Trials Under Military Order:

A Guide to the Final Rules for Military Commissions

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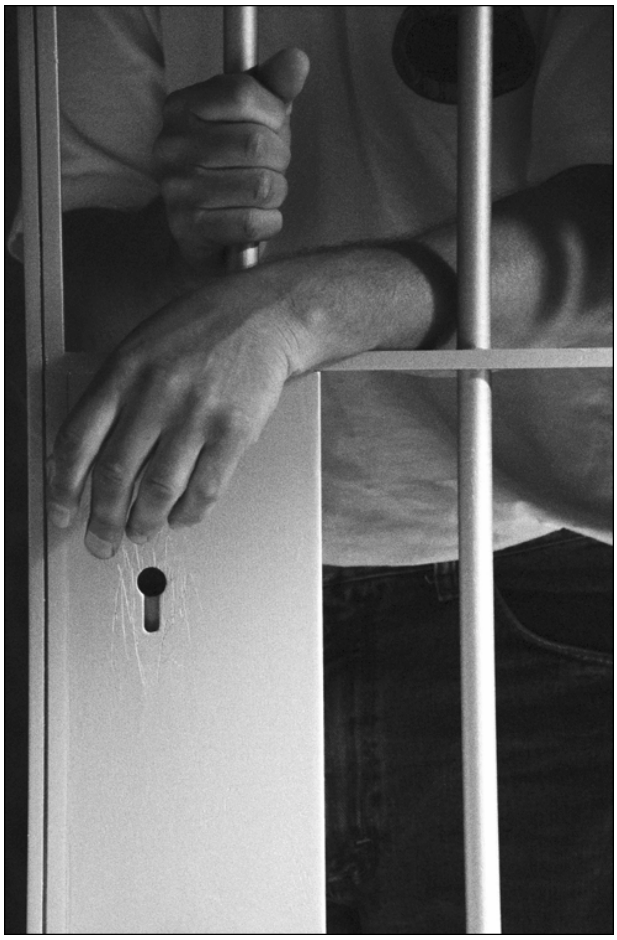

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Trials Under Military Order:
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The Lawyers Committee for Human Rights
Briefing Paper

Updated July 2003

This briefing paper analyzes the main provisions of the most substantive and lengthy of the military commission rules issued by the U.S. Department of Defense – Military Commission Instruction No. 2, which enumerates the crimes over which the military commissions will have jurisdiction – and provides a summary and commentary on the other seven Military Commission Instructions.

To assist in understanding the specific analysis of the individual Military Commission Instructions, it is useful to begin by reviewing the four overarching themes that encapsulate the issues raised by the military commissions:

1) Overbroad Jurisdiction

2) Disincentives for Civilian Legal Participation

3) Secret Trials; Secret Evidence

4) Lack of Independent Appeal Process Outside Military Chain of Command

Overbroad Jurisdiction of the Military Commissions

In general, the range of substantive offenses that are presented as "triable by military commission" is quite broad. The breadth of jurisdictional

Military Commissions Timeline

November 13, 2001. President Bush, in his capacity as Commander-in-Chief, issues a five-page Military Order on "Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism." The Military Order calls for the use of military commissions to try suspected members of al Qaeda or other international terrorists groups.

March 21, 2002. The Department of Defense issues Military Commission Order No. 1, which outlines a set of procedural rules under which the military commissions would operate.

February, 2003. The Department of Defense issues a proposed draft "Military Commission Instruction: Crimes and Elements for Trials by Military Commission." Unlike the March 2002 procedural rules, the rules for crimes and elements are issued in draft form; a number of individuals and groups, including the Lawyers Committee for Human Rights, submit comments and suggestions.

April 30, 2003. The Department of Defense issues the final versions of eight Military Commission Instructions. "Military Commission Instruction No. 2" is the revised and final version of the "Crimes and Elements" document circulated in February. The other documents are new to the public.

July 1, 2003. The Department of Defense issues (without notice) a slightly revised version of Military Commission Instruction No. 5. This revision (which retains the "April 30, 2003" date) somewhat loosens restrictions on civilian defense counsel by allowing them to speak to potential witnesses and individuals who may assist in discovering evidence, and also permits lawyers to do case preparation off-site.

All of the Military Commission Instructions were issued pursuant to authority established by President Bush's Military Order of November 13, 2001 and the Department of Defense's Military Commission Order No. 1 of March 21, 2002. Together with these documents and pre-existing U.S. law, the eight Military Commission Instructions establish the finalized legal architecture for conduct of military commission trials.

reach is largely achieved because Military Commission Instruction No. 2 expands the notion of "armed conflict" to include isolated incidents – and even attempted crimes. By doing this, crimes that would – until now – have fallen outside military jurisdiction, can now, for purpose of the military commissions, be included under the mantle of "laws of war."

Disincentives for Civilian Participation in Military Commissions

As for administration of the military commissions, the most noteworthy issues concern potential civilian defense attorneys, specifically the fact that the constraints imposed on these lawyers make it highly unlikely that competent lawyers will be willing – or financially able – to become in involved with what they might otherwise have considered a significant and professionally valuable *pro bono* experience.

Unlike the military prosecutors involved in the commissions, civilian defense lawyers will face rigid constraints on their normal personal and professional life. First, they will themselves largely be confined to the premises of military commission proceedings (presumably at Guantanamo or a similarly inaccessible offshore location) and will require Defense Department approval to leave the site.[1] They will also face significant out-of-pocket expenses and opportunity costs: during the proceedings, the civilian lawyers will be required to subordinate the rest of their professional activities to the military commissions while they are defending a case and they must pay for their own security clearance investigations and other expenses.

In addition to these adverse practical matters, the civilian defense lawyers will be hampered in their ability to mount a robust defense. Under Military Instruction No. 5, civilian defense attorneys:

- Are subject to Defense Department monitoring of communications with their clients;
- Are generally barred from speaking about the proceedings to anyone, particularly to the press, except as approved by the Defense Department;[2]
- May be excluded from all material parts of the proceedings and denied access to "protected information" (including potential exculpatory evidence[3]) if "necessary to protect the interests of the United States";
- Are required to reveal to the Defense Department "information related to the representation…to the extent [they] reasonably believe necessary to prevent the commission of a future criminal act that [they] believe is likely to result in

[1] Under the revised version of Military Commission Instruction No. 5, however, they will be authorized to perform case preparation work off-site.
[2] Under the revised version of the Military Commission Instruction No. 5, they will have the right to talk with other members of the DoD-approved Defense team, and with potential witnesses and people who may assist them in finding relevant evidence.
[3] Potentially exculpatory evidence not introduced into the proceeding may be withheld even from assigned military defense counsel. See discussion (below) of "Secret Evidence; Secret Trials."

death or substantial bodily harm, or ***significant impairment of national security"*** [4]

Secret Evidence; Secret Trials

Though the Pentagon's newly appointed Chief Defense Counsel has promised to push for trials to be as open as possible, the government has broad discretion to close proceedings to protect what it determines to be "national security interests."

