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## Briefing Paper on U.S. Military Commissions

Revised November 2005

On July 15, 2005, a U.S. federal appeals court in *Hamdan v. Rumsfeld* overturned a November 8, 2004 district court ruling that had resulted in the suspension of the U.S. military commissions at Guantanamo Bay. On November 7, the Supreme Court agreed to review the *Hamdan* decision.

The appellate court ruling opens the way for the resumption of the four cases currently before the commissions. The case against Australian David Hicks is scheduled to resume on November 18, 2005. To date President Bush has designated fifteen Guantanamo detainees as eligible for trial by military commission. Of those fifteen, four were formally charged in 2004 and referred for prosecution. On November 7, 2005, the Defense Department announced that the military commission Appointing Authority had approved charges against an additional five detainees at Guantanamo. They are from Ethiopia, Algeria, Canada, and two from Saudi Arabia.<sup>1</sup>

Human Rights Watch has raised serious due process concerns about the Guantanamo military commissions since they were first announced by President Bush in November 2001. These concerns, restated below, remain valid today. On August 31, 2005, the U.S. Department of Defense announced several changes to the military commissions that it claimed would make the commissions “smoother and more efficient.” Under the rule changes, the commission’s presiding officer will act more like a judge, ruling on legal issues, while the other members of the panel will act more like a jury, determining issues of fact.<sup>2</sup> Commission hearings held in 2004—to which Human Rights Watch sent observers—had highlighted serious deficiencies in the U.S. military commission members’ understanding of the laws of war and basic principles of criminal justice.<sup>3</sup>

The rule changes also provide that classified evidence can be withheld from the accused unless doing so would deny him a “full and fair trial.” While Human Rights Watch welcomed the Pentagon’s recognition that access to evidence is necessary for a fair trial, the Pentagon will still remain the arbiter of that evidence. This change may mean little so long as there is no judicial review of the proceedings by a civilian court. U.S. courts martial, unlike the commissions, are reviewed by a civilian appeals court. Revelations of torture and other mistreatment by U.S. personnel at Guantánamo Bay and other

<sup>1</sup> Human Rights Watch has long be concerned about the treatment at Guantanamo of the Canadian, Omar Ahmed Khadr, who was fifteen-years old at the time of his arrest but has not been treated as a child by U.S. authorities as is required under international law.

<sup>2</sup> Military Commission Order (MCO), No. 1 (revised August 31, 2005).

<sup>3</sup> Human Right Watch, “U.S.: Guantanamo Tribunal Lacks Basic Knowledge of Law,” press release, November 5, 2004.

detention facilities outside the United States heightens concerns over the use of evidence withheld from the accused.

Human Rights Watch believes the rule changes were aimed to deflect criticism of the commissions without addressing the commissions' most fundamental problems. The military commissions will still function entirely within the military and executive branch, without independent judicial review. Fair trial rules can be found in the military commission rules, but there remains no means of ensuring that any will in fact be respected.

Despite the Bush administration's oft-repeated assurances that the "global war on terror" will affirm and protect basic human rights, the rules for the proposed commissions fall far short of international standards for a fair trial. The U.S. government has replaced the U.S. federal court and court-martial structures and procedures with a wholly new and untried system that assures Department of Defense control over the proceedings, the verdict, appellate review, and ultimately what the public can know about the trials. Such trials, if allowed to go forward, will undermine the basic rights of defendants to a fair trial. They will yield verdicts – possibly including death sentences – of questionable legitimacy, and will deliver a message worldwide that the fight against terrorism need not respect the rule of law.

Human Rights Watch has stated before, and we reiterate here, that absent significant change in the structure and rules of the military commissions, the United States would be in violation of its obligations under international law to try anyone before them. The United States should instead take all the necessary steps to ensure that those tried before military commissions receive trials that are a credit to American justice, not a stain on its history.

Under the president's directive, the U.S. Department of Defense has issued a series of orders and instructions governing most aspects of the commissions, from their basic organization to the crimes to be prosecuted to the rules governing defense counsel and appellate review.<sup>4</sup> These rules incorporate certain due process safeguards into the commissions, including the presumption of innocence, proceedings ostensibly open to the public, and the presentation of evidence and cross examination of witnesses. Important as they are, these provisions cannot overcome the cumulative impact of other provisions that militate against fairness. They provide a patina of due process to proceedings that are otherwise deeply flawed.

