

109TH CONGRESS
2D SESSION

S. _____

To authorize trial by military commission for violations of the law of war,
and for other purposes.

IN THE SENATE OF THE UNITED STATES

introduced the following bill, which was read twice
and referred to the Committee on

A BILL

To authorize trial by military commission for violations of
the law of war, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Military Commissions
5 Act of 2006".

6 **SEC. 2. FINDINGS.**

7 Congress makes the following findings:

8 (1) The Constitution of the United States
9 grants to Congress the power "To define and pun-
10 ish... Offenses against the Law of Nations", as well

1 as the power "To declare War...To raise and support
2 Armies...[and] To provide and maintain a Navy".

3 (2) The military commission is the traditional
4 tribunal for the trial of persons engaged in hostilities
5 for violations of the law of war.

6 (3) Congress has, in the past, both authorized
7 the use of military commission by statute and recog-
8 nized the existence and authority of military com-
9 missions.

10 (4) Military commissions have been convened
11 both by the President and by military commanders
12 in the field to try offenses against the law of war.

13 (5) It is in the national interest for Congress to
14 exercise its authority under the Constitution to enact
15 legislation authorizing and regulating the use of
16 military commissions to try and punish violations of
17 the law of war.

18 (6) Military commissions established and oper-
19 ating under chapter 47A of title 10, United States
20 Code (as enacted by this Act), are regularly con-
21 stituted courts affording, in the words of Common
22 Article 3 of the Geneva Conventions, "all the judicial
23 guarantees which are recognized as indispensable by
24 civilized peoples".

1 **SEC. 3. AUTHORIZATION FOR MILITARY COMMISSIONS.**

2 (a) **IN GENERAL.**—The President is authorized to es-
3 tablish military commissions for the trial of alien unlawful
4 enemy combatants engaged in hostilities against the
5 United States for violations of the law of war and other
6 offenses specifically made triable by military commission
7 as provided in chapter 47 of title 10, United States Code,
8 and chapter 47A of title 10, United States Code (as en-
9 acted by this Act).

10 (b) **CONSTRUCTION.**—The authority in subsection (a)
11 may not be construed to alter or limit the authority of
12 the President under the Constitution of the United States
13 to establish military commissions for areas declared to be
14 under martial law or in occupied territories should cir-
15 cumstances so require.

16 (c) **SCOPE OF PUNISHMENT AUTHORITY.**—A military
17 commission established pursuant to subsection (a) shall
18 have authority to impose upon any person found guilty
19 under a proceeding under chapter 47A of title 10, United
20 States Code (as so enacted), a sentence that is appropriate
21 for the offense or offenses for which there is a finding
22 of guilt, including a sentence of death if authorized under
23 such chapter, imprisonment for life or a term of years,
24 payment of a fine or restitution, or such other lawful pun-
25 ishment or condition of punishment as the military com-
26 mission shall direct.

1 (d) EXECUTION OF PUNISHMENT.—The Secretary of
2 Defense is authorized to carry out a sentence of punish-
3 ment imposed by a military commission established pursu-
4 ant to subsection (a) in accordance with such procedures
5 as the Secretary may prescribe.

6 (e) ANNUAL REPORT ON TRIALS BY MILITARY COM-
7 MISSIONS.—

8 (1) ANNUAL REPORT REQUIRED.—Not later
9 than December 31 each year, the Secretary of De-
10 fense shall submit to the Committees on Armed
11 Services of the Senate and the House of Representa-
12 tives a report on any trials conducted by military
13 commissions established pursuant to subsection (a)
14 during such year.

15 (2) FORM.—Each report under this subsection
16 shall be submitted in unclassified form, but may in-
17 clude a classified annex.

18 **SEC. 4. MILITARY COMMISSIONS.**

19 (a) MILITARY COMMISSIONS.—

20 (1) IN GENERAL.—Subtitle A of title 10,
21 United States Code, is amended by inserting after
22 chapter 47 the following new chapter:

23 **“CHAPTER 47A—MILITARY COMMISSIONS**

24 **“SUBCHAPTER I—GENERAL PROVISIONS**

“Sec.

“948a. Definitions.

“948b. Military commissions generally.

"948c. Persons subject to military commissions.

