

Calendar No. 605

109TH CONGRESS
2^D SESSION**S. 3886**

To authorize military commissions to bring terrorists to justice, to strengthen and modernize terrorist surveillance capabilities, and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 11, 2006

Mr. FRIST (for himself and Mr. MCCONNELL) introduced the following bill;
which was read the first time

SEPTEMBER 12, 2006

Read the second time and placed on the calendar

A BILL

To authorize military commissions to bring terrorists to justice, to strengthen and modernize terrorist surveillance capabilities, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Terrorist Tracking,
5 Identification, and Prosecution Act of 2006”.

TITLE I—MILITARY COMMISSIONS

3 SEC. 101. SHORT TITLE.

4 This title may be cited as the “Military Commissions
5 Act of 2006”.

6 SEC. 102. FINDINGS.

7 Congress makes the following findings:

8 (1) For more than 10 years, the al Qaeda ter-
9 rorist organization has waged an unlawful war of vi-
10 olence and terror against the United States and its
11 allies. Al Qaeda was involved in the bombing of the
12 World Trade Center in New York City in 1993, the
13 bombing of the United States Embassies in Kenya
14 and Tanzania in 1998, and the attack on the U.S.S.
15 Cole in Yemen in 2000. On September 11, 2001, al
16 Qaeda launched the most deadly foreign attack on
17 United States soil in history. 19 al Qaeda operatives
18 hijacked 4 commercial aircraft and piloted them into
19 the World Trade Center Towers in New York City
20 and the headquarters of the United States Depart-
21 ment of Defense at the Pentagon, and downed
22 United Airlines Flight 93. The attack destroyed the
23 Towers, severely damaged the Pentagon, and re-
24 sulted in the deaths of approximately 3,000 innocent
25 people.

1 (2) Following the attacks on the United States
2 on September 11th, Congress recognized the existing
3 hostilities with al Qaeda and affiliated terrorist orga-
4 nizations and, by the Authorization for the Use of
5 Military Force Joint Resolution (Public Law 107–
6 40), recognized that “the President has authority
7 under the Constitution to take action to deter and
8 prevent acts of international terrorism against the
9 United States” and authorized the President “to use
10 all necessary and appropriate force against those na-
11 tions, organizations, or persons he determines
12 planned, authorized, committed, or aided the ter-
13 rorist attacks that occurred on September 11, 2001
14 ... in order to prevent any future acts of inter-
15 national terrorism against the United States by such
16 nations, organizations, or persons.”.

17 (3) The President’s authority to convene mili-
18 tary commissions arises from the Constitution’s vest-
19 ing in the President of the executive power and the
20 power of Commander in Chief of the Armed Forces.
21 As the Supreme Court of the United States recog-
22 nized in *Madsen v. Kinsella*, 343 U.S. 341, 346–48
23 (1952), “[s]ince our nation’s earliest days, such
24 commissions have been constitutionally recognized
25 agencies for meeting many urgent governmental re-

1 sponsibilities related to war.... They have taken
2 many forms and borne many names. Neither their
3 procedure nor their jurisdiction has been prescribed
4 by statute. It has been adapted in each instance to
5 the need that called it forth.”.

6 (4) In exercising the authority vested in the
7 President by the Constitution and laws of the
8 United States, including the Authorization for Use
9 of Military Force Joint Resolution, and in accord-
10 ance with the law of war, the President has detained
11 enemy combatants in the course of this armed con-
12 flict and issued the Military Order of November 13,
13 2001, to govern the “Detention, Treatment, and
14 Trial of Certain Noncitizens in the War Against
15 Terrorism.” This Order authorized the Secretary of
16 Defense to establish military commissions to try in-
17 dividuals subject to the Order for any offenses tri-
18 able by military commission that such individuals
19 are alleged to have committed.

20 (5) The Supreme Court in *Hamdan v. Rums-*
21 *feld*, 126 S. Ct. 2749 (2006), held that the military
22 commissions established by the Department of De-
23 fense under the President’s Military Order of No-
24 vember 13, 2001, were not consistent with certain
25 aspects of United States domestic law. The Congress

1 may by law, and does by enactment of this title,
2 eliminate any deficiency of statutory authority to fa-
3 cilitate bringing terrorists with whom the United
4 States is engaged in armed conflict to justice for vio-
5 lations of the law of war and other offenses triable
6 by military commissions. The prosecution of such in-
7 dividuals by military commissions established and
8 conducted consistent with this title fully complies
9 with the Constitution, the laws of the United States,
10 treaties to which the United States is a party, and
11 the law of war.

12 (6) The use of military commissions is particu-
13 larly important in this context because other alter-
14 natives, such as the use of courts-martial, generally
15 are impracticable. The terrorists with whom the
16 United States is engaged in armed conflict have
17 demonstrated a commitment to the destruction of
18 the United States and its people, to the violation of
19 the law of war, and to the abuse of American legal
20 processes. In a time of ongoing armed conflict, it
21 generally is neither practicable nor appropriate for
22 combatants like al Qaeda terrorists to be tried be-
23 fore tribunals that include all of the procedures asso-
24 ciated with courts-martial.

1 (7) Many procedures for courts-martial would
2 not be practicable in trying the unlawful enemy com-
3 batants for whom this title provides for trial by mili-
4 tary commission. For instance, court-martial pro-
5 ceedings would in certain circumstances—

6 (A) compel the Government to share classi-
7 fied information with the accused, even though
8 members of al Qaeda cannot be trusted with
9 our Nation's secrets and it would not be con-
10 sistent with the national security of the United
11 States to provide them with access to classified
12 information;

13 (B) exclude the use of hearsay evidence
14 even though such evidence often will be the best
15 and most reliable evidence that the accused has
16 committed a war crime. For example, many wit-
17 nesses in military commission trials are likely to
18 be foreign nationals who are not amenable to
19 process or may be precluded for national secu-
20 rity reasons from entering the United States or
21 Guantanamo Bay to testify. Other witnesses
22 may be unavailable because of military neces-
23 sity, incarceration, injury, or death. In short,
24 applying the hearsay rules from the Manual for
25 Courts Martial or from the Federal Rules of

1 Evidence would make it virtually impossible to
2 bring terrorists to justice for their violations of
3 the law of war;

4 (C) specify speedy trials and technical
5 rules for sworn and authenticated statements
6 when, due to the exigencies of wartime, the
7 United States cannot safely require members of
8 the armed forces to gather evidence on the bat-
9 tlefield, including civilian eyewitness testimony,
10 as though they were police officers. Nor can the
11 United States divert members from the front
12 lines and their duty stations to attend military
13 commission proceedings. Therefore, strict com-
14 pliance with such rules for evidence gathered on
15 the battlefield would be impracticable, given the
16 preeminent focus on military operations and the
17 chaotic nature of combat.

18 (8) The exclusive judicial review for which this
19 title, and the Detainee Treatment Act of 2005, pro-
20 vides is without precedent in the history of armed
21 conflicts involving the United States, exceeds the
22 scope of judicial review historically provided for by
23 military commissions, and is channeled in a manner
24 appropriately tailored to—

1 (A) the circumstances of the conflicts be-
2 tween the United States and international ter-
3 rorist organizations; and

4 (B) the need to ensure fair treatment of
5 those detained as enemy combatants, to mini-
6 mize the diversion of members of the armed
7 forces from other wartime duties, and to protect
8 the national security of the United States.

9 (9) In early 2002, as memorialized in a memo-
10 randum dated February 7, 2002, the President de-
11 termined that common Article 3 of the Geneva Con-
12 ventions did not apply with respect to the United
13 States conflict with al Qaeda because al Qaeda was
14 not a party to those treaties and the conflict with al
15 Qaeda was an armed conflict of an international
16 character. That was the interpretation of the United
17 States prior to the Supreme Court's decision in
18 Hamdan on June 29, 2006. Hamdan's statement to
19 the contrary makes it appropriate to clarify the
20 standards imposed by common Article 3. This title
21 makes clear that the prohibitions against cruel, in-
22 human, and degrading treatment found in the De-
23 tainee Treatment Act of 2005 fully satisfy the obli-
24 gations of the United States with respect to the
25 standards for detention and treatment established by

1 section 1 of common Article 3, except for those obli-
2 gations arising under paragraphs (b) and (d). In ad-
3 dition, the Act makes clear that the Geneva Conven-
4 tions are not a source of judicially enforceable indi-
5 vidual rights, thereby reaffirming that enforcement
6 of the obligations imposed by the Conventions is a
7 matter between the nations that are parties to them.

8 **SEC. 103. AUTHORIZATION FOR MILITARY COMMISSIONS.**

9 (a) IN GENERAL.—The President is authorized to es-
10 tablish military commissions for violations of the law of
11 war and other offenses triable by military commissions as
12 provided in section 104 of this Act (chapter 47A of title
13 10).

14 (b) CONSTRUCTION.—The authority granted in sub-
15 section (a) shall not be construed to limit the authority
16 of the President under the Constitution of the United
17 States or the laws thereof to establish military commis-
18 sions on the battlefield, in occupied territories, or in other
19 armed conflicts should circumstances so require.

20 (c) SCOPE OF PUNISHMENT AUTHORITY.—A military
21 commission established pursuant to subsection (a) shall
22 have authority to impose upon any person found guilty
23 after a proceeding under this title a sentence that is ap-
24 propriate to the offense or offenses for which there was
25 a finding of guilt, which sentence may include death where

1 authorized by this title, imprisonment for life or a term
2 of years, payment of a fine or restitution, or such other
3 lawful punishment or condition of punishment as the com-
4 mission shall determine to be proper.

5 (d) EXECUTION OF PUNISHMENT.—The Secretary of
6 Defense shall be authorized to carry out a sentence of pun-
7 ishment decreed by a military commission pursuant to
8 subsection (a) in accordance with such procedures as the
9 Secretary may prescribe.

10 (e) ANNUAL REPORT ON TRIALS BY MILITARY COM-
11 MISSION.—

12 (1) ANNUAL REPORT REQUIRED.—Not later
13 than December 31 each year, the Secretary of De-
14 fense shall submit to the Armed Services Commit-
15 tees of the House of Representatives and the Senate
16 an annual report on the conduct of trials by military
17 commissions established pursuant to subsection (a)
18 during such year.

19 (2) FORM.—Each such report shall be sub-
20 mitted in unclassified form, with classified annex, if
21 necessary and consistent with national security.

22 **SEC. 104. MILITARY COMMISSIONS.**

23 (a) MILITARY COMMISSIONS.—

1 (1) In general.—Subtitle A of title 10, United
 2 States Code, is amended by inserting after chapter
 3 47 the following new chapter:

4 **“CHAPTER 47A—MILITARY COMMISSIONS**

5 **“SUBCHAPTER I—GENERAL PROVISIONS**

“Sec.

“948a. Definitions.

“948b. Military commissions generally.

“948c. Persons subject to military commissions.

“948d. Jurisdiction of military commissions.

6 **“§ 948a. Definitions**

7 “In this chapter:

8 “(1) ALIEN.—The term ‘alien’ means an indi-
 9 vidual who is not a citizen of the United States.

10 “(2) CLASSIFIED INFORMATION.—The term
 11 ‘classified information’ means the following—

12 “(A) Any information or material that has
 13 been determined by the United States Govern-
 14 ment pursuant to statute, Executive order, or
 15 regulation to require protection against unau-
 16 thorized disclosure for reasons of national secu-
 17 rity.

18 “(B) Any restricted data, as that term is
 19 defined in section 11 y. of the Atomic Energy
 20 Act of 1954 (42 U.S.C. 2014(y)).

21 “(3) COMMISSION.—The term ‘commission’
 22 means a military commission established pursuant to
 23 this chapter.

1 “(4) CONVENING AUTHORITY.—The term ‘con-
2 vening authority’ shall be the Secretary of Defense
3 or his designee.

4 “(5) LAWFUL ENEMY COMBATANT.—The term
5 ‘lawful enemy combatant’ means an individual deter-
6 mined by or under the authority of the President or
7 Secretary of Defense (whether on an individualized
8 or collective basis) to be—

9 “(A) a member of the regular forces of a
10 State party engaged in hostilities against the
11 United States or its cobelligerents;

12 “(B) a member of a militia, volunteer
13 corps, or organized resistance movement belong-
14 ing to a State party engaged in such hostilities,
15 which are under responsible command, wear a
16 fixed distinctive sign recognizable at a distance,
17 carry their arms openly, and abide by the law
18 of war; or

19 “(C) a member of a regular armed forces
20 who professes allegiance to a government en-
21 gaged in such hostilities, but not recognized by
22 the United States.

23 “(6) SECRETARY.—The term ‘Secretary’ means
24 the Secretary of Defense.

1 “(7) UNLAWFUL ENEMY COMBATANT.—The
2 term ‘unlawful enemy combatant’ means an indi-
3 vidual determined by or under the authority of the
4 President or the Secretary of Defense—

5 “(A) to be part of or affiliated with a force
6 or organization, including but not limited to al
7 Qaeda, the Taliban, any international terrorist
8 organization, or associated forces, engaged in
9 hostilities against the United States or its co-
10 belligerents in violation of the law of war;

11 “(B) to have committed a hostile act in aid
12 of such a force or organization so engaged; or

13 “(C) to have supported hostilities in aid of
14 such a force or organization so engaged.

15 This definition includes any individual determined by
16 a Combatant Status Review Tribunal, before the ef-
17 fective date of this Act, to have been properly de-
18 tained as an enemy combatant, but excludes any
19 alien determined by the President or the Secretary
20 of Defense (whether on an individualized or collec-
21 tive basis), or by any competent tribunal established
22 under their authority, to be (i) a lawful enemy com-
23 batant (including a prisoner of war), or (ii) a pro-
24 tected person whose trial by these military commis-
25 sions would be inconsistent with Articles 64–76 of

1 the Geneva Convention Relative to the Protection of
2 Civilian Persons in Time of War of August 12,
3 1949. For purposes of this section, the term ‘pro-
4 tected person’ refers to the category of persons de-
5 scribed in Article 4 of the Geneva Convention Rel-
6 ative to the Protection of Civilian Persons in Time
7 of War of August 12, 1949.

8 “(8) GENEVA CONVENTIONS.—The term ‘Gene-
9 va Conventions’ means the international conventions
10 signed at Geneva on August 12, 1949, including
11 common Article 3.

12 **“§ 948b. Military commissions generally**

13 “(a) PURPOSE.—This chapter codifies and estab-
14 lishes procedures governing the use of military commis-
15 sions to try unlawful enemy combatants for violations of
16 the law of war and other offenses triable by military com-
17 missions. Although military commissions traditionally
18 have been constituted by order of the President, the deci-
19 sion of the Supreme Court in *Hamdan v. Rumsfeld* makes
20 it both necessary and appropriate to codify procedures for
21 military commissions as set forth herein.

22 “(b) RULE OF CONSTRUCTION.—The procedures for
23 military commissions set forth in this chapter are modeled
24 after the procedures established for courts-martial in the
25 Uniform Code of Military Justice. However, it would be

1 neither desirable nor practicable to try unlawful enemy
2 combatants by court-martial procedures. The trial of such
3 persons by military commission presents new challenges
4 that require that interpretations of this chapter not be un-
5 duly influenced by the rules and procedures developed for
6 courts-martial. Therefore, no construction or application
7 of chapter 47 of this title shall be binding in the construc-
8 tion or application of this chapter.

9 “(c) Alien unlawful enemy combatants may be tried
10 for violations of the law of war and other offenses triable
11 by military commissions committed against the United
12 States or its cobelligerents before, on, or after September
13 11, 2001.

14 “(d) A military commission established under this
15 chapter is a regularly constituted court, affording all the
16 necessary ‘judicial guarantees which are recognized as in-
17 dispensable by civilized peoples’ for purposes of common
18 Article 3 of the Geneva Conventions.

19 **“§ 948c. Persons subject to military commissions**

20 “Alien unlawful enemy combatants, as defined in sec-
21 tion 948a of this title, shall be subject to trial by military
22 commissions as set forth in this chapter.

23 **“§ 948d. Jurisdiction of military commissions**

24 “(a) Military commissions shall have jurisdiction to
25 try any offense made punishable under this chapter, when

1 committed by an alien unlawful enemy combatant. Mili-
2 tary commissions shall not have jurisdiction over lawful
3 enemy combatants. Lawful enemy combatants who violate
4 the law of war are subject to chapter 47 of this title.
5 Courts-martial established under chapter 47 of this title
6 shall have jurisdiction to try a lawful enemy combatant
7 for any offense made punishable under this chapter.

