

**FOR DISCUSSION PURPOSES ONLY
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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.” is 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, topu—

**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 to have committed a belligerent act in aid of such an organization so engaged, 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.

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

- (b) A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.
- (c) ~~The military judge of a commission shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member in accordance with regulations prescribed under subsection (a). Unless the military commission is convened by the Secretary of Defense, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. A commissioned officer who is certified to be qualified for duty as a military judge of a commission may perform such duties as are assigned to him by or with the approval of that Judge Advocate General or his designee.~~
- (c)
- (d) No person is eligible to act as military judge in a case if he is the accuser or a witness or has acted as investigating officer or a counsel in the same case.
- (e) The military judge of a commission may not consult with the members of the commission except in the presence of the accused (except as provided in section 216), trial counsel, and defense counsel, nor may he vote with the members of the commission.

(adapted from UCMJ Art. 26)

SEC. 207. DETAIL OF TRIAL COUNSEL AND DEFENSE COUNSEL

- (a) Trial counsel and defense counsel shall be detailed for each commission. Assistant trial counsel and assistant and associate defense counsel may be detailed for each commission. Defense counsel shall be detailed as soon as practicable after the swearing of charges against the person accused. The Secretary of Defense shall prescribe regulations providing for the manner in which counsel are detailed for such commission and for the persons who are authorized to detail counsel for such commission.
- (b) No person who has acted as investigating officer, military judge, or ~~commission~~ member in any case may act later as trial counsel or, unless expressly requested by the accused, as defense counsel in the same case. No person who has acted for the prosecution may act later in the same case for the defense, nor may any person who has acted for the defense act later in the same case for the prosecution.

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

(c) Trial counsel or defense counsel detailed for a military commission—

- (1) must be a judge advocate who is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; or must be a member of the bar of a Federal court or of the highest court of a State; and
- (2) must be certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member; or
- (3) must be otherwise qualified to practice before the commission pursuant to regulations prescribed by the Secretary of Defense.

(adapted from UCMJ Art. 27)

SEC. 208. DETAIL OR EMPLOYMENT OF REPORTERS AND INTERPRETERS.

Under such regulations as the Secretary of Defense may prescribe, the convening authority of a military commission shall detail or employ qualified court reporters, who shall record the proceedings of and testimony taken before that commission. Under like regulations the convening authority may detail or employ interpreters who shall interpret for the commission, to include interpretation for the defense.

(adapted from UCMJ Art. 28)

SEC. 209. ABSENT AND ADDITIONAL MEMBERS.

- (a) No member of a military commission may be absent or excused after the court commission has been assembled for the trial of the accused unless excused as a result of challenge, excused by the military judge for physical disability or other good cause, or excused by order of the convening authority for good cause.
- (b) A military commission shall have at least five members. Whenever a military commission is reduced below that number, the trial may not proceed unless the convening authority details new members sufficient in number to provide not less than five members. The trial may proceed with the new members present after the recorded evidence previously introduced before the members of the court commission has been read to the court commission in the presence of the military judge, the accused (except as provided by section 216), and counsel for both sides.

(adapted from UCMJ Art. 29)

SEC. 210. CHARGES AND SPECIFICATIONS.

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

- (a) Charges and specifications shall be signed by a person subject to the Uniform Code of Military Justice under oath before a commissioned officer of the armed forces authorized to administer oaths and shall state—
- (1) that the signer has personal knowledge of, or reason to believe, the matters set forth therein; and
 - (2) that they are true in fact to the best of his/her knowledge and belief.
- (b) Upon the swearing of the charges in accordance with subsection (a), the person accused shall be informed of the charges against him as soon as practicable.

(adapted from UCMJ Art. 30)

SEC. 211. COMPULSORY SELF-INCRIMINATION PROHIBITED.

- (a) No person shall be required to testify against himself at a commission proceeding.
- (b) Statements obtained by use of torture, as defined in 18 U.S.C. § 2340, whether or not under color of law, shall not be admissible, except against a person accused of torture as evidence the statement was made. No otherwise admissible statement obtained through the use of [REDACTED] may be received in evidence if the military judge finds that the circumstances under which the statement was made render it unreliable or lacking in probative value.

(adapted from UCMJ Art. 31)

SEC. 212. SERVICE OF CHARGES.

The trial counsel to whom charges are referred for trial shall cause to be served upon the accused a copy of the charges upon which trial is to be had in English and, if appropriate, in another language that the accused understands, sufficiently in advance of trial to prepare a defense.

