RECORD OF TRIAL

COVER SHEET

IN THE
MILITARY COMMISSION
CASE OF

UNITED STATES
V.
ALI HAMZA AHMAD SULAYMAN AL BAHLUL

ALSO KNOWN AS:

ALI HAMZA AHMED SULEIMAN AL BAHLUL
ABU ANAS AL MAKKI
ABU ANAS YEMENI
MOHAMMAD ANAS ABDULLAH KHALIDI

NO. 040003

VOLUME ___ OF ___ TOTAL VOLUMES

1ST VOLUME OF REVIEW EXHIBITS (RE):
RES 1-6 (AUG. 26, 2004 SESSION)
& RES 101-120 (JAN. 11, 2006 SESSION)
(REDACTED VERSION)

United States v. Ali Hamza Sulayman al Bahlul, NO. 040003

INDEX OF VOLUMES

A more detailed index for each volume is included at the front of the particular volume concerned. An electronic copy of the redacted version of this record of trial is available at http://www.defenselink.mil/news/commissions.html.

The volumes have not been numbered on the covers. The numerical order for the volumes of the record of trial, as listed below, as well as the total number of volumes will change as litigation progresses and additional documents are added.

After trial is completed, the Presiding Officer will authenticate the final session transcript and exhibits, and the Appointing Authority will certify the records as administratively complete. The volumes of the record of trial will receive their final numbering just prior to the Appointing Authority's administrative certification.

VOLUME NUMBER	SUBSTANCE OF CONTENTS
I*	Military Commission Primary References (President's Military Order; Military Commission Orders; DoD Directive; Military Commission Instructions; Appointing Authority Regulations; Presiding Officer Memoranda)—includes rescinded publications
II*	Supreme Court Decisions: *Rasul v. Bush*, 542 U.S. 466 (2004); *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *In re Yamashita*, 327 U.S. 1 (1946); *Ex Parte Quirin*, 317 U.S. 1 (1942); *Ex Parte Milligan*, 71 U.S. 2 (1866)
III*	DoD Decisions on Commissions including Appointing Authority orders and decisions
IV*	Federal Litigation in *Hamdan v. Rumsfeld*, at U.S. Supreme Court and D.C. Circuit
V*	Federal Litigation at U.S. District Courts
VI*	Transcript (Aug. 26, 2004 and Jan. 11, 2006 sessions)
VII*	Review Exhibits 1-6; 101-120 (Aug. 26, 2004 and Jan. 11, 2006 sessions)
VIII*	Review Exhibits 121-140 (Jan. 11, 2006 session)

* Interim volume numbers. Final numbers to be added when trial is completed.

UNITED STATES V. ALI HAMZA AHMAD SULAYMAN AL BAHLUL, NO. 040003—1ST VOLUME OF REVIEW EXHIBITS

Description of Exhibit **PAGE No.**

1ST VOLUME OF REVIEW EXHIBITS: RES 1-6 (7 PAGES)
SESSION OF AUG. 26, 2004

RE 1	Convening Order and Appointment of Military Commission Members, June 28, 2004 (2 pages)	1
RE 2	Presidential Reason to Believe Determination, July 14, 2003 (1 page)	3
RE 3	List of Interpreters (1 page)	4
RE 4	Protective Order for Interpreters (1 page)	5
RE 5	Detail of Prosecutors, July 28, 2004 (1 page)	6
RE 6	Chief Defense Counsel details military defense counsel, February 3, 2004 (1 page)	7

RES 101-120
SESSION OF JAN. 10-12, 2006

RE 101	Self-Representation Issue (20 enclosures)	9
	1. Detailed Defense Counsel's request to withdraw as Detailed Defense Counsel (20 Apr 04) (1 page)	11
	2. Chief Defense Counsel's request to permit withdrawal of detailed defense counsel (26 Apr 04) (2 pages)	12
	3. Detailed defense counsel's request to Sec Defense to modify rules to permit self-representation (11 May 04) (2 pages)	14
	4. Legal Advisor's memo to Appointing Authority re: self-representation (25 May 05) (2 pages)	16
	5. Transcript--United States v. al Bahlul (26 Aug 04) (17 pages)	18

UNITED STATES V. ALI HAMZA AHMAD SULAYMAN AL BAHLUL, NO. 040003—1ST VOLUME OF REVIEW EXHIBITS

Description of Exhibit	PAGE No.
6. Detailed Defense Counsel's memo in support of right to self-representation (2 Sep 04) (7 pages)	35
7. Chief Defense Counsel's memo in support of right to self-representation (23 Sep 04) (2 pages)	42
8. Prosecution's memo supporting right to self-representation (1 Oct 04) (10 pages)	44
9. Detailed Defense Counsel's additional comments regarding right to self-representation (8 Oct 04) (7 pages)	54
10. Detailed Defense Counsel's email (13 Oct 04) (1 page)	61
11. Presiding Officer's email (13 Oct 04) (1 page)	62
12. Detailed Defense Counsel's email (14 Oct 04) (1 page)	63
13. Presiding Officer's email (14 Oct 04) (7 pages)	64
14. Presiding Officer's email--Order to Brief Pro Se Issue and Other Issues (18 Oct 04) (4 pages)	71
15. Detailed Defense Counsel's answers to Presiding Officer's questions on the self-representation issue (22 Oct 04) (5 pages)	75
16. Detailed Defense Counsel's memo on self-representation (22 Oct 04) (8 pages)	80
17. Prosecution's answers to the Presiding Officer's questions on self-representation (25 Oct 04) (7 pages)	88
18. Dep Sec Def memo on self-representation (10 Dec 04) (1 page)	95
19. Detailed Defense Counsel's Amicus Brief, *Hamdan v. Rumsfeld* (27 Dec 04) (24 pages)	96
20. Appointing Authority's memo on self-representation (14 June 05) (2 pages)	121

UNITED STATES V. ALI HAMZA AHMAD SULAYMAN AL BAHLUL, NO. 040003—1ST VOLUME OF REVIEW EXHIBITS

Description of Exhibit		PAGE No.
RE 102	Presiding Officer Order directing resumption of proceedings (PO 102) (16 Nov 05) (4 pages)	123
RE 103	Charge Sheet for al Bahlul (4 pages)	127
RE 104	Presidential Reason to Believe Determination (3 Jul 03) (1 page)	131
RE 105	Convening Order for al Bahlul (28 Jun 04) (1 page)	132
RE 106	Appointing Authority Orders proceedings held in Abeyance (10 Dec 04) (1 page)	133
RE 107	Convening Order No. 05-0003 for al Bahlul (4 Nov 05) (2 pages)	134
RE 108	Protective Order for Classified Material (9 Jul 04) (2 pages)	136
RE 109	Protective Order for Sensitive Material (30 Jun 04) (2 pages)	138
RE 110	Protective Order for Sensitive Material (17 Mar 04) (2 pages)	140
RE 111	Approval of Charges (23 Feb 04) (5 pages)	142
	1. Charge Sheet al Bahlul (4 pages)	143
RE 112	Email re: PO 101 (5 Dec 05) (2 pages)	147
RE 113	Email re: PO 102 (22 Nov 05) (3 pages)	149
RE 114	Email re: PO 102 (22 Nov 05) (2 pages)	152
RE 115	Email re: PO 102 (28 Nov 05) (4 pages)	154
RE 116	Email re: self-representation (1 Dec 05) (2 pages)	158
RE 117	Email re: PO 102 (1 Dec 05) (1 page)	160
RE 118	Email re: Ethics Opinion (1 Dec 05) (2 pages)	161

UNITED STATES V. ALI HAMZA AHMAD SULAYMAN AL BAHLUL, NO. 040003—1ST VOLUME OF REVIEW EXHIBITS

Description of Exhibit	PAGE No.
RE 119 Email forwarding self-representation issue to Army Ethics Office (6 Dec 05) (137 pages)	163
1. Detailed Defense Counsel's request to withdraw as Detailed Defense Counsel (20 Apr 04) (1 page)	169
2. Chief Defense Counsel's request to permit withdrawal of detailed defense counsel (26 Apr 04) (2 pages)	170
3. Detailed defense counsel's request to Sec Defense to modify rules to permit self-representation (11 May 04) (2 pages)	172
4. Legal Advisor's memo to Appointing Authority re: self-representation (25 May 05) (2 pages)	174
5. Transcript--United States v. al Bahlul (26 Aug 04) (17 pages)	176
6. Detailed Defense Counsel's memo in support of right to self-representation (2 Sep 04) (7 pages)	193
7. Chief Defense Counsel's memo in support of right to self-representation (23 Sep 04) (2 pages)	200
8. Prosecution's memo supporting right to self-representation (1 Oct 04) (10 pages)	202
9. Detailed Defense Counsel's additional comments regarding right to self-representation (8 Oct 04) (7 pages)	212
10. Detailed Defense Counsel's email (13 Oct 04) (1 page)	219
11. Presiding Officer's email (13 Oct 04) (1 page)	220
12. Detailed Defense Counsel's email (14 Oct 04) (1 page)	221
13. Presiding Officer's email (14 Oct 04) (7 pages)	222
14. Presiding Officer's email--Order to Brief Pro Se Issue and Other Issues (18 Oct 04) (4 pages)	229

Description of Exhibit **PAGE No.**

15. Detailed Defense Counsel's answers to Presiding Officer's questions on the self-representation issue (22 Oct 04) (5 pages) 233

16. Detailed Defense Counsel's memo on self-representation (22 Oct 04) (8 pages) 238

17. Prosecution's answers to the Presiding Officer's questions on self-representation (25 Oct 04) (7 pages) 246

18. Dep Sec Def memo on self-representation (10 Dec 04) (1 page) 253

19. Detailed Defense Counsel's Amicus Brief, *Hamdan v. Rumsfeld* (27 Dec 04) (24 pages) 254

20. Appointing Authority's memo on self-representation (14 June 05) (2 pages) 279

21. MAJ Fleener detailed to defend al Bahlul (3 Nov 05) (2 pages) 281

22. Email on self-representation (28 Nov 05) (4 pages) 283

23. Email on self-representation (1 Dec 05) (2 pages) 287

24. Email on self-representation (22 Nov 05) (3 pages) 289

25. Email on self-representation (22 Nov 05) (2 pages) 292

26. Email on self representation (28 Nov 05) (4 pages) 294

27. Prosecution memo on self-representation (5 Dec 05) (2 pages) 298

RE 120 **Presiding Officer's email on self-representation (1 Dec 05) (2 pages)** 300

[redacted]

No. 040003

UNITED STATES v. ALI HAMZA AHMAD SULAYMAN AL BAHLUL a/k/a Ali Hamza Ahmed Suleiman al Bahlul a/k/a Abu Anas al Makki a/k/a Abu Anas Yemeni a/k/a Mohammad Anas Abdullah Khalidi	))))))))))	**Military Commission Members** June 28, 2004

The following officers are appointed to serve as a Military Commission for the purpose trying any and all charges referred for trial in the above-styled case. The Military Commission will meet at such times and places as directed by the Appointing Authority or the Presiding Officer. Each member of the Military Commission will serve until relieved by proper authority.

In the event of incapacity, resignation, or removal of a member who has not been designated as the Presiding Officer, the alternate member is automatically appointed as a member.

Colonel Peter E. Brownback, III, USA (Retired), Presiding Officer
Colonel [redacted] USMC, Member
Colonel [redacted] USMC, Member
Colonel [redacted] USAF, Member
Lieutenant Colonel [redacted] USAF, Member
Lieutenant Colonel [redacted] USA, Alternate Member

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

[redacted]

Review Exhibit 1

Page 1 Of 2

[redacted]

No. 040003

UNITED STATES v. ALI HAMZA AHMAD SULAYMAN AL BAHLUL a/k/a Ali Hamza Ahmed Suleiman al Bahlul a/k/a Abu Anas al Makki a/k/a Abu Anas Yemeni a/k/a Mohammad Anas Abdullah Khalidi	))))))))))	**Approval of Charge And Referral** June 28, 2004

The charge against Ali Hamza Ahmad Sulayman al Bahlul (a/k/a Ali Hamza Ahmed Suleiman al Bahlul, a/k/a Abu Anas al Makki, a/k/a Abu Anas Yemeni, a/k/a Mohammad Anas Abdullah Khalidi) is approved and referred to the Military Commission identified at Encl 1. The Presiding Officer will notify me not later than July 15, 2004, of the initial trial schedule, including dates for submission and argument of motions, and a convening date.

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

[redacted]

[redacted]

THE WHITE HOUSE

WASHINGTON

OFFICE OF THE SECRETARY OF DEFENSE

2003 JUL 14 PM 5:12

TO THE SECRETARY OF DEFENSE:

Based on the information available to me from all sources, including the factual summary from the Department of Defense Criminal Investigation Task Force dated June 24, 2003 and forwarded to me by the Deputy Secretary of Defense by letter dated July 1, 2003;

Pursuant to the Military Order of November 13, 2001 on "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism";

In accordance with the Constitution and consistent with the laws of the United States, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40);

I, GEORGE W. BUSH, as President of the United States and Commander in Chief of the Armed Forces of the United States, hereby DETERMINE for the United States of America that in relation to Ali Hamza Ahmad Sulayman al-Bahlul, Department of Defense Internment Serial No. US[redacted], who is not a United States citizen:

(1) There is reason to believe that he, at the relevant times:
- (a) is or was a member of the organization known as al Qaida;
- (b) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
- (c) has knowingly harbored one or more individuals described in subparagraphs (a) or (b) above.

(2) It is in the interest of the United States that he be subject to the Military Order of November 13, 2001.

Accordingly, it is hereby ordered that, effective this day, Ali Hamza Ahmad Sulayman al-Bahlul shall be subject to the Military Order of November 13, 2001.

DATE: July 3 2003

White House Office-controlled Document

DECLASSIFIED IAW
JTF-GTMO-JZ SCG, 10JUN2004
DECLASSIFIED ON: 23AUG2004

Review Exhibit 2

Page 1 Of 1

[redacted]

X02375 /03

Interpreters

[redacted]

[redacted]

[redacted]

Review Exhibit 3

Page 1 Of 1

REVIEW EXHIBIT 4

1. Review Exhibit (RE) 4 states that the names of the interpreters are protected information, and describes a process for ensuring the names of the interpreters are not released to the public.

2. RE 4 states that the contractor providing language-translation services for military commissions requested that the names of translators not be released to the public. The Presiding Officer ordered that the names of the translators not be mentioned at the hearing or included in the record of trial that is made available to the public. The names of the translators will be attached to the record as a sealed exhibit.

3. The order itself, RE 4, was classified "For Official Use Only" (FOUO). RE 4 consists of one page of text.

4. Material classified as FOUO, absent permission from the classification authority, is not releaseable for posting on the Department of Defense (DoD) Public Affairs web site.

5. The authority for the Presiding Officer's protective order is DoD Military Commission Order No. 1, paragraph 6(D)(5) (Aug. 31, 2005).

6. I certify that this is an accurate summary of sealed RE 4.

//Signed//

M. Harvey
Chief Clerk
of Commissions

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

July 28, 2004

MEMORANDUM FOR COMMANDER [redacted] USN
LIEUTENANT COLONEL [redacted] USMC
LIEUTENANT COLONEL [redacted] USMC
MAJOR [redacted] USA
CAPTAIN [redacted] USA
LIEUTENANT [redacted] USNR
CAPTAIN [redacted] USAFR

SUBJECT: Detailed Prosecutors

Consistent with my authority as Chief Prosecutor and the provisions of Sections 4B(2) of Military Commission Order No. 1, dated March 21, 2002, and Section 3B(9) of Military Commission Instruction No. 3, dated April 30, 2003, the above named counsel are detailed and designated as follows:

United States v. al Bahlul
Detailed Prosecutor: Commander [redacted]
Detailed Assistant Prosecutors: Lieutenant Colonel [redacted] Captain [redacted]

United States v. al Qosi
Detailed Prosecutor: Lieutenant Colonel [redacted]
Detailed Assistant Prosecutors: Lieutenant [redacted] Captain [redacted]

United States v. Hamdan
Detailed Prosecutor: Commander [redacted]
Detailed Assistant Prosecutors: Captain [redacted]

United States v. Hicks
Detailed Prosecutor: Lieutenant Colonel [redacted]
Detailed Assistant Prosecutors: Major [redacted]

ROBERT SWANN
Colonel, U.S. Army
Chief Prosecutor
Office of Military Commissions

cc:
Deputy Chief Prosecutor
Mr. [redacted]

Review Exhibit 5

Page 1 Of 1

DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

3 February 2004

MEMORANDUM DETAILING DEFENSE COUNSEL

TO: LCDR PHILIP SUNDEL AND MAJOR MARK BRIDGES

SUBJECT: DETAILING LETTER REGARDING MILITARY COMMISSION PROCEEDINGS OF ALI HAMZA AHMAD SULAYMAN AL BAHLUL

Pursuant to the authority granted to me by my appointment as Chief Defense Counsel; Sections 4C and 5D of Military Order No. 1, dated March 21, 2002; and Section 3B8 of Military Commission Instruction No. 4, dated April 30, 2003, you are hereby detailed as Military Counsel for all matters relating to Military Commission proceedings involving Ali Hamza Ahmad Sulayman al Bahlul. Your appointment exists until such time any findings and sentence become final as defined in Section 6(H)(2) of Military Commission Order No. 1 unless you are excused from representing Mr. al Bahlul by me or my successor

In your representation of Mr. al Bahlul, you are directed to review and comply with the Presidential Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," (66 FR 57833); Military Commission Orders No. 1 and 2 and Military Commission Instructions 1 through 9 and all Supplementary Regulations and Instructions issued in accordance therewith. Specifically, you are directed to ensure that your conduct and activities are consistent with the prescriptions and proscriptions specified in Section II of the Affidavit And Agreement By Civilian Defense Counsel at Appendix B to Military Instruction No. 5.

You are directed to inform Mr. al Bahlul of his rights before a Military Commission. In the event that Mr. al Bahlul chooses to exercise his rights to Selected Military Counsel or his right to Civilian Defense Counsel at his own expense, you shall inform me as soon as possible.

In the event that you become aware of a conflict of interest arising from the representation of Mr. al Bahlul before a Military Commission, you shall immediately inform me of the nature and facts concerning such conflict. You should be aware that in addition to your State Bar and Service Rules of Professional Conduct that by virtue of your appointment to the Office of Military Commissions you will be attached to the Defense Legal Services Agency and will be subject to

Review Exhibit 6

Page 1 of 2

professional supervision by the Department of Defense General Counsel.

You are directed to inform me of all requirements for personnel, office space, equipment, and supplies necessary for preparation of the defense of Mr. al Bahlul.

Colonel Will A. Gunn, USAF
Chief Defense Counsel
Office of Military Commissions

cc:
Col Borch
General Hemingway
Mr. [redacted]

RE 101 - United States v. Al Bahlul

Index of Contents (Pages 1-2)

1. Detailed Defense Counsel, US v. Al Bahlul, Memorandum for Chief Defense Counsel, Subject: Request to Withdraw as Detailed Defense Counsel, United States v. Al Bahlul, 20 April 2004. (Page 3)

2. Chief Defense Counsel, Memorandum for Major Mark Bridges and LCDR Philip Sundel, Subject: Request to Withdraw as Detailed Defense Counsel, United States v. Al Bahlul, 26 April 2004. (Pages 4-5)

3. LCDR Sundel, Memorandum for Secretary of Defense; General Counsel, Department of Defense, and Appointing Authority, Subject: Request for Modification of Military Commission Rules to Recognize the Right of Self-Representation, United States v. Al Bahlul, 11 May 2004. (Pages 6-7)

4. Legal Advisor to the Appointing Authority for Military Commissions, Memorandum for Mr. John D. Altenburg, Jr., Appointing Authority for Military Commissions, Subject: Response to Accused's request to modify the Military Commission Rules to recognize the right of self-representation, 25 May 2004. (Pages8-9)

5. Transcript, Proceedings of United States v. Al Bahlul, 26 August 2004. (Pages10-26)

6. Detailed Defense Counsel, US v. Al Bahlul, Memorandum of Law, Right to Self-Representation; Right to Choice of Counsel, 2 September 2004. (Pages27-33)

7. Chief Defense Counsel, Memorandum for Mr. John D. Altenburg, Jr., Appointing Authority for Military Commissions, Subject: Preservation of right to full and fair trial by military commission in the case of Ali Hamza Sulayman Al Bahlul, 23 September 2004. (Pages 34-35)

8. Detailed Prosecution Counsel, Prosecution Response to Defense Memo for Self-Representation and Right to Choice of Counsel, 1 October 2004. (Pages 36-44)

9. Detailed Defense Counsel, Defense Reply: Right to Self-representation; right to choice of counsel, 8 October 2004. (Pages 46-52)

10. Detailed Defense Counsel, Email, Subject: Defense Reply Brief -- Representation (US v. al Bahlul), 13 October 2004. (Page 53)

11. Presiding Officer, Email, Subject: Defense Reply Brief -- Representation (US v. al Bahlul), 13 October 2004. (Page 54)

12. Detailed Defense Counsel, Email, Subject: Defense Reply Brief -- Representation (US v. al Bahlul), 14 October 2004. (Page 55)

13. Presiding Officer, Email, Subject: Defense Reply Brief -- Representation (US v. al Bahlul), 14 October 2004. (Pages 55-62)

14. Presiding Officer, Email, Subject: Al Bahlul - Order to Brief Pro Se Issue and Other Issues, 18 October 2004. (Pages 63-66)

15. Detailed Defense Counsel, Answers to Presiding Officer's Questions on the Issue of Self-Representation, 22 October 2004. (Pages 67-71)

16. Detailed Defense Counsel, Memorandum of Law: Right to Self-Representation; Right to Choice of Counsel, 22 October 2004. (Pages 72-79)

17. Detailed Prosecution Counsel, Answers to the Presiding Officer's Questions on the Issue of Self-Representation, 25 October 2004. (Pages 80-86)

18. Deputy Secretary of Defense, Memorandum for General Counsel of the Department of Defense, Appointing Authority for Military Commissions, Legal Advisor to the Appointing Authority for Military Commissions, Chief Prosecutor for Military Commissions, Chief Defense Counsel for Military Commissions, Subject: Request of Detailed Defense Counsel to Modify Military Commission Rules to Recognize Right of Self-Representation, 10 December 2004. (Page 87)

19. Detailed Defense Counsel, Amicus Brief, Hamdan v. Rumsfeld, on petition for writ of certiorari before judgment, 27 December 2004. (Pages 88-112)

20. Appointing Authority, Memorandum for Chief Defense Counsel for Military Commissions, Subject: Request of Detailed Defense Counsel to Modify Military Commission Rule to Recognize Right of Self-Representation, 14 June 2005. (Pages 113-114)

DEPARTMENT OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1931 JEFFERSON DAVIS HIGHWAY, SUITE 103
ARLINGTON, VIRGINIA 22202

20 April 2004

MEMORANDUM FOR CHIEF DEFENSE COUNSEL

SUBJECT: Request to Withdraw as Detailed Defense Counsel. *United States v. al Bahlul*

1. Undersigned counsel, detailed by you on 3 February 2004, to represent Ali Hamza Ahmed Sulayman al Bahlul in proceedings before a military commission, met with Mr. al Bahlul on several occasions during the week of 12-16 April 2004, in the detention facility at Guantanamo Bay, Cuba. At the last of those meeting Mr. al Bahlul informed us that he did not desire the services of either ourselves or any other counsel, military or civilian. Rather, Mr. al Bahlul wishes to represent himself in any military commission proceedings.

