



SIZING UP THE BUSH MILITARY COMMISSIONS: COMPARISON OF MODELS OF DUE PROCESS

| | UCMJ, General Courts-Martial¹ | United States Criminal Law | International Criminal Tribunal for Yugoslavia² | International Criminal Court³ | International Covenant on Civil & Political Rights⁴ | President Bush's Military Commissions⁵ |
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| Accused's right to exculpatory evidence | <p>R.C.M. 701 requires the trial counsel to disclose evidence favorable to the defense, including evidence that the trial counsel reasonably believes would tend to negate guilt, reduce the degree of guilt, or reduce the punishment.</p> <p>The military judge may issue protective orders or regulate the time, place, and manner of discovery as necessary and just.</p> | <p>Fifth Amendment protects defendant's right to all exculpatory information, including information that tends to mitigate guilt or affects credibility of prosecution witnesses. <i>Brady v. Maryland</i>, 373 U.S. 83 (1963).</p> <p>Responsibility to disclose such evidence continues after conviction.</p> | <p>Rule 68 requires the prosecution to disclose materials that tend to show innocence, mitigate guilt, or which may affect the credibility of prosecution witnesses.</p> <p>The prosecution may apply for relief from disclosure on grounds of a State's national security. The prosecution must take "reasonable steps" to obtain permission to disclose.</p> <p>Responsibility to disclose such evidence continues after conviction.</p> | <p>Art. 67 requires the prosecutor to disclose all evidence in the prosecution's control which tends to show the innocence of the accused, mitigate guilt, or which may affect the credibility of prosecution witnesses.</p> <p>Under Art. 72, a State, acting in conjunction with the prosecutor, may apply <i>ex parte, in camera</i> to withhold such evidence on grounds of national security.</p> | Not specified. | <p>Section 5(E) requires the prosecution to submit to the defense evidence known to the prosecution that tends to exculpate the accused, subject to restrictions on national security information.</p> <p>The accused has no express right to evidence that would tend to mitigate guilt or that might affect the credibility of prosecution witnesses.</p> |
| Rules of evidence and admissibility of hearsay evidence | <p>Mil. R. Evid. 602 prohibits a witness from testifying to a matter unless sufficient evidence supports a finding that the witness has personal knowledge of the matter.</p> <p>Mil. R. Evid. 707 prohibits all evidence from polygraph examinations.</p> <p>Mil. R. Evid. 802 prohibits hearsay evidence. If a declarant is unavailable as a witness, then the judge may admit former testimony, statements made under belief of impending death, statements against interest, and statements of personal or family history.</p> | <p>Under federal statute, the U.S. Constitution, and the Federal Rules of Evidence, hearsay evidence is admissible pursuant only to a few narrowly defined exceptions, such as for former testimony that was subject to cross-examination, statements against interest, excited utterances, statements of family history, or statements made under belief of impending death.</p> <p>Testimonial statements of witnesses absent from trial can be admitted only where the declarant is unavailable, <i>and</i> only where the defendant has had a prior opportunity to cross-examine. "Admitting statements deemed reliable by a judge is</p> | <p>Under Rule 89, the Chamber may admit "any relevant evidence which it deems to have probative value," although it may exclude the evidence "if its probative value is substantially outweighed by the need to ensure a fair trial."</p> <p>Hearsay is admissible under Rule 92<i>bis</i>, but discouraged where "a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value" or "there are any other factors which make it appropriate for the witness to attend for cross-examination."</p> | <p>Art. 69 allows the Court to consider any "relevant" evidence, taking into account "the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness."</p> | Not specified. | <p>Section 6(D) allows any evidence to be admitted that would have "probative value to a reasonable person."</p> <p>There are no restrictions on hearsay evidence.</p> |

