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An Abbreviated Legislative History and Timeline Regarding the Development of Section 949(b) of the Military Commissions Act of 2006

Gregory S. McNeal*

**ABSTRACT: This document presents an abbreviated legislative history regarding the development of Section 949(b) of the Military Commissions Act of 2006. This legislative history supplements information and arguments made in Gregory S. McNeal, *Beyond Guantanamo, Obstacles and Options*, 102 NW. U. L. REV ___ (2008).**

On September 6, 2006, President George W. Bush held a press conference announcing that his administration transferred High Value Detainees (hereinafter "HVD") to Guantanamo Bay Cuba and confirming that the detainees had been interrogated by the CIA.[1] The President also confirmed that these HVD's were subjected to interrogation using "an alternative set of procedures"[2] which the Department of Justice had reviewed and determined to be lawful. Concurrently, the President announced he was submitting draft legislation to Congress titled the Military Commission Act of 2006.[3] The draft legislation "authorize[ed] military commission to try detainees, amend[ed] the War Crimes Act, and specif[ied] conduct [as] complying with Common Article 3"[4] of the Geneva Conventions.

In response, numerous pieces of draft legislation were introduced in Congress. Most proposals were identical to the President's bill. Of particular note were proposals S. 3861, titled the "Bringing Terrorists to Justice Act of 2006," introduced by Senator Bill Frist, S. 3886, titled the "Terrorist Tracking, Identification, and Prosecution Act of 2006," also introduced by Senator Bill Frist; and H.R. 6054, titled the "Military Commission Act of 2006," introduced by Representative Duncan Hunter.[5] For these three proposals the language of Section 949(b), the provision dealing with unlawful influence, was identical to 10 U.S.C.A. § 837 of the Uniform Code of Military Justice. This section of the U.C.M.J. states:

> **"(a)** No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this chapter may attempt to coerce or,

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[1] White House Press Release, President Discusses Creation of Military Commissions to Try Suspected Terrorists (September 6, 2006); available at http://www.whitehouse.gov/news/releases/2006/09/print/20060906-3.html. (These HVD include Khalid Sheikh Mohammed, Abu Zubaydah, Ramzi bin al-Shibh, and 11 other Terrorists)

[2] White House Press Release, President Discusses Creation of Military Commissions to Try Suspected Terrorists (September 6, 2006); available at http://www.whitehouse.gov/news/releases/2006/09/print/20060906-3.html., White House Press Release, Fact Sheet: The Administration's Legislation to Create Military Commissions (September 6, 2006), available at http://www.whitehouse.gov/news/releases/2006/09/20060906-6.html

[3] White House Press Release, Fact Sheet: The Administration's Legislation to Create Military Commissions (September 6, 2006), available at http://www.whitehouse.gov/news/releases/2006/09/20060906-6.html

[4] Michael John Garcia, The War Crimes Act: Current Issues, CRS Report for Congress, 5-6 (2007); available at http://www.fas.org/sgp/crs/intel/RL33662.pdf

[5] Michael John Garcia, The War Crimes Act: Current Issues, CRS Report for Congress, 5-6 (2007); available at http://www.fas.org/sgp/crs/intel/RL33662.pdf

> by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions of the subsection shall not apply with respect to (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial, or (2) to statements and instructions given in open court by the military judge, president of a special court-martial, or counsel."[6]

All three of the proposed bills featured language for military commissions mirroring this U.C.M.J. provision. The language placed in Section 949 (b) stated:

> "No authority convening a military commission under this chapter may censure, reprimand, or admonish the military commission, or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the military commission, or with respect to any other exercises of its or his functions in the conduct of the proceedings.
>
> `(2) No person may attempt to coerce or, by any unauthorized means, influence the action of a military commission under this chapter, or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.
>
> `(3) Paragraphs (1) and (2) do not apply with respect to--
>
> `(A) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of military commissions; or
>
> `(B) statements and instructions given in open proceedings by a military judge or counsel."[7]

