



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
- Military Commissions were used to try the individuals who conspired to assassinate President Lincoln
- 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 (Nuremberg trials, Tokyo Trials)
- President George W. Bush established Military Commissions to prosecute potential law of war violations during the global war against 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 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 Military Commissions Act of 2009 establishes procedures governing the use of Military Commissions to try alien unprivileged enemy belligerents engaged in hostilities against the United States 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;
- A requirement for 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 and 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
- Foreign consultants available for assistance during the proceedings;
- The right to remain silent and to have no adverse inference drawn from it;
- The right to examine all evidence presented to a jury by the prosecution;
- The right 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 to call witnesses on his own behalf 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 then seek to review through the District of Columbia Circuit Court of Appeals to the U.S. Supreme Court.

The Military Commissions process

The Military Commissions legal system begins when the Prosecution drafts charges, when appropriate, against individuals subject to the Military Commissions Act of 2009. Charges may then be sworn by any person subject to the Uniform Code of Military Justice. Once charged, a person is referred to as the accused.

The Convening Authority decides whether to refer any or all charges to trial. A referral requires a finding of probable cause – similar to a grand jury returning an indictment. If the Convening Authority decides to refer a case to trial, a Military Commission is created.

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 United States. For example, evidence seized outside the United States may not be excluded on the grounds it was not obtained pursuant to a search warrant. Similarly, 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 probative, and its admission is in the best interests of justice.

Military Commissions follow the same panel-member standards for determining guilt that are used in the court-martial trials of all U.S. service members subject to the Uniformed Code of Military Justice. A finding of guilt and the imposition of a sentence must be with the concurrence of at least two-thirds of the Military Commission members. Sentences that include confinement for ten years or more must be concurred in by at least three-fourths 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 case is referred as a capital case by the Convening Authority. A sentence of death requires a unanimous vote of at least twelve members as to both findings and sentence.

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

- The Convening Authority shall take action on the sentence only after consideration of any and all matters submitted by the accused, as well as the recommendation of the Legal Advisor. In the event of conviction, the Convening Authority can reduce the sentence, dismiss any charges or specifications or order a rehearing for any charge for which the accused was convicted. The prosecution cannot appeal any mitigation action by the Convening Authority.
- In addition to the legal review, the accused must be given an opportunity to formally request clemency from the Convening Authority.
- Each case which includes a finding of guilt is referred to the U.S. Court of Military Commission Review. The Secretary of Defense has established a Court of Military Commission Review composed of at least three appellate military judges. The judges may be military or civilian.
- The United States Court of Appeals for the District of Columbia Circuit 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.