8 “(b) Military commissions shall not have jurisdiction
9 over any individual determined by the President or the
10 Secretary of Defense (whether on an individualized or col-
11 lective basis), or by any competent tribunal established
12 under their authority, to be a ‘protected person’ whose
13 trial by these military commissions would be inconsistent
14 with Articles 64–76 of the Geneva Convention Relative to
15 the Protection of Civilian Persons in Time of War of Au-
16 gust 12, 1949. Such persons shall be tried in courts-mar-
17 tial or other tribunals consistent with their status under
18 the Geneva Conventions. For purposes of this section, the
19 term ‘protected person’ refers to the category of persons
20 described in Article 4 of the Geneva Convention Relative
21 to the Protected of Civilian Persons in Time of War of
22 August 12, 1949.

23 “(c) Military commissions may, under such limita-
24 tions as the Secretary of Defense may prescribe, adjudge

1 any punishment not forbidden by this chapter, including
 2 the penalty of death where authorized by this chapter.

3 “SUBCHAPTER II—COMPOSITION OF MILITARY
 4 COMMISSIONS

“Sec.

“948h. Who may convene military commissions.

“948i. Who may serve on military commissions.

“948j. Military judge of a military commission.

“948k. Detail of trial counsel and defense counsel.

“948l. Detail or employment of reporters and interpreters.

“948m. Number of members; excuse of members; absent and additional mem-
 bers.

5 “§ 948h. Who may convene military commissions

6 “(a) The Secretary may issue orders convening mili-
 7 tary commissions to try individuals under this chapter.

8 “(b) The Secretary may delegate his authority to con-
 9 vene military commissions or to promulgate any regula-
 10 tions under this chapter.

11 “§ 948i. Who may serve on military commissions

12 “(a) IN GENERAL.—Any commissioned officer of the
 13 United States armed forces on active duty is eligible to
 14 serve on a military commission. Eligible commissioned of-
 15 ficers shall include, without limitation, reserve personnel
 16 on active duty, National Guard personnel on active duty
 17 in Federal service, and retired personnel recalled to active
 18 duty.

19 “(b) DETAIL OF MEMBERS.—When convening a com-
 20 mission, the convening authority shall detail as members
 21 thereof such members of the armed forces as, in his opin-

1 ion, are fully qualified for the duty by reason of age, edu-
2 cation, training, experience, length of service, and judicial
3 temperament. No member of an armed force shall be eligi-
4 ble to serve as a member of a commission when he is the
5 accuser or a witness for the prosecution or has acted as
6 an investigator or counsel in the same case.

7 “(c) EXCUSE OF MEMBERS.—Before a commission is
8 assembled for the trial of a case, the convening authority
9 may excuse a member of the commission from partici-
10 pating in the case.

11 **“§ 948j. Military judge of a military commission**

12 “(a) DETAIL OF A MILITARY JUDGE.—A military
13 judge shall be detailed to each commission. The Secretary
14 shall prescribe regulations providing for the manner in
15 which military judges are detailed to such commissions.
16 The military judge shall preside over each commission to
17 which he has been detailed. The convening authority shall
18 not prepare or review any report concerning the effective-
19 ness, fitness, or efficiency of the military judge so detailed
20 relating to his performance of duty as a military judge.

21 “(b) ELIGIBILITY.—A military judge shall be a com-
22 missioned officer of the armed forces who is a member
23 of the bar of a Federal court or a member of the bar of
24 the highest court of a State, and who is certified to be
25 qualified for duty as a military judge by the Judge Advo-

1 cate General of the armed force of which such military
2 judge is a member. A commissioned officer who is certified
3 to be qualified for duty as a military judge of a commis-
4 sion may perform such other duties as are assigned to him
5 by or with the approval of that Judge Advocate General
6 or his designee.

7 “(c) INELIGIBILITY OF CERTAIN INDIVIDUALS.—No
8 person is eligible to act as military judge in any case in
9 which he is the accuser or a witness or has acted as inves-
10 tigator or a counsel in the same case.

11 “(d) CONSULTATION WITH MEMBERS; INELIGI-
12 BILITY TO VOTE.—Except as provided in section 949d of
13 this title, the military judge detailed to the commission
14 may not consult with the members of the commission ex-
15 cept in the presence of the accused, trial counsel, and de-
16 fense counsel, nor may he vote with the members of the
17 commission.

18 **“§ 948k. Detail of trial counsel and defense counsel**

19 “(a) DETAIL OF COUNSEL GENERALLY.—(1) Trial
20 counsel and military defense counsel shall be detailed for
21 each commission.

22 “(2) Assistant trial counsel and assistant and asso-
23 ciate military defense counsel may be detailed for each
24 commission.

1 “(3) Military defense counsel shall be detailed as soon
2 as practicable after the swearing of charges against the
3 person accused.

4 “(4) The Secretary shall prescribe regulations pro-
5 viding for the manner in which counsel are detailed for
6 military commissions and for the persons who are author-
7 ized to detail counsel for such military commissions.

8 “(b) TRIAL COUNSEL.—Subject to subsection (d),
9 trial counsel detailed for a military commission under this
10 chapter must be—

11 “(1) a judge advocate (as that term is defined
12 in section 801 of this title) who is—

13 “(A) a graduate of an accredited law
14 school or is a member of the bar of a Federal
15 court or of the highest court of a State; and

16 “(B) certified as competent to perform du-
17 ties as trial counsel before general courts-mar-
18 tial by the Judge Advocate General of the
19 armed force of which he is a member; or

20 “(2) a civilian who is—

21 “(A) a member of the bar of a Federal
22 court or of the highest court of a State; and

23 “(B) otherwise qualified to practice before
24 the commission pursuant to regulations pre-
25 scribed by the Secretary.

1 “(c) MILITARY DEFENSE COUNSEL.—Subject to sub-
2 section (d), military defense counsel detailed for a military
3 commission under this chapter must be a judge advocate
4 (as so defined) who is—

5 “(1) a graduate of an accredited law school or
6 a member of the bar of a Federal court or of the
7 highest court of a State; and

8 “(2) certified as competent to perform duties as
9 defense counsel before general courts-martial by the
10 Judge Advocate General of the armed force of which
11 he is a member.

12 “(d) INELIGIBILITY OF CERTAIN INDIVIDUALS.—No
13 person who has acted as an investigator, military judge,
14 or member of a military commission under this chapter
15 may act later as trial counsel or defense counsel in the
16 same case. No person who has acted for the prosecution
17 may act later in the same case for the defense, nor may
18 any person who has acted for the defense act later in the
19 same case for the prosecution.

20 **“§ 9481. Detail or employment of reporters and inter-**
21 **preters**

22 “(a) COURT REPORTERS.—Under such regulations
23 as the Secretary may prescribe, the convening authority
24 of a military commission shall detail or employ qualified

1 court reporters, who shall record the proceedings of and
2 testimony taken before that commission.

3 “(b) INTERPRETERS.—Under like regulations the
4 convening authority may detail or employ interpreters who
5 shall interpret for the commission, and, as necessary, for
6 trial counsel and defense counsel.

7 “(c) TRANSCRIPT; RECORD.—The transcript shall be
8 under the control of the convening authority, which is re-
9 sponsible for preparing the record of the proceedings.

10 **“§ 948m. Number of members; excuse of members; ab-**
11 **sent and additional members**

12 “(a) NUMBER OF MEMBERS.—(1) A military com-
13 mission under this chapter shall, except as provided in
14 paragraph (2), have at least 5 members.

15 “(2) In a case in which the death penalty is sought,
16 the military commission shall have the number of members
17 prescribed by section 949m(c) of this title.

18 “(b) EXCUSE OF MEMBERS.—No member of a mili-
19 tary commission may be absent or excused after the com-
20 mission has been assembled for the trial of the accused
21 unless excused—

22 “(1) as a result of challenge;

23 “(2) by the military judge for physical disability
24 or other good cause; or

1 “(3) by order of the convening authority for
2 good cause.

3 “(c) ABSENT AND ADDITIONAL MEMBERS.—When-
4 ever a military commission is reduced below the requisite
5 number of members, the trial may not proceed unless the
6 convening authority details new members sufficient to pro-
7 vide not less than the requisite number. The trial may pro-
8 ceed with the new members present after the recorded evi-
9 dence previously introduced before the members of the
10 commission has been read to the commission in the pres-
11 ence of the military judge, the accused (except as provided
12 by section 949d of this title), and counsel for both sides.

13 “SUBCHAPTER III—PRE-TRIAL PROCEDURE

“Sec.

“948q. Charges and specifications.

“948r. Compulsory self-incrimination prohibited; statements obtained by torture.

“948s. Service of charges.

14 “§ 948q. **Charges and specifications**

15 “(a) CHARGES AND SPECIFICATIONS.—Charges and
16 specifications against an accused shall be signed by a per-
17 son subject to chapter 47 of this title under oath before
18 a commissioned officer of the armed forces authorized to
19 administer oaths and shall state—

20 “(1) that the signer has personal knowledge of,
21 or reason to believe, the matters set forth therein;
22 and

1 charges upon which trial is to be had in English and, if
 2 appropriate, in another language that the accused under-
 3 stands, sufficiently in advance of trial to prepare a de-
 4 fense.

5 “SUBCHAPTER IV—TRIAL PROCEDURE

“Sec.

“949a. Rules.

“949b. Unlawfully influencing action of military commission.

“949c. Duties of trial counsel and defense counsel.

“949d. Sessions.

“949e. Continuances.

“949f. Challenges.

“949g. Oaths.

“949h. Former jeopardy.

“949i. Pleas of the accused.

“949j. Opportunity to obtain witnesses and other evidence.

“949k. Defense of lack of mental responsibility.

“949l. Voting and rulings.

“949m. Number of votes required.

“949n. Military commission to announce action.

“949o. Record of trial.

6 **“§ 949a. Rules**

7 “(a) PROCEDURES.—Pre-trial, trial, and post-trial
 8 procedures, including elements and modes of proof, for
 9 cases triable by military commission under this chapter
 10 shall be prescribed by the Secretary, but may not be con-
 11 trary to or inconsistent with this chapter.

12 “(b) RULES OF EVIDENCE.—Subject to such excep-
 13 tions and limitations as the Secretary may provide by reg-
 14 ulation, evidence in a military commission shall be admis-
 15 sible if the military judge determines that the evidence
 16 would have probative value to a reasonable person.

17 “(c) HEARSAY EVIDENCE.—Hearsay evidence is ad-
 18 missible, unless the military judge finds that the cir-

1 cumstances render it unreliable or lacking in probative
2 value, provided that the proponent of the evidence makes
3 the evidence known to the adverse party in advance of trial
4 or hearing.

5 “The military judge shall exclude any evidence the
6 probative value of which is substantially outweighed by the
7 danger of unfair prejudice, confusion of the issues, or mis-
8 leading the members of the commission, or by consider-
9 ations of undue delay, waste of time, or needless presen-
10 tation of cumulative evidence.

11 **“§ 949b. Unlawfully influencing action of military**
12 **commission**

13 “(a) IN GENERAL.—(1) No authority convening a
14 military commission under this chapter may censure, rep-
15 rimand, or admonish the commission or any member, mili-
16 tary judge, or counsel thereof, with respect to the findings
17 or sentence adjudged by the commission, or with respect
18 to any other exercises of its or his functions in the conduct
19 of the proceedings.

20 “(2) No person may attempt to coerce or, by any un-
21 authorized means, influence the action of a commission
22 or any member thereof, in reaching the findings or sen-
23 tence in any case, or the action of any convening, approv-
24 ing, or reviewing authority with respect to his judicial acts.

1 “(3) The foregoing provisions of this subsection shall
2 not apply with respect to—

3 “(A) general instructional or informational
4 courses in military justice if such courses are de-
5 signed solely for the purpose of instructing members
6 of a command in the substantive and procedural as-
7 pects of military commissions; or

8 “(B) statements and instructions given in open
9 proceedings by the military judge or counsel.

10 “(b) PROHIBITION ON CONSIDERATION OF ACTIONS
11 ON COMMISSION IN EVALUATION OF FITNESS.—In the
12 preparation of an effectiveness, fitness, or efficiency report
13 or any other report or document used in whole or in part
14 for the purpose of determining whether a commissioned
15 officer of the armed forces is qualified to be advanced, in
16 grade, or in determining the assignment or transfer of any
17 such officer or in determining whether any such officer
18 should be retained on active duty, no person may—

19 “(1) consider or evaluate the performance of
20 duty of any member of a military commission under
21 this chapter; or

22 “(2) give a less favorable rating or evaluation
23 to any commissioned officer because of the zeal with
24 which such officer, in acting as counsel, represented

1 any accused before a military commission under this
2 chapter.

3 **“§ 949c. Duties of trial counsel and defense counsel**

4 “(a) TRIAL COUNSEL.—The trial counsel of a mili-
5 tary commission shall prosecute in the name of the United
6 States.

7 “(b) DEFENSE COUNSEL.—(1) The accused shall be
8 represented in his defense before a military commission
9 as provided in this subsection.

10 “(2) The accused shall be represented by military
11 counsel detailed under section 948k of this title.

12 “(3) The accused may be represented by civilian
13 counsel if retained by him, provided that civilian counsel—

14 “(A) is a United States citizen;

15 “(B) is admitted to the practice of law in a
16 State, district, territory, or possession of the United
17 States, or before a Federal court;

18 “(C) has not been the subject of any sanction
19 of disciplinary action by any court, bar, or other
20 competent governmental authority for relevant mis-
21 conduct;

22 “(D) has been determined to be eligible for ac-
23 cess to information classified at the level Secret or
24 higher; and

1 “(E) has signed a written agreement to comply
2 with all applicable regulations or instructions for
3 counsel, including any rules of court for conduct
4 during the proceedings.

5 Civilian defense counsel shall protect any classified infor-
6 mation received during the course of their representation
7 of the accused in accordance with all applicable law gov-
8 erning the protection of classified information, and shall
9 not divulge such information to any person not authorized
10 to receive it.

11 “(4) If the accused is represented by civilian counsel,
12 military counsel detailed shall act as associate counsel.

13 “(5) The accused is not entitled to be represented by
14 more than one military counsel. However, the person au-
15 thorized under regulations prescribed under section 948k
16 of this title to detail counsel in his sole discretion may
17 detail additional military counsel.

18 “(6) Defense counsel may crossexamine each witness
19 for the prosecution who testifies before the commission.

20 **“§ 949d. Sessions**

21 “(a) SESSIONS WITHOUT PRESENCE OF MEM-
22 BERS.—(1) At any time after the service of charges which
23 have been referred for trial by military commission, the
24 military judge may call the commission into session with-
25 out the presence of the members for the purpose of—

1 “(A) hearing and determining motions raising
2 defenses or objections which are capable of deter-
3 mination without trial of the issues raised by a plea
4 of not guilty;

5 “(B) hearing and ruling upon any matter which
6 may be ruled upon by the military judge under this
7 chapter, whether or not the matter is appropriate for
8 later consideration or decision by the members of
9 the commission;

10 “(C) if permitted by regulations of the Sec-
11 retary, receiving the pleas of the accused; and

12 “(D) performing any other procedural function
13 which may be performed by the military judge under
14 this chapter or under rules prescribed pursuant to
15 section 949a of this title and which does not require
16 the presence of the members of the commission.

17 “(2) Except as provided in subsection (e), any pro-
18 ceedings under paragraph (1) shall be conducted in the
19 presence of the accused, defense counsel, and trial counsel,
20 and shall be made part of the record.

21 “(b) PROCEEDINGS IN PRESENCE OF ACCUSED.—
22 Except as provided in subsections (c) and (e), all pro-
23 ceedings of a military commission under this chapter shall
24 be in the presence of the accused, defense counsel, and
25 trial counsel, and shall be made a part of the record.

1 “(c) DELIBERATIONS OR VOTE OF MEMBERS.—
2 When the members of the commission deliberate or vote,
3 only the members may be present.

4 “(d) PUBLIC PROCEEDINGS.—(1) The military com-
5 mission shall hold open and public proceedings.

6 “(2) The military judge may close to the public all
7 or a part of the proceedings of a military commission
8 under this chapter only upon making a specific finding
9 that such closure is necessary to—

10 “(A) protect information the disclosure of which
11 could reasonably be expected to cause identifiable
12 damage to the public interest or the national secu-
13 rity, including intelligence or law enforcement
14 sources, methods, or activities; or

15 “(B) ensure the physical safety of individuals.

16 “(e) LIMITED EXCLUSION OF THE ACCUSED FOR
17 THE PROTECTION OF CLASSIFIED INFORMATION.—(1)
18 The military judge may, subject to the provisions of this
19 subsection, permit the admission in a military commission
20 under this chapter of classified information outside the
21 presence of the accused.

22 “(2) The military judge shall not exclude the accused
23 from any portion of the proceeding except upon a specific
24 finding that extraordinary circumstances exist such that—

25 “(A) the exclusion of the accused—

1 “(i) is necessary to protect classified infor-
2 mation the disclosure of which to the accused
3 could reasonably be expected to cause identifi-
4 able damage to the national security, including
5 intelligence or law enforcement sources, meth-
6 ods, or activities; or

7 “(ii) is necessary to ensure the physical
8 safety of individuals; or

9 “(iii) is necessary to prevent disruption of
10 the proceedings by the accused; and

11 “(B) the exclusion of the accused—

12 “(i) is no broader than necessary; and

13 “(ii) will not deprive the accused of a full
14 and fair trial.