2. Consequently, pursuant to the authority granted you in Section 4C of Military Commission Order No. 1, dated March 21, 2002, we respectfully request permission to withdraw as Mr. al Bahlul's detailed defense counsel.

3. To assist you in acting on this request, we note that international law recognizes the right of self-representation before criminal tribunals,[1] as do the Rules for Courts-Martial.[2] The rules governing the military commissions, however, do not appear to have provided a mechanism for such.[3]

4. Thank you for your consideration of this request.

Major Mark A. Bridges, USA
Defense Counsel
Office of Military Commissions

Philip Sundel
LCDR, JAGC, USN
Defense Counsel

[1] Article 21(4)(d), Statute of the International Criminal Tribunal for the Former Yugoslavia; Article 20(4)(d), Statute of the International Criminal Tribunal for Rwanda.
[2] Rule for Courts-Martial 506(c).
[3] *See* Section 4C(4), Military Commission Order No. 1; Section 3B(11), Military Commission Instruction No. 4.

DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

26 April 2004

MEMORANDUM FOR MAJOR MARK BRIDGES AND LCDR PHILIP SUNDEL

SUBJECT: Request to Withdraw as Detailed Defense Counsel, *United States v. al Bahlul*

1. I have reviewed your memorandum dated 20 April 2004 in which you informed me of your client's desire to represent himself in any military commission proceedings. In the same memorandum you requested permission to withdraw as Mr. al Bahlul's detailed defense counsel. In my opinion, I do not have the authority to decide whether Mr. al Bahlul can represent himself in military commission proceedings. I see that as a question for the Appointing Authority and/or for a military commission. As a result, I will not decide that issue.

2. While I lack the authority to decide whether Mr. al Bahlul can represent himself before military commissions, as Chief Defense Counsel, I do have the authority pursuant to Military Commission Order (MCO) No. 1 and Military Commission Instruction (MCI) No. 4 to make a decision on your request to withdraw as Mr. al Bahlul's defense counsel. Your request to withdraw is denied.

3. The procedures for military commissions as currently drafted envision a central role for Detailed Defense Counsel. Accordingly, several provisions of MCO No. 1 and MCI No. 4 convince me that it would be inappropriate to approve your request to withdraw as Detailed Defense Counsel. These provisions include: paragraph 4C(4) of MCO No. 1 which states that "the Accused must be represented at all relevant times by Detailed Defense Counsel;" paragraph 5D of MCO No. 1 which states that at least one Detailed Defense Counsel shall be made available to the Accused sufficiently in advance of trial to prepare a defense *and until any findings and sentence become final in accordance with Section 6(H)(2)*" (emphasis added); paragraph 6B(3) of MCO No. 1 which allows an Accused to be excluded from commission proceedings but provides that Detailed Defense Counsel can never be excluded; and paragraph 6B(5)(b) of MCO No. 1 which sets out procedures for handling Protected Information during commission proceedings and provides that such information can never be admitted into evidence if not presented to Detailed Defense Counsel.

4. Paragraph 3C(2) of MCI No. 4 speaks directly to the point of whether or not Detailed Defense Counsel can be relieved of the responsibility of representing an Accused before a Military Commission. This paragraph provides that "Detailed Defense Counsel shall represent the Accused before military commissions" and that counsel "*shall so serve notwithstanding any intention expressed by the Accused to represent himself.* (Emphasis added)."

5. You are to continue to represent Mr. al Bahlul consistent with my letter (dated 3 February 2004) detailing you to represent him. In the event, your client decides to exercise other options with respect to representation by Detailed Defense Counsel, please notify me so that I can consider his request. I am copying the Appointing Authority and the Legal Advisor to the Appointing Authority on this memorandum and I invite you to appeal to the Appointing Authority if you disagree with my decisions on these matters.

WILL A. GUNN, Colonel, USAF
Chief Defense Counsel

cc:
Appointing Authority
Legal Advisor to the Appointing Authority

DEPARTMENT OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1931 JEFFERSON DAVIS HIGHWAY, SUITE 103
ARLINGTON, VIRGINIA 22202

11 May 2004

MEMORANDUM FOR SECRETARY OF DEFENSE; GENERAL COUNSEL, DEPARTMENT OF DEFENSE; AND APPOINTING AUTHORITY

SUBJECT: Request for Modification of Military Commission Rules to Recognize the Right of Self-Representation, *United States v. al Bahlul*

1. Lieutenant Commander Philip Sundel, JAGC, USN, and Major Mark Bridges, USA, were detailed by the Chief Defense Counsel, Office of Military Commissions on 3 February 2004, to represent Ali Hamza Ahmed Sulayman al Bahlul in proceedings before a military commission. Detailed counsel met with Mr. al Bahlul on several occasions during the week of 12-16 April 2004, in the detention facility at Guantanamo Bay, Cuba. At the last of those meetings Mr. al Bahlul informed us that he did not desire the services of either ourselves or any other counsel, military or civilian. Rather, Mr. al Bahlul wishes to represent himself in any military commission proceedings.

2. On 20 April 2004, detailed counsel requested permission of the Chief Defense Counsel to withdraw as Mr. al Bahlul's detailed counsel (enclosure 1). On 26 April 2004, based on his view that the rules governing military commissions precluded self-representation, the Chief Defense Counsel denied our request (enclosure 2).

3. Pursuant to section 4(b) of the President's Military Order of November 13, 2001, section 7(A) of Military Commission Order Number 1, dated March 21, 2002, and paragraph 6.3 of Department of Defense Directive 5105.70 of February 10, 2004, respectively, each of you has the authority to modify or supplement the rules governing military commissions as necessary to facilitate the conduct of proceedings by military commissions.

4. Given the view of the Chief Defense Counsel regarding the restrictive nature of the rules governing military commissions, we respectfully request that each of you exercise his authority to modify or supplement those rules so as to allow withdrawal by detailed defense counsel and recognize the right of persons to represent themselves before military commissions.

5. In acting on this request, we ask that you consider the fact that international law recognizes the right of self-representation before criminal tribunals,[1] as do the Rules for Courts-Martial.[2] Further, while the rules governing military commissions presently do not appear to have provided a mechanism for such, we invite you to consider the significant difficulties that will arise if counsel are required to represent accused who wish to represent themselves.

---

[1] Article 21(4)(d), Statute of the International Criminal Tribunal for the Former Yugoslavia; Article 20(4)(d), Statute of the International Criminal Tribunal for Rwanda.
[2] Rule for Courts-Martial 506(c).

6. As this matter involves ongoing litigation, we anticipate pursuing other avenues of redress if this request is not acted on by 11 June 2004. Thank you for your consideration of this request.

Very respectfully,

Philip Sundel
LCDR, JAGC, USN
Defense Counsel

[redacted]

DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

May 25, 2004

MEMORANDUM FOR Mr. John D. Altenburg, Jr., Appointing Authority for Military Commissions

SUBJECT: Response to Accused's request to modify the Military Commission Rules to recognize the right of self-representation

The Accused, Ali Hamza Ahmed Sulayman al Bahlul, through detailed defense counsel, Lieutenant Commander Philip Sundel, JAGC, USN, and Major Mark Bridges, USA, requests that that the Appointing Authority modify the Military Commission Rules to recognize the right of self-representation of the Accused. The Appointing Authority is without authority to modify Military Commission Orders or Instructions.[1] The authority to modify Military Order No. 1 rests solely with the Secretary of Defense. The General Counsel of the Department of Defense may modify Military Commission Instructions consistent with Military Order No. 1.[2]

I recommend Accused's request be denied. The Accused has no right to self-representation. Further, self-representation is inconsistent with a full and fair trial of the Accused.

Under the Military Commission Orders and Instructions, the Accused is not authorized to conduct his own defense.[3] The Military Commission Orders and Instructions state that the Accused must be represented by Detailed Defense Counsel during all relevant times, notwithstanding any intention expressed by the Accused to represent himself.[4]

The requirement of Detailed Defense Counsel arises from the authority of the Appointing Authority and Presiding Officer to close military commission proceedings and exclude the accused on grounds of protection of classified information or information protected from unauthorized disclosure; safety of Commission participants; intelligence and law enforcement sources, methods, and activities; and other national security interests.[5] Although the Accused may be excluded from these closed sessions, Detailed Defense Counsel may not be excluded.[6] If the Accused conducts his own defense, he is without

[1] Military Order of November 13, 2001 (President's Military Order No. 1), 4(b), November 13, 2001; DoD MCI No. 1, 4(A), April 30, 2003; and DODD 5105.70, 6.3, Feb 10, 2004. *See also,* DoD MCO, 7(A), March 21, 2002, although cited by Accused as authority to amend orders and instructions, this Order authorizes the Appointing Authority to promulgate Regulations consistent with the Orders and Instructions, subject to approval of the General Counsel of the Department of Defense.
[2] DoD MCO No. 1, 7(A).
[3] DoD MCO No. 1, 4(C)(4); DoD MCI No. 4, 3(B)(11), 3(D)(2).
[4] DoD MCI No. 4, 3(D)(2).
[5] DoD MCO No. 1, 4(A)(5)(a), 6(B)(3), DODD 5105.70, 4.1.7.
[6] DoD MCO No. 1, 5(K), 6(B)(3).

[redacted]

representation in closed sessions from which he is excluded and thus is not afforded a full and fair trial.

The Office of the Chief Prosecutor recommends that the issue be addressed at a later time and that it is more appropriately handled by the Presiding Officer once charges are referred. (TAB A)

I recommend that the Accused's request to modify Military Commission Rules to recognize the right of self-representation be denied and that you sign the attached memorandum to the General Counsel of the Department of Defense.

If you have any questions regarding this memorandum, please contact me at [redacted]

for Sean M. Connelly CPT, U.S. Army, Assistant Legal Advisor
Thomas L. Hemingway
Legal Advisor to the Appointing Authority
for Military Commissions

The Commission Hearing was called to order at 0931, 26 August 2004.

PO: The military commission is called to order.

P (CDR [redacted]): This military commission is convened by Appointing Order number 04-003, dated June 28th 2004; copies of which have been furnished to the members of the commission, counsel, and the accused, and which will be marked as Review Exhibit 1 and attached to the record. There are no corrections noted to the appointing order. The Presidential determination that the accused may be subject to trial by military commission has been marked as Review Exhibit 2 and has been provided to all members.

The charge has been properly approved by the appointing authority and referred to this commission for trial. The prosecution caused a copy of the charge in English and Arabic, the accused's native language, to be served on the accused on August 12, 2004.

The prosecution is ready to proceed in the commission trial of the United States versus Ali Hamza Sulayman al Bahlul.

The accused, commission members, and alternate commission member named in the appointing order and detailed to this commission are present.

All detailed counsel are present.

Gunnery Sergeant [redacted] has been detailed reporter for this commission and has previously been sworn.

PO: I'll note that she's gotten a promotion that she isn't aware of.

P (CDR [redacted]): Yes, sir. Sergeant [redacted]

Security personnel have been detailed for this commission and have been previously sworn.

The interpreters have been detailed for this commission and have also been previously sworn. The full names of the interpreters who are providing interpretation for today's hearing are contained in Review Exhibit 3, a copy of which has been previously provided to the

defense and the reporters for inclusion in the record.

The bailiff has also previously been sworn.

PO: Previously marked, shown to counsel, and signed is RE 4, a protective order concerning the identity of the interpreters. Either side object to that order?

P (CDR[redacted] No, sir.

DC (LCDR Sundel): No, sir.

PO: I have been designated as the presiding officer of this commission by the appointing authority, and I have been previously sworn. All other members of the commission and the alternate member will now be sworn.

All persons in the courtroom, please rise.

The members were sworn.

PO: The commission is assembled.

I would ask before we continue all people who are going to speak to remember that we have to speak so the interpreters, the translators can translate.

Before continuing with preliminary matters, it is necessary for me to inquire into the accused's need for an interpreter.

Mr. al Bahlul, do you understand and speak English?

ACC: I prefer to have an interpreter.

PO: Would you repeat the translation, please?

ACC: I prefer to have an interpreter present.

PO: What language do you speak?

ACC: Arabic language.

PO: As I said earlier, translators have been appointed to this case. Do you understand the translation that is being made?

ACC: Clear.

PO: Commander [redacted] please state the detailing and qualifications of the prosecution.

P (CDR [redacted] Sir, all members of the prosecution have been detailed to this military commission by the chief prosecutor. All members of the prosecution are qualified under Military Commission Order Number 1, Paragraph 4(b), and we have previously been sworn. No member of the prosecution has acted in any manner which might tend to disqualify us in this proceeding. The detailing document has been marked as Review Exhibit 5 and previously provided to the court reporter.

PO: Commander Sundel, have either you or Major Bridges -- well, have you and Major Bridges been properly detailed to this case?

DC (LCDR Sundel): We have, sir.

PO: Has either of you acted in any manner inconsistent with your duties?

DC (LCDR Sundel): Not that I'm aware of.

PO: I'll take that for a no.

Mr. al Bahlul, pursuant to Military Commission Order Number 1, you are now at this moment, represented by your detailed counsel, Commander Sundel and Major Bridges. They are provided to you at no expense. You may also request a different military lawyer to represent you. If the person you ask for is reasonably available, he or she would be appointed to represent you. If that happens, your detailed counsel, Commander Sundel and Major Bridges, would normally be excused; however, you could request that they remain on the case.

In addition, you may request to be represented by a civilian lawyer. A civilian lawyer would represent you at no expense to the government. Such a lawyer must be a United States citizen and certified to practice law in the United States. She or he must be eligible for a secret clearance and agree in writing to comply with the rules of the commissions. If you had a civilian lawyer, the detailed counsel, Commander Sundel and Major Bridges would remain on the case. Do you understand what I just said?

ACC: Clear.

PO: Do you have any questions about your rights to be being represented before this commission?

ACC: Am I allowed to represent myself?

PO: I'm referring to Military Commission Order Number 1, Paragraph 4(c), sub (4). It states, the accused must be represented at all relevant times by detailed defense counsel. So the answer is, no, you're not allowed to represent yourself.

ACC: Excuse me. If I can ask the judge --

PO: Please speak up.

ACC: -- if I can to know the reason that disqualifies me from representing myself. I would like to know why, and if not --

PO: Okay. Are you asking to represent yourself before this commission?

ACC: Yes, I would like to represent myself.

PO: Sir, could you please try speaking -- or move the mic closer to yourself.

ACC: Yes, I would like to represent myself. [Interpreter: Is that better?]

PO: Let's talk about that. I want to go over several matters with you so that you understand what such a request means. Let me talk about your detailed counsel.

To be detailed counsel, they have to be qualified attorneys; that means that they have to be admitted to practice before the highest court of a state, and be commissioned as a judge advocate in one of the military services of the United States.

Commander Sundel, you're obviously Navy. What state?

DC (LCDR Sundel): I am barred in Maryland, sir.

PO: Major Bridges you're Army. What state?

ADC (Maj Bridges): Kentucky, sir.

PO: Okay. So Commander Sundel is admitted to practice in Maryland, and he's been certified by the Judge Advocate General of the Navy as a judge advocate. Major Bridges is admitted in Kentucky, and he's been certified by the Judge Advocate General of the Army.

Okay. Second, before they got here, they were nominated; they were chosen by the Navy and the Army as representatives of those services to serve as defense counsel. And then they were selected as defense counsel by Colonel Gunn who is the Chief Defense Counsel of the commissions. He's an Air Force officer. They have to have a security clearance, and they both do have security clearances; correct?

DC (LCDR Sundel): Yes, sir.

ADC (Maj Bridges): Yes, sir.

PO: So they can see all the information for that tribunal or commission. In addition to graduating from college and law school, they've each received extensive training in military law which is, at times, a confusing subset of law. From the time they became judge advocates, they've learned not only military legal principles and terminology, but they've learned military terminology about troops and airplanes and ships and things like that. And they've become familiar with the general military practice and how things are handled in the Departments of the Navy, Army, and the Department of Defense.

And -- I resist making a comment about Kentucky -- they are both fluent in English, which is a necessity here.

Perhaps even more importantly, they are not on trial here, which means that they are not personally involved, which means that they can remain objective in situations when a person about whom things are being said might become emotional or heated. Do you understand what I've said so far?

ACC: Yes, I understood.

PO: Now, like I said before, Commander Sundel and Major Bridges are both judge advocates. They have both been

detailed to represent you since the 3rd of February of 2004. During this period, while I'm not aware of their exact activities since they don't reveal things to me, I feel certain that they have been studying the law which is applicable to these proceedings, preparing various matters to present to the commission and to other authorities, and determining how best to represent you in front of the commission.

Given their background and training, they have the skill and knowledge to force the commission to apply the rules and the law on your behalf; and if they feel that the commission has not done so, they have instant access to computers to make and file motions. They can make objections. They can argue by analogy to federal, military, and international law; and they have research resources, both computer and personal, which will help them insure that your rights are represented or protected in these proceedings. Do you understand what I just said now?

ACC: Yes, I understand. I have a question based on what you said. Are you done?

PO: Not yet.

ACC: When you're done.

PO: No, I'm sorry. Yes, you may ask your question now.

ACC: I have some idea about practicing law in Yemen. [To interpreter]

PO: Excuse me. Could you please lean forward and speak just a little louder.

ACC: I have some idea about practicing law in Yemen.

DC (LCDR Sundel): Excuse me, sir. I'm not sure that was exactly what Mr. al Bahlul said. My understanding is he said that he knows some people who practice law.

INT: I do apologize, sir. Correction, I have --

ACC: Nobody represents me until this point. I wish nobody would interrupt you while I'm talking. I have some people that do practice or are familiar with law in the country of Yemen from different areas.

If the American law, as far as I know, would allow me to be represented by a Yemeni attorney through American system, is it possible that I can be granted this, a Yemeni attorney. And as far as I know, if I'm right, that I cannot be represented by anybody other than an American. Is it possible that the Yemeni attorney, through the American attorney, can be involved in my case?

PO: So we are talking correctly, so I can make sure I understood what you requested, referring again to MCO Number 1, Paragraph 4(c)(3), it states, in talking about civilian counsel -- which just means anyone who's not wearing a uniform -- that the attorney, the civilian must be a United States citizen. And you understood that you -- it appeared to me that you understand that.

Now, is what you are telling me that you want to have a Yemeni attorney provided at no expense to the government, meaning the United States Government, present to assist your detailed counsel, Commander Sundel and Major Bridges for this proceeding? I don't know, that's why I'm asking.

ACC: Yes.

DC (LCDR Sundel): Sir, if I just may?

PO: Yeah, you may.

DC (LCDR Sundel): I think perhaps what we may want to do is to clarify if his first preference is to represent himself; if that is not allowable, his second preference is to be represented exclusively by a Yemeni attorney; and if that is not allowable, his last preference is to be represented by military counsel, with a Yemeni attorney assistant.

PO: Thank you for your assistance, I mean it.

You heard Commander Sundel, so now I'm going to ask you. I explained to you generally your rights to counsel. Detailed counsel, a requested military counsel, a civilian counsel, U.S. citizen, those are your rights to counsel. As you're sitting there, please just tell me, right now, what do you want? Do you want a second talk to someone? Honest, I mean -- do you want to take a --

ACC: I have mentioned previously, and you answered it. I asked if I can represent myself, you said no. But what I meant -- I do not want an attorney representing me. I'll attend the sessions if it's mandatory to attend; I'll be here. If I do have that choice attending the sessions, I'd rather not be here. This is an order.

PO: What was the last word, sir?

ACC: If I do not have -- if it's have to attend the hearing, then I'd rather not attend.

PO: I do not recall directing or stating that you are not allowed to represent yourself. What I said and I read was the provision of the military commission order. I am trying, honestly, to find out your desires and to find out something more about you and those desires. I have not ignored what you said, but I want to find out some more before I say anything in that regard; okay?

ACC: Good.

PO: Commander [redacted] did I say, on the record -- if I did -- did I say he couldn't represent himself, or did I read from the -- I'm not trying to trick anyone. I don't remember saying he could not represent himself.

P (CDR [redacted] One moment, sir. Sir, I believe that when you read the instruction, that's the reasonable interpretation of the instruction.

PO: Order, but that's fine.

P (CDR [redacted] The order that you read.

PO: Okay. I get to interpret my words, he gets to translate them.

Before I say anything on that subject, Mr. al Bahlul, I'd like to know something more about you. And if you wish, you can take a moment and talk with anyone and you can tell me whether or not you want to answer these questions.

How old are you?

ACC: You can ask me anything. I don't need to go back to anybody.

PO: How old are you?

ACC: Thirty-six years.

PO: How many years of formal education do you have?

ACC: Sixteen years.

PO: Have you spent much time in the American culture other than your time here at Guantanamo?

ACC: This is personal, to me?

PO: Yes, personally.

ACC: Are you interested or is it important to you that I answer this question?

PO: I'm asking the question because the proceedings that you're in front of are derived from our culture, and different cultures have different ways of handling things. And I guess what I'm asking is this: Is your knowledge of our culture sufficient to make things that would appear strange if you had no knowledge, not appear so strange? That's all I'm asking.

ACC: I have large amount of knowledge.

PO: Okay. Talking about language, we are using a translator now, but there are things that are said, no matter how good the translator might be, that lose something in translation. And therefore, I ask: Is your fluency level in English such that you can understand most of what's said without translation?

ACC: Not a large scale.

PO: Have you had any formal training in the law? And here I'm not talking just about the American legal system, but any legal training.

ACC: I've read legal matters and books.

PO: Other than the legal motions that you've seen, have you ever studied international law or the law of war? It's not something that most people may much attention to.

ACC: Yes, I did. I've read.

PO: You have been given a copy of the charges against you at this proceeding -- and before you answer this question, please take time to consider my use of the word "understand". When I say "understand", what I mean is, do you comprehend, as they are written, what they are charging? Having put that caveat -- having put that explainers in, do you understand the charges against you?

ACC: Very good.

PO: Do you realize that because -- well, that in accordance with the President's military order and Military Commission Order Number 1, there may be evidence against you which you would not be allowed to see because of its protected nature?

ACC: Do you have another question? The protected information, this is something that is intentional. The people that started this were the British, relating to Muslims. I don't think it's fair that the evidence would not be presented and the accused cannot defend himself without seeing such evidence for himself, or even through an attorney.

PO: You have made in your response, what you just said, a challenge to the structure, the way the commission is set up. And the commission will take a motion -- piece of paper on this.

That wasn't my question. My question was: Whether you believe it's fair or not fair, do you understand right now that you will not be able to see certain evidence because it is either classified or protected. Right now, you can't see it. Do you understand that?

ACC: For the protected evidence, let's put it aside. It's all well known in all those -- the civilian or the local, the decision is the evidence, especially if that decision is under no pressure, and based on the person without any -- without being placed under any pressure, and based on personal decision or preference.

I know that the presiding officer is not interested that I decide that I am from al Qaida or not. Let the proceedings take its course regarding if I am guilty or not.

One point that I would like the judge to understand and the members or the panel, and the people -- the people that are the jurors, or the people that were sworn in, and the prosecutor, and the defense team that until this point does not represent me, and the visitors and detainees, and if it's being, you know, viewed via media channels, people that are watching as well, people of the entire globe should know, I testify that the American government is under no pressure. Nobody has put the United States Government under pressure. I am from al Qaida, and the relationship between me and September 11th --

PO: Members -- thank you. Please stop for a second.

