Department of Defense
Military Commission Instruction No. 9

December 26, 2003

SUBJECT: Review of Military Commission Proceedings

References: (a) Military Commission Order No. 1 (Mar. 21, 2002)

(b) 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)

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

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

(e) Section 603 of Title 10 of the United States Code

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

(g) Military Commission Instruction No. 2, current edition

1. PURPOSE

This Instruction prescribes procedures and establishes responsibilities for the review of military commission proceedings.

2. AUTHORITY

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

3. ADMINISTRATIVE REVIEW BY THE APPOINTING AUTHORITY

Pursuant to Section 6(H)(3) of reference (a), the Appointing Authority shall promptly perform an administrative review of the record of trial. Once satisfied that the proceedings of the military commission are administratively complete, the Appointing Authority shall transmit the record of trial to the Review Panel constituted under Section 6(H)(4) of reference (a) and in accordance with this Instruction. If not so satisfied, the Appointing Authority shall return the case to the

military commission for any necessary supplementary proceedings.

4. REVIEW PANEL

A. *Generally.* A Review Panel shall consist of three Military Officers and shall commence its review of a military commission case upon the forwarding of a record of trial by the Appointing Authority.

B. *Members.* The Secretary of Defense will designate three or more Military Officers, including civilians commissioned pursuant to reference (e), as eligible to serve on a Review Panel. With regard to the internal operations of a Review Panel, civilians appointed as officers shall have the same authority, duties, and responsibilities as any other member of the armed forces serving on the Review Panel. Such officers whose total service under reference (e) and otherwise to the United States is not expected to exceed 130 days during any period of 365 consecutive days shall be special Government employees for the purposes of 18 U.S.C. §§ 202, 203, 205, 207, 208, and 209. Section 973(b) of Title 10, U.S. Code, does not apply to such officers. At least one member of each Review Panel shall have experience as a judge.

1) *Qualifications.*

a. In designating members as eligible to serve on a Review Panel, only individuals who are well qualified by virtue of their experience, impartiality, and judicial temperament shall be chosen.

b. No person shall be eligible to serve on a Review Panel if such person:

(1) Participated in the investigation of the case;

(2) Served as a member of the military commission that heard the case;

(3) Served as prosecutor or defense counsel before such commission; or

(4) Is otherwise incapable of providing an impartial review of military commissions as determined by the Secretary of Defense.

c. No person who has served a term of appointment as a member eligible to serve on a Review Panel may be reappointed to a second term.

2) *Term of Appointment.* The Secretary of Defense will prescribe the term of each Review Panel member, which normally shall not exceed two years. The Secretary of Defense may permanently remove a Review Panel member only for good cause. "Good cause" includes, but is not limited to, physical disability, military exigency, or other circumstances that render the member unable to perform his duties.

3) *Review Panel Composition.* The Military Officers designated by the Secretary of Defense shall select from among themselves the three members of each Review Panel. The three members of each Review Panel may select, at their discretion, one member to act as the President of that Review Panel.

4) *Oath of Office.* An oath (or affirmation) of office shall be administered to each Review Panel member.

   a. *Procedure for administering oath.* The following oath (or affirmation) may be administered by the Secretary of Defense, the General Counsel of the Department of Defense, and any person duly authorized to administer oaths, "Do you (swear) (affirm) that you will faithfully and impartially perform, according to your conscience and the rules applicable to the review of trials by military commission, all the duties incumbent upon you as a member of this Review Panel (so help you God)?"

C. *Post-Trial Review by the Review Panel.*

1) *Action on the Record of Trial.* After it has completed its review, the Review Panel shall take action as specified in subparagraphs (a) or (b) below:

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

      (1) In cases where the only further proceedings necessitated by the Review Panel's conclusion that a material error of law occurred are proceedings where the charge(s) against the Accused shall be dismissed, the Appointing Authority shall dismiss the charge(s).

      (2) In all other cases, the Appointing Authority shall refer the Review Panel's conclusions to the military commission for proceedings consistent with those conclusions.

   b. Forward the case directly to the Secretary of Defense with a written opinion, consistent with Section 4(C)(5) of this Instruction, when a majority of the Review Panel has not formed a definite and firm conviction that a material error of law occurred.

      (1) As to each finding of Guilty, the Review Panel shall recommend that it be approved, disapproved, or changed to a finding of Guilty to a lesser-included offense. The Review Panel may recommend disapproval of findings of guilty on a basis other than a material error of law.

