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Comparison of Rights in Military Commission Trials and Trials in Federal Criminal Court

Updated March 21, 2014

Congressional Research Service

<https://crsreports.congress.gov>

R40932

Summary

The renewal of military commission proceedings against Khalid Sheik Mohammad and four others for their alleged involvement in the 9/11 terrorist attacks has focused renewed attention on the differences between trials in federal court and those conducted by military commission. The decision to try the defendants in military court required a reversal in policy by the Obama Administration, which had publicly announced in November 2009 its plans to transfer the five detainees from the U.S. Naval Station in Guantanamo Bay, Cuba, into the United States to stand trial in the U.S. District Court for the Southern District of New York for criminal offenses related to the 9/11 attacks. The Administration's plans to try these and possibly other Guantanamo detainees in federal court proved controversial, and Congress responded by enacting funding restrictions which effectively barred any non-citizen held at Guantanamo from being transferred into the United States. These restrictions, which have been extended for the duration of FY2014, effectively make military commissions the only viable option for trying detainees held at Guantanamo for the foreseeable future, and have resulted in the Administration choosing to reintroduce charges against Mohammed and his co-defendants before a military commission.

While military commission proceedings have been instituted against some suspected enemy belligerents held at Guantanamo, the Obama Administration has opted to bring charges in federal criminal court against terrorist suspects arrested in the United States, as well as some terrorist suspects who were taken into U.S. custody abroad but who were not transferred to Guantanamo. Some who oppose the use of federal criminal courts argue that bringing detainees to the United States for trial poses a security threat and risks disclosing classified information, or could result in the acquittal of persons who are guilty. Others have praised the efficacy and fairness of the federal court system and have argued that it is suitable for trying terrorist suspects and wartime detainees, and have also voiced confidence in the courts' ability to protect national security while achieving justice that will be perceived as such among U.S. allies abroad. Some continue to object to the trials of detainees by military commission, despite the amendments Congress enacted as part of the Military Commissions Act of 2009 (MCA), P.L. 111-84, because they say it demonstrates a less than full commitment to justice or that it casts doubt on the strength of the government's case against those detainees. Others question the continued viability of military commissions in light of the recent appellate court decision invalidating the offense of material support of terrorism as to conduct occurring prior to the 2006 enactment of the MCA (*Hamdan v. United States*).

This report provides a brief summary of legal issues raised by the choice of forum for trying accused terrorists and a chart comparing selected military commissions rules under the Military Commissions Act, as amended, to the corresponding rules that apply in federal court. The chart follows the same order and format used in CRS Report RL31262, *Selected Procedural Safeguards in Federal, Military, and International Courts*, to facilitate comparison with safeguards provided in international criminal tribunals. For similar charts comparing military commissions as envisioned under the MCA, as originally passed in 2006, to the rules that had been established by the Department of Defense (DOD) for military commissions and to general military courts-martial conducted under the Uniform Code of Military Justice (UCMJ), see CRS Report RL33688, *The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military Justice*, by Jennifer K. Elsea.

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Introduction

The renewal of military commission proceedings against Khalid Sheik Mohammad and four others for their alleged involvement in the 9/11 terrorist attacks has focused renewed attention on the differences between trials in federal court and those conducted by military commission. The decision to try the defendants in military court required a reversal in policy by the Obama Administration, which had publicly announced in November 2009 its plans to transfer the five detainees from the U.S. Naval Station in Guantanamo Bay, Cuba, into the United States to stand trial in the U.S. District Court for the Southern District of New York for criminal offenses related to the 9/11 attacks. The Administration's plans to try some Guantanamo detainees in federal civilian court proved controversial, and Congress responded by enacting funding restrictions which barred any non-citizen held at Guantanamo from being transferred into the United States for any purpose, including prosecution.¹ These restrictions, which have been extended for the duration of FY2014,² effectively make military commissions the only viable option for trying detainees held at Guantanamo for the foreseeable future, and have resulted in the Administration choosing to reintroduce charges against Mohammed and his co-defendants before a military commission.

While military commission proceedings have been instituted against a number of suspected enemy belligerents held at Guantanamo,³ the Obama Administration has opted to bring charges in federal criminal court against many terrorist suspects held at locations other than Guantanamo. On July 5, 2011, Somali national Ahmed Abdulkadir Warsame was brought to the United States to face terrorism-related charges in a civilian court, after having reportedly been detained on a U.S. naval vessel for two months for interrogation by military and intelligence personnel.⁴ Some argued that Warsame should have remained in military custody abroad and face trial before a military commission, while others argued that he should have been transferred to civilian custody immediately. Similar controversy also arose regarding the arrest by U.S. civil authorities and subsequent prosecution of Umar Farouk Abdulmutallab and Faisal Shahzad, who some argued should have been detained and interrogated by military authorities and tried by military commission.⁵

¹ E.g., Ike Skelton National Defense Authorization Act for FY2011 (2011 NDAA), P.L. 111-383, §1032 (barring military funds from being used to transfer or assist in the transfer of Guantanamo detainees into the United States); Department of Defense and Full-Year Continuing Appropriations Act, 2011, (2011 CAA), P.L. 112-10, §1112 (applying to funds appropriating under the act or any other measure); National Defense Authorization Act for FY2012 (2012 NDAA), P.L. 112-81, §1026 (applying to funds authorized to be appropriated or otherwise made available to the Department of Defense for FY2012); Consolidated and Further Continuing Appropriations Act, 2012 (2012 Minibus), P.L. 112-55, §532 (providing that "[n]one of the funds appropriated or otherwise made available in this or any other Act may be used to transfer, release, or assist in the transfer or release to or within the United States, its territories, or possessions" any detainee held at Guantanamo); Consolidated Appropriations Act, 2012 (2012 CAA), P.L. 112-74, Div. A, §8119, Div. H, §511 (similar). For further discussion, see CRS Report R42143, *The National Defense Authorization Act for FY2012 and Beyond: Detainee Matters*, by Jennifer K. Elsea and Michael John Garcia.

² P.L. 113-66 §1034. Current funding restrictions only apply to the transfer of detainees held at Guantanamo. They do not bar wartime detainees held by the United States in Afghanistan or other locations from being brought into the United States, including potentially in order to face trial in federal court.

³ For information about the status of military commissions cases, visit the Office of Military Commissions website at <http://www.mc.mil/CASES/MilitaryCommissions.aspx>.

⁴ Peter Finn and Karen DeYoung, *In Detention Case, a Blend of Two Systems*, WASH. POST, July 6, 2011, at A02, available at http://www.washingtonpost.com/national/national-security/in-somali-terror-suspects-case-administration-blends-military-civilian-systems/2011/07/06/gIQAQ4AJ1H_story.html.

⁵ Umar Farouk Abdulmutallab is a Nigerian national accused of trying to destroy an airliner traveling from Amsterdam

This report provides a brief summary of legal issues raised by the choice of forum for trying accused terrorists and a chart comparing authorities and composition of the federal courts to those of military commissions. A second chart compares selected military commissions rules under the Military Commissions Act (MCA), as amended by the Military Commissions Act of 2009, to the corresponding rules that apply in federal court. This chart follows the same order and format used in CRS Report RL31262, *Selected Procedural Safeguards in Federal, Military, and International Courts*, to facilitate comparison with safeguards provided in international criminal tribunals. For similar charts comparing military commissions as envisioned under the MCA, as passed in 2006, to the rules that had been established by the Department of Defense (DOD) for military commissions and to general military courts-martial conducted under the Uniform Code of Military Justice (UCMJ), see CRS Report RL33688, *The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military Justice*, by Jennifer K. Elsea. For a comparison of the rules established by the MCA 2006 with those found in the MCA 2009 and to the rules that apply to courts martial under the UCMJ, see CRS Report R41163, *The Military Commissions Act of 2009 (MCA 2009): Overview and Legal Issues*, by Jennifer K. Elsea. For additional analysis of issues related to the disposition of Guantanamo detainees, including possible trials in federal or military courts, see CRS Report R40139, *Closing the Guantanamo Detention Center: Legal Issues*, by Michael John Garcia et al.

