

109TH CONGRESS
2^D SESSION

S. 3614

To provide comprehensive procedures for the adjudication of cases involving unprivileged combatants.

IN THE SENATE OF THE UNITED STATES

JUNE 29, 2006

Mr. SPECTER introduced the following bill; which was read twice and referred to the Committee on Armed Services

A BILL

To provide comprehensive procedures for the adjudication of cases involving unprivileged combatants.

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; AUTHORITY; FINDINGS.**

4 (a) **SHORT TITLE.**—This Act may be cited as the
5 “Unprivileged Combatant Act of 2006”.

6 (b) **AUTHORITY.**—The requirements, conditions, and
7 restrictions established by this Act are made under the
8 authority of Congress under clauses 1, 10, 11, 12, 13, 14,
9 and 18 of article I, section 8 of the Constitution of the
10 United States.

1 (c) FINDINGS.—Congress finds the following:

2 (1) Article I, section 8, of the Constitution pro-
3 vides that the Congress has the power to “constitute
4 Tribunals inferior to the Supreme Court; . . . define
5 and punish . . . Offenses against the Law of Nations;
6 . . . make Rules concerning Captures on Land and
7 Water; . . . make all Laws which shall be necessary
8 and proper for carrying into Execution the foregoing
9 Powers and all other Powers vested by this Constitu-
10 tion in the Government of the United States, or in
11 any Department or Officer thereof”.

12 (2) The Supreme Court has repeatedly recog-
13 nized military tribunals, as stated in *Madsen v.*
14 *Kinsella* 343 U.S. 341, 1952, “[s]ince our nation’s
15 earliest days, such tribunals have been constitu-
16 tionally recognized agencies for meeting many ur-
17 gent governmental responsibilities related to
18 war....They have taken many forms and borne many
19 names. Neither their procedure nor their jurisdiction
20 has been prescribed by statute. It has been adapted
21 in each instance to the need that called it forth.”
22 *Madsen*, citing *In re Yamashita*, 327 U.S. 1 (1946).

23 (3) The President has inherent authority to
24 convene military tribunals arising from his role as
25 Commander and Chief of the Armed Forces under

1 article II of the Constitution and from title 10 of the
2 United States Code. Due to the extraordinary cir-
3 cumstances of the ongoing war on terrorism, it is
4 appropriate for Congress to provide additional and
5 explicit authorization of and procedures for military
6 tribunals to adjudicate and punish offenses relating
7 to the war on terrorism.

8 (4) This Act is in direct response to the United
9 State Supreme Court’s ruling in *Rasul v. Bush*.
10 With the passage of this Act, the 109th Congress
11 will have addressed the concerns of the Supreme
12 Court’s *Rasul* majority, and therefore alien enemy
13 combatants detained or prosecuted under this Act
14 may not challenge their detentions in the Federal
15 courts of the United States via the habeas or any
16 other statute.

17 **SEC. 2. DEFINITIONS.**

18 As used in this Act, the following definitions apply:

19 (1) **CLASSIFICATION TRIBUNAL.**—The term
20 “classification tribunal” means any tribunal con-
21 ducted under section 9 or any related proceeding.

22 (2) **CLASSIFICATION TRIBUNAL BOARD.**—The
23 term “classification tribunal board” means a board
24 established pursuant to section 9(d).

1 (3) CLASSIFIED INFORMATION.—The term
2 “classified information” has the meaning given that
3 term in section 1(a) of the Classified Information
4 Procedures Act (18 U.S.C. App.).

5 (4) COMMISSION.—The term “commission”
6 means a military commission established pursuant to
7 section 3.

8 (5) CRIMINAL PROSECUTION.—The term
9 “criminal prosecution” means a prosecution for a
10 violation of any criminal law, including subchapter X
11 of chapter 47 of title 10, United States Code (the
12 Uniform Code of Military Justice) or pursuant to
13 the Department of Defense Military Commission
14 Instruction number two.

15 (6) DETAINEE.—The term “detainee” means a
16 person who is in the custody of the Department of
17 Defense at Guantanamo Bay, Cuba, and who has
18 not been charged with a criminal offense during that
19 period.

20 (7) INTERNATIONAL TERRORISM.—The term
21 “international terrorism” has the meaning given
22 that term in section 101 of the Foreign Intelligence
23 Surveillance Act of 1978 (50 U.S.C. 1801).

1 (8) JUDGE.—The term “judge” means a
2 United States military judge designated by the Sec-
3 retary of Defense to hear cases under this Act.

