

**PART I
PREAMBLE**

1. Structural provisions of the M.C.A.

The M.C.A. amends both Articles 21 and 36, Uniform Code of Military Justice (U.C.M.J.) (10 U.S.C. §§ 821 and 836) to permit greater flexibility in constructing procedural and evidentiary rules for trials of alien unlawful enemy combatants by military commission. Several key provisions of the M.C.A. demonstrate this accommodation of military operational and national security considerations:

(a) While the M.C.A. is consistent with the U.C.M.J. in many respects, neither the U.C.M.J. itself nor “[t]he judicial construction and application of that chapter” is binding on trials by military commission (10 U.S.C. § 948b(c)).

(b) 10 U.S.C. §§ 810, 831(a), (b), & (d), and 832 do not apply to these military commissions (10 U.S.C. § 948b(d)(1)).

(c) Other provisions of the U.C.M.J. apply only as specified in the M.C.A. (10 U.S.C. § 948b(d)(2)).

(d) The M.C.A. provides that the Secretary of Defense, in consultation with the Attorney General, may prescribe rules of evidence and procedure, as well as elements and modes of proof, for offenses tried by these military commissions (10 U.S.C. § 949a(a)), and that if the Secretary promulgates regulations, he shall submit them to the Committees on Armed Services of the Senate and the House of Representatives (M.C.A. § 3(b)).

(e) Such rules “shall, so far as the Secretary considers practicable or consistent with military or intelligence activities, apply the principles of law and the rules of evidence” for trials by general court-martial, so long as the Secretary’s rules and procedures are not contrary to or inconsistent with the M.C.A. (10 U.S.C. § 949a(a)).

(f) Implementing rules must be consistent with the M.C.A. and provide for the accused’s rights to:

(1) be present at trial, examine and respond to evidence admitted against him, cross-examine witnesses who testify against him, obtain and present evidence, and not be required to testify against himself at a military commission proceeding (10 U.S.C. §§ 948r(a), 949a(b)(1)(A) & (B), and 949j(a)); and

(2) assistance by counsel or self-representation (10 U.S.C. § 949a(b)(1)(C) & (D)).

(g) Statements obtained by torture are not admissible (10 U.S.C. § 948r(b)), but statements “in which the degree of coercion is disputed” may be admitted if reliable, probative, and the admission would best serve the interests of justice (10 U.S.C.

§ 948r(c)). In addition, for such statements obtained after December 30, 2005, the methods used to obtain those statements must comply with the Detainee Treatment Act of 2005, enacted on that date (10 U.S.C. § 948r(d)(3)).

(h) In addition, rules may provide for:

(1) admission of evidence if determined to have “probative value to a reasonable person” (10 U.S.C. § 949a(b)(2)(A));

(2) admission of evidence notwithstanding the absence of a search warrant or other authorization (10 U.S.C. § 949a(b)(2)(B));

(3) admission of an accused’s allegedly coerced statements if they comport with § 948r (10 U.S.C. § 949a(b)(2)(C));

(4) authentication of evidence similar to Military Rule of Evidence (Mil. R. Evid.) 901 (10 U.S.C. § 949a(b)(2)(D));

(5) admission of hearsay evidence not meeting an exclusion or exception under the Mil. R. Evid. if the proponent gives notice and the opposing party does not demonstrate that the evidence lacks probative value or reliability (10 U.S.C. § 949a(b)(2)(E)); and

(6) exclusion of any evidence failing to meet the requirements of Mil. R. Evid. 403 (10 U.S.C. § 949a(b)(2)(F)).

2. Determinations of practicability and consistency with military and intelligence activities

The rules of evidence and procedure promulgated herein reflect the Secretary’s determinations of practicability and consistency with military and intelligence activities. Just as importantly, they provide procedural and evidentiary rules that not only comport with the M.C.A. and ensure protection of classified information, but extend to the accused all the “necessary judicial guarantees” as required by Common Article 3. In this regard, these rules represent a delicate balance similar in concept, but different in detail from those provided in the Manual for Courts-Martial.