The March 21, 2002 Military Commission Order No. 1 permits the Prosecution to deny a defendant and his chosen civilian counsel access to unclassified and even unclassifiable "Protected Information" that the Prosecution intends to use in the trial. Indeed, the March Order authorizes the court, for unspecified "national security" reasons, to conduct the entire trial in secret, without the presence of the accused or his chosen civilian counsel.[5] Military Commission Instruction No. 5 reinforces this principle by requiring a civilian attorney to acknowledge under oath that his "qualification as a Civilian Defense Counsel does not guarantee [his or her] presence at closed military commission proceedings or guarantee [his or her] access to any [protected] information…." (Annex B to Military Commission Instruction No. 2, Section I(B)).

Even though assigned *military* defense counsel will be entitled to be present when secret evidence is presented at trial, without court authorization, he or she "may not disclose any information presented during a closed session to individuals excluded from such proceeding or part thereof" – including the civilian defense counsel and the defendant. (March 21, 2002 Military Commission Order No. 1, Section (6(B)(3)). It may, of course, be difficult for the military lawyer to appraise the significance of, or devise a response to, such "Protected Information" without the assistance of the defendant.

Moreover, while "Protected Information" would be excluded from consideration by the tribunal unless made available to the defendant's assigned military counsel, potentially *exculpating evidence* could be withheld even from the military lawyer under Section 6(D)(5)(b) of the March 21, 2002 Military Commission Order No. 1.

These restrictions violate a defendant's rights under the Constitution's Sixth Amendment "to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor." They also violate the defendant's rights under Article 105 of the Third Geneva Convention (relating to prisoners of war)[6] to "defense by…counsel of his own choice"; the "calling of witnesses" and access to the "[p]articulars of the…charges…as well as the

[4] In this memorandum, language in bold italics is always quoted, as indicated by context, from either the February 2003 draft of Military Commission Instruction No. 2, or the April 2003 final version of that or another of the Military Commission Instructions.
[5] March 21, 2002 Military Commission Order No. 1, Sections 6(B)(3) and 6(D)(5)(a).
[6] Convention (III) Relative to the Treatment of Prisoners of War, Geneva, August 12, 1949.

documents which are generally communicated to the accused by virtue of the laws in force in the armed forces in the Detaining Power."[7] While Article 105 does permit a trial to be "held in camera" (excluding the public), as an exceptional matter, "in the interest of State security," no mention is made of excluding the defendant or his lawyer.[8]

Lack of Independent Appeal Process Outside Military Chain of Command

The March Order confirms that the military commission structure will be an entirely closed system, subject to the control of the President or Secretary of Defense, with no appeal to any civilian court. Officials all in the same chain of command create the rules governing the military commissions, define the crimes to be tried by them, and staff the panels sitting in judgment (including review panels).[9] This circumstance – "the accumulation of all powers, legislative, executive, and judiciary in the same hands" – constitutes what James Madison pronounced "the very definition of tyranny."[10]

By contrast, normal courts martial under the Uniform Code of Military Justice provide U.S. military defendants an appeal as of right to the Court of Appeals for the Armed Forces, a civilian panel outside the military command structure. The failure to provide such an independent appeal to military commission defendants directly contravenes Article 106 of the Third Geneva Convention, which mandates a right of appeal "in the same manner as the members of the armed forces of the Detaining Power."[11]

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[7] Under the Uniform Code of Military Justice, which governs normal courts martial, the "trial counsel [military prosecutor], the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence….Process issued in court-martial cases 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…." 10 U.S.C. 846.

[8] By reason of Article 129 of the Third Geneva Convention and Article 146 of Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, August 12, 1949 (Fourth Geneva Convention), Article 105 (and Article 106 referred to below) applies "[i]n all circumstances" to all "persons" accused of "grave breaches" under the Geneva Conventions; and so, even to individuals the administration determines to be ineligible for "prisoner of war" status. The secret trial features of the November Order would also be in violation of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Geneva, 1977 (Additional Protocol I), for example, Article 75(4)(a) (right "to be informed without delay of the particulars of the offence alleged…[and right to] all necessary rights and means of defense"); and Article 75(4)(g) ("right to examine or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him"). Article 75 is expressly intended to protect "persons accused of war crimes or crimes against humanity…who do not benefit from more favourable treatment under the [Geneva] Conventions or this Protocol, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol." (Article 75(7)). Though the United States is not a party to the Additional Protocol I, the United States accepts Article 75 of Additional Protocol I as either "legally binding as customary international law or acceptable practice though not legally binding." See *2003 U.S. Operational Law Handbook* (JAG School), p. 11.

[9] Members of the military commission are appointed by the Secretary of Defense "or a designee." (March 21, 2002 Order, Section 2 and Section 4(A)(1)).

[10] The Federalist No. 47 (James Madison).

[11] As noted above, by reason of Article 129 of the Third Geneva Convention and Article 146 of the Fourth Geneva Convention, Article 106 applies "[i]n all circumstances" even to individuals the administration

ANALYSIS OF MILITARY COMMISSION INSTRUCTIONS

This analysis begins with Military Commission Instruction No. 2, since it is the most substantive and lengthy. Following that discussion, Instructions Nos. 1, and 3 through 8 are addressed.

MILITARY COMMISSION INSTRUCTION NO. 2:
CRIMES AND ELEMENTS FOR TRIALS BY MILITARY COMMISSION

War Crimes and Other Offenses Triable by Military Commission

After the November 13, 2001 Military Order was issued, the Lawyers Committee and other commentators noted a particularly grave concern: that the intended purpose of the military commissions – to try alleged terrorists – indicated that commissions would be used to expand military jurisdiction into areas never before considered subject to military law or military courts.

