

(4) *Review Panel.* The Secretary of Defense shall designate a Review Panel consisting of three Military Officers, which may include civilians commissioned pursuant to section 603 of title 10, United States Code. At least one member of each Review Panel shall have experience as a judge. The Review Panel shall review the record of trial and, in its discretion, any written submissions from the Prosecution and the Defense and shall deliberate in closed conference. The Review Panel shall disregard any variance from procedures specified in this part or elsewhere that would not materially have affected the outcome of the trial before the Commission. Within thirty days after receipt of the record of trial, the Review Panel shall either:

(i) Forward the case to the Secretary of Defense with a recommendation as to disposition, or

(ii) Return the case to the Appointing Authority for further proceedings, provided that a majority of the Review Panel has formed a definite and firm conviction that a material error of law occurred.

(5) *Review by the Secretary of Defense.* The Secretary of Defense shall review the record of trial and the recommendation of the Review Panel and either return the case for further proceedings or, unless making the final decision pursuant to a Presidential designation under section 4(c)(8) of the President's Military Order, forward it to the President with a recommendation as to disposition.

(6) *Final decision.* After review by the Secretary of Defense, the record of trial and all recommendations will be forwarded to the President for review and final decision (unless the President has designated the Secretary of Defense to perform this function). If the President has so designated the Secretary of Defense, the Secretary may approve or disapprove findings or change a finding of Guilty to a finding of Guilty to a lesser-included offense, or mitigate, commute, defer, or suspend the sentence imposed or any portion thereof. If the Secretary of Defense is authorized to render the final decision, the review of the Secretary of Defense under paragraph (h)(5) of this section shall constitute the final decision.

§ 9.7 Regulations.

(a) *Supplementary regulations and instructions.* The Appointing Authority shall, subject to approval of the General Counsel of the Department of Defense if the Appointing Authority is not the Secretary of Defense, publish such further regulations consistent with the President's Military Order and this part

as are necessary or appropriate for the conduct of proceedings by Commissions under the President's Military Order. The General Counsel shall issue such instructions consistent with the President's Military Order and this part as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions, including those governing the establishment of Commission-related offices and performance evaluation and reporting relationships.

(b) *Construction.* In the event of any inconsistency between the President's Military Order and this part, including any supplementary regulations or instructions issued under paragraph (a) of this section, the provisions of the President's Military Order shall govern. In the event of any inconsistency between this part and any regulations or instructions issued under paragraph (a) of this section, the provisions of this part shall govern.

§ 9.8 Authority.

Nothing in this part shall be construed to limit in any way the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons. Nothing in this part shall affect the authority to constitute military commissions for a purpose not governed by the President's Military Order.

§ 9.9 Protection of State secrets.

Nothing in this part shall be construed to authorize disclosure of state secrets to any person not authorized to receive them.

§ 9.10 Other.

This part is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person. No provision in this part shall be construed to be a requirement of the United States Constitution. Section and subsection captions in this document are for convenience only and shall not be used in construing the requirements of this part. Failure to meet a time period specified in this part, or supplementary regulations or instructions issued under § 9.7(a), shall not create a right to relief for the Accused or any other person. DoD Directive 5025.1² shall not apply to this part or any supplementary

regulations or instructions issued under § 9.7(a).

§ 9.11 Amendment.

The Secretary of Defense may amend this part from time to time.

§ 9.12 Delegation.

The authority of the Secretary of Defense to make requests for assistance under section 5 of the President's Military Order is delegated to the General Counsel of the Department of Defense. The Executive Secretary of the Department of Defense shall provide such assistance to the General Counsel as the General Counsel determines necessary for this purpose.

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 10

Military Commission Instructions

AGENCY: Department of Defense.

ACTION: Final rule.

SUMMARY: This rule establishes policies for the issuance and interpretation of Military Commission Instructions promulgated pursuant to regulations on Procedures for Trials by Military Commission of Certain Non-United States Citizens in the War Against Terrorism, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."

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 10 is as a military function of the United States and exempt from administrative procedures for rule making.

² Available from www.ditc.mil/whs/directives.

Executive Order 12866, "Regulatory Planning and Review"

It has been certified that 32 CFR part 10 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 10 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 10 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 10 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 10

Military law.

■ Accordingly, 32 CFR part 10 is added to Subtitle A, Chapter I, Subchapter B to read as follows:

PART 10—MILITARY COMMISSION INSTRUCTIONS

- Sec.
- 10.1 Purpose.
 - 10.2 Authority.
 - 10.3 Applicability.
 - 10.4 Policies and procedures.
 - 10.5 Construction.
 - 10.6 Non-creation of right.
 - 10.7 Reservation of authority.
 - 10.8 Amendment.

Authority: 10 U.S.C. 1131d) and 140(b).

§ 10.1 Purpose.

This part establishes policies for the issuance and interpretation of Military Commission Instructions promulgated 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," (3 CFR, 2001 comp., p. 918, 66 FR 57833).

§ 10.2 Authority.

This part is issued pursuant to 32 CFR 9.7(a) and in accordance with 10 U.S.C. 113(d) and 140(b).

§ 10.3 Applicability.

