

(ii) *Comments.* (A) Two or more persons are required in order to have a conspiracy. Knowledge of the identity of co-conspirators and their particular connection with the agreement or enterprise need not be established. A person may be guilty of conspiracy although incapable of committing the intended offense. The joining of another conspirator after the conspiracy has been established does not create a new conspiracy or affect the status of the other conspirators. The agreement or common criminal purpose in a conspiracy need not be in any particular form or manifested in any formal words.

(B) The agreement or enterprise must, at least in part, involve the commission or intended commission of one or more substantive offenses triable by military commission. A single conspiracy may embrace multiple criminal objectives. The agreement need not include knowledge that any relevant offense is in fact "triable by military commission."

(C) The overt act must be done by one or more of the conspirators, but not necessarily the accused, and it must be done to effectuate the object of the conspiracy or in furtherance of the common criminal purpose. The accused need not have entered the agreement or criminal enterprise at the time of the overt act.

(D) The overt act need not be in itself criminal, but it must advance the purpose of the conspiracy. It is not essential that any substantive offense be committed.

(E) Each conspirator is liable for all offenses committed pursuant to or in furtherance of the conspiracy by any of the co-conspirators, after such conspirator has joined the conspiracy and while the conspiracy continues and such conspirator remains a party to it.

(F) A party to the conspiracy who withdraws from or abandons the agreement or enterprise before the commission of an overt act by any conspirator is not guilty of conspiracy. An effective withdrawal or abandonment must consist of affirmative conduct that is wholly inconsistent with adherence to the unlawful agreement or common criminal purpose and that shows that the party has severed all connection with the conspiracy. A conspirator who effectively withdraws from or abandons the conspiracy after the performance of an overt act by one of the conspirators remains guilty of conspiracy and of any offenses committed pursuant to the conspiracy up to the time of the withdrawal or abandonment. The withdrawal of a conspirator from the conspiracy does not affect the status of the remaining members.

(G) That the object of the conspiracy was impossible to effect is not a defense to this offense.

(H) Conspiracy to commit an offense is a separate and distinct offense from any offense committed pursuant to or in furtherance of the conspiracy, and both the conspiracy and any related offense may be charged, tried, and punished separately. Conspiracy should be charged separately from the related substantive offense. It is not a lesser-included offense of the substantive offense.

(7) *Attempt*—(i) *Elements.* (A) The accused committed an act;

(B) The accused intended to commit one or more substantive offenses triable by military commission;

(C) The act amounted to more than mere preparation; and

(D) The act apparently tended to effect the commission of the intended offense.

(ii) *Comments.* (A) To constitute an attempt there must be a specific intent to commit the offense accompanied by an act that tends to accomplish the unlawful purpose. This intent need not involve knowledge that the offense is in fact "triable by military commission."

(B) Preparation consists of devising or arranging means or measures apparently necessary for the commission of the offense. The act need not be the last act essential to the consummation of the offense. The combination of specific intent to commit an offense, plus the commission of an act apparently tending to further its accomplishment, constitutes the offense of attempt. Failure to complete the offense, whatever the cause, is not a defense.

(C) A person who purposely engages in conduct that would constitute the offense if the attendant circumstances were as that person believed them to be is guilty of an attempt.

(D) It is a defense to an attempt offense that the person voluntarily and completely abandoned the intended offense, solely because of the person's own sense that it was wrong, prior to the completion of the substantive offense. The voluntary abandonment defense is not allowed if the abandonment results, in whole or in part, from other reasons, for example, the person feared detection or apprehension, decided to await a better opportunity for success, was unable to complete the crime, or encountered unanticipated difficulties or unexpected resistance.

(E) Attempt is a lesser-included offense of any substantive offense triable by military commission and need not be charged separately. An accused may be charged with attempt without being charged with the substantive offense.

Dated: June 24, 2003.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 03-16379 Filed 6-26-03; 12:40 pm]

BILLING CODE 5001-08-P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 12

Responsibilities of the Chief Prosecutor, Prosecutors, and Assistant Prosecutors

AGENCY: Department of Defense.

ACTION: Final rule.

SUMMARY: This rule establishes the responsibilities of the Office of the Chief Prosecutor and components thereof.

EFFECTIVE DATE: April 30, 2003.

FOR FURTHER INFORMATION CONTACT:

Office of Military Commission
Spokesperson, 703-693-1115

SUPPLEMENTARY INFORMATION: Although exempt from administrative procedures for rulemaking, publication of the final rule in the **Federal Register** is deemed appropriate under 5 U.S.C. 552(a)(1)(C). Certifications follow:

Administrative Procedures Act (Sec. 1, Pub. L. 89-544)

It has been certified that 32 CFR part 12 is as a military function of the United States and exempt from administrative procedures for rule making.

Executive Order 12866, "Regulatory Planning and Review"

It has been certified that 32 CFR part 12 pertains to military functions other than procurement and import-export licenses and is exempt from Office of Management and Budget review under Section 3, Para (d)(2).

