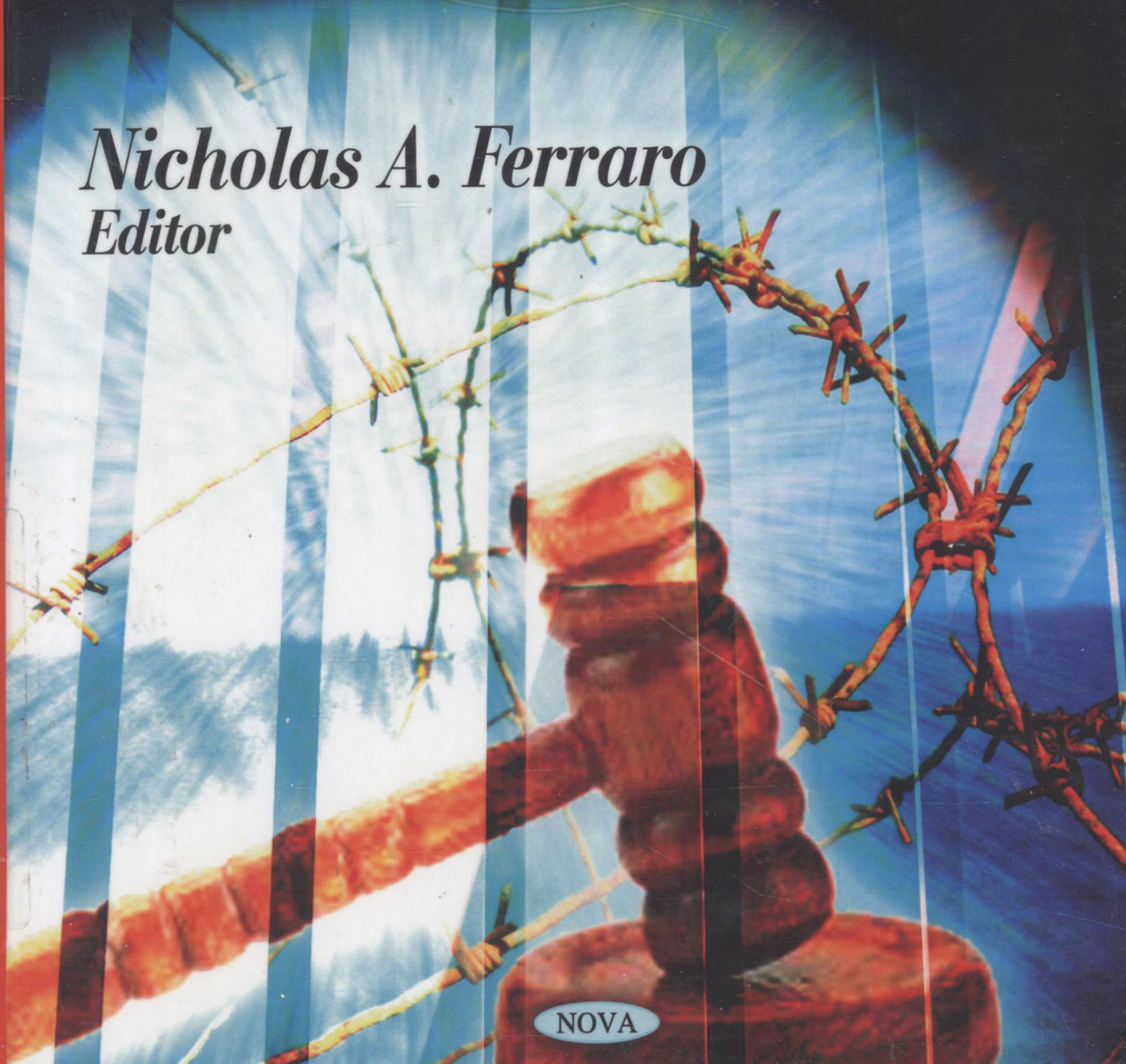
Terrorism, Hot Spots and Conflict-Related Issues

