continuances if they appear to be just.

Section 949f—Challenges

This section would permit the military judge and members of a military commission under this chapter to be challenged by the accused or trial counsel for cause stated to the commission. The section would also require the military judge to determine the relevance and validity of challenges for cause. The section would prohibit the military judge from receiving a challenge to more than one person at a time. The section would require challenges by trial counsel to ordinarily be presented and decided before challenges by the accused.

The section would permit one peremptory challenge by the trial counsel and one peremptory challenge by the accused. The section would authorize only a challenge against the military judge for cause.

The section would permit challenges for cause to additional members detailed to a military commission under this chapter. Finally, after any challenges for cause against such additional members are presented and decided, the section would permit the accused and trial counsel one peremptory challenge against members not previously subject to peremptory challenge.

949g—Oaths

This section would require military judges, members, trial counsel, defense counsel, reporters, and interpreters to take an oath to perform their duties faithfully before performing their duties in a military commission under this chapter. This section would authorize the Secretary of Defense to prescribe regulations regarding the form of the oath, 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 duties are to be performed or for a particular case. The section would also require that the regulations for 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 the duty; and if such an oath is taken, such oath need not again be taken at the time the judge advocate or other person is detailed to that duty. Finally, the section would provide that each witness before a military commission under this chapter will be examined under oath.

Section 949h—Former Jeopardy

This section would provide that no person may, without his consent, be tried by a military commission under this chapter a second time for the same offense. The section would also provide that no proceeding in which the accused has been found guilty by military commission under this chapter upon any charge or specification is a trial in the sense of this section until the finding of guilty has become final after review of the case has been fully completed.

Section 949i—Pleas of the Accused

This section would provide that a plea of not guilty shall be entered on the record and the military commission shall proceed as though the accused had pleaded not guilty if an accused in a military commission under this chapter after a plea of guilty sets up matter inconsistent with the plea, or if it appears that the accused has entered the plea of guilty through lack of understanding of its meaning and effect, or if the accused fails or refuses to plead. This section would also provide that with respect to any charge or specification to which a plea of guilty has been made by the accused in a military commission under this chapter and accepted by the military judge, a finding of guilty of the charge or specification may be entered immediately without a vote by the military commission. The section would further provide that the finding of guilty by the military judge pursuant to this section shall constitute the finding of the commission unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty.

Section 949j—Opportunity To Obtain Witnesses and Other Evidence

This section would provide that defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence, including evidence in the possession of the United States, as provided in regulations prescribed by the Secretary of Defense.

This section would also provide that the process issued in a military commission under this chapter to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue; and shall run to any place where the United States shall have jurisdiction thereof.

This section would also provide the military judge in a military commission under this chapter, upon a sufficient showing, may authorize trial counsel, in making documents available to the accused through discovery conducted pursuant to such rules as the Secretary of Defense shall prescribe, to delete specified items of classified information from such documents and, when such a deletion is made: (1) to substitute an unclassified summary of the classified information in such documents; or (2) to substitute an unclassified statement admitting relevant facts that classified information in such documents would tend to prove.

This section would require the trial counsel in a military commission under this chapter to disclose as soon as practicable to the defense, the existence of any evidence known to trial counsel that reasonably tends to exculpate the accused. The section would also require that exculpatory evidence that consists of classified information may be provided solely to defense counsel, and not the accused, after review *in camera* by the military judge. The section would further require that before evidence may be withheld from the accused under this subsection, the head of the executive or military department or government agency concerned shall ensure, and shall certify in writing to the military judge, that (1) the disclosure of such evidence to the accused could reasonably be expected to prejudice the national security; and (2) such evidence has been declassified to the maximum extent possible, consistent with the requirements of national security. This section would further require that any classified exculpatory evidence that is not disclosed to the accused under this subsection: (1) shall be provided to military defense counsel; (2) shall be provided to civilian defense counsel, if civilian defense counsel has obtained the necessary security clearances and access to such evidence is consistent with regulations that the Secretary may prescribe to protect classified information; and (3) shall be provided to the accused in a redacted or summary form, if it is possible to do so without compromising intelligence sources, methods, or activities or other national security interests. Finally, this section would provide that a defense counsel who receives evidence under this subsection is not obligated to, and will not, disclose that evidence to the accused. The committee notes that this section makes clear that defense counsel is prohibited from sharing classified evidence with the accused and that this prohibition overrides any duty of communication that may be imposed by other federal or state law.

Section 949k—Defense of Lack of Mental Responsibility

This section would provide an affirmative defense in a trial by military commission under this chapter that, if at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts. The section would also clarify that a mental disease or defect does not

otherwise constitute a defense. The section would provide that the accused in a military commission under this chapter has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence. The section would require the military judge to instruct the members of the commission as to the defense of lack of mental responsibility under this section whenever the lack of mental responsibility of the accused with respect to an offense is properly at issue in a military commission under this chapter. The section would require the military judge to instruct the members that their options when the accused has properly raised the defense of lack of mental responsibility are to find the accused: (1) guilty; (2) not guilty; or (3) not guilty by reason of lack of mental responsibility. Finally, the section would require that the accused may be found not guilty by reason of lack of mental responsibility only if a majority of the members present at the time the vote is taken determine that the defense of lack of mental responsibility has been established.

Section 9491—Voting and Rulings

This section would require that all votes by members of a military commission under this chapter on the findings and on the sentence will be by secret written ballot. This section would also require that the military judge in a military commission under this chapter will rule upon all questions of law, including the admissibility of evidence and all interlocutory questions arising during the proceedings. The section would also provide that any ruling made by the military judge upon a question of law or an interlocutory question (other than the factual issue of mental responsibility of the accused) is conclusive and constitutes the ruling of the military commission. The section would also make it clear that a military judge may change his ruling at any time during the trial.

This section would also require that before a vote is taken of the findings of a military commission under this chapter, the military judge will, in the presence of the accused and counsel, instruct the members as to the elements of the offense and charge them: (1) that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt; (2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and he must be acquitted; (3) that, if there is reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and (4) that the burden of proof to establish the guilt of the accused beyond a reasonable doubt is upon the United States.

Section 949m—Number of Votes Required

This section would provide that two-thirds of the members present must vote for conviction to find the accused guilty of any offense. The section would also provide that a two-thirds vote of the members present is required for any sentence other than confinement for more than ten years, life imprisonment, or death. The section would require three-fourths of the members present to vote for a sentence of confinement for more than ten years or life imprisonment. The section would provide that no person may be sentenced

to death unless: (1) the penalty of death is expressly authorized under this chapter for an offense and the accused is found guilty of that offense, (2) the trial counsel expressly sought the penalty of death by filing an appropriate notice in advance of trial, (3) the accused is convicted of the offense by the concurrence of all the members, and (4) all the members concur in the sentence of death.

The section would further provide that in a case in which the penalty of death is sought, the number of members of the military commission under this chapter shall be not less than 12. Finally, the section would provide that in any case in which the death penalty is sought and in which twelve members are not reasonably available because of physical conditions or military exigencies, the convening authority shall specify a lesser number of members for the military commission but with a minimum of nine members. The section would also provide that in a death penalty case in which twelve members are not available, the convening authority will make a detailed written statement stating why a greater number of members were not reasonably available and append the written statement to the record.

Section 949n—Military Commission to Announce Action

This section would require a military commission under this chapter to announce its findings and sentence to the parties as soon as determined.

Section 949o—Record of Trial

This section would require each military commission established under this chapter to keep a separate, verbatim record of the proceeding in each case. This section would also require that a complete record of the proceedings and testimony be prepared for each military commission. Finally, this section would require that a copy of the record of the proceedings of the military commission be given to the accused as soon as it is authenticated. The section would require that the accused be given a redacted version of the record, if the record contains classified information or a classified annex. The section would also require that the Secretary of Defense prescribe regulations to provide a defense counsel who is eligible for access to classified information pursuant to this chapter to have access to the unredacted record.

SUBCHAPTER V—SENTENCES

Section 949s—Cruel or Unusual Punishments Prohibited

This section would prohibit the imposition of any cruel or unusual punishment under Chapter 47A. Prohibited punishments would include flogging, branding, marking, and tattooing on the body. This section would also prohibit the use of irons, single or double, except for the purpose of safe custody.

Section 949t—Maximum Limits

This section would require that any punishment directed for an offense by a military commission under this chapter may not exceed any limits prescribed by the President or Secretary of Defense for that offense.

Section 949u—Execution of Confinement

This section would authorize the Secretary of Defense to prescribe regulations for any sentence of confinement adjudged by a military commission under this chapter. This section would authorize confinement in any place of confinement under the control of any of the armed forces or in any penal or correctional institution under the control of the United States or its allies, or which the United States is allowed to use. This section would also require that any person confined under this chapter in a penal or correctional facility not under the control of the armed forces would be subject to the same discipline and treatment as persons confined or committed by the courts of the United States, or of the state, District of Columbia, or place in which the institution is situated.

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

Section 950a—Error of Law; Lesser Included Offenses

This section would provide 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.

Section 950b—Review by the Convening Authority

This section would require that the findings and sentence of a military commission under this chapter be reported in writing promptly to the convening authority after the announcement of the sentence. This section also provides that the accused may submit to the convening authority matters for consideration with respect to the findings and the sentence of the military commission under this chapter. This submission should be made in writing within 20 days after the accused has been given an authenticated record of trial (as referenced by section 949o(c) of this chapter); however, if the accused shows that additional time is required beyond the 20 days, the convening authority may, for good cause, extend the applicable period for not more than an additional 20 days. Alternatively, the accused may waive his right to make a submittal to the convening authority. Such a waiver must be made in writing and may not be revoked, and effectively terminates the accused's opportunity to request a 20 day extension.

This section would permit the convening authority, in his sole discretion, to approve, disapprove, commute or suspend the sentence in whole or in part. The convening authority may not, however, increase a sentence beyond that which is found by the military commission, and is not required to take actions on the findings of a military commission under this chapter. Subject to regulations prescribed by the Secretary of Defense, action on the sentence may be taken only after consideration of any matters submitted by the accused or after the time for submitting such matters expires, whichever is earlier. If the convening authority takes action on the findings, the convening authority may, in his sole discretion, dismiss any charge or specification by setting aside a finding of guilty thereto; or change a finding of guilty to a charge to a finding of

guilty to an offense that is a lesser included offense of the offense stated in the charge. Finally, the convening authority shall serve on the accused or on defense counsel notice of any action taken by the convening authority.

This section would also permit the convening authority, in his sole discretion, to order a proceeding in revision or a rehearing. A proceeding in revision may be ordered by the convening authority if there is an apparent error or omission in the record or the record shows improper or inconsistent action by the military commission with respect to the findings or sentence that can be rectified without material prejudice to the substantial rights of the accused. In no case may a proceeding in revision reconsider a finding of not guilty of a specification or a ruling which amounts to a finding of not guilty; reconsider a finding of not guilty of any charge, unless there has been a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation; or increase the severity of the sentence unless the sentence prescribed for the offense is mandatory. A rehearing may be ordered by the convening authority if the convening authority disapproves the findings and sentence, and states the reasons for disapproval of the findings. A rehearing as to the findings may not be ordered by the convening authority, however, when there is a lack of sufficient evidence in the record to support the findings. Similarly, if the convening authority disapproves the sentence, he may order a rehearing as to the sentence or he may dismiss the charges.

Section 950c—Appellate Referral; Waiver or Withdrawal of Appeal

This section would provide an automatic review by the Court of Military Commission Review in each case in which the final decision of a military commission (as approved by the convening authority) includes a finding of guilty. The convening authority shall refer the case to the Court of Military Commission Review, in accordance with procedures prescribed under regulations of the Secretary of Defense. This section would also provide, except in a case in which the sentence as approved extends to death, the accused may file with the convening authority a statement expressly waiving the right of the accused to such review, which will bar the Court of Military Commission Review from reviewing the case. Such a waiver shall be signed by both the accused and a defense counsel, and must be filed, if at all, within 10 days after notice on the action is served on the accused or on defense counsel. The convening authority, for good cause, may extend the period for such filing by not more than 30 days. Except in a case in which the sentence as approved under section 950b of this title extends to death, the accused may withdraw an appeal at any time.

Section 950d—Appeal by the United States

This section would grant the United States the right to take an interlocutory appeal based upon the military judge's decision to terminate commission proceedings on any charge or specification; to exclude evidence that is substantial proof of a military fact; and matters dealing with excluding the accused from certain proceedings, continuances or challenges. To make such an appeal the United States shall file a notice of appeal with the military judge

within five days after the date of such order or ruling. In ruling on an appeal under this section, the Court of Military Commission Review may act only with respect to matters of law. The United States may not appeal an order or ruling that is, or amounts to, a finding of not guilty by the military commission with respect to a charge or specification. Finally this section would also permit the United States to appeal an adverse ruling from the Court of Military Commission Review to the United States Court of Appeals for the District of Columbia Circuit by filing a petition for review in the Court of Appeals within ten days after the date of such ruling. Review under this subsection shall be at the discretion of the Court of Appeals.

Section 950e—Rehearings

This section would provide 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. In the event the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceeding or the sentence prescribed for the offense is mandatory, the rehearing may impose a sentence in excess or more than the original sentence.

Section 950f—Review by Court of Military Commission Review

This section would create a Court of Military Commission Review within the Department of Defense. The Secretary of Defense shall establish a Court of Military Commission Review which shall be composed of one or more panels, with each panel consisting of not less than three appellate military judges. In accordance with rules prescribed by the Secretary, the court may sit in panels or as a whole for the purpose of reviewing military commission decisions. This section would also require the Secretary of Defense to assign appellate military judges to a Court of Military Commission Review. Appellate military judges shall meet the qualifications for military judges prescribed for a military judge of a military commission or shall be a civilian with comparable qualifications. No person may be appointed to serve as an appellate military judge in any case in which that person acted as a military judge, counsel, or reviewing official. Finally, this section would require the Court of Military Commission Review, in accordance with procedures and regulations prescribed by the Secretary, to review the record in each case that is referred to the Court by the convening authority with respect to any matter of law raised by the accused. The Court of Military Commission Review may act only with respect to matters of law.

Section 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 would grant the accused the right to appeal his conviction to the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) which shall have exclusive jurisdiction to determine the validity of a final judgment rendered by a

military commission (as approved by the convening authority). The D.C. Circuit may not review the final judgment until all other appeals under this chapter have been waived or exhausted, and a petition for review was filed by the accused in the D.C. Circuit not later than 20 days after the date on which written notice of the final decision of the Court of Military Commission Review is served on the accused or on defense counsel or the accused submits a written notice waiving the right of the accused to review by the Court of Military Commission Review. The D.C. Circuit may act only with respect to matters of law, and the jurisdiction of the D.C. Circuit should be limited to the consideration of whether the final decision was consistent with the standards and procedures for military commissions and to the extent applicable, the Constitution.

The committee notes that Congress has already determined in section 1005 of the Detainee Treatment Act (DTA) of 2005 (Public Law 109–148) that review of military commission judgments should lie in the D.C. Circuit. The committee also notes that the D.C. Circuit has acquired experience in recent years handling cases brought by individuals detained at Guantanamo Bay, Cuba such as the Hamdan, and believes 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 procedures set out in Chapter 47 of Title 10, United States Code. Therefore, this chapter would preserve existing review procedures under the DTA, but would expand the right of the accused to appeal regardless of the length of his sentence.

Finally, this section would permit the Supreme Court to review by writ of certiorari the final judgment of the D.C. Circuit.

Section 950h—Appellate Counsel

This section would provide for the appointment of appellate counsel to represent the accused and the United States in any appeal or review under this chapter. Appellate counsel appointed representing the United States shall represent the United States in any appeal or review proceeding before the Court of Military Commission Review, and may, when requested to do so by the Attorney General in a case arising under this chapter, represent the United States before the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) or the Supreme Court.

Appellate Counsel for the accused shall be represented before the Court of Military Commission Review, the D.C. Circuit, and the Supreme Court, and by civilian counsel if retained by the accused. Any such civilian counsel shall be subject to the same requirements and qualifications for civilian counsel appearing before military commissions. Finally, the accused must at all times have appellate counsel with sufficient security clearance to participate in any proceeding with respect to classified information.

Section 950i—Execution of Sentence; Suspension of Sentence

This section would provide that a death sentence may not be executed until the judgment is final and approved by the President. A judgment is final in the case of a death sentence when the time for the accused to file a petition for review by the Court of Appeals

for the District of Columbia Circuit (D.C. Circuit) has expired and the accused has not filed a timely petition for such review, and the case is not otherwise under review by that Court, or review is completed in accordance with the judgment of the D.C. Circuit and a petition for a writ of certiorari is not timely filed, such a petition is denied by the Supreme Court or review is otherwise completed in accordance with the judgment of the Supreme Court. Finally, this section would permit the Secretary of the Defense, or the convening authority acting on the case (if other than the Secretary), to suspend the execution of any sentence or part thereof in the case, except a sentence of death.

Section 950j—Finality of Proceedings, Findings, and Sentences

This section would provide that the appellate review of records of trial provided by this chapter, and the proceedings, findings, and sentences of military commissions as approved, reviewed, or affirmed as required by this chapter, are final and conclusive. Orders publishing the proceedings of military commissions are binding upon all departments, courts, agencies, and officers of the United States, except as otherwise provided by the President. Finally this section would state that no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.

