

Prosecution by Military Commission versus Federal Criminal Court: A Comparative Analysis

Paul H. Hennessy

Retired Supervising U.S. Probation Officer

ON SUNDAY, OCTOBER 31, 2010, Omar Ahmed Khadr was sentenced to eight years confinement after pleading guilty six days earlier to murder and other war crimes during military commission proceedings at Guantanamo Bay, Cuba. Khadr had been charged with offenses he committed while acting as an “alien unprivileged enemy belligerent” during Operation Enduring Freedom in Afghanistan. A Canadian national and Al Qaida associate, Khadr had been detained at Guantanamo since shortly after his capture in July, 2002, at the age of fifteen.

This article will present an overview of how the United States utilizes military commissions to prosecute suspected war criminals such as Omar Khadr, using this proceeding to explain how this process differs from criminal prosecution in U.S. District Court. The information that follows has been drawn from three major sources. The Military Commissions Act of 2009 (hereafter referred to as the “MCA 2009”), and a companion publication, the Manual for Military Commissions, United States, 2010 Edition (hereafter referred to as the “Manual”), were invaluable in providing the legal basis for the military commission system and the rules that govern their day-to-day procedures and operation. Specifics regarding the Khadr case were obtained by reviewing available court records, supplemented by my personal observations during four days in the military commission courtroom where Khadr’s sentencing hearing was held. The last primary source of information regarding the military commissions was a one-hour interview conducted with Navy Captain David C. Iglesias, JAGC, on October 28, 2010 at Guantanamo Bay. Captain Iglesias has served since 2008 with the Office of Military Commissions as a team leader, prosecutor, and spokesman. Iglesias is a member of the Navy Judge Advocate General’s Corps, and he served as the U.S. Attorney for the District of New Mexico from 2001 to 2007. Follow-up questions concerning the military commissions were answered by Captain Iglesias during several subsequent emails. Additional resources used in preparing this article were Title 18 of the United States Code, including the Federal Rules of Criminal Procedure, and my working knowledge of the U.S. Courts, acquired in serving as a U.S. probation officer in the Middle District of Florida from 1987 to 2007.

Military Commission Legislation

The use of military commissions to prosecute suspected war criminals dates to the Civil War, and was also utilized during World War II. The current practice was resumed in November 2004, under a Military Order signed by President Bush two days after the attacks of September 11, 2001. The Military Commissions Act of 2006 (MCA 2006) was approved by Congress under Chapter 47A of Title 10, U.S.C. after the Supreme Court ruled that military commissions could not be conducted

under the Uniform Code of Military Justice (UCMJ). The Military Commissions Act of 2009 (MCA 2009), enacted by Congress under President Obama, contains a number of reforms to MCA 2006 and is the current law authorizing the use of military commissions to prosecute persons for war crimes. The rules and procedures for military commissions are based upon, and are very similar to, those under the UCMJ.

Jurisdiction

According to MCA 2009, any alien unprivileged enemy belligerent is subject to trial by military commission. This includes aliens not belonging to one of the eight categories listed in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War, who 1) have engaged in hostilities against the United States or its coalition partners; 2) have purposefully and materially supported hostilities against the United States or its coalition partners; or 3) were a part of al Qaeda at the time of the alleged offense under Chapter 47A of Title 10, U.S.C. A military commission has no jurisdiction over U.S. citizens.

Despite the fact that Omar Khadr was 15 years old at the time he committed his offenses, his prosecution was authorized under MCA 2009, as there are no provisions in MCA 2009 prohibiting the filing of criminal charges against minors. Captain Iglesias explained that historical precedent in this area was established following World War II, when the allied powers prosecuted underage Nazis for war crimes committed while the Nazis were in power. While the prosecution of juveniles in federal criminal court is not common, Title 18 U.S.C. §§5031-42 contains provisions for the treatment of juveniles who have violated federal law.

