Military Commissions: Trying American Justice[1]

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The Department of Defense (DOD) General Counsel's "Military Commission Instructions," issued on 30 April 2003, renew the concerns that surrounded the President's 13 November 2001 military order and again cast serious doubt on the ability of military commissions to be viewed as fundamentally fair and to meet American standards of justice.

On 30 April 2003, the DOD General Counsel issued eight "*Military Commission Instructions*," the third event in the process of establishing the structure and regulations for the trials of individuals the President has designated as subject to trial by military commission.[2] Because they depart materially from court-martial practice and procedure, these instructions renew the doubts created by the initial military order issued by the President on 13 November 2001[3] about whether military commissions established under that order would—or could—meet basic standards of American justice.[4] Unless substantially modified to more closely reflect *current* court-martial principles and rules, these military commissions will not achieve the level of due process that is characteristic of American criminal justice, and the United States could lose the moral high ground it has long enjoyed as a world leader working to ensure fundamental fairness in criminal adjudications.

President's Military Order—13 November 2001

When the President issued the *Military Order* (*PMO*) on 13 November 2001, it immediately precipitated a storm of criticism. The order—applicable only to non-U.S. citizens that the President determined either to be members of al Qaida, or to have played a role in international terrorism, or to have harbored any such person—raised doubts about the application of the presumption of innocence, whether the usual criminal standard of "beyond a reasonable doubt" would apply, and whether acquittals could be reversed. It also clearly prohibited judicial review of convictions.[5] It appeared to allow trials to be conducted in secret—with the possibility that those accused could be denied access to the evidence used against them at trial—and to set aside normal rules of evidence in favor of a generic "probative value to a reasonable person" standard.[6] It also provided for conviction and sentencing—even the death sentence—by

1. The current article is an expanded and updated version of an article that previously appeared under a similar title in *The Federal Lawyer* and is used with permission. The changes and updates are set forth primarily in the expanded footnotes in this article. *See* Kevin J. Barry, *Military Commissions: American Justice on Trial*, 50:6 FED. LAW. 24 (2003).

2. Procedures for Trials by Military Commissions of Certain Non-U.S. Citizens in the War Against Terrorism, 68 Fed. Reg. 39,374-99 (July 1, 2003) (to be codified at 32 C.F.R. pts. 10-17); U.S. DEP'T OF DEFENSE, MILITARY COMMISSION INSTRUCTIONS (30 Apr. 2003), *available at* http://www.defenselink.mil/news/commissions.html [hereinafter MCI Nos. 1-8]. The eight instructions were originally made available on the DOD Web site, but were later published in the *Federal Register* as part of a broader rule-making that included, along with the eight military commission instructions and the DOD's *Military Commission Order No. 1* that had previously been issued on 21 March 2002. 68 Fed. Reg. 39,374-99; U.S. DEP'T OF DEFENSE, MILITARY COMMISSION ORDER NO. 1 (21 Mar. 2002), *available at* http://www.defenselink.mil/news/commissions.html [hereinafter MCO No. 1]; *see* Establishment of New Subchapter B-Military Commissions, 68 Fed. Reg. 38,609 (June 30, 2003). In a remarkable development, after publication of the military commission instructions in the *Federal Register* on 1 July 2003, and after preparation of this article for its initial publication, the DOD placed a modification of Annex B to *Military Commission Instruction No. 5* on its Web site, but without formally announcing that it had done so in the *Federal Register.* The modification continued to carry the original 30 April 2003 date. The changes relaxed several of the restrictions the original order had imposed. *See* MCI No. 5, *infra* note 2.

3. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html [hereinafter PMO].

4. *See, e.g.*, American Bar Association (A.B.A.) Task Force on Terrorism and the Law, *Report and Recommendations on Military Commissions* (Jan. 4, 2002), *available at* http://www.abanet.org/leadership/military.pdf (recommending that military commissions "be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial" and conform to Article 14 of the International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966)); J. Gordon Forester, Jr. & Kevin J. Barry, *Military Commissions: Meeting American Standards of Justice*, 49:2 FED. LAW. 28 (2002) (arguing that military commissions must follow court-martial procedures if they are to be viewed as fundamentally fair); *see also* Robinson O. Everett, *The Law of War: Military Tribunals and the War on Terrorism*, 48:10 FED. LAW. 20, 22 (2001) (explaining that military tribunals to try terrorists would involve many nations, and should be conducted in a manner that "would brook no dispute with the fairness of the results," and that to this end, courts-martial, with well defined rules of procedure and evidence, "are preferable to the use of ad hoc military commissions").