"948d. Jurisdiction of military commissions.

1 **"§ 948a. Definitions**

2 "In this chapter:

3 "(1) ALIEN.—The term 'alien' means an indi-
4 vidual who is not a citizen of the United States.

5 "(2) CLASSIFIED INFORMATION.—The term
6 'classified information' means the following:

7 "(A) Any information or material that has
8 been determined by the United States Govern-
9 ment pursuant to statute, Executive order, or
10 regulation to require protection against unau-
11 thorized disclosure for reasons of national secu-
12 rity.

13 "(B) Any restricted data, as that term is
14 defined in section 11 y. of the Atomic Energy
15 Act of 1954 (42 U.S.C. 2014(y)).

16 "(3) LAWFUL ENEMY COMBATANT.—The term
17 'lawful enemy combatant' means an individual deter-
18 mined by or under the authority of the President or
19 Secretary of Defense, whether on an individualized
20 or collective basis, to be—

21 "(A) a member of the regular forces of a
22 State party engaged in hostilities against the
23 United States;

1 “(B) a member of a militia, volunteer
2 corps, or organized resistance movement belong-
3 ing to a State party engaged in such hostilities,
4 which are under responsible command, wear a
5 fixed distinctive sign recognizable at a distance,
6 carry their arms openly, and abide by the law
7 of war; or

8 “(C) a member of a regular armed force
9 who professes allegiance to a government en-
10 gaged in such hostilities, but not recognized by
11 the United States.

12 “(4) PROTECTED PERSON.—The term ‘pro-
13 tected person’ means the category of persons de-
14 scribed in Article 4 of the Geneva Convention Rel-
15 ative to the Protection of Civilian Persons in Time
16 of War, done at Geneva August 12, 1949 (6 UST
17 3516).

18 “(5) UNLAWFUL ENEMY COMBATANT.—(A) The
19 term ‘unlawful enemy combatant’ means an indi-
20 vidual determined by or under the authority of the
21 President or the Secretary of Defense—

22 “(i) to be part of or affiliated with a force
23 or organization (including al Qaeda, the
24 Taliban, and associated forces) engaged in hos-

1 tilities against the United States in violation of
2 the law of war;

3 “(ii) to have committed a hostile act in aid
4 of a force or organization described in subpara-
5 graph (A); or

6 “(iii) to have supported hostilities in aid of
7 a force or organization described in subpara-
8 graph (A).

9 “(B) The term includes any individual deter-
10 mined by a Combatant Status Review Tribunal, be-
11 fore the date of the enactment of the Military Com-
12 mission Act of 2006, to have been properly detained
13 as an unlawful enemy combatant.

14 “(C) The term does not include any alien deter-
15 mined by the President or the Secretary of Defense,
16 whether on an individualized or collective basis, or
17 by any competent tribunal established under the au-
18 thority of the President or the Secretary of Defense,
19 to be—

20 “(i) a lawful combatant (including a pris-
21 oner of war); or

22 “(ii) a protected person whose trial by
23 military commission under this chapter would
24 be inconsistent with Articles 64–76 of the Gene-
25 va Convention Relative to the Protection of Ci-

1 vilian Persons in Time of War, done at Geneva
2 August 12, 1949.

3 **“§ 948b. Military commissions generally**

4 “(a) PURPOSE.—This chapter codifies and estab-
5 lishes procedures governing the use of military commis-
6 sions to try alien unlawful enemy combatants engaged in
7 hostilities against the United States for violations of the
8 law of war and other offenses triable by military commis-
9 sion.

10 “(b) CONSTRUCTION OF PROVISIONS.—The proce-
11 dures for military commissions set forth in this chapter
12 are based upon the procedures for trial by general courts-
13 martial under chapter 47 of this title (the Uniform Code
14 of Military Justice). Chapter 47 of this title does not, by
15 its terms, apply to trial by military commission except as
16 specifically provided therein or in this chapter, and many
17 of the provisions of chapter 47 of this title are by their
18 terms inapplicable to military commissions. The judicial
19 construction and application of chapter 47 of this title,
20 while instructive, is therefore not of its own force binding
21 on military commissions established under this chapter.

