A CRITICAL ANALYSIS OF THE UNITED STATES MILITARY COMMISSIONS ACT OF 2006

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I. INTRODUCTION

After 9/11 Congress passed a resolution[1] authorizing the President to use all necessary and appropriate force against those nations, organizations, or persons determined to have planned, authorized, committed or aided the September 11, 2001, Al Qaeda attacks.[2] Following the joint Congressional resolution, the President of the United States authorized a system of military commissions to hear cases against foreign terrorists accused of war crimes. The United States armed forces then invaded Afghanistan, where, among the purported foreign combatants that the armed forces captured in 2001, was a Yemeni national named Salim Ahmed Hamdan. In 2002, Hamdan was transported to a United States military prison in Guantanamo Bay, Cuba, for detention.[3] After being incarcerated for more than one year, Hamdan was deemed eligible for trial by a military commission for unspecified crimes. After another year passed he was charged with conspiracy to commit offenses triable by a military commission.[4]

Hamdan then petitioned for a writ of habeas corpus and filed a petition for a writ of mandamus. He argued in *Hamdan v. Rumsfeld*[5] that the Military Commission lacked authority to try him for several reasons.[6] First, neither the Congressional Act nor the Common Law of war supported a trial by the Military Commission for conspiracy that was not a violation of the laws of war. Secondly, the established procedures were in violation of both military and international law because the defendant was not permitted to see or hear the evidence against him.[7]

The Supreme Court of the United States concluded in *Hamdan* that the Military Commission in question did not comply with the common law governing military commissions,[8] and that Congress had denied the President the legislative authority to create military commissions. However, the Court articulated in a separate dissent written by Justice Breyer, joined by Kennedy,

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[1] *See* Authorization for Use of Military Force Act, Pub. L. No. 107-40, S.J. Res. 23, H.J. Res. 64, 115 Stat. 224 107th Cong. (Oct. 1, 2001) (hereinafter Authorization). "That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." *See also* Senate S. J. Res. 23, Sept. 14, 2001. The House passed it Sept. 14, 2001. The President signed it into law on Tuesday, Sept. 18, 2001 at P.L. 107-40, S.J. Res. 23, H.J. Res. 64, 115 Stat. 224 (2001).

[2] *See* Authorization, Senate, P.L. 107-40, S.J. Res. 23 (2001).

[3] Salim Ahmed Hamdan v. Donald H. Rumsfeld, Secretary of Defense, 126 S. Ct. 274 (2006), 415 F3d 33 (2006), 2006 U.S. Lexis 5185 (2006).

[4] *Id.*

[5] *See id*. at 274.

[6] *See id.*

[7] *Id.*

[8] *See id.* Justice Stevens delivered the majority opinion; joined by Souter, Ginsburg, and Breyer.

Souter and Ginsburg, that nothing prevented the President from returning to Congress to seek the authority that the President believed to be necessary.[9] Shortly thereafter, the President asked Congress for authority to create military commissions and the Congress complied. This paper is a critical analysis of The United States Military Commissions Act of 2006.[10]

II. THE UNITED STATES MILITARY COMMISSIONS ACT OF 2006

The United States Military Commissions Act of 2006 (hereinafter referred to as the Act) is an act of Congress, signed by the President on October 17, 2006,[11] and it authorizes the President of the United States to establish military commissions.[12] According to the supporters of the Act, it is one of the most important pieces of legislation in the war on terror. The Act's[13] purpose is to establish procedures governing the use of military commissions to try[14] alien[15] unlawful enemy combatants[16] engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission.[17] The Act provides jurisdictional authority to the Commission to try any offense made punishable by the laws of war when committed by an alien[18] unlawful enemy combatant[19] after September 11, 2001.[20] The Commission also has jurisdiction to try for any offense committed before September 11, 2001. Furthermore, the Commission has the authority to adjudge punishment including the penalty of death as the Secretary of Defense may prescribe or as the laws of war may prescribe. Being an unlawful enemy combatant shifts the status of the accused from one having clearly defined legal rights to one who floats in legal limbo.[21]

[9] *Id.* articulated by Justices Breyer, J., joined by Kennedy, Souter, and Ginsburg; *see also Cf.* Julian Ku and John Yoo, Hamdan v. Rumsfeld: *The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 Constitutional Commentary 179 (Sum. 2006), criticizing "the Court's decision in Hamdan, especially its failure to follow doctrines requiring deference to executive interpretations of foreign affairs laws."

[10] The United States Military Commissions Act of 2006, S. Res. 3930, 109 Cong. (2006) (enacted), 10 U.S.C. Chap. 47A (2006) (hereinafter Commission); *see also* Benjamin Madison, *Trial by Jury or by Military Tribunal for accuse Terrorist Detainees Facing the Death Penalty? An Examination of Principles that Transcend the U.S. Constitution*, 17 J.L. & PUB. Pol'y. 347 (Dec. 2006), stating that "In times of threats to national security, the Framers designated Congress, not the judicial system, as the primary (if not exclusive) check on executive powers. If Congress enacts legislation setting limits that the executive branch proceeds to ignore, then courts may have a role to play-but not before."

[11] *See generally* Commission.

[12] *See id*. § 948b(a).

[13] *Id.*

[14] *See id*. § 948c (stating that any alien unlawful enemy combatant is subject to trial by military commission under this chapter).