SUBCHAPTER VII—PUNITIVE MATTERS

Section 950p—Statement of Substantive Offenses

This section would codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission. Because the provisions of this subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, the committee firmly believes that trial for crimes that occurred before the date of the enactment of this chapter might be prosecuted with this subchapter.

The committee notes that 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 Department of Defense Military Commission Instruction No. 2, April 30, 2003, which is based 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. Constitution article I, section 8. Because the provisions are declarative of existing law, the committee believes that trial for crimes that occurred prior to the Act's effective date is not precluded.

Section 950q—Statement of Substantive Offense

This section would provide 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.

Section 950r—Accessory After the Fact

This section provides for punishment as an accessory after the fact.

Section 950s—Conviction of Lesser Included Offense

This section would provide that an individual may be convicted of a lesser included offense, where appropriate.

Section 950t—Attempts

This section would provide for the circumstances under which an individual may be convicted of an attempt to commit an offense under this chapter.

Section 950u—Solicitation

This section would provide 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.

Section 950v—Crimes Triable by Military Commissions

This section would enumerate 27 substantive offenses triable by military commission.

The committee notes that in light of the common law origins of the war crimes, no list of offenses is likely to be entirely complete. Nonetheless, the committee believes the list codifies offenses hitherto recognized as offenses triable by military commissions or international courts. Most of the listed offenses constitute clear violations of the Geneva Conventions, the Hague Convention, or both. 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 Committee views conspiracy as a separate offense punishable by military commissions.

Section 950w—Perjury and Obstruction of Justice

This section would provide, as 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.

Section 950x—Contempt

This section would provide for the military commission's authority to punish contempt of its proceedings.

Section 4—Clarification of conduct constituting war crime offense under federal criminal code

This section would amend subsection 2441(c) of title 18, United States Code, (War Crimes Act of 1996, Public Law 105–118) defining a war crime Code conduct which constitutes a serious violation of Common Article 3 of the Geneva Convention. In particular, torture, cruel or inhuman treatment, performing biological experiments, murder, mutilation or maiming, intentionally causing great suffering or serious injury, rape, sexual assault or abuse, and taking hostages are codified and defined in this section as conduct which constitutes a war crime. The section would also make the amendment apply retroactively to the date of enactment of the War Crimes Act, November 26, 1997. The committee notes that because no person has been prosecuted under the War Crimes Act, this amendment can apply as if enacted on November 26, 1997.

The committee also notes that 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. These statutes, however, give 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, the committee believes it is imperative that the statute provide clear notice to United States personnel charged with interrogating detainees. The committee's intent, therefore, is that this section provide clarity and certainty with respect to the serious violations of Common Article 3 that are punishable as war crimes under section 1441(c), title 18, United States Code. The Act does not specifically provide for a general crime of "outrages upon personal dignity", as provided in Common Article 3, because the committee believes it is nearly impossible to 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 would identify and criminalize 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.

Section 5—Judicial Review

This section would amend section 2241 of title 28, United States Code, to prohibit any court, justice, or judge except the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) the jurisdiction to hear or consider any claim or cause of action, including an application for a writ of habeas corpus, pending on or filed after the date of enactment of H.R. 6054, against the United States or its agents, brought by or on behalf of any

alien detained by the United States as an unlawful enemy combatant, relating to any aspect of the alien's detention, transfer, treatment, or conditions of confinement. This section would provide that the D.C. Circuit will review two causes of action for these aliens: (1) exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal (CSRT); and (2) final judgments of military commissions as provided for pursuant to section 950g of title 10, United States Code (as added by section 950g of Section 3 of this Act). Finally, the section would provide that the D.C. Circuit may consider classified information submitted in *camera* and *ex parte* in making any determination under this section.

The committee notes that this section would clarify an ambiguity noted by the Supreme Court in *Hamdan* v. *Rumsfeld,* 548 U.S. at_____, by amending the judicial review provisions of the Detainee Treatment Act (DTA) of 2005 (Public Law 109–148) codified in section 2241, title 28 of the United States Code. The DTA provided that the D.C. Circuit would have jurisdiction over determination of CSRTs for enemy combatants detained at the U.S. Naval Base, Guantanamo Bay, Cuba and final judgments of military commissions, and that all other courts would be foreclosed from hearing *habeas corpus* petitions or any other civil actions brought by enemy combatants in U.S. custody. The committee notes its intention to make clear through this section that except for the specific review provided by the DTA, that is review of final judgments by CSRTs and final judgments of military commissions, this section forecloses any legal claim, including applications for the writ of habeas corpus, brought on by or on behalf of these detainees. The committee notes its intention that judicial review of detention and military commission is channeled through the adequate alternative procedures provided by this Act and the DTA.

The committee further notes that the scope of CSRT review is defined in section 1005(e)(2) of the DTA. Section 1005(e)(2) provided that the D.C. Circuit would have exclusive jurisdiction to determine the validity of any final decision by a CSRT that an alien is properly detained at the U.S. Naval Base Guantanamo Bay, Cuba, as an enemy combatant. The CSRT process was established by Deputy Secretary of Defense Order dated July 7, 2004. The purpose of the process is to determine if the individuals detained by the Department of Defense at the U.S. Naval Base Guantanamo Bay, Cuba are properly classified as enemy combatants and to permit each detainee the opportunity to contest such designation. An "enemy combatant" for the purpose of a CSRT review is "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." The D.C. Circuit's jurisdiction is limited to claims brought by or on behalf of an alien: (1) who at the time of the request for a review by the D.C. Circuit is filed is detained by the Department of Defense at Guantanamo Bay, Cuba; and (2) for whom a CSRT has been conducted, pursuant to procedures specified by the Secretary of Defense. The scope of the D.C. Circuit's review has been amended by section 950g(c) of this Act.

Section 6—Satisfaction of Treaty Obligations

This section would establish that compliance with section 1003 of the Detainee Treatment Act of 2005 (Public Law 109–148) fully satisfies the obligations of the United States with regard to section 1 of Common Article 3 of the Geneva Conventions, and would prohibit 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.

The committee believes the treaty obligations of the United States under the Geneva Conventions should be codified in United States law. Therefore, this section would establish that compliance with section 1003 of the Detainee Treatment Act of 2005 (DTA) fully satisfies the obligations of the United States with regard to section 1 of Common Article 3 of the Geneva Conventions. Like the DTA, Common Article 3 provides a baseline standard for detainees in armed conflicts where it applies. Unlike the DTA, however, several provisions of Common Article 3 are vague, particularly its prohibition upon "outrages upon personal dignity, in particular humiliating and degrading treatment." This section would define Common Article 3's treatment standards by reference to the DTA, which is based upon the familiar standards of the U.S. Constitution. Moreover, "cruel, inhuman, and degrading treatment or punishment" under this section means the cruel, unusual, inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT) done at New York, December 10, 1984. The committee believes that the Constitution, which provides the fundamental, underlying protections for the citizens of the United States, provides more than sufficient protections to satisfy the United States' treaty obligation under the Geneva Common Article 3. The committee does not believe that detainees—especially unlawful enemy combatants—should enjoy protections that exceed what the Constitution provides to United States citizens. Finally, the parts of Common Article 3 that concern the taking of hostages and the passing of sentences by regularly constituted courts do not concern detainee treatment and therefore are specifically excepted from this provision.

The committee also believes that while this section prohibits any court from treating the Geneva Conventions as a source of rights, this section does not affect the obligations of the United States under the Geneva Conventions; to the contrary, the committee believes that the political branches of the United States remain fully bound by, and will continue to honor, the Conventions whenever and wherever they apply.

Section 7—Revisions to Detainee Treatment Act of 2005 relating to protection of certain United States Government personnel

This section would amend section 1004(b) of the Detainee Treatment Act (DTA) of 2005 (Public Law 109–148) to enhance the protection of U.S. government personnel engaged in authorized interrogations. The committee notes that section 1004(b) of the DTA

provides counsel in any civil action or criminal prosecution against a member of the armed forces or other agent of the United States government arising involving certain interrogation procedures of aliens determined by the government to be international terrorists. This section would provide that the provision of counsel under section 1004(b) is mandatory, that the right to counsel includes investigations, and that the right applies to foreign and international courts or agencies. This section would further provide that the affirmative defense provided in section 1004(a) of the DTA and the right to counsel provided in section 1004(b) of the DTA applies to any criminal prosecution that: (1) related to the detention and interrogation of aliens described in such section, (2) is grounded in section 2441(c)(3) of title 18, United States Code (as amended by section 4 of this Act), and (3) relates to actions occurring between September 11, 2001, and December 30, 2005.

Section 8—Retroactive applicability

This section would clarify 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.

The committee notes that 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.

EXECUTIVE COMMUNICATION

DEPARTMENT OF DEFENSE,
Washington, DC, September 13, 2006.

Hon. DUNCAN HUNTER,
Chairman, Committee on Armed Services,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: We understand that the Congress is considering legislation proposed by the Administration in response to the recent Supreme Court decision in Hamdan.

We would like to clarify our views on two specific sections of the proposed legislation. We do not object to section 6 of the Administration proposal, which would clarify the obligations of the United States under common Article 3 of the Geneva Conventions, and section 7 of the Administration proposal, which would address crimes under the War Crimes Act. Indeed, we think these provisions would be helpful to our fighting men and women at war on behalf of our Country.

Sincerely,

SCOTT BLACK,
Major General, U.S. Army, The Judge Advocate General.

CHARLES J. DUNLAP, Jr.,
Major General, U.S. Air Force, The Deputy Judge Advocate General.

BRUCE MACDONALD,
Rear Admiral, U.S. Navy, The Judge Advocate General.
JAMES C. WALKER,
Brigadier General, U.S. Marine Corps, Staff Judge Advocate to the U.S. Marine Corps.
RONALD M. REED,
Colonel, U.S. Air Force, Legal Counsel to the Chairman of the Joint Chiefs of Staff.

COMMUNICATION FROM ANOTHER COMMITTEE

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERNATIONAL RELATIONS,
Washington, DC, September 15, 2006.

Hon. DUNCAN HUNTER
Chairman, Committee on Armed Services,
House of Representatives, Washington, DC.

DEAR CHAIRMAN HUNTER: I am writing to you concerning the bill H.R. 6054 "Military Commissions Act of 2006" There are certain provisions in the legislation which fall within the Rule X jurisdiction of the Committee on International Relations upon which the Speaker bases his referral to this Committee.

In the interest of permitting your Committee to proceed expeditiously to floor consideration of this important bill, I am willing to waive this Committee's right to consider it. I do so with the understanding that by waiving consideration of the bill the Committee on International Relations does not waive any future jurisdictional claim over the subject matters contained in the bill which fall within its Rule X jurisdiction. I request that you to urge the Speaker to name Members of this Committee to any conference committee which is named to consider any such provisions.

Please place this letter into the Committee report on H.R. 6054 and into the *Congressional Record* during consideration of the measure on the House floor. Thank you for the cooperative spirit in which you have worked regarding this matter and others between our respective committees.

With best wishes,

Sincerely,

HENRY J. HYDE, *Chairman.*

COMMITTEE POSITION

On September 13, 2006, the Committee on Armed Services, a quorum being present, reported H.R. 6054, as amended, favorably by a record vote of 52 ayes to 8 noes with 1 voting present.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the cost estimate prepared by the Con-

gressional Budget Office and submitted pursuant to section 402(a) of the Congressional Budget Act of 1974 is as follows:

SEPTEMBER 15, 2006.

Hon. DUNCAN HUNTER,
Chairman, Committee on Armed Services,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 6054, the Military Commissions Act of 2006.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Jason Wheelock.

Sincerely,

DONALD B. MARRON,
Acting Director.

Summary: H.R. 6054 would authorize the President to establish military commissions to try unlawful combatants for a number of offenses including terrorism, hijacking, and the murder of non-combatants. The bill would set out the rules and procedures for such trials, including the process for assigning counsel and compelling witnesses and evidence, the rules of evidence, and post-trial reviews and appeals. H.R. 6054 also would amend the U.S. criminal code to retroactively specify which actions under the Geneva Convention would be considered criminal acts for which the U.S. Armed Forces or other U.S. nationals could be prosecuted. The bill would apply to detention, treatment, or trial of any person detained since September 11, 2001.

CBO estimates that implementing H.R. 6054 would cost $21 million in 2007 and $141 million over the 2007–2011 period, assuming the appropriation of necessary funds. Enacting H.R. 6054 would not affect direct spending or revenues.

H.R. 6054 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

Estimated Cost to the Federal Government: The estimated budgetary impact of H.R. 6054 is shown in the following table. The costs of this legislation fall within budget function 050 (national defense).

	By fiscal year, in millions of dollars—				
	2007	2008	2009	2010	2011
CHANGES IN SPENDING SUBJECT TO APPROPRIATION					
Estimated Authorization Level	29	30	31	31	32
Estimated Outlays	21	28	29	31	32

Basis of Estimate: Pursuant to the President's Military Order on November 21, 2001, the Secretary of Defense established the Office of Military Commissions (OMC) within the Defense Legal Services Agency of the Department of Defense (DoD). Prior to the U.S. Supreme Court's decision on June 29, 2006, that prohibited the use of military commissions to try unlawful combatants, the OMC was responsible for trying unlawful combatants detained by DoD.

To date in fiscal year 2006, the OMC has received approximately $27 million in appropriations from the fiscal year 2006 Defense Ap-

propriations Act (Public Law 109–148) and the 2006 Emergency Supplemental for Defense, the Global War on Terror, and Hurricane Recovery (Public Law 109–234). Those amounts cover expenses for salaries and benefits of civilian personnel, travel, contractual services, equipment and supplies. In addition, the OMC has also used 10 to 15 reserve Judge Advocates to assist the OMC in preparing and trying cases. Based upon prior costs and staffing levels, CBO estimates that implementing H.R. 6054 would cost $21 million in 2007 and $141 million over the 2007–2011 period, assuming the appropriation of necessary funds.

CBO assumes for the purposes of this estimate that, if legislation is not enacted authorizing the use of military commissions to try unlawful combatants detained by the United States, the OMC will be dissolved and the United States would continue to hold those detainees who would have been tried. Thus, the estimated costs of the bill reflect only the incremental costs for conducting such trials.

Section 4 of H.R. 6054 would change the U.S. criminal code to specify which actions under the Geneva Convention would be considered criminal acts for which the U.S. Armed Forces or other U.S. nationals could be prosecuted. We expect that section 4 would apply to a relatively small number of cases. Thus, any resulting in change in costs for law enforcement, court proceedings, or prison operations would not be significant.

Section 6 of would specify that section 1003 of the Detainee Treatment Act of 2005 would satisfy U.S. obligations with respect to the standards for treatment under Common Article 3 under the Geneva Conventions. If enacted, this section may provide more latitude to the United States in the treatment and interrogation of detainees. Section 7 of the bill would expand the conditions under which the government would provide funds and personnel to defend certain government employees who are being investigated or prosecuted in a matter related to the detention and interrogation of certain detainees. CBO has no basis for estimating the potential cost of those sections.

Intergovernemental and Private-Sector Impact: H.R. 6054 contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Estimate Prepared By: Federal Costs: Jason Wheelock, Impact on State, Local, and Tribal Governments: Melissa Merrell, Impact on the Private Sector: Victoria Liu.

Estimate Approved By: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

COMMITTEE COST ESTIMATE

Pursuant to clause 3(d) of rule XIII of the Rules of the House of Representatives, the committee generally concurs with the estimate as contained in the report of the Congressional Budget Office.

OVERSIGHT FINDINGS

With respect to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the committee reports that the findings and recommendations of the committee, based on oversight activi-

ties pursuant to clause 2(b)(1) of rule X, are incorporated in the descriptive portions of this report.

With respect to clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, this legislation does not include any new spending or credit authority, nor does it provide for any increase or decrease in tax revenues or expenditures.

With respect to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the bill does not authorize specific program funding.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the committee finds the authority for this legislation in Article I, section 8 of the United States Constitution.

EARMARKS

Pursuant to House Resolution 1000, entitled Providing for earmarking reform in the House of Representatives, adopted on September 14, 2006, the committee finds that there are no earmarks contained in this legislation.

STATEMENT OF FEDERAL MANDATES

Pursuant to section 423 of Public Law 104–4, this legislation contains no federal mandates with respect to state, local, and tribal governments, nor with respect to the private sector. Similarly, the bill provides no unfunded federal intergovernmental mandates.

RECORD VOTES

In accordance with clause 3(b) of rule XIII of the Rules of the House of Representatives, record and voice votes were taken with respect to the committee's consideration of H.R. 6054. The record of these votes is attached to this report.

The committee ordered H.R. 6054, as amended, reported to the House with a favorable recommendation by a vote of 52–8–1, a quorum being present.