22 “(c) INAPPLICABILITY OF CERTAIN PROVISIONS.—

23 (1) The following provisions of this title shall not apply
24 to trial by military commission under this chapter:

1 “(A) Section 810 (article 10 of the Uniform
2 Code of Military Justice), relating to speedy trial,
3 including any rule of courts-martial relating to
4 speedy trial.

5 “(B) Sections 831(a), (b), and (d) (articles
6 31(a), (b), and (d) of the Uniform Code of Military
7 Justice), relating to compulsory self-incrimination.

8 “(C) Section 832 (article 32 of the Uniform
9 Code of Military Justice), relating to pretrial inves-
10 tigation.

11 “(2) Other provisions of chapter 47 of this title shall
12 apply to trial by military commission under this chapter
13 only to the extent provided by the terms of such provisions
14 or by this chapter.

15 “(d) TREATMENT OF RULINGS AND PRECEDENTS.—
16 The findings, holdings, interpretations, and other prece-
17 dents of military commissions under this chapter may not
18 be introduced or considered in any hearing, trial, or other
19 proceeding of a court-martial convened under chapter 47
20 of this title. The findings, holdings, interpretations, and
21 other precedents of military commissions under this chap-
22 ter may not form the basis of any holding, decision, or
23 other determination of a court-martial convened under
24 that chapter.

1 **“§ 948c. Persons subject to military commissions**

2 “Any alien unlawful enemy combatant engaged in
3 hostilities or having supported hostilities against the
4 United States is subject to trial by military commission
5 as set forth in this chapter.

6 **“§ 948d. Jurisdiction of military commissions**

7 “A military commission under this chapter shall have
8 jurisdiction to try persons subject to this chapter for any
9 offense made punishable by this chapter, sections 904 and
10 906 of this title (articles 104 and 106 of the Uniform Code
11 of Military Justice), or the law of war, and may, under
12 such limitations as the President may prescribe, adjudge
13 any punishment not forbidden by this chapter, including
14 the penalty of death when authorized under this chapter,
15 chapter 47 of this title, or the law of war.

16 **“SUBCHAPTER II—COMPOSITION OF MILITARY**
17 **COMMISSIONS**

“Sec.

“948h. Who may convene military commissions.

“948i. Who may serve on military commissions.

“948j. Military judge of a military commission.

“948k. Detail of trial counsel and defense counsel.

“948l. Detail or employment of reporters and interpreters.

“948m. Number of members; excuse of members; absent and additional members.

18 **“§ 948h. Who may convene military commissions**

19 “Military commissions under this chapter may be
20 convened by the Secretary of Defense or by any officer

1 or official of the United States designated by the Secretary
2 for that purpose.

3 **“§ 948i. Who may serve on military commissions**

4 “(a) IN GENERAL.—Any commissioned officer of the
5 armed forces on active duty is eligible to serve on a mili-
6 tary commission under this chapter, including commis-
7 sioned officers of the reserve components of the armed
8 forces on active duty, commissioned officers of the Na-
9 tional Guard on active duty in Federal service, or retired
10 commissioned officers recalled to active duty.

11 “(b) DETAIL OF MEMBERS.—When convening a mili-
12 tary commission under this chapter, the convening author-
13 ity shall detail as members thereof such members of the
14 armed forces eligible under subsection (a) who, as in the
15 opinion of the convening authority, are best qualified for
16 the duty by reason of age, education, training, experience,
17 length of service, and judicial temperament. No member
18 of an armed force is eligible to serve as a member of a
19 military commission when such member is the accuser or
20 a witness for the prosecution or has acted as an investi-
21 gator or counsel in the same case.

22 “(c) EXCUSE OF MEMBERS.—Before a military com-
23 mission under this chapter is assembled for the trial of
24 a case, the convening authority may excuse a member
25 from participating in the case.

1 **“§ 948j. Military judge of a military commission**

2 “(a) **DETAIL OF MILITARY JUDGE.**—A military judge
3 shall be detailed to each military commission under this
4 chapter. The Secretary of Defense shall prescribe regula-
5 tions providing for the manner in which military judges
6 are so detailed to military commissions. The military judge
7 shall preside over each military commission to which he
8 has been detailed.