Referral of Charges

Whereas defendants in federal criminal court are charged by way of indictment or information, MCA 2009 requires that charges against unprivileged enemy belligerents (as they are designated in MCA 2009) be filed by way of a charges and specifications document, similar to the method by which members of the U.S. military are charged in court-martial proceedings. The charges and specifications document must contain at least one of the 32 chargeable offenses listed in MCA 2009. (These offenses include the typical war crimes of Using Protected Persons as a Shield, Pillaging, Taking Hostages, and Improperly Using a Flag of Truce.) By comparison, a defendant in the federal criminal court system is subject to being charged with any of over 4000 federal crimes, most of which are enumerated in Title 18 of the U.S. Code. In addition to listing the offense or offenses, the Manual on Military Commissions requires that the charges and specifications also include a narrative that clearly states the facts constituting any offense charged. As is also required with an indictment or information in federal court, every element of the charged offense must be alleged in the charges and specifications document. Any person may report an offense that is subject to trial by military commission, but formal charges must be signed under oath by a member of the U.S. military. The individual signing the charges must have personal knowledge of or reason to believe the matters set forth in the charges and specifications and must swear that such matters are true to the best of the signer's knowledge and belief. The accuser's belief may be based upon the reports of others, and is not restricted to first-hand knowledge. As soon as practicable following the swearing of the charges and specifications, the accused shall be informed of the charges and specifications.

The specifications and charges in the Khadr case contained the following offenses:

CHARGE I: VIOLATION OF 10 U.S.C. §950v(b)(15), MURDER IN VIOLATION OF THE LAW OF WAR

CHARGE II: VIOLATION OF 10 U.S.C. §950t, ATTEMPTED MURDER IN VIOLATION OF THE LAW OF WAR

CHARGE III: VIOLATION OF 10 U.S.C. §950v(b)(28), CONSPIRACY

CHARGE IV: VIOLATION OF 10 U.S.C. §950v(b)(25), PROVIDING MATERIAL SUPPORT FOR TERRORISM

CHARGE V: VIOLATION OF 10 U.S.C. §950v(b)(27), SPYING

A summary of the specifications for the above charges alleges that Khadr, on or about July 27, 2002, murdered U.S. Army Sergeant First Class Christopher Speer by throwing a hand grenade at U.S. forces; that he attempted to commit murder by converting land mines into improvised explosive devices and planting them in the ground with the intent to kill U.S. or coalition forces; that he conspired with Usama Bin Laden and other members of al Qaeda, that he joined al Qaeda and that he received training from al Qaeda in the use of various weapons and explosives; that he provided material support to al Qaeda, a terrorist organization; and that he, at the direction of al Qaeda, conducted surveillance of a U.S. military convoy in preparation for targeting U.S. forces.

According to Captain Iglesias, captured enemy fighters being detained at Guantanamo have no right to immediate freedom and may be held under the law of war, potentially until hostilities have ended, without ever being charged. Once the decision is made to charge a detainee, the rules established by the Secretary of Defense require arraignment within 30 days of being charged, and trial within 120 days of charging. The military judge may grant delays in these deadlines to either side. These rules are less restrictive than the speedy trial provisions found at 18 U.S.C. §3161, which require the filing of charges within 30 days of arrest and the commencement of trial within 70 days from the filing of charges or the date of first appearance, whichever is later.

The Convening Authority

Under MCA 2009, once charges and specifications against an accused are sworn to, they are forwarded to the convening authority. The convening authority is a designee of the Secretary of the Department of Defense whose sole responsibility is to oversee and manage the military commissions process. This position is currently held by Retired Navy Vice-Admiral Bruce E. MacDonald, who previously served as the Judge Advocate General of the Navy. After reviewing the charges and specifications, the convening authority, acting on the advice of a legal advisor, can dismiss the charges and specifications, forward them to another authority for disposition, or refer them for trial to a military commission. The Manual instructs that a charge should be dismissed if it fails to state a covered offense, when harm to national security may result, or when there is a lack of evidence to support the charge and meet the probable cause standard of proof. There is no comparable review of filed charges in U.S. District Court.

Composition of a Military Commission

After a set of charges and specifications has been approved for prosecution, the convening authority is responsible for putting together a military commission to hear the case. As mandated by MCA 2009, a military commission is composed of a military judge (also denoted as the presiding officer) and at least twelve “members,” who are the equivalent of “jurors” in federal court. If qualifying circumstances prevent the designation of twelve members for a capital military commission, the convening authority may designate a lesser number of members, but no fewer than nine. A military commission in a non-capital case is composed of a military judge and at least five members. The Commission members must be active duty commissioned officers from any military branch. By comparison, a typical federal criminal jury, for both capital and non-capital offenses, has twelve members.

