

Human Rights Watch Briefing Paper on U.S. Military Commissions

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The U.S. government is moving closer to convening the military commissions authorized by President Bush in November 2001 to try suspected terrorists. Despite President Bush's oft-repeated insistence that the war on terror is a war to affirm and protect basic human rights, the rules for the proposed commissions fall far short of international due process standards.

If the proposed commissions try terrorist suspects under the existing military orders and instructions, the trials will undermine the basic rights of defendants to a fair trial; yield verdicts – possibly including death sentences – of questionable legitimacy; and deliver a message worldwide that the fight against terrorism need not respect the rule of law.

The Department of Defense has issued a series of orders and instructions governing most aspects of the commissions, from their basic organization, to the crimes to be prosecuted.¹ These rules incorporate certain due process safeguards into the commissions, including the presumption of innocence, proceedings open to the public, and the presentation of evidence and cross examination of witnesses. Important as they are, these provisions cannot overcome the cumulative impact of other provisions that militate against fairness. They provide a patina of due process to proceedings that are otherwise deeply flawed.

Under the current rules, the commissions will:

- Deprive defendants of a trial by an independent court.
- Improperly subject criminal suspects to military justice.
- Try prisoners of war (POWs) in a manner that violates the 1949 Geneva Conventions.
- Provide lower due process standards for non-citizens.
- Restrict the right to choose one's defense counsel.
- Deprive defense counsel the means to prepare an effective defense.
- Impose a gag order on defense counsel

Lack of Independent Judicial Oversight

¹ Since President Bush issued Military Order of November 13, 2001 authorizing military commissions, the Department of Defense has released several instructions setting out the applicable law and procedure: Military Commission Order No. 1 (MCO No. 1), issued March 21, 2002; a draft set of crimes and elements released on February 28, 2003 for public comment; and a set of eight final Military Commission Instructions (MCIs) released on April 30, 2003.

The military commissions established by the Bush administration and the Department of Defense do not allow for review by a court independent of the executive branch of government. Review of the commissions' proceedings is limited to a specially created panel appointed by the Secretary of Defense that will consist solely of military officers.² No appeal is permitted to U.S. federal courts or the U.S. Court of Appeals for the Armed Forces, a civilian court independent of the executive branch.³ The President has final review of commission convictions and sentences.

The executive branch is thus prosecutor, judge, jury and – since the commissions can impose the death penalty – potential executioner. Persons tried and convicted by the commissions will have no opportunity for independent judicial review of verdicts, no matter how erroneous, arbitrary, or legally unsound. Indeed, a defendant cannot even ask civilian judges to rule on the legality of military commission jurisdiction over him.⁴

Improper Use of Military Courts

President Bush's Military Order of November 13, 2001 authorizes the use of military commissions to try non-U.S. citizens who are or were members of al-Qaeda, who engaged in acts of international terrorism, or who knowingly "harbored" such persons. Military commissions are permitted under international law within the context of an armed conflict. But President Bush's order encompasses civilians who had no connection to armed conflict as understood under international humanitarian law and, indeed, whose acts were committed far from any actual battlefield. Using military courts to try such persons violates their right to trial by an independent and impartial court.

According to the U.N. Human Rights Committee, the body that monitors compliance with the International Covenant on Civil and Political Rights,⁵ the use of military courts to try civilians "could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice."⁶ Such would seem to be the case with the U.S. military commissions. The Bush Administration appears intent on evading the due process protections of U.S. federal courts by trying civilians for alleged military offenses that are in fact crimes that should be prosecuted in a regular criminal court.

² Review panels will consist of three military officers, only one of which must have experience as a judge. The Secretary of Defense may include on the panel civilians who have been temporarily commissioned into the military, but there is no obligation to do so. MCO, (6)(H)(4).

³ The U.S. Court of Appeals for the Armed Forces was established under Article I of the Constitution, which empowers Congress to make rules for the regulation of the armed forces. The court consists of five civilian judges appointed by the President and confirmed by the Senate to fifteen-year terms. The legislative history of the Uniform Code of Military Justice provides that the court is not subject to the "authority, direction, or control of the Secretary of Defense." Its decisions are subject to review by the U.S. Supreme Court.