9 “(b) **ELIGIBILITY.**—A military judge shall be a com-
10 missioned officer of the armed forces who is a member
11 of the bar of a Federal court, or a member of the bar
12 of the highest court of a State, and who is certified to
13 be qualified for duty under section 826 of this title (article
14 26 of the Uniform Code of Military Justice) as a military
15 judge in general courts-martial by the Judge Advocate
16 General of the armed force of which such military judge
17 is a member.

18 “(c) **INELIGIBILITY OF CERTAIN INDIVIDUALS.**—No
19 person is eligible to act as military judge in a case of a
20 military commission under this chapter if he is the accuser
21 or a witness or has acted as investigator or a counsel in
22 the same case.

23 “(d) **CONSULTATION WITH MEMBERS; INELIGI-**
24 **BILITY TO VOTE.**—A military judge detailed to a military
25 commission under this chapter may not consult with the
26 members except in the presence of the accused (except as

1 otherwise provided in section 949d of this title), trial coun-
2 sel, and defense counsel, nor may he vote with the mem-
3 bers.

4 “(e) OTHER DUTIES.—A commissioned officer who
5 is certified to be qualified for duty as a military judge of
6 a military commission under this chapter may perform
7 such other duties as are assigned to him by or with the
8 approval of the Judge Advocate General of the armed
9 force of which such officer is a member or the designee
10 of such Judge Advocate General.

11 “(f) PROHIBITION ON EVALUATION OF FITNESS BY
12 CONVENING AUTHORITY.—The convening authority of a
13 military commission under this chapter shall not prepare
14 or review any report concerning the effectiveness, fitness,
15 or efficiency of a military judge detailed to the military
16 commission which relates to his performance of duty as
17 a military judge on the military commission.

18 **“§ 948k. Detail of trial counsel and defense counsel**

19 “(a) DETAIL OF COUNSEL GENERALLY.—(1) Trial
20 counsel and military defense counsel shall be detailed for
21 each military commission under this chapter.

22 “(2) Assistant trial counsel and assistant and asso-
23 ciate defense counsel may be detailed for a military com-
24 mission under this chapter.

1 “(3) Military defense counsel for a military commis-
2 sion under this chapter shall be detailed as soon as prac-
3 ticable.

4 “(4) The Secretary of Defense shall prescribe regula-
5 tions providing for the manner in which trial counsel and
6 military defense counsel are detailed for military commis-
7 sions under this chapter and for the persons who are au-
8 thorized to detail such counsel for such military commis-
9 sions.

10 “(b) TRIAL COUNSEL.—Subject to subsection (d),
11 trial counsel detailed for a military commission under this
12 chapter must be—

13 “(1) a judge advocate (as that term is defined
14 in section 801 of this title (article 1 of the Uniform
15 Code of Military Justice) who is—

16 “(A) a graduate of an accredited law
17 school or is a member of the bar of a Federal
18 court or of the highest court of a State; and

19 “(B) certified as competent to perform du-
20 ties as trial counsel before general courts-mar-
21 tial by the Judge Advocate General of the
22 armed force of which he is a member; or

23 “(2) a civilian who is—

24 “(A) a member of the bar of a Federal
25 court or of the highest court of a State; and

1 “(B) otherwise qualified to practice before
2 the military commission pursuant to regulations
3 prescribed by the Secretary of Defense.

4 “(c) MILITARY DEFENSE COUNSEL.—Subject to sub-
5 section (d), military defense counsel detailed for a military
6 commission under this chapter must be a judge advocate
7 (as so defined) who is—

8 “(1) a graduate of an accredited law school or
9 is a member of the bar of a Federal court or of the
10 highest court of a State; and

11 “(2) certified as competent to perform duties as
12 defense counsel before general courts-martial by the
13 Judge Advocate General of the armed force of which
14 he is a member.

15 “(d) INELIGIBILITY OF CERTAIN INDIVIDUALS.—No
16 person who has acted as an investigator, military judge,
17 or member of a military commission under this chapter
18 in any case may act later as trial counsel or military de-
19 fense counsel in the same case. No person who has acted
20 for the prosecution before a military commission under
21 this chapter may act later in the same case for the de-
22 fense, nor may any person who has acted for the defense
23 before a military commission under this chapter act later
24 in the same case for the prosecution.