5. 66 Fed. Reg. at 57,833 § 7(b)(2).

6. *Id.* at 57,833 § 4(c)(3).

only a two-thirds majority of those sitting as military commissioners.[7] *New York Times* columnist William Safire, normally known for his conservative views, characterized military commissions as "U.S. kangaroo courts" with "[n]o presumption of innocence; no independent juries; no right to choice of counsel; [and] no appeal to civilian judges."[8] The criticism was international in scope, with Spain and other European countries indicating reluctance or outright refusal to extradite terrorists to the United States if they were to be tried by military tribunals.[9]

The *PMO* is an adaptation of the orders issued in two well-known World War II military commission cases decided by the Supreme Court: *Ex parte Quirin*,[10] the Nazi saboteur case, and *In re Yamashita*,[11] the case of the Japanese general tried for his role as commander of troops that committed war crimes in the Philippines. Presumably, the *PMO* authors believed they were on solid legal ground by doing essentially what had been judicially reviewed some sixty years earlier. Throughout this nation's history, however, the rules and procedures applicable to military commissions have always been closely allied to those rules and procedures applicable to courts-martial at that point in time.[12] Courts-martial today are very different from those of World War II, and they reflect evolving standards in both military and civilian criminal law.[13] Just as courts-martial have evolved dramatically in the last sixty years, military commissions must similarly be vastly different from those conducted sixty years ago.

Military Commissions and Courts-Martial

Both military commissions and courts-martial are types of military tribunals. Courts-martial are criminal trials conducted within this nation's military justice system—applicable mostly to those in our own military services.[14] Courts-martial have always been creatures of statute,[15] with the Second Continental Congress adopting the first Articles of War in 1775.[16] Military commissions, used for the trial of spies, saboteurs, and other war criminals, have been almost completely unregulated by statute, and are the military's common law war courts.[17] These military war courts have always closely followed the principles of law, rules of evidence, and procedure then applicable in courts-martial, as Colonel William Winthrop, the pre-eminent nineteenth-century military law historian and commentator, stated with succinct clarity:

> In the absence of any statute or regulation governing the proceedings of military commissions, the same are commonly conducted according to the rules and forms governing courts-martial. These war-courts are indeed more summary in their action than are the courts held under the Articles of [W]ar [courts-martial], and, as their powers are not defined by law, their proceedings—as heretofore indicated—will not be rendered *illegal* by the omission of details required upon trials by courts-martial . . . . But, as a general rule and as the only quite safe and satisfactory course for the rendering of justice to both parties, a military commission will—like a court-martial— . . . ordinarily and properly be governed, upon all important questions, by the established rules and principles of law and evidence. Where essential, indeed, to a full investigation or to the doing of justice, these rules and principles will be liberally construed and applied.[18]

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7. *Id.* at 57,833 § 4(c)(6).

8. William Safire, *Voices of Negativism*, N.Y. Times, Dec. 6, 2001, at A35.

9. T.R. Reed, *Europeans Reluctant to Send Terror Suspects to U.S.*, Wash. Post, Nov. 29, 2001, at A23.

10. 317 U.S. 1 (1942).

11. 327 U.S. 1 (1946).

12. William Winthrop, Military Law and Precedents 835-36 (2d ed. 1895, 1920 Reprint).

13. *See* Manual For Courts-Martial, United States pt. II (2002) [hereinafter MCM]; Everett, *supra* note 4 (arguing that general courts-martial are appropriate and the desirable venue for trying civilian terrorists for violations of the law of war).

14. *See id.*; Winthrop, *supra* note 12, at 831.

15. Winthrop, *supra* note 12, at 831.

16. *See id.* at 17; *see also* Kevin J. Barry, *A Face Lift (And Much More) for an Aging Beauty: The Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice*, Law Rev. Mich. St. U.-Det. C.L. 57, 60-75 (2002) (explaining the evolution of courts-martial in this country, as well as current proposals for modernization).

17. *See* Winthrop, *supra* note 12.

18. *Id.* at 841-42.