⁴ Human Rights Watch, [U.S.: Commission Rules Meet Some, Not All, Rights Concerns](http://hrw.org/press/2002/03/tribunals0321.htm), March 21, 2002, available online at: <http://hrw.org/press/2002/03/tribunals0321.htm>

⁵ International Covenant on Civil and Political Rights (ICCPR), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976. The United States became a party to the ICCPR in 1992.

⁶ U.N. Human Rights Committee, General Comment 13, art. 14 (Twenty-first session, 1984), U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994).

Under the military commission rules, an offense prosecutable by the commissions must have taken place “in the context of and was associated with armed conflict.”⁷ The definition of an armed conflict under the commission rules is so broad, however, that virtually any terrorist act anywhere in the world would be within the commission’s jurisdiction. The defendant’s conduct need only be distantly or vaguely related to a traditional battlefield.⁸ According to the rules, the nexus between the defendant and armed conflict:

could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities.... This element does not require a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an “armed attack” or an “act of war,” or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force.⁹

This explanation leaves open the possibility that the Bush administration – which has stated it is engaged in a global war against terrorism – might well consider any violent act by any suspected member of al-Qaeda anywhere in the world to be “associated with armed conflict.” For instance, a non-U.S. national living in the United States could be tried by a military commission for the crime of “aiding the enemy”¹⁰ if he sent funds to al-Qaeda. The question is not whether such conduct can properly be criminalized, but rather which court should exercise jurisdiction.

Under the commission rules, criminal acts that should be prosecuted by a U.S. civilian court can easily be deemed to have the necessary nexus to an armed conflict and thus be prosecutable by the military commissions. Such a misuse of military courts to try civilians would be an evasion of U.S. obligations to conduct fair trials under international human rights law.

Military Commission Jurisdiction Over POWs

The U.S. military order and instructions are inconsistent with provisions of the 1949 Geneva Conventions relating to the prosecution of prisoners of war (POWs). Under the Third Geneva Convention, a POW can be validly sentenced only if tried by “the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power,”¹¹ and “shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him.”¹²

⁷ MCI, No. 2, 5(C).

⁸ Human Rights Watch, Letter to Department of Defense General Counsel Haynes, March 14, 2002, available online at: <http://www.hrw.org/press/2003/03/us031403.htm>

⁹ MCI, No. 2, 5(C).

¹⁰ MCI No. 2, 6(B)(5).

¹¹ Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention), 75 U.N.T.S. 135, entered into force Oct. 21, 1950. Third Geneva Convention, art. 102.

¹² Ibid. art. 106.

Because U.S. service members are tried under courts-martial as established by the Uniform Code of Military Justice and have a right of appeal to an independent civilian court,¹³ any POW held by the United States must also be tried by a court-martial and have a similar right of appeal. Military commissions are not the same as courts-martial – they were created precisely to preclude some of the procedural safeguards of courts-martial, and, as noted under the Military Order of November 13, 2001, persons tried before the commissions have no right of appeal to a civilian court.¹⁴

Detained Taliban soldiers (members of the regular armed forces of the then-government of Afghanistan) and perhaps other detained combatants should have been designated by the United States as POWs under the Third Geneva Convention. Moreover, all captured belligerents should have been treated as POWs unless a “competent tribunal” individually determined otherwise.¹⁵ The Bush administration instead violated its clear obligations under the Third Geneva Convention and made a blanket ruling that no captured combatants in Afghanistan were entitled to POW status. Denying POW status without convening competent tribunals was not only unlawful, it contravened both past U.S. military practice and current practice in Iraq.

The failure of the United States to properly determine whether any persons held in connection with the armed conflict in Afghanistan are POWs does not obviate its legal obligation to ensure that any trials of persons entitled to POW status are conducted in courts-martial with a right of appeal to an independent civilian court. “[W]ilfully depriving a prisoner of war of the rights of fair and regular trial” is a grave breach of the Third Geneva Convention.¹⁶

The improper determination of the legal status of captured belligerents also bears on the propriety of charges brought against persons prosecuted before the commissions. Under international humanitarian law, so-called unlawful or unprivileged belligerents do not have any combatant immunity. That is, they may be prosecuted for conduct – such as shooting at U.S. forces – that is not criminal when undertaken by members of the armed forces. The military commission rules state that where an element of a crime requires the absence of combatant immunity, the prosecutor has the burden of establishing that the accused was indeed an unprivileged belligerent.¹⁷ The issue must be decided in each case based on a fair and independent assessment of the specific facts before the commission.