[15] *See id*. § 948a(3) (stating that the term *alien* means a person who is not a citizen of the United States).

[16] *See id*. § 948a(1)(A) (stating that the term *unlawful enemy combatant* means (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 United States 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).

[17] *See id*. § 948b (a).

[18] *See id*. § 948a(3) (stating that *alien* means a person who is not a citizen of the United States).

[19] *See id*.

[20] *See id*. § 948d(a).

[21] Olmstead v. United States, 277 U.S. 438 (1928). In his dissent, Justice Louis Brandeis cautioned, "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding."

Whether or not a person is a lawful[22] or unlawful enemy combatant is determined by a Combatant Status Review Tribunal[23] or another competent tribunal established under the authority of the President of the United States or the Secretary of Defense.[24] What the other competent tribunal may be is not defined in the Act.

III. LAWS NOT APPLICABLE TO THE MILITARY COMMISSIONS

A. THE CODE OF MILITARY JUSTICE

The Act exculpates the Military Commission[25] from Section 810 Article 10 of the Uniform Code of Military Justice (hereinafter referred to as UCMJ), relating to speedy trial, including any rule of courts martial relating to speedy trial.[26] This means that the Military Commission is not bound by the Sixth Amendment to the United States Constitution.[27] The UCMJ states that when any person is placed under arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.[28] The Military Commission is not required to ensure these basic protections. Neither is the Commission required to adhere to Sections 831(a), (b), and (d) of the Uniform Code of Military Justice, relating to compulsory self-incrimination.[29] The UCMJ states that (a) no person may be compelled to incriminate himself or to answer any questions the answer to which may tend to incriminate him, (b) no person may interrogate, or request any statement from the accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and (c) that any statement made by him may be used as evidence against him in a trial by court-martial. The Commission, under the Act, does not have these legal obligations. The UCMJ also states that (d) no statement obtained from any person through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.[30] Again, the Military Commission is not required to follow these laws under the Act.

The following Rules of the Uniform Code of Military Justice[31] relating to pretrial investigations also do not apply to the Military Commissions. [32] Unlike the UCMJ, which dictates that "No charge may be referred to a general court-martial for trial until a through and impartial investigation of all the matters set forth therein has been made,"[33] the Commission is not required

[22] *See* Commission § 948d (a); *See also id.* § 948(a)(2) (stating that the "term 'lawful enemy combatant' means (1) a person who is member of the regular forces of a State party engaged in hostilities against the United States; (2) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law[s] of war; or (3) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.")

[23] *See The Combatant Status Review Tribunals* which were held by the United States Department of Defense between July 8, 2004 through March 29, 2005 for the purpose of confirming whether the detainees they had been holding in Guantanamo Bay detainment camps in Cuba had been correctly classified as enemy combatants (Dec. 2006). *See also* United States Department of Defense, News Release (No. 651-04, July 07, 2004) at http://www.defenselink.mil/releases/release.aspx?releaseid=7530 (last visited Oct. 4, 2007).

[24] *See* Commission § 948d(d).

[25] *See id.* § 948b(d).

[26] *See id.* § 948(d)(A).

[27] U.S. Const. art. VI.

[28] The Uniform Code of Military Justice (UCMJ) § 810 Art. 10, Restraint of Persons Charged with Offenses.

[29] *See* Commission § 948b(d)(B). *See contra* U.S. Const. V. (stating that "no person shall be compelled to be a witness against himself.")

[30] *See* UCMJ at art. 31, § 831 (1950), Compulsory Self-Incrimination Prohibited.

[31] *See id.* at art. 32.

[32] *See* Commission § 948b(d)(C).

[33] UCMJ at art. 32.

to wait for an investigation to be completed before charges are brought against the accused.[34] Moreover, the Commission[35] does not have to inquire about the truth of the matter set forth in the charges, consideration of the form of charges, and recommendation as to the disposition of the case in the interest of justice and discipline.[36] The Commission[37] is not required to advise the accused of the charges against him and of his right to be represented at that investigation.[38] The accused is not given the opportunity to cross-examine witnesses against him and present anything he may desire on his own behalf, either in defense or mitigation, and the investigation officer is not required to examine available witnesses requested by the accused[39] as required by the UCMJ.[40] Similarly, the Commission is not required to provide copies to the accused of statements of the substance of the testimony taken from both sides,[41] nor is the accused entitled to recall witnesses for further cross-examination or to offer any new evidence on his own behalf when a further investigation is demanded. [42]

B. GENEVA CONVENTION AND HABEAS CORPUS NOT APPLICABLE

Under the Act the accused is prohibited from using the rules of the Geneva Convention. The Act states that, "No alien unlawful enemy combatant[43] subject to trial by military commission may invoke the Geneva Conventions[44] as a source of rights."[45] But the most critical and radical change in American jurisprudence found in the Act is the denial of habeas corpus.[46] The Act asserts that:

> [N]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States

[34] *See* Commission § 948b(d)(C).

[35] *Cf.* UCMJ at art. 32(a).

[36] *See* Commission § 948b(d)(C).

[37] *Cf.* UCMJ at art. 32(a).

[38] *Id*. at art. 38 § 838(a).

[39] *Id*. at art. 32(a).

[40] *See cf. id.* at art. 38 § 838(a).

[41] *See id*. at art. 32 § 832(b).

[42] *Id.* at art. 32 § 832(c).

