TITLE __—MATTERS RELATING TO MILITARY COMMISSIONS

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SEC. __01. SHORT TITLE.

This title may be cited as the "Military Commissions Act Amendments of 2016".

SEC. __02. DETAIL OF JUDGES TO HEAR MOTIONS.

(a) AUTHORITY TO DETAIL JUDGES TO COMMISSIONS TO HEAR MOTIONS.—Section 948l of title 10, United States Code, is amended by adding at the end the following new subsection:

"(d) DETAIL OF JUDGES TO HEAR MOTIONS.—Under such regulations as the Secretary of Defense may prescribe, the presiding judge of a military commission under this chapter may request that the chief judge of the military commission trial judiciary assign an unassigned judge detailed to military commissions under this chapter to hear, determine, and rule upon one or more collateral or other motions before a military commission under this chapter for which a military judge may call a military commission into session without the presence of members under section 949d(a) of this title. If no military judge detailed to a military commission under this chapter is available, the convening authority for military commissions under this chapter may request a Judge Advocate General (as defined in section 801(1) of this title) or the Staff Judge Advocate to the Commandant of the Marine Corps to detail to the military commission a military judge for the purpose of hearing, determining, and ruling upon any such motion.".

(b) CONFORMING AMENDMENTS.—

(1) SECTION HEADING.—The heading of such section is amended to read as follows:

"§948l. Detail or employment of reporters or interpreters; detail of judges to hear motions".

(2) CLERICAL AMENDMENT.—The item relating to such section in the table of sections at the beginning of subchapter II of chapter 47A of such title is amended to read as follows:

"948l. Detail or employment of reporters or interpreters; detail of judges to hear motions.".

SEC. __03. PROFESSIONAL ADVICE.

(a) MILITARY COMMISSIONS.—Section 949b(a)(3) of title 10, United States Code, is amended—

(1) by striking "or" at the end of subparagraph (A);

(2) by striking the period at the end of subparagraph (B) and inserting a semicolon; and

(3) by adding at the end the following new subparagraphs:

"(C) the provision of appropriate professional legal advice to trial counsel by a supervisory attorney of trial counsel; or

"(D) the provision of appropriate professional legal advice to government defense counsel by a supervisory attorney of government defense counsel.".

(b) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the enactment of this Act and shall apply to any motion alleging a violation of section 949b of title 10, United States Code, pending or brought on or after the date of the enactment of this Act.

SEC. __04. USE OF VIDEO TELECONFERENCING.

Section 949d of title 10, United States Code, is amended by adding at the end the following new subsection:

"(e) VIDEO TELECONFERENCING.—The military judge may provide for the participation of the accused, defense counsel, trial counsel, and other necessary participants by video teleconferencing for any matter for which the military judge may call the military commission into session without the presence of the members under section (a), and the participation of the accused by video teleconferencing as so provided by the military judge shall be treated as meeting the requirement under subsection (a)(2) for the accused to be present.".

SEC. __05. PROVISION OF GOVERNMENT COUNSEL.

(a) DETAIL GOVERNMENT COUNSEL.—Section 948k of title 10, United States Code, is amended—

(1) in subsection (a)—

(A) by striking "military defense counsel" in paragraphs (1) and (4) and inserting "government defense counsel";

(B) by inserting "government" before "defense counsel" in paragraph (2); annd

(C) by striking "Military defense counsel" in paragraph (3) and inserting "Government defense counsel";

(2) in subsection (c)(1)—

(A) by striking "military defense counsel" and inserting "government defense counsel"; and

(B) by striking "shall be" and all the follows and inserting "shall meet the requirements set forth in subsection (b) for trial counsel."; and

(3) in subsection (e), by striking "military defense counsel" and inserting "government defense counsel" in the first sentence.

(b) CONFORMING AMENDMENTS.—

(1) Section 948s of such title is amended by striking "military defense counsel" and inserting "government defense counsel".

(2) Section 949c(b) of such title is amended by striking "military counsel" in paragraphs (2), (4), and (5) and inserting "government defense counsel".

(c) CLERICAL AMENDMENTS.—

(1) The heading of section 948k of such title is amended to read as follows:

"§948k. Detail of trial counsel and government defense counsel".

(2) The heading of subsection (c) of such section is amended by inserting "GOVERNMENT" before "DEFENSE COUNSEL".

(3) The item relating to such section in the table of sections at the beginning of subchapter II of chapter 47A of such title is amended to read as follows:

"948k. Detail of trial counsel and government defense counsel.".