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| | Mil. R. Evid. 807 allows a judge to admit certain hearsay evidence not covered by the exceptions if it has “equivalent circumstantial guarantees of trustworthiness,” is offered as proof of material fact, is more probative than other evidence reasonably available, and the interests of justice would best be served by admission into evidence. | fundamentally at odds with the right of confrontation.” <i>See Crawford v. Washington</i> , 541 U.S. 36 (2004). | All written statements must have a signed declaration of authenticity and reliability and be witnessed. | | | |
| Admissibility of evidence obtained through coercion | <p>Art. 31(d) provides that “no statement obtained ... through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.”</p> <p>Mil. R. Evid. 304 prohibits admission of an involuntary statement <i>and</i> derivative evidence, although the statement can be admitted for impeachment purposes if it was involuntary only on the grounds of technical noncompliance with warnings about the right to counsel (in essence, <i>Miranda</i>-defective).</p> <p>Mil. R. Evid. 304(e) states that the prosecution has the burden of establishing that a statement was voluntarily made.</p> | <p>Fifth Amendment prohibits evidence obtained by coercion. <i>See Brown v. Mississippi</i>, 297 U.S. 278, 286 (1936) (coerced confessions are “revolting to the sense of justice.”) .</p> <p>Prosecution has the burden of proving that a statement was voluntarily made.</p> | Rule 95 prohibits evidence “obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings,” such as evidence obtained in violation of international human rights. | Art. 69 prohibits evidence obtained by means of a violation of the Rome Statute or “internationally recognized human rights,” if the violation “casts substantial doubt on the reliability of the evidence” or “would be antithetical to and would seriously damage the integrity of the proceedings.” | Not specifically mentioned, but Art. 7 prohibits “torture or [] cruel, inhuman or degrading treatment or punishment.” | Not specified. |
| Impartiality of judges | <p>Art. 16 provides that each courts-martial shall be made up of a military judge and not less than five members.</p> <p>Art. 25(d) prohibits any member from serving if “he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.”</p> <p>Art. 26 specifies that the military judge must be a</p> | <p>Article III provides for federal judges to be nominated by the President and confirmed by the Senate, with life tenure.</p> <p>Fifth Amendment protects the right to a fair, impartial judge. <i>See Tumey v. Ohio</i>, 273 U.S. 510, 532 (1927) (“[T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could</p> | <p>Art. 13 provides that judges “shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices.”</p> <p>Art. 12 provides that the ICTY shall be composed of 16 permanent independent judges, with no more than two from the same State.</p> | Art. 36 provides that judges “shall be of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.” Nominations shall be by State Party, and each judge must obtain a two-thirds majority vote of the Assembly of State Parties to be confirmed to the Court. | Art. 14(1) gives the accused the right to a “competent, independent and impartial tribunal established by law.” | <p>Section 4(A) allows the Secretary of Defense or his designee (the same person who also approves the charges) to designate the presiding officer, who shall be a judge advocate.</p> <p>Section 4(A) provides that each Commission shall consist of at least three members who are commissioned officers of the U.S. armed forces.</p> |

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| | <p>member of the bar of a Federal court or a member of the bar of the highest court of a State and be certified as qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.</p> <p>Art. 26(d) prohibits the military judge from having contact with the other members of the court except in the presence of the accused.</p> | <p>carry it without danger of injustice.”).</p> | <p>Judges are elected by an absolute majority of the U.N. General Assembly.</p> | <p>Art. 74 states that a Trial Chamber’s decision may be based “only on evidence submitted and discussed before it at the trial.”</p> | | |
| Availability & impartiality of appellate review | <p>Art. 66 provides right to review of questions of law by three-judge appellate panel of the Court of Military Review.</p> <p>Art. 67 provides right to review of death sentences before the Court of Military Appeals; certiorari review is available for all other cases.</p> <p>Certiorari review available before the Supreme Court.</p> | <p>Convicted person has the right to <i>de novo</i> review of decisions of law, and review of findings of fact for substantial evidence.</p> <p>Review is also available through the writ of habeas corpus.</p> | <p>Arts. 12 & 25 provide the right to appeal for review of errors of law and fact before an independent chamber of five judges.</p> | <p>Arts. 39 & 81 provide the right to appeal for review of errors of both law and fact before an independent chamber of five judges.</p> | <p>Art. 14(5) gives the convicted the right “to his conviction and sentence being reviewed by a higher tribunal according to law.”</p> | <p>Section 6(H)(4) provides for review by a panel of three military officers appointed by the Secretary of Defense, only one of whom need be a judge.</p> <p>Final decisions of the Review Panel are reviewed only by the President and the Secretary of Defense.</p> <p>The Detainee Treatment Act of 2005 restricts review in the federal courts.</p> |
| Right of the accused to know all evidence against him / participate in own trial | <p>Art. 39 requires that all proceedings except deliberations and the vote “shall be conducted in the presence of the accused, the defense counsel, and the trial counsel.”</p> <p>Mil. R. Evid. 507 provides that the identities of informants can be withheld from the accused, although the military judge must order the disclosure of the identity of the informant if it is necessary to the accused’s defense on the issue of guilt or innocence. If the prosecution chooses to call the informant as witness, then his identity must be disclosed.</p> | <p>Sixth Amendment protects the accused’s right to be present at his trial.</p> <p>Fed. R. Crim. P. 43(a) prohibits the trial <i>in absentia</i> of a defendant who is not present at the beginning of trial, but a defendant may be convicted <i>in absentia</i> if she disappears after the trial begins.</p> | <p>Art. 21(4)(d) gives the accused the right to be tried in his presence.</p> <p>Art. 22 gives the Tribunal the ability to protect vulnerable witnesses; in 1995 the Trial Chamber once ordered some witnesses’ identity to be withheld from the accused.</p> | <p>Art. 63 gives the accused the right to be present during trial, although she can be removed and required to participate through communications technology if she disrupts the trial.</p> <p>Art. 68 permits the Court to take appropriate measures to protect victims and witnesses, but states that “these measures shall not be prejudicial or inconsistent with the rights of the accused to a fair and impartial trial.”</p> | <p>Art. 14(3)(d) gives the accused the right “to be tried in his presence, and to defend himself in person.”</p> | <p>Section 6(B)(3) allows the accused and his civilian attorney to be excluded from <i>ex parte, in camera</i> presentation of certain protected evidence.</p> <p>Section 5(I) provides that the Detailed Defense Counsel (but not necessarily the accused or his civilian attorney) may cross-examine all witnesses presented by the prosecution.</p> |
| Accused’s right to | <p>Art. 46 provides that “the trial</p> | <p>Sixth Amendment gives the</p> | <p>Art. 21(4)(e) gives defense the</p> | <p>Art. 67(e) gives the defense the</p> | <p>Art. 14(3)(e) provides the</p> | <p>Section 5(H) gives the accused</p> |