Bush Administration spokesmen were quick to dismiss concerns regarding the plan to bypass ordinary civilian and military courts for alleged foreign terrorists as "wrong and…based on misconceptions about what the president's order does and how it will function."[12] White House Counsel Alberto Gonzales insisted that "[t]he order only covers foreign enemy war criminals….people [who will] be tried by military commission…must be chargeable with offenses against the international laws of war."[13]

Concerns about the potentially broad scope of the military commissions' jurisdiction now appear to have been well founded. In general, the overriding problem with Military Commission Instruction No. 2, on Crimes and Elements – both in the original draft and the final version – is the attempt to shoehorn crimes such as terrorism and hijacking, which have always been considered *civilian* crimes, into the rubric of *military jurisdiction*; this is true, notwithstanding the claim that the Instructions are not intended to create new law, but merely to re-state, or "declar[e] existing law" (Section 3(A)).

The original draft included terrorism, hijacking and other such offenses within the category of war crimes. These crimes, however, have never before been recognized as *war crimes* under international law. The drafters of the instructions seem to recognize this problem, though the military instruction documents do not acknowledge it. The final version attempts to finesse the issue by putting recognized war crimes into one category –

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determines to be ineligible for "prisoner of war" status. Denial of an impartial tribunal and/or appeal is also in violation Article 75 of Additional Protocol I. See, *e.g.,* Article 75(4) (requiring "an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure…."; and Article 75(4)(j) (requiring that a "convicted person shall be advised on conviction of his judicial and other remedies").

[12] Alberto R. Gonzales, Counsel to President Bush, "Martial Justice, Full and Fair," *New York Times*, November 30, 2001.

[13] Ibid.

"Substantive Offenses – War Crimes" (Section 6(A)) – and then creating a second category of "other" crimes that are also purportedly triable by military commissions: "Substantive Offenses – Other Offenses Triable by Military Commission" (Section 6(B)).

These "Other Offenses" include:

- Hijacking or Hazarding a Vessel or Aircraft
- Terrorism
- Murder by an Unprivileged Belligerent
- Destruction of Property by an Unprivileged Belligerent
- Aiding the Enemy
- Spying
- Perjury or False Testimony
- Obstruction of Justice Related to Military Commissions[14]

To link these crimes to the "law of war" – as they must in order to fall within the jurisdiction of a military commission – each crime includes, as an element, the following condition: ***"[t]he conduct took place in the context of and was associated with armed conflict."***[15]

The attempt to squeeze these crimes into the "law of war" rubric, however, requires expanding the definition of "armed conflict" to the breaking point. As a result, the jurisdiction of the military commissions becomes so broad as potentially to encompass almost any serious unlawful conduct whatsoever.

Armed Conflict.

The White House assured the public that "under the [November 13, 2001] order, the president will refer to military commissions only non-citizens who are members or active supporters of Al Qaeda or other international terrorist organizations targeting the United States."[16]

In fact, in Military Commission Instruction No. 2, there is no requirement that the necessary "Armed Conflict" involve Al Qaeda or a foreign terrorist organization. This means, as the military commission instructions are written, virtually any significant criminal act by a non-citizen committed within, or otherwise affecting the United States risks being qualified as "[taking] place in the context of and [being] associated with

[14] The first five of these offenses are particularly problematic from this point of view. (Arguably, the latter two offenses might be considered to fall under some form of inherent ancillary jurisdiction of the tribunal to address violations against itself.)
[15] This is not true for the crimes "Perjury or False Testimony" and "Obstruction of Justice Related to Military Commissions."
[16] Alberto R. Gonzales, Counsel to President Bush, "Martial Justice, Full and Fair," *New York Times*, November 30, 2001.

armed conflict." By satisfying the 'associated with armed conflict' test, the normal civilian crime becomes a war crime, subject to a special military commission.

Section 5(C) explains that:

> ***This element does not require a declaration of war, ongoing mutual hostilities, or a confrontation involving a regular national armed force. A single hostile act or attempted act*** may provide sufficient basis for the nexus [between 'armed conflict' and a particular offense] so long as its magnitude or severity rises to the level of an 'armed attack' or an 'act of war,' or the number, power, stated intent or organization of the force with which the actor is associated is such that the ***act or attempted act is tantamount to an attack*** by an armed force. Similarly, ***conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act*** or hostilities would satisfy the nexus requirement.

This means a single act of terrorism, if sufficiently large – or even a single unsuccessful attempt – could be deemed to qualify as an "armed conflict" for purposes of the military commissions.

This broad definition in Military Commission Instruction No. 2 stands in sharp contrast to the much more limited notion of armed conflict under established international law, which considers *international* a*rmed conflict* as a conflict between states;[17] and, with regard to non-state actors, covers only "protracted[18] armed conflict between governmental authorities and organized armed groups or between such groups [….] and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature."[19]

The military commissions' elastic definition of "armed conflict" could, in some circumstances, be construed to consider purely domestic crimes committed by non-citizens as involvement in "armed conflict." It takes little imagination, for example, to picture military commission trials of non-citizen alleged drug traffickers apprehended in the course of the "war on drugs" and charged with being foot soldiers for the Cali cartel.

While the jurisdiction of military commissions remains limited to non-citizen defendants, the "armed conflict" that allows for the military commission trials need not involve a foreign entity. Thus a U.S. permanent resident taking part in what turned out to be a violent anti-abortion demonstration, environmental or animal rights protest, or action against military shelling in the island of Vieques could find him or herself brought before a military commission.

Moreover, even acts that would normally be lawful conduct – a demonstration, suspicious-seeming library research, a loan or contribution of money, assistance to

[17] Third Geneva Convention, Art. 2.
[18] In this memorandum, underlining represents the author's added emphasis.
[19] Rome Statute of the International Criminal Court, Art. 8(2)(f).

someone dealing with immigration formalities, a visit to a conflict zone – could be construed as intended to "initiate or contribute to such hostile act or hostilities," so long as the President found some basis on which to link such person's conduct to a significant violent action (or apparent intent to commit such an action) of a group generally advocating a cause that the person might be identified with.

To elaborate on this point: the Justice Department has shown a tendency to label as "terrorism" cases charges not considered such by even the prosecutors involved. "In the first two months of [2003], the Justice Department filed charges against 56 people, labeling all the cases as 'terrorism.'…. [A]t least 41 of them had nothing to do with terrorism – a point that prosecutors of the cases themselves acknowledge." Among the purported "terrorism" cases were "28 Latinos charged with working illegally at [an airport] most of them using phony Social Security numbers"; "eight Puerto Ricans charged with trespassing on Navy property on the island of Vieques"; "a Middle Eastern man indicted…for allegedly passing bad checks who has the same name as a Hezbollah leader" and "a Middle Eastern college student charged …with paying a stand-in to take his college English-proficiency tests." [20]

Operating under even less transparency and legislative oversight than the Justice Department, the military commission system will run a serious risk of comparable or greater laxness in definition.