The seven panel members in the Khadr commission included a Navy Commander, a Marine Colonel, and an Army Lt. Col. Under a Protective Order issued by the military judge, the identities of the four male and three female officers were ordered not to be reported or otherwise disclosed without the prior approval of the military judge. The panel members were identified only by a number displayed at each of their seats, and the courtroom sketch artist was prohibited from drawing their faces.

The members of a military commission are voting members who are detailed for this service by the convening authority after having been deemed best qualified by the convening authority for this duty, based on their age, education, training, experience, length of service, and judicial temperament. The military judge, who is also detailed by the convening authority, is prohibited from voting with the members of the commission and is barred from communicating with the commission

members outside of the courtroom. In addition to the judge and the commission members, military counsel for the prosecution and defense are also designated and detailed for the case by the chief prosecutor and chief defense counsel, respectively. Being foreign nationals, the accused are permitted to have attorneys from their home countries as legal advisors. These advisors may confer with the accused and are seated at the defense table during all court proceedings. Since they are not attorneys of record, they are prohibited from addressing the Court. Captain Iglesias views these foreign legal advisors not as an impediment to the judicial process, but as facilitators due to their influence with the accused, particularly during plea negotiations.

Whenever court proceedings in a military commission matter are convened, the military judge, the commission members and the attorneys, along with any victims, witnesses, and ancillary court support personnel are flown by military charter from Andrews Air Force Base in Maryland to the U.S. Naval Station at Guantanamo Bay, Cuba, where hearings are conducted in one of two courtrooms specifically designated for this purpose. Members of the media as well as prisoner advocates, such as representatives of non-governmental organizations (NGOs) such as Amnesty International, the American Civil Liberties Union, and Human Rights Watch are also given the opportunity to travel to Guantanamo at their own expense, to observe military commission hearings.

Due to widespread interest throughout Canada in the Khadr case because of his Canadian citizenship, the contingent of approximately 30 observers who attended the Khadr proceedings in October 2010 were primarily members of the Canadian press. Among the Canadian journalists present was Michelle Shephard, the Toronto Star's national security reporter, who authored the 2008 book on Omar Khadr, Guantanamo's Child. Alex Neve, the Secretary General of Amnesty International Canada, was also among the observers in the courtroom. The majority of the journalists who were present viewed the proceedings via a closed-circuit television feed in the nearby media center, thereby allowing them to immediately file their print, radio, and television reports without having to wait for scheduled breaks in the hearing.

Due Process Rights

MCA 2009 provides the accused in a military commission with many of the due process rights afforded to criminal defendants in federal court. The accused in a military commission enjoys a presumption of innocence until proven guilty beyond a reasonable doubt. Trials by military commission must be publicly held, except when access may be limited by location, physical security requirements, the size of the facility, and concerns of national security. The accused has the right to be present at his trial, the privilege against self-incrimination, and the right not to testify at trial. The accused can present evidence in his own defense and cross-examine prosecution witnesses. The right to appointed counsel at no charge is also provided. MCA 2009 specifically prohibits the introduction of any statements made by the accused that were elicited by torture or cruel, inhuman, or degrading treatment. Protection against double jeopardy is also afforded the accused. In a military commission, the accused may subpoena witnesses who are under U.S. jurisdiction.

Rules of Evidence

The rules of evidence in a military commission, according to Captain Iglesias, are similar to those in federal criminal court, but they are not as comprehensive. The rules for hearsay evidence are less restrictive than those in federal court. Hearsay that would not be admissible in federal court may be admitted in a military commission trial only if the opposing party is given proper notice as well as the particulars of the evidence and how it was obtained, and only if the military judge permits it after evaluating its indicia of reliability and considering a number of other factors outlined in MCA 2009. At the discretion of the military judge, this exception to the normal hearsay rule allows the introduction of reliable statements from persons in war zones in foreign countries who cannot testify in person for any number of reasons. Captain Iglesias noted that while critics of the military commissions are not happy with this relaxed policy regarding hearsay, he defended the practice by stating, "We can't issue a subpoena to a goat herder in Pakistan."