4 (9) PROTECTED INFORMATION.—The term
5 “protected information” means information—

6 (A) that is classified information;

7 (B) protected by law or rule from unau-
8 thorized disclosure;

9 (C) the disclosure of which may endanger
10 the physical safety of participants in Commis-
11 sion proceedings, including prospective wit-
12 nesses;

13 (D) concerning intelligence and law en-
14 forcement sources, methods, or activities; or

15 (E) the disclosure of which would other-
16 wise jeopardize national security interests.

17 (10) UNITED STATES PERSON.—The term
18 “United States person” has the meaning given that
19 term in section 101 of the Foreign Intelligence Sur-
20 veillance Act of 1978 (50 U.S.C. 1801).

21 (11) UNPRIVILEGED COMBATANT.—The term
22 “unprivileged combatant” means an individual—

23 (A) who has been designated as an enemy
24 combatant by a Combatant Status Review Tri-
25 bunal prior to the enactment of this Act; or

1 (B) who a Field Tribunal conducted by the
2 United States military as provided in this Act
3 determines—

4 (i) is not entitled to the protections
5 set out in the Convention Relative to the
6 Treatment of Prisoners of War, done at
7 Geneva, August 12, 1948 (6 UST 3516)
8 (referred to in this Act as the “Geneva
9 Convention”); and

10 (ii) has—

11 (I) knowingly assisted, conspired
12 with, or solicited for a group or an in-
13 dividual hostile to the United States;

14 (II) knowingly attempted to as-
15 sist others in taking up arms against
16 the United States;

17 (III) conspired with or solicited
18 others to take up arms against the
19 United States; or

20 (IV) has taken up arms against,
21 or intentionally assisted combat oper-
22 ations against, the United States.

23 (12) APPROPRIATE COMMITTEES OF CON-
24 GRESS.—The term “appropriate committees of Con-
25 gress” means the Committee on the Judiciary and

1 the Committee on Armed Services of the Senate and
2 the Committee on the Judiciary and the Committee
3 on Armed Services of the House of Representatives.

4 **SEC. 3. AUTHORIZING MILITARY COMMISSIONS.**

5 The President is authorized to establish military com-
6 missions for the trial of individuals for offenses as pro-
7 vided in this Act.

8 **SEC. 4. JURISDICTION.**

9 (a) UNPRIVILEGED COMBATANTS.—This Act estab-
10 lishes exclusive jurisdiction to hear any matter involving
11 an unprivileged combatant who has been detained by the
12 Department of Defense for not less than 180 consecutive
13 days at Guantanamo Bay, Cuba.

14 (b) OFFENSES.—

15 (1) CRIMINAL PROSECUTIONS.—A commission
16 shall have jurisdiction to hear any criminal prosecu-
17 tion involving international terrorism, including any
18 offense under chapter 113B of title 18, United
19 States Code.

20 (2) OFFENSES AGAINST THE LAWS OF WAR.—
21 A commission shall have exclusive jurisdiction over
22 violations of the laws of war committed by
23 unprivileged combatants.

24 (3) OTHER OFFENSES.—A commission shall
25 have jurisdiction over other offenses traditionally tri-

1 able by military commissions or pursuant to the De-
2 partment of Defense’s Military Commission Instruc-
3 tion Number Two.

4 **SEC. 5. APPELLATE JURISDICTION.**

5 (a) FINAL DECISIONS.—The United States Court of
6 Military Appeals shall have exclusive jurisdiction of ap-
7 peals from all final decisions of a classification tribunal
8 board or commission under this Act.

9 (b) REVIEW BY SUPREME COURT.—

10 (1) CERTIORARI.—The decisions of the United
11 States Court of Military Appeals are subject to re-
12 view by the Supreme Court by writ of certiorari.

13 (2) EXEMPTION FROM CERTAIN PETITION RE-
14 QUIREMENTS.—A person who files a petition for a
15 writ of certiorari under paragraph (1) shall not be
16 required to submit—

17 (A) prepayment of any fees and costs or
18 security therefor; or

19 (B) the affidavit required by section
20 1915(a) of title 28, United States Code.

21 (c) CONFORMING AMENDMENTS.—

22 (1) IN GENERAL.—Section 1005 of the De-
23 tainee Treatment Act of 2005 (10 U.S.C. 801 note)
24 is amended—

1 (A) in subsection (e), by striking para-
2 graphs (2) through (4); and

3 (B) by striking subsection (h) and insert-
4 ing the following:

5 “(h) EFFECTIVE DATE.—This section shall take ef-
6 fect on the date of enactment of this Act.”.