Under the Defense Department rules, the military commissions will or are likely to:

- Deprive defendants of independent judicial oversight by a civilian court.
- Improperly subject to military trials persons apprehended far from any battle zone.
- Try prisoners of war (POWs) in a manner that violates the 1949 Geneva Conventions.
- Deprive defense counsel of the means to prepare an effective defense.
- Prevent defendants from seeing all evidence introduced against them.
- Impose no obligation on the government to disclose exculpatory information.
- Place review of important interlocutory questions with the charging authority rather than an independent adjudicator.
- Fail to guarantee that evidence obtained via torture or ill-treatment shall not be used.
- Allow wide latitude to close proceedings and impose a "gag order" on defense counsel.

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<sup>4</sup> Since President Bush issued Military Order of November 13, 2001 authorizing military commissions, the Department of Defense has released several instructions setting out the applicable law and procedure: Military Commission Order No. 1 (MCO No. 1), issued March 21, 2002; a draft set of crimes and elements released on February 28, 2003 for public comment; a set of nine Military Commission Instructions (MCIs) released on April 30, 2003 and subsequently, several of which were later revised; and Military Commission Order No. 3 (MCO No. 3), issued February 5, 2004.

- Deprive military defense counsel of normal protections afforded military lawyers from improper “command influence.”
- Restrict the defendant’s right to choose legal counsel.
- Provide lower due process standards for non-citizens than for U.S. citizens.

In the end, it is unclear how many cases will proceed to full trials before the commissions. The lopsided rules plus the threat of capital punishment may compel many of those accused to accept plea agreements, even if harsh. Others may be convicted on the basis of evidence withheld from the defendant. This will permit prosecutors to declare victory, but the broader public will be deprived of an important opportunity to assess guilt or innocence, and fill an important historical record.

### **Lack of Independent Judicial Oversight**

The military commissions do not allow for review by a court independent of the executive branch of government. Review of the commissions’ proceedings is limited to a specially created review panel appointed by the Secretary of Defense.<sup>5</sup> No appeal is permitted to U.S. federal courts or the U.S. Court of Appeals for the Armed Forces, a civilian court independent of the executive branch that handles appeals from the courts martial.<sup>6</sup> The President has final review of commission convictions and sentences.

The executive branch is thus prosecutor, judge, jury and – since the commissions can impose the death penalty – potential executioner. Persons tried and convicted by the commissions will have no opportunity for direct, independent judicial review of verdicts, no matter how erroneous, arbitrary, or legally unsound. Review of commission decisions thus remain wholly within the control of the military, other than by relatively deferential habeas corpus review. By skirting review by a civilian court, the military commissions depart from the well-established principle of civilian review in the U.S. military justice system.

### **Improper Use of Military Courts**

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

According to the U.N. Human Rights Committee, the body that monitors compliance with the International Covenant on Civil and Political Rights,<sup>7</sup> the use of military courts to try civilians “could present serious

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<sup>5</sup> Review panels will consist of three military officers, only one of which must have experience as a judge. The Secretary of Defense may include on the panel civilians who have been temporarily commissioned into the military, but there is no obligation to do so. MCO No. 1, (6)(H)(4). On December 30, 2003, Defense Secretary Donald Rumsfeld designated four members of the Review Panel: Judge Griffin Bell, former U.S. Attorney General and former U.S. Court of Appeals judge; Judge Edward G. Biester, Judge, Court of Common Pleas of Bucks County, PA and former Pennsylvania Attorney General; Hon. William T. Coleman, Jr., former Secretary of Transportation; and Frank J. Williams, Chief Justice of the Rhode Island Supreme Court. They are appointed for a term “which normally shall not exceed two years.” MCI No. 9 (Dec. 26, 2003), 4(B)(2).

<sup>6</sup> **The U.S. Court of Appeals for the Armed Forces was established under Article I of the Constitution, which empowers Congress to make rules for the regulation of the armed forces. The court consists of five civilian judges appointed by the President and confirmed by the Senate to fifteen-year terms. The legislative history of the Uniform Code of Military Justice provides that the court is not subject to the “authority, direction, or control of the Secretary of Defense.” Its decisions are subject to review by the U.S. Supreme Court.**

<sup>7</sup> International Covenant on Civil and Political Rights (ICCPR), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976. The United States became a party to the ICCPR in 1992.

problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice.”<sup>8</sup> Such would seem to be the case with the U.S. military commissions. The Bush administration appears intent on evading the due process protections of U.S. federal courts by trying civilians for alleged military offenses that are in fact crimes that should be prosecuted in a regular criminal court.

