

**FOR DISCUSSION PURPOSES ONLY  
DELIBERATIVE DRAFT—  
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**A BILL**

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

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

**CHAPTER 1—**

**SECTION 101. SHORT TITLE.**

This Act may be cited as the "Enemy Combatant Military Commissions Act of 2006."

**SECTION 102. FINDINGS.**

The Congress finds:

- (1) For more than 10 years, the al Qaeda terrorist organization has waged an unlawful war of violence and terror against the United States and its allies. Al Qaeda was involved in the bombing of the World Trade Center in New York City in 1993, the bombing of the U.S. Embassies in Kenya and Tanzania in 1998, and the attack on the U.S.S. *Cole* in Yemen in 2000. On September 11, 2001, al Qaeda launched the most deadly foreign attack on U.S. soil in history. Nineteen al Qaeda operatives hijacked four commercial aircraft and piloted them into the World Trade Center Towers in New York City and the headquarters of the U.S. Department of Defense at the Pentagon, and downed United Airlines Flight 93. The attack destroyed the Towers, severely damaged the Pentagon, and resulted in the deaths of approximately 3,000 innocent people.
- (2) Following the attacks on the United States on September 11, Congress recognized the existing hostilities with al Qaeda and affiliated terrorist organizations and by the Authorization for the Use of Military Force Joint Resolution (Public Law 107-40) recognized that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States" and authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."

**FOR DISCUSSION PURPOSES ONLY  
DELIBERATIVE DRAFT—  
CLOSE HOLD**

- (3) The President's authority to convene military tribunals arises from the Constitution's vesting in the President of the executive power and the power of Commander in Chief of the Armed Forces. As the Supreme Court of the United States recognized in *Madsen v. Kinsella*, 343 U.S. 341 (1952), "[s]ince our nation's earliest days, such tribunals have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war. . . . They have taken many forms and borne many names. Neither their procedure nor their jurisdiction has been prescribed by statute. It has been adapted in each instance to the need that called it forth."
- (4) Exercising authority vested in the President by the Constitution and laws of the United States, including the Authorization for Use of Military Force Joint Resolution, and consistent in accordance with the laws of war, the President has (A) detained enemy combatants in the course of this armed conflict; and (B) issued the Military Order of November 13, 2001 to govern the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," which authorized the Secretary of Defense to establish military commissions to try individuals subject to that Order by military commission for any offenses triable by military commission that such individuals are alleged to have committed.
- (5) The Supreme Court in *Hamdan v. Rumsfeld* (2006) held that the military commissions established by the Department of Defense under the President's Military Order of November 13, 2001 were not consistent with certain aspects of U.S. domestic law. The Congress may by law, and does by enactment of this statute, eliminate any deficiency of statutory authority to facilitate bringing alien enemy combatants with whom the United States is engaged in armed conflict to justice for violations of the laws of war and other crimes triable by military commissions. The prosecution of such alien enemy combatants by military commissions established and conducted consistent with this Act fully complies with the Constitution, the laws of the United States, treaties to which the United States is a party, and the laws of war.
- (6) The use of military commissions is particularly important because the conflict between the United States and international terrorist organizations, including al Qaeda, the Taliban, and associated forces generally makes other alternatives, such as the use of Federal courts or courts-martial, are impracticable. The terrorists with whom the United States is engaged in armed conflict have demonstrated a commitment to the destruction of the United States and its people, to violation of the laws of war, and to the abuse of American legal processes. In a time of ongoing armed conflict, it is neither practicable nor appropriate for alien

**FOR DISCUSSION PURPOSES ONLY  
DELIBERATIVE DRAFT—  
CLOSE HOLD**

enemy combatants like al Qaeda terrorists to be tried like American citizens in Federal courts or courts-martial.

- (7) Many procedures for courts martial would not be practicable in trying alien enemy combatants for whom this Act provides for trial by military commission. For instance, court-martial proceedings would in certain circumstances—
- (A) require the Government to share classified information with the accused, even though members of al Qaeda cannot be trusted with our Nation's secrets and it would not be consistent with the national security of the United States to provide them with access to classified information;
  - (B) exclude the use of hearsay evidence determined to be probative and reliable, even though the hearsay statements from, for example, fellow terrorists are often the only evidence available in this conflict, given that terrorists rarely fight and declare their intentions openly but instead pursue terrorist objectives in secret conspiracies the objectives of which can often be discerned only or primarily through hearsay statements from collaborators; and
  - (C) specify speedy trials and technical rules for sworn and authenticated statements when, due to the exigencies of wartime, the United States cannot safely require members of the armed forces to gather evidence on the battlefield as though they were police officers nor can the United States divert members from the front lines and their duty stations to attend military commission proceedings.
- (8) The exclusive judicial review for which this Act, and the Detainee Treatment Act of 2005, provides, is without precedent in the history of armed conflicts involving the United States, exceeds the scope of judicial review historically provided for by military commissions, and is channeled in a manner appropriately tailored to—
- (A) the circumstances of the conflicts between the United States and international terrorist organizations; and
  - (B) and the needs to ensure fair treatment of those detained as enemy combatants, to minimize the diversion of members of the armed force from other wartime duties, and to protect the national security of the United States.