Legal and Trial Issues Stemming from the War on Terror

Nicholas A. Ferraro
Editor



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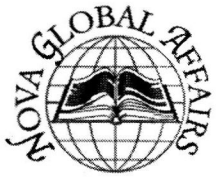

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PREFACE

This book explores the legal and trial issues arising from the United States' war on terrorism. The detention of alleged enemy combatants at the U.S. Naval Station in Guantanamo Bay, Cuba, and the potential transfer of such individuals away from the Guantanamo detention facility, have been the focus of significant legislative activity during the 111th Congress. Also discussed, herein, is Attorney General Holder's decision to try certain detainees in federal criminal court, including those accused of conspiring to commit the 9/11 terrorist attacks, and to try other detainees by military commission. Attention has focused on the procedural differences between trials in federal court and those conducted under the Military Commissions Act.

Chapter 1 - On November 13, 2001, President Bush issued a Military Order (M.O.) pertaining to the detention, treatment, and trial of certain non-citizens in the war against terrorism. Military commissions pursuant to the M.O. began in November 2004 against four persons declared eligible for trial, but proceedings were suspended after a federal district court found that one of the defendants could not be tried under the rules established by the Department of Defense (DOD). The D.C. Circuit Court of Appeals reversed that decision in *Rumsfeld v. Hamdan*, but the Supreme Court granted review and reversed the decision of the Court of Appeals. To permit military commissions to go forward, Congress approved the Military Commissions Act of 2006 (MCA), conferring authority to promulgate rules that depart from the strictures of the Uniform Code of Military Justice (UCMJ) and possibly U.S. international obligations. The Department of Defense published regulations to govern military commissions pursuant to the MCA.

The Court of Military Commissions Review (CMCR), created by the MCA, issued its first decision on September 24, 2007, reversing a dismissal of charges based on lack of jurisdiction and ordering the military judge to determine whether the accused is an "unlawful enemy combatant" subject to the military commission's jurisdiction. The CMCR rejected the government's argument that the determination by a Combatant Status Review Tribunal (CSRT) that a detainee is an "enemy combatant" was a sufficient basis for jurisdiction, but also rejected the military judge's finding that the military commission was not empowered to make the appropriate determination.

This chapter provides a background and analysis comparing military commissions as envisioned under the MCA to the rules that had been established by the Department of Defense (DOD) for military commissions and to general military courts-martial conducted under the UCMJ. After reviewing the history of the implementation of military commissions

in the "global war on terrorism," the report provides an overview of the procedural safeguards provided in the MCA. The report identifies pending legislation, including H.R. 267, H.R. 1585, H.R. 2543, H.R. 2826, S. 1547, S. 1548, H.R. 1416, S. 1876, S. 185, S. 576, S.447, H.R. 1415 and H.R. 2710. Finally, the report provides two tables comparing the MCA with regulations that had been issued by the Department of Defense pursuant to the President's Military Order with standard procedures for general courts-martial under the Manual for Courts-Martial. The first table describes the composition and powers of the military tribunals, as well as their jurisdiction. The second chart, which compares procedural safeguards required by the MCA with those that had been incorporated in the DOD regulations and the established procedures in courts-martial, follows the same order and format used in CRS Report RL31262, *Selected Procedural Safeguards in Federal, Military, and International Courts*, to facilitate comparison with safeguards provided in federal court and international criminal tribunals.

Chapter 2 - The detention of alleged enemy combatants at the U.S. Naval Station in Guantanamo Bay, Cuba, and the potential transfer of such individuals away from the Guantanamo detention facility, have been the focus of significant legislative activity during the 111th Congress. Several enacted authorization and appropriations measures affect the treatment of Guantanamo detainees and restrict the use of federal funds to transfer or release Guantanamo detainees into the United States.