The principles of law and rules of evidence and procedure in courts-martial underwent only incremental change from the time of the Revolution through the mid-twentieth century.[19] But beginning after World War I, and particularly during and after World War II, there were widespread perceptions of unfairness, and of unlawful command influence, in the court-martial process; consequently criticism abounded.[20] The result was the enactment of the Uniform Code of Military Justice (UCMJ) in 1950, bringing substantial changes and major increases in due process.[21] Underlying these changes was the adoption of the "largely untested precept that military effectiveness depends on justice and that, by and large, civilian forms and principles are necessary to ensure justice" in military trials.[22] Principal among the reforms adopted in the UCMJ was the establishment of a civilian court, known today as the U.S. Court of Appeals for the Armed Forces, to oversee the entire military justice system.[23] In 1983, another statutory change made its decisions subject to certiorari review by the Supreme Court.[24]

Since 1950, the UCMJ and court-martial practice have been further modernized several times, including the creation of a military judiciary in 1968 for virtually all courts-martial, and the establishment of courts of military review with appellate military judges for each of the military services.[25] In addition, there are now independent defense counsel structures in each service that provide military attorney counsel to accused members facing trial by court-martial at no cost.[26] Court-martial procedures have thus changed drastically since the last military commissions were conducted during the World War II era. The military commission structures outlined in the *PMO*, including the attempted foreclosure of any judicial review of military commissions and the absence of many commonly accepted court-martial due process protections, were throwbacks to the outdated military law of a former era.

Applicable Principles of Law and Rules of Evidence and Procedure

Since early in the twentieth century, one of the few statutes that addresses military commissions has empowered the President to make rules for courts-martial and other military tribunals. Little-changed in almost a century, the statute currently reads:

> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
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> (b) All rules and regulations made under this article shall be uniform insofar as practicable.[27]

Ever since the adoption of the modern military justice system,[28] the President has mandated that military commissions continue the historic close relationship with courts-martial

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19. *See* DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE 24 (5th ed. 1999); *see also* John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1, 7 (1998) ("For the first 175 years of its history, military justice . . . changed only slowly.").

20. *See, e.g.*, JONATHAN LURIE, MILITARY JUSTICE IN AMERICA 76-88, 128-131 (2001).

21. Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950).

22. Cooke, *supra* note 19, at 8-9.

23. *See generally* UCMJ arts. 141-145 (2002). Note that the appellate court was originally called the Court of Military Appeals (COMA) from 1950 until 1968 when Congress redesignated it the U.S. Court of Military Appeals. U.S. Court of Appeals for the Armed Forces, *Establishment*, *at* http://www.armfor.uscourts.gov/Establis.htm (last visited 22 Sept. 2003). "In 1994, Congress gave the Court its current designation, the United States Court of Appeals for the Armed Forces." *Id.*

24. Pub. L. No. 98-209, 97 Stat. 1393 (1983).

25. Pub. L. No. 90-632, 82 Stat. 1335 (1968).

26. *See* UCMJ arts. 27, 38. The U.S. Army's Trial Defense Service (USATDS) is an example of this independent structure. *See* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 6-3 (6 Sept. 2002) [hereinafter AR 27-10] ("USATDS is an activity of the [U.S. Army Legal Services Agency] USALSA, a field operating agency of TJAG. USATDS counsel may be assigned either to USALSA, with duty station at a specified installation, or to another organization (MTOE/TDA) and attached to USALSA for all purposes except administrative and logistical support.").

27. 10 U.S.C. § 836(a) (2000); UCMJ art. 36.

28. The enactment of the UCMJ in 1950, and the first implementing regulation promulgated under Article 36(a) in the *Manual for Courts-Martial* (*MCM*) in 1951 resulted in the implementation of the current military justice system. *See* UCMJ art. 36; MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I, ¶ 2 (1951) [hereinafter 1951 MCM].

noted by Colonel Winthrop. The current provision, almost unchanged since its promulgation in 1951, provides:

> Subject to any applicable rule of international law or to any regulations prescribed by the President or by any other competent authority, military commissions and provost courts shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial.[29]

The military commissions as constituted in the *PMO* are a departure from the presumptive rule and from longstanding military practice—and in failing to apply the principles of law or the rules of evidence and procedure of *current* courts-martial, they fail to provide the degree of fairness and due process expected in criminal trials conducted by the United States in the twenty-first century.

The adoption of the World War II military commission model brought with it another flaw—the adoption of the *Yamashita* evidentiary standard of "probative value in the mind of a reasonable man."[30] Until 1916, "courts-martial followed in general the rules of evidence, including the rules as to competency of witnesses to testify, that are applied by Federal courts in criminal cases."[31] Since 1916, the President has prescribed the rules in the various editions of the *Manual for Courts-Martial* (*MCM*).[32] The *Yamashita* evidentiary standard was a drastic departure from the rules of evidence set forth in the then-applicable (1928) edition of the *MCM*, and it never received judicial approval because the Supreme Court found the commission's rulings on evidence "not reviewable by the courts."[33] The standard drew scathing criticism in Justice Rutledge's dissent.[34] Yet, fifty-five years later, it was adopted virtually intact in the *PMO* as the sole evidentiary standard applicable to present proposed military commissions. The net result was a military order that applied standards of fairness more than a half century out-of-date, including an aberrant evidentiary standard that provides virtually no limitations whatsoever on admissible evidence.