7 (2) HABEAS.—Section 2241(e) of title 28,
8 United States Code, is amended—

9 (A) in the matter preceding paragraph (1),
10 by striking “section 1005 of the Detainee
11 Treatment Act of 2005” and inserting “the
12 Unprivileged Combatant Act of 2006”;

13 (B) by striking paragraph (2)(B) and in-
14 serting the following:

15 “(B) has been determined by a classifica-
16 tion tribunal to meet the requirements of para-
17 graph (1) or (2) of section 9(a) of the
18 Unprivileged Combatant Act of 2006.”.

19 **SEC. 6. COMMISSION.**

20 (a) COMMISSION PERSONNEL.—

21 (1) MEMBERS.—

22 (A) APPOINTMENT.—The Secretary of De-
23 fense shall designate no less than 12 United
24 States military judges to serve as members of

1 a commission and to assume other duties as-
2 signed in this Act.

3 (B) NUMBER OF MEMBERS.—Each com-
4 mission shall consist of at least 3 military offi-
5 cers, at least one of whom shall be a military
6 judge.

7 (C) ALTERNATE MEMBERS.—For each
8 such commission, there shall also be 1 or 2 al-
9 ternate members. The alternate member or
10 members shall attend all sessions of the com-
11 mission. In case of incapacity, resignation, or
12 removal of any member, an alternate member
13 shall take the place of that member.

14 (D) QUALIFICATIONS.—Each member and
15 alternate member of the commission shall be a
16 military officer.

17 (E) PRESIDING OFFICER.—

18 (i) IN GENERAL.—From among the
19 members of the commission, the Secretary
20 of Defense shall designate a presiding offi-
21 cer who is a military judge to preside over
22 the proceedings of that commission.

23 (ii) DUTIES.—The duties of the pre-
24 siding officer shall be as follows:

1 (I) The presiding officer shall
2 admit or exclude evidence at trial in
3 accordance with the rules of this Act.
4 The presiding officer shall have au-
5 thority to close proceedings or por-
6 tions of proceedings in accordance
7 with this Act or for any other reason
8 necessary for the conduct of a full and
9 fair trial.

10 (II) The presiding officer shall
11 ensure that the discipline, dignity, and
12 decorum of the proceedings are main-
13 tained, shall exercise control over the
14 proceedings to ensure proper imple-
15 mentation of the President's Military
16 Order and this Act, and shall have au-
17 thority to act upon any contempt or
18 breach of commission rules and proce-
19 dures. Any attorney authorized to ap-
20 pear before a commission who is
21 thereafter found not to satisfy the re-
22 quirements for eligibility or who fails
23 to comply with laws, rules, regula-
24 tions, or other orders applicable to the
25 commission proceedings or any other

1 individual who violates such laws,
2 rules, regulations, or orders may be
3 disciplined as the presiding officer
4 deems appropriate, including revoca-
5 tion of eligibility to appear before that
6 commission. The Court may further
7 revoke that attorney's or any other
8 person's eligibility to appear before
9 any other commission convened under
10 this Act.

11 (III) The presiding officer shall
12 ensure the expeditious conduct of the
13 trial. In no circumstance shall accom-
14 modation of counsel be allowed to
15 delay proceedings unreasonably.

16 (IV) The presiding officer may
17 certify interlocutory questions to the
18 Military Commission Review Panel for
19 the Armed Forces as the presiding of-
20 ficer deems appropriate.

21 (b) POWERS OF A COMMISSION.—A commission shall
22 have the following powers:

23 (1) To summon witnesses to the trial and to re-
24 quire their attendance and testimony and to put
25 questions to them.

1 (2) To require the production of documents and
2 other evidentiary material.

3 (3) To administer oaths to witnesses.

4 (4) To appoint officers for the carrying out of
5 any task designated by the commission, including
6 the power to have evidence taken.

7 **SEC. 7. PERSONS IN CUSTODY.**

8 (a) IN GENERAL.—Not later than 60 days after the
9 date of enactment of this Act, the Secretary of Defense
10 shall develop—

11 (1) a complete listing of all persons who—

12 (A) are being detained by the Department
13 of Defense at Guantanamo Bay, Cuba; and

14 (B) the Government wishes to continue to
15 detain as an unprivileged combatant; and

16 (2) a detailed summary of the evidence upon
17 which the determination to keep a person described
18 in paragraph (1) in custody was made.

19 (b) CONGRESSIONAL OVERSIGHT.—Not later than 10
20 days after developing the list described in subsection (a),
21 the Secretary of Defense shall submit an unclassified
22 version of that list to the appropriate committees of Con-
23 gress. A classified, unredacted version of that list shall
24 also be submitted to the appropriate committees of Con-
25 gress for review.

