SUBCHAPTER B—MILITARY COMMISSIONS

PART 9—PROCEDURES FOR TRIALS BY MILITARY COMMISSIONS OF CERTAIN NON-UNITED STATES CITIZENS IN THE WAR AGAINST TERRORISM

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AUTHORITY: 5 U.S.C. 552(1)(a)(1)(C) and (D).
SOURCE: 68 FR 39374, July 1, 2003, unless otherwise noted.

§ 9.1 Purpose.

This part implements policy, assigns responsibilities, and prescribes procedures under the United States Constitution, Article II, section 2 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), for trials before military commissions of individuals subject to the President’s Military Order and appointing any other personnel necessary to facilitate such trials.

§ 9.3 Jurisdiction.

(a) Over persons. A military commission appointed under this part ("Commission") shall have jurisdiction over only an individual or individuals ("the Accused"): (1) Subject to the President’s Military Order; and (2) Alleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority.

(b) Over offenses. Commissions established hereunder shall have jurisdiction over violations of the laws of war and all other offenses triable by military commission.

(c) Maintaining integrity of commission proceedings. The Commission may exercise jurisdiction over participants in its proceedings as necessary to preserve the integrity and order of the proceedings.

§ 9.4 Commission personnel.

(a) Members—(1) Appointment. The Appointing Authority shall appoint the members and the alternate member or members of each Commission. The alternate member or members shall attend all sessions of the Commission, but the absence of an alternate member shall not preclude the Commission from conducting proceedings. In case of incapacity, resignation, or removal of any member, an alternate member shall take the place of that member. Any vacancy among the members or alternate members occurring after a trial has begun may be filled by the Appointing Authority, but the substance of all prior proceedings and evidence taken in that case shall be made known to that new member or alternate member before the trial proceeds. (2) Number of members. Each Commission shall consist of at least three but
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no more than seven members, the number being determined by the Appointing Authority. For each such Commission, there shall also be one or two alternate members, the number being determined by the Appointing Authority.

(3) Qualifications. Each member and alternate member shall be a commissioned officer of the United States armed forces ("Military Officer"), including without limitation reserve personnel on active duty, National Guard personnel on active duty in Federal service, and retired personnel recalled to active duty. The Appointing Authority shall appoint members and alternate members determined to be competent to perform the duties involved. The Appointing Authority may remove members and alternate members for good cause.

(4) Presiding Officer. From among the members of each Commission, the Appointing Authority shall designate a Presiding Officer to preside over the proceedings of that Commission. The Presiding Officer shall be a Military Officer who is a judge advocate of any United States armed force.

(5) Duties of the Presiding Officer. (i) The Presiding Officer shall admit or exclude evidence at trial in accordance with section 6(d) of this part. The Presiding Officer shall have authority to close proceedings or portions of proceedings in accordance with §9.6(b)(3) of this part and for any other reason necessary for the conduct of a full and fair trial.

(ii) The Presiding Officer shall ensure that the discipline, dignity, and decorum of the proceedings are maintained, shall exercise control over the proceedings to ensure proper implementation of the President’s Military Order and this part, and shall have authority to act upon any contempt or breach of Commission rules and procedures. Any attorney authorized to appear before a Commission who is thereafter found not to satisfy the requirements for eligibility or who fails to comply with laws, rules, regulations, or other orders applicable to the Commission proceedings or any other individual who violates such laws, rules, regulations, or orders may be disciplined as the Presiding Officer deems appropriate, including but not limited to revocation of eligibility to appear before that Commission. The Appointing Authority may further revoke that attorney’s or any other person’s eligibility to appear before any other Commission convened under this part.

(iii) The Presiding Officer shall ensure the expeditious conduct of the trial. In no circumstance shall accommodation of counsel be allowed to delay proceedings unreasonably.

(iv) 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. The Presiding Officer may certify other interlocutory questions to the Appointing Authority as the Presiding Officer deems appropriate.

(b) Prosecution—(1) Office of the Chief Prosecutor. The Chief Prosecutor shall be a judge advocate of any United States armed force, shall supervise the overall prosecution efforts under the President’s Military Order, and shall ensure proper management of personnel and resources.

(2) Prosecutors and Assistant Prosecutors. (i) Consistent with any supplementary regulations or instructions issued under §9.7(a), the Chief Prosecutor shall detail a Prosecutor and, as appropriate, one or more Assistant Prosecutors to prepare charges and conduct the prosecution for each case before a Commission ("Prosecution"). Prosecutors and Assistant Prosecutors shall be:

(A) Military Officers who are judge advocates of any United States armed force, or

(B) Special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States.