COMMITTEE ON ARMED SERVICES
109TH CONGRESS
ROLL CALL

Amendment Number: 3 **Date: 09/13/2006**
Description: Substitute **Offered by: Mr. Skelton**

Rep.	Aye	Nay	Present	Rep.	Aye	Nay	Present
Mr. Hunter		X		Mr. Skelton	X		
Mr. Weldon		X		Mr. Spratt	X		
Mr. Hefley		X		Mr. Ortiz	X		
Mr. Saxton		X		Mr. Evans	X		
Mr. McHugh		X		Mr. Taylor	X		
Mr. Everett		X		Mr. Abercrombie	X		
Mr. Bartlett			X	Mr. Meehan	X		
Mr. Thornberry		X		Mr. Reyes	X		
Mr. Hostettler		X		Dr. Snyder	X		
Mr. Jones		X		Mr. Smith	X		
Mr. Ryun (KS)		X		Ms. Sanchez	X		
Mr. Gibbons		X		Mr. McIntyre	X		
Mr. Hayes		X		Ms. Tauscher	X		
Mr. Calvert		X		Mr. Brady	X		
Mr. Simmons				Mr. Andrews	X		
Mrs. Davis (VA)		X		Ms. Davis (CA)	X		
Mr. Akin		X		Mr. Langevin	X		
Mr. Forbes		X		Mr. Israel	X		
Mr. Miller (FL)		X		Mr. Larsen	X		
Mr. Wilson		X		Mr. Cooper	X		
Mr. LoBiondo		X		Mr. Marshall			
Mr. Bradley		X		Mr. Meek	X		
Mr. Turner		X		Ms. Bordallo	X		
Mr. Kline		X		Mr. Ryan (OH)	X		
Mrs. Miller (MI)		X		Mr. Udall	X		
Mr. Rogers		X		Mr. Butterfield	X		
Mr. Franks		X		Ms. McKinney			
Mr. Shuster		X		Mr. Boren	X		
Mrs. Drake		X					
Dr. Schwarz		X					
Ms. McMorris		X					
Mr. Conaway		X					
Mr. Davis (KY)		X					
Mr. Bilbray		X					

Roll Call Vote Total: **26 Aye 32 Nay 1 Present**

COMMITTEE ON ARMED SERVICES
109TH CONGRESS
ROLL CALL

Final Passage of H. R. 6054 **Date: 09/13/2006**
as Amended

Rep.	Aye	Nay	Present	Rep.	Aye	Nay	Present
Mr. Hunter	X			Mr. Skelton	X		
Mr. Weldon	X			Mr. Spratt	X		
Mr. Hefley	X			Mr. Ortiz	X		
Mr. Saxton	X			Mr. Evans	X		
Mr. McHugh	X			Mr. Taylor	X		
Mr. Everett	X			Mr. Abercrombie		X	
Mr. Bartlett			X	Mr. Meehan		X	
Mr. Thornberry	X			Mr. Reyes	X		
Mr. Hostettler	X			Dr. Snyder	X		
Mr. Jones	X			Mr. Smith		X	
Mr. Ryun (KS)	X			Ms. Sanchez		X	
Mr. Gibbons	X			Mr. McIntyre	X		
Mr. Hayes	X			Ms. Tauscher		X	
Mr. Calvert	X			Mr. Brady	X		
Mr. Simmons	X			Mr. Andrews	X		
Mrs. Davis (VA)	X			Ms. Davis (CA)		X	
Mr. Akin	X			Mr. Langevin	X		
Mr. Forbes	X			Mr. Israel	X		
Mr. Miller (FL)	X			Mr. Larsen		X	
Mr. Wilson	X			Mr. Cooper	X		
Mr. LoBiondo	X			Mr. Marshall	X		
Mr. Bradley	X			Mr. Meek	X		
Mr. Turner	X			Ms. Bordallo	X		
Mr. Kline	X			Mr. Ryan (OH)	X		
Mrs. Miller (MI)	X			Mr. Udall		X	
Mr. Rogers	X			Mr. Butterfield	X		
Mr. Franks	X			Ms. McKinney			
Mr. Shuster	X			Mr. Boren	X		
Mrs. Drake	X						
Dr. Schwarz	X						
Ms. McMorris	X						
Mr. Conaway	X						
Mr. Davis (KY)	X						
Mr. Bilbray	X						

Roll Call Vote Total: **52 Aye** **8 Nay** **1 Present**

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 10, UNITED STATES CODE

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SUBTITLE A—General Military Law

* * * * * * *

PART II—PERSONNEL

PART II—PERSONNEL

CHAPTER 47—UNIFORM CODE OF MILITARY JUSTICE

* * * * * * *

SUBCHAPTER I—GENERAL PROVISIONS

* * * * * * *

§ 802. Art. 2. Persons subject to this chapter

(a) The following persons are subject to this chapter:

(1) * * *

* * * * * * *

(13) Lawful enemy combatants who violate the law of war.

* * * * * * *

SUBCHAPTER IV—COURT-MARTIAL JURISDICTION

* * * * * * *

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

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

tried by military commissions, provost courts, or other military tribunals. *This section does not apply to military commissions established under chapter 47A of this title.*

* * * * * * *

SUBCHAPTER VII—TRIAL PROCEDURE

* * * * * * *

§ 836. Art. 36. President may prescribe rules

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not*, except as provided in chapter 47A of this title,* be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable*, except insofar as applicable to military commissions established under chapter 47A of this title*.

* * * * * * *

CHAPTER 47A—MILITARY COMMISSIONS

SUBCHAPTER I—GENERAL PROVISIONS

§ 948a. Definitions

In this chapter:

(1) UNLAWFUL ENEMY COMBATANT.—(A) The term "unlawful enemy combatant" means an individual determined by or under the authority of the President or the Secretary of Defense—

(i) to be part of or affiliated with a force or organization (including al Qaeda, the Taliban, any international terrorist organization, or associated forces) that is engaged in hostilities against the United States or its co-belligerents in violation of the law of war;

(ii) to have committed a hostile act in aid of such a force or organization so engaged; or

(iii) to have supported hostilities in aid of such a force or organization so engaged.

(B) Such term includes any individual determined by a Combatant Status Review Tribunal before the date of the enactment of the Military Commissions Act of 2006 to have been properly detained as an enemy combatant.

(C) Such term does not include any alien determined by the President or the Secretary of Defense (whether on an individualized or collective basis), or by any competent tribunal established under their authority, to be—

(i) a lawful enemy combatant (including a prisoner of war); or

(ii) a protected person whose trial by a military commission under this chapter would be inconsistent with Articles 64 through 76 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949.

(D) For purposes of subparagraph (C)(ii), the term "protected person" refers to the category of persons described in Article 4 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949.

(2) LAWFUL ENEMY COMBATANT.—The term "lawful enemy combatant" means an individual determined by or under the authority of the President or Secretary of Defense (whether on an individualized or collective basis) to be—

(A) a member of the regular forces of a State party engaged in hostilities against the United States or its co-belligerents;

(B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or

(C) a member of a regular armed forces who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.

(3) GENEVA CONVENTIONS.—The term "Geneva Conventions" means the international conventions signed at Geneva on August 12, 1949, including Common Article 3.

(4) CLASSIFIED INFORMATION.—The term "classified information" means the following:

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

(B) Any restricted data, as that term is defined in section 11 y. of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)).

(5) ALIEN.—The term "alien" means an individual who is not a citizen of the United States.

§ 948b. Military commissions generally

(a) AUTHORITY FOR MILITARY COMMISSIONS UNDER THIS CHAPTER.—The President is authorized to establish military commissions

for violations of offenses triable by military commission as provided in this chapter.

(b) CONSTRUCTION OF PROVISIONS.—The procedures for military commissions set forth in this chapter are based upon the procedures for trial by general courts-martial under chapter 47 of this title (the Uniform Code of Military Justice). Chapter 47 of this title, including any construction or application of such chapter and any administrative practice under such chapter, does not apply to trial by military commission under this chapter.

(c) STATUS OF COMMISSIONS UNDER COMMON ARTICLE 3.—A military commission established under this chapter is a regularly constituted court, affording all the necessary "judicial guarantees which are recognized as indispensable by civilized peoples" for purposes of common Article 3 of the Geneva Conventions.

§ 948c. Persons subject to military commissions

Any alien unlawful enemy combatant is subject to trial by military commission under this chapter.

§ 948d. Jurisdiction of military commissions

(a) JURISDICTION.—A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.

(b) LAWFUL ENEMY COMBATANTS.—Military commissions under this chapter shall not have jurisdiction over lawful enemy combatants. Lawful enemy combatants who violate the law of war are subject to chapter 47 of this title. Courts martial established under that chapter shall have jurisdiction to try a lawful enemy combatant for any offense made punishable under this chapter.

(c) PUNISHMENTS.—A military commission under this chapter may, under such limitations as the Secretary of Defense may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when authorized under this chapter.

§ 948e. Annual report to congressional committees

(a) ANNUAL REPORT REQUIRED.—Not later than December 31 each year, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report on any trials conducted by military commissions under this chapter during such year.

(b) FORM.—Each report under this section shall be submitted in unclassified form, but may include a classified annex.

SUBCHAPTER II—COMPOSITION OF MILITARY COMMISSIONS

Sec.

§ 948h. Who may convene military commissions

Military commissions under this chapter may be convened by the Secretary of Defense or by any officer or official of the United States designated by the Secretary for that purpose.

§ 948i Who may serve on military commissions

(a) IN GENERAL.—Any commissioned officer of the armed forces on active duty is eligible to serve on a military commission under this chapter.

(b) DETAIL OF MEMBERS.—When convening a military commission under this chapter, the convening authority shall detail as members of the commission such members of the armed forces eligible under subsection (a), as in the opinion of the convening authority, are fully qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a military commission when such member is the accuser or a witness for the prosecution or has acted as an investigator or counsel in the same case.

(c) EXCUSE OF MEMBERS.—Before a military commission under this chapter is assembled for the trial of a case, the convening authority may excuse a member from participating in the case.

§ 948j. Military judges

(a) DETAIL OF MILITARY JUDGE.—A military judge shall be detailed to each military commission under this chapter. The Secretary of Defense shall prescribe regulations providing for the manner in which military judges are so detailed to military commissions. The military judge shall preside over each military commission to which he has been detailed.

(b) QUALIFICATIONS.—A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court, or a member of the bar of the highest court of a State, and who is certified to be qualified for duty under section 826 of this title (article 26 of the Uniform Code of Military Justice) as a military judge in general courts-martial by the Judge Advocate General of the armed force of which such military judge is a member.

(c) INELIGIBILITY OF CERTAIN INDIVIDUALS.—No person is eligible to act as military judge in a case of a military commission under this chapter if he is the accuser or a witness or has acted as investigator or a counsel in the same case.

(d) CONSULTATION WITH MEMBERS; INELIGIBILITY TO VOTE.—A military judge detailed to a military commission under this chapter may not consult with the members of the commission except in the presence of the accused (except as otherwise provided in section 949d of this title), trial counsel, and defense counsel, nor may he vote with the members of the commission.

(e) OTHER DUTIES.—A commissioned officer who is certified to be qualified for duty as a military judge of a military commission under this chapter may perform such other duties as are assigned to him by or with the approval of the Judge Advocate General of the armed force of which such officer is a member or the designee of such Judge Advocate General.

(f) PROHIBITION ON EVALUATION OF FITNESS BY CONVENING AUTHORITY.—The convening authority of a military commission under this chapter shall not prepare or review any report concerning the

effectiveness, fitness, or efficiency of a military judge detailed to the military commission which relates to his performance of duty as a military judge on the military commission.

§ 948k. Detail of trial counsel and defense counsel

(a) DETAIL OF COUNSEL GENERALLY.—(1) Trial counsel and military defense counsel shall be detailed for each military commission under this chapter.

(2) Assistant trial counsel and assistant and associate defense counsel may be detailed for a military commission under this chapter.

(3) Military defense counsel for a military commission under this chapter shall be detailed as soon as practicable after the swearing of charges against the accused.

(4) The Secretary of Defense shall prescribe regulations providing for the manner in which trial counsel and military defense counsel are detailed for military commissions under this chapter and for the persons who are authorized to detail such counsel for such commissions.

(b) TRIAL COUNSEL.—Subject to subsection (d), trial counsel detailed for a military commission under this chapter must be—

(1) a judge advocate (as that term is defined in section 801 of this title (article 1 of the Uniform Code of Military Justice) who is—

(A) a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; and

(B) certified as competent to perform duties as trial counsel before general courts-martial by the Judge Advocate General of the armed force of which he is a member; or

(2) a civilian who is—

(A) a member of the bar of a Federal court or of the highest court of a State; and

(B) otherwise qualified to practice before the military commission pursuant to regulations prescribed by the Secretary of Defense.

(c) MILITARY DEFENSE COUNSEL.—Subject to subsection (d), military defense counsel detailed for a military commission under this chapter must be a judge advocate (as so defined) who is—

(1) a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; and

(2) certified as competent to perform duties as defense counsel before general courts-martial by the Judge Advocate General of the armed force of which he is a member.

(d) INELIGIBILITY OF CERTAIN INDIVIDUALS.—No person who has acted as an investigator, military judge, or member of a military commission under this chapter in any case may act later as trial counsel or military defense counsel in the same case. No person who has acted for the prosecution before a military commission under this chapter may act later in the same case for the defense, nor may any person who has acted for the defense before a military commission under this chapter act later in the same case for the prosecution.

§ 948l. Detail or employment of reporters and interpreters

(a) COURT REPORTERS.—Under such regulations as the Secretary of Defense may prescribe, the convening authority of a military commission under this chapter shall detail to or employ for the commission qualified court reporters, who shall make a verbatim recording of the proceedings of and testimony taken before the commission.

(b) INTERPRETERS.—Under such regulations as the Secretary of Defense may prescribe, the convening authority of a military commission under this chapter may detail to or employ for the military commission interpreters who shall interpret for the commission and, as necessary, for trial counsel and defense counsel.

(c) TRANSCRIPT; RECORD.—The transcript of a military commission under this chapter shall be under the control of the convening authority of the commission, who shall also be responsible for preparing the record of the proceedings.

§ 948m. Number of members; excuse of members; absent and additional members

(a) NUMBER OF MEMBERS.—(1) A military commission under this chapter shall, except as provided in paragraph (2), have at least five members.

(2) In a case in which the death penalty is sought, the military commission shall have the number of members prescribed by section 949m(c) of this title.

(b) EXCUSE OF MEMBERS.—No member of a military commission under this chapter may be absent or excused after the military commission has been assembled for the trial of a case unless excused—

(1) as a result of challenge;

(2) by the military judge for physical disability or other good cause; or

(3) by order of the convening authority for good cause.

(c) ABSENT AND ADDITIONAL MEMBERS.—Whenever a military commission under this chapter is reduced below the number of members required by subsection (a), the trial may not proceed unless the convening authority details new members sufficient to provide not less than such number. The trial may proceed with the new members present after the recorded evidence previously introduced before the members has been read to the military commission in the presence of the military judge, the accused (except as provided in section 949d of this title), and counsel for both sides.

SUBCHAPTER III—PRE-TRIAL PROCEDURE

§ 948q. Charges and specifications

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

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

(2) that they are true in fact to the best of the signer's knowledge and belief.

(b) NOTICE TO ACCUSED.—Upon the swearing of the charges and specifications in accordance with subsection (a), the accused shall be informed of the charges against him as soon as practicable.

§ 948r. Compulsory self-incrimination prohibited; treatment of statements obtained by torture and other statements

(a) IN GENERAL.—No person shall be required to testify against himself at a proceeding of a military commission under this chapter.

(b) EXCLUSION OF STATEMENTS OBTAINED BY TORTURE.—A statement obtained by use of torture, whether or not under color of law, shall not be admissible against the accused in a military commission under this chapter, except against a person accused of torture as evidence the statement was made.

(c) OTHER STATEMENTS.—An otherwise admissible statement, including a statement allegedly obtained by coercion, shall not be admitted in evidence in a military commission under this chapter if the military judge finds that the circumstances under which the statement was made render the statement unreliable or lacking in probative value.

(d) TORTURE.—In this section, the term "torture" has the meaning given that term in section 2340 of title 18.

§ 948s. Service of charges

The trial counsel assigned to a case before a military commission under this chapter shall cause to be served upon the accused and military defense counsel a copy of the charges upon which trial is to be had. Such charges shall be served in English and, if appropriate, in another language that the accused understands. Such service shall be made sufficiently in advance of trial to prepare a defense.

SUBCHAPTER IV—TRIAL PROCEDURE

§ 949a. Rules

(a) PROCEDURES.—Pretrial, trial, and post-trial procedures, including elements and modes of proof, for cases triable by military

commission under this chapter shall be prescribed by the Secretary of Defense, but may not be contrary to or inconsistent with this chapter.

(b) RULES OF EVIDENCE.—(1) Subject to such exceptions and limitations as the Secretary may prescribe by regulation, evidence in a military commission under this chapter shall be admissible if the military judge determines that the evidence would have probative value to a reasonable person.

(2) Hearsay evidence is admissible unless the military judge finds that the circumstances render the evidence unreliable or lacking in probative value. However, such evidence may be admitted only if the proponent of the evidence makes the evidence known to the adverse party in advance of trial or hearing.

(3) The military judge shall exclude any evidence the probative value of which is substantially outweighed—

(A) by the danger of unfair prejudice, confusion of the issues, or misleading the members of the commission; or

(B) by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(c) NOTIFICATION TO CONGRESSIONAL COMMITTEES OF CHANGES TO PROCEDURES.—Not later than 60 days before the date on which any proposed modification of the procedures in effect for military commissions under this chapter goes into effect, the Secretary of Defense shall submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives a report describing the modification.

§ 949b. Unlawfully influencing action of military commission

(a) IN GENERAL.—(1) No authority convening a military commission under this chapter may censure, reprimand, or admonish the military commission, or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the military commission, or with respect to any other exercises of its or his functions in the conduct of the proceedings.

