Department of Defense

Appointing Authority Regulation No. 2

November 17, 2004

SUBJECT: Motion and Interlocutory Question Procedures

References: (a) 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)

(b) Department of Defense Directive 5105.70, "Appointing Authority for Military Commissions" (Feb. 10, 2004)

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

(d) Military Commission Instruction No. 8, current edition

(e) Military Commission Instruction No. 9, current edition

1. PURPOSE

This Regulation prescribes rules and procedures for motion practice and certification of interlocutory questions to the Appointing Authority.

2. AUTHORITY

This regulation is issued pursuant to Section 6.3 of reference (b) and Section 7(A) of reference (c) and in accordance with reference (a). The provisions of references (d) and (e) are applicable to this Regulation.

3. MOTIONS

A. *Generally.* A motion is a request to the Presiding Officer for any type of relief. Except for determinations concerning protected information as set forth in Section 6(D)(5) of reference (c), and as provided in Section 5 of reference (d), the full Commission shall adjudicate all issues of law and fact raised by the parties by way of a motion.

B. *Terms and Definitions.* The following definitions apply to motion practice:

1) A "filing" includes a motion, response, reply, supplement, notice of motion, request for special relief, or other communication involved in resolving a

motion, when provided to and received by the Chief Clerk of the Military Commissions (or, in his absence, the Presiding Officer or designated assistants) and opposing counsel, as detailed in Section 3(D) below.

2) A "motion" is the original request from the moving party or the party requesting relief.

3) A "response" is the opponent's answer to a motion.

4) A "reply" is the moving party's answer to a response.

5) A "supplement" is a filing in regard to a motion other than a motion, response, or reply.

C. *Form of Filings.* Each motion, response, reply, and supplement shall contain, at a minimum:

1) A heading which styles the case "United States of America v [name of accused as set forth on the charge sheet.]"

2) A descriptive title, indicating specifically the form of relief sought by the party.

3) A concise statement of the relief sought.

4) A statement of facts pertinent to the issue at bar.

5) A statement of law with references to cases, statutes, or pertinent legal sources.

6) If desired, a written request for the following:

a. A hearing before the military commission, with a list of witnesses, if witnesses are to be called; and/or

b. A request for oral argument.

7) A statement of the burden of proof on any issue necessary to the resolution of the motion and the party on which the burden of persuasion falls.

D. *Acceptable Methods of Service.* Counsel shall ensure filings are served on opposing counsel and the Chief Clerk of the Military Commissions (or, in his absence, the Presiding Officer or designated assistants). Service of filings shall be accomplished by one of the following methods:

1) *Electronic Mail:* Service may be accomplished using electronic mail. Such filings shall be included as an attachment to, and not in the body of, the electronic mail message. The attached filing shall be a scanned, signed copy of

the motion. Service shall be considered complete when the electronic mail message is sent to opposing counsel and the Chief Clerk of the Military Commissions (or, in his absence, the Presiding Officer or designated assistants). Electronic mails shall be sent with a request for delivery receipt of the message, indicating that the actual message was received by the recipients. Printed copies of these receipts shall be provided to the Chief Clerk of the Military Commissions (or, in his absence, the Presiding Officer or designated assistants).

2) *Facsimile:* Service may be accomplished by faxing a signed copy of the filing to the Chief Clerk of the Military Commissions (or, in his absence, the Presiding Officer or designated assistants) and opposing counsel. A printed receipt of transmission generated by the fax machine shall suffice for proof of service. This receipt shall be provided to the Chief Clerk of the Military Commissions (or, in his absence, the Presiding Officer or designated assistants).

3) The Chief Clerk of the Military Commissions (or, in his absence, the Presiding Officer or designated assistants) shall maintain copies of all E-mails and fax receipts attesting to service of filings.

4) Counsel for both sides are responsible for notifying the Chief Clerk of the Military Commissions (or, in his absence, the Presiding Officer or designated assistants) of any delay in receiving filings from opposing counsel. The Presiding Officer for good cause may extend dates for responding to filings. Failure to regularly check electronic mail messages or fax transmissions shall not be good cause for a delay in receipt of filings.

E. *Presiding Officer Memoranda.* The Presiding Officer may, in his discretion, promulgate additional rules concerning the form and timing of motions provided such rules do not conflict with this Regulation or the authorities cited in references (a) – (e).

4. PRELIMINARY MOTIONS

A. The following preliminary motions must be raised before a plea is entered:

1) Challenges to jurisdiction;

2) Alleged defects in the form of charges;

3) Severance of charges or separate trials;

4) Inadmissibility of evidence based on facts or law then known to the moving party; or

5) Objections based on the refusal of a request for assignment of counsel or the release of counsel prior to trial.

B. *Timing of Preliminary Motions.*

1) The moving party shall provide the opposing party and the Presiding Officer notice of intent to file a preliminary motion as soon as a decision is made to file the motion.

2) Unless directed otherwise by the Presiding Officer upon a showing of good cause or for some other reason, the moving party shall provide to opposing counsel and the Presiding Officer at least 7 calendar days prior to the convening of a Military Commission copies of all preliminary motions the party intends to raise before the Military Commission.

3) Unless directed otherwise by the Presiding Officer upon a showing of good cause or for some other reason, the party responding to any motion shall provide to opposing counsel and the Presiding Officer at least 3 calendar days prior to the convening of a Military Commission copies of all replies the party intends to raise before the Military Commission.

5. MOTIONS FOR A FINDING OF NOT GUILTY

Motions for a Finding of Not Guilty may result in a final verdict with respect to a charge. Members of the Commission shall deliberate and vote on motions for a Finding of Not Guilty in closed conference.