1 **“§ 948l. Detail or employment of reporters and inter-**
2 **preters**

3 “(a) COURT REPORTERS.—Under such regulations
4 as the Secretary of Defense may prescribe, the convening
5 authority of a military commission under this chapter
6 shall detail to or employ for the military commission quali-
7 fied court reporters, who shall prepare a verbatim record
8 of the proceedings of and testimony taken before the mili-
9 tary commission.

10 “(b) INTERPRETERS.—Under such regulations as the
11 Secretary of Defense may prescribe, the convening author-
12 ity of a military commission under this chapter may detail
13 to or employ for the military commission interpreters who
14 shall interpret for the military commission, and, as nec-
15 essary, for trial counsel and defense counsel for the mili-
16 tary commission, and for the accused.

17 “(c) TRANSCRIPT; RECORD.—The transcript of a
18 military commission under this chapter shall be under the
19 control of the convening authority of the military commis-
20 sion, who shall also be responsible for preparing the record
21 of the proceedings of the military commission.

22 **“§ 948m. Number of members; excuse of members; ab-**
23 **sent and additional members**

24 “(a) NUMBER OF MEMBERS.—(1) A military com-
25 mission under this chapter shall, except as provided in
26 paragraph (2), have at least five members.

1 “(2) In a case in which the accused before a military
2 commission under this chapter may be sentenced to a pen-
3 alty of death, the military commission shall have the num-
4 ber of members prescribed by section 949m(c) of this title.

5 “(b) EXCUSE OF MEMBERS.—No member of a mili-
6 tary commission under this chapter may be absent or ex-
7 cused after the military commission has been assembled
8 for the trial of a case unless excused—

9 “(1) as a result of challenge;

10 “(2) by the military judge for physical disability
11 or other good cause; or

12 “(3) by order of the convening authority for
13 good cause.

14 “(c) ABSENT AND ADDITIONAL MEMBERS.—When-
15 ever a military commission under this chapter is reduced
16 below the number of members required by subsection (a),
17 the trial may not proceed unless the convening authority
18 details new members sufficient to provide not less than
19 such number. The trial may proceed with the new mem-
20 bers present after the recorded evidence previously intro-
21 duced before the members has been read to the military
22 commission in the presence of the military judge, the ac-
23 cused (except as provided in section 949d of this title),
24 and counsel for both sides.

1 “SUBCHAPTER III—PRE-TRIAL PROCEDURE

“Sec.

“948q. Charges and specifications.

“948r. Compulsory self-incrimination prohibited; statements obtained by torture
or cruel inhuman or degrading treatment.

“948s. Service of charges.

2 **“§ 948q. Charges and specifications**

3 “(a) CHARGES AND SPECIFICATIONS.—Charges and
4 specifications against an accused in a military commission
5 under this chapter shall be signed by a person subject to
6 chapter 47 of this title under oath before a commissioned
7 officer of the armed forces authorized to administer oaths
8 and shall state—

9 “(1) that the signer has personal knowledge of,
10 or reason to believe, the matters set forth therein;
11 and

12 “(2) that they are true in fact to the best of his
13 knowledge and belief.

14 “(b) NOTICE TO ACCUSED.—Upon the swearing of
15 the charges and specifications in accordance with sub-
16 section (a), the accused shall be informed of the charges
17 and specifications against him as soon as practicable.

18 **“§ 948r. Compulsory self-incrimination prohibited;**
19 **statements obtained by torture or cruel**
20 **inhuman or degrading treatment**

21 “(a) IN GENERAL.—No person shall be required to
22 testify against himself at a proceeding of a military com-
23 mission under this chapter.

1 “(b) STATEMENTS OBTAINED BY TORTURE OR
2 CRUEL, INHUMAN, OR DEGRADING TREATMENT.—A
3 statement obtained by use of torture or by cruel, inhuman,
4 or degrading treatment prohibited by section 1003 of the
5 Detainee Treatment Act of 2005 (42 U.S.C. 2000dd),
6 whether or not under color of law, shall not be admissible
7 in a military commission under this chapter, except
8 against a person accused of torture or such treatment as
9 evidence the statement was made.