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| <p>call witnesses</p> | <p>counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses.”</p> <p>R.C.M. 703 gives both parties the right to compulsory process.</p> <p>Mil. R. Evid. 403 allows the judge to exclude evidence, even if relevant, if its probative value is outweighed by the danger of unfair prejudice or confusion on the issues, or if it would cause undue delay, waste time, or represent needless presentation of cumulative evidence.</p> | <p>accused the right to compulsory process for obtaining witnesses in his favor.</p> | <p>right “to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”</p> | <p>right “to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.”</p> | <p>accused with the right “to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”</p> | <p>the ability to call witnesses “to the extent necessary and reasonably available as determined by the Presiding Officer,” and subject to limitations for national security.</p> |
| <p>Accused’s right to discovery</p> | <p>R.C.M. 701 requires the prosecution to disclose papers which accompanied the charges, as well as “books, papers, documents, photographs, [and] tangible objects” which are material to the preparation of the defense or are intended for use at trial.</p> <p>R.C.M. 701 requires the prosecution to disclose the names and addresses of prosecution witnesses before the beginning of the trial.</p> | <p>Fed. R. Crim. P. 16 requires the prosecutor to submit to the defense any books, documents, or tangible materials which are “material” to the preparation of the defense.</p> <p>The Jencks Act requires prosecutors to disclose all prior statements of the accused and prior statements of prosecution witnesses.</p> | <p>Rule 66 requires prosecution to disclose materials that supported indictment, prior statements of the accused, copies of all statements of witnesses, materials obtained from or belonging to the accused that will be introduced as evidence, and all tangible items “material to the preparation of the defense,” subject to exception for security classified information.</p> | <p>Art. 67(b) gives the defense the right “to have adequate time and facilities for the preparation of the defence” and to communicate freely with counsel in confidence.</p> <p>Rule 77 requires the prosecutor to permit the defense to inspect books, documents, photographs, and other tangible items material to the preparation of the defense or that the prosecution intends to present at trial.</p> <p>Rule 76 requires the prosecutor to provide the names and prior statements of prosecution witnesses in advance of trial.</p> | <p>Art. 14(3)(b) gives the accused has the right to “adequate time and facilities for the preparation of his defence.”</p> | <p>Section 5(E) requires the prosecution to share with the defense the materials intended to be presented at trial. The prosecution does not have to disclose tangible items that would be material to the defense, or the materials that supported indictment.</p> <p>Section 5(H) gives the accused the ability to obtain documents “to the extent necessary and reasonably available as determined by the Presiding Officer,” with exceptions for national security.</p> |
| <p>Restrictions on the discovery of national security classified information</p> | <p>Mil. R. Evid. 505(g) allows the government to apply <i>in camera</i> for relief from disclosure of classified or national security information. The government must provide notice of the kind of information that will be at issue. The military judge may delete classified information, substitute a summary, or substitute a statement admitting relevant facts, unless the disclosure of the actual information is “necessary to</p> | <p>The Classified Information Procedures Act (CIPA) provides that a judge may order that a <i>discoverable</i> document that also contains <i>nondiscoverable</i> classified information can be edited, summarized, or redacted if doing so does not prejudice the accused.</p> <p>Discoverable information may not be withheld.</p> | <p>Rule 66(C) allows prosecution to apply <i>in camera</i> for relief from disclosure of any materials, if disclosure would be contrary to the public interest or affect the security interests of any State.</p> <p>Information that is withheld from discovery cannot be used at trial.</p> | <p>Rule 72 permits a State, acting in conjunction with the prosecutor, to seek to withhold information that would prejudice its national security interests.</p> <p>If the Court cannot obtain permission to disclose the evidence, and the Court determines that the evidence is relevant or necessary for the establishment of guilt or innocence, the Court may “make</p> | <p>Not specified.</p> | <p>Section 6(D)(5) allows the prosecution to withhold any classified information, information which may endanger the safety of witnesses, information revealing sources and methods, or any “information concerning other national security interests.”</p> <p>Information withheld from the accused can be used at trial.</p> |