[43] *See* Commission § 948d (a), § 948(a)(2).

[44] *See* Geneva Convention, *Relative to the Treatment of Prisoners of War* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (1949). *See also* Commission at 950v § 5(b) (1949) (stating that the term ''Geneva Conventions means that (1) the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, done at Geneva August 12, 1949 (6 UST 3114); (2) the Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, done at Geneva August 12, 1949 (6 UST 3217); (3) the Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949 (6 UST 3316); and (4) the Convention Relative to the Protection of Civilian Persons in Time of War, done at Geneva August 12, 1949.")

[45] *See* Commission § 948b(g).

[46] U.S. Const. art. I, § 9, cl. 2, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it." *See also, e.g.*, James E. Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror*, 91 Cornell L. Rev. 497 (2006); See also Maurer v. Pitchess, 530 F. Supp. 77 (1981), 1981 LEXIS 16697; Fed. R. Serv. 2d (Callaghan) 365 (1981) (stating that habeas corpus is a generic term, embracing a variety of writs known to the common law. Included among these are habeas corpus ad subjiciendum (the "Great Writ" used to inquire into the cause of a prisoner's restraint), habeas corpus ad prosequendum (used to bring a prisoner to a jurisdiction wherein he may be criminally prosecuted), and habeas corpus ad testificandum (used to bring a prisoner to give evidence before a court)). *But see cf.* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 53 (1980); 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 116-17, 124 (1982 ed.); 3 BLACKSTONE, COMMENTARIES 131 (1768); *see also* 1 Op. Att'y Gen. 47 (1794); *In re Ning Yi-Ching*, 56 T. L. R. 3, 5 (Vacation Ct. 1939) (noting prior judge "had listened in vain for a case in which the writ of *habeas corpus* had issued in respect of a foreigner detained in a part of the world which was not a part of the King's dominions or realm").

> to have been properly detained as an enemy combatant[47] or is awaiting such determination.[48]

Hence, the accused does not have to be an alien nor an unlawful enemy combatant; all that is required is that the accused be an enemy combatant to be deprived of his right to habeas corpus. Furthermore, even where the accused has not yet been classified and given a status, the accused may be deprived of his right to habeas corpus while he is waiting for "such a determination."[49] Therefore, it appears that to be deprived of this right, the accused does not have to be an alien, nor an enemy combatant; hence, the deprived accused could be any accused American citizen.

The Act also forbids the United States judicial court system from acquiring jurisdiction in five areas with respect to enemy combatants. It states that:

> no court, justice, or judge shall have jurisdiction to hear or consider any action against the United States or its agents relating to any aspect of the (1) detention, (2) transfer, (3) treatment, (4) trial, or (5) conditions of confinement of an alien[50] who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant.[51]

The Act also forbids the court system from acquiring jurisdiction with respect to those "awaiting status determination."[52] Therefore, the court system, by this Act, is forbidden from acquiring jurisdiction over the accused who may or may not be an alien or an enemy combatant.

IV. PRE-TRIAL PROCEDURE

A. CHARGES AGAINST THE ACCUSED

Under the Act, the charges and specifications brought against the accused are required to be signed by someone under oath before a commissioned officer of the armed forces that is authorized to administer the oath and is required to state[53] (1) that the signer has personal knowledge of, or has some reason to believe without knowledge of the matters set forth therein;[54] and (2) that the facts are true to the best of the signer's knowledge and belief.[55] After the swearing of the charges and specifications, the accused should thereafter be informed of the charges against him as soon as practical.[56] How soon is practical is not defined. It could be a short period or it could be years, or it could be an indefinite period of time. Nor does the Act define whether the notion of practical applies to the accused or to the Commission.

[47] Lakhdar Boumediene v. George W. Bush, No. 05-5062, U.S. Dist. Ct., Dist. of Colum., (2007), 2007 Lexis 3682 (Feb. 20, 2007). The Federal Court for the District of Columbia affirms the United States Military Commissions Act of 2006 and concludes that federal courts do not have jurisdiction over petitions for writs of habeas corpus filed by aliens captured abroad and detained as enemy combatants at the Guantanamo Bay Naval Base in Cuba.

[48] *See* Commission § 950v Sec.7 Habeas Corpus Matters (e)(1), *but see c.f.* the Habeas Corpus Restoration Act of 2006, S. 4081, 109 Cong. (2006) in which the bill attempts to restore the guarantees under the writ of habeas corpus.

[49] *See* Commission § 950v Sec.7 Habeas Corpus Matters (e)(1).

[50] *See id*. § 948a(3), defining the term "Alien."

[51] *See id*. § 950v Sec.7 Habeas Corpus Matters (e)(2).

[52] *See id*. § 950v Sec.7 Habeas Corpus Matters (e)(2).

[53] *See id.* § 948q(a).

[54] *See id.* § 948q(a)(1).

[55] *Id.* § 948q(a)(2).

[56] *See id* § 948q(b).

B. EVIDENCE OBTAINED BY SELF-INCRIMINATION AND TORTURE

The Act states, in general, that no person shall be required to testify against himself at a proceeding of a military commission,[57] and that a statement obtained by use of torture shall not be admissible in a military commission.[58] There is an exception, however: "except against a person accused of torture as evidence that the statement was made."[59] The statute is not clear about the exception. When will evidence obtained under torture be admitted? When the accused is the torturer? Moreover, it seems that the evidence obtained under torture will be admitted, but only as evidence that the statement was made. The conclusion seems to be that evidence obtained under torture, that a statement was made by a torturer, will be admitted.[60] Therefore, even though the Act in one section explicitly forbids the admission of evidence when it has been obtained by the use of torture, it does allow such evidence to prove that the statements under torture were made.

