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Legislative Notice

No. 19

July 14, 2009

**Military Commissions Act of 2009
(FY10 Defense Authorization Bill Section 1031)**

Legislative Notice 18 (dated July 13, 2009) analyzed S. 1390, the FY10 Defense Authorization Bill. This notice is an in-depth review of one section of that bill: section 1031.

Noteworthy

- In fall 2006, Congress passed on a bipartisan basis the Military Commissions Act (MCA) of 2006, creating a forum in which the government could prosecute al Qaeda terrorists for their acts in a manner consistent with national security. Section 1031 of the FY10 Defense Authorization Bill replaces that system with a new military commissions system.
- Among other things, the section changes rules concerning hearsay; the use of classified information; and statements allegedly obtained through cruel, inhumane, or degrading treatment. It also changes the definition of an unlawful enemy combatant (relabeling the individual an “unprivileged enemy belligerent”).
- The section provides that, “Except as otherwise provided, the procedures and rules of evidence applicable in trials by general courts-martial of the United States shall apply in trials by military commission.”
- The section disbands the Court of Military Commission Review as the appellate court for the military commissions trial forum, and vests the appellate path directly from the trial forum to the U.S. Court of Appeals for the Armed Forces. This court serves as the appellate forum for the Uniform Code of Military Justice courts-martial.
- The Senate rejected several provisions of this section during consideration of the MCA when the Senate rejected Senator Levin’s substitute amendment to the MCA. (Roll call vote No. 254, 109th Congress, 2nd Session, September 27, 2006).

Overview

In fall 2006, Congress passed on a bipartisan basis the Military Commissions Act (MCA) of 2006, creating a forum in which al Qaeda terrorists could face justice for their terrorist acts in a manner consistent with national security. The Act added a new Chapter 47A to Title 10 of the U.S. Code.

The congressionally authorized military commissions were used until President Obama abruptly halted all proceedings as one of his first acts in office.¹ Charges had been referred against a collection of co-conspirators in the September 11 attacks, including the self-proclaimed mastermind, Khalid Sheikh Mohammad. A military commission judge set a trial date of October 9, 2009, for the prosecution of Ahmed Ghailani, a key figure in the 1998 bombings of the U.S. embassies in Kenya and Tanzania.² In June of this year, Ghailani was transferred to Department of Justice custody and moved to the Southern District of New York to stand trial for his terrorist acts. The judge in that case recently set the case for trial September 13, 2010, close to a full year after the case would have proceeded had the military commission been allowed to continue.³

Section 1031 of the FY10 Defense Authorization Bill strikes Chapter 47A in its entirety and replaces it with a new statutory regime, making critical changes to various elements, such as changes to the procedural and substantive evidentiary rules concerning hearsay; the use of classified information; and statements allegedly obtained through cruel, inhumane, or degrading treatment. The bill essentially re-visits many of the most contentious points during consideration of the original MCA and changes the governing structure to that rejected during the debate in 2006.

Statements Allegedly Obtained Through Coercion

- In the original MCA, the test for admission of testimony allegedly obtained through coercion was keyed to the passage of the Detainee Treatment Act (DTA).⁴
 - First, statements in which the degree of coercion is disputed are to be admitted only if the military judge finds that: 1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and 2) the interests of justice would best be served by admission of the statement into evidence.
 - Then, there is an additional requirement for statements obtained after December 30, 2005, in that the military judge also has to find that the interrogation methods used to obtain the statement did not amount to cruel, inhuman, or degrading treatment prohibited by the DTA.
- The new MCA applies the post-DTA test to all statements regardless of the date when they were taken.

¹ Exec Order No. 13,492 ¶ 7, 74 Fed. Reg. 4,897, 4,899 (Jan. 27, 2009).

² *United States v. Ahmed Khalfan Ghailani*, Trial Schedule (Mar. 4, 2009), available at <http://www.defenselink.mil/news/012%20Ghailani%20Order%20Amended%20Trial%20Schedule.pdf>.