1 (c) UPDATED LIST.—

2 (1) IN GENERAL.—Not less than once every 60
3 days after the date the list described in subsection
4 (a) is completed, the Secretary of Defense shall up-
5 date the list of the persons described in subsection
6 (a) and submit to the appropriate committees of
7 Congress a detailed report for each person on such
8 list that includes—

9 (A) the name and nationality of each such
10 person; and

11 (B) with respect to each such person—

12 (i) a detailed statement of why such
13 person has not been charged, repatriated,
14 or released;

15 (ii) a statement of when the United
16 States intends to charge, repatriate, or re-
17 lease such person;

18 (iii) a description of the procedures to
19 be employed by the United States to deter-
20 mine whether to charge, repatriate, or re-
21 lease such person and a schedule for the
22 employment of such procedures; and

23 (iv) if the Secretary of Defense has
24 transferred or has plans to transfer such
25 person from the custody of the Secretary

1 to another agency or department of the
2 United States, a description of such trans-
3 fer.

4 (2) FORM OF REPORTS.—Each report required
5 by this subsection shall be submitted in an unclassi-
6 fied form, to the maximum extent practicable, and
7 may include a classified annex, if necessary.

8 (3) APPROPRIATE COMMITTEES OF CONGRESS
9 DEFINED.—In this subsection, the term “appro-
10 priate committees of Congress” means—

11 (A) the Committee on Armed Services, the
12 Committee on the Judiciary, and the Select
13 Committee on Intelligence of the Senate; and

14 (B) the Committee on Armed Services, the
15 Committee on the Judiciary, and the Perma-
16 nent Select Committee on Intelligence of the
17 House of Representatives.

18 (d) CONGRESSIONAL OVERSIGHT.—Not later than 10
19 days after updating the list of persons under subsection
20 (c), the Secretary of Defense shall submit that updated
21 list to the appropriate committees of Congress in both un-
22 classified and unredacted, classified form.

23 **SEC. 8. FIELD TRIBUNALS.**

24 (a) IN GENERAL.—Not more than 30 days after a
25 suspected unprivileged combatant has been detained by

1 United States forces, the Department of Defense shall
2 conduct a field tribunal in order to determine whether the
3 detainee is an unprivileged combatant and whether the de-
4 tainee is entitled to the rights afforded under the Geneva
5 Convention.

6 (b) PROCEDURES.—The procedures governing a field
7 tribunal shall be promulgated by the Department of De-
8 fense

9 **SEC. 9. CLASSIFICATION TRIBUNALS.**

10 (a) IN GENERAL.—A detainee shall be released and
11 repatriated to an appropriate country unless a classifica-
12 tion tribunal board finds by a preponderance of the evi-
13 dence that—

14 (1) the detainee is a threat to the national secu-
15 rity interest of the United States; or

16 (2) there are reasonable grounds to believe that
17 if released the detainee would take up arms against
18 the United States.

19 (b) COMPLIANCE WITH GENEVA CONVENTIONS.—If
20 a detainee is found to be a privileged combatant entitled
21 to provisions under the Convention Relative to the Treat-
22 ment of Prisoners of War, done at Geneva, August 12,
23 1948 (6 UST 3516), then the detainee must be treated
24 in accordance with that convention.

1 (c) CITIZEN OF THE UNITED STATES.—If a detainee
2 is found to be a citizen of the United States of America,
3 the detainee shall not be held or tried under this Act.

4 (d) CLASSIFICATION TRIBUNAL BOARD.—A classi-
5 fication tribunal shall be conducted by a board appointed
6 by the Secretary of Defense and consist solely of line offi-
7 cers, one of whom shall be an attorney.

8 (e) DETERMINATION.—

9 (1) IN GENERAL.—If a classification tribunal
10 board finds that a detainee meets the requirements
11 of subsection (a), the classification tribunal board
12 shall order that the detainee shall continue to be de-
13 tained by the Department of Defense, subject to
14 periodic review under subsection (h).

15 (2) TIME PERIOD.—The time period for the de-
16 tention of a detainee under paragraph (1) may not
17 exceed the time period that United States forces are
18 engaged in combat operations as defined by the De-
19 partment of Defense in the nation or theater where
20 the detainee was captured so long as the detainee is
21 found to be a privileged combatant.

22 (3) CONCLUSION OF COMBAT.—At the conclu-
23 sion of combat operations within a given theater or
24 nation—

1 (A) a privileged combatant that was cap-
2 tured in that area shall be either indicted under
3 this Act or repatriated to the appropriate coun-
4 try; and

5 (B) an unprivileged combatant may con-
6 tinue to be detained pursuant to subsection (a).