In addition, because the "enemy," for purposes of the military commissions, includes "any entity with which the United States ***or allied forces*** may be engaged in armed conflict,"[21] non-citizen financial or political supporters of self-professed national liberation movements having little to do with the United States, but in conflict with U.S. allies (say in Northern Island, or the Spanish Basque country, or possibly even Tibet or Chechnya) could also find themselves subject to military commission jurisdiction.

It is important to understand that the issue here is not whether intentional acts genuinely constituting participation, conspiracy or material support to terrorist activities should be criminalized: U.S. civilian law does provide for criminal sanction of just such acts. See, *e.g.,* 18 U.S.C. 2331-2339B (section of criminal code defining crime of terrorism and related crimes, for trial in *civilian* courts). The question is whether such offenses are *war* crimes, and whether defendants charged with such acts, including longstanding U.S. residents, should be sidelined from the civilian criminal justice system, and so denied the normal rights associated with the presumption of innocence.

[20] See Mark Fazlollah, "Reports of Terror Crimes Inflated," *Philadelphia Inquirer*, May 15, 2003. See also Thomas Ginsberg, "The War on…Liberty?", *Philadelphia Inquirer*, June 15, 2003: "The Government… has labeled hundreds…as 'terrorists' or 'unlawful combatants' who before 9/11 would have been treated as common criminals, illegal immigrants or enemy soldiers. Last year [2002], 60 Middle Eastern students were convicted of cheating on college English-equivalency tests. The Justice Department counted them among 174 'international terrorism' cases. In January, the General Accounting Office said three-fourths of these were in fact nonterrorism convictions."

[21] Military Commission Instruction No. 2, Section 5(B).

Moreover, while the military commissions authorized under the current orders only cover non-citizens, it should be kept in mind that the administration's pleadings in the cases of U.S. citizen alleged "enemy combatants" José Padilla and Yaser Hamdi have made clear the administration's view that it could broaden jurisdiction to cover U.S. citizens with the stroke of a Presidential pen.

Improvements and Clarifications

The final version of the "Crimes and Elements" document does incorporate some changes that had been proposed by the Lawyers Committee for Human Rights and others. For the most part, these were clarifications of concepts that may have been intended but not clearly stated. Some changes, though, did address, at least in part, substantive matters that had raised concerns for the Lawyers Committee and for others. By comparison with the earlier draft, the final version is now clearer on several points. Examples include:

- ***Ex Post Facto* Liability.** A fundamental principle of due process, included, for example, in Article I, Sections 9 and 10 of the Constitution, is the prohibition against holding a person criminally responsible for conduct that was not prohibited by law at the time it was committed. Military Commission Instruction No. 2 now expressly disallows this as well: **"No offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question."** (Section 3(A));

- **Burden of Proof.** The burden of proof for all elements of an offense (except "lack of mental responsibility") is – as it should be – on the prosecutor (Section 4(B));

- **Defenses.** A defendant ***"is entitled to raise any defense available under the law of armed conflict"*** (Section 4(B)); and

- **"Combatant Immunity."** Combatant immunity is the right of a combatant in an armed conflict to commit violent acts against hostile combatant forces, within the limits of the laws of war. Military Commission Instruction No. 2 now confirms that *any* ***"lawful combatant"*** enjoys combatant immunity (Section 5(A)).

Substantive Problematic Areas Remain

While there were some improvements, most of the issues on which the Lawyers Committee expressed concern remain problematic. As with the broadened definition of "armed conflict," the concepts retained in the final document generally reflect the intent to carve out as much room as possible for the exercise of discretion by the military commission prosecutor. Such wide discretion is particularly susceptible to abuse because the entire process is limited to one branch of government (the executive) with no meaningful independent oversight or review by either the judiciary

or the legislature, and none of the participants has both standing and an interest to challenge possible abuses. This dynamic is magnified in a political environment characterized by a strong penchant for executive secrecy.
The absence of independent review in the military commission system is in strong contrast to the normal military justice system, in which convictions can be appealed to *civilian* judges in the Court of Appeals for the Armed Forces.[22]

Accordingly, the definitions used for specifying the crimes "triable by military commission" are cast quite broadly, in many cases extending significantly beyond current standards of international and even U.S. law. For example:

- **"Enemy."** Consistent with the broad definition of "armed conflict," the term "Enemy" is also expanded substantially beyond customary usage, and could potentially cover almost any armed criminal organization, whether domestic or foreign. The term "Enemy" is defined to ***"includ[e] any entity with which the United States or allied forces may be engaged in armed conflict … not limited to foreign nations, or foreign organizations or members thereof."*** In fact, the final version of Military Commission Instruction No. 2 substantially broadens the concept of "Enemy" even further, by comparison with the earlier draft, by extending it to cover also ***"any entity…which is preparing to attack the United States."*** (Section 5(B)).

- **"Aiding the Enemy."** There is no materiality requirement in the crime of "Aiding the Enemy (Section 6(B)(5)). That is, even relatively insignificant acts can result in substantial culpability – loan of a car or money; providing access to a computer; renting a room. The act need not be unlawful in itself.

- **"Spying."** There is no materiality requirement in the crime of "Spying," which applies to the collection of undefined ***"certain information."*** (Indeed, there appears to be no requirement that the relevant information be secret or that its communication to the "Enemy" be harmful to the United States.) (Section 6(B)(6)).

- **"Obstruction of Justice."** This offense is particularly vaguely defined. There need not even be a trial (only reason for the defendant to believe there is an investigation), and the criminal act could be as little as a newspaper commentary or a public speech, if the military commission concludes that the defendant "***intended to influence***, impede, or otherwise obstruct the due administration of justice." Unlike the corresponding U.S. civilian criminal provision,[23] there is ***no requirement*** that an act constituting "Obstruction of Justice" involve ***corruption or threats of force***. (Section 6(B)(8)).

[22] 10 U.S.C. 942(b)(1). Decisions of the Court of Appeals for the Armed Forces are also subject to Supreme Court review by writ of certiorari. 10 U.S.C. 867a(a).
[23] 18 U.S.C. 1503.