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| | enable the accused to prepare for trial.” | | | such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances.” Rule 81 provides that information withheld from discovery cannot subsequently be used at trial. | | |
| Right to a public trial | Mil. R. Evid. 505 allows the military judge to exclude the public during the portion of the presentation of evidence that discloses classified government information. | Sixth Amendment provides right to “speedy and public trial.” The court may close portions of the trial, but the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced; the closure must be no broader than necessary to protect that interest; the trial court must consider reasonable alternatives to closing the hearing; and it must make findings adequate to support the closure. <i>See Waller v. Georgia</i> , 467 U.S. 39 (1984). | Rule 79 allows trials or portions of trials to be closed to the press or public on reason of public order and morality, safety of witnesses, or protection of the interests of justices. The Chamber must make public its reasons for issuing the order. | Art. 64 provides for a public trial, although closed sessions can be held to protect vulnerable witnesses or confidential or sensitive information to be given in evidence. | Art. 14(1) allows for press and public to be excluded from trials “for reasons of morals, public order [] or national security ... to the extent strictly necessary in the opinion of the court.” | Section 6(B) provides for an open trial except where otherwise decided by the Presiding Officer on grounds of national security or other interests, although the proceedings should be open “to the maximum extent possible.” |
| Right to counsel | Art. 27 specifies that defense counsel shall be detailed for each general court-martial. Defense counsel must be a judge advocate and cannot have worked on the investigation or for the prosecution. | Sixth Amendment provides right to “assistance of counsel for his defense” in all felony cases, or where the accused faces more than six months in prison. <i>See Gideon v. Wainwright</i> , 372 U.S. 335 (1963). | Art. 21(4)(d) provides for the appointment of counsel in all cases. | Art. 67(d) provides the right to have legal assistance assigned by the Court “in any case where the interests of justice so require.” | Art. 14(3)(d) provides the accused with the right to have counsel appointed “in any case where the interests of justice so require.” | Section 4(C)(2) provides that each defendant shall be appointed a Detailed Defense Counsel, who shall be a judge advocate of the armed services. |
| Right to choose one’s own lawyer | Art. 38 provides that the accused may be represented by his own civilian lawyer if provided by him, or by a military lawyer of his choosing if one is reasonably available. | Sixth Amendment protects a general right to choose one’s own counsel, but it can be circumscribed where there is a conflict of interest between multiple defendants represented by the same lawyer. <i>See Wheat v. United States</i> , 486 U.S. 153 (1988). | Art. 21(4)(d) provides right to choose one’s own legal counsel. | Art. 67(d) grants the accused the right to legal assistance “of the accused’s choosing.” | Art. 14(3)(d) provides the accused with the right to “legal assistance of his own choosing.” | Section 4(C)(3)(a) allows the accused to replace his appointed Detailed Defense Counsel with another military judge advocate of his choosing, provided such military officer is available. Section 4(C)(3)(b) allows the accused to choose his own civilian defense counsel as co-counsel with the Detailed Defense Counsel, subject to certain qualifications (such as citizenship and security clearance), but the accused’s |