Procedures for Trials by Military Commission

On 21 March 2002, after months of open criticism, the Secretary of Defense exercised the authority delegated to him in the *PMO* and issued *Military Commission Order No. 1, Procedures for Trials by Military Commissions* (*PTMC*) as the second stage in the process.[35] In it, he responded directly to much of the criticism by making it clear that the usual criminal due process rules would apply to military commissions, including the presumption of innocence, the requirement for proof beyond a reasonable doubt to convict, the right to counsel, the irreversibility of an acquittal, the requirement for a unanimous vote of the commissioners to impose the death penalty, the presumption that trials would be open and not secret, and the establishment of an appellate review process (albeit, not a judicial review process).[36] Although the *PTMC* did not allay the earlier concerns about the lack of "independent juries" or the lack of an "appeal to civilian judges" that had troubled commentators such as William Safire, nonetheless, the groundswell of criticism that had prevailed for four months died abruptly.[37]

Some of the provisions of the *PTMC* depart from the *PMO*, and although the *PTMC* clearly states the *PMO* controls in the event of conflict, it is seemingly the *PTMC* that will apply in these crucial areas. Much of the confusion stems from the fact that the *PMO* and *PTMC* have started essentially from scratch in building a new trial system. If instead, the *PMO* and *PTMC* used the court-martial rules and procedures as the model, the instructions could easily have departed from that model where necessary or desirable to meet national security concerns or

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29. MCM, *supra* note 13, pt. I, ¶ 2(b)(2).

30. *In re Yamashita*, 327 U.S. 1, 18 (1946).

31. MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 198 (1917) [hereinafter 1917 MCM].

32. *See* MCM, *supra* note 13, pt. II; 1951 MCM, *supra* note 28, pt. I, ¶ 2; 1917 MCM, *supra* note 31, ¶ 198.

33. *Yamashita*, 327 U.S. at 23.

34. Justice Rutledge reasoned as follows:

> Our tradition does not allow conviction by tribunals both authorized and bound by the instrument of their creation to receive and consider evidence which is expressly excluded by Act of Congress or by treaty obligation; nor is it in accord with our basic concepts to make the tribunal, specially constituted for the particular trial, regardless of those prohibitions the sole and exclusive judge of the credibility, probative value and admissibility of whatever may be tendered as evidence.

Id. at 44-45 (Rutledge, J., dissenting).

35. MCO No. 1, *supra* note 2.

36. *Id.* §§ 5-6.

37. Safire, *supra* note 8.

other anticipated contingencies.[38] As a result, very few of the many necessary procedures and rules have been addressed, and a myriad of issues and procedures remain to be resolved. Many of these issues are discussed in the detailed commentary on the *PTMC*.[39]

Military Commission Instructions

Now, eighteen months later, the ability of military commissions to provide the "full and fair trial"[40] the *PMO* mandates is again in doubt. On 30 April 2003, the DOD General Counsel, pursuant to the delegation contained in the *PTMC*, issued eight *Military Commission Instructions*.[41] These instructions—setting organizational rules for the defense and the prosecution, establishing procedural rules amplifying and modifying those of the *PTMC*, and establishing the elements of crimes triable by military commission—are sure to present challenges to those involved with military commissions.[42] In particular, they appear to make it extremely difficult for one accused before a military commission to obtain effective representation by counsel of choice.[43]

Four of the instructions are less controversial than the remaining ones. Three of the instructions establish general procedural rules: *Military Commission Instructions* (*MCI*) *No. 1* (Instructions); *MCI No. 7* (Sentencing); and *MCI No. 8* (Administrative Procedures).[44] These generally follow and implement the *PTMC*, and will no doubt be subject to challenge, but they are not further addressed here. One, *MCI No. 2* (Crimes and Elements for Trials by Military Commission) is the longest, and the only military commission document that was published in advance for public comment.[45] A number of organizations criticized *MCI No. 2*, and the document was modified after receipt of these comments.[46] Nonetheless, the final rules have already been strongly criticized on a variety of fronts, including for the perception that they extend the jurisdiction of military commissions beyond traditional war crimes, and that the provisions of this *MCI* are certain to be the subject of litigation.[47] These four instructions may be more palatable than the remaining four.

