# Privilege Against Self-Incrimination (Freedom from Compelled Testimony)

## U.S. Constitution

"No person ... shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty or property without due process of law."

Amendment V.

## Federal Criminal Court

Defendant may not be compelled to testify. Jury may not be instructed that guilt may be inferred from the defendant's refusal to testify. *Griffin v. California*, 380 U.S. 609 (1965).

Witnesses may not be compelled to give testimony that may be incriminating unless given immunity for that testimony.

18 U.S.C. § 6002.

## Military Commissions Act of 2009

"No person shall be required to testify against himself or herself at a proceeding of a military commission under this chapter." 10 U.S.C. § 948r.

No person subject to the UCMJ may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him. 10 U.S.C. § 831(c).

Adverse inferences drawn from a failure to testify are not expressly prohibited; however, members are to be instructed that "the accused must be presumed to be innocent until his guilt is established by legal and competent evidence." 10 U.S.C. § 949l.

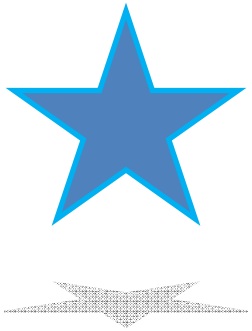
There does not appear to be a provision for immunity of witnesses, although 18 U.S.C. § 6002 may apply to military commissions.

# Effective Assistance of Counsel

## U.S. Constitution

"In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."

Amendment VI.



## Federal Criminal Court

Defendants in criminal cases have the right to representation by an attorney at all stages of prosecution.

The defendant may hire an attorney or, if indigent, have counsel appointed at the government's expense. If two or more codefendants are represented by one attorney, the court must inquire as to whether a conflict of interest exists. Fed. R. Crim. P. 44.

Conversations between attorneys and clients are privileged. Fed. R. Evid. 501.

Procedures for ensuring adequate representation of defendants are outlined at 18 U.S.C. §§ 3005 (capital

## Military Commissions Act of 2009

At least one qualifying military defense counsel is to be detailed "as soon as practicable." 10 U.S.C. § 948k. The accused is entitled to select one "reasonably available" military counsel to represent him. The accused is not entitled to have more than one military counsel, but "associate defense counsel" may be authorized pursuant to regulations. 10 U.S.C. §§ 948c, 948k.

The accused may also hire a civilian attorney who
1. is a U.S. citizen,
2. is admitted to the bar in any state, district, or possession,
3. has never been disciplined,
4. has a SECRET clearance (or higher, if necessary for a particular case), and
5. agrees to comply with all applicable rules.
10 U.S.C. § 949c(b)(3).

If civilian counsel is hired, the detailed military counsel serves as associate counsel.
10 U.S.C. § 949c(b)(5).

No attorney-client privilege is mentioned.
Adverse personnel actions may not be taken against defense attorneys because of the "zeal with which such officer, in acting as counsel, represented any accused before a military commission.…"
10 U.S.C. § 949b.

In capital cases, the accused is entitled to be represented, "to the greatest extent practicable, by at least one additional counsel who is learned in applicable law," who may be a civilian.
10 U.S.C. § 949a.

# Right to Examine or Have Examined Adverse Witnesses (Hearsay Prohibition, Classified Information)

## U.S. Constitution

"In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him"

Amendment VI.

## Federal Criminal Court

Rules of Evidence prohibit generally the introduction at trial of statements made out of court to prove the truth of the matter stated unless the declarant is unavailable for cross-examination at trial (hearsay rule). Fed. R. Evid. 801 et seq.

The government is required to disclose to defendant any relevant evidence in its possession or that may become known through due diligence. Fed. R. Crim. P. 16.

The use of classified information is governed by the Classified Information Procedures Act (CIPA, codified at 18 U.S.C. App. 3). CIPA recognizes the government's entitlement to prevent the disclosure of classified information, even where it is material to the defense. However, in such cases the court is empowered to dismiss the indictment against the defendant or impose other sanctions as may be appropriate. The United States may ask the court to permit the substitution of a statement admitting relevant facts that the specific classified information would tend to prove or of a summary of the specific classified information. The court is required to grant the government's motion if it finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information.

## Military Commissions Act of 2009

"Defense counsel may cross-examine each witness for the prosecution who testifies before a military commission under this chapter." 10 U.S.C. § 949c.

The Secretary of Defense is permitted to provide that hearsay evidence that would not be admissible at a general court-martial is admissible if adequate notice is given and the military judge determines that the statement is reliable and is offered as evidence of a material fact, that direct testimony from the witness is not available or would have an adverse impact on military or intelligence operations, and that the general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence. In determining reliability, the military judge may be obligated to consider the degree to which the statement is corroborated, the indicia of reliability within the statement itself, and whether the will of the declarant was overborne. 10 U.S.C. § 949a(b)(3)(D) . The burden of persuasion to demonstrate unreliability or lack of probative value appears to be on the profferer of the evidence. (Language providing otherwise was repealed).