Background

On January 22, 2009, President Barack Obama issued an executive order requiring that the Guantanamo detention facility be closed no later than a year from the date of the order.⁶ The order established a task force (“Guantanamo Task Force”) to review all Guantanamo detentions to assess whether each detainee should continue to be held by the United States, be transferred or released to another country, or be prosecuted by the United States for criminal offenses. Ongoing military commissions were essentially halted during this review period, although some pretrial proceedings continued to take place. One detainee, Ahmed Ghailani, was transferred in June 2009 to the Southern District of New York for trial in federal court on charges related to his alleged role in the 1998 East Africa Embassy bombings, and was subsequently convicted and sentenced to life imprisonment.⁷

President Obama’s Detention Policy Task Force⁸ issued a preliminary report July 20, 2009, reaffirming that the White House considers military commissions to be an appropriate forum for trying some cases involving suspected violations of the laws of the war, although federal criminal court would be the preferred forum for any trials of detainees.⁹ The disposition of each case

to Detroit on Christmas Day 2009. He was apprehended and interrogated by civilian law enforcement before being charged in an Article III court, where he was sentenced to life imprisonment. Faisal Shahzad, a naturalized U.S. citizen originally from Pakistan, was arrested by civilian law enforcement and convicted in federal court for his attempt to detonate a bomb in New York’s Times Square in 2010.

⁶ Executive Order 13492, “Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities,” 74 *Federal Register* 4897, January 22, 2009.

⁷ United States v. Ghailani, 761 F. Supp. 2d 167 (S.D.N.Y. 2011), *aff’d*, 733 F.3d 29 (2d Cir. 2013), *cert. denied*, 2014 WL 272119 (U.S. March 10, 2014). For information about the Ghailani case and other federal court cases involving putative enemy combatants, see CRS Report R41156, *Judicial Activity Concerning Enemy Combatant Detainees: Major Court Rulings*, by Jennifer K. Elsea and Michael John Garcia.

⁸ This entity was created by Executive Order 13493, “Review of Detention Policy Options,” 74 *Federal Register* 4901 (January 22, 2009).

⁹ Memorandum from the Detention Policy Task Force to the Attorney General and the Secretary of Defense, July 20, 2009, <http://www.justice.gov/opa/documents/preliminary-rpt-dptf-072009.pdf>.

referred for criminal prosecution is to be assigned to a team comprised of DOJ and DOD personnel, including prosecutors from the Office of Military Commissions. The report also provided a set of criteria to govern the disposition of cases involving Guantanamo detainees. In addition to “traditional principles of federal prosecution,” the protocol identifies three broad categories of factors to be taken into consideration:

- Strength of interest, namely, the nature and gravity of offenses or underlying conduct; identity of victims; location of offense; location and context in which individual was apprehended; and the conduct of the investigation.
- Efficiency, namely, protection of intelligence source and methods; venue; number of defendants; foreign policy concerns; legal or evidentiary problems; efficiency and resource concerns.
- Other prosecution considerations, namely, the extent to which the forum and offenses that can be tried there permit a full presentation of the wrongful conduct, and the available sentence upon conviction.

On November 13, 2009, Attorney General Holder announced the decision to transfer five “9/11 conspirators” to the Southern District of New York to stand trial,¹⁰ and charges that had previously been brought against these individuals before military commissions were withdrawn without prejudice in January 2010.¹¹

On January 22, 2010, the Guantanamo Task Force issued its final report concerning the appropriate disposition of each detainee held at Guantanamo. The Task Force concluded that 36 detainees remained subject to active criminal investigations or prosecutions; 48 detainees should remain in preventive detention without criminal trial, as they are “too dangerous to transfer but not feasible for prosecution”; and the remaining detainees may be transferred, either immediately or eventually, to a foreign country.

The Administration’s plans to bring Khalid Sheik Mohammed and other Guantanamo detainees into the United States proved controversial. Beginning in 2009, Congress began placing funding restrictions in annual appropriations and authorization measures to limit executive discretion to transfer or release Guantanamo detainees into the United States.¹² Because no civilian court operates at Guantanamo, these limitations have effectively made military commissions the only viable option for trying Guantanamo detainees for criminal activity for the foreseeable future.

In March 2011, Secretary of Defense Robert Gates announced that the government would resume the filing of charges before military commissions at Guantanamo.¹³ Shortly thereafter, Attorney General Eric Holder announced the Obama Administration’s reversal of its decision to bring Khalid Sheik Mohammed and his alleged co-conspirators into the United States to face trial in federal court, and stated that they would instead be tried before a military commission at Guantanamo.¹⁴ In April 2012, charges were referred to a military commission against Khalid

¹⁰ Press Release, U.S. Department of Justice, “Departments of Justice and Defense Announce Forum Decisions for Ten Guantanamo Detainees,” November 13, 2009, available at <http://www.justice.gov/opa/pr/2009/November/09-ag-1224.html>.

¹¹ Press Release, U.S. Department of Defense, “Military Commission Charges Withdrawn in Sept. 11 Case,” January 22, 2010, available at <http://www.defense.gov/releases/release.aspx?releaseid=13262>.

¹² For information about funding restrictions applicable to detainee transfers, see CRS Report R42143, *The National Defense Authorization Act for FY2012 and Beyond: Detainee Matters*, by Jennifer K. Elsea and Michael John Garcia.

¹³ Press Release, U.S. Department of Defense, “Statement by Defense Secretary Robert Gates on Resumption of Military Commission Charges,” March 7, 2011, available at <http://www.defense.gov/news/newsarticle.aspx?id=63063>.

¹⁴ See Charlie Savage, “In a Reversal, Military Trials for 9/11 Cases,” *New York Times*, April 4, 2011, available at

Sheikh Mohammed, Walid Bin Attash, Ramzi Bin Al Shibh, Ali Abdul-Aziz Ali, and Mustafa Ahmed Al Hawsawi for their alleged involvement in the 9/11 attacks.

In October 2012, the U.S. Court of Appeals for the D.C. Circuit, in its first case of an appeal from a military commission conviction, reversed the conviction of Salim Hamdan after determining that Congress did not intend for the offenses it defined in the MCA to apply retroactively (*Hamdan II*).¹⁵ Because the court agreed that the crime of material support for terrorism did not exist as a war crime under the international law of war at the time the relevant conduct occurred (a requirement under the military commissions statute in effect at the time¹⁶), it vacated the decision below of the Court of Military Commissions Review (CMCR), which had unanimously affirmed Hamdan's conviction.¹⁷ Some have noted the prevalence of the charge of material support for terrorism in military commission cases to date and question the continued viability of the military commission system in light of this decision.

The government did not appeal the decision to the Supreme Court. Instead, the government is appealing the second CMCR appeal of a final verdict, *Al Bahlul v. United States*. When that case reached the D.C. Circuit on appeal, the government essentially asked the appellate court to overturn Al Bahlul's conviction¹⁸ on the basis that *Hamdan II* provided binding precedent on the question presented, namely, the validity of convictions for conspiracy, solicitation, and material support of terrorism for conduct preceding passage of the Military Commissions Act (MCA) in 2006. (*Hamdan II* did not address conspiracy or solicitation, but the government conceded that these offenses do not constitute universally recognized violations of the international law of war.) The court complied with the request in a per curiam order.¹⁹ The government sought and was granted a rehearing *en banc* in the *Bahlul* case.

Forum Choice for Terror Suspects

U.S. law provides for the trial of suspected terrorists, including those captured abroad, in several ways. Those who are accused of violating specific federal laws are triable in federal criminal court. Provisions in the U.S. Criminal Code relating to war crimes and terrorist activity apply extraterritorially and may be applicable to some detainees.²⁰ Those accused of violating the law of war or committing the offenses enumerated in the Military Commissions Act (MCA), as amended

http://www.nytimes.com/2011/04/05/us/05gitmo.html?_r=1&ref=khalidshaikhmohammed.

¹⁵ *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012) (*Hamdan II*).

¹⁶ 10 U.S.C. §821.

¹⁷ *Hamdan v. United States*, 801 F. Supp. 2d 1247 (USCMCR 2011).

¹⁸ Al Bahlul, formerly Osama bin Laden's public relations director and personal secretary, was convicted in 2009 by a military commission of "(1) providing material support and resources, including himself to al Qaeda ... ; (2) conspiring with Osama bin Laden and other members and associates of al Qaeda to, inter alia, commit murder, attack civilians and civilian objects in violation of the law of war, commit terrorism, and provide material support for terrorism with exceptions; and (3) soliciting various persons to commit these same offenses in violation of the MCA." The CMCR upheld the conviction, finding that the offenses for which Al Bahlul was charged were violations of the law of war when committed. *Al Bahlul v. United States*, 820 F. Supp. 2d 1141 (USCMCR 2011).

