

107TH CONGRESS  
2D SESSION

# S. 1937

To set forth certain requirements for trials and sentencing by military commissions, and for other purposes.

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IN THE SENATE OF THE UNITED STATES

FEBRUARY 13, 2002

Mr. SPECTER (for himself and Mr. DURBIN) introduced the following bill;  
which was read twice and referred to the Committee on Armed Services

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## A BILL

To set forth certain requirements for trials and sentencing  
by military commissions, and for other purposes.

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

3       **SECTION 1. SHORT TITLE.**

4       This Act may be cited as the “Military Commission  
5       Procedures Act of 2002”.

6       **SEC. 2. DECLARATION OF LEGISLATIVE AUTHORITY.**

7       The requirements, conditions, and restrictions pro-  
8       vided in this Act are imposed in the exercise of the author-  
9       ity of Congress under clauses 1, 10, 11, 12, 13, 14, and  
10      18 of section 8 of article I of the Constitution.

1 **SEC. 3. APPLICABILITY.**

2       The provisions of this Act shall apply with respect  
3 to each military commission established by, or pursuant  
4 to authority granted by, the President (whether by the  
5 Military Order of November 13, 2001, or otherwise) to  
6 try an individual who is not a United States citizen and  
7 with respect to whom the President determines that—

8           (1) there is reason to believe that the indi-  
9       vidual, at the relevant times—

10           (A) is or was a member of the organization  
11       known as al Qaeda;

12           (B) has engaged in, aided or abetted, or  
13       conspired to commit, acts of international ter-  
14       rorism, or acts in preparation therefor, that  
15       have caused, threaten to cause, or have as their  
16       aim to cause, injury to or adverse effects on the  
17       United States, its citizens, national security,  
18       foreign policy, or economy; or

19           (C) has knowingly harbored one or more  
20       individuals described in subparagraph (A) or  
21       (B); and

22           (2) it is in the interest of the United States  
23       that such individual be subject to trial by a military  
24       commission on such charge.

1 **SEC. 4. SUBJECT MATTER JURISDICTION.**

2 A military commission may only adjudicate violations  
3 of the international law of war.

4 **SEC. 5. COMPOSITION OF MILITARY COMMISSION.**

5 (a) MINIMUM NUMBER OF MEMBERS.—A military  
6 commission shall consist of not less than five members.

7 (b) ABSENT OR EXCUSED MEMBERS.—No member  
8 of a military commission may be absent or excused after  
9 the military commission has been assembled for the trial  
10 of the defendant unless excused as a result of a challenge  
11 or excused by the Secretary of Defense for physical dis-  
12 ability or other good cause.

13 (c) REPLACEMENT OF EXCUSED MEMBERS.—When-  
14 ever a military commission is reduced below five members,  
15 the trial may not proceed unless the Secretary of Defense  
16 details new members sufficient in number to provide not  
17 less than five members. The trial may proceed with the  
18 new members present after the recorded evidence pre-  
19 viously introduced before the members of the military com-  
20 mission has been read to the military commission in the  
21 presence of the other members of the military commission,  
22 the defendant, and counsel for both sides.

23 **SEC. 6. REPRESENTATION BY COUNSEL.**

24 (a) IN GENERAL.—A defendant charged with any of-  
25 fense referred or to be referred to trial by a military com-  
26 mission shall have the same rights to representation by

1 counsel as does an accused in a general court-martial  
2 under chapter 47 of title 10, United States Code (the Uni-  
3 form Code of Military Justice).

4 (b) CIVILIAN COUNSEL.—

5 (1) SECURITY CLEARANCE.—

6 (A) EXPEDITED CONSIDERATION.—The  
7 Secretary of Defense shall ensure that a civilian  
8 counsel representing a defendant before a mili-  
9 tary commission is timely processed for the se-  
10 curity clearance required for access to materials  
11 necessary for providing the defendant with ef-  
12 fective assistance of counsel.

13 (B) COUNSEL INELIGIBLE FOR CLEAR-  
14 ANCE.—Notwithstanding subsection (a), a de-  
15 fendant referred to in that subsection is not en-  
16 titled to be represented by a civilian counsel  
17 who is not eligible for the necessary security  
18 clearance, as determined in writing by the Sec-  
19 retary of Defense. The determination of the  
20 Secretary shall be final and is not subject to ap-  
21 peal to, or other review by, any court of the  
22 United States.