Members, you all understand that I am questioning Mr. al Bahlul in order to determine his representation. You all understand that; right? You all understand that Mr. al Bahlul has not been placed under oath?

Apparently so.

You further understand that none of this is evidence in any way. Do you all understand that?

Apparently so.

I apologize for interrupting you.

P (CDR [redacted]: Sir, before we go on, we'd note our objection to that statement and ask for a recess.

PO: What do you wish to discuss in the recess?

P (CDR [redacted]: I think our objection is noted. We don't think that's an accurate statement of commission law.

PO: Thank you. You may provide a brief on that matter.

P (CDR [redacted]: Yes, sir.

PO: Go on.

ACC: I know that this is like an arraignment, and the questions are limited legally, and there is other sessions that will take place. And it's normal from the presiding officer and the others sitting here take their time to see that probably they might render an improper

judgment; so that we don't really go into, you know, side things, you know, over here.

In short, I would like to represent myself, and I'm telling this to the presiding officer, or the judge. For the questions that the judge have asked, for the things that you need to know about me relating to being familiar with the law and the new laws. Specifically, there was new laws that were drafted in the United States specifically after the September 11th incident. I would like to file a motion to represent myself and defend myself at the same time.

I can write or everybody in this room can be a witness in the next sessions. Nobody should be worried relating to me causing problems, or being loud, or basically saying things that might be inflammatory. I can give you my word, you know, my verbal promise, that basically I would not, you know, go against that, what I'm saying today.

From your questions, you know, you wanted to know my level of law-wise, you know, legal terms, legal terms relating to the local. I know all the Islamic laws and according to your questions, basically wants to verify my ability. And if the American system would not allow me to defend myself, then I'll be forced to attend and I'll be a listener. Only.

PO: While I'm thinking, let me make a note that's an aside. I have motioned at counsel and Mr. al Bahlul and myself with what I prefer to think of as a slow-down motion solely because we all talk too fast for the translators sometimes.

You stated that up until this time, while Commander Sundel and Major Bridges were detailed as your counsel, they were not representing you.

ACC: They don't represent me.

PO: There's a term in the law called amicus curiae. What it means is a friend of the court. Would you permit Commander Sundel and Major Bridges to file, or to give to the commission on your behalf a motion requesting that you be allowed to represent yourself, which is what you've told me you want to do? Because until someone tells the commission that this order does not apply, the

commission is not able to let you represent yourself. And I further tell you that, based on my experience, the best way to get an answer to your question would be to have a motion filed.

Will you permit them to file a motion on your behalf, not stating that they are representing you?

ACC: If I represent that motion through me, through the legal term, that means I did have them represent me.

PO: No, I have just said that they would file a motion as an amicus, meaning just as a friend of the commission.

ACC: Friends of the commission?

PO: As a --

ACC: As a mediator between the two of us?

PO: I would imagine that sitting there, Commander Sundel and Major Bridges have the desire to get you what you want, if they can. No one on this commission is going to write a brief -- a brief is just the law that's attached to a motion -- which puts forth your side. By allowing them to file an amicus brief, you have said and I've heard, we've all heard, it's on the record that they're not representing you. And you -- by allowing them to file an amicus brief, you're not changing that. You're just getting the benefit -- how long in the service, Major Bridges? JAG Corps?

ADC (Maj Bridges): Twelve-and-a-half years, sir.

DC (LCDR Sundel): About 14 years, sir.

PO: -- of 26-and-a-half years of legal training who are trying to get you what you want on this one issue.

ACC: I would only stick to the verbal offer.

PO: Well, you get your recess, Commander [redacted] Court's in recess.

The Commission Hearing recessed at 1028, 26 August 2004.

The Commission Hearing reconvened at 1110, 26 August 2004.

PO: The commission will come to order. Let the record reflect that all parties present when the commissions recessed are once again present.

In looking at my notes, I note that I failed to mention on the record the defense counsel detailing letter which is already what, Commander [redacted]

P (CDR [redacted]: Six, sir.

PO: Thank you. Mr. al Bahlul, in the course of our discussions, I believe I determined what it is you want. I'm going to ask you again so that I can make sure that I know. The first thing you want, your desires are that you be permitted to represent yourself before this commission; is that correct?

ACC: Yes.

PO: If that is not permitted, your second choice is to be represented by a Yemeni attorney; is that correct?

ACC: As far as the Yemeni attorney is concerned, if I get the guarantees that he'll not be harmed neither by the Yemeni, nor by the American authority because of the sensitivity of the matter, and the sensitivity of the matter as far as the al Qaida case and the United States of America, if I get guarantees from the Yemeni government and the Americans that they will not be harmed, as far as the sensitivity of the matters, then I can appoint if law permits me to do so.

PO: I'll rephrase my understanding. If you are not allowed to represent yourself, you wish to have a Yemeni lawyer represent you subject to the guarantees you just stated; is that correct?

ACC: This is okay because I don't want anybody to be harmed because of me.

PO: What you have posed, as I believe I stated before, are structural challenges to the commission proceedings. The commission, as it sits here, does not have the authority to make those structural changes.

However, the commission will cause -- will make a transcript of everything that's been said and forward it to the people who can make or authorize structural

changes. You have told me that you do not wish Commander Sundel and Major Bridges to do anything on your behalf.

ACC: Yes, either them or anybody else.

PO: Commander Sundel, speaking for yourself and Major Bridges, recognizing that Mr. al Bahlul says that you do not represent him, I hereby direct you to provide, for forwarding to the appointing authority, a motion. And this motion will address two structural changes and your support -- your legal support -- a motion. The structural changes will be concerning the right of an accused to represent himself, and the right of an accused to get a foreign attorney to represent him.

Y'all have been on the case for a long time. By the -- I'm sorry, I also did not say, you will not in this motion state that you are representing the views or desires of Mr. al Bahlul. Any question about that?

DC (LCDR Sundel): No, sir.

PO: Don't sit down yet. When can you have a well-reasoned and well-researched brief on those matters prepared to send forward?

DC (LCDR Sundel): I think we could have that ready a week from tomorrow, sir. That would be the 3rd of September, sir.

PO: Okay. Provide it to prosecution; prosecution, you provide your response to Commander Sundel and Major Bridges in their capacity as detailed counsel who are not representing Mr. al Bahlul by the 17th of September.

You provide, Commander Sundel, by the 30th of September your final reply and all the matters therewith to the appointing authority, Mr. Altenburg.

I will provide both counsel -- I will provide the prosecution and Commander Sundel and Major Bridges no later than Saturday, a transcript of these proceedings so that you both -- so that the prosecution and the detailed defense counsel may see what Mr. al Bahlul stated verbally on the record. This transcript will be authenticated in due course.

All authenticated means, Mr. al Bahlul, is that I will

review it and sign it and say that's what happened and I will forward it and a certified interlocutory question to Mr. Altenburg for his action. And all that should arrive for him to start work on by the 30th of September.

Commander [redacted] is there anything else that I can do at this time, in your opinion, to frame the issue or to get this matter resolved?

P (CDR [redacted] No, sir. We believe what you laid out is the approved course of action.

PO: Mr. al Bahlul, you've heard what I've said. The appointing authority will be the one to start the decision making on this process. If you wish to submit any matters to Mr. Altenburg other than what you've stated on the record here today, those matters will have to be forwarded so as to reach him by the 30th of September.

ACC: And it is about what?

PO: About the whole thing we've been talking. Earlier, you stated that you did not want to put anything in writing; you wanted it to be all words. I have told you --

ACC: A verbal request. Like he said earlier, verbal request.

PO: What you stated verbally, has been taken down by Sergeant [redacted] and it will become written. I am telling you, though, that if you change your mind -- I'm not telling you to change your mind -- I'm saying if you change your mind and you want to submit anything to Mr. Altenburg those matters have got to reach him by the 30th of September.

Anything else, Commander [redacted]

P (CDR [redacted] No, sir.

PO: Members?

I am not going to set a date for the next hearing in this case. Once Mr. Altenburg or others in the chain make a decision, I'll do something then; okay?

All rise. Court's in recess.

The Commissions Hearing recessed at 1125, 26 August 2004.

	)	MEMORANDUM OF LAW:
UNITED STATES OF AMERICA	)	
	)	RIGHT TO SELF-
v.	)	REPRESENTATION;
	)	RIGHT TO CHOICE OF
	)	COUNSEL
ALI HAMZA AHMAD SULAYMAN AL BAHLUL	)	
	)	2 September 2004

1. Purpose of Memorandum.

On 26 August 2004, the Presiding Officer of Mr. al Bahlul's military commission directed the undersigned, detailed defense counsel, to address the issues of an accused's right to self-representation and counsel of his own choice in the context of military commissions. This Memorandum is provided in accordance with that direction.

2. Facts.

During counsel's initial meetings with Mr. al Bahlul in April 2004, he stated that he did not want detailed defense counsel to represent him. Instead, he stated that he intended to represent himself before the commission. Consistent with Mr. al Bahlul's wishes, on 20 April 2004 detailed defense counsel requested that the Chief Defense Counsel approve a request to withdraw as detailed defense counsel. The Chief Defense Counsel denied the request to withdraw on 26 April 2004. Specifically, the Chief Defense Counsel found that MCO No. 1 and MCI No. 4 required detailed defense counsel to represent the accused despite the accused's wishes. The most relevant provision cited by the Chief Defense Counsel states that detailed defense counsel "shall so serve notwithstanding any intention expressed by the Accused to represent himself." MCI No. 4, para. 3D(2). See also MCO No. 1, para. 4C(4)("The Accused must be represented at all relevant times by Detailed Defense Counsel.")

After our request to withdraw was denied by the Chief Defense Counsel, detailed defense counsel submitted a request to the Secretary of Defense, General Counsel of the Department of Defense, and Appointing Authority to modify or supplement the rules for commissions to allow for withdrawal of detailed defense counsel and recognize the right of self-representation. See attached memorandum, dated 11 May 2004, entitled "Request for Modification of Military Commission Rules to Recognize the Right of Self-Representation, *United States v. al Bahlul*"). The Secretary of Defense, General Counsel, and the Appointing Authority have not responded to this request.

Before the military commission on 26 August 2004, Mr. al Bahlul stated that he wished to represent himself. Transcript of 26 August 2004 Commission Hearing (Transcript) at 6, 7, 11, 15, 16, 18. Mr. al Bahlul went on to state that if he is prohibited

from representing himself he desires to be represented by a Yemeni attorney of his own choosing. Transcript at 10, 18-19. Finally, Mr. al Bahlul made clear that he did not wish to be represented by detailed defense counsel, and that he did not accept the services of detailed defense counsel. Transcript at 11, 16, 17, 19.

3. Law.

A. An Accused has a Fundamental Right to Represent Himself Before a Military Commission.

Binding treaty law, procedural rules for comparable international tribunals for the prosecution of war crimes, and United States domestic law all establish an accused's fundamental right to represent himself, and the concurrent right to refuse the services of appointed defense counsel. This recognized right of self-representation "assures the accused of the right to participate in his or her defense, including directing the defense, rejecting appointed counsel, and conducting his or her own defense under certain circumstances." M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 Duke J. Comp. & Int'l L. 235, 283 (Spring 1993). Not since the Star Chamber of 16th and 17th century England, has defense counsel been forced upon an unwilling accused. *Faretta v. California*, 422 U.S. 806, 821 (1975).

The International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (AMCHR), and the Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF) all recognize an accused's right to represent himself in criminal proceedings. ICCPR, Article 14(3)(d); AMCHR, Article 8(2)(d); CPHRFF, Article 6(3)(c); Bassiouni at 283. Representative of these three treaties is the ICCPR's mandate that "in the determination of any criminal charge against him, everyone shall be entitled . . . to defend himself in person or through legal assistance of his own choosing." ICCPR, Article 14(3)(d). The plain language of this provision establishes an accused's right to represent himself.

The right of self-representation is enforced by the both of the current international tribunals established to prosecute violations of the law of war. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) both allow for self-representation before the tribunal. Statute of the ICTY, Article 21(4)(d); Statute of the ICTR, Article 20(4)(d).

It is worth noting that the World War II international military tribunals also recognized the right of self-representation. The rules of procedure governing the Nuremberg military tribunals provided that "a defendant shall have the right to conduct

his own defense."[1] Similarly, the tribunal for the Far East recognized an accused's right to forgo representation by counsel except where the Tribunal believed that appointment of counsel was "necessary to provide for a fair trial."[2]

The internationally recognized right of self-representation in criminal proceedings is consistent with United States domestic law. The Sixth Amendment of the United States Constitution, as well as English and Colonial jurisprudence, support the right of self-representation. In *Faretta v. California*, the Supreme Court found that "forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." 422 U.S. at 807. In surveying the long history of English criminal jurisprudence, the Supreme Court concluded that only one tribunal "adopted a practice of forcing counsel upon an unwilling defendant in a criminal proceeding" – the Star Chamber. *Id.* at 821. The Star Chamber which was of "mixed executive and judicial character" and "specialized in trying 'political' offenses . . . has for centuries symbolized disregard of basic individual rights." *Id.*

Soon after the disestablishment of the Star Chamber the right of self-representation was again formally recognized in English law:

> The 1695 [Treason Act] . . . provided for court appointment of counsel, *but only if the accused so desired.* Thus, as new rights developed, the accused retained his established right 'to make what statements he liked.' The right to counsel was viewed as guaranteeing a choice between representation by counsel and the traditional practice of self-representation. . . . At no point in this process of reform in England was counsel ever forced upon the defendant. The common-law rule . . . has evidently always been that 'no person charged with a criminal offence can have counsel forced upon him against his will.'

Faretta, 422 U.S. at 825-26 (footnotes and internal citations omitted).

This common law approach continued in Colonial America, where "the insistence upon a right of self-representation was, if anything, more fervent than in England." *Id.* at 826.

> This is not to say that the Colonies were slow to recognize the value of counsel in criminal cases. . . . At the same time, however, the basic right of self-representation was never questioned. We have found no instance where a colonial court required a defendant in a criminal case to accept as his representative an unwanted lawyer. Indeed, even where counsel was permitted, the general practice continued to be self-representation.

---

[1] Rule 2(d), Nuremberg Trial Proceedings Vol. 1 Rules of Procedure (Nuremberg Proceedings); Rule 7(a), Rules of Procedure Adopted by Military Tribunal I in the Trial of the Medical Case (Medical Case); Rule 7(a), Uniform Rules of Procedure, Military Tribunals, Nuremberg, Revised to 8 January 1948 (Uniform Rules) (http://www.yale.edu/lawweb/avalon/imt/imt.htm#rules).

[2] Article 9(c), Charter of the International Military Tribunal for the Far East (Far East Tribunal) (http://www.yale.edu/lawweb/avalon/imtfech.htm).

Id. at 827-28 (footnote omitted).

Further, there can be no legitimacy to a view that counsel can be forced upon an unwilling defendant for the defendant's own good:

> It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. . . . The right to defend is personal . . . . It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'

Faretta, 422 U.S. at 834 (internal citation omitted).

Finally, rules of professional responsibility governing attorneys' conduct also recognize an individual's right to self-representation. In discussing the formation of a client-attorney relationship, one commentary observes "The client-lawyer relationship ordinarily is a consensual one. A client ordinarily should not be forced to put important legal matters into the hands of another or accept unwanted legal services." Restatement 3d of the Law Governing Lawyers, American Law Institute (2000), §14. Similarly, §1.16(a)(3) of the American Bar Association's Model Rules of Professional Responsibility, which exists in each of the Service's rules of professional responsibility, "recognizes the long-established principle that a client has a nearly absolute right to discharge a lawyer." The Law of Lawyering, Hazard & Hodes, Aspen Law & Business 2003 (3d ed.), 20-9.

Treaties, procedures of international tribunals, Anglo-American common law, current domestic law, and rules of professional responsibility are unanimous in recognizing a criminal accused's right to self-representation. The only contrary provisions are those found in the procedural rules contained in the orders and instructions designed to implement the President's Military Order establishing the military commissions.

B. An Accused has a Fundamental Right to Counsel of His Own Choosing Before a Military Commission.

The International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (AMCHR), and the Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF) all recognize an accused's right to be represented by counsel of his own choosing. ICCPR, Article 14(3)(b) and (d);

AMCHR, Article 8(2)(d); CPHRFF, Article 6(3)(c). The plain language of these provisions unequivocally establish such a right.

Further, the right to counsel of choice is enforced by the both of the current international tribunals established to prosecute violations of the law of war. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) both allow for representation by counsel of one's own choosing before the tribunal. Statute of the ICTY, Article 21(4)(d); Statute of the ICTR, Article 20(4)(d).

Historically, the Nuremburg military tribunals also recognized the right of an accused to be represented by counsel his own selection, with two of the tribunals requiring only that "such counsel [be] a person qualified under existing regulations to conduct cases before the courts of defendant's country, or [be] specially authorized by the Tribunal."[3] Interestingly, the military tribunal for the Far East and one of the Nuremberg tribunals imposed no limitations on an accused's choice of counsel, although the former did provide for "disapproval of such counsel at any time by the Tribunal."[4]

The internationally recognized right of self-representation in criminal proceedings is consistent with United States domestic law. The Sixth Amendment of the United States Constitution supports the right to counsel of choice; over seventy years ago the Supreme Court wrote "it is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice." *Powell v. Alabama,* 287 U.S. 45, 53 (1932). While this right is not absolute, its "essential aim . . . is to guarantee an effective advocate for each criminal defendant." *Wheat v. United States*, 486 U.S. 153, 159 (1988).

The right of a criminal accused to be represented by counsel of his own choosing is widely recognized in international and domestic law as being an essential part of the right to present a defense. The decision as to who qualifies as an effective advocate for a foreign national charged with war crimes before a military commission is an individual one which should be permitted each accused. Rules governing military commissions that limit an accused's choice of counsel based solely on the counsel's nationality impermissibly infringe on the right to present a defense, and thus are inconsistent with the law.

C. The Military Commission Must Respect an Accused's Right to Self-Representation and Choice of Counsel.

Treaties, signed by the Executive and ratified by the Senate, are binding law. U.S. Constitution, Article VI, Clause 2 ("Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land"). The ICCPR has been signed and ratified by the United States.[5] Furthermore, the President has

[3] Rule 7(a), Medical Case; Rule 7(a), Uniform Rules, note 1, infra.
[4] Article 9(c), Far East Tribunal; Rule 2(d), Nuremberg Proceedings, note 2, infra.
[5] http://www.unhchr.ch/pdf/report.pdf

ordered executive departments and agencies to "fully respect and implement its obligations under the international human rights treaties to which [the United States] is a party, including the ICCPR." Executive Order 13,107, Section 1(a), 61 Fed.Reg. 68,991 (1998). The Executive Order provides that "all executive departments and agencies . . . including boards and commissions . . . shall perform such functions so as to respect and implement those obligations fully." Executive Order 13,107, Section 2(a).

The commission is also bound by customary international law. Customary international law is developed by the practice of states and "crystallizes when there is 'evidence of a general practice accepted as law.'" Yoram Dinstein, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 5 (Cambridge University Press 2004). The United States considers itself bound by customary international law in implementing its law of war obligations. Department of Defense Directive (DODD) Number 5100.77, DoD Law of War Program, Dec. 9, 1998, para. 3.1 ("The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law."); DODD Number 2310.1, DoD Program for Enemy Prisoners of War (EPOW) and Other Detainees, Aug. 18, 1994, para. 3.1 ("The U.S. Military Services shall comply with the principles, spirit, and intent of the international law of war, both customary and codified, to include the Geneva Conventions."); Field Manual 27-10, The Law of Land Warfare, July 1956, Chapter 1, Section I, para. 4 (the law of war is derived from both treaties and customary law).

Finally, Article 21, Uniform Code of Military Justice, which the President cites as authority for the military commissions, recognizes that jurisdiction for military commissions derives from the law of war. 10 U.S.C. Section 821 (jurisdiction for military commissions derives from offenses that "by the law of war may be tried by military commission"); see also Manual for Courts-Martial, 2002 edition, Part I, para. 1 (international law, which includes the law of war, is a source of military jurisdiction). Just as the jurisdiction of military commissions are bounded by the law of war, so the procedures followed by military commissions must comply with the law of war, whether it be codified or customary.

The ICCPR, AMCHR, CPHRFF, ICTY and ICTR rules, and United States domestic law establish that self-representation and counsel of one's choosing are recognized as rights that must be afforded as part of one's ability to present a defense. Additional Protocol I to the Geneva Conventions provides that a court trying an accused for law of war violations "shall afford the accused before and during his trial all necessary rights and means of defence." Geneva Conventions (1949), Additional Protocol I, Article 75, para. 4(a). The United States considers Article 75 of Additional Protocol I to be applicable customary international law. William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 Yale J. Int'l L. 319, 322 (Summer 2003)("[the United States] regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.")

The military commission is bound by treaties, international agreements, and customary international law, all of which recognize an accused's right to self-representation and choice of counsel. Any provisions in the President's Military Order, or the Military Commission Orders and Instructions, that conflict with those rights are unlawful.

4. Attached Files.

A. Memorandum, dated 11 May 2004, "Request for Modification of Military Commission Rules to Recognize the Right of Self-Representation, *United States v. al Bahlul*."

/s/
Philip Sundel
LCDR, JAGC, USN
Detailed Defense Counsel

/s/
Mark A. Bridges
MAJ, JA, USA
Assistant Detailed Defense Counsel

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

23 September 2004

MEMORANDUM FOR MR. JOHN D. ALTENBURG, APPOINTING AUTHORITY, OFFICE OF MILITARY COMMISSIONS

SUBJECT: PRESERVATION OF RIGHT TO FULL AND FAIR TRIAL BY MILITARY COMMISSION IN THE CASE OF ALI HAMZA AHMAD SULAYMAN AL BAHLUL

1. Mr. Ali Hamza Ahmad Sulayman al Bahlul's initial hearing before the military commission occurred on 26 August 2004. During that hearing Mr. al Bahlul stated that he wished to represent himself, and that if he is prohibited from representing himself he desires to be represented by a Yemeni attorney of his own choosing. Mr. al Bahlul also stated that he did not wish to be represented by detailed defense counsel and that he did not accept the services of detailed defense counsel.

2. The Presiding Officer of the military commission ultimately concluded that the commission did not have the authority to rule on Mr. al Bahlul's representation requests, and directed that the matter be submitted to the Appointing Authority. A schedule was set which was to result in the filing of all relevant matters regarding these issues with the Appointing Authority by 30 September 2004. With respect to their brief on the issues the Presiding Officer instructed detailed defense counsel that "you will not in this motion state that you are representing the views or desires of Mr. al Bahlul." The hearing concluded with the Presiding Officer informing the participants that "I am not going to set a date for the next hearing in this case. Once [the Appointing Authority] or others in the chain make a decision, I'll do something then."

3. There are at present no events scheduled in Mr. al Bahlul's case after submittal of the representation issues to you. The cases of U.S. v. Hamdan, U.S. v. Hicks, and U.S. v. al Qosi, however, are proceeding – motions hearings are scheduled to occur in all three in either November or December, and trials are scheduled for December 2004, January 2005, and February 2005, respectively. Further, counsel are being provided the opportunity to comment on procedural matters being addressed outside of the motions hearings, such as Interlocutory Questions submitted by the Presiding Officer and Presiding Officer Memoranda (POM) detailing rules of practice before the commissions.

