

Some Key Facts on Military Commissions v. Federal Courts

In the current incarnation of the Military Commissions:

- ☑ Despite updated rules designed to prohibit the introduction of evidence obtained through torture or cruel, inhuman, or degrading treatment, other rules could allow military commission to consider such evidence.
 - Coerced testimony obtained at the point of capture is permitted, so long as the judge finds it reliable and probative;
 - Overbroad classified information protection rules make it nearly impossible to verify the source of information being used in military commission trials, including whether such information was obtained through abusive interrogation methods;
 - Rules permitting the use of hearsay in situations not permitted by civilian courts or courts-martial could allow evidence obtained through abusive interrogation methods to be admitted.

- ☑ Jurisdiction is defined too broadly (not compatible with international law), to including juveniles and those not engaged in hostilities;

- ☑ Defendants may be tried ex-post facto for conduct such as “material support for terrorism” and “conspiracy” that did not constitute war crimes when the acts were allegedly committed. Terrorism suspects could, by contrast, be legitimately charge in federal courts with a far broader range of charges than in the military commissions – including material support for terrorism and conspiracy.

- ☑ Hearsay evidence is admissible in situations not permitted by federal courts or courts-martial, and the defense has limited opportunities to challenge its source. The result is that the defendant is denied the right to confront the witnesses against him.

- ☑ The Defense does not have the same access to witnesses or other evidence as does the prosecution, as the defense would in a military court martial. Though the Defense has some ability to call witnesses in military commissions, unlike federal courts, there is no right to subpoena witnesses to testify for the defense. In military commissions, the judge is authorized to compel witnesses to appear, but need not do so.

- ☑ Defense counsels have frequently stated that they have insufficient resources and are otherwise prevented from fully advocating on behalf of their clients. The National Association for Criminal Defense Lawyers recently put out an advisory opinion stating that military commissions’ defense counsel would be violating their legal ethics requirements if they followed the guidelines of a recent GTMO protective order requiring disclosure of confidential attorney-client communications to DoD personnel.

FACT SHEET

- ☑ In a death penalty case, although the defense is entitled to produce mitigating evidence in the sentencing phase of the trial, defense counsel may be denied access to much of that evidence—particularly evidence about the detainee’s treatment in U.S. custody -- due to classification of evidence or the difficulty of obtaining access to witnesses. Severe restrictions on the transmission of classified evidence – including statements from a defendant to his lawyer – make a fair death penalty case in the military commission nearly impossible.
- ☑ U.S. military handpicks the judge and pool of potential panel members (the military commission equivalent of jurors), all of whom are members of the U.S. military. In a federal court, by contrast, the judge is a life-tenured civilian and the jury is drawn broadly from the civilian population.
- ☑ There is no right to a speedy trial, despite the serious difficulties in these cases of obtaining accurate evidence many years after the crimes were allegedly committed.
- ☑ MCs are only used for aliens and therefore discriminate based on citizenship. The fact that the U.S. refuses to use them for U.S. citizens is a tacit acknowledgment that they are sub-standard. The federal courts could ultimately hold the entire MC system unconstitutional on this ground.
- ☑ Judicial precedents from World War II only uphold the authority of military officers to convene law of war commissions in the theater of their command and to try violations committed after the “declaration of war” and before the conclusion of a final peace treaty. It is thus not clear that any pre-9/11 conduct can validly be tried by the commissions.
- ☑ All of these problems combined undermine the credibility of the MC verdicts. This prevents allies from cooperating with the US in counterterrorism investigations and fuels recruitment and fund-raising for terrorist groups who may want to target the United States.