

## **Analysis of Proposed Rules for Military Commissions Trials**

### **Background**

On January 19, 2007, the Department of Defense submitted to Congress a proposed “Manual for Military Commissions” for the trials of so-called “unlawful enemy combatants.” The Manual lays out the procedural and evidentiary rules that would govern military commissions, as well as the crimes punishable by this system.<sup>1</sup> The Defense Department was required to submit the Manual to Congress by the Military Commissions Act of 2006 (MCA), legislation hastily passed by the 109<sup>th</sup> Congress in the run-up to the 2006 mid-term Congressional elections. Although Congress rejected the administration’s proposal to redefine the humane treatment standards of the Geneva Conventions, the MCA contains a number of provisions the administration had sought that violate the U.S. Constitution, the laws of war, and international human rights standards applicable to detention and trial. The Manual does contain improvements over the previous military commissions rules (struck down by the Supreme Court in June 2006), including rules governing attorney-client privilege and the right to self-representation. The Manual does not, however, vitiate against the due process deficiencies of the MCA, and instead further entrenches them in the military justice system and magnifies their effects.

### **A Missed Opportunity**

With the military commission rules, the Defense Department – and the Department of Justice, which was also deeply involved in the process – could have corrected two fundamental errors the administration made in its earlier efforts to create a detainee trial system. First, despite the flaws of the MCA, the Defense and Justice Departments could have more closely modeled the military commissions on the Manual for Courts-Martial and the Uniform Code of Military Justice, a fair trial system with which the Pentagon has deep experience. Current and former Judge Advocates General recommended this approach in congressional testimony, as did retired senior military leaders. Second, the Defense and Justice Departments could have provided notice to the public and a period for public comment on the draft rules. In addition to the benefit of receiving input from all military commissions counsel, other military lawyers, military justice and law of war experts, scholars, and human rights groups, a notice and comment period would likely have strengthened public support for the commissions. The administration did neither.

### **Summary of Key Flaws**

Instead of attempting to ameliorate the flaws of the MCA, the proposed rules fail to ensure that military commission trials will satisfy the key goals of a trial system – full and fair procedures designed to arrive at the truth, to protect the innocent, and to convict the guilty – and in many instances institutionalize violations of fair trial rules in the system. For example:

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<sup>1</sup> The citation form used in this paper follows the convention in the Manual.

- ***Although the MCA specifically prohibits evidence obtained through torture, the combined effect of three rules – each of which violates fair trial standards – increase the likelihood that convictions may rest on such tainted evidence:*** (i) evidence obtained through coercion is permitted so long as a military judge finds it to be “reliable”; (ii) second- or third- hand testimony (hearsay) can be used without the defense being able to confront the source or challenge accuracy; and, (iii) the prosecution can withhold classified evidence and also keep from the defendant and his counsel the sources and methods used to obtain that evidence. The possibility that military commission trials would be tainted by evidence obtained through torture is not just theoretical. For example, the administration has claimed that the so-called “alternative interrogation techniques” used on 14 former CIA detainees now held at Guantanamo are classified. These techniques reportedly included waterboarding, extreme sleep deprivation and hypothermia. The government could seek to include hearsay testimony derived from these interrogations, claim that the techniques used are classified, and defense lawyers would have a hard time showing that evidence should be excluded because it was obtained through torture.
- ***Evidence obtained through coercion, including cruel, inhuman and degrading treatment, is explicitly permitted, with certain limitations.***
- ***The classified evidence rules are so broad that they would prevent the defense from seeing evidence that tends to show innocence or a lack of responsibility; the rules limit the defense’s ability to question the basis for classification.***
- ***The MCA and the Manual’s definition of “unlawful enemy combatants” who can be subjected to military trial is so broad that it would include civilians with no real connection to armed conflict, picked up anywhere around the world.***
- ***Taken together, a number of other provisions, both procedural and evidentiary, tilt the trial system unfairly in favor of the government.*** These provisions include: (i) the defendant may be excluded from portions of the proceedings; (ii) an alleged oral confession by the defendant can be introduced into evidence without corroboration; and (iii) the judge and jury may see testifying witnesses that the defendant and his counsel may not.

### **Congress’s Opportunity to Correct Past Mistakes**

Congress has an opportunity to apply the lessons of the past five years, during which the administration sought to proceed with a detainee detention and trial system that violated fundamental standards of due process. All that resulted from the administration’s approach are negative outcomes: protracted litigation, no convictions, hundreds of men subjected to indefinite detention, and the erosion of the United States’ international reputation as a nation committed to the rule of law. Congress can choose now to take a different path. It should hold hearings to review the Manual’s rules, and the process through which they were developed, in a deliberate, bipartisan way, and then ensure that the Manual is revised to comply with the fundamental fairness and due process guarantees that are enshrined in domestic and international law and are a hallmark of American values.