4. It is likely that procedures established for the first commissions, and many of the legal rulings made during them, will control or significantly impact all subsequent military commissions. Indeed, many of the issues are treated as joint issues across all of the current commissions, with all counsel being given an opportunity to comment, and the Government filing a single pleading, signed by the Chief Prosecutor or his Deputy, to be used as its response in all cases. Consequently, the right of an accused to participate in the decisions that will be made over the next few months is an important one, and one that each person whose case is currently before a military commission should have.

5. Unfortunately, it appears that Mr. al Bahlul is being denied the opportunity to participate in these decisions. Mr. al Bahlul's detailed defense counsel are taking no actions on his behalf pending resolution of questions regarding his right to decline their services. At the same time, no competent authority has taken steps to craft an alternate mechanism to ensure Mr. al Bahlul's interests in the military commission proceedings are protected pending resolution of the representation issues. I am concerned that this situation compromises Mr. al Bahlul's right to a full and fair trial.

6. Since Mr. al Bahlul has stated that he does not wish to be represented by military counsel I do not believe that there are any steps I can take to remedy the situation. Nonetheless, as Chief Defense Counsel I believe that I am obligated to communicate my concerns to competent authority if I believe that a defendant's rights are being violated. In discharge of that duty I request that you take steps necessary to ensure that Mr. al Bahlul is not denied the opportunity to participate in military commission matters of potential interest to him. I recommend that you direct the Presiding Officer and his Assistant, members of the Office of the Chief Prosecutor, and members of your own staff to communicate with Mr. al Bahlul directly on matters which are of potential interest to him, and allow him the opportunity to respond.

Will A. Gunn

WILL A. GUNN, Colonel, USAF
Chief Defense Counsel

cc:
Presiding Officer
DoD Deputy General Counsel (Personnel and Health Policy)
Chief Prosecutor

UNITED STATES OF AMERICA v. ALI HAMZA AHMAD SULAYMAN AL BAHLUL	)))))))))	**PROSECUTION RESPONSE TO DEFENSE MEMO FOR SELF-REPRESENTATION AND RIGHT TO CHOICE OF COUNSEL** 1 October 2004

1. Timeliness. This motion response is being filed within the timeline established by the Presiding Officer.

2. Prosecution Position on Defense Motion. The Prosecution joins the Defense in their implied requested relief to amend Commission Law and permit the Accused to represent himself in these Commission proceedings conditioned upon standby counsel being appointed. Standby counsel need to be available to:

a. Assist the Accused in his Defense consistent with the desires of the Accused;
b. Represent the Accused at closed sessions involving classified or otherwise protected information;
c. Take over the representation should the Accused forfeit his right to represent himself.

3. Agreed Upon Facts. The Prosecution does not dispute the factual assertions contained in the Memorandum of Law submitted by the Defense on 2 September 2004.

4. Additional Facts. Mr. al Bahlul appeared before the Military Commission on 26 August 2004. During this appearance, the following was established:

a. The Accused clearly stated that he wished to represent himself before the Military Commission (transcript pages 6-7);
b. Other than his refusal to rise when the Commission members entered and exited the courtroom, the Accused was respectful during the Commission proceedings (see transcript in its entirety);
c. The Accused is 36-years-old and has 16 years of formal education (transcript page 12);
d. The Accused stated clearly that while under no pressure from the American government, he wanted to state that he is an al Qaida member (transcript page 14);
e. The Accused gave his word that he would not be loud or disruptive and that he would not make inflammatory statements if permitted to represent himself (transcript page 16).

5. Legal Authority.

a. Military Commission Instruction No. 4
b. Military Commission Order No. 1
c. Farretta v. California, 422 U.S. 806 (1975)
d. Brady v. United States, 397 U.S. 742 (1970)
e. United States v. Singleton, 107 F.3d 1091, 1095 (4th Cir. 1997)
f. McKaskle v. Wiggins, 465 U.S. 168 (1984)
g. United States v. Davis, 285 F.3d 378, 383 (5th Cir. 2002)
h. United States v. Betancourt-Arretuche, 933 F.2d 89, 95 (1st Cir. 1991)
i. United States v. McDowell, 814 F.2d 245, 250 (6th Cir. 1987)
j. United States v. Frazier-El, 204 F.3d 553, 558 (4th Cir. 2000)
k. Patterson v. Illinois, 487 U.S. 285,299 (1988)
l. Torres v. United States, 140 F.3d 392, 401 (2d Cir. 1998)
m. United States v. Lane, 718 F.2d 226, 233 (1983)
n. United States v. Bin Laden, 58 F. Supp.2d 113, 121 (S.D.N.Y. 1999)
o. Illinois v. Allen, 397 U.S. 337 (1970)
p. United States v. Kaczynski, 239 F.3d 1108, 1116 (9th Cir. 2001)
q. Moussaoui, Criminal No. 01-455-A, Court Order of November 14, 2003 (E.D. Va.).
r. United States v. Lawrence, 11 F.3d 250, 253 (4th Cir. 1998)
s. United States v. Dougherty, 473 F.2d 1113, 1125 (D.C. Cir. 1972)
t. Barham v. Powell, 895 F.2d 19, 23 (1st Cir. 1990)
u. President's Military Order of November 13, 2001, Section 4(c)(2).
v. Haig v. Agee, 453 U.S. 280, 309-10 (1981)
w. United States v. Dennis, 341 U.S. 494, 519 (1951) (Frankfurter, J., concurring)
x. McQueen v. Blackburn, 755 F.2d 1174, 1177 (5th Cir. 1985)
y. Raulerson v. Wainwright, 732 F.2d 803, 808 (11th Cir. 1984)
z. Prosecutor v. Vojislav Seselj, "Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj", Case No.: IT-03-67-PT, 9 May 2003
aa. Prosecutor v. Jean-Bosco Barayagwiza, ICTR-97-19-T, 2 November 2000
bb. Rule for Court-Martial 502
cc. United States v. Jackson, 54 M.J. 527, 535 (N.M. Ct. Crim. App. 2000)
dd. United States v. Steele, 53 M.J. 274 (2000)
ee. Frazier v. Heebe, 482 U.S. 641, 645 (1987)
ff. United States v. Grismore, 546 F.2d 844, 847 (10th Cir. 1976);
gg. United States v. Whitesel, 543 F.2d 1176, 1177-81 (6th Cir. 1976);
hh. United States v. Kelley, 539 F.2d 1199, 1201-03 (9th Cir. 1976).
ii. Rule 1.16(c) of Navy Judge Advocate General Instruction 5803.1B

6. Analysis

a. Current Military Commission Law Does not Permit Self-representation

Military Commission Instruction (MCI) No. 4 clearly delineates that an accused cannot represent himself before a Military Commission. Section 3(D) (2) of this Instruction states that "Detailed Defense Counsel shall represent the Accused before Military Commissions" and that counsel "shall so serve notwithstanding any intention

expressed by the Accused to represent himself." While not worded as unambiguously or as strongly, Sections 4(C) (4) and 5(D) of Military Commission Order (MCO) No. 1 do nothing to contradict MCI No. 4.

The Prosecution concurs with the analysis of the Chief Defense Counsel in his Memorandum of 26 April 2004 where he denied the Defense Counsel's request to withdraw from representing Mr. al Bahlul (Attached).

The Prosecution joins the Defense in their prior request that the Military Commission Instructions be amended to permit self-representation. As will be discussed in detail below, such an amendment will align Commission practice with U.S. Domestic and International Law standards.

b. There is a Right to Self-representation under United States Domestic Law.

Although not binding on Commission proceedings, the right to self-representation is recognized under United States domestic law and in other judicial systems and there are compelling reasons to permit self-representation at Commission trials.

The United States Supreme Court has recognized that a criminal defendant has a Constitutional right to represent himself in a criminal proceeding. Farretta v. California, 422 U.S. 806 (1975). A defendant may waive his right to counsel so long as the waiver is knowing, intelligent and voluntary. See Brady v. United States, 397 U.S. 742 (1970); Johnson v. Zerbst, 304 U.S. 458, 468 (1938); United States v. Singleton, 107 F.3d 1091, 1095 (4th Cir. 1997). The right to self-representation must be preserved even if the trial court believes that the defendant will benefit from the advice of counsel. McKaskle v. Wiggins, 465 U.S. 168 (1984); United States v. Davis, 285 F.3d 378, 383 (5th Cir. 2002) (rejecting appointment of "independent counsel" to present mitigating evidence in capital case against express wishes of defendant).

Mr. al Bahlul has 16 years of formal education and demonstrated that he is very articulate and intelligent during his preliminary hearing. He did express that he only had a rudimentary understanding of the English language. Regardless, a defendant's otherwise valid invocation of his right to self-representation should not be denied because of limitations in the defendant's education, legal training or language abilities. United States v. Betancourt-Arretuche, 933 F.2d 89, 95 (1st Cir. 1991) (neither lack of post-high school education or inability to speak English is "an insurmountable barrier to *pro se* representation"); United States v. McDowell, 814 F.2d 245, 250 (6th Cir. 1987) ("To suggest that an accused who knows and appreciates what he is relinquishing and yet intelligently chooses to forego counsel and represent himself, must still have had some formal education or possess the ability to converse in English is . . . to misunderstand the thrust of Faretta and the constitutional *right* it recognized.") (emphasis in original).

c. A Detailed Inquiry is Required Before Self-representation is Permitted

In United States Federal District Courts, a detailed inquiry of the defendant is required before he is permitted to represent himself. Singleton, 107 F.3d at 1096. If *pro se* representation is permitted before a Military Commission, this safeguard should also be adopted.

An effective assertion of the right of self-representation "must be (1) clear and unequivocal; (2) knowing, intelligent and voluntary; and (3) timely." United States v. Frazier-El, 204 F.3d 553, 558 (4th Cir. 2000). To constitute a knowing, intelligent and voluntary waiver, the defendant must be aware of the disadvantages of self-representation. Patterson v. Illinois, 487 U.S. 285,299 (1988); see e.g., Torres v. United States, 140 F.3d 392, 401 (2d Cir. 1998) (court should conduct on-the-record discussion to ensure that defendant was aware of risks and ramifications of self-representation).

An important facet of making a knowing, intelligent and voluntary waiver of the right to counsel is knowing the conditions under which a defendant will be permitted to represent himself. For example, the Seventh Circuit held in United States v. Lane, that a waiver of counsel is properly made when the defendant was advised that he would not be permitted unlimited legal access to research facilities away from the prison in which he was detained. 718 F.2d 226, 233 (1983). This inquiry is of significant importance in this case as Mr. al Bahlul does not possess nor will he qualify for the required security clearance necessary to review certain classified materials that have already been provided by the Prosecution as part of the discovery process.

Based upon prior admissions to investigators as well as his own assertion during his initial hearing before the Commission, the Accused is an al Qaida member. He has previously stated that he fully supports Usama bin Laden's *fatwa* calling for the killing of American civilians. He has stated that all those killed in the World Trade Center on September 11th were legitimate targets. He has further admitted to pledging *bayat* to Usama bin Laden and stated that he joined al Qaida because he believed in the cause of bin Laden and the war against America. He acknowledges that he will kill Americans at the first opportunity upon release from detention.

It is clear that under these unique circumstances, measures must be taken to safeguard information in the interests of national security. The investigation of al Qaida and its members is an ongoing endeavor and the concerns over the premature or inappropriate disclosure of classified information are heightened. See United States v. Bin Laden, 58 F. Supp.2d 113, 121 (S.D.N.Y. 1999) (government's terrorism investigation ongoing thereby increasing possibility that unauthorized disclosures might place additional lives in danger). The accused must fully comprehend the limitations required due to national security concerns and give an affirmative waiver with respect to these limitations before being permitted to proceed *pro se*.

The Prosecution has provided a proposed colloquy as an attachment to this response. While we acknowledge that a colloquy was commenced during the Accused's

initial hearing before the Commission, we feel that there must be a more in-depth inquiry before the Accused could qualify to engage in self-representation.

d. The Right to Self-representation is not Absolute and Can Be Forfeited

The Supreme Court in Farretta held that the right to self-representation is not absolute and may be forfeited by a defendant who uses the courtroom proceedings for a deliberate disruption of their trial. 422 U.S. at 834; McKaskle v. Wiggins, 465 U.S. 168, 173 (1984) (defendant forfeits right to represent himself if he is unable or unwilling to abide by the rules of procedure or courtroom protocol); Illinois v. Allen, 397 U.S. 337 (1970); United States v. Kaczynski, 239 F.3d 1108, 1116 (9th Cir. 2001) (right to self-representation forfeited when right being asserted to create delay in the proceedings). The right of self-representation is not "a license to abuse the dignity of the courtroom," nor a license to violate the "relevant rules of procedural and substantive law." Faretta, 422 U.S. at 834 n.46. Forfeiture of the right to proceed *pro se* occurred recently in the high visibility prosecutions of Zacarias Moussaoui (inappropriate and disruptive behavior) and Slobadan Milosevic (Milosevic case being tried before International Criminal Tribunal for the former Yugoslavia (ICTY) and right was forfeited based on poor health of Milosevic). See Moussaoui, Criminal No. 01-455-A, Court Order of November 14, 2003 (E.D. Va.).

Based on his demonstrated behavior at his initial hearing as well as his personal promise on the record, the Accused appears willing to abide by courtroom rules and protocol. There is currently no indication that the Accused's approach to his self-representation will change. However, should he become disruptive, the Commission and/or Appointing Authority should not hesitate to revoke his ability to proceed *pro se*. The Commission should be positioned to be able to continue the Commission trial if things change and the Accused proves to be unable to represent himself. For this and other reasons discussed below, standby counsel should be appointed.

e. Standby Counsel Should be Appointed

Once a court has decided to allow a person to proceed *pro se*, the court may, if necessary, to protect the public interest in a fair trial, appoint standby counsel. McKaskle, 465 U.S. at 173. Once standby counsel are appointed, trial courts are given broad discretion in delineating their responsibilities and defining their roles. United States v. Lawrence, 11 F.3d 250, 253 (4th Cir. 1998). This may be done over the objection of the defendant. McKaskle, 465 U.S. at 184. Clear in all cases where standby counsel are present, is the notion that such counsel must be prepared to step into the representative mode should the defendant lose the right of self-representation. United States v. Dougherty, 473 F.2d 1113, 1125 (D.C. Cir. 1972). The only limitation to the role of standby counsel is that the participation cannot undermine the right to self-representation or the appearance before the jury as one who is defending himself. McKaskle, 456 U.S. at 177.

Standby counsel have conducted research on behalf of a *pro se* defendant, Barham v. Powell, 895 F.2d 19, 23 (1st Cir. 1990). They have assisted with other substantive matters throughout the trial. McKaskle, 465 U.S. at 180 ("Counsel made

motions, dictated proposed strategies into the record, registered objections to the prosecution's testimony, urged the summoning of additional witnesses, and suggested questions that the defendant should have asked of witnesses.").

Standby counsel cannot however interfere with the defendant's control of the case. They may express disagreement with the defendant's decisions, but must do so outside the jury's presence. Id. at 179.

The appointment of standby counsel is crucial in this case because of the interplay of classified material with this prosecution. While the Prosecution does not intend to admit any classified evidence as part of its cases on the merits or sentencing, classified materials have been provided as part of the discovery process. Standby counsel would be needed to review such information and make appropriate motions pertaining to such information. Such motions may include requests for unclassified summaries of the information they deem pertinent that could then be provided to the Accused.

In the Federal system, the role of standby counsel with respect to classified information is less intrusive to the accused's right of self-representation because such issues are normally resolved outside the presence of the jury. As the entire Commission panel is both the finder of fact and law, trial sessions dealing with issues involving classified information may be conducted in the Accused's absence before the entire Commission panel. See President's Military Order of November 13, 2001, Section 4(c)(2).

Members of this Military Commission were chosen based upon their experience and maturity. They have all had command as well as combat experience. They will already be involved in the litigation of motions and will be exposed to evidence they otherwise would not have seen had they solely been traditional finders of fact. Any impact that exposure to standby counsel litigating classified matters on the Accused's behalf will certainly not outweigh the benefit to the Accused of meeting his desire to proceed *pro se*.

While the right of self-representation is universally recognized, "it is not a suicide pact." Haig v. Agee, 453 U.S. 280, 309-10 (1981). The fundamental principle of self-preservation necessarily demands that some reasonable and well-defined boundaries may be placed on the Accused's ability to represent himself in this case. Cf. United States v. Dennis, 341 U.S. 494, 519 (1951) (Frankfurter, J., concurring). What is of the utmost importance is that the Accused be advised of these lawful limits before he waives his right to counsel with his eyes wide open. United States v. McDowell, 814 F.2d at 250; - McQueen v. Blackburn, 755 F.2d 1174, 1177 (5th Cir. 1985) (court must be satisfied accused understands the nature of the charges, the consequences of the proceedings, and the practical meaning of the right that he is waiving); Raulerson v. Wainwright, 732 F.2d 803, 808 (11th Cir. 1984) ("Once there is a clear assertion of that right [self-representation], the court must conduct a hearing to ensure that the defendant is fully aware of the dangers and disadvantages of proceeding without counsel"). If the Accused can show that he fully understands that he will not have access to classified information and he voluntarily continues to assert his desire for self-representation, he should be permitted to proceed *pro se*.

In summary, standby counsel should be appointed regardless of the Accused's desires. They are needed to assist the Accused consistent with his desires, represent the Accused on matters related to classified information and be prepared to assume full representation should the accused forfeit his right to represent himself.

f. Right of Self-representation under International Law

The Prosecution agrees with the Defense assertion that the right of self-representation is fully recognized under International Law. The Prosecution does contend that the Defense Memorandum is at times misleading as it implies that various international treaties **mandate** this Commission to permit self-representation. They fail to note that with respect to many of the treaties they mention, the United States is either not a party, or did not ratify these documents. See, Additional Protocol I to the Geneva Conventions; American Convention on Human Rights; Convention for the Protection of Human Rights and Fundamental Freedoms.

With respect to the International Covenant on Civil and Political Rights (ICCPR), the United States has signed and ratified this treaty. However its applicability and binding effect on the United States is not as simple and straightforward as the Defense opines. A lengthy discussion on this issue is unnecessary at present as the Prosecution believes that the right to self-representation should be provided to give what has been recognized as a fundamental right both domestically and internationally.

g. Standby Counsel and Forfeiture of the Right to Self-representation are Recognized Under International Law

In Prosecutor v. Vojislav Seselj, the ICTY recognized that a counsel can be assigned to assist an accused engaging in self-representation on a case by case basis in the interests of justice. "Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj", Case No.: IT-03-67-PT, 9 May 2003 paras 20-21. Noting that the right to self-representation is a starting point and not absolute, the Tribunal asserted its fundamental interest in a fair trial related to its own legitimacy in justifying the appointment of standby counsel. Id.

The recognition of the appropriateness of imposition of defense counsel on an accused was emphasized in a decision of the International Criminal Tribunal for Rwanda (ICTR). Prosecutor v. Jean-Bosco Barayagwiza, ICTR-97-19-T, 2 November 2000 para 24. Similar to our present case, Barayagwiza instructed his attorneys "not to represent him in the courtroom" and as a result they initially remained passive and did not mount a defense. Id. at para 17. These attorneys requested to withdraw from representation and their request was denied by the Trial Chamber. Id. at paras 17-20. Viewing the accused's actions as a form of protest and an attempt to obstruct the proceedings, counsel were deemed to be under no obligation to follow the accused's instructions to remain passive. Id. at paras 21-24. In his concurring opinion, Judge Gunawardana opined that the counsel should more appropriately be classified as "standby counsel" whose obligations were not just to protect the interests of the accused, but also the due

administration of justice. Barayagwiza, Concurring and Separate Opinion of Judge Gunawardana (relying on Article 20(4) of the ICTR Statute).

h. The Accused's Alternative Request to be Represented Exclusively by an Attorney from Yemen should be Denied

Section 4(C)(3)(b) of MCO No. 1 requires a civilian attorney representing an accused to be: (1) a United States citizen; (2) admitted to practice law in a State, district, territory, or possession of the United States, or before a Federal court; (3) has not been subject to any sanction or disciplinary action . . . (4) has been determined eligible for access to SECRET information; and (5) agrees in writing to comply with all regulations or instructions for counsel. It is clearly evident that a Yemen citizen attorney who is not eligible to practice law in the United States does not meet these criteria.

Additionally, the Accused's first fallback request is not in accord with Section 4(C)(3)(b) of MCO No.1 as his request for representation is conditioned upon his current detailed military Defense Counsel having absolutely no role in his representation. This conflicts directly with MCO No. 1 where it states that representation by a Civilian Defense Counsel will not relieve Detailed Defense Counsel of their duties specified in Section 4(C)(2). Similarly, even a cleared Civilian Counsel is not guaranteed the ability to be present at closed Commission proceedings. MCO No. 1 Section 4(C)(3)(b); MCI No. 4, Section 3(F).

There are sound reasons for the requirements imposed on civilian counsel. As explained by the Presiding Officer in the Accused's initial hearing, there is great importance in counsel having expertise in military law, military terminology, and the ability to argue by analogy to federal, U.S. military and international law (transcript pages 7-9). Furthermore, as already demonstrated by the Defense's attempt to utilize a non-citizen interpreter in this case, it can take upwards to a year (if ever) to do the background investigation necessary for an appropriate security clearance to be granted. Several months have already been lost in the trial preparation process awaiting the granting of this clearance (which has still not been obtained). Protocol and procedures cannot be disregarded when it comes to national security. The time commitment for obtaining a security clearance would not be consistent with Section 4(A)(5)(c) of MCO No. 1 where the Presiding Officer is tasked to ensure an expeditious trial where the accommodation of counsel does not delay the proceedings unreasonably.

In the court-martial setting, Rule for Court-Martial 502(d)(3) requires that a civilian counsel representing an accused be "[a] member of the bar of a Federal court or of the bar of the highest court of a State." Absent such membership, the lawyer must be authorized by a recognized licensing authority to practice law and must demonstrate to the military judge that they have the demonstrated training and familiarity with criminal law applicable to courts-martial. RCM 502(d)(3)(B). For practical purposes, the civilian counsel must in fact be a lawyer who is a "member in good standing of a recognized bar." United States v. Jackson, 54 M.J. 527, 535 (N.M. Ct. Crim. App. 2000). The Prosecution is unaware of any caselaw questioning the propriety of these conditions. The decisions of military and other federal courts reflect that admission to practice is a

necessary indicia that a level of competence has been achieved and reviewed by a competent licensing authority. United States v. Steele, 53 M.J. 274 (2000).

The United States Supreme Court has held that federal district courts can regulate the admission of people to its own bar so long as these regulations are consistent with "the principles of right and justice." Frazier v. Heebe, 482 U.S. 641, 645 (1987). Greater approval is given to regulations restricting outside attorneys coming into other "state" courts as opposed to other federal courts as the laws and procedures may differ substantially from state to state. Id. at 647. These differences in laws and procedures are of even greater significance in our case as the laws of Yemen differ dramatically from our laws and procedures. Depending on the qualifications of the yet unnamed proposed attorney from Yemen, it may almost be akin to permitting a lay person or non-licensed attorney to represent the Accused. A right to such representation is not recognized in U.S. domestic law. United States v. Grismore, 546 F.2d 844, 847 (10th Cir. 1976); United States v. Whitesel, 543 F.2d 1176, 1177-81 (6th Cir. 1976); United States v. Kelley, 539 F.2d 1199, 1201-03 (9th Cir. 1976).

Part C of the Defense Memorandum appears to merge the concept or entitlement to self-representation with the entitlement to having another individual who does not meet the court's requisite qualifications represent the Accused. These two concepts require distinct analysis as the right to self-representation has an independent source in the structure and history of the Constitution. No such independent source can be found for the alleged right to the assistance of a non-qualified lawyer. Kelley, 539 F.2d at 1202.