The Act further allows statements made by the use of coercion if the military judge is able to justify it. For example:

> [A] statement obtained *before* December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005)[61] in which the degree of coercion is disputed may be admitted only if the military judge finds two criteria that[62] (1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value;[63] and (2) the interests of justice would best be served by admission of the statement into evidence.[64]

If on the other hand, the statement is obtained on or *after* December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005), in which the degree of coercion is disputed, such statement may be admitted only if the military judge finds the same two criteria mentioned above and a third which states that [65] (3) the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment[66] prohibited by section 1003 of the Detainee Treatment Act of 2005.[67] So, it does not matter whether the statements were made before or after December 30, 2005, where the degree of coercion is disputed. The military judge may admit the evidence if it meets the stated criteria.

[57] *Id.* § 948r(a).

[58] *Id.*

[59] *See id.* § 948r(b).

[60] *See id*.

[61] *See* Detainee Treatment Act of 2005, H.R. 2863, No.109-359 § 1001 (2005), 10 U.S.C. § 1001 (2005) Matters Relating to Detainees (hereinafter Detainee) (as included in the Department of Defense Appropriations Act, 2006 and agreed to by the US House and Senate and signed by President Bush, December 30, 2005 (incorporating the McCain Amendment and the Graham-Levin Amendment on detainees)). *See also* Jurist Legal News and Research, Univ. of Pittsburgh, School of Law http://jurist.law.pitt.edu/gazette/2005/12/detainee-treatment-act-of-2005-white.php (last visited Jan. 29, 2007).

[62] *See* Commission § 948r(c).

[63] *See id.* § 948r(c)(1).

[64] *Id.* § 948r(c)(2).

[65] *See id.* § 948r(d).

[66] *See* Detainee § 1003 (d) *stating* that the term "cruel, inhuman, or degrading treatment or punishment" means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

[67] *See* Commission § 948r (d)(3). *See also* Detainee § 1002(d) defining Cruel, Inhuman, or Degrading Treatment or Punishment.

C. PROTECTION PERSONNEL ENGAGED IN INTERROGATION

Under the Detainee Treatment Act of 2005,[68] officials involved with detention and interrogation are provided legal protections, which include those acting under the The United States Military Commissions Act of 2006. The area of protection is broad in that it covers "any United States personnel that are involved in specific operational practices that includes detention and interrogation of aliens who the president or his designees determined are believed to be engaged with international terrorist activity."[69] Here the powers of the President and his designees are extended to include those aliens whom he *believes* to be engaged in international terrorist activity. The defenses available to those individuals involved in detention and interrogation of apprehended persons are extensive. For example, the statute states that "it shall be a defense that such personnel *did not know that the practices were unlawful* or that such personnel in *good faith relied on advice of counsel, among others*, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful."[70] The general application of law to citizens is that everyone is presumed to know the law. Here, that proposition is turned on its head and states that if the offending official is not aware of the law of torture, for example, then it can be used as a defense. In addition, if the offending official relies in good faith on the advice of counsel, and the advice of counsel is incorrect, it can be used as a defense. Finally, it is also a good defense if the offending official relies on the advice of others.

D. SERVICE OF CHARGE

The trial counsel assigned to a case before a military commission is required to serve the accused and military defense counsel a copy of the charges upon which the trial is to be based,[71] but there is no specified time within which to do so. The Act further states that "such charges shall be served in English and, if appropriate, in another language that the accused understands. Such service shall be made sufficiently in advance of trial to prepare a defense."[72] But there is no requirement for a speedy trial. Therefore, to provide such service sufficiently in advance could be six months, a year or more, as was the case in *Hamdan.*[73]

V. TRIAL PROCEDURE

The Secretary of Defense and the Attorney General are given the power, under the Act, to prescribe procedures, principles of law and rules of evidence for the Military Commission. Specifically, pretrial, trial, and post-trial procedures, including elements and modes of proof, for cases triable by military commission can be prescribed by the Secretary of Defense, in consultation with the Attorney General.[74] As far as the Secretary of Defense considers *practicable*, procedures are to be applied consistent with military or intelligence activities. If the Secretary does not consider the procedures to be *practical*, they will not be applied. This is at variance with trials by general court-martials that are required to apply consistent, clearly defined procedures, principles of law, and rules of evidence.[75]

[68] *See id.* § 1004 (a).
[69] *Id.*
[70] *See id.*
[71] *See id*. § 948s Service of Charge.
[72] *See id.*
[73] *Supra* note 3.
[74] *See* Commission § 949a Procedures and Rules of Evidence.
[75] *See id.* § 949a, Procedures and Rules of Evidence.

