Trials Under Military Order

A Guide to the Rules for Military Commissions

Briefing Paper
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About Us

For the past quarter century, Human Rights First has worked in the United States and abroad to create a secure and humane world by advancing justice, human dignity and respect for the rule of law. We support human rights activists who fight for basic freedoms and peaceful change at the local level; protect refugees in flight from persecution and repression; help build a strong international system of justice and accountability; and make sure human rights laws and principles are enforced in the United States and abroad.

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This briefing paper was researched and written by Kenneth Hurwitz and edited by Deborah Pearlstein. Human Rights First staff members Avidan Cover, Allison Johnson Priti Patel, Gabor Rona, and Lauren Smith contributed to this report.

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This report is available online at www.HumanRightsFirst.org.

New York Headquarters
Human Rights First
333 Seventh Avenue
13th Floor
New York, NY 10001
Tel: (212) 845-5200
Fax: (212) 845-5299

Washington, DC Office
Human Rights First
100 Maryland Avenue, N.E.
Suite 502
Washington, DC 20002
Tel: (202) 547-5692
Fax: (202) 543-5999
www.HumanRightsFirst.org

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Military Commission Timeline

November 13, 2001. President Bush, citing his authority as commander in chief, issues a five-page Military Order on "Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism." The Military Order calls for the use of military commissions to try suspected members of al Qaeda or other international terrorist groups.

March 21, 2002. The Defense Department issues Military Commission Order No. 1, which outlines a set of procedural rules under which the military commissions would operate.

February 2003. The Defense Department issues a proposed draft "Military Commission Instruction: Crimes and Elements for Trials by Military Commission." Unlike the March 2002 procedural rules, the rules for crimes and elements are issued in draft form; a number of individuals and groups, including Human Rights First (then called the Lawyers Committee for Human Rights), submit comments and suggestions.

April 30, 2003. The Defense Department issues the "final" versions of eight Military Commission Instructions. "Military Commission Instruction No. 2" is the revised and final version of the "Crimes and Elements" document circulated in February. The other documents are new to the public. Military Commission Instruction No. 8 vests determination of most questions of law in the Presiding Officer, in apparent conflict with Section 4(C)(2) of the President's November 13, 2001 Military Order (providing for the entire military commission to sit "as the triers of both fact and law"), but consistent with the role of "military judges" in normal courts martial under the Uniform Code of Military Justice.

July 1, 2003. The Defense Department issues (without notice) a slightly revised version of Military Commission Instruction No. 5, regarding a defendant's access to counsel. This revision (which retains the "April 30, 2003" date) somewhat loosens restrictions on civilian defense counsel by allowing them to speak to potential witnesses and individuals who may assist in discovering evidence, and also permits lawyers to do case preparation off-site. (The original Military Instruction No. 5 had prohibited civilian defense counsel from "discuss[ing] or otherwise communicat[ing] or shar[ing]…information about the case with anyone except…members of the Defense Team.")

December 26, 2003. The Defense Department announces issuance of Military Commission Instruction No. 9, detailing the procedures for administrative review of military commission convictions and sentences by a military Review Panel appointed by the Appointing Authority. The same day, the Department announces the appointment of retired Major General John D. Altenburg, Jr. (Ret.) as Appointing Authority; Air Force Brigadier General Thomas L. Hemingway as legal advisor to the Appointing Authority; and Griffin B. Bell, Edward George Biester, Jr., William T. Coleman, Jr., and Frank J. Williams as members of the Military Commission Review Panel. Judge Bell and Mr. Coleman had served as outside consultants to the Defense Department when the original plans for military commissions were being formulated at the end of 2001.

February 5, 2004. The Defense Department issues a third revision of Military Commission Instruction No. 5. The Instruction itself is unchanged (and retains the April 30, 2003 date), but

the attached "Affidavit and Agreement by Civilian Defense Counsel" is revised. The Affidavit, loosens certain conditions applicable to civilian defense counsel by permitting counsel to bring additional members onto the defense legal team (subject to specified security clearance), and also to consult with outside legal and other experts. The same day, the Defense Department issues Military Commission Order No. 3, setting forth the regulations regarding monitoring of attorney-client communications. The Instruction declares that communications may be monitored if the Commander who controls the detainee determines that such monitoring is "likely to produce information for security or intelligence purposes (including information related to the….prevention of future terrorist or other illegal acts)."

February 24, 2004. Charge sheets alleging conspiracy to commit war crimes are issued against Guantánamo detainees *Ali Hamza Ahmed Sulayman al Bahlul* of Yemen and *Ibrahim Ahmed Mahmoud al Qosi* of Sudan, making them the first two individuals to be charged under military commission rules.

April 15, 2004. The Defense Department issues slightly revised versions of Military Commission Instructions No. 3, 4, and 6, requiring the Chief Prosecutor to report to the legal advisor to the Military Commission Appointing Authority, rather than to the Defense Department's Deputy General Counsel (Legal Counsel). The effect is to separate somewhat further the direct authority of the Secretary of Defense over commission proceedings. Nonetheless, all chains of command relevant to the commissions lead eventually to the Secretary of Defense, and then the President. (The Chief Defense Counsel continues under the new rules to report to the Defense Department's Deputy General Counsel (Personnel and Health Policy).)

June 10, 2004. The Defense Department issues charges against *David Hicks* of Australia. The charges allege conspiracy to commit war crimes, attempted murder by an unprivileged belligerent, and aiding the enemy.

June 28, 2004. The U.S. Supreme Court hands down decisions in *Rasul v. Bush*, 542 U.S. 466, and *Hamdi v. Rumsfeld*, 542 U.S. 507. In *Rasul*, the Supreme Court holds that U.S. courts have jurisdiction to consider challenges to the legality of detention of foreign nationals held at Guantanamo Bay. In *Hamdi*, the Supreme Court holds that an American citizen detained in the United States as an enemy combatant must be provided a meaningful opportunity to contest his detention before a neutral decisionmaker and be provided a lawyer.

June 29, 2004. The Defense Department approves and refers charges on *Ali Hamza Ahmed Sulayman al Bahlul* of Yemen and *Ibrahim Ahmed Mahmoud al Qosi* of Sudan and refers charges on *David Hicks* of Australia to a panel consisting of Presiding Officer Retired Army Col. Peter E. Brownback III and four other officers.

July 13, 2004. The Defense Department approves and refers charges on *Salim Ahmed Hamdan* of Yemen to the panel already appointed on June 29, 2004. The charges against Hamdan include conspiracy to commit: attacks on civilians, destruction of property, murder by an unprivileged belligerent, and acts of terrorism.

August 23, 2004. Military commission preliminary hearings begin in cases of *Ali Hamza Ahmed Sulayman al Bahlul, Ibrahim Ahmed Mahmoud al Qosi, David Hicks,* and *Salim Ahmed Hamdan*.

August 31, 2004. The Defense Department issues amended versions of both Military Commission Instructions Nos. 4 and 8, canceling the previous versions. Instruction No. 4 is amended to recognize the existence of a privileged and confidential relationship between the Chief Defense Counsel and individual defendants. The amendments to Instruction No. 8 allow the full commission to adjudicate issues of fact and law that were previously the province of the Presiding Officer alone (thus bringing Military Commission Instruction No. 8 back into apparent conformity with Section 4(c)(2) of the President's November 13, 2001 Military Order (providing for the entire military commission to sit "as the triers of both fact and law"). Key decisions, however, relating to disclosure of information and the probative value of evidence, remain with the Presiding Officer, as does the determination whether a legal question is subject to mandatory resolution by the Appointing Authority. The Presiding Officer also continues to have discretion to certify other questions to the Appointing Authority.

October 19, 2004. Military Commission Appointing Authority General John D. Altenburg, Jr. (Ret.) excuses three members of the military commission panel from their duties following a defense challenge to their ability to judge the proceedings fairly and impartially. Replacement panelists are to be appointed for two of the current cases, that of *Ibrahim al Qosi* and *Ali Hamza Ahmed Sulayman al Bahlul*, but trials for *David Hicks* and *Salim Ahmed Hamdan* – whose attorneys had originally made the challenge – are to proceed with only three voting commission members. Based on the commission rules requiring a two-thirds vote for conviction, the prosecution now needs only to persuade two panel members to convict, in the cases of *David Hicks* and *Salim Ahmed Hamdan*, while before Gen. Altenburg's ruling, four votes were required.

November 1, 2004. Preliminary hearings in the case of *David Hicks* resume.

November 8, 2004. Just as military commission proceedings begin in the case of *Salim Ahmed Hamdan*, it is reported that Judge James Robertson of the U.S. District Court for the District of Columbia has ruled the military commission trial of *Salim Ahmed Hamdan* in violation of U.S. legal obligations under the Third Geneva Convention. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004). Commission proceedings are immediately stayed under the court's order. Following the court's stay, the Defense Department adjourns the other military commission trials as well, pending appeal of Judge Robertson's decision.

July 15, 2005. The U.S. Court of Appeals for the District of Columbia Circuit overturns the district court's decision in the *Hamdan* case, ruling that Congress authorized the commissions and that alien detainees held outside the United States have no rights under the Geneva Conventions enforceable in U.S. courts, thus greenlighting recommencement of all of the military commissions. *Hamdan v. Rumsfeld*, 415 F. 3d 33 (C.A.D.C. 2005). The same day, the Defense Department issues slightly revised versions of Military Commission Instructions Nos. 3 and 4.

August 31, 2005. The Defense Department issues a revised version of Military Commission Order No. 1. The most important change is a reconfiguration of the Presiding Officer function back into a role more similar to that of a military judge. The revised rule provides that the Presiding Officer instructs the other commission members regarding the law, and rules upon all questions of law; a majority of the other members may still overrule the Presiding Officer on decisions regarding admissibility of evidence. Like a military judge, the Presiding Officer does not vote on findings and sentence. These changes to Military Commission Order No. 1 bring the

military commission rules back into apparent conflict with the President's November 13, 2001 Military Order, Section 4(c)(2) (providing for the entire military commission to sit "as the triers of both fact and law"). The revised rules also appear to evidence a stronger intent than the prior version to provide the accused and civilian defense counsel access to "Protected Information….to the maximum extent consistent with national security, law enforcement interest, and applicable law." Though the Presiding Officer still retains the power to deny the defendant and his civilian lawyer access to evidence deemed sensitive (including possibly exculpatory evidence), the Presiding Officer is mandated to exclude such evidence if no adequate substitute can be made available, and admission of the evidence "would result in denial of a full and fair trial."

September 16, 2005. The Defense Department issues revised versions of Military Commission Instructions Nos. 4 and 8. Reference to determination of questions of law by the full commission is deleted from Military Commission Instruction No. 8, in conformity with the August 31, 2005 changes to Military Commission Order No. 1. Military Commission Instruction No. 8 now also appears to remove from the Appointing Authority to the Presiding Officer *primary* authority for decisions on removal of a commission member for cause (though the Appointing Authority continues to retain authority to make such decisions).

September 21, 2005. The Defense Department issues revised Military Commission Order No. 3, slightly narrowing the conditions under which attorney-client communications may be monitored. The revised language authorizes such monitoring if it "may prevent communications aimed at furthering or facilitating terrorist operations or other illegal acts" (deleting reference to monitoring for general "security or intelligence purposes").

October 11, 2005. The Defense Department issues revised Military Commission Instruction No. 9, formalizing a procedure for submission as of right of post-trial briefs from the prosecution and the defense to the Review Panel. This is the fourteenth change to initially issued versions of the Military Commission Orders and Instructions.

November 4, 2005. The Defense Department issues charges against five additional defendants. *Ghassan Abdullah al Sharbi* and *Jabran Said bin al Qahtani*, of Saudi Arabia; *Sufyian Barhoumi*, of Algeria, and *Binyam Ahmed Muhammad*, of Ethiopia, are charged with conspiracy to commit murder by an unprivileged belligerent, to attack civilians, to commit terrorism, and to commit other offenses. Canadian *Omar Ahmed Khadr* is charged with murder by an unprivileged belligerent, conspiracy, and other crimes.

November 7, 2005. The U.S. Supreme Court agrees to review the Circuit Court's *Hamdan* decision, with argument heard on March 28, 2006. Additionally, Appointing Authority John D. Altenburg, Jr. lifts his stay in the case of *Ali Hamza Ahmed Sulayman al Bahlul*.

January 11, 2006. The Defense Department begins a new round of military commission hearings in the cases of Canadian citizen *Omar Khadr* and Yemeni citizen *Ali Hamza Ahmed Sulayman al Bahlul*.

January 20, 2006. The Defense Department announces issuance and referral of charges against *Abdul Zahir*, for conspiracy, attacking civilians, and aiding the enemy. *Abdul Zahir* is the tenth defendant against whom charges have been issued.

March 1-2, 2006. Military commission proceedings continue in the cases of *Ali Hamza Ahmed Sulayman al Bahlul,* and commence in the case of *Sufyian Barhoumi*.

March 27, 2006. On the eve of oral arguments in the U.S. Supreme Court in *Hamdan v. Rumsfeld,* the Defense Department releases Military Commission Instruction No. 10 barring use in military commissions of "statements established to have been made as a result of torture." This Instruction is the fifteenth modification to the military commission rules.

March 28, 2006. The U.S. Supreme Court hears oral arguments in *Hamdan v Rumsfeld*. At issue in the case is whether the Detainee Treatment Act divested the U.S. Supreme Court of jurisdiction to hear the case and whether the military commissions as currently constituted violate the Geneva Conventions and U.S. domestic and military law.

April 4-7, 2006. Military commission proceedings continue in the cases of *Ali Hamza Ahmed Sulayman al Bahlul, Omar Khadr, Binyam Ahmed Muhammad,* and *Abdul Zahir*.

* * * * *

All of the Military Commission Orders and Instructions were issued pursuant to President Bush's Military Order of November 13, 2001. Legal and military public affairs documents regarding the military commissions generally and specific cases are available at http://www.defenselink.mil/news/commissions.html (accessed April 11, 2006). Most important of these are the President's November 13, 2001 Military Order; the Military Commission Orders issued by the Secretary of Defense; the Military Commission Instructions issued by the Defense Department General Counsel; and the Presiding Officers Memoranda issued by the Presiding Officers. Together these establish the legal architecture for military commission trials.

Revisions to Military Commission Orders (MCOs) and Military Commission Instructions (MCIs) As of May 2006[1]

Date	MCO 1	MCO 3	MCI 1	MCI 2	MCI 3	MCI 4	MCI 5	MCI 6	MCI 7	MCI 8	MCI 9	MCI 10
3/21/02	Original											
4/30/03			Original	Original	Original	Original	Original	Original	Original	Original		
6/21/03												
7/1/03							1st Rev.					
12/26/03											Original	
2/5/04		Original					2nd Rev					
3/15/04												
4/15/04					1st Rev	1st Rev		1st Rev				
8/31/04						2nd Rev				1st Rev.		
7/15/05					2nd Rev	3rd Rev						
8/31/05	1st Rev											
9/16/05						4th Rev				2nd Rev		
9/21/05		1st Rev										
10/11/05											1st Rev	
3/27/06												Original

Introduction

On November 13, 2001, President Bush issued a Military Order, which authorized the trial of non-U.S. citizens suspected of terrorism before military commissions. The specially created tribunals were widely criticized by bipartisan observers in the United States and abroad as lacking many of the basic fairness protections provided for in standard U.S. civilian and military courts. The military commissions diverged from long-standing U.S. law and practice providing that such commissions should generally "be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts martial" – the existing, congressionally sanctioned system of military justice.[2]

Since the creation of the commissions in 2001, Human Rights First has engaged closely as the Department of Defense has developed, issued, and re-issued a regularly changing set of regulations and procedures under which the commissions will operate. The regulations since developed in some important respects improve the process contemplated by the original order. In other respects, however, the rules continue to lack key fair trial safeguards – including the lack of independent judicial oversight, creation *ex post facto* of new or newly defined crimes, lack of attorney-client confidentiality, reduced standards of evidence, and restrictions on the defendant's access to civilian counsel. Appointed military lawyers continue publicly to question the fairness of the military commissions. And as Human Rights First trial monitors have observed first hand in tracking commission proceedings at the U.S. Naval Base at Guantanamo Bay, Cuba, concerns about the structural fairness of the commissions have been borne out – and concerns about the effectiveness of the commissions have multiplied – as the commissions have struggled for nearly five years without yet bringing a single case to conclusion.