This part, and, unless stated otherwise, all other Military Commission Instructions apply throughout the Department of Defense, including to the Office of the Secretary of Defense, the Military Departments, the Chairman and Vice Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the Department of Defense Field Activities, and all other organizational entities within the Department of Defense, to any special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States to serve as a prosecutor in trials before military commissions pursuant to 32 CFR 9.4(b)(2), to any civilian attorney who seeks qualification as a member of the pool of qualified Civilian Defense Counsel authorized in 32 CFR 9.4(c)(3)(ii), and to any attorney who has been qualified as a member of that pool.

§ 10.4 Policies and procedures.

(a) *Promulgation.* Military Commission Instructions will be issued by the General Counsel of the Department of Defense (hereinafter General Counsel). Each Instruction will issue over the signature of the General Counsel and, unless otherwise specified therein, shall take effect upon the signature of the General Counsel. Instructions will be numbered in sequence.

(b) *Professional responsibility.* Compliance with these Instructions shall be deemed a professional responsibility obligation for the practice of law within the Department of Defense.

(c) *Compliance breaches.* Failure to adhere to these Instructions or any other failure to comply with any rule, regulation, or Instruction applicable to trials by military commission convened 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," may be subject to appropriate action by the Appointing Authority, the General Counsel of the Department of Defense, or the Presiding Officer of a military commission. Such action may include permanently barring an individual from participating in any military commission proceeding convened 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," punitive measures imposed under 10 U.S.C. 898, and any other lawful sanction.

§ 10.5 Construction.

Military Commission Instructions shall be construed in a manner 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." Nothing in these Military Commission Instructions applies with respect to the trial of crimes by military commissions convened under other authority. In the event of an inconsistency, the provisions of 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," shall govern as provided in Section 7(B) of Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." Pronouns referring to the male gender shall be construed as applying to both male and female.

§ 10.6 Non-creation of right.

Neither this part nor any Military Commission Instruction issued hereafter, is intended to and does not create any right, benefit, privilege, substantive or procedural, enforceable by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person. Alleged noncompliance with an Instruction does not, of itself, constitute error, give rise to judicial review, or establish a right to relief for the Accused or any other person.

§ 10.7 Reservation of authority.

Neither this part nor any Military Commission Instruction issued hereafter shall be construed to limit, impair, or otherwise affect any authority granted by the Constitution or laws of the United States or Department of Defense regulation or directive.

§ 10.8 Amendment.

The General Counsel may issue, supplement, amend, or revoke any Military Commission Instruction at any time.

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 11****Crimes and Elements of Trials by Military Commission**

AGENCY: Department of Defense.

ACTION: Final rule.

SUMMARY: This rule provides guidance with respect to crimes that may be tried by military commissions established pursuant to regulations on, Procedures for Trials by Military Commission of Certain Non-United States Citizens in the War Against Terrorism, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," and enumerates the elements of those crimes.

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 11 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 11 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 11 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 11 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 11 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 11

Military law.

■ Accordingly, 32 CFR part 11 is added to subtitle A, chapter I, subchapter B to read as follows:

PART 11—CRIMES AND ELEMENTS FOR TRIALS BY MILITARY COMMISSION

Sec.

- 11.1 Purpose.
- 11.2 Authority.
- 11.3 General.
- 11.4 Applicable principles of law.
- 11.5 Definitions.
- 11.6 Crimes and elements.

Authority: 10 U.S.C. 821.

§ 11.1 Purpose.

This part provides guidance with respect to crimes that may be tried by military commissions established 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," (3 CFR, 2001 comp., p. 918, 66 FR 57833) and enumerates the elements of those crimes.

§ 11.2 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," (66 FR 57833) and 10 U.S.C. 113(d), 140(b), and 821. The provisions of 32 CFR part 10 are applicable to this part.

§ 11.3 General.

(a) *Background.* The following crimes and elements thereof are intended for use by military commissions established 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," the jurisdiction of which extends to offenses or offenders that by statute or the law of armed conflict may be tried by military commission as limited by Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." No offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question. These crimes and elements derive from the law of armed conflict, a body of law that is sometimes referred to as the law of war. They constitute violations of the law of armed conflict or offenses that, consistent with that body of law, are triable by military commission. Because this document is declarative of existing law, it does not preclude trial for crimes that occurred prior to its effective date.

(b) *Effect of other laws.* No conclusion regarding the applicability or persuasive authority of other bodies of law should be drawn solely from the presence, absence, or similarity of particular language in this part as compared to other articulations of law.

(c) *Non-exclusivity.* This part does not contain a comprehensive list of crimes triable by military commission. It is intended to be illustrative of applicable principles of the common law of war but not to provide an exclusive enumeration of the punishable acts recognized as such by that law. The absence of a particular offense from the corpus of those enumerated herein does not preclude trial for that offense.

§ 11.4. Applicable principles of law.

(a) *General intent.* All actions taken by the Accused that are necessary for completion of a crime must be performed with general intent. This intent is not listed as a separate element. When the mens rea required for culpability to attach involves an intent that a particular consequence occur, or some other specific intent, an intent element is included. The necessary relationship between such intent element and the conduct constituting the actus reus is not articulated for each