



Office of Military Commissions Fact Sheet: Military Commission Members (Panel Members)

Why does a military commission have members in the case?

The Military Commissions Act (2009) (MCA) § 949m requires that no person may be convicted by a military commission for any offense under the chapter except by a plea of guilty or by concurrence of two-thirds of the members present when the vote is taken. Rules for Military Commission (RMC) 502(a)(2) of the Manual for Military Commissions (2010) (MMC) requires the members to determine whether the accused is proved guilty and, if necessary, adjudge a proper sentence, based on the evidence and in accordance with the instructions of the military judge.

Sentences shall be determined by a military commission by concurrence of two-thirds of the members present. A sentence that includes confinement for life or more than 10 years confinement may be adjudged only if at least three-fourths of the members present vote for the sentence. See MCA § 949m(b) and RMC 1006 (d)(4). Any sentence to death requires that all the members present at the time the vote is taken concur in the conviction for the offense that provides for a death sentence and that all the members present at the time the vote is taken on the sentence concurs in a sentence of death. See MCA § 949m and RMC 501.

Who can serve on a military commission panel?

Any commissioned officer of the armed forces on active duty can serve as a military commission member. This includes commissioned officers of the reserve components of the armed forces on active duty, commissioned officers of the National Guard on active duty in Federal service, or retired commissioned officers recalled to active duty. See §948i of the MCA and RMC 502.

Who selects the members?

Military commission members are detailed as members by the Convening Authority. The Convening Authority details individuals from the armed forces who in the opinion of the Convening Authority are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of the armed forces is eligible to serve as a member of a military commission when such member is the accuser or a witness for the prosecution or has acted as an investigator. See § 948i(b) of the MCA and RMC 503(a)(1).

The Convening Authority selects members from lists of available officers. See RMC 503(a)(1). The Secretaries of the Military Departments are asked to nominate individuals to serve as military commission members. The Office of the Secretary of Defense requests the Service Departments to nominate individuals to serve as military commission members and to submit a list of individuals to the Convening Authority. The Service Departments apply the same criteria to nominate individuals as the Convening Authority applies when he selects the individuals as members. See § 948i(b) of the MCA and RMC 503(a)(1). The Service Departments are asked to nominate a sufficient number of members to provide the Convening Authority with a pool of individuals he can consider when he selects members. Generally, each Service Department is requested to provide approximately 140 nominees to the Convening Authority to consider in his selection of military commission members.

How many members are required to proceed to trial?

Military commissions must have at least five members. See MCA § 948m(a). In a case where the accused may be sentenced to a penalty of death, the military commission shall have no less than 12 members. See MCA § 949m(c) and RMC 501(a).

When are members excused from military commission duty?

Before trial, the Convening Authority may excuse a member from participating in the case. See MCA § 948i(c). Before assembly of the commission, the Convening Authority may change the members of the military commission without showing cause. After assembly, no member may be absent or excused except by the Convening Authority for good cause shown on the record; by the Military Judge for good cause shown on the record; or as a result of a peremptory challenge. See RMC 505(c). Assembly of the commission occurs when the Military Judge announces the assembly of the commission. See RMC 911.

How does the voir dire process work?

The Military Judge may allow the parties to conduct the examination of the members or may personally conduct the examination. The examination of the members is called "voir dire." The opportunity for voir dire is to obtain information for the intelligent exercise of challenges. Thus, voir dire should not be used to present factual matter which will not be admissible or to argue the case. See RMC 912(d), discussion.

The nature and scope of the voir dire examination is within the discretion of the Military Judge. The Military Judge may permit the parties to conduct the examination of the members or may personally conduct the examination. Members may be questioned individually or collectively. The trial counsel ordinarily conducts an inquiry before the defense. Generally, the members are initially questioned by the parties collectively. The members should be cautioned not to disclose information in the presence of other members which might disqualify them. After the questioning of the members collectively, the parties may subsequently request to question members individually outside the presence of other members.

Members may be challenged by the accused or the trial counsel for cause. The parties may exercise an unlimited number of challenges for cause against the members. The parties, however, are limited to one peremptory challenge each. See MCA § 949f and RMC 912. The basis for causal challenges include inelastic attitude on sentencing, an unfavorable inclination toward a particular offense, being a victim of an offense similar to the one being prosecuted, knowledge of the case, and expertise in the issues to be litigated. A member is disqualified only after a showing that the basis for challenge will prohibit the performance of duties as a member. See RMC 912(f). An individual should be excused as a member on a causal challenge in the interest of having the military commission free from substantial doubt as to legality, fairness, and impartiality.

What guidance do members receive regarding their conduct during the trial?

Members should avoid any conduct or communication with the military judge, witnesses, or other trial personnel during the trial which might present an appearance of partiality. Members may not discuss any part of a case with anyone, not even among themselves until the matter is submitted to them for determination. Members should not form an opinion on any matter in connection with a case until the matter is submitted to them for determination. See RMC 502(a)(2), discussion.

Each member has an equal voice and vote with the other members in deliberating upon and deciding all matters submitted to them. No member may use rank or position to influence another member.

No member of a military commission may have access to or use in any open or closed session the Manual for Military Commissions, reports of decided cases, or any other reference material. Furthermore, members should not visit or conduct a view of the scene of the crime and should not investigate or gather evidence of the offense. RMC 502(a)(2), discussion.

The Military Judge instructs members that they may not listen to or read any account of the trial or consult any source, written or otherwise, as to matters involved in the case. In a high profile case, some knowledge of the fact of the offense, or an unfavorable inclination toward an offense, does not *per se* disqualify a member from sitting on a case. The critical issue is whether a member is able to put aside outside knowledge, association, or inclination, and decide the case fairly and impartially on its merits.

Why are the identities of the members not disclosed in open court?

The Military Judge may issue protective orders to protect the safety of military members and their families. The orders may strictly limit the disclosure of information including, but not limited to addresses, names, ages, and locations of dependents. See RMC 912(a)(3).

What guidance do the members receive regarding their conduct after the trial?

At the conclusion of the trial, the Military Judge will remind the members the oath they took prevents them from discussing their deliberations with anyone, to include stating any member's opinion or vote, unless ordered to do so by a court. The Judge will also instruct the members that they may discuss their personal observations in the courtroom and the process of how a military commission functions, but not what was discussed during their deliberations.