SEC. __06. ADMINISTRATIVE IMPROVEMENTS.

Section 949a(b) of title 10, United States Code, is amended by adding at the end the following new paragraph:

"(5) The Secretary of Defense may provide in regulations under this chapter the following:

"(A) Procedures for the conversion of a case that has been referred to trial by a military commission under this chapter as a capital case to a noncapital case.

"(B) Standing before a military commission under this chapter for the convening authority with regard to funding or resource requests by either party.".

SEC. __07. TECHNICAL AMENDMENTS.

Chapter 47A of title 10, United States Code, is amended as follows:

(1) The item relating to subchapter VII in the table of subchapter after the chapter heading is amended by striking “Procedures” and inserting “Procedure”.

(2) The item relating to section 950g in the table of sections at the beginning of subchapter VII is amended by striking “Court of” after “United States”.

(3) Section 950t is amended—

(A) in paragraph (9), by striking the period after “attack” and inserting a comma;

(B) in paragraph (16), by inserting “be” after “shall”; and

(C) in paragraph (22), by inserting a period at the end.

SEC. __08. EFFECTIVE DATE.

The amendments made by this title shall apply to any case referred to a military commission under chapter 47A of title 10, United States Code, before, on, or after the date of the enactment of this Act other than a case in which a military commission has rendered a final judgment.

Section-by-Section Analysis

Section __02: This section would provide assistance to military judges in addressing issues raised by the parties and managing military commission dockets by permitting military judges to refer to motion judges any matter that can be addressed outside the presence of members of the military commission. The proposal defines motion judges as military judges detailed to the military commissions who are not presently assigned to a particular commission. The proposal is intended to provide military judges with additional tools to assist them in presiding over military commission cases and does not obligate military judges to refer matters to motion judges.

Section __03: This section clarifies that the provision of appropriate professional legal advice by supervisory attorneys does not constitute unlawful influence. These amendments would bring the unlawful influence prohibition of the Military Commissions Act more in line with, but still broader than, the prohibition on unlawful command influence contained in the Uniform Code of Military Justice. The provisions are intended to take effect on the date of enactment of this Act with application to any motion alleging a violation of section 949b – the unlawful influence prohibition – pending or brought on or after the date of enactment.

Section __04: This section would provide further assistance to military judges in scheduling and convening hearings for military commission cases. It permits a military judge to convene a hearing by video teleconference (VTC) on any matter for which the military judge may call a military commission into session without the presence of its members. The provision is intended to provide flexibility at the military judge's discretion to convene hearings without requiring all necessary participants to travel to Guantanamo Bay, Cuba.

Section __05: This section would permit the detail of civilian government attorneys to serve as defense counsel to represent an accused before a military commission. This section responds to concerns raised by the defense bar regarding challenges associated with mandatory rotations of military defense counsel. In order to sustain continuity of representation, government civilian attorneys are offered to the accused in lieu of military defense counsel.

Section __06: This section would provide authority for the Secretary of Defense to promulgate procedures to facilitate the change of a capital commission to a non-capital commission after referral without requiring the charges and specifications to be withdrawn and to be referred to a non-capital commission. This section is intended to provide the government with flexibility to convert a capital case without requiring the government to withdraw and re-refer charges against an accused.

This section would also provide the convening authority for military commissions with standing before a military commission with regard to funding or resource requests submitted by the prosecution or the defense. Currently, in the event the convening authority denies a request for funding submitted by the prosecution or defense, either party may seek relief from the military judge via motion to compel. This section is intended to provide the convening authority with a mechanism to demonstrate his or her reasoning to the military judge in the event of such a motion.

Section __07: This section does not change operative law, but merely corrects grammatical errors in diverse portions of the MCA.

Changes to Existing Law: This proposal would amend title 10, United States Code, as follows:

§948l. Detail or employment of reporters or interpreters<u>; detail of judges to hear motions</u>.

(a) COURT REPORTERS.—Under such regulations as the Secretary of Defense may prescribe, the convening authority of a military commission under this chapter shall detail to or employ for the military commission qualified court reporters, who shall prepare a verbatim record of the proceedings of and testimony taken before the military commission.

(b) INTERPRETERS.—Under such regulations as the Secretary of Defense may prescribe, the convening authority of a military commission under this chapter may detail to or employ for the military commission interpreters who shall interpret for the military commission, and, as necessary, for trial counsel and defense counsel for the military commission, and for the accused.