³ *Reuters*, "Guantanamo Suspect to be Tried in U.S. Court in 2010," available at <http://in.reuters.com/article/worldNews/idINIndia-40768120090702>

⁴ 10 U.S.C. §948r.

- During consideration of the original MCA, the Senate rejected a standard barring the admission of statements obtained by use of cruel, inhuman, or degrading treatment regardless of the point in time at which they were taken when the Senate rejected a substitute amendment by Senator Levin.⁵
- Prior to the military commission trial for Salim Hamdan, Judge Allred suppressed from evidence any statement Hamdan made in Afghanistan, finding that “the interests of justice are not served by admitting these statements because of the highly coercive environments and conditions under which they were made.”⁶

Admission of Hearsay Evidence

- The MCA and the pending Defense Authorization Bill both allow for the admission of hearsay evidence at trial, although the test proposed in the pending bill is more restrictive than the test under the MCA.
 - First, under both regimes the proponent of the evidence must give sufficient notice to the adverse party of the intention to offer the evidence and the particulars of the evidence (including information on the circumstances under which the evidence was obtained).⁷
- Under the original MCA, the test for admission provides that the particular piece of hearsay evidence not be admitted “if the party opposing the admission of the evidence demonstrates that the evidence is unreliable or lacking in probative value.”⁸
- The proposed new MCA provides that the military judge may admit the hearsay evidence after taking into account all of the circumstances surrounding the taking of the statement, the degree to which the statement is corroborated, and the indicia of reliability within the statement itself. After that, the test for admission provides that the judge may admit the evidence only if the judge determines:
 - the statement is offered as evidence of a material fact;
 - the general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence; and
 - either:
 - direct testimony from the witness is not available as a practical matter, taking into consideration the physical location of the witness and the unique circumstances of the conduct of military and intelligence operations during hostilities; or
 - the production of the witness would have an adverse impact on military or intelligence operations.

⁵ Roll Call Vote No. 254, 109th Cong., 2nd Sess. (Sept. 27, 2006).

⁶ *United States v. Salim Ahmed Hamdan*, Ruling on Motion to Suppress Statements Based on Coercive Interrogation Practices, D-029 (July 20, 2008); Jerry Markon, “Guantanamo Judge Blocks Use of Some Statements,” *Washington Post* A1, July 22, 2008.

⁷ 10 U.S.C. 949a(b)(2)(E).

⁸ 10 U.S.C. 949a(b)(2)(E).

- During consideration of the original MCA, the Senate rejected a similarly restrictive test that did not place the final burden to the admission of hearsay evidence on the party opposing its admission when the Senate rejected Senator Levin’s substitute amendment.⁹
 - Under the Levin substitute, hearsay evidence was to be admitted only if “the military judge finds that the totality of the circumstances render the evidence more probative on the point for which it is offered than other evidence which the proponent can procure through reasonable efforts, taking into consideration the unique circumstances of the conduct of military and intelligence operations during hostilities.”

Use of Classified Information

- The original MCA provided a regime for the protection of classified information where the trial judge could authorize:
 - Deletion: the deletion of specified items of classified information from documents to be made available to the accused or introduced as evidence before the military commission.
 - Summary: summary of the information for such classified documents.
 - Substitution: substitution of a statement admitting relevant facts the classified information would tend to prove.
- With respect to protecting the sources, methods, or activities by which the government acquired the information at issue:
 - Upon motion, if the military judge finds during discovery that the sources, methods, or activities by which the United States acquired such evidence are classified, the judge shall authorize the government counsel to protect such matters. The judge could require an unclassified summary of the sources, methods, or activities by which the United States acquired such evidence.
 - The judge was to similarly protect such sources and methods at trial if the judge found them to be classified and found the evidence reliable.
- The proposed new MCA would provide accused al Qaeda terrorists with the same rights with respect to access to classified information against them as U.S. service members subject to court-martial. The Defense Authorization Bill provides that “classified information shall be handled in accordance with rules applicable in trials by general courts-martial of the United States.”
- The Senate rejected a similar regime of calibrating the use of classified information to the courts-martial system and affording al Qaeda terrorists the same rights as U.S. service members in accessing the classified information against them during consideration of the original MCA when the Senate rejected Senator Levin’s substitute amendment.