Unfunded Mandates Reform Act (Sec. 202, Pub. L. 104-4)

It has been certified that 32 CFR part 12 does not contain a Federal Mandate that may result in the expenditure by State, local and tribal governments, in aggregate, or by the private sector, of \$100 million or more in any one year.

Public Law 96-354, "Regulatory Flexibility Act" (5 U.S.C. 601)

It has been determined that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities.

Public Law 96-511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35)

It has been certified that 32 CFR part 12 does not impose any reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 44).

Federalism (Executive Order 13132)

It has been certified that 32 CFR part 12 does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

- (1) The States;
- (2) The relationship between the National Government and the States; or
- (3) The distribution of power and responsibilities among the various levels of government.

List of Subjects in 32 CFR Part 12

Military law.

■ Accordingly, 32 CFR part 12 is added to subtitle A, chapter I, Subchapter B to read as follows:

PART 12—RESPONSIBILITIES OF THE CHIEF PROSECUTOR, PROSECUTORS, AND ASSISTANT PROSECUTORS

Sec.

- 12.1 Purpose.
- 12.2 Authority.
- 12.3 Office of the Chief Prosecutor.
- 12.4 Duties and responsibilities of the prosecution.
- 12.5 Policies.

Authority: 10 U.S.C. 113(d) and 140(b).

§ 12.1 Purpose.

This part establishes the responsibilities of the Office of the Chief Prosecutor and components thereof.

§ 12.2 Authority.

This part is issued pursuant to 32 CFR 9.7(a) and in accordance with Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," (3 CFR, 2001 comp., p. 918, 66 FR 57833) and 10 U.S.C. 113(d) and 140(b). The provisions of 32 CFR part 10 are applicable to this part.

§ 12.3 Office of the Chief Prosecutor.

(a) *General.* The Office of the Chief Prosecutor shall be a component of the Office of Military Commissions and shall be comprised of the Chief Prosecutor, Prosecutors, and other persons properly under the supervision of the Chief Prosecutor.

(b) *Chief Prosecutor.* (1) The Chief Prosecutor shall be a judge advocate of any United States armed force and shall be designated by the General Counsel of the Department of Defense.

(2) The Chief Prosecutor shall report directly to the Deputy General Counsel (Legal Counsel) of the Department of Defense.

(3) The Chief Prosecutor shall have authority to subpoena any individual to appear as a witness, to testify, or to produce any evidence in a case referred to military commissions or in a criminal investigation associated with a case that may be referred to a military commission.

(4) The Chief Prosecutor shall direct the overall prosecution effort pursuant to 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," ensuring proper supervision and management of all personnel and resources assigned to the Office of the Chief Prosecutor.

(5) The Chief Prosecutor shall ensure that all personnel assigned to the Office of the Chief Prosecutor review, and attest that they understand and will comply with, 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," and all Supplementary Regulations and Instructions issued in accordance therewith.

(6) The Chief Prosecutor shall inform the Deputy General Counsel (Legal Counsel) of all requirements for personnel, office space, equipment, and supplies to ensure the successful functioning and mission accomplishment of the Office of the Chief Prosecutor.

(7) The Chief Prosecutor shall supervise all Prosecutors and other personnel assigned to the Office of the Chief Prosecutor including any special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States.

(8) The Chief Prosecutor, or his designee, shall fulfill applicable performance evaluation requirements associated with Prosecutors and other personnel properly under the supervision of the Office of the Chief Prosecutor.

(9) The Chief Prosecutor shall detail a Prosecutor and, as appropriate, one or more Assistant Prosecutors to perform the duties of the prosecution as set forth in 32 CFR 9.4(b)(2). The Chief Prosecutor may detail himself to perform such duties.

(10) The Chief Prosecutor shall ensure that all Prosecutors and Assistant Prosecutors faithfully represent the United States in discharging their prosecutorial duties before military commissions conducted pursuant to 32

CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."

(11) The Chief Prosecutor shall ensure that all Prosecutors and Assistant Prosecutors have taken an oath to perform their duties faithfully.

(12) The Chief Prosecutor shall ensure that all personnel properly under the supervision of the Office of the Chief Prosecutor possess the appropriate security clearances.

(c) *Prosecutors.* (1) Prosecutors shall be detailed by the Chief Prosecutor and may be either judge advocates of any United States armed force or special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States.

(2) Prosecutors shall represent the United States as Prosecutors or Assistant Prosecutors as directed by the Chief Prosecutor and in accordance with 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."

(3) Prosecutors shall fulfill all responsibilities detailed in 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," those set forth in this part, and those assigned by the Chief Prosecutor.

(4) Prosecutors shall ensure that all court reporters, security personnel, and interpreters who are to perform duties in relation to a military commission proceeding have taken an oath to perform their duties faithfully. As directed by the Presiding Officer, Prosecutors also shall administer appropriate oaths to witnesses during military commission proceedings.

§ 12.4 Duties and responsibilities of the prosecution.

(a) *Regular duties.* The Prosecution shall perform all duties specified or implied in 32 CFR part 9 as responsibilities of the Prosecution.