(adapted from UCMJ Art. 35)

SEC. 213. RULES OF PROCEDURE.

- (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases triable in military commissions may be prescribed by the Secretary of Defense, but may not be contrary to or inconsistent with this chapter.
- (b) Subject to such exceptions and limitations as the Secretary of Defense may provide by regulation, evidence in a military commission shall be admissible if the military judge determines that the evidence would have probative value to a

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

~~reasonable person is relevant and has probative value~~. Hearsay evidence shall be admissible in the discretion of the military judge unless the circumstances render it unreliable or lacking in probative value.

- (c) **SUBMISSION OF PROCEDURES.**— Not later than 90 days after the date of enactment of this Act, the Secretary of Defense shall submit to the Armed Services Committees of the House of Representatives and the Senate a report setting forth the procedures for military commissions promulgated under this chapter. Thereafter, the Secretary of Defense shall submit to the same committees a report on any modification of such procedures, no later than 60 days before the date on which such modifications shall go into effect.

(adapted from UCMJ Art. 36)

SEC. 214. UNLAWFULLY INFLUENCING ACTION OF COMMISSION.

- (a) No authority convening a military commission may censure, reprimand, or admonish the commission or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the commission, or with respect to any other exercises of its or his 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, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions of the subsection shall not apply with respect to
- (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of military commissions, or
 - (2) to statements and instructions given in open proceedings by the military judge or counsel.
- (b) In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person may, in preparing any such report consider or evaluate the performance of duty of any such member of a commission, or give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a military commission, as counsel in representing any accused before a military commission.

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

(b)

(adapted from UCMJ Art. 37)

SEC. 215. DUTIES OF TRIAL COUNSEL AND DEFENSE COUNSEL.

(a) **TRIAL COUNSEL.**—The trial counsel of a military commission shall prosecute in the name of the United States, and shall, under the direction of the court commission, prepare the record of the proceedings.

(b) **DEFENSE COUNSEL.**—

(1) The accused shall be represented in his defense before a military commission as provided in this subsection.

(2) The accused may be represented by civilian counsel if provided retained by him, provided that civilian counsel: (i) is a United States citizen; (ii) is admitted to the practice of law in a State, district, territory, or possession of the United States, or before a Federal court; (iii) has not been the subject of any sanction of disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct; (iv) has been determined to be eligible for access to information classified at the level SECRET or higher; (v) has signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the proceedings; and (vi) complies with any other requirements that the Secretary of Defense may prescribe by regulation.

(3) The accused shall also be represented by military counsel detailed under section 207 of this chapter.

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

(5) The accused is not entitled to be represented by more than one military counsel. However, the person authorized under regulations prescribed under section 207 of this chapter to detail counsel in his sole discretion may detail additional military counsel.

(adapted from UCMJ Art. 38)

SEC. 216. SESSIONS.

(a) At any time after the service of charges which have been referred for trial by military commission, the military judge may call the commission into session without the presence of the members for the purpose of—

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

- (1) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty;
- (2) hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later consideration or decision by the members of the commission;
- (3) if permitted by regulations of the Secretary of Defense, holding the arraignment and receiving the pleas of the accused; and
- (4) performing any other procedural function which may be performed by the military judge under this chapter or under rules prescribed pursuant to section 213 of this chapter and which does not require the presence of the members of the commission.

These proceedings shall be conducted in the presence of the accused, the defense counsel, and the trial counsel, except as provided by subsection (c), and shall be made part of the record.

- (b) When the members of the commission deliberate or vote, only the members may be present. All other proceedings, including any other consultation of the members of the commission with counsel or the military judge, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, and the trial counsel, except as provided by subsection (c).
- (c) The military commission shall hold open proceedings, in the presence of the accused, except as provided in this subsection.
 - (1) The military judge may close all or part of a proceeding on his own initiative or based upon a presentation, including an *ex parte* or *in camera* presentation, by either the prosecution or the defense.
 - (2) The military judge may close to the public all or a portion of the proceeding upon a finding that closing of the proceeding is necessary to protect classified information; information the disclosure of which could reasonably be expected to cause identifiable damage to the public interest; the physical safety of the participants in the proceeding; intelligence and law enforcement sources, methods, or activities; or other national security interests.
 - (3) A decision to close a proceeding or portion thereof may include a decision to exclude the accused only upon a finding by the military judge that doing so is necessary to protect the national security, to ensure the safety of individuals, or to prevent disruption. One military defense counsel shall be present for all trial proceedings, and the exclusion of the accused shall be no broader than necessary.