15 “(3)(A) A finding under paragraph (2) may be based
16 upon a presentation, including an ex parte or in camera
17 presentation, by either trial counsel or defense counsel.

18 “(B) Before trial counsel may make a presentation
19 described in subparagraph (A) requesting the admission
20 of classified evidence outside the presence of the accused,
21 the head of the executive or military department or gov-
22 ernmental agency which has control over the matter (after
23 personal consideration by that officer) shall certify in writ-
24 ing to the military judge that—

1 “(i) the disclosure of such classified information
2 to the accused could reasonably be expected to prej-
3 udice the national security; and

4 “(ii) such evidence has been declassified to the
5 maximum extent possible, consistent with the re-
6 quirements of national security.

7 “(4)(A) No evidence shall be admitted if the accused
8 is not present for its admission or the evidence is not oth-
9 erwise provided to the accused, unless the evidence is clas-
10 sified information and the military judge makes a specific
11 finding that—

12 “(i) consideration of the evidence by the com-
13 mission, without the presence of the accused, is war-
14 ranted;

15 “(ii) admission of an unclassified summary or
16 redacted version of that evidence would not be an
17 adequate substitute and, in the case of testimony, al-
18 ternative methods to obscure the identity of the wit-
19 ness are not adequate; and

20 “(iii) admission of the evidence would not de-
21 prive the accused of a full and fair trial.

22 “(B) If the accused is excluded from a portion of the
23 proceeding, the accused shall be provided with a redacted
24 transcript of the proceeding and, to the extent practicable,
25 an unclassified summary of any evidence introduced.

1 Under no circumstances shall such a summary or redacted
2 transcript compromise the interests warranting the exclu-
3 sion of the accused under this subsection.

4 “(5)(A) Military defense counsel shall be present and
5 able to participate in all trial proceedings, and shall be
6 given access to all evidence admitted under paragraph (4).

7 “(B) Civilian defense counsel shall be permitted to
8 be present and to participate in all trial proceedings, and
9 shall be given access to evidence admitted under para-
10 graph (4), provided that civilian defense counsel has ob-
11 tained the necessary security clearances and that such
12 presence and access are consistent with regulations that
13 the Secretary may prescribe to protect classified informa-
14 tion.

15 “(C) Notwithstanding any other provision of law, any
16 defense counsel who receives classified information admit-
17 ted pursuant to paragraph (4) shall not be obligated to,
18 and may not, disclose that evidence to the accused.

19 “(f) ADMISSION OF STATEMENTS OF ACCUSED.—(1)
20 Notwithstanding any other provision in this chapter, no
21 statement made by the accused during an interrogation,
22 even if otherwise classified, may be admitted into evidence
23 in a military commission under this chapter unless the ac-
24 cused is present for its admission or the evidence is other-
25 wise provided to the accused.

1 “(2) For purposes of this subsection, a ‘statement’
2 is a statement communicated knowingly and directly by
3 the accused in response to questioning by foreign or
4 United States military, intelligence, or criminal investiga-
5 tive personnel. This paragraph shall not be construed to
6 prevent the redaction of intelligence sources or methods,
7 which do not constitute statements of the accused, from
8 any document provided to the accused or admitted into
9 evidence.

10 **“§ 949e. Continuances**

11 “The military judge may, for reasonable cause, grant
12 a continuance to any party for such time, and as often,
13 as may appear to be just.

14 **“§ 949f. Challenges**

15 “(a) CHALLENGES AUTHORIZED.—The military
16 judge and members of the commission may be challenged
17 by the accused or the trial counsel for cause stated to the
18 commission. The military judge shall determine the rel-
19 evance and validity of the challenges for cause, and may
20 not receive a challenge to more than one person at a time.
21 Challenges by the trial counsel shall ordinarily be pre-
22 sented and decided before those by the accused are of-
23 fered.

24 “(b) PEREMPTORY CHALLENGES.—Each accused
25 and the trial counsel is entitled to one preemptory chal-

1 lenge, but the military judge may not be challenged except
2 for cause.

3 “(c) CHALLENGES AGAINST ADDITIONAL MEM-
4 BERS.—Whenever additional members are detailed to the
5 court, and after any challenges for cause against such ad-
6 ditional members are presented and decided, each accused
7 and the trial counsel are entitled to one peremptory chal-
8 lenge against members not previously subject to peremp-
9 tory challenge.

10 **“§ 949g. Oaths**

11 “(a) IN GENERAL.—(1) Before performing their re-
12 spective duties, military judges, members of commissions,
13 trial counsel, defense counsel, reporters, and interpreters
14 shall take an oath to perform their duties faithfully.

15 “(2) The form of the oath required by paragraph (1),
16 the time and place of the taking thereof, the manner of
17 recording the same, and whether the oath shall be taken
18 for all cases in which these duties are to be performed
19 or for a particular case, shall be as prescribed in regula-
20 tions of the Secretary. These regulations may provide
21 that—

22 “(A) an oath to perform faithfully duties as a
23 military judge, trial counsel, or defense counsel, may
24 be taken at any time by any judge advocate or other

1 person certified to be qualified or competent for
2 duty; and

3 “(B) if such an oath is taken it need not again
4 be taken at the time the judge advocate, or other
5 person is detailed to that duty.

6 “(b) WITNESSES.—Each witness before a military
7 commission under this chapter shall be examined on oath.

8 “(c) OATH DEFINED.—As used in this section, ‘oath’
9 includes an affirmation.

10 **“§ 949h. Former jeopardy**

11 “(a) IN GENERAL.—No person may, without his con-
12 sent, be tried by a commission a second time for the same
13 offense.

14 “(b) SCOPE OF TRIAL.—No proceeding in which the
15 accused has been found guilty by military commission
16 upon any charge or specification is a trial in the sense
17 of this section until the finding of guilty has become final
18 after review of the case has been fully completed.

19 **“§ 949i. Pleas of the accused**

20 “(a) PLEA OF NOT GUILTY.—If an accused after a
21 plea of guilty sets up matter inconsistent with the plea,
22 or if it appears that he has entered the plea of guilty
23 through lack of understanding of its meaning and effect,
24 or if he fails or refuses to plead, a plea of not guilty shall

1 be entered in the record, and the commission shall proceed
2 as though he had pleaded not guilty.

3 “(b) FINDING OF GUILT AFTER GUILTY PLEA.—
4 With respect to any charge or specification to which a plea
5 of guilty has been made by the accused and accepted by
6 the military judge, a finding of guilty of the charge or
7 specification may be entered immediately without a vote.
8 This finding shall constitute the finding of the commission
9 unless the plea of guilty is withdrawn prior to announce-
10 ment of the sentence, in which event the proceedings shall
11 continue as though the accused had pleaded not guilty.

12 **“§ 949j. Opportunity to obtain witnesses and other**
13 **evidence**

14 “(a) IN GENERAL.—(1) Defense counsel in a military
15 commission under this chapter shall have a reasonable op-
16 portunity to obtain witnesses and other evidence, including
17 evidence in the possession of the United States, as speci-
18 fied in regulations prescribed by the Secretary.

19 “(2) Process issued in military commissions to com-
20 pel witnesses to appear and testify and to compel the pro-
21 duction of other evidence—

22 “(A) shall be similar to that which courts of the
23 United States having criminal jurisdiction may law-
24 fully issue; and

1 “(B) shall run to any place where the United
2 States shall have jurisdiction thereof.

3 “(b) TREATMENT OF CERTAIN ITEMS.—The military
4 judge in a military commission under this chapter may,
5 upon a sufficient showing, authorize trial counsel in mak-
6 ing documents available to the defense through discovery
7 conducted pursuant to such rules as the Secretary shall
8 prescribe—

9 “(1) to delete specified items of classified infor-
10 mation from such documents;

11 “(2) to substitute an unclassified summary of
12 the information for such classified documents; or

13 “(3) to substitute an unclassified statement ad-
14 mitting relevant facts that classified information
15 would tend to prove.

16 “(c) DISCLOSURE OF EXCULPATORY EVIDENCE.—
17 (1) As soon as practicable, trial counsel in a military com-
18 mission under this chapter shall disclose to the defense
19 the existence of any evidence known to trial counsel that
20 reasonably tends to exculpate the accused.

21 “(2) Exculpatory evidence that is classified may be
22 provided solely to defense counsel, and not the accused,
23 after in camera review by the military judge.

24 “(3) Before classified evidence may be withheld from
25 the accused under this subsection, the executive or mili-

1 tary department or governmental agency which has con-
2 trol over the matter shall ensure and shall certify in writ-
3 ing to the military judge that the disclosure of such evi-
4 dence to the accused could reasonably be expected to prej-
5 udice the national security and that such evidence has
6 been declassified to the maximum extent possible, con-
7 sistent with the requirements of national security.

8 “(4) Any classified exculpatory evidence that is not
9 disclosed to the accused under this subsection—

10 “(A) shall be provided to military defense coun-
11 sel;

12 “(B) shall be provided to civilian defense coun-
13 sel, provided that civilian defense counsel has ob-
14 tained the necessary security clearances and access
15 to such evidence is consistent with regulations that
16 the Secretary may prescribe to protect classified in-
17 formation; and

18 “(C) shall be provided to the accused in a re-
19 dacted or summary form, if it is possible to do so
20 without compromising intelligence sources, methods,
21 activities, or other national security interests.

22 “(5) Notwithstanding any other provision of law, any
23 defense counsel who receives evidence under this sub-
24 section shall not be obligated to, and may not, disclose
25 that evidence to the accused.

1 **“§ 949k. Defense of lack of mental responsibility**

2 “(a) AFFIRMATIVE DEFENSE.—It is an affirmative
3 defense in a trial by military commission that, at the time
4 of the commission of the acts constituting the offense, the
5 accused, as a result of a severe mental disease or defect,
6 was unable to appreciate the nature and quality or the
7 wrongfulness of the acts. Mental disease or defect does
8 not otherwise constitute a defense.

9 “(b) BURDEN OF PROOF.—The accused has the bur-
10 den of proving the defense of lack of mental responsibility
11 by clear and convincing evidence.

12 “(c) FINDINGS FOLLOWING ASSERTION OF DE-
13 FENSE.—Whenever lack of mental responsibility of the ac-
14 cused with respect to an offense is properly at issue, the
15 military judge shall instruct the members of the commis-
16 sion as to the defense of lack of mental responsibility
17 under this section and shall charge them to find the ac-
18 cused—

19 “(1) guilty;

20 “(2) not guilty; or

21 “(3) not guilty only by reason of lack of mental
22 responsibility.

23 “(d) MAJORITY VOTE REQUIRED FOR FINDING.—
24 The accused shall be found not guilty only by reason of
25 lack of mental responsibility under subsection (c)(3) only
26 if a majority of the members of the commission at the

1 time the vote is taken determines that the defense of lack
2 of mental responsibility has been established.

3 **“§ 9491. Voting and rulings**

4 “(a) VOTE BY SECRET WRITTEN BALLOT.—Voting
5 by members of a military commission on the findings and
6 on the sentence shall be by secret written ballot.

7 “(b) RULINGS.—(1) The military judge shall rule
8 upon all questions of law, including the admissibility of
9 evidence, and all interlocutory questions arising during the
10 proceedings.

11 “(2) Any such ruling made by the military judge
12 upon any question of law or any interlocutory question
13 other than the factual issue of mental responsibility of the
14 accused is conclusive and constitutes the ruling of the
15 commission. However, the military judge may change his
16 ruling at any time during the trial.

17 “(c) INSTRUCTIONS PRIOR TO VOTE.—Before a vote
18 is taken of the findings, the military judge shall, in the
19 presence of the accused and counsel, instruct the members
20 of the commission as to the elements of the offense and
21 charge them—

22 “(1) that the accused must be presumed to be
23 innocent until his guilt is established by legal and
24 competent evidence beyond reasonable doubt;

1 “(2) that in the case being considered, if there
2 is a reasonable doubt as to the guilt of the accused,
3 the doubt must be resolved in favor of the accused
4 and he must be acquitted;

5 “(3) that, if there is reasonable doubt as to the
6 degree of guilt, the finding must be in a lower de-
7 gree as to which there is no reasonable doubt; and

8 “(4) that the burden of proof to establish the
9 guilt of the accused beyond a reasonable doubt is
10 upon the United States.

11 **“§ 949m. Number of votes required**

12 “(a) CONVICTION.—No person may be convicted of
13 any offense, except as provided in section 949i(b) of this
14 title or by concurrence of $\frac{2}{3}$ of the members present at
15 the time the vote is taken.

16 “(b) SENTENCES.—(1) Except as provided in para-
17 graphs (2) and (3), sentences shall be determined by a
18 military commission by the concurrence of $\frac{2}{3}$ of the mem-
19 bers present at the time the vote is taken.

20 “(2) No person may be sentenced to suffer death, ex-
21 cept insofar as—

22 “(A) death has been expressly authorized under
23 this chapter for an offense of which the accused has
24 been found guilty;

1 “(B) the charges referred to the commission ex-
2 pressly sought the penalty of death;

3 “(C) the accused was convicted of the offense
4 by the concurrence of all the members of the mili-
5 tary commission present at the time the vote is
6 taken; and

7 “(D) all members of the military commission
8 present at the time the vote was taken concurred in
9 the sentence of death.

10 “(3) No person may be sentenced to life imprison-
11 ment or to confinement for more than 10 years, except
12 by the concurrence of $\frac{3}{4}$ of the members at the time the
13 vote is taken.

14 “(c) NUMBER OF MEMBERS REQUIRED FOR PEN-
15 ALTY OF DEATH.—(1) Except as provided in paragraph
16 (2), in a case in which the penalty of death is sought, the
17 number of members shall be not less than 12.

18 “(2) In any case described in paragraph (1) in which
19 12 members are not reasonably available because of phys-
20 ical conditions or military exigencies, the convening au-
21 thority shall specify a lesser number of members for the
22 military commission (but not fewer than 5 members), and
23 the military commission may be assembled and the trial
24 held with not fewer than the number of members so speci-
25 fied. In such a case, the convening authority shall make

1 a detailed written statement, to be appended to the record,
2 stating why a greater number of members were not rea-
3 sonably available.

4 **“§ 949n. Military commission to announce action**

5 “A military commission shall announce its findings
6 and sentence to the parties as soon as determined.

7 **“§ 949o. Record of trial**

8 “(a) RECORD; AUTHENTICATION.—Each military
9 commission shall keep a separate, substantially verbatim,
10 record of the proceedings in each case brought before it,
11 and the record shall be authenticated by the signature of
12 the military judge. If the record cannot be authenticated
13 by the military judge by reason of his death, disability,
14 or absence, it shall be authenticated by the signature of
15 the trial counsel or by that of a member of the commission
16 if the trial counsel is unable to authenticate it by reason
17 of his death, disability, or absence. Where appropriate,
18 and as provided by regulation, the record of the military
19 commission may contain a classified annex.

20 “(b) COMPLETE RECORD REQUIRED.—A complete
21 record of the proceedings and testimony shall be prepared
22 in every military commission established under this chap-
23 ter.

24 “(c) PROVISION OF COPY TO ACCUSED.—A copy of
25 the record of the proceedings of each military commission

1 shall be given to the accused as soon as it is authenticated.
 2 Where the record contains classified information, or a
 3 classified annex, the accused shall receive a redacted
 4 version of the record. The appropriate defense counsel
 5 shall have access to the unredacted record, as provided
 6 by regulation.

7 “SUBCHAPTER V—SENTENCES

“Sec.

“949s. Cruel or unusual punishments prohibited.

“949t. Maximum limits.

“949u. Execution of confinement.

8 **“§ 949s. Cruel or unusual punishments prohibited**

9 “Punishment by flogging, or by branding, marking,
 10 or tattooing on the body, or any other cruel or unusual
 11 punishment, may not be adjudged by a military commis-
 12 sion or inflicted upon any person subject to this chapter.
 13 The use of irons, single or double, except for the purpose
 14 of safe custody, is prohibited.

15 **“§ 949t. Maximum limits**

16 “The punishment which a military commission may
 17 direct for an offense may not exceed such limits as the
 18 President or Secretary may prescribe for that offense.

19 **“§ 949u. Execution of confinement**

20 “(a) IN GENERAL.—Under such regulations as the
 21 Secretary may prescribe, a sentence of confinement ad-
 22 judged by a military commission may be carried into exe-
 23 cution by confinement—

1 ground of an error of law unless the error materially prej-
2 udices the substantial rights of the accused.

3 “(b) LESSER INCLUDED OFFENSE.—Any reviewing
4 authority with the power to approve or affirm a finding
5 of guilty may approve or affirm, instead, so much of the
6 finding as includes a lesser included offense.