7 (f) CONSIDERATIONS.—

8 (1) IN GENERAL.—In making a determination
9 under subsection (a), a classification tribunal board
10 shall consider any information brought to its atten-
11 tion regarding the need for continued detention, in-
12 cluding—

13 (A) the detainee’s alleged position or rank
14 in any hostile organization;

15 (B) the activities of that hostile organiza-
16 tion;

17 (C) any statements made by the detainee
18 in response to interrogation; and

19 (D) the detainee’s history of violence or
20 terrorist activity.

21 (2) PRIMA FACIE EVIDENCE.—If the Govern-
22 ment represents that a detainee was captured during
23 a military engagement while taking up arms against,
24 or supporting military operations against, the Armed
25 Forces of the United States or its allies, there shall

1 be prima facie evidence that, if released, the detainee
2 would take up arms against the United States.

3 (g) TIMING.—A detainee shall be afforded a classi-
4 fication tribunal as soon as is reasonably practicable but
5 not later than 180 days after the detainee’s capture and
6 not later than 30 days after the detainee is listed under
7 section 7, unless continued.

8 (h) PERIODIC REVIEW.—

9 (1) IN GENERAL.—

10 (A) SEMIANNUAL REVIEW.—The classifica-
11 tion tribunal shall conduct a classification hear-
12 ing for each detainee not less frequently than
13 every 180 days, in accordance with the proce-
14 dures established under this section and section
15 10.

16 (B) ACTION PERIOD.—A detainee appre-
17 hended during a military engagement while tak-
18 ing up arms against, or supporting military op-
19 erations against, the Armed Forces of the
20 United States or its allies may be detained until
21 the cessation of armed hostilities in the nation
22 or region in which they were captured.

23 (2) ARGUMENT.—The Government and the de-
24 tainee may be heard regarding the review under
25 paragraph (1).

1 **SEC. 10. CLASSIFICATION TRIBUNAL PROCEDURES.**

2 (a) **DETAINEES.**—

3 (1) **IN GENERAL.**—A detainee shall not be re-
4 quired to testify or present any evidence at a classi-
5 fication tribunal.

6 (2) **PRESENCE.**—A detainee shall be entitled to
7 be present at the classification tribunal, unless the
8 head of the tribunal has decided to admit classified
9 information.

10 (b) **COUNSEL.**—

11 (1) **IN GENERAL.**—A detainee is entitled to the
12 assistance of counsel admitted to practice under this
13 Act at every stage of the classification tribunal, in-
14 cluding the periodic review of orders under sub-
15 section (e).

16 (2) **RIGHT TO APPOINTED COUNSEL.**—A de-
17 tainee who is unable to obtain counsel is entitled to
18 have counsel admitted to practice before a commis-
19 sion under this Act.

20 (3) **REFUSAL OF COUNSEL.**—A detainee may
21 waive counsel but shall not be entitled to protected
22 information.

23 (c) **DISCOVERY.**—

24 (1) **GOVERNMENT'S DISCLOSURE.**—Not later
25 than 3 days prior to the classification tribunal, the
26 Government shall make available for inspection by

1 counsel for the detainee any affidavit or affirmation
2 the Government intends to offer in support of con-
3 tinuing to detain the detainee. A classification tri-
4 bunal board shall maintain a copy of any submis-
5 sions made by the Government for inspection by the
6 detainee and for transmittal, if necessary, to that
7 tribunal.

8 (2) DETAINEE'S DISCLOSURE.—If the detainee
9 chooses to submit any evidence, such evidence, in-
10 cluding a list of any witnesses the detainee intends
11 to call, shall be made available to the Government
12 for inspection not later than 3 days prior to the clas-
13 sification tribunal.

14 (d) EVIDENCE.—

15 (1) IN GENERAL.—The Federal Rules of Evi-
16 dence shall not apply to a classification tribunal.

17 (2) ADMISSIBILITY STANDARD.—Evidence shall
18 be admitted if the classification tribunal board deter-
19 mines the evidence would have probative value to a
20 reasonable person.

21 (3) AFFIDAVIT OR AFFIRMATION.—The Govern-
22 ment may proceed by proffer and submit any rel-
23 evant information by affidavit or affirmation, unless
24 decided unreliable by the members of the classifica-
25 tion tribunal board.

1 (4) CROSS-EXAMINATION.—

2 (A) GOVERNMENT WITNESSES.—If a Gov-
3 ernment chooses to call witnesses, the detainee
4 may cross-examine those witnesses on all rel-
5 evant facts.