(2) No person may attempt to coerce or, by any unauthorized means, influence the action of a military commission under this chapter, or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

(3) Paragraphs (1) and (2) do 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 a 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 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, represented any accused before a military commission under this chapter.

§ 949c. Duties of trial counsel and defense counsel

(a) TRIAL COUNSEL.—The trial counsel of a military commission under this chapter shall prosecute in the name of the United States.

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

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

(3) The accused may be represented by civilian counsel if retained by the accused, but only if such civilian counsel—

(A) is a United States citizen;

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

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

(D) has been determined to be eligible for access to classified information that is classified at the level Secret or higher; and

(E) has signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the proceedings.

(4) Civilian defense counsel shall protect any classified information received during the course of representation of the accused in accordance with all applicable law governing the protection of classified information and may not divulge such information to any person not authorized to receive it.

(5) If the accused is represented by civilian counsel, military counsel detailed shall act as associate counsel.

(6) The accused is not entitled to be represented by more than one military counsel. However, the person authorized under regulations prescribed under section 948k of this title to detail counsel, in that person's sole discretion, may detail additional military counsel to represent the accused.

(7) Defense counsel may cross-examine each witness for the prosecution who testifies before a military commission under this chapter.

§ 949d. Sessions

(a) SESSIONS WITHOUT PRESENCE OF MEMBERS.—(1) At any time after the service of charges which have been referred for trial by military commission under this chapter, the military judge may call the military commission into session without the presence of the members for the purpose of—

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

(B) hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not

the matter is appropriate for later consideration or decision by the members;

(C) if permitted by regulations prescribed by the Secretary of Defense, receiving the pleas of the accused; and

(D) performing any other procedural function which may be performed by the military judge under this chapter or under rules prescribed pursuant to section 949a of this title and which does not require the presence of the members.

(2) Except as provided in subsections (c), (d), and (e), any proceedings under paragraph (1) shall—

(A) be conducted in the presence of the accused, defense counsel, and trial counsel; and

(B) be made part of the record.

(b) PROCEEDINGS IN PRESENCE OF ACCUSED.—Except as provided in subsections (c) and (e), all proceedings of a military commission under this chapter, including any consultation of the members with the military judge or counsel, shall—

(1) be in the presence of the accused, defense counsel, and trial counsel; and

(2) be made a part of the record.

(c) DELIBERATION OR VOTE OF MEMBERS.—When the members of a military commission under this chapter deliberate or vote, only the members may be present.

(d) CLOSURE OF PROCEEDINGS.—(1) The military judge may close to the public all or part of the proceedings of a military commission under this chapter, but only in accordance with this subsection.

(2)(A) The military judge may close to the public all or a portion of the proceedings of a military commission under paragraph (1), or permit the admission of classified information outside the presence of the accused, based upon a presentation (including an ex parte or in camera presentation) by either the prosecution or the defense.

(B) Trial counsel may not make a presentation requesting the admission of classified information outside the presence of the accused unless the head of the department or agency which has control over the matter (after personal consideration by that officer) certifies in writing to the military judge that—

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

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

(3) The military judge may close to the public all or a portion of the proceedings of a military commission under paragraph (1) upon making a specific finding that such closure is necessary to—

(A) protect information the disclosure of which could reasonably be expected to cause identifiable damage to the public interest or the national security, including intelligence or law enforcement sources, methods, or activities; or

(B) ensure the physical safety of individuals.

(e) EXCLUSION OF ACCUSED FROM CERTAIN PROCEEDINGS.—(1) The military judge may not exclude the accused from any portion of the proceeding except upon a specific finding of each of the following:

(A) That 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;

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

(iii) is necessary to prevent disruption of the proceedings by the accused.

(B) That the exclusion of the accused—

(i) is no broader than necessary; and

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

(2)(A) A finding under paragraph (1) may be based upon a presentation, including a presentation ex parte or in camera, by either trial counsel or defense counsel.

(B) Before trial counsel may make a presentation for purposes of subparagraph (A) requesting the admission of classified information that has not been provided to the accused, the head of the executive or military department or governmental agency concerned shall ensure, and shall certify in writing to the military judge, that such evidence has been declassified to the maximum extent possible, consistent with the requirements of national security.

(3)(A) No evidence may be admitted that has not been provided to the accused unless the evidence is classified information and the military judge makes a specific finding that—

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

(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

(iii) admission of the evidence would not deprive the accused of a full and fair trial.

(B) If the accused is excluded from a portion of the proceedings, the accused shall be provided with a redacted transcript of the proceedings from which excluded and, to the extent practicable, an unclassified summary of any evidence introduced. Under no circumstances shall such a summary or redacted transcript compromise the interests warranting the exclusion of the accused under paragraph (1).

(4)(A) Military defense counsel shall be present and able to participate in all trial proceedings and shall be given access to all evidence admitted under paragraph (3).

(B) Civilian defense counsel shall be permitted to be present and to participate in proceedings from which the accused is excluded under this subsection, and shall be given access to classified information admitted under this subsection, if—

(i) civilian defense counsel has obtained the necessary security clearances; and

(ii) the presence of civilian defense counsel or access of civilian defense counsel to such information, as applicable, is consistent with regulations to protect classified information that the Secretary of Defense may prescribe.

(C) Any defense counsel who receives classified information admitted under this subsection shall not be obligated to, and may not, disclose that information to the accused.

(D) At all times the accused must have defense counsel with sufficient security clearance to participate in any proceeding, including an ex parte or in camera presentation, with respect to classified information.

(5) If evidence has been admitted under this subsection that has not been provided to the accused, the judge shall instruct the members of the commission—

(A) that such evidence was so admitted; and

(B) that, in weighing the value of that evidence, the commission shall consider the fact that such evidence was admitted without having been provided to the accused.

(f) ADMISSION OF STATEMENTS OF ACCUSED.—(1) A statement described in paragraph (2) that is made by the accused during an interrogation, even if otherwise classified, may not be admitted into evidence in a military commission under this chapter unless the accused is present for the admission of the statement into evidence or the statement is otherwise provided to the accused.

(2) A statement of an accused described in this paragraph is a statement communicated knowingly and directly by the accused in response to questioning by United States or foreign military, intelligence, or criminal investigative personnel.

(3) This subsection shall not be construed to prevent the redaction of intelligence sources or methods, which do not constitute statements of the accused, from any document provided to the accused or admitted into evidence.

§ 949e. Continuances

The military judge in a military commission under this chapter may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just.

§ 949f. Challenges

(a) CHALLENGES AUTHORIZED.—The military judge and members of a military commission under this chapter may be challenged by the accused or trial counsel for cause stated to the commission. The military judge shall determine the relevance and validity of challenges for cause. The military judge may not receive a challenge to more than one person at a time. Challenges by trial counsel shall ordinarily be presented and decided before those by the accused are offered.

(b) PEREMPTORY CHALLENGES.—Each accused and the trial counsel are entitled to one peremptory challenge. The military judge may not be challenged except for cause.

(c) CHALLENGES AGAINST ADDITIONAL MEMBERS.—Whenever additional members are detailed to a military commission under this chapter, and after any challenges for cause against such additional members are presented and decided, each accused and the trial counsel are entitled to one peremptory challenge against members not previously subject to peremptory challenge.

§ 949g. Oaths

(a) IN GENERAL.—(1) Before performing their respective duties in a military commission under this chapter, military judges, members, trial counsel, defense counsel, reporters, and interpreters shall take an oath to perform their duties faithfully.

(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 duties are to be performed or for a particular case, shall be as prescribed in regulations of the Secretary of Defense. Those 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 the duty; and

(B) if such an oath is taken, such oath 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.

§ 949h. Former jeopardy

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

(b) SCOPE OF TRIAL.—No proceeding in which the accused has been found guilty by military commission under this chapter upon any charge or specification is a trial in the sense of this section until the finding of guilty has become final after review of the case has been fully completed.

§ 949i. Pleas of the accused

(a) ENTRY OF PLEA OF NOT GUILTY.—If an accused in a military commission under this chapter after a plea of guilty sets up matter inconsistent with the plea, or if it appears that the accused has entered the plea of guilty through lack of understanding of its meaning and effect, or if the accused fails or refuses to plead, a plea of not guilty shall be entered in the record, and the military commission shall proceed as though the accused had pleaded not guilty.

(b) FINDING OF GUILT AFTER GUILTY PLEA.—With respect to any charge or specification to which a plea of guilty has been made by the accused in a military commission under this chapter and accepted by the military judge, a finding of guilty of the charge or specification may be entered immediately without a vote. The finding shall constitute the finding of the commission unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty.

§ 949j. Opportunity to obtain witnesses and other evidence

(a) RIGHT OF DEFENSE COUNSEL.—Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence, including evidence in the possession of the United States, as provided in regulations prescribed by the Secretary of Defense.

(b) PROCESS FOR COMPULSION.—Process issued in a military commission under this chapter to compel witnesses to appear and testify and to compel the production of other evidence—

(1) shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue; and

(2) shall run to any place where the United States shall have jurisdiction thereof.

(c) TREATMENT OF CLASSIFIED INFORMATION.—The military judge in a military commission under this chapter, upon a sufficient showing, may authorize trial counsel, in making documents available to the accused through discovery conducted pursuant to such rules as the Secretary of Defense shall prescribe, to delete specified items of classified information from such documents and, when such a deletion is made—

(1) to substitute an unclassified summary of the classified information in such documents; or

(2) to substitute an unclassified statement admitting relevant facts that classified information in such documents would tend to prove.

(d) DISCLOSURE OF EXCULPATORY EVIDENCE.—(1) As soon as practicable, trial counsel in a military commission under this chapter shall disclose to the defense the existence of any evidence known to trial counsel that reasonably tends to exculpate the accused.

(2) Exculpatory evidence that consists of classified information may be provided solely to defense counsel, and not the accused, after review in camera by the military judge.

(3) Before evidence may be withheld from the accused under this subsection, the head of the executive or military department or government agency concerned shall ensure, and shall certify in writing to the military judge, that—

(A) the disclosure of such evidence to the accused could reasonably be expected to prejudice the national security; and

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

(4) Any classified exculpatory evidence that is not disclosed to the accused under this subsection—

(A) shall be provided to military defense counsel;

(B) shall be provided to civilian defense counsel, if civilian defense counsel has obtained the necessary security clearances and access to such evidence is consistent with regulations that the Secretary may prescribe to protect classified information; and

(C) shall be provided to the accused in a redacted or summary form, if it is possible to do so without compromising intelligence sources, methods, or activities or other national security interests.

(5) A defense counsel who receives classifed evidence under this subsection shall not be obligated to, and may not, disclose that evidence to the accused.

§ 949k. Defense of lack of mental responsibility

(a) AFFIRMATIVE DEFENSE.—It is an affirmative defense in a trial by military commission under this chapter that, at the time of the commission of the acts constituting the offense, the accused, as a re-

sult of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts. Mental disease or defect does not otherwise constitute a defense.

(b) BURDEN OF PROOF.—The accused in a military commission under this chapter has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence.

(c) FINDINGS FOLLOWING ASSERTION OF DEFENSE.—Whenever lack of mental responsibility of the accused with respect to an offense is properly at issue in a military commission under this chapter, the military judge shall instruct the members of the commission as to the defense of lack of mental responsibility under this section and shall charge them to find the accused—

(1) guilty;

(2) not guilty; or

(3) subject to subsection (d), not guilty by reason of lack of mental responsibility.

(d) MAJORITY VOTE REQUIRED FOR FINDING.—The accused shall be found not guilty by reason of lack of mental responsibility under subsection (c)(3) only if a majority of the members present at the time the vote is taken determines that the defense of lack of mental responsibility has been established.

§ 949l. Voting and rulings

(a) VOTE BY SECRET WRITTEN BALLOT.—Voting by members of a military commission under this chapter on the findings and on the sentence shall be by secret written ballot.

(b) RULINGS.—(1) The military judge in a military commission under this chapter shall rule upon all questions of law, including the admissibility of evidence and all interlocutory questions arising during the proceedings.

(2) Any ruling made by the military judge upon a question of law or an interlocutory question (other than the factual issue of mental responsibility of the accused) is conclusive and constitutes the ruling of the military commission. However, a military judge may change his ruling at any time during the trial.

(c) INSTRUCTIONS PRIOR TO VOTE.—Before a vote is taken of the findings of a military commission under this chapter, the military judge shall, in the presence of the accused and counsel, instruct the members as to the elements of the offense and charge them—

(1) that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt;

(2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and he must be acquitted;

(3) that, if there is reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and

(4) that the burden of proof to establish the guilt of the accused beyond a reasonable doubt is upon the United States.

§ 949m. Number of votes required

(a) CONVICTION.—No person may be convicted by a military commission under this chapter of any offense, except as provided in sec-

tion 949i(b) of this title or by concurrence of two-thirds of the members present at the time the vote is taken.

(b) SENTENCES.—(1) No person may be sentenced by a military commission to suffer death, except insofar as—

(A) the penalty of death is expressly authorized under this chapter for an offense of which the accused has been found guilty;

(B) trial counsel expressly sought the penalty of death by filing an appropriate notice in advance of trial;

(C) the accused is convicted of the offense by the concurrence of all the members; and

(D) all the members concur in the sentence of death.

(2) No person may be sentenced to life imprisonment, or to confinement for more than 10 years, by a military commission under this chapter except by the concurrence of three-fourths of the members present at the time the vote is taken.

(3) All other sentences shall be determined by a military commission by the concurrence of two-thirds of the members present at the time the vote is taken.

(c) NUMBER OF MEMBERS REQUIRED FOR PENALTY OF DEATH.—(1) Except as provided in paragraph (2), in a case in which the penalty of death is sought, the number of members of the military commission under this chapter shall be not less than 12.

(2) In any case described in paragraph (1) in which 12 members are not reasonably available because of physical conditions or military exigencies, the convening authority shall specify a lesser number of members for the military commission (but not fewer than 9 members), and the military commission may be assembled, and the trial held, with not fewer than the number of members so specified. In such a case, the convening authority shall make a detailed written statement, to be appended to the record, stating why a greater number of members were not reasonably available.

§ 949n. Military commission to announce action

A military commission under this chapter shall announce its findings and sentence to the parties as soon as determined.

§ 949o. Record of trial

(a) RECORD; AUTHENTICATION.—Each military commission under this chapter shall keep a separate, verbatim, record of the proceedings in each case brought before it, and the record shall be authenticated by the signature of the military judge. If the record cannot be authenticated by the military judge by reason of his death, disability, or absence, it shall be authenticated by the signature of the trial counsel or by a member of the commission if the trial counsel is unable to authenticate it by reason of his death, disability, or absence. Where appropriate, and as provided in regulations prescribed by the Secretary of Defense, the record of a military commission under this chapter may contain a classified annex.

(b) COMPLETE RECORD REQUIRED.—A complete record of the proceedings and testimony shall be prepared in every military commission under this chapter.

(c) PROVISION OF COPY TO ACCUSED.—A copy of the record of the proceedings of the military commission under this chapter shall be given the accused as soon as it is authenticated. If the record con-

tains classified information, or a classified annex, the accused shall be given a redacted version of the record. The appropriate defense counsel shall have access to the unredacted record, as provided in regulations prescribed by the Secretary of Defense.

SUBCHAPTER V—SENTENCES

§ 949s. Cruel or unusual punishments prohibited

Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a military commission under this chapter or inflicted under this chapter upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited under this chapter.

§ 949t. Maximum limits

The punishment which a military commission under this chapter may direct for an offense may not exceed such limits as the President or Secretary of Defense may prescribe for that offense.

§ 949u. Execution of confinement

(a) IN GENERAL.—Under such regulations as the Secretary of Defense may prescribe, a sentence of confinement adjudged by a military commission under this chapter may be carried into execution by confinement—

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

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

(b) TREATMENT DURING CONFINEMENT BY OTHER THAN THE ARMED FORCES.—Persons confined under subsection (a)(2) in a penal or correctional institution not under the control of an armed force are subject to the same discipline and treatment as persons confined or committed by the courts of the United States or of the State, District of Columbia, or place in which the institution is situated.

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

§ 950a. Error of law; lesser included offense

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

(b) LESSER INCLUDED OFFENSE.—Any reviewing authority with the power to approve or affirm a finding of guilty by a military commission under this chapter may approve or affirm, instead, so much of the finding as includes a lesser included offense.

§ 950b. Review by the convening authority

(a) NOTICE TO CONVENING AUTHORITY OF FINDINGS AND SENTENCE.—The findings and sentence of a military commission under this chapter shall be reported in writing promptly to the convening authority after the announcement of the sentence.

(b) SUBMITTAL OF MATTERS BY ACCUSED TO CONVENING AUTHORITY.—(1) The accused may submit to the convening authority matters for consideration by the convening authority with respect to the findings and the sentence of the military commission under this chapter.

(2)(A) Except as provided in subparagraph (B), a submittal under paragraph (1) shall be made in writing within 20 days afer accused has been given an authenticated record of trial under section 949o(c) of this title.

(B) If the accused shows that additional time is required for the accused to make a submittal under paragraph (1), the convening authority may, for good cause, extend the applicable period under subparagraph (A) for not more than an additional 20 days.

(3) The accused may waive his right to make a submittal to the convening authority under paragraph (1). Such a waiver shall be made in writing and may not be revoked. For the purposes of subsection (c)(2), the time within which the accused may make a submittal under this subsection shall be deemed to have expired upon the submittal of a waiver under this paragraph to the convening authority.