The Administration of Oaths

All witnesses in a military commission hearing are sworn prior to their testimony by a member of the military prosecution team. This practice differs from that in federal criminal court, where oaths are customarily administered by the courtroom deputy clerk.

In addition to the oath taken by witnesses to testify truthfully, MCA 2009 specifies that the military judge, members of the military commission, the court reporter and interpreter, and all counsel must also take an oath to faithfully perform their duties. If trial counsel testifies as a witness, the oath is administered by the military judge.

Disclosure of Classified Information

Classified information in a military commission is privileged and is protected from disclosure if disclosure would be harmful to national security. As provided for in MCA 2009, a protective order may be issued by the military judge to limit the disclosure or distribution of classified evidence to the defense. As a remedy, the military judge shall order that the classified information be deleted from documents made available to the defense and substituted with a portion or summary of the information and a statement of the facts that the classified information would tend to prove. Federal criminal courts deal with classified information in a comparable manner through the issuance of protective orders and the provisions of the Classified Information Procedures Act (CIPA), as promulgated in 18 U.S.C. App III Sections 1-16. Such provisions were utilized to protect classified information in the federal criminal case of Ahmed Khalfan Ghailani, the first former Guantanamo detainee to be tried in a civilian court.

Pretrial Agreements

Just as a defendant in federal criminal court may be afforded the opportunity to enter into a plea agreement with the government, Rule 705 of MCA 2009 contains provisions for the accused in a military commission proceeding to enter into a pretrial agreement with the military commission prosecutors, subject to the approval of the convening authority. A pretrial agreement may include a promise by the convening authority to refer a capital offense as non-capital; a promise to withdraw one or more charges or specifications; an agreement to take specified action on a sentence adjudged by the commission; and/or a commitment to approve no sentence in excess of a specified maximum or outside a specified and agreed-upon range. The convening authority may also promise through a pretrial agreement to suspend all or part of a sentence.

Omar Khadr pled guilty under a pretrial agreement approved by the convening authority. The key elements of Khadr's binding pretrial agreement include a description of the charges to which he agreed to plead guilty; a Stipulation of Fact as to those offenses; a waiver of his right to appeal his conviction, sentence, and/or detention; an agreement not to engage in or support hostilities against the U.S. or its coalition partners; an agreement, while in U.S. custody, to submit to interviews by U.S. law enforcement officials, intelligence authorities, and prosecutors; a sentence of confinement of no greater than eight years; and an agreement to support his transfer from the custody of the U.S. to the custody of Canada after serving one year. Khadr's plea hearing, which lasted about an hour, was similar to, and contained the essential elements of a typical change of plea hearing in federal criminal court. While the provisions in Khadr's pretrial agreement regarding waiving his rights to appeal and cooperating with authorities are commonly found in plea agreements in federal criminal court, binding plea agreements with a negotiated cap on the sentence and an agreement to a prisoner transfer to another country are not typically found.

Whether or not a pretrial agreement with a specified maximum sentence may be in place, sentencing procedures in a military commission are conducted in much the same manner.

Role of the Commission Members during the Trial and Deliberations

In commission cases that are scheduled for trial, the commission members, like federal jurors, are responsible for hearing the evidence in the case and rendering a verdict as to the guilt or innocence

of the accused. The Manual directs that the commission member holding the highest military rank is designated as the president (known as the foreperson in federal court) of the panel. Whereas jurors in U.S. District Court are prohibited from posing questions to trial witnesses, the members of a military commission are permitted to question witnesses after they have testified. The questions are reduced to writing and then reviewed by counsel on both sides, before being delivered to the judge, who then reads the questions to the witness. At the discretion of the judge, a member's question for a witness may be excluded and not read to the witness when an objection has been raised to the question. The rules also permit the members to recall a witness who has previously testified.

At the conclusion of the trial, the members are given instructions by the judge that they will utilize in their deliberations and their findings. According to the Manual, these instructions include a statement of the issues in the case and an explanation of the legal standards and procedural requirements by which the members will determine their findings. The judge describes to the members the elements of each offense charged, as well as the elements of each lesser included offense. The members are instructed that the accused is presumed to be innocent unless the evidence that was presented to the commission establishes his or her guilt beyond a reasonable doubt.

