Department of Defense

Military Commission Instruction No. 4

August 31, 2004

SUBJECT: Responsibilities of the Chief Defense Counsel, Deputy Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel

References:
(a) Military Commission Instruction No. 4 (Apr. 15, 2004)
(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
(g) DoD Directive 5122.5, "Assistant Secretary of Defense for Public Affairs," current edition

1. PURPOSE

This Instruction establishes the responsibilities of the Office of Chief Defense Counsel (OCDC) and components thereof. 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 (e). The provisions of reference (f) are applicable to this Instruction.

3. OFFICE OF THE CHIEF DEFENSE COUNSEL

A. *General.* The Office of the Chief Defense Counsel shall be a component of the Office of Military Commissions (OMC) and shall be comprised of the Chief Defense Counsel, Deputy Chief Defense Counsel, Defense Counsel, and other such persons properly under the supervision of the Chief Defense Counsel.

B. *Chief Defense Counsel.*

1) The Chief Defense Counsel shall be a judge advocate of any United States armed force and shall be designated by the General Counsel of the Department of Defense.

2) The Chief Defense Counsel shall report directly to the Deputy General Counsel (Personnel and Health Policy) of the Department of Defense.

3) The Chief Defense Counsel shall supervise all defense activities and the efforts of Detailed Defense Counsel and other office personnel and resources pursuant to references (b) and (c), ensuring proper supervision and management of all personnel and resources assigned to the Office of the Chief Defense Counsel and facilitating the proper representation of all Accused referred to trial before a military commission appointed pursuant to references (b) and (c).

4) The Chief Defense Counsel shall ensure that all personnel assigned to the Office of the Chief Defense Counsel review, and attest that they understand and will comply with, references (b) and (c) and all Supplementary Regulations and Instructions issued in accordance therewith. Furthermore, the Chief Defense Counsel shall regulate the conduct of Detailed Defense Counsel as deemed necessary, consistent with references (b) and (c) and subordinate instructions and regulations, and specifically shall ensure that Detailed Defense Counsel have been directed to conduct their activities consistent with applicable prescriptions and proscriptions specified in Section II of the Affidavit And Agreement By Civilian Defense Counsel at Annex B to Military Commission Instruction No. 5.

5) The Chief Defense Counsel shall inform the Appointing Authority of all requirements for personnel, office space, equipment, and supplies to ensure the successful functioning and mission accomplishment of the Office of the Chief Defense Counsel. The Chief Defense Counsel shall provide the Deputy General Counsel (Personnel and Health Policy) of the Department of Defense an information copy of such requests.

6) The Chief Defense Counsel shall supervise all Defense Counsel and other personnel assigned to the Office of the Chief Defense Counsel.

7) The Chief Defense Counsel, or his designee, shall fulfill applicable performance evaluation requirements associated with Defense Counsel and other personnel properly under the supervision of the Chief Defense Counsel.

8) The Chief Defense Counsel shall detail a judge advocate of any United States armed force to perform the duties of the Detailed Defense Counsel as set forth in Section 4(C)(2) of reference (b) and shall detail or employ any other personnel as directed by the Appointing Authority or the Presiding Officer in a particular case. The Chief Defense Counsel may not detail himself to

perform the duties of Detailed Defense Counsel. The Chief Defense Counsel may receive information protected by the attorney-client privilege, incurring the concomitant obligation of confidentiality, in order to fulfill his responsibilities set forth in section 4(C)(1) of reference (b) and this Military Commission Instruction.

a. The Chief Defense Counsel may, when appropriate, detail an additional judge advocate as Assistant Detailed Defense Counsel to assist in performing the duties of the Detailed Defense Counsel.

b. The Chief Defense Counsel may structure the Office of the Chief Defense Counsel so as to include subordinate supervising attorneys who may incur confidentiality obligations in the context of fulfilling their supervisory responsibilities with regard to Detailed Defense Counsel.

9) The Chief Defense Counsel shall take appropriate measures to preclude Defense Counsel conflicts of interest arising from the representation of Accused before military commissions. The Chief Defense Counsel shall be provided sufficient information (potentially including protected information) to fulfill this responsibility.

10) The Chief Defense Counsel shall take appropriate measures to ensure that each Detailed Defense Counsel is capable of zealous representation, unencumbered by any conflict of interest. In this regard, the Chief Defense Counsel shall monitor the activities of all Defense Counsel (Detailed and Civilian) and take appropriate measures to ensure that Defense Counsel do not enter into agreements with other Accused or Defense Counsel that might cause them or the Accused they represent to incur an obligation of confidentiality with such other Accused or Defense Counsel or to effect some other impediment to representation.

11) The Chief Defense Counsel shall ensure that an Accused tried before a military commission pursuant to references (b) and (c) is represented at all relevant times by Detailed Defense Counsel.

12) The Chief Defense Counsel shall administer all requests for replacement Detailed Defense Counsel requested in accordance with Section 4(C)(3) of reference (b). He shall determine the availability of such counsel in accordance with this Instruction.

13) The Chief Defense Counsel shall administer the Civilian Defense Counsel pool, screening all requests for pre-qualification and ad hoc qualification, making qualification determinations and recommendations in accordance with reference (b), this Instruction, and Military Commission Instruction No. 5, and ensuring appropriate notification to an Accused of civilian attorneys available to represent Accused before a military commission.

14) The Chief Defense Counsel shall ensure that all Detailed Defense Counsel and

Civilian Defense Counsel who are to perform duties in relation to a military commission have taken an oath to perform their duties faithfully.