(c) ACTION BY CONVENING AUTHORITY.—(1) The authority under this subsection to modify the findings and sentence of a military commission under this chapter is a matter of the sole discretion and prerogative of the convening authority.

(2)(A) The convening authority shall take action on the sentence of a military commission under this chapter.

(B) Subject to regulations prescribed by the Secretary of Defense, action on the sentence under this paragraph may be taken only after consideration of any matters submitted by the accused under subsection (b) or after the time for submitting such matters expires, whichever is earlier.

(C) In taking action under this paragraph, the convening authority may, in his sole discretion, approve, disapprove, commute, or suspend the sentence in whole or in part. The convening authority may not increase a sentence beyond that which is found by the military commission.

(3) The convening authority is not required to take action on the findings of a military commission under this chapter. If the convening authority takes action on the findings, the convening authority may, in his sole discretion, may—

(A) dismiss any charge or specification by setting aside a finding of guilty thereto; or

(B) change a finding of guilty to a charge to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge.

(4) The convening authority shall serve on the accused or on defense counsel notice of any action taken by the convening authority under this subsection.

(d) ORDER OF REVISION OR REHEARING.—(1) Subject to paragraphs (2) and (3), the convening authority of a military commission under this chapter may, in his sole discretion, order a proceeding in revision or a rehearing.

(2)(A) Except as provided in subparagraph (B), a proceeding in revision may be ordered by the convening authority if—

(i) there is an apparent error or omission in the record; or

(ii) the record shows improper or inconsistent action by the military commission with respect to the findings or sentence that can be rectified without material prejudice to the substantial rights of the accused.

(B) In no case may a proceeding in revision—

(i) reconsider a finding of not guilty of a specification or a ruling which amounts to a finding of not guilty;

(ii) reconsider a finding of not guilty of any charge, unless there has been a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation; or

(iii) increase the severity of the sentence unless the sentence prescribed for the offense is mandatory.

(3) A rehearing may be ordered by the convening authority if the convening authority disapproves the findings and sentence and states the reasons for disapproval of the findings. If the convening authority disapproves the finding and sentence and does not order a rehearing, the convening authority shall dismiss the charges. A rehearing as to the findings may not be ordered by the convening authority when there is a lack of sufficient evidence in the record to support the findings. A rehearing as to the sentence may be ordered by the convening authority if the convening authority disapproves the sentence.

§ 950c. Appellate referral; waiver or withdrawal of appeal

(a) AUTOMATIC REFERRAL FOR APPELLATE REVIEW.—Except as provided under subsection (b), in each case in which the final decision of a military commission (as approved by the convening authority) includes a finding of guilty, the convening authority shall refer the case to the Court of Military Commission Review. Any such referral shall be made in accordance with procedures prescribed under regulations of the Secretary.

(b) WAIVER OF RIGHT OF REVIEW.—(1) In each case subject to appellate review under section 950f of this title, except a case in which the sentence as approved under section 950b of this title extends to death, the accused may file with the convening authority a statement expressly waiving the right of the accused to such review.

(2) A waiver under paragraph (1) shall be signed by both the accused and a defense counsel.

(3) A waiver under paragraph (1) must be filed, if at all, within 10 days after notice on the action is served on the accused or on de-

fense counsel under section 950b(c)(4) of this title. The convening authority, for good cause, may extend the period for such filing by not more than 30 days.

(c) WITHDRAWAL OF APPEAL.—Except in a case in which the sentence as approved under section 950b of this title extends to death, the accused may withdraw an appeal at any time.

(d) EFFECT OF WAIVER OR WITHDRAWAL.—A waiver of the right to appellate review or the withdrawal of an appeal under this section bars review under section 950f of this title.

§ 950d. Appeal by the United States

(a) INTERLOCUTORY APPEAL.—(1) Except as provided in paragraph (2), in a trial by military commission under this chapter, the United States may take an interlocutory appeal to the Court of Military Commission Review of any order or ruling of the military judge that—

(A) terminates proceedings of the military commission with respect to a charge or specification;

(B) excludes evidence that is substantial proof of a fact material in the proceeding; or

(C) relates to a matter under subsection (d), (e), or (f) of section 949d of this title.

(2) The United States may not appeal under paragraph (1) an order or ruling that is, or amounts to, a finding of not guilty by the military commission with respect to a charge or specification.

(b) NOTICE OF APPEAL.—The United States shall take an appeal of an order or ruling under subsection (a) by filing a notice of appeal with the military judge within five days after the date of such order or ruling.

(c) APPEAL.—An appeal under this section shall be forwarded, by means specified in regulations prescribed the Secretary of Defense, directly to the Court of Military Commission Review. In ruling on an appeal under this section, the Court of Military Commission Review may act only with respect to matters of law.

(d) APPEAL FROM ADVERSE RULING.—The United States may appeal an adverse ruling on an appeal under subsection (c) to the United States Court of Appeals for the District of Columbia Circuit by filing a petition for review in the Court of Appeals within 10 days after the date of such ruling. Review under this subsection shall be at the discretion of the Court of Appeals.

§ 950e. Rehearings

(a) COMPOSITION OF MILITARY COMMISSION FOR REHEARING.—Each rehearing under this chapter shall take place before a military commission under this chapter composed of members who were not members of the military commission which first heard the case.

(b) SCOPE OF REHEARING.—(1) Upon a rehearing—

(A) the accused may not be tried for any offense of which he was found not guilty by the first military commission; and

(B) no sentence in excess of or more than the original sentence may be imposed unless—

(i) the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings; or

(ii) the sentence prescribed for the offense is mandatory.

(2) Upon a rehearing, if the sentence approved after the first military commission was in accordance with a pretrial agreement and the accused at the rehearing changes his plea with respect to the charges or specifications upon which the pretrial agreement was based, or otherwise does not comply with pretrial agreement, the sentence as to those charges or specifications may include any punishment not in excess of that lawfully adjudged at the first military commission.

§ 950f. Review by Court of Military Commission Review

(a) ESTABLISHMENT.—The Secretary of Defense shall establish a Court of Military Commission Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing military commission decisions under this chapter, the court may sit in panels or as a whole in accordance with rules prescribed by the Secretary.

(b) APPELLATE MILITARY JUDGES.—The Secretary shall assign appellate military judges to a Court of Military Commission Review. Each appellate military judge shall meet the qualifications for military judges prescribed by section 948j(b) of this title or shall be a civilian with comparable qualifications. No person may be appointed to serve as an appellate military judge in any case in which that person acted as a military judge, counsel, or reviewing official.

(c) CASES TO BE REVIEWED.—The Court of Military Commission Review, in accordance with procedures prescribed under regulations of the Secretary, shall review the record in each case that is referred to the Court by the convening authority under section 950c of this title with respect to any matter of law raised by the accused.

(d) SCOPE OF REVIEW.—In a case reviewed by it under this section, the Court of Military Commission Review may act only with respect to matters of law.

§ 950g. Review by the United States Court of Appeals for the District of Columbia Circuit and the Supreme Court

(a) EXCLUSIVE APPELLATE JURISDICTION.—(1)(A) Except as provided in subparagraph (B), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission (as approved by the convening authority) under this chapter.

(B) The Court of Appeals may not review the final judgment until all other appeals under this chapter have been waived or exhausted.

(2) A petition for review must be filed by the accused in the Court of Appeals not later than 20 days after the date on which—

(A) written notice of the final decision of the Court of Military Commission Review is served on the accused or on defense counsel; or

(B) the accused submits, in the form prescribed by section 950c of this title, a written notice waiving the right of the accused to review by the Court of Military Commission Review under section 950f of this title.

(b) STANDARD FOR REVIEW.—In a case reviewed by it under this section, the Court of Appeals may act only with respect to matters of law.

(c) SCOPE OF REVIEW.—The jurisdiction of the Court of Appeals on an appeal under subsection (a) shall be limited to the consideration of—

(1) whether the final decision was consistent with the standards and procedures specified in this chapter; and

(2) to the extent applicable, the Constitution.

(d) SUPREME COURT.—The Supreme Court may review by writ of certiorari the final judgment of the Court of Appeals pursuant to section 1257 of title 28.

§ 950h. Appellate counsel

(a) APPOINTMENT.—The Secretary of Defense shall, by regulation, establish procedures for the appointment of appellate counsel for the United States and for the accused in military commissions under this chapter. Appellate counsel shall meet the qualifications for counsel appearing before military commissions under this chapter.

(b) REPRESENTATION OF UNITED STATES.—Appellate counsel appointed under subsection (a)—

(1) shall represent the United States in any appeal or review proceeding under this chapter before the Court of Military Commission Review; and

(2) may, when requested to do so by the Attorney General in a case arising under this chapter, represent the United States before the United States Court of Appeals for the District of Columbia Circuit or the Supreme Court.

(c) REPRESENTATION OF ACCUSED.—The accused shall be represented by appellate counsel appointed under subsection (a) before the Court of Military Commission Review, the United States Court of Appeals for the District of Columbia Circuit, and the Supreme Court, and by civilian counsel if retained by the accused. Any such civilian counsel shall meet the qualifications under paragraph (3) of section 949c(b) of this title for civilian counsel appearing before military commissions under this chapter and shall be subject to the requirements of paragraph (4) of that section. The provisions of subparagraph (D) of section 949d(e)(5) of this title shall apply with respect to appellate counsel.

§ 950i. Execution of sentence; suspension of sentence

(a) EXECUTION OF SENTENCE OF DEATH ONLY UPON APPROVAL BY THE PRESIDENT.—If the sentence of a military commission under this chapter extends to death, that part of the sentence providing for death may not be executed until approved by the President. In such a case, the President may commute, remit, or suspend the sentence, or any part thereof, as he sees fit.

(b) EXECUTION OF SENTENCE OF DEATH ONLY UPON FINAL JUDGMENT OF LEGALITY OF PROCEEDINGS.—(1) If the sentence of a military commission under this chapter extends to death, the sentence may not be executed until there is a final judgement as to the legality of the proceedings (and with respect to death, approval under subsection (a)).

(2) A judgement as to legality of proceedings is final for purposes of paragraph (1) when—

(A) the time for the accused to file a petition for review by the Court of Appeals for the District of Columbia Circuit has expired and the accused has not filed a timely petition for such review and the case is not otherwise under review by that Court; or

(B) review is completed in accordance with the judgment of the United States Court of Appeals for the District of Columbia Circuit and—

(i) a petition for a writ of certiorari is not timely filed;

(ii) such a petition is denied by the Supreme Court; or

(iii) review is otherwise completed in accordance with the judgment of the Supreme Court.

(c) SUSPENSION OF SENTENCE.—The Secretary of the Defense, or the convening authority acting on the case (if other than the Secretary), may suspend the execution of any sentence or part thereof in the case, except a sentence of death.

§ 950j. Finality or proceedings, findings, and sentences

(a) FINALITY.—The appellate review of records of trial provided by this chapter, and the proceedings, findings, and sentences of military commissions as approved, reviewed, or affirmed as required by this chapter, are final and conclusive. Orders publishing the proceedings of military commissions under this chapter are binding upon all departments, courts, agencies, and officers of the United States, except as otherwise provided by the President.

(b) PROVISIONS OF CHAPTER SOLE BASIS FOR REVIEW OF MILIARY COMMISSION PROCEDURES AND ACTIONS.—Except as otherwise provided in this chapter and notwithstanding any other provision of law (including section 2241 of title 28 or any other habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.

SUBCHAPTER VII—PUNITIVE MATTERS

Sec.

§ 950p. Statement of substantive offenses

(a) PURPOSE.—The provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission.

(b) EFFECT.—Because the provisions of this subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter.

§ 950q. Principals

Any person is punishable as a principal under this chapter who—

(1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission;

(2) causes an act to be done which if directly performed by him would be punishable by this chapter; or

(3) is a superior commander who, with regard to acts punishable under this chapter, knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

§ 950r. Accessory after the fact

Any person subject to this chapter who, knowing that an offense punishable by this chapter has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment shall be punished as a military commission under this chapter may direct.

§ 950s. Conviction of lesser included offense

An accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an attempt to commit either the offense charged or an offense necessarily included therein.

§ 950t. Attempts

(a) IN GENERAL.—Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a military commission under this chapter may direct.

(b) SCOPE OF OFFENSE.—An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.

(c) EFFECT OF CONSUMMATION.—Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.

§ 950u. Solicitation

Any person subject to this chapter who solicits or advises another or others to commit one or more substantive offenses triable by military commission under this chapter shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed or attempted, he shall be punished as a military commission under this chapter may direct.

§ 950v. Crimes triable by military commissions

(a) DEFINITIONS AND CONSTRUCTION.—In this section:

(1) MILITARY OBJECTIVE.—The term "military objective" refers to—

(A) combatants; and

(B) those objects during an armed conflict—

(i) which, by their nature, location, purpose, or use, effectively contribute to the opposing force's war-fighting or war-sustaining capability; and

(ii) the total or partial destruction, capture, or neutralization of which would constitute a definite military advantage to the attacker under the circumstances at the time of the attack.

(2) PROTECTED PERSON.—The term "protected person" refers to any person entitled to protection under one or more of the Geneva Conventions, including—

(A) civilians not taking an active part in hostilities;

(B) military personnel placed hors de combat by sickness, wounds, or detention; and

(C) military medical or religious personnel.

(3) PROTECTED PROPERTY.—The term "protected property" refers to property specifically protected by the law of war (such as buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals, or places where the sick and wounded are collected), if such property is not being used for military purposes or is not otherwise a military objective. Such term includes objects properly identified by one of the distinctive emblems of the Geneva Conventions.

(4) CONSTRUCTION.—The intent specified for an offense under paragraph (1), (2), (3), (4), or (12) of subsection (b) precludes the applicability of such offense with regard to—

(A) collateral damage; or

(B) death, damage, or injury incident to a lawful attack.

(b) OFFENSES.—The following offenses shall be triable by military commission under this chapter at any time without limitation:

(1) MURDER OF PROTECTED PERSONS.—An alien unlawful enemy combatant who intentionally kills one or more protected persons is guilty of the offense of intentionally killing a protected person and shall be subject to whatever punishment a commission may direct, including the penalty of death.

(2) ATTACKING CIVILIANS.—An alien unlawful enemy combatant who intentionally engages in an attack upon a civilian population as such or individual civilians not taking active part in hostilities is guilty of the offense of attacking civilians and shall be subject to whatever punishment a commission may direct, including, if death results to one or more of the victims, the penalty of death.

(3) ATTACKING CIVILIAN OBJECTS.—An alien unlawful enemy combatant who intentionally engages in an attack upon property that is not a military objective shall be guilty of the offense of attacking civilian objects and shall be subject to whatever punishment a commission may direct.

(4) ATTACKING PROTECTED PROPERTY.—An alien unlawful enemy combatant who intentionally engages in an attack upon protected property shall be guilty of the offense of attacking protected property and shall be subject to whatever punishment a commission may direct.

(5) PILLAGING.—An alien unlawful enemy combatant who intentionally and in the absence of military necessity appropriates or seizes property for private or personal use, without the consent of a person with authority to permit such appropriation or seizure, shall be guilty of the offense of pillaging and shall be subject to whatever punishment a commission may direct.

(6) DENYING QUARTER.—An alien unlawful enemy combatant who, with effective command or control over subordinate groups, declares, orders, or otherwise indicates to those forces that there shall be no survivors or surrender accepted, with the intent therefore to threaten an adversary or to conduct hostilities such that there would be no survivors or surrender accepted, shall be guilty of denying quarter and shall be subject to whatever punishment a commission may direct.

(7) TAKING HOSTAGES.—An alien unlawful enemy combatant who, having knowingly seized or detained one or more persons, threatens to kill, injure, or continue to detain such person or persons with the intent of compelling any nation, person other than the hostage, or group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of such person or persons, shall be guilty of the offense of taking hostages and shall be subject to whatever punishment a commission may direct, including, if death results to one or more of the victims, the penalty of death.

(8) EMPLOYING POISON OR ANALOGOUS WEAPONS.—An alien unlawful enemy combatant who intentionally, as a method of warfare, employs a substance or a weapon that releases a substance that causes death or serious and lasting damage to health in the ordinary course of events, through its asphyxiating, bacteriological, or toxic properties, shall be guilty of employing poison or analogous weapons and shall be subject to whatever punishment a commission may direct, including, if death results to one or more of the victims, the penalty of death.

(9) USING PROTECTED PERSONS AS SHIELDS.—An alien unlawful enemy combatant who positions, or otherwise takes advantage of, a protected person with the intent to shield a military objective from attack or to shield, favor, or impede military operations, shall be guilty of the offense of using protected persons as shields and shall be subject to whatever punishment a commission may direct, including, if death results to one or more of the victims, the penalty of death.

(10) USING PROTECTED PROPERTY AS SHIELDS.—An alien unlawful enemy combatant who positions, or otherwise takes advantage of the location of, protected property under the law of war with the intent to shield a military objective from attack or to shield, favor, or impede military operations, shall be guilty of the offense of using protected property as shields and shall be subject to whatever punishment a commission may direct.

(11) TORTURE.—An alien unlawful enemy combatant who commits an act specifically intended to inflict severe physical pain or suffering or severe mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimida-

tion, coercion, or any reason based on discrimination of any kind, shall be guilty of torture and subject to whatever punishment a commission may direct, including, if death results to one or more of the victims, the penalty of death. In this paragraph, the term "severe mental pain or suffering" has the meaning given that term in section 2340(2) of title 18.