CLOSE HOLD

- (9) In early 2002, as memorialized in a memorandum dated February 7, 2002, the President determined that common Article 3 of the Geneva Conventions did not apply with respect to the United States conflict with al Qaeda because al Qaeda was not a party to those treaties and the conflict with al Qaeda was an armed conflict of an international character. That was the interpretation of the United States prior to the Supreme Court's decision in *Hamdan* on June 29, 2006. The statement by the Supreme Court in *Hamdan* that common Article 3 applied gave rise to uncertainties in the conduct of the conflict, and this Act addresses such uncertainties. In particular, this Act makes clear that the standards for treating detainees under the Detainee Treatment Act of 2005 fully satisfy any obligations of the United States regarding detainee treatment under common Article 3(1), except for those obligations arising under paragraphs (b) and (d). In addition, the Act makes clear that the Geneva Conventions are not a source of judicially enforceable individual rights, thereby reaffirming that enforcement of the legal and political obligations imposed by the Conventions is a matter between the nations that are parties to them.

#### SEC. 102103. DEFINITIONS.

As used in this Act:

- (1) ~~“alien enemy combatant” means an enemy combatant who is not a citizen of the United States;~~
- (2)(1) “classified information” means any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security and any restricted data, as defined in paragraph r. of section 11 of the Atomic Energy Act of 1954;
- (3)(2) “commission” means a military commission established pursuant to chapter 2 of this Act;
- (4)(3) “enemy combatant,” for the purposes of this statute, means a person engaged in hostilities against the United States or its coalition partners who has committed an act that violates the law of war and this statute. The term enemy combatant includes “lawful combatants” and “unlawful combatants.” An individual (other than an individual found by the President or the Secretary of Defense to be entitled to status as a prisoner of war or as a “protected person” under Article 4 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949) determined by or under the authority of the President or the Secretary of Defense, to be

**FOR DISCUSSION PURPOSES ONLY  
DELIBERATIVE DRAFT—  
CLOSE HOLD**

(A) "Lawful" enemy combatant include members of the regular armed forces of a State party to the conflict; militia, volunteer corps, and organized resistance movements belonging to a State party to the conflict, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the laws of war; and members of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power; be part of or supporting an international terrorist organization engaged in hostilities against the United States or its co-belligerents, including but not limited to al Qaeda, the Taliban, or associated forces;

(B) "Unlawful" enemy combatants are persons not entitled to combatant immunity, who engage in acts against the United States or its coalition partners in violation of the laws and customs of war during an armed conflict. Spies and saboteurs are traditional examples of unlawful enemy combatants. For purposes of the war on terrorism, the term Unlawful Enemy Combatant is defined to include, but is not limited to, an individual who is or was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners; have committed a belligerent act in aid of such an organization; or

(C) to have directly supported hostilities in aid of such enemy armed forces.

(4) "Geneva Conventions" means the four international conventions signed at Geneva, 12 August 1949, including common Article 3;

(5) "Law of war" is that part of international law that regulates the conduct of armed hostilities. It is often called the law of armed conflict. The law of war encompasses all international law applicable to the conduct of hostilities that is binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party (e.g., the Geneva Conventions of 1949), and applicable customary international law as recognized by the United States.

(6) "person" includes corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.

**SEC. 103104. AUTHORIZATION FOR MILITARY COMMISSIONS.**

**FOR DISCUSSION PURPOSES ONLY**

**DELIBERATIVE DRAFT—**

**CLOSE HOLD**

- (a) The President is authorized to establish military commissions for the trial of alien enemy combatants for violations of the laws and customs of war and other crimes triable by military commissions as provided in chapter 2 of this Act. The grant of this authority should not be understood to limit the President's constitutional authority to establish military commissions on the battlefield, in occupied territories, or in armed conflicts should circumstances so require.
- (b) Military commissions shall have the authority, under such limitations as the President or Secretary of Defense may prescribe, to adjudge any punishment not forbidden by this act, including the penalty of death, imprisonment for life or term of years, payment of fine or restitution, or any other lawful punishment, impose upon any accused found guilty after a proceeding under this Act a sentence that is appropriate to the offense or offenses for which there was a finding of guilt, which sentence may include death, imprisonment for life or term of years, payment of fine or restitution, or such other lawful punishment or condition of punishment as the Commission shall determine to be proper.
- (b)
- (c) The Secretary of Defense or his designee shall be authorized to carry out a sentence of punishment decreed by a military commission pursuant to such procedures.
- (d) The Secretary of Defense shall submit to the Armed Services Committees of the House of Representatives and the Senate an annual report on the conduct of trials by military commissions under this Act. Each such report shall be submitted in unclassified form, with classified annex, if necessary, and consistent with national security. The report shall be submitted not later than December 31 of each year.
- (e) Pursuant to the President's authority under the Constitution and laws of the United States, including the Authorization for Use of Military Force Joint Resolution, and in accordance with the law of war, the United States has the authority to detain persons who have engaged in unlawful belligerence until the cessation of hostilities. The authority to detain enemy combatants until the cessation of hostilities is wholly independent of any pre-trial detention or sentence to confinement that may occur as a result of a military commission. An enemy combatant may always be detained, regardless of the pendency or outcome of a military commission, until the cessation of hostilities as a means to prevent their return to the fight.