Section 14103 of the Supplemental Appropriations Act, 2009 (P.L. 111-32), enacted in June 2009, restricts the use of funds appropriated by that or any prior act for the transfer or release of detainees into the United States. However, for transfers for the purpose of prosecution or legal proceedings, an exception may be made if the President submits a plan fulfilling specified requirements to Congress 45 days prior to the transfer.

Three FY2010 measures enacted to date—the Department of Homeland Security Appropriations Act, 2010 (P.L. 111-83), the National Defense Authorization Act for Fiscal Year 2010 (P.L. 111- 84), and the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010 (P.L. 111-88)—generally bar the use of federal funds appropriated in those or "any other" acts to release or transfer a Guantanamo detainee into the United States or specified U.S. territories. Like the 2009 Supplemental Appropriations Act, they provide exceptions in some circumstances for transfers effected after a 45-day reporting requirement has been fulfilled. The exceptions vary somewhat. Most notably, the exception in P.L. 111-84 appears to contemplate transfers to the United States for continued preventative detention, while the other measures restrict transfers to those for prosecution or detention during legal proceedings. The effective time periods for the restrictions also differ. The restriction in the defense authorization measure, P.L. 111-84, applies through December 31, 2010. In contrast, the restrictions in P.L. 111-83 and P.L. 111-88 presumably apply commensurately with the 2010 fiscal year (October 1, 2009, to September 30, 2010).

The public laws and pending proposals address additional issues related to the treatment and disposition of Guantanamo detainees. Title XVIII of P.L. 111-84 establishes new procedures for military commissions. Section 552 of P.L. 111-83 requires that former Guantanamo detainees be included on the "No Fly List" in most circumstances and restricts their access to immigration benefits.

This chapter analyzes relevant provisions in enacted legislation and selected pending bills. For more detailed explorations of the legal issues related to the potential closure of the detention facility and the transfer, release, and treatment of detainees, see CRS Report R40

139, *Closing the Guantanamo Detention Center: Legal Issues*, by Michael John Garcia et al., and CRS Report RL33 180, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*, by Jennifer K. Elsea, Kenneth R. Thomas, and Michael John Garcia.

Chapter 3 - Following the terrorist attacks of 9/11, Congress passed the Authorization to Use Military Force (AUMF), which granted the President the authority "to use all necessary and appropriate force against those ... [who] planned, authorized, committed, or aided the terrorist attacks" against the United States. Many persons subsequently captured during military operations in Afghanistan and elsewhere were transferred to the U.S. Naval Station at Guantanamo Bay, Cuba, for detention and possible prosecution before military tribunals. Although nearly 800 persons have been transferred to Guantanamo since early 2002, the substantial majority of Guantanamo detainees have ultimately been transferred to another country for continued detention or release. The 215 detainees who remain fall into three categories: (1) persons placed in non-penal, preventive detention to stop them from rejoining hostilities; (2) persons who have faced or are expected to face criminal charges; and (3) persons who have been cleared for transfer or release, whom the United States continues to detain pending transfer. Although the Supreme Court ruled in *Boumediene v. Bush* that Guantanamo detainees may seek *habeas corpus* review of the legality of their detention, several legal issues remain unsettled, including the extent to which other constitutional provisions apply to noncitizens held at Guantanamo.

On January 22, 2009, President Obama issued an Executive Order requiring the Guantanamo detention facility to be closed as soon as practicable, and no later than a year from the date of the Order. Several legislative proposals have been introduced in the 111th Congress concerning the potential closure of the Guantanamo facility. The Supplemental Appropriations Act, 2009 (P.L. 111-32), Department of Homeland Security Appropriations Act, 2010 (P.L. 111-83), National Defense Authorization Act for Fiscal Year 2010 (P.L. 111-84), and Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010 (P.L. 111-88), all contain provisions barring funds from being used to release Guantanamo detainees into the United States, and also restrict funds from being used to transfer detainees into the country for prosecution prior to the submission of certain reports to Congress. The National Defense Authorization Act also contains provisions modifying the rules for military commissions, which may have implications for Guantanamo detainees. For more information, see CRS Report R40754, *Guantanamo Detention Center: Legislative Activity in the 111th Congress*, by Anna C. Henning, and CRS Report R40932, *Comparison of Rights in Military Commission Trials and Trials in Federal Criminal Court*, by Jennifer K. Elsea.