7 **“§ 950b. Review by the convening authority**

8 “(a) NOTICE TO CONVENING AUTHORITY OF FIND-
9 INGS AND SENTENCE.—The findings and sentence of a
10 military commission under this chapter shall be reported
11 in writing promptly to the convening authority after the
12 announcement of the sentence.

13 “(b) SUBMITTAL OF MATTERS BY ACCUSED TO CON-
14 VENING AUTHORITY.—(1) The accused may submit to the
15 convening authority matters for consideration by the con-
16 vening authority with respect to the findings and the sen-
17 tence of the military commission under this chapter.

18 “(2)(A) Except as provided in subparagraph (B), a
19 submittal under paragraph (1) shall be made in writing
20 within 20 days after the accused has been given an au-
21 thenticated record of trial under section 949o(c) of this
22 title.

23 “(B) If the accused shows that additional time is re-
24 quired for the accused to make a submittal under para-
25 graph (1), the convening authority, for good cause, may

1 extend the applicable period under subparagraph (A) for
2 not more than an additional 20 days.

3 “(3) The accused may waive his right to make a sub-
4 mission to the convening authority under paragraph (1).
5 Such a waiver must be made in writing and may not be
6 revoked. For the purposes of subsection (c)(2), the time
7 within which the accused may make a submission under
8 this subsection shall be deemed to have expired upon the
9 submission of such a waiver to the convening authority.

10 “(c) ACTION BY THE CONVENING AUTHORITY.—(1)
11 The authority under this section to modify the findings
12 and sentence of a military commission under this chapter
13 is a matter of the sole discretion and prerogative of the
14 convening authority.

15 “(2)(A) Action on the sentence of a military commis-
16 sion shall be taken by the convening authority.

17 “(B) Subject to regulations of the Secretary, such ac-
18 tion may be taken only after consideration of any matters
19 submitted by the accused under subsection (b) or after
20 the time for submitting such matters expires, whichever
21 is earlier.

22 “(C) In taking action under this paragraph, the con-
23 vening authority, in his sole discretion, may approve, dis-
24 approve, commute, or suspend the sentence in whole or

1 in part. The convening authority may not increase the sen-
2 tence beyond that which is found by the commission.

3 “(3) Action on the findings of a military commission
4 by the convening authority is not required. However, the
5 convening authority, in his sole discretion, may—

6 “(A) dismiss any charge or specification by set-
7 ting aside a finding of guilty thereto; or

8 “(B) change a finding of guilty to a charge to
9 a finding of guilty to an offense that is a lesser in-
10 cluded offense of the offense stated in the charge.

11 “(4) The convening authority shall serve on the ac-
12 cused or on defense counsel notice of any action taken by
13 the convening authority under this subsection.

14 “(d) ORDER OF REVISION OR REHEARING.—(1) Sub-
15 ject to paragraphs (2) and (3), the convening authority,
16 in his sole discretion, may order a proceeding in revision
17 or a rehearing.

18 “(2)(A) Except as provided in subparagraph (B), a
19 proceeding in revision may be ordered if—

20 “(i) there is an apparent error or omission in
21 the record; or

22 “(ii) the record shows improper or inconsistent
23 action by a military commission with respect to the
24 findings or sentence that can be rectified without

1 material prejudice to the substantial rights of the
2 accused.

3 “(B) In no case may a proceeding in revision—

4 “(i) reconsider a finding of not guilty of any
5 specification or a ruling which amounts to a finding
6 of not guilty;

7 “(ii) reconsider a finding of not guilty of any
8 charge, unless there has been a finding of guilty
9 under a specification laid under that charge, which
10 sufficiently alleges a violation; and

11 “(iii) increase the severity of the sentence un-
12 less the sentence prescribed for the offense is man-
13 datory.

14 “(3) A rehearing may be ordered by the convening
15 authority if he disapproves the findings and sentence and
16 states the reasons for disapproval of the findings. If such
17 a person disapproves the findings and sentence and does
18 not order a rehearing, he shall dismiss the charges. A re-
19 hearing as to the findings may not be ordered where there
20 is a lack of sufficient evidence in the record to support
21 the findings. A rehearing as to the sentence may be or-
22 dered if the convening authority disapproves the sentence.

23 **“§ 950c. Waiver or withdrawal of appeal**

24 “(a) WAIVER OF RIGHT OF REVIEW.—(1) In each
25 case subject to appellate review under section 950f and

1 950g of this title, except a case in which the sentence as
2 approved under section 950b of this title includes death,
3 the accused may file with the convening authority a state-
4 ment expressly waiving the right of the accused to such
5 review.

6 “(2) A waiver under paragraph (1) shall be signed
7 by both the accused and by a defense counsel.

8 “(3) A waiver under paragraph (1) must be filed, if
9 at all, within 10 days after notice on the action is served
10 on the accused under section 950b(c)(4) of this title. The
11 convening authority, for good cause, may extend the pe-
12 riod for such filing by not more than 30 days.

13 “(b) WITHDRAWAL OF APPEAL.—Except in a case in
14 which the sentence as approved under section 950b of this
15 title includes death, the accused may withdraw an appeal
16 at any time.

17 “(c) EFFECT OF WAIVER OR WITHDRAWAL.—A
18 waiver of the right to appellate review or the withdrawal
19 of an appeal under this section bars review under section
20 950f or 950g of this title.

21 **“§ 950d. Appeal by the United States**

22 “(a) INTERLOCUTORY APPEAL.—(1) Except as pro-
23 vided in paragraph (2), in a trial by military commission
24 under this chapter, the United States may take an inter-

1 locutory appeal to the Court of Military Commission Re-
2 view of any order or ruling of the military judge that—

3 “(A) terminates commission proceedings with
4 respect to a charge or specification;

5 “(B) excludes evidence that is substantial proof
6 of a fact material in the proceeding; or

7 “(C) relates to a matter under subsection (d),
8 (e), or (f) of section 949d of this title.

9 “(2) The United States may not appeal under para-
10 graph (1) an order or ruling that is, or amounts to, a find-
11 ing of not guilty by the commission with respect to the
12 charge or specification.

13 “(b) NOTICE OF APPEAL.—The United States shall
14 take an appeal of an order or ruling under subsection (a)
15 by filing a notice of appeal with the military judge within
16 5 days after the date of such order or ruling.

17 “(c) APPEAL.—An appeal under this section shall be
18 forwarded by means prescribed under regulations of the
19 Secretary directly to the Court of Military Commission Re-
20 view. In ruling on an appeal under this section, the Court
21 of Military Commission Review may act only with respect
22 to matters of law.

23 “(d) COURT OF APPEALS.—The United States may
24 appeal an adverse ruling under subsection (c) to the
25 United States Court of Appeals for the District of Colum-

1 bia Circuit by filing a petition for review in the Court of
2 Appeals within 10 days after the date of such ruling. Re-
3 view under this subsection shall be at the discretion of the
4 Court of Appeals.

5 **“§ 950e. Rehearings**

6 “(a) COMPOSITION OF MILITARY COMMISSION FOR
7 REHEARING.—Each rehearing under this chapter shall
8 take place before a military commission composed of mem-
9 bers not members of the commission which first heard the
10 case.

11 “(b) SCOPE OF REHEARING.—(1) Upon a rehear-
12 ing—

13 “(A) the accused may not be tried for any of-
14 fense of which he was found not guilty by the first
15 commission; and

16 “(B) no sentence in excess of or more than the
17 original sentence may be imposed unless—

18 “(i) the sentence is based upon a finding
19 of guilty of an offense not considered upon the
20 merits in the original proceedings; or

21 “(ii) unless the sentence prescribed for the
22 offense is mandatory.

23 “(2) Upon a rehearing, if the sentence approved after
24 the first commission was in accordance with a pre-trial
25 agreement and the accused at the rehearing changes his

1 plea with respect to the charges or specifications upon
2 which the pre-trial agreement was based, or otherwise does
3 not comply with pre-trial agreement, the sentence as to
4 those charges or specifications may include any punish-
5 ment not in excess of that lawfully adjudged at the first
6 commission.

7 **“§ 950f. Review by Court of Military Commission Re-**
8 **view**

9 “(a) COURT ESTABLISHED.—(1) The Secretary shall
10 establish a Court of Military Commission Review which
11 shall be composed of 1 or more panels, and each such
12 panel shall be composed of not less than three appellate
13 military judges.

14 “(2) For the purpose of reviewing military commis-
15 sion decisions, the court may sit in panels or as a whole
16 in accordance with rules prescribed by the Secretary.

17 “(b) COMPOSITION OF THE COURT.—(1) The Sec-
18 retary shall assign appellate military judges to a Court
19 of Military Commission Review.

20 “(2) Each appellate military judge shall meet the
21 qualifications for military judges prescribed by section
22 948j(b) of this title or shall be a civilian with comparable
23 qualifications.

1 “(2) A petition for review must be filed by the ac-
2 cused in the Court of Appeals by no longer than 20 days
3 from the earlier of when—

4 “(A) written notice of the final decision of the
5 Court of Military Commission Review is served on
6 the accused or on defense counsel; or

7 “(B) the accused submits, in the form pre-
8 scribed by section 950c of this title, a written notice
9 waiving his right to appeal under section 950f of
10 this title.

11 “(b) REVIEW BY SUPREME COURT.—The Supreme
12 Court of the United States may review by writ of certiorari
13 the final judgment of the Court of Appeals pursuant to
14 section 1257 of title 28, United States Code.

15 **“§ 950h. Appellate counsel**

16 “(a) APPOINTMENT.—The Secretary shall, by regula-
17 tion, establish procedures for the appointment of appellate
18 counsel for the United States and for the accused in mili-
19 tary commissions under this chapter. Appellate counsel
20 shall meet the qualifications for appearing before military
21 commissions under this chapter.

22 “(b) REPRESENTATION OF UNITED STATES.—Appel-
23 late counsel may represent the United States in any ap-
24 peal or review proceeding under this chapter. Appellate
25 Government counsel may represent the United States be-

1 fore the Supreme Court in cases arising under this chapter
2 when requested to do so by the Attorney General.

3 “(c) REPRESENTATION OF ACCUSED.—The accused
4 shall be represented by appellate military counsel before
5 the Court of Military Commission Review, the United
6 State Court of Appeals for the District of Columbia Cir-
7 cuit, or the Supreme Court, or by civilian counsel if re-
8 tained by him.

9 **“§ 950i. Execution of sentence; suspension of sentence**

10 “(a) EXECUTION OF SENTENCE OF DEATH ONLY
11 UPON APPROVAL BY THE PRESIDENT.—If the sentence
12 of a military commission under this chapter extends to
13 death, that part of the sentence providing for death may
14 not be executed until approved by the President. In such
15 a case, the President may commute, remit, or suspend the
16 sentence, or any part thereof, as he sees fit.

17 “(b) EXECUTION OF SENTENCE OF DEATH ONLY
18 UPON FINAL JUDGMENT OF LEGALITY OF PRO-
19 CEEDINGS.—(1) If the sentence of a military commission
20 under this chapter extends to death, the sentence may not
21 be executed until there is a final judgment as to the legal-
22 ity of the proceedings (and with respect to death, approval
23 under subsection (a)).

24 “(2) A judgment as to legality of the proceedings is
25 final for purposes of paragraph (1) when—

1 “(A) review is completed by the Court of Mili-
2 tary Commission Review and—

3 “(i) the time for the accused to file a peti-
4 tion for review by the Court of Appeals for the
5 District of Columbia Circuit has expired;

6 “(ii) the accused has not filed a timely pe-
7 tition for such review; and

8 “(iii) the case is not otherwise under re-
9 view by that Court; or

10 “(B) review is completed in accordance with the
11 judgment of the Court of Appeals for the District of
12 Columbia Circuit and—

13 “(i) a petition for a writ of certiorari is not
14 timely filed;

15 “(ii) such a petition is denied by the Su-
16 preme Court; or

17 “(iii) review is otherwise completed in ac-
18 cordance with the judgment of the Supreme
19 Court.

20 “(c) SUSPENSION OF SENTENCES.—The Secretary,
21 or the convening authority acting on the case (if other
22 than the Secretary), may suspend the execution of any
23 sentence or part thereof in the case, except a sentence of
24 death.

1 **“§ 950j. Finality of proceedings, findings, and sen-**
 2 **tences**

3 “(a) FINALITY.—The appellate review of records of
 4 trial provided by this chapter, the proceedings, findings,
 5 and sentences of military commissions as approved, re-
 6 viewed, or affirmed as required by this chapter, are final
 7 and conclusive. Orders publishing the proceedings of mili-
 8 tary commissions are binding upon all departments,
 9 courts, agencies, and officers of the United States, subject
 10 only to the authority of the President.

11 “(b) PROVISIONS OF CHAPTER SOLE BASIS FOR RE-
 12 VIEW OF MILITARY COMMISSION PROCEDURES AND AC-
 13 TIONS.—Except as otherwise provided in this chapter, and
 14 notwithstanding any other law (including section 2241 of
 15 title 28 or any other habeas corpus provision), no court,
 16 justice, or judge shall have jurisdiction to hear or consider
 17 any claim or cause of action whatsoever, including any ac-
 18 tion pending on or filed after the date of enactment of
 19 this chapter, relating to the prosecution, trial, or judgment
 20 of a military commission convened under this section, in-
 21 cluding challenges to the lawfulness of the procedures of
 22 military commissions under this chapter.

23 **“SUBCHAPTER VII—PUNITIVE MATTERS**

“Sec.

“950p. Substantive offenses generally.

“950q. Principals.

“950r. Accessory after the fact.

“950s. Conviction of lesser offenses.

“950t. Attempts.

“950u. Solicitation.

“950v. Crimes triable by military commission.

“950w. Perjury and obstruction of justice.

“950x. Contempt.

1 **“§ 950p. Substantive offenses generally**

2 “(a) PURPOSE.—The following provisions codify of-
3 fenses that have traditionally been triable by military com-
4 missions. This chapter does not establish new crimes that
5 did not exist before its establishment, but rather codifies
6 those crimes for trial by military commission.

7 “(b) EFFECT.—Because these provisions are declara-
8 tive of existing law, they do not preclude trial for crimes
9 that occurred prior to their effective date.

10 **“§ 950q. Principals**

11 “Any person is punishable as a principal under this
12 chapter who—

13 “(1) commits an offense punishable by this
14 chapter, or aids, abets, counsels, commands, or pro-
15 cures its commission;

16 “(2) causes an act to be done which if directly
17 performed by him would be punishable by this chap-
18 ter; or

19 “(3) is a superior commander who, with regard
20 to acts punishable under this chapter, knew, had
21 reason to know, or should have known, that a subor-
22 dinate was about to commit such acts or had done
23 so and the superior failed to take the necessary and

1 reasonable measures to prevent such acts or to pun-
2 ish the perpetrators thereof.

3 **“§ 950r. Accessory after the fact**

4 “Any person subject to this chapter who, knowing
5 that an offense punishable by this chapter has been com-
6 mitted, receives, comforts, or assists the offender in order
7 to hinder or prevent his apprehension, trial, or punishment
8 shall be punished as a military commission may direct.

9 **“§ 950s. Conviction of lesser offenses**

10 “An accused may be found guilty of an offense nec-
11 essarily included in the offense charged or of an attempt
12 to commit either the offense charged or an offense nec-
13 essarily included therein.

14 **“§ 950t. Attempts**

15 “(a) IN GENERAL.—Any person subject to this chap-
16 ter who attempts to commit any offense punishable by this
17 chapter shall be punished as a military commission may
18 direct.

19 “(b) SCOPE OF OFFENSE.—An act, done with spe-
20 cific intent to commit an offense under this chapter,
21 amounting to more than mere preparation and tending,
22 even though failing, to effect its commission, is an attempt
23 to commit that offense.

24 “(c) EFFECT OF CONSUMMATION.—Any person sub-
25 ject to this chapter may be convicted of an attempt to com-

1 mit an offense although it appears on the trial that the
2 offense was consummated.

3 **“§ 950u. Solicitation**

4 “Any person subject to this chapter who solicits or
5 advises another or others to commit one or more sub-
6 stantive offenses triable by military commission shall, if
7 the offense solicited or advised is attempted or committed,
8 be punished with the punishment provided for the commis-
9 sion of the offense, but, if the offense solicited or advised
10 is not committed or attempted, he shall be punished as
11 a military commission may direct.

12 **“§ 950v. Crimes triable by military commission**

13 “(a) DEFINITIONS AND CONSTRUCTION.—(1) For
14 purposes of this chapter, the term ‘military objective’ re-
15 fers to combatants and those objects during an armed con-
16 flict which, by their nature, location, purpose, or use, ef-
17 fectively contribute to the opposing force’s war-fighting or
18 war-sustaining capability and whose total or partial de-
19 struction, capture, or neutralization would constitute a
20 definite military advantage to the attacker under the cir-
21 cumstances at the time of the attack.