Under the military commission rules, an offense prosecutable by the commissions must be one that has taken place “in the context of and was associated with armed conflict.”<sup>9</sup> The definition of an armed conflict under the commission rules is so broad, however, that virtually any terrorist act anywhere in the world would be within the commission’s jurisdiction. The defendant’s conduct need only be distantly or vaguely related to a traditional armed conflict.<sup>10</sup>

This explanation leaves open the possibility that the Bush administration – which has stated it is engaged in a global war against terrorism – might well consider any act anywhere in the world that is suspected of supporting a terrorist group to be “associated with armed conflict.” For instance, a non-U.S. national living in the United States could conceivably be tried by a military commission for the crime of “aiding the enemy.”<sup>11</sup> if he sent funds to al-Qaeda, rather than being tried under federal anti-terrorism legislation. The question is not whether such conduct can properly be criminalized, but rather whether such crimes can properly be tried by a military tribunal. Under the military commission rules, jurisdiction is defined to include acts that are normally considered civilian crimes and lack the necessary nexus to an armed conflict to be war crimes. The Pentagon has thus greatly expanded the range of offenses prosecutable by the military commissions. Such a misuse of military courts to try civilians would be an evasion of U.S. obligations to conduct fair trials under international human rights law.

### **Military Commission Jurisdiction Over POWs**

The U.S. military order and instructions are inconsistent with provisions of the 1949 Geneva Conventions relating to the prosecution of prisoners of war (POWs). Under the Third Geneva Convention, a POW can be validly sentenced only if tried by “the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power,”<sup>12</sup> and “shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him.”<sup>13</sup>

Because U.S. service members are tried under courts-martial as established by the Uniform Code of Military Justice and have a right of appeal to an independent civilian court,<sup>14</sup> any POW held by the United States must also be tried by a court-martial and have a similar right of appeal. Military commissions are not the same as courts-martial – they were created precisely to preclude some of the procedural safeguards of courts-martial,

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<sup>8</sup> U.N. Human Rights Committee, General Comment 13, art. 14 (Twenty-first session, 1984),

<sup>9</sup> MCI, No. 2 (Apr. 30, 2003), 5(C).

<sup>10</sup> Human Rights Watch, Letter to Department of Defense General Counsel Haynes, March 14, 2002, available online at: <http://www.hrw.org/press/2003/03/us031403.htm>. According to MCI, No. 2, 5(C), the nexus between the defendant and armed conflict:

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

<sup>11</sup> MCI No. 2, 6(B)(5).

<sup>12</sup> Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention), 75 U.N.T.S. 135, entered into force Oct. 21, 1950. Third Geneva Convention, art. 102.

<sup>13</sup> Ibid. art. 106.

<sup>14</sup> See Uniform Code of Military Justice, U.S.C. Title 10, Ch. 47. Article 2(a)(9) specifically provides military court jurisdiction over “[p]risoners of war in custody of the armed forces.”

and, as noted under the Military Order of November 13, 2001, persons tried before the commissions have no right of appeal to a civilian court.<sup>15</sup>

Detained Taliban soldiers (members of the regular armed forces of the then-government of Afghanistan) and perhaps other detained combatants should have been designated by the United States as POWs under the Third Geneva Convention. Moreover, all captured belligerents should have been treated as POWs unless a “competent tribunal” individually determined otherwise.<sup>16</sup> The Bush administration instead violated its clear obligations under the Third Geneva Convention and made a blanket ruling that no captured combatants in Afghanistan were entitled to POW status. Denying POW status without convening competent tribunals was not only unlawful, but it also contravened both past U.S. military practice and recent U.S. military practice in Iraq. (The *Hamdan* appellate court accepted as valid the president’s determination that none of those detained at Guantanamo were entitled to POW status, but also held that the military commissions could be the competent tribunal to determine POW status under the Third Geneva Convention.)

The failure of the United States to properly determine whether any persons held in connection with the armed conflict in Afghanistan are POWs does not obviate its legal obligation to ensure that any trials of persons entitled to POW status are conducted in courts-martial with a right of appeal to an independent civilian court. “[W]ilfully depriving a prisoner of war of the rights of fair and regular trial” is a grave breach of the Third Geneva Convention.<sup>17</sup>

The improper determination of the legal status of captured belligerents also bears on the propriety of charges brought against persons prosecuted before the commissions. Under international humanitarian law, so-called unlawful or unprivileged belligerents do not have any combatant immunity. That is, they may be prosecuted for conduct – such as shooting at U.S. forces – that is not criminal when undertaken by members of the armed forces. The military commission rules state that where an element of a crime requires the absence of combatant immunity, the prosecutor has the burden of establishing that the accused was indeed an unprivileged belligerent.<sup>18</sup> The issue must be decided in each case based on a fair and independent assessment of the specific facts before the commission.