¹⁹ 2013 WL 297726 (D.C. Cir. January 25, 2013).

²⁰ See, e.g., 18 U.S.C. chapter 113B (terrorism-related offenses); 18 U.S.C. §2441 (war crimes).

by the Military Commissions Act of 2009,²¹ may be tried by military commissions under the MCA, or by general court-martial under the UCMJ.²²

The procedural protections afforded to the accused in each of these forums may differ. The MCA authorizes the establishment of military commissions with jurisdiction to try alien “unprivileged enemy belligerents”²³ for offenses made punishable by the MCA or the law of war.

Notwithstanding the recent amendments to the MCA, which generally enhance due process guarantees for the accused, critics continue to question their constitutionality.

One issue that has been raised by proponents of the use of military commissions is the concern that federal criminal courts would endow accused terrorists with constitutional rights they would not otherwise enjoy. The MCA does not restrict military commissions from exercising jurisdiction within the United States, and the Supreme Court has previously upheld the use of military commissions against “enemy belligerents” tried in the United States under procedural rules that differed from the federal rules.²⁴ The Supreme Court has not settled the question regarding the extent to which constitutional guarantees apply to aliens detained at Guantanamo, making any difference in rights due to location of the trials difficult to predict. Some view the unpredictability of the Supreme Court’s acceptance of the military commission procedures as a factor in favor of using civilian trial courts.

Sources of Rights

The Fifth Amendment to the Constitution provides that “no person shall be ... deprived of life, liberty, or property, without due process of law.” Due process includes the opportunity to be heard whenever the government places any of these fundamental liberties at stake. The Constitution contains other explicit rights applicable to various stages of a criminal prosecution. Criminal proceedings provide both the opportunity to contest guilt and to challenge the government’s conduct that may have violated the rights of the accused. The system of procedural rules used to conduct a criminal hearing, therefore, serves as a safeguard against violations of constitutional rights that take place outside the courtroom, for example, during arrests and interrogations.

The Bill of Rights applies to all citizens of the United States and all aliens within the United States.²⁵ However, the methods of application of constitutional rights, in particular the remedies available to those whose rights might have been violated, may differ depending on the severity of

²¹ Title XVIII of the National Defense Authorization Act for Fiscal Year 2010, P.L. 111-84.

²² See 10 U.S.C. §818 (jurisdiction of general court-martial over any person triable under the law of war). The jurisdiction of common law military commissions under the UCMJ is also preserved to try “offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.” 10 U.S.C. §821. No proposals have been floated to use general courts-martial or military commissions under the UCMJ to try Guantanamo detainees. This report will discuss federal court trials and trials under the Military Commissions Act of 2009.

²³ This term replaces “alien unlawful enemy combatant” who were subject to jurisdiction under the Military Commissions Act of 2006.

²⁴ See *Ex parte Quirin*, 317 U.S. 1, 31 (1942) (upholding military commissions used to try eight German saboteurs in the United States).

²⁵ *Zadyvydas v. Davis*, 533 U.S. 678, 693 (2001). (“the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent”); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (“all persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth Amendments], and ... aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law”).

the punitive measure the government seeks to take and the entity deciding the case. The jurisdiction of various entities to try a person accused of a crime could have a profound effect on the procedural rights of the accused. The type of judicial review available also varies and may be crucial to the outcome.

International law also contains some basic guarantees of human rights, including rights of criminal defendants and prisoners. Treaties to which the United States is a party are expressly made a part of the law of the land by the Supremacy Clause of the Constitution²⁶ and may be codified through implementing legislation,²⁷ or in some instances, may be directly enforceable by the judiciary.²⁸ International law is incorporated into U.S. law,²⁹ but does not take precedence over statute. The law of war, a subset of international law, applies to cases arising from armed conflicts (i.e., war crimes).³⁰ It remains unclear how the law of war applies to the current hostilities involving non-state terrorists, and the nature of the rights due to accused terrorist/war criminals may depend in part on their status under the Geneva Conventions. The Supreme Court has ruled that Al Qaeda fighters are entitled at least to the baseline protections applicable under Common Article 3 of the Geneva Conventions,³¹ which includes protection from the “passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”³²

Federal Court

The federal judiciary is established by Article III of the Constitution and consists of the Supreme Court and “inferior tribunals” established by Congress.³³ It is a separate and co-equal branch of the federal government, independent of the executive and legislative branches, designed to be insulated from the public passions. Its function is not to make law, but rather to interpret law and decide disputes arising under it. Federal criminal law and procedures are enacted by Congress and codified primarily in title 18 of the U.S. Code. The Supreme Court promulgates procedural rules for criminal trials at the federal district courts, subject to Congress’s approval. These rules, namely the Federal Rules of Criminal Procedure (Fed. R. Crim. P.) and the Federal Rules of Evidence (Fed. R. Evid.), incorporate procedural rights that the Constitution and various statutes demand. The charts provided at the end of this report cite relevant rules or court decisions, but make no effort to provide an exhaustive list of authorities.

²⁶ U.S. CONST. art. VI (“[A]ll Treaties ... shall be the Supreme Law of the Land; ...”).

²⁷ See, e.g., 18 U.S.C. §2441 (War Crimes Act).

²⁸ Treaty provisions that are self-executing are binding on the courts in the absence of implementing legislation. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS §113 (1987). Most human rights treaties, however, are not likely to be held self-executing.

²⁹ *Id.* §111.

³⁰ For a brief explanation of the sources of the law of war, see generally CRS Report RL31191, *Terrorism and the Law of War: Trying Terrorists as War Criminals before Military Commissions*, by Jennifer K. Elsea.

³¹ *Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006).

³² The Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, art. 3 §1(d), 6 U.S.T. 3317). The identical provision is included in each of the four Geneva Conventions and applies to any “conflict not of an international character.” The majority declined to accept the President’s interpretation of Common Article 3 as inapplicable to the conflict with Al Qaeda and interpreted the phrase “in contradistinction to a conflict between nations,” which the Geneva Conventions designate a “conflict of international character.”

³³ U.S. CONST. art. III, §1.

There is historical precedent for using federal courts to try those accused of terrorism or war related offenses, including some that might under some circumstances be characterized as “violations of the law or war.” The U.S. Constitution empowers Congress to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”³⁴ The First Congress provided for the punishment of persons who committed murder or robbery or the like on the high seas, declaring that each offender was to be “taken and adjudged to be a pirate and felon and being thereof convicted,” would be sentenced to death.³⁵ In 1798, Attorney General Charles Lee advised Secretary of State Timothy Pickering that federal courts were fully competent to try and punish pirates, whether U.S. citizens or aliens.³⁶ Federal courts exercised jurisdiction in many such cases.³⁷

More recently, several high-profile prosecutions involving terrorism abroad have resulted in federal convictions. The 1985 hijacking of the *Achille Lauro* by Palestinian Liberation Organization (PLO) terrorists resulted in the federal conviction of a Lebanese suspect on charges of aircraft piracy and hostage-taking, notwithstanding the defendant’s claim to have been merely following military orders.³⁸ Federal courts also handled prosecutions related to the 1993 bombing of the World Trade Center in New York City, the 2000 bombing of the U.S.S. Cole in the Gulf of Aden, and the 1998 U.S. Embassy bombings in Africa. Federal courts are currently handling several high-profile terrorism cases, including that of Sulaiman Abu Ghaith, a former Al Qaeda spokesman and son-in-law of Osama bin Laden who is on trial in Manhattan on charges of providing material support to Al Qaeda and conspiracy to kill Americans.³⁹ This and other trials slated to begin soon are seen as providing test cases to demonstrate the efficacy or inadequacy of civilian courts for prosecuting terrorism suspects.⁴⁰

In March 2010, the Department of Justice released a list of terrorism trials conducted since 2001, and reported a total of 403 unsealed convictions from September 11, 2001, to March 18, 2010.⁴¹ Around 60% of these convictions were charged under criminal code provisions that are not facially terrorism offenses, including such offenses as fraud, immigration violations, firearms offenses, drug-related offenses, false statements, perjury, obstruction of justice, and general

³⁴ U.S. CONST. art. I, §8, cl. 10.