22 “(2) For purposes of this section only, ‘protected per-
23 son’ refers to any person entitled to protection under one
24 or more of the Geneva Conventions, including civilians not
25 taking an active part in hostilities, military personnel

1 placed hors de combat by sickness, wounds, or detention,
2 and military medical or religious personnel.

3 “(3) For purposes of this chapter, the term ‘protected
4 property’ refers to property specifically protected by the
5 law of war such as buildings dedicated to religion, edu-
6 cation, art, science or charitable purposes, historic monu-
7 ments, hospitals, or places where the sick and wounded
8 are collected, provided they are not being used for military
9 purposes or are not otherwise military objectives. Such
10 property would include objects properly identified by one
11 of the distinctive emblems of the Geneva Conventions but
12 does not include all civilian property.

13 “(4) The intent required for offenses (1), (2), (3),
14 (4), and (12) under subsection (b) precludes their applica-
15 bility with regard to collateral damage or to death, dam-
16 age, or injury incident to a lawful attack.

17 “(b) OFFENSES.—The following enumerated of-
18 fenses, when committed in the context of and associated
19 with armed conflict, shall be triable by military commis-
20 sion under this chapter at any time without limitation:

21 “(1) MURDER OF PROTECTED PERSONS.—Any
22 person who intentionally kills one or more protected
23 persons is guilty of the offense of intentionally kill-
24 ing protected persons and shall be subject to what-

1 ever punishment the commission may direct, includ-
2 ing the penalty of death.

3 “(2) ATTACKING CIVILIANS.—Any person who
4 intentionally engages in an attack upon a civilian
5 population as such or individual civilians not taking
6 active part in hostilities is guilty of the offense of at-
7 tacking civilians and shall be subject to whatever
8 punishment the commission may direct, including, if
9 death results to one or more of the victims, the pen-
10 alty of death.

11 “(3) ATTACKING CIVILIAN OBJECTS.—Any per-
12 son who intentionally engages in an attack upon ci-
13 vilian objects (property that is not a military objec-
14 tive) shall be guilty of the offense of attacking civil-
15 ian objects and shall be subject to whatever punish-
16 ment the commission may direct.

17 “(4) ATTACKING PROTECTED PROPERTY.—Any
18 person who intentionally engages in an attack upon
19 protected property shall be guilty of the offense of
20 attacking protected property and shall be subject to
21 whatever punishment the commission may direct.

22 “(5) PILLAGING.—Any person who intentionally
23 and in the absence of military necessity appropriates
24 or seizes property for private or personal use, with-
25 out the consent of a person with authority to permit

1 such appropriation or seizure, shall be guilty of the
2 offense of pillaging and shall be subject to whatever
3 punishment the commission may direct.

4 “(6) DENYING QUARTER.—Any person who,
5 with effective command or control over subordinate
6 groups, declares, orders, or otherwise indicates to
7 those forces that there shall be no survivors or sur-
8 render accepted, with the intent therefore to threat-
9 en an adversary or to conduct hostilities such that
10 there would be no survivors or surrender accepted,
11 shall be guilty of denying quarter and shall be sub-
12 ject to whatever punishment the commission may di-
13 rect.

14 “(7) TAKING HOSTAGES.—Any person who,
15 having knowingly seized or detained one or more
16 persons, threatens to kill, injure, or continue to de-
17 tain such person or persons with the intent of com-
18 pelling any nation, person other than the hostage, or
19 group of persons to act or refrain from acting as an
20 explicit or implicit condition for the safety or release
21 of such person or persons, shall be guilty of the of-
22 fense of taking hostages and shall be subject to
23 whatever punishment the commission may direct, in-
24 cluding, if death results to one or more of the vic-
25 tims, the penalty of death.

1 “(8) EMPLOYING POISON OR ANALOGOUS WEAP-
2 ONS.—Any person who intentionally, as a method of
3 warfare, employs a substance or a weapon that re-
4 leases a substance that causes death or serious and
5 lasting damage to health in the ordinary course of
6 events, through its asphyxiating, bacteriological, or
7 toxic properties, shall be guilty of employing poison
8 or analogous weapons and shall be subject to what-
9 ever punishment the commission may direct, includ-
10 ing, if death results to one or more of the victims,
11 the penalty of death.

12 “(9) USING PROTECTED PERSONS AS
13 SHIELDS.—Any person who positions, or otherwise
14 takes advantage of, a protected person with the in-
15 tent to shield a military objective from attack or to
16 shield, favor, or impede military operations, shall be
17 guilty of the offense of using protected persons as
18 shields and shall be subject to whatever punishment
19 the commission may direct, including, if death re-
20 sults to one or more of the victims, the penalty of
21 death.

22 “(10) USING PROTECTED PROPERTY AS
23 SHIELDS.—Any person who positions, or otherwise
24 takes advantage of the location of, protected prop-
25 erty under the law of war with the intent to shield

1 a military objective from attack or to shield, favor,
2 or impede military operations, shall be guilty of the
3 offense of using protected property as shields and
4 shall be subject to whatever punishment the commis-
5 sion may direct.

6 “(11) TORTURE.—Any person who commits an
7 act specifically intended to inflict severe physical or
8 mental pain or suffering (other than pain or suf-
9 fering incidental to lawful sanctions) upon another
10 person within his custody or physical control for the
11 purpose of obtaining information or a confession,
12 punishment, intimidation, coercion, or any reason
13 based on discrimination of any kind, shall be guilty
14 of torture and subject to whatever punishment the
15 commission may direct, including, if death results to
16 one or more of the victims, the penalty of death. The
17 term ‘severe mental pain or suffering’ has the mean-
18 ing provided in paragraph (2) of section 2340 of
19 title 18.

20 “(12) CRUEL OR INHUMAN TREATMENT.—Any
21 person who commits an act intended to inflict severe
22 physical or mental pain or suffering (other than pain
23 or suffering incidental to lawful sanctions), including
24 severe physical abuse, upon another person within
25 his custody or physical control shall be guilty of

1 cruel or inhuman treatment and subject to whatever
2 punishment the commission may direct, including, if
3 death results to one or more of the victims, the pen-
4 alty of death. The term ‘severe mental pain or suf-
5 fering’ has the meaning provided in paragraph (2)
6 of section 2340 of title 18.

7 “(13) INTENTIONALLY CAUSING SERIOUS BOD-
8 ILY INJURY.—Any person who intentionally causes
9 serious bodily injury to one or more persons, includ-
10 ing lawful combatants, in violation of the law of war
11 shall be guilty of the offense of causing serious bod-
12 ily injury and shall be subject to whatever punish-
13 ment the commission may direct, including, if death
14 results to one or more of the victims, the penalty of
15 death. The term ‘serious bodily injury’ has the
16 meaning provided in subsection (b)(2) of section 113
17 of title 18.

18 “(14) MUTILATING OR MAIMING.—Any person
19 who intentionally injures one or more protected per-
20 sons, by disfiguring the person or persons by any
21 mutilation thereof or by permanently disabling any
22 member, limb, or organ of his body, without any le-
23 gitimate medical or dental purpose, shall be guilty of
24 the offense of mutilation or maiming and shall be
25 subject to whatever punishment the commission may

1 direct, including, if death results to one or more of
2 the victims, the penalty of death.

3 “(15) MURDER IN VIOLATION OF THE LAW OF
4 WAR.—Any person who intentionally kills one or
5 more persons, including lawful combatants, in viola-
6 tion of the law of war shall be guilty of the offense
7 of murder in violation of the law of war and shall
8 be subject to whatever punishment the commission
9 may direct, including the penalty of death.

10 “(16) DESTRUCTION OF PROPERTY IN VIOLA-
11 TION OF THE LAW OF WAR.—Any person who inten-
12 tionally destroys property belonging to another per-
13 son in violation of the law of war shall be guilty of
14 the offense of destruction of property in violation of
15 the law of war and shall be subject to whatever pun-
16 ishment the commission may direct.

17 “(17) USING TREACHERY OR PERFIDY.—Any
18 person who, after inviting the confidence or belief of
19 one or more persons that they were entitled to, or
20 obliged to accord, protection under the law of war,
21 intentionally makes use of that confidence or belief
22 in killing, injuring, or capturing such person or per-
23 sons, shall be guilty of using treachery or perfidy
24 and shall be subject to whatever punishment the
25 commission may direct.

1 “(18) IMPROPERLY USING A FLAG OF TRUCE.—
2 Any person who uses a flag of truce to feign an in-
3 tention to negotiate, surrender, or otherwise to sus-
4 pend hostilities when there is no such intention,
5 shall be guilty of improperly using a flag of truce
6 and shall be subject to whatever punishment the
7 commission may direct.

8 “(19) IMPROPERLY USING A DISTINCTIVE EM-
9 BLEM.—Any person who intentionally uses a distinc-
10 tive emblem recognized by the law of war for com-
11 batant purposes in a manner prohibited by the law
12 of war shall be guilty of improperly using a distinc-
13 tive emblem and shall be subject to whatever punish-
14 ment the commission may direct.

15 “(20) INTENTIONALLY MISTREATING A DEAD
16 BODY.—Any person who intentionally mistreats the
17 body of a dead person, without justification by legiti-
18 mate military necessity, shall be guilty of the of-
19 fense of mistreating a dead body and shall be sub-
20 ject to whatever punishment the commission may di-
21 rect.

22 “(21) RAPE.—Any person who forcibly or with
23 coercion or threat of force wrongfully invades the
24 body of a person by penetrating, however slightly,
25 the anal or genital opening of the victim with any

1 part of the body of the accused or with any foreign
2 object shall be guilty of the offense of rape and shall
3 be subject to whatever punishment the commission
4 may direct.

5 “(22) HIJACKING OR HAZARDING A VESSEL OR
6 AIRCRAFT.—Any person subject to this chapter who
7 intentionally seizes, exercises unauthorized control
8 over, or endangers the safe navigation of, a vessel or
9 aircraft that was not a legitimate military target is
10 guilty of the offense of hijacking or hazarding a ves-
11 sel or aircraft and shall be subject to whatever pun-
12 ishment the commission may direct, including, if
13 death results to one or more of the victims, the pen-
14 alty of death.

15 “(23) TERRORISM.—Any person subject to this
16 chapter who intentionally kills or inflicts great bodily
17 harm on one or more persons, or intentionally en-
18 gages in an act that evinces a wanton disregard for
19 human life, in a manner calculated to influence or
20 affect the conduct of government or civilian popu-
21 lation by intimidation or coercion, or to retaliate
22 against government conduct, shall be guilty of the
23 offense of terrorism and shall be subject to whatever
24 punishment the commission may direct, including, if

1 death results to one or more of the victims, the pen-
2 alty of death.

3 “(24) PROVIDING MATERIAL SUPPORT FOR
4 TERRORISM.—Any person who provides material
5 support or resources, knowing or intending that they
6 are to be used in preparation for, or in carrying out,
7 an act of terrorism (as defined in subsection
8 (b)(23)), or who intentionally provides material sup-
9 port or resources to an international terrorist orga-
10 nization engaged in hostilities against the United
11 States, knowing that such organization has engaged
12 or engages in terrorism (as defined in subsection
13 (b)(23)), shall be guilty of the offense of providing
14 material support for terrorism and shall be subject
15 to whatever punishment the commission may direct.
16 The term ‘material support or resources’ has the
17 meaning provided in subsection (b) of section 2339A
18 of title 18.

19 “(25) WRONGFULLY AIDING THE ENEMY.—Any
20 person who, in breach of an allegiance or duty to the
21 United States, knowingly and intentionally aids an
22 enemy of the United States or one its cobelligerents
23 shall be guilty of the offense of wrongfully aiding the
24 enemy and shall be subject to whatever punishment
25 the commission may direct.

1 “(26) SPYING.—Any person who, with intent or
2 reason to believe that it is to be used to the injury
3 of the United States or to the advantage of a foreign
4 power, collects or attempts to collect certain infor-
5 mation by clandestine means or while acting under
6 false pretenses, for the purpose of conveying such in-
7 formation to an enemy of the United States or one
8 of its cobelligerents, shall be guilty of the offense of
9 spying and shall be subject to whatever punishment
10 the commission may direct, including the penalty of
11 death.

12 “(27) CONSPIRACY.—Any person who conspires
13 to commit one or more substantive offenses triable
14 under this section, and who knowingly does any
15 overt act to effect the object of the conspiracy, shall
16 be guilty of conspiracy and shall be subject to what-
17 ever punishment the commission may direct, includ-
18 ing, if death results to one or more of the victims,
19 the penalty of death.

20 **“§ 950w. Perjury and obstruction of justice**

21 “The military commissions also may try offenses and
22 impose punishments for perjury, false testimony, or ob-
23 struction of justice related to military commissions.

1 **“§ 950x. Contempt**

2 “A military commission may punish for contempt any
3 person who uses any menacing word, sign, or gesture in
4 its presence, or who disturbs its proceedings by any riot
5 or disorder.”.

6 (2) TABLES OF CHAPTERS AMENDMENTS.—The
7 tables of chapters at the beginning of subtitle A and
8 part II of subtitle A of title 10, United States Code,
9 are each amended by inserting after the item relat-
10 ing to chapter 47 the following new item:

“CHAPTER 47A—MILITARY COMMISSIONS

“SUBCHAPTER I—GENERAL PROVISIONS

“SUBCHAPTER II—COMPOSITION OF COURTS-MARTIAL

“SUBCHAPTER III—PRE-TRIAL PROCEDURE

“SUBCHAPTER IV—TRIAL PROCEDURE

“SUBCHAPTER V—SENTENCES

“SUBCHAPTER VI—POST-TRIAL PROCEDURE AND REVIEW OF MILITARY
COMMISSIONS

“SUBCHAPTER VII—PUNITIVE MATTERS”.

11 (b) SUBMITTAL OF PROCEDURES TO CONGRESS.—

12 (1) SUBMITTAL OF PROCEDURES.—Not later
13 than 90 days after the date of the enactment of this
14 Act, the Secretary shall submit to the Committees
15 on Armed Forces of the Senate and the House of
16 Representatives a report setting forth the procedures
17 for military commissions prescribed under chapter
18 47A of title 10, United States Code (as added by
19 subsection (a)).

1 (2) SUBMITTAL OF MODIFICATIONS.—Not later
2 than 60 days before the date on which any proposed
3 modification of the procedures described in para-
4 graph (1) shall go into effect, the Secretary shall
5 submit to the committees of Congress referred to in
6 that paragraph a report describing such modifica-
7 tions.

8 **SEC. 105. JUDICIAL REVIEW.**

9 Section 2241 of title 28, United States Code, is
10 amended by replacing subsection (e) with the following:

11 “(e) Except as provided for in this subsection, and
12 notwithstanding any other law, no court, justice, or judge
13 shall have jurisdiction to hear or consider any claim or
14 cause of action, including an application for a writ of ha-
15 beas corpus, pending on or filed after the date of enact-
16 ment of this subsection, against the United States or its
17 agents, brought by or on behalf of any alien detained by
18 the United States as an unlawful enemy combatant, relat-
19 ing to any aspect of the alien’s detention, transfer, treat-
20 ment, or conditions of confinement:

21 “(1) COMBATANT STATUS REVIEW TRIBU-
22 NALS.—The United States Court of Appeals for the
23 District of Columbia Circuit shall have exclusive ju-
24 risdiction to determine the validity of any final deci-
25 sion of a Combatant Status Review Tribunal. The

1 scope of such review is defined in section 1005(e)(2)
2 of the Detainee Treatment Act of 2005. If the Court
3 grants a detainee’s petition for review, the Depart-
4 ment of Defense may conduct a new Combatant Sta-
5 tus Review Tribunal.

6 “(2) MILITARY COMMISSIONS.—Review shall be
7 had only of final judgments of military commissions
8 as provided for pursuant to section 247 of the Mili-
9 tary Commissions Act of 2006.

10 “(3) INFORMATION CONSIDERED.—The court
11 may consider classified information submitted in
12 camera and ex parte in making any determination
13 under this section.”.

14 **SEC. 106. SATISFACTION OF TREATY OBLIGATIONS.**

15 (a) IN GENERAL.—Satisfaction of the prohibitions
16 against cruel, inhuman, and degrading treatment set forth
17 in section 1003 of the Detainee Treatment Act of 2005
18 (title X of Public Law 109–148; 119 Stat. 2739; 42
19 U.S.C. 2000dd) shall fully satisfy United States obliga-
20 tions with respect to the standards for detention and treat-
21 ment established by section 1 of common Article 3 of the
22 Geneva Conventions, with the exception of the obligations
23 imposed by sections 1(b) and 1(d) of such Article.

24 (b) RIGHTS NOT JUDICIALLY ENFORCEABLE.—

1 (1) IN GENERAL.—No person in any habeas ac-
2 tion or any other action may invoke the Geneva Con-
3 ventions or any protocols thereto as a source of
4 rights, whether directly or indirectly, for any pur-
5 pose in any court of the United States or its States
6 or territories.

