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Selected Procedural Safeguards in Federal, Military, and International Courts

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Summary

Declaring it necessary to bring to justice those responsible for the terrorist attacks on the United States of September 11, 2001, President Bush signed a Military Order (M.O.) authorizing the trial by military commission of certain non-citizens. The order directs the Secretary of Defense to establish the procedural rules for the operation of the military commissions convened pursuant to the M.O. The Department of Defense is reportedly drafting regulations, but few details have been released. In the meantime, there has been much discussion about the procedural safeguards to be applied by the military commissions. The chart that follows compares selected procedural safeguards employed in criminal trials in federal criminal court with parallel protective measures in military general courts-martial, military commissions as authorized under the Military Order of November 13, and, as a possible benchmark of international standards, the Rome Statute of the International Criminal Court.

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Selected Procedural Safeguards in Federal, Military, and International Courts

Declaring it necessary to bring to justice those responsible for the terrorist attacks on the United States of September 11, 2001, President Bush signed a Military Order (M.O.) authorizing the trial by military commission of certain non-citizens.¹ The order directs the Secretary of Defense to establish the procedural rules for the operation of the military commissions convened pursuant to the M.O. The Department of Defense is reportedly drafting regulations, but few details have been released. In the meantime, there has been much discussion about the procedural safeguards to be applied by the military commissions. This report compares selected procedural safeguards employed in criminal trials in federal criminal court with parallel protective measures in military general courts-martial, military commissions as authorized under the Military Order of November 13, and, as a possible benchmark of international standards, the Rome Statute of the International Criminal Court.

Introduction

The Constitution imposes on the government a system of restraints to provide that no unfair law is enforced and that no law is enforced unfairly. What is fundamentally fair in a given situation depends in part on the objectives of a given system of law weighed alongside the possible infringement of individual liberties that system might impose. In the criminal law system, some basic objectives are to discover the truth, punish the guilty proportionately with their crimes, acquit the innocent without unnecessary delay or expense, and prevent and deter further crime, thereby providing for the public order. Military justice shares these objectives in part, but also serves to enhance discipline throughout the armed forces, serving the overall objective of providing an effective national defense. The equation for international criminal law may also consider foreign policy elements as well as international law and treaty obligations.

The Fifth Amendment to the Constitution provides that “no person shall be ... deprived of life, liberty, or property, without due process of law.” Due process includes the opportunity to be heard whenever the government places any of these fundamental liberties at stake. The Constitution contains other explicit rights applicable to various stages of a criminal prosecution. Criminal proceedings provide both the opportunity to contest guilt and to challenge the government’s conduct that may have violated the rights of the accused. The system of procedural rules used to conduct a criminal hearing, therefore, serves as a safeguard against violations of constitutional rights that take place outside the courtroom.

¹Military Order, November 13, 2001 Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism §1(a), 66 Fed. Reg. 57,833 (Nov. 16, 2001).

The Bill of Rights applies to all citizens of the United States and all aliens within the United States.² However, the methods of application of constitutional rights, in particular the remedies available to those whose rights might have been violated, may differ depending on the severity of the punitive measure the government seeks to take and the entity deciding the case. The jurisdiction of various entities to try a person accused of a crime could have a profound effect on the procedural rights of the accused. The type of judicial review available also varies and may be crucial to the outcome.

International law also contains some basic guarantees of human rights, including rights of criminal defendants and prisoners. Treaties to which the U.S. is a party are expressly made a part of the law of the land by the Supremacy Clause of the Constitution,³ and may be codified through implementing legislation.⁴ International law is incorporated into U.S. law.⁵ The law of war, a subset of international law, applies to cases arising from armed conflicts (i.e., war crimes).⁶ It is unclear exactly how the law of war applies to the current hostilities involving non-state terrorists, and the nature of the rights due to accused terrorist/war criminals may depend in part on their status under the Geneva Conventions.

The chart that follows identifies a selection of basic rights in rough order of the stage in the criminal justice process where they might become most important. The text of the chart indicates some of the procedural safeguards designed to protect these rights in different tribunals. Recognizing that fundamental fairness relies on the *system* of procedural safeguards as a whole rather than individual rules, the chart is intended only as an outline to compare some of the rules different courts and tribunals might use to safeguard certain rights.

Federal Court

The federal judiciary is established by Article III of the Constitution and consists of the Supreme Court and “inferior tribunals” established by Congress. It is a separate and co-equal branch of the federal government, independent of the executive and legislative branches, designed to be insulated from the public passions. Its function is not to make law but to interpret law and decide disputes arising under it. Federal criminal law and procedures are enacted by Congress and housed primarily in title 18 of the U.S. Code. The Supreme Court promulgates procedural rules for criminal trials at the federal district courts. These rules, namely the Federal Rules of Criminal Procedure (Fed. R. Crim. P.) and the Federal Rules of Evidence (Fed. R. Evid.), incorporate procedural rights that the Constitution and various statutes

²Wong Wing v. United States, 163 U.S. 228 (1896)(aliens are entitled to due process of law).

³U.S. CONST. Art. VI (“[A]ll Treaties ... shall be the Supreme Law of the Land; ...”).

⁴See, e.g. 18 U.S.C. § 2441 (War Crimes Act).

⁵See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 111 (1987).