The U.S. government’s high-level, public assertions that none of the persons captured during the international armed conflict in Afghanistan are entitled to POW status should not play any role in the determinations made by the military commission concerning the status of individuals being prosecuted before them. We are concerned, however, that it will be extremely difficult for a court under the direct authority of the executive branch to reach an independent and impartial finding on this issue.

### **Restrictions on Effective Defense**

The military commission rules impose important limitations on the ability of defense counsel – both military and civilian lawyers – to mount an effective defense of their clients. Many of these restrictions are spelled out in the affidavit civilian lawyers for the commissions are required to sign and with which military defense counsel must comply. A military order issued on February 5, 2004 revoked some of the worst provisions in the affidavit, including a broad-based infringement of attorney-client confidentiality and onerous restrictions on civilian defense counsel as to whom they could communicate documents or information.<sup>19</sup> There remain,

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<sup>15</sup> The Nov. 13, 2001 military order, states at sec. 7(b) that any person subject to this order:

“(1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and (2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual’s behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.”

<sup>16</sup> Third Geneva Convention, art. 5.

<sup>17</sup> Third Geneva Convention, art. 130.

<sup>18</sup> MCI No. 2, 4(B).

<sup>19</sup> Military defense counsel are directed to conduct their activities consistent with the “prescriptions and proscriptions” specified in the Affidavit and Agreement by Civilian Defense Counsel. MCI No. 4 (Apr. 30, 2003), 3(B)(4). See Annex B to MCI No. 5 (Feb. 5, 2004).

however, significant restrictions on the ability of defense counsel to fully and fairly present their client's defense.

*Attorney-Client Confidentiality:* Perhaps the most important of these restrictions is infringement of the confidentiality of attorney-client communications, which will deprive a defendant of that most fundamental of rights: to have a legal representative with whom one can have full and complete confidence. In February 2004, the Defense Department amended rules that permitted the government to monitor all communications between attorneys and defendants for "security and intelligence purposes."<sup>20</sup> Such conversations are traditionally covered by the attorney-client privilege of confidentiality, in order to encourage clients to confide openly with their attorneys.

The new rules require that such monitoring be approved only upon a determination that it would "likely produce information" for security or intelligence purposes or that it "may prevent" communications facilitating terrorist operations. More important, military and civilian defense counsel must now be notified in advance of any monitoring of their communications, and that communications solely among defense counsel will never be monitored. The new rules also detail the use and review of monitored communications.<sup>21</sup>

Human Rights Watch welcomes these changes, but remains concerned about those cases where the government insists on monitoring attorney-client communications. The ability to communicate candidly and effectively with one's attorney is inherent in the right to counsel, which in turn, helps secure the overarching right of due process and a fair trial. The U.S. government's willingness to compromise these rights is deeply troubling.

The commission rules state that any evidence or information derived from such communications "shall not be used in proceedings against the individual who made or received the relevant communication; and such information shall not be disclosed to personnel involved in the prosecution or underlying prosecution investigation of said individual."<sup>22</sup> Restricting the use of information obtained from monitoring attorney-client conversations does not fully mitigate the harm from such monitoring. The mere fact that a conversation may be monitored will likely inhibit candid conversations between the accused (whether guilty or innocent) and his attorney. A defendant will rightly hesitate to name names, including those of relatives and friends who could support his claims, out of genuine concern that the U.S. government might then seek to apprehend those persons. Under the plain wording of the provision, information so gathered could also be used by the Appointing Authority prior to commission proceedings (regarding a plea agreement) and after proceedings (regarding early release or a pardon).<sup>23</sup> The rights to counsel and to a fair trial are clearly jeopardized when the detaining officials listen in to their conversations with their attorneys, regardless of the subsequent use to which information gleaned from those conversations is put.

*Restrictions on Access to Evidence and Proceedings by Civilian Defense Counsel and Defendants:* The military commission rules deny civilian counsel with appropriate security clearance the same access to protected information as military counsel. They authorize the Appointing Authority or the Presiding Officer to close proceedings on broad grounds, such as to protect "intelligence and law enforcement sources, methods, or activities; and other national security interests."<sup>24</sup> Civilian defense counsel, unlike military counsel, may be excluded from closed military commission proceedings.<sup>25</sup> The commission rules also authorize the Presiding Officer to issue protective orders to safeguard "protected information" – a category of information that goes beyond classified material – including orders to delete the information from documents made available to the defendant or the defense team. The commission may not consider protected information unless it is presented

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<sup>20</sup> MCO No. 3 (Feb. 5, 2004), which supercedes MCI No. 5, Annex B, II(I).