This guide, revised since previous editions, provides updated summary and commentary on the military commission rules issued by the U.S. Defense Department. New in this edition are observations from Human Rights First trial monitors, reflected in text boxes throughout the guide. The commentary on the commission rules described here raises five overarching concerns about the legality and fairness of commission proceedings:

1. Overbroad Jurisdiction of the Military Commissions
2. Disincentives for Civilian Participation in Military Commissions
3. Secret Evidence, Secret Trials
4. Admissibility of Evidence Obtained Through Torture or Other Coercion
5. Lack of Independent Appeal Outside Military Chain of Command

Overbroad Jurisdiction of the Military Commissions

The range of substantive offenses that are presented as "triable by military commission" is quite broad, and includes offenses normally considered civilian crimes. Military Commission Instruction No. 2 expands the notion of "armed conflict" – the state of affairs that is the threshold condition for any criminal offense to be characterized as a "war crime" – to include isolated incidents, and even attempted crimes. By doing this,

crimes that traditionally have fallen outside military jurisdiction can now, for purpose of the military commissions, be included under the mantle of "laws of war."

Particularly controversial has been the prosecution's extensive reliance on the crime of "conspiracy" – a crime that can be completed by mere agreement, with no criminal act otherwise necessary. Conspiracy is widely considered not to be a crime under international humanitarian law (the law of war) because of the breadth of its sweep. [3]

Disincentives for Civilian Participation in Military Commissions

Despite some loosening of restrictions following issuance of the original Military Commission Instructions,[4] constraints imposed upon civilian defense attorneys by commission rules – as well as the practical challenges of working at Guantanamo itself – can make it very difficult for civilian lawyers to participate in military commission proceedings. Civilian defense lawyers who do participate can face rigid constraints on their personal and professional life. Not only are civilian lawyers denied any compensation from the Government for representing their clients –who may be indigent – but they must also incur significant out-of-pocket expenses and opportunity costs, none of which are reimbursable.[5] Lawyers have no telephone access to their clients. In addition to these practical considerations, civilian defense lawyers are hampered in their ability to mount a robust defense. Under Military Instruction No. 5, and Military Commission Order No. 3, civilian defense attorneys:

- Are subject to Defense Department monitoring of communications with their clients (though defense counsel must be notified in advance of any such monitoring);
- Are generally barred from speaking about the proceedings to anyone, particularly to the press, except as approved by the Defense Department;[6]
- May be excluded from parts of the proceedings and denied access to "Protected Information" (including potential exculpatory evidence[7]) if "necessary to protect the interests of the United States"[8];
- Are required to reveal to the Defense Department "information related to the representation…to the extent [they] reasonably believe necessary to prevent the commission of a future criminal act that [they] believe is likely to result in death or substantial bodily harm, or *significant impairment of national security*."[9]

The particular conditions of detention at Guantanamo – where numerous credible allegations of serious physical and psychological abuse have been made – can raise serious barriers to effective legal representation. Such circumstances are likely to heighten the difficulty of establishing a relationship of trust with the client.

Military defense lawyers have continually complained as well about the disproportionate human and material resources allocated to prosecution and defense counsel, an imbalance that naturally burdens civilian defense lawyers as well. In January 2006, defense lawyers complained of a 3 to 1 ratio between lawyers and support staff for the military commission prosecution and defense teams.[10]

Notwithstanding these obstacles, however, some of the military commission defendants, such as Yemeni Salim Ahmed Hamdan, Australian David Hicks, Ethiopian Binyam Ahmed Muhammad and Canadian Omar Khadr, have benefited from strong representation by teams including both civilian and military lawyers.

Secret Evidence, Secret Trials

The government retains broad discretion to close proceedings to protect what it determines to be "national security interests."

Indeed, Military Commission Order No. 1 authorizes the Presiding Officer, for unspecified "national security" reasons, to conduct the entire trial in secret, without the presence of the accused or his chosen civilian counsel. (Military Commission Order No. 1, Sections 6(B)(3) and 6(D)(5)(a).) The standard for closure or exclusion under this rule was slightly tightened in August 2005, and now evidence that has been withheld from the defendant (and his civilian lawyer) may not be used in the trial if admission of such evidence would result in "denial of a full and fair trial." If, however, the Presiding Officer determines that, overall, even with inclusion of the secret evidence, the trial remains "full and fair," secret evidence may still be used. (Military Commission Order No. 1, Section 6(D)(5)(b).)

Military Commission Order No. 1 also permits the prosecution to deny a defendant and his chosen civilian counsel access to unclassified and even unclassifiable "Protected Information" that the prosecution intends to use in the trial. (As discussed below, "Protected Information" is not limited to classified information, and includes information "*concerning* intelligence and law enforcement sources, methods, or activities….or…*concerning* other national security interests.") Even though assigned *military* defense counsel will be entitled to be present when secret evidence is presented at trial, without court authorization he or she "may not disclose any information presented during a closed session to individuals excluded from such proceeding or part thereof"– including to the civilian defense counsel and the defendant. (Military Commission Order No. 1, Section 6(B)(3).) Without the assistance of the defendant, however, it may be difficult for the military lawyer to appraise the significance of, or devise a response to, such "Protected Information."

Moreover, while "Protected Information" would be excluded from consideration by the tribunal unless made available to the defendant's assigned military counsel, potentially *exculpatory evidence* could be withheld even from the military lawyer under Section 6(D)(5)(b) of Military Commission Order No. 1.

These restrictions violate a defendant's rights under the Constitution's Sixth Amendment "to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor." They also violate the defendant's rights under Article 105 of the Third Geneva Convention to "defense by…counsel of his own choice"; the "calling of witnesses" and access to the "[p]articulars of the…charges…as well as the documents which are generally communicated to the accused by virtue of the laws in force in the armed forces in the Detaining Power."[11] While Article 105 does permit a trial to be "held

in camera" (excluding the public), as an exceptional matter, "in the interest of State security," no mention is made of excluding the defendant or his lawyer.[12]

Admissibility of Evidence Obtained Through Torture or Other Coercion

One of the most troubling features of the military commission rules is that evidence may be introduced based on testimony obtained by physical or mental abuse or other coercive interrogation techniques.[13] In fact, until the issuance of Military Commission Instruction No. 10 on March 27, 2006 – on the eve of oral arguments in the Supreme Court in the case of *Hamdan v. Rumsfeld* – the rules authorized admission of evidence even if it had been obtained through the most severe abuses constituting torture. While Military Commission Instruction No. 10 now does expressly prohibit the commission from admitting "statements established to have been made as a result of torture," the rule does not bar use of evidence obtained through other forms of unlawful coercion, including cruel, inhuman or degrading treatment. Moreover, like all the military commission rules, Military Commission Instruction No. 10 by its terms reflects current policy, and is subject to revision or revocation should current policy change.

The potential for use of evidence obtained by coercion results from the combination of several factors, including a relaxed standard of admissibility for evidence, permitting introduction of any relevant evidence considered to "have probative value to a reasonable person,"[14] and the absence of any principle excluding evidence obtained by unlawful means not rising to the Administration's definition of "torture." While a "probative value" evidentiary standard is alien to American legal traditions, which have developed rigorous tests intended to ensure the reliability of evidence in criminal trials, "probative value" is a standard that has been incorporated into leading international criminal tribunals, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC). In each case, however, the governing regulations of those tribunals are careful to bar evidence obtained through means that "cast substantial doubt on its reliability," or are "antithetical to, and would seriously damage, the integrity of the proceedings." [15]

Use of coerced evidence would violate numerous international and U.S. legal prohibitions applicable to normal civilian or military courts, and would taint the entire proceedings.[16] Coerced evidence is also notoriously unreliable. Yet if the prosecution were to introduce evidence obtained coercively from someone other than the defendant as "Protected Information," defense counsel might not even be aware of its origin; or, if counsel are aware, they may still be unable to obtain sufficient information about the methods used to extract the evidence to enable them to rebut it or challenge its credibility.

Lack of Independent Appeal Outside Military Chain of Command

Military Commission Order No. 1 confirms that the military commission structure is designed to be an entirely closed system, subject to the control of the President or Secretary of Defense, with no appeal to any civilian court. Officials all in the same chain of command create the rules governing the military commissions, define the crimes to be tried by them, designate those to be tried in them, and staff the panels sitting in

judgment (including review panels).[17] This circumstance – "the accumulation of all powers, legislative, executive, and judiciary in the same hands" – constitutes what James Madison pronounced "the very definition of tyranny."[18]

By contrast, normal courts martial under the Uniform Code of Military Justice (□□□□) provide U.S. military defendants an appeal as of right to the Court of Appeals for the Armed Forces, a civilian panel outside the military command structure.[19] The failure to provide such an independent appeal to military commission defendants contravenes Article 106 of the Third Geneva Convention, which mandates a right of appeal "in the same manner as the members of the armed forces of the Detaining Power."[20]

DETAINEE TREATMENT ACT OF 2005

Despite the stated intent in the President's November 13, 2001 Military Order to exclude review of military commission proceedings by any civilian court, the courts have not to date accepted this restriction on their jurisdiction. In particular, Salim Ahmed Hamdan has pursued a challenge to the lawfulness of his military commission prosecution through the civilian courts, and his case is now pending in the Supreme Court. In December 2005, however, Congress passed the "Detainee Treatment Act of 2005" (also known as the "Graham-Levin-Kyl Amendment"), which purports to remove federal court habeas corpus jurisdiction in cases respecting *all* Guantanamo detainees, including the military commission defendants.[21] With respect to military commissions, the Detainee Treatment Act provides for limited review exclusively in the U.S. Court of Appeals for the District of Columbia Circuit of military commission convictions in which the defendant received a sentence of ten years or more, or death; and authorizes review at the court's discretion for other military commission convictions.

Among the limits on judicial review the Act may pose is the courts' ability to address legal challenges under the Geneva Conventions, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the International Covenant on Civil and Political Rights – all treaties to which the United States is party, and which set down rules and standards governing the military commissions.[22]

The Supreme Court will now have to determine whether the Detainee Treatment Act of 2005 was intended to, or may constitutionally, divest the Supreme Court of its power to consider the *Hamdan* case by requiring the court to abstain from consideration until after there has been a military commission conviction. The Court's decision is expected by summer 2006.

Military Commission Instruction No. 1

Military Commission Instructions

[Non-Creation of Rights]

The main substantive provision in this Instruction is Section 6, concerning "Non-Creation of Right [sic]." This provision denies a defendant a remedy for violation of any procedural or other protections in the Military Commission Instructions that might benefit him, whether committed by the prosecutor, the military commission, or the defendant's own military or civilian defense lawyer.[23]

Section 6 specifies that none of the Military Commission Instructions "create any right, benefit, privilege, substantive or procedural, enforceable by any party, against the United States, its departments, agencies or other entities, its officers or employees, or any other person." This is an almost verbatim repetition of the court-stripping provision in Section 7(C) of the November 13, 2001 President's Military Order.

Section 6 goes on to provide that "[a]lleged noncompliance with an Instruction does not, of itself, constitute error, give rise to judicial review, or establish a right to relief for the Accused or any other person."[24]

Military Commission Instruction No. 2

Crimes and Elements for Trials by Military Commission

[War Crimes and Other Offenses Triable by Military Commission]

After the November 13, 2001 President's Military Order was issued, Human Rights First (then called the Lawyers Committee for Human Rights) and other commentators noted a particularly grave concern: that the intended purpose of the military commissions – to try alleged terrorists – indicated that commissions would be used to expand military jurisdiction into areas never before considered subject to military law or military courts.

Administration spokesmen were quick to dismiss concerns regarding the plan to bypass ordinary civilian and military courts for alleged foreign terrorists as "wrong and…based on misconceptions about what the president's order does and how it will function."[25] Alberto Gonzales, White House Counsel at the time, insisted that "[t]he order only covers foreign enemy war criminals….people [who will] be tried by military commission…must be chargeable with offenses against the international laws of war."[26]

Now that the Military Commission Instructions have been released, charges under them have been issued, and proceedings have commenced, discomfort regarding the potentially broad scope of the military commissions' jurisdiction appears to have been well-founded. The crimes charged purport to be based on the "law of war" (rather than any federal statute or other criminal law authority); indeed, it would be contrary to international law to try defendants before *military* commissions (as opposed to in civilian courts) if the crimes alleged did not arise under the law of war. To do so, the crime must include, as an element, the following condition: *"[t]he conduct took place in the context of and was associated with armed conflict."*[27]

Yet Military Commission Instruction No. 2, on Crimes and Elements, attempts to shoehorn crimes such as terrorism and hijacking, which have always been considered *civilian* crimes, into the rubric of *military jurisdiction*; this is true, notwithstanding the claim that the Instructions are not intended to create new law, but merely to re-state, or "declar[e] existing law." (Section 3(A).)

The original February 2003 draft of Military Commission Instruction No. 2 included terrorism, hijacking and other such offenses within the category of war crimes. These crimes, however, have never before been recognized as *war crimes* under international law. Though this problem was not expressly acknowledged, the drafters of the instructions later seemed to recognize it. The final, April 30, 2003, version of Military Commission Instruction No. 2 attempts to finesse the issue by putting recognized war crimes into one category – "Substantive Offenses – War Crimes" (Section 6(A)) – and then creating a second category of "other" crimes that are also purportedly triable by military commissions: "Substantive Offenses – Other Offenses Triable by Military Commission." (Section 6(B).)

These "Other Offenses" include:

- Hijacking or Hazarding a Vessel or Aircraft
- Terrorism

- Murder by an Unprivileged Belligerent
- Destruction of Property by an Unprivileged Belligerent
- Aiding the Enemy
- Spying
- Perjury or False Testimony
- Obstruction of Justice Related to Military Commissions[28]

The attempt to squeeze these crimes into the "law of war" rubric, however, requires expanding the definition of "armed conflict" to the breaking point. As a result, the jurisdiction of the military commissions becomes so broad as potentially to encompass almost any serious unlawful conduct whatsoever.

Armed Conflict

The White House assured the public that "under the [November 13, 2001] order, the President will refer to military commissions only non-citizens who are members or active supporters of Al Qaeda or other international terrorist organizations targeting the United States."[29]

In fact, in Military Commission Instruction No. 2, there is no requirement that the necessary "Armed Conflict" involve Al Qaeda or a foreign terrorist organization. This means that virtually any significant criminal act by a non-citizen committed within, or otherwise affecting, the United States risks being qualified as "[taking] place in the context of and [being] associated with armed conflict." By satisfying the 'associated with armed conflict' test, the normal civilian crime becomes a war crime, subject to a special military commission.

Section 5(C) explains:

> This element ["Armed Conflict"] does not require a declaration of war, ongoing mutual hostilities, or a confrontation involving a regular national armed force. A single hostile act *or attempted act* may provide sufficient basis for the nexus [between 'armed conflict' and a particular offense] so long as its magnitude or severity rises to the level of an 'armed attack' or an 'act of war,' or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

This means a single act of terrorism, if sufficiently large – or even a single unsuccessful attempt – could be deemed to qualify as an "armed conflict" for purposes of the military commissions.

This broad definition stands in sharp contrast to the much more limited notion of armed conflict under established international law, which considers *international armed conflict* as a conflict between states;[30] and, with regard to non-state actors, covers only "*protracted* armed conflict between governmental authorities and organized armed groups or between such groups [….] and thus *does not apply to* situations of internal disturbances and tensions, such as riots, *isolated and sporadic acts of violence* or other acts of a similar nature."[31]

The military commissions' elastic definition of "armed conflict" could, in some circumstances, be construed to consider purely domestic crimes committed by non-citizens as involvement in "armed conflict." It takes little imagination, for example, to picture military commission trials of non-citizen alleged drug traffickers apprehended in the course of the "war on drugs" and charged with being foot soldiers – or co-conspirators – of the Cali cartel.

While the jurisdiction of military commissions remains limited to non-citizen defendants, the "armed conflict" that allows for the military commission trials need not involve a foreign entity. Thus a U.S. permanent resident taking part in what turned out to be a violent anti-abortion demonstration, environmental or animal rights protest,[32] or action against military shelling in the island of Vieques could find him or herself brought before a military commission.