(b) *Administrative duties.* The Prosecution shall, as directed by the Presiding Officer or the Appointing Authority, prepare any documentation necessary to facilitate the conduct of military commissions proceedings. The Prosecution shall, as directed by the Deputy General Counsel (Legal Counsel), prepare a trial guide to provide a standardized administrative plan for the conduct of military commission proceedings. Unless directed otherwise by the Appointing Authority, the Presiding Officer may, in

his discretion, depart from this guide as appropriate.

(c) *Special duties.* The Prosecution shall perform all other functions, consistent with 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," as may be directed by the Appointing Authority or the General Counsel of the Department of Defense.

§ 12.5 Policies.

(a) *Prohibition on Prosecutors serving as Defense Counsel.* Judge advocates assigned to the Office of the Chief Prosecutor shall be deemed unavailable for service as Defense Counsel under 32 CFR 9.4(c)(3)(i).

(b) *Prohibition on certain disclosures.* All Prosecutors must strictly comply with 32 CFR 9.6(d)(5) and 9.9 to ensure they do not improperly disclose classified information, national security information, or state secrets to any person not specifically authorized to receive such information.

(c) *Statements to the media.* Consistent with DoD Directive 5122.5¹, the Assistant Secretary of Defense for Public Affairs shall serve as the sole release authority for DoD information and audiovisual materials regarding military commissions. Personnel assigned to the Office of the Chief Prosecutor may communicate with news media representatives regarding cases and other matters related to military commissions only when approved by the Appointing Authority or the General Counsel of the Department of Defense.

Dated: June 24, 2003.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 13

Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel

AGENCY: Department of Defense.

ACTION: Final rule.

SUMMARY: This rule establishes the responsibilities of the Office of the Chief Defense Counsel and components thereof.

EFFECTIVE DATE: April 30, 2003.

FOR FURTHER INFORMATION CONTACT:

Office of Military Commission Spokesperson, (703) 693-1115.

SUPPLEMENTARY INFORMATION: Although exempt from administrative procedures for rule making, publication of the final rule in the *Federal Register* is deemed appropriate under 5 U.S.C. 552(a)(1)(C). Certifications follow:

Administrative Procedures Act (Sec. 1, Pub. L. 89-544)

It has been certified that 32 CFR part 13 is as a military function of the United States and exempt from administrative procedures for rule making.

Executive Order 12866, "Regulatory Planning and Review"

It has been certified that 32 CFR part 13 pertains to military functions other than procurement and import-export licenses and is exempt from Office of Management and Budget review under Section 3, Para (d)(2).

Unfunded Mandates Reform Act (Sec. 202, Pub. L. 104-4)

It has been certified that 32 CFR part 13 does not contain a Federal Mandate that may result in the expenditure by State, local and tribal governments, in aggregate, or by the private sector, of \$100 million or more in any one year.

Public Law 96-354, "Regulatory Flexibility Act" (5 U.S.C. 601)

It has been determined that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities.

Public Law 96-511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35)

It has been certified that 32 CFR part 13 does not impose any reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 44).

Federalism (Executive Order 13132)

It has been certified that 32 CFR part 13 does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

(1) The States;

(2) The relationship between the National Government and the States; or

(3) The distribution of power and responsibilities among the various levels of government.

List of Subjects in 32 CFR Part 13

Military law.

■ Accordingly, 32 CFR part 13 is added to Subtitle A, Chapter I, Subchapter B to read as follows:

PART 13—RESPONSIBILITIES OF THE CHIEF DEFENSE COUNSEL, DETAILED DEFENSE COUNSEL, AND CIVILIAN DEFENSE COUNSEL

Sec.

13.1 Purpose.

13.2 Authority.

13.3 Office of the Chief Defense Counsel.

13.4 Duties and responsibilities of the defense.

13.5 Policies.

Authority: 10 U.S.C. 113(d) and 140(b).

§ 13.1 Purpose.

This part establishes the responsibilities of the Office of Chief Defense Counsel and components thereof.

§ 13.2 Authority.

This part is issued pursuant to 32 CFR 9.7(a) and in accordance with Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," (3 CFR, 2001 comp., p. 918, 66 FR 57833) and 10 U.S.C. 113(d) and 140(b). The provisions of 32 CFR part 10 are applicable to this part.

§ 13.3 Office of the Chief Defense Counsel.

(a) *General.* The Office of the Chief Defense Counsel shall be a component of the Office of Military Commissions and shall be comprised of the Chief Defense Counsel, Defense Counsel, and other such persons properly under the supervision of the Chief Defense Counsel.

(b) *Chief Defense Counsel.* (1) The Chief Defense Counsel shall be a judge advocate of any United States armed force and shall be designated by the General Counsel of the Department of Defense.

(2) The Chief Defense Counsel shall report directly to the Deputy General Counsel (Personnel and Health Policy) of the Department of Defense.

(3) The Chief Defense Counsel shall supervise all defense activities and the efforts of Detailed Defense Counsel and other office personnel and resources pursuant to 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," ensuring proper supervision and management of all personnel and resources assigned to the Office of the Chief Defense Counsel and facilitating the proper representation of all Accused referred to trial before a military commission appointed pursuant to 32 CFR part 9, and Military Order of

¹ Available at <http://www.dtic.mil/whs/directives>.