⁶For a brief explanation of the sources of the law of war, see generally Terrorism and the Law of War: Trying Terrorists as War Criminals before Military Commissions, CRS Report RL31191 (updated Dec. 11, 2001).

demand. The chart cites relevant rules or court decisions, but makes no effort to provide an exhaustive list of authorities.

General Courts-Martial

The Constitution, in order to provide for the common defense,⁷ gives Congress the power to raise, support, and regulate the armed forces,⁸ but makes the President Commander-in-Chief of the armed forces.⁹ Article III does not give the judiciary any explicit role in the military, and the Supreme Court has taken the view that Congress' power "[t]o Make Rules for the Government and Regulation of the land and naval Forces"¹⁰ is entirely separate from Article III.¹¹ Therefore, courts-martial are not considered to be Article III courts and are not subject to all of the rules that apply in federal courts.¹² Defendants are not able to appeal their courts-martial directly to federal courts, but may seek relief in the form of a writ of habeas corpus, although review may be limited.

Although military personnel are "persons" to whom the Bill of Rights applies, in the military context it might be said that discipline is as important as liberty as objectives of military justice. Also, the Constitution specifically exempts military members accused of a crime from the Fifth Amendment right to a grand jury indictment,¹³ from which the Supreme Court has inferred there is no right to a civil jury in courts-martial.¹⁴ However, in part because of the different standards provided in courts-martial, their jurisdiction is limited to those persons and offenses the military has a legitimate interest in regulating. Courts-martial jurisdiction extends mainly to service members on active duty, prisoners of war, and persons accompanying the armed forces in time of declared war,¹⁵ as well as certain violators of the law of war.¹⁶

Congress regulates the armed forces largely through title 10 of the U.S. Code, which contains as Chapter 47 the Uniform Code of Military Justice (UCMJ) regulating the system of military courts-martial. The Supreme Court has found the

⁷U.S. CONST. Preamble.

⁸ *Id.* art. I § 8, cls. 11-14 (War Power).

⁹ *Id.* art. II § 2, cl. 1.

¹⁰ *Id.* art. I § 8, cl. 14.

¹¹ *See* *Dynes v. Hoover*, 61 U.S. (How.) 65 (1857).

¹² *See* WILLIAM WINTHROP, *WINTHROP'S MILITARY LAW AND PRECEDENTS* 48-49 (2d. ed. 1920)(describing courts-martial as *instrumentalities of the executive power*, provided by Congress for the President as Commander-in-chief, to aid him in properly commanding the army and navy and enforcing discipline therein) (emphasis in original).

¹³ *See* chart, *infra*.

¹⁴ *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

¹⁵ *See* 10 U.S.C. § 802. "In time of war" refers to war declared by Congress. *United States v. Averette*, 17 USCMA 363 (1968).

¹⁶ *See* 10 U.S.C. § 818.

procedures Congress set through the UCMJ to provide adequate procedural safeguards to satisfy constitutional requirements and the interest in maintaining a strong national defense.

Congress has delegated to the President the authority to make procedural rules for the military justice system.¹⁷ The President created the Rules for Courts-Martial (R.C.M.) and the Military Rules of Evidence (Mil. R. Evid.) pursuant to that delegation.¹⁸ The comparison chart will cite provisions of the UCMJ and the applicable rules, as well as Court of Military Appeals (CMA) opinions as applicable.

Military Commissions¹⁹

The Constitution empowers the Congress to declare war and “make rules concerning captures on land and water,”²⁰ to define and punish violations of the “Law of Nations,”²¹ and to make regulations to govern the armed forces.²² The power of the President to convene military commissions flows from his authority as Commander in Chief of the Armed Forces and his responsibility to execute the laws of the nation.²³ Under the Articles of War and subsequent statute,²⁴ the President has at least implicit authority to convene military commissions to try offenses against the law of war.²⁵ There is, therefore, somewhat of a distinction between the authority and objectives behind convening military courts-martial and commissions.²⁶ Rather than serving the internally directed purpose of maintaining discipline and order of the troops, the military commission is externally directed at the enemy as a means of waging successful war by punishing and deterring offenses against the law of war.

¹⁷ 10 U.S.C. § 836.

¹⁸ The rules are set forth in the Manual for Courts Martial (M.C.M.), established as Exec. Order No. 12473, Manual for Courts-Martial, United States, 49 Fed. Reg 17,152, (Apr. 23, 1984).

¹⁹For a more in-depth discussion of military commissions, see CRS Report RL31191, *supra* note 4.

²⁰ U.S. CONST. art. I, § 8, cl. 11.

²¹ *Id.* art. I, § 8, cl. 10.

²² *Id.* art. I, § 8, cl. 14.

²³ *Id.* art. II.

²⁴ The Articles of War were re-enacted at 10 U.S.C. § 801 *et seq.* as part of the UCMJ. Although there is no case law interpreting the UCMJ as authorizing military commissions, the relevant sections of the UCMJ, which recognize the concurrent jurisdiction of military commissions to deal with “offenders or offenses designated by statute or the law of war,” are essentially identical to the corresponding language in the Articles of War. See 10 U.S.C. § 821.

²⁵ *Ex parte Quirin*, 317 U.S. 1 (1942).

²⁶See WINTHROP, *supra* note 3, at 831 (describing distinction between courts-martial and military tribunals).

Jurisdiction of military commissions is limited to time of war and to trying offenses recognized under the law of war or as designated by statute.²⁷ While caselaw suggests that military commissions could try U.S. citizens as enemy belligerents,²⁸ the Military Order of November 13, 2001 limits their jurisdiction to non-citizens.