6 (B) DETAINEE WITNESSES.—If a detainee
7 calls any witnesses, they shall be subject to
8 cross examination.

9 (C) DETAINEE.—If the detainee chooses to
10 testify, the detainee shall be subject to cross-ex-
11 amination.

12 (e) DEFENSES.—A detainee may challenge whether
13 the detainee satisfies the elements required under sub-
14 section (a).

15 (f) PROCEEDINGS.—

16 (1) IN GENERAL.—A classification tribunal
17 shall be closed to the public.

18 (2) SECURITY CLEARANCES.—Each person
19 present at a classification tribunal, other than the
20 detainee, shall possess a security clearance appro-
21 priate to the level of any classified information being
22 presented.

23 (3) PUBLIC INFORMATION REGARDING PRO-
24 CEEDINGS.—After the classification tribunal board
25 rules in the classification tribunal, the parties shall

1 propose a nonclassified summary to that board. The
2 board shall publicly release a summary, containing
3 any information generated at the tribunal which can
4 be disclosed in a manner consistent with the Classi-
5 fied Information Procedures Act (18 U.S.C. App.)
6 and the national security of the United States.

7 (g) REINSTITUTING CLASSIFICATION PRO-
8 CEEDINGS.—

9 (1) IN GENERAL.—If a matter involving the
10 classification tribunal of a detainee is dismissed
11 without prejudice by the classification tribunal or
12 withdrawn by the Government at, or prior to, the
13 classification tribunal, the Government may re-
14 institute the matter with the tribunal board that dis-
15 missed or permitted the withdrawal of the matter.

16 (2) TIME LIMIT.—A complaint reinstating
17 proceedings under paragraph (1) shall be filed not
18 later than 10 days after the dismissal or withdrawal
19 of the matter.

20 (3) NUMBER.—The Government may re-
21 institute proceedings under paragraph (1) not more
22 than twice and only if approved by the ranking
23 member on the classification tribunal board.

24 **SEC. 11. CONTINUANCE OF CLASSIFICATION TRIBUNALS.**

25 (a) CONTINUANCES.—

1 (1) IN GENERAL.—A classification tribunal
2 board may, for cause shown, grant a continuance of
3 a classification tribunal.

4 (2) CONTINUANCE.—

5 (A) IN GENERAL.—Upon motion of the
6 Government, the classification tribunal board
7 may grant a continuance for as long as nec-
8 essary, but no longer than a 6-month period,
9 under paragraph (1) if the classification tri-
10 bunal board determines that the detainee is a
11 high level individual in the planning or financ-
12 ing of terrorist activities or the individual pos-
13 sess information vital to the safety of the
14 United States or its citizens.

15 (B) SUBSEQUENT CONTINUANCES.—The
16 Government may obtain subsequent continu-
17 ances for additional 6-month periods so long as
18 the classification tribunal board finds such con-
19 tinuances are necessary to the informational
20 gathering purposes as it related to the national
21 security of the United States.

22 (3) EX PARTE APPLICATIONS.—

23 (A) IN GENERAL.—The Government may
24 move for a continuance under paragraph (1) ex
25 parte.

1 (B) DETAINEE RIGHTS.—A detainee—

2 (i) is not entitled to representation by
3 counsel in connection with any such ex
4 parte motion; and

5 (ii) shall not be given notice of the re-
6 quest for a hearing prior to the ruling of
7 the classification tribunal board on the
8 Government's request for a continuance
9 pursuant to paragraph (2).

10 (b) GRANT OF CONTINUANCE.—For each continu-
11 ance granted under subsection (a), the classification tri-
12 bunal board shall note on the record of the proceedings—

13 (1) the grounds for granting each such continu-
14 ance;

15 (2) the identity of the party requesting the con-
16 tinuance;

17 (3) the new date and time for the tribunal hear-
18 ing; and

19 (4) the reasons that the date under paragraph
20 (3) was chosen.

21 **SEC. 12. CRIMINAL PROSECUTION PROCEDURES GEN-**
22 **ERALLY.**

23 (a) COUNSEL.—

24 (1) IN GENERAL.—A defendant in a criminal
25 proceeding under this Act has a right to be rep-

1 resented by counsel admitted to practice before a
2 commission under this Act.

3 (2) APPOINTED COUNSEL.—

4 (A) IN GENERAL.—A defendant who is un-
5 able to obtain counsel is entitled to have counsel
6 appointed and to be represented by such coun-
7 sel at every stage of the proceeding subsequent
8 to being indicted.

