AGREEMENT ON CLASSIFIED INFORMATION

949d. Sessions

(e) PROTECTION OF CLASSIFIED INFORMATION.—

(1) NATIONAL SECURITY PRIVILEGE.—Classified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security. This rule applies to all stages of the proceedings.

(A) The privilege may be claimed by the head of the executive or military department or government agency concerned based on a finding by that department or agency head that the information is properly classified and that disclosure would be detrimental to the national security.

(B) A person who may claim the privilege may authorize a representative, witness, or trial counsel to claim the privilege and make the finding described in paragraph (A) on his or her behalf. The authority of the representative, witness or trial counsel to do so is presumed in the absence of evidence to the contrary.

(2) INTRODUCTION OF CLASSIFIED INFORMATION.—

(A) ALTERNATIVES TO DISCLOSURE.—To protect classified information from disclosure, the military judge, upon motion of trial counsel, shall authorize, to the extent practicable—

(i) the deletion of specified items of classified information from documents to be introduced as evidence before the commission;
(ii) the substitution of a portion or summary of the information for such classified documents; or
(iii) the substitution of a statement of relevant facts that the classified information would tend to prove.

(B) PROTECTION OF SOURCES, METHODS, OR ACTIVITIES.—The military judge, upon motion of trial counsel, shall permit trial counsel to introduce otherwise admissible evidence before the commission, while protecting from disclosure the sources, methods, or activities by which the United States acquired the evidence, provided that the military judge finds that (i) the sources, methods, or activities by which the United States acquired the evidence are classified, and (ii) the evidence is reliable. The military judge may require trial counsel to present to the commission and the defense, to the extent practicable and consistent with national security, an unclassified summary of the sources, methods, or activities by which the United States acquired the evidence.

(C) ASSERTION OF NATIONAL SECURITY PRIVILEGE AT TRIAL.— During the examination of any witness, trial counsel may object to any question, line of inquiry, or motion to admit evidence, that would require the disclosure of classified information.

Following such an objection, the military judge shall take suitable action to safeguard any such classified information. Such action may include the review of trial counsel's claim of privilege by the military judge *in camera* and on an *ex parte* basis, and the delaying of proceedings to permit trial counsel to consult with the department or agency concerned as to whether the national security privilege should be asserted.

(3) A claim of privilege under this section and any materials submitted in support thereof shall, upon request of the Government, be considered by the military judge *in camera* and shall not be disclosed to the accused.

(4) The Secretary of Defense may prescribe additional regulations, consistent with this section, for the use and protection of classified information during commission proceedings. Such regulations shall be promptly reported to the Committees on Armed Services of the Senate and House of Representatives pursuant to section 4(b) of the Military Commissions Act of 2006.

949j. Opportunity to obtain witness and other evidence.

(b) PROTECTION OF CLASSIFIED INFORMATION.— (A) With respect to trial counsel's discovery obligations under this section, the military judge, upon motion of trial counsel, shall authorize, to the extent practicable—

(i) the deletion of specified items of classified information from documents to be made available to the defendant
(ii) the substitution of a portion or summary of the information for such classified documents; or
(iii) the substitution of a statement admitting relevant facts that the classified information would tend to prove.

(B) PROTECTION OF SOURCES, METHODS, OR ACTIVITIES.—The military judge, upon motion of trial counsel, shall authorize trial counsel, in the course of complying with discovery obligations under this section, to protect from disclosure the sources, methods, or activities by which the United States acquired the evidence, provided that the military judge finds that the sources, methods, or activities by which the United States acquired the evidence are classified. The military judge may require trial counsel to provide, to the extent practicable, an unclassified summary of the sources, methods, or activities by which the United States acquired the evidence.

(c) EXCULPATORY EVIDENCE.—(1) As soon as practicable, trial counsel shall disclose to the defense the existence of any evidence known to trial counsel that reasonably tends to exculpate the accused. Where exculpatory evidence is classified, the defense shall be provided with an adequate substitute in accordance with the procedures under subsection (b).

(2) For purposes of this subsection, the “evidence known to trial counsel” shall consist of the same exculpatory evidence that the prosecution would be required to disclose in a trial by courts-martial under chapter 47 of this title.

AGREEMENT ON SELF-INCRIMINATION/COERCION

Sec. 948r. Compulsory self-incrimination prohibited; statements obtained by torture or other methods of coercion

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

(b) Statements Obtained By Torture.—A statement obtained by use of torture shall not be admissible in a military commission under this chapter, except against a person accused of torture as evidence the statement was made.

(c) Statements Obtained Prior to the Enactment of the Detainee Treatment Act of 2005.—A statement obtained prior to the Detainee Treatment Act of 2005 in which the degree of coercion is disputed may be admitted only if the military judge finds that—

(1) the totality of the circumstances under which the statement was made renders it reliable and possessing sufficient probative value; and

(2) the interests of justice would best be served by admission of the statement into evidence.

(d) Statements Obtained After the Enactment of the Detainee Treatment Act of 2005.—A statement obtained after the enactment of the Detainee Treatment Act of 2005 in which the degree of coercion is disputed may be admitted only if the military judge finds that—

(1) the totality of the circumstances under which the statement was made renders it reliable and possessing sufficient probative value;

(2) the interests of justice would best be served by admission of the statement into evidence; and

(3) the interrogation methods used to obtain the statement do not violate the cruel, unusual, or inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

AGREEMENT ON HEARSAY

§ 949a. Rules

(b)(3)(D) HEARSAY EVIDENCE.—(1) Subject to paragraph (2), hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission if the proponent of the evidence makes known to the adverse party, sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence, the proponent's intention to offer the evidence, and the particulars of the evidence (including information on the general circumstances under which the evidence was obtained).

(2) Hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial shall not be admitted if the party opposing the admission of the evidence demonstrates that the evidence is unreliable or lacking in probative value.

(3) The disclosure requirements in paragraph (1) shall be fully subject to the procedures for the protection and substitution of classified evidence under section 949j(b) of this title.