As non-Article III courts, military commissions are not subject to the same constitutional requirements that are applied in Article III courts.²⁹ Congress has delegated to the President the authority to set the rules of procedure and evidence for military tribunals, applying “the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district court” insofar as he considers it practicable.³⁰ The rules “may not be contrary to or inconsistent with the UCMJ.”³¹

The United States first used military commissions to try enemy belligerents accused of war crimes during the occupation of Mexico in 1847, and made heavy use of them in the Civil War. However, no military commissions have been convened since the aftermath of World War II. Because of the lack of standards of procedure used by military commissions, it is difficult to draw a meaningful comparison with the other types of tribunals. The comparison chart will cite the language of the M.O. as a baseline for comparing the possible terrorist tribunals to other courts, supplemented by language of the UCMJ expressly applicable to such tribunals and historical precedent where it may be relevant. It should be emphasized that the actual procedures to be used have yet to be pronounced and that historical precedent is not necessarily binding. The chart includes the column only to help analyze what might be possible under current law.

The International Criminal Court

As mentioned above, it is difficult to ascertain exactly what procedural safeguards are due under the international law of war. The Nuremberg and Tokyo trials established by the Allies at the end of World War II provide some precedent; however, advances in international human rights law probably make the procedural rules then used obsolete for today’s trials. Perhaps the most recent embodiment of the requirements of the international law of war to try accused war criminals is to be found in the procedures of the not-yet-operational International Criminal Court (ICC) established by the Rome Statute.³² For this reason, the ICC will be included on the

²⁷ 10 U.S.C. § 821. Statutory offenses for which military commissions may be convened are limited to aiding the enemy, 10 U.S.C. § 904, and spying, 10 U.S.C. § 906.

²⁸ See *Ex parte Quirin*, 317 U.S. 1 (1942).

²⁹ See *Ex parte Quirin*, 317 U.S. at 38; *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866) (noting a servicemember “surrenders his right to be tried by the civil courts”).

³⁰ 10 U.S.C. § 836.

³¹ *Id.*

³² Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1988). The United States has signed but not ratified the Rome Statute. See The Rome Statute of the

following chart as representative of international standards for comparison purposes only.

³²(...continued)

International Criminal Court, Selected Legal and Constitutional Issues, CRS Report, RL30091 (Feb. 22, 1999).

Selected Procedural Safeguards in Federal, Military, and International Courts

	U.S. Constitution	Federal Court	General Courts-Martial	Military Commissions	Rome Statute of the ICC
Presumption of Innocence	<p>“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”</p> <p>Coffin v. United States, 156 U.S. 432, 453 (1895).</p>	<p>If the defendant fails to enter a proper plea, a plea of not guilty will be entered.</p> <p>Fed. R. Crim. P. 11(a).</p> <p>Defendant is entitled to jury instructions explaining that guilt must be proved on the evidence beyond a reasonable doubt.</p> <p>Taylor v. Kentucky, 436 U.S. 478 (1978).</p> <p>Defendant is entitled to appear in court without unnecessary physical restraints or other indicia of guilt, such as appearing in prison uniform, that may be prejudicial to jury.</p> <p>See Holbrook v. Flynn, 475 U.S. 560 (1986).</p>	<p>If the defendant fails to enter a proper plea, a plea of not guilty will be entered.</p> <p>R.C.M. 910(b).</p> <p>Members of court martial must be instructed that the “accused must be presumed to be innocent until the accused’s guilt is established by legal and competent evidence beyond a reasonable doubt.”</p> <p>R.C.M. 920(e).</p> <p>The accused shall be properly attired in uniform with grade insignia and any decorations to which entitled. Physical restraint shall not be imposed unless prescribed by the military judge.</p> <p>R.C.M. 804.</p>	<p>Unclear. Under M.O. President first determines there is “reason to believe” person is or was a member of al Qaeda, has engaged in acts of international terrorism, or has knowingly harbored such a person.</p> <p>M.O. § 2.</p>	<p>“Everyone shall be presumed to be innocent until proven guilty before the Court”</p> <p>Rome Statute Art. 66.</p>
Right to Remain Silent	<p>“No person...shall be compelled in any criminal case to be a witness against himself”</p> <p>Amendment V.</p>	<p>Incriminating statements made by defendant under duress or without prior <i>Miranda</i> warning are inadmissible as evidence of guilt in a criminal trial.</p> <p>Miranda v. Arizona, 384 U.S. 436 (1966).</p>	<p>Coerced confessions or confessions made without statutory equivalent of <i>Miranda</i> warning are not admissible as evidence.</p> <p>Art. 31, UCMJ, 10 U.S.C. § 831.</p> <p>The prosecutor must notify</p>	<p>Unclear. The M.O. does not require warning or bar use of statements made during military interrogation from criminal proceedings.</p> <p>Art. 31(a), UCMJ bars persons subject to it from compelling any individual to</p>	<p>During an investigation, if there is reason to believe a person has committed a crime under the jurisdiction of the ICC, that person has the right “[t]o remain silent, without such silence being a consideration in the determination of guilt or</p>