<sup>21</sup> MCO No. 3.

<sup>22</sup> MCO No. 3, 4(F).

<sup>23</sup> Monitored communications and information derived from monitored communications "may be disclosed to appropriate persons other than those involved in such prosecutions." MCO No. 3, 4(F).

<sup>24</sup> MCO No. 1, 6(B)(3).

<sup>25</sup> MCI No. 4, 3(E)(4).

to the military defense counsel. But civilian defense counsel may be denied access to such information even when it is admitted into evidence.

While requiring a security clearance is permissible, Human Rights Watch is troubled that attorneys even with high-level security clearances are not guaranteed access to all materials presented in a case before the commissions. We question the very basis for restricting access to evidence and proceedings by civilian defense counsel who already have undergone a rigorous security clearance. All persons with access to classified information, whether civilians or members of the military, must protect that information. Yet, under the rules, civilian defense counsel may be excluded from critical portions of the trial and be denied access to protected information admitted against the client, even if they have a high-level security clearance.<sup>26</sup> These restrictions clearly impinge on the ability to provide effective representation. The Department of Defense should instead ensure that civilian counsel who have received a security clearance be given access to all commission proceedings, including closed sessions, and to all information necessary to their defense work.

Similarly, the military commission rules permit the exclusion of defendants themselves from portions of trials that are closed to the public.<sup>27</sup> The accused may not see classified or protected information that is used against him. While the assigned military defense counsel is guaranteed to see all evidence used in the case, the military lawyer may not discuss protected evidence with his client, which prevents the accused from confronting the evidence against him. In August 2005 the Defense Department placed a limitation on this rule so that an accused may not be denied access to evidence if to do so would deny him a “full and fair trial.” While Human Rights Watch welcomed the Pentagon’s recognition that access to evidence is necessary for a fair trial, so long as such decisions are made without judicial review by a civilian court, this change may have little practical effect.

*Review Panels:* All decisions of the military commissions will be reviewed by a review panel that will give the appearance of an appeals court, but whose structure and procedures will not ensure impartial and competent appellate review. The review panel will consist of three military officers (or civilians commissioned for this purpose) appointed by the Secretary of Defense.<sup>28</sup> While the review panel will issue a written opinion in all cases after reviewing the record of the trial,<sup>29</sup> only at its discretion will it review written submissions by the prosecution and defense and hear oral arguments.<sup>30</sup> It is thus not obligated to even consider procedural errors raised by the defense counsel after the trial or gain clarification of the issues through oral argument in a courtroom. The standard of review is also narrow in scope: the panel must disregard procedural errors that would not have “materially affected the outcome of the trial.” Moreover, the rules require, absent an extension, that the panel issue its ruling within 30 days of receipt of the case. This gives defense counsel insufficient time to prepare an appeal and have it included within the review panel’s deliberations.<sup>31</sup> Taken together, the review panel will present a façade of judicial review at the expense of providing defense counsel with a genuine opportunity to bring forth claims of procedural error and have them fairly adjudged.

### **Interlocutory Questions Reviewed by Appointing Authority**

The military commission rules allow for important legal issues occurring during the trial to be decided by the Appointing Authority, the executive branch official who brought the charges against the accused. The Appointing Authority must be the Secretary of Defense or his designate,<sup>32</sup> and is responsible for supervising the

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<sup>26</sup> MCI No. 5, Annex B, I (B).

<sup>27</sup> MCO, No. 1, 6(B)(3).

<sup>28</sup> MCO, No. 1, 6(H)(4).

<sup>29</sup> MCI, No. 9 (Dec. 26, 2003), 4(C)(5).

<sup>30</sup> MCI No. 9, 4(C)(4)(b). The Review Panel may at its discretion review amicus (friend of the court) briefs, “particularly from the government of the nation of which the accused is a citizen.” Id. (4)(c).

<sup>31</sup> MCO No. 1, 6(H)(4).