10 “(c) STATEMENTS OBTAINED BY ALLEGED COER-
11 CION NOT AMOUNTING TO TORTURE OR CRUEL, INHU-
12 MAN, OR DEGRADING TREATMENT.—An otherwise admis-
13 sible statement obtained through the use of alleged coer-
14 cion not amounting to torture or cruel, inhuman, or de-
15 grading treatment prohibited by section 1003 of the De-
16 tainee Treatment Act of 2005 may be admitted in evidence
17 in a military commission under this chapter only if the
18 military judge finds that—

19 “(1) the totality of the circumstances under
20 which the statement was made render it reliable and
21 possessing sufficient probative value; and

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

1 **“§ 948s. Service of charges**

2 “The trial counsel assigned to a case before a military
3 commission under this chapter shall cause to be served
4 upon the accused and military defense counsel a copy of
5 the charges upon which trial is to be had in English and,
6 if appropriate, in another language that the accused un-
7 derstands, sufficiently in advance of trial to prepare a de-
8 fense.

9 **“SUBCHAPTER IV—TRIAL PROCEDURE**

“Sec.

“949a. Rules.

“949b. Unlawfully influencing action of military commission.

“949c. Duties of trial counsel and defense counsel.

“949d. Sessions.

“949e. Continuances.

“949f. Challenges.

“949g. Oaths.

“949h. Former jeopardy.

“949i. Pleas of the accused.

“949j. Opportunity to obtain witnesses and other evidence.

“949k. Defense of lack of mental responsibility.

“949l. Voting and rulings.

“949m. Number of votes required.

“949n. Military commission to announce action.

“949o. Record of trial.

10 **“§ 949a. Rules**

11 “(a) PROCEDURES.—Pretrial, trial, and post-trial
12 procedures, including elements and modes of proof, for
13 cases triable by military commission under this chapter
14 may be prescribed by the Secretary of Defense. Such pro-
15 cedures may not be contrary to or inconsistent with this
16 chapter.

17 “(b) RULES OF EVIDENCE.—Except as otherwise
18 provided in this chapter or chapter 47 of this title, the

1 rules of evidence applicable in trials by general courts-
2 martial of the United States shall apply in trials by mili-
3 tary commission under this chapter.

4 “(c) EXCEPTIONS.—(1) The Secretary of Defense, in
5 consultation with the Attorney General, may make such
6 exceptions in the applicability in trials by military commis-
7 sion under this chapter from the procedures and rules oth-
8 erwise applicable in general courts-martial as may be re-
9 quired by the unique circumstances of the conduct of mili-
10 tary and intelligence operations during hostilities or by
11 other practical need.

12 “(2) Notwithstanding any exceptions authorized by
13 paragraph (1), the procedures and rules of evidence in
14 trials by military commission under this chapter shall in-
15 clude, at a minimum, the following rights:

16 “(A) To examine and respond to all evidence
17 considered by the military commission on the issue
18 of guilt or innocence and for sentencing.

19 “(B) To be present at all sessions of the mili-
20 tary commission (other than those for deliberations
21 or voting), except when excluded to ensure the phys-
22 ical safety of individuals or prevent disruption of the
23 proceedings under section 949d of this title.

24 “(C) To the assistance of counsel.

1 “(D) To self-representation, if the accused
2 knowingly and competently waives the assistance of
3 counsel.

4 “(E) To the suppression of evidence that is not
5 reliable or probative.

6 “(F) To the suppression of evidence the pro-
7 bative value of which is substantially outweighed
8 by—

9 “(i) the danger of unfair prejudice, confu-
10 sion of the issues, or misleading the members;
11 or

12 “(ii) considerations of undue delay, waste
13 of time, or needless presentation of cumulative
14 evidence.

15 “(3) In making exceptions in the applicability in
16 trials by military commission under this chapter from the
17 procedures and rules otherwise applicable in general
18 courts-martial, the Secretary of Defense may provide the
19 following:

20 “(A) Evidence seized outside the United States
21 shall not be excluded from trial by military commis-
22 sion on the grounds that the evidence was not seized
23 pursuant to a search warrant or authorization.