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		<p>Before a jury is allowed to hear evidence of a defendant's confession, the court must determine that it was voluntarily given.</p> <p>18 U.S.C. § 3501.</p>	<p>the defense of any incriminating statements made by the accused that are relevant to the case prior to the arraignment. Motions to suppress such statements must be made prior to pleading.</p> <p>Mil. R. Evid. 304.</p>	<p>make a confession, but art. 31(d) bars the use of compelled statements only at courts-martial.</p> <p>Art. 31, UCMJ, 10 U.S.C. § 831.</p>	<p>innocence.”</p> <p>Rome Statute Art. 54.</p> <p>“Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible...”</p> <p>Rome Statute Art. 69(7).</p>
<p>Freedom from Unreasonable Searches & Seizures</p>	<p>“The right of the people to be secure ... against unreasonable searches and seizures, shall not be violated; no Warrants shall issue, but upon probable cause...”</p> <p>Amendment IV.</p>	<p>Evidence, including derivative evidence, gained through unreasonable searches and seizures may be excluded in court.</p> <p>Boyd v. United States, 116 U.S. 616 (1886); Nardone v. United States, 308 U.S. 338 (1938); Fed. R. Crim. P. 41.</p> <p>A search warrant issued by a magistrate on a showing of probable cause is generally required for law enforcement agents to conduct a search of an area where the subject has a reasonable expectation of privacy, including searches and seizures of telephone or other communications and emissions of heat and other phenomena detectable with means other than human senses.</p> <p>Katz v. United States, 389</p>	<p>“Evidence obtained as a result of an unlawful search or seizure ... is inadmissible against the accused ...” unless certain exceptions apply.</p> <p>Mil. R. Evid. 311.</p> <p>“Authorization to search” may be oral or written, and may be issued by a military judge or an officer in command of the area to be searched, or if the area is not under military control, with authority over persons subject to military law or the law of war. It must be based on probable cause.</p> <p>Mil. R. Evid. 315.</p> <p>Interception of wire and oral communications within the United States requires judicial application in accordance with 18 U.S.C. §§ 2516 <i>et seq.</i></p>	<p>Not addressed in M.O.</p>	<p>“Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible”</p> <p>Rome Statute Art. 69(7).</p>

	U.S. Constitution	Federal Court	General Courts-Martial	Military Commissions	Rome Statute of the ICC
		<p>U.S. 347 (1967).</p> <p>Evidence resulting from overseas searches of American property by foreign officials is admissible unless foreign police conduct shocks judicial conscience or participation by U.S. agents is so substantial as to render the action that of the United States.</p> <p>U.S. v. Barona, 56 F.3d 1087 (9th Cir. 1995).</p>	<p>Mil. R. Evid. 317.</p> <p>A search conducted by foreign officials is unlawful only if the accused is subject to “gross and brutal treatment.”</p> <p>Mil. R. Evid. 311(c).</p>		
Assistance of Effective Counsel	<p>“In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.”</p> <p>Amendment VI.</p>	<p>Defendants in criminal cases have the right to representation by an attorney at all stages of prosecution. The defendant may hire an attorney or, if indigent, have counsel appointed at the government’s expense. If two or more co-defendants are represented by one attorney, the court must inquire as to whether a conflict of interest exists.</p> <p>Fed. R. Crim. P. 44.</p> <p>Conversations between attorneys and clients are privileged.</p> <p>Fed. R. Evid. 501</p> <p>Procedures for ensuring adequate representation of</p>	<p>The defendant has a right to military counsel at government expense. The defendant may choose counsel, if that attorney is reasonably available, and may hire a civilian attorney in addition to military counsel.</p> <p>Art 38, UCMJ, 10 U.S.C. § 838.</p> <p>Appointed counsel must be certified as qualified and may not be someone who has taken any part in the investigation or prosecution, unless explicitly requested by the defendant.</p> <p>Art. 27, UCMJ, 10 U.S.C. § 827.</p> <p>The attorney-client privilege</p>	<p>M.O. indicates defendants will be represented by attorneys, but does not explicitly provide for a defendant’s right to retain counsel of choice. Regulations are to provide for qualifications of attorneys.</p> <p>M.O. § 4(c).</p> <p>In some past military tribunals, defendants were not permitted to choose attorneys, nor were there procedures to avoid conflicts of interest. For example, the eight <i>Quirin</i> defendants were not permitted to choose counsel and seven were represented by the same attorney, although one of them had betrayed the others to the FBI.</p>	<p>“...the accused shall be entitled... to have legal assistance assigned by the Court where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it; ...”</p> <p>Rome Statute Art. 67(1)(d).</p> <p>“... the accused shall be entitled ... to communicate freely with counsel of accused's choosing”</p> <p>Rome Statute Art. 67(1)(b).</p>