6. OTHER MOTIONS

After the charge or charges are referred to a Commission and the Appointing Authority designates a Presiding Officer, either party may at any time move before the Military Commission by way of motion, not being a preliminary motion, for appropriate ruling or relief. Such motion should normally be in written form, as specified in Paragraph 3(C), but may be made orally by the moving party at the discretion of the Presiding Officer.

7. RULES OF EVIDENCE GOVERNING MOTION PRACTICE

The following rules shall govern the admissibility of evidence during hearings on motions and use of such evidence:

A. A Commission hearing a motion or question may consider affidavits, witness testimony, argument of counsel, or any other form of information, at its discretion.

B. Evidence submitted by the Prosecution and Defense Counsel in support of a motion or related filing specified in Paragraph 3(B) may be considered by the Commission during the findings portion of trial and, upon a conviction, sentencing, provided that the Presiding Officer, or a majority of the Commission pursuant to Section 6(D)(1) of reference (c), determines that the evidence would have probative value to a

reasonable person. The Prosecution and Defense Counsel need not reintroduce evidence submitted in support of a motion during findings or sentencing. However, the Prosecution and Defense may choose to reintroduce evidence submitted in support of a motion during findings and sentencing in order to ensure completeness, context, or continuity of facts presented.

8. INTERLOCUTORY QUESTIONS

A. *Required Certification of Interlocutory Questions.* In accordance with Section 4(A)(5)(d) of reference (c), the Presiding Officer shall certify all interlocutory questions, the disposition of which would effect the termination of the proceedings with respect to a charge, for decision by the Appointing Authority.

1) An interlocutory question would only effect the termination of the proceedings with respect to a charge if, after consideration of the motion or question that arises during the course of a trial, the Commission reaches a conclusion that would effect a dismissal with respect to that charge.

2) If the Commission reaches a conclusion that would not effect a dismissal with respect to a charge, there is no requirement for certification of an interlocutory question.

B. *Other Interlocutory Questions.* The Presiding Officer may certify other interlocutory questions to the Appointing Authority as the Presiding Officer deems appropriate. The Presiding Officer may grant and consider argument by the Prosecution and Defense as to whether an issue should be certified as an interlocutory question.

9. PROCEDURES FOR SUBMITTING INTERLOCUTORY QUESTIONS

A. *Generally.* An interlocutory question does not arise until a party to the action, by motion, requests any type of relief from the Presiding Officer.

1) The Presiding Officer shall ensure that the motion is considered by the full Commission and, where appropriate, evidence, witnesses, and arguments of counsel are entertained before a ruling is made on the motion. The Commission shall issue a ruling on the motion before the issue considered is certified to the Appointing Authority as an interlocutory question.

2) A request for interpretation of Commission rules and procedures from the Presiding Officer or parties to an action does not constitute an interlocutory question. If the Presiding Officer has questions concerning Commission rules and procedures, he shall exercise his discretion in interpreting such rules with the interests of a full and fair trial for the Accused in mind. Such determinations by the Presiding Officer do not become interlocutory questions unless challenged by motion by one of the parties to the case, the Commission issues a

ruling on the motion, and the Presiding Officer subsequently decides to certify the issue raised pursuant to subsection 8(B), above.

B. *Commission Procedures Prior to Submitting an Interlocutory Question.*

1) Once the Presiding Officer decides to certify an interlocutory question, the Presiding Officer will notify the Prosecution and Defense whether the certification was required or optional.

2) The Presiding Officer will inform the Prosecution and Defense of the Commission's decision on the issue and the documentary or other materials the Presiding Officer intends to forward to the Appointing Authority. The Presiding Officer will also inform the Prosecution and Defense whether the proceedings will be held in abeyance until the Appointing Authority provides a response.

3) The Presiding Officer, may at his discretion, grant and hear argument from the Prosecution and Defense on the appropriateness of the documentary or other materials the Presiding Officer intends to forward to the Appointing Authority, and whether the proceedings will be held in abeyance until the Appointing Authority provides a response.

C. *Commission Procedures after Receiving a Response from the Appointing Authority.*

1) Once the Presiding Officer receives a response from the Appointing Authority, he will provide the response to the Prosecution, Defense, and other Commission Members and conduct the Commission consistent with the Appointing Authority's response.

2) The Appointing Authority's response and the documents the Appointing Authority considered will be made a part of the Record of Trial and subject to review in accordance with reference (e).

10. MATERIAL SUBMITTED TO THE APPOINTING AUTHORITY

A. When submitting an interlocutory question to the Appointing Authority, the Presiding Officer will provide the following:

1) A memorandum that states:

a. Whether the certification of the interlocutory question was required or optional;

b. The interlocutory question or issues presented to the Appointing Authority;

c. The decision of the Presiding Officer or a majority of the Commission when a member requests reconsideration of the Presiding Officer's decision, on the issue;

d. A list of the documentary or other materials, if any, the Presiding Officer forwarded to the Appointing Authority in conjunction with an interlocutory question; and

e. Whether the Presiding Officer is holding the proceedings in abeyance until receiving a response on the interlocutory question.

2) Portions of the record of trial, including all applicable exhibits that pertain to the certified questions or issues.

B. The Appointing Authority may return the interlocutory question to the Presiding Officer with direction to obtain additional information.

11. INTERLOCUTORY QUESTION CERTIFICATION EFFECT 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.

12. OTHER

This Regulation is prospective in application and shall not serve as a basis to challenge or reconsider decisions made prior to the effective date of this Regulation.

13. EFFECTIVE DATE

This Regulation is effective immediately.

John D. Altenburg, Jr.
Appointing Authority
for Military Commissions