³⁵ Act of April 30, 1790, 1 Stat. 112. Current statutes provide for life imprisonment for piracy as defined by the law of nations, 18 U.S.C. §1651; for citizens engaged in hostilities against the United States, *id.* §1652; for aliens taken on the high seas making war against the United States in violation of a treaty, *id.* §1653. Lesser punishments are available for other piracy or privateering offenses under chapter 81 of title 18, U.S. code.

³⁶ 1 Op. Att’y. Gen. 83-84 (1798) (recommending that accused pirates be tried in New Jersey). *See also* 1 Op. Att’y Gen 185 (1815) (those committing piratical acts outside the jurisdiction of any state should be tried in the federal district where the offender is apprehended or first brought after capture).

³⁷ *See, e.g.*, *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818); *United States v. Holmes*, 18 (5 Wheat.) 412 (1820); *United States v. Furlong*, 18 U.S. (5 Wheat.) 184 (1820) (jurisdiction over offenses committed using U.S. vessel); *Miller v. United States*, 88 F.2d 102 (9th Cir. 1937); *Daeche v. United States*, 250 F. 566 (2d Cir. 1918) (defendants were accused of conspiring to aid Germany by attaching to munition-bearing ships in U.S. waters “infernal machines which would explode while they were on the high seas”). *See also* *The Ambrose Light*, 25 F. 408 (S.D.N.Y. 1885) (depredations on the high seas committed without authority of from any sovereign power is piracy under the law of nations).

³⁸ *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991).

³⁹ *See* Jonathan Stempel, *U.S. judge allows Bin Laden driver testimony at Abu Ghaith trial*, REUTERS, January 15, 2014, <http://www.reuters.com/article/2014/01/15/us-usa-crime-binladen-soninlaw-idUSBREA0E1JP20140115>.

⁴⁰ *See* Charles Levinson, *Terror Trials Test Prosecutors*, WALL ST. J., March 3, 2014, at A3.

⁴¹ Fact Sheet, Statistics on Unsealed International Terrorism and Terrorism-Related Convictions, available online at <http://www.fas.org/irp/agency/doj/doj032610-stats.pdf>. Although the Fact Sheet was originally posted on the Department of Justice’s website, it no longer appears to be available.

conspiracy charges under 18 U.S.C. Section 371, some of which may not have law-of-war analogs that would permit their trial by military commissions.⁴² The remaining 40% are what the Justice Department labeled “Category I Offenses” for the purposes of its report, which covers crimes that are directly related to international terrorism. These crimes include the following:

- Aircraft Sabotage (18 U.S.C. §32)
- Animal Enterprise Terrorism (18 U.S.C. §43)
- Crimes Against Internationally Protected Persons (18 U.S.C. §§112, 878, 1116, 1201(a)(4))
- Use of Biological, Nuclear, Chemical or Other Weapons of Mass Destruction (18 U.S.C. §§175, 175b, 229, 831, 2332a)
- Production, Transfer, or Possession of Variola Virus (Smallpox) (18 U.S.C. §175c)
- Participation in Nuclear and WMD Threats to the United States (18 U.S.C. §832)
- Conspiracy Within the United States to Murder, Kidnap, or Maim Persons or to Damage Certain Property Overseas (18 U.S.C. §956)
- Hostage Taking (18 U.S.C. §1203)
- Terrorist Attacks Against Mass Transportation Systems (18 U.S.C. §1993)
- Terrorist Acts Abroad Against United States Nationals (18 U.S.C. §2332)
- Terrorism Transcending National Boundaries (18 U.S.C. §2332b)
- Bombings of Places of Public Use, Government Facilities, Public Transportation Systems and Infrastructure Facilities (18 U.S.C. §2332f)
- Missile Systems designed to Destroy Aircraft (18 U.S.C. §2332g)
- Production, Transfer, or Possession of Radiological Dispersal Devices (18 U.S.C. §2332h)
- Harboring Terrorists (18 U.S.C. §2339)
- Providing Material Support to Terrorists (18 U.S.C. §2339A)
- Providing Material Support to Designated Terrorist Organizations (18 U.S.C. §2339B)
- Prohibition Against Financing of Terrorism (18 U.S.C. §2339C)
- Receiving Military-Type Training from a Foreign Terrorist Organization (18 U.S.C. §2339D)
- Narco-Terrorism (21 U.S.C. §1010A)
- Sabotage of Nuclear Facilities or Fuel (42 U.S.C. §2284)
- Aircraft Piracy (49 U.S.C. §46502)

⁴² Some of the offenses, categorized as Category II offenses in the report are comparable to offenses under the MCA, such as Arsons and Bombings (18 U.S.C. §§842(m), 842(n), 844(f), 844(I)); Killings in the Course of Attack on a Federal Facility (18 U.S.C. §930(c)); Genocide (18 U.S.C. §1091); Destruction of Communication Lines (18 U.S.C. §1362); Sea Piracy (18 U.S.C. §1651); Wrecking Trains (18 U.S.C. §1992); Destruction of National Defense Materials, Premises, or Utilities (18 U.S.C. §2155); Violence against Maritime Navigation and Maritime Fixed Platforms (18 U.S.C. §§2280, 2281); Torture (18 U.S.C. §2340A); War Crimes (18 U.S.C. §2441); International Traffic in Arms Regulations (22 U.S.C. §2778); Destruction of Interstate Gas or Hazardous Liquid Pipeline Facilities (49 U.S.C. §60123(b)).

- Violations of the International Emergency Economic Powers Act (IEEPA, 50 U.S.C. §1705(b)) involving E.O. 12947 (Terrorists Who Threaten to Disrupt the Middle East Peace Process); E.O. 13224 (Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism or Global Terrorism List); and E.O. 13129 (Blocking Property and Prohibiting Transactions With the Taliban)⁴³

Military Commissions

The Constitution empowers Congress to declare war and “make rules concerning captures on land and water,”⁴⁴ to define and punish violations of the “Law of Nations,”⁴⁵ and to make regulations to govern the armed forces.⁴⁶ The power of the President to convene military commissions flows from his authority as Commander in Chief of the Armed Forces⁴⁷ and his responsibility to execute the laws of the nation.⁴⁸ Under the Articles of War and subsequent statute,⁴⁹ the President has at least implicit authority to convene military commissions to try offenses against the law of war.⁵⁰ The authority and objectives underlying military courts-martial and military commissions are not coextensive.⁵¹ Rather than serving the internally directed purpose of maintaining discipline and order of the troops, the military commission is externally directed at the enemy as a means of waging successful war by punishing and deterring offenses against the law of war. Military commissions have historically been used in connection with military government in cases of occupation or martial law where ordinary civil government was impaired.

Jurisdiction of military commissions is limited to time of war and to trying offenses recognized under the law of war or as designated by statute.⁵² While case law suggests that military commissions could try U.S. citizens as enemy belligerents,⁵³ the Military Commissions Act permits only aliens to be tried. The United States first used military commissions to try enemy belligerents accused of war crimes during the occupation in Mexico in 1847, and made heavy use of them in the Civil War and in the Philippine Insurrection.⁵⁴ However, prior to President Bush’s Military Order of 2001 establishing military commissions for certain alien terrorism suspects, no

⁴³ *Id.* at Annex A.

⁴⁴ U.S. CONST. art. I, §8, cl. 11.

⁴⁵ *Id.* art. I, §8, cl. 10.

⁴⁶ *Id.* art. I, §8, cl. 14.

⁴⁷ *Id.* art. II, §2, cl. 1.

⁴⁸ *Id.* art. II, §3.

⁴⁹ The Articles of War were re-enacted at 10 U.S.C. §801 *et seq.* as part of the UCMJ. Although there is no case law interpreting the UCMJ as authorizing military commissions, the relevant sections of the UCMJ, which recognize the concurrent jurisdiction of military commissions to deal with “offenders or offenses designated by statute or the law of war,” are essentially identical to the corresponding language in the Articles of War. See 10 U.S.C. §821.

⁵⁰ *Ex parte Quirin*, 317 U.S. 1 (1942).

⁵¹ See WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 831 (2d ed. 1920) (describing distinction between courts-martial and military tribunals).

⁵² 10 U.S.C. §821. Statutory offenses for which military commissions may be convened are limited to aiding the enemy, 10 U.S.C. §904, and spying, 10 U.S.C. §906. These offenses are explicitly included in the MCA.