(c) TRANSCRIPT; RECORD.—The transcript of a military commission under this chapter shall be under the control of the convening authority of the military commission, who shall also be responsible for preparing the record of the proceedings of the military commission.

(d) MOTION JUDGES.—Under such regulations as the Secretary of Defense may prescribe, the presiding judge of a military commission under this chapter may request that the chief judge of the military commission trial judiciary assign an unassigned judge presently detailed to the military commissions under this chapter to hear, determine and rule upon one or more collateral or other motions before a military commission under this chapter for which a military judge may call a military commission into session without the presence of members under section 94d(a) of this title. If no military judge detailed to a military commission under this chapter is available, the convening authority for military commissions under this chapter may request a Judge Advocate general (as defined in section 801(1) of this title) or the Staff Judge Advocate to the Commandant of the Marine Corps to detail to the military commission a military judge for the purpose of hearing, determining and ruling upon any such motion

§949b. Unlawfully influencing action of military commission and United States Court of Military Commission Review

(a) MILITARY COMMISSIONS.—(1) No authority convening a military commission under this chapter may censure, reprimand, or admonish the military commission, or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the military commission, or with respect to any other exercises of its or their functions in the conduct of the proceedings.

(2) No person may attempt to coerce or, by any unauthorized means, influence—

(A) the action of a military commission under this chapter, or any member thereof, in reaching the findings or sentence in any case;

(B) the action of any convening, approving, or reviewing authority with respect to their judicial acts; or

(C) the exercise of professional judgment by trial counsel or defense counsel.

(3) The provisions of this subsection shall not apply with respect to—

(A) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of military commissions; or

(B) statements and instructions given in open proceedings by a military judge or counsel.;

(C) the provision of appropriate professional legal advice to trial counsel by a supervisory attorney of trial counsel; or

(D) the provision f appropriate professional legal advice to government defense counsel by a supervisory attorney of government defense counsel.

(b) UNITED STATES COURT OF MILITARY COMMISSION REVIEW.— (1) No person may attempt to coerce or, by any unauthorized means, influence—

(A) the action of a military appellate judge or other duly appointed judge under this chapter on the United States Court of Military Commissions Review in reaching a decision on the findings or sentence on appeal in any case; or

(B) the exercise of professional judgment by trial counsel or defense counsel appearing before the United States Court of Military Commission Review.

(2) No person may censure, reprimand, or admonish a military appellate judge on the United States Court of Military Commission Review, or counsel thereof, with respect to any exercise of their functions in the conduct of proceedings under this chapter.

(3) The provisions of this subsection shall not apply with respect to—

(A) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of military commissions; or

(B) statements and instructions given in open proceedings by an appellate military judge or a duly appointed appellate judge on the United States Court of Military Commission Review, or counsel.

(4) No appellate military judge on the United States Court of Military Commission Review may be reassigned to other duties, except under circumstances as follows:

(A) The appellate military judge voluntarily requests to be reassigned to other duties and the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, approves such reassignment.

(B) The appellate military judge retires or otherwise separates from the armed forces.

(C) The appellate military judge is reassigned to other duties by the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, based on military necessity and such reassignment is consistent with service rotation regulations (to the extent such regulations are applicable).

(D) The appellate military judge is withdrawn by the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, for good cause consistent with applicable procedures under chapter 47 of this title (the Uniform Code of Military Justice).

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

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

(2) give a less favorable rating or evaluation to any commissioned officer because of the zeal with which such officer, in acting as counsel, represented any accused before a military commission under this chapter.

§949d. Sessions

(a) SESSIONS WITHOUT PRESENCE OF MEMBERS.—(1) At any time after the service of charges which have been referred for trial by military commission under this chapter, the military judge may call the military commission into session without the presence of the members for the purpose of—

(A) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty;

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

(C) if permitted by regulations prescribed by the Secretary of Defense, receiving the pleas of the accused; and

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

(2) Except as provided in subsections (b), (c), and (d), any proceedings under paragraph (1) shall be conducted in the presence of the accused, defense counsel, and trial counsel, and shall be made part of the record.

(b) DELIBERATION OR VOTE OF MEMBERS.—When the members of a military commission under this chapter deliberate or vote, only the members may be present.

(c) CLOSURE OF PROCEEDINGS.—(1) The military judge may close to the public all or part of the proceedings of a military commission under this chapter.