As the proposed legislation was negotiated, Senator Warner proposed new legislation, which took a harder stance regarding cruel treatment of detainees. His bill, S.3901, submitted on September 14, 2006 was titled the "Military Commissions Act of 2006." This proposed legislation followed the standards put forward in the McCain Amendment[8] to the Detainee Treatment Act.[9] The McCain Amendment "prohibits persons in the custody or control of the U.S. government, regardless of their nationality or physical location, from being subjected to 'cruel, inhuman, or degrading treatment or punishment.'"[10] The public debate over this issue

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[6] 10 U.S.C.A. § 837

[7] H.R. 6054, draft legislation submitted by Representative Duncan Hunter (September 12, 2006); available at http://thomas.loc.gov/cgi-bin/query/F?c109:1:./temp/~c109eoCEmu:e23141:

[8] Michael John Garcia, Interrogation of Detainees: Overview of McCain Amendment, CRS Report for Congress, (2007); available at http://www.fas.org/sgp/crs/intel/RL33655.pdf

[9] Detainee Treatment Act of 2005, available at http://jurist.law.pitt.edu/gazette/2005/12/detainee-treatment-act-of-2005-white.php

[10] Michael John Garcia, Interrogation of Detainees: Overview of McCain Amendment, CRS Report for Congress, 3 (2007); available at http://www.fas.org/sgp/crs/intel/RL33655.pdf

prominently placed Senator McCain and other Senators at odds with the administration over the issue of torture.[11] While the public debate focused on torture, Colonel Morris Davis, then the Chief Prosecutor feared that he would be pressured by administration officials to offer evidence derived from torture in future military commission proceedings. Col. Davis met with legislators to ensure they would include provisions protecting military attorneys from political pressure. In an email to the staff of Senator Lindsey Graham prior to publication of S.3901, Col. Davis stated:

> 4. I recommend amending the language in your section 949b, "Unlawfully influencing action of military commission," by modifying section (a)(2) to read:
>
> (2) No person may attempt to coerce or, by any unauthorized means, influence the action of a military commission under this chapter, or any member thereof, in reaching the findings or sentence in any case; the convening, approving, or reviewing authority with respect to their judicial acts; **or the exercise of professional legal judgment by trial counsel or defense counsel.**[12]

Colonel Davis made clear his rationale for adding this important provision, stating:

> The second part of the proposed section 949b provides defense counsel some protections from adverse performance reviews and assignments based upon zealously defending an accused, but the section does not offer a prosecutor any protection at all. If, for instance, I determine the prosecution will not offer any statement obtained as a result of water boarding I shouldn't be subject to reprisal if someone above me believes waterboarding is an acceptable way to extract evidence.[13]

Also, as it relates to the phenomenon of executive forum discretion discussed in *Beyond Guantanamo, Obstacles and Options*[14] Col. Davis sought to ensure that the military commissions process would not be used as a lesser substitute for civilian courts, stating:

> As I mentioned yesterday, I believe it is important for a variety of reasons to make it patently clear that a "military" commission is a "military" proceeding and not some second-rate subterfuge for a federal district court where DOJ attorneys can prosecute terrorists without the obstacles they'd face in federal court. The military commissions are a part of the war effort and its structure should reflect the same.[15]

S.3901 incorporated Col. Davis' recommendations adding protection that extended to "the

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[11] Richard Simon and Janet Hook, *McCain Stand Comes at Price*, L.A. Times, A-1, Sep. 19, 2006, *available at: http://articles.latimes.com/2006/sep/19/nation/na-mccain19* (

[12] E-mail from Col. Davis to staff of Senator Lindsey Graham, page 2. (On file with the author) (emphasis added).

[13] *Id, See also* text *Supra* accompanying notes 108-110. (As the contemporaneous legislative history and public debates make clear, the issue of torture and evidence derived from it permeates the entire military commissions process. This fact lends credence to the arguments made in Gregory S. McNeal, *Beyond Guantanamo, Obstacles and Options*, 102 Nw. U. L. Rev ___ (2008).

[14] Gregory S. McNeal, *Beyond Guantanamo, Obstacles and Options*, 102 Nw. U. L. Rev ___ (2008).

