SEC. 1013. CLARIFICATION THAT EITHER PARTY MAY USE DEPOSITION TESTIMONY IN TRIAL OF CAPITAL OFFENSE BY MILITARY COMMISSION.

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

"(5) In applying section 849(d) of this title (article 49(d) of the Uniform Code of Military Justice) to trials by military commission under this chapter, the limitation under that section to cases not capital shall not apply to the trial of a capital case by military commission under this chapter. Subject to that section, testimony by deposition may be presented in such a capital case by the prosecution as well as the defense.".

Section-by-Section Analysis

Chapter 47A of title 10, United States Code (10 USC 949a et seq.), as amended by the Military Commissions Act of 2009 (title XVIII of Public Law 111-84) ("2009 M.C.A." or "Act"), is the source of statutory authority for rules governing the reformed military commission system. Section 949a(a) of that chapter states that "Except as otherwise provided in this chapter . . . the procedures and rules of evidence in trials by general courts-martial of the United States shall apply in trials by military commission under this chapter." The Act sets forth a number of specific exceptions, including an exception permitting the admission of hearsay evidence "not otherwise admissible" in general courts-martial, *see* 10 U.S.C. 949a(b)(3)(D), as well as an exception permitting the use of "[e]vidence seized outside the United States," 10 U.S.C. 949a(b)(3)(A).

The proposed legislation clarifies that both the defense and the prosecution may affirmatively offer into evidence deposition testimony in capital cases in military commissions conducted pursuant to Chapter 47A. This clarification is appropriate because Article 49 of the Uniform Code of Military Justice ("Article 49") might otherwise be understood to prohibit the admission of depositions offered into evidence by the prosecution in capital cases in military commissions. Such a result would be inconsistent with other evidentiary rules in the 2009 Military Commissions Act, which permit the use in reformed military commissions of reliable, probative, and lawfully-obtained hearsay evidence, as well as evidence seized outside the United States, by both the defense and the prosecution. In Federal court, the applicable rules do not prohibit the use of depositions in capital cases.

Legislative action is needed in FY 2013 because a capital military commission case is already under way at Guantanamo. The suggested revision will ensure that both parties can present testimony from witnesses who cannot be compelled to travel to testify in person.

This legislative clarification can be made solely by amending the Military Commissions Act of 2009. No change to or amendment to the Uniform Code of Military Justice is required.

Budget Implications: This legislative proposal has no budget implications. Any depositions that would be taken pursuant to the above legislative clarification are already funded by existing statutory authorization and funding sources.

Changes to Existing Law: This section would make the following changes to section 949a(b) of title 10, United States Code:

TITLE 10—ARMED FORCES
Subtitle A—General Military Law
PART II—PERSONNEL
CHAPTER 47A—MILITARY COMMISSIONS
SUBCHAPTER IV—TRIAL PROCEDURE

§ 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 military 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 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) In applying section 849(d) of this title (article 49(d) of the Uniform Code of Military Justice) to trials by military commission under this chapter, the limitation under that section to cases not capital shall not apply to the trial of a capital case by military commission under this chapter. Subject to that section, testimony by deposition may be presented in such a capital case by the prosecution as well as the defense.

(c) DELEGATION OF AUTHORITY TO PRESCRIBE REGULATIONS.—The Secretary of Defense may delegate the authority of the Secretary to prescribe regulations under this chapter.

(d) NOTICE TO CONGRESS OF MODIFICATION OF RULES.—Not later than 60 days before the date on which any proposed modification of the rules in effect for military commissions under this chapter goes into effect, the Secretary of Defense shall submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives a report describing the proposed modification.