The closure of the Guantanamo detention facility may raise a number of legal issues with respect to the individuals formerly interned there, particularly if those detainees are transferred to the United States for continued detention, prosecution, or release. The nature and scope of constitutional protections owed to detainees within the United States may be different from the protections owed to persons held outside the United States. This may have implications for the continued detention or prosecution of persons who are transferred to the United States. The transfer of detainees to the United States may also have immigration consequences. This chapter provides an overview of major legal issues likely to arise as a result of executive and legislative action to close the Guantanamo detention facility. It discusses legal issues related to the transfer of Guantanamo detainees (either to a foreign country or into the United States), the continued detention of such persons in the United

States, and the possible removal of persons brought into the country. It also discusses selected constitutional issues that may arise in the criminal prosecution of detainees, emphasizing the procedural and substantive protections that are utilized in different adjudicatory forums (i.e., federal civilian courts, court-martial proceedings, and military commissions).

Chapter 4 - Attorney General Holder's decision to try certain detainees in federal criminal court, including those accused of conspiring to commit the 9/11 terrorist attacks, and to try other detainees by military commission, has focused attention on the procedural differences between trials in federal court and those conducted under the Military Commissions Act, as recently amended. Some who are opposed to the decision argue that bringing detainees to the United States for trial poses a security threat and risks disclosing classified information, or could result in the acquittal of persons who are guilty. Others have praised the decision as recognizing the efficacy and fairness of the federal court system and have voiced confidence in the courts' ability to protect national security while achieving justice that will be perceived as such among U.S. allies abroad. Some continue to object to the planned trials of detainees by military commission, despite the amendments Congress enacted as Title XVIII of the National Defense Authorization Act for Fiscal Year 2010, P.L. 111-84, because they say it demonstrates a less than full commitment to justice or that it casts doubt on the strength of the government's case against those detainees.

This chapter provides a brief summary of legal issues raised by the choice of forum for trying accused terrorists and a table comparing selected military commissions rules under the Military Commissions Act, as amended, to the corresponding rules that apply in federal court. The table follows the same order and format used in CRS Report RL31262, *Selected Procedural Safeguards in Federal, Military, and International Courts*, to facilitate comparison with safeguards provided in international criminal tribunals. For similar charts comparing military commissions as envisioned under the MCA, as passed in 2006, to the rules that had been established by DOD for military commissions and to general military courts-martial conducted under the Uniform Code of Military Justice (UCMJ), see CRS Report RL33688, *The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military Justice*, by Jennifer K. Elsea. For information about legislation with relevance to Guantanamo detainees, see CRS Report R40754, *Guantanamo Detention Center: Legislative Activity in the 111th Congress*, by Anna C. Henning.

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Chapter 1

THE MILITARY COMMISSIONS ACT OF 2006: ANALYSIS OF PROCEDURAL RULES AND COMPARISON WITH PREVIOUS DOD RULES AND THE UNIFORM CODE OF MILITARY JUSTICE*

Jennifer K. Elsea

SUMMARY

On November 13, 2001, President Bush issued a Military Order (M.O.) pertaining to the detention, treatment, and trial of certain non-citizens in the war against terrorism. Military commissions pursuant to the M.O. began in November 2004 against four persons declared eligible for trial, but proceedings were suspended after a federal district court found that one of the defendants could not be tried under the rules established by the Department of Defense (DOD). The D.C. Circuit Court of Appeals reversed that decision in *Rumsfeld v. Hamdan*, but the Supreme Court granted review and reversed the decision of the Court of Appeals. To permit military commissions to go forward, Congress approved the Military Commissions Act of 2006 (MCA), conferring authority to promulgate rules that depart from the strictures of the Uniform Code of Military Justice (UCMJ) and possibly U.S. international obligations. The Department of Defense published regulations to govern military commissions pursuant to the MCA.