[15] *Id.*

exercise of professional judgment by trial counsel or defense counsel"[16] more expansive language than the narrower "professional legal judgment" urged by Col. Davis. Subsequently, three more bills were introduced, all of which were titled "The Military Commissions Act of 2006." S. 3929 and S. 3930 were introduced by Senator Mitch McConnell and H.R. 6166 also titled "Military Commissions Act of 2006" was introduced by Representative Duncan Hunter.[17] These three other bills "reflected an agreement reached by the Bush Administration and certain lawmakers to resolve differences in the approach taken by S. 3901 and that taken by S. 3861, S. 3886, and H.R. 6054."[18] This compromise was necessary to get the Military commission Act of 2006 passed before Congress took a break on September 29, 2006 to campaign for the midterm elections.[19]

H.R. 6166, S. 3930 and S. 3929 all included the S.3901's language for section 949(b).[20] H.R. 6166 passed the House of September 27, 2007, S. 3930 was passed by the Senate on September 28, 2006 and by the House on September 29, 2006.[21]

Floor statements regarding the legislation bolster the argument offered in *Beyond Guantanamo, Obstacles and Options*[22] regarding prosecutorial independence. For example, Representative Hunter in his floor statement in support of H.R. 6166 stated:

> "It is time for us to think about war crime trials and a process that provides due process and protects national security in this new war.
>
> * * *
>
> While I will not read all of them, here are some of the essential rights we provide: []
>
> Prohibitions against unlawful command influence toward members of the commission, counsel or military judges;"[23]

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[16] S. 3901, draft legislation submitted Senator John Warner, (September 14, 2006); available at http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN03901.

[17] Michael John Garcia, The War Crimes Act: Current Issues, CRS Report for Congress, 6 (2007); available at http://www.fas.org/sgp/crs/intel/RL33662.pdf

[18] Michael John Garcia, The War Crimes Act: Current Issues, CRS Report for Congress, 6 (2007); available at http://www.fas.org/sgp/crs/intel/RL33662.pdf; citing Kate Zernike & Sheryl Gay Stolberg, Differences Settled in Deal Over Detainee Treatment, NY TIMES, September 23, 2006, at A9; available at http://www.nytimes.com/2006/09/23/washington/23detain.html?ei=5088&en=516b31d97412901b&ex=1316664000&partner=rssnyt&emc=rss&pagewanted=all

[19] Kate Zernike, Top Republicans Reach an Accord on Detainee Bill, Washington Post (September 21, 2006); available at http://www.nytimes.com/2006/09/22/washington/22detain.html?fta=y

[20] H.R. 6166, introduced by Representative Duncan Hunter , (September 25, 2006); available at http://thomas.loc.gov/cgi-bin/query/F?c109:1:./temp/~c109sgWBoj:e31273: S. 3929, introduced by Senator Mitch McConnell, (September 22, 2006); available at http://thomas.loc.gov/cgi-bin/query/F?c109:1:./temp/~c109pdYWyF:e31041: , S. 3930, introduced by Senator Mitch McConnell (September 22, 2006); available at http://thomas.loc.gov/cgi-bin/query/F?c109:1:./temp/~c1096wQHAW:e30878:

[21] Michael John Garcia, The War Crimes Act: Current Issues, CRS Report for Congress, 6 (2007); available at http://www.fas.org/sgp/crs/intel/RL33662.pdf

[22] McNeal, *Supra* note 14.

[23] Statement of Representative Duncan Hunter, Floor Statements for H.R. 6166, Page H7534 (Sept. 27, 2006) available at http://www.fas.org/irp/congress/2006_cr/h092706.html, (This statement was echoed by Mr. James Sensenbrenner, who at the time was the Chairman of the House Judiciary Committee). Statement of Representative James Sensenbrenner, Floor Statements for H.R. 6166, Page H7551-H7552 (Sept. 27, 2006) available at http://www.fas.org/irp/congress/2006_cr/h092706.html

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It is clear that prosecutorial independence was a primary legislative goal from the beginning stages of negotiations over the Military Commission Act. This fact is supported by the report of the House Armed Services Committee dealing with H.R. 6054 which was the precursor to H.R. 6166. That report provided the purpose and summary of H.R. 6054, stating:

> "Section 949b—Unlawfully Influencing Action of Military Commission
>
> This section would prohibit the convening authority from censuring, reprimanding, or admonishing the members of a military commission, trial counsel, defense counsel or military judge assigned under this chapter with respect to the findings or sentence adjudged by the military commission, or with respect to any other exercise of any functions in the conduct of the proceedings."
>
> "Finally, this section would prohibit consideration or evaluation of the performance of duty of any member of a military commission, or giving a less favorable rating or evaluation to any commissioned officer because of the zeal with which such officer, in acting as counsel, represented any accused before a military commission under this chapter for the following purposes: the preparation of any report or document used for the purpose of determining whether a commissioned officer of the armed forces is qualified to be advanced in grade, assigned to a new position, transferred or retained on active duty."[24]

**Select Timeline of Legislative History Regarding Section 949(b) of the Military Commissions Act of 2006**

September 6, 2006 – President George W. Bush announces that high value detainees were transferred to Guantanamo Bay and confirms they had been subject to coercive interrogation

September 6, 2006 – President Bush submits draft legislation to Congress

September 6 – President releases Fact Statement explaining his proposed Military Commission legislation

September 6 – S. 3861 Bringing Terrorists to Justice Act of 2006 introduced by Senator Frist featuring the same language as UCMJ regarding protections for prosecutors

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[24] Report of the Committee on Armed Services House of Representatives on H.R. 6054 together with additional and dissenting views, 11 (Sept. 15, 2006); available at http://www.loc.gov/rr/frd/Military_Law/pdf/H-Rep-109-664-1.pdf, *C.f.,* Letter to Senator McCain from Rear Admiral Bruce McDonald, JAG, US Navy, placed in the Congressional Record of the Senate for S.3930, S10411 (September 28, 2006); *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/SCOR-2006-09-28.pdf (stating "defense counsel must have an independent reporting chain of command, free from both actual and perceived influence of prosecution and convening authorities." Although Admiral McDonald is only referencing defense counsel it is plausible to conclude he also felt that the prosecutor should similarly be free from undue influence.)

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September 7- Colonel Davis meets with Senator Lindsey Graham to discuss provisions of proposed legislation

September 8- Colonel Davis e-mails the staff of Senator Lindsey Graham with suggested modifications to proposed legislation

September 11 – S. 3886 Terrorist Tracking, Identification, and Prosecution Act of 2006 introduced by Senator Frist featuring the same language as UCMJ regarding protections for prosecutors

September 12 - H.R. 6054 Military Commission Act of 2006 introduced by Congressman Hunter featuring the same language as UCMJ regarding protections for prosecutors

September 14 – S. 3901 Military Commission Act of 2006 introduced by Senator Warner featuring language similar to that proposed by Col. Davis, providing protection to prosecutor in the "the exercise of professional judgment"

September 15 – Report from House Armed Services on H.R. 6054

September 21 – Agreement reached between Republican leadership regarding language in bill.

September 22 – S. 3929 Military Commission Act of 2006 introduced by Senator McConnell featuring language providing protection to prosecutor in the "the exercise of professional judgment"

September 22 – S. 3930 Military Commission Act of 2006 introduced by Senator McConnell featuring language providing protection to prosecutor in the "the exercise of professional judgment." This eventually becomes the Military Commissions Act of 2006.

September 25 – H.R. 6166 Military Commission Act of 2006 introduced by Congressman Hunter featuring language providing protection to prosecutor in the "the exercise of professional judgment."

September 25 – Report from the House Committee for the Judiciary on H.R. 6054

September 27 - Floor Debate on H.R. 6166 in House

September 27 – H.R. 6166 passed by House

September 27 – S. Amendment 5085 for S. 3930 passed which made S. 3930 and H.R. 6166 the same

September 27-28 Floor Debate on S. 3930 in Senate

September 28 – S. 3930 passed by Senate

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September 29 – Floor Debate on S. 3930 in House

September 29 – S. 3930 passed by House

October 17 –Military Commissions Act of 2006 signed by President George W. Bush including language providing protection for prosecutor in the "the exercise of professional judgment."