Moreover, even acts that would normally be lawful conduct – a peaceful demonstration, suspicious-seeming library research, a loan or contribution of money, assistance to someone dealing with immigration formalities, a visit to a conflict zone – could be construed as intended to "initiate or contribute to such hostile act or hostilities," so long as the President found some basis on which to link such person's conduct to a significant violent action (or apparent intent to commit such an action) of a group generally advocating a cause that the person might be identified with.

To elaborate on this point: the Justice Department has shown a tendency to label as "terrorism" cases charges not considered such by even the prosecutors involved. "In the first two months of [2003], the Justice Department filed charges against 56 people, labeling all the cases as 'terrorism.'…. [A]t least 41 of them had nothing to do with terrorism – a point that prosecutors of the cases themselves acknowledge." Among the purported "terrorism" cases were "28 Latinos charged with working illegally at [an airport] most of them using phony Social Security numbers"; "eight Puerto Ricans charged with trespassing on Navy property on the island of Vieques"; "a Middle Eastern man indicted…for allegedly passing bad checks who has the same name as a Hezbollah leader" and "a Middle Eastern college student charged …with paying a stand-in to take his college English-proficiency tests." [33] This trend continues. "Federal and state prosecutors are applying stiff antiterrorism laws adopted after the 9/11 attacks to broad, run-of-the-mill probes of political corruption, financial crimes and immigration frauds….[c]ritics say the greatest effect of new state and federal antiterrorism laws has been on crimes already covered by other laws." [34]

Operating under even less transparency and legislative oversight than the Justice Department, the military commission system will run a serious risk of comparable, expansionist tendencies in the use of its power.

In addition, because the "enemy," for purposes of the military commissions, includes "any entity with which the United States *or allied forces* may be engaged in armed conflict,"[35] non-citizen financial or political supporters of self-professed national liberation movements having little to do with the United States, but in conflict with U.S. allies (*e.g.,* in Northern Ireland, or the Spanish Basque country, or possibly even Tibet or Chechnya) could also find themselves subject to military commission jurisdiction.

The issue here is not whether intentional acts genuinely constituting participation, conspiracy or material support to terrorist activities should be criminalized; U.S. civilian law already

criminalizes just such acts.[36] The question is whether such offenses are *war* crimes, and whether defendants charged with such acts, including longstanding U.S. residents, should be sidelined from the civilian criminal justice system, and so denied the normal rights associated with the presumption of innocence.

Moreover, while the military commissions authorized under the current orders only cover non-citizens, the administration's pleadings in the cases of U.S. citizen alleged "enemy combatants" José Padilla and Yaser Hamdi have made clear the administration's view that it could broaden jurisdiction to cover U.S. citizens with the stroke of a Presidential pen.[37]

Improvements and Clarifications

The final April 30, 2003 version of the "Crimes and Elements" document does incorporate some changes that had been proposed by Human Rights First (then, the Lawyers Committee for Human Rights) and others. By comparison with the earlier draft, the final version is now clearer on several points. Examples include:

- ***Ex Post Facto* Liability.** A fundamental principle of due process, included, for example, in Article I, Sections 9 and 10 of the Constitution, is the prohibition against holding a person criminally responsible for conduct that was not prohibited by law at the time the conduct occurred. Military Commission Instruction No. 2 now expressly disallows this as well: *"No offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question."* (Section 3(A))[38];
- **Burden of Proof.** The burden of proof for all elements of an offense (except "lack of mental responsibility") is – as it should be – on the prosecutor (Section 4(B));
- **Defenses**. A defendant "is entitled to raise any defense available under the law of armed conflict" (Section 4(B)); and
- **"Combatant Immunity."** Combatant immunity is the right of a combatant in an armed conflict to commit violent acts against hostile combatant forces, within the limits of the laws of war. Military Commission Instruction No. 2 now confirms that *any "lawful combatant"* enjoys combatant immunity (Section 5(A)).

Problematic Areas Remain

While there were some improvements, many of the issues on which Human Rights First expressed concern remain problematic. As with the broadened definition of "armed conflict," the concepts retained in the final document generally reflect the intent to carve out as much room as possible for the exercise of discretion by the Appointing Authority (who determines the charges lodged) and the military commission prosecutor. Such wide discretion is particularly susceptible to abuse because the entire process is limited to one branch of government (the executive) with no meaningful independent oversight or review by either the judiciary or the legislature. This dynamic is magnified in a political environment characterized by a strong penchant for executive secrecy. The absence of independent review in the military commission system is in strong contrast to the normal military justice system, in which convictions can be appealed to *civilian* judges in the Court of Appeals for the Armed Forces.[39]

The definitions used for specifying the crimes "triable by military commission" are also cast quite broadly, in many cases extending significantly beyond current standards of international and even U.S. law. [40] For example:

- **"Enemy."** Consistent with the broad definition of "armed conflict," the term "enemy" is also expanded substantially beyond customary usage, and could potentially cover almost any armed criminal organization, whether domestic or foreign. The term "enemy" is defined to *"includ[e] any entity with which the United States or allied forces may be engaged in armed conflict … not limited to foreign nations, or foreign organizations or members thereof."* In fact, the final version of Military Commission Instruction No. 2 substantially broadens the concept of "enemy" even further, by extending it to cover also *"any entity…which is preparing to attack the United States."* (Section 5(B).)
- **"Aiding the Enemy."** There is no materiality requirement in the crime of "Aiding the Enemy." (Section 6(B)(5).) That is, even relatively insignificant acts can result in substantial culpability – loan of a car or money; providing access to a computer; renting a room. The act need not be unlawful in itself.
- **"Spying."** There is no materiality requirement in the crime of "Spying," which applies to the collection of undefined "certain information." (Indeed, there appears to be no requirement that the relevant information be secret or that its communication to the "enemy" be harmful to the United States.) (Section 6(B)(6).)
- **"Obstruction of Justice."** This offense is particularly vaguely defined. There need not even be a trial (only reason for the defendant to believe there is an investigation), and the criminal act could be as little as a newspaper commentary or a public speech, if the military commission concludes that the defendant "*intended to influence*, impede, or otherwise obstruct the due administration of justice." Unlike the corresponding U.S. civilian criminal provision,[41] there is *no requirement* that an act constituting "Obstruction of Justice" involve *corruption or threats of force*. (Section 6(B)(8).)
- **"Conspiracy."** The conspiracy provisions allow military commission trials where the defendant had no idea that the alleged behavior bore any relation to terrorism or war. Thus a defendant may be tried before a military commission for "conspiracy," or for membership in an "enterprise of persons who share a common criminal purpose…[involving], *at least in part*, the commission or intended commission of one or more substantive offenses triable by military commission." This is so even if the unlawful offense(s), taken as a whole, are essentially outside of military jurisdiction, and even if the alleged agreement did "not include knowledge that any relevant offense is in fact 'triable by military commission.'" (Section 6(C)(6).)

  More generally, the broad sweep of the "conspiracy" charge as applied to members of military organizations in armed conflicts has aroused considerable concern among experts in humanitarian law, many of whom have argued that the offense establishes what is in effect a crime of guilt by association, a principle foreign to the international law of war. They also note that outside the common law legal systems, there is no recognition of an offense of mere agreement to commit a crime in the future, particularly when the agreed-on crime itself is never consummated.[42]

Mental Competency

While commission rules appropriately acknowledge the defense of "lack of mental responsibility," there is no mention of a requirement that the defendant be mentally competent at trial.[43] (Section 4(B).) Nor is there any restriction on the trial of children.[44]

Military Commission Instruction No. 3

Responsibilities of Chief Prosecutor, Prosecutors, and Assistant Prosecutors

Chief Prosecutor

The Chief Prosecutor "directs the overall prosecution effort" before military commissions. He is a judge advocate designated by the Defense Department General Counsel, and reports directly to the "Legal Advisor to the Appointing Authority and then to the Appointing Authority."[45] He has the authority to subpoena any individual to testify or produce evidence "in a case referred to military commissions *or in a [civilian] criminal investigation associated with a case that may be referred to a military commission*." (Section 3(B)(1)–(4).)

Prosecutors

Prosecutors will be assigned to a case ("detailed") by the Chief Prosecutor, and may be either judge advocates or "special trial counsel of the Department of Justice who may be made available by the Attorney General." (Section 3(D)(1).)

Statements to the Media

Prosecutors and staff "may communicate with news media representatives regarding cases and other matters related to military commissions only when approved by the Appointing Authority or the General Counsel of the Department of Defense." (Section 5(C).) (Media communications are discussed below in the context of Military Commission Instruction No. 4.) These restrictions do not apply to higher-level officials such as the Defense Department General Counsel, or the Secretary of Defense, or the President.

A LOOK AT THE HEARINGS: PROSECUTOR QUESTIONED OVER PUBLIC STATEMENTS

Civilian defense lawyers have raised concerns over public statements by the prosecution that appear to reflect prejudgment bias. As Human Rights First observed during the January 13, 2006 hearing for Omar Khadr: "The proceedings consisted solely of oral arguments concerning whether the chief prosecutor, Col. Morris Davis, had made extrajudicial prejudicial statements in a press conference on Tuesday that heightened condemnation of Khadr or threatened to substantially prejudice the proceedings. Despite a stirring argument by Muneer Ahmad, Khadr's civilian lawyer, the presiding officer, Col. Robert Chester, ruled that although the Chief Prosecutor's comments were unusual for a military prosecutor, he had not violated his ethical obligations and had not impaired Khadr's right to a full and fair trial, in part because he found Colonel Davis was responding to Ahmad's own negative characterizations of the military commissions and Ahmad's attribution of unlawful conduct to the government. The decision was probably an inevitable one but the arguments, especially by Ahmad, reinforced the great differences between the prosecution and the defense in these military commissions at Guantanamo, and suggest…that the presiding officer, who is clearly very thoughtful and deliberate, got this one wrong."[46]

Military Commission Instruction No. 4

Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel

Chief Defense Counsel

The Chief Defense Counsel "supervise[s] all defense activities and the efforts of Detailed Defense Counsel and other office personnel and resources." Like the Chief Prosecutor, he is a judge advocate designated by the Defense Department General Counsel. He reports directly to the Defense Department "Deputy General Counsel (Personnel and Health Policy)." He "may not detail himself to perform the duties of Detailed [assigned military] Defense Counsel." (Section 3(B)(8).)

The Chief Defense counsel is responsible for supervising both Detailed [assigned military] Defense Counsel and any civilian defense lawyer chosen by an accused. The Chief Defense Counsel also *"monitor[s]…all qualified Civilian Defense Counsel for compliance with all rules, regulations, and instructions governing military commissions….[and] will report all instances of noncompliance with [such] rules, regulations, and instructions…to the Appointing Authority and to the General Counsel of the Department of Defense with recommendation as to any appropriate action."* (Section 3(F)(5).)

Accordingly, both the assigned military defense lawyer and the civilian defense lawyer (if any) in a particular case will be supervised by an officer, the Chief Defense Counsel, who will be responsible for discovering and sanctioning alleged breaches of applicable rules by the defense lawyers, particularly alleged breaches regarding "Protected Information." As discussed below, attorney-client communications may be subject to monitoring.

While the original version of Instruction No. 4 had stipulated that the Chief Defense Counsel "does [not] form an attorney-client relationship with accused persons or incur any concomitant confidentiality obligations" (Section 3(B)(8)), the corresponding section of Instruction No. 4 now provides that the Chief Defense Counsel "may receive [privileged] information…[and so incur] the concomitant obligation of confidentiality."

However, the Chief Defense Counsel's policing function risks establishing an atmosphere of distrust among the civilian lawyer, the military lawyer, and the Chief Defense Counsel. It can equally undermine the likelihood of candid communication between the defendant and his lawyer(s).

Another responsibility of the Chief Defense Counsel is to police a prohibition on possible defense strategies involving "Common Interest Arrangements."[47] Such arrangements, common in federal multi-defendant cases, allow counsel to discuss the case candidly with co-defendants and co-defendants' counsel. Among other things, the prohibition of Common Interest Arrangements can prevent counsel from discussing with each other even purely legal strategy without waiving attorney-client privilege, and also from pooling resources, such as hiring of legal or other expertise or fact investigators. This is a particularly significant disability for civilian defense lawyers, who will almost certainly be covering their own expenses. It could also prevent

a defendant possessing exculpatory information from sharing it with another similarly situated defendant.

Detailed Defense Counsel

Detailed Defense Counsel are military judge advocates who are assigned to represent a commission defendant by the Chief Defense Counsel. (Section 3(B)(8).) Such counsel "shall" represent an accused "notwithstanding any intention expressed by the Accused to represent himself." (Section 3(D)(2).)[48]

This is another abridgement of a standard defendant's right. The principle of right to representation by counsel of one's choice naturally encompasses the right to represent oneself. Though often deemed imprudent by lawyers, defendants since the time of Socrates have found rational reasons for choosing to be their own attorneys. A defendant might easily consider the absence of effective attorney-client privilege alone as sufficient grounds for choosing to dispense with services of a defense counsel.[49] Similarly, it would be hard to dismiss as groundless the logic of a detainee, such as Ali Hamza Ahmed Sulayman al Bahlul, who insists that since the United States is his enemy, he cannot trust a U.S. military attorney provided to him by the United States[50] – especially when it is known that some Guantanamo detainees have encountered interrogators pretending to be their lawyers.[51]

This limitation on defendants' rights in the military commission context must be viewed in light of the administration's early frustrations in the federal criminal trial of accused terrorist Zacarias Moussaoui, whose initial efforts to defend himself were vigorously opposed by prosecutors. (Defendants do, however, retain one other option: a commission defendant may choose a judge advocate who is otherwise available to replace the military defense counsel he is originally assigned. (Section 3(E)1).))

Qualified Civilian Defense Counsel

At no expense to the United States, an accused may also hire a civilian attorney of his choosing "to assist in the conduct of his defense…provided that the civilian attorney retained has been determined to be qualified pursuant to Section 4(C)(3)(b) of [Military Commission Order No. 1]." (Section 3(F)(1).)[52]

The right of the accused to select Qualified Civilian Defense Counsel is hampered, however, by various restrictions. The Chief Defense Counsel will be the one who "administer[s] the Civilian Defense Counsel pool, screening all requests for pre-qualification and *ad hoc* qualification, making qualification determinations and recommendations…and ensuring appropriate notification to an Accused of civilian attorneys available to represent Accused before a military commission." (Section 3(B)(13).) A further hurdle is the condition that "retention of Civilian Defense Counsel shall not unreasonably delay military commission proceedings." (Section 3(F)(2).) Likely the most important restriction is the requirement that Civilian Defense Counsel be a U.S. citizen. (Military Commission Order No. 1, Section 4(C)(3)(b).) Controversy over the right to counsel of the accused's nationality has featured particularly in the case of Ali Hamza Ahmed Sulayman al Bahlul, who has stated his desire to be represented by a Yemeni lawyer if he is not be permitted to represent himself.[53]

A LOOK AT THE HEARINGS: AL BAHLUL'S RIGHT TO SELF-REPRESENTATION

At Ali Hamza Ahmed Sulayman al Bahlul's January 12, 2006 hearing before the military commissions, Human Rights First observed that "al Bahlul….had previously declined legal assistance and had stated he wanted to represent himself in the proceedings. When he was allowed to speak by the presiding officer, Col. Peter Brownback III, al Bahlul offered 'causes and circumstances' for why he would not participate in either Wednesday's session or in any future proceedings. For about ten minutes everyone in the commission room fell silent as al Bahlul, a slight man who measures not much more than five and one-half feet and has a full beard and a short head of hair, spoke quietly and deliberately. He denounced the United States as an enemy of Muslim nations, for its support of Israel, and for denying to him the right to be represented by a non-American lawyer. At the end of his statement al Bahlul raised a small piece of paper above his head and waved it slowly for all in the commission room to see, saying, 'muqataa,' and then in English, 'boycott, boycott, boycott'….The commission was then quickly in recess. Brownback then ruled against al Bahlul's request to represent himself, offering 'two separate and distinct reasons.' First, Brownback said, al Bahlul was not competent to represent himself because someone who boycotts the proceedings cannot go forward pro se….The second reason, Brownback stated, was based on the President's Military Order and other military regulations, that require al Bahlul to be represented by assigned military counsel. This, of course, goes to one of the many problems with the commission rules and one of the ways in which they have been out of step with our American legal system: as Maj. Tom Fleener, al Bahlul's detailed counsel put it, 'For four years they wouldn't let detainees have lawyers; now they're shoving one down his throat.'"[54]

Access to Protected Information

> Neither qualification of a Civilian Defense Counsel for membership in the pool of available Civilian Defense Counsel nor the entry of appearance in a specific case guarantees that counsel's presence at closed military commission proceedings or access to information protected under Section 6(D)(5) of [Military Commission Order No. 1].
>
> Military Commission Instruction No. 4, Section 3(F)(4).