**CHAPTER 2—MILITARY COMMISSIONS**

This chapter may be cited as the "Code of Military Commissions" and shall be codified as Chapter 47A of Title 10, United States Code.

**SEC. 201. MILITARY COMMISSIONS GENERALLY.**

**FOR DISCUSSION PURPOSES ONLY  
DELIBERATIVE DRAFT—  
CLOSE HOLD**

(e) **PURPOSE.**—This chapter codifies and establishes procedures governing the use of military commissions to try alien enemy combatants for violations of the laws of war and any other crimes triable by military commissions. Although military commissions have traditionally been constituted by order of the President, the decision of the Supreme Court in *Hamdan v. Rumsfeld* makes it both necessary and appropriate to codify procedures for military commissions as set forth herein.

(a)

(b) **RULE OF CONSTRUCTION.**—The procedures for military commissions set forth in this chapter are modeled after the procedures established for courts martial in the Uniform Code of Military Justice. As provided in Chapter 1, Section 102 (7), it is not practicable to try unlawful enemy combatants pursuant to the UCMJ or the procedures contained in the Manual for Courts-martial. However, due to the similarities of the UCMJ and CMC, the precedents established under the UCMJ may form precedential value for military judges and appellate courts when interpreting the rules under the CMC, but only inasmuch as the provisions of each act are the same. It is not intended that any of the rights, privileges, or procedures contained under the UCMJ, and specifically removed from the CMC, are to be applied by implication or application. It would be neither desirable nor practicable to try alien enemy combatants by court-martial procedures, however. Therefore, no construction or application of chapter 47 of this title shall be controlling in the construction or application of this chapter.

(c) Members of al Qaeda and affiliated organizations may be tried for war crimes/violations of the law of war and offenses triable by military commissions committed against the United States or its co-belligerents before, on, or after September 11, 2001. A person charged with an offense under this Act may be tried and punished at any time without limitations. An acquittal or conviction under this act does not preclude the United States, in accordance with the law of war, to detain enemy combatants until the cessation of hostilities as a means to prevent their return to the fight.

(d) A military commission established under this chapter is a regularly constituted court, affording all the necessary judicial guarantees for purposes of common Article 3 of the Geneva Conventions.

**SEC. 202. PERSONS SUBJECT TO MILITARY COMMISSIONS.**

Alien enemy combatants, as defined in section 102 of this Act, shall be subject to trial by military commissions as set forth in this chapter.

*(adapted from UCMJ Art. 2)*

**SEC. 203. JURISDICTION OF MILITARY COMMISSIONS.**

**FOR DISCUSSION PURPOSES ONLY  
DELIBERATIVE DRAFT—  
CLOSE HOLD**

Military commissions shall have jurisdiction to try any offense made punishable by this chapter, or by regulations promulgated pursuant to this chapter, when committed by an alien enemy combatant.

*(adapted from UCMJ Art. 17, 18)*

**SEC. 204. WHO MAY CONVENE MILITARY COMMISSIONS.**

- (a) The Secretary of Defense may issue orders appointing one or more military commissions to try individuals under this chapter.
- (b) The Secretary of Defense may delegate his authority to convene military commissions or to promulgate any regulations under this chapter.
- (c) The "Secretary" in this chapter shall be the "Secretary of Defense." The "convening authority" shall be the Secretary of Defense or his designee.

*(adapted from UCMJ Art. 22)*

**SEC. 205. WHO MAY SERVE ON MILITARY COMMISSIONS. (p)**

- (a) Any commissioned officer of the United States Armed Forces on active duty is eligible to serve on a military commission. Eligible commissioned officers shall include, without limitation, reserve personnel on active duty, National Guard personnel on active duty in Federal service, or retired personnel recalled to active duty.
- (b) When convening a commission, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a commission when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.
- (c) Before a commission is assembled for the trial of a case, the convening authority may excuse a member of the court from participating in the case.

*(adapted from UCMJ Art. 25)*

**SEC. 206. MILITARY JUDGE OF A MILITARY COMMISSION.**

- (a) A military judge shall be detailed to each commission. The Secretary shall prescribe regulations providing for the manner in which military judges are detailed for such commissions and for the persons who are authorized to detail military judges for such courts-martial commissions. The military judge shall preside over each commission to which he has been detailed.