The limitations of MCO No.1 with respect to requiring counsel to be a U.S. citizen are narrowly drawn. If the Accused truly desires an attorney from Yemen to play a role in strategizing for his Commission trial, this individual can be requested as a "foreign attorney consultant." Requests for "foreign attorney consultants" have been requested in two of the other three currently pending Commission cases and these requests have been granted. To date, the Accused has not submitted any such request.

7. Conclusion. Current Military Commission Law does not permit the Accused to represent himself. Absent an amendment to current Commission Law, the Detailed Military Defense Counsel should be ordered by the Commission to represent the Accused. See Rule 1.16(c) of Navy Judge Advocate General Instruction 5803.1B (Professional Responsibility Instruction which requires continued representation when ordered by a tribunal or other competent authority notwithstanding good cause for terminating the representation).

The Prosecution believes that an amendment to current Commission Law to permit self-representation is appropriate to bring the Commission in accord with the standards established for United States domestic courts as well as under Customary International Law.

Exclusive representation by a yet unnamed attorney from Yemen should not be permitted. Military Commission Law does not permit this and Commission Law is narrowly tailored in this regard to promote national security as well as the "principles of

right and justice." Any request for a Yemen attorney to act as a foreign attorney consultant should be looked upon favorably assuming all preconditions are met.

8. Attached Files.

   a. Chief Defense Counsel Memorandum dated 26 April 2004
   b. Moussaoui, Criminal No. 01-455-A, Court Order of November 14, 2003 (E.D. Va.).
   c. Proposed colloquy.

Commander, JAGC, USN
Prosecutor

UNITED STATES OF AMERICA	)	DEFENSE REPLY:
	)	
v.	)	RIGHT TO SELF-REPRESENTATION;
	)	
ALI HAMZA AHMAD SULAYMAN AL BAHLUL	)	RIGHT TO CHOICE OF COUNSEL
	)	
	)	
	)	8 October 2004

1. Timeliness of Motion.

This reply is being filed within the timeline established by the Presiding Officer.

2. Legal Authority.

a. *United States v. Ray*, 933 F.2d 307 (5th Cir. 1991)
b. *McKaskle v. Wiggins*, 465 U.S. 168 (1984)
c. ABA Standards for Criminal Justice, Standards 4-3.9 and 6-3.7, <http://www.abanet.org/crimjust/standards/home.html>
d. Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,833 § 4(c)(2) (Nov. 16, 2001)
e. Military Commission Order (MCO) No. 1
f. *Arizona v. Fulminante*, 499 U.S. 279 (1991)
g. Rule for Courts-Martial (RCM) 502
h. *Soriano v. Hosken*, 9 M.J. 221 (C.M.A. 1980)
i. *United States v. Jackson*, 54 M.J. 527 (2000)
j. *United States v. Steele*, 53 M.J. 274 (2000)
k. *United States v. Grismore*, 546 F.2d 844 (10th Cir. 1976)
l. *United States v. Whitesel*, 543 F.2d 1176 (6th Cir. 1976)
m. *United States v. Kelley*, 539 F.2d 1199 (9th Cir. 1976)
n. *Frazier v. Heebe*, 482 U.S. 641 (1987)
o. Military Commission Instruction (MCI) No. 8

3. Analysis.

a. Standby Counsel.

As the government correctly notes, the practice of appointing standby counsel to assist the *pro se* defendant has been recognized by domestic and international courts. Although useful in such cases, "the proper role of standby counsel is quite limited." *United States v. Ray*, 933 F.2d 307, 312-13 (5th Cir. 1991), *citing McKaskle v. Wiggins*, 465 U.S. 168, 177-78 (1984).

> Standby counsel does not *represent* the defendant. The defendant represents himself, and may or may not seek or heed the advice of the attorney standing by. As such, the role of standby counsel is more akin to that of an observer, an attorney who attends the trial or other proceeding and who may offer advice, but who does not speak for the defendant or bear responsibility for his defense.

United States v. Ray, 933 F.2d at 313 (emphasis in original).

If the military commission determines that appointment of standby counsel is appropriate, the commission must be cognizant of the limited authority of standby counsel to speak for the accused. The commission must also define the role of standby counsel, consistent with the desires of the accused, so that all parties understand the responsibilities of standby counsel.

(1) Defining the Role of Standby Counsel.

In exercising its discretion, the commission should consider the desires of the accused in defining the parameters of standby counsel's role. The American Bar Association (ABA) Standards for Criminal Justice differentiate between standby counsel appointed to "actively assist" a pro se accused and standby counsel whose duty it is to assist "only when the accused requests assistance." Standard 4-3.9, *Obligations of Hybrid and Standby Counsel* (visited Oct. 5, 2004) <http://abanet.org/crimjust/standards/dfunc_blk.html>.

If an accused desires no assistance, then the latter, more passive role should be assumed by standby counsel. In this passive role, standby counsel should only be required to "bring to the attention of the accused matters beneficial to him . . . but should not actively participate in the conduct of the defense." Standard 4-3.9(b). If on the other hand the accused desires assistance, standby counsel should be authorized to "actively assist" the accused, but should nonetheless allow the accused to "make the final decisions on all matters, including strategic and tactical matters relating to the conduct of the case." Standard 4-3.9(a). In order to avoid confusion, the court should "notify both the defendant and standby counsel of their respective roles and duties." Standard 6-3.7(b), *Standby Counsel for Pro Se Defendant* (visited Oct. 5, 2004) <http://abanet.org/crimjust/standards/trialjudge.html>.

(2) Defining the Role of the "Unwanted" Standby Counsel in the Context of Military Commission Proceedings.

Although the accused should first be consulted regarding his desires, it is likely that he will object to the appointment of standby counsel. If so, any significant role played by standby counsel during military commission proceedings will undermine the accused's right to self-representation. Standby counsel's role should be limited to providing advice on routine procedural and evidentiary matters, and basic courtroom protocol.

In *McKaskle v. Wiggins*, the Supreme Court addressed the role of standby counsel who is present at trial "over the defendant's objection." 465 U.S. 168, 170 (1984). Because of the danger that multiple defense voices will confuse the defendant's message, the court recognized that limits must be placed on "the extent of standby counsel's unsolicited participation":

> First, the *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury. This is the core of the *Faretta* right. If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak *instead* of the defendant on any matter of importance, the *Faretta* right is eroded.
>
> Second, participation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself.

McKaskle v. Wiggins, 465 U.S. at 178 (emphasis in original).

Unlike the ordinary criminal trial where issues of law are decided by a judge, outside the presence of the jury, military commissions are comprised of members who serve as both judge and jury. *See* Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,833 § 4(c)(2) (Nov. 16, 2001)("the military commission sit[s] as the triers of both fact and law"). Thus, all proceedings before a military commission will be in the presence of the "jury." The ever-present military commission "jury" is a major limitation on the role which can be played by standby counsel.

Standby counsel's participation in the presence of the jury is "more problematic" than participation outside the jury's presence because "excessive involvement by counsel will destroy the appearance that the defendant is acting *pro se*." *McKaskle v. Wiggins*, 465 U.S. at 181. In the presence of the jury, standby counsel, even over the accused's objection, may assist the accused "in overcoming routine procedural or evidentiary obstacles to the completion of some specific task, such as introducing evidence or objecting to testimony, that the defendant has clearly shown he wishes to complete . . . [and] to ensure the defendant's compliance with basic rules of courtroom protocol and procedure." *Id.* at 183. When standby counsel ventures beyond these basic procedural functions, the accused's self-representation rights are eroded.

(3) Standby Counsel Cannot Represent the Accused at Closed Sessions Without the Accused's Consent.

Without the consent of the accused, representation by standby counsel during closed sessions, from which the accused has been excluded, would violate the accused's right to self-representation. Closed sessions of commission proceedings are allowed for a variety of reasons. MCO No. 1, para. 6.B.(3)(proceedings may be closed to protect

classified information or other information protected by law; the physical safety of participants; intelligence and law enforcement sources, methods, or activities; and other national security interests). Participation by standby counsel, on behalf of the accused, at these merits-phase, closed proceedings would undermine the notion that the accused was representing himself and would prevent the accused from making important tactical and strategic decisions regarding his defense. Such a role would violate not only part two of the *McKaskle* test, but part one as well by "effectively allow[ing] counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak *instead* of the defendant on any matter of importance." *McKaskle v. Wiggins*, 465 U.S. at 178. Such a role would also signal that the military commission "cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)(discussing impact on a criminal trial of a structural defect such as denial of the right to self-representation).

Excluding the accused from the courtroom violates international and domestic standards of a fair trial on many levels, not the least of which include the accused's self-representation rights. Furthermore, representing an accused over his objections at a closed hearing and outside of the accused's presence presents difficult ethical issues which standby counsel would need to resolve with his state bar and military ethics advisors.

b. **Choice of Counsel**

The Prosecution readily admits that domestic and international law recognize an accused's right to self-representation. In deference to this fact, the Prosecution agrees that "an amendment to current Commission Law to permit self-representation is appropriate to bring the Commission in accord with standards established for the United States domestic courts as well as Customary International Law."

Similarly, the Prosecution does not appear to dispute that domestic and international law recognize an accused's right to representation by counsel of his choice. Indeed, the Prosecution does not even address, let alone question, the international authority for this right. Curiously, though, the Prosecution does not believe that this right deserves the same recognition, and opposes an amendment to bring the military commission into line with this standard. The Prosecution's arguments opposing this amendment, however, are both woefully incomplete and unconvincing.

In arguing that foreign counsel should not be allowed to appear before a military commission the Prosecution relies in large part on RCM 502(d)(3). The Prosecution draws an analogy between qualifications that apply to a civilian lawyer seeking to appear before a court-martial and qualifications it believes should apply to a civilian lawyer seeking to appear before a military commission. It then concludes that "[f]or practical purposes, the civilian counsel must in fact be a lawyer who is a 'member in good standing of a recognized bar,'" apparently seeking to imply that only a domestic state or federal bar qualifies as a "recognized bar."

Contrary to this implication, however, the Rules for Courts-Martial specifically contemplate allowing foreign attorneys to appear. The Discussion section immediately following RCM 502(d)(3)(B) states "[i]n making such a determination – *particularly in the case of civilian counsel who are members only of a foreign bar* – the military judge should also inquire . . . " (emphasis added). The Discussion section is not binding authority, but it is unquestionably relevant. Although the Prosecution does not acknowledge it, the fact is that the very RCM it cites in opposition to foreign counsel appearing before a military commission actually supports the view that choice of counsel, even including choice of foreign counsel, is a right that should be respected.

Further, the Court of Appeals for the Armed Forces (then the Court of Military Appeals) addressed this very issue over 20 years ago, and held that "a member of a local bar in a foreign country may be qualified to represent a military accused at a court-martial." *Soriano v. Hosken*, 9 M.J. 221, 222 (C.M.A. 1980). The Court went on to write that "[i]t is the military judge assigned to the court-martial who must make the determination whether such a lawyer is minimally qualified to act as civilian counsel." *Id.* Finally, in direct contradiction of the Prosecution's argument the Court stated "[w]e do not anticipate that the military judge will establish any *per se* disqualification with respect to any recognized foreign bar or act on an individual basis in a niggardly fashion." *Id.*

Significantly, none of the cases cited by the Prosecution actually dealt with foreign attorneys. Rather, the cases arose in the context of domestic civilian attorneys accused of providing ineffective assistance of counsel (*United States v. Jackson*, 54 M.J. 527 (2000); *United States v. Steele*, 53 M.J. 274 (2000)), or people requesting to be represented by lay persons (*United States v. Grismore*, 546 F.2d 844, 847 (10th Cir. 1976); *United States v. Whitesel*, 543 F.2d 1176, 1177-81 (6th Cir. 1976); *United States v. Kelley*, 539 F.2d 1199, 1201-03 (9th Cir. 1976). While one of the cases the Prosecution cited does have relevance, that case stands for the proposition that rules precluding otherwise qualified attorneys from practicing in a particular court should be related to legitimate objectives. *Frazier v. Heebe*, 482 U.S. 641, 645 (1987)(error to prohibit attorney residing in one state from practicing in federal court in another state when attorney qualified to practice law in state courts of both states). *Frazier*, therefore, appears to support Mr. al Bahlul's request more than it does the Prosecution's opposition.

The Prosecution's remaining arguments against recognition of this right are similarly unpersuasive. While a security clearance for a foreign counsel might take a significant amount of time, the Prosecution is already aware that such need not be the case -- Mr. Kenny, the Foreign Attorney Consultant for Mr. David Hicks, was able to obtain a security clearance allowing him to participate in military commission proceedings within a matter of weeks. Further, although we have been waiting quite some time for a security clearance for a foreign national interpreter we seek to hire, there is every reason to believe that the process might have been much quicker had a government official associated with the military commissions taken a personal interest. Since the clearance request has instead been delegated to an inexperienced civilian firm

operating under contract, it is not clear that such a lengthy process is inevitable. Finally, even a slow clearance procedure does not justify continuing to bar foreign attorneys. Almost every aspect of the painfully slow military commission process has moved to date according to the Government's timetable. Given that, the Prosecution's reliance on MCO No. 1's provision against unreasonable delay is scant support for denying Mr. al Bahlul's right to representation by counsel of his choice.

The military commission is certainly free to reserve the right to decide whether a particular civilian counsel is qualified. Recognizing that there are differences in laws and procedures between military commissions and the laws of Yemen, however, hardly supports the Prosecution's conclusion that allowing a Yemeni attorney to appear before the commission "may almost be akin to permitting a lay person or non-licensed attorney to represent the Accused." Being qualified to conduct cases before the courts of a defendant's country was sufficient to permit a counsel to represent persons at Nuremberg[1], and little more than that is required by RCM 502 (d)(3)(B). There is no reason to accept the view that all Yemeni attorneys are by definition incompetent to provide representation before a military commission. Mr. al Bahlul's right to find a qualified Yemeni attorney to represent him should be recognized.

c. The Military Commission Must Rule on Mr. al Bahlul's Requests

Section 4(A)(5)(d) of MCO No. 1 and paragraph 4(A) of MCI No. 8 authorize the Appointing Authority to decide interlocutory questions certified by the Presiding Officer. Both provisions state that a question "the disposition of which would affect a termination of proceedings with respect to a charge" is a mandatory question that "shall" be certified to the Appointing Authority. Both provisions also allow that the Presiding Officer "may" certify other interlocutory questions that the Presiding Officer deems appropriate.

With respect to the latter class of questions, the Appointing Authority has determined that a Presiding Officer can exercise his discretionary authority to certify interlocutory matters only after the full military commission has ruled on the question. Memoranda from Appointing Authority to Presiding Officer on Interlocutory Questions 1-5 of 5 October 2004. This is based on the military commission's role as the adjudicator of all questions of fact and law. *Id.* Consequently, if the disposition of an issue cannot affect a termination of proceedings with respect to a charge, the matter is not properly raised as a discretionary interlocutory question until after it has been addressed by the full commission. *Id.*

Of the two classes of interlocutory matters, any questions involving Mr. al Bahlul's representation requests would be discretionary. Mr. al Bahlul challenges the legality of military commission procedures that are inconsistent with domestic and international law. Regardless of how these challenges are decided, there is no way that the outcome might affect a termination of the proceedings against him. Whoever

[1] Rule 7(a), Rules of Procedure Adopted by Military Tribunal I in the Trial of the Medical Case; Rule 7(a), Uniform Rules of Procedure, Military Tribunals, Nuremberg, Revised to 8 January 1948. (http://www.yale.edu/lawweb/avalon/imt/imt.htm#rules).

represents him, Mr. al Bahlul will still be facing the same charge. Thus, these matters do not qualify for mandatory interlocutory certification, and any certification of the issues must follow the procedures established for discretionary questions.

Since the issues raised by Mr. al Bahlul's representation requests fall squarely within the military commission's power and obligation to decide questions of law, no interlocutory certification procedure is available until after the commission has discharged its duty.[2] Contrary to the Presiding Officer's apparent intent to pass these issues directly to the Appointing Authority, therefore, the military commission must decide the legality of the challenged rules first.

d. **Timely Resolution of Mr. al Bahlul's Requests is Critical**

Despite concerns recently expressed by the Chief Defense Counsel, Mr. al Bahlul continues to be denied the opportunity to participate in the on-going process addressing legal matters affecting the military commissions. Memorandum from Chief Defense Counsel to Appointing Authority, "Preservation of Right to Full and Fair Trial by Military Commissions in the case of Ali Hamza Ahmad Sulayman al Bahlul," of 23 September 2004. The issues that have been and soon will be addressed are critical to the development of the military commission process, and the decisions will substantively impact Mr. al Bahlul's rights in that process. *Id.* Apparently, the longer resolution of Mr. al Bahlul's representation issues are delayed the longer he will be shut out of the development process. Consequently, the military commission should expeditiously address the legal questions posed by Mr. al Bahlul's representation requests.

4. Attached Files.

a. Memoranda from Appointing Authority to Presiding Officer, Interlocutory Questions 1-5, of 5 October 2004.

b. Memorandum from Chief Defense Counsel to Appointing Authority, "Preservation of Right to Full and Fair Trial by Military Commission in the case of Ali Hamza Ahmad Sulayman al Bahlul," of 23 September 2004

/s/
Philip Sundel
LCDR, JAGC, USN
Detailed Defense Counsel

/s/
Mark A. Bridges
MAJ, JA
Assistant Detailed Defense Counsel

[2] Counsel acknowledge that there may be practical difficulties involved with the military commission passing on legal matters prior to *voir dire* and challenges. Such difficulties would not change the nature of the underlying legal questions, however, and cannot justify interlocutory certification in violation of established procedures, although they might be evidence of a structural defect in the process. *See Arizona v. Fulminante*, 499 U.S. 279, 309-310 (1991)(participation of trial judge who was not impartial affected entire course of trial.)

From: Sundel, Philip, LCDR, DoD OGC
To: 'Pete Brownback' ; [redacted] 'Hodges, Keith'
Cc: [redacted] Bridges, Mark, MAJ, DoD OGC ; Gunn, Will, Col, DoD OGC ; [redacted]
Sent: Wednesday, October 13, 2004 11:16 AM
Subject: RE: Defense Reply Brief-- Representation (US v. al Bahlul)

Sir,

Is your intent still to submit this as a "certified interlocutory question" as you indicated during the 26 August 2004 hearing?

V/r
LCDR Sundel
Detailed Defense Counsel

From: Pete Brownback [redacted]
Sent: Wednesday, October 13, 2004 15:45
To: 'Hodges, Keith'; [redacted] Sundel, Philip, LCDR, DoD OGC
Cc: [redacted] Swann, Robert, [redacted] Gunn, Will, Col, DoD OGC; Bridges, Mark, MAJ, DoD OGC; [redacted]
Subject: Re: Defense Reply Brief-- Representation (US v. al Bahlul)

LCDR Sundel,

1. If the Appointing Authority makes a ruling, there will be no need for an interlocutory question.
2. If the Appointing Authority does not make a ruling, the issue will be presented to the Commission for decision.
3. I do not, at this time, intend to send the matter as an interlocutory question to the Appointing Authority prior to the Commission acting upon the matter.
4. I am, however, quite willing to listen to any input from the parties.

COL Brownback

From: Sundel, Philip, LCDR, DoD OGC
To: 'Pete Brownback' ; 'Hodges, Keith' ; [redacted]
Cc: [redacted]
Swann, Robert, COL, DoD OGC ; [redacted]
DoD OGC ; [redacted] Gunn, Will, Col, DoD OGC ; Bridges, Mark, [redacted]
Sent: Thursday, October 14, 2004 11:45 AM
Subject: RE: Defense Reply Brief-- Representation (US v. al Bahlul)

Sir,

There is a need for Mr. al Bahlul's representation issues to be placed squarely before a decision maker. You have indicated that you will not allow the military commission to address these matters, and that you do not intend to certify the issue to the Appointing Authority. This leaves Mr. al Bahlul's case in a "no-man's-land" with no one accepting responsibility to decide the issue of his right to self-representation.

Mr. al Bahlul made his request to be allowed to represent himself to the military commission. We have filed a Memorandum of Law and a Reply with the military commission. We believe that the matter is presently before the military commission, and that the commission needs to address it.

However, you have indicated that you believe the request must be addressed by the Appointing Authority or a higher power. If that is still your belief, then the matter needs to in fact be presented to the Appointing Authority. Certifying the issue to him as an interlocutory question would appear to be the only mechanism to formally place it before the Appointing Authority (though I again reiterate that we disagree with the legality of that course of action). Simply assuming that he is aware of it, and hoping that he elects to take it up, does not seem like a judicious approach.

Along those lines, it is worth remembering that this matter has already been before the Appointing Authority for five months. Unfortunately, we have received no response or status update on our mid-May request for a rule change. Consequently, we are concerned with a plan that may rely on an assumption that the Appointing Authority will choose to take this up because it is the right thing to do.

The Prosecution has acknowledged that it is not sure whether the representation issues should be addressed by the military commission or the Appointing Authority. We believe that concession, along with the arguments contained in our Reply brief, should be enough to return the matter to the commission.

Regardless of how you choose to handle this, though, it must be clear what authority is responsible for deciding Mr. al Bahlul's representation issues. Allowing them to possibly languish in a gray area between the military commission and the Appointing Authority is unacceptable.

V/r

LCDR Sundel
Detailed Defense Counsel

From: "Pete Brownback" [redacted]

COL, DoD OGC" [redacted]
Subject: Re: Defense Reply Brief-- Representation (US v. al Bahlul)
Date: Thursday, October 14, 2004 1:43 PM

MessageLCDR Sundel,

1. I am very sensitive to Mr. aL Bahul's situation -- as evidenced by my actions and directions thus far. Mr. Hodges and I have been monitoring the self-representation issue. During and immediately after Mr. Al Bahlul's appearance before the Commission in Guantanamo, I believed that the correct and most efficient route to see if Mr. aL Bahul could get what he wanted was to see if the rules could and would be changed. That is why that course of action was pursued.

2. Please look again at paragraph 2 of my note of 13 Oct 2004 (below). At some point the matter will be placed before the Commission, unless action is taken by other authorities. If I thought that submitting an Interlocutory Question would hasten the process, I would submit an IQ.

3. I would suggest that detailed defense counsel work with the prosecution to assemble all the documents and filings concerning the right to self-representation into one place, so that it will be ready for the Commission to hear. Although the docket is not final, I expect Mr. Al Bahlul to be part of the November motions session.

4. Since detailed defense counsel and the prosecution seem to be in accord on the right to self-representation, I would also urge detailed defense counsel and the prosecution to consider and discuss the problems involved in the matter of a defendant, who rejects representation, presenting his position before a body that under the current state of Commission Law requires representation. I feel certain that the Commission would welcome constructive suggestions on this matter.

5. Finally, please be prepared to explain where you and MAJ Bridges stand with your Bars and with the Department of Defense with regard to presenting these matters before the Commission. I am not asking for you to address these matters now, but to think about how they might be addressed if and when the time comes.