Civilian Defense Counsel may also be denied access to undefined "state secrets" under Section 9 of Military Commission Order No. 1. When the President's original November 13, 2001 Military Order was issued, (then) White House Counsel Alberto Gonzales assured the public that the contemplated "[m]ilitary commission trials are not secret….The president's order authorizes the secretary of defense to close proceedings *to protect classified information [but does not require secret proceedings]*."[55] The definition of "Protected Information" under the referenced sections of Military Commission Order No. 1, however, is far broader, and much less clearly defined, than "classified information." In addition to the vague "state secrets,"[56] "Protected Information" includes not just "classified" but also "classifiable" information, as well as "information concerning other [undefined] national security interests." Defense counsel will have no standard, and no procedure, by which they can challenge withholding of information, and, in many cases, will likely not even know of the existence of such information. (Issues relating to "Protected Information" are addressed in more detail below in the discussion of Military Commission Instruction No. 8.)

Statements to the Media

As with Prosecutors,

> Personnel assigned to the Office of the Chief Defense Counsel, as well as members of the Civilian Defense Counsel pool and associated personnel may communicate with news media representatives regarding cases and other matters related to military commissions only when approved by the Appointing Authority or the General Counsel of the Department of Defense.
>
> Military Commission Instruction No. 4, Section 5(C).

Under the rules, all civilian defense counsel (including approved but currently unassigned members of the Civilian Defense counsel pool) are technically prohibited from communications with the media unless they first receive prior approval by the Defense Department. Application of this gag rule not only to case-related communications but also to "other matters related to military commissions" could severely limit the universe of knowledgeable lawyers allowed to speak publicly regarding military commission proceedings. These free-speech restrictions seem particularly difficult to justify even on an expansive interpretation of national security requirements. While government officials familiar with, but not directly involved in, a prosecution – including the Secretary of Defense, the Defense Department General Counsel, and the President – will be free to provide to the media the government's interpretation of the proceedings, media access to the defense perspective can be strictly limited.[57]

In practice, to date, it appears that this rule has not been very strictly enforced, and civilian and military defense lawyers have spoken often and in strong terms to the press. Nonetheless, the existence of the strict rules represents the latent power of the government to rein in public communications more tightly at its discretion.

Military Commission Instruction No. 5

Qualification of Civilian Defense Counsel

Qualification Conditions

As set out in Section 4(C)(3)(b) of Military Commission Order No. 1, and further elaborated in Section 3(A)(2) of Military Commission Instruction No. 5, civilian defense counsel must satisfy the following conditions:

1. U.S. citizenship.
2. Admission to practice of law in a State, district, territory or possession of the United States, or before a Federal court.
3. Absence of any sanction or disciplinary action by any court, bar, or other competent governmental authority for "relevant misconduct."
4. Eligibility for access to information classified at the level secret or higher. (Those not already eligible must consent to a background investigation and *"pay any actual costs associated with the processing of the same.")*[58]
5. Written agreement to comply with all applicable regulations or instructions for counsel, including any rule of court (as set out in a signed affidavit in the form attached as Annex B to Military Commission Instruction No. 5).

Application materials are reviewed and approved or rejected by the Chief Defense Counsel, "[s]ubject to review by the General Counsel of the Department of Defense."

The Chief Defense Counsel's review in particular "include[s] determinations as to whether any sanction, disciplinary action, or challenge is related to *relevant misconduct* that [in the view of the Chief Defense Counsel or the Defense Department General Counsel] would disqualify the Civilian Defense Counsel applicant." (Section 3(B)(4).) There appears to be no provision for appeal by the applicant (or his potential client) of an adverse determination.

Affidavit and Agreement by Civilian Defense Counsel

(Appendix B to Military Commission Instruction No. 5)

Among other agreements and undertakings, the Civilian Defense Counsel agrees and/or acknowledges that:

1. Qualification as a Civilian Defense Counsel "does not guarantee [Counsel's] presence at closed military commission proceedings or guarantee…access to any [protected] information." (Para. I(B).)

2. Civilian Defense Counsel "will ensure that these proceedings are [his or her] primary duty….[and] that [he or she] can commit sufficient time and resources to handle an Accused's case expeditiously through its conclusion." Moreover, the Presiding Officer "may deny any request for a delay or continuance of proceedings based on reasons relating to matters that arise in the course of [Civilian Defense Counsel's] law practice or other professional or personal activities that are not related to military commission proceedings, if in the Presiding Officer's determination such a continuation would unreasonably delay the proceedings."[59] (Para. II(B).) This could, as a practical matter, prevent a defense lawyer from taking on any other employment for the duration of a military commission trial (the precise dating of which may be unpredictable). This restriction could place a substantial burden on civilian lawyers who will likely be working without payment or reimbursement for expenses.[60] As in the earlier versions, the February 5, 2004 revision requires Civilian Defense Counsel to obtain prior Defense Department approval for travel from the site, once proceedings have begun; the February 5 version adds an understanding that such travel will not be "unreasonably restrict[ed]." (Para. □□(E)(2).)
3. "Recognizing that [his or her] representation does not relieve Detailed [assigned military] Defense Counsel of [his or her] duties… *[Civilian Defense Counsel] will work cooperatively with such [Detailed Defense] counsel to ensure coordination of efforts and to ensure such counsel is capable of conducting the defense independently if necessary."* (Para. □□(D).) The military defense counsel must be fully included in the preparation and conduct of the trial *even when the client has expressed a preference not to be represented by the military lawyer*.[61]
4. As a general rule, Civilian Defense Counsel agrees that "[d]uring [his or her] representation of an Accused before military commissions, unless [he or she] obtain[s] approval in advance from the Appointing Authority of the Presiding Officer [of the military commission] to do otherwise…[he or she] *will not discuss*, transmit, communicate or otherwise share documents or information specific to *the case with anyone except…(a)…members of the Defense Team…; (b) commission personnel…; (c) potential witnesses in the proceedings; or (d) other individuals with particularized knowledge that may assist in discovering relevant evidence in the case."* The February 5, 2004 revision of the Affidavit specifies, however, that *"[s]uch discussions, transmissions, or sharing may include consulting with other legal professionals for assistance with defense tasks that [Civilian Defense Counsel] may have otherwise personally undertaken," [provided that the Civilian Defense Counsel] "may not share attorney confidences, attorney work product, or any Protected Information with anyone unless that individual has been previously approved for that specific type of relationship or information as part of the Defense Team."* (Para. □□(E)(1).)[62]

5. Civilian Defense Counsel agrees that, in addition to him or herself, "[t]he Defense Team shall consist entirely of…Detailed [military] Defense Counsel, and other personnel provided by the Chief Defense Counsel, the Presiding Officer, or the Appointing Authority." (Para. □□(C).) Notwithstanding the retention of the word "entirely," the February 5, 2004 revision now permits Civilian Defense Counsel to request (with appropriate "justification") authorization to bring onto the Defense Team additional outside members. Such additional Defense Team members would be eligible to receive attorney confidences and attorney work product and, on a case-by-case basis, to obtain access to the defendant, other detainees or Protected Information, subject to completion of an Affidavit similar to the Civilian Defense Counsel Affidavit, and completion of appropriate security clearances.
6. "[T]here may be reasonable restrictions on the time and duration of contact [Civilian Defense Counsel] may have with [his or her] client, as imposed by the Appointing Authority, the Presiding Officer, detention authorities, or regulation." (Para. □□(H).)
7. Civilian Defense Counsel confirms the understanding that *"[C]ommunications with an Accused are not protected if they* would facilitate criminal acts or a conspiracy to commit criminal acts, or if those communications *are not related to the seeking or providing of legal advice*." (Para. □□(I).) Earlier language in the July 2003 version expressly acknowledging the possibility that attorney-client communications will be monitored has been deleted from the February 5, 2004 Affidavit. The current (September 21, 2005) version of Military Commission Order No. 3, however, authorizes the Commander of the unit with control of the detainee (or the Commander's designee) to "approve…communications monitoring….upon a determination that such monitoring may prevent communications aimed at furthering or facilitating terrorist operations or other illegal acts."[63] Military and Civilian Defense Counsel will be notified in advance of any such monitoring, and they may, if they choose, notify their client. (Communications solely among counsel will not be monitored.) Information obtained through such monitoring "shall not be used in proceedings against the individual who made or received the relevant communication…and shall not be disclosed to personnel involved in the prosecution or underlying prosecution investigation of said individual." Information obtained from monitoring may be used in proceedings against other detainees. (Section 4(A), (B), and (F), Military Commission Order No. 3.)

8. Civilian Defense Counsel also undertakes to "reveal to the Chief Defense Counsel and any other appropriate authorities information relating to the representation of [the] client to the extent that [Civilian Defense Counsel] reasonably believe[s] necessary to prevent the commission of a future criminal act that [he or she believes] is likely to result in death or substantial bodily harm, or significant impairment of national security." (Para. □□(J).) While it is not unusual for legal professional responsibility rules to authorize,[64] or in some jurisdictions even require,[65] a lawyer to disclose privileged communications where necessary to prevent a crime involving risk of serious bodily harm or death, such provisions are generally rather narrowly tailored to ensure protection for most privileged communications. In the civilian defense Counsel's undertaking, however, broadening the duty to include the vague and undefined term "impairment of national security" could effect a serious chill over both parties in attorney-client consultations, particularly in light of the potential monitoring of attorney-client communications.

Military Commission Instruction No. 6

Reporting Relationships for Military Commission Personnel

This Instruction sets forth reporting relationships referred to in the other Military Commission Instructions, most of which are described elsewhere in this guide. Prosecutors report to the Deputy Chief Prosecutor and then to the Chief Prosecutor. The Chief Prosecutor, in turn, reports to the Legal Advisor to the Appointing Authority and then to the Appointing Authority. The Appointing Authority reports to the Secretary of Defense. (Section 3(B)(1)-(5).)

Detailed [military] Defense Counsel report to the Deputy Chief Defense Counsel and then to the Chief Defense Counsel. The Chief Defense Counsel reports to the Defense Department Deputy General Counsel (Personnel and Health Policy) and then to the Defense Department General Counsel (who reports to the Secretary of Defense). (Section 3(B)(6)-(8).)

Review Panel Members report directly to the Secretary of Defense. (Section 3(B)(9).)[66]

Military commission panel members continue to report to their parent commands; and the Instruction specifies that "[t]he consideration or evaluation of the performance of duty as a member of a military commission is prohibited in preparing effectiveness, fitness, or evaluation reports of a commission member," a helpful if inadequate affirmation of the principle of impartiality. (Section 3(B)(10).)

Military Commission Instruction No. 7

Sentencing

Conviction and Sentencing

As specified in Sections 4(A) and 6(F) and (G) of Military Commission Order No. 1, military commission panels are appointed by the Appointing Authority, who is either the Secretary of Defense or his designee.[67] Military commissions consist of a Presiding Officer and at least three other members, plus one or more alternates (the number of alternates to be determined at the discretion of the Appointing Authority). All panel members must be commissioned officers of any U.S. armed service. In addition, the Presiding Officer, who acts somewhat like a military judge in a court martial, must also be a U.S. judge advocate (a trained military lawyer). The Presiding Officer instructs panel members on the law but is not present at, and does not participate in, deliberations by the other members regarding guilt or sentence. Convictions – *including for capital offenses* – require two-thirds vote of the voting commission members. The same panel votes on sentences separately from verdicts, with all sentences except death requiring two-thirds vote. A sentence of death requires a unanimous vote. Only a panel of seven members may sentence an accused to death. [68]

Military Commission Instruction No. 7 provides that "wide latitude in sentencing" is permitted. "The sentence determination should be made while bearing in mind that there are several principal reasons for a sentence given to those who violate the law. Such reasons include: punishment of the wrongdoer; protection of society from the wrongdoer; deterrence of the wrongdoer and those who know of his crimes and sentence from committing the same or similar offenses; and rehabilitation of the wrongdoer….[T]he weight to be accorded any or all of these reasons rests solely within the discretion of commission members." (Section 3(A).)

Plea Bargaining

Any plea agreement must be approved by the Appointing Authority (Secretary of Defense or his designee); and any approved plea agreement must be complied with by the military commission, subject to the Presiding Officer's determination that the agreement is voluntary and informed. (Section 4(C).)

Military Commission Instruction No. 8

Administrative Procedures

Appointment and Removal of Commission Members

The Appointing Authority appoints panels comprising the Presiding Officer (who does not vote on findings or sentences) and three or more other members (plus one or more alternates). (Military Commission Order No. 1, Section 4(A)(1) – (2).) The rules appear to vest both the Appointing Authority and the Presiding Officer with authority to remove members of the military commission for "good cause." (Military Commission Order No. 1, Section 4(A)(3).) In addition, the Presiding Officer has the authority to "determine if it is necessary to conduct or permit questioning of members (including the Presiding Officer) on issues of whether there is good cause for their removal," and the Presiding Officer "shall decide challenges for cause in accordance with the standards established by the Appointing Authority."[69] (Military Commission Instruction No. 8, Section 3(A).)

Presiding Officer; Motions and Interlocutory Questions

The functions of the Presiding Officer are set forth in Section 4(A)(5) of Military Commission Order No. 1 and in Military Commission Instruction No. 8.[70] The Presiding Officer is the only member of a military commission panel who must be a judge advocate, that is, a military lawyer. (Military Commission Order No. 1, Section 4(A)(4).) The Presiding Officer need not be a military judge, however.[71]

The Presiding Officer functions largely the same as a military judge under the UCMJ. In a court martial, the military judge generally rules on all questions of law and instructs the court martial members on the law, but does not himself vote on verdict or sentence. Similarly, as a general matter, the Presiding Officer "rule[s] on all questions of law, all challenges for cause, and all interlocutory questions arising during the proceedings." However, the Presiding Officer must "certify" – or refer – to the Appointing Authority for immediate resolution any motion arising during the course of the proceedings if disposition of such motion "would effect a termination of proceedings with respect to a charge." (Military Commission Order No. 1, Section 4(A)(5)(e).) (An example of such a "charge-dispositive" motion might be a defense motion to dismiss all conspiracy charges on the legal grounds that the law of war does not recognize an offense of conspiracy.) The Presiding Officer may also, in his or her discretion, certify other interlocutory questions to the Appointing Authority as well. (Questions regarding the admissibility of evidence are handled differently, however. See below.)

It can be anticipated that the Appointing Authority will not likely be seen as an impartial adjudicator of these legal questions, however, since it is he who will have approved bringing the charges in the first place. (Military Commission Order No. 1, Section 6(A)(2).)

The Presiding Officer does not vote with the other members on findings or sentences, and is not present during deliberations. (Military Commission Instruction No. 1, Section 4(A)(5)(a).)

Evidence

Evidence shall be admitted into a military commission proceeding if it would *"have probative value to a reasonable person."*[72] This "probative value" standard is vastly more accommodating than the strict rules of evidence applicable in civilian criminal courts and the substantially similar rules applicable in courts martial of U.S. soldiers under the UCMJ. (Indeed the relevant provision, Article 36 of the UCMJ, 10 U.S.C. Section 836, provides that in *all* "military tribunals" – expressly including "courts-martial [and] military commissions" – "[p]retrial, trial, and post-trial procedures, including modes of proof" are to be prescribed by the President, but "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."[73]) In contrast to the single-sentence "probative value" standard in the military commission rules, the Military Rules of Evidence (M.R.E.) provide extensive detailed guidance on the admissibility of evidence for courts martial and other military tribunals, designed to ensure the authenticity, reliability, and non-prejudicial nature of evidence used to convict.[74]

The determination of "probative value" is, in the first instance, made by the Presiding Officer. However, at the request of any other member of the commission, the Presiding Officer's decision to exclude evidence may be overturned by vote of a majority of the commission, in which vote the Presiding Officer will participate. (Military Commission Order No, 1, Sections 4(A)(5)(a)-(b) and 6(D)(1).) By contrast, under the □□□□, not only evidentiary questions but "all questions of law and all interlocutory questions" are generally decided by the military judge, and, once so decided, become "final and constitut[e] the ruling of the court." (10 U.S.C. Section 851(b).) Because the "probative value" standard provides the only grounds for exclusion of evidence, it is unclear whether military commission defendants would have legal basis to challenge admission of evidence that would normally be excluded from judicial proceedings based on, for example, objections to the admission of privileged communications; hearsay; or allegations of mental or physical coercion (not rising to the level of "torture") inflicted upon the defendant or another person who may be the source of the testimony.[75] As of March 27, 2006, Military Commission Instruction No. 10 now bars admission of "statements established to have been made as a result of torture as evidence against an accused." It remains unclear how or by whom the determination shall be made as to whether or not evidence results from torture. (See discussion below of Military Commission Instruction No. 10.)

