

**DEPARTMENT OF DEFENSE****Office of the Secretary****32 CFR Part 17****Administrative Procedures**

**AGENCY:** Department of Defense.

**ACTION:** Final rule.

**SUMMARY:** This rule promulgates policy, assigns responsibilities, and prescribes procedures for the conduct of trials by a military commission appointed 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 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 17 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 17 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 17 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 17 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 17 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 17**

Military law.

■ Accordingly, 32 CFR part 17 is added to Subtitle A, Chapter I, Subchapter B to read as follows:

**PART 17—ADMINISTRATIVE PROCEDURES**

Sec.

- 17.1 Purpose.
- 17.2 Authority.
- 17.3 Commission personnel.
- 17.4 Interlocutory questions.
- 17.5 Implied duties of the presiding officer.
- 17.6 Disclosures.

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

**§ 17.1 Purpose.**

This part promulgates policy, assigns responsibilities, and prescribes procedures for the conduct of trials by a military commission appointed 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).

**§ 17.2 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," and 10 U.S.C. 113(d) and 140(b). The provisions of 32 CFR part 10 are applicable to this part.

**§ 17.3 Commission personnel.**

(a) *Appointment and removal of Commission members.* (1) In accordance with 32 CFR part 9, the Appointing Authority shall appoint at least three but no more than seven members and one or two alternate members. The Appointing Authority may remove members and alternate members for

good cause. In the event a member (or alternate member) is removed for good cause, the Appointing Authority may replace the member, direct that an alternate member serve in the place of the original member, direct that proceedings simply continue without the member, or convene a new commission. In the absence of guidance from the Appointing Authority regarding replacement, the Presiding Officer shall select an alternate member to replace the member in question.

(2) The Presiding Officer shall determine if it is necessary to conduct or permit questioning of members (including the Presiding Officer) on issues of whether there is good cause for their removal. The Presiding Officer may permit questioning in any manner he deems appropriate. Consistent with 32 CFR part 9, any such questioning shall be narrowly focused on issues pertaining to whether good cause may exist for the removal of any member.

(3) From time to time, it may be appropriate for a Presiding Officer to forward to the Appointing Authority information and, if appropriate, a recommendation relevant to the question of whether a member (including the Presiding Officer) should be removed for good cause. While awaiting the Appointing Authority's decision on such matter, the Presiding Officer may elect either to hold proceedings in abeyance or to continue. The Presiding Officer may issue any appropriate instructions to the member whose continued service is in question. A military commission shall not engage in deliberations on findings or sentence prior to the Appointing Authority's decision in any case in which the Presiding Officer has recommended a member's removal.

(b) *Military commission security officer.* The Appointing Authority may detail a Security Officer to advise a military commission on matters related to classified and protected information. In addition to any other duties assigned by the Appointing Authority, the Security Officer shall ensure that all classified or protected evidence and information is appropriately safeguarded at all times and that only personnel with the appropriate clearances and authorizations are present when classified or protected materials are presented before military commissions.

(c) *Other military commission personnel.* The Appointing Authority may detail court reporters, interpreters, security personnel, bailiffs, clerks, and any other personnel to a military commission as deemed necessary. In the absence of a detailing by the Appointing

Authority, the Chief Prosecutor shall be responsible to ensure the availability of necessary or appropriate personnel to facilitate the impartial and expeditious conduct of full and fair trials by military commission.

#### § 17.4 Interlocutory questions.

(a) *Certification of interlocutory questions.* The Presiding Officer shall generally adjudicate all motions and questions that arise during the course of a trial by military commission. In accordance with 32 CFR 9.4(a)(5)(iv), however, the Presiding Officer shall certify all interlocutory questions, the disposition of which would effect a termination of proceedings with respect to a charge, for decision by the Appointing Authority. In addition, the Presiding Officer may certify other interlocutory questions to the Appointing Authority as the Presiding Officer deems appropriate.

(b) *Submission of interlocutory questions.* The Presiding Officer shall determine what, if any, documentary or other materials should be forwarded to the Appointing Authority in conjunction with an interlocutory question.

(c) *Effect of interlocutory question certification on proceedings.* While decision by the Appointing Authority is pending on any certified interlocutory question, the Presiding Officer may elect either to hold proceedings in abeyance or to continue.

#### § 17.5 Implied duties of the presiding officer.

The Presiding Officer shall ensure the execution of all ancillary functions necessary for the impartial and expeditious conduct of a full and fair trial by military commission in accordance with 32 CFR part 9. Such functions include, for example, scheduling the time and place of convening of a military commission, ensuring that an oath or affirmation is administered to witnesses and military commission personnel as appropriate, conducting appropriate *in camera* meetings to facilitate efficient trial proceedings, and providing necessary instructions to other commission members. The Presiding Officer shall rule on appropriate motions or, at his discretion consistent with 32 CFR part 9, may submit them to the commission for decision or to the Appointing Authority as a certified interlocutory question.

#### § 17.6 Disclosures.

(a) *General.* Unless directed otherwise by the Presiding Officer upon a showing of good cause or for some other reason, counsel for the Prosecution and the Defense shall provide to opposing counsel, at least one week prior to the scheduled convening of a military commission, copies of all information intended for presentation as evidence at trial, copies of all motions the party intends to raise before the military commission, and names and contact information of all witnesses a party intends to call. Motions shall also be

provided to the Presiding Officer at the time they are provided to opposing counsel. Unless directed otherwise by the Presiding Officer, written responses to any motions will be provided to opposing counsel and the Presiding Officer no later than three days prior to the scheduled convening of a military commission.

(b) *Notifications by the prosecution.* The Prosecution shall provide the Defense with access to evidence known to the Prosecution that tends to exculpate the Accused as soon as practicable, and in no instance later than one week prior to the scheduled convening of a military commission.

(c) *Notifications by the defense.* The Defense shall give notice to the Prosecution of any intent to raise an affirmative defense to any charge at least one week prior to the scheduled convening of a military commission.

(d) *Evidence related to mental responsibility.* If the Defense indicates an intent to raise a defense of lack of mental responsibility or introduce expert testimony regarding an Accused's mental condition, the prosecution may require that the Accused submit to a mental examination by a military psychologist or psychiatrist, and both parties shall have access to the results of that examination.

Dated: June 24, 2003.

**Patricia L. Toppings,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

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