9 (B) APPOINTMENT PROCEDURE.—The
10 Secretary of Defense shall determine the rules
11 for appointing counsel to practice before the
12 commission.

13 (b) DISCOVERY.—

14 (1) CLASSIFIED DOCUMENTS AND OBJECTS.—
15 The Government shall provide the defense with ac-
16 cess to evidence the Government intends to intro-
17 duce at trial and with access to evidence known to
18 the Government or which should be known to the
19 Government that tends to exculpate the accused. In-
20 formation disclosed to the defense may not be dis-
21 closed to the defendant if it is classified as defined
22 by this Act. The defense may submit classified infor-
23 mation for review under section 12(b)(2).

24 (2) SEPARATE COMMISSION CONCERNING CLAS-
25 SIFIED INFORMATION.—The Secretary of Defense

1 shall appoint a commission to conduct a thorough
2 review of the classification system for national secu-
3 rity information, including the policy, procedures,
4 and practices of the system. The Secretary of De-
5 fense shall determine what level of security clearance
6 is necessary to conduct the review under this para-
7 graph. No person shall be appointed as a member of
8 the commission who does not have a security clear-
9 ance at or above the level of clearance so designated
10 by the Secretary. The commission shall make rec-
11 ommendations to the Secretary of Defense as to the
12 declassification of information relevant to the trial of
13 detainees.

14 (3) REGULATING DISCOVERY.—

15 (A) IN GENERAL.—A commission may, for
16 good cause, deny, restrict, or defer discovery or
17 inspection, or grant other appropriate relief.

18 (B) EX PARTE REQUEST.—A party may
19 make an ex parte request in writing that a com-
20 mission deny, restrict, or defer discovery or in-
21 spection under subparagraph (A). If the a com-
22 mission grants a request under this subpara-
23 graph, the Commission shall preserve the entire
24 text of the party's request under seal.

1 (C) FAILURE TO COMPLY.—If a party fails
2 to comply with the rules of discovery applicable
3 to a commission, the commission may—

4 (i) order that party to permit the dis-
5 covery or inspection, specify its time, place,
6 and manner, and prescribe other just
7 terms and conditions; or

8 (ii) grant a continuance.

9 (c) OPEN PROCEEDINGS.—

10 (1) IN GENERAL.—Except as provided in para-
11 graphs (2) and (3), a proceeding before a commis-
12 sion shall be open to the public.

13 (2) CLASSIFIED INFORMATION.—

14 (A) IN GENERAL.—Upon motion by the
15 Government, a proceeding before a commission
16 shall be closed to the public if necessary to
17 avoid disclosure of classified information.

18 (B) NONDISCLOSURE.—A priority under
19 subparagraph (A) shall not disclose any infor-
20 mation presented during a closed session to in-
21 dividuals excluded from such proceeding or part
22 thereof including the defendant.

23 (3) OTHER BASES.—A commission may order
24 that a hearing be held, in whole or in part, in cam-
25 era, if the commission determines—

1 (A) it is appropriate for the security of a
2 witness or a Government employee or to protect
3 public safety; or

4 (B) that an open hearing would deter a
5 witness from testifying freely or prevent the
6 witness from testifying at all.

7 (4) EXTRAJUDICIAL STATEMENTS.—At the dis-
8 cretion of a commission, the commission may issue
9 an order limiting extrajudicial statements by the
10 parties.

11 (d) PROTECTED INFORMATION.—

12 (1) IN GENERAL.—A commission may issue
13 protective orders as necessary to safeguard protected
14 information in a proceeding before that commission.

15 (2) NOTIFICATION.—As soon as practicable, a
16 party shall notify a commission of any intent to offer
17 evidence including protected information .

18 (3) TRIAL RECORD.—

19 (A) IN GENERAL.—All exhibits admitted as
20 evidence but containing protected information
21 shall be sealed and annexed to the record of
22 trial.

23 (B) PROTECTED INFORMATION NOT AD-
24 MITTED.—Any protected information not admit-
25 ted as evidence, but reviewed by a commission

1 in camera and withheld from the defendant's
2 counsel over objection shall be sealed and an-
3 nexed to the record of the trial, with any associ-
4 ated motions and responses and any materials
5 submitted in support thereof, as additional ex-
6 hibits.

7 (e) RECORD OF TRIAL.—

8 (1) REQUIREMENT FOR RECORD.—A record of
9 each proceeding by a commission shall be prepared
10 promptly after the conclusion of the trial.

11 (2) VERBATIM TRANSCRIPT.—The record of
12 trial shall include a verbatim written transcript of all
13 sessions of the trial.

