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Legislative Bulletin……September 29, 2006

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S. 3930—Military Commissions Act

S. 3930—Military Commissions Act—*as received*
(Sen. McConnell, R-KY)

Order of Business: The bill is scheduled to be considered on Friday, September 29, 2006, subject to a closed rule. On September 27, 2006, the House passed H.R. 6166 (identical to S. 3930) by a vote of 253 – 168.

Background: In June 2006, the Supreme Court's decision in *Hamdan v. Rumsfeld* invalidated the military commissions that the Bush Administration had established by executive order to try war criminals detained at Guantanamo Bay. The court held that the commissions did not comply with the Uniform Code of Military Justice (UCMJ) nor the U.S.'s obligations under Article 3 of the Geneva Convention. As a result, legislation must be enacted to provide suitable constitutional footing for these military commissions and the ongoing terrorist interrogation program.

Recently, the Administration agreed to a compromise with key Members of the Senate Armed Services Committee (SASC) over various evidentiary issues and the appropriate manner in which to clarify the U.S.'s obligations to detainees under international law. S. 3930 is the embodiment of that compromise.

Summary: S. 3930 authorizes the President to establish military commissions to try alien unlawful enemy combatants engaged in hostilities against the U.S. for any offense committed before, on, or after September 11, 2001. The bill states expressly that this authority should not be construed to alter or limit the President's constitutional authority to establish military commissions in areas under martial law or in occupied territories as circumstances require.

An unlawful enemy combatant is defined as a person who is engaged in (or materially supporting) hostilities against the U.S. and is *not* a member of the regular forces of a State party engaged in hostilities against the U.S, a member of a militia or organized resistance belonging to a State party under a responsible command, wearing a fixed distinctive sign, carrying arms openly, and abiding by the law of the war, or a member of an armed force who profess allegiance to another country engaged in hostilities. Any

detainee that a Combatant Status Review Tribunal had determined to be an unlawful enemy combatant (prior to enactment) would also be covered. Lawful enemy combatants would continue to be tried under normal courts-marshal proceedings.

Specifically, S. 3930 establishes the procedures and requirements for these military commissions by amending the Uniform Code of Military Justice. The bill clarifies that many of the procedures for trial by general courts-martial do not apply to trials by military commissions and are therefore not binding. Such military commissions are deemed to be "regularly constituted, affording all the necessary judicial guarantees which are recognized as indispensable by civilized peoples court for purposes of Article 3 of the Geneva Convention," but alien enemy unlawful combatants would not be able to invoke the Convention as a source of rights during his trial.

Composition of Military Commissions: A military commission, typically consisting of five members, would be convened by the Secretary of Defense or his designee, and made up of commissioned officers on active duty. The members would be selected for their age, education, training, and expertise and could not include either the accuser or a witness for the prosecution. A military judge would preside over each commission, as prescribed by regulations to be developed by the Secretary, and military trial counsel (the prosecution) and defense counsel would be detailed for service.

Self-Incrimination and Coerced Statements: S. 3930 requires a detainee to be informed of the charges against him as soon as it is practicable. No person would be required to testify against himself at any commission proceeding, and *no statement obtained by torture would be admissible*. A statement obtained *before* December 30, 2005, where coercion is alleged, could be admitted if the judge finds it reliable, probative, and serving the "interest of justice." This was the approach advocated by the Administration and the House Armed Services Committee (HASC) for all allegedly coerced statements. Under H.R. 6166, a statement made *after* December 30, 2005, where coercion is alleged, must satisfy a higher test to be admissible—it must not have been secured through interrogation methods that violate "the cruel, unusual, or inhumane treatment or punishment prohibited by the Fifth, Eighth, and 14th Amendments" to the U.S. Constitution (the standard enacted in the Detainee Treatment Act, DTA). This was the approach outlined in the SASC version for all allegedly coercive statements. December 30, 2005 is the date that the President signed DTA into law. According to press reports, the compromise—by hinging the more rigorous test off of enactment of DTA—protects statements gathered from the interrogation of Khalid Sheikh Mohammed and 13 other al Qaeda operatives that might otherwise be inadmissible.

Hearsay and Classified Evidence: S. 3930 ensures a detainee a minimum of rights during a commission's proceedings, including an opportunity: to examine and respond to all evidence that impacts guilt, innocence, or sentencing; to be present at all commission sessions (subject to exceptions); and to be assisted by counsel. Hearsay evidence, not otherwise admitted in general courts-marshal, *would* be admitted if it is demonstrated to be reliable and probative. A detainee would be represented by

military counsel and could retain civilian counsel, who is a U.S. citizen and cleared for access to classified information. If a detainee retains civilian counsel, the military counsel would then serve as an associate counsel. S. 3930 permits the judge to excuse the detainee (after a warning) from a proceeding to ensure the physical safety of individuals in the court room and prevent disruption in the proceedings.