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

- (4) If the accused is denied access to classified evidence presented in the proceeding, a redacted or unclassified summary of evidence shall be provided, if it is possible to do so without compromising intelligence sources, methods, or activities, or other national security interests. No evidence shall be admitted to which the accused has been denied access if its admission would result in the denial of a [REDACTED].

(adapted from UCMJ Art. 39)

SEC. 217. CONTINUANCES.

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

(adapted from UCMJ Art. 40)

SEC. 218. CHALLENGES.

- (a) The military judge and members of the commission may be challenged by the accused or the trial counsel for cause stated to the commission. The military judge shall determine the relevance and validity of the challenges for cause, and may not receive a challenge to more than one person at a time. Challenges by the trial counsel shall ordinarily be presented and decided before those challenges presented by the defense by the accused are offered.
- (b) Each accused and the trial counsel is entitled to one peremptory challenge, but the military judge may not be challenged except for cause.

(adapted from UCMJ Art. 41)

SEC. 219. OATHS.

- (a) Before performing their respective duties, military judges, members of commissions, trial counsel, defense counsel, reporters, and interpreters shall take an oath to perform their duties faithfully. The form of the oath, the time and place of the taking thereof, the manner of recording the same, and whether the oath shall be taken for all cases in which these duties are to be performed or for a particular case, shall be as prescribed in regulations of the Secretary. These regulations may provide that an oath to perform faithfully duties as a military judge, trial counsel, or defense counsel, may be taken at any time by any judge advocate or other person certified to be qualified or competent for duty, and if such an oath is taken it need not again be taken at the time the judge advocate, or other person is detailed to that duty.
- (b) Each witness before a commission shall be examined on oath.

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

(adapted from UCMJ Art. 42)

SEC. 220. FORMER JEOPARDY.

- (a) No person may, without his consent, be tried by a commission a second time for the same offense.
- (b) No proceeding in which the accused has been found guilty by military commission upon any charge or specification is a trial in the sense of this section until the finding of guilty has become final after review of the case has been fully completed.

(adapted from UCMJ Art. 44)

SEC. 221. PLEAS OF THE ACCUSED⁽¹³⁾.

- (a) If an accused after charges have been filed makes an irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the commission shall proceed as though he had pleaded not guilty.
- (b) A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty is sought. With respect to any other charge or specification to which a plea of guilty has been made by the accused and accepted by the military judge, a finding of guilty of the charge or specification may, if permitted by regulations, be entered immediately without a vote. This finding shall constitute the finding of the commission unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty.

(adapted from UCMJ Art. 45)

SEC. 222. OPPORTUNITY TO OBTAIN WITNESSES AND OTHER EVIDENCE.

- (a) Defense counsel shall have opportunity to obtain witnesses and other evidence in accordance with such regulations as the Secretary of Defense may prescribe. Defense counsel may cross-examine each witness for the prosecution who testifies before the commission. Process issued in military commissions to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any place where the United States shall have jurisdiction thereof.

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DELIBERATIVE DRAFT—
CLOSE HOLD**

- (b) 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. Exculpatory evidence that is classified may be provided solely to military defense counsel, after in camera review by the military judge. All exculpatory classified evidence shall be provided to the accused in a redacted or summary form, if it is possible to do so without compromising intelligence sources, methods, or activities, or other national security interests.

(adapted from UCMJ Art. 46)

SEC. 223. DEFENSE OF LACK OF MENTAL RESPONSIBILITY.

- (a) It is an affirmative defense in a trial by military commission that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality of the wrongfulness of the acts. Mental disease or defect does not otherwise constitute a defense.
- (b) The accused has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence.
- (c) Whenever lack of mental responsibility of the accused with respect to an offense is properly at issue, the military judge shall instruct the members of the commission as to the defense of lack of mental responsibility under this section and shall charge them to find the accused—
- (1) guilty;
 - (2) not guilty; or
 - (3) not guilty only by reason of lack of mental responsibility.

(adapted from UCMJ Art. 50A)

SEC. 224. VOTING AND RULINGS.

- (a) Voting by members of a military commission on the findings and on the sentence shall be by secret written ballot.
- (b) The military judge shall rule upon all questions of law, including the admissibility of evidence, and all interlocutory questions arising during the proceedings. Any such ruling made by the military judge upon any question of law or any interlocutory question other than the factual issue of mental responsibility of the accused is final and constitutes the ruling of the commission. However, the military judge may change his ruling at any time during the trial.