COL Brownback
----- Original Message -----
From: Sundel, Philip, LCDR, DoD OGC
To: 'Pete Brownback' ; 'Hodges, Keith' ; [redacted]
Cc: [redacted]
Swann, Robert, COL, DoD OGC ; [redacted]
DoD OGC ; [redacted] Gunn, Will, Col, DoD OGC ; Bridges, Mark, [redacted]

Sent: Thursday, October 14, 2004 11:45 AM
Subject: RE: Defense Reply Brief-- Representation (US v. al Bahlul)

Sir,

There is a need for Mr. al Bahlul's representation issues to be placed squarely before a decision maker. You have indicated that you will not allow the military commission to address these matters, and that you do not intend to certify the issue to the Appointing Authority. This leaves Mr. al Bahlul's case in a "no-man's-land" with no one accepting responsibility to decide the issue of his right to self-representation.

Mr. al Bahlul made his request to be allowed to represent himself to the military commission. We have filed a Memorandum of Law and a Reply with the military commission. We believe that the matter is presently before the military commission, and that the commission needs to address it.

However, you have indicated that you believe the request must be addressed by the Appointing Authority or a higher power. If that is still your belief, then the matter needs to in fact be presented to the Appointing Authority. Certifying the issue to him as an interlocutory question would appear to be the only mechanism to formally place it before the Appointing Authority (though I again reiterate that we disagree with the legality of that course of action). Simply assuming that he is aware of it, and hoping that he elects to take it up, does not seem like a judicious approach.

Along those lines, it is worth remembering that this matter has already been before the Appointing Authority for five months. Unfortunately, we have received no response or status update on our mid-May request for a rule change. Consequently, we are concerned with a plan that may rely on an assumption that the Appointing Authority will choose to take this up because it is the right thing to do.

The Prosecution has acknowledged that it is not sure whether the representation issues should be addressed by the military commission or the Appointing Authority. We believe that concession, along with the arguments contained in our Reply brief, should be enough to return the matter to the commission.

Regardless of how you choose to handle this, though, it must be clear what authority is responsible for deciding Mr. al Bahlul's representation issues. Allowing them to possibly languish in a gray area between the military commission and the Appointing Authority is unacceptable.

V/r

LCDR Sundel

Detailed Defense Counsel

-----Original Message-----
From: Pete Brownback [redacted]
Sent: Wednesday, October 13, 2004 15:45
To: 'Hodges, Keith'; [redacted] Sundel, Philip, LCDR, DoD OGC
Cc: [redacted] Swann, Robert, COL, DoD OGC; [redacted] Gunn, Will, Col, DoD OGC; Bridges, Mark, MAJ, DoD OGC; [redacted]
Subject: Re: Defense Reply Brief-- Representation (US v. al Bahlul)

LCDR Sundel,

1. If the Appointing Authority makes a ruling, there will be no need for an interlocutory question.
2. If the Appointing Authority does not make a ruling, the issue will be presented to the Commission for decision.
3. I do not, at this time, intend to send the matter as an interlocutory question to the Appointing Authority prior to the Commission acting upon the matter.
4. I am, however, quite willing to listen to any input from the parties.

COL Brownback

----- Original Message -----
From: Sundel, Philip, LCDR, DoD OGC
To: 'Pete Brownback' ; [redacted] 'Hodges, Keith'
Cc: [redacted] Bridges, Mark, MAJ, DoD OGC ; Gunn, Will, Col, DoD OGC ; [redacted] Swann, Robert, COL, DoD OGC ; [redacted]
Sent: Wednesday, October 13, 2004 11:16 AM
Subject: RE: Defense Reply Brief-- Representation (US v. al Bahlul)

Sir,

Is your intent still to submit this as a "certified interlocutory question" as you indicated during the 26 August 2004 hearing?

V/r
LCDR Sundel
Detailed Defense Counsel

-----Original Message-----
From: Pete Brownback [redacted]
Sent: Wednesday, October 13, 2004 10:47

To: [redacted] Sundel, Philip, LCDR, DoD OGC; 'Hodges, Keith'
Cc: [redacted] Bridges, Mark, MAJ, DoD OGC; Gunn, Will, Col, DoD OGC; [redacted] Swann, Robert, COL, DoD OGC; [redacted]
Subject: Re: Defense Reply Brief-- Representation (US v. al Bahlul)

CDR [redacted]

Thank you for the reply.

Mr. Hodges will inventory this motion as one pending before the AA - with a note that it is one the Commission may ultimately have to resolve.

COL Brownback

----- Original Message -----
From: [redacted]
To: 'Pete Brownback' ; [redacted] Sundel, Philip, LCDR, DoD OGC ; 'Hodges, Keith'
Cc: [redacted] Bridges, Mark, MAJ, DoD OGC ; Gunn, Will, Col, DoD OGC ; [redacted] Swann, Robert, COL, DoD OGC ; [redacted]
Sent: Wednesday, October 13, 2004 10:30 AM
Subject: RE: Defense Reply Brief-- Representation (US v. al Bahlul)

Sir,

COL Gunn sent a memo to the AA on 23 Sep 04 raising the issue that the Accused is being denied participation in this Commission. The AA in a responsive memo of 30 Sep 04 said the Accused was not being denied the ability to participate and that he would take the matter under advisement.

In response to Mr. Hodge's questions - my answer is that I don't know.

VR

-----Original Message-----
From: Pete Brownback [redacted]
Sent: Wednesday, October 13, 2004 09:51
To: [redacted] Sundel, Philip, LCDR, DoD OGC; 'Hodges, Keith'
Cc: [redacted] Bridges, Mark, MAJ, DoD OGC; Gunn, Will, Col, DoD OGC; [redacted] Swann, Robert, COL, DoD OGC; [redacted]
Subject: Re: Defense Reply Brief-- Representation (US v. al Bahlul)

CDR [redacted]

1. It does not appear to me that Mr. Hodges was soliciting any litigation by email. His question was:

Is this issue in the Presiding Officer's (Commission members) "box", or is this matter waiting resolution by the Appointing Authority?

On matters such as this, Mr. Hodges is authorized to act on my behalf. If you have a legal reason not to answer a question he presents to you, tell him the legal reason. If you're not happy with his response, tell me about it.

2. Please answer Mr. Hodges' question so that he can continue to get these motions in order. Constructing and deconflicting the motions inventories for these cases is not an easy task and will benefit all .

COL Brownback

----- Original Message -----
From: [redacted]
To: Sundel, Philip, LCDR, DoD OGC ; 'Hodges, Keith' ; 'Pete Brownback'
Cc: [redacted] Bridges, Mark, MAJ, DoD OGC ; Gunn, Will, Col, DoD OGC ; [redacted] Swann, Robert, COL, [redacted]
Sent: Friday, October 08, 2004 1:22 PM
Subject: RE: Defense Reply Brief-- Representation (US v. al Bahlul)

Sir,

The Prosecution is prepared to discuss these issues on the record. We are opposed to litigating this issue via email. While we agree with the Defense position that the right to pro se representation is recognized in other forums, it appears we have lost sight of the fact that current detailed military defense counsel do at this point in time represent the Accused and should continue to do so until relieved by competent authority.

VR

CDR [redacted]
-----Original Message-----

From: Sundel, Philip, LCDR, DoD OGC
Sent: Friday, October 08, 2004 11:54
To: 'Hodges, Keith'; Pete Brownback
Cc: [redacted] Bridges, Mark, MAJ, DoD OGC; Gunn, Will, Col, DoD OGC; [redacted]
Subject: RE: Defense Reply Brief-- Representation (US v. al Bahlul)

Sir,

We believe that the full military commission must rule on the legality of regulations that preclude an accused from representing himself or being represented by a foreign attorney. We believe that until the military commission rules the matter may not properly be certified as an interlocutory question.

V/r
LCDR Sundel
Detailed Defense Counsel

-----Original Message-----
From: Hodges, Keith [redacted]
Sent: Friday, October 08, 2004 11:42
To: Sundel, Philip, LCDR, DoD OGC; Pete Brownback
Cc: [redacted] Bridges, Mark, MAJ, DoD OGC; Gunn, Will, Col, DoD OGC; [redacted] OGC; Hodges, Keith; Swann, Robert, COL, DoD OGC; [redacted]
Subject: RE: Defense Reply Brief-- Representation (US v. al Bahlul)

Let me be sure I know where we are on this issue.

Is this issue in the Presiding Officer's (Commission members) "box", or is this matter waiting resolution by the Appointing Authority?

I appreciate that counsel could submit a matter to the PO after AA action, or perhaps along with it, but I just want to know where we are on the pro se question so I know who is going to answer the mail.

Thank you.

Keith Hodges

-----Original Message-----
From: Sundel, Philip, LCDR, DoD OGC [redacted]
Sent: Friday, October 08, 2004 11:24 AM
To: 'Pete Brownback'
Cc: [redacted] Hemingway, Thomas, BG, DoD OGC; Altenburg, John, Mr, DoD OGC; [redacted] Bridges, Mark, MAJ, DoD OGC; Gunn, Will, Col, DoD OGC; [redacted]

Subject: Defense Reply Brief-- Representation (US v. al Bahlul)

Sir,

Attached please find our Reply and copies of the six attached documents.

V/r
LCDR Sundel
Detailed Defense Counsel

-----Original Message-----
From: [redacted]
Sent: Friday, October 01, 2004 16:59
To: Brownback, Peter
Cc: Swann, Robert, COL, DoD OGC; Hodges, Keith; [redacted] Gunn, Will, Col, DoD OGC; Sundel, Philip, LCDR, DoD [redacted]
Subject: AL BAHLUL - PROSECUTION PRO SE RESPONSE

Sir,

Attached is the Prosecution response to the defense memorandum of law re pro se representation, with three attachments.

V/R,

LtCol V. [redacted] USMC

Prosecutor, Office of Military Commissions

Department of Defense

Phone: [redacted]

Fax: [redacted]

E-mail: [redacted]

SIPR: [redacted]

From: "Pete Brownback" [redacted]
To: "Sundel, Philip, LCDR, DoD OGC" [redacted]
Hemingway" [redacted]
Subject: Al Bahlul - Order to Brief Pro Se Issue and Other Issues
Date: Monday, October 18, 2004 2:09 PM

Message

United States of America v. Al Bahlul

1. Detailed defense counsel will brief the issue of self-representation by Mr. Al Bahlul to the Commission, using the procedures established in POM 4-2. The defense brief may consist of briefs and other matters already filed with the Appointing Authority on this issue. If so, a cover document meeting the formatting requirements of POM 4-2 will accompany all the matters the defense wishes the Commission to consider. (Counsel will not presume that matters previously sent to the Presiding Officer as courtesy copies are before the Commission.) The initial brief will be sent prior to 1700 hours, 22 October 2004. The response and reply will follow in accordance with POM 4-2. The prosecution may provide as its response any matters that may have filed with the Appointing Authority, in the same fashion as provided above for the defense. Any questions about this filing requirement should be forwarded to Mr. Hodges immediately.

2. In addition to the filings required by paragraph 1 above, detailed defense counsel and the prosecution will address the questions and issues listed in paragraph 4 below in a separate filing. The questions and issues listed will be addressed in this separate filing, even if counsel believe that the matters have been previously addressed. The style of the filing will be in accordance with POM 4-2 with the subject: Answers to Presiding Officer's Questions on the Issue of Self-Representation. Other than that, the filing does not have to be in any particular format. Each of the questions or issues listed below, however, will be in a separate paragraph or section - head-noted by the question or issue being addressed. Detailed defense counsel and the prosecution will file and present their views not later than 1200 hours, 25 October 2004 to the Presiding Officer and the Assistant only. When both filings are received, the Assistant will ensure that each counsel has the filing of opposing counsel, and counsel will be permitted to reply to the filings. Any questions about this filing requirement should be forwarded to Mr. Hodges immediately.

3. Notwithstanding that the initial filings will be sent simultaneously to the Presiding officer before being served on opposing counsel, counsel are encouraged to consult with each other in their initial filings to see if both agree to the answer. For example, if counsel for both sides agree that a certain procedure would meet the requirements of law, counsel may cause their initial filings to reflect such an agreement. Any questions about making joint filings should be forwarded to Mr. Hodges immediately.

4. Issues and questions to be addressed.

a. A candid consideration of the evidence and a statement by counsel concerning whether they believe any closed sessions or presentation of protected information will be necessary. Part of the answer to this issue will be an explicit statement that a closed session or presentation of protected information is, is not, or may be required.

b. The procedural problem involved in having the Commission determine the issue of self-representation when the Commission has not been subject to voir dire on behalf of Mr. Al Bahlul. (That is, for the Commission to decide a question of fact or law, the Commission has to be established. Assume that for the Commission to be established it should be subject to voir dire and a decision on challenges. Who will represent Mr. Al Bahlul in this process when the question presented to the Commission is who is representing him?)

c. Should the Appointing Authority consider the challenges made in US v. Hamdan and US v. Hicks as reflecting the challenges of any competent counsel and use them for US v. Al Bahlul? Additionally, assuming that members originally appointed to sit on the defendant's trial were challenged and removed in the cases of Hamdan and Hicks, are those members required to be available for voir dire in US v. aL Bahul?

d. Is self-representation required in order to provide Mr. Al Bahul a full and fair trial, and the authority that requires allowing the defendant to represent himself notwithstanding the current state of Commission Law?

e. Are current detailed defense counsel permitted or required to argue the issue of self-representation to the Commission, given Mr. Al Bahlul's expressed desire that he does not wish detailed counsel to represent him?

f. If detailed defense counsel are permitted or required to represent the defendant on the limited issue of whether self-representation shall be allowed,

and detailed defense counsel believe that self-representation is not in the defendant's best interests, can or should detailed defense counsel argue in favor of self-representation?

g. If detailed defense counsel are permitted or required to represent the defendant on the limited issue of whether self-representation shall be allowed, and detailed defense counsel believe that self-representation would deprive the defendant of a full and fair trial, can or should detailed defense counsel argue in favor of self-representation?

h. Assuming that Mr. Al Bahlul is allowed to represent himself, what procedures might be used if there is a closed session from which the defendant is excluded and at which evidence is presented to the Commission that the Commission might consider? The answer to this issue will not be limited to only an assertion there should be no closed sessions.

i. Assuming that Mr. Al Bahlul is allowed to represent himself, how would stand-by counsel be appointed and how they would communicate with Mr. Al Bahlul?

j. Assuming that Mr. Al Bahlul is allowed to represent himself, how would the issues of access to evidence be handled?

k. Assuming that Mr. Al Bahlul is allowed to represent himself, is there any requirement that those matters to which the defense is entitled under Commission Law - less classified or protected information - must be translated into the defendant's language?

l. Assuming that Mr. Al Bahlul is allowed to represent himself, is there any requirement that the accused be allowed access to that information or those sessions that he would not have access to were he being represented by detailed defense counsel under the current state of Commission Law?

m. Assuming that Mr. Al Bahlul is allowed to represent himself, what are the consequences of, possible uses of, and ability of the Commission to consider any and all statements made by Mr. Al Bahlul, while representing himself at times when Mr. al Bahul is not a witness?

n. Assuming that Mr. Al Bahlul is allowed to represent himself, the methods by which Mr. Al Bahlul would be able to control his notes and other working documents given his current status and security precautions taken with detainees?

o. Any other problems or issues which might arise from allowing Mr. Al Bahlul to represent himself.

Peter E. Brownback III

COL, JA

Presiding Officer

UNITED STATES OF AMERICA v. ALI HAMZA AHMAD SULAYMAN AL BAHLUL	))))))))	DETAILED DEFENSE COUNSEL'S ANSWERS TO PRESIDING OFFICER'S QUESTIONS ON THE ISSUE OF SELF-REPRESENTATION 22 October 2004

1. Pursuant to direction of the Presiding Officer of 18 October 2004, detailed defense counsel provide the following responses to the questions presented.

2. Letters correspond to that proceeding each question posed in the 18 October message:

a. A candid consideration of the evidence and a statement by counsel concerning whether they believe any closed sessions or presentation of protected information will be necessary. Part of the answer to this issue will be an explicit statement that a closed session or presentation of protected information is, is not, or may be required.

It is our understanding that detailed defense counsel have not yet received all of the evidence in this case. Additionally, we have not interviewed any potential witnesses, have not begun a pretrial investigation, and do not know what evidence the Prosecution intends to present at trial. Further, defense counsel have no way of predicating what trial evidence will ultimately be considered "protected," and what if any "protected information" will be limited to closed sessions. Consequently, at this stage it is impossible for counsel to know whether any closed sessions will be required.

b. The procedural problem involved in having the Commission determine the issue of self-representation when the Commission has not been subject to voir dire on behalf of Mr. Al Bahlul. (That is, for the Commission to decide a question of fact or law, the Commission has to be established. Assume that for the Commission to be established it should be subject to voir dire and a decision on challenges. Who will represent Mr. Al Bahlul in this process when the question presented to the Commission is who is representing him?)

A regularly constituted court providing fundamental due process is structured so as to give it competence to address preliminary questions such as an accused's right to self-representation or representation by counsel of his own choice. Mr. al Bahlul's military commission must address his right to represent himself or be represented by counsel of his choosing before it can proceed with any other matters, including voir dire and challenges. Whether military commissions have been structured in a way to allow Mr. al Bahlul's to do so is a matter that may not be answered until long after the commission proceedings have been completed.

c. Should the Appointing Authority consider the challenges made in US v. Hamdan and US v. Hicks as reflecting the challenges of any competent counsel and use them for US v. Al Bahlul? Additionally, assuming that members originally appointed to sit on the defendant's trial were challenged and removed in the cases of Hamdan and Hicks, are those members required to be available for voir dire in US v. aL Bahul?

The Appointing Authority has already acted on this issue.

d. Is self-representation required in order to provide Mr. Al Bahul a full and fair trial, and the authority that requires allowing the defendant to represent himself notwithstanding the current state of Commission Law?

Yes, self-representation and representation by counsel of one's choosing are fundamental rights recognized in both domestic and international law as being essential parts of a fair criminal proceeding. Any military commission rule, instruction, or order to the contrary must be considered invalid and unenforceable as it would require a process which, by definition, would violate due process and the President's mandate that military commissions be full and fair. Further discussion of this matter can be found in the Memorandum of Law filed by detailed defense counsel on 2 September and 21 October 2004, and the Reply brief filed on 8 October 2004.

e. Are current detailed defense counsel permitted or required to argue the issue of self-representation to the Commission, given Mr. Al Bahlul's expressed desire that he does not wish detailed counsel to represent him?

Current detailed defense counsel are in a very difficult position with respect to what actions they may take on Mr. al Bahlul's behalf. While counsel are detailed to represent Mr. al Bahlul, they have never been accepted by him as his representative. Mr. al Bahlul has both instructed counsel and stated in open court that counsel are to take no actions on his behalf. Under applicable rules of professional responsibility, counsel would appear to be precluded from arguing the issue of self-representation on Mr. al Bahlul's behalf.

At the same time, there appears to be no mechanism for counsel to argue an issue to the military commission in any capacity other than as representatives of an accused.

Finally, however, Mr. al Bahlul has been denied the means to effectively address this matter himself. Mr. al Bahlul has no access to legal or research material. Further, the majority of orders, instructions, and rules relevant to military commission have not been translated into Arabic, nor have any of the numerous documents and electronic massages that have been generated on various substantive aspects of military commissions. Finally, Mr. al Bahlul has not been kept apprised of any discussions or developments that have occurred since the 26 August 2004 hearing, and expressions of concern voiced both by detailed defense counsel and the Chief Defense Counsel that Mr. al Bahlul has been unfairly frozen out of military commission matters have resulted only in assurances by the Appointing Authority that everything is fine, and that he would continue to monitor the situation.

f. If detailed defense counsel are permitted or required to represent the defendant on the limited issue of whether self-representation shall be allowed, and detailed defense counsel believe that self-representation is not in the defendant's best interests, can or should detailed defense counsel argue in favor of self-representation?

Mr. al Bahlul has a fundamental right to represent himself if he so chooses. As the United States Supreme Court recognized in *Faretta v. California*, the question is not whether others think that self-representation is the right choice, only whether an accused whishes to exercise that right.

g. If detailed defense counsel are permitted or required to represent the defendant on the limited issue of whether self-representation shall be allowed, and detailed defense counsel believe that self-representation would deprive the defendant of a full and fair trial, can or should detailed defense counsel argue in favor of self-representation?

The right of self-representation and the right to fundamental due process in a full and fair proceeding are not interchangeable, and they cannot be mutually exclusive. If Mr. al Bahlul's choice to exercise his right to represent himself means that he will be denied a fair proceeding then the military commission process must be changed. Mr. al Bahlul cannot be denied one fundamental right because the structure of military commissions would then result in the denial of another fundamental right.

h. Assuming that Mr. Al Bahlul is allowed to represent himself, what procedures might be used if there is a closed session from which the defendant is excluded and at which evidence is presented to the Commission that the Commission might consider? The answer to this issue will not be limited to only an assertion there should be no closed sessions.

Fundamental due process as well as domestic and international notions of fairness require that Mr. al Bahlul be present and allowed to represent himself during all proceedings, particularly those involving the presentation of evidence. Mr. al Bahlul chooses to exercise his right to represent himself, thus no one is available to act on his behalf in either open or closed sessions. While sessions from which the media and general public are excluded are permissible, there can be no sessions from which Mr. al Bahlul is excluded.

i. Assuming that Mr. Al Bahlul is allowed to represent himself, how would stand-by counsel be appointed and how they would communicate with Mr. Al Bahlul?

While there is presently no mechanism in place for the appointment of standby counsel, presumably the Appointing Authority, the General Counsel of the Department of Defense, or the Secretary of Defense would create a mechanism if the military commission directed such an appointment. Standby counsel could communicate with Mr. al Bahlul via the same interpreters and during similar face-to-face meetings as have previously been utilized.

j. Assuming that Mr. Al Bahlul is allowed to represent himself, how would the issues of access to evidence be handled?

Mr. al Bahlul must be allowed access to evidence. It would presumably be the responsibility of JTF-GTMO to create the mechanism for his reviewing, storing and handling such evidence in a way that does not interfere with his ability to represent himself.

k. Assuming that Mr. Al Bahlul is allowed to represent himself, is there any requirement that those matters to which the defense is entitled under Commission Law - less classified or protected information - must be translated into the defendant's language?

Pursuant to MCO No. 1 Mr. al Bahlul is entitled to have the proceedings and any documentary evidence translated into Arabic. In order to provide him a fair trial, Mr. al Bahlul is also entitled to have translated into Arabic any other matters necessary to allow him to represent himself.

l. Assuming that Mr. Al Bahlul is allowed to represent himself, is there any requirement that the accused be allowed access to that information or those sessions that he would not have access to were he being represented by detailed defense counsel under the current state of Commission Law?

In order to provide a fair process that comports with fundamental due process, Mr. al Bahlul must be allowed access to any information necessary to allow him to represent himself. He must also be allowed to be present during any military commission proceeding.

m. Assuming that Mr. Al Bahlul is allowed to represent himself, what are the consequences of, possible uses of, and ability of the Commission to consider any and all statements made by Mr. Al Bahlul, while representing himself at times when Mr. al Bahul is not a witness?

Since Mr. al Bahlul will not be testifying under oath while representing himself, nothing he says while doing so should be admissible as evidence against him.

n. Assuming that Mr. Al Bahlul is allowed to represent himself, the methods by which Mr. Al Bahlul would be able to control his notes and other working documents given his current status and security precautions taken with detainees?

The methods by which Mr. al Bahlul will be allowed to control his notes and other working documents must be determined by JTF-GTMO and implemented in such a way as to not interfere with his ability to represent himself.

o. Any other problems or issues which might arise from allowing Mr. Al Bahlul to represent himself.