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* This is an edited, reformatted and augmented version of a CRS Report for Congress publication dated September 2007.

also rejected the military judge's finding that the military commission was not empowered to make the appropriate determination.

This chapter provides a background and analysis comparing military commissions as envisioned under the MCA to the rules that had been established by the Department of Defense (DOD) for military commissions and to general military courts-martial conducted under the UCMJ. After reviewing the history of the implementation of military commissions in the "global war on terrorism," the report provides an overview of the procedural safeguards provided in the MCA. The report identifies pending legislation, including H.R. 267, H.R. 1585, H.R. 2543, H.R. 2826, S. 1547, S. 1548, H.R. 1416, S. 1876, S. 185, S. 576, S.447, H.R. 1415 and H.R. 2710. Finally, the report provides two tables comparing the MCA with regulations that had been issued by the Department of Defense pursuant to the President's Military Order with standard procedures for general courts-martial under the Manual for Courts-Martial. The first table describes the composition and powers of the military tribunals, as well as their jurisdiction. The second chart, which compares procedural safeguards required by the MCA with those that had been incorporated in the DOD regulations and the established procedures in courts-martial, follows the same order and format used in CRS Report RL31262, *Selected Procedural Safeguards in Federal, Military, and International Courts*, to facilitate comparison with safeguards provided in federal court and international criminal tribunals.

INTRODUCTION

Rasul v. Bush, issued by the U.S. Supreme Court at the end of its 2003-2004 term, clarified that U.S. courts do have jurisdiction to hear petitions for habeas corpus on behalf of the approximately 550 persons then detained at the U.S. Naval Station in Guantanamo Bay, Cuba, in connection with the war against terrorism,[1] establishing a role for federal courts to play in determining the validity of the military commissions convened pursuant to President Bush's Military Order (M.O.) of November 13, 2001.[2] After dozens of petitions for habeas corpus were filed in the federal District Court for the District of Columbia, Congress passed the Detainee Treatment Act of 2005 (DTA),[3] revoking federal court jurisdiction over habeas claims, at least with respect to those not already pending, and creating jurisdiction in the Court of Appeals for the District of Columbia Circuit to hear appeals of final decisions of military commissions. The Supreme Court, in *Hamdan v. Rumsfeld*,[4] overturned a decision by the D.C. Circuit that had upheld the military commissions, holding instead that although Congress has authorized the use of military commissions, such commissions must follow procedural rules as similar as possible to courts-martial proceedings, in compliance with the Uniform Code of Military Justice (UCMJ).[5] In response, Congress passed the Military Commissions Act of 2006 (MCA)[6] to authorize military commissions and establish procedural rules that are modeled after, but depart from in some significant ways, the UCMJ.

The Department of Defense has issued regulations for the conduct of military commissions pursuant to the MCA.[7] One detainee, David Matthew Hicks of Australia, was convicted of material support to terrorism pursuant to a plea agreement. Trials began for two other defendants, but were halted after the military judges dismissed charges based on lack of jurisdiction, finding in both cases that the defendants had not properly been found to be

"unlawful enemy combatants." The prosecutors appealed the cases to the Court of Military Commissions Review (CMCR), which reversed the dismissal of charges in one case and remanded it to the military commission for a determination of whether the accused is an "unlawful enemy combatant."[8] The CMCR decision rejected the government's contention that the determination by a Combatant Status Review Tribunal (CSRT) that a detainee is an "enemy combatant" was a sufficient basis for jurisdiction, but also rejected the military judge's finding that the military commission was not itself empowered to make the appropriate determination.