A. RIGHTS OF THE ACCUSED

Concerning the accused, the procedures and rules of evidence in trials by military commission include the following:[76] the accused will be permitted to present evidence in his own defense, to cross-examine the witnesses who testify against him, and to examine and respond to evidence admitted against him on the issues of sentencing and guilt or innocence.[77] The accused is allowed to be present at all sessions of the Military Commission (other than those for deliberations or voting), except when excluded[78] under the Act.[79] The accused shall receive the assistance of counsel[80] who may or may not be a member of a bar, but must be certified to practice before a general court-martial and be a member of the Armed Forces.[81]

B. PROCEDURE AND RULES OF EVIDENCE

The Secretary of Defense may prescribe procedures and rules of evidence for military commission proceedings concerning the admission of evidence such as: (1) those seized without a search warrant,[82] (2) those where the evidence was coerced,[83] and (3) those where the evidence is hearsay.[84] First, the Act provides that evidence will be admissible if the military judge determines that the evidence would have probative value to a reasonable person.[85] Second, evidence will be admitted in a trial by a military commission even when the evidence was seized pursuant to a lack of a search warrant or other authorization.[86] Third, a statement of the accused that is otherwise admissible will not be excluded from trial by a military commission on grounds of alleged coercion or compulsory self-incrimination so long as the evidence comports with dictates of this Act.[87] Fourth, evidence will be admitted as authentic so long as[88] "the military judge of the military commission determines that there is sufficient basis to find that the evidence is what it is claimed to be."[89] Lastly, the military judge is required to provide instructions to the members of the Commission that "they may consider any issue as to authentication or identification of evidence in determining the weight, if any, to be given to the evidence."[90] It is reasonable to conclude that evidence will be admitted in a military commission trial whenever the military judge determines that the evidence would have probative value to a reasonable *military* person.

[76] *Id.* § 949a(b)(1).
[77] *See id*. § 949a(b)(1)(A).
[78] *Id.* § 949d(a), *Session without presence of members* (stating that "at any time after the service of charges which have been referred for trial by military commission . . . the military judge may call the military commission into session without the presence of the members for the purpose of (A) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty; (B) hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later consideration or decision by the members; (C) if permitted by regulations prescribed by the Secretary of Defense, receiving the pleas of the accused; and (D) performing any other procedural function which may be performed by the military judge under this chapter or under rules prescribed pursuant to section 949a of this title and which does not require the presence of the members.")
[79] *See id.* § 949a(b)(1)(B).
[80] *See id.* § 948k (c) (stating that "defense counsel detailed for a military commission must be a judge advocate who is (1) a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; and (2) certified as competent to perform duties as defense counsel before general courts-martial by the Judge Advocate General of the armed force *of which he is a member*.")
[81] *See id*. § 949a(b)(1)(C).
[82] *Id.* § 949a (b)(2)(B).
[83] *See id.* § 949a(b)(2)(C).
[84] *See id.* § 949a(b)(2)(E)(ii).
[85] *See id*. § 949a(b)(2)(A).
[86] *See id*. § 949a(b)(2)(B).
[87] *Id.* § 949a(b)(2)(C).
[88] *See id.* § 949a (b)(2)(D).
[89] *See id*. § 949a(b)(2)(D)(i).
[90] *Id.* § 949a(b)(2)(D)(ii).

C. Admissible Hearsay Evidence

As a general rule, under the Act, hearsay evidence is admissible in a military commission trial unless the accused demonstrates that the evidence is unreliable or lacking in probative value. Again, the jurisprudential traditional notion of the hearsay rule is inversely applied and places the burden on the accused to show why hearsay evidence should not be admitted. In addition, hearsay evidence may be admitted in a trial by a military commission if the proponent of the evidence makes three pieces of information known to the adverse party: (1) notice is given sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence, (2) the intention of the proponent to offer the evidence, and (3) the particulars of the evidence including information on the general circumstances under which the evidence was obtained.[91] But even if these conditions are met, the disclosure of evidence is subject to the requirements and limitations applicable to the disclosure of classified information.[92] Moreover, hearsay evidence that is inadmissible under the rules of evidence in a general court-martial will also be inadmissible in a trial by a military commission if it is demonstrated that the evidence is unreliable or lacking in probative value.[93] Finally, under The United States Military Commissions Act of 2006, the military judge has the power to exclude any evidence if the probative value does not (1) create[94] the danger of unfair prejudice, (2) instill confusion of the issues, (3) mislead the commission,[95] (4) cause undue delay, waste of time, or (5) create needless presentation of cumulative evidence.[96]

D. Right of Self-Representation

The accused is given the right of self-representation under the Act, so long as his deportment and the conduct of the defense to the rules of evidence, procedure, and decorum[97] conforms to the applicable rules of the Military Commission.[98] But it is likely that an alien enemy combatant with a different language and culture will be unfamiliar with the military culture and the procedure under which the Military Commission is conducted and will therefore be unable to adequately represent himself. If the accused is unable to conform to the rules[99] it may result in a partial or total revocation[100] by the military judge of the right of self-representation.[101] Once the accused is removed from self-representation, the defense counsel of the accused or an appropriately authorized civilian counsel will be instructed by the military judge to perform the functions necessary for the accuser's defense.[102]

E. Notice to Congress

The Secretary of Defense may delegate the authority given to him by the Act, to create rules and regulations concerning substitutive and procedural matters about the operational process of the

