



Military Commissions Fact Sheet

For more than 200 years Military Commissions have been used to prosecute violations of the law of war.

- General George Washington convened a Military Commission to try Major John Andre as a spy for the British (Andre had conspired with American military traitor Benedict Arnold)
- General Winfield Scott used Military Commissions during the Mexican War (1847) to prosecute local nationals who committed crimes against American soldiers
- In 1862, President Abraham Lincoln authorized the use of Military Commissions, and Military Commissions were used to try the individuals who conspired to assassinate him
- Commissions were used during the Spanish-American War
- After World War II, Military Commissions were used throughout Europe and Asia to conduct more than 800 trials (including the Nuremberg and Tokyo Trials)
- President George W. Bush established Military Commissions on October 17, 2006 to prosecute potential law of war violations during the global war on terrorism
 - The *Military Commissions Act of 2006* established procedures for trials of alien unlawful enemy combatants
 - President Barack Obama signed into law the *Military Commissions Act of 2009* which expanded the rights and protections afforded to those accused of war crimes

The U.S. Constitution (Article I, Section 8) empowers Congress to define and punish offenses committed against the Law of Nations. The *Military Commissions Act (MCA) of 2009* provides statutory authority for these prosecutions. Consistent with Supreme Court precedent, Commissions satisfy Geneva Convention Common Article 3, which prohibits the “passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”

The 2009 *MCA* establishes procedures governing the use of Military Commissions to try alien unprivileged enemy belligerents engaged in hostilities against the U.S. for violations of the law of war and other offenses triable by Military Commission. The Act defines an unprivileged enemy belligerent as a “person who has engaged in hostilities against the United States or its coalition partners; has purposefully and materially supported hostilities against the United States and its coalition partners; or was a part of al Qaeda at the time of the alleged offense.”

The Military Commissions Act provides the following protections for the accused:

- A presumption of innocence and proof of guilt beyond a reasonable doubt;
- Representation by an independent military defense counsel of his own selection, as well as civilian counsel of his own selection (at no expense to the government);
- In capital cases, the right to be represented by at least one additional counsel who is learned in the law relating to capital cases
- The right to remain silent and have no adverse inference drawn from it, to examine evidence presented to a jury by the prosecution, and to confront and cross-examine every witness called by the prosecution;
- The right to be present during the presentation of evidence;

- The right to obtain evidence and call witnesses, including expert witnesses;
- The right to have no statements obtained by torture or cruel, inhuman, or degrading treatment admitted into evidence;
- An automatic appeal to U.S. Court of Military Commission Review, and the opportunity to seek review through the District of Columbia Circuit Court of Appeals to the U.S. Supreme Court

The Military Commissions process

In the Military Commissions system, the process of charging a detainee involves a number of specific, chronological steps.

First, an offense subject to trial by military commission is reported. Any person may report the offense and the content of the report can take many forms, usually in the form of an official investigative or law enforcement agency report. (Rule for Military Commission (“RMC”) 301)

After an offense is reported, charges are typically drafted by a government prosecutor and then “sworn” as outlined in Title 10 of the United States Code, Chapter 47. The swearing of charges is the way an individual (frequently called the “accuser”) affirms that he or she has personal knowledge of, or has reason to believe; the allegations in the charges are true. The individual swearing the charges usually learns what they know about the charges by reading a file prepared by a lawyer or other government official. The individual swearing the charges then signs and dates the charges, after which the accused or detainee is informed of the sworn charges as soon as practicable. (RMC 307-308)

At some point after the charges are sworn, they are forwarded to the Convening Authority, who has been designated by the Secretary of Defense to dispose of the charges. Prior to the prosecutor forwarding the charges, the convening authority cannot take any action. (RMC 401)

Once the prosecutor forwards the charges to the Convening Authority, the Convening Authority has three options. The first is to dismiss some or all of the charges. The second is to forward the charges to a higher authority such as the Secretary of Defense for action. The third option is to refer any or all charges to a military commission for trial. (RMC 401(b), 407)

Before the convening authority makes any decision on the disposition of a case, he or she receives written pretrial advice from the legal advisor to the Convening Authority. The legal advice discusses whether the charges are in the proper form, whether the evidence supports each offense, whether the military commission has jurisdiction over the accused and the offense, whether the charges would be harmful to national security, and also provides a recommendation as to the disposition of the charges. (RMC 406)

If a Convening Authority decides to refer any or all charges to a trial by military commission, a convening order is drafted which will begin the trial process. (RMC 407(a)(4))

The Secretary of Defense or his designee appoints the Chief Judge of the Military Commissions Trial Judiciary. The Chief Judge then details a military judge to each case referred to trial. The military judge of a Military Commission must be certified in accordance with the Uniform Code of Military Justice. The military judge rules upon all questions of law, including the admissibility of evidence and all interlocutory questions arising during the proceedings. Each Military Commission consists of a military judge and at least five members. Commission members would be referred to as

"jurors" in a civilian court. In a case where the accused may be sentenced to death, a minimum of twelve members and unanimous agreement are required. Any commissioned officer of the armed forces on active duty is eligible to serve on a Military Commission.

The rules of evidence designed for Military Commissions take into account international legal standards and the battlefield environment, and are different than traditional domestic law enforcement practices in the US. For example, evidence seized outside the US may not be excluded on the grounds it was not obtained pursuant to a search warrant. Similarly, hearsay and statements of an accused are not excludable merely because the accused was not read his Miranda rights. Instead, the rules of evidence for Military Commissions focus on whether the evidence is reliable and relevant. Also noteworthy, the *Military Commission Act of 2009* expressly excludes Speedy Trial rights in Military Commissions cases.

Military Commissions follow the same panel-member standards for determining guilt that are used in the courts-martial trials of all U.S. service members subject to the Uniformed Code of Military Justice – at least 2/3 must agree with a finding of guilt and the imposition of a sentence. Sentences that include confinement for ten years or more must be concurred in by at least 3/4 of the members. There are no "hung juries"; if less than the required percentage votes for conviction, the accused is acquitted.

If there is a finding of guilt, Military Commission members may impose any appropriate sentence - up to the maximum sentence authorized, including death if the Convening Authority referred the case as capital.

After the Military Commission has delivered its verdict and imposed a sentence:

- The Convening Authority takes action on the sentence after consideration of all matters submitted by the accused, as well as the recommendation of the Legal Advisor. The Convening Authority can reduce the sentence, dismiss any charges or specifications, or order a rehearing for any charge of which the accused was convicted. The Convening Authority cannot increase the sentence, and the prosecution cannot appeal any mitigation action by the Convening Authority.
- Each case which includes a finding of guilt is referred to the U.S. Court of Military Commission Review (CMCR). The CMCR must have at least three appellate military judges who may be military or civilian.
- The United States Court of Appeals for the District of Columbia has exclusive jurisdiction to determine the validity of any final decisions of a Military Commission case. The Supreme Court may review by writ of certiorari the final judgment of the Court of Appeals.