<sup>32</sup> Defense Secretary Rumsfeld initially appointed then-Deputy Defense Secretary Paul Wolfowitz as the Appointing Authority. In December 2003, as actual trials became more imminent, former Judge Advocate General John Altenburg was named to the post.

military commissions, including approving charges and plea agreements.<sup>33</sup> The military commission rules provide that the head of the commission shall turn over for decision by the Appointing Authority “all interlocutory questions, the disposition of which would effect a termination of proceedings with respect to a charge.” The Presiding Officer may also certify other interlocutory questions to the Appointing Authority as he deems appropriate.<sup>34</sup>

Important legal questions raised by defense counsel regarding such matters as the jurisdiction of the commission, the charges brought, evidentiary rulings that would result in the dismissal of a charge, or the elements of a crime would be decided not by a judge or judicial panel, but by the very same executive officer who initiated the charges and approved the prosecution, and who presumably believed he was acting in accordance with the law. This improper blurring of the functions of the prosecutorial and judicial roles violates the right to a trial by an independent and impartial tribunal under article 14 of the ICCPR. It also sharply contrasts with the U.S. military justice system, where the convening authorities (the analogue to the Appointing Authority in the military commission process) play a prosecutorial role (and may reduce sentences), but have no judicial authority whatsoever and therefore do not rule on questions of law.

Rulings on interlocutory questions could presumably be overturned by the commission review panel following the commission trial. Given that the review panel is appointed by the Appointing Authority, however, it is likely to be extremely reluctant to overturn a case-dispositive decision on which the Appointing Authority has already expressed its views.

Revisions to the commission rules made in April 2004 add a further complication to the role of the Appointing Authority. The chief prosecutor now answers to the Legal Advisor to the Appointing Authority and, in turn, to the Appointing Authority, both administratively and in terms of performance evaluations.<sup>35</sup> The prosecutorial function of the military commissions is thus subsumed within the Appointing Authority. Given the judicial powers of the Appointing Authority, who will rule on interlocutory questions, placing the office of the chief prosecutor within that of the Appointing Authority raises serious questions about whether the commission structure favors the prosecution on key matters of law that will directly affect the outcome of the proceedings.

### **Use of Evidence Gathered Through Torture or Ill-Treatment**

The commission rules themselves do not prohibit the use of evidence that was gathered via coercive techniques of interrogation. Torture and cruel or inhuman treatment are absolutely prohibited under international law, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which the United States ratified in 1994. The United States is under an affirmative obligation to ensure that any statements made as a result of torture shall not be invoked as evidence in any proceedings whatsoever.<sup>36</sup> Despite evidence that the Bush Administration has approved and used coercive interrogation tactics on detainees at Guantanamo Bay and elsewhere, it is far from clear whether defendants will be able to prevent consideration by military commissions of evidence gathered through such methods.

Under the commission rules, the standard for admission of evidence is simply whether, in the opinion of the Presiding Officer or majority of commission members, the evidence “would have probative value to a reasonable person.”<sup>37</sup> Despite the widely recognized unreliability of information gleaned from torture and ill-treatment, defendants may not be able to challenge successfully the voluntariness of information they themselves may have provided to interrogators. Moreover, the defense is unlikely to learn whether evidence was obtained from coercive interrogation of other detainees, whether held at Guantanamo or elsewhere, because

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<sup>33</sup> The Appointing Authority is responsible for approving charges against terrorist suspects, appointing the commission members, revoking eligibility of attorneys to appear, approving plea agreements, and determining when to close cases to the media. See generally, MCO No. 1.

<sup>34</sup> MCO No. 1, 4(A)(5)(d); MCI No. 8 (Apr. 30, 2003), 4(A).

<sup>35</sup> MCI No. 3 (April 15, 2004), 3(B); MCI No. 6 (April 15, 2004), 3(B).

<sup>36</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, art. 15.

<sup>37</sup> MCO No. 1, 6(D)(1)



the witness need not be brought before the commission; a hearsay account of what he said could be introduced into the evidence instead. Defense counsel therefore will be hard pressed to challenge the circumstances under which such third-party evidence was obtained.

### **Secret Trials and Gag Order for Defense Counsel**

While the commission proceedings are presumptively open to the public and media, the rules give wide latitude to the commission members to close proceedings to the public and to the accused's chosen defense lawyer. They also limit the ability of defense counsel to speak publicly about the proceedings.