Closure of Proceedings

Sections 6(B)(3) and 6(D)(5) of Military Commission Order No. 1 empower the Appointing Authority or the Presiding Officer to close all or part of a proceeding. The Presiding Officer may make a closure decision on his own initiative or upon motion, including an *ex parte* [without the presence of defendant or defense counsel] *in camera* [in secret] motion, by the prosecution (or the defense). A closure order may exclude Civilian Defense Counsel as well as the defendant himself. While the Detailed (assigned military) Defense Counsel may not be so excluded, he or she will be prohibited from disclosing information subject to the order to individuals who have been excluded. Grounds for closure include protection of classified, classifiable, or other confidential information; the physical safety of participants in the proceedings; intelligence and law enforcement sources, methods, or activities; "and other national security interests." Section 4(A)(5)(b) adds that closure can be justified "for any other reason necessary for the conduct of a full and fair trial."

Protected Information

In addition to closure of the proceedings, Section 6(D)(5) of Military Commission Order No. 1 authorizes the Presiding Officer "as necessary" to issue protective orders to safeguard "Protected Information." Protected Information is not limited to classified information, and includes information "*concerning* intelligence and law enforcement sources, methods, or activities….or…*concerning* other national security interests." The definition of Protected Information does not require any showing that its disclosure would cause harm.

The Presiding Officer may issue such a "protective order" upon the motion of the prosecutor or *upon his own initiative*, even if the prosecutor does not raise the question.

The protective order issued by the Presiding Officer "shall, *as necessary to protect the interests of the United States*….direct (i) the deletion of specified items of Protected Information from documents to be made available to the Accused, Detailed Defense Counsel, or Civilian Defense Counsel; (ii) the substitution of a portion or summary of the information for such Protected Information; or (iii) the substitution of a statement of the relevant facts that the Protected Information would tend to prove." (Military Commission Order No. 1, Section 6(D)(5)(b).)

Though assigned *military* defense counsel will in all circumstances be entitled to be present when secret evidence is presented at trial, without court authorization he or she "may not disclose any information presented during a closed session to individuals excluded from such proceeding or part thereof" – including to the civilian defense counsel and the defendant. (Military Commission Order No. 1, Section 6(B)(3).) It may, however, be difficult for the military lawyer to appraise the significance or credibility of such evidence, or devise a persuasive response, without the assistance of the defendant.

CLOSED HEARINGS AND SECRET EVIDENCE

On March 1, 2006, Chief Defense Counsel Col. Dwight Sullivan and military defense counsel Cpt. William Kuebler, counsel for Ghassan Abdullah al Sharbi, told Human Rights First that their "biggest criticism of the military commission process…was that almost all of the information the military defense lawyers received regarding the guilt or innocence of their clients from the prosecution was information they were not allowed to share with their clients because it was either classified, labeled 'law enforcement sensitive' or marked for official use only." Later the same week, Chief Prosecutor Col. Morris Davis stated that he did not believe there would in fact be closed hearings or secret evidence withheld from the defendants in any of the cases he had reviewed. There nonetheless remains no clear and fixed rule protecting the Defense's access to relevant evidence.[76]

The original March 21, 2002 version of Military Commission Order No. 1 provided no express duty for the Presiding Officer to consider the "interests" of the *defendant* in making determinations regarding Protected Information. A revised version, however, issued on August 31, 2005, went some distance in correcting this imbalance. Section 6(D)(5)(b) now provides that "if…an adequate substitute for [Protected Information] is unavailable…the Presiding Officer, notwithstanding any determination of probative value…shall not admit the Protected Information as evidence *if the admission of such evidence would result in the denial of a full and fair trial."*

Notwithstanding this improvement, the military commission rules still compare unfavorably with the corresponding provisions of the Military Rules of Evidence, applicable to courts martial. Under those rules, the military judge may not issue a protective order respecting classified information or other secret government information on his or her own initiative. Such an order may only be issued at the request of the affected government department or agency. Moreover, to obtain such an order, the requesting agency must show that the disclosure would result in harm: "Classified information is privileged from disclosure if disclosure would be detrimental to the national security"[77]; and unclassified "government information is privileged from disclosure if disclosure would be detrimental to the public interest."[78] (The third relevant privilege in courts martial relates to the right of "the United States or a State or subdivision thereof…[to] refuse to disclose the identity of an informant." This last privilege authorizes withholding of relevant communications of an informant only "to the extent necessary to prevent the disclosure of the informant's identity."[79])

Under the rules of evidence applicable to courts martial, the military judge may permit alternatives to full disclosure of evidence relevant and material to the defense. The alternatives available are generally of the same nature as those provided for in Military Commission Order No. 1, such as use of a portion or summary of the classified or other secret governmental material, or admission of a statement by the government admitting relevant facts. In a court martial, if the military judge finds that no alternative is adequate and that use of the classified or other secret government information itself is "necessary to afford the accused a fair trial," the judge is required to order "sanctions" as the "interests of justice require." Such sanctions may include striking all or part of a witness' testimony; declaring a mistrial; finding against the government on an issue as to which the evidence is material and relevant to the defense; or dismissing the charges or specifications.[80]

On its face, the military commission requirement to exclude Protected Information if "admission of such evidence would result in the denial of a full and fair trial" resembles the court martial requirement that use of substitutions for secret information must not deny "the accused a fair trial." The crucial difference, however, is that in the military commission context, there is no *independent* review of the adequacy of the alternatives selected in the particular case (which may well have been adopted on the Presiding Officer's own initiative). While the military commission rule mandating exclusion of Protected Information when "admission of such evidence would result in the denial of a full and fair trial" marks an improvement over the original provision, the protection is cold comfort without some independent check on the objectivity and fairness of the decisionmaking.

In fact, all participants in the decisionmaking regarding Protected Information are in the same chain of command, beginning with the Secretary of Defense, who chooses the Appointing Authority. (Military Commission Instruction No. 6, Section 3(B)(1).) The Appointing Authority, in turn, appoints the Presiding Officer and other military commission members, and also "refers" particular defendants for trial. (Military Commission Order No. 1, Sections 4(A)(1) and 6(A)(2).) The Defense Department General Counsel (who works for the Secretary of Defense) appoints the Chief Prosecutor, who, in turn, reports directly to the Legal Advisor to the Appointing Authority and then to the Appointing Authority. (Military Commission Instruction No. 3, Sections 3(B)(1)-2).) On any review, the case goes before a three-member Review Panel – appointed by, and reporting to, the Secretary of Defense. (Military Commission Instruction No. 9, Section 4(B); Military Commission Instruction No. 6, Section 3(B)(9).) At no stage of the

process is there review of the proceedings by any official outside the military chain of command. As explained below, in the discussion of Military Commission Instruction No. 9, this lack of independent judicial review contrasts starkly with the situation of courts martial under the UCMJ, which provides for review of all court martial convictions by a panel of *civilian* judges, appointed for fixed fifteen-year terms by the President with the advice and consent of the Senate, with possible further review by certiorari to the Supreme Court, as well.[81]

The dilemma of Guantanamo detainee Mustafa Ait Idr, in his Combatant Status Review hearing, may give some idea of the absurd repercussions of a rule allowing use of secret evidence in military commission prosecutions. At his hearing, Mr. Idr struggled to refute "classified" evidence withheld from him allegedly proving his involvement in a plot to blow up the U.S. Embassy in Sarajevo:

> I asked the interrogators to tell me who this person was. Then I could tell you if I might have known this person, but not if this person is a terrorist. Maybe I knew this person as a friend. Maybe it was a person that worked with me….If you tell me the name, then I can respond and defend myself against this accusation….The only thing I can tell you is I did not plan or even think of [attacking the Embassy]. Did you find any explosives with me? Any weapons?....I am prepared now to tell you, if you have anything or any evidence, even if it just very little….I was hoping you had evidence that you can give me. If I was in your place – and I apologize in advance for these words – but if a supervisor came to me and showed me accusations like these, I would take these accusations and I would hit him in the face with them. Sorry about that. [Everyone in the Tribunal room laughs.]

Quoted in *In re Guantanamo Detainee Cases,* 355 F. Supp. 2d 443, 469 (D.D.C. 2005).

The panel confirmed Mustafa Ait Idr's status as "enemy combatant."[82]

Exculpatory Information

Section 6(B) of Military Commission Instruction No. 8 states that "[t]he Prosecution shall provide the Defense with access to evidence known to the Prosecution that tends to exculpate the Accused as soon as practicable, and in no instance later than one week prior to the scheduled convening of a military commission." (Section 5(E) of Military Commission Order No. 1 contains almost identical language.) Unfortunately, this promise is undercut by Sections 6(D)(5)(a) and (b) of Military Commission Order No. 1, which together authorize the Presiding Officer to order withholding of "Protected Information" – including potentially exculpatory evidence – from even the military defense counsel, if the prosecution does not intend to introduce such evidence at trial.[83]

As discussed above, Section 6(D)(5)(b) of Military Commission Order No. 1 provides that the Presiding Officer may, on his own initiative or at the request of the prosecution, issue an order to safeguard "Protected Information" by deleting specified items of Protected Information from documents provided to the defense; substituting a portion or summary of the information for such Protected Information; or substituting a statement of the relevant facts that the Protected Information would tend to prove. Such a prosecution motion "shall, upon request of the Prosecution, be considered by the Presiding Officer *ex parte* [without the presence of defendant

or defense counsel] *in camera* [in secret], but no Protected Information shall be admitted into evidence for consideration by the Commission if not presented to Detailed [assigned military] Defense Counsel."[84] This means that both the substance – and even the existence – of potentially exculpatory information may be withheld from the defendant and the *entire* defense team if the Presiding Officer finds its non-disclosure, as Protected Information, appropriate. Significantly, while Section 6(D)(5)(b) now requires exclusion of evidence comprising Protected Information for which adequate substitute is unavailable "if the admission of such evidence would result in the denial of a full and fair trial," there is no corresponding requirement that potentially *exculpatory* Protected Information for which there is no adequate substitute *must be disclosed, or else the corresponding charge(s) dismissed* if failure to do so "would result in the denial of a full and fair trial."

Military Commission Instruction No. 9

Review of Military Commission Proceedings

Appointment of Review Panel

Military Commission Instruction No. 9 sets forth procedures and responsibilities for review of convictions and sentences of military commission trials. A Review Panel consists of three Military Officers, appointed by the Secretary of Defense. Civilians may be temporarily commissioned as officers to comply with this requirement. At least one of the Panel members shall have experience as a judge. The Secretary of Defense will set terms for Panel members, which will normally not exceed two years. The Secretary may remove a Panel member "only for good cause… includ[ing], but…not limited to, physical disability, military exigency, or other circumstances that render the member unable to perform his duties." (Section 4(A) and (B).)

On December 30, 2003, Defense Secretary Donald Rumsfeld announced the names of four individuals selected to serve on military commission Review Panels. The panel members were commissioned for two-year terms as major generals in the United States Army. The four are all distinguished civilian lawyers with broad experience in public service: Griffin B. Bell, former Fifth Circuit Court of Appeals judge and U.S. Attorney General; Edward George Biester, Jr., former Pennsylvania Attorney General; William T. Coleman, Jr., former Secretary of Transportation; and Frank J. Williams, Chief Justice of the Rhode Island Supreme Court.[85]

Post-Trial Review

Every military commission conviction is sent for review to a Review Panel. Following the Appointing Authority's review, the trial record is delivered to the defense and the prosecution. Within the next 30 days, the defense may file a brief with the Appointing Authority and the prosecution, and the prosecution may file an answer brief within 30 days of receipt of the defense brief. *Amici curiae* (friends of the court) may submit briefs no later than the filing of the prosecution's brief. The Appointing Authority then forwards the trial record and all briefs to the Review Panel, which has 75 days to complete its review (subject to extension by application to the Secretary of Defense). (Section 4(C)(3).) The Review Panel may in its discretion hear oral argument. (Section 4(C)(4)(b).)

The Review Panel "shall" review the post-trial submissions from the prosecution and the defense, and "may in its discretion" review *amicus curiae* briefs, "but shall ordinarily review any such submissions from the government of the nation of which the accused is a citizen. (Section 4(C)(4)(b)-(c).)[86]

In every case, the Review Panel shall issue a written opinion, and such opinions "shall constitute precedent for subsequent opinions of all [other Review Panels]." Review Panel opinions shall be published "[e]xcept as necessary to safeguard protected information." Separate dissenting or concurring opinions may also be written. (Sections 4(C)(5); 4(E).)

If a majority of the three members "has formed *a definite and firm conviction that a material error of law occurred*," they must return the case for further proceedings, or order a dismissal. (See discussion of "Material Error of Law," below.) Under this standard, in principle, Panel members could conclude there was *probably* (more likely than not) a material legal error prejudicing the defendant, but still not be sufficiently persuaded to overturn the verdict. (Section 4(C)(1)a.)

Where it does *not* find that a "material error of law" has occurred, the Review Panel will forward the case with its opinion(s) to the Secretary of Defense, recommending that the trial verdict and/or sentence be approved, disapproved, or revised in the defendant's favor. "The Review Panel may recommend disapproval of findings of guilty on a basis other than a material error of law." (Section 4(C)(1)b.)

Upon receipt of the Review Panel's recommendations, the Secretary of Defense "will review the record of trial and the recommendations of the Review Panel and either return the case for further proceedings or, unless making the final decision pursuant to a Presidential designation [under section 4(c)(8) of the President's November 13, 2001 Military Order], forward it to the President with a recommendation as to disposition." (Section 5.)[87]

At this stage, if the Secretary of Defense has *not* been designated by the President under the November 13, 2001 Military Order as 'final decisionmaker,' the Secretary of Defense can either "return the case for further proceedings" even in the event of an acquittal, or "forward it to the President" for final decision. (Section 5 provides no explicit standard for the Secretary's decision to "return the case for further proceedings.")

If the Secretary of Defense *has*, however, been designated 'final decisionmaker,' he is limited, with respect to each charge, to deciding to (1) approve or disapprove of the trial verdict and/or sentence, or (2) revise either or both in the defendant's *favor*. (Section 6.[88])

If the President himself serves as 'final decisionmaker,' he may presumably make any of the determinations specified in Section 6 as available to the Secretary of Defense in his capacity as 'final decisionmaker,' though that is not expressly spelled out. It is *not*, however, clear whether the President may *also* choose to reverse or revise a verdict or a sentence a*dversely* to the defendant.[89]

"Material Error of Law"

The Instruction specifies that "material errors of law may include but are not limited to:…(1) A deficiency or error of such gravity and materiality that it deprives the accused of a full and fair trial; (2) Conviction of a charge that fails to state an offense that by statute or the law of armed

conflict may be tried by military commission….; (3) Insufficiency of the evidence as a matter of law; and (4) A sentence that is not "appropriate to the offense or offenses for which there was a finding of Guilty."[90] (Military Commission Instruction No. 9, Section 4(C)(2); Military Commission Order No. 1, Section 6(G).)