24 “(B) A statement of the accused shall not be
25 excluded from trial by military commission on the

1 grounds of compulsory self-incrimination or failure
2 to give warnings pertaining to self-incrimination, so
3 long as the evidence complies with the provisions of
4 section 948r of this title.

5 “(C) Evidence shall be admitted as authentic so
6 long as—

7 “(i) the military judge of the military com-
8 mission determines that there is sufficient evi-
9 dence that the evidence is what it is claimed to
10 be; and

11 “(ii) the military judge instructs the mem-
12 bers that they may consider any issue as to au-
13 thentication or identification of evidence in de-
14 termining the weight, if any, to be given to the
15 evidence.

16 “(D) Hearsay evidence not otherwise admissible
17 under the rules of evidence applicable in trial by
18 general courts-martial may be admitted in a trial by
19 military commission only if—

20 “(i) the proponent of the evidence makes
21 known to the adverse party, sufficiently in ad-
22 vance of trial or hearing to provide the adverse
23 party with a fair opportunity to meet the evi-
24 dence, the proponent’s intention to offer the
25 evidence, and the particulars of the evidence

1 (including information on the circumstances
2 under which the evidence was obtained); and

3 “(ii) the military judge finds that the total-
4 ity of the circumstances render the evidence re-
5 liable or possessing sufficient probative value.

6 “(d) DELEGATION OF AUTHORITY TO PRESCRIBE
7 REGULATIONS.—The Secretary of Defense may delegate
8 the authority of the Secretary to prescribe regulations
9 under this chapter.

10 **“§ 949b. Unlawfully influencing action of military**
11 **commission**

12 “(a) IN GENERAL.—(1) No authority convening a
13 military commission under this chapter may censure, rep-
14 rimand, or admonish the military commission, or any
15 member, military judge, or counsel thereof, with respect
16 to the findings or sentence adjudged by the military com-
17 mission, or with respect to any other exercises of its or
18 his functions in the conduct of the proceedings.

19 “(2) No person may attempt to coerce or, by any un-
20 authorized means, influence the action of a military com-
21 mission under this chapter, or any member thereof, in
22 reaching the findings or sentence in any case, or the action
23 of any convening, approving, or reviewing authority with
24 respect to his judicial acts.

1 “(3) The provisions of this subsection shall not apply
2 with respect to—

3 “(A) general instructional or informational
4 courses in military justice if such courses are de-
5 signed solely for the purpose of instructing members
6 of a command in the substantive and procedural as-
7 pects of military commissions; or

8 “(B) statements and instructions given in open
9 proceedings by a military judge or counsel.

10 “(b) PROHIBITION ON CONSIDERATION OF ACTIONS
11 ON COMMISSION IN EVALUATION OF FITNESS.—In the
12 preparation of an effectiveness, fitness, or efficiency report
13 or any other report or document used in whole or in part
14 for the purpose of determining whether a commissioned
15 officer of the armed forces is qualified to be advanced in
16 grade, or in determining the assignment or transfer of any
17 such officer or whether any such officer should be retained
18 on active duty, no person may—

19 “(1) consider or evaluate the performance of
20 duty of any member of a military commission under
21 this chapter; or

22 “(2) give a less favorable rating or evaluation
23 to any commissioned officer because of the zeal with
24 which such officer, in acting as counsel, represented

1 any accused before a military commission under this
2 chapter.

3 **“§ 949c. Duties of trial counsel and defense counsel**

4 “(a) TRIAL COUNSEL.—The trial counsel of a mili-
5 tary commission under this chapter shall prosecute in the
6 name of the United States.

7 “(b) DEFENSE COUNSEL.—(1) The accused shall be
8 represented in his defense before a military commission
9 under this chapter as provided in this subsection.

10 “(2) The accused shall be represented by military
11 counsel detailed under section 948k of this title.

12 “(3) The accused may be represented by civilian
13 counsel if retained by the accused, provided that such civil-
14 ian counsel—

15 “(A) is a United States citizen;

16 “(B) is admitted to the practice of law in a
17 State, district, or possession of the United States, or
18 before a Federal court;

19 “(C) has not been the subject of any sanction
20 of disciplinary action by any court, bar, or other
21 competent governmental authority for relevant mis-
22 conduct;

23 “(D) has been determined to be eligible for ac-
24 cess to information classified at the level Secret or
25 higher; and

1 “(E) has signed a written agreement to comply
2 with all applicable regulations or instructions for
3 counsel, including any rules of court for conduct
4 during the proceedings.