Detailed defense counsel have no thoughts on other issues that might arise from recognizing Mr. al Bahlul's right to represent himself.

/s/
Philip Sundel
LCDR, JAGC, USN
Detailed Defense Counsel

/s/
Mark A. Bridges
MAJ, JA, USA
Assistant Detailed Defense Counsel

	)	MEMORANDUM OF LAW:
UNITED STATES OF AMERICA	)	
	)	RIGHT TO SELF-REPRESENTATION; RIGHT TO CHOICE OF COUNSEL
v.	)	
	)	
	)	
ALI HAMZA AHMAD SULAYMAN AL BAHLUL	)	
	)	22 October 2004

1. Timeliness.

This pleading is being filed within the timeline established by the Presiding Officer.

2. Relief Sought.

Mr. al Bahlul wishes to represent himself. If he is denied that right, Mr. al Bahlul desires to be represented by a Yemeni attorney of his own choosing. Mr. al Bahlul does not wish to be represented by detailed defense counsel.

3. Facts.

a. During counsel's initial meetings with Mr. al Bahlul in April 2004, he stated that he did not want detailed defense counsel to represent him.

b. Instead, he stated that he intended to represent himself before the commission.

c. Consistent with Mr. al Bahlul's wishes, on 20 April 2004 detailed defense counsel requested that the Chief Defense Counsel approve a request to withdraw as detailed defense counsel.

d. The Chief Defense Counsel denied the request to withdraw on 26 April 2004.

e. Specifically, the Chief Defense Counsel found that MCO No. 1 and MCI No. 4 required detailed defense counsel to represent the accused despite the accused's wishes.

f. The most relevant provision cited by the Chief Defense Counsel states that detailed defense counsel "shall so serve notwithstanding any intention expressed by the Accused to represent himself." MCI No. 4, para. 3D(2).

g. See also MCO No. 1, para. 4C(4)("The Accused must be represented at all relevant times by Detailed Defense Counsel.")

h. After our request to withdraw was denied by the Chief Defense Counsel, detailed defense counsel submitted a request to the Secretary of Defense, General Counsel of the Department of Defense, and Appointing Authority to modify or supplement the rules for commissions to allow for withdrawal of detailed defense counsel and recognize the right of self-representation. See attached memorandum, dated 11 May 2004, entitled "Request for Modification of Military Commission Rules to Recognize the Right of Self-Representation, *United States v. al Bahlul*").

i. The Secretary of Defense, General Counsel, and the Appointing Authority have not responded to this request.

j. Before the military commission on 26 August 2004, Mr. al Bahlul stated that he wished to represent himself. Transcript of 26 August 2004 Commission Hearing (Transcript) at 6, 7, 11, 15, 16, 18.

k. Mr. al Bahlul went on to state that if he is prohibited from representing himself he desires to be represented by a Yemeni attorney of his own choosing. Transcript at 10, 18-19.

l. Finally, Mr. al Bahlul made clear that he did not wish to be represented by detailed defense counsel, and that he did not accept the services of detailed defense counsel. Transcript at 11, 16, 17, 19.

4. Law.

A. An Accused has a Fundamental Right to Represent Himself Before a Military Commission.

Binding treaty law, procedural rules for comparable international tribunals for the prosecution of war crimes, and United States domestic law all establish an accused's fundamental right to represent himself, and the concurrent right to refuse the services of appointed defense counsel. This recognized right of self-representation "assures the accused of the right to participate in his or her defense, including directing the defense, rejecting appointed counsel, and conducting his or her own defense under certain circumstances." M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 Duke J. Comp. & Int'l L. 235, 283 (Spring 1993). Not since the Star Chamber of 16th and 17th century England, has defense counsel been forced upon an unwilling accused. *Faretta v. California*, 422 U.S. 806, 821 (1975).

The International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (AMCHR), and the Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF) all recognize an accused's right to represent himself in criminal proceedings.[1] ICCPR, Article 14(3)(d); AMCHR, Article

[1] The United States has ratified the ICCPR (http://www.unhchr.ch/pdf/report.pdf). The AMCHR and CPHRFF are cited as evidence of customary international law.

8(2)(d); CPHRFF, Article 6(3)(c); Bassiouni at 283. Representative of these three treaties is the ICCPR's mandate that "in the determination of any criminal charge against him, everyone shall be entitled . . . to defend himself in person or through legal assistance of his own choosing." ICCPR, Article 14(3)(d). The plain language of this provision establishes an accused's right to represent himself.

The right of self-representation is enforced by the both of the current international tribunals established to prosecute violations of the law of war. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) both allow for self-representation before the tribunal. Statute of the ICTY, Article 21(4)(d); Statute of the ICTR, Article 20(4)(d).

It is worth noting that the World War II international military tribunals also recognized the right of self-representation. The rules of procedure governing the Nuremberg military tribunals provided that "a defendant shall have the right to conduct his own defense."[2] Similarly, the tribunal for the Far East recognized an accused's right to forgo representation by counsel except where the Tribunal believed that appointment of counsel was "necessary to provide for a fair trial."[3]

The internationally recognized right of self-representation in criminal proceedings is consistent with United States domestic law. The Sixth Amendment of the United States Constitution, as well as English and Colonial jurisprudence, support the right of self-representation. In *Faretta v. California*, the Supreme Court found that "forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." 422 U.S. at 807. In surveying the long history of English criminal jurisprudence, the Supreme Court concluded that only one tribunal "adopted a practice of forcing counsel upon an unwilling defendant in a criminal proceeding" – the Star Chamber. *Id.* at 821. The Star Chamber which was of "mixed executive and judicial character" and "specialized in trying 'political' offenses . . . has for centuries symbolized disregard of basic individual rights." *Id.*

Soon after the disestablishment of the Star Chamber the right of self-representation was again formally recognized in English law:

> The 1695 [Treason Act] . . . provided for court appointment of counsel, *but only if the accused so desired.* Thus, as new rights developed, the accused retained his established right 'to make what statements he liked.' The right to counsel was viewed as guaranteeing a choice between representation by counsel and the traditional practice of self-representation. . . . At no point in this process of reform in England was counsel ever forced upon the defendant. The common-law rule . . . has

[2] Rule 2(d), Nuremberg Trial Proceedings Vol. 1 Rules of Procedure (Nuremberg Proceedings); Rule 7(a), Rules of Procedure Adopted by Military Tribunal I in the Trial of the Medical Case (Medical Case); Rule 7(a), Uniform Rules of Procedure, Military Tribunals, Nuremberg, Revised to 8 January 1948 (Uniform Rules) (http://www.yale.edu/lawweb/avalon/imt/imt.htm#rules).

[3] Article 9(c), Charter of the International Military Tribunal for the Far East (Far East Tribunal) (http://www.yale.edu/lawweb/avalon/imtfech.htm).

> evidently always been that 'no person charged with a criminal offence can have counsel forced upon him against his will.'

Faretta, 422 U.S. at 825-26 (footnotes and internal citations omitted).

This common law approach continued in Colonial America, where "the insistence upon a right of self-representation was, if anything, more fervent than in England." *Id.* at 826.

> This is not to say that the Colonies were slow to recognize the value of counsel in criminal cases. . . . At the same time, however, the basic right of self-representation was never questioned. We have found no instance where a colonial court required a defendant in a criminal case to accept as his representative an unwanted lawyer. Indeed, even where counsel was permitted, the general practice continued to be self-representation.

Id. at 827-28 (footnote omitted).

Further, there can be no legitimacy to a view that counsel can be forced upon an unwilling defendant for the defendant's own good:

> It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. . . . The right to defend is personal . . . . It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'

Faretta, 422 U.S. at 834 (internal citation omitted).

Finally, rules of professional responsibility governing attorneys' conduct also recognize an individual's right to self-representation. In discussing the formation of a client-attorney relationship, one commentary observes "The client-lawyer relationship ordinarily is a consensual one. A client ordinarily should not be forced to put important legal matters into the hands of another or accept unwanted legal services." *Restatement 3d of the Law Governing Lawyers*, American Law Institute (2000), §14. Similarly, §1.16(a)(3) of the American Bar Association's Model Rules of Professional Responsibility, which exists in each of the Service's rules of professional responsibility, "recognizes the long-established principle that a client has a nearly absolute right to discharge a lawyer." *The Law of Lawyering*, Hazard & Hodes, Aspen Law & Business 2003 (3d ed.), 20-9.

Treaties, procedures of international tribunals, Anglo-American common law, current domestic law, and rules of professional responsibility are unanimous in recognizing a criminal accused's right to self-representation. The only contrary provisions are those found in the procedural rules contained in the orders and instructions designed to implement the President's Military Order establishing the military commissions.

B. An Accused has a Fundamental Right to Counsel of His Own Choosing Before a Military Commission.

The International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (AMCHR), and the Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF) all recognize an accused's right to be represented by counsel of his own choosing. ICCPR, Article 14(3)(b) and (d); AMCHR, Article 8(2)(d); CPHRFF, Article 6(3)(c). The plain language of these provisions unequivocally establish such a right.

Further, the right to counsel of choice is enforced by the both of the current international tribunals established to prosecute violations of the law of war. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) both allow for representation by counsel of one's own choosing before the tribunal. Statute of the ICTY, Article 21(4)(d); Statute of the ICTR, Article 20(4)(d).

Historically, the Nuremburg military tribunals also recognized the right of an accused to be represented by counsel his own selection, with two of the tribunals requiring only that "such counsel [be] a person qualified under existing regulations to conduct cases before the courts of defendant's country, or [be] specially authorized by the Tribunal."[4] Interestingly, the military tribunal for the Far East and one of the Nuremberg tribunals imposed no limitations on an accused's choice of counsel, although the former did provide for "disapproval of such counsel at any time by the Tribunal."[5]

The internationally recognized right of self-representation in criminal proceedings is consistent with United States domestic law. The Sixth Amendment of the United States Constitution supports the right to counsel of choice; over seventy years ago the Supreme Court wrote "it is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice." *Powell v. Alabama,* 287 U.S. 45, 53 (1932). While this right is not absolute, its "essential aim . . . is to guarantee an effective advocate for each criminal defendant." *Wheat v. United States*, 486 U.S. 153, 159 (1988).

The right of a criminal accused to be represented by counsel of his own choosing is widely recognized in international and domestic law as being an essential part of the

[4] Rule 7(a), Medical Case; Rule 7(a), Uniform Rules, note 2, infra.
[5] Article 9(c), Far East Tribunal; Rule 2(d), Nuremberg Proceedings, note 3, infra.

right to present a defense. The decision as to who qualifies as an effective advocate for a foreign national charged with war crimes before a military commission is an individual one which should be permitted each accused. Rules governing military commissions that limit an accused's choice of counsel based solely on the counsel's nationality impermissibly infringe on the right to present a defense, and thus are inconsistent with the law.

C. The Military Commission Must Respect an Accused's Right to Self-Representation and Choice of Counsel.

Treaties, signed by the Executive and ratified by the Senate, are binding law. U.S. Constitution, Article VI, Clause 2 ("Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land"). The ICCPR has been signed and ratified by the United States. Furthermore, the President has ordered executive departments and agencies to "fully respect and implement its obligations under the international human rights treaties to which [the United States] is a party, including the ICCPR." Executive Order 13,107, Section 1(a), 61 Fed.Reg. 68,991 (1998). The Executive Order provides that "all executive departments and agencies . . . including boards and commissions . . . shall perform such functions so as to respect and implement those obligations fully." Executive Order 13,107, Section 2(a).

The commission is also bound by customary international law. Customary international law is developed by the practice of states and "crystallizes when there is 'evidence of a general practice accepted as law.'" Yoram Dinstein, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 5 (Cambridge University Press 2004). The United States considers itself bound by customary international law in implementing its law of war obligations. Department of Defense Directive (DODD) Number 5100.77, DoD Law of War Program, Dec. 9, 1998, para. 3.1 ("The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law."); DODD Number 2310.1, DoD Program for Enemy Prisoners of War (EPOW) and Other Detainees, Aug. 18, 1994, para. 3.1 ("The U.S. Military Services shall comply with the principles, spirit, and intent of the international law of war, both customary and codified, to include the Geneva Conventions."); Field Manual 27-10, The Law of Land Warfare, July 1956, Chapter 1, Section I, para. 4 (the law of war is derived from both treaties and customary law).

Finally, Article 21, Uniform Code of Military Justice, which the President cites as authority for the military commissions, recognizes that jurisdiction for military commissions derives from the law of war. 10 U.S.C. Section 821 (jurisdiction for military commissions derives from offenses that "by the law of war may be tried by military commission"); see also Manual for Courts-Martial, Part I, para. 1 (international law, which includes the law of war, is a source of military jurisdiction). Just as the jurisdiction of military commissions are bounded by the law of war, so the procedures

followed by military commissions must comply with the law of war, whether it be codified or customary.

The ICCPR, AMCHR, CPHRFF, ICTY and ICTR rules, and United States domestic law establish that self-representation and counsel of one's choosing are recognized as rights that must be afforded as part of one's ability to present a defense. Additional Protocol I to the Geneva Conventions provides that a court trying an accused for law of war violations "shall afford the accused before and during his trial all necessary rights and means of defence." Geneva Conventions (1949), Additional Protocol I, Article 75, para. 4(a). The United States considers Article 75 of Additional Protocol I to be applicable customary international law. William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 Yale J. Int'l L. 319, 322 (Summer 2003)("[the United States] regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.")

The military commission is bound by treaties, international agreements, and customary international law, all of which recognize an accused's right to self-representation and choice of counsel. Any provisions in the President's Military Order, or the Military Commission Orders and Instructions, that conflict with those rights are unlawful.

5. Attached Files.

a. Memorandum, dated 11 May 2004, "Request for Modification of Military Commission Rules to Recognize the Right of Self-Representation, *United States v. al Bahlul*."

6. Oral argument.

Counsel take no position on whether oral argument is required.

7. Legal authority.

a. M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 Duke J. Comp. & Int'l L. 235, 283 (Spring 1993)
b. *Faretta v. California*, 422 U.S. 806, 821 (1975)
c. International Covenant on Civil and Political Rights (http://www1.umn.edu/humanrts/instree/ainstls1.htm)
d. American Convention on Human Rights (http://www1.umn.edu/humanrts/instree/ainstls1.htm)
e. Convention for the Protection of Human Rights and Fundamental Freedoms (http://www1.umn.edu/humanrts/instree/ainstls1.htm)
f. Statute of the International Criminal Tribunal for the Former Yugoslavia (http://www1.umn.edu/humanrts/instree/ainstls1.htm)

g. Statute of the International Criminal Tribunal for Rwanda (http://www1.umn.edu/humanrts/instree/ainstls1.htm)

h. Nuremberg Trial Proceedings Rules of Procedure (http://www.yale.edu/lawweb/avalon/imt/imt.htm#rules)

i. Rules of Procedure Adopted by Military Tribunal I in the Trial of the Medical Case (http://www.yale.edu/lawweb/avalon/imt/imt.htm#rules)

j. Uniform Rules of Procedure, Military Tribunals, Nuremberg (http://www.yale.edu/lawweb/avalon/imt/imt.htm#rules).

k. *Restatement 3d of the Law Governing Lawyers*, American Law Institute (2000)

l. *The Law of Lawyering*, Hazard & Hodes, Aspen Law & Business 2003 (3d ed.)

m. *Powell v. Alabama*, 287 U.S. 45, 53 (1932)

n. *Wheat v. United States*, 486 U.S. 153, 159 (1988)

o. U.S. Constitution

p. Executive Order 13,107, 61 Fed.Reg. 68,991 (1998) (http://www.archives.gov/federal_register/executive_orders/executive_orders.html)

q. Yoram Dinstein, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 5 (Cambridge University Press 2004)

r. Department of Defense Directive Number 5100.77 (http://www.dtic.mil/whs/directives/)

s. Department of Defense Directive Number 2310.1 (http://www.dtic.mil/whs/directives/)

t. Field Manual 27-10, The Law of Land Warfare, July 1956 (http://www.usapa.army.mil/)

u. Article 21, UCMJ, 10 U.S.C. Section 821

v. Manual for Courts-Martial

w. Geneva Conventions (1949), Additional Protocol I (http://www1.umn.edu/humanrts/instree/ainstls1.htm)

x. William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 Yale J. Int'l L. 319, 322 (Summer 2003) (http://www.ihlresearch.org/ihl/)

/s/
Philip Sundel
LCDR, JAGC, USN
Detailed Defense Counsel

/s/
Mark A. Bridges
MAJ, JA, USA
Assistant Detailed Defense Counsel

UNITED STATES	)	
	)	ANSWERS TO THE PRESIDING
v.	)	OFFICER'S QUESTIONS ON THE ISSUE
	)	OF SELF-REPRESENTATION
ALI HAMZA SULEIMAN AL BAHLUL	)	
	)	
	)	October 25, 2004

The following is the Prosecution's responses to the Presiding Officer's questions concerning self-representation.

a. A candid consideration of the evidence and a statement by counsel concerning whether they believe any closed sessions or presentation of protected information will be necessary. Part of the answer to this issue will be an explicit statement that a closed session or presentation of protected information is, is not, or may be required.

In our proposed Protective Order, the Accused is entitled to see FOUO and Law Enforcement Sensitive information that is considered protected information. We intend to introduce a lot of this form of protected information, but it should not create any issues with respect to the Accused's access and preparation.

Depending on the Accused's theory of the case, the Prosecution may introduce a limited amount of classified (and thereby protected information) in either the case in chief or in rebuttal. The Accused would not be entitled to see unsanitized versions of this information.

b. **The procedural problem involved in having the Commission determine the issue of self-representation when the Commission has not been subject to voir dire on behalf of Mr. Al Bahlul. (That is, for the Commission to decide a question of fact or law, the Commission has to be established. Assume that for the Commission to be established it should be subject to voir dire and a decision on challenges. Who will represent Mr. Al Bahlul in this process when the question presented to the Commission is who is representing him?)**

LCDR Sundel and Major Bridges are the counsel detailed to this Commission. Until relieved by competent authority, they are to continue to represent the Accused to include during any voir dire. They have previously asked to be relieved by competent authority (Chief Defense Counsel), and that request was denied.

To ensure that ethics issues are not problematic, the Presiding Officer and or Commission as a whole should order that LCDR Sundel and Major Bridges represent the Accused through voir dire and other preliminary matters. This is consistent with Navy JAGINST 5803.1B Rule 1.16(c) which states that "when ordered to do so by a tribunal or other competent authority, a covered attorney shall continue representation notwithstanding good cause for terminating the representation." This is consistent with the ABA Model Rules.

Our situation is unique as the Commission as a whole is the finder of fact and law. In a traditional situation, the Accused is represented by detailed counsel during the colloquy used to determine if the accused qualifies for self-representation. This colloquy is normally only conducted in the presence of the judge.

The Prosecution believes that Detailed Defense Counsel should represent the Accused during voir dire and through the colloquy. At that point, the Commission can decide if they desire to certify this issue as an interlocutory question. If they decide not to, then current Commission Law prevails and the Accused is not entitled to represent himself. If the question is certified as an interlocutory question, and if rules are amended to permit self-representation, the Accused should be provided the opportunity to conduct additional voir dire in his capacity as a pro se defendant.

It is noteworthy that "the right to self-representation complements the right to counsel and is not meant as a substitute thereof." M. Cherif Bassiouni, Human Rights in the Context of Criminal Justice: Identifying International Protections and Equivalent Protections in National Constitutions, 3 Duke J. Comp. & Int'l L. 235, 283 (1993).

c. **Should the Appointing Authority consider the challenges made in US v. Hamdan and US v. Hicks as reflecting the challenges of any competent counsel and use them for US v. Al Bahlul? Additionally, assuming that members originally appointed to sit on the defendant's trial were challenged and removed in the cases of Hamdan and Hicks, are those members required to be available for voir dire in US v. al Bahlul?**

This issues appears either moot or at a minimum not yet ripe for discussion. The Appointing Authority has already stated his position that "official orders appointing replacement commission members for the cases of . . . United States v. al Bahlul will be issued at a future date." We desire to reserve comment until these official orders are issued.

d. **Is self-representation required in order to provide Mr. Al Bahlul a full and fair trial, and the authority that requires allowing the defendant to represent himself notwithstanding the current state of Commission Law?**

The Prosecution's position is that current Commission Law does not permit self-representation. The sole basis for certifying this as an interlocutory issue is the requirement that a full and fair trial be provided. Based upon the case law identified in the submissions of both the Prosecution and the Defense, there appears to be no precedent for denying the opportunity to represent oneself (where standby counsel are also appointed), and therefore we believe self-representation is necessary for a full and fair trial unless and until the Accused forfeits this opportunity.

e. **Are current detailed defense counsel permitted or required to argue the issue of self-representation to the Commission, given Mr. Al Bahlul's expressed desire that he does not wish detailed counsel to represent him?**

Yes. As previously discussed, these detailed counsel are to represent the Accused until relieved by an appropriate authority. Even in cases where pro se representation is permitted, the detailed counsel remain on the case until the colloquy is conducted where the accused demonstrates that he is capable of self representation.

As it is the Prosecution's position that a colloquy should also be conducted, the Accused will be provided an opportunity to put on the record his position as to whether he desires to engage in self-representation and this will be part of what is forwarded to the Appointing Authority should it be certified.

The discussion of McKaskle v. Wiggins below demonstrates the active role that a standby counsel can engage in even against the wishes of the accused. More on point is the case of Prosecutor v. Seselj, Case No. IT-03-67-PT, Decision on Prosecution's Motion for Order Appointing Counsel, (ICTY Order of May 9, 2003). In this case, the Trial Chamber held that things are examined on a case by case basis and that even in the case of an accused desiring no assistance and wanting to proceed pro se (accused was a qualified lawyer), it was appropriate to assign counsel in the interest of justice. Id. at para 20. Permitting counsel to represent such an accused in some capacity may be necessary for a "fair trial which is not only a fundamental right of the accused, but also a fundamental interest of the Tribunal related to its own legitimacy." Id. at para 21. Similarly, Detailed Defense Counsel in this case should zealously represent this Accused unless the Accused is permitted to engage in some form of self-representation. Absent this requirement, the Prosecution contends that a full and fair trial for the Accused may be jeopardized.

f. **If detailed defense counsel are permitted or required to represent the defendant on the limited issue of whether self-representation shall be allowed, and detailed defense counsel believe that self-representation is not in the defendant's best interests, can or should detailed defense counsel argue in favor of self-representation?**

Until this issue is formally resolved either through a Commission decision, or the certification of an interlocutory question, the Detailed Defense counsel should argue for self-representation on the Accused's behalf. Examining ABA Defense Counsel Standard 4-5.2, while not specifically mentioned, the desire to engage in self-representation appears to be the type of decision that belongs to the Accused and is not a strategic or tactical decision that belongs to counsel. Furthermore Rule 1.2(c)of the Rules of Professional Responsibility states that a "covered attorney shall follow the client's well-informed and lawful decisions concerning case objectives, **choice of counsel**, forum, pleas, whether to testify, and settlements.

g. **If detailed defense counsel are permitted or required to represent the defendant on the limited issue of whether self-representation shall be allowed, and detailed defense counsel believe that self-representation would deprive the defendant of a full and fair trial, can or should detailed defense counsel argue in favor of self-representation?**

The hypothetical is not the situation at hand. Detailed Defense Counsel have been filing correspondence for months stating that they believe the Accused is entitled to represent himself.