After receiving these instructions, the members retire to commence their closed session deliberations and secret ballot voting. A conviction requires a finding of guilty by at least two thirds of the members present. A unanimous vote by a panel of at least twelve members is required in a case where the death penalty is mandatory. (By comparison, unanimous verdicts are required in all cases tried in federal criminal courts.) Once a verdict has been reached, the military commission is opened and the panel president informs the judge that a verdict has been reached. The judge then has the opportunity to review the verdict before it is pronounced in open court by the president. Except in limited circumstances, the polling of the members regarding their voting is prohibited. Conversely, in federal criminal court, the polling of jurors by counsel or the court is permitted by Rule 31 of the Federal Rules of Criminal Procedure.

Sentencing Hearings

In some respects, a sentencing hearing in a military commission is much like its counterpart in federal criminal court. The prosecution is permitted to call witnesses in aggravation, and the defense is allowed to present evidence in mitigation. Both sides are then given the opportunity to present argument.

In the Khadr case, prosecution witnesses included a forensic psychiatrist, who testified as to Khadr's risk of dangerousness as a violent jihadist, and several FBI agents, one of whom showed the court a confiscated videotape of Khadr and others converting land mines to improvised explosive devices. An Army officer whose identity was withheld for security reasons also testified via video teleconference from Afghanistan as to his previous interactions with Khadr at the Guantanamo detention camp. Other witnesses for the prosecution were a retired soldier who lost an eye during the firefight in which Khadr was captured and the widow of the Army sergeant that Khadr admitted killing with a hand grenade. The defense called a Canadian associate professor with whom Khadr had been corresponding, who testified that Khadr had expressed an interest in enrolling at the university where she taught. Khadr himself took the witness stand, and through an unsworn statement that did not subject him to cross examination, delivered an apology to the widow of the soldier that he killed.

This is where the similarity between sentencing in federal criminal court and sentencing in a military commission ends. Perhaps the primary distinction between criminal proceedings in U.S. District Court and those in a military commission is the fact that while sentencing in district court is strictly a function of the judicial officer, the responsibility for determining the sentence in a military commission is delegated to the panel members who also serve as jurors. While this practice is alien to federal criminal court, it is an option available to military service members under the UCMJ, along with the alternative of having the judge determine guilt and impose sentence.

Sentencing Instructions

The military judge is required to provide the panel members with sentencing instructions before they undertake the task of sentencing. These instructions are individualized for each military commission, but have four minimum requirements under Rule 1005 of the Manual. Sentencing instructions must include a statement of the maximum authorized punishment that may be adjudged and the mandatory punishment, if any; a statement of the procedures for deliberation and voting on the sentence; a statement informing the members that they are solely responsible for selecting an appropriate sentence and may not rely on the possibility of any mitigating action by the convening or higher authority; and a statement that the members should consider all matters in extenuation, mitigation, and aggravation, including evidence of prior convictions of the accused that may have been introduced by the prosecution. The judge explains to the members that they must determine a total sentence that provides punishment for all of the offenses of conviction. Unlike in federal criminal court, there are no provisions for concurrent and consecutive sentences on individual counts.

While the punishments that a military commission may lawfully impose include confinement, a fine (with no set maximum), and death (when authorized), confinement is the only punishment that has been imposed on any of the Guantanamo detainees sentenced thus far. MCA 2009 also provides for a sentence of probation. Perhaps fortunately, this sentencing option has yet to be exercised, as the law does not address the issues of where supervision would be provided and which branch of the military would assume such supervision. According to Captain Iglesias, should a convicted detainee be sent to another country for service of a probationary sentence, that country's probation laws would control. The members have the discretion to set the term of confinement at the maximum term or at any lesser term, including a sentence of no punishment.

In U.S. v. Khadr, the members were instructed to consider the nearly eight-year length of Khadr's pretrial detention and his conduct while in detention in determining his sentence, because there are no provisions in the military commission system that allow the accused to otherwise receive credit for time served. In fashioning their sentence, the members in the Khadr case were also instructed to consider the societal interests of rehabilitation, punishment, protection of society, and deterrence. Other factors that the members in the Khadr case were instructed to consider when making their determination of the sentence were the nature of the offense or offenses of conviction and Khadr's personal characteristics and background.