(12) CRUEL OR INHUMAN TREATMENT.—An alien unlawful enemy combatant who commits an act intended to inflict severe physical pain or suffering or severe mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including severe physical abuse, upon another person within his custody or physical control shall be guilty of cruel or inhuman treatment and subject to whatever punishment a commission may direct, including, if death results to one or more of the victims, the penalty of death. In this paragraph, the term "severe mental pain or suffering" has the meaning given that term in section 2340(2) of title 18.

(13) INTENTIONALLY CAUSING SERIOUS BODILY INJURY.—An alien unlawful enemy combatant who intentionally causes serious bodily injury to one or more persons, including lawful combatants, in violation of the law of war shall be guilty of the offense of causing serious bodily injury and shall be subject to whatever punishment a commission may direct, including, if death results to one or more of the victims, the penalty of death. In this paragraph, the term "serious bodily injury" has the meaning given that term in section 113(b)(2) of title 18.

(14) MUTILATING OR MAIMING.—An alien unlawful enemy combatant who intentionally injures one or more protected persons, by disfiguring the person or persons by any mutilation thereof or by permanently disabling any member, limb, or organ of his body, without any legitimate medical or dental purpose, shall be guilty of the offense of mutilation or maiming and shall be subject to whatever punishment a commission may direct, including, if death results to one or more of the victims, the penalty of death.

(15) MURDER IN VIOLATION OF THE LAW OF WAR.—An alien unlawful enemy combatant who intentionally kills one or more persons, including lawful combatants, in violation of the law of war shall be guilty of the offense of murder in violation of the law of war and shall be subject to whatever punishment a commission may direct, including the penalty of death.

(16) DESTRUCTION OF PROPERTY IN VIOLATION OF THE LAW OF WAR.—An alien unlawful enemy combatant who intentionally destroys property belonging to another person in violation of the law of war shall be guilty of the offense of destruction of property in violation of the law of war and shall be subject to whatever punishment a commission may direct.

(17) USING TREACHERY OR PERFIDY.—An alien unlawful enemy combatant who, after inviting the confidence or belief of one or more persons that they were entitled to, or obliged to accord, protection under the law of war, intentionally makes use of that confidence or belief in killing, injuring, or capturing such person or persons, shall be guilty of using treachery or perfidy and shall be subject to whatever punishment a commission may direct.

(18) IMPROPERLY USING A FLAG OF TRUCE.—An alien unlawful enemy combatant who uses a flag of truce to feign an intention to negotiate, surrender, or otherwise to suspend hostilities when there is no such intention, shall be guilty of improperly using a flag of truce and shall be subject to whatever punishment a commission may direct.

(19) IMPROPERLY USING A DISTINCTIVE EMBLEM.—An alien unlawful enemy combatant who intentionally uses a distinctive emblem recognized by the law of war for combatant purposes in a manner prohibited by the law of war shall be guilty of improperly using a distinctive emblem and shall be subject to whatever punishment a commission may direct.

(20) INTENTIONALLY MISTREATING A DEAD BODY.—An alien unlawful enemy combatant who intentionally mistreats the body of a dead person, without justification by legitimate military necessary, shall be guilty of the offense of mistreating a dead body and shall be subject to whatever punishment a commission may direct.

(21) RAPE.—An alien unlawful enemy combatant who forcibly or with coercion or threat of force wrongfully invades the body of a person by penetrating, however slightly, the anal or genital opening of the victim with any part of the body of the accused or with any foreign object shall be guilty of the offense of rape and shall be subject to whatever punishment a commission may direct.

(22) HIJACKING OR HAZARDING A VESSEL OR AIRCRAFT.—An alien unlawful enemy combatant subject to this title who intentionally seizes, exercises unauthorized control over, or endangers the safe navigation of, a vessel or aircraft that was not a legitimate military target is guilty of the offense of hijacking or hazarding a vessel or aircraft and shall be subject to whatever punishment a commission may direct, including, if death results to one or more of the victims, the penalty of death.

(23) TERRORISM.—An alien unlawful enemy combatant subject to this title who intentionally kills or inflicts great bodily harm on one or more persons, or intentionally engages in an act that evinces a wanton disregard for human life, in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct, shall be guilty of the offense of terrorism and shall be subject to whatever punishment a commission may direct, including, if death results to one or more of the victims, the penalty of death.

(24) PROVIDING MATERIAL SUPPORT FOR TERRORISM.—An alien unlawful enemy combatant who provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism (as defined in paragraph (23)), or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism (as defined in paragraph (23)), shall be guilty of the offense of providing material support for terrorism and shall be subject to whatever punishment a commission may direct. In this para-

graph, the term "material support or resources" has the meaning given that term in section 2339A(b) of title 18.

(25) WRONGFULLY AIDING THE ENEMY.—An alien unlawful enemy combatant who, in breach of an allegiance or duty to the United States, knowingly and intentionally aids an enemy of the United States or one its co-belligerents shall be guilty of the offense of wrongfully aiding the enemy and shall be subject to whatever punishment a commission may direct.

(26) SPYING.—An alien unlawful enemy combatant who, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign power, collects or attempts to collect certain information by clandestine means or while acting under false pretenses, for the purpose of conveying such information to an enemy of the United States or one of its co-belligerents, shall be guilty of the offense of spying and shall be subject to whatever punishment a commission may direct, including the penalty of death.

(27) CONSPIRACY.—An alien unlawful enemy combatant who conspires to commit one or more substantive offenses triable under this section, and who knowingly does any overt act to effect the object of the conspiracy, shall be guilty of conspiracy and shall be subject to whatever punishment a commission may direct, including, if death results to one or more of the victims, the penalty of death.

§ 950w. Perjury and obstruction of justice

A military commission under this chapter may try offenses and impose punishments for perjury, false testimony, or obstruction of justice related to military commissions under this chapter.

§ 950x. Contempt

A military commission under this chapter may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder.

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SECTION 2441 OF TITLE 18, UNITED STATES CODE

§ 2441. War crimes

(a) * * *

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(c) DEFINITION.—As used in this section the term "war crime" means any conduct—

(1) * * *

* * * * * * *

[(3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or**]**

(3) which constitutes a serious violation of common Article 3 of the 1949 Geneva Conventions, when committed in the context

of and in association with an armed conflict not of an international character; or

* * * * * * *

(d) COVERED COMMON ARTICLE 3 VIOLATIONS.—

(1) SERIOUS VIOLATIONS.—In subsection (c)(3), the term "serious violation of common Article 3 of the 1949 Geneva Conventions" means any of the following:

(A) TORTURE.—The act of a person who commits, or conspires or attempts to commit, an act specifically intended to inflict severe physical pain or suffering or severe mental pain or suffering (as such term is defined in section 2340(2) of this title), other than pain or suffering incidental to lawful sanctions, upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind.

(B) CRUEL OR INHUMAN TREATMENT.—The act of a person who commits, or conspires or attempts to commit, an act intended to inflict severe physical pain or suffering or severe mental pain or suffering (as such term is defined in section 2340(2) of this title), other than pain or suffering incidental to lawful sanctions, and including severe physical abuse, upon another person within his custody or physical control.

(C) PERFORMING BIOLOGICAL EXPERIMENTS.—The act of a person who subjects, or conspires or attempts to subject, one or more persons within his custody or physical control to biological experiments and in so doing endangers the body or health of such person or persons.

(D) MURDER.—The act of a person who intentionally kills, or conspires or attempts to kill, or kills whether intentionally or unintentionally in the course of committing any other offense under this section, one or more persons taking no active part in the hostilities, including those placed hors de combat by sickness, wounds, detention, or any other cause.

(E) MUTILATION OR MAIMING.—The act of a person who intentionally injures, or conspires or attempts to injure, or injures whether intentionally or unintentionally in the course of committing any other offense under this section, one or more persons taking no active part in the hostilities, including those placed hors de combat by sickness, wounds, detention, or any other cause, by disfiguring the person or persons by any mutilation thereof or by permanently disabling any member, limb, or organ of his body, without any legitimate medical or dental purpose.

(F) INTENTIONALLY CAUSING GREAT SUFFERING OR SERIOUS INJURY.—The act of a person who intentionally causes, or conspires or attempts to cause, serious bodily injury (as such term is defined in section 113(b)(2) of this title) to one or more persons taking no active part in the hostilities, including those placed hors de combat by sickness, wounds, detention, or any other cause.

(G) RAPE.—The act of a person who forcibly or with coercion or threat of force wrongfully invades, or conspires or attempts to invade, the body of a person by penetrating,

however slightly, the anal or genital opening of the victim with any part of the body of the accused or with any foreign object.

(H) SEXUAL ASSAULT OR ABUSE.—The act of a person who forcibly or with coercion or threat of force engages, or conspires or attempts to engage, in sexual contact (as such term is defined in section 2246(3) of this title) with one or more persons, or causes, or conspires or attempts to cause, one or more persons to engage in sexual contact (as so defined).

(I) TAKING HOSTAGES.—The act of a person who—

(i) having knowingly seized or detained one or more persons, threatens to kill, injure, or continue to detain such person or persons with the intent of compelling any nation, person other than the hostage, or group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of such person or persons; or

(ii) attempts to engage or conspires to engage in conduct under clause (i).

(2) INAPPLICABILITY OF SPECIFIED PROVISIONS WITH RESPECT TO CERTAIN CONDUCT.—The intent specified for the conduct stated in subparagraphs (D), (E), and (F) of paragraph (1) precludes the applicability of those subparagraphs with regard to—

(A) collateral damage; or

(B) death, damage, or injury incident to a lawful attack.

SECTION 2241 OF TITLE 28, UNITED STATES CODE

§ 2241. Power to grant writ

(a) * * *

* * * * * * *

[(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—

[(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

[(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—

[(A) is currently in military custody; or

[(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.

[(e) Except as provided in section 1405 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—

[(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

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[(A) is currently in military custody; or

[(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1405(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.]

(e)(1) Except as provided for in this subsection, and notwithstanding any other law, no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action, including an application for a writ of habeas corpus, pending on or filed after the date of the enactment of the Military Commissions Act of 2006, against the United States or its agents, brought by or on behalf of any alien detained by the United States as an unlawful enemy combatant, relating to any aspect of the alien's detention, transfer, treatment, or conditions of confinement.

(2) The United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal. The scope of such review is defined in section 1005(e)(2) of the Detainee Treatment Act of 2005. If the Court grants a detainee's petition for review, the Secretary of Defense may conduct a new Combatant Status Review Tribunal.

(3) Review shall be had only of final judgments of military commissions as provided for pursuant to section 950g of title 10, United States Code.

(4) The court may consider classified information submitted in camera and ex parte in making any determination under this section.

SECTION 1004 OF THE DETAINEE TREATMENT ACT OF 2005

SEC. 1004. PROTECTION OF UNITED STATES GOVERNMENT PERSONNEL ENGAGED IN AUTHORIZED INTERROGATIONS.

(a) * * *

(b) COUNSEL.—The United States Government [may] *shall* provide or employ counsel, and pay counsel fees, court costs, bail, and other expenses incident to the representation of an officer, employee, member of the Armed Forces, or other agent described in subsection (a), with respect to any civil action or criminal prosecution *or investigation* arising out of practices described in that subsection *whether before United States courts or agencies, foreign courts or agencies, or international courts or agencies,*, under the same conditions, and to the same extent, to which such services and payments are authorized under section 1037 of title 10, United States Code.

ADDITIONAL AND DISSENTING VIEWS

ADDITIONAL VIEWS

The time is well past when the United States of America should have a judicial system with which to deal with the likes of those terrorists detained at Guantanamo Bay, Cuba. While we support the effort to establish a system of military commissions as required by the Supreme Court's decision in *Hamdan* v. *Rumsfeld*, we are disappointed that the Skelton amendment in the form of a substitute was not adopted by the Armed Services Committee. We feel the Skelton amendment, which was very similar to the bipartisan bill subsequently reported out of the Senate Armed Services Committee under the leadership of Chairman John Warner and Senators John McCain, Carl Levin, and Lindsey Graham, was a better approach to this issue. It offered the best opportunity to quickly create a military commission system that is tough, swift, and fair, and that would produce sustainable convictions of accused terrorists, including Khalid Sheik Mohammad, the master mind of the 9/11 attacks.

This amendment would have established tough but fair rules for trying terrorists based on the Uniform Code of Military Justice and its associated regulations. This would have addressed a significant issue that the Supreme Court had with the previous tribunal system. Of particular concern is the fact that H.R. 6054 as reported creates certain circumstances where the military judge could admit evidence into consideration that a defendant would not have the right to see. This is contrary to what most understand as a fundamental legal guarantee for the accused, and creates a situation where the Supreme Court may overturn convictions found through the military commission on that basis. As the Air Force Deputy Judge Advocate General, Major General Charles Dunlap, testified before the committee, "I don't think the Supreme Court, for example, would ever affirm a decision to execute an individual who was tried where the trier of fact relied upon evidence that the accused never saw and never had a chance to defend himself against."

Moreover, the existing military justice system and its regulations—long experienced in dealing with classified evidence and the need to protect witnesses from the intelligence community—already provide a range of tools for dealing with the challenge of balancing the requirement for a fair trial with the protection of national security information. For example, under current law, classified evidence can be redacted into unclassified form and witnesses can testify behind a screen or have their voices disguised to prevent their identities from being revealed. In no way does the current system risk disclosing classified evidence to terrorists or revealing the identities of sensitive witnesses. What it does do, however, is ensure that any conviction reached will withstand Supreme Court

scrutiny. This is particularly significant since five years after 9/11, the existing military commission system has not produced a single conviction. We cannot base the new system on a rule likely to jeopardize the government's ability to successfully prosecute. The substitute offered a better way.

Furthermore, the Skelton substitute applied existing rules of evidence from the manual for courts-martial but acknowledged that the realities of battlefield and intelligence operations must be taken into account. Therefore, it provided the Secretary of Defense, with the Attorney General, the ability to make exceptions to take into account the needs of the war zone. H.R. 6054, on the other hand, simply says that evidence is generally admissible if the judge finds it is probative to a reasonable person standard.

Also, contrary to the measure adopted, the Skelton substitute did not attempt to redefine the United States' obligations under the Geneva Conventions' Common Article 3. H.R. 6054 lowers the standard of treatment the United States will be bound by from one this nation led the way in establishing and has maintained for over 60 years. Our uniformed military has been among the most vocal in their concerns about diluting this standard because they want to do everything possible to ensure that American forces would be treated with a similarly high standard if captured.

Two former Chairmen of the Joint Chiefs of Staff sent letters to Senator McCain on this critical provision in H.R. 6054. General Colin Powell, former Secretary of State in this administration, said: "The world is beginning to doubt the moral basis of our fight against terrorism. To redefine Common Article 3 would add to those doubts. Furthermore, it would put our own troops at risk." General Jack Vessey said this change "would give opponents a legal argument for the mistreatment of Americans being held prisoner in times of war." These are powerful arguments that should be taken seriously.

Lastly, where H.R. 6054 creates an entirely new system for appeals, the Skelton substitute would have used the tried and true existing system for military appeals. This would have allowed for an appeals process that is already tested and well understood by the military lawyers and judges who will have to make the system effective. We feel there was no need to reinvent this process.

In conclusion, all Americans and all members of the Armed Services Committee want a tough system of military commissions that will swiftly convict terrorists. While H.R. 6054 will move the process toward a conference with the Senate, it is very unclear whether its approach will withstand scrutiny in the courts. The Skelton substitute would have created a commissions system that lived up to the requirements of the Supreme Court, protected American troops under the Geneva Conventions, and swiftly moved to convictions for alleged terrorists. We will continue to work, as the bill moves through the legislative process, to ensure that the system Congress eventually enacts is effective.

IKE SKELTON.
JOHN SPRATT.
SOLOMON ORTIZ.
SILVESTRE REYES.
VIC SNYDER.
ROBERT ANDREWS.
JAMES LANGEVIN.
STEVE ISRAEL.
JIM COOPER.
G.K. BUTTERFIELD.

ADDITIONAL VIEW OF RANKING MEMBER IKE SKELTON

While it is critical that Congress pass legislation that will provide the President with a tough and fair system of military commissions that will ensure swift convictions for terrorists and protect our men and women in uniform, I continue to have serious concerns about how this legislation deals with *habeas corpus* matters.

Representative Meehan offered a very good amendment that would have stripped provisions involving *habeas corpus* matters out of the substitute amendment. But unfortunately Mr. Meehan's amendment did not pass.

I emphasize, as I did in my remarks in the Congressional Record of December 15, 2005, and as Senator Levin also emphasized, the congressional intent of the Detainee Treatment Act was that it not apply to or alter pending habeas cases. The United States Supreme Court in *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749 (2006) confirmed this congressional intent. As the Supreme Court ruled in *Lindh* v. *Murphy*, *521 U.S. 320 (1997)*, the fact that Congress chose not to explicitly apply the habeas-stripping provision to pending cases means that the courts retain jurisdiction to consider these appeals.

Congress should not strip the United States federal courts of jurisdiction to hear pending habeas cases, or it would seriously undermine well-established case law, separation of powers and other values enshrined in our constitution.