It is recommended that the Commission should not exceed the scope of the question with regard to these particular facts in resolving this issue.

h. **Assuming that Mr. Al Bahlul is allowed to represent himself, what procedures might be used if there is a closed session from which the defendant is excluded and at which evidence is presented to the Commission that the Commission might consider? The answer to this issue will not be limited to only an assertion there should be no closed sessions.**

At the outset, the Accused must be told that there may be closed sessions involving classified information and that he will not be able to be present at these sessions. Absent an affirmative understanding and acknowledgement of this condition, the Accused should not be permitted to represent himself. Furthermore, he should be reminded of his decision to engage in self-representation and its impact each time we going into a protected session where the Accused cannot be present.

While not directly applicable, under the Classified Information Procedures Act (CIPA), court sessions involving classified information are routinely held outside the presence of the accused. 18 U.S.C. app. 3 (1980); United States v. bin Laden, 2001 U.S. Dist Lexis 719 (S.D.N.Y. 2001). In the bin Laden case the defendants were not given security clearances and were denied access to the relevant classified information in the case.

Standby counsel in this case should be required to represent the Accused's interests at any closed session where the Accused is not present. Part of this representation should include advocating for redacted or sanitized versions of the classified documents that can then be provided to the Accused. To the extent not requiring the disclosure of classified information, the Accused should also be involved in this process. In bin Laden, a defendant argued that his Sixth Amendment right was violated because his attorneys could not effectively confront the evidence against him without his input. Id. The court held that mere speculation on this issue would not override the compelling interest to protect classified information. Id. The Prosecution can state in good faith that it does not intend to introduce more than a few pages of classified information against the Accused, and depending on the Accused's strategy, there may be no need to introduce any classified information.

The Moussaoui case demonstrates that such closed sessions can be held with the absence of a pro se defendant who is not being cooperative with his standby counsel. In the context of an al Qaida member charged with a conspiracy to commit acts of terrorism transcending national boundaries, it was held that the interest of the United States in protecting national security information outweighed the pro se accused's desire to review the information. United States v. Moussaoui, 2002 U.S. Dist. Lexis 16530 (E.D. Va. August 23, 2002)

i. **Assuming that Mr. Al Bahlul is allowed to represent himself, how would stand-by counsel be appointed and how would they communicate with Mr. Al Bahlul?**

The Commission could rule that standby counsel are required and could order the Chief Defense Counsel to appoint standby counsel. The Commission is permitted great discretion in defining the role of standby counsel. A starting point would be to ask the Accused how he

prefers to communicate with standby counsel. Regardless, standby counsel would need to be present at all stages in the proceedings and available to perform any and all functions the Commission deems appropriate for a full and fair trial mindful of the fact that the Accused be permitted to represent himself both in fact and in appearance.

The Military Commission is unique in having the entire panel as finders of fact and law. Throughout any commission trial, they will be exposed to a variety of evidence they would not ordinarily see and arguments they would not ordinarily hear if solely finders of fact. While it is true that the greater role of standby counsel is at times justified because they perform actions outside the presence of the jury, the Commission system is built around experienced, proven officers who must be entrusted to maintain the perspective that the Accused is making his own trial decisions. Furthermore, the Supreme Court has ruled that a categorical bar on participation by standby counsel in the presence of the jury is unnecessary. McKaskle v. Wiggins, 465 U.S. 168, 181 (1984)

In McKaskle, standby counsel were quite active as they frequently expressed their views to the judge, made motions, dictated proposed strategies into the record, and registered objections to the prosecution's evidence. Id at180. There were even open disagreements between the accused and his standby counsel. Id. at 181. However, the trial judge cautiously and correctly was quick to opine that any conflicts between the tactical calls of the accused and standby counsel would be resolved in favor of the accused. Id.

In McKaskle, the Supreme Court saw a more active role for standby counsel as needed for a just trial. The Court specifically reversed the judgment of a lower court that had held that "standby counsel is to be seen and not heard" and that his "presence is there for advisory purposes only, to be used or not used as the defendant sees fit." Id. at 173.

The Supreme Court specifically said that there is no infringement of pro se rights when standby counsel assists in: (1) helping to overcome routine procedural or evidentiary obstacles; (2) assisting in the introduction of evidence; (3) helping to object to evidence the accused clearly does not want admitted; and (4) ensuring the accused complies with basic courtroom protocol and procedure. Id. at 183. What is clear is that the accused's lack of desire for standby counsel is not a "free pass" for standby counsel to abandon playing an important and significant role in the trial.

The Seseli Trial Chamber has provided excellent guidance on the role of standby counsel that should be the Commission's starting point in defining this role. It includes requiring standby counsel to:

(1) assist the accused in pretrial preparation when requested by the accused;

(2) assist the accused in presentation of the trial case when the accused requests;

(3) receive copies of all court filings and discovery;

(4) be present in the courtroom for all proceedings;

(5) be actively engaged in substantive preparation of the case;

(6) address the Court when requested by the accused or Trial Chamber;

(7) offer advice or suggestions to the accused when they see fit;

(8) question protected or sensitive witnesses when so ordered; and

(9) take over representation if accused forfeits ability to proceed pro se.

j. **Assuming that Mr. Al Bahlul is allowed to represent himself, how would the issues of access to evidence be handled?**

The majority of the evidence is FOUO or Law Enforcement sensitive and the Accused is entitled to see this evidence. If it is classified, the Standby counsel would have to view it on the Accused's behalf, and consistent with the Accused's interests, they could represent the Accused in a quest to obtain declassified sanitized versions of the evidence.

k. **Assuming that Mr. Al Bahlul is allowed to represent himself, is there any requirement that those matters to which the defense is entitled under Commission Law - less classified or protected information - must be translated into the defendant's language?**

The Accused should maintain the relationship he has with his current translator and this translator should be available to either read or translate documents for the Accused as the Accused deems necessary for him to adequately represent himself. There is no independent burden on the Prosecution to translate every document.

l. **Assuming that Mr. Al Bahlul is allowed to represent himself, is there any requirement that the accused be allowed access to that information or those sessions that he would not have access to were he being represented by detailed defense counsel under the current state of Commission Law?**

No. Consistent with Moussaoui and other cases, one does not get access to classified evidence or evidence he is otherwise not entitled to see simply because he engages in self-representation. As the case law holds, so long as the Accused is informed up front of the limitations he will experience should he desire to pursue self-representation, it is completely permissible to have standby counsel represent his interests with respect to this evidence.

m. **Assuming that Mr. Al Bahlul is allowed to represent himself, what are the consequences of, possible uses of, and ability of the Commission to consider any and all statements made by Mr. Al Bahlul, while representing himself at times when Mr. al Bahlul is not a witness?**

The standard for admissibility is does the evidence have probative value to a reasonable person. If in the course of engaging in self-representation the Accused says something that has probative value to a reasonable person in relation to this case, it qualifies as admissible evidence. Just as the Accused has previously made admissible incriminating statements on the record, his self-representation does alter his status and provide him greater protection.

n. **Assuming that Mr. Al Bahlul is allowed to represent himself, the methods by which Mr. Al Bahlul would be able to control his notes and other working documents given his current status and security precautions taken with detainees?**

At the time of this filing, I have not resolved this issue with JTF GTMO personnel. We will continue to pursue an answer.

o. **Any other problems or issues which might arise from allowing Mr. Al Bahlul to represent himself.**

Not aware of any at this time.

[redacted]
Commander, JAGC, U.S. Navy
Prosecutor

THE DEPUTY SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301

DEC 10 2004

MEMORANDUM FOR GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
APPOINTING AUTHORITY FOR MILITARY COMMISSIONS
LEGAL ADVISOR TO THE APPOINTING AUTHORITY FOR MILITARY COMMISSIONS
CHIEF PROSECUTOR FOR MILITARY COMMISSIONS
CHIEF DEFENSE COUNSEL FOR MILITARY COMMISSIONS

SUBJECT: Request of Detailed Defense Counsel to Modify Military Commission Rules to Recognize Right of Self-Representation

I have reviewed the attached request by Lieutenant Commander Philip Sundel, United States Navy and Major Mark Bridges, United States Army, Defense Counsel for Mr. Ali Hamza Ahmed Suliman al Bahlul, that Secretary Rumsfeld change *Military Commission Order No. 1*, to allow for self-representation by persons brought before a military commission. I am returning this request without taking action. This Memorandum shall serve as guidance for similar requests in the future.

Following the issuance of a Reason to Believe (RTB) memorandum by the President, all questions concerning the Military Commission process, its rules and issues applicable to a given case shall be addressed to and decided by the Appointing Authority. After a referral of charges and detailing of a Presiding Officer to a case, all questions shall be addressed first to the Presiding Officer unless a process specifically set forth in any commission rule provides otherwise.

Paul Wolfowitz

Attachments:
As stated

OSD 19463-04

RE 101 (al Bahul)
Page 87 of 114

No. 04-702

IN THE

Supreme Court of the United States

SALIM AHMED HAMDAN,
Petitioner,

v.

DONALD H. RUMSFELD, ET AL.,
Respondents.

On Petition for Writ of Certiorari Before Judgment to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF MILITARY ATTORNEYS DETAILED TO REPRESENT ALI HAMZA AHMAD SULAYMAN AL BAHLUL BEFORE A MILITARY COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

MAJOR MARK A. BRIDGES,*
U.S. ARMY
LCDR PHILIP SUNDEL,
U.S. NAVY
OFFICE OF CHIEF DEFENSE COUNSEL, OFFICE OF MILITARY COMMISSIONS, OFFICE OF THE SECRETARY OF DEFENSE
1600 Defense Pentagon
Washington, D.C. 20301-1600
(703) 607-1521

* Counsel of Record

December 27, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THE RIGHT OF SELF-REPRESENTATION IS A FUNDAMENTAL TRIAL RIGHT APPLICABLE TO MILITARY COMMISSIONS	5
II. AN ACCUSED'S RIGHT OF SELF-REPRESENTATION CAN BE RENDERED MEANINGLESS IF OTHER COMMISSION RULES ARE ALLOWED TO DENY HIM THE RIGHT TO BE PRESENT AT TRIAL AND TO CONFRONT THE WITNESSES AGAINST HIM	10
CONCLUSION	16
APPENDIX A	
Order of the District Court of the District of Columbia, *al Qosi v. Bush*, December 17, 2004	1a
APPENDIX B	
Order of the District Court of the District of Columbia, *Hicks v. Bush*, December 15, 2004	3a

TABLE OF AUTHORITIES

FEDERAL CASES Page

al Qosi v. Bush, Civ. No. 04-1937 (PLF) (D.D.C. December 17, 2004) 4, 15
Faretta v. California, 422 U.S. 806 (1975) 5-7, 12
Hamdan v. Rumsfeld, 2004 U.S. Dist. LEXIS 22724 (D.D.C. November 8, 2004) 2, 11
Hicks v. Bush, Civ. No. 02-CV-0299 (CKK) (December 15, 2004) 4, 15
McKaskle v. Wiggins, 465 U.S. 168 (1984) 12-14
United States v. McDermott, 64 F.3d 1448 (10th Cir. 1995) 13
United States v. Taylor, 933 F.2d 307 (5th Cir. 1991) 13

FEDERAL CONSTITUTIONAL PROVISIONS

U.S. CONST., art. VI, cl. 2 9

REGULATIONS

Military Commission Instruction No. 4, 32 C.F.R. § 13.3 2
Military Commission Order No. 1, 32 C.F.R § 9.4 ..... 2, 11, 14
Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001) 2, 13-14

OTHER AUTHORITIES:

Charter of the International Military Tribunal for the Far East 8
Exec. Order No. 13,107, 63 Fed. Reg. 68,991 (1998) 9
Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316, 74 U.N.T.S. 135 8

TABLE OF AUTHORITIES—Continued

Page

International Covenant on Civil and Political Rights. G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 9

JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 79 (2d ed. 2003)..... 10

M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections In National Constitutions*, 3 Duke J. Comp. & Int'l L. 235 (Spring 1993) 10

Milosevic v. Prosecutor, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, Nov. 1, 2004..... 7

Prosecutor v. Tadic, Case No. IT-94-1-A, ICTY, Trial Chamber, Decision of Defense Motion on Jurisdiction, Aug. 10, 1995..... 8

Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, reprinted in 16 I.L.M. 1391 (1977)..... 9

Rules of Procedure Adopted by Military Tribunal I in the Trial of the Medical Case..... 7

Rules of Procedure for the Trial of the German Major War Criminals, (Oct. 29, 1945) 7

Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598 7

TABLE OF AUTHORITIES—Continued

Page

Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at 1-2, U.N. Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 1159 7

Uniform Rules of Procedure, Military Tribunals, Nuernberg, (Revised 8 Jan 48) 7

William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 Yale J. Int'l L. 319 (Summer 2003) 9

IN THE

Supreme Court of the United States

No. 04-702

SALIM AHMED HAMDAN,
Petitioner,
v.

DONALD H. RUMSFELD, ET AL.,
Respondents.

On Petition for Writ of Certiorari Before Judgment to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF MILITARY ATTORNEYS DETAILED TO REPRESENT ALI HAMZA AHMAD SULAYMAN AL BAHLUL BEFORE A MILITARY COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE* [1]

Lieutenant Commander Philip Sundel and Major Mark A. Bridges are military counsel detailed to represent Ali Hamza Ahmad Sulayman al Bahlul, a detainee at Guantanamo Bay,

[1] This brief is filed with the consent of all parties. No counsel for a party in this case authored this brief in whole or in part and no person or entity other than the *amicus* made a monetary contribution to it. Filing and printing costs were paid by the Office of the Chief Defense Counsel, Office of Military Commissions.

Cuba, before a military commission convened to try "war crimes" pursuant to the President's Military Order of November 13, 2001.[2] The views expressed in this brief do not represent the official views of the United States Government.

Lieutenant Commander Sundel and Major Bridges submit this brief to highlight the importance of the confrontation issue addressed in *Rumsfeld v. Hamdan* to the related issue of self-representation presently being considered by Mr. al Bahlul's military commission—for Mr. al Bahlul to be able to exercise the right of self-representation in a meaningful way the related right of confrontation must also exist.

At his initial hearing on August 26, 2004, Mr. al Bahlul told the military commission that he wanted to represent himself during his trial for war crimes.[3] The Presiding Officer informed Mr. al Bahlul that the military commission rules did not allow an accused to represent himself,[4] a statement that is consistent with the existing provisions governing military commissions.[5] Nonetheless, the Presiding Officer directed the defense and prosecution to file briefs related to the self-representation issue, and stated he would not schedule further proceedings until a higher authority resolved the issue.[6]

---

[2] Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

[3] Dep't of Defense, Unofficial Transcript of Initial Hearing Before a Military Commission, *United States v. al Bahlul*, at 6-7, 15, *available at* http://www.defenselink.mil/news/Nov2004/d20041109hearing.pdf (visited Dec. 21, 2004).

[4] *Id.* at 6.

[5] Military Commission Order No. 1, para. 4(C)(4), 32 C.F.R § 9.4(c) (an accused "must be represented at all relevant times by Detailed Defense Counsel."); Military Commission Instruction No. 4, para. 3D(2), 32 C.F.R. § 13.3(c) ("Detailed Defense Counsel shall represent the Accused . . . notwithstanding any intention expressed by the Accused to represent himself.")

[6] Note 3, *supra*, at 19-20.

Ultimately, the prosecution agreed that an accused tried before a military commission must be afforded the right to represent himself.[7] Subsequent to that concession the Appointing Authority for Military Commissions continued all proceedings in the case, pending appointment of new commission members. While Mr. al Bahlul's request to represent himself was never acted on by the military commission, it is likely that it will be honored once commission proceedings resume.

SUMMARY OF ARGUMENT

There is no question more fundamental to a criminal proceeding than the question of who will represent the defendant. The answer to that question will shape the course of the proceeding. There is no right more fundamental than the right of a defendant to choose to represent himself. Domestic and international law recognize that right as being an indispensable element of a fair criminal process. *Amicus* anticipates that Mr. al Bahlul's request to represent himself before his military commission will be granted soon after his commission proceedings resume.

Along with recognizing the fundamental right of self-representation, however, military commissions must also be required to recognize the related right of an accused to be present at his own trial and to confront the witnesses against him. Otherwise, the power that presently exists to involuntarily exclude Mr. al Bahlul from closed sessions of his trial will render his right of self-representation meaningless. Since the right of confrontation inevitably impacts the right of self-representation, it is appropriate for the Court to grant Petitioner's request for a writ of certiorari prior to judgment

[7] Dep't of Defense, Prosecution Response to Defense Memo for Self-Representation and Right to Choice of Counsel, *United States v. al Bahlul*, *available at* http://www.defenselink.mil/news/Oct2004/d20041006pro.pdf (visited Dec. 21, 2004).

to address the District Court's recognition of the right of confrontation.

The right of self representation is integrally bound up with the second question presented in this case, that the "military commission . . . lacks jurisdiction and is improperly constituted because it . . . violates the Uniform Code of Military Justice and other federal guarantees." As the decision below recognized, a defendant's right to be present and to confront the witnesses against him is fundamental. The military commission abridges this fundamental right, asserting that the presence of counsel alone is enough. The view that a military commission is not bound by the longstanding right of confrontation, and that the President has the raw power to abridge these rights, cannot be correct. Judge Robertson disagreed on this specific question, finding that a defendant cannot be excluded from the courtroom. Should this Court affirm Judge Robertson's decision, it will necessarily end the uncertainty around the right to self-representation in the commission. This Court should grant certiorari before judgment to resolve this matter, which impacts not only Hamdan, but Bahlul and every defendant who will face a commission.

More generally, the need for certiorari before judgment has grown extreme because the Hamdan case has generated a crisis of uncertainty in the commission process. Indeed, the two other judges in the federal courts who have military commission cases before them have formally placed those cases in abatement pending the outcome of Petitioner's case. *al Qosi v. Bush,* Civ. No. 04-1937 (PLF) (D.D.C. December 17, 2004) (order), *infra* App. A; *Hicks v. Bush*, Civ. No. 02-CV-0299 (CKK) (December 15, 2004)(order), *infra* App. B. The commissions are halted, no one knows what the rules are, and the defendants languish waiting, perhaps for years, for ultimate resolution of these weighty matters. Such uncertainty is bad for accused and counsel, bad for the commissions

themselves, and bad for the interest in prompt and speedy justice.

ARGUMENT

I. THE RIGHT OF SELF-REPRESENTATION IS A FUNDAMENTAL TRIAL RIGHT APPLICABLE TO MILITARY COMMISSIONS.

One of the first matters addressed in any criminal proceeding is the question of who will represent the defendant. It is a decision that is central to the entire proceeding, and one which will affect all that follows. The central nature of this question is illustrated by the fact that the right of a defendant to choose to represent himself is universally recognized as a fundamental right in criminal trials. As the Court concluded in *Faretta v. California*, 422 U.S. 806 (1975), the right is implicit in the Sixth Amendment of the United States Constitution, and was long recognized in English and Colonial jurisprudence as one of the indispensable guarantees of a fair criminal justice system.

The Court opined in *Faretta* that "forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." 422 U.S. at 817. In surveying the history of self-representation in English criminal jurisprudence the Court concluded that only one tribunal "adopted a practice of forcing counsel upon an unwilling defendant in a criminal proceeding"—the Star Chamber. *Id.* at 821. A proceeding of "mixed executive and judicial character . . . . the Star Chamber has for centuries symbolized disregard of basic individual rights." *Id.*

Soon after the disestablishment of the Star Chamber the right of self-representation was formally recognized in English law:

> The 1695 [Treason Act] . . . provided for court appointment of counsel, *but only if the accused so desired.* Thus, as new rights developed, the accused retained his

> established right 'to make what statements he liked.' The right to counsel was viewed as guaranteeing a choice between representation by counsel and the traditional practice of self-representation. . . . At no point in this process of reform in England was counsel ever forced upon the defendant. The common-law rule . . . has evidently always been that 'no person charged with a criminal offence can have counsel forced upon him against his will.'

Faretta, 422 U.S. at 825-26 (emphasis in original, footnotes and internal citations omitted).

This common law approach continued in Colonial America, where "the insistence upon a right of self-representation was, if anything, more fervent than in England." *Id.* at 826.

> This is not to say that the Colonies were slow to recognize the value of counsel in criminal cases. . . . At the same time, however, the basic right of self-representation was never questioned. We have found no instance where a colonial court required a defendant in a criminal case to accept as his representative an unwanted lawyer. Indeed, even where counsel was permitted, the general practice continued to be self-representation.

Id. at 827-28 (footnote omitted).

The Court has even rejected the view that counsel can be forced upon an unwilling defendant for the defendant's own good:

> It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. . . . The right to defend is personal . . . . It is the defendant, therefore, who must be

> free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'

Faretta, 422 U.S. at 834 (internal citation omitted).

The right of self-representation is recognized as well in international tribunals. Both of the currently operating *ad hoc* international tribunals for the prosecution of war crimes provide for the right of self-representation. Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), art. 21(4)(d), adopted at New York, May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at 1-2, U.N. Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 1159; Statute of the International Criminal Tribunal for Rwanda (ICTR), art. 20(4)(d), adopted at New York, Nov. 8, 1994, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598. The ICTY Appeals Chamber recently reaffirmed this fundamental right in holding that the right of self-representation is "an indispensable cornerstone of justice," and cited *Faretta* in doing so. *Milosevic v. Prosecutor*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, Nov. 1, 2004, at para. 11.[8]

Historic precedence also recognizes the right of self-representation. Rules of procedure governing the post-World War II Nuremberg military tribunals provided that "a defendant shall have the right to conduct his own defense."[9] Similarly,

---

[8] *Available at* http://www.un.org/icty/milosevic/appeal/decision-e/041101.htm (visited Dec. 21, 2004).

[9] Rule 2(d), Rules of Procedure for the Trial of the German Major War Criminals, (Oct. 29, 1945); Rule 7(a), Rules of Procedure Adopted by Military Tribunal I in the Trial of the Medical Case (Medical Case); Rule 7(a), Uniform Rules of Procedure, Military Tribunals, Nuremberg, Re-

the war crimes tribunals held in the Pacific theater recognized an accused's right to forgo representation by counsel except where the Tribunal believed that appointment of counsel was "necessary to provide for a fair trial."[10]

Subsequently, the right of self-representation was implicitly guaranteed by the Geneva Conventions of 1949, formally adopting it as part of the law of armed conflict in treaties ratified by the United States. Common Article 3 of the Geneva Conventions requires "regularly constituted court[s] affording all the judicial guarantees which are recognized as indispensable by civilized peoples" in trials for law of war violations or other criminal offenses during armed conflict. Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316, 74 U.N.T.S. 135 [hereinafter GPW].[11] Domestic law, including treaties of the United States, as well as customary international law help define which judicial guarantees are "recognized as indispensable by civilized peoples."

The first additional protocol to the Geneva Conventions, which similarly provides "minimum" guarantees for "persons

---

vised to 8 January 1948 (Uniform Rules), *available at* http://www.yale.edu/lawweb/avalon/imt/imt.htm#rules (visited Dec. 21, 2004).

[10] Article 9(c), Charter of the International Military Tribunal for the Far East (Far East Tribunal), *available at* http://www.yale.edu/lawweb/avalon/imtfech.htm (visited Dec. 21, 2004).

[11] Although Common Article 3 is specifically addressed to "armed conflict not of an international character," its protections are widely recognized as a minimum due process guarantee in all armed conflicts. *Prosecutor v. Tadic*, Case No. IT-94-1-A, ICTY, Trial Chamber, Decision of Defense Motion on Jurisdiction, Aug. 10, 1