7 (2) CONSTRUCTION.—Paragraph (1) may not
8 be construed to affect the obligations of the United
9 States under the Geneva Conventions.

10 (c) GENEVA CONVENTIONS DEFINED.—In this sec-
11 tion, the term “Geneva Conventions” means the inter-
12 national conventions signed at Geneva on August 12,
13 1949, including common Article 3.

14 **SEC. 107. WAR CRIMES ACT AMENDMENT.**

15 Section 2441 of title 18, United States Code, is
16 amended by replacing subsection (c)(3) with the following:

17 “(3) which constitutes any of the following seri-
18 ous violations of common Article 3 of the inter-
19 national conventions signed at Geneva on August 12,
20 1949, when committed in the context of and in asso-
21 ciation with an armed conflict not of an inter-
22 national character:

23 “(A) TORTURE.—Any person who com-
24 mits, or conspires or attempts to commit, an
25 act specifically intended to inflict severe phys-

1 ical or mental pain or suffering (other than
2 pain or suffering incidental to lawful sanctions)
3 upon another person within his custody or
4 physical control for the purpose of obtaining in-
5 formation or a confession, punishment, intimi-
6 dation, coercion, or any reason based on dis-
7 crimination of any kind, shall be guilty of a vio-
8 lation of this subsection. The term ‘severe men-
9 tal pain or suffering’ has the meaning provided
10 in paragraph (2) of section 2340 of this title.

11 “(B) CRUEL OR INHUMAN TREATMENT.—
12 Any person who commits, or conspires or at-
13 tempts to commit, an act intended to inflict se-
14 vere physical or mental pain or suffering (other
15 than pain or suffering incidental to lawful sanc-
16 tions), including severe physical abuse, upon an-
17 other person within his custody or physical con-
18 trol shall be guilty of a violation of this sub-
19 section. The term ‘severe mental pain or suf-
20 fering’ has the meaning provided in paragraph
21 (2) of section 2340 of this title.

22 “(C) PERFORMING BIOLOGICAL EXPERI-
23 MENTS.—Any person who subjects, or conspires
24 or attempts to subject, one or more persons
25 within his custody or physical control to biologi-

1 cal experiments without a legitimate medical
2 purpose and in so doing endangers the body or
3 health of such person or persons shall be guilty
4 of a violation of this subsection.

5 “(D) MURDER.—Any person who inten-
6 tionally kills, or conspires or attempts to kill, or
7 kills whether intentionally or unintentionally in
8 the course of committing any other offense
9 under this section, one or more persons taking
10 no active part in the hostilities, including those
11 placed hors de combat by sickness, wounds, de-
12 tention, or any other cause, shall be guilty of a
13 violation of this subsection. The intent required
14 for this offense precludes its applicability with
15 regard to collateral damage or to death, dam-
16 age, or injury incident to a lawful attack.

17 “(E) MUTILATION OR MAIMING.—Any per-
18 son who intentionally injures, or conspires or
19 attempts to injure, or injures whether inten-
20 tionally or unintentionally in the course of com-
21 mitting any other offense under this section,
22 one or more persons taking no active part in
23 the hostilities, including those placed hors de
24 combat by sickness, wounds, detention, or any
25 other cause, by disfiguring the person or per-

1 sons by any mutilation thereof or by perma-
2 nently disabling any member, limb, or organ of
3 his body, without any legitimate medical or den-
4 tal purpose, shall be guilty of a violation of this
5 subsection. The intent required for this offense
6 precludes its applicability with regard to collat-
7 eral damage or to death, damage, or injury inci-
8 dent to a lawful attack.

9 “(F) INTENTIONALLY CAUSING GREAT
10 SUFFERING OR SERIOUS INJURY.—Any person
11 who intentionally causes, or conspires or at-
12 tempts to cause, serious bodily injury to one or
13 more persons taking no active part in the hos-
14 tilities, including those placed hors de combat
15 by sickness, wounds, detention, or any other
16 cause, shall be guilty of a violation of this sub-
17 section. The intent required for this offense
18 precludes its applicability with regard to collat-
19 eral damage or to death, damage, or injury inci-
20 dent to a lawful attack. The term ‘serious bod-
21 ily injury’ has the meaning provided in sub-
22 section (b)(2) of section 113 of this title.

23 “(G) RAPE.—Any person who forcibly or
24 with coercion or threat of force wrongfully in-
25 vades, or conspires or attempts to invade, the

1 body of a person by penetrating, however slight-
2 ly, the anal or genital opening of the victim
3 with any part of the body of the accused or
4 with any foreign object shall be guilty of a vio-
5 lation of this subsection.

6 “(H) SEXUAL ASSAULT OR ABUSE.—Any
7 person who forcibly or with coercion or threat
8 of force engages, or conspires or attempts to
9 engage, in sexual contact with one or more per-
10 sons, or causes, or conspires or attempts to
11 cause, one or more persons to engage in sexual
12 contact, shall be guilty of a violation of this
13 subsection. For purposes of this offense, the
14 term ‘sexual contact’ has the meaning provided
15 in paragraph (3) of section 2246 of this title.

16 “(I) TAKING HOSTAGES.—Any person who,
17 having knowingly seized or detained one or
18 more persons, threatens to kill, injure, or con-
19 tinue to detain such person or persons with the
20 intent of compelling any nation, person other
21 than the hostage, or group of persons to act or
22 refrain from acting as an explicit or implicit
23 condition for the safety or release of such per-
24 son or persons, shall be guilty of a violation of
25 this subsection. Any person who attempts to en-

1 gage or conspires to engage in this offense shall
2 also be guilty under this subsection.”.

3 **SEC. 108. CONFORMING AMENDMENTS.**

4 (a) Section 1004(b) of the Detainee Treatment Act
5 of 2005 (10 U.S.C. 801 note) is amended to conform with
6 this title as follows—

7 (1) by replacing “may provide” with “shall pro-
8 vide”;

9 (2) by adding “or investigation” after “criminal
10 prosecution”; and

11 (3) by adding “whether before United States
12 courts or agencies, foreign courts or agencies, or
13 international courts or agencies,” after “described in
14 that subsection”.

15 (b) Section 1005 of the Detainee Treatment Act of
16 2005 (10 U.S.C. 801 note) is amended to conform with
17 this title as follows—

18 (1) by striking subsection (e)(3)(B) and renum-
19 bering subsections (e)(3)(C) and (e)(3)(D) as sub-
20 sections (e)(3)(B) and (e)(3)(C), respectively;

21 (2) in subsection (e)(3)(A), by striking “pursu-
22 ant to Military Commission Order No. 1, August 31,
23 2005 (or any successor military order)” and insert-
24 ing “by a military commission under chapter 47a of
25 title 10, United States Code”;

1 (3) in former subsection (e)(3)(C)(i), by strik-
2 ing “pursuant to the military order” and inserting
3 “by a military commission”;

4 (4) in former subsection (e)(3)(C)(ii), by strik-
5 ing “pursuant to such military order” and inserting
6 “by such a military commission”;

7 (5) in former subsection (e)(3)(D)(i) by striking
8 “specified in the military order” and inserting “spec-
9 ified for a military commission”;

10 (6) in former subsection (e)(3)(C)(i), by strik-
11 ing “at Guantanamo Bay, Cuba”; and

12 (7) in former subsection (e)(2)(B)(i) by replac-
13 ing “the Department of Defense at Guantanamo
14 Bay, Cuba” with “United States”.

15 (c) Section 802 of title 10, United States Code, is
16 amended to conform with this title by adding, “(a)(13)
17 Lawful enemy combatants who violate the law of war.”.

18 (d) Section 821 of title 10, United States Code, is
19 amended to conform with this title by striking the phrase
20 “by statute or the law of war”.

21 (e) Section 836 of title 10, United States Code, is
22 amended to conform with this title as follows—in sub-
23 section (a), by replacing “military commissions and other
24 military tribunals” with “and other military tribunals (ex-
25 cluding military commissions)”.

1 **SEC. 109. RETROACTIVE APPLICATION.**

2 This title shall take effect on the date of the enact-
3 ment of this title and shall apply retroactively, including
4 to any aspect of the detention, treatment, or trial of any
5 person detained at any time since September 11, 2001,
6 and to any claim or cause of action pending on or after
7 the date of the enactment of this Act.

8 **SEC. 110. SEVERABILITY.**

9 If any provision of this title, or the application of a
10 provision to any person or circumstance, is held to be un-
11 constitutional, the remainder of this title, and the applica-
12 tion of the provisions to any other person or circumstance,
13 shall not be affected thereby.

14 **TITLE II—FOREIGN**
15 **INTELLIGENCE SURVEILLANCE**

16 **SEC. 201. SHORT TITLE.**

17 This title may be cited as the “National Security Sur-
18 veillance Act of 2006”.

19 **SEC. 202. FINDINGS.**

20 Congress finds the following:

21 (1) After the terrorist attacks of September 11,
22 2001, President Bush authorized the National Secu-
23 rity Agency to intercept communications between
24 people inside the United States, including American
25 citizens, and terrorism suspects overseas.

1 (2) One of the lessons learned from September
2 11, 2001, is that the enemies who seek to greatly
3 harm and terrorize our Nation utilize technologies
4 and techniques that defy conventional law enforce-
5 ment practices.

6 (3) For days before September 11, 2001, the
7 Federal Bureau of Investigation suspected that con-
8 fessed terrorist Zacarias Moussaoui was planning to
9 hijack a commercial plane. The Federal Bureau of
10 Investigation, however, could not meet the require-
11 ments to obtain a traditional criminal warrant or an
12 order under the Foreign Intelligence Surveillance
13 Act of 1978 to search his laptop computer (Report
14 of the 9/11 Commission 273–76).

15 (4) The President, as the constitutional officer
16 most directly responsible for protecting the United
17 States from attack, requires the ability and means
18 to detect and track an enemy that can master and
19 exploit modern technology.

20 (5) It is equally essential, however, that in pro-
21 tecting the United States against our enemies, the
22 President does not compromise the very civil lib-
23 erties that he seeks to safeguard. As Justice Hugo
24 Black observed, “The President’s power, if any, to
25 issue [an] order must stem either from an Act of

1 Congress or from the Constitution itself.” *Youngs-*
2 *town Sheet & Tube Co. v. Sawyer*, 343 U.S. 579,
3 585 (1952) (opinion by Black, J.). Similarly, in
4 2004, Justice Sandra Day O’Connor explained in
5 her plurality opinion for the Supreme Court in
6 *Hamdi v. Rumsfeld*: “We have long since made clear
7 that a state of war is not a blank check for the
8 President when it comes to the rights of the Na-
9 tion’s citizens.” *Hamdi v. Rumsfeld*, 542 U.S. 507,
10 536 (2004) (citations omitted).

11 (6) When deciding issues of national security, it
12 is in our Nation’s best interest that, to the extent
13 feasible, all 3 branches of the Federal Government
14 should be involved. This helps guarantee that elec-
15 tronic surveillance programs do not infringe on the
16 constitutional rights of Americans, while at the same
17 time ensuring that the President has all the powers
18 and means necessary to detect and track our en-
19 emies and protect our Nation from attack.

20 (7) As Justice Sandra Day O’Connor explained
21 in her plurality opinion for the Supreme Court in
22 *Hamdi v. Rumsfeld*, “Whatever power the United
23 States Constitution envisions for the Executive in its
24 exchanges with other nations or with enemy organi-
25 zations in times of conflict, it most assuredly envi-

1 sions a role for all 3 branches when individual lib-
2 erties are at stake.” Hamdi v. Rumsfeld, 542 U.S.
3 507, 536 (2004) (citations omitted).

4 (8) Similarly, Justice Jackson famously ex-
5 plained in his Youngstown concurrence: “When the
6 President acts pursuant to an express or implied au-
7 thorization of Congress, his authority is at its max-
8 imum, for it includes all that he possesses in his own
9 right plus all that Congress can delegate... When the
10 President acts in absence of either a congressional
11 grant or denial of authority, he can only rely upon
12 his own independent powers, but there is a zone of
13 twilight in which he and Congress may have concur-
14 rent authority, or in which its distribution is uncer-
15 tain. Therefore, congressional inertia, indifference or
16 quiescence may sometimes, at least as a practical
17 matter, enable, if not invite, measures on inde-
18 pendent presidential responsibility... When the Presi-
19 dent takes measures incompatible with the expressed
20 or implied will of Congress, his power is at its lowest
21 ebb, for then he can rely only upon his own constitu-
22 tional powers minus any constitutional powers of
23 Congress over the matter. Courts can sustain exclu-
24 sive Presidential control in such a case only by dis-
25 abling the Congress from acting upon the subject.”

1 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S.
2 579, 635–38 (1952) (Jackson, J., concurring).

3 (9) Congress clearly has the authority to enact
4 legislation with respect to electronic surveillance pro-
5 grams. The Constitution provides Congress with
6 broad powers of oversight over national security and
7 foreign policy, under article I, section 8 of the Con-
8 stitution of the United States, which confers on Con-
9 gress numerous powers, including the powers—

10 (A) “To declare War, grant Letters of
11 Marque and Reprisal, and make Rules con-
12 cerning Captures on Land and Water”;

13 (B) “To raise and support Armies”;

14 (C) “To provide and maintain a Navy”;

15 (D) “To make Rules for the Government
16 and Regulation of the land and naval Forces”;

17 (E) “To provide for calling forth the Mili-
18 tia to execute the Laws of the Union, suppress
19 Insurrections and repel Invasions”; and

20 (F) “To provide for organizing, arming,
21 and disciplining the Militia, and for governing
22 such Part of them as may be employed in the
23 Service of the United States”.

24 (10) While Attorney General Alberto Gonzales
25 explained that the executive branch reviews the elec-

1 tronic surveillance program of the National Security
2 Agency every 45 days to ensure that the program is
3 not overly broad, it is the belief of Congress that ap-
4 proval and supervision of electronic surveillance pro-
5 grams should be conducted outside of the executive
6 branch, by the article III court established under
7 section 103 of the Foreign Intelligence Surveillance
8 Act of 1978 (50 U.S.C. 1803). It is also the belief
9 of Congress that it is appropriate for an article III
10 court to pass upon the constitutionality of electronic
11 surveillance programs that may implicate the rights
12 of Americans.

13 (11) The Foreign Intelligence Surveillance
14 Court is the proper court to approve and supervise
15 classified electronic surveillance programs because it
16 is adept at maintaining the secrecy with which it
17 was charged and it possesses the requisite expertise
18 and discretion for adjudicating sensitive issues of
19 national security.

20 (12) In 1975, [then] Attorney General Edward
21 Levi, a strong defender of executive authority, testi-
22 fied that in times of conflict, the President needs the
23 power to conduct long-range electronic surveillance
24 and that a foreign intelligence surveillance court

1 should be empowered to issue special approval orders
2 in these circumstances.

3 (13) The Foreign Intelligence Surveillance Act
4 of 1978 clarifies and definitively establishes that the
5 Foreign Intelligence Surveillance Court has the au-
6 thority to review electronic surveillance programs
7 and pass upon their constitutionality. Such authority
8 is consistent with well-established, longstanding
9 practices.

10 (14) The Foreign Intelligence Surveillance
11 Court already has broad authority to approve sur-
12 veillance of members of international conspiracies, in
13 addition to granting warrants for surveillance of a
14 particular individual under sections 104, 105, and
15 402 of the Foreign Intelligence Surveillance Act of
16 1978 (50 U.S.C. 1804, 1805, and 1842).

17 (15) Prosecutors have significant flexibility in
18 investigating domestic conspiracy cases. Courts have
19 held that flexible warrants comply with the 4th
20 amendment to the Constitution of the United States
21 when they relate to complex, far-reaching, and
22 multifaceted criminal enterprises like drug conspir-
23 acies and money laundering rings. The courts recog-
24 nize that applications for search warrants must be
25 judged in a common sense and realistic fashion, and

1 the courts permit broad warrant language where,
2 due to the nature and circumstances of the inves-
3 tigation and the criminal organization, more precise
4 descriptions are not feasible.

5 (16) Federal agents investigating international
6 terrorism by foreign enemies are entitled to tools at
7 least as broad as those used by law enforcement offi-
8 cers investigating domestic crimes by United States
9 citizens. The Supreme Court, in the “Keith Case”,
10 United States v. United States District Court for
11 the Eastern District of Michigan, 407 U.S. 297
12 (1972), recognized that the standards and proce-
13 dures used to fight ordinary crime may not be appli-
14 cable to cases involving national security. The Court
15 recognized that national “security surveillance may
16 involve different policy and practical considerations
17 from the surveillance of ordinary crime” and that
18 courts should be more flexible in issuing warrants in
19 national security cases. United States v. United
20 States District Court for the Eastern District of
21 Michigan, 407 U.S. 297, 322 (1972).