	U.S. Constitution	Federal Court	General Courts-Martial	Military Commissions	Rome Statute of the ICC
		defendants are outlined at 18 U.S.C. §§ 3005 (capital cases) and 3006A.	is honored. Mil. R. Evid. 502.		
Right to Indictment and Presentment	<p>“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger”</p> <p>Amendment V.</p>	<p>Where the accused is in danger of being subjected to an infamous punishment if convicted, he has the right to insist that he shall not be tried except on the accusation of a grand jury.</p> <p><i>Ex parte</i> Wilson, 114 U.S. 417 (1885); Fed. R. Crim. P. 7.</p> <p>Jurors must be selected from a fair cross section of the community; otherwise, an accused can challenge the indictment.</p> <p>28 U.S.C. §§ 1861 <i>et seq.</i></p> <p>Once an indictment is given, its scope may not be increased.</p> <p><i>Ex parte</i> Bain, 121 U.S. 1 (1887).</p> <p>(Amendments to an indictment must undergo further grand jury process.)</p>	<p>The right to indictment by grand jury is explicitly excluded in “cases arising in the land or naval forces.”</p> <p>Amendment V</p> <p>Whenever an offense is alleged, the commander is responsible for initiating a preliminary inquiry and deciding how to dispose of the offense.</p> <p>R.C.M. 303-06.</p>	<p>Does not apply to offenses against the law of war.</p> <p><i>Ex Parte</i> Quirin, 317 U.S. 1 (1942).</p> <p>M.O. allows individuals to be tried by military commission once it is determined in writing by the President that there is “reason to believe” the accused is or was a member of al Qaeda, has engaged in acts of international terrorism, or has knowingly harbored such a person.</p> <p>M.O. § 2.</p>	<p>The Pre-Trial Chamber conducts a hearing “to determine whether there is sufficient evidence to establish substantial grounds to believe that the accused committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall confirm those charges in relation to which it has determined that there is sufficient evidence; ... decline to confirm those charges in relation to which it has determined that there is insufficient evidence; ... or adjourn the hearing and request the Prosecutor to [provide further evidence or amend the charges]”</p> <p>Rome Statute Art. 61.</p> <p>Charges may be amended up to the time of the trial but are subject to rehearing.</p> <p><i>Id.</i></p>
Right to Written Statement of Charges	<p>“In all criminal prosecutions, the accused shall enjoy the right...to be informed of the</p>	<p>Defendant is entitled to be informed of the nature of the charge with sufficiently</p>	<p>Charges and specifications must be signed under oath and made known to the</p>	<p>Not specifically addressed in M.O.</p>	<p>“... the person shall be provided with a copy of the ... charges...”</p>

	U.S. Constitution	Federal Court	General Courts-Martial	Military Commissions	Rome Statute of the ICC
	nature and cause of the accusation; ...” Amendment VI.	reasonable certainty to allow for preparation of defense. Cook v. United States, 138 U.S. 157 (1891).	accused as soon as practicable. Art. 30, UCMJ, 10 U.S.C. § 830.	“[C]harges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment.” <i>In re Yamashita</i> , 327 U.S. 1 (1946).	Rome Statute Art. 61(3).
Right to be Present at Trial	The Confrontation Clause of Amendment VI guarantees the accused's right to be present in the courtroom at every stage of his trial. Illinois v. Allen, 397 U.S. 337 (1970).	The language, history, and logic of Rule 43 support a straightforward interpretation that prohibits the trial in absentia of a defendant who is not present at the beginning of trial. Crosby v. United States, 506 U.S. 255, 262 (1993); Fed. R. Crim. P. 43. When defendant knowingly absents himself from court during trial, court may “proceed with trial in like manner and with like effect as if he were present.” Diaz v. United States, 223 U.S. 442, 455 (1912).	The presence of the accused is required during arraignment, at the plea, and at every stage of the court-martial unless the accused waives the right by voluntarily absenting him or herself from the proceedings after the arraignment or by persisting in conduct that justifies the trial judge in ordering the removal of the accused from the proceedings. R.C.M. 801.	Not addressed. M.O. does not appear to contemplate trials in absentia.	“The accused shall be present during the trial.” Rome Statute Art. 63.
Prohibition against Ex Post Facto Crimes	“No ... ex post facto law shall be passed.” Art. I, § 9, cl. 3.	Congress may not pass a law punishing conduct that was not a crime when perpetrated, increasing the possible sentence for a crime, or	Courts-martial will not enforce an ex post facto law, including increasing amount of pay to be forfeited for specific crimes.	M.O. provides for trial of individuals for “any and all offenses triable by military commission.”	“A person shall not be criminally responsible...unless the conduct in question constitutes, at the time it takes

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		<p>reducing the government’s evidentiary burden.</p> <p>Calder v. Bull, 3 Dall. (3 U.S.) 386 (1798); Ex Parte Garland, 4 Wall (71 U.S.) 1867.</p>	<p>U.S. v. Gorki, 47 M.J. 370 (1997).</p>		<p>place, a crime within the jurisdiction of the Court.”</p> <p>Rome Statute Art. 22.</p>
<p>Protection against Double Jeopardy</p>	<p>“... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; ...”</p> <p>Amendment V.</p> <p>Subject to “dual sovereign” doctrine, that is, federal and state courts may prosecute an individual for the same conduct without violating the clause.</p>	<p>Jeopardy attaches once the jury is sworn or where there is no jury, when the first evidence is presented. If the trial is terminated after jeopardy has attached, a second trial may be barred in a court under the same sovereign, particularly where it is prosecutorial conduct that brings about the termination of the trial.</p> <p>Illinois v. Somerville, 410 U.S. 458 (1973).</p>	<p>Double jeopardy clause applies.</p> <p>See Wade v. Hunter, 336 US 684, 688-89 (1949).</p> <p>Art. 44, UCMJ prohibits double jeopardy, provides for jeopardy to attach after introduction of evidence.</p> <p>10 U.S.C. § 844.</p> <p>General court-martial proceeding is considered to be a federal trial for double jeopardy purposes. Double jeopardy does not result from charges brought in state or foreign courts, although court-martial in such cases is disfavored.</p> <p>U. S. v. Stokes, 12 M.J. 229 (C.M.A. 1982).</p> <p>Once military authorities have turned service member over to civil authorities for trial, military may have waived jurisdiction for that crime, although it may be possible to</p>	<p>M.O. provides that a person subject to the order must be turned over to the Secretary of Defense upon demand, and reserves the authority to direct the Secretary of Defense to transfer control of such a person to another governmental authority. If a defendant before a U.S. court is removed for trial by military tribunal for the same conduct, double jeopardy could become an issue.</p> <p>M.O. §§ 2(c), 7(e).</p>	<p>“No person who has been tried by another court...shall be tried by the Court with respect to the same conduct...”</p> <p>“No person who has been tried by another court ... shall be tried by the Court with respect to the same conduct unless the proceedings in the other court [were not properly conducted].”</p> <p>Rome Statute Art. 20</p>

