

NATIONAL INSTITUTE OF MILITARY JUSTICE

PROPOSED AMENDMENTS TO THE UNIFORM CODE OF MILITARY JUSTICE

July 5, 2006

**Text**

**Sec. 821. Art. 21. ~~Jurisdiction of courts-martial not exclusive~~ Military commissions and provost courts**

In time of war or national emergency declared by Congress, the President may establish military commissions and provost courts consistent with international law, including the law of war. The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, and provost courts, ~~or other military tribunals~~ of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, or provost courts, ~~or other military tribunals~~.

**Sec. 836. Art. 36. President may prescribe rules**

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and provost courts, ~~and other military tribunals~~, and procedures for courts of inquiry,

may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) To the extent that the President considers it impracticable for the regulations for military commissions and provost courts to apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, the procedures in military commissions and provost courts shall, subject to any applicable rule of international law and with the exception of section 832 of this title (article 32), apply the principles of law and pretrial, trial, and post-trial procedures, including modes of proof, prescribed for general courts-martial.

(bc) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress.

#### **Sec. 866. Art. 66. Review by Court of Criminal Appeals**

(a) Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial, military commission, and provost court cases, the court may

sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Criminal Appeals established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

(b) The Judge Advocate General shall refer to a Court of Criminal Appeals the record in each case of trial by court-martial, military commission, or provost court—

(1) in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more; and

(2) except in the case of a sentence extending to death, the right to appellate review has not been waived or an appeal has not been withdrawn under section 861 of this title (article 61).

(c) In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(d) If the Court of Criminal Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) The Judge Advocate General shall, unless there is to be further action by the President, the Secretary concerned, the Court of Appeals for the Armed Forces, or the Supreme Court, instruct the convening authority to take action in accordance with the decision of the Court of Criminal Appeals. If the Court of Criminal Appeals has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(f) The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Criminal Appeals and shall meet periodically to formulate poli-

cies and procedure in regard to review of court-martial cases in the offices of the Judge Advocates General and by Courts of Criminal Appeals.

(g) No member of a Court of Criminal Appeals shall be required, or on his own initiative be permitted, to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another Court of Criminal Appeals, an effectiveness, fitness, or efficiency report, or 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.

(h) No member of a Court of Criminal Appeals shall be eligible to review the record of any trial if such member served as investigating officer in the case or served as a member of the court-martial before which such trial was conducted, or served as military judge, trial or defense counsel, or reviewing officer of such trial.

(i) The President shall determine which Court of Criminal Appeals will have jurisdiction over a military commission or provost court case.

## Comment

The first purpose of the amendment is to state directly, for the first time, the President's power to establish military commissions. At present, military commissions are referred to in several articles of the Uniform Code of Military Justice ("UCMJ"), but the statute in effect simply acknowledges their existence rather than affirmatively authorizing them. This is a function of legislative fortuities dating back to 1916, and is long overdue for correction. The amendment is not intended to disturb rulings such as *Ex parte Milligan*, 71 U.S. 2 (1866), and *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), that limit the use of military commissions and provost courts.

The second purpose of the amendment is to tie military commission procedures to court-martial procedures to the extent the President determines that use of district court procedures is unworkable. At present, Article 36 of the UCMJ simply addresses conformity with district court procedures, but leaves entirely open—except for the uniformity clause in Article 36(b)—the follow-on question of what the rules may provide if and to the extent the President has determined that district court procedures are unworkable. This second stage of the conformity issue is currently addressed only in ¶ 2(b)(2) of the *Manual for Courts-Martial*, which speaks in what can be read as precatory terms, providing that military commissions “shall be guided by” court-martial rules, and then only if there are no contrary regulations

and “applicable rules of international law.” The amendment goes beyond ¶ 2(b)(2) by broadly requiring the use of general court-martial procedures. General courts-martial are the highest level of trial court in the military justice system. Reference to their procedures is consistent with Article 18, which confers on general courts-martial jurisdiction over persons who are subject to the law of war. On the other hand, the amendment explicitly exempts military commissions and provost courts from the requirement for an investigation under Article 32, inasmuch as such investigations result in only a recommendation, which the convening authority is free to accept or reject.

The amendment would make court-martial procedure the second-step default standard for military commissions, much as district court procedure is the first-step default standard for courts-martial and military commissions. The effect would be to afford the President the same measure of deference as applies to court-martial-rule departures from the district court norm. *Hamdan v. Rumsfeld* did not articulate precisely what that level of deference is. The plurality “assume[d] that complete deference is owed to [an Article 36(a)] determination” (slip op. at 60), while Justice Kennedy (slip op. at 5)—the fifth vote—is less clear on this score. He observed that the textual differences between the practicability clauses of Article 36(a) and (b) suggest, “at the least,” that determinations under the latter are entitled to “a lower degree of deference.” Whatever the proper degree of deference, the

amendment is not intended to authorize the President to establish rules that are inconsistent with treaty obligations.

The amendment would liberate the President from the constraints imposed by the uniformity clause in the present Article 36(b), as analyzed by the *Hamdan* majority, while at the same time imposing on him a corresponding duty to justify discrepancies between court-martial and military commission procedure. The amendment does not take a position on the proper standard of deference for such determinations. Obviously, to the extent the President may elect to exercise the power to depart from the court-martial norm, those departures would be subject to scrutiny for violations of international law. This is consistent with the current text of the *Manual for Courts-Martial*, which itself is an Executive Order issued by the President.

Until 1990, Article 36(b) required that changes in the *Manual for Courts-Martial* be reported to Congress. “The power to repudiate a *Manual* provision has never been exercised, and indeed, it appears that the responsible committees of Congress have never played a significant role with respect to oversight of the President’s power under” Article 36(b). Eugene R. Fidell, *Going on Fifty: Evolution and Devolution in Military Justice*, 32 WAKE FOREST L. REV. 1213, 1216 n.12 (1997). The reporting requirement was repealed as a paperwork reduction measure.



The amendment restores the requirement and is intended to apply to rules for military commissions and provost courts as well as those for courts-martial.

The amendment draws directly on the current *Manual for Courts-Martial*, and deletes obsolete references to “other military tribunals.”

The third purpose of the amendment is to provide for appellate review of military commissions. The UCMJ provides for three stages of appellate review: by a service Court of Criminal Appeals, by the United States Court of Appeals for the Armed Forces, and by the Supreme Court of the United States. Because decisions of the Courts of Criminal Appeals are subject to review by the other courts just mentioned, only the grant of appellate jurisdiction to the Courts of Criminal Appeals in Article 66 of the UCMJ needs to be adjusted. This amendment would render superfluous the Review Panel created by the Department of Defense’s Military Commission Order, and require a conforming amendment to repeal the Detainee Treatment Act’s grant of limited military commission appellate jurisdiction to the United States Court of Appeals for the District of Columbia Circuit.

The amendment requires the President to designate which of the Courts of Criminal Appeals will have jurisdiction over a military commission case.

## Sources

1. *Manual for Courts-Martial, United States* (2005 ed.)
2. Eugene R. Fidell, Dwight H. Sullivan & Detlev F. Vagts, *Military Commission Law*, ARMY LAW., December 2005
3. Eugene R. Fidell, *Judicial Review of Presidential Rulemaking Under Article 36: The Sleeping Giant Stirs*, 4 MIL. L. RPTR. 6049 (1976)
4. Kevin J. Barry, *Military Commissions: American Justice on Trial*, FED. LAW., July 2003
5. David W. Glazier, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005 (2003)