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

7 “(5) The accused is not entitled to be represented by
8 more than one military counsel. However, the person au-
9 thorized under regulations prescribed under section 948k
10 of this title to detail counsel, in such person’s sole discre-
11 tion, may detail additional military counsel to represent
12 the accused.

13 “(6) Defense counsel may cross-examine each witness
14 for the prosecution who testifies before a military commis-
15 sion under this chapter.

16 “§ 949d. Sessions

17 “(a) SESSIONS WITHOUT PRESENCE OF MEM-
18 BERS.—(1) At any time after the service of charges which
19 have been referred for trial by military commission under
20 this chapter, the military judge may call the military com-
21 mission into session without the presence of the members
22 for the purpose of—

23 “(A) hearing and determining motions raising
24 defenses or objections which are capable of deter-

1 mination without trial of the issues raised by a plea
2 of not guilty;

3 “(B) hearing and ruling upon any matter which
4 may be ruled upon by the military judge under this
5 chapter, whether or not the matter is appropriate for
6 later consideration or decision by the members;

7 “(C) if permitted by regulations prescribed by
8 the Secretary of Defense, receiving the pleas of the
9 accused; and

10 “(D) performing any other procedural function
11 which may be performed by the military judge under
12 this chapter or under rules prescribed pursuant to
13 section 949a of this title and which does not require
14 the presence of the members.

15 “(2) Except as provided in subsections (b), (c), and
16 (d), any proceedings under paragraph (1) shall be con-
17 ducted in the presence of the accused, defense counsel, and
18 trial counsel, and shall be made part of the record.

19 “(b) DELIBERATION OR VOTE OF MEMBERS.—When
20 the members of a military commission under this chapter
21 deliberate or vote, only the members may be present.

22 “(c) CLOSURE OF PROCEEDINGS.—(1) The military
23 judge may close to the public all or part of the proceedings
24 of a military commission under this chapter.

1 “(2) The military judge may close to the public all
2 or a portion of the proceedings under paragraph (1) only
3 upon making a specific finding that such closure is nec-
4 essary to—

5 “(A) protect information the disclosure of which
6 could reasonably be expected to cause damage to the
7 national security, including intelligence or law en-
8 forcement sources, methods, or activities; or

9 “(B) ensure the physical safety of individuals.

10 “(3) A finding under paragraph (2) may be based
11 upon a presentation, including a presentation ex parte or
12 in camera, by either trial counsel or defense counsel.

13 “(4) Classified information shall be handled in ac-
14 cordance with rules applicable in trials by general courts-
15 martial of the United States. In accordance with such
16 rules, and to the extent provided in such rules, the military
17 judge may authorize—

18 “(A) the deletion of specified items of classified
19 information from documents made available to the
20 accused;

21 “(B) the substitution of a portion or summary
22 of the information for such classified documents; or

23 “(C) the substitution of a statement admitting
24 relevant facts that the classified information would
25 tend to prove.

1 “(d) EXCLUSION OF ACCUSED FROM CERTAIN PRO-
2 CEEDINGS.—The military judge may exclude the accused
3 from any portion of a proceeding upon a determination
4 that, after being warned by the military judge, the accused
5 persists in conduct that justifies exclusion from the court-
6 room—

7 “(1) to ensure the physical safety of individuals;

8 or

9 “(2) to prevent disruption of the proceedings by
10 the accused.

11 **“§ 949e. Continuances**

12 “The military judge in a military commission under
13 this chapter may, for reasonable cause, grant a continu-
14 ance to any party for such time, and as often, as may
15 appear to be just.

16 **“§ 949f. Challenges**

17 “(a) CHALLENGES AUTHORIZED.—The military
18 judge and members of a military commission under this
19 chapter may be challenged by the accused or trial counsel
20 for cause stated to the military commission. The military
21 judge shall determine the relevance and validity of chal-
22 lenges for cause, and may not receive a challenge to more
23 than one person at a time. Challenges by trial counsel
24 shall ordinarily be presented and decided before those by
25 the accused are offered.