The U.S. government’s high-level, public assertions that none of the persons captured during the international armed conflict in Afghanistan are entitled to POW status should not play any role in the determinations made by the military commission concerning the status of individuals being

¹³ See Uniform Code of Military Justice, U.S.C. Title 10, Ch. 47. Article 2(a)(9) specifically provides military court jurisdiction over “[p]risoners of war in custody of the armed forces.”

¹⁴ The Nov. 13, 2001 military order, states at sec. 7(b) that any person subject to this order:
“(1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual;
and (2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.”

¹⁵ Third Geneva Convention, art. 5.

¹⁶ Third Geneva Convention, art. 130.

¹⁷ MCI No. 2, 4(B).

prosecuted before them. We are concerned, however, that it will be extremely difficult for a court under the direct authority of the executive branch to reach an independent and impartial finding on this issue.

Second-Class Justice for Non-Citizens

The President's Military Order authorizing the commissions restricts their jurisdiction to persons who are not U.S. citizens. U.S. citizens may not be tried before the commissions, regardless of whether they were combatants who committed war crimes. This exclusion presumably reflects a political judgment that the U.S. public would not accept the truncated justice of commission proceedings for U.S. citizens. International human rights law, however, does not permit countries to discriminate between citizens and non-citizens with regard to their fair trial rights.¹⁸ The fact that a person is not a U.S. citizen should not be used as an excuse to weaken protections for their internationally recognized rights.

Right to Counsel of Choice

The military commission instructions provide for the mandatory appointment of a military defense counsel for the defendant, who would have the right to request a different military counsel. The defendant may also retain, at his own expense, private counsel, but military counsel would remain assigned to the defense team. As the instructions state, the "[a]ccused must be represented at all relevant times by Detailed Defense Counsel [military defense counsel]."¹⁹

The right to counsel of choice is an integral component of a fair trial – one recognized in international and U.S. law, including the rules for courts-martial. Nevertheless, the Department of Defense instructions for military commissions violate this fundamental right by requiring the defendant to accept a military lawyer and by denying the defendant the right to either represent himself or to be represented solely by private counsel.²⁰

In the United States, low-income defendants who cannot afford to retain their own private counsel as a practical matter must accept lawyers assigned to them by a public defender or legal services organizations. Yet these lawyers are independent of the government. In the case of the military commissions, however, the defendants will be compelled to conduct a defense with counsel provided by, and under the ultimate authority of, the executive branch that is prosecuting and judging them.

We do not question the ability or willingness of military defense lawyers to represent zealously and competently anyone brought to trial before the military commissions. But there is no lawful basis for denying a defendant tried before military commissions the ability of conducting a

¹⁸ ICCPR, art. 14 ("All persons shall be equal before the courts and tribunals").

¹⁹ MCO No. 1, (4)(C)(4).

²⁰ Article 14 of the ICCPR provides that everyone charged with a criminal offense shall have the right "to communicate with counsel of his own choosing." The Human Rights Committee has interpreted this to include a right of persons to defend themselves. See Human Rights Committee, *Hill and Hill v. Spain* (526/1993).

defense without the participation of military defense lawyers.²¹ The ability to represent oneself or to be represented solely by private counsel takes on added significance in the context of foreign persons who were captured in Afghanistan or other countries and held as military prisoners at Guantánamo. For reasons of culture, personal history, and the conditions of their imprisonment, many of those detainees may never fully trust or cooperate with U.S. military counsel assigned to them. Such trust and cooperation are, of course, vital to an effective defense.