Military Commissions: General Background

Military commissions are courts usually set up by military commanders in the field to try persons accused of certain offenses during war.[9] Past military commissions trying enemy belligerents for war crimes directly applied the international law of war, without recourse to domestic criminal statutes, unless such statutes were declaratory of international law.[10] Historically, military commissions have applied the same set of procedural rules that applied in courts-martial.[11] By statute, military tribunals may be used to try "offenders or offenses designated by statute or the law of war."[12] Although the Supreme Court long ago stated that charges of violations of the law of war tried before military commissions need not be as exact as those brought before regular courts,[13] it is unclear whether the current Court would adopt that proposition or look more closely to precedent.

The President's Military Order establishing military commissions to try suspected terrorists was the focus of intense debate both at home and abroad. Critics argued that the tribunals could violate any rights the accused may have under the Constitution as well as their rights under international law, thereby undercutting the legitimacy of any verdicts rendered by the tribunals. The Administration established rules prescribing detailed procedural safeguards for the tribunals in Military Commission Order No. 1 ("M.C.O. No. 1"), issued in March 2002 and amended in 2005.[14] These rules were praised as a significant improvement over what might have been permitted under the language of the M.O., but some continued to argue that the enhancements did not go far enough and called for the checks and balances of a separate rule-making authority and an independent appellate process.[15] Critics also noted that the rules did not address the issue of indefinite detention without charge, as appeared to be possible under the original M.O.,[16] or that the Department of Defense may continue to detain persons who have been cleared by a military commission.[17] The Pentagon has reportedly stated that its Inspector General (IG) looked into allegations, made by military lawyers assigned as prosecutors to the military commissions, that the proceedings are rigged to obtain convictions, but the IG did not substantiate the charges.[18]

President Bush determined that twenty of the detainees at the U.S. Naval Station in Guantánamo Bay were subject to the M.O., and 10 were subsequently charged for trial before military commissions.[19]

Hamdan v. Rumsfeld

Salim Ahmed Hamdan was captured in Afghanistan and charged with conspiracy for having allegedly worked for Osama Bin Laden.[20] He challenged the lawfulness of the military commission under the UCMJ[21] and claimed the right to be treated as a prisoner of war under the Geneva Conventions.[22] A ruling in his favor at the district court was reversed by the D.C. Circuit Court of Appeals, which, while rejecting the government's argument that the federal courts had no jurisdiction to interfere in ongoing commission proceedings, agreed with the government that the Geneva Conventions are not judicially enforceable;[23] that even if they were, Hamdan was not entitled to their protections; and that in any event, the military commission would qualify as a "competent tribunal" for challenging the petitioner's non-POW status. The appellate court did not accept the government's argument that the President has inherent authority to create military commissions without any authorization from Congress, but found such authority in the Authorization to Use Military Force (AUMF),[24] read together with UCMJ arts. 21 and 36.[25]

The Supreme Court granted review and reversed. Before reaching the merits of the case, the Supreme Court dispensed with the government's argument that Congress had, by passing the Detainee Treatment Act of 2005 (DTA),[26] stripped the Court of its jurisdiction to review habeas corpus challenges by or on behalf of Guantanamo detainees whose petitions had already been filed.[27] In addition, regardless of whether the Geneva Conventions provide rights that are enforceable in Article III courts, the Court found that Congress, by incorporating the "law of war" into UCMJ art. 21,[28] brought the Geneva Conventions within the scope of law to be applied by courts.[29] Further, the Court found that, at the very least, Common Article 3 of the Geneva Conventions applies, even to members of al Qaeda, according to them a minimum baseline of protections, including protection from 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."[30]

The Court concluded that, although Common Article 3 "obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict" and that "its requirements are general ones, crafted to accommodate a wide variety of legal systems," the military commissions under M.C.O. No. 1 did not meet these criteria. In particular, the military commissions were not "regularly constituted" because they deviated too far, in the Court's view, from the rules that apply to courts-martial, without a satisfactory explanation of the need for such deviation.[31] Justice Scalia, joined by Justices Thomas and Alito, dissented, arguing that the DTA should be interpreted to preclude the Court's review.