MCI Limitations on Defense Counsel

The remaining four instructions cause the most concern. Most of the concern is based on the instructions' obvious potential to restrict the option of an accused to obtain his counsel of choice, and to raise a question as to whether a defense counsel—particularly a civilian defense counsel—would be able to provide competent or effective representation. A number of provisions differ from court-martial practice and are certain to be controversial.

Under *MCI No. 5*, *Qualification of Civilian Defense Counsel*, civilian attorneys may seek qualification and become "prequalified," as members of the "pool" of civilian attorneys eligible to represent accused persons before military commissions.[48] The required qualifications include American citizenship; admission to practice in a state, district, territory or possession, or federal court; and not having been the subject of "any sanction or disciplinary action . . . for relevant misconduct," a term which *MCI No. 5* does not define.[49] The attorney is required to provide an affidavit regarding admissions to the bar and discipline history, and to sign an authorization for release of information[50] so that the Chief Defense Counsel can

38. *See generally* MCM, *supra* note 13, pt. IV.

39. National Institute of Military Justice, Annotated Guide: Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (2002).

40. PMO, *supra* note 3, § 4(c)(2).

41. *See* MCI Nos. 1-8, *supra note 2*.

42. *See* National Institute of Military Justice, Military Commission Instructions Sourcebook (2003), *available at* http://www.nimj.org/documents/Supp_Disc_MCI5_Annex_B.pdf [hereinafter NIMJ Sourcebook] (containing a detailed analysis of each of the instructions).

43. *Report and Recommendation on Military Commissions*, A.B.A. Annual Meeting (adopted Aug. 2003), *available at* http://www.abanet.org/leadership/recommendations03/109.pdf [hereinafter ABA Report and Recommendation].

44. *See* MCI Nos. 1, 7, & 8, *supra* note 2.

45. NIMJ Sourcebook, *supra* note 42, at 9-27; U.S. Dep't of Defense, Draft Military Commission Instructions (28 Feb. 2003), *available at* http://www.defenselink.mil/news/Feb2003/b02282003_bt092-03.html; *see* Eugene R. Fidell, *Military Commissions & Administrative Law*, 6 Green Bag 2d 379 (2003) (analyzing the military commission rulemaking process and strongly recommending that Congress repeal the statutory exemptions for military commissions in the Administrative Procedure Act).

46. *See* NIMJ Sourcebook, *supra* note 42, at 29-71 (reproducing most of the comments received by the DOD).

47. *Trials Under Military Order: A Guide to the Final Rules for Military Commissions* (2003), Lawyers' Comm. For Human Rights, *available at* http://www.lchr.org/us_law/a_guide_to_the_final_rules.pdf [hereinafter Lawyers' Comm. For Human Rights].

48. MCI No. 5, *supra* note 2, ¶ 3.A.2).

conduct an investigation into the attorney's qualifications.[51] In addition, the attorney must possess a valid, current security clearance of "secret" or higher, or be willing to submit to (and pay the government's actual costs for processing) a background investigation to obtain a "secret" security clearance.[52]

To be qualified, the civilian attorney must also agree to comply with all applicable regulations and instructions for counsel, and to execute a standard form "Affidavit and Agreement" that is provided as Annex B to *MCI No. 5*.[53] This is a remarkable document, reflecting the very unusual counsel relationships that these instructions mandate, and imposing a number of restrictions on an attorney representing an accused person. Annex B was quietly revised early in July this year, modifying and relaxing several of its requirements.[54]

Under Annex B, attorneys must agree to ensure that the military commission is their "primary duty," and that they will not seek to delay or continue the proceedings for reasons relating to other matters arising in their "law practice or other professional or personal activities."[55] The economic considerations implicit in such an agreement—in undertaking a representation of indeterminate duration outside the country—are significant. In addition, the detailed defense counsel remains the lead counsel, and the civilian counsel must agree to cooperate with him or her "to ensure coordination of efforts and to ensure such counsel is capable of conducting the defense independently if necessary."[56] This arrangement is contrary to the usual situation in court-martial practice, when a retained civilian attorney presumptively becomes lead counsel, and the client can either dismiss the detailed defense counsel or retain that attorney as associate counsel.[57]

This arrangement is apparently needed, because under *MCI No. 4*, *Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel*, the civilian counsel is not guaranteed presence at closed sessions of the commission, and may be denied access to protected information admitted against the client, which would be revealed only to the detailed defense counsel. The detailed defense counsel would be prohibited from sharing that information with the civilian counsel, possibly with the client as well—raising the possibility that the accused could be convicted on the basis of information to which he had been denied access.[58] This provision denying the accused's counsel of choice access to critical evidence is perhaps the most important of the *MCIs*' limitations, and one that clearly has an impact on the ability of counsel to provide effective representation.