(2) The military judge may close to the public all or a portion of the proceedings under paragraph (1) only upon making a specific finding that such closure is necessary to—

(A) protect information the disclosure of which could reasonably be expected to cause damage to the national security, including intelligence or law enforcement sources, methods, or activities; or

(B) ensure the physical safety of individuals.

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

(d) EXCLUSION OF ACCUSED FROM CERTAIN PROCEEDINGS.— The military judge may exclude the accused from any portion of a proceeding upon a determination that, after being warned by the military judge, the accused persists in conduct that justifies exclusion from the courtroom—

(1) to ensure the physical safety of individuals; or

(2) to prevent disruption of the proceedings by the accused.

<u>(e) Video Teleconferencing.— The military judge may provide for the participation of the accused, defense counsel, trial counsel, and other necessary participants by video teleconferencing for any matter for which the military judge may call the military commission into session without the presence of the members under section (a), and the participation of the accused by video teleconferencing as so provided by the military judge shall be treated as meeting the requirement under subsection (a)(2) for the accused to be present.</u>

§948k. Detail of trial counsel and government defense counsel

(a) DETAIL OF COUNSEL GENERALLY.—(1) Trial counsel and military defense counsel government defense counsel shall be detailed for each military commission under this chapter.

(2) Assistant trial counsel and assistant and associate government defense counsel may be detailed for a military commission under this chapter.

(3) Military defense counsel Government defense counsel for a military commission under this chapter shall be detailed as soon as practicable.

(4) The Secretary of Defense shall prescribe regulations providing for the manner in which trial counsel and military defense counsel government defense counsel are detailed for military commissions under this chapter and for the persons who are authorized to detail such counsel for such military commissions.

(b) TRIAL COUNSEL.—Subject to subsection (e), a trial counsel detailed for a military commission under this chapter shall be—

(1) a judge advocate (as that term is defined in section 801 of this title (article 1 of the Uniform Code of Military Justice)) who is—

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

(B) certified as competent to perform duties as trial counsel before general courts-martial by the Judge Advocate General of the armed force of which such judge advocate is a member; or

(2) a civilian who is—

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

(B) otherwise qualified to practice before the military commission pursuant to regulations prescribed by the Secretary of Defense.

(c) DEFENSE COUNSEL.—(1) Subject to subsection (e), a military defense counsel government defense counsel detailed for a military commission under this chapter shall be a judge advocate (as so defined) who is—

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

(B) certified as competent to perform duties as defense counsel before general courts-martial by the Judge Advocate General of the armed force of which such judge advocate is a member. shall meet the requirements set forth in subsection (b) for trial counsel.

(2) The Secretary of Defense shall prescribe regulations for the appointment and performance of defense counsel in capital cases under this chapter.

(d) CHIEF PROSECUTOR; CHIEF DEFENSE COUNSEL.—(1) The Chief Prosecutor in a military commission under this chapter shall meet the requirements set forth in subsection (b)(1).

(2) The Chief Defense Counsel in a military commission under this chapter shall meet the requirements set forth in subsection (c)(1).

(e) INELIGIBILITY OF CERTAIN INDIVIDUALS.—No person who has acted as an investigator, military judge, or member of a military commission under this chapter in any case may act later as trial counsel or military defense counsel government defense counsel in the same case. No person who has acted for the prosecution before a military commission under this chapter may act later in the same case for the defense, nor may any person who has acted for the defense before a military commission under this chapter act later in the same case for the prosecution.

§949a. Rules

(a) PROCEDURES AND RULES OF EVIDENCE.—Pretrial, trial, and post-trial procedures, including elements and modes of proof, for cases triable by military commission under this chapter may be prescribed by the Secretary of Defense. Such procedures may not be contrary to or inconsistent with this chapter. Except as otherwise provided in this chapter or chapter 47 of this title, the procedures and rules of evidence applicable in trials by general courts-martial of the United States shall apply in trials by military commission under this chapter.

(b) EXCEPTIONS.—(1) In trials by military commission under this chapter, the Secretary of Defense, in consultation with the Attorney General, may make such exceptions in the applicability of the procedures and rules of evidence otherwise applicable in general courts-martial as may be required by the unique circumstances of the conduct of military and intelligence operations during hostilities or by other practical need consistent with this chapter.