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| Right to self-representation | Not specified. | Sixth Amendment protects the right to represent one's self, subject to limitations for mental competence or for undue disruption to the trial. <i>See Faretta v. California</i> , 422 U.S. 806 (1975). | Art. 21(4)(d) gives defendant right to defend himself in person. In Nov. 2004, the Trial Chamber ruled in the Milosevic case that the right to represent oneself was not absolute and could be "curtailed on the grounds that a defendant's self-representation was substantially and persistently obstructing the proper and expeditious conduct of his trial." | Art. 67(d) grants the defense the right to "conduct the defence in person," unless he disrupts the trial. | Art. 14(3)(d) gives the accused the right "to defend himself in person." | Not specified. |
| Presumption of innocence | Art. 51 establishes a presumption of innocence. | Fifth Amendment requires presumption of innocence. <i>See Coffin v. United States</i> , 156 U.S. 432, 453 (1895). | Art. 21 establishes a presumption of innocence. | Art. 66 establishes a presumption of innocence. | Art. 14(2) provides right to be presumed innocent until proven guilty. | Section 5(B) provides that the accused shall be presumed innocent until proven guilty. |
| Burden of proof | Art. 52 requires that two-thirds of the judges must find proof beyond reasonable doubt. The death penalty cannot be imposed without unanimous agreement. | Fifth Amendment requires proof beyond reasonable doubt by a unanimous jury as to every fact necessary to constitute the crime. <i>See In re Winship</i> , 397 U.S. 358, 364 (1970). | Art.23 requires a majority vote of the judges to convict. Rule 87 provides that a judge shall not vote to convict unless all allegations have been proven "beyond reasonable doubt." | Art. 66 places burden on prosecution to prove the case beyond a reasonable doubt. Art. 67(i) gives the defense the right "[n]ot to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal." Art. 74 allows conviction by a majority of judges, although "the judges shall attempt to achieve unanimity in their decision." | Not specified. | Section 6(F) provides that a member of the Commission may only make a finding of guilt if convinced beyond reasonable doubt. A two-thirds vote of the Commission is necessary to convict, except that a unanimous vote is required to impose the death penalty. |
| Privilege against self-incrimination | Art. 31 gives the accused the right not to be compelled to incriminate himself or to answer any questions which may tend to incriminate him. He must be informed of the right to silence. | Fifth Amendment provides privilege against self-incrimination. Accused does not have the right to make an unsworn statement in defense. Fifth and Sixth Amendments give the accused the right to counsel during custodial | Art. 21(4)(g) gives right "not to be compelled to testify against himself or to confess guilt." Art. 18 gives the accused the right to counsel during investigations. | Art. 67(g) gives the accused the right "[n]ot to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence." Art. 67(h) gives the accused has the right to make an unsworn oral or written statement in his | Art. 14(3)(g) provides that the accused has the right "not to be compelled to testify against himself or to confess guilt." | Section 5(F) gives the accused the right not to testify against himself, but notes that this "shall not preclude admission of evidence of prior statements or conduct of the Accused." |

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| | | interrogations. | | own defense. | | |
| Right to speedy trial | R.C.M. 707 gives the accused the right to a speedy trial, including the right to be brought to trial within 120 days of the referral of charges or the imposition of restraints on liberty. | Sixth Amendment gives right to a “speedy and public trial.” | Art. 21(4)(c) gives the accused the right to speedy trial. | Art. 67(c) provides right to be tried “without undue delay.” | Art. 14(3)(c) gives the accused the right to be “tried without undue delay.” | Not specified. |

¹ Uniform Code of Military Justice, 10 U.S.C. § 801 et. seq.; and the Manual for Courts Martial (MCM), 2000 Edition.

² Statute of the International Tribunal for the Former Yugoslavia (ICTY), *adopted by* S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 6, U.N. Doc. S/RES/827 (1993), 32 I.L.M. 1203 (1993); and the Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.37 (Apr. 2006), *entered into force* 14 March 1994, *amendments adopted* 29 March 2006.

³ Rome Statute of the International Criminal Court, 2187 U.N.T.S. 3, *entered into force* July 1, 2002; and Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1 (2000).

⁴ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

⁵ Department of Defense Military Commission Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, Aug. 31, 2005.