Department of Defense

Military Commission Instruction No. 8

August 31, 2004

SUBJECT: Administrative Procedures

References: (a) Military Commission Instruction No. 8 (April 30, 2003)

(b) Military Commission Order No. 1 (Mar. 21, 2002)

(c) Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (Nov. 16, 2001)

(d) Section 113(d) of Title 10 of the United States Code

(e) Section 140(b) of Title 10 of the United States Code

(f) Military Commission Instruction No. 1, current edition

1. PURPOSE

This Instruction promulgates policy, assigns responsibilities, and prescribes procedures for the conduct of trials by a military commission appointed pursuant to references (b) and (c). This Instruction expressly cancels and reissues reference (a).

2. AUTHORITY

This Instruction is issued pursuant to Section 7(A) of reference (b) and in accordance with references (c), (d), and (d). The provisions of reference (f) are applicable to this Instruction.

3. COMMISSION PERSONNEL

A. *Appointment and Removal of Commission Members.*

1) In accordance with reference (b), 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 reference (b), 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.

4. INTERLOCUTORY QUESTIONS

A. *Certification of Interlocutory Questions.* Except for determinations concerning protection of information as set forth in Section 6(D)(5) of reference (b) and the probative value of evidence, the full Commission shall adjudicate all issues of fact and law in a trial. Determinations concerning the probative value of evidence are governed by Section 4(c)(3) of reference (c). In accordance with Section 4(A)(5)(d) of reference (b), 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.

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 reference (b). 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. Notwithstanding the role of the Presiding Officer and Commission Members in voting on issues of law and fact as set forth of Paragraph 4(A), above, and decisions concerning the probative value of evidence as set forth in Section 4(c)(3) of reference (c), the Presiding Officer shall have independent responsibility for issuing protective orders and deciding upon issues of limited disclosure of information pursuant to Sections 6(D)(5)(a) and (b) of reference (b) and for directing closure of proceedings pursuant to Section 6(B)(3) of reference (b).

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.

7. EFFECTIVE DATE

This Instruction is effective immediately.

William J. Haynes II
General Counsel of the Department of Defense