(2) Notwithstanding any exceptions authorized by paragraph (1), the procedures and rules of evidence in trials by military commission under this chapter shall include, at a minimum, the following rights of the accused:

(A) To present evidence in the accused's defense, to cross examine the witnesses who testify against the accused, and to examine and respond to all evidence admitted against the accused on the issue of guilt or innocence and for sentencing, as provided for by this chapter.

(B) To be present at all sessions of the military commission (other than those for deliberations or voting), except when excluded under section 949d of this title.

(C)(i) When none of the charges preferred against the accused are capital, to be represented before a military commission by civilian counsel if provided at no expense to the Government, and by either the defense counsel detailed or the military counsel of the accused's own selection, if reasonably available.

(ii) When any of the charges preferred against the accused are capital, to be represented before a military commission in accordance with clause (i) and, to the greatest extent practicable, by at least one additional counsel who is learned in applicable law relating to capital cases and who, if necessary, may be a civilian and compensated in accordance with regulations prescribed by the Secretary of Defense.

(D) To self-representation, if the accused knowingly and competently waives the assistance of counsel, subject to the provisions of paragraph (4).

(E) To the suppression of evidence that is not reliable or probative.

(F) To the suppression of evidence the probative value of which is substantially outweighed by—

(i) the danger of unfair prejudice, confusion of the issues, or misleading the members; or

(ii) considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(3) In making exceptions in the applicability in trials by military commission under this chapter from the procedures and rules otherwise applicable in general courts-martial, the Secretary of Defense may provide the following:

(A) Evidence seized outside the United States shall not be excluded from trial by military commission on the grounds that the evidence was not seized pursuant to a search warrant or authorization.

(B) A statement of the accused that is otherwise admissible shall not be excluded from trial by military commission on grounds of alleged coercion or compulsory self-incrimination so long as the evidence complies with the provisions of section 948r of this title.

(C) Evidence shall be admitted as authentic so long as—

(i) the military judge of the military commission determines that there is sufficient evidence that the evidence is what it is claimed to be; and

(ii) the military judge instructs the members that they may consider any issue as to authentication or identification of evidence in determining the weight, if any, to be given to the evidence.

(D) Hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission only if—

(i) the proponent of the evidence makes known to the adverse party, sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence, the proponent's intention to offer the evidence, and the particulars of the evidence (including information on the circumstances under which the evidence was obtained); and

(ii) the military judge, after taking into account all of the circumstances surrounding the taking of the statement, including the degree to which the statement is corroborated, the indicia of reliability within the statement itself, and whether the will of the declarant was overborne, determines that—

(I) the statement is offered as evidence of a material fact;

(II) the statement is probative on the point for which it is offered;

(III) direct testimony from the witness is not available as a practical matter, taking into consideration the physical location of the witness, the unique circumstances of military and intelligence operations during hostilities, and the adverse impacts on or intelligence operations that would likely result from the production of the witness; and

(IV) the general purposes of the rules of evidence and the interests of justice will be best be served by admission of the statement into evidence.

(4)(A) The accused in a military commission under this chapter who exercises the right to self-representation under paragraph (2)(D) shall conform the accused's deportment and the

conduct of the defense to the rules of evidence, procedure, and decorum applicable to trials by military commission.

(B) Failure of the accused to conform to the rules described in subparagraph (A) may result in a partial or total revocation by the military judge of the right of self-representation under paragraph (2)(D). In such case, the military counsel of the accused or an appropriately authorized civilian counsel shall perform the functions necessary for the defense.

(5) The Secretary of Defense may provide in regulations under this chapter the following:

(A) Procedures for the conversion of a case that has been referred to trial by a military commission under this chapter as a capital case to a noncapital case.

(B) Standing before the commission under this chapter for the convening authority with regard to funding or resource requests by either party.

§950t. Crimes triable by military commission

The following offenses shall be triable by military commission under this chapter at any time without limitation:

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(9) Using protected persons as a shield.-Any person subject to this chapter who positions, or otherwise takes advantage of, a protected person with the intent to shield a military objective from attack~~.~~**,** or to shield, favor, or impede military operations, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

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(16) Destruction of property in violation of the law of war.-Any person subject to this chapter who intentionally destroys property belonging to another person in violation of the law of war shall **be** punished as a military commission under this chapter may direct.

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(22) Sexual assault or abuse.-Any person subject to this chapter who forcibly or with coercion or threat of force engages in sexual contact with one or more persons, or causes one or more persons to engage in sexual contact, shall be punished as a military commission under this chapter may direct**.**

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