23 (2) TRAVEL EXPENSES.—The Secretary of De-  
24 fense shall pay a civilian counsel for travel away  
25 from the counsel's home or regular place of business

1 in connection with the representation of a defendant  
2 before a military commission. The rates for the pay-  
3 ment of travel expenses shall be those authorized for  
4 employees of agencies under subchapter I of chapter  
5 57 of title 5, United States Code.

6 **SEC. 7. TRIAL PROCEDURES.**

7 (a) TRIAL AND SENTENCING PHASES.—Each trial by  
8 a military commission shall be composed of two phases,  
9 as follows:

10 (1) HEARING ON ISSUE OF GUILT.—A hearing  
11 for the presentation of evidence and argument on  
12 the issue of guilt.

13 (2) HEARING ON SENTENCING.—A hearing,  
14 after any verdict of guilty, for the presentation of  
15 evidence and argument on the issue of appropriate  
16 sentence.

17 (b) CONFRONTATION OF WITNESSES.—Subject to  
18 section 8(c), a defendant in a trial by a military commis-  
19 sion shall have—

20 (1) the right to confront and cross-examine  
21 each witness providing evidence offered by the pros-  
22 ecution against the defendant in the trial; and

23 (2) the right to examine all evidence offered by  
24 the prosecution against the defendant in the trial.

1 (c) NOTICE OF REFERRAL AS CAPITAL OFFENSE.—

2 For a charged offense to be tried and sentenced as a cap-  
3 ital offense by a military commission in any case—

4 (1) the charge shall specifically set forth an al-  
5 legation of the aggravating factors on which a sen-  
6 tence of death is justified; and

7 (2) the referral of the charge to the military  
8 commission shall specify that the maximum punish-  
9 ment authorized for the offense in the case includes  
10 death.

11 (d) BURDEN OF PROOF.—

12 (1) PRESUMPTION OF INNOCENCE.—The de-  
13 fendant in a trial by a military commission shall be  
14 presumed innocent until proven guilty.

15 (2) STANDARD OF PROOF.—The prosecution  
16 shall have the burden of proving guilt of a charged  
17 offense beyond a reasonable doubt.

18 (3) CAPITAL OFFENSES.—For an offense  
19 charged and referred to a military commission as a  
20 capital offense, the prosecution shall also have the  
21 burden of proving one or more aggravating factors  
22 sufficient to justify the sentence of death beyond a  
23 reasonable doubt.

24 (e) VOTING ON ISSUE OF GUILT.—

1           (1) CAPITAL OFFENSES.—For an offense  
2 charged and referred to a military commission as a  
3 capital offense—

4           (A) a finding of guilty of the offense as a  
5 capital offense results only if all members of the  
6 military commission present at the time the  
7 vote is taken vote for a finding of guilty and a  
8 finding of an alleged aggravating factor or a set  
9 of alleged aggravating factors sufficient to jus-  
10 tify the sentence of death; or

11          (B) a finding of guilty of the offense as a  
12 noncapital offense results only if at least  $\frac{2}{3}$  of  
13 all members of the military commission present  
14 at the time the vote is taken vote for a finding  
15 of guilty.

16          (2) OTHER OFFENSES.—In the case of an of-  
17 fense for which the maximum penalty does not in-  
18 clude death, a finding of guilty of the offense results  
19 only if at least  $\frac{2}{3}$  of all members of the military  
20 commission present at the time the vote is taken  
21 vote for a finding of guilty.

22          (f) VOTING ON SENTENCE.—A sentence may be ad-  
23 judged by a military commission only if the requisite num-  
24 ber of members of the military commission vote for that  
25 sentence. The requisite number of members is as follows:

1           (1) SENTENCE TO DEATH.—In the case of a  
2 sentence that includes death, all members of the  
3 military commission present at the time the vote is  
4 taken.

5           (2) SENTENCE TO CONFINEMENT FOR MORE  
6 THAN 10 YEARS.—In the case of a sentence that in-  
7 cludes confinement for life or more than 10 years,  
8 at least  $\frac{3}{4}$  of all members of the military commis-  
9 sion present at the time the vote is taken.