Restrictions on Effective Defense

The military commission rules impose astounding limitations on the ability of defense counsel – both military and civilian lawyers – to mount an effective defense of their clients. These restrictions on travel, research, and communications “during the pendency of the proceedings” are spelled out in the affidavit civilian lawyers for the commissions are required to sign and with which military defense counsel must comply.²² Taking the rules at face value, defense representation could be limited to concocting legal arguments from a room in Guantánamo, with no leeway to interview witnesses or gather evidence elsewhere. The rules also reflect the Department of Defense’s willingness to disregard the confidentiality of attorney-client communications.

Evidence Gathering: Counsel may not “discuss or otherwise communicate or share documents or information about the case with anyone” except members of the “Defense Team.”²³ The provision is far broader than necessary to meet legitimate national security concerns, e.g. to ensure that classified documents or information obtained during the trial proceedings are not passed on to terrorist organizations.²⁴ The excessive breadth of the restriction on attorney communications significantly limits the ability of counsel to mount a meaningful defense. Preparation of a criminal defense includes the identification of relevant witnesses and the acquisition of useful documents and other information. The need to undertake such work can also continue during trial proceedings themselves. Read literally, the provision would prevent lawyers from trying to locate and talk to prospective witnesses, conversations that would necessarily include discussion of at least some aspects of a case.

In addition, the rules mandate that all work by defense lawyers relating to the commission proceedings, including electronic or other research, be done at the site of the proceedings.²⁵ Requiring all defense work to be done at Guantánamo or other site of commission proceedings makes constructing an effective defense nearly impossible. On their face, these rules prevent members of the defense team from leaving Guantánamo to locate and interview potentially exculpatory eyewitnesses in Afghanistan or other countries. They would not be able to travel to locate and review useful documents. They would not be able to investigate the scene of the alleged conduct. In addition, the rules would prevent civilian attorneys from using stateside

²¹ Persons tried by U.S. courts-martial may conduct their defense *pro se* or proceed solely with civilian counsel if they so choose.

²² Military defense counsel are directed to conduct their activities consistent with the “prescriptions and proscriptions” specified in the Affidavit and Agreement by Civilian Defense Counsel. MCI No. 4, 3(B)(4).

²³ MCI No. 5, Annex B, II(E)(2).

²⁴ Defense lawyers are already bound by a separate provision never to make any statements regarding classified information or material. MCI No. 5, Annex B, II(F).

²⁵ MCI No. 5, Annex B, II(E)(2).

paralegals and other lawyers to work on aspects of the case that do not entail protected or classified information.

Defense Travel Restrictions: Defense attorneys must also obtain permission from military authorities to travel to and from the site of the proceedings and to transmit documents from there unless they receive prior approval from the Presiding Officer, the head of the commission.²⁶

The rules suggest that the Presiding Officer may give approval to modify these travel and communication restrictions. Nevertheless, they give scant guidance as to the criteria by which the Presiding Officer should respond to defense attorney requests.²⁷ Nothing requires a Presiding Officer, for example, to exercise discretion according to the criteria of enabling a meaningful defense. Leaving the ability of the defense team to develop the facts necessary to represent their client to the unfettered discretion of the commission violates the most basic notion of the right to a defense.

On June 4, 2003 Human Rights Watch spoke with Major John Smith, the Judge Advocate Spokesman in the Office of Military Commissions at the Department of Defense concerning the travel and communications restrictions. Major Smith acknowledged that the literal language of the rules could be read as preventing research off-site and limiting attorney communications beyond what is necessary to protect national security information. He stated that the issue was currently under review for clarification so that the language would “not be read with unintended results.”

Attorney-Client Confidentiality: Defense counsel must represent their clients knowing that any communications with them may be monitored by government officials for “security and intelligence purposes.”²⁸ Such conversations are traditionally covered by the attorney-client privilege of confidentiality, to encourage clients to confide openly with their attorneys. The ability to communicate candidly and effectively with one’s attorney is inherent in the right to counsel, which in turn, helps secure the overarching right of due process and a fair trial. The U.S. government’s willingness to profoundly compromise these rights is deeply troubling. Moreover, it forces attorneys who represent defendants before the military commissions to do so knowing the applicable rules are likely to impede the open communication essential for constructing a proper defense.