14 (3) EXHIBITS AND OTHER EVIDENCE.—The
15 record of trial shall also include all exhibits and
16 other real or demonstrative evidence, except that
17 photographs may be substituted for any large writ-
18 ten or graphic exhibits and any other real or demon-
19 strative evidence. If a photograph is substituted for
20 an exhibit or other evidence, the Government shall
21 retain the original exhibit or other evidence, respec-
22 tively, until no further appeal of the results of the
23 trial is authorized.

24 (4) CLASSIFIED INFORMATION.—In the case of
25 a conviction of a charge on which classified informa-

1 tion is admitted as evidence by a commission, the
2 copy of the record of trial submitted to the commis-
3 sion shall include the classified information.

4 **SEC. 13. TRIAL PROCEDURES FOR UNPRIVILEGED COMBAT-**
5 **ANTS.**

6 (a) SPECIALIZED PROCEDURES.—

7 (1) STANDARD OF PROOF.—All 3 members of a
8 commission shall agree that the defendant is guilty
9 beyond a reasonable doubt for a defendant to be
10 found guilty.

11 (2) RULES OF PROCEDURE.—

12 (A) IN GENERAL.—Except as provided in
13 subparagraph (B), the Secretary of Defense
14 shall draft supplementary rules to govern all
15 proceedings under this section.

16 (B) STANDARD.—Evidence is admissible if
17 the Secretary of Defense determines that the
18 evidence would have probative value to a rea-
19 sonable person.

20 (3) FORM OF TRIAL.—Any trial under this sub-
21 section shall take place before 2 military officers or
22 attorneys and at least one military judge.

23 (4) BAD ACTS.—Other bad acts may be consid-
24 ered if they would have fallen within the definition
25 under this Act of either terrorism or terrorist activ-

1 ity and they are deemed to be relevant by a commis-
2 sion including propensity.

3 (b) CUSTODY.—The Department of Defense shall re-
4 tain custody of any person determined by a commission
5 to be unprivileged combatants after the person has been
6 either convicted or sentenced in accordance with this Act,
7 unless the Department of Defense deems otherwise. Deci-
8 sions made by a commission in regards to a detainee’s
9 guilt or innocence may be considered by a tribunal when
10 assessing the need to continue the detention of a detainee.

11 **SEC. 14. COMMUNICATION WITH PERSONS IN CUSTODY.**

12 An individual detained, indicted, or convicted under
13 this Act shall only be permitted to communicate with the
14 interpreter assigned to the individual, the counsel rep-
15 resenting the individual, prison personnel, and any other
16 individual approved by the Secretary of Defense.

17 **SEC. 15. COMMISSION COUNSEL.**

18 (a) IN GENERAL.—A person shall be admitted to
19 practice before a commission if the person—

20 (1) is a United States citizen;

21 (2) has been admitted to the practice of law in
22 a State, district, territory, or possession of the
23 United States, or before a Federal court;

24 (3) has not been sanctioned or otherwise the
25 subject of disciplinary action by any court, bar, or

1 other competent governmental authority for mis-
2 conduct;

3 (4) is eligible for access to information classi-
4 fied at the level of secret as defined by the Depart-
5 ment of Defense; and

6 (5) signs a written agreement to comply with
7 all applicable regulations or instructions for counsel,
8 including any rules of court for conduct during the
9 course of proceedings.

10 (b) CONSULTATION WITH COLLEAGUES.—Any per-
11 son admitted under subsection (a) shall not confer with
12 any colleague who does not have the appropriate clearance.

13 (c) SECURITY CLEARANCE.—

14 (1) EXPEDITED CONSIDERATION.—The Sec-
15 retary of Defense shall ensure that a person seeking
16 to be admitted under subsection (a) is timely proc-
17 essed for the security clearance required for access
18 to materials necessary for providing a defendant
19 with effective assistance of counsel.

20 (2) COUNSEL INELIGIBLE FOR CLEARANCE.—If
21 the Secretary of Defense determines a person is not
22 eligible for the necessary security clearance, the per-
23 son shall not be permitted to represent an individual
24 in any proceeding before the Commission. The deter-
25 mination of the Secretary of Defense shall be final

1 and is not subject to appeal to, or other review by,
2 any court of the United States.

3 (d) TRAVEL EXPENSES.—The Secretary of Defense
4 shall reimburse any person not employed by the Govern-
5 ment who is representing an individual before the Com-
6 mission for travel away from the home or regular place
7 of business of the person in connection with such represen-
8 tation. The rates for the payment of travel expenses under
9 this subsection shall be those authorized for employees of
10 agencies under subchapter I of chapter 57 of title 5,
11 United States Code.

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