	U.S. Constitution	Federal Court	General Courts-Martial	Military Commissions	Rome Statute of the ICC
			charge the individual for another crime arising from the same conduct. <i>See</i> 54 AM. JUR. 2D, Military and Civil Defense §§ 227-28.		
Speedy & Public Trial	<p>“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial,”</p> <p>Amendment VI.</p> <p>“The purpose of the requirement of a public trial was to guarantee that the accused would be fairly dealt with and not unjustly condemned. History had proven that secret tribunals were effective instruments of oppression.”</p> <p><i>Estes v. State of Tex.</i>, 381 U.S. 532, 539 (1965).</p>	<p>Trial is to commence within seventy days of indictment or original appearance before court.</p> <p>18 U.S.C. § 3161.</p> <p>Closure of the courtroom during trial proceedings is justified only if 1) the proponent of closure advances an overriding interest likely to be prejudiced; 2) the closure is no broader than necessary; 3) the trial court considers reasonable alternatives to closure; and 4) the trial court makes findings adequate to support closure.</p> <p><i>See Waller v. Georgia</i>, 467 U.S. 39, 48 (1984).</p>	<p>In general, accused must be brought to trial within 120 days of the preferral of charges or the imposition of restraint, whichever date is earliest.</p> <p>R.C.M. 707(a).</p> <p>The right to a public trial applies in courts-martial but is not absolute.</p> <p>R.C.M. 806.</p> <p>The military trial judge may exclude the public from portions of a proceeding for the purpose of protecting classified information if the prosecution demonstrates an overriding need to do so and the closure is no broader than necessary.</p> <p><i>United States v. Grunden</i>, 2 M.J. 116 (CMA 1977).</p>	<p>Military commissions are exempt from statutory requirements for speedy trial.</p> <p>18 U.S.C. § 3172.</p> <p>M.O. appears to suggest possible indefinite detention without trial or charge.</p> <p>M.O. §§ 1(e), 2(b), 4(a).</p> <p>M.O. authorizes the Secretary of Defense to establish rules for the “conduct, closure of, and access to proceedings” that will protect information that is classified or “classifiable” pursuant to executive order or otherwise protected by law.</p>	<p>“... the accused shall be entitled to a public hearing ...</p> <p>“the accused shall be entitled ... to be tried without undue delay;”</p> <p>Rome Statute Arts. 67(1), 67(1)(c).</p>
Burden & Standard of Proof	<p>Due Process requires the prosecution to prove the defendant guilty of each element of a crime beyond a reasonable doubt.</p>	<p>Defendant is entitled to jury instructions clarifying that the prosecution has the burden of presenting evidence sufficient to prove guilt beyond a</p>	<p>Members of court martial must be instructed that the burden of proof to establish guilt is upon the government and that any reasonable doubt</p>	<p>Unclear. M.O. does not establish standard of proof.</p>	<p>“The onus is on the Prosecutor to prove the guilt of the accused</p> <p>“In order to convict the accused, the Court must be</p>

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	<i>In re Winship</i> , 397 U.S. 358 (1970).	reasonable doubt. <i>Cool v. United States</i> , 409 U.S. 100 (1978).	must be resolved in favor of the defendant. R.C.M. 920(e).		convinced of the guilt of the accused beyond reasonable doubt.” Rome Statute Art. 66.
Privilege Against Self-Incrimination	“No person ... shall be compelled in any criminal case to be a witness against himself...” Amendment V.	Defendant may not be compelled to testify. Jury may not be instructed that guilt may be inferred from the defendant’s refusal to testify. <i>Griffin v. California</i> , 380 U.S. 609 (1965). Witnesses may not be compelled to give testimony that may be incriminating unless given immunity for that testimony. 18 U.S.C. § 6002.	No person subject to the UCMJ may compel any person to answer incriminating questions. Art. 31(a) UCMJ, 10 U.S.C. § 831(a). Defendant may not be compelled to give testimony that is immaterial or potentially degrading. Art. 31(c), UCMJ, 10 U.S.C. § 831(c). No adverse inference is to be drawn from a defendant’s refusal to answer any questions or testify at court-martial. Mil. R. Evid. 301(f). Witnesses may not be compelled to give testimony that may be incriminating unless granted immunity for that testimony by a general court-martial convening authority, as authorized by the Attorney General, if required. 18 U.S.C. § 6002; R.C.M. 704.	M.O. does not explicitly address self-incrimination, but art. 31, UCMJ mandates that “no person subject to [the UCMJ] may compel a person to make a statement or produce evidence before <i>any military tribunal</i> if the statement or evidence is not material to the issue and may tend to degrade him.” Art. 31(c) UCMJ (emphasis added), 10 U.S.C. § 831. Witnesses may not be compelled to give testimony that may be incriminating unless given immunity for that testimony. 18 U.S.C. § 6002 (applicable to any proceedings before an executive department, including the Department of Defense or branch of the Armed Services. 18 U.S.C. § 6001; 5 U.S.C. §§ 101-02)	“[T]he accused shall be entitled ... not to be compelled to testify or to confess guilt” Rome Statute Arts. 54(1)(a), 67(1)(g). Any individual questioned during an investigation “[s]hall not be compelled to incriminate himself or herself or to confess guilt; [and s]hall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;” Rome Statute Art. 55.