      (2) As to the sentence imposed or any portion thereof, the Review Panel shall recommend that it be approved, mitigated, commuted, deferred, or suspended.

2) *Standard of Review.*

   a. *Material Error of Law.* Variance from the procedures specified in reference (a) and its implementing Instructions that would not have had a material effect on the outcome of the military commission shall not constitute a material error of law.

b. Material errors of law may include but are not limited to the following:

(1) A deficiency or error of such gravity and materiality that it deprives the accused of a full and fair trial;

(2) Conviction of a charge that fails to state an offense that by statute or the law of armed conflict may be tried by military commission pursuant to references (a), (b), and (g);

(3) Insufficiency of the evidence as a matter of law; and

(4) A sentence that is not consistent with Section 6(G) of reference (a).

3) *Timing of Post-Trial Review.* The Review Panel shall complete its review and forward the record of trial within 30 days of receipt of the record of trial. The Appointing Authority shall ensure that the Review Panel has sufficient time to review the record of trial. Upon written application of the President of the Review Panel, the Secretary of Defense may grant extensions of time.

4) *Scope of Post-Trial Review.*

a. The Review Panel shall review the entire record of trial as defined by Section 6(H)(1) of reference (a), including decisions by the Appointing Authority.

(1) In making the determination specified in Section 4(C)(1)(a) of this Instruction and the recommendations required in Section 4(C)(1)(b) of this Instruction, the Review Panel may consider factual matters included in the record of trial.

(2) In making the determination specified in Section 4(C)(1)(a) of this Instruction and the recommendations required in Section 4(C)(1)(b) of this Instruction, the Review Panel may review sentences as part of its review of the record of trial.

b. The Review Panel shall ordinarily review submissions from the Prosecution and the Defense. In the event that the Review Panel reviews such written submissions, it may also in its discretion invite oral arguments on the written submissions.

c. The Review Panel may in its discretion review any *amicus curiae* submissions, particularly from the government of the nation of which the accused is a citizen. The Review Panel shall ordinarily review any such governmental submissions.

5) *Written Opinions.* The Review Panel shall issue a written opinion in every case, addressing the determination specified in Section 4(C)(1)(a) of this Instruction and the recommendations required in Section 4(C)(1)(b) of this Instruction.

a. The written opinion shall include a legal analysis in the form of a memorandum supporting the Review Panel's determination in Section 4(C)(1)(a) and recommendations in Section 4(C)(1)(b) of this Instruction and where it otherwise deems appropriate in the exercise of its discretion.

b. Members of the Review Panel may write a separate opinion concurring with or dissenting from the majority opinion.

c. The written opinions of each Review Panel shall constitute precedent for subsequent opinions of all Review Panels.

D. *Deliberation.* The members of the Review Panel shall deliberate in closed conference and shall not disclose the contents of their deliberations outside their closed conference.

E. *Publication.* Except as necessary to safeguard protected information (as defined by reference (a)), the written opinions of the Review Panel shall be published.

F. *Applicability of 10 U.S.C. § 837(a).* The provisions of 10 U.S.C. § 837(a), prohibiting any attempts to coerce or, by any unauthorized means, influence the action of any military tribunal or reviewing authority, apply to Review Panel members.

G. *Effectiveness, Fitness, or Evaluation Reports.* The consideration or evaluation of the substantive judicial decisions made by a member of a Review Panel is prohibited in preparing effectiveness, fitness, or evaluation reports of a Review Panel member.

H. *Administrative Support.* The Review Panel shall be provided any necessary administrative and logistical support required to perform its duties through the Office of the Appointing Authority.

5. REVIEW BY THE SECRETARY OF DEFENSE AFTER RECEIPT OF THE REVIEW PANEL'S RECOMMENDATION

Pursuant to Section 6(H)(5) of reference (a), the Secretary of Defense will review the record of trial and the recommendations 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 reference (b), forward it to the President with a recommendation as to disposition.

6. FINAL DECISION

Pursuant to Section 6(H)(6) of reference (a), 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: 1) The Secretary may approve or disapprove findings or change a finding of Guilty to a finding of Guilty to a lesser-included offense; or 2) The Secretary of Defense may 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 Section 6(H)(5) of reference (a) shall constitute the final decision. Pursuant to Section 6(H)(2) of reference (a), an authenticated finding of Not Guilty as to a charge shall not be changed to a finding of Guilty.

7. EFFECTIVE DATE

This Instruction is effective immediately.

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