- **"Conspiracy."** The conspiracy provisions allow military commission trials where the defendant had no idea that the alleged behavior bore any relation to terrorism or war. Thus a defendant may be tried before a military commission for "Conspiracy," or for membership in an "enterprise of persons who share a common criminal purpose…[involving], ***at least in part***, the commission or intended commission of one or more substantive offenses triable by military commission." This is so even if the unlawful offense(s), taken as a whole, are essentially outside of military jurisdiction, and even if the alleged agreement did "not include knowledge that any relevant offense is in fact 'triable by military commission.'" (Section 6(C)(6)).[24]

Mental Competency.

While there is, appropriately, express acknowledgement of the possible defense of "lack of mental responsibility," there is no mention of a requirement that the defendant be mentally competent at trial.[25] (Section 4(B)). Nor is there any restriction on the trial of children.[26]

THE FOLLOWING SECTION ANALYZES MILITARY COMMISSION INSTRUCTIONS NOS. 1 AND 3-8

MILITARY COMMISSION INSTRUCTION NO. 1:
MILITARY COMMISSION INSTRUCTIONS

Non-Creation of Rights

[24] Where the definitions do not broaden but, rather, narrow jurisdiction, by comparison with international law, they tend to undermine rather than affirm international standards. For example:

- **"Torture."** With regard to "Torture," the definition of "severe mental pain or suffering" contains the requirement (absent from international law) that the mental harm be ***"prolonged"*** (Section 6(A)(11));
- **"Rape."** The crime of "Rape" requires that the bodily invasion be committed by use or threat of force or coercion (or be inflicted upon a "person incapable of giving consent"); more in tune with current international law would be a standard turning on lack of consent (for example, where coercion may be implicit); suggestions to incorporate this concept were rejected. (Section 6(A)(18)).

[25] In addition, the final version does not reflect our suggestion to include recognition, as formulated by the American Law Institute, that "[e]vidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind that is an element of the offense," American Law Institute, Model Penal Code, Section 4.02(1).

[26] At least three current detainees at Guantanamo are reported to be younger than 16. Carlotta Gall and Neil A. Lewis, "Inmates Released from Guantanamo Tell Tales of Despair," *New York Times*, June 17, 2003.

The main substantive provision in this instruction is Section 6, concerning "Non-Creation of Right [sic]." This provision denies a defendant a remedy for violation of any procedural or other protections in the Military Commission Instructions that might benefit him, whether committed by the prosecutor, the military commission, or the defendant's own military or civilian defense lawyer.[27]
Section 6 specifies that none of the Military Commission Instructions "create any right, benefit, privilege, substantive or procedural, enforceable by any party, against the United States, its departments, agencies or other entities, its officers or employees, or any other person." This is an almost verbatim repetition of the court-stripping provision in Section 7(C) of the November 13, 2002 Military Order.

Section 6 goes on to provide that "[a]lleged noncompliance with an Instruction does not, of itself, constitute error, give rise to judicial review, or establish a right to relief for the Accused or any other person."[28]

MILITARY COMMISSION INSTRUCTION NO. 3:
RESPONSIBILITIES OF THE CHIEF PROSECUTOR, PROSECUTORS, AND ASSISTANT PROSECUTORS

Chief Prosecutor

The Chief Prosecutor is a judge advocate designated by the DOD General Counsel. He reports directly to the DOD "Deputy General Counsel (Legal Counsel)." He has the authority to subpoena any individual to testify or produce evidence "in a case referred to military commissions ***or in a [civilian] criminal investigation associated with a case that may be referred to a military commission***." (Section 3(B)(1)–(3)).

Contrary to the rules of civilian trials and ordinary military trials, defense counsel in military commissions lack a corresponding power of subpoena; nor is there any basis recognized for quashing an improper subpoena. Moreover, there are no apparent controls on retention or use of subpoenaed material, whether or not used in a trial. Accordingly, there would be no checks against abuse of military commission subpoena power to obtain

[27] Section 4(C) of Military Instruction No. 1 does provide that failure to adhere to applicable rules and regulations (including the Military Commission Instructions) "may be subject to appropriate action" by the Secretary of Defense (or designee), the DOD General Counsel, or the Presiding Officer of a military commission. But Section 6 denies standing to the only party likely to have a direct interest in uncovering and sanctioning such failures.
[28] The White House insisted, in November 2001, that "[[t]he [November 13 military] order preserves judicial review in civilian courts. Under the order, anyone arrested, detained or tried in the United States by a military commission will be able to challenge the lawfulness of the commission's jurisdiction through a habeas corpus proceeding in a federal court," Alberto R. Gonzales, Counsel to President Bush, "Martial Justice, Full and Fair," *New York Times*, November 30, 2001. But since then the administration has forcefully maintained that "unlawful combatant" detainees in Guantanamo have no right to be heard in a U.S. court, and has never indicated the slightest intent to hold military commission trials within the territorial United States. In light of the administration's positions on these issues, Counsel Gonzales' assurances about civilian judicial oversight of military commissions ring hollow.

information that might otherwise be legally unobtainable in a civilian investigation even under the relaxed standards created under the PATRIOT Act; or abuse of such information for other purposes extraneous to an authorized military commission investigation or prosecution.

Prosecutors

Prosecutors will be assigned to a case ("detailed") by the Chief Prosecutor, and may be either judge advocates or "special trial counsel of the Department of Justice who may be made available by the Attorney General." (Section 3(C)(1)).

Statements to the Media

Prosecutors and staff "may communicate with news media representatives regarding cases and other matters related to military commissions only when approved by the Appointing Authority[29] or the General Counsel of the Department of Defense." (Section 5(C)). (Media communications are discussed below in the context of Military Commission Instruction No. 4.)

MILITARY COMMISSION INSTRUCTION NO. 4:
RESPONSIBILITIES OF THE CHIEF DEFENSE COUNSEL, DETAILED DEFENSE COUNSEL, AND CIVILIAN DEFENSE COUNSEL

Chief Defense Counsel

The Chief Defense Counsel is a judge advocate designated by the DOD General Counsel. He reports directly to the DOD "Deputy General Counsel (Personnel and Health Policy)." (Section 3(B)(1)-(2)).

He "may not detail himself to perform the duties of Detailed [assigned military] Defense Counsel, nor does he form an attorney-client relationship with an accused person or incur any concomitant confidentiality obligations," though he may "structure the Office of the Chief Defense Counsel so as to include subordinate supervising attorneys who may incur confidentiality obligations in the context of fulfilling their supervisory responsibilities with regard to Detailed Defense Counsel." (Section 3(B)(1)-(2), (8)).