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Right to Examine or Have Examined Adverse Witnesses	<p>“In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him;”</p> <p>Amendment VI.</p>	<p>Rules of Evidence prohibit generally the introduction at trial of statements made out of court to prove the truth of the matter stated unless the declarant is available for cross-examination at trial (hearsay rule).</p> <p>Fed. R. Evid. 801 <i>et seq.</i></p> <p>The government is required to disclose to defendant any relevant evidence in its possession or that may become known through due diligence.</p> <p>Fed. R. Crim. P. 16.</p>	<p>Hearsay rules apply as in federal court.</p> <p>Mil. R. Evid. 801 <i>et seq.</i></p> <p>In capital cases, sworn depositions may not be used in lieu of witness, unless court-martial is treated as non-capital or it is introduced by the defense.</p> <p>Art. 49, UCMJ, 10 U.S.C. § 849.</p>	<p>Hearsay evidence admissible if the commission determines such evidence would “have probative value to a reasonable person.”</p> <p>M.O. § 4(c)(3).</p> <p>Art. 49(d), UCMJ, allowing for duly authenticated depositions to be read into evidence in non-capital cases, applies to military commissions.</p>	<p>“[T]he accused shall be entitled ... to examine, or to have examined ... the witnesses against him or her”</p> <p>Rome Statute Art. 67(1)(e).</p>
Right to Compulsory Process to Obtain Witnesses	<p>“In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor,”</p> <p>Amendment VI.</p>	<p>Defendants have the right to subpoena witnesses to testify in their defense. The court may punish witnesses who fail to appear.</p> <p>Fed. R. Crim. Pro. Rule 17.</p>	<p>Defendants before court-martial have the right to compel appearance of witnesses necessary to their defense.</p> <p>R.C.M. 703.</p> <p>Process to compel witnesses in court-martial cases is to be similar to the process used in federal courts.</p> <p>Art. 46, UCMJ, 10 U.S.C. § 846.</p>	<p>M.O. does not address subpoenas. Art. 46, UCMJ, guarantees to all parties of court-martial the opportunity to obtain evidence and witnesses, but empowers military commissions as well as courts-martial to hold witnesses in contempt for failure to appear.</p> <p>Art. 46, UCMJ, 10 U.S.C. § 846.</p>	<p>“...the accused shall be entitled...to obtain the attendance and examination of witnesses on his or her behalf...”</p> <p>Rome Statute Art. 67(1)(e).</p>
Right to Trial by Impartial Judge	<p>“The Judicial Power of the United States, shall be vested in one supreme Court, and in</p>	<p>The independence of the judiciary from the other branches was established to</p>	<p>A qualified military judge is detailed to preside over the court-martial. The convening</p>	<p>M.O. does not expressly provide for measures to ensure impartiality of the</p>	<p>“The judges shall be independent in the performance of their</p>

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	<p>... inferior courts The Judges ... shall hold their Offices during good Behaviour, and shall receive ... a Compensation, which shall not be diminished during their Continuance in Office.”</p> <p>Article III § 1.</p> <p>The Due Process clause of the Fifth Amendment requires trial by impartial judge.</p> <p>Tumey v. Ohio, 273 U.S. 510 (1927).</p>	<p>ensure trials are decided impartially, without the “potential domination by other branches of government.”</p> <p>United States v. Will, 449 U.S. 200, 217-18 (1980).</p> <p>Judges with a pecuniary interest in the outcome of a case or other conflicts of interest are disqualified and must recuse themselves.</p> <p>28 U.S.C. § 455.</p>	<p>authority may not prepare or review any report concerning the performance or effectiveness of the military judge.</p> <p>Art. 26, UCMJ, 10 U.S.C. § 826.</p> <p>Article 37, UCMJ, prohibits unlawful influence of courts-martial through admonishment, censure, or reprimand of its members by the convening authority or commanding officer, or any unlawful attempt by a person subject to the UCMJ to coerce or influence the action of a court-martial or convening authority.</p> <p>Art. 37, UCMJ, 10 U.S.C. § 837.</p>	<p>members of tribunals. Article 37, UCMJ applies to “other military tribunals” as to the prohibition of coercion or unlawful influence by any person subject to the UCMJ, but does not appear to prohibit admonishment, censure, or reprimand of its members by the convening authority or commanding officer.</p> <p>Art. 37, UCMJ, 10 U.S.C. § 837.</p>	<p>functions.”</p> <p>Rome Statute Art. 40.</p> <p>“A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case ... if, inter alia, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted”</p> <p>Rome Statute Art. 41.</p>
Right to Trial By Impartial Jury	<p>“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury;”</p> <p>Art III § 2 cl. 3.</p> <p>“In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury of the state”</p> <p>Amendment VI.</p>	<p>The pool from which juries are drawn must represent a fair cross section of the community.</p> <p>Taylor v. Louisiana, 419 U.S. 522 (1975).</p> <p>There must further be measures to ensure individual jurors selected are not biased (<i>i.e.</i>, the <i>voir dire</i> process).</p> <p>Lewis v. United States, 146 U.S. 370 (1892); <i>see</i> Fed. R.</p>	<p>A military accused has no Sixth Amendment right to a trial by petit jury.</p> <p><i>Ex Parte Quirin</i>, 317 U.S. 1, 39-40 (1942) (<i>dicta</i>).</p> <p>However, “Congress has provided for trial by members at a court-martial.”</p> <p>United States v. Witham, 47 MJ 297, 301 (1997); Art. 25, UCMJ, 10 U.S.C. § 825.</p>	<p>Crimes against the law of war are not required to be tried by jury.</p> <p><i>Ex Parte Quirin</i>, 317 U.S. 1 (1942).</p>	<p>The Rome Statute follows the civil law tradition of employing a panel of judges to decide questions of both fact and law. There is no provision for trial by jury.</p>