15) The Chief Defense Counsel shall ensure that all personnel properly under the supervision of the Office of the Chief Defense Counsel possess the appropriate security clearances.

C. *Deputy Chief Defense Counsel.*

1) The Deputy Chief Defense Counsel shall be a judge advocate of any United States armed force and shall be designated by the General Counsel of the Department of Defense.

2) The Deputy Chief Defense Counsel shall have full authority to exercise the authority and perform the duties of the Chief Defense Counsel in the absence of the Chief Defense Counsel.

D. *Detailed Defense Counsel.*

1) Detailed Defense Counsel shall be judge advocates of any United States armed force.

2) Detailed Defense Counsel shall represent the Accused before military commissions when detailed in accordance with references (a) and (b). In this regard Detailed Defense Counsel shall: defend the Accused to whom detailed zealously within the bounds of the law and without regard to personal opinion as to guilt; represent the interests of the Accused in any review process as provided by reference (b); and comply with the procedures accorded the Accused pursuant to Sections 5 and 6 of reference (b). Detailed Defense Counsel shall so serve notwithstanding any intention expressed by the Accused to represent himself.

3) Detailed Defense Counsel shall have primary responsibility to prevent conflicts of interest related to the handling of the cases to which detailed.

4) Detailed Defense Counsel shall fulfill all responsibilities detailed in references (b) and (c), those set forth in this Instruction, and those assigned by the Chief Defense Counsel.

E. *Selected Detailed Defense Counsel.*

1) The Accused may select a judge advocate of any United States armed force to replace the Accused's Detailed Defense Counsel, provided that judge advocate has been determined to be available by the Chief Defense Counsel in consultation with the Judge Advocate General of that judge advocate's military department.

2) A judge advocate shall be determined not to be available if assigned duties: as a general or flag officer; as a military judge; as a prosecutor in the Office of Military Commissions; as a judge advocate assigned to the Department of Defense Criminal Investigation Task Force or Joint Task Force Guantanamo; as a principal legal advisor to a command, organization, or agency; as an

instructor or student at a service school, academy, college or university; or in any other capacity that the Judge Advocate General of the Military Department concerned may determine precludes availability because of the nature or responsibilities of the judge advocate's assignments, exigent circumstances, military necessity, or other appropriate reasons.

3) Consistent with Section 6(B) of reference (b), the selection and replacement of new Detailed Defense Counsel shall not unreasonably delay military commission proceedings.

4) Unless otherwise directed by the Appointing Authority or the General Counsel of the Department of Defense, the Chief Defense Counsel will, after selection of a new Detailed Defense Counsel, relieve the original Detailed Defense Counsel of all duties with respect to that case.

F. *Qualified Civilian Defense Counsel.*

1) The Accused may, at no expense to the United States, retain the services of a civilian attorney of the Accused's own choosing to assist in the conduct of his defense before a military commission, provided that the civilian attorney retained has been determined to be qualified pursuant to Section 4(C)(3)(b) of reference (b).

2) Consistent with Section 6(B) of reference (b), the retention of Civilian Defense Counsel shall not unreasonably delay military commission proceedings.

3) Representation by Civilian Defense Counsel will not relieve Detailed Defense Counsel of the duties specified in Section 4(C)(2) of reference (b).

4) Neither qualification of a Civilian Defense Counsel for membership in the pool of available Civilian Defense Counsel nor the entry of appearance in a specific case guarantees that counsel's presence at closed military commission proceedings or access to information protected under Section 6(D)(5) of reference (b).

5) The Chief Defense Counsel shall monitor the conduct of all qualified Civilian Defense Counsel for compliance with all rules, regulations, and instructions governing military commissions. The Chief Defense Counsel will report all instances of noncompliance with the rules, regulations, and instructions governing military commissions to the Appointing Authority and to the General Counsel of the Department of Defense with a recommendation as to any appropriate action consistent with reference (b) and this Instruction.

4. DUTIES AND RESPONSIBILITIES OF THE DEFENSE

A. *Regular Duties.* The Defense shall perform all duties specified or implied in reference (a) as responsibilities of the Defense.

B. *Special Duties.* The Office of the Chief Defense Counsel shall perform such other

functions, consistent with references (b) and (c) and the mission of the Office of the Chief Defense Counsel, as may be directed by the Appointing Authority or the General Counsel of the Department of Defense.

5. POLICIES

A. *Prohibition on Certain Agreements.* No Defense Counsel may enter into agreements with any detainee other than his client, or such detainee's Defense Counsel, that might cause him or the client he represents to incur an obligation of confidentiality with such other detainee or Defense Counsel or to effect some other impediment to representation.

B. *Prohibition on Certain Disclosures.* All Defense Counsel must strictly comply with section 6(D)(5) and section 9 of reference (b) to ensure they do not improperly disclose classified information, national security information, or state secrets to an Accused or potential Accused or to any other person not specifically authorized to receive such information.

C. *Statements to the Media.* Consistent with reference (g), the Assistant Secretary of Defense for Public Affairs shall serve as the sole release authority for DoD information and audiovisual materials regarding military commissions. Personnel assigned to the Office of the Chief Defense Counsel, as well as all members of the Civilian Defense Counsel pool and associated personnel may communicate with news media representatives regarding cases and other matters related to military commissions only when approved by the Appointing Authority or the General Counsel of the Department of Defense.

6. EFFECTIVE DATE

This Instruction is effective immediately.

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