Accordingly, both the civilian defense lawyer (if any) and the assigned military defense lawyer in a particular case will be supervised by an officer, the Chief Defense Counsel, who will have no obligation to maintain confidentiality regarding the defendant's case. Moreover, that same officer will be responsible for discovering and sanctioning alleged

[29] *I.e.,* the Secretary of Defense or a designee. Military Commission Order No. 1 (March 21, 2002), Section 2.

breaches of applicable rules by the defense lawyers, particularly alleged breaches regarding "Protected Information."[30]

These arrangements are virtually guaranteed to assure an atmosphere of distrust between the civilian lawyer, on the one hand, and the military lawyer and the Chief Defense Counsel, on the other; they equally undermine the likelihood of candid communication between the defendant and his lawyer(s).

Another responsibility of the Chief Defense Counsel is to police a prohibition on possible defense strategies involving "Common Interest Arrangements."[31] Such arrangements, common in federal multi-defendant cases, allow counsel to discuss their views and evidence candidly with co-defendants and co-defendants' counsel. Among other things, the prohibition of Common Interest Arrangements prevents counsel from discussing with each other even purely legal strategy without waiving privilege, and also from pooling resources, such as hiring of legal or other expertise or fact investigators, a particularly significant disability for civilian defense lawyers, who will almost certainly be covering their own expenses. It could also prevent a defendant possessing exculpatory information from sharing it with another similarly situated defendant.

Detailed Defense Counsel

Detailed [assigned military] Defense Counsel will be judge advocates who are detailed to a case by the Chief Defense Counsel. (Section 3(B)(8)). Such counsel "shall" represent an Accused "notwithstanding any intention expressed by the Accused to represent himself." (Section 3(C)(2)).

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[30] The Chief Defense Counsel "shall supervise all Defense Counsel and other personnel assigned to the Office of the Chief Defense Counsel." (Section 3(B)(6); 3(B)(10)). This includes both Detailed [assigned military] Defense Counsel and any civilian defense lawyer chosen by an Accused. The Chief Defense Counsel also ***"monitor[s]…all qualified Civilian Defense Counsel for compliance with all rules, regulations, and instructions governing military commissions….[and] will report all instances of noncompliance with [such] rules, regulations, and instructions…to the Appointing Authority and to the General Counsel of the Department of Defense with recommendation as to any appropriate action…."*** (Section 5(E)(5)).

[31] Section 3(B)(10) mandates the Chief Defense Counsel to ***"ensure that Defense Counsel do not enter into agreements with other Accused or Defense Counsel that might cause them or the Accused they represent to incur an obligation of confidentiality with such other Accused or Defense Counsel or to effect some other impediment to representation."*** (See also Section 5(A).) The ethical propriety of Common Interest Arrangements, and the reciprocal relation of privilege established by them between one defendant and his lawyer and the other defendant and his lawyer, is well established. See, for example, Section 76 of the American Law Institute's Restatement of the Law Governing Lawyers (2000), which provides: "(1) If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged under Sections 68-72 that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication….." See also the draft Code of Conduct & Disciplinary Procedure of the International Criminal Bar (2003), Art. 7, substantially to the same effect.

This is another abridgement of defense rights regarding a matter (*pro se* representation) obviously of high sensitivity to the government (which should be viewed in light of the Administration's frustrations in the federal trial of Zacarias Moussaoui).

The principle of right to representation by counsel of one's choice naturally encompasses the right to represent oneself. Though often deemed imprudent by lawyers, defendants since the time of Socrates have found rational reasons for choosing to be their own attorneys. A defendant might easily consider the absence of effective attorney-client privilege alone[32] as sufficient grounds for choosing to dispense with services of a defense counsel.

Selected Detailed Defense Counsel

"The Accused may select a judge advocate… to replace the Accused's Detailed [assigned military] Defense Counsel, provided that judge advocate has been determined to be available by the Chief Defense Counsel in consultation with the Judge Advocate General of that judge advocate's military department." (Section 3(D)1)).

Qualified Civilian Defense Counsel

At no expense to the United States, an Accused may retain a civilian attorney of the Accused's choosing "to assist in the conduct of his defense…provided that the civilian attorney retained has been determined to be qualified pursuant to Section 4(C)(3)(b) of [the March 21, 2002 Military Commission Order No. 1]."[33]

As noted above, the Civilian Defense Counsel will answer to the Chief Defense Counsel, who will, however, not be bound by legal privilege (Section 3(B)(6)); 3(E)(5)); and the Chief Defense Counsel will also be the one who "administer[s] the Civilian Defense Counsel pool, screening all requests for pre-qualification and *ad hoc* qualification, making qualification determinations and recommendations…and ensuring appropriate notification to an Accused of civilian attorneys available to represent Accused before a military commission." (Section 3(B)(13)). The right of the Accused to select Qualified Civilian Defense Counsel is hampered further by the condition that "retention of Civilian Defense Counsel shall not unreasonably delay military commission proceedings." (Section 3(E)(2)).

[32] See, *e.g.*, Para. II(I) of the Civilian Defense Counsel's compulsory Affidavit (Appendix B to Military Commission Instruction No. 5) (discussed below), which provides for monitoring of attorney-client communications by government officials, without, apparently, notice to lawyer or client.

[33] The qualification conditions set out in the March 21 Military Commission Order are elaborated on in Military Commission Instruction No. 5: Qualification of Civilian Defense Counsel, discussed below. "Civilian attorneys may be prequalified as members of the pool of attorneys eligible to represent Accused before military commissions at no expense to the United States, if, at the time of application, they meet the eligibility criteria…[as] detailed in [Military Commission Instruction No. 5], or they may be qualified on an *ad hoc* basis after being requested by an accused." (Military Commission Instruction No. 5, Section3(A)(1)).

Access to Protected Information

"Neither qualification of a Civilian Defense Counsel for membership in the pool of available Civilian Defense Counsel nor the entry of appearance in a specific case guarantees that counsel's presence at closed military commission proceedings or access to information protected under Section 6(D)(5) of [the March 21, 2002 Military Commission Order No. 1]." (Section 3(E)(4)).