10          (3) OTHER SENTENCES.—In the case of a sen-  
11 tence not described in paragraph (1) or (2), at least  
12  $\frac{2}{3}$  of all members of the military commission  
13 present at the time the vote is taken.

14          (g) RECORD OF TRIAL.—

15           (1) REQUIREMENT FOR RECORD.—A record of  
16 each trial by a military commission shall be prepared  
17 promptly after the conclusion of the trial.

18           (2) VERBATIM TRANSCRIPT.—The record of  
19 trial shall include a verbatim written transcript of all  
20 sessions of the trial except for sessions that are  
21 closed for deliberation and voting by the military  
22 commission.

23           (3) EXHIBITS AND OTHER EVIDENCE.—The  
24 record of trial shall also include all exhibits and  
25 other real or demonstrative evidence, except that

1        photographs may be substituted for any large writ-  
2        ten or graphic exhibits and any other real or demon-  
3        strative evidence. If a photograph is substituted for  
4        an exhibit or other evidence, the prosecution shall  
5        retain the original exhibit or other evidence, respec-  
6        tively, until no further appeal of the results of the  
7        trial is authorized.

8            (4) CLASSIFIED INFORMATION.—In the case of  
9        a conviction of a charge on which classified informa-  
10       tion is admitted as evidence by the military commis-  
11       sion, the copy of the record of trial submitted to an  
12       appellate court shall include the classified informa-  
13       tion.

14   **SEC. 8. EVIDENTIARY MATTERS.**

15        (a) STATEMENTS OF DEFENDANTS.—

16            (1) ADMISSIBILITY.—In a trial by a military  
17        commission, a statement made by the defendant  
18        shall be admissible notwithstanding any failure to  
19        advise the defendant, or any defect in the advising  
20        of the defendant, under section 831 of title 10,  
21        United States Code (article 31 of the Uniform Code  
22        of Military Justice), if the statement is otherwise ad-  
23        missible.

24            (2) PROHIBITION OF COMPELLED TESTI-  
25        MONY.—A defendant in a trial by a military commis-

1 sion may not be compelled to testify in the trial. A  
2 military commission may not draw any evidentiary  
3 inference from a failure of the defendant to testify.

4 (b) DISCOVERY AND PRESENTATION OF EXCUL-  
5 PATORY EVIDENCE.—The defendant shall be accorded the  
6 opportunity to discover and present exculpatory evidence  
7 to the same extent as applies to defendants in courts-mar-  
8 tial under chapter 47 of title 10, United States Code (the  
9 Uniform Code of Military Justice).

10 (c) CLASSIFIED INFORMATION.—

11 (1) ADMISSIBILITY.—A military commission  
12 may admit and consider classified information of-  
13 fered by the prosecution in the case of a defendant  
14 if the prosecution has previously submitted a sum-  
15 mary of the information, approved under this sub-  
16 section, to the military commission and the defend-  
17 ant. The military commission shall receive and con-  
18 sider the classified information ex parte and in cam-  
19 era.

20 (2) SUMMARY OF EVIDENCE.—Before offering  
21 classified information as evidence in a trial before a  
22 military commission, the prosecution shall submit a  
23 summary of the information to the military commis-  
24 sion and the defendant.

25 (3) COMMISSION REVIEW.—

1           (A) APPROVAL.—The military commission  
2 shall approve the summary of classified infor-  
3 mation if the military commission finds that the  
4 summary provides the defendant with informa-  
5 tion sufficient to ensure that the defendant has  
6 substantially the same ability to defend against  
7 the charge or charges to which the classified in-  
8 formation relates as the defendant would have  
9 if the classified information were disclosed to  
10 the defendant.

11           (B) DISAPPROVAL.—If the military com-  
12 mission disapproves the summary of informa-  
13 tion, the military commission shall notify the  
14 prosecution and the defendant of the dis-  
15 approval and return the summary to the pros-  
16 ecution with the notification.

17           (C) REVISED SUBMITTAL.—Upon receipt  
18 of a notification of a disapproval of a summary  
19 of classified information under subparagraph  
20 (B), the prosecution may submit a revised sum-  
21 mary of the classified information to the mili-  
22 tary commission and the defendant within 15  
23 days after the date on which the prosecution re-  
24 ceives the notification. A revised summary of

1 classified information shall be subject to sub-  
2 paragraphs (A) and (B).