The protection of classified information is governed by a new subchapter V, 10 U.S.C. §§ 949p-1 – 949p-7. Subchapter V provides that the government cannot be compelled to disclose classified information to anyone not authorized to receive it. If the government claims a privilege, the military judge may not authorize the discovery of or access to the classified information unless he determines the evidence is noncumulative, relevant, and helpful to a legally cognizable defense, rebuttal of the prosecution's case, or to sentencing. If the military judge determines disclosure or access is necessary, the military judge must grant the government's request to delete or withhold specified items of classified information; to substitute a summary for classified information; or to substitute a statement admitting relevant facts that the classified information or material would tend to prove, so long as the alternative procedure would provide the accused with substantially the same ability to make a defense. If the prosecution makes a motion for protective measures in camera, the accused has no opportunity to request a reconsideration.

# Right to Be Present at Trial

## U.S. Constitution

The Confrontation Clause of Amendment VI guarantees the accused's right to be present in the courtroom at every stage of his trial. *Illinois v. Allen*, 397 U.S. 337 (1970).

## Federal Criminal Court

The language, history, and logic of Rule 43 support a straightforward interpretation that prohibits the trial in absentia of a defendant who is not present at the beginning of trial. *Crosby v. United States*, 506 U.S. 255, 262 (1993); Fed. R. Crim. P. 43.

When defendant knowingly absents himself from court during trial, court may "proceed with trial in like manner and with like effect as if he were present." *Diaz v. United States*, 223 U.S. 442, 455 (1912).

## Military Commissions Act of 2009

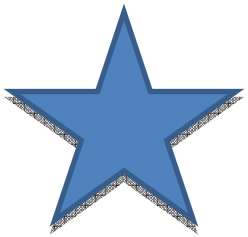
The accused has the right to be present at all sessions of the military commission except deliberation or voting, unless exclusion of the accused is permitted under § 949d. 10 U.S.C. § 949a(b)(1)(B).

The accused may be excluded from attending portions of the proceeding if the military judge determines that the accused persists in disruptive or dangerous conduct. 10 U.S.C. § 949d(e).

# Freedom from Unreasonable Searches and Seizures

## U.S. Constitution

"The right of the people to be secure ... against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue,
but upon probable cause..."
Amendment IV.



## Federal Criminal Court

Evidence, including derivative evidence, gained through unreasonable searches and seizures may be excluded in court. *Boyd v. United States*, 116 U.S. 616 (1886); *Nardone v. United States*, 308 U.S. 338 (1938); Fed. R. Crim. P. 41.

A search warrant issued by a magistrate on a showing of probable cause is generally required for law enforcement agents to conduct a search of an area where the subject has a reasonable expectation of privacy, including searches and seizures of telephone or other communications and emissions of heat and other phenomena detectable with means other than human senses. *Katz v. United States*, 389 U.S. 347 (1967).

Evidence resulting from overseas searches of American property by foreign officials is admissible unless foreign police conduct shocks judicial conscience or participation by U.S. agents is so substantial as to render the action that of the United States. *United States v. Barona*, 56 F.3d 1087 (9th Cir. 1995).

Searches of alien property overseas are not necessarily protected by the Fourth Amendment. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

The Fourth Amendment's warrant requirement does not govern searches conducted abroad by United States agents. *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 157 (2d. Cir. 2008).

## Military Commissions Act of 2009

Not provided.

The Secretary of Defense may provide that "evidence seized outside the United States shall not be excluded from trial by military commission on the grounds that the evidence was not seized pursuant to a search warrant or other authorization."
10 U.S.C. § 949a.

# Speedy and Public Trial

## U.S. Constitution

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, ...." Amendment VI.

## Federal Criminal Court

Trial is to commence within seventy days of indictment or original appearance before court.
18 U.S.C. § 3161.

Closure of the courtroom during trial proceedings is justified only if
1) the proponent of closure advances an overriding interest likely to be prejudiced;
2) the closure is no broader than necessary;
3) the trial court considers reasonable alternatives to closure; and
4) The trial court makes findings adequate to support closure.
*See Waller v. Georgia,* 467 U.S. 39, 48 (1984).

## Military Commissions Act of 2009

There is no right to a speedy trial. Article 10, UCMJ, 10 U.S.C. § 810, requiring immediate steps to inform arrested person of the specific wrong of which he is accused and to try him or to dismiss the charges and release him, is expressly made inapplicable to military commissions.
10 U.S.C. § 948b(d).

The military judge may close all or part of a trial to the public only after making a determination that such closure is necessary to protect information, the disclosure of which would be harmful to national security interests or to the physical safety of any participant.
10 U.S.C. § 949d(c).