Civilian Defense Counsel may also be denied access to undefined "state secrets" under Section 9 of the March 21, 2002 Military Commission Order No. 1. When the President's original November 13, 2001 Military Order was issued, White House Counsel Alberto Gonzales assured the public that the contemplated "[m]ilitary commission trials are not secret….The president's order authorizes the secretary of defense to close proceedings to protect classified information [but does not require secret proceedings]."[34] The definition of "Protected Information," under the referenced sections of Military Commission Order No. 1, however, is far broader, and much less clearly defined, than "classified information." In addition to the vague "state secrets," "Protected Information" includes not just "classified" but also "classifiable" information, as well as "information concerning other [undefined] national security interests." Defense counsel will have no standard, and no procedure, by which they can challenge withholding of information, and, in many cases, will likely not even know of the existence of such information.

Statements to the Media

As with Prosecutors, ***"[p]ersonnel assigned to the Office of the Chief Defense Counsel, as well as members of the Civilian Defense Counsel pool and associated personnel may communicate with news media representatives regarding cases and other matters related to military commissions only when approved by the Appointing Authority or the General Counsel of the Department of Defense.***"

Inclusion of members of the civilian lawyer "pool" even if they are not involved in a case, and application of this gag rule not only to case-related communications but to "other matters related to military commissions" as well, could severely limit the universe of knowledgeable lawyers allowed to speak publicly regarding military commission proceedings. These free-speech restrictions seem particularly difficult to justify even on an expansive interpretation of national security requirements. While government officials familiar with, but not directly involved in, a prosecution – including the Secretary of Defense and the DOD General Counsel – will be free to provide to the media the government's interpretation of the proceedings, media access to the defense perspective will be strictly limited.[35]

[34] Alberto R. Gonzales, Counsel to President Bush, "Martial Justice, Full and Fair," *New York Times*, November 30, 2001.
[35] Section 5(C) of Military Commission Instruction No. 3 imposes similar communications restrictions only upon "[p]ersonnel assigned to the Office of the Chief Prosecutor."

MILITARY COMMISSION INSTRUCTION NO. 5:
QUALIFICATION OF CIVILIAN DEFENSE COUNSEL

Qualification Conditions

As set out in Section 4(C)(3)(b) of the March 21, 2002 Military Commission Order No. 1, and further elaborated in Section 3(A)(2) of Military Commission Instruction No. 5, the following conditions apply, whether the applicant seeks membership in the pool of eligible attorneys, or qualification on an *ad hoc* basis after being requested by an Accused:

1. U.S. citizenship.
2. Admission to practice of law in a State, district, territory or possession of the United States, or before a Federal court.
3. Absence of any sanction or disciplinary action by any court, bar, or other competent governmental authority for "relevant misconduct."
4. Determination of eligibility for access to information classified at the level SECRET or higher. (Those not already eligible must consent to a background investigation and ***"pay any actual costs associated with the processing of the same."***)
5. Written agreement to comply with all applicable regulations or instructions for counsel, including any rule of court (as set out in a signed affidavit in the form attached as Annex B to Military Commission Instruction No. 5).

Application materials are reviewed and approved or rejected by the Chief Defense Counsel, "[s]ubject to review by the General Counsel of the Department of Defense."

The Chief Defense Counsel's review in particular "include[s] determinations as to whether any sanction, disciplinary action, or challenge is related to ***relevant misconduct*** that [in the view of the Chief Defense Counsel or the Defense Department General Counsel] would disqualify the Civilian Defense Counsel applicant." (Section 3(B)(4)). There appears to be no provision for appeal by the applicant (or his potential client) of an adverse determination.

Affidavit and Agreement by Civilian Defense Counsel (Appendix B to Military Commission Instruction No. 5).

Among other agreements and undertakings, the Civilian Defense Counsel agrees and/or acknowledges that:

1. Qualification as a Civilian Defense Counsel ***"does not guarantee [Counsel's] presence at closed military commission proceedings or guarantee…access to any[protected] information."*** (Para. I(A)).

2. Civilian Defense Counsel ***"will ensure that these proceedings are [his or her] primary duty….[and] will not seek to delay or to continue the proceedings for reasons relating to matters that arise in the course of [his or her] law practice or other professional or personal activities that are not related to military commission proceedings."*** (Para. II(B)). This could prevent a defense lawyer from taking on any other employment for the duration of a military commission trial (the precise dating of which may be unpredictable). This restriction seems an unreasonably burdensome condition to impose on civilian lawyers who will likely be working without receiving a fee and without reimbursement for expenses.[36]

3. "Recognizing that [his or her] representation does not relieve Detailed [assigned military] Defense Counsel of [his or her] duties… ***[Civilian Defense Counsel] will work cooperatively with such [Detailed Defense] counsel to ensure coordination of efforts and to ensure such counsel is capable of conducting the defense independently if necessary."*** (Para. II(D)). The military defense counsel must be fully included in the preparation and conduct of the trial even when the client has expressed a preference not to be represented by the military lawyer.[37]

4. Civilian Defense Counsel agrees that "[d]uring [his or her] representation of an Accused before military commissions, unless [he or she] obtain[s] approval in advance from the Appointing Authority of the Presiding Officer [of the military commission] to do otherwise…[he or she] ***will not discuss***, transmit, communicate or otherwise share documents or information specific to ***the case with anyone except…(a)…members of the Defense Team…; (b) commission personnel…; (c) potential witnesses in the proceedings; or (d) other individuals with particularized knowledge that may assist in discovering relevant evidence in the case."*** (Para. II (E) (1)).[38]

5. Civilian Defense Counsel agrees that, in addition to him or herself, ***"[t]he Defense Team shall consist entirely of…Detailed [military] Defense***

[36] Civilian Defense Counsel must agree to "make no claim against the U.S. Government for any fees or costs associated with [their] conduct of the defense or related activities or efforts." (Para. II(C)).
[37] Military Commission Instruction No. 4, Section 3(C)(2).
[38] With this provision, the revised version of Military Commission Instruction No. 5 loosened the original issued version's blanket prohibition of communications with anyone outside the Defense Team. Though not free from doubt, it would appear that the authorization in the revised version for communications with "individuals with particularized knowledge that may assist in discovering relevant evidence" would allow consultations with at least certain types of technical experts in fields such as forensic medicine, accounting, or ballistics. The revised version of Military Commission Instruction No. 5 also removed the original requirement that all case preparation work be performed on-site.

Counsel, and other personnel provided by the Chief Defense Counsel, the Presiding Officer, or the Appointing Authority." (Para. II(C), (E)(2). Civilian Defense Counsel will thus be prohibited from consulting with other lawyers, law professors or similar experts regarding even purely legal issues, unless such individuals have agreed – and been accepted by the Chief Defense Counsel – to participate as official members of the legal team.