Further, as originally drafted, Annex B placed other restrictions upon the defense team. First, counsel must agree that they will not travel or transmit documents from the site of the proceedings while they are ongoing, without approval from the appointing authority or the presiding officer. Second, they must also agree not to do any preparation or any other "work relating to the proceedings, including any electronic or other research" without the advance approval of the presiding officer, except at the site of the proceedings.[59] The rule is relaxed only for post-

49. *Id.* The provision addressing disciplinary actions reads as follows:

> An applicant shall submit a statement detailing all sanctions or disciplinary actions, pending or final, to which he has been subject, whether by a court, bar or other competent governmental authority, for misconduct of any kind. The statement shall identify the jurisdiction or authority that imposed the sanction or disciplinary action, together with any explanation deemed appropriate by the applicant. Additionally, the statement shall identify and explain any formal challenge to the attorney's fitness to practice law, regardless of the outcome of any subsequent proceedings. In the event that no sanction, disciplinary action or challenge has been imposed on or made against an applicant, the statement shall so state. Further, the applicant's statement shall identify each jurisdiction in which he has been admitted or to which hehas applied to practice law, regardless of whether the applicant maintains a current active license in that jurisdiction, together with any dates of admission to or rejection by each such jurisdiction and, if no longer active, the date of and basis for inactivation. The above information shall be submitted either in the form of a sworn notarized statement or as a declaration under penalty of perjury of the laws of the United States. The sworn statement or declaration must be executed and dated within three months of the date of the Chief Defense Counsel's receipt of the application.

Id. ¶ 3.A.2)c.

50. *Id.* Annex A. Annex A contains a form authorizing the chief defense counsel to conduct an investigation, and an authorization for release of any relevant records. *Id.*

51. *Id.* ¶ 3.A.2)c.

52. *Id.* ¶ 3.A.2)d.

53. *Id.* ¶ 3.A.2)e.

54. *Id.* Annex B, § II.B. *See supra* note 2.

55. *Id.* This requirement is unchanged in the modification. *Id.*

56. *Id.* Annex B, § II.D. This requirement is unchanged in the modification. *Id.*

57. *See* U.S. Dep't of Army, Pam. 27-9, Military Judges' Benchbook ch. 2, § I, para. 2-1-1 (14 Sept. 2002) [hereinafter Benchbook].

58. MCI No. 4, *supra* note 2, ¶ 3.E.4.

trial proceedings.[60] Counsel must also agree, absent advance approval from the presiding officer, not to "discuss or otherwise communicate or share documents or information about the case with anyone except persons who have been designated as members of the Defense Team," which includes the civilian attorney, the detailed defense counsel, and any other personnel provided by appropriate authority.[61] Thus, counsel may not, absent permission, confer with anyone outside the defense team, and may not seek expert assistance, advice, or counsel, even on discrete questions of law.[62]

The revised Annex B, however, relaxed these rules, as one commentary recently noted:

> The revised Annex B expands the scope of defense communications by permitting defense team members to discuss the case with "commissioned personnel participating in the proceedings," "potential witnesses in the proceedings," and "other individuals with particularized knowledge that may assist in discovering relevant evidence in the case." Second, the revised Annex B no longer contains the requirement that the defense team perform all "work relating to the proceedings, including any electronic or other research, at the site of the proceedings." As a result, it appears that the defense may now perform case-related work, such as research, investigation, and witness interviews, from offsite locations, notwithstanding the other restrictions on communication and handling of information.[63]

Under *MCI No. 4*, all defense counsel are prohibited from entering into agreements with "other Accused or Defense Counsel that might cause them or the Accused they represent to incur an obligation of confidentiality with such other Accused or Defense Counsel or to effect some other impediment to representation."[64] Though described as protections for the accused and intended to prevent impediments to representation, these prohibitions have attracted criticism because they contravene longstanding defense practice in criminal cases, prevent defense counsel from conferring with other defense counsel regarding similarly situated accused or others with a common interest, and have the potential to deny counsel exculpatory evidence that lawyers for other accused may possess.[65]

The instruction places further limits on the attorney client relationship. First, counsel must acknowledge that contacts with their clients are subject to "reasonable restrictions on the time and duration."[66] More troubling is that communications with clients, "even if traditionally covered by the attorney-client privilege, may be subject to monitoring or review by government officials, using any available means."[67] These requirements are unchanged in the modification.[68] Although the instruction confirms that information gleaned will not be used "in proceedings against the Accused who made or received the relevant communication,"[69] the chilling effect of—and difficult issues raised by—such a government policy are apparent.[70]