Security Restrictions on Civilian Defense Lawyers: The military commission rules deny civilian counsel with appropriate security clearance the same access to protected information as military counsel. They authorize the Secretary of Defense or his designate, or the Presiding Officer, to close proceedings on broad grounds, such as to protect “intelligence and law enforcement sources, methods, or activities; and other national security interests.”²⁹ Civilian defense counsel, unlike military counsel, may be excluded from closed military commission proceedings.³⁰ The commission rules also authorize the Presiding Officer to issue protective orders to safeguard

²⁶ MCI No. 5, Annex B, II(E).

²⁷ Military Commission Order No. 1 charges the Presiding Officer with ensuring the “expeditious conduct of the trial.” MCO No. 1, 4(A)(5)(c).

²⁸ MCI No. 5, Annex B, II(I).

²⁹ MCO No. 1, 6(B)(3).

³⁰ MCI No. 4, 3(E)(4).

“protected information” including orders to delete the information from documents made available to the defendant or the defense team. The commission may not consider protected information unless it is presented to the military defense counsel. But civilian defense counsel may be denied access to such information even when it is admitted into evidence.

Civilian counsel may not represent defendants before the military commission unless they have received security clearance of “SECRET” or higher.³¹ The rules require that attorneys who do not already possess a security clearance must pay “any actual costs associated with processing” the security clearance.³² While requiring a security clearance is permissible, we are troubled that attorneys even with high-level security clearances are not guaranteed access to all materials presented in a case before the commissions. We note also that the rules do not commit the government to trying to expedite security clearances for civilian attorneys seeking to represent defendants before the commissions.

Gag Order for Defense Counsel

While the commission proceedings are presumptively open to the public and press, the commission rules nonetheless contain various provisions that prevent defense counsel from speaking publicly about their cases or commission proceedings. Collectively these rules impose a gag order on defense attorneys, a dictate of silence that contradicts the fair trial purposes of open proceedings.³³

One commission rule, discussed above, prevents defense counsel from discussing information about the case with anyone except the defense team. In addition to limiting defense counsel investigations, this rule precludes defense counsel from talking to the press or public at large about their case. Another commission rule prohibits defense counsel – including private counsel – from making statements about military commission cases or other matters relating to the commissions to the news media, unless they have received approval from the Appointing Authority (Secretary of Defense or designee) or the General Counsel of the Secretary of Defense.³⁴ This rule imposes unwarranted censorship on counsel communications with the media.

Finally, the censorship is extended in another military commission rule that prohibits defense attorneys from ever making any public or private statements regarding any closed sessions of the proceedings.³⁵

Human Rights Watch understands that the counsel’s right to speak and the public’s right to know must be balanced against the legitimate Department of Defense goal of protecting national security information. Indeed, one of the commission rules commits attorneys to never make public or private statements regarding classified or protected information.³⁶ But the other gag

³¹ MCI No. 5, 3(A)(2)(d)(ii).

³² MCI No. 5, 3(A)(2)(d)(ii).

³³ As the Manual for Courts-Martial states, opening proceedings “to public scrutiny reduces the chance of arbitrary or capricious decisions and enhances public confidence.” RCM 806(b) (discussion).

³⁴ MCI No. 4 (5)(C).

³⁵ MCI No. 5, Annex B, II(F).

³⁶ MCI No. 5, Annex B, II (F).

rules imposed by the commission rules on defense attorneys silence far more than the disclosure of such information. For example, the rules would prohibit defense attorneys from stating to the press that commission evidentiary rulings were prejudicial to their client. The rules also would prohibit defense attorneys from *ever* commenting on whether closed proceedings were conducted in ways that safeguarded defendants' due process interests – even if no classified or protected information would be disclosed in such comments – or even noting publicly how much of the trial consisted of closed proceedings.

While the rules suggest defense attorneys may seek prior approval for public statements that would otherwise be prohibited, they do not contain any criteria to guide military authorities considering such requests. There is, for example, no requirement that any such request must be granted as long as protected national security information is not revealed.

Conclusion

All of the problems we have outlined above can be corrected. All of them should be. The United States should ensure that those tried before military commissions receive trials that are a credit to American justice, not a stain on its history.