Absence of Independent Judicial Review

Under Section 7(B) of the November 13, 2001 Military Order, military commission defendants are barred from seeking review or remedy in any court other than the military commissions themselves.[91] The issue of the independence of participants in military legal proceedings is to some extent not limited to military commissions alone. With respect to courts martial, the normal military justice system attempts to address this in two ways. First, a judge advocate (military lawyer), including a military judge serving in a court martial, is at least to some degree insulated from direct command influence by virtue of his or her position in a distinct Judge Advocate General chain of command rising up to the Judge Advocate General of the particular armed force he or she belongs to. In a military commission, the "Presiding Officer" (who is a military lawyer, though not necessarily a military judge) may also be seen as at least somewhat insulated from direct command influence for the same reason.[92]

Far more important, under the UCMJ, court martial verdicts are subject to appeal by a panel of *civilian* judges, who serve fifteen-year terms in the Court of Appeals for the Armed Forces (CAAF). From the □□□□, cases may be appealed, by writ of certiorari, to the U.S. Supreme Court. Though the CAAF is a military court and not a constitutional "Article III" court,[93] such as the civilian federal District Courts, Courts of Appeal, and Supreme Court, CAAF judges are, like judges in the regular federal courts, civilians who are appointed by the President with the advice and consent of the Senate, and they make decisions independent of the executive once appointed. (10 U.S.C. Sections 942, 967a.) It is this critical civilian judicial review component that is entirely missing from the military commission system.

Military Commission Instruction No. 10

Certain Evidentiary Determinations

Torture and Coercion

Following criticism of the current rules allowing use of evidence extracted under torture in commission proceedings, including in a brief to the Supreme Court filed by Human Rights First on behalf of a challenger to the commission proceedings, the Defense Department issued Military Commission Instruction No. 10 on March 27, 2006. The Defense Department's announcement of the new rule, on the eve of Supreme Court oral arguments in *Hamdan v. Rumsfeld*, follows a pattern of major policy concessions made at strategic junctures in litigation surrounding "enemy combatant" cases, such as the government's criminal indictment of a U.S. citizen and alleged "dirty bomber" Jose Padilla on November 22, 2005 – three business days before a key government filing in that case was due in the Supreme Court. (The indictment paved the way for Mr. Padilla's transfer into the civilian criminal justice system, bolstering the government's argument that Supreme Court review of the lawfulness of his *military* detention as "enemy combatant" was no longer needed.)[94]

Noting the "longstanding policy that the United States will neither commit nor condone torture," Military Commission Instruction No. 10 provides:

> The prosecution shall not offer any statement determined by the prosecution to have been made as a result of torture. The commission shall not admit statements established to have been made as a result of torture as evidence against an accused, except against a person accused of torture as evidence the statement was made. [95]

While the rule clarification is welcome, the new rule appears to only partially incorporate into "commission law" current U.S. and international law, which clearly prohibit use of evidence obtained through torture. [96] It also fails to address many critical matters pertaining to its application. Military Commission Instruction No. 10 does not, for example, explain the procedures for "establish[ing]" whether a statement has been made as a result of torture, including the degree of certainty that may be required for such a determination (for example, a civil litigation standard of "more likely than not," or the normal criminal standard of "beyond a reasonable doubt," or some other standard in between, such as "clear and convincing evidence"). It prohibits the prosecution from offering statements determined to result from torture, but does

not impose on the prosecution any duty to inquire whether statements it contemplates introducing may have resulted from torture, nor, apparently, any duty to provide relevant evidence used in reaching its determination to the military commission or to the defense. It is not clear whether the defense will have the right to challenge introduction of statements it believes resulted from torture, or to appeal an adverse decision on admissibility. Moreover, the rule prohibits statements obtained through torture, but does not prohibit non-testamentary evidence that may have been obtained by means of interrogation involving torture.

Even more troubling is the Instruction's failure to exclude evidence deriving from abuse or coercion falling short of torture but constituting cruel, inhuman or degrading treatment – interrogation methods equally prohibited by the Geneva Conventions and other treaties to which the United States is party, as well as the U.S. Constitution and other U.S. law, including the Detainee Treatment Act of 2005 and the UCMJ. [97]

In addition, Military Commission Instruction No. 10 by its terms is a statement of policy, not law. As with all the military commission orders, instructions and other rules, Military Commission Instruction No. 10 does not "create any right, benefit, privilege, substantive or procedural, enforceable by any party." (Military Commission Instruction No. 1, Section 6.) Accordingly, it appears that the bar on use of tortured statements can be withdrawn as easily as it was issued.

Concerns regarding use of torture and other severe abuse in Guantanamo and other U.S. detention facilities have been far from theoretical. Reports by government officials, journalists and others include accounts of Guantanamo detainees being tied to a leash and led around like dogs, forced to wear women's undergarments, stripped naked, held in isolation for months on end, and subjected to 48 of 54 consecutive days of 18-to-20 hour interrogations; subjected to sleep deprivation and forced nudity; being chained hand and foot to the floor for 18-24 hours or more without food or water, left to soil themselves, and being subjected to temperatures below freezing or well over 100 degrees; being kept for months on end in isolation in a cell that was always flooded with light; and of investigators breaking the vertebrae of a Guantanamo detainee (who was later exonerated) by stomping on his back, dropping him on the floor and repeatedly forcing his neck forward, leaving him in a wheelchair.[98]

These troubling allegations, along with the gaps left by Military Commission Instruction No. 10, pose two serious problems for the appearance and reality of fairness in the military commissions: first, possible use of the defendant's own coerced statements against him; and, second, possible use against the defendant of coerced statements of other detainees.

Section 5(F) of Military Commission Order No. 1 properly ensures the defendant's right not to testify "during trial," with no adverse inference to be taken from such a refusal. But "this subsection shall not preclude admission of evidence of prior statements or conduct of the accused." Thus, coerced confessions obtained outside the courtroom remain admissible, including without limitation against the individual who made such confessions. Under the loose "probative value" standard of evidentiary admissibility, it remains possible that defendants will be condemned with their own words, forcibly extracted over years of incommunicado detention, so long as their treatment is not established as meeting the new rule's specific standard for torture.

Defendants in courts martial under the UCMJ have much broader protection from compulsory self-incrimination. "No statement obtained from any person…through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court martial." (10 U.S.C. Section 831(d).) There is no distinction made between statements at trial and otherwise. [99]

The allegations of the so-called "Tipton Three" during interrogation in Guantanamo illustrate the putative dangers of permitting use of coerced pre-trial statements in military commissions. According to statements made after their release, former Guantanamo detainees Shafiq Rasul, Asif Iqbal, and Ruhel Ahmed reportedly "after three months of solitary confinement" 'admitted' to their U.S. captors to attending a meeting on a particular date with Osama bin Laden and Mohamed Atta, the leader of the September 11 hijackers. British intelligence agency MI5 later brought forward evidence that on the date they confessed to meeting with bin Laden and Atta, the three men were actually in the United Kingdom.[100]

This experience does not appear to have been unique. Reporters reviewing thousands of pages of newly declassified Combatant Status Review Tribunal files in March 2006 found them "replete" with such retractions. "Detainees who had confessed to having ties to Al Qaeda or the Taliban or terrorism frequently told the tribunals that they had only made those admissions to stop beatings or torture by their captors. 'The only reasons for my original statements is because I was tortured when I was captured,' said a former mechanical engineering student form Saudi Arabia who was accused of training at a Qaeda camp in Afghanistan. 'In Kabul, an Afghan interrogator beat me and told me they would kill me if I didn't talk. They shot and killed someone in front of me and said they would do the same if I didn't cooperate.'" [101]

The broad power of the Presiding Officer to deny a defendant and his civilian attorney (if any) access to "Protected Information" is likely to make it even harder for an accused to refute his own alleged confessions. A military commission defendant is unlikely to succeed in identifying or locating interrogators who may be in position to confirm under cross-examination their use of coercion to obtain his statements. But even if the defendant could do so, it can be anticipated that the prosecutor would seek – likely with success – to persuade the Presiding Officer to withhold from the defendant, as "Protected Information," the interrogator's identity and his "sources and methods" for obtaining the defendant's statements. It is indeed quite possible that even the military defense lawyer would never have a chance to question the interrogator. The written interrogation records themselves – or some redacted version of them – would presumably be admissible under the "probative value" evidentiary standard, without need for any direct witness to provide a foundation to authenticate them, or explain the circumstances in which the records were produced. (See also analysis of Military Commission Instruction No. 8, "Exculpatory Information," above.)[102]

Together, the loose "probative value" evidentiary standard and the use of secret evidence raise particularly grave concerns with respect to statements obtained from other detainees. Reports regarding the Combatant Status Review Tribunals indicate that much of the "evidence" used to inculpate detainees in those proceedings came from their own interrogations and those of other detainees.[103] Under the current rules, the fruits of coercive interrogations of third parties could be introduced as "Protected Information" in such a way that the defendant and his counsel might not even realize that it is coerced evidence. (Though proof that evidence was coerced – but not the result of torture – would not be sufficient to exclude it entirely from the proceedings,

such proof, if accessible to the defense, could presumably be admissible for purposes of challenging the credibility of that evidence.) Even if the defense had some basis to suspect that this was the case, however, it would be difficult if not impossible to prove the manner in which the evidence was obtained, since, as discussed above, information about the interrogation process itself would quite likely be deemed "protected." In short, current commission rules continue to leave open the substantial possibility that commission proceedings may be tainted by the use of coerced and intrinsically unreliable evidence – evidence the use of which in normal judicial proceedings is prohibited by U.S. and international law.

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[1] The Table includes issuance dates and revision of only the legally substantive Military Commission Orders and Military Commission Instructions. Accordingly the Table does not include purely ministerial documents such as, for example, Military Commission Order No. 2 (MCO 2), which effected the appointment on June 21, 2003 of Deputy Secretary of Defense Dr. Paul D. Wolfowitz as Appointing Authority. MCO 2 was rescinded on March 15, 2004 by Military Commission Order No. 5 on March 15, 2004.

[2] *Manual for Courts Martial* (2005 Ed.), Preamble, para. 2(b)(2), p. I-1 (p. 48 online), *available at* http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf (accessed Mar. 24, 2006). The presumption that ordinary court-martial rules will apply to military commissions is "[s]ubject to any applicable rule of international law or to any regulations prescribed by the President or by other competent authority." *See also* 10 U.S.C. § 836, which provides that "procedures…for…military commissions…may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with [the Uniform Code of Military Justice.]" The Uniform Code of Military Justice (UCMJ) is found in Chapter 47 of Title 10 of the U.S. Code, and comprises 10 U.S.C. §§ 801 to 946, *available at* http://caselaw.lp.findlaw.com/casecode/uscodes/10/subtitles/a/parts/ii/chapters/47/toc.html (accessed Mar. 24, 2006). "In the absence of any statute or regulation governing the proceedings of military commissions, the same are commonly conducted according to the rules and forms governing courts martial….[W]hile in general even less technical than a court-martial, [a military commission] will ordinarily and properly be governed, upon all important questions, by the established rules and principles of law and evidence." W. Winthrop, *Military Law and Precedents* (1896, reprint 2000), pp. 841-842.

[3] *See, e.g.*, Brief for Salim Ahmed Hamdan as Amicus Curiae, Specialists in Conspiracy and International Law in Support of Petitioner [Conspiracy – Not a Triable Offense], No. 05-184, Hamdan v. Rumsfeld (S.Ct., filed Jan. 5, 2006), *available at* http://www.hamdanvrumsfeld.com/15053HuntonBRFcomplete.pdf (accessed Mar. 24, 2006).

[4] All current Military Commission Instructions and Orders, and other related materials, are collected at http://www.defenselink.mil/news/commissions.html (accessed Mar. 24, 2006).

[5] Civilian Defense Counsel's Affidavit (annexed to Military Commission Instruction No. 5), at para. II(B).

[6] Revisions in July 2003 and February 2004 to Military Commission Instruction No. 5 provide civilian defense counsel the right to talk with other members of the Defense Department-approved defense team; with potential witnesses and people who may assist them in finding relevant evidence; and with legal experts who are not members of the defense team, though no "Protected Information" may be communicated to such individuals without prior Defense Department approval.

[7] Potentially exculpatory evidence not introduced into the proceeding may be withheld even from assigned military defense counsel. See discussion (below) of "Secret Evidence, Secret Trials"; see also discussion of Military Commission Instruction No. 8.

[8] The August 31, 2005 revision of Military Commission Order No. 1 now disallows use of secret evidence from which the defendant and civilian counsel are excluded if use of such evidence would result in denial of a "full and fair trial." § 6(D)(5)(b). If, however, the military commission determines that overall, even with secret evidence, the trial will remain "full and fair," there is no bar to use of the secret evidence.

[9] In this briefing paper, language in italics always represents author's emphasis.
[10] *See* Human Rights First, Military Commission Trial Observation, "Preview," Jan. 10, 2006, *available at* http://www.humanrightsfirst.org/us_law/detainees/gitmo_diary/post-011006.asp (accessed Mar. 24, 2006).
[11] Geneva Convention (III) Relative to the Treatment of Prisoners of War, Geneva, Aug. 12, 1949, 75 U.N.T.S. 135. The four Geneva Conventions of 1949 and the two 1977 Additional Protocols to the 1949 Conventions are available at http://www.icrc.org/ihl (accessed Mar. 24, 2006). Under the UCMJ, which governs normal courts martial, the "trial counsel [military prosecutor], the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence….Process issued in court-martial cases 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…." 10 U.S.C. § 846.
[12] By reason of the Third Geneva Convention, art. 129 and Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, Aug. 12, 1949 (Fourth Geneva Convention), 75 U.N.T.S. 287, art. 146, the provisions of Article 105 (and of Article 106 referred to below) of the Third Geneva Convention apply "[i]n all circumstances" to all "persons" accused of "grave breaches" under the Geneva Conventions; and so, even to individuals the administration determines to be ineligible for "prisoner of war" status. The secret trial features of the President's November 13, 2001 Military Order also violate the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977, for example, art. 75(4)(a) (right "to be informed without delay of the particulars of the offence alleged…[and right to] all necessary rights and means of defense"); and art. 75(4)(g) ("right to examine or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him"). Article 75 is expressly intended to protect "persons accused of war crimes or crimes against humanity…who do not benefit from more favourable treatment under the [Geneva] Conventions or this Protocol, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol." (Article 75(7).) Though the United States is not a party to Protocol I, the United States accepts Article 75 as either "legally binding as customary international law or acceptable practice though not legally binding." *See* Maj. Derek I. Grimes, ed., et al., 2005 U.S. Operational Law Handbook (Army JAG School), chap. 2, p. 15, *available at* https://www.jagcnet.army.mil/jagcnetintranet/databases/operational+law/clamo.nsf/(JAGCNetDocID)/C7719006CE434DF385256F3B006E39EA/$FILE/OpLaw%20Handbook%2005%20PDF.pdf (accessed Mar. 24, 2006).
[13] Reports by government officials, journalists and others of severe abuses at Guantanamo (and other U.S. detention facilities in Afghanistan and Iraq) have been plentiful. *See, e.g.*, Neil A. Lewis, "Red Cross Finds Detainee Abuse in Guantanamo," *New York Times*, Nov. 30, 2004 (International Committee of Red Cross charges intentional use of psychological and physical coercion "tantamount to torture" following June 2004 visit to Guantanamo; treatment included humiliating acts, solitary confinement, temperature extremes, and forced positions). *See also* discussion of Military Commission Instruction No. 8, below.
[14] President's Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism Nov. 13, 2001, Section 4(3).
[15] International Criminal Tribunal for the former Yugoslavia (ICTY) Rules of Procedure and Evidence (2005), Rules 89(C) and 95, *available at* http://www.un.org/icty/legaldoc-e/index.htm (accessed March 9, 2006); International Criminal Tribunal for Rwanda (ICTR) Rules of Procedure and Evidence (2005), Rules 89(C) and 95, *available at* http://65.18.216.88/ENGLISH/rules/070605/070605.doc (accessed March 9, 2006); Rome Statute of the International Criminal Court (ICC) (2002), Article 69((4) and (7), *available at* http://www.un.org/law/icc/statute/romefra.htm (accessed March 9, 2006).
[16] Use of evidence obtained by torture or other coercion in trials would violate the Constitution, as well as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Third and Fourth Geneva Conventions of 1949 (all of which are treaties ratified by the United States). *See generally* Brief for Salim Ahmed Hamdan as Amicus Curiae, Human Rights First and Organizations Concerned with Treatment of Torture Survivors in Support of Petitioner, No. 05-184, Hamdan v. Rumsfeld (Supreme Court, filed Jan. 6, 2006), pp. 14-24, *available at* http://www.humanrightsfirst.info/pdf/06110-etn-hamdan-ami-jan5.pdf (accessed Feb. 8, 2006).