⁵³ See *Ex parte Quirin*, 317 U.S. 1 (1942).

⁵⁴ For more information about the history of military commissions in the United States, see CRS Report RL31191, *Terrorism and the Law of War: Trying Terrorists as War Criminals before Military Commissions*, by Jennifer K. Elsea. For more information about the jurisdiction of military commissions, see CRS Report R40752, *The Military Commissions Act of 2006 (MCA): Background and Proposed Amendments*, by Jennifer K. Elsea.

military commissions had been convened since the aftermath of World War II. As non-Article III courts, military commissions have not been subject to the same constitutional requirements that are applied in Article III courts.⁵⁵ The Military Commissions Act authorizes the Secretary of Defense to establish regulations for military commissions in accordance with its provisions. To date, there have been eight convictions of Guantanamo detainees by military commissions, six of which were procured by plea agreement. A few commission rulings have been appealed.⁵⁶

Comparison of Authorities and Procedural Rights

The following charts provide a comparison of the military commissions under the revised Military Commissions Act and standard procedures for federal criminal court under the Federal Rules of Criminal Procedure and the Federal Rules of Evidence. **Chart 1** compares the legal authorities for establishing both types of tribunals, the jurisdiction over persons and offenses, and the structures of the tribunals. **Chart 2**, which compares procedural safeguards incorporated in the MCA to those applicable in federal criminal cases, follows the same order and format used in CRS Report RL31262, *Selected Procedural Safeguards in Federal, Military, and International Courts*, *Selected Procedural Safeguards in Federal, Military, and International Courts*, by Jennifer K. Elsea, in order to facilitate comparison of the those tribunals to safeguards provided in the international military tribunals that tried World War II crimes at Nuremberg and Tokyo, and contemporary ad hoc tribunals set up by the UN Security Council to try crimes associated with hostilities in the former Yugoslavia and Rwanda. For a comparison with previous rules established under President George W. Bush's Military Order, refer to CRS Report RL33688, *The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military Justice*. For a comparison of the rules established by the MCA 2006 with those found in the MCA 2009 and to the rules that apply to courts martial under the UCMJ, see CRS Report R41163, *The Military Commissions Act of 2009 (MCA 2009): Overview and Legal Issues*, by Jennifer K. Elsea.

⁵⁵ See *Ex parte Quirin*, 317 U.S. at 38; *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866) (noting a servicemember "surrenders his right to be tried by the civil courts").

⁵⁶ Information regarding the status of military commission cases, including case dockets, can be accessed via the website of the Defense Department's Office of Military Commissions, <http://www.mc.mil/HOME.aspx>. For information about military commissions completed at the trial level, see CRS Report R41163, *The Military Commissions Act of 2009 (MCA 2009): Overview and Legal Issues*, by Jennifer K. Elsea.

Chart 1. Comparison of Rules

Authority

Federal Criminal Court	Military Commissions Act of 2009
U.S. Constitution, Article III, establishing the Judiciary; Article I, §8.	U.S. Constitution, Article I, §8, in particular, cl. 10, "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;" cl. 11, "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water"; and cl. 14 (Necessary and Proper Clause).

Procedure

Federal Criminal Court	Military Commissions Act of 2009
Most criminal offenses are defined and criminal procedure established in Title 18, U.S. Code. The Federal Rules of Criminal Procedure (Fed. R. Crim. P.) are set forth as an appendix to Title 18.	The Secretary of Defense may prescribe rules of procedure for military commissions. Such rules may not be inconsistent with the MCA (as amended). Procedural rules for general courts-martial are to apply unless the MCA or UCMJ provide otherwise. Consultation with the Attorney General is required only in cases of exceptions, which are permissible "as may be required by the unique circumstances of the conduct of military and intelligence operations during hostilities or by other practical need." 10 U.S.C. §949a.

Jurisdiction over Persons

Federal Criminal Court	Military Commissions Act of 2009
Varies depending on criminal statute. Generally applies to U.S. nationals and aliens within the United States or within the Special Territorial and Maritime Jurisdiction of the United States (SMTJ) as defined in 18 U.S.C §7. Aliens are covered under some, but not all, definitions of the SMTJ. In particular, in the areas outside the territories of the United States, prohibitions apply to aliens only if a U.S. national is a perpetrator or victim of the offense. Statutes may apply to extraterritorial conduct of U.S. nationals, or more rarely, certain aliens.	Alien unprivileged enemy belligerents are subject to trial by military commission. 10 U.S.C. §948c. The term “unprivileged enemy belligerent” is defined to mean “an individual (other than a privileged belligerent) who has engaged in hostilities against the United States or its coalition partners; or has purposefully and materially supported hostilities against the United States or its coalition partners....” or an individual who was a member of Al Qaeda at the time the offense occurred. “Privileged belligerent” is defined in terms of the Geneva Convention Relative to the Treatment of Prisoners of War (GPW) Art. 4. 10 U.S.C. §948a(6-7).

Jurisdiction over Offenses

Federal Criminal Court	Military Commissions Act of 2009
Offenses described by statute, typically defined in Title 18, U.S. Code.	A military commission has jurisdiction to try any offense made punishable by the MCA or the law of war when committed by an alien unprivileged enemy belligerent that occurred “in the context of and associated with hostilities,” whether before, on, or after September 11, 2001. Military commissions are expressly authorized to determine their own jurisdiction. 10 U.S.C. §§948c – 948d. Offenses listed in 10 U.S.C. §950t include the following: murder of protected persons; attacking civilians, civilian objects, or protected property; pillaging; denying quarter; taking hostages; employing poison or similar weapons; using protected persons or property as shields; torture, cruel or inhuman treatment; intentionally causing serious bodily injury; mutilating or maiming; murder in violation of the law of war; destruction of property in violation of the law of war; using treachery or perfidy; improperly using a flag of truce or distinctive emblem; intentionally mistreating a dead body; rape; sexual assault or abuse; hijacking or hazarding a vessel or aircraft; terrorism; providing material support for terrorism; wrongfully aiding the enemy; spying, contempt; perjury and obstruction of justice. Conspiracy, attempts, and solicitation to commit the defined acts are also punishable. 10 U.S.C. §950t.

Composition

Federal Criminal Court	Military Commissions Act of 2009
A federal judge and twelve jurors, unless a jury trial is waived by the defendant. Fed. R. Crim. P. 23.	A military judge and at least five members, unless the death penalty is sought, in which case no fewer than 12 members must be included. 10 U.S.C. §948m; 10 U.S.C. §949m(c). In death penalty cases where twelve members are not reasonably available because of physical conditions or military exigencies, the convening authority may approve a commission with as few as 9 members. 10 U.S.C. §949m.

Chart 2. Comparison of Procedural Safeguards

Presumption of Innocence

U.S. Constitution	Federal Criminal Court	Military Commissions Act of 2009
"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453 (1895).	If the defendant fails to enter a proper plea, a plea of not guilty will be entered. Fed. R. Crim. P. 11(a). Defendant is entitled to jury instructions explaining that guilt must be proved on the evidence beyond a reasonable doubt. Taylor v. Kentucky, 436 U.S. 478 (1978). Defendant is entitled to appear in court without unnecessary physical restraints or other indicia of guilt, such as appearing in prison uniform, that may be prejudicial to jury. See Holbrook v. Flynn, 475 U.S. 560 (1986).	Before a vote is taken on the findings, the military judge must instruct the commission members "that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt." 10 U.S.C. §949l. If an accused refuses to enter a plea or pleads guilty but provides inconsistent testimony, or if it appears that he lacks proper understanding of the meaning and effect of the guilty plea, the commission must treat the plea as denying guilt. 10 U.S.C. §949i.

Right to Remain Silent (Freedom from Coerced Statements)

U.S. Constitution	Federal Criminal Court	Military Commissions Act of 2009
"No person ... shall be compelled in any criminal case to be a witness against himself...." Amendment V.	Incriminating statements made by defendant under duress or without prior <i>Miranda</i> warning are inadmissible as evidence of guilt in a criminal trial. Miranda v. Arizona, 384 U.S. 436 (1966). Before a jury is allowed to hear evidence of a defendant's confession, the court must determine that it was voluntarily given. 18 U.S.C. §3501.	Sections a, b, and d of Article 31, UCMJ, is expressly made inapplicable to military commission trials under the MCA, as amended. These provide that no person subject to the UCMJ may compel any person to incriminate himself or interrogate an accused without first informing him of his right to remain silent, and that statements obtained in violation of the above or through other unlawful inducement may not be received in evidence against him in a trial by court-martial. 10 U.S.C. §948b(d). Confessions allegedly elicited through coercion or compulsory self-incrimination that are otherwise admissible are not to be excluded at trial unless their admission violates §948r. 10 U.S.C. §949a(b)(2)(C).

