

§ 10.8 Amendment.

The General Counsel may issue, supplement, amend, or revoke any Military Commission Instruction at any time.

Dated: June 24, 2003.

Patricia L. Toppings,
Alternate OSD Federal Register Liaison
Officer, Department of Defense.

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DEPARTMENT OF DEFENSE**Office of the Secretary****32 CFR Part 11****Crimes and Elements of Trials by Military Commission**

AGENCY: Department of Defense.

ACTION: Final rule.

SUMMARY: This rule provides guidance with respect to crimes that may be tried by military commissions established pursuant to regulations on, Procedures for Trials by Military Commission of Certain Non-United States Citizens in the War Against Terrorism, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," and enumerates the elements of those crimes.

EFFECTIVE DATE: April 30, 2003.

FOR FURTHER INFORMATION CONTACT:
Office of Military Commission
Spokesperson, 703-693-1115.

SUPPLEMENTARY INFORMATION: Although exempt from administrative procedures for rulemaking, publication of the final rule in the *Federal Register* is deemed appropriate under 5 U.S.C. 552(a)(1)(C). Certifications follow:

Administrative Procedures Act (Sec. 1, Pub. L. 89-544)

It has been certified that 32 CFR part 11 is as a military function of the United States and exempt from administrative procedures for rule making.

Executive Order 12866, "Regulatory Planning and Review"

It has been certified that 32 CFR part 11 pertains to military functions other than procurement and import-export licenses and is exempt from Office of Management and Budget review under section 3, para (d)(2).

Unfunded Mandates Reform Act (Sec. 202, Pub. L. 104-4)

It has been certified that 32 CFR part 11 does not contain a Federal Mandate that may result in the expenditure by

State, local and tribal governments, in aggregate, or by the private sector, of \$100 million or more in any one year.

Public Law 96-354, "Regulatory Flexibility Act" (5 U.S.C. 601)

It has been determined that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities.

Public Law 96-511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35)

It has been certified that 32 CFR part 11 does not impose any reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 44).

Federalism (Executive Order 13132)

It has been certified that 32 CFR part 11 does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

- (1) The States;
- (2) The relationship between the national government and the States; or
- (3) The distribution of power and responsibilities among the various levels of government.

List of Subjects in 32 CFR Part 11

Military law.

■ Accordingly, 32 CFR part 11 is added to subtitle A, chapter I, subchapter B to read as follows:

PART 11—CRIMES AND ELEMENTS FOR TRIALS BY MILITARY COMMISSION

Sec.

- 11.1 Purpose.
- 11.2 Authority.
- 11.3 General.
- 11.4 Applicable principles of law.
- 11.5 Definitions.
- 11.6 Crimes and elements.

Authority: 10 U.S.C. 821.

§ 11.1 Purpose.

This part provides guidance with respect to crimes that may be tried by military commissions established pursuant to 32 CFR part 9, 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) and enumerates the elements of those crimes.

§ 11.2 Authority.

This part is issued pursuant to 32 CFR 9.7(a) and in accordance with Military Order of November 13, 2001, "Detention, Treatment, and Trial of

Certain Non-Citizens in the War Against Terrorism," (66 FR 57833) and 10 U.S.C. 113(d), 140(b), and 821. The provisions of 32 CFR part 10 are applicable to this part.

§ 11.3 General.

(a) *Background.* The following crimes and elements thereof are intended for use by military commissions established pursuant to 32 CFR part 9, and Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," the jurisdiction of which extends to offenses or offenders that by statute or the law of armed conflict may be tried by military commission as limited by Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." No offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question. These crimes and elements derive from the law of armed conflict, a body of law that is sometimes referred to as the law of war. They constitute violations of the law of armed conflict or offenses that, consistent with that body of law, are triable by military commission. Because this document is declarative of existing law, it does not preclude trial for crimes that occurred prior to its effective date.

(b) *Effect of other laws.* No conclusion regarding the applicability or persuasive authority of other bodies of law should be drawn solely from the presence, absence, or similarity of particular language in this part as compared to other articulations of law.

(c) *Non-exclusivity.* This part does not contain a comprehensive list of crimes triable by military commission. It is intended to be illustrative of applicable principles of the common law of war but not to provide an exclusive enumeration of the punishable acts recognized as such by that law. The absence of a particular offense from the corpus of those enumerated herein does not preclude trial for that offense.

§ 11.4. Applicable principles of law.

(a) *General intent.* All actions taken by the Accused that are necessary for completion of a crime must be performed with general intent. This intent is not listed as a separate element. When the mens rea required for culpability to attach involves an intent that a particular consequence occur, or some other specific intent, an intent element is included. The necessary relationship between such intent element and the conduct constituting the actus reus is not articulated for each