(ii) The duties of the Prosecution are:

(A) To prepare charges for approval and referral by the Appointing Authority;

(B) To conduct the prosecution before the Commission of all cases referred for trial; and

(C) To represent the interests of the Prosecution in any review process.

(c) Defense—(1) Office of the Chief Defense Counsel. The Chief Defense Counsel shall be a judge advocate of any
§ 9.5 Procedures accorded the accused.

The following procedures shall apply with respect to the Accused:

(a) The Prosecution shall furnish to the Accused, sufficiently in advance of trial to prepare a defense, a copy of the charges in English and, if appropriate, in another language that the Accused understands.

(b) The Accused shall be presumed innocent until proven guilty.

(c) A Commission member shall vote for a finding of Guilty as to an offense if and only if that member is convinced

United States armed force, shall super-

(vise the overall defense efforts under the President’s Military Order, shall

ensure proper management of per-

(sonnel and resources, shall preclude con-

flicts of interest, and shall facili-

tate proper representation of all Acc-

used.

(2) Detailed Defense Counsel. Cons-

istent with any supplementary regula-

tions or instructions issued under § 9.7(a), the Chief Defense Counsel shall
detail one or more Military Officers who
are judge advocates of any United States armed force to conduct the de-

fense for each case before a Commis-

sion (‘‘Detailed Defense Counsel’’). The
duties of the Detailed Defense Counsel are:

(i) To defend the Accused zealously

within the bounds of the law without

regard to personal opinion as to the
guilt of the Accused; and

(ii) To represent the interests of the

Accused in any review process as pro-

vided by this part.

(iii) Choice of Counsel. (A) The Ac-
cused may select a Military Officer
who is a judge advocate of any United
States armed force to replace the
Accused’s Detailed Defense Counsel,
provided that Military Officer has been
determined to be available in accord-
ance with any applicable supple-

mentary regulations or instructions
issued under § 9.7(a). After such selec-
tion of a new Detailed Defense Counsel,
the original Detailed Defense Counsel
will be relieved of all duties with re-
spect to that case. If requested by the
Accused, however, the Appointing Au-

thority may allow the original De-
tailed Defense Counsel to continue to
assist in representation of the Accused
as another Detailed Defense Counsel.

(B) The Accused may also retain the
services of a civilian attorney of the
Accused’s own choosing and at no ex-

pense to the United States Government
(‘‘Civilian Defense Counsel’’), provided
that attorney:

(1) Is a United States citizen;

(2) Is admitted to the practice of law
in a State, district, territory, or pos-
session of the United States, or before
a Federal court;

(3) Has not been the subject of any
sanction or disciplinary action by any
court, bar, or other competent govern-

mental authority for relevant mis-

conduct;

(4) Has been determined to be eligible
for access to information classified at
the level SECRET or higher under the
authority of and in accordance with
the procedures prescribed in DoD
5200.2–R1; and

(5) Has signed a written agreement to
comply with all applicable regulations
or instructions for counsel, including
any rules of court for conduct during
the course of proceedings. Civilian at-
torneys may be pre-qualified as mem-
ers of the pool of available attorneys
if, at the time of application, they
meet the relevant criteria, or they may
be qualified on an ad hoc basis after
being requested by an Accused. Rep-
resentation by Civilian Defense Coun-
sel will not relieve Detailed Defense
Counsel of the duties specified in para-
graph (c)(2) of this section. The qual-
ification of a Civilian Defense Counsel
does not guarantee that person’s pres-
ence at closed Commission proceedings
or that person’s access to any informa-
tion protected under § 9.6(d)(5).

(4) Continuity of representation. The
Accused must be represented at all rel-

vant times by Detailed Defense Coun-
sel. Detailed Defense Counsel and Civil-
ian Defense Counsel shall be herein re-
ferred to collectively as ‘‘Defense Coun-
sel.’’ The Accused and Defense Coun-
sel shall be herein referred to col-
lectively as ‘‘the Defense.’’

(d) Other Personnel. Other personnel,
such as court reporters, interpreters,
security personnel, bailiffs, and clerks
may be detailed or employed by the
Appointing Authority, as necessary.

§ 9.5 Procedures accorded the accused.

The following procedures shall apply with respect to the Accused:

(a) The Prosecution shall furnish to
the Accused, sufficiently in advance of
trial to prepare a defense, a copy of the
charges in English and, if appropriate,
in another language that the Accused
understands.

(b) The Accused shall be presumed in-
nocent until proven guilty.

(c) A Commission member shall vote
for a finding of Guilty as to an offense
if and only if that member is convinced

1Available from www.dtic.mil/whs/directives.