[17] Members of the military commission are appointed by the "Appointing Authority," who is either the Secretary of Defense "or a designee." (Military Commission Order No. 1, §§2, 4(A)(1).) Members of the Review Panel are military officers appointed by the Secretary of Defense. (Military Commission Instruction No. 9, § 4.)
[18] *The Federalist* No. 47 (1788), *available at* http://memory.loc.gov/const/fed/fed_47.html (accessed March 24, 2006).
[19] 10 U.S.C. §§ 867, 942. Decisions of the Court of Appeals for the Armed Forces are subject to discretionary review (by writ of certiorari) by the Supreme Court. 10 U.S.C. § 867a.
[20] As noted above, by reason of the Third Geneva Convention, art. 129 and the Fourth Geneva Convention, art. 146, art. 106 applies "[i]n all circumstances" even to individuals the administration determines to be ineligible for "prisoner of war" status. Denial of an impartial tribunal and/or appeal is also in violation of Article 75 of Protocol I. See, *e.g.*, Article 75(4) (requiring "an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure…."); and Article 75(4)(j) (requiring that a "convicted person shall be advised on conviction of his judicial and other remedies").
[21] The Detainee Treatment Act of 2005, Pub. L. No. 109-148, enacted as title X of the Defense Appropriation Act, Sec. 1003, H.R. 2863, 109th Cong., 1st Sess. (Dec. 30, 2005) [hereinafter Detainee Treatment Act of 2005], § 1005(e)(3)(C)-(D).
[22] The administration has repeatedly argued and will certainly continue to argue that relevant international treaties do not "give rise to judicially enforceable rights." *See, e.g.*, Brief for Respondents, No. 05-184 (Supreme Court, filed February 2006), pp. 30-37, Hamdan v. Rumsfeld, *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/05-06/05-184_Respondent.pdf (accessed March 9, 2006).
[23] Military Instruction No. 1 § 4(C) does provide that failure to adhere to applicable rules and regulations (including the Military Commission Instructions) "may be subject to appropriate action" by the Secretary of Defense (or designee), the Defense Department General Counsel, or the Presiding Officer of a military commission. But § 6 denies standing to the only party likely to have a direct interest in uncovering and sanctioning such failures.
[24] The White House insisted, in November 2001, that "[[t]he [November 13 military] order preserves judicial review in civilian courts. Under the order, anyone arrested, detained or tried in the United States by a military commission will be able to challenge the lawfulness of the commission's jurisdiction through a habeas corpus proceeding in a federal court." Alberto R. Gonzales, "Martial Justice, Full and Fair," *New York Times*, Nov. 30, 2001. But since then the administration has forcefully maintained that "unlawful combatant" detainees in Guantánamo have no right to be heard in a U.S. court, and has never indicated the slightest intent to hold military commission trials within the territorial United States. The Supreme Court, however, held in *Rasul v. Bush* that detainees at Guantanamo Bay may challenge the lawfulness of their detention in U.S. courts. 542 U.S. 466 (2004).
[25] Alberto R. Gonzales, "Martial Justice, Full and Fair," *New York Times*, Nov. 30, 2001.
[26] Ibid.
[27] This is not true for the crimes "Perjury or False Testimony" and "Obstruction of Justice Related to Military Commissions."
[28] The first five of these offenses are particularly problematic from this point of view. (Arguably, the latter two offenses might be considered to fall under some form of inherent ancillary jurisdiction of the tribunal to address violations against itself.)
[29] Alberto R. Gonzales, "Martial Justice, Full and Fair," *New York Times*, Nov. 30, 2001.
[30] Third Geneva Convention, art. 2.
[31] Rome Statute of the International Criminal Court, art. 8(2)(f), available at http://www.un.org/law/icc/statute/romefra.htm (accessed Mar. 24, 2006). The Rome Statute language largely derives from Article 1(2) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977. (Protocol II does "not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.") Though the United States has not ratified Protocol II, it has accepted all of Protocol II as legally "binding customary international law." *Law of War Workshop Deskbook* (Army JAG School 2000), chap. 3, p. 8, *available at*

http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset ("TJAGCLS Publications") (accessed Mar. 24, 2006).

[32] In June 2004, an F.B.I. representative reportedly "appealed to an industry group for help in combating what, he told the audience, the F.B.I. regards as the country's leading domestic terrorist threat: ecological and animal rights extremists." Paul Krugman, "Noonday in the Shade," *New York Times*, June 22, 2004.

[33] *See* Mark Fazlollah, "Reports of Terror Crimes Inflated," *Philadelphia Inquirer*, May 15, 2003. *See also* Thomas Ginsberg, "The War on…Liberty?" *Philadelphia Inquirer*, June 15, 2003: "The Government… has labeled hundreds…as 'terrorists' or 'unlawful combatants' who before 9/11 would have been treated as common criminals, illegal immigrants or enemy soldiers. Last year [2002], 60 Middle Eastern students were convicted of cheating on college English-equivalency tests. The Justice Department counted them among 174 'international terrorism' cases. In January, the General Accounting Office said three-fourths of these were in fact nonterrorism convictions."

[34] Lance Gay, "Post-9/11 Laws Expand to More than Terrorism," *Scripps-Howard News Service*, June 14, 2004. *See also* "Narrowing the Field," *Wash. Post*, June 12, 2005, *available at* http://www.washingtonpost.com/wp-srv/nation/daily/graphics/naterrorism_061205.html (accessed Mar. 24, 2006) (" Fewer than half of the 330 suspects on a Justice Department list of terrorism prosecutions have a demonstrated connection to terrorism or terrorism groups, according to an analysis by *The Washington Post*. Only 39 have been convicted of terrorism or national security crimes.")

[35] Military Commission Instruction No. 2, § 5(B).

[36] *See, e.g.*, 18 U.S.C. §§ 2331-2339B (section of criminal code defining crime of terrorism and related crimes, for trial in *civilian* courts).

[37] *See, e.g.*, Brief for Petitioner, No. 03-1027, Rumsfeld v. Padilla (Supreme Court, filed March 2004), pp. 33 and 47, *available at* http://www.humanrightsfirst.org/us_law/inthecourts/padilla_briefs/Supreme_Court/Merits_Stage/Government_brief.pdf (accessed Mar. 24, 2006) ("'Citizenship in the United States of an enemy belligerent does not relieve him of the consequences of [his] belligerency.'….[A]ll enemy combatants are 'subject to capture and detention…by opposing military forces,' but…unlawful combatants are '*in addition* subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.'" (Original emphasis.) (Omitted internal citations are to *Ex Parte Quirin*, 317 U.S. 1, 31, 37 (1942). In *Quirin*, the Supreme Court upheld the jurisdiction of a military commission to try eight German army soldiers, including one U.S. citizen, for violations of the law of war.)

[38] This principle, however, seems to be contradicted on its face by inclusion within Military Commission Instruction No. 2 of the category of "Other Offenses Triable by Military Commission" (see discussion above).

[39] 10 U.S.C. § 942(b)(1). Decisions of the Court of Appeals for the Armed Forces are also subject to Supreme Court review by writ of certiorari. 10 U.S.C. § 867a(a).

[40] Where the definitions do not broaden but, rather, narrow jurisdiction, by comparison with international law, they tend to undermine rather than affirm international standards. For example:

"Torture." With regard to "Torture," the definition of "severe mental pain or suffering" contains the requirement (absent from international law) that the mental harm be "*prolonged*" (§ 6(A)(11));

"Rape." The crime of "Rape" requires that the bodily invasion be committed by use or threat of force or coercion (or be inflicted upon a "person incapable of giving consent"); more in tune with current international law would be a standard turning on lack of consent (for example, where coercion may be implicit); suggestions to incorporate this concept were rejected. § 6(A)(18).

[41] 18 U.S.C. § 1503.

[42] *See, e.g.*, Brief for Salim Ahmed Hamdan as Amicus Curiae, Specialists in Conspiracy and International Law in Support of Petitioner [Conspiracy – Not a Triable Offense], No. 05-184, Hamdan v. Rumsfeld (Supreme Court, Jan. 5, 2006), *available at* http://www.hamdanvrumsfeld.com/15053HuntonBRFcomplete.pdf (accessed Mar. 24, 2006).

"The laws of war simply do not include for the crime of conspiratorial agreement. Nor do they permit the expansion of liability to include sub-conspiratorial forms of identifying with or 'joining' criminal organizations." Ibid. at 29-30.

[43] In addition, the final version does not reflect our suggestion to include recognition, as formulated by the American Law Institute, that "[e]vidence that the defendant suffered from a mental disease or defect is admissible *whenever it is relevant* to prove that the defendant did or did not have a state of mind that is an element of the offense," American Law Institute, Model Penal Code (1962), § 4.02(1).
[44] At least three of the Guantánamo detainees were known to have been younger than 16. Carlotta Gall and Neil A. Lewis, "Inmates Released from Guantanamo Tell Tales of Despair," *New York Times*, June 17, 2003. In fact, one current defendant, Omar Ahmed Khadr, was not quite 16 years old at the time of his alleged crimes. Khadr faces the most serious charge of all the military commission defendants to date: murder by an unprivileged belligerent. *See* Charge Sheet of Omar Ahmed Khadr (Nov. 4, 2005), *available at* http://www.defenselink.mil/news/Nov2005/d20051104khadr.pdf (accessed February 15, 2006). Under the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, ratified by the United States in December 2002, individuals under the age of 18 are deemed to be "children". The Optional Protocol is available at http://www.unhchr.ch/html/menu2/6/crc/treaties/opac.htm (accessed February 15, 2006).
[45] The "Appointing Authority" is the Secretary of Defense or a designee. Military Commission Order No. 1, § 2.
[46] Human Rights First, Military Commission Trial Observations, "The Guantanamo Spin Zone" Jan. 13, 2006, *available at* http://www.humanrightsfirst.org/us_law/detainees/gitmo_diary/post-011306.asp (accessed Mar. 29, 2006).
[47] Section 3(B)(10) mandates the Chief Defense Counsel to *"ensure that Defense Counsel do not enter into agreements with other Accused or Defense Counsel that might cause them or the Accused they represent to incur an obligation of confidentiality with such other Accused or Defense Counsel or to effect some other impediment to representation."* See also § 5(A). The ethical propriety of Common Interest Arrangements, and the reciprocal relation of privilege established by them between one defendant and his lawyer and the other defendant and his lawyer, is well established. *See, e.g.*, American Law Institute's Restatement of the Law Governing Lawyers (2000), § 76, which provides: "(1) If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged under sections 68-72 that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication."
[48] On Jan. 11, 2006, the Presiding Officer in the military commission trying Ali Hamza Ahmed Sulayman al Bahlul ruled that the defendant would not be permitted to defend himself. See Human Rights First Military Commission Trial Observation, "Boycott – United States v. Al Bahlul," Jan. 12, 2006, *available at* http://www.humanrightsfirst.org/us_law/detainees/gitmo_diary/post-011206.asp (accessed February 8, 2006). The Defense Department has posted a collection of motions and other documents relating to military counsel's request to withdraw from the case at http://www.defenselink.mil/news/Dec2004/commissions_motions_albahlul.html and http://www.defenselink.mil/news/Presiding_alBahlul.html (accessed February 8, 2006).
[49] See, *e.g.*, Military Commission Order No. 3, § 4(a), authorizing "communications monitoring" upon the relevant commander's "determination that such monitoring may prevent communications aimed at furthering or facilitating terrorist operations or other illegal acts." Advance notice of such monitoring is to be provided to the Detailed Defense Counsel and the Civilian Defense Counsel, who "*may*, in turn, notify the individual with whom they are communicating". While Military Commission Order No. 3, § 4(F) does provide that information obtained from monitoring shall not be used in proceedings against the individual who made or received the relevant communication, nor disclosed to prosecution personnel working on that individual's case, defendants may be wary of such assurances. In any case, monitored information may be used in prosecuting other military commission cases.
[50] Human Rights First, Military Commission Trial Observation, "Flaws in the Process and Dracula?" Mar. 1, 2006, *available at* http://www.humanrightsfirst.org/us_law/detainees/gitmo_diary/post-030106-patel.asp (accessed Mar. 6, 2006).
[51] *See* Thomas Wilner, "American Gulag," *Los Angeles Times*, Feb. 26, 2006, *available at* http://www.latimes.com/news/opinion/commentary/la-op-wilner26feb26,0,1383538.story?coll=la-home-commentary (accessed Mar. 6, 2006) (Wilner, civilian attorney for a group of Kuwaiti detainees at

Guantanamo, reporting that several of his clients were initially suspicious of him because they "had been interrogated by people claiming to be their lawyers, but who turned out not to be").

[52] The qualification conditions set out in Military Commission Order No. 1 are elaborated on in Military Commission Instruction No. 5: Qualification of Civilian Defense Counsel, discussed below. "Civilian attorneys may be prequalified as members of the pool of attorneys eligible to represent Accused before military commissions at no expense to the United States, if, at the time of application, they meet the eligibility criteria…[as] detailed in [Military Commission Instruction No. 5], or they may be qualified on an *ad hoc* basis after being requested by an accused." Military Commission Instruction No. 5, § 3(A)(1).

[53] [Defense] Memorandum of Law: Right to Self-Representation; Right to Counsel of Choice, p. 2, U.S. v. al-Bahlul, Military Commission, Sept. 2, 2004 *available at* http://www.defenselink.mil/news/Sep2004/d20040917Selfrep.pdf (accessed February 8, 2006); *see also* Human Rights First Military Commission Trial Observation, "Boycott – United States v. Al Bahlul," Jan. 12, 2006, *available at* http://www.humanrightsfirst.org/us_law/detainees/gitmo_diary/post-011206.asp (accessed Feb. 8, 2006).

[54] Human Rights First, Military Commission Trial Observations, "Boycott - United States v. Al Bahlul" Jan. 12, 2006, *available at* http://www.humanrightsfirst.org/us_law/detainees/gitmo_diary/post-011206.asp (accessed Mar. 29, 2006).

[55] Alberto R. Gonzales, (then) Counsel to President Bush, "Martial Justice, Full and Fair," *New York Times*, Nov. 30, 2001.

[56] Military Commission Order No. 1, § 9, ensures that "state secrets" shall not be disclosed to "any person not authorized to receive them."

[57] Military Commission Instruction No. 3, § 5(C) imposes similar communications restrictions only upon "[p]ersonnel assigned to the Office of the Chief Prosecutor."

[58] The Defense Department has announced that it will waive payment by Civilian Defense Counsel of the cost of a "top secret" clearance (estimated at $2,500), but require Civilian Defense Counsel to pay the cost of a lower level "secret" clearance" (estimated $200). *See* Dep't of Defense, "New Military Commission Orders, Annex Issued," news release, Feb. 6, 2004, *available at* http://www.defenselink.mil/releases/2004/nr20040206-0331.html (accessed Mar. 24, 2006); and Kevin J. Barry, Grant E. Lattin and Eugene R. Fidell, "Discussion of February 6, 2004 Revision of Annex B (Affidavit and Agreement by Civilian Defense Counsel), Military Commission Instruction No. 5 (Qualification of Civilian Defense Counsel)," Mar. 17, 2004, *available at* http://www.justicescholars.org/pegc/archive/Organizations/NIMJ_Disc_20040206_Rev_Annex_B.doc (accessed Mar. 24, 2006) .

[59] This language, from the most recent (Feb. 5, 2004) revision of para. II(B) of the Civilian Defense Counsel's Affidavit (annexed to Military Commission Instruction No. 5), is a significant improvement over the language of the July 2003 version, which had required the Civilian Defense Counsel to agree ahead of time not even to "seek to delay or to continue the proceedings for reasons relating to matters that arise in the course of [his or her] law practice or other professional or personal activities that are not related to military commission proceedings."

[60] Civilian Defense Counsel must agree to "make no claim against the U.S. Government for any fees or costs associated with [their] conduct of the defense or related activities or efforts." Para. II(C).

[61] Military Commission Instruction No. 4, § 3(D)(2).

[62] With this provision, the revised version of Military Commission Instruction No. 5 loosened the original issued version's blanket prohibition of communications with anyone outside the Defense Team. Though on a strict reading, "other legal professionals" would not seem to fall under any of the four categories listed in (a) through (d), the intention does seem clear to permit non-privileged consultations with legal experts, who will not be entitled to receive Protected Information.