Classified information would be privileged from disclosure if detrimental to national security, and the judge would be authorized, to the extent practicable, to delete any classified information in evidentiary documents. In addition, the sources or methods used to collect otherwise admissible evidence would also be protected if classified and the evidence yielded is reliable (although an unclassified summary may be required for presentation to the commission and the defense). However, if classified information could not be appropriately redacted, *the prosecutor may be forced to forego the use of such evidence completely*. The Administration and the HASC supported an alternative—allowing the evidence to be offered and presented to the accused's counsel but not the accused himself. This approach, favored by the SASC, could allow a future detainee to escape prosecution because the prosecution would not have the benefit of necessary but classified evidence.

Defense, Convictions, and Sentencing: S. 3930 provides an affirmative defense that a detainee lacked mental responsibility to appreciate the nature and quality or the wrongfulness of his acts. The detainee would carry the burden of proving this defense by clear and convincing evidence, and a majority of the members of the commission would determine whether the defense had been established.

Members of a military commission would vote using a secret written ballot on the findings and the sentence with respect to a detainee, and two-thirds of the members would need to concur to secure a conviction or determine a sentence. A death sentence would require the members' unanimity, while a sentence of life in prison (or confinement lasting longer than ten years) would require the concurrence of three-fourths of the members. Cruel or unusual punishments, including flogging, branding, tattooing, and the use of irons (other than for safe custody), are expressly prohibited as permissible sentence. A sentence of confinement could take place in any place under the control of the U.S. armed forces or in any penal institution controlled by the U.S. or its allies.

All sentences would be carried out by the Secretary of Defense, and a death sentence could not be executed until the appellate review process is exhausted and the sentence is approved by the President (who could commute, remit, or suspend the sentence).

Appellate Review: S. 3930 establishes a Court of Military Commission Review—composed of one or more panels, each with at least three appellate military judges—for the purpose of reviewing military commission decisions. The Court may act only with respect to matters of law. Once this court has reviewed a commission's decision, an appeal could be made to the U.S. Court of Appeals for the District of Columbia, and

later with a writ of certiorari, the U.S. Supreme Court. The Secretary of Defense is tasked with providing a detainee with appellate counsel.

Substantive Offenses: The bill codifies certain offenses that military commissions have tried in the past, which shall be triable by commission upon enactment at any time without limitation, including: murder in violation of the law of war, attacking civilians, attacking civilian objects, attacking protected property, pillaging, denying quarter, taking hostages, employing poison or similar weapons, using protected persons as a shield, using protected property as a shield, torture, inflicting severe physical or mental pain or suffering (offense), intentionally causing serious bodily injury, mutilating or maiming, destruction of property in violation of the law of war, treachery, improperly using a flag of truce, improperly using a distinctive emblem, intentionally mistreating a dead body, rape, sexual assault or abuse, hijacking a vessel or aircraft, terrorism, providing material support for terrorism, wrongfully aiding the enemy, spying, conspiracy, and perjury or obstruction of justice.

Treaty Obligations and the Geneva Convention: S. 3930 defines the U.S.'s responsibility under Article 3 of the Geneva Convention, which prohibits "outrages upon personal dignity" and "humiliating and degrading treatment." In the aftermath of *Hamdan*, the vagueness of what Article 3 requires led to significant concerns that U.S. personnel would lack sufficient guidance on how to appropriately interrogate detainees without engaging in a war crime. Specifically, the bill would prohibit "grave" breaches of Article 3 and authorizes the President to interpret the meaning and application of the Geneva Convention further and promulgate higher standards beyond grave breaches. Grave breaches would include torture, cruel or inhuman treatment (see below), performing biological experiments, murder, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, and taking hostages. Furthermore, no detainee would be subject to "cruel, inhuman, or degrading treatment or punishment—as prohibited by the Fifth, Eighth, and Fourteenth Amendments of the Constitution," the same standard under the Detainee Treatment Act.

Finally, S. 3930 clarifies that no person may invoke the Geneva Convention, in any habeas corpus or other civil action in which the U.S. is a party, as source of rights in a U.S. court. The bill states that no court, justice, or judge shall have jurisdiction to consider an application for a writ of habeas corpus filed by alien unlawful enemy combatant.

Committee Action: S. 3930 was introduced on September 25, 2006, and referred to the Housed Armed Services Committee for consideration. However, S. 3930 is meant to supersede an earlier pre-compromise version (H.R. 6054) of the legislation that was reported on September 12, 2006.

Cost to Taxpayers: A CBO cost estimate is not available yet, but the HASC-reported version (H.R. 6054) would cost $21 million in FY 2007, and $141 million over five years, subject to appropriations. The bill would not affect direct spending or revenues.

Does the Bill Expand the Size and Scope of the Federal Government?: No.

Constitutional Authority: Committee Report 109-664 (accompanying H.R. 6054) cites constitutional authority in Article I, Section 8 of the Constitution, but failed to cite a specific clause. House Rule XIII, Section 3(d)(1), requires that all committee reports contain "a statement citing the *specific* powers granted to Congress in the Constitution to enact the law proposed by the bill or joint resolution." *[emphasis added]*

Does the Bill Contain Any New State-Government, Local Government, or Private Sector Mandates?: No.

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