22 (17) By authorizing the Foreign Intelligence
23 Surveillance Court to review electronic surveillance
24 programs, Congress preserves the ability of the
25 President to use the necessary means to guard our

1 national security, while also protecting the civil lib-
2 erties and constitutional rights that we cherish.

3 **SEC. 203. DEFINITIONS.**

4 The Foreign Intelligence Surveillance Act of 1978
5 (50 U.S.C. 1801 et seq.) is amended—

6 (1) by redesignating title VII as title IX;

7 (2) by redesignating section 701 as section 901;

8 and

9 (3) by inserting after title VI the following:

10 **“TITLE VII—ELECTRONIC**
11 **SURVEILLANCE**

12 **“SEC. 701. DEFINITION.**

13 “As used in this title—

14 “(1) the terms ‘agent of a foreign power’, ‘At-
15 torney General’, ‘foreign power’, ‘international ter-
16 rorism’, ‘minimization procedures’, ‘person’, ‘United
17 States’, and ‘United States person’ have the same
18 meaning as in section 101;

19 “(2) the term ‘congressional intelligence com-
20 mittees’ means the Select Committee on Intelligence
21 of the Senate and the Permanent Select Committee
22 on Intelligence of the House of Representatives;

23 “(3) the term ‘electronic communication’ means
24 any transfer of signs, signals, writing, images,
25 sounds, data, or intelligence of any nature trans-

1 mitted, in whole or in part, by a wire, radio, electro
2 magnetic, photo electronic or photo optical system,
3 cable, or other like connection furnished or operated
4 by any person engaged as a common carrier in pro-
5 viding or operating such facilities for the trans-
6 mission of communications;

7 “(4) the term ‘electronic tracking’ means the
8 acquisition by an electronic, mechanical, or other
9 surveillance device of the substance of any electronic
10 communication sent by, received by, or intended to
11 be received by a person who is reasonably believed
12 to be in the United States, through the intentional
13 targeting of that person’s communications, where a
14 person in the United States participating in the
15 communication has a reasonable expectation of pri-
16 vacy;

17 “(5) the term ‘electronic surveillance program’
18 means a program to engage in electronic tracking—

19 “(A) that has as a significant purpose the
20 gathering of foreign intelligence information or
21 protecting against international terrorism;

22 “(B) where it is not technically feasible to
23 name every person or address every location to
24 be subjected to electronic tracking;

1 “(C) where effective gathering of foreign
2 intelligence information requires the flexibility
3 to begin electronic surveillance immediately
4 after learning of suspect activity; and

5 “(D) where effective gathering of foreign
6 intelligence information requires an extended
7 period of electronic surveillance;

8 “(6) the term ‘foreign intelligence information’
9 has the same meaning as in section 101 and in-
10 cludes information necessary to protect against
11 international terrorism;

12 “(7) the term ‘Foreign Intelligence Surveillance
13 Court’ means the court established under section
14 103(a);

15 “(8) the term ‘Foreign Intelligence Surveillance
16 Court of Review’ means the court established under
17 section 103(b);

18 “(9) the term ‘intercept’ means the acquisition
19 of the substance of any electronic communication by
20 a person through the use of any electronic, mechan-
21 ical, or other device; and

22 “(10) the term ‘substance’ means any informa-
23 tion concerning the symbols, sounds, words, purport,
24 or meaning of a communication, and does not in-
25 clude dialing, routing, addressing, or signaling.”.

1 **SEC. 204. FOREIGN INTELLIGENCE SURVEILLANCE COURT**
2 **JURISDICTION TO REVIEW ELECTRONIC SUR-**
3 **VEILLANCE PROGRAMS.**

4 (a) IN GENERAL.—Title VII of the Foreign Intel-
5 ligence Surveillance Act of 1978, as amended by section
6 203, is amended by adding at the end the following:

7 **“SEC. 702. FOREIGN INTELLIGENCE SURVEILLANCE COURT**
8 **JURISDICTION TO REVIEW ELECTRONIC SUR-**
9 **VEILLANCE PROGRAMS.**

10 “(a) AUTHORIZATION OF REVIEW.—

11 “(1) INITIAL AUTHORIZATION.—The Foreign
12 Intelligence Surveillance Court shall have jurisdic-
13 tion to issue an order under this title, lasting not
14 longer than 90 days, that authorizes an electronic
15 surveillance program to obtain foreign intelligence
16 information or to protect against international ter-
17 rorism.

18 “(2) REAUTHORIZATION.—The Foreign Intel-
19 ligence Surveillance Court shall have jurisdiction to
20 reauthorize an electronic surveillance program for a
21 period of time not longer than such court determines
22 to be reasonable.

23 “(3) RESUBMISSION OR APPEAL.—In the event
24 that the Foreign Intelligence Surveillance Court re-
25 fuses to approve an application under this sub-
26 section, the Attorney General may submit a new ap-

1 plication. There shall be no limit on the number of
2 times the Attorney General may seek approval of an
3 electronic surveillance program. Alternatively, the
4 Attorney General may appeal the decision of the
5 Foreign Intelligence Surveillance Court to the For-
6 eign Intelligence Surveillance Court of Review.

7 “(b) MANDATORY TRANSFER FOR REVIEW.—

8 “(1) IN GENERAL.—In any case before any
9 court challenging the legality of classified commu-
10 nications intelligence activity relating to a foreign
11 threat, including an electronic surveillance program,
12 or in which the legality of any such activity or pro-
13 gram is in issue, if the Attorney General files an af-
14 fidavit under oath that the case should be trans-
15 ferred to the Foreign Intelligence Court of Review
16 because further proceedings in the originating court
17 would harm the national security of the United
18 States, the originating court shall transfer the case
19 to the Foreign Intelligence Surveillance Court of Re-
20 view for further proceedings under this subsection.

21 “(2) RETRANSFER TO ORIGINATING COURT.—

22 Upon completion of review pursuant to this sub-
23 section, the Foreign Intelligence Surveillance Court
24 of Review shall remand the case to the originating

1 court for further proceedings consistent with its
2 opinion.

3 “(3) PRESERVATION OF LITIGATION.—In any
4 case that is transferred and received under this sub-
5 section, all litigation privileges shall be preserved.

6 “(4) CERTIORARI AND EFFECTS OF DECI-
7 SIONS.—The decision the Foreign Intelligence Sur-
8 veillance Court of Review made under paragraph
9 (1), including a decision that the disclosure of na-
10 tional security information is constitutionally re-
11 quired, shall be subject to certiorari review in the
12 United States Supreme Court, and shall otherwise
13 be binding in all other courts.

14 “(5) DISMISSAL.—The Foreign Intelligence
15 Surveillance Court of Review or a court that is an
16 originating court under paragraph (1) may dismiss
17 a challenge to the legality of an electronic surveil-
18 lance program for any reason provided for under
19 law.

20 “(c) MODIFICATIONS AND APPEAL IN EVENT APPLI-
21 CATION IS DENIED.—In the event that the Foreign Intel-
22 ligence Surveillance Court declines to approve an applica-
23 tion under subsection (a)—

1 “(1) the court shall state its reasons in a writ-
2 ten opinion, which it shall submit to the Attorney
3 General; and

4 “(2) the Attorney General may submit a new
5 application under section 703 for the electronic sur-
6 veillance program.”.

7 **SEC. 205. APPLICATIONS FOR APPROVAL OF ELECTRONIC**
8 **SURVEILLANCE PROGRAMS.**

9 Title VII of the Foreign Intelligence Surveillance Act
10 of 1978, as amended by section 204, is amended by adding
11 at the end the following:

12 **“SEC. 703. APPLICATIONS FOR APPROVAL OF ELECTRONIC**
13 **SURVEILLANCE PROGRAMS.**

14 “(a) IN GENERAL.—Each application for approval of
15 an electronic surveillance program under this title (includ-
16 ing for reauthorization) shall—

17 “(1) be made by the Attorney General or his
18 designee;

19 “(2) include a statement of the authority con-
20 ferred on the Attorney General by the President of
21 the United States;

22 “(3) include a statement setting forth the legal
23 basis for the conclusion by the Attorney General
24 that the electronic surveillance program is consistent
25 with the Constitution of the United States;

1 “(4) certify that a significant purpose of the
2 electronic surveillance program is to gather foreign
3 intelligence information or to protect against inter-
4 national terrorism;

5 “(5) certify that the information sought cannot
6 reasonably be obtained by normal investigative tech-
7 niques or through an application under section 104;

8 “(6) include a statement of the means and
9 operational procedures by which the electronic track-
10 ing will be executed and effected;

11 “(7) include an explanation of how the elec-
12 tronic surveillance program is reasonably designed to
13 ensure that the communications that are intercepted
14 are communications of or with—

15 “(A) a foreign power that is engaged in
16 international terrorism activities or in prepara-
17 tion therefor;

18 “(B) an agent of a foreign power that is
19 engaged in international terrorism activities or
20 in preparation therefor; or

21 “(C) a person reasonably believed to have
22 communication with or be associated with a for-
23 eign power that is engaged in international ter-
24 rorism activities or in preparation therefor or
25 an agent of a foreign power that is engaged in

1 international terrorism activities or in prepara-
2 tion therefor;

3 “(8) include a statement of the proposed mini-
4 mization procedures;

5 “(9) if the electronic surveillance program that
6 is the subject of the application was initiated prior
7 to the date the application was submitted, specify
8 the date that the program was initiated;

9 “(10) include a description of all previous appli-
10 cations that have been made under this title involv-
11 ing the electronic surveillance program in the appli-
12 cation (including the minimization procedures and
13 the means and operational procedures proposed) and
14 the decision on each previous application; and

15 “(11) include a statement of facts concerning
16 the implementation of the electronic surveillance pro-
17 gram described in the application, including, for any
18 period of operation of the program authorized not
19 less than 90 days prior to the date of submission of
20 the application—

21 “(A) the minimization procedures imple-
22 mented; and

23 “(B) the means and operational procedures
24 by which the electronic tracking was executed
25 and effected.

1 that are intercepted are communications of or
2 with—

3 “(A) a foreign power that is engaged in
4 international terrorism activities or in prepara-
5 tion therefor;

6 “(B) an agent of a foreign power that is
7 engaged in international terrorism activities or
8 in preparation therefor; or

9 “(C) a person reasonably believed to have
10 communication with or be associated with a for-
11 eign power that is engaged in international ter-
12 rorism activities or in preparation therefor or
13 an agent of a foreign power that is engaged in
14 international terrorism activities or in prepara-
15 tion therefor;

16 “(4) the proposed minimization procedures
17 meet the definition of minimization procedures
18 under section 101(h); and

19 “(5) the application contains all statements and
20 certifications required by section 703.

21 “(b) CONSIDERATIONS.—In considering the constitu-
22 tionality of the electronic surveillance program under sub-
23 section (a), the Foreign Intelligence Surveillance Court
24 may consider—

1 “(1) whether the electronic surveillance pro-
2 gram has been implemented in accordance with the
3 proposal by the Attorney General by comparing—

4 “(A) the minimization procedures proposed
5 with the minimization procedures actually im-
6 plemented;

7 “(B) the nature of the information sought
8 with the nature of the information actually ob-
9 tained; and

10 “(C) the means and operational procedures
11 proposed with the means and operational proce-
12 dures actually implemented; and

13 “(2) whether foreign intelligence information
14 has been obtained through the electronic surveillance
15 program.

16 “(c) CONTENTS OF ORDER.—An order approving an
17 electronic surveillance program under this section shall di-
18 rect—

19 “(1) that the minimization procedures be fol-
20 lowed;

21 “(2) that, upon the request of the applicant,
22 specified communication or other common carriers,
23 landlords, custodians, or other specified person, fur-
24 nish the applicant forthwith with all information, fa-
25 cilities, or technical assistance necessary to under-

1 take the electronic surveillance program in such a
2 manner as will protect its secrecy and produce a
3 minimum of interference with the services that such
4 carriers, landlords, custodians, or other persons are
5 providing potential targets of the electronic surveil-
6 lance program;

7 “(3) that any record concerning the electronic
8 surveillance program or the aid furnished or retained
9 by such carriers, landlords, custodians, or other per-
10 sons are maintained under security procedures ap-
11 proved by the Attorney General and the Director of
12 National Intelligence; and

13 “(4) that the applicant compensate, at the pre-
14 vailing rate, such carriers, landlords, custodians, or
15 other persons for furnishing such aid.”.

16 **SEC. 207. CONGRESSIONAL OVERSIGHT.**

17 Title VII of the Foreign Intelligence Surveillance Act
18 of 1978, as amended by section 206, is amended by adding
19 at the end the following:

20 **“SEC. 705. CONGRESSIONAL OVERSIGHT.**

21 “(a) IN GENERAL.—Not less often than every 180
22 days, the Attorney General shall submit to the congres-
23 sional intelligence committees a report in classified form
24 on the activities during the previous 180-day period under

1 any electronic surveillance program authorized under this
2 title.

3 “(b) CONTENTS.—Each report submitted under sub-
4 section (a) shall provide, with respect to the previous 180-
5 day period, a description of—

6 “(1) the minimization procedures implemented;

7 “(2) the means and operational procedures by
8 which the surveillance was executed and effected;

9 “(3) significant decisions of the Foreign Intel-
10 ligence Surveillance Court on applications made
11 under section 703;

12 “(4) the total number of applications made for
13 orders approving electronic surveillance pursuant to
14 this title; and

15 “(5) the total number of orders applied for that
16 are granted, modified, or denied.

17 “(c) RULE OF CONSTRUCTION.—Nothing in this title
18 shall be construed to limit the authority or responsibility
19 of any committee of either House of Congress to obtain
20 such information as such committee may need to carry
21 out its respective functions and duties.”

22 **SEC. 208. CLARIFICATION OF THE FOREIGN INTELLIGENCE**
23 **SURVEILLANCE ACT OF 1978.**

24 (a) IN GENERAL.—The Foreign Intelligence Surveil-
25 lance Act of 1978 (50 U.S.C. 1801 et seq.) is amended

1 by inserting after title VII, as amended by this title, the
2 following:

3 **“TITLE VIII—EXECUTIVE**
4 **AUTHORITY**

5 **“SEC. 801. EXECUTIVE AUTHORITY.**

6 “Nothing in this Act shall be construed to limit the
7 constitutional authority of the President to collect intel-
8 ligence with respect to foreign powers and agents of for-
9 eign powers.”.

10 (b) REPEAL.—Sections 111, 309, and 404 of the
11 Foreign Intelligence Surveillance Act of 1978 (50 U.S.C.
12 1811, 1829, and 1844) are repealed.

13 (c) CONFORMING AMENDMENTS.—

14 (1) TITLE 18.—Section 2511(2) of title 18,
15 United States Code, is amended—

16 (A) in paragraph (e), by striking “, as de-
17 fined in section 101” and all that follows
18 through the end of the paragraph and inserting
19 the following: “under the Constitution or the
20 Foreign Intelligence Surveillance Act of 1978.”;
21 and

22 (B) in paragraph (f), by striking “from
23 international or foreign communications,” and
24 all that follows through the end of the para-
25 graph and inserting “that is authorized under

1 a Federal statute or the Constitution of the
2 United States.”

3 (2) FISA.—Section 109 of the Foreign Intel-
4 ligence Surveillance Act of 1978 (50 U.S.C. 1809)
5 is amended—

6 (A) in subsection (a)—

7 (i) in paragraph (1)—

8 (I) by inserting “or under the
9 Constitution” after “authorized by
10 statute”; and

11 (II) by striking “or” at the end;

12 (ii) in paragraph (2)—

13 (I) by inserting “or under the
14 Constitution” after “authorized by
15 statute”; and

16 (II) by striking the period and
17 inserting “; or”; and

18 (iii) by adding at the end the fol-
19 lowing:

20 “(3) knowingly discloses or uses information ob-
21 tained under color of law by electronic surveillance
22 in a manner or for a purpose not authorized by
23 law.”; and

24 (B) in subsection (c)—

- 1 (i) by striking “\$10,000” and insert-
2 ing “\$100,000”; and
3 (ii) by striking “five years” and in-
4 sserting “15 years”.

5 **SEC. 209. OTHER CONFORMING AMENDMENTS TO FISA.**

6 (a) REFERENCE.—In this section, a reference to
7 “FISA” shall mean the Foreign Intelligence Surveillance
8 Act of 1978 (50 U.S.C. 1801 et seq.)