6. "[T]here may be ***reasonable restrictions on the time and duration of contact [Civilian Defense Counsel] may have with [his or her] client, as imposed by the Appointing Authority, the Presiding Officer, detention authorities, or regulation."*** (Para. II(H)).

7. ***"[C]ommunications with [the] client, even if traditionally covered by the attorney-client privilege, may be subject to monitoring*** or review by government officials, using any available means, for security and intelligence purposes….[A]ny such monitoring will only take place in limited circumstances when ***approved by proper authority***, and…any evidence or information derived from such communications will not be used in proceedings against the Accused who made or received the relevant communication….***[C]ommunications are not protected if they*** would facilitate criminal acts or a conspiracy to commit criminal acts, or if those communications ***are not related to the seeking or providing of legal advice***." (Para. II(I)). The "proper authority" charged with approving such monitoring is not identified, nor does it appear that in a particular case such authority need be identified to the civilian lawyer. There appears to be no requirement of notice to the attorney or client that such monitoring is occurring or has occurred.

8. Civilian Defense Counsel also undertakes to ***"reveal to the Chief Defense Counsel and any other appropriate authorities information relating to the representation of [the] client to the extent that [Civilian Defense Counsel] reasonably believe[s] is likely to result in death or substantial bodily harm, or significant impairment of national security."*** (Para. II(J)). Together with the monitoring of attorney-client communications, and particularly in light of the vagueness of the phrase "significant impairment of national security," this provision can be expected to place a serious chill over both parties in attorney-client consultations.

MILITARY COMMISSION INSTRUCTION NO. 6:
REPORTING RELATIONSHIPS FOR MILITARY COMMISSION PERSONNEL

This instruction largely sets forth reporting relationships referred to in the other Military Commission Instructions, the more important of which are mentioned above in this memorandum. The Instruction does specify that military commission panel members continue to report to their parent commands; and it properly stipulates that "[t]he consideration or evaluation of the performance of

duty as a member of a military commission is prohibited in preparing effectiveness, fitness, or evaluation reports of a commission member," a helpful if inadequate affirmation of the principle of impartiality. (Para. 3(A)(8)).

MILITARY COMMISSION INSTRUCTION NO. 7:
SENTENCING

Sentencing

As specified in Section 6(F) and (G) of the March 21, 2002 Military Commission Order No. 1, voting is on a standard of "beyond a reasonable doubt," and convictions – including for capital offenses – require two-thirds vote of the commission members. Sentences are voted on separately from verdicts, with all sentences except death requiring two-thirds vote. A sentence of death requires a unanimous vote. Only a panel of seven members may sentence an Accused to death.

Military Commission Instruction No. 7 provides that "wide latitude in sentencing" is permitted. "The sentence determination should be made while bearing in mind that there are several principal reasons for a sentence given to those who violate the law. Such reasons include: punishment of the wrongdoer; protection of society from the wrongdoer; deterrence of the wrongdoer and those who know of his crimes and sentence from committing the same or similar offenses; and rehabilitation of the wrongdoer….[T]he weight to be accorded any or all of these reasons rests solely within the discretion of commission members." (Section 3(A)).

Plea Bargaining

Any plea agreement must be approved by the Appointing Authority (Secretary of Defense or his designee); and any approved plea agreement must be complied with by the military commission, subject to the commission's determination that the agreement is voluntary and informed. (Section 4(C)).

MILITARY COMMISSION INSTRUCTION NO. 8:
ADMINISTRATIVE PROCEDURES

Appointment and Removal of Commission Members

The Appointing Authority appoints panels of three to seven members (plus one or two alternates). Members may be removed by the Appointing Authority for good cause. (Section 3(A)(1)).

Interlocutory Questions

Generally, the Presiding Officer adjudicates all motions and questions arising during the course of a trial. The Presiding Officer shall, however, certify for decision by the Appointing Authority "all interlocutory questions, the disposition of which would effect a termination of proceedings with respect to a charge"; and may certify any other interlocutory questions he "deems appropriate." (Section 4(A)).

Motions

"The Presiding Officer shall rule on appropriate motions or, at his discretion…may submit them to the commission for decision or to the Appointing Authority as a certified interlocutory question." (Section 5).

Exculpatory Information

Section 6(B) of Military Commission Instruction No. 8 states that "[t]he Prosecution shall provide the Defense with access to evidence known to the Prosecution that tends to exculpate the Accused as soon as practicable, and in no instance later than one week prior to the scheduled convening of a military commission." Unfortunately, this promise is undercut by the March 21, 2002 Military Commission Order No. 1, which permits withholding of "Protected Information" – including potentially exculpatory evidence – from even the military defense counsel, if the Prosecution does not intend to introduce such evidence at trial.[39]

Section 6(D)(5)(b)) of the March 21, 2002 Military Commission Order No. 1 provides that "[t]he Presiding Officer, upon a motion of the Prosecution or *sua sponte*, shall, as necessary to protect the interests of the United States…. direct (i) the deletion of specified items of Protected Information from documents to be made available to the Accused, Detailed Defense Counsel, or Civilian Defense Counsel; (ii) the substitution of a portion or summary of the information for such Protected Information; or (iii) the substitution of a statement of the relevant facts that the Protected Information would tend to prove." Such a Prosecution motion "shall, upon request of the Prosecution, be considered by the Presiding Officer *ex parte* [without the presence of defendant or defense counsel] *in camera* [in secret], but no Protected Information shall be admitted into evidence for consideration by the Commission if not presented to Detailed [assigned military]

[39] Section 7(B) of the March 21, 2002 Military Commission Order No. 1 establishes that that Order prevails in the event of any inconsistency between it and any subsequent regulations and instructions.

Defense Counsel."[40] This means that both the substance – and even the existence – of potentially exculpatory information may be withheld from the defendant and the *entire* Defense team if the commission finds its non-disclosure, as Protected Information, appropriate.

[40] Commenting on Section 6(D)(5)(b) of the March 21, 2002 Military Commission Order No. 1, the National Institute of Military Justice notes that "Allowing an accused to be convicted on the basis of information he or she has not seen raises concerns under the Sixth Amendment's Confrontation Clause. The military courts have long held that the Confrontation Clause applies to trials by court-martial." National Institute of Military Justice, Annotated Guide, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (2002), pp. 58-59 (citations omitted).