

## COMMISSION ANNOTATION

**M**ORE LIKELY THAN NOT, any attorneys who find themselves trying cases before a military commission in the post-9/11 era, whether for the prosecution or the defense, will refer to the National Institute of Military Justice's *Annotated Guide to the U.S. Defense Department's Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism* (Military Comm'n Order No. 1, Mar. 21, 2002). Why is that? Because, as NIMJ President Eugene Fidell points out in the Introduction to the *Annotated Guide*, they don't have many other places to turn for guidance focused on the *Procedures*. And why is that? Because, writes Fidell,

there is no public rulemaking docket, and because no official section-by-section analysis has thus far been made available, the policy choices underlying the [*Procedures*] can be gleaned only from informal sources such as the March 21, 2002 press briefing [by Secretary of Defense Donald Rumsfeld] and earlier leaks. This *Annotated Guide* attempts to fill that gap.

After spending the last year awash in news-media reportage and law-review analysis of military commissions authored, for the most part, by newly-minted and apocalyptically-minded experts on military justice, it is somehow reassuring to read a workmanlike manual focusing on the statutes, regulations, precedents, and practices potentially relevant to the operation of military commissions. Consider, for example, the commentary on *Procedures* § 11 ("Amendment: The Secretary of Defense may amend this Order from time to time."):

The [*Procedures*] establish no particular process for their amendment. Legally, neither notice-and-comment rulemaking procedures nor publication in the *Federal Register* is required. 5 U.S.C. §§ 551(i)(F), 552, 553(a)(1). Nothing in the *Procedures* bars suggestions

for amendment from within or outside the armed forces. Such suggestions are best addressed to the General Counsel. It is doubtful that they would be referred to the Joint Service Committee on Military Justice ("JSC") for initial review, see 32 C.F.R. Pt. 152 (2001), since the JSC appears not to have played a significant role in framing [the *Procedures*]. In any event, it is certain that any suggestions that were deemed worthwhile by the Department of Defense would be coordinated with the Department of Justice and the White House before promulgation by the Secretary. Given the high level of congressional and public interest in the initial *Procedures*, and the consternation that some in Congress expressed over the lack of consultation before the [initial November 13, 2001 Presidential Military Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism] was issued, any amendments to [the *Procedures*] would also likely be the subject of consultations with the House and Senate Committees on the Judiciary and/or Armed Services prior to issuance.

By analogy to the process employed by the JSC for proposed [*Manual for Courts-Martial*] changes, those recommending amendments are well-advised to include not only the proposed text but also a concise explanation of the need for the change.

It is to be assumed that any [*Procedures*] amendments would be disseminated in such a fashion that all who might be affected by them would have reasonable notice. Cf. 44 U.S.C. § 1507 (*Federal Register* publication as constructive notice of regulations); see also *United States v. Tolkach*, 14 M.J. 239 (C.M.A. 1982) (general order not binding on persons without actual knowledge of its terms where order was not disseminated in accordance with standard service procedures). Although *Federal Register* publication is not required for [military commission orders], it is worth noting that even for documents that do require such publication, Congress has provided for "alternative systems" of notice "[i]n the event of an attack or threatened attack upon the continental United States and a determination by the President that as

a result of an attack or threatened attack ... under existing conditions publication in the Federal Register would not serve to give appropriate notice to the public ... ." These "alternative systems" may include "regional or specialized publications or depositories for documents, or ... the press, radio, or similar mediums of general communication." 44 U.S.C. § 1505(c).

Lloyd Cutler – now of Wilmer, Cutler & Pickering and 50 years ago a prosecutor before the military commission whose jurisdiction and procedures were upheld in *Ex parte Quirin*, 317 U.S. 1 (1942) – opines in his Preface to the *Annotated Guide* that, "I believe that the [Procedures] as issued are a substantial improvement

over those in effect during World War II." If you disagree, or think that there is room for improvement, now you know how and where to make your case. The General Counsel's address is:

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National Institute of Military Justice,  
ANNOTATED GUIDE: PROCEDURES FOR  
TRIALS BY MILITARY COMMISSIONS OF  
CERTAIN NON-UNITED STATES CITIZENS  
IN THE WAR AGAINST TERRORISM (Lexis-  
Nexis 2002). 