9 (b) DEFINITIONS.—Section 101 of FISA (50 U.S.C.
10 1801) is amended—

11 (1) in subsection (b)(1)—

12 (A) in subparagraph (B), by striking “or”
13 after the semicolon; and

14 (B) by adding at the end the following:

15 “(D) otherwise possesses or is expected to
16 transmit or receive foreign intelligence informa-
17 tion within the United States; or”;

18 (2) by striking subsection (f) and inserting the
19 following:

20 “(f) ‘Electronic surveillance’ means—

21 “(1) the installation or use of an electronic, me-
22 chanical, or other surveillance device for the inten-
23 tional collection of information concerning a par-
24 ticular known person who is reasonably believed to
25 be in the United States by intentionally targeting

1 that person under circumstances in which that per-
2 son has a reasonable expectation of privacy and a
3 warrant would be required for law enforcement pur-
4 poses; or

5 “(2) the intentional acquisition of the contents
6 of any communication under circumstances in which
7 a person has a reasonable expectation of privacy and
8 a warrant would be required for law enforcement
9 purposes, and if both the sender and all intended re-
10 cipients are located within the United States.”;

11 (3) in subsection (g), by inserting before the pe-
12 riod the following: “or a person or persons des-
13 ignated by the Attorney General or Acting Attorney
14 General”;

15 (4) in subsection (h)—

16 (A) in paragraph (2), by inserting “and”
17 after the semicolon;

18 (B) in paragraph (3), by striking “; and”
19 and inserting a period; and

20 (C) by striking paragraph (4); and

21 (5) by striking subsection (n) and inserting the
22 following:

23 “(n) ‘contents’ has the meaning set forth in section
24 2510(8) of title 18, United States Code.”.

1 (c) ELECTRONIC SURVEILLANCE AUTHORIZATION.—
2 Section 102 of FISA (50 U.S.C. 1802) is amended to read
3 as follows:

4 “ELECTRONIC SURVEILLANCE AUTHORIZATION WITHOUT
5 COURT ORDER; CERTIFICATION BY ATTORNEY GEN-
6 ERAL; REPORTS TO CONGRESSIONAL COMMITTEES;
7 TRANSMITTAL UNDER SEAL; DUTIES AND COM-
8 PENSATION OF COMMUNICATION COMMON CARRIER;
9 APPLICATIONS; JURISDICTION OF COURT

10 “SEC. 102. (a)(1) Notwithstanding any other law, the
11 President through the Attorney General, may authorize
12 electronic surveillance without a court order under this
13 title to acquire foreign intelligence information for periods
14 of up to 1 year if the Attorney General certifies in writing
15 under oath that—

16 “(A)(i) the acquisition of the contents of com-
17 munications of foreign powers, as defined in section
18 101(a), an agent of a foreign power as defined in
19 section 101(b)(1); or

20 “(ii) the acquisition of technical intelligence,
21 other than the spoken communications of individ-
22 uals, from property or premises under the open and
23 exclusive control of a foreign power, as defined in
24 paragraph (1), (2), or (3) of section 101(a); and

1 “(B) the proposed minimization procedures
2 with respect to such surveillance meet the definition
3 of minimization procedures under section 101(h);
4 if the Attorney General reports such minimization proce-
5 dures and any changes thereto to the Senate Select Com-
6 mittee on Intelligence and the House Permanent Select
7 Committee on Intelligence at least 30 days prior to their
8 effective date, unless the Attorney General determines im-
9 mediate action is required and notifies the committees im-
10 mediately of such minimization procedures and the reason
11 for their becoming effective immediately.

12 “(2) An electronic surveillance authorized by this
13 subsection may be conducted only in accordance with the
14 Attorney General’s certification and the minimization pro-
15 cedures. The Attorney General shall assess compliance
16 with such procedures and shall report such assessments
17 to the Senate Select Committee on Intelligence and the
18 House Permanent Select Committee on Intelligence under
19 the provisions of section 108(a).

20 “(3) The Attorney General shall immediately trans-
21 mit under seal to the court established under section
22 103(a) a copy of his certification. Such certification shall
23 be maintained under security measures established by the
24 Chief Justice with the concurrence of the Attorney Gen-

1 eral, in consultation with the Director of National Intel-
2 ligence, and shall remain sealed unless—

3 “(A) an application for a court order with re-
4 spect to the surveillance is made under section 104;
5 or

6 “(B) the certification is necessary to determine
7 the legality of the surveillance under section 106(f).

8 “(b) The Attorney General is also authorized to de-
9 liver to a provider of any electronic communication service,
10 landlord, custodian, or other person (including any officer,
11 employee, agent, or other specified person thereof) who
12 has access to electronic communications, either as they are
13 transmitted or while they are stored, or equipment that
14 is being or may be used to transmit or store such commu-
15 nications, a certificate requiring that such person or per-
16 sons furnish any information, facilities, or technical assist-
17 ance to an official authorized by the President to engage
18 in electronic surveillance for foreign intelligence purposes,
19 for periods of up to 1 year if the Attorney General certifies
20 in writing to the carrier under oath that such provision
21 of information, facilities, or technical assistance does not
22 constitute electronic surveillance as defined in section
23 101(f).

24 “(c) With respect to electronic surveillance or the fur-
25 nishing of any information, facilities, or technical assist-

1 ance authorized by this section, the Attorney General may
2 direct a provider of any electronic communication service,
3 landlord, custodian or other person (including any officer,
4 employee, agent, or other specified person thereof) who
5 has access to electronic communications, either as they are
6 transmitted or while they are stored or equipment that
7 is being or may be used to transmit or store such commu-
8 nications to—

9 “(1) furnish all information, facilities, or tech-
10 nical assistance necessary to accomplish the elec-
11 tronic surveillance in such a manner as will protect
12 its secrecy and produce a minimum of interference
13 with the services that such provider of any electronic
14 communication service, landlord, custodian, or other
15 person is providing its customers; and

16 “(2) maintain under security procedures ap-
17 proved by the Attorney General and the Director of
18 National Intelligence any records concerning the sur-
19 veillance or the aid furnished which such provider of
20 any electronic communication service, landlord, cus-
21 todian, or other person wishes to retain.

22 The Government shall compensate, at the prevailing rate,
23 such provider of any electronic communication service,
24 landlord, custodian, or other person for furnishing such
25 aid.

1 “(d) Electronic surveillance directed solely at the col-
2 lection of international radio communications of diplomati-
3 cally immune persons in the United States may be author-
4 ized by an official authorized by the President to engage
5 in electronic surveillance for foreign intelligence purposes
6 in accordance with procedures approved by the Attorney
7 General.”.

8 (d) DESIGNATION OF JUDGES.—Section 103 of FISA
9 (50 U.S.C. 1803) is amended in subsection (a), by insert-
10 ing, “at least” before “seven of the United States Judici-
11 ary”.

12 (e) APPLICATIONS FOR COURT ORDERS.—Section
13 104 of FISA (50 U.S.C. 1804) is amended:

14 (1) in subsection (a), by striking paragraphs
15 (6) through (11) and inserting the following:

16 “(6) a certification or certifications by the As-
17 sistant to the President for National Security Af-
18 fairs or an executive branch official authorized by
19 the President to conduct electronic surveillance for
20 foreign intelligence purposes—

21 “(A) that the certifying official deems the
22 information sought to be foreign intelligence in-
23 formation;

1 “(B) that a significant purpose of the sur-
2 veillance is to obtain foreign intelligence infor-
3 mation;

4 “(C) that such information cannot reason-
5 ably be obtained by normal investigative tech-
6 niques; and

7 “(D) including a statement of the basis for
8 the certification that—

9 “(i) the information sought is the type
10 of foreign intelligence information des-
11 ignated; and

12 “(ii) such information cannot reason-
13 ably be obtained by normal investigative
14 techniques; and

15 “(7) a statement of the period of time for which
16 the electronic surveillance is required to be main-
17 tained, and if the nature of the intelligence gath-
18 ering is such that the approval of the use of elec-
19 tronic surveillance under this title should not auto-
20 matically terminate when the described type of infor-
21 mation has first been obtained, a description of facts
22 supporting the belief that additional information of
23 the same type will be obtained thereafter.”;

24 (2) by striking subsection (b); and

1 (3) by redesignating subsections (c) through (e)
2 as subsections (b) through (d), respectively.

3 (f) ISSUANCE OF ORDER.—Section 105 of FISA (50
4 U.S.C. 1805) is amended—

5 (1) in subsection (a), by—

6 (A) striking paragraph (1); and

7 (B) redesignating paragraphs (2) through
8 (5) as paragraphs (1) through (4), respectively;

9 (2) by striking paragraph (1) of subsection (c)
10 and inserting the following:

11 “(1) An order approving an electronic surveillance
12 under this section shall specify—

13 “(A) the identity, if known, or a description of
14 the specific target of the electronic surveillance iden-
15 tified or described in the application pursuant to sec-
16 tion 104(a)(3);

17 “(B) the nature and location of each of the fa-
18 cilities or places at which the electronic surveillance
19 will be directed, if known; and

20 “(C) the period of time during which the elec-
21 tronic surveillance is approved.”;

22 (3) by striking subsection (d) and inserting the
23 following:

1 “(d) Each order under this section shall specify the
2 type of electronic surveillance involved, including whether
3 physical entry is required.”;

4 (4) by striking paragraphs (1) and (2) of sub-
5 section (e) and inserting the following:

6 “(1) An order issued under this section may approve
7 an electronic surveillance may be for a period not to exceed
8 1 year. If such emergency employment of electronic sur-
9 veillance is authorized, the official authorizing the emer-
10 gency employment of electronic surveillance shall require
11 that the minimization procedures required by this title for
12 the issuance of a judicial order be followed.

13 “(2) Extensions of an order issued under this title
14 may be granted on the same basis as an original order
15 upon an application for an extension and new findings
16 made in the same manner as required for an original order
17 and may be for a period not to exceed 1 year.”;

18 (5) by striking subsection (f) and inserting the
19 following:

20 “(f)(1) Notwithstanding any other provision of this
21 title, when an official authorized by the President to con-
22 duct electronic surveillance reasonably determines that—

23 “(A) an emergency situation exists with respect
24 to the employment of electronic surveillance to ob-
25 tain foreign intelligence information before an order

1 authorizing such surveillance can with due diligence
2 be obtained; and

3 “(B) the factual basis for issuance of an order
4 under this title to approve such surveillance exists;
5 that official may authorize the emergency employment of
6 electronic surveillance in accordance with paragraph (2).

7 “(2) Under paragraph (1), the following require-
8 ments shall be satisfied:

9 “(A) The Attorney General shall be informed of
10 the emergency electronic surveillance.

11 “(B) A judge having jurisdiction under section
12 103 shall be informed by the Attorney General or
13 his designee as soon as practicable following such
14 authorization that the decision has been made to
15 employ emergency electronic surveillance.

16 “(C) An application in accordance with this
17 title shall be made to that judge or another judge
18 having jurisdiction under section 103 as soon as
19 practicable, but not more than 7 days after such
20 surveillance is authorized. In the absence of a judi-
21 cial order approving such electronic surveillance, the
22 surveillance shall terminate when the information
23 sought is obtained, when the application for the
24 order is denied, or after the expiration of 7 days
25 from the time of emergency authorization, whichever

1 is earliest. In the event that such application for ap-
2 proval is denied, or in any other case where the elec-
3 tronic surveillance is terminated and no order is
4 issued approving the surveillance, no information ob-
5 tained or evidence derived from such surveillance
6 shall be received in evidence or otherwise disclosed
7 in any trial, hearing, or other proceeding in or be-
8 fore any court, grand jury, department, office, agen-
9 cy, regulatory body, legislative committee, or other
10 authority of the United States, a State, or political
11 subdivision thereof, and no information concerning
12 any United States person acquired from such sur-
13 veillance shall subsequently be used or disclosed in
14 any other manner by Federal officers or employees
15 without the consent of such person, except with the
16 approval of the Attorney General if the information
17 indicates a threat of death or serious bodily harm to
18 any person. A denial of the application made under
19 this subsection may be reviewed as provided in sec-
20 tion 103.”; and

21 (6) in subsection (i) by—

22 (A) striking “a wire or” and inserting
23 “any”;

24 (B) striking “chapter” and inserting
25 “title”; and

1 (C) by adding at the end “, or in response
2 to certification by the Attorney General or his
3 designee seeking information, facilities, or tech-
4 nical assistance from such person that does not
5 constitute electronic surveillance as defined in
6 section 101(f)”.

7 (g) USE OF INFORMATION.—Section 106 of FISA
8 (50U.S.C. 1806) is amended—

9 (1) in subsection (i), by—

10 (A) deleting “radio”; and

11 (B) inserting “Attorney General deter-
12 mines that the content” after “contain signifi-
13 cant foreign intelligence or”; and

14 (2) in subsection (k), by deleting “104(a)(7)”
15 and inserting “104(a)(6)”.

16 (h) CONGRESSIONAL OVERSIGHT.—Section 108 of
17 FISA (50 U.S.C. 1808) is amended by adding at the end
18 the following:

19 “(c) DOCUMENT MANAGEMENT SYSTEM FOR APPLI-
20 CATIONS FOR ORDERS APPROVING ELECTRONIC SURVEIL-
21 LANCE.—

22 “(1) SYSTEM PROPOSED.—The Attorney Gen-
23 eral and Director of National Intelligence shall, in
24 consultation with the Director of the Federal Bu-
25 reau of Investigation, the Director of the National

1 Security Agency, the Director of the Central Intel-
2 ligence Agency, and the Foreign Intelligence Surveil-
3 lance Court, conduct a feasibility study to develop
4 and implement a secure, classified document man-
5 agement system that permits the prompt prepara-
6 tion, modification, and review by appropriate per-
7 sonnel of the Department of Justice, the Federal
8 Bureau of Investigation, the National Security
9 Agency, and other applicable elements of the United
10 States Government of applications under section 104
11 before their submittal to the Foreign Intelligence
12 Surveillance Court.

13 “(2) SCOPE OF SYSTEM.—The document man-
14 agement system proposed in paragraph (1) shall—

15 “(A) permit and facilitate the prompt sub-
16 mittal of applications and all other matters, in-
17 cluding electronic filings, to the Foreign Intel-
18 ligence Surveillance Court under section 104 or
19 105(g)(5); and

20 “(B) permit and facilitate the prompt
21 transmittal of rulings of the Foreign Intel-
22 ligence Surveillance Court to personnel submit-
23 ting applications described in paragraph (1).”.

1 (i) CRIMINAL SANCTIONS.—Section 109 of FISA (50
2 U.S.C. 1809) is amended by striking subsection (a) and
3 inserting the following:

4 “(a) PROHIBITED ACTIVITIES.—A person is guilty of
5 an offense if he intentionally—

6 “(1) engages in electronic surveillance, as de-
7 fined in section 101(f), under color of law except as
8 authorized by law; or

9 “(2) discloses or uses information obtained
10 under color of law by electronic surveillance, know-
11 ing or having reason to know that the information
12 was obtained through electronic surveillance not au-
13 thorized by law.”.

14 (j) AUTHORIZATION DURING TIME OF WAR.—Title
15 I of FISA is amended by striking section 111.

16 (k) PHYSICAL SEARCHES.—Title III of Foreign Intel-
17 ligence Surveillance Act of 1978 (50 U.S.C. 1821 et seq.)
18 is amended—

19 (1) in section 301 (50 U.S.C. 1821), by striking
20 paragraph (5) and inserting the following:

21 “(5) ‘Physical search’ means any physical intru-
22 sion within the United States into premises or prop-
23 erty (including examination of the interior of prop-
24 erty by technical means) that is intended to result
25 in a seizure, reproduction, inspection, or alteration

1 of information, material, or property, under cir-
2 cumstances in which a person has a reasonable ex-
3 pectation of privacy and a warrant would be re-
4 quired for law enforcement purposes, but does not
5 include activities conducted in accordance with sec-
6 tions 102 or 105.”;

7 (2) in section 307, by striking subsection (a)
8 and inserting the following:

9 “(a) A person is guilty of an offense if he inten-
10 tionally—

11 “(1) under color of law for the purpose of ob-
12 taining foreign intelligence information, executes a
13 physical search within the United States except as
14 authorized by statute or under the Constitution; or

15 “(2) discloses or uses information obtained
16 under color of law by physical search within the
17 United States, knowing or having reason to know
18 that the information was obtained through physical
19 search not authorized by statute or the Constitu-
20 tion.”; and

21 (3) by striking section 309.

22 **SEC. 210. CONFORMING AMENDMENT TO TABLE OF CON-**
23 **TENTS.**

24 The table of contents for the Foreign Intelligence
25 Surveillance Act of 1978 is amended by striking the items

1 related to title VII and section 701 and inserting the fol-
2 lowing:

“TITLE VII—ELECTRONIC SURVEILLANCE

“Sec. 701. Definition.

“Sec. 702. Foreign intelligence surveillance court jurisdiction to review elec-
tronic surveillance programs.

“Sec. 703. Applications for approval of electronic surveillance programs.

“Sec. 704. Approval of electronic surveillance programs.

“Sec. 705. Congressional oversight.

“TITLE VIII—EXECUTIVE AUTHORITY

“Sec. 801. Executive authority.”.

Calendar No. 605

109TH CONGRESS
2^D SESSION

S. 3886

A BILL

To authorize military commissions to bring terrorists to justice, to strengthen and modernize terrorist surveillance capabilities, and for other purposes.

SEPTEMBER 12, 2006

Read the second time and placed on the calendar