The rules give the Pentagon broad discretion to conduct proceedings in secret in order to protect what it determines to be national security interests. The Appointing Authority or Presiding Officer may not only decide to close proceedings, but may exclude the accused, civilian defense counsel, or any other person, except the assigned military defense counsel. The Appointing Authority retains the discretion to decide whether the press and the public may attend open proceedings, and whether transcripts of open proceedings will be publicly released.<sup>38</sup>

The commission rules contain various provisions that prevent defense counsel from speaking publicly about their cases or commission proceedings. Collectively these rules impose a gag order on defense attorneys, a dictate of silence that contradicts the fair trial purposes of open proceedings.<sup>39</sup>

One commission rule, discussed above, prevents defense counsel from discussing information about the case with anyone except the defense team, potential witnesses and experts. In addition to constraining defense counsel investigations, this rule precludes defense counsel from talking to the media or public at large about the case. Another commission rule prohibits defense counsel – both defense and civilian counsel – from making statements about military commission cases or other matters relating to the commissions to the news media, unless they have received approval from the Appointing Authority or the General Counsel of the Secretary of Defense.<sup>40</sup>

There is no basis for giving the Defense Department control over what civilian counsel say outside of court. We know of no precedent in either civilian courts or the rules of military justice for such a gag order. Judges sometimes impose gag orders on attorneys in individual cases to protect the interests of justice, e.g., to ensure fair proceedings before an unprejudiced jury. Prohibiting attorneys from revealing protected or classified information to the public is also a familiar concept in the U.S. criminal justice system. As written, however, the commission rule is not limited to protecting sensitive information nor is it necessary to further the interests of justice.

The only apparent purpose of the gag rule is to control what the public may learn and understand about commission proceedings. Such a purpose is inconsistent with right of the public to have access to information about what its government is doing, a right that is particularly significant in the context of such nationally and internationally important proceedings. Limiting defense counsel's ability to speak to journalists can only impede the media's -- and hence the public's -- understanding of the significance of developments during the proceedings.

Additionally, the military commission rules prohibit defense attorneys from ever making any public or private statements regarding any closed sessions of the proceedings.<sup>41</sup> Human Rights Watch understands that the counsel's right to speak and the public's right to know must be balanced against the legitimate Defense Department goal of protecting national security information. Indeed, one of the commission rules commits

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<sup>38</sup> MCO No. 1, 6(B)(3)

<sup>39</sup> As the Manual for Courts-Martial states, opening proceedings "to public scrutiny reduces the chance of arbitrary or capricious decisions and enhances public confidence." RCM 806(b) (discussion).

<sup>40</sup> MCI No. 4 (5)(C). In courts martial, military defense lawyers may speak with the media about a case in accordance with professional rules of legal ethics.

<sup>41</sup> MCI No. 5, Annex B, II (F).

attorneys to never make public or private statements regarding classified or protected information.<sup>42</sup> But the rules imposed on defense attorneys silence far more than the disclosure of such information. For example, the rule would prevent defense counsel from ever commenting on whether the exclusion from closed sessions affected the counsel's ability to mount an effective defense or whether the rulings during closed sessions were fair -- even if no classified or protected information would be disclosed in such comments. The press and the public will not have access to closed sessions; their only ability to evaluate whether justice was served in those sessions will be through comments made by defense counsel or the prosecution.

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

### **“Command Influence” and Military Defense Counsel**

Under existing U.S. military law, military defense counsel are protected by various means from undue command interference in representing clients. Crucial is the requirement that they report to a defense counsel chain of command that is distinct from the normal military chain of command, and serves to distance defense lawyers from senior military or Defense Department officials. Additionally, Article 37 of the Uniform Code of Military Justice prohibits command influence in the judicial process by superior officers.<sup>43</sup> This article effectively prevents a convening authority or other commanding officer from pressuring defense counsel in cases before military tribunals.

However, under the military commission rules, military defense lawyers remain directly in the military chain of command.<sup>44</sup> They report to the Chief Defense Counsel who does not incur any confidentiality obligations.<sup>45</sup> He in turn reports to a Deputy General Counsel who reports to the Defense Department General Counsel (a political appointee who reports to the Secretary of Defense).<sup>46</sup> These officials are responsible for supervising and preparing fitness and performance evaluation reports.<sup>47</sup> Even without any overt pressure, this command structure could significantly affect the work of military defense counsel. For instance, anything a military defense lawyer tells a superior officer, such as regarding an ethical issue, could be communicated up the chain of command. This chain of command will limit a superior officer's ability to assist subordinate military defense counsel and complicate matters in the event of disciplinary hearings, despite the provisions in the military tribunal rules to protect defense counsel.

### **Right to Counsel of Choice**

The military commission instructions provide for the mandatory appointment of a military defense counsel for the defendant. The defendant may also retain, at his own expense, private counsel, but military counsel would

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<sup>42</sup> MCI No. 5, Annex B, II (F).