THE MILITARY COMMISSIONS ACT OF 2006

In response to the *Hamdan* decision, Congress enacted the Military Commissions Act of 2006 ("MCA") to grant the President express authority to convene military commissions to prosecute those fitting the definition under the MCA of "alien unlawful enemy combatants." The MCA eliminates the requirement for military commissions to conform to either of the two uniformity requirements in article 36, UCMJ. Instead, it establishes a new chapter 47A in

title 10, U.S. Code and excepts military commissions under the new chapter from the requirements in article 36.[32] It provides that the UCMJ "does not, by its terms, apply to trial by military commissions except as specifically provided in this chapter." While declaring that the new chapter is "based upon the procedures for trial by general courts-martial under [the UCMJ]," it establishes that "[t]he judicial construction and application of [the UCMJ] are not binding on military commissions established under this chapter."[33] It expressly exempts the new military commission from UCMJ articles 10 (speedy trial), 31 (self-incrimination warnings) and 32 (pretrial investigations), and amends articles 21, 28, 48, 50(a), 104, and 106 of the UCMJ to except military commissions under the new chapter.[34] Other provisions of the UCMJ are to apply to trial by military commissions under the new chapter only to the extent provided therein.[35]

Jurisdiction

The President's M.O. was initially criticized by some as overly broad in its assertion of jurisdiction, because it could be interpreted to cover non-citizens who had no connection with Al Qaeda or the terrorist attacks of September 11, 2001, as well as offenders or offenses not triable by military commission pursuant to statute or the law of war.[36] A person subject to the M.O. was amenable to detention and possible trial by military tribunal for violations of the law of war and "other applicable law."[37] M.C.O. No. 1 established that commissions may be convened to try aliens designated by the President as subject to the M.O., whether captured overseas or on U.S. territory, for violations of the law of war and "all other offenses triable by military commissions." The MCA largely validates the President's jurisdictional scheme for military commissions.

Personal Jurisdiction

While many observers agreed that the President is authorized by statute to convene military commissions in the "Global War on Terrorism," some believed the President's constitutional and statutory authority to establish such tribunals does not extend beyond Congress' authorization to use armed force in response to the attacks.[38] Under a literal interpretation of the M.O., however, the President could designate as subject to the order any non-citizen he believed had ever engaged in any activity related to international terrorism, no matter when or where these acts took place.

The M.O. was not cited for the authority to detain; instead, the Department of Defense asserted its authority to be grounded in the law of war, which permits belligerents to kill or capture and detain enemy combatants. The Department of Defense defined "enemy combatant" to mean "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners," including "any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces."[39]

The MCA applies a somewhat broader definition for "unlawful enemy combatant," which includes

(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or

(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.[40]

Thus, persons who do not directly participate in hostilities, but "purposefully and materially" support hostilities, are subject to treatment as an "unlawful enemy combatant" under the MCA. Citizens who fit the definition of "unlawful enemy combatant" are not amenable to trial by military commission under the MCA, but may be subject to detention.

The MCA does not define "hostilities" or explain what conduct amounts to "supporting hostilities." To the extent that the jurisdiction is interpreted to include conduct that falls outside the accepted definition of participation in an armed conflict, the MCA might run afoul of the courts' historical aversion to trying civilians before military tribunal when other courts are available.[41] It is unclear whether this principle would apply to aliens captured and detained overseas, but the MCA does not appear to exempt from military jurisdiction permanent resident aliens captured in the United States who might otherwise meet the definition of "unlawful enemy combatant." It is generally accepted that aliens within the United States are entitled to the same protections in criminal trials that apply to U.S. citizens. Therefore, to subject persons to trial by military commission who do not meet the exception carved out by the Supreme Court in *ex parte Quirin*[42] for unlawful belligerents, to the extent such persons enjoy constitutional protections, would likely raise significant constitutional questions.