3 (D) INTERLOCUTORY APPEAL.—

4 (i) AUTHORITY.—The prosecution  
5 may appeal to the United States Court of  
6 Appeals for Military Commissions estab-  
7 lished under section 9(b) any disapproval  
8 of a summary or revised summary of clas-  
9 sified information under this paragraph.

10 (ii) TIMELINESS.—Any appeal under  
11 this subparagraph shall be commenced not  
12 later than 15 days after the date on which  
13 the prosecution receives the notification of  
14 disapproval from the military commission.

15 (iii) DOCUMENTATION.—The prosecu-  
16 tion shall include in the appeal documents  
17 the classified information and the sum-  
18 mary and, if any, the revised summary or  
19 summaries of such information, together  
20 with a summary of all of the other evi-  
21 dence intended to be offered by the pros-  
22 ecution.

23 (iv) ACTION BY APPELLATE COURT.—  
24 The appellate court shall conduct a de  
25 novo review of the summary or summaries,

1 as the case may be, and issue a final ruling  
2 on the interlocutory appeal within 45 days  
3 after all submittals required by the court  
4 are filed.

5 **SEC. 9. APPEAL.**

6 (a) IN GENERAL.—Any individual convicted by a  
7 military commission is entitled to a review of that convic-  
8 tion in accordance with this section.

9 (b) REVIEW BY UNITED STATES COURT OF APPEALS  
10 FOR MILITARY COMMISSIONS.—

11 (1) ESTABLISHMENT OF COURT.—Upon the  
12 first determination of the President to try and dis-  
13 pose of any charge before a military commission,  
14 there shall be established a court to be known as the  
15 United States Court of Appeals for Military Com-  
16 missions (in this section referred to as the “Court”).

17 (2) COMPOSITION.—

18 (A) IN GENERAL.—The Court shall be  
19 composed of three judges publicly designated by  
20 the Chief Justice of the United States from  
21 among the judges of the United States courts  
22 of appeals.

23 (B) LIMITATION.—No two judges des-  
24 ignated for the Court may be from the same  
25 court of appeals.

1 (C) VACANCY.—Any vacancy in the Court  
2 shall be filled in the same manner as the origi-  
3 nal designation, subject to subparagraph (B).

4 (3) DURATION.—The Court shall continue until  
5 the final disposition of all matters under the juris-  
6 diction of the Court on any charges that may be  
7 tried or disposed of by a military commission.

8 (4) PROCEDURE.—The Court shall establish its  
9 rules of procedure. Such rules shall be consistent, to  
10 the extent practicable, with applicable provisions of  
11 the Federal Rules of Appellate Procedure and the  
12 rules of procedure prescribed by the United States  
13 Court of Appeals for the Armed Forces under sec-  
14 tion 944 of title 10, United States Code (article 144  
15 of the Uniform Code of Military Justice).

16 (5) JURISDICTION.—The Court shall have juris-  
17 diction to review the following:

18 (A) INTERLOCUTORY APPEAL OF DIS-  
19 APPROVAL OF SUMMARY OF CLASSIFIED INFOR-  
20 MATION.—Any interlocutory appeal of the dis-  
21 approval of a summary or revised summary of  
22 classified information under section 8(c)(3)(D).

23 (B) APPEAL OF CONVICTION.—Any appeal  
24 of the conviction of an individual by a military  
25 commission.

1           (6) PROCEEDINGS.—Proceedings under this  
2 subsection in review of an appeal under paragraph  
3 (5)(B) shall be conducted as expeditiously possible.

4           (c) REVIEW BY SUPREME COURT.—

5           (1) IN GENERAL.—Decisions by the Court are  
6 subject to review by the Supreme Court by writ of  
7 certiorari.

8           (2) EXEMPTION FROM CERTAIN PETITION RE-  
9 QUIREMENTS.—An individual may petition the Su-  
10 preme Court for a writ of certiorari under this sub-  
11 section without prepayment of fees and costs or se-  
12 curity therefor and without filing the affidavit re-  
13 quired by section 1915(a) of title 28, United States  
14 Code.

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