<sup>43</sup> UCMJ, art. 37 on “Unlawfully influencing action of court,” states:

(a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. ... (b) In the preparation of an effectiveness, fitness, or efficiency report on any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member, as counsel, represented any accused before a court-martial.

<sup>44</sup> To date, the Department of Defense has appointed five military lawyers to serve full-time as defense counsel for detainees tried before the military commissions.

<sup>45</sup> MCI No. 4, 3(B)(8).

<sup>46</sup> See MCI No. 6, 3(B).

<sup>47</sup> MCI No. 6, 3(B).

remain assigned to the defense team. As the instructions state, the “[a]ccused must be represented at all relevant times” by military defense counsel.<sup>48</sup>

The right to counsel of choice is an integral component of a fair trial – one recognized in international and U.S. law, including the rules for courts-martial. Nevertheless, the Department of Defense instructions for military commissions violate this fundamental right by requiring the defendant to accept a military lawyer and by denying the defendant the right to either represent himself or to be represented solely by private counsel.<sup>49</sup>

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

Human Rights Watch does not question the ability or willingness of military defense lawyers to represent zealously and competently anyone brought to trial before the military commissions. Those appointed have to date acted as ardent advocates on behalf of their clients. But there is no lawful basis for denying a defendant tried before military commissions the ability of conducting a defense without the participation of military defense lawyers.<sup>50</sup> The ability to represent oneself or to be represented solely by private counsel takes on added significance in the context of non-U.S. citizens who were taken into custody in Afghanistan or other countries and held as military detainees at Guantánamo. For reasons of culture, personal history, language and the conditions of their imprisonment, many of those detainees may never fully trust or cooperate with U.S. military counsel assigned to them. Such trust and cooperation are, of course, vital to an effective defense.

Forcing military defense counsel on the accused is not the only way to balance the right to counsel with protection of classified information. For example, the Department of Defense could permit civilian counsel to have access to classified documents subject to serious penalties if they in fact divulge protected information. Both civilian courts and courts martial can impose penalties for violating court orders to keep information confidential. Sensitive information can be protected by providing for such penalties in the commission rules. Moreover, existing rules of professional conduct preclude violation of confidentiality orders. The Department of Defense could also choose to use the procedures specified in the Classified Information Procedures Act<sup>51</sup> that balance the need to protect classified information and the right to a full and fair defense.

## **Second-Class Justice for Non-Citizens**

The President’s Military Order authorizing the commissions restricts their jurisdiction to persons who are not U.S. citizens. U.S. citizens may not be tried before the commissions, regardless of whether they were combatants who committed war crimes. This exclusion presumably reflects a political judgment that the U.S. public would not accept the truncated justice of commission proceedings for U.S. citizens. International human rights law, however, does not permit countries to discriminate between citizens and non-citizens with regard to their fair trial rights.<sup>52</sup> The fact that a person is not a U.S. citizen should not be used as an excuse to weaken protections for their internationally recognized rights.

Also see:

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<sup>48</sup> MCO No. 1, 4(C)(4). The defendant would have the right to request a different military counsel.

<sup>49</sup> Article 14 of the ICCPR provides that everyone charged with a criminal offense shall have the right “to communicate with counsel of his own choosing.” The Human Rights Committee has interpreted this to include a right of persons to defend themselves. See Human Rights Committee, *Hill and Hill v. Spain* (526/1993).

<sup>50</sup> Persons tried by U.S. courts-martial may conduct their defense *pro se* or proceed solely with civilian counsel if they so choose.

<sup>51</sup> Classified Information Procedures Act, PL 96-456, 96th Congress, Act of 15 Oct. 1980 - 94 Stat. 2025, 18 USC Appendix, as amended by Pub. L. 100-690, Title VII, Sec. 7020(G), Nov. 18, 1988, 102 Stat. 4396, available at <http://www.fas.org/irp/offdocs/laws/pl096456.htm>.

<sup>52</sup> ICCPR, art. 14 (“All persons shall be equal before the courts and tribunals”).

U.S.: Military Commissions Changes Are 'Cosmetic': Commissions Should Be Scrapped for Regular Courts

[http://hrw.org/english/docs/2005/08/31/usdom11671\\_txt.htm](http://hrw.org/english/docs/2005/08/31/usdom11671_txt.htm)

Letter to Defense Secretary Donald Rumsfeld on the Military Commissions at Guantanamo Bay, September 16, 2004

<http://hrw.org/english/docs/2004/09/15/usdom9350.htm>

Making Sense of the Guantanamo Bay Tribunals, <http://hrw.org/english/docs/2004/08/16/usdom9235.htm>