[63] Section 4(A). Broad as this language is, the corresponding provision in the original (February 5, 2004) version of Military Commission Order No. 3 was even more expansive, permitting monitoring upon a determination that it is "(1) likely to produce information *for security or intelligence purposes* (including information related to the conduct, furtherance, facilitation, or prevention of future terrorist or other illegal acts) or (2) may prevent communications aimed at facilitating terrorist operations." Military Commission Order No. 3 § 4 (Feb. 5, 2004 version), *available at*

http://www.defenselink.mil/news/Feb2004/d20040206ord3.pdf (accessed February 8, 2006). The new language appears intended to tie the rationale somewhat more closely to an actual criminal plan or purpose.

[64] Some legal ethics codes also include provisions permitting disclosure of confidences to avoid serious economic harms, when the lawyer's services are being used to further the offense. *See, e.g.*, American Bar Association, Model Rules of Professional Conduct (2004), Rule 1.6, *available at* http://www.law.cornell.edu/ethics/aba/current/ABA_CODE.HTM (accessed Mar. 6, 2006). Rule 1.6(b) provides:

> A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
> (1) to prevent reasonably certain death or substantial bodily harm;
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.

[65] State ethics code provisions containing some kind of *mandatory* disclosure rule to prevent serious physical injury or death include: Arizona Rules of Professional Conduct (2004), Rule 1.6(b), *available at* http://www.law.cornell.edu/ethics/az/code/AZ_CODE.HTM#ER_1.6 (accessed Mar. 6, 2006); Illinois Rules of Professional conduct (2002), Rule 1.6(b), *available at* http://www.law.cornell.edu/ethics/il/code/IL_CODE.HTM#Rule_1.6 (accessed Mar. 6, 2006); and Texas Disciplinary Rules of Professional Conduct (2002), Rule 1.05(e), *available at* http://www.law.cornell.edu/ethics/tx/code/TX_CODE.HTM#Rule_1.05 (accessed Mar. 6, 2006).

[66] See discussion of Military Commission Instruction No. 9 below.

[67] As of Mar. 15, 2004, the Appointing Authority is Major General John D. Altenburg, Jr. (Ret.). *See* Military Commission Order No. 5, Mar. 15, 2004, *available at* http://www.defenselink.mil/news/Mar2004/d20040317ord5.pdf (accessed Mar. 24, 2006).

[68] By contrast, while rules for courts martial accord with the two-thirds vote requirement for military commission convictions and sentences in most cases, courts martial require (1) minimum of five voting members, (2) three-quarters vote for any sentence of confinement for life or longer than ten years, and (3) unanimous vote of a twelve-member court-martial for a sentence of death (unless twelve members are "not reasonably available"). 10 U.S.C. § 852; Executive Order: 2005 Amendments to the Manual for Courts Martial, United States, amendment to Rule 501(a)(1) of Rules for Courts Martial (October 14, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/10/20051014-1.html (accessed Feb. 8, 2006).

[69] No such standards have been issued as of March 24, 2006.

[70] In addition, procedures regarding certification of interlocutory questions to the Appointing Authority are set forth in Appointing Authority Regulation No. 2, Trial Procedures, Jan. 26, 2006, *available at* http://www.defenselink.mil/news/Feb2006/d20060214trial.pdf (accessed Mar. 8, 2006).

[71] A military judge is a military lawyer who has been specially "certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member." 10 U.S.C. § 826.

[72] Military Order of November 13, 2001, § 4(3).

[73] In Section 1(F) of the Nov. 13, 2001 Military Order, President Bush does in fact recite as a broad formal "Finding" that "consistent with section 836 of title 10, United States Code…it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." The Order makes no attempt to justify this blanket conclusion, nor does it specify whether and to what extent any particular such "principles of law and rules of evidence" might actually be "practicable" even in trials of terrorist suspects subject to the Order.

[74] Military Rules of Evidence, Rules 301 to 321 cover "Exclusionary Rules and Related Matters Concerning Self-Incrimination, Search and Seizure, and Eyewitness Identification"; Rules 401 to 414 explain "Relevancy and its Limits"; Rules 501 to 513 cover privileges; Rules 601 to 615 cover use of witnesses; Rules 701 to 707 cover "Opinions and Expert Testimony"; Rules 801 to 807 cover "Hearsay";

and Rules 901 to 1008 deal with authentication and similar issues relating to documents, recordings and photographs. Military Rules of Evidence, in *Manual For Courts Martial* (2005 Ed.), *available at* http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf (accessed Mar. 8, 2006).

[75] *See generally* Federal Rules of Evidence, Rule 801(C) (2006); Federal Rules of Evidence, Rule 804 (2006).

[76] *See* Human Rights First, Military Commission Trial Observations, "Flaws in the Process and Dracula?" Mar. 1, 2006, and "Not Full and Fair," Mar. 2, 2006, *available at* http://humanrightsfirst.org/us_law/detainees/gitmo_diary/post-030206-patel.asp (accessed Mar. 4, 2006).

[77] Military Rules of Evidence, Rule 505(a), in *Manual for Courts Martial* (2005 Ed.), *available at* http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf (accessed Mar. 8, 2006).

[78] Military Rules of Evidence, Rule 506(a).

[79] Military Rules of Evidence, Rule 507(a).

[80] Military Rules of Evidence, Rule 505(i)(B) – (E) sets forth in the procedures for determining alternatives to full disclosure and the regime of possible sanctions when the government denies disclosure of evidence found to be "necessary to afford the accused a fair trial." Rules 506(i) and (j) contain parallel procedures and sanctions applicable to other secret government information. Under Rule 507, there is no privilege for an informant's identity if the informant is called as a witness for the prosecution; in other circumstances, involving unidentified informants, the military judge "may dismiss the charge or specifications or both to which the information regarding the informant would relate if the military judge determines that further proceedings would materially prejudice a substantial right of the accused."

[81] 10 U.S.C. §§ 942, 867a.

[82] *See* Declaration of James R. Crisfield, Jr., Mustafa Aid Idr v. George W. Bush (D.D.C. Oct. 26, 2004) (No. 04-CV-1166 (RJL)), *available at* http://wid.ap.org/documents/detainees/idr.pdf (accessed Mar. 8, 2006). A heavily redacted portion of the Combatant Status Review file is attached to this Declaration.

[83] Military Commission Order No. 1, § 7(B) establishes that that Order prevails in the event of any inconsistency between it and any subsequent regulations and instructions.

[84] Commenting on the Mar. 21, 2002 Military Commission Order No. 1 § 6(D)(5)(b), the National Institute of Military Justice notes that "Allowing an accused to be convicted on the basis of information he or she has not seen raises concerns under the Sixth Amendment's Confrontation Clause. The military courts have long held that the Confrontation Clause applies to trials by court-martial." National Institute of Military Justice, *Annotated Guide, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism* (2002), pp. 58-59 (citations omitted).

[85] *See* "Announcements of Key Personnel for Military Commissions; Issuance of Military Commission Instruction No. 9 on Military Commissions Review Panel," Department of Defense News Transcript, Dec. 30, 2003, *available at* http://www.defenselink.mil/transcripts/2003/tr20031230-1081.html (accessed Mar. 24, 2006). Judge Bell and Mr. Coleman had both served as outside consultants to the Defense Department when plans for the military commissions were being developed at the end of 2001. See "Testimony Before the Senate Armed Services Committee on Military Commissions," Dec. 12, 2001 (Testimony of Deputy Secretary of Defense Paul Wolfowitz), *available at* http://www.dod.gov/speeches/2001/s20011212-depsecdef1.html (accessed February 14, 2006). Though more than two years have now passed since their appointment, the four are still, as of March 2006, listed on the Defense Department website as Review Panel members. See Military Commissions Biographies, *available at* http://www.defenselink.mil/news/Aug2004/commissions_biographies.html (accessed March 9, 2006). No new appointments have been announced.

[86] There appears to be no provision in the rules for even discretionary submission of *amicus* briefs at the trial level.

[87] Identical language is also at Military Commission Order No. 1, § 6(H)(5).

[88] Identical language is also at Military Commission Order No. 1, § 6(H)(6).

[89] On the one hand, the President's decision (or the Defense Secretary's, if he is designated 'final decision maker') is "final," yet on the other hand, the rules state that "an *authenticated finding* of Not Guilty as to a charge shall not be changed to a finding of Guilty" – without providing any definition of "authenticated." (Military Commission Instruction No. 9, § 6; Military Commission Order No. 1, § 6(H)(2) and (6).) If "authenticated" simply means the same as "final," then the President would not appear to be restricted in

his options for final disposition of the case, which would not become "final" until the President has acted. If, however, a military commission's "finding" may become "authenticated" at some stage before the President's "final decision," the President may not change such an "authenticated finding of Not Guilty…to a finding of Guilty." Even in such a circumstance, however, there would appear to be no restriction on the President's revising a sentence adversely to the defendant.

[90] The quoted language regarding appropriateness of the sentence is incorporated by reference to Military Commission Order No. 1, § 6(G). That Section would also mandate reversal of a death sentence unless it approved by a panel of seven or more officers, not counting the Presiding Officer.

[91] As discussed above, however, the administration's efforts to insulate the military commission system entirely from civilian judicial review has not been completely successful. See discussion of *Hamdan v. Rumsfeld* and of the Detainee Treatment Act of 2005, above at pp. 5-6.

[92] With regard to the other non-military lawyer commission members, the rules expressly specify that they "shall continue to report to their parent commands….[and that] consideration or evaluation of the performance of duty as a member of a military commission is prohibited in preparing effectiveness, fitness, or evaluation reports of a commission member." Military Commission Instruction No. 6, § 3(B)(10).

[93] U.S. Constitution art. III § 1 provides that "[t]he judicial Power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office."

[94] Andrew Zajaz, "U.S. Indicts Padilla," *Chicago Tribune*, November 23, 2005. Mr. Padilla's petition for certiorari remains pending as of March 29, 2006. In the case of the other U.S. citizen held as an "enemy combatant," in September 2004, the government agreed to release Yaser Hamdi without charge and deport him to Saudi Arabia rather than bring him before a federal court where he could challenge his classification as an "enemy combatant," as the Supreme Court had ordered the previous June. Michael Isikoff and Mark Hosenball, "Out of the Brig," *Newsweek*, September 15, 2004, available at http://www.msnbc.msn.com/id/6012286/site/newsweek/ (accessed March 29, 2006); *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004). The government's earlier decision to permit Mr. Hamdi, for the first time, to meet with his lawyers, had been announced the evening before the government filed its brief opposing Supreme Court review of the case. Jerry Markon and Dann Eggen, "U.S. Allows Lawyer for Citizen Held as 'Enemy Combatant,' Reversal Comes on Eve of Court Filing," *Washington Post*, March 3, 2003, available at http://www.washingtonpost.com/wp-dyn/articles/A29796-2003Dec2.html (accessed March 29, 2006).

[95] Military Commission Instruction No. 10, § 3(A). The rule defines "torture" in substantially similar terms as Military Commission Instruction No. 2, § (6)(A)(11) . That language, in turn, tracks the federal criminal torture statute, 18 U.S.C. § 2340.

[96] "There have been, and are now, certain foreign nations with governments…which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government." *Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944) (confession inculpating self and co-defendant obtained after thirty-six hours of incommunicado continuous interrogation in police custody unconstitutional violation of due process, voiding both convictions). The United States is also party to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, G.A. Res. 39/46, 39 UN GAOR Supp. No. 51, at 197, UN Doc. A/RES/39/708 (1984), *entered into force* June 26, 1987, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (1984), *as modified*, 24 I.L.M. 535,which prohibits, in Article 15, the use of "any statement which is established to have been made as a result of torture…in any proceedings." *See generally* Brief for Salim Ahmed Hamdan as Amicus Curiae, Human Rights First and Organizations Concerned with Treatment of Torture Survivors in Support of Petitioner, No. 05-184, Hamdan v. Rumsfeld (Supreme Court, filed Jan. 6, 2006) pp. 14-24 (arguing that military commission rules that permit use of evidence derived from torture or other cruel, inhuman or degrading treatment violate U.S. Constitution and

applicable international treaties), *available at* http://www.humanrightsfirst.info/pdf/06110-etn-hamdan-ami-jan5.pdf (accessed February 15, 2006).

[97] The Geneva Conventions have repeated prohibitions of coercion and other cruel treatment. Article 17 of the Third Geneva Convention, for example, provides that "[n]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever." The Fourth Geneva Convention has similar language in art. 31. *See also* Third Geneva Convention, arts. 3, 13, and 99; Fourth Geneva Convention, arts. 3, 5, 27, and 32. Section 1003 of the Detainee Treatment Act of 2005 expressly prohibits infliction of "cruel, inhuman or degrading treatment or punishment" upon any "individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location." Section 831 of the UCMJ prohibits "compel[led]" self-incrimination of "any person"; and Section 893 prohibits military personnel from committing "cruelty toward, or oppression or maltreatment of, any person subject to [their] orders." *See generally* Brief for Salim Ahmed Hamdan as Amicus Curiae, Human Rights First and Organizations Concerned with Treatment of Torture Survivors in Support of Petitioner, No. 05-184, Hamdan v. Rumsfeld (Supreme Court, filed Jan. 6, 2006), pp. 14-24 (arguing that military commission rules that permit use of evidence derived from torture or other cruel, inhuman or degrading treatment violates U.S. Constitution and applicable international treaties), *available at* http://www.humanrightsfirst.info/pdf/06110-etn-hamdan-ami-jan5.pdf (accessed Feb. 8, 2006).

[98] *See* Brief for Salim Ahmed Hamdan as Amicus Curiae, Human Rights First and Organizations Concerned with Treatment of Torture Survivors in Support of Petitioner, No. 05-184, Hamdan v. Rumsfeld, (Supreme Court, filed Jan. 6, 2006), pp. 26-29, *available at* http://www.humanrightsfirst.info/pdf/06110-etn-hamdan-ami-jan5.pdf (accessed Feb. 8, 2006).

[99] Section 831(a) of the UCMJ provides that "[n]o person subject to this chapter may compel *any person* to incriminate himself or to answer any question the answer to which may tend to incriminate him." (Emphasis added.) This prohibition is not limited to trial proceedings. Because the category of "persons subject to this chapter" includes, among others, all "[m]embers of a regular component of the armed forces…and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces," this prohibition would appear to cover all military interrogators, regardless of the status of the individual being interrogated. 10 U.S.C. § 802.

[100] Tania Branigan, "Ministers Face New Action Over Camp Delta Britons," *Guardian*, Mar. 15, 2004. Also charged detainee Salim Ahmed Hamdan has given a sworn statement indicating he was abused by U.S. armed forces in Afghanistan and is suffering at Guantanamo Bay. Declaration of Charles P. Schmitz, Ph.D., Swift v. Rumsfeld (W.D. Was. February 9, 2004) (No. CV04-0777) (translating Hamdan's deposition). A psychiatrist, who swore out a declaration regarding the mental state of Mr. Hamdan, stated: "the conditions of his confinement make Mr. Hamdan particularly susceptible to mental coercion and false confession in conjunction with his case." Declaration of Daryl Matthews, M.D., Ph.D., Para. 14, Swift v. Rumsfeld (W.D. Was. Mar. 31, 2004) (No. CV04-0777).

[101] Tim Golden, "Voices Baffled, Brash and Irate in Guantanamo," *New York Times*, Mar. 6, 2006 (describing newly declassified records of Combatant Status Review Tribunal hearings).

[102] Section 6(B) of Military Commission Instruction No. 8 and § 5(E) of Military Commission Order No. 1 both require the prosecution to provide the Defense "evidence known to the Prosecution that tends to exculpate the Accused" – but *only* "to the extent consistent with national security, law enforcement interests, and applicable law." Military Commission Order No. 1, § 6(D)(5)(b).

[103] *See e.g.*, Corine Hegland, "Who Is at Guantanamo Bay," *National Journal*, Feb. 3, 2006. "False confessions and false accusations are rampant [at Guantanamo], according to the lawyers and the Defense Department records….One prisoner at Guantanamo, for example, has made accusations against more than 60 of his fellow inmates…more than 10 percent of Guantanamo's entire prison population." Hegland's conclusions are based on a "detailed review of government files on 132 [Guantanamo] prisoners who have asked the courts for help [in habeas corpus proceedings], and a thorough reading of heavily censored transcripts from the Combatant Status Review Tribunals conducted in Guantanamo for 314 prisoners." Corine Hegland, "Empty Evidence," *National Journal*, Feb. 3, 2006.