[91] *See id*. § 949a.
[92] *See id*. § 948a(4), (stating that the term "classified information" is (A) any information or material that has been determined by the United States Government pursuant to statute, Executive order, or regulation to require protection against unauthorized disclosure for reasons of national security, and (B) any restricted data, as that term is defined in Section 11(y) of the Atomic Energy Act of 1954, 42 U.S.C. § 2014(y)(b)(2)(D)(i)). *See also id.* § 949a(b)(2)(E)(i).
[93] *See id*. § 949a(b)(2)(E)(ii).
[94] *Id.* § 949a(b)(2)(F).
[95] *See id*. § 949a(b)(2)(F)(i).
[96] *Id.* § 949a(b)(2)(F)(ii).
[97] *Id.* § 949b *Rules*, (b)(3)(A).
[98] *Id.* § 949a(b)(3)(A).
[99] *See id*. § 949a (b)(3)(B).
[100] *Id.* § 949a (b)(1)(D).
[101] *See id.* § 949a (b)(3)(B).
[102] *See id.*

Military Commission.[103] The Secretary may also prescribe additional regulations with respect to national security as they apply to the Military Commission.[104] But the Act requires that a reporting process be instituted. It states that not later than 60 days before the date on which any proposed modification of the procedures go into effect, the Secretary of Defense must submit a report describing the modifications to the Senate Committee on Armed Services and the House of Representatives Committee on Armed Services.[105]

F. Closed Proceedings

Under the act, the military judge is given the authority to close the proceeding in whole or in part. The judge may close to the public all or part of the proceedings of a military commission, under three circumstances.[106] First, the proceeding may be closed if the judge makes a specific finding that such closure is necessary. [107] This is hardly an objective test since the judge can on his own volition and his own subjective determination find that the *closure is necessary*. Second, if the government claims that the court should protect information that if disclosed could *reasonably be expected to cause damage* to national security, including intelligence or law enforcement sources, methods, or activities,[108] the judge in this case will make a determination whether or not national security is in danger and expected to cause damage. The revelation of the disclosure does not even have to be expected to cause damage so long as it *can reasonably be expected to cause damage* to national security. In other words, if there is some expectation that the disclosure may cause damage in the future, the judge may close the proceedings. The disclosure which is to be protected by closing the proceeding includes four areas (1) intelligence, (2) law enforcement sources, (3) methods, or (4) activities. Finally, the proceeding may be closed to the public by the military judge to ensure the physical safety of individuals.[109] A finding may be based upon a presentation, including a presentation ex parte or in camera, by either trial counsel or defense counsel.[110]

G. Exclusion of The Accused from the Proceedings

Under the Act the military judge may exclude the accused from any portion of a proceeding the military judge (1) determines that after being warned, the accused persists in conduct that justifies exclusion from the courtroom,[111] (2) intends to ensure the physical safety of individuals;[112] (3) or intends to prevent disruption of the proceedings by the accused.[113]

VI. Protection of Classified Information

The Act provides a broad mandate for the protection of classified information[114] and is considered privileged from disclosure if disclosure would be detrimental to national security.[115]

[103] *See id*. § 949a(c).
[104] *Id.* § 949d(f)(4).
[105] *Id.* § 949a(d).
[106] *See id*. § 949d(d)(1).
[107] *See id.* § 949d(d)(2).
[108] *Id.* § 949d(d)(2)(A).
[109] *Id.* § 949d(d)(2)(B).
[110] *See id.* § 949d(d)(3).
[111] *See id.* § 949d(e).
[112] *Id.* § 949d(e)(1).
[113] *Id.* § 949d(e)(2).
[114] *Id.* § 948a(4) (stating that the term *classified information* was any information or material that has been determined by the United States Government pursuant to statute, Executive order, or regulation to require protection against unauthorized disclosure for reasons of national security or any restricted data, as that term is defined in section 11 y. of the Atomic Energy Act of 1954, 42 U.S.C. § 2014(y)(b)(2)(D)(i)).
[115] *See Id.* § 949d (f)(1)(B)(ii).

This applies to all stages[116] of the proceedings of the Military Commission.[117] The Act identifies a large number of people who may determine whether particular information falls under the guise of national security. For example, the privilege may be claimed by: (1) the head of the executive branch, (2) a military department, or (3) a government agency based on a finding by the head of that department or agency[118] stating that the information is properly classified[119] and that disclosure of the information would be detrimental to national security.[120] Conceivably, this would include thousands of people who are employed by the executive branch of government, the military complex and the Pentagon, or any government agency. All of these individuals, under the act, then have the privilege to transfer the power to others to designate specific information as classified. Therefore, a person who claims the privilege may authorize a representative, witness, or trial counsel to make the case on behalf of the original person claiming the privilege.[121] Finally, if there is no evidence to the contrary, the authority to claim the privilege of the representative, witness, or trial counsel is presumed.[122]

A. Classified Information

With respect to discovery, the accused will not be allowed to receive evidence that has been determined to be classified information. Upon motion of trial counsel to the commission, the military judge shall authorize[123] the deletion of specified items of classified information[124] from documents that may be available to the accused,[125] and the accused will not have access to such information for his defense except as the judge may authorize in the form of substitution of a portion or summary of the information for such classified documents.[126] The accused will also be denied classified information concerning sources of information, methods of investigation, and governmental activities that would otherwise be available for his defense. Therefore, the military judge, upon motion of trial counsel, can authorize trial counsel to protect from disclosure[127] the

[116] *See id*. § 949d(f)(2)(C), (stating that "During the examination of any witness, trial counsel may object to any question, line of inquiry, or motion to admit evidence that would require the disclosure of classified information. Following such an objection, the military judge shall take suitable action to safeguard such classified information. Such action may include the review of trial counsel's claim of privilege by the military judge in camera and on an *ex parte* basis, and the delay of proceedings to permit trial counsel to consult with the department or agency concerned as to whether the national security privilege should be asserted.") *See also* Commission at 949d(f)(3), (stating that "A claim of privilege and any materials submitted in support thereof, shall, upon request of the Government, be considered by the military judge in camera and shall *not* be disclosed to the accused.")