Notably, the commission members are instructed to consider many of the factors delineated in 18 U.S.C. §3553 upon which an Article III judge would also rely in determining a just and appropriate sentence. However, the members are unable to rely on a presentence investigation report or a sentencing guideline range for guidance, as neither of these federal criminal court requirements of Fed. R. Crim. P. 32 and 18 U.S.C. §3552 are provided for in the military commission system. Even if a presentence investigation were authorized under the rules, it would be very challenging to obtain prior record and personal background information on foreign nationals who have never lived in the United States. As explained by Captain Iglesias, the duty of informing the commission members as to the personal background of the accused lies with defense counsel, who has the opportunity to introduce such information during mitigation arguments and through witness testimony.

Procedure for Determining the Sentence

Any member of the commission panel may propose a sentence, which is done in writing. The junior member collects the proposed sentences and submits them to the president for voting by the entire panel. All panel members are required to vote by secret ballot on each proposed sentence, even if they had previously voted not to convict the accused. The members vote first on the least severe sentence, continuing as necessary with the next least severe, until a sentence receives sufficient votes for adoption. The process of proposing sentences and voting on them is repeated as necessary. A sentence of death requires an affirmative vote by all members present and cannot be imposed without the approval of the President of the United States. A sentence of confinement of more than 10 years and up to life cannot be adopted unless at least three-fourths of the members present vote in favor of such a sentence. Any sentence that does not exceed 10 years confinement requires a vote by at least two-thirds of the members present.

After the members have adopted a sentence, the military commission is opened and the military judge is advised by the president that a sentence has been reached. The president then announces the sentence in open court. If the members cannot agree on a sentence, a mistrial may be declared as to the sentence and the case is returned to the convening authority, who may order a rehearing on only the sentence. As an alternative, a sentence of no punishment may be ordered.

Impact of a Pretrial Agreement on the Panel Members' Sentence

In the event the accused has a pretrial agreement reflecting a maximum sentence, such an agreement would not be made known to the panel members until after the panel reached its own sentence and announced it in open court. If the sentence determined by the panel members exceeds the sentence contained in a pretrial agreement (as the accused would expect), the lesser sentence specified in the pretrial agreement would control. If the panel members adopt a sentence that is less than that which is contained in a pretrial agreement, the lesser sentence determined by the panel members would prevail. Under either scenario, the accused would receive the benefit of the lesser sentence.

In U.S. v. Khadr, the panel reached a sentence of forty years confinement. That forty year sentence was trumped by Khadr's pretrial agreement, which specified a sentence not to exceed eight years. Captain Iglesias cautioned that Khadr's sentence could revert to the higher sentence determined by the commission members in the event that Khadr violated the terms of his pretrial agreement.

Appeals and Post Sentencing Issues

As is typical for a defendant in federal criminal court, an accused convicted by military commission has the right to appeal both his conviction and sentence. In fact, an appeal is automatic under MCA 2009. The initial level of review is the convening authority. The convening authority has the responsibility of reviewing the proceedings of the military commissions, including any agreements between the parties, as well as the sentence. The convening authority has the authority to suspend or reduce any sentence imposed. The convening authority may not, however, increase the punishment previously imposed. Appeals from the decision of the convening authority are initially heard by the U.S. Court of Military Commission Review, and can then be taken to the United States Court of Appeals for the District of Columbia Circuit, and ultimately to the U.S. Supreme Court, if needed.

Unlike in federal criminal court, where the Bureau of Prisons assumes custody of a prisoner for service of his or her sentence, those convicted by a military commission remain in the custody of the Joint Task Force, Guantanamo (JTF-GTMO), which is a military unit comprised of members from each branch of the military. JTF-GTMO operates the detention camps at Guantanamo and is responsible for the custody of all sentenced prisoners as well as detainees. Exceptions to this may occur when, as in Khadr's case, there is a prisoner transfer agreement with the prisoner's country of origin, allowing the prisoner to serve all or a portion of his sentence in his native country. MCA 2009 also allows a prisoner to serve his sentence at any U.S. military or federal prison. To date, this option has not been exercised.