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		<p>Crim. P. 24 (peremptory challenges).</p> <p>The trial must be conducted in a manner designed to avoid exposure of the jury to prejudicial material or undue influence.</p> <p>If the locality of the trial has been so saturated with publicity about a case that it is impossible to assure jurors will not be affected by prejudice, the defendant is entitled to a change of venue.</p> <p>Irvin v. Dowd, 366 U.S. 717 (1961).</p>	<p>The Sixth Amendment requirement that the jury be impartial applies to court-martial members and covers not only the selection of individual jurors, but also their conduct during the trial proceedings and the subsequent deliberations.</p> <p>United States v. Lambert, 55 M.J. 293 (2001).</p> <p>The absence of a right to trial by jury precludes criminal trial of civilians by court-martial.</p> <p>Reid v. Covert, 354 U.S. 1 (1957); Kinsella v. United States <i>ex rel.</i> Singleton, 361 U.S. 234 (1960).</p>		
Right to Appeal to Independent Reviewing Authority	<p>“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it”</p> <p>Article I § 9 cl. 2.</p>	<p>Originally, the writ of <i>habeas corpus</i> permitted collateral attack upon a prisoner's conviction only if the sentencing court lacked subject matter jurisdiction. It later evolved into an avenue for the challenge of federal and state convictions on other due process grounds, to determine whether a prisoner's detention is “contrary to the Constitution or laws or treaties of the United States.”</p>	<p>The writ of <i>habeas corpus</i> provides the primary means by which those sentenced by military court, having exhausted military appeals, can challenge a conviction or sentence in a civilian court. The scope of matters that a court will address is more narrow than in challenges of federal or state convictions.</p> <p>Burns v. Wilson, 346 U.S. 137 (1953).</p>	<p>The language of the M.O. appears to exclude review by any civilian court.</p> <p>“[T]he individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.”</p>	<p>The Rome Statute provides for appeal of a conviction or sentence to the Appeals Chamber of the ICC at any time after trial if new evidence becomes available, even after the accused's death.</p> <p>Rome Statute Art. 84.</p> <p>However, it does not explicitly provide for appeal to another international court or the civilian courts of any state.</p>

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		28 U.S.C. §§ 2241 <i>et seq.</i>		M.O. §7(b)(2). Similar language was held not to bar <i>habeas corpus</i> review in <i>ex parte Quirin</i> , but <i>habeas corpus</i> review was denied in other most other cases tried by military commissions, e.g. <i>Johnson v. Eisentrager</i> , 339 U.S. 763 (1950); <i>In re Application of Homma</i> , 327 U.S. 759, 760 (1946); <i>Ex parte Mudd</i> , 17 F. Cas. 954 (S.D. Fla. 1868).	
Protection against Excessive Penalties	“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Amendment VIII.	The death penalty is not <i>per se</i> unconstitutional, but its discriminatory and arbitrary imposition may be, and the death penalty may not be automatic. <i>See Gregg v. Georgia</i> , 428 U.S. 153 (1976); 18 U.S.C. § 3592 (mitigating /aggravating circumstances). When the death penalty may be imposed, the defendant shall be provided a list of potential jurors and witnesses, unless the court finds that such action might jeopardize the life or safety of any person. 18 U.S.C. § 3432. A special hearing is held to	Death may only be adjudged for certain crimes where the defendant is found guilty by unanimous vote of court-martial members present at the time of the vote. Prior to arraignment, the trial counsel must give the defense written notice of aggravating factors the prosecution intends to prove. R.C.M. 1004. A conviction of spying during time of war under article 106, UCMJ, carries a mandatory death penalty. 10 U.S.C. § 906.	Conviction and sentencing requires two-thirds concurrence of commission members present, a majority of members being present. Sentences can include life imprisonment or death. M.O. § 4. Charge of spying during time of war under article 106, UCMJ, is triable by military commission and on conviction carries a mandatory death penalty. 10 U.S.C. § 906. Aiding the enemy is also triable by military commission and may be punished by death. 10 U.S.C. § 904.	Penalties are limited to imprisonment, fines, and forfeiture of assets; there is no death penalty. Rome Statute Art. 77.

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		determine whether the death sentence is warranted. 18 U.S.C. § 3593.			