[117] *See id*. § 949d(f)(1)(A).

[118] *See id.* § 949d(f)(1)(B).

[119] *Id.* § 949d(f)(1)(B)(i).

[120] *Id.* § 949d (f)(1)(B)(ii).

[121] *See id.* at 10 U.S.C. § 949d(f)(1)(C).

[122] *Id.* § 949d(f)(1)(C).

[123] *Id.* § 949j(c).

[124] *See id*. § 949d (f)(2)(B), § 949d (f)(2)(B)(i) and § 949d (f)(2)(B)(II) (stating that the "military judge, upon motion of trial counsel, shall permit trial counsel to introduce otherwise admissible evidence before the military commission, while protecting from disclosure the sources, methods, or activities by which the United States acquired the evidence if the military judge finds that the sources, methods, or activities by which the United States acquired the evidence are classified, and the evidence is reliable. The military judge may require trial counsel to present to the military commission and the defense, to the extent practicable and consistent with national security, an unclassified summary of the sources, methods, or activities by which the United States acquired the evidence.")

[125] *See id.* § 949j (c)(A).

[126] *Id.* § 949j(c)(B).

[127] *See id*. § 949d(f)(2)(A), § (A)(i), § (A)(ii) and § (A)(iii) (stating three ways by which the military judge my protect classified information from disclosure upon motion of trial counsel "The judge (1) can authorize, to the extent practicable (1) the deletion of specified items of classified information from documents to be introduced as evidence before the military commission; (2) the substitution of a portion or summary of the information for such classified documents; or (3) the substitution of a statement of relevant facts that the classified information would tend to prove.")

sources, methods, or activities by which the United States acquired evidence if the military judge finds this information is classified.[128] The military judge may require trial counsel to provide, *to the extent practicable*, an unclassified summary of the sources, methods, or activities by which the United States acquired such evidence.[129] If it is not practical, the summary may not be provided. Unfortunately, whether a situation is or is not practical is not clear and is not defined in the Act.

VII. Challenges, Jeopardy and Defenses

A. Challenges for Cause and Peremptory

The accused has the right, under the Act, to challenge the military judge and member of the Military Commission for cause by stating so to the Commission.[130] The military judge shall then take the challenge into consideration and determine the relevance and the validity of the challenges for cause. [131] Only one person may be challenged at one time. Once the determination of the initial challenge has been made, the second challenge may be allowed.[132] The trial counsel's challenge shall ordinarily be presented and decided first, before the challenges by the accused are offered.[133] The accused and the trial counsel are entitled to only one peremptory challenge.[134] The military judge may only be challenged for cause.[135] Whenever there are additional members added to the Military Commission and no challenges have heretofore been asserted against them, the trial counsel is entitled to one peremptory challenge against members not previously subject to peremptory challenge.[136]

B. Mental Deficiency as a Defense

Mental disease or defect can only be used by the accused when asserted as an affirmative defense in a trial by a military commission asserting that, at the time of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts.[137] No other type of insanity plea is allowed. The burden of proof is on the accused to show the defense of lack of mental responsibility by clear and convincing evidence.[138] Whenever the issue of lack of mental responsibility of the accused is asserted with respect to an offense, the military judge is required to instruct the members of the commission regarding the defense of lack of mental responsibility and shall charge them to find the accused[139] in one of three ways: guilty,[140] not guilty,[141] or not guilty by reason of lack of mental responsibility.[142] The requirement for finding the accused not guilty by reason of lack of mental responsibility is met only when a majority of the members present at the time the vote is taken determine that the defense of lack of mental responsibility has been established[143] by clear and convincing evidence.

[128] *See id.* § 949j(C)(2).

[129] *Id.*

[130] *See id.* § 949f(a).

[131] *Id.* § 949(f)(a).

[132] *Id.*

[133] *Id.* § 49f(a).

[134] *Id.* § 949f(c).

[135] *See id*. § 949f(b).

[136] *See id*. § 949f(c).

[137] *See id.* § 949k(a).

[138] *Id.* § 949k(b).

[139] *See id.* § 949k (c).

[140] *Id.* § 949k(c)(1).

[141] *Id.* § 949k(c)(2).

[142] *See id.* § 949k(c)(3).

[143] *See id*. § 949k(d).