The MCA did not specifically identify who makes the determination that defendants meet the definition of "unlawful enemy combatant." The government sought to establish jurisdiction based on the determinations of Combatant Status Review Tribunals (CSRTs), set up by the Pentagon to determine the status of detainees using procedures similar to those the Army uses to determine POW status during traditional wars.[43] The CSRTs, however, are not empowered to determine whether the enemy combatants are unlawful or lawful, which recently led two military commission judges to hold that CSRT determinations are inadequate to form the basis for the jurisdiction of military commissions.[44] One of the judges determined that the military commission itself is not competent to make the determination, while the other judge appears to have determined that the government's allegations did not set forth sufficient facts to conclude that the defendant, Salim Hamdan, was an unlawful enemy combatant.[45] The Court of Military Commission Review (CMCR) reversed the dismissal in the first case.[46] While it agreed that the CSRT determinations are insufficient by themselves to establish jurisdiction, it found the military judge erred in declaring that the status determination had to be made by a competent tribunal other than the military commission itself.

In denying the government's request to find that CSRT determinations are sufficient to establish jurisdiction over the accused, the CMCR interpreted the MCA to require more than establishing membership in Al Qaeda or the Taliban. The CMCR found

> no support for [the government's] claim that Congress, through the M.C.A., created a "comprehensive system" which sought to embrace and adopt all prior C.S.R.T. determinations that resulted in "enemy combatant" status assignments, and summarily turn those designations into findings that persons so labeled could also properly be considered "unlawful enemy combatants." Similarly, we find no support for [the government's] position regarding the parenthetical language contained in § 948a(1)(A)(i) of the M.C.A. — "including a person who is part of the Taliban, al Qaeda, or associated forces." We do not read this language as declaring that a member of the Taliban, al Qaeda, or associated forces is *per se* an "unlawful enemy combatant" for purposes of exercising criminal jurisdiction before a military commission. We read the parenthetical comment as simply elaborating upon the sentence immediately preceding it. That is, that a member of the Taliban, al Qaeda, or associated forces *who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents* will also qualify as an "unlawful enemy combatant" under the M.C.A. (emphasis added [by the court]).[47]

The CMCR further explained that executive branch memoranda defining "enemy combatant" status were implemented solely for purposes of continued detention of personnel captured during hostilities and applicability of the Geneva Conventions. By contrast,

> Congress in the M.C.A. was carefully and deliberately defining status for the express purpose of specifying the in personam criminal jurisdiction of military commission trials. In defining what was clearly intended to be limited jurisdiction, Congress also prescribed serious criminal sanctions for those members of this select group who were ultimately convicted by military commissions.[48]

Further, because detainees could not have known when their CSRT reviews were taking place that the determination could subject them to the jurisdiction of a military commission, the CMCR suggested that the use of CSRT determinations to establish jurisdiction would undermine Congress's intent that military commissions operate as "regularly constituted court[s], affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of Common Article 3 of the Geneva Conventions."[49]

As a consequence of the decision, the Department of Defense will not have to institute new status tribunals, but the prosecution has the burden of proving jurisdiction over each person charged for trial by a military commission.

Subject-Matter Jurisdiction

The MCA provides jurisdiction to military commissions over "any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant...."[50] Crimes to be triable by military commission are defined in subchapter VII (10 U.S.C. §§ 950p - 950w). Offenses include the following: murder of protected persons; attacking civilians, civilian objects, or protected property; pillaging; denying quarter; taking hostages; employing poison or similar weapons; using protected persons or property as shields; torture, cruel or inhuman treatment; intentionally causing serious bodily injury; mutilating or maiming; murder in violation of the law of war; destruction of property in violation of the law of war; using treachery or perfidy; improperly using a flag of truce or distinctive emblem; intentionally mistreating a dead body; rape; sexual assault or abuse;