

## MILITARY COMMISSIONS

- Military Commissions have historically been used to prosecute enemy combatants who violate the laws of war; the last time the United States used the Military Commission process was during World War II.
- Military Commissions provide:
  - A full and fair trial;
  - Protection for classified and sensitive information; and
  - Protection and safety for all personnel participating in the process, including the accused.
- In accordance with his Military Order of November 13, 2001, the President must determine if an individual is subject to his Military Order. This decision is the jurisdictional basis for prosecution; until the President determines that an individual is subject to his Military Order, no prosecution is possible. However, this determination does not require that criminal charges be brought against the individual; that decision is made by the Appointing Authority after the Chief Prosecutor recommends that charges be approved.
- An individual may be subject to the President's Military Order if the individual is not a U.S. citizen and the President determines that there is a reason to believe that the individual:
  - Is or was a member of al Qaeda;
  - Has engaged in, aided or abetted, or conspired to commit acts of international terrorism against the United States; or
  - Knowingly harbored one or more of the individuals described above; and
  - It is in the interest of the United States that such individual be subject to this order.
- The Chief Prosecutor will draft charges, when appropriate, on individuals subject to the President's Military Order.
- The Appointing Authority approves and refers appropriate charges to a Military Commission and appoints Military Commission members.
- Each Military Commission panel consists of a Presiding Officer who must be a judge advocate and at least three other military officer members. The Presiding Officer shall rule upon all questions of law, all challenges for cause, and all interlocutory questions arising during the proceedings. All members of the

Military Commission panel, except the Presiding Officer, vote on findings and, if necessary, on a sentence.

- Each accused tried by a Military Commission has the following procedural safeguards:
  - the presumption of innocence;
  - proof of guilt beyond a reasonable doubt;
  - the right to call and cross examine witnesses (subject to the rules regarding production of witnesses and protection of information);
  - nothing said by an accused to his attorney, or anything derived therefrom, may be used against him at trial;
  - no adverse inference for remaining silent;
  - the overall requirement that any military commission proceeding be full and fair.
  - Finally, to assist him in preparing a defense, each accused has Military Defense Counsel provided at no cost to him.
- The accused may also hire a civilian defense counsel at no cost to the government as long as that counsel:
  - Is a United States citizen;
  - Is admitted to practice in a United States jurisdiction;
  - Has not been the subject of sanction or disciplinary action;
  - Is eligible for and obtains at least a SECRET level clearance; and
  - Agrees to follow the Military Commission rules.
- The Presiding Officer may admit any evidence that “would have probative value to a reasonable person” provided its admission would not deprive an accused of a full and fair trial. This standard of evidence takes into account the unique battlefield environment that is different than traditional peacetime law enforcement practices in the U.S.
- A finding of guilt and the imposition of a sentence must be with the concurrence of two-thirds of the Military Commission panel members, excluding the Presiding Officer.
- If there is a finding of guilt, the Military Commission panel members, excluding the Presiding Officer, may impose any appropriate sentence, including death if referred as a capital case by the Appointing Authority. A sentence of death requires a unanimous vote from a Military Commission panel consisting of at least seven members (excluding the Presiding Officer).

- After the panel has delivered its verdict and imposed a sentence:
  - All records of trial must be reviewed by the Appointing Authority who may return the case to the Military Commission for further proceedings if he determines it is not administratively complete.
  - A three-member Review Panel of Military Officers, one of whom must have prior experience as a judge, will review all cases for material errors of law, and may consider matters submitted by the Prosecution and Defense. Review Panel members may be civilians who were specifically commissioned to serve on the panel. If a majority of the Review Panel members believe a material error of law has occurred, they may return the case to the Military Commission for further proceedings.
  - The Secretary of Defense will review the record of trial and, if appropriate, may return it to the Military Commission for further proceedings, or forward the case to the President with a recommendation as to disposition.
  - The President may either return the case to the Military Commission for further proceedings or make the final decision as to its disposition.
    - The President may delegate final decision authority to the Secretary of Defense, in which case the Secretary may approve or disapprove the findings or change a finding of Guilty to a finding of Guilty to a lesser-included offense, or mitigate, commute, defer, or suspend the sentence imposed, or any portion thereof. A finding of Not Guilty as to a charge shall not be changed to a finding of Guilty.
  - Under the recently passed Detainee Treatment Act of 2005, the United States Circuit Court of Appeals for the District of Columbia shall have exclusive jurisdiction to determine the validity of any final decisions of a military commission case. Review shall be “as of right” for capital cases or cases with a sentence of 10 years or more. Review for all other cases shall be at the discretion of the US Circuit Court of Appeals for the District of Columbia.