This aspect of the instructions was the subject of the first of the seven substantive recommendations adopted by the House of Delegates of the American Bar Association at its meeting in August 2003, stating that the "government should not monitor privileged conversations, or interfere with confidential communications, between any defense counsel and client."[71] The recommendation further called for Congress and the Executive Branch to "ensure that all defendants in any military commis-

59. *Id.* MCI No. 5, Annex B, § II.E. (original Annex B). This requirement has been modified. *Id.*

60. *Id.* MCI No. 5, Annex B, § II.E.1 (original Annex B). This requirement has been modified. *Id.*

61. *Id.* MCI No. 5, Annex B, § II.E.2 (original Annex B). This requirement has been modified. *Id.*

62. *Id.*

63. NIMJ Sourcebook, *supra* note 42, at 129-133.

64. MCI No. 4, *supra* note 2, ¶ 3.B.10.

65. Lawyers Committee for Human Rights, *supra* note 47.

66. MCI No. 5, *supra* note 2, Annex B, § II.H, I.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *See, e.g.*, ABA Report and Recommendation, *supra* note 43 (supporting this conclusion).

sion trials that may take place have the opportunity to receive the zealous and effective assistance of Civilian Defense Counsel (CDC)" and noted the American Bar Association's opposition to "any qualification requirements or rules that would restrict the full participation of CDC who have received appropriate security clearances."[72]

No document constituting protected information may leave the site of the proceedings,[73] and counsel must agree to *never* make "any public or private statements regarding any closed sessions of the proceedings or any classified information or material, or document or material constituting protected information under *MCO No. 1*."[74] This seems to be a permanent gag order, covering a very wide range of material. For example, the definition of "protected information" in the *PTMC* includes *classifiable* information, a term that is both broad and vague.[75] Regrettably, the *PTMC* does not further explain or justify this provision.[76]

Indeed, it is noteworthy that none of these restrictions are explained or justified. The failure to publish any background or source information, or any analysis on any of these instructions makes understanding and interpreting them all the more difficult. As noted, only one, *MCI No. 2*, was published in advance for comment, but that was also without any source or background information, making it difficult to provide meaningful critical comment. Such secrecy, in the case of such unusual and restrictive rules, can only result in questions.

Chief Defense Counsel

Other aspects of these instructions raise additional concerns. First, under *MCI No. 6*, *Reporting Relationships for Military Commission Personnel*, the Chief Prosecutor and the Chief Defense Counsel are part of one organization. The Chief Prosecutor and Chief Defense Counsel are both military attorneys, who report to different deputy general counsels of the DOD as first-line supervisors but both report to the DOD General Counsel as a second-line supervisor.[77] In a system where only three people—the President, the Secretary, and the General Counsel—have exercised control,[78] the supervision of the Chief Defense Counsel by one so heavily involved in the design and administration of the process presents an appearance inconsistent with the independent role of defense counsel. This is so even if the Chief Defense Counsel is not actually a defense counsel—an open question under these instructions.

Second, under *MCI No. 4* and *MCI No. 6*, the role of Chief Defense Counsel is one of questionable efficacy. The Chief Defense Counsel is the reporting supervisor for all the military defense counsel and is required to "supervise all defense activities and the efforts of Detailed Defense Counsel."[79] The Chief Defense Counsel, however, is seemingly prohibited from actually functioning as a supervisor, and may *not*: (1) perform duties of a detailed defense counsel; (2) form an attorney-client relationship with any accused person; or (3) incur any concomitant confidentiality obligations.[80] Accordingly, it would seem that reasonable defense counsel would not normally (if they would ever) choose to actually confer with the Chief Defense Counsel, who cannot be a member of any defense team. The Chief Defense Counsel's role with regard to civilian defense counsel is to administer the civilian defense counsel pool, to make decisions (subject to review by the General Counsel) on the qualifications of civilian defense counsel to represent persons before military commissions, and to:

> monitor the conduct of all qualified Civilian Defense Counsel for compliance with all rules, regulations and instructions governing military commissions . . . [and] report all instances of noncompliance . . . to the Appointing Authority and to the General Counsel of the Department of Defense with a recommendation as to any appropriate action.[81]

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72. *Id.*

73. MCI No. 5, *supra* note 2, Annex B, § II.G (original Annex B). This requirement has been changed, and counsel are now required to comply with rules, regulations and instructions regarding handling protected information. *See supra* note 42.

74. MCI No. 5, *supra* note 2, Annex B, § II.F. This requirement is unchanged in the modification. *Id.*

75. *Id.* MCO No. 1, ¶ 6(D)(5).