While the military commission legislation must ensure swift convictions for terrorists, uphold our obligations under the Geneva Conventions, and protect our men and women in uniform, it must also respond to the United States Supreme Court's ruling in the Hamdan case and withstand judicial scrutiny, or it may not effectively serve its other purposes.

IKE SKELTON.

DISSENTING VIEWS

The time is well past when the United States of America should have a judicial system with which to deal with the likes of those terrorists detained at Guantanamo Bay, Cuba. While we support the effort to establish a system of military commissions as required by the Supreme Court's decision in *Hamdan* v. *Rumsfeld*, we are disappointed that the Skelton amendment in the form of a substitute was not adopted by the Armed Services Committee. We feel the Skelton amendment, which was very similar to the bipartisan bill subsequently reported out of the Senate Armed Services Committee under the leadership of Chairman John Warner and Senators John McCain, Carl Levin, and Lindsey Graham, was a better approach to this issue. It offered the best opportunity to quickly create a military commission system that is tough, swift, and fair, and that would produce sustainable convictions of accused terrorists, including Khalid Sheik Mohammad, the master mind of the 9/11 attacks.

This amendment would have established tough but fair rules for trying terrorists based on the Uniform Code of Military Justice and its associated regulations. This would have addressed a significant issue that the Supreme Court had with the previous tribunal system. Of particular concern is the fact that H.R. 6054 as reported creates certain circumstances where the military judge could admit evidence into consideration that a defendant would not have the right to see. This is contrary to what most understand as a fundamental legal guarantee for the accused, and creates a situation where the Supreme Court may overturn convictions found through the military commission on that basis. As the Air Force Deputy Judge Advocate General, Major General Charles Dunlap, testified before the committee, "I don't think the Supreme Court, for example, would ever affirm a decision to execute an individual who was tried where the trier of fact relied upon evidence that the accused never saw and never had a chance to defend himself against."

Moreover, the existing military justice system and its regulations—long experienced in dealing with classified evidence and the need to protect witnesses from the intelligence community—already provide a range of tools for dealing with the challenge of balancing the requirement for a fair trial with the protection of national security information. For example, under current law, classified evidence can be redacted into unclassified form and witnesses can testify behind a screen or have their voices disguised to prevent their identities from being revealed. In no way does the current system risk disclosing classified evidence to terrorists or revealing the identities of sensitive witnesses. What it does do, however, is ensure that any conviction reached will withstand Supreme Court scrutiny. This is particularly significant since five years after 9/11, the existing military commission system has not produced a single

conviction. We cannot base the new system on a rule likely to jeopardize the government's ability to successfully prosecute. The substitute offered a better way.

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Also, contrary to the measure adopted, the Skelton substitute did not attempt to redefine the United States' obligations under the Geneva Conventions' Common Article 3. H.R. 6054 lowers the standard of treatment the United States will be bound by from one this nation led the way in establishing and has maintained for over 60 years. Our uniformed military has been among the most vocal in their concerns about diluting this standard because they want to do everything possible to ensure that American forces would be treated with a similarly high standard if captured.

Two former Chairmen of the Joint Chiefs of Staff sent letters to Senator McCain on this critical provision in H.R. 6054. General Colin Powell, former Secretary of State in this administration, said: "The world is beginning to doubt the moral basis of our fight against terrorism. To redefine Common Article 3 would add to those doubts. Furthermore, it would put our own troops at risk." General Jack Vessey said this change "would give opponents a legal argument for the mistreatment of Americans being held prisoner in times of war." These are powerful arguments that should be taken seriously.

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In conclusion, all Americans and all members of the Armed Services Committee want a tough system of military commissions that will swiftly convict terrorists. While H.R. 6054 will move the process toward a conference with the Senate, it is very unclear whether its approach will withstand scrutiny in the courts. The Skelton substitute would have created a commissions system that lived up to the requirements of the Supreme Court, protected American troops under the Geneva Conventions, and swiftly moved to convictions for alleged terrorists.

When the Skelton bill failed, we opposed the underlying legislation which we believe will irreparably harm the war on terror by tying up the prosecution of terrorists with new untested legal norms that do no meet the requirement of the Supreme Court's Hamdan decision; endangering our service members by attempting to rewrite and limit U.S. compliance with Common Article Three of the Geneva Conventions; undermining basic standards of U.S. law; and departing from a body of law well understood by our troops.

Habeas corpus

It is our opinion that by extinguishing the court's jurisdiction over pending and future habeas corpus petitions, this legislation contradicts the Constitution and numerous Supreme Court rulings. Section 5 of the Committee report would sanction one of the most sweeping jurisdiction-stripping measures in our history and raises grave constitutional questions.

By legislating that all pending and future habeas petitions are not subject to judicial review, the Committee leaves itself open to an adverse court ruling that will strike down this bill leaving us exactly where we were after the Supreme Court ruled in Hamdan v. Rumsfeld (2006) that the ad hoc military commissions set up by the President were illegal. This will only lengthen the current delay in the prosecution of terrorists. Not a single trial has taken place, or a single criminal convicted, in military commissions in the more than five years since September 11, 2001. We fear that things will not change for the better if we enact the legislation in its current form.

If the Committee's true intent was an expedited legislative process which would lead to quick and just prosecutions for terrorists, it would have been wise to take the Supreme Court's comments on this topic into consideration. As Chairman Warner of the Senate Armed Services Committee said on July 13, 2006:

> "[I]n my judgment, as a Congress, in this legislation, [we] must meet the tenets and objectives of that [Hamdan v. Rumsfeld] opinion. Otherwise, such legislation that we will devise and enact into law might well be struck down by subsequent federal court review. And that would not be in the interests of this nation.
>
> The eyes of the world are on this nation as to how we intend to handle this type of situation and handle it in a way that a measure of legal rights and human rights are given to detainees."

Common article three

The further we depart from the Geneva Conventions and Common Article Three and try to rewrite or ignore its provisions, the stronger the message we send that it is alright for other nations not to give our soldiers any rights when they are captured on the battlefield.

On Thursday, September 7, 2006, Major General Charles Dunlap expressed a feeling common among the Judge Advocates General who testified before the House Armed Services Committee that "a process fully compliant with Common Article Three will enhance our standing internationally and empower our allies to embrace the legal reasoning and architecture behind our prosecution of military cases. Doing so is plainly in our warfighting interests."

We could not agree with him more.

By stating that compliance with the prohibitions against cruel, inhuman, and degrading treatment in the Detainee Treatment Act fully satisfies U.S. obligations with respect to the standards for detention and treatment of detainees under Geneva, the bill threatens noncompliance with Article 3, Sections 1(c) which also includes

outrages on personal dignity and humiliating treatment and 1(d) being tried before a regularly constituted court "affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

We are also concerned with the possible implications of section 4 which contains an exclusive list of offenses in an attempt to limit behavior prohibited under Geneva.

Section 4 of the underlying bill endeavors to codify behavior that would be considered a war crime under the War Crimes Act by listing specific crimes that violate Common Article 3 of the Geneva Conventions.

By creating an exclusive list, the bill would omit any form of abuse not specifically enumerated in the bill which could operate to legislatively "exempt out" outrages upon personal dignity and humiliating treatment.

Such a step threatens to place United States in noncompliance with the Geneva Conventions.

The Geneva Conventions are international treaties that the United States was instrumental in creating and in encouraging other nations to join and to comply.

The provision could send the wrong message to our enemies and to our allies that they could feel free not to comply with the internationally recognized treaties that have been ratified by 194 countries and that our own JAGs testified that the United States military has been trained to comply with for decades.

We agree with former chairman of the Joint Chiefs of Staff, General John Vessey who wrote in a letter to Sen. John McCain, "I continue to read and hear that we are facing a 'different enemy' in the war on terror. No matter how true that may be, inhumanity and cruelty are not new to warfare nor to enemies we have faced in the past * * * Through the years, we held to our own values. We should continue to do so."

Coerced testimony

Finally, we are also concerned that H.R. 6054 contradicts, and threatens to undermine, the clear prohibition on cruel, inhuman, or degrading treatment established by Congress in the Detainee Treatment Act (DTA) of 2005. The Skelton substitute would have reinforced current U.S. detainee treatment standards under the Detainee Treatment Act by prohibiting the admission of statements obtained by torture, or by cruel, inhuman, and degrading treatment. The measure adopted, on the other hand, prohibited only the admission of statements obtained by torture; evidence allegedly obtained by coercion less than torture would be admitted unless the judge finds it unreliable or lacking in probative value. This lower could indirectly weaken the DTA's clear detainee treatment standards. Again, for the sake of the protection of American troops that may be captured by our enemies in the future, as well as the need to maintain moral authority in the war on terrorism, we must not step back from our commitments on detainee treatment.

Conclusion

We would concur with Senator Warner and note that the Committee should have passed a stronger bill—one that is tough on ter-

rorists, true to American values and able to withstand judicial scrutiny. We strongly oppose House passage of the underlying bill in its current form. We will continue to work, as the bill moves through the legislative process, to ensure that the system Congress eventually enacts is effective.

ELLEN O. TAUSCHER.
MARTY MEEHAN.
LORETTA SANCHEZ.
RICK LARSEN.
NEIL ABERCROMBIE.

DISSENTING VIEW OF REPRESENTATIVE MARK UDALL

The time is well past when the United States of America should have a judicial system with which to deal with the likes of those terrorists detained at Guantanamo Bay, Cuba. While we support the effort to establish a system of military commissions as required by the Supreme Court's decision in Hamdan v Rumsfeld, we are disappointed that the Skelton amendment in the form of a substitute was not adopted by the Armed Services Committee. We feel the Skelton amendment, which was very similar to the bipartisan bill subsequently reported out of the Senate Armed Services Committee under the leadership of Chairman John Warner and Senators John McCain, Carl Levin, and Lindsey Graham, was a better approach to this issue. It offered the best opportunity to quickly create a military commission system that is tough, swift, and fair, and that would produce sustainable convictions of accused terrorists, including Khalid Sheik Mohammad, the master mind of the 9/11 attacks.

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MARK UDALL.

DISSENTING VIEW OF REPRESENTATIVE CYNTHIA McKINNEY

President Bush relies on various authorizations for his initiation of the conflicts and wars in Afghanistan and Iraq and in the "war on terrorism", in the course of which thousands of individuals, both U.S. citizens and aliens have been captured and detained for indefinite periods. Before addressing the nature and legality of creating special courts to try these people for alleged crimes of war it is necessary to examine the legality of the wars, conflicts and conditions of their capture and detention and the standing legal precedents and protocols that should guide those activities.

These detainees have been held, interrogated and mistreated outside the protection of the US Constitution and the principles and legal procedures that insure due process as well as outside the protections and protocols of the Geneva Convention of 1949 and later, including Article 3 and Article 4, and against proscriptions of the International Commission of the Red Cross, United Nations agreements and provisions, and international laws of war and other treaties.

In addition, President Bush issued a Military Commission Order 1 on March 31, 2002 and a series of Military Commission Instructions on April 30, 2002 creating an unprecedented new form of tribunal with rules and procedures not consistent with the Uniform Code of Military Justice that is the authority and guide for the creation of such tribunals, which also violates the Constitutional guarantees due anyone facing possible conviction and sentencing by a court, and the provisions of the Geneva Convention protocols for protected persons and fair trials.

Legal authority

The legal basis claimed for these actions, in both public statements and legal memoranda adopted by this administration, has allegedly been the Authorization of the Use of Military Force (AUMF) legislation passed by Congress on September 14, 2001, and October 16, 2002 respectively, and the power implicitly granted the president in times of war as Commander in Chief under Article II, Section 2 of the U.S. Constitution, and the historical and legal precedents for the use of military commissions in U.S. history, as well as court decisions in reaction to them.

In fact, the AUMF passed on September 4, 2001 was to be limited by the provisions of the War Powers Act of 1973, requiring regular Congressional review and oversight, and contains no language about military commissions or the granting of any extra-legal or extra-Constitutional powers to the president, nor does the language of the Constitution imply the right of the president to act without Congressional consultation or beyond the balance of powers guaranteed in its articles. In July, 2006 the Supreme Court ruled in

Hamdan vs. Rumsfeld that these Military Commissions, as constituted, were in violation of both Constitutional and international law, including Common Article 3 of the Geneva Convention and lacked necessary Congressional authorization and approval.

The War in Afghanistan

The AUMF of September 14, 2001 became Public Law 107–40 on September 19 and authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons * * *" Implicit support was given to the "global war against terrorism" and the US invasion of Afghanistan by the United Nations Security Council in resolutions passed between September and December 2001, despite clear U.N. provisions against wars of aggression.

This war was never declared by Congress, and AUMF approval was based on evidence never presented in public to the American people or to Congress that apparently relied solely on the testimony of individuals in detention in undisclosed locations, subjected to torture and cruel and degrading punishments for the claim that Osama bin Laden was ultimately responsible for the attacks. It is also clear that the war against the Taliban regime was planned and prepared long before the attacks of September 11, and announced to surrounding countries by Secretary of State Colin Powell in the summer of 2001.

Despite repeated offers from the Taliban, the government of Afghanistan, to meet the accords of international law and procedures by turning bin Laden over to an international tribunal for interrogation and trial for crimes against humanity, the U.S. administration carried out a war of aggression that toppled the government of Afghanistan and caused massive and ongoing suffering to its population without capturing Osama bin Laden or most of the key leadership of his organization to date.

A large body of detainees was captured, or turned over to U.S. forces by Northern Alliance combatants and detained in Afghanistan, and then transferred to a special prison at Guantanamo Bay, Cuba, on property controlled by the United States. While several hundred of these detainees have been released from detention, most without trail or combat status review, hundreds also remain in indefinite custody and detention without charges or trials pending. Those pending trial are not guaranteed release upon acquittal of charges of crimes of war.

The War on Iraq

Another undeclared war of aggression was carried out under the subsequent AUMF of October 13, 2002, following years of aerial bombardment and economic sanctions that led to countless civilian deaths and massive suffering under the covert and overt attacks by U.S. forces. The AUMF was passed in Congress on the basis of what is now recognized as false assertions, manipulated intelligence and the testimony of detainees under duress of torture, regarding both the presence and imminent development or use of

weapons of mass destruction in Iraq, and the linking of Iraq to Osama bin Laden and the attacks of 9/11.

The concept of "preventive war" is not allowed as a justification for wars under international law, and cannot be considered self-defense, nor was this war authorized by the United Nations Security Council. Iraq was incapable of mounting a credible defense, much less an attack on the United States. In the war of aggression waged against Iraq, the United States was responsible for a disproportionate use of force, attacks on civilian populations, hospitals and critical infrastructures, the use of weapons prohibited by international treaty and convention, the destruction of a government and occupation of sovereign territory, and the extrajudicial use of murders and assassinations.

The President specifically authorized these assassinations to be carried out by the CIA (using Predator UAVs) and Special Operations forces under the Department of Defense to kill anyone designated as an "enemy combatant" by the President, apparently without rescinding the 1976 Executive Order of President Ford forbidding assassinations abroad involving U.S. government personnel.

Another large body of captives continue to be put in custody and detained by U.S. forces, both inside and outside Iraq, and subjected to torture and cruel, degrading punishments while placed beyond the legal protections of the Constitution, the Geneva Convention and international law and treaties the U.S. is bound by.

The war on terrorism

Yet another legally undeclared and undefined "war on terrorism" has been predicted by the current administration to last beyond our lifetimes, and to involve as many as 60 countries in a global battlefield that extends to include the United States as a combat zone, requiring the creation of a new military regional command, NORTHCOM to direct and carry out combat operations inside the United States.

In response to the attacks on September 11, 2001, thousands of U.S. residents, both citizens and aliens, were rounded-up in mass arrests, many secretly arrested and indefinitely detained without the Constitutional rights that extend to any people on U.S. soil or controlled territories, and the legal procedures and due process rights that U.S. authorities are required to provide them. Many of these individuals were never charged with crimes and were released or continued in detention without trials for periods of months and years. These detainees also complained of torture and cruel or degrading treatment.

Material witnesses, immigrants and citizens

Since the attacks of September 11, 2001, tens of thousands of legal and illegal immigrants residing inside the United States were arrested and detained beyond the resolution of their immigrant status or in same cases for long periods before hearings or deportation, with a special focus on Arabs, Muslims and South Asians who suffered racial profiling, social dislocation, and being brutalized, held incommunicado, without legal rights and often in solitary confinement.

These immigrants and other U.S. citizens and permanent residents were arrested by the Justice Department as "material witness seizures" in clear violations of the International Covenant for Civil and Political Rights and the Constitutional protections that extend to all on U.S. soil.

Certain U.S. citizens were seized and detained inside the United States or abroad with no right to challenge in courts, depicted as "enemy combatants", transferred to military custody without a judicial hearing on the facts or legality of their detention. Also, their status under Geneva Convention rules was effectively decided unilaterally by the President, rather than by a Combat Status Review or civilian court.

Extraordinary renditions

The Bush administration, in violation of U.S. statures and international law, used both the CIA and U.S. military personnel to track, capture, drug and bind, and transport individuals identified by the President as past or potential terrorists or those who are assumed to have special knowledge about terrorist plots or perpetrators, both U.S. citizens and aliens, here and abroad, and rendered them outside the justice and law. These individuals are taken from inside other sovereign nations or our own to foreign countries where torture is practiced or to secret detention centers beyond oversight or legal intervention where detainees are known to have been tortured.