## Key Flaws

Among the military commission trial procedures that would violate U.S. and international fair trial standards are:

- **The overbroad definition of “Unlawful Enemy Combatant” could subject thousands of people, including civilians, to military trial. *R.M.C. 103; 202***

The Manual’s definition of unlawful enemy combatant tracks that of the MCA, and raises the same critical concern of unprecedented breadth: a person, including a U.S. legal permanent resident, could be picked up anywhere in the world – and need not even be near a battlefield – and subjected to the flawed military trial system. The person need not have been directly engaged in hostilities against the United States or have committed any terrorist act or had any connection to armed conflict. This definition of “unlawful enemy combatant” has far-reaching and negative consequences for U.S. and international law. It blurs the fundamental distinction the laws of war make between combatants and non-combatants and between types of armed conflict. It also crosses long-established boundaries between prosecution of wrongdoing under criminal laws (which include individual rights protections recognized since the time of the Founding Fathers) and prosecution under the special laws applicable to war (in which certain rights may be abridged).

- **Subjecting detainees to military commissions based on the deeply flawed Combatant Status Review Tribunal’s status determination compounds an already inequitable system. *R.M.C. 103***

Under the MCA and the Manual, the executive branch has the discretion to label a person an “unlawful enemy combatant” either on its own say-so, or after a set of procedures even more flawed than the proposed military commission trials. These procedures, used in Combatant Status Review Tribunals (CSRT), use a different – and broader – definition of “unlawful enemy combatant”: unlike the military commission rules, the CSRT definition does not require that a person “materially support” al Qaeda or the Taliban. CSRT procedures allow military officials to label a person an “unlawful enemy combatant” based on secret evidence (without even the minimal protections to challenge classified evidence that the Manual provides), including evidence that could have been obtained through torture or coercion. The procedures do not include one of the most basic elements of fairness – the presumption of innocence – even as they include a rebuttable presumption that the government’s evidence is correct. In practice, the detainee’s opportunity to rebut this evidence is severely limited: detainees in some cases do not have full access to the allegations against them because the evidence has been classified; they are permitted no legal assistance; and, detainees have been denied witnesses on their behalf from outside of Guantanamo.

- **Evidence obtained through coercion and cruel, inhuman and degrading treatment is permitted. *Mil. Comm. R. Evid. 304***

The Manual permits the use of statements obtained through coercion — including through cruel, inhuman and degrading treatment if obtained before December 30, 2005 — if the statement is “reliable,” sufficiently probative, and its admission is “in the interest of justice.” This express

inclusion flies in the face of 200 years of U.S. court decisions finding that coerced evidence is not reliable and its use cannot be justified. The Manual commentary acknowledges that the military judge may consider “other” corroborating evidence – this could possibly include a pattern or practice of coercion – and the circumstances surrounding the coercion in deciding if a coerced statement is reliable or consistent with the interests of justice. But if the interrogation techniques used to obtain the information are classified, it could be extremely difficult for a defendant or his counsel to show that coerced evidence should not be admitted.

- **The classified evidence provisions are overly broad and limit the ability of the defendant and his lawyers to challenge the government’s withholding of classified evidence or the basis for classification. *Mil. Comm. R. Evid. 505; R.M.C. 701***

The Manual contains a number of classified evidence provisions that, singly or together, restrict the defendant’s ability to make his case or deny him the right to see the evidence to be used against him (except in summarized or redacted form):

- A defendant’s right to evidence in the hands of the government that could tend to show his innocence or is otherwise favorable to his defense is usually absolute. This principle reflects the importance not just of ensuring that a person has a full and fair defense, but also of arriving at a correct and just outcome. The Manual provides that this exculpatory evidence can be withheld by the government and provided only in summary or other substitute form.
- Upon the request of the government, the judge may exclude both the defendant and his lawyer from the process in which the government argues to the judge that classified information should be withheld. The defendant may also be prevented from seeing portions of the government’s legal filings regarding why the evidence cannot be disclosed and from participation in the discussion between the government’s attorney and the judge. Regular courts-martial procedures require both the defendant and his counsel to be present at all proceedings determining the classification of information.
- Unlike courts-martial rules, the government has no duty to disclose classified information that could result in a more lenient sentence for the defendant.
- The judge is specifically permitted to limit the scope of examination of witnesses on the stand, which could hamper the ability of the defense to challenge a witness’s testimony or basis for classification.
- The ability of the defendant to fully present his case is made more difficult by a provision that allows the government to withhold not just classified information, but also the sources, methods, or activities by which the evidence was obtained.