U.S. Constitution	Federal Criminal Court	Military Commissions Act of 2009
		Statements elicited through torture or cruel, inhuman, or degrading treatment prohibited by 42 U.S.C. §2000dd are inadmissible except against a person accused of torture or such treatment, regardless of whether the statement was made prior to the enactment of that provision. No statement of the accused is admissible at trial unless the military judge finds that the statement is reliable and sufficiently probative; and that the statement was made “incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement” and the interests of justice would best be served by admission of the statement into evidence; or that the statement was voluntarily given, taking into consideration all relevant circumstances, including military and intelligence operations during hostilities; the accused’s age, education level, military training; and the change in place or identity of interrogator between that statement and any prior questioning of the accused. 10 U.S.C. §948r. Evidence derived from impermissible interrogation methods is not barred.

Freedom from Unreasonable Searches and Seizures

U.S. Constitution	Federal Criminal Court	Military Commissions Act of 2009
“The right of the people to be secure ... against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause...” Amendment IV.	Evidence, including derivative evidence, gained through unreasonable searches and seizures may be excluded in court. Boyd v. United States, 116 U.S. 616 (1886); Nardone v. United States, 308 U.S. 338 (1938); Fed. R. Crim. P. 41. A search warrant issued by a magistrate on a showing of probable cause is generally required for law enforcement agents to conduct a search of an area where the subject has a reasonable expectation of privacy, including searches and seizures of telephone or other communications and emissions of heat and other phenomena detectable with means other than human senses. Katz v. United States, 389 U.S. 347 (1967). Evidence resulting from overseas searches of American property by foreign officials is admissible unless foreign police conduct shocks judicial conscience or participation by U.S. agents is so substantial as to render the action that of the United States. United States v. Barona, 56 F.3d 1087 (9th Cir. 1995). Searches of alien property overseas are not necessarily protected by the Fourth Amendment. United States v. Verdugo-Urquidez, 494 U.S. 259 (1990). The Fourth Amendment’s warrant requirement does not govern searches conducted abroad by United States agents. <i>In re Terrorist Bombings of U.S. Embassies in East Africa</i>, 552 F.3d 157 (2d. Cir. 2008).	Not provided. The Secretary of Defense may provide that “evidence seized outside the United States shall not be excluded from trial by military commission on the grounds that the evidence was not seized pursuant to a search warrant or other authorization.” 10 U.S.C. §949a.

Effective Assistance of Counsel

U.S. Constitution	Federal Criminal Court	Military Commissions Act of 2009
"In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." Amendment VI.	Defendants in criminal cases have the right to representation by an attorney at all stages of prosecution. The defendant may hire an attorney or, if indigent, have counsel appointed at the government's expense. If two or more co-defendants are represented by one attorney, the court must inquire as to whether a conflict of interest exists. Fed. R. Crim. P. 44. Conversations between attorneys and clients are privileged. Fed. R. Evid. 501. Procedures for ensuring adequate representation of defendants are outlined at 18 U.S.C. §§3005 (capital cases) and 3006A.	At least one qualifying military defense counsel is to be detailed "as soon as practicable." 10 U.S.C. §948k. The accused is entitled to select one "reasonably available" military counsel to represent him. The accused is not entitled to have more than one military counsel, but "associate defense counsel" may be authorized pursuant to regulations. 10 U.S.C. §§948c, 948k. The accused may also hire a civilian attorney who 1. is a U.S. citizen, 2. is admitted to the bar in any state, district, or possession, 3. has never been disciplined, 4. has a SECRET clearance (or higher, if necessary for a particular case), and 5. agrees to comply with all applicable rules. 10 U.S.C. §949c(b)(3). If civilian counsel is hired, the detailed military counsel serves as associate counsel. 10 U.S.C. §949c(b)(5). No attorney-client privilege is mentioned. Adverse personnel actions may not be taken against defense attorneys because of the "zeal with which such officer, in acting as counsel, represented any accused before a military commission...." 10 U.S.C. §949b. In capital cases, the accused is entitled to be represented, "to the greatest extent practicable, by at least one additional counsel who is learned in applicable law," who may be a civilian. 10 U.S.C. §949a.

Right to Indictment and Presentment

U.S. Constitution	Federal Criminal Court	Military Commissions Act of 2009
"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger...." Amendment V.	Where the accused is in danger of being subjected to an infamous punishment if convicted, he has the right to insist that he shall not be tried except on the accusation of a grand jury. <i>Ex parte Wilson</i>, 114 U.S. 417 (1885); Fed. R. Crim. P. 7. Jurors must be selected from a fair cross section of the community; otherwise, an accused can challenge the indictment. 28 U.S.C. §§1861 et seq. Once an indictment is given, its scope may not be increased. <i>Ex parte Bain</i>, 121 U.S. 1 (1887). (Amendments to an indictment must undergo further grand jury process.)	UCMJ Article 32, which provides for impartial pretrial hearings prior to referral of a matter to general court-martial, is expressly made inapplicable. 10 U.S.C. §948b(d)(1)(C). Charges and specifications against an accused are to be signed by a person subject to UCMJ swearing under oath that the signer has "personal knowledge of, or reason to believe, the matters set forth therein," and that they are "true in fact to the best of his knowledge and belief." The accused is to be informed of the charges and specifications against him as soon as practicable after charges are sworn. 10 U.S.C. §948q.

Right to Written Statement of Charges

U.S. Constitution	Federal Criminal Court	Military Commissions Act of 2009
"In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation; ..." Amendment VI.	Defendant is entitled to be informed of the nature of the charge with sufficiently reasonable certainty to allow for preparation of defense. <i>Cook v. United States</i>, 138 U.S. 157 (1891).	The trial counsel assigned is responsible for serving counsel a copy of the charges upon the accused, in English and, if appropriate, in another language that the accused understands, "sufficiently in advance of trial to prepare a defense." 10 U.S.C. §948s.

Right to Be Present at Trial

U.S. Constitution	Federal Criminal Court	Military Commissions Act of 2009
The Confrontation Clause of Amendment VI guarantees the accused's right to be present in the courtroom at every stage of his trial. <i>Illinois v. Allen</i>, 397 U.S. 337 (1970).	The language, history, and logic of Rule 43 support a straightforward interpretation that prohibits the trial in absentia of a defendant who is not present at the beginning of trial. <i>Crosby v. United States</i>, 506 U.S. 255, 262 (1993); <i>Fed. R. Crim. P.</i> 43. When defendant knowingly absents himself from court during trial, court may "proceed with trial in like manner and with like effect as if he were present." <i>Diaz v. United States</i>, 223 U.S. 442, 455 (1912).	The accused has the right to be present at all sessions of the military commission except deliberation or voting, unless exclusion of the accused is permitted under §949d. 10 U.S.C. §949a(b)(1)(B). The accused may be excluded from attending portions of the proceeding if the military judge determines that the accused persists in disruptive or dangerous conduct. 10 U.S.C. §949d(e).

Prohibition Against *Ex Post Facto* Crimes

U.S. Constitution	Federal Criminal Court	Military Commissions Act of 2009
"No ... ex post facto law shall be passed." Art. I, §9, cl. 3.	Congress may not pass a law punishing conduct that was not a crime when perpetrated, increasing the possible sentence for a crime, or reducing the government's evidentiary burden. <i>Calder v. Bull</i>, 3 Dall. (3 U.S.) 386 (1798); <i>Ex Parte Garland</i>, 4 Wall (71 U.S.) 1867.	The MCA expressly provides jurisdiction over the defined crimes, whether committed prior to, on or after September 11, 2001. 10 U.S.C. §948d. The act declares that, because it codifies offenses that "have traditionally been triable under the law of war or otherwise triable by military commission," the subchapter defining offenses "does not preclude trial for offenses that occurred before the date of the enactment of this subchapter, as so amended." 10 U.S.C. §950p. Congress did not intend for any offenses that were not violations of the law of war when committed to be prosecutable by military commission. <i>Hamdan v. United States</i>, 696 F.3d 1238 (D.C. Cir. 2012) (<i>Hamdan II</i>). Crimes punishable by military commissions under the new chapter are contained in subchapter VII. It includes the crime of conspiracy, which a plurality of the Supreme Court in <i>Hamdan v. Rumsfeld</i> viewed as invalid as a charge of war crimes. 548 U.S. 557 (2006).