Notwithstanding the fact that detainees and prisoners in Guantanamo are under the custody and control of JTF-GTMO, Captain Iglesias noted that the military has mobilized a number of reservists for duty at the Guantanamo detention camps who are also employed by the Federal Bureau of Prisons as correctional officers. For this reason, some of the military personnel providing custody and supervision of those held at Guantanamo have prior experience in corrections from their work supervising inmates at federal prisons. Sentenced prisoners at Guantanamo are housed separately from the detainees, and are afforded fewer privileges than those who have not been convicted. Prisoners at Guantanamo are not eligible to receive the good time credits that inmates in the Bureau of Prisons receive.

Conclusion

The prosecution of Guantanamo detainees by the military follows a strict set of guidelines under the Military Commissions Act of 2009. Although these prosecutions vary in numerous respects from

prosecutions in federal criminal court, they are similar in large part to how the military prosecutes its own members under the UCMJ. While Captain Iglesias acknowledges that there are critics of the military commissions, he enthusiastically supports them. When asked how the military commission system might be improved, he responded, “The Military Commissions Act represents the state of the art in military commissions law...” Iglesias commented that it would be helpful if the military commissions had both a formalized substantial assistance policy and a witness security program, both of which have proved useful in federal criminal prosecutions.

[back to top](#)

[References](#)

The articles and reviews that appear in *Federal Probation* express the points of view of the persons who wrote them and not necessarily the points of view of the agencies and organizations with which these persons are affiliated. Moreover, *Federal Probation's* publication of the articles and review is not to be taken as an endorsement of the material by the editors, the Administrative Office of the U.S. Courts, or the Federal Probation and Pretrial Services System.

Published by the Administrative Office of the United States Courts www.uscourts.gov
[Publishing Information](#)

- Ruback, R. B. (1981). Perceived honesty in the parole interview. *Personality and Social Psychology Bulletin*, 7(4), 677-681.
- Ruback, R.B., & Hopper, C. (1986). Decision making by parole interviewers: The effect of case and interview factors. *Law and Human Behavior*, 10(3), 203-214.
- Scheid, T.L. (1999). Employment of individuals with mental disabilities: Business response to the ADA's challenge. *Behavioral Sciences & the Law*, 17, 73-91.
- Steadman, H J., Mulvey, E.P., Monahan, J., Robbins, P.C., Appelbaum, P.S., Grisso, T., et al. (1998). Violence by people discharged from acute psychiatric inpatient facilities and by others in the same neighborhoods. *Archives of General Psychiatry*, 55(5), 393-401.
- Stuart, H. (2006). Mental illness and employment discrimination. *Current Opinion in Psychiatry*, 19, 522-526.
- Swanson, J.W., Swartz, M.S., Essock, S.M., Osher, F.C., Wagner, H.R., Goodman, L.A., et al. (2002). The social-environmental context of violent behavior in persons treated for severe mental illness. *American Journal of Public Health*, 92(9), 1523-1531.
- Swartz, M.S., Swanson, J. W., Hiday, V.A., Borum, R., Wagner, H.R., & Burns, B.J. (1998). Violence and severe mental illness: the effects of substance abuse and nonadherence to medication. *American Journal of Psychiatry*, 155(2), 226-231.

Prosecution by Military Commission versus Federal Criminal Court: A Comparative Analysis

- Elsa, Jennifer K. (April 6, 2010). The Military Commissions Act of 2009: Overview and Legal Issues. Retrieved from <http://www.crs.gov>
- Iglesias, David C. (2010, October 28). Interview at Guantanamo Bay, Cuba.
- Military Commissions Act of 2009, Public Law 111-84. Retrieved from <http://www.defense.gov/commissionsacts.html>
- United States Department of Defense, Office of Military Commissions. (2010) Manual for Military Commissions, United States. Retrieved from <http://www.defense.gov/news/commissions.html>

18 U.S.C. §§2-3147.

18 U.S.C. §3161.

18 U.S.C. §3552-3553.

18 U.S.C. §§5031-42.

18 U.S.C. App III Sections 1-16.

Fed. R. Crim. P. 31, 32.

[back to top](#)