76. *Id.*

77. *Id.* MCI No. 6, ¶ 3.A.3, 5.

78. *See id.*

79. *Id.* MCI No. 4, ¶ 3.B.3.

80. *Id.*

81. *Id.* ¶ 3.E.5.

These instructions, read together, make it clear that the Chief Defense Counsel is less a defense counsel than he is a government administrator operating on behalf of the General Counsel. The structure makes it difficult to imagine any civilian defense counsel being comfortable dealing with the Chief Defense Counsel—except to consider him simply as another member of the government (prosecution) team.

Summary

The drafters of these instructions were faced with the task of attempting to strike a balance between guaranteeing the rights of accused persons at military commissions on the one hand, and protecting the national security interests of the United States on the other. Doing so surely required consideration of the application of traditional criminal law guarantees as they exist in American law and of constitutional and statutory rights as they have developed in the American military justice system—especially in the almost sixty years since the last common-law war-courts were held in the World War II era. Those principles and rules have changed drastically since World War II; the fact that a military commission process or procedure passed (or escaped) judicial review in 1942 or 1946 is irrelevant to what is acceptable for military commissions in 2003.

The enactment of the UCMJ in 1950 brought dramatic changes to the military justice system. One of the most controversial at the time—now an indispensable element—was the establishment of a civilian court at the apex of the system.[82] In establishing a military commission structure without the availability of civilian judicial review, the administration has failed to account for a cardinal principle of military justice in effect for more than a half-century. Indeed, in an attempt to thwart some of the intense criticism of the *PMO*, the President's counsel assured the nation that the *PMO* "preserves judicial review in civilian courts. Under the order, anyone arrested, detained or tried in the United States by a military commission will be able to challenge the lawfulness of the commission's jurisdiction through a habeas corpus proceeding in a federal court."[83] Since that time, however, the Administration has argued steadfastly and successfully against U.S. courts exercising habeas corpus jurisdiction over those incarcerated in Guantanamo.[84] The world will question American standards of justice and our commitment to the rule of law if the United States tries and sentences the Guantanamo detainees, perhaps to death, with no U.S. court able to review the conviction.

What is at stake is our prestige in the world community and our own heritage. For two centuries, we have viewed ourselves as a nation that believes in and adheres to the rule of law and treasures the concepts of truth and justice—all supported by, perhaps incorporated in, our American sense of fairness. We must take care that we do not sacrifice our principles on the altar of our response to the terrorism of 11 September 2001 and the recently perceived needs of national security, or we may find ourselves sacrificing the very values we prize in an abortive effort to protect them. In the oft-repeated words of Benjamin Franklin, "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."[85]

Unless we change some of the rules that have been promulgated, when the first military commissions are convened, it will not just be alleged war criminals called before the bar of military commission justice. The world will be watching, and it is American justice that will be on trial.[86]

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82. *See* UCMJ arts. 141-145 (2002).

83. Alberto R. Gonzales, *Martial Justice, Full and Fair*, N.Y. Times, Nov. 30, 2001, at A27 (serving as counsel to President Bush).

84. *See, e.g.*, Coalition of Clergy v. Bush, 189 F. Supp. 2d 1036 (C.D. Cal. 2002) (dismissing writ of habeas corpus filed on behalf of detainees held by the military at U.S. Naval Base Guantanamo Bay, Cuba and finding that the "court lacks jurisdiction to entertain this petition because no custodian responsible for the custody of the detainees is present in the territorial jurisdiction of this district").

85. John Bartlett, Familiar Quotations 392:9 (10th ed. 1919), *available at* http://education.yahoo.com/search/bfq?lb=q&p=num%3A245.1.

86. It would appear that American justice is already on trial, well before the first military commission has been appointed. The 12 July 2003 cover of the British weekly *The Economist* reads "*Unjust, unwise, unAmerican: Why terrorist tribunals are wrong*," Economist, July 12, 2003, at 9, 26. Both the editorial and the news article in this issue are highly critical. *See id.* In particular, the editorial alleges the Administration has "avoided America's own courts repeatedly," and harshly criticizes its current approach:

> Mr. Bush could have asked Congress to pass new anti-terrorism laws. Instead he is setting up a shadow court system outside the reach of either Congress or America's judiciary, and answerable only to himself. Such a system is the antithesis of the rule of law which the United States was founded to uphold . . . Mr. Bush is not only dismaying America's friends but also blunting one of America's most powerful weapons against terrorism.

Id. at 9. The risk is that such criticism will increase and multiply should the United States convene military commissions as it has currently structured them.