- **Hearsay evidence is generally admissible. *Mil. Comm. R. Evid. 803***

Unlike the evidentiary rules applicable to both military and civilian courts, the Manual provides that hearsay evidence will be admitted on the same terms as any other evidence. Generally, hearsay – statements made by someone who is not available to testify and whose credibility cannot therefore be tested – is disfavored, although both military and civilian courts have exceptions that permit hearsay when the speaker is unavailable or the statement has other indicia of reliability. In the Manual, however, the blanket admission of hearsay evidence increases the likelihood that statements

obtained by coercion, or that are otherwise unreliable, will be admitted and that the defendant will not be able to confront an accuser. The Manual does specify that if evidence would be inadmissible hearsay under the Military Rules of Evidence, the proponent must make known “the general circumstances under which the evidence was obtained, the name of the declarant, and, where available, the declarant’s address.” Presumably, the government will generally be unable to introduce hearsay from someone whose identity cannot be disclosed, although it could seek to do so under the classified evidence rules.

- **People may be punished for acts that were not illegal when they were committed. *R.M.C. 201; Part IV***

The MCA authorizes, and the Manual reinforces in its rules, that defendants may be subjected to military trial for offenses that were (i) not illegal before the passage of the MCA, or (ii) not recognized as war crimes under the laws of war. These offenses include conspiracy and “providing material support for terrorism.” Basic due process requires that a person cannot be held criminally responsible for an action that was not legally prohibited at the time it was committed. Indeed the U.S. Constitution prohibits “ex post facto” laws, which make past conduct illegal. In violation of this fundamental tenet of the rule of law, defendants could be convicted for actions that were not illegal when they were taken.

- **The scope of judicial review is restricted and inadequate. *R.M.C. 1201***

Like the MCA, the Manual restricts the scope of judicial review. The Manual limits review by the initial appeals court, the Court of Military Commission Review, only to matters of law (not fact) that “prejudiced a substantial trial right” of the defendant. This provision would prevent the first appellate court and the subsequent two – the U.S. Court of Appeals for the District of Columbia and the U.S. Supreme Court – from considering factual appeals, including possible appeals based on a defendant’s factual innocence.

- **The Manual does not protect against evidence obtained through unlawful search or seizure.**

Court-martial rules address and exclude evidence obtained from unlawful searches and seizures. Mil. R. Evid. 311-321. The Manual excludes these rules entirely, instead of revising the court-martial rules to fit any different needs of military commissions. The Manual’s approach does not take into account any interest of a military justice system in preventing the admission of evidence obtained through unlawful searches or seizures, including, possibly, inside the United States.

- **The Manual creates a system that is weighted in favor of the prosecution.**

The Manual contains a number of provisions that either have the potential to, or actually do, tilt the system in favor of the prosecution, to the detriment of the defense. Among them:

- **An alleged confession or admission by a defendant is not required to be corroborated. *Mil. Comm. R. Evid. 304(g)*** In recognition of the ease with which false confessions or admissions can be manufactured, the normal court-martial procedure prohibits evidence of an oral

confession or admission by a defendant, unless it can be corroborated by some other source of evidence. The Manual, however, allows anyone who claims to have heard an admission to testify, without the need for corroboration. This is true even if the testimony was made in writing, but the writing can no longer be found.

- **Military commission proceedings may take place regardless of lack of critical witnesses or evidence. *R.M.C. 703*** Even if the testimony of a witness or other evidence is “of central importance to resolution of an issue essential to a fair trial,” the military judge may decide not to grant time to get the witness or evidence *unless* the government is responsible for the witness’ unavailability or lost or destroyed the evidence in bad faith. This provision is in stark contrast to the rules for courts-martial, under which the judge may grant extra time regardless of whether the government is at fault. The rule may, in practice, hurt the defense more than the government and further encourage the use of second- or third-hand hearsay testimony.
- **The judge and jury have access to witnesses that the defendant and his counsel do not. *Mil. Comm. R. Evid. 611(d)(2)*** The Manual allows a person whose identity, name, or appearance is classified or otherwise protected from disclosure to testify from behind a screen, seen only by the judge and jury. It is likely that such a witness would be offered by the government, which would have the benefit of knowing the witness’s identity and assessing his or her credibility. This provision could effectively leave only the defendant and his counsel without witness information, which could inhibit their ability to conduct a full defense.
- **The fast-tracking of appeals on some of the most controversial Manual provisions, including on classified evidence, the closure of proceedings, and the exclusion of the defendant from proceedings could be prejudicial to the defense. *R.M.C. 908(d)*** Appeals of evidentiary rulings by the judge on each of these issues is accelerated: oral arguments before the Court of Military Commission Review could take place as soon as nine days after the military commission decision. Although a timely decision on critical issues is important, in practice, this accelerated process may unfairly burden the defense, which may not have had the same access as the government to the classified evidence that would likely be the subject of the appeal.