Another group of hundreds of captured individuals were part of these secret renditions to locations outside the reach of law and justice. Some of these secretly held prisoners have recently been acknowledged and transferred to a new U.S, prison facility at Guantanamo Bay, Cuba. Such renditions involve elaborately planned clandestine seizure and transport by covert operatives and flights arranged by the Central Intelligence Agency, and were initially used by the Clinton administration to bring terrorists or other international criminals to justice by returning them to proper jurisdictions and authorities here and abroad. The current administration has illegally reversed their purpose.

Indefinite detainment

In order to justify these thousands of arrests, captures and detentions which place these individuals outside the reach and protection of U.S. Constitution, law and treaty provisions, the Bush administration has created a special category of "enemy combatants" in the "war on terror" which in practice has not been limited to aliens or non-citizens, or to people captured hors de combat, or even to actual combatants. Recently released interrogation transcripts from Camp X-Ray at Guantanamo Bay, Cuba clearly indicate that many individuals were held and interrogated solely on the basis of having been captured or turned over to U.S. control in the combat areas. Many of these have been released again without any clear definition of the criteria involved, while others remain in indefinite detention without rights or charges proffered.

These detentions are often arbitrary in purpose, and not universally related to the duration of hostilities, war or conflict since hundreds have been released following interrogation and often torture

on grounds never promulgated and apparently unrelated to pending charges or acquittals by military reviews or trials. Recent proposed legislation and testimony by administration officials reveals that the duration of some detentions will extend beyond trial and acquittal or termination of sentence of those tried by Military Commissions, short of life imprisonment or death penalties.

Torture and cruel and degrading punishment

The Bush administration, through classified legal memoranda, legislative signing statements and executive directives from the White House, the Pentagon and the Central Intelligence Agency have attempted to exempt their conduct from the laws of war and U.S. laws and procedures, as well as the standards outlined in Army Field Manual 35–42, based on the Geneva Convention protocols, which have determined the interrogations and treatment of detainees for the last 50 years in cases of capture during conflict, combat or war, on and off U.S. soil and their detention as prisoners.

Torture is being redefined in these memoranda and proposed, classified changes to the Army Field Manual, as exempting any abuse short of actions that might result in organ failure and death. In more recent proposed legislation the internationally prohibited cruel and degrading punishments are being redefined as only those which "shock the conscience", effectively and unilaterally modifying the terms of the Geneva Convention and the Convention Against Torture, as well as the War Crimes Act of 1996, and Detainee Treatment Act and long-established practices and training that are based on those standards, without seeking consent of Congress before acting on them, and without seeking the necessary international consideration and consensus that prohibits any nation from breaking the rules of reciprocity in regard to laws of war and combat.

All categories of captives are protected, both before and after any determination of their combat status, under Article 3 and Article 4 of the Geneva Convention and its protocols, which has been incorporated into U.S. practice and policy prior to legislation affirming these principles. The United States has always tried to set the example by training troops and commanders to extend protections and shun any abusive treatment whatsoever towards captives or detainees. Under the Geneva Convention rules any cruel and degrading punishment, physical abuse or excessive discomfort, and any form of torture are prohibited in the treatment of all unarmed captives, whether prisoners of war (POW), civilians, non-combatants, or unauthorized combatants of any kind, even if suspected of taking part in crimes of war. Their required and immediate Combat Status Review may improve aspects of their rights and treatment or their release, but it is never used to deprive them of the basic rights and protections extended to all.

The torture that has been carried out by U.S. forces and intelligence operatives, or by surrogates in the secret prisons abroad has taken the form of beatings, water-boarding (immersion), electroshocks, extreme temperature or noise levels, denial of pain medication for injuries, severe burning, deprivation of food, water and sleep, threats against family members, extended shackling in

painful positions, self-inflicted coerced pain, extended isolation, sensory deprivation, denial of medical care, suffering loss of limbs or permanent injuries and death, mental breakdown and illness, disappearances from families or countries of origin.

"Enemy combatants"

The terms "enemy combatant" or "alien unlawful enemy combatant" from the proposed new legislation have no precedent or recognition in international or domestic law or treaty. No such category exists under the Geneva Convention combat status categories. The vaguely defined term was introduced by the current administration after the terrorist attacks in 2001 in order to create a category of people who were beyond the Convention and U.S. laws, and whose rights and protections could be ignored and dismissed for purposes of interrogation or fighting the "war on terror". Interestingly, most of the specifics used to identify unlawful enemy combatants match Geneva convention definitions of a protected category, the expansion of that definition to include certain suspected proscribed activities moves them out from under that protection before trying them.

In practice "enemy combatants" can be citizens or aliens, combatants or their supporters, those suspected of terrorist activities or crimes of war now or in the future, those who harbor terrorists, and even those not involved in combat or captured outside any combat zone. The proposed definition expands to activities far beyond the commission of crimes of war or even terrorism to undefined acts "triable by Military Commissions". The range of offenses that both define a person as an enemy combatant and are then used to detain and prosecute the person are outside the scope of existing international law or accord in relation to war.

At the same time, proposed legislation is attempting to undermine the legal accountability of U.S. personnel for their participation in prohibited torture and crimes of war that can potentially lead to the death penalty under the Geneva Convention. There is no guarantee that the proposed vague definition for "alien unlawful enemy combatant" used to allow their trials by Military Commissions would be applied to all other cases of detention in the future. There is no guarantee that U.S. citizens will be detained, stripped of their Constitutional rights, and even stripped of citizenship without a full and fair trial or even a judicial hearing or determination prior to their deportation or indefinite detention.

Restoring rights and justice

While none of the cited legislative or statutory authorities for the creation or use of the Military Commissions ordered by the White House really address or allow them, including the two AUMF laws, the Detainee Treatment Act of 2001, nor the arrogated powers allegedly based on Article II of the Constitution, but it is the case that the Constitution as interpreted by the Supreme Court and in practice historically makes clear that the President and the Congress can create and regulate military commissions or tribunals in times of war or domestic emergency, and suspend the rights of certain clearly identified classes of belligerents. Over time, the formation and procedures of such tribunals have been incorporated into

law, specifically into sections of Title 10, U.S. Code that codify the Uniform Code of Military Justice (Article 21) and in the Laws of War (Article 15).

In recent American history the use of such tribunals was based on the exigencies of battle or political assassination, and following World War II they have been based legally and in form on the Military Rules of Evidence and the Manual for Courts Martial procedures that have developed over decades under the UCMJ and in military court decisions or civilian court appeals and reviews. The current proposals would move them away from this imperfect but more reasonable and fair legal system in many ways, repeating errors of the past that informed the current practices and rules. In our history, the rights of citizens and non-citizens alike have been based on and enjoyed the broad protections of our Constitution and settled international law and reciprocal protocols. There is no need to abandon these protections, including habeas petition rights, even if a small and clearly defined category of people suspected of having committed crimes of war should more logically be prosecuted by a Military Commission than a civilian court.

There is also a principle established by the Supreme Court at the end of World War II and by the Posse Comitatus Act that followed the Civil War that if civilian courts are functional then military courts should not replace that function, especially for citizens or other protected groups. Military tribunals have traditionally been used to try belligerents in declared wars where the exigencies of war and timing made them imperative. Using them for detainees now having spent years in captivity far from the battlefield or zone of combat has much less compelling justification.

Current legislation inadequate

The Military Commissions created under President Bush's special orders and instructions in 2002 have been ruled by the Supreme Court to be unconstitutional in many aspects, in violation of international law and convention, and in defiance of the required balance that Congressional review and involvement should bring. Based on vague definitions and ill-informed legal rationale, they should best be abandoned in favor of methods of jurisprudence and rights established over time in our country and by the world community rather than supported with new legislation that may result in additional court review and reversal. While the conflict we fight in may be new, the reasons to retain our respect for Constitutional principles and rights and international accords have stood the test of time and should not be compromised or abandoned. In fact, they are our best defense.

Unfortunately, both H.R. 6054, the Military Commissions Act of 2006, based closely on White House proposals to get Congressional approval and sanction for their illegal activities and programs, and the closely aligned substitute proposed by Rep. Ike Skelton which was defeated by the HASC during mark-up, itself based on a bipartisan Senate bill promoted by Senators McCain, Warner, Graham and Levine, fail to address many of the worst excesses of the proposed Military Commissions. Among the Constitutional, legal and international treaty rights not incorporated into either version are:

Authorities and limitations

Legislate any new version of Military Commissions to conform exactly to and satisfy the ruling of the Supreme Court in Hamdan vs. Rumsfeld rather than to legalize the excesses of the version adopted by the President and rejected by the court.

The existing limitations on and balances to Presidential powers even in times of declared war. Courts and Congress cannot rely on assurances of "good faith" intentions to concede their role in balance of power and oversight.

Any existing or future Authorization of the Use of Military Force passed by Congress must require oversight, regular review, transparency and clear criteria for a deadline requiring a full declaration of war or cessation of hostilities as well as defined limits to Presidential powers under the AUMF. (War Powers Act, 1973)

The necessary Congressional oversight and review of the conduct of the "war on terror" or other armed conflicts under the provisions of the War Powers Act of 1973 as well as their own Constitutional mandate to declare and fund wars. Require Congressional hearings, oversight and review of all agencies involved in the capture and indefinite detention of any persons, citizen or not excluding arrests by recognized police agencies for commission of actual crimes.

Clearly codify and define who can be classified as an "enemy combatant" or any sort, and who cannot. Under the original Military Commission Order, the definition included anyone who "is or was a member of Al Qaeda", or who "engaged in, aided or abetted a conspiracy to commit acts." The definition should not be self-referential, making the suspicion of a crime sufficient to override a presumption of innocence or define the status without a speedy hearing or right of appeal following initial detention. No U.S. citizen who is not engaged in direct combat or hostilities against U.S. forces abroad and who commits a crime of war in that combat zone should be designated as an "enemy combatant" or detained and tried under military control.

Appoint and fund the legally mandated but uninitiated federal Civil Liberties Review Board and include any and all detainees in its scope, meeting the requirement that each federal agency or entity has at least one full time staff member assigned to protect civil liberties and rights.

Support current legislative challenges such as H. Res. 990 requiring that the AUMF of October 13, 2002 be revisited and modified in light of current changes following full and open debate by Congress, thereby restoring their prerogative and duty to oversight and the separation of powers that denies the arrogation of increased or unitary executive powers in times of emergency or war.

Reaffirm our commitment to the laws of war and international agreements that insure reciprocity by all nations in their treatment of captured belligerents or others in the zone of combat during conflicts or wars. Reaffirm the Constitutional spheres of authority and rules of war within those spheres, and reaffirm our commitment to all treaties signed and covenants agreed to in regard to the United Nations. Do not exempt American military personnel from the Geneva Conventions, the War Crimes Act of 1996 or reduce the standing definitions of war crimes to a more minimal standard. Do not accept the current legislative language that asserts that the Gene-

va Convention is "not a source of judicially enforceable individual acts", since military personnel are taught and directed in their acts by its provisions.

Rights of detainees

Right to a timely (10–15 day) Combat Status Review following capture and detention, conducted in the combat zone while witnesses and information can be obtained. (Geneva Convention)

Right to the protections of the Geneva Convention which apply to all detainees arrested, whether U.S. citizens or foreign nationals, and whether or not citizens of a country we are at war with, or if aligned with a country or group not a signatory to the Conventions, and whether or not captured in the territory of a signatory country. Geneva Convention Common Rule 3 requires minimum protection of anyone caught hors de combat.

Right to a reasonably limited period between detention and any criminal charges (48 hours in U.S. law) or release from custody, which would reflect the conditions of capture and the need for detention and interrogation, but which would not exceed all legal limits or subject individuals to indefinite detention without charges or trial (30–45 days maximum).

Right to restricted communication with family and unrestricted with counsel or government officials from the beginning of the detention.

Right to access to International Commission of the Red Cross visitation and inspection of facilities and treatment of detainees under international law and established procedures.

No secret rendition or detention, including access to counsel and initiation of habeas review for wrongful detention.

Right of accused to be present during public proceedings, and to view all evidence presented against the defendant, barring evidence that is classified by source or method in such a way that it cannot be redacted, summarized or conveyed, and therefore cannot be introduced or used as the sole or partial basis for conviction. (MRE 505)

Right to file a writ of habeas in any federal civilian court challenging detention or timely procedures, reminding federal courts to intervene in a timely way during crises or war in the public interest to protect Constitutional rights and safeguards.

Right to all guaranteed due process legal rights that are part of any established proceeding barring those that would require full disclosure of classified information despite its withdrawal as evidence, and prohibition of any and all evidence obtained under coercion or hearsay unless it clearly fits existing standards under the MRE for review.

Right to promulgated standards for release from detention and access to administrative and judicial reviews. No indefinite detention without provable cause given judicial review. Release from detention following acquittal of charges or determination that person was wrongly detained or not a threat. Set a maximum time for detentions solely for the purpose of interrogation (30–45 days).

No suspension of full Constitutional, statutory and other rights accorded to any U.S. citizen regardless of conditions of capture unless they are eligible to be tried under international laws of war

for crimes that allow an international court to have jurisdiction, requiring a U.S. federal court review of such claims.

No death penalty sentence without unanimous consent of full Commission, all other convictions and sentencing requiring at least ⅔ of Commission appointed.

Reaffirm the rights of immigrants, both legal and illegal, once arrested or detained to access to counsel, speedy public hearings, and no deportation based on secret or coerced evidence in either Immigration hearings or FISA court proceedings. Prohibit any automatic deportations based on alien or ethnic criteria or suspicion of threat not proven by criminal acts.

Right against "preventive detention" based on anything less than imminent and demonstrable danger of overt actions of criminal intent.

Legal procedures

Military Commissions meet the standards of the Geneva Convention Article 3, requiring a "regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." (Common Article 3)

No use of Military Commissions where exigencies of war or emergency do not exist or would not prohibit use of established courts with jurisdiction based on alleged crimes and not on categories of detainees. Refer crimes against humanity to international tribunals instead and only try crimes of war in combat zones. Commissions should not apply to the vast number of detainees cited above.

Legal proceedings follow UCMJ Article 36 provisions in terms of Military Rules of Evidence and the Manual for Courts Martial so that rules are "uniform insofar as practicable" with the established protections. Do not add to or amend Title 10 U.S.C. 47 in this regard or add new offenses to the code.

Establish procedures to insure public transparency of CSR and Military Commission proceedings including public disclosure of the outcomes of each decision, conviction or sentence at frequent and regular intervals. Use existing Military Rules of Evidence and do not minimalize the standards for acceptance of evidence, allowing some discretion on the part of the judge.

Charges under Military Commissions should relate solely to participation in crimes of war as defined by the Geneva Convention and other standing U.S. law and treaty. Creation of additional or new charges relating to aiding, abetting or supporting such crimes is not proper, and those should be adjudicated in other courts with a broader jurisdiction.

Do not amend the War Crimes Act of 1996 to redefine only "serious" or "grave beaches" as illegal or actionable.

Independent appointment of the convening authority, the trial judges, and the commission members will prevent undue influence by the President or the Secretary of Defense. Similarly, fully independent and unrestricted post-action review by existing and established military appeal courts (Court of Appeals for the Armed Forces) and all federal courts of appeal including the Supreme Court should be available regarding the Combat Status Review, any conviction or sentence by a Military Commission, a required review in the case of a death penalty or life sentence, and any

other issues of habeas or mandamus that arise. Creation and appointment of special appeal panels, limitation of appeal of death penalty sentences to the President, limitation on the specific areas of appeal available, and retroactive or ongoing consolidation of habeas petitions into a single circuit should not be allowed.

Torture

Renew our commitment to international anti-torture standards and withdraw all Presidential executive orders, legal memoranda, directives, legislative signings, proposed legislative changes, modification of standards of evidence, and changes to existing military or intelligence regulations, manuals or directives that in any way alter our practice or procedures, enumerations of specific methods or levels of abuse that distinguish some as less than torture, or prohibitions or reliance on established definitions of torture. Reaffirm our support for all Geneva Convention articles and protocols relating to torture or any cruel or degrading treatment it prohibits, withdraw our reservations to the international Convention Against Torture and preserve our own laws prohibiting torture or mistreatment of detainees or any prisoner held within or without the United States by any arm of government from local police to federal prisons and military brigs.

Prohibit the use of torture both by military and intelligence agency employees or assets and subcontractors, private security forces, or any public or private institution with control over the movement or treatment of long-term inmates, delinquents, mental or health patients or residents. Prohibit the use of torture by any covert operation abroad or inside the United States. Prohibit the facilitating diagnostic or treatment roles of medical or psychiatric/psychological personnel in any military or civilian use of torture, even if not directly involved in the abuse. Prohibit the study of or experimentation on any techniques to be used in torture and the training of any such techniques or methods to other governments or organized forces by any U.S. military or civilian government personnel or subcontractors.

Restore the use of Army Field Manual 34–52 without proposed modifications and continue the universal training of non-coercive interrogation standards to all military service members and to forces and police abroad, and apply the same standards to all intelligence or civilian agencies of the federal, state or local governments and police forces.

Require regular independent reviews of all places of detainment by International Commission of Red Cross and federal agencies to be sure that conditions of imprisonment, transfer and treatment meet the established standards of the Bureau of Prisons and prohibit excessive shackling or stress positions and sensory deprivation. Establish a procedure to insure the ability of detainees to formal complaints, protected from retaliation, about their conditions and treatment that are not dealt with solely by prison guards or administrators but afford external investigations and review.

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