VIII. REQUIREMENTS FOR CONVICTION AND PUNISHMENT

A. INSTRUCTIONS PRIOR TO THE VOTE

Prior to the final vote by the Military Commission, the judge is required to instruct the members of the Commission with respect to the elements of the offense and must provide the members[144] of the Commission with four charges: (1) that the accused must be presumed innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt; (2) that if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and he must be acquitted;[145] and (3) that if there is reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt;[146] and (4) that the burden of proof to establish the guilt of the accused beyond a reasonable doubt is upon the United States.[147]

B. CONVICTION, IMPRISONMENT, AND DEATH SENTENCE

The Act requires that for the Military Commission to convict an accused of any offense there must be a vote of concurrence of two-thirds of the Commission members present at the time the vote is taken.[148] The Act further requires four conditions to be present before the accused can be sentenced by a military commission to suffer the punishment of death:[149] (1) the penalty of death is expressly authorized under this chapter or the law of war for an offense of which the accused has been found guilty;[150] (2) the trial counsel expressly sought the penalty by filing an appropriate notice in advance of trial;[151] (3) the accused is convicted of the offense by a concurrence of *all the members present* at the time the vote is taken;[152] and (4) all the members present at the time the vote is taken concur in the sentence of death.[153] (The number of members of the Military Commission required cannot be less than twelve.[154]) After a person has been adjudged by the Military Commission, the sentence of death may not be executed until approved by the President. The President may commute, remit, or suspend the sentence, or any part thereof, as he sees fit.[155]

With respect to punishment by incarceration, the President or the Secretary of Defense *may prescribe the limits* for an offense as they deem appropriate. [156] But the Act provides a limit to sentences for life imprisonment, or to confinement for no more than ten years, unless it is by concurrence of three-fourths of the commission members present at the time the vote is taken.[157] Punishment by branding, marking, or tattooing on the body in addition to flogging or any other cruel or unusual punishment, may not be adjudged by a military commission or inflicted upon any

[144] *See id*. § 949l(c).
[145] *Id.* § 949l(c)(2).
[146] *Id.* § 949l(c)(3).
[147] *See id*. § 949l(c)(4).
[148] *Id.* § 949m(a).
[149] *See id.* § 949m(b)(1).
[150] *Id.* § 949m(b)(1)(A).
[151] *See id*. § 949m(b)(1)(B).
[152] *Id.* § 949m(b)(1)(C).
[153] *Id.* § 949m(b)(1)(D).
[154] *See id.* §949m(c)(1) (stating that where 12 commission "members are not reasonably available because of physical conditions or military exigencies, the convening authority shall specify a lesser number of members for the military commission (but not fewer than 9 members), and the military commission may be assembled, and the trial held. If there is fewer then such a number, the convening authority shall make a detailed written statement, to be appended to the record, *stating* why a greater number of members were not reasonably available.")
[155] *See id.* § 950i(b).
[156] *See id.* § 949t.
[157] *Id.* § 949m(b)(2).

person. The use of irons, single or double, except for the purpose of safe custody, is prohibited.[158] All other sentences are to be determined by a military commission by the concurrence of two-thirds of the members present at the time the vote is taken.[159] The Secretary of the Defense, or the convening authority acting on the case (if other than the Secretary), may suspend the execution of any sentence or part thereof in the case, except a sentence of death.[160]

C. CONFINEMENT

The Act provides considerable latitude for the Secretary of Defense to prescribe the sentence of confinement adjudged by a military commission which can be carried out[161] in: (1) any place of confinement under the control of any of the armed forces,[162] including the Army, Navy, Air Force, or any other special forces; (2) any penal or correctional institution under the control of the United States or its allies, which could be any country in the world that the United States considers an ally; or (3) any country which may or may not be an ally but which the United States may be allowed to use[163] either on a permanent or temporary basis. The incarceration may be carried out in any place in the world. If the confinement takes place in a penal or correctional institution that is not under the control of an armed force, then the Act states the prisoner is subject to the same discipline and treatment as persons confined or committed by the courts of the United States, the District of Columbia, or the place in which the institution is situated.[164]

IX. CONCLUSION

The Act comes on the heels of one of the worst disasters in the history of the United States: the 9/11 attack. The intent of the Act was to increase the security and protection of the citizens of the United States by capturing the offending parties, bringing them to justice and incarcerating them for injuries caused to the United States and it citizens. What resulted from this good intent was the creation of a legal infrastructure encapsulated in the form of a military commission that exists in a universe separate from those American principles and ideals articulated in the Constitution of the United States, the common law, the Uniform Code of Military Justice, and the Geneva Convention.

It is an Act that provides significant latitude to the President of the United States and the Secretary of Defense to create and change the substantive and procedural rules of the Military Commission unilaterally to try enemy combatants. It contravenes the principles enshrined in the Constitution of the United States such as the right to habeas corpus, a speedy trial, and confrontation of witness. It sets aside some of the well-established laws articulated in the Uniform Code of Military Justice, which has served this nation well in peace and in war. And finally, it sets aside the well-recognized rules of law and rule of war in the Geneva Convention treaty. The rules of evidence that have generally been recognized under national and international law have been set aside to deprive the accused of certain rights and to allow such evidence as hearsay to be admitted to the detriment of the accused. Fearing that in future years there might be repercussion for the acts of those government employees that engage in incarceration and interrogation of the accused, the Act provides for special defenses for members of the government. Practically anyone in government can designate information as *classified*. Once information, which may become evidence, is classified, it can be kept from the accused even if the evidence will assist his case.

[158] *Id.* § 949s.
[159] *See id.* § 949m(b)(3).
[160] *See id.* § 950i (d).
[161] *Id.* § 949u(a).
[162] *Id.* § 949u(a)(1).
[163] *See id.* § 949u(a)(2).
[164] *Id.* § 949u(b).

Finally, under the Act, the accused may be incarcerated indefinitely any place in the world without right to counsel.

Following the analysis of the Act one can argue that there has been a shift away from accepted norms of American jurisprudence, and that many of the valued principles under which this nation was founded have been significantly eroded.