Protection Against Double Jeopardy

U.S. Constitution	Federal Criminal Court	Military Commissions Act of 2009
“... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; ...” Amendment V. Subject to “dual sovereign” doctrine, that is, federal and state courts may prosecute an individual for the same conduct without violating the clause.	Jeopardy attaches once the jury is sworn or where there is no jury, when the first evidence is presented. If the trial is terminated after jeopardy has attached, a second trial may be barred in a court under the same sovereign, particularly where it is prosecutorial conduct that brings about the termination of the trial. <i>Illinois v. Somerville</i>, 410 U.S. 458 (1973).	“No person may, without his consent, be tried by a military commission [under the MCA] a second time for the same offense.” Jeopardy attaches when a guilty finding becomes final after review of the case has been completed. There is no indication when jeopardy attaches in cases that are dismissed without any fault of the accused. 10 U.S.C. §949h. The United States may not appeal an order or ruling that amounts to a finding of not guilty. 10 U.S.C. §950d(b). The convening authority may not revise findings or order a rehearing in any case to reconsider a finding of not guilty of any specification or a ruling which amounts to a finding of not guilty, or reconsider a finding of not guilty of any charge, unless there has been a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation. The convening authority may not increase the severity of the sentence unless the sentence prescribed for the offense is mandatory. 10 U.S.C. §950b(d).

Speedy and Public Trial

U.S. Constitution	Federal Criminal Court	Military Commissions Act of 2009
“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial,....” Amendment VI.	Trial is to commence within seventy days of indictment or original appearance before court. 18 U.S.C. §3161. Closure of the courtroom during trial proceedings is justified only if 1) the proponent of closure advances an overriding interest likely to be prejudiced; 2) the closure is no broader than necessary; 3) the trial court considers reasonable alternatives to closure; and 4) the trial court makes findings adequate to support closure. See <i>Waller v. Georgia</i>, 467 U.S. 39, 48 (1984).	There is no right to a speedy trial. Article 10, UCMJ, 10 U.S.C. §810, requiring immediate steps to inform arrested person of the specific wrong of which he is accused and to try him or to dismiss the charges and release him, is expressly made inapplicable to military commissions. 10 U.S.C. §948b(d). The military judge may close all or part of a trial to the public only after making a determination that such closure is necessary to protect information, the disclosure of which would be harmful to national security interests or to the physical safety of any participant. 10 U.S.C. §949d(c).

Burden and Standard of Proof

U.S. Constitution	Federal Criminal Court	Military Commissions Act of 2009
Due Process requires the prosecution to prove the defendant guilty of each element of a crime beyond a reasonable doubt. <i>In re Winship</i>, 397 U.S. 358 (1970).	Defendant is entitled to jury instructions clarifying that the prosecution has the burden of presenting evidence sufficient to prove guilt beyond a reasonable doubt. <i>Cool v. United States</i>, 409 U.S. 100 (1978). Jury verdicts must be unanimous. Fed. R. Crim. P. 31.	Commission members are to be instructed that the accused is presumed to be innocent until his “guilt is established by legal and competent evidence beyond reasonable doubt”; that any reasonable doubt as to the guilt of the accused must result in acquittal; that reasonable doubt as to the degree of guilt must be resolved in favor of the lower degree as to which there is no reasonable doubt; and that the burden of proof is on the government. 10 U.S.C. §949l. Two-thirds of the members must concur on a finding of guilty, except in capital cases (which must be unanimous) and cases involving confinement for more than ten years. 10 U.S.C. §949m. The Secretary of Defense must prescribe that the military judge is to exclude any evidence, the probative value of which is substantially outweighed by the danger of unfair prejudice,

U.S. Constitution	Federal Criminal Court	Military Commissions Act of 2009
		confusion of the issues, or misleading the members of the commission, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. 10 U.S.C. §949a.

Privilege Against Self-Incrimination (Freedom from Compelled Testimony)

U.S. Constitution	Federal Criminal Court	Military Commissions Act of 2009
“No person ... shall be compelled in any criminal case to be a witness against himself...” Amendment V.	Defendant may not be compelled to testify. Jury may not be instructed that guilt may be inferred from the defendant’s refusal to testify. Griffin v. California, 380 U.S. 609 (1965). Witnesses may not be compelled to give testimony that may be incriminating unless given immunity for that testimony. 18 U.S.C. §6002.	“No person shall be required to testify against himself or herself at a proceeding of a military commission under this chapter.” 10 U.S.C. §948r. No person subject to the UCMJ may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him. 10 U.S.C. §831(c). Adverse inferences drawn from a failure to testify are not expressly prohibited; however, members are to be instructed that “the accused must be presumed to be innocent until his guilt is established by legal and competent evidence.” 10 U.S.C. §949l. There does not appear to be a provision for immunity of witnesses, although 18 U.S.C. §6002 may apply to military commissions.

Right to Examine or Have Examined Adverse Witnesses (Hearsay Prohibition, Classified Information)

U.S. Constitution	Federal Criminal Court	Military Commissions Act of 2009
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“In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him;....” Amendment VI.	Rules of Evidence prohibit generally the introduction at trial of statements made out of court to prove the truth of the matter stated unless the declarant is unavailable for cross-examination at trial (hearsay rule). Fed. R. Evid. 801 <i>et seq.</i> The government is required to disclose to defendant any relevant evidence in its possession or that may become known through due diligence. Fed. R. Crim. P. 16. The use of classified information is governed by the Classified Information Procedures Act (CIPA, codified at 18 U.S.C. App. 3). CIPA recognizes the government's entitlement to prevent the disclosure of classified information, even where it is material to the defense. However, in such cases the court is empowered to dismiss the indictment against the defendant or impose other sanctions as may be appropriate. The United States may ask the court to permit the substitution of a statement admitting relevant facts that the specific classified information would tend to prove or of a summary of the specific classified information. The court is required to grant the government's motion if it finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information.	“Defense counsel may cross-examine each witness for the prosecution who testifies before a military commission under this chapter.” 10 U.S.C. §949c. The Secretary of Defense is permitted to provide that hearsay evidence that would not be admissible at a general court-martial is admissible if adequate notice is given and the military judge determines that the statement is reliable and is offered as evidence of a material fact, that direct testimony from the witness is not available or would have an adverse impact on military or intelligence operations, and that the general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence. In determining reliability, the military judge may be obligated to consider the degree to which the statement is corroborated, the indicia of reliability within the statement itself, and whether the will of the declarant was overborne, 10 U.S.C. §949a(b)(3)(D). The burden of persuasion to demonstrate unreliability or lack of probative value appears to be on the profferer of the evidence. (Language providing otherwise was repealed). The protection of classified information is governed by subchapter V, 10 U.S.C. §§949p-1 – 949p-7. Subchapter V provides that the government cannot be compelled to disclose classified information to anyone not authorized to receive it. If the government claims a privilege, the military judge may not authorize the discovery of or access to the classified information unless he determines the evidence is noncumulative, relevant, and helpful to a legally cognizable defense, rebuttal of the prosecution's case, or to sentencing. If the military judge determines disclosure or access is necessary, the military judge must grant the government's request to delete or withhold specified items of classified
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		information; to substitute a summary for classified information; or to substitute a statement admitting relevant facts that the classified information or material would tend to prove, so long as the alternative procedure would provide the accused with substantially the same ability to make a defense. If the prosecution makes a motion for protective measures in camera, the accused has no opportunity to request a reconsideration.