⁹ Roll Call Vote No. 254, 109th Cong., 2nd Sess. (Sept. 27, 2006).

Conflation of Military Commissions and Courts-Martial

- When the Congress created the military commissions in 2006, it recognized it was creating a judicial forum long used throughout the history of the country as separate and distinct from the standing court-martial system. To that end, the MCA made the specific recognition in statute that Chapter 47 (promulgating the Uniform Code of Military Justice—UCMJ) does not apply to Chapter 47A (creating the military commissions), and that interpretation of UCMJ provisions is not binding on the military commissions.¹⁰
- The proposed new MCA seeks to conflate the two systems, as the Defense Authorization Bill provides that: “Except as otherwise provided, the procedures and rules of evidence applicable in trials by general courts-martial of the United States shall apply in trials by military commission.”
- The Senate rejected a similar effort to conflate the military commissions and the courts-martial during consideration of the original MCA when the Senate rejected Senator Levin’s substitute amendment containing this specific provision.

Appellate Forum

- The original MCA created a Court of Military Commission Review to serve as the appellate court for the military commissions trial forum. Further appeals were then authorized through the D.C. Circuit and the Supreme Court.
- In another sign that the Defense Authorization Bill intends to conflate the courts-martial and the military commissions, the bill vests the appellate path directly from the trial forum to the U.S. Court of Appeals for the Armed Forces, which serves as the appellate forum for the UCMJ courts-martial.
- The Senate rejected a similar effort to place the appellate path of the military commissions through the Court of Appeals for the Armed Forces during consideration of the original MCA when the Senate rejected Senator Levin’s substitute amendment.

Ex Post Facto Concerns

- In defining the offenses triable by military commission, the original MCA declared that it was outlining the current state of the law as to offenses traditionally triable by military commission, and thus codifying these offenses at that time did not “preclude trial for crimes that occurred before the date of the enactment” of the MCA.¹¹

¹⁰ 10 U.S.C. § 948b(c).

¹¹ 10 U.S.C. § 950p.

- The proposed new MCA is less clear, seemingly leaving the decision on the state of the law to some entity other than the Congress, stating that “*to the extent* that the provisions of this subchapter codify offenses that have traditionally been triable under the law of war or otherwise triable by military commission, this subchapter does not preclude trial for offenses that occurred before the date of the enactment” of the FY10 Defense Authorization Bill.

Substantive Offense of Cruel or Inhuman Treatment

- The original MCA defined a set of offenses triable by military commission, one of which was cruel or inhuman treatment.¹² This is defined as committing an act “intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse, upon another within his custody or control.”
 - The MCA then went on to define each of the elements of the crime.
- The proposed new MCA defines it as “subject[ing] another person in their custody or under their physical control, regardless of nationality or physical location, to cruel or inhuman treatment that constitutes a grave breach of common Article 3 of the Geneva Conventions.”
 - No definition of what constitutes a grave breach of common Article 3 is provided.
 - The MCA Amendments to the War Crimes Act defined the conduct constituting a grave breach of common Article 3, but the proposed new act makes no cross-reference to that definitional scheme.
 - Note: if this proposed new definition of cruel or inhuman treatment were adopted, there could be a disconnect between the definition of cruel or inhuman treatment in the War Crimes Act and the new MCA.

Definition of Unprivileged Enemy Belligerents (Those Subject to a Military Commission)

- The main purpose of the MCA was to create a forum in which to try “alien unlawful enemy combatants” for violations of the law of war.¹³
- This bill changes that label to “unprivileged enemy belligerent,” defining this as an individual who: 1) has engaged in hostilities against the United States or its coalition partners; or 2) has purposefully and materially supported hostilities against the United States or its coalition partners.

¹² 10 U.S.C. § 950v(b)(12).

¹³ 10 U.S.C. §948b(a).