Right to Compulsory Process to Obtain Witnesses (Discovery)

U.S. Constitution	Federal Criminal Court	Military Commissions Act of 2009
"In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor,...." Amendment VI.	Defendants have the right to subpoena witnesses to testify in their defense. The court may punish witnesses who fail to appear. Fed. R. Crim. P. 17. The prosecution is required to disclose defendant's statements, whether written or oral, that are material to the case. The government must also provide results or reports of any physical or mental examination of the defendant. Upon a defendant's request, the government must permit the defendant to inspect and make copies or photos of tangible objects, buildings or places, within the government's control if (i) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant. At the defendant's request, the government must provide a written summary of any expert testimony that the government intends to use during its case-in-chief at trial. Fed. R. Crim. P. 16. The government must also give notice of any witnesses it intends to	Defense counsel is to be afforded a reasonable opportunity to obtain witnesses and other evidence, including evidence in the possession of the United States, according to DOD regulations. The military judge is authorized to compel witnesses under U.S. jurisdiction to appear. The trial counsel is obligated to disclose exculpatory evidence of which he is aware to the defense, along with mitigating evidence, evidence that reasonably tends to impeach the credibility of a government witness who is to be called at trial. The trial counsel is deemed to be aware of information that is known or reasonably should be known to any government officials who participated in the investigation and prosecution of the case 10 U.S.C. §949j.

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	depose, generally permitting the defendant to attend the deposition. Fed. R. Crim. P. 15.	

Right to Trial by Impartial Judge

U.S. Constitution	Federal Criminal Court	Military Commissions Act of 2009
“The Judicial Power of the United States, shall be vested in one supreme Court, and in ... inferior courts.... The Judges ... shall hold their Offices during good Behaviour, and shall ... receive ... a Compensation, which shall not be diminished during their Continuance in Office.” Article III §1.	The independence of the judiciary from the other branches was established to ensure trials are decided impartially, without the “potential domination by other branches of government.” United States v. Will, 449 U.S. 200, 217-18 (1980). Judges with a pecuniary interest in the outcome of a case or other conflicts of interest are disqualified and must recuse themselves. 28 U.S.C. §455.	Military judges must take an oath to perform their duties faithfully. 10 U.S.C. §949g. The convening authority is prohibited from preparing or reviewing any report concerning the effectiveness, fitness, or efficiency of a military judge. 10 U.S.C. §948j(f). A military judge may not be assigned to a case in which he is the accuser, an investigator, a witness, or a counsel. 10 U.S.C. §948j(c). The military judge may not consult with the members of the commission except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the commission. 10 U.S.C. §948j(d). Convening authority may not censure, reprimand, or admonish the military judge. No person may attempt to coerce or use unauthorized means to influence the action of a commission. 10 U.S.C. §949b. The military judge may be challenged for cause. 10 U.S.C. §949f.

Right to Trial by Impartial Jury

U.S. Constitution	Federal Criminal Court	Military Commissions Act of 2009
“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury;....” Art III §2 cl. 3. “In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury of the state....” Amendment VI.	The pool from which juries are drawn must represent a fair cross section of the community. Taylor v. Louisiana, 419 U.S. 522 (1975). There must further be measures to ensure individual jurors selected are not biased (i.e., the <i>voir dire</i> process). Lewis v. United States, 146 U.S. 370 (1892); see Fed. R. Crim. P. 24 (peremptory challenges). The trial must be conducted in a manner designed to avoid exposure of the jury to prejudicial material or undue influence. If the locality of the trial has been so saturated with publicity about a case that it is impossible to assure jurors will not be affected by prejudice, the defendant is entitled to a change of venue. Irvin v. Dowd, 366 U.S. 717 (1961).	Military commission members must take an oath to perform their duties faithfully. 10 U.S.C. §949g. The accused may make one peremptory challenge, and may challenge other members for cause. 10 U.S.C. §949f. No convening authority may censure, reprimand, or admonish the commission or any member with respect to the findings or sentence or the exercise of any other functions in the conduct of the proceedings. No person may attempt to coerce or, by any unauthorized means, influence the action of a commission or any member thereof, in reaching the findings or sentence in any case. Military commission duties may not be considered in the preparation of an effectiveness report or any similar document with potential impact on career advancement. 10 U.S.C. §949b.

Right to Appeal to Independent Reviewing Authority

U.S. Constitution	Federal Criminal Court	Military Commissions Act of 2009
“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” Article I §9 cl. 2. There is no express requirement for appellate review. Appellate courts may exercise jurisdiction only where Congress has authorized it. <i>E.g. Liberty Mut. Ins. Co. v. Wetzel</i>, 424 U.S. 737 (1976).	Originally, the writ of <i>habeas corpus</i> permitted collateral attack upon a prisoner’s conviction only if the sentencing court lacked subject matter jurisdiction. It later evolved into an avenue for the challenge of federal and state convictions on other due process grounds, to determine whether a prisoner’s detention is “contrary to the Constitution or laws or treaties of the United States.” 28 U.S.C. §§2241 <i>et seq.</i> Federal appellate courts may review the final decisions of district courts as well as certain interlocutory orders. 28 U.S.C. §§1291-92.	The accused may submit matters for consideration by the convening authority with respect to the authenticated findings or sentence of the military commission. The convening authority must review timely submissions prior to taking action. 10 U.S.C. §950b. The accused may appeal a final decision of the military commission with respect to any properly raised issue to the Court of Military Commission Review, a body composed of appellate military judges who meet the same qualifications as military judges or comparable qualifications for civilian judges. 10 U.S.C. §950f. Once these appeals are exhausted, the accused may appeal the final decision to the United States Court of Appeals for the District of Columbia Circuit, with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the United States Court of Military Commission Review. The appellate court may take action only with respect to matters of law, including the sufficiency of the evidence to support the verdict. D.C. Cir. appellate decisions may be reviewed by the Supreme Court under writ of certiorari. 10 U.S.C. §950g. Other review by a civilian court, including review on petition of habeas corpus, is not expressly prohibited.

Protection Against Excessive Penalties

U.S. Constitution	Federal Criminal Court	Military Commissions Act of 2009
“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Amendment VIII.	The death penalty is not <i>per se</i> unconstitutional, but its discriminatory and arbitrary imposition may be, and the death penalty may not be automatic. See <i>Gregg v. Georgia</i>, 428 U.S. 153 (1976); 18 U.S.C. §3592 (mitigating/aggravating circumstances). When the death penalty may be imposed, the defendant shall be provided a list of potential jurors and witnesses, unless the court finds that such action might jeopardize the life or safety of any person. 18 U.S.C. §3432. A special hearing is held to determine whether the death sentence is warranted. 18 U.S.C. §3593. In capital cases, the accused is entitled to assistance of at least 2 counsel, one of whom has expertise in death penalty cases. Counsel in such cases have free access to the accused at all reasonable hours. The defendant is allowed to make any proof in his defense that he can produce by lawful witnesses, and is entitled to have the same process to compel witnesses to appear as is ordinarily granted to the prosecution. 18 U.S.C. §3005. The court must stay a death sentence if the defendant appeals the conviction or sentence. Fed. R. Crim. P. 38.	Military commissions may adjudge “any punishment not forbidden by [the MCA], including the penalty of death when specifically authorized....” 10 U.S.C. §948d. A vote of two-thirds of the members present is required for sentences of up to 10 years. Longer sentences require the concurrence of three-fourths of the members present. The death penalty must be approved unanimously on a unanimous guilty verdict or a guilty plea which was accepted and not withdrawn prior to the announcement of the sentence.^a Where the death penalty is sought, a panel of 12 members is required (unless not “reasonably available”). The death penalty must be expressly authorized for the offense, and the charges must have expressly sought the penalty of death. 10 U.S.C. §949m. An accused who is sentenced to death may waive his appeal, but may not withdraw an appeal. 10 U.S.C. §950c. The death sentence may not be executed until the commission proceedings have been finally adjudged lawful and the time for filing a writ has expired or the writ has been denied. The President must approve the sentence. 10 U.S.C. §950i. In capital cases, the accused is entitled to assistance of counsel with expertise in death penalty cases, which may include civilian counsel paid for by the government. 10 U.S.C. §949a.

- a. The National Defense Authorization Act for FY2012 amended the MCA to expressly permit guilty pleas in capital cases, so long as military commission panel members vote unanimously to approve the sentence. P.L. 112-81, §1030. As previously written, the MCA only clearly permitted the death penalty in cases where commission members unanimously voted to convict and concurred in the sentence of death—a requirement that many had interpreted as precluding the imposition of the death penalty in cases where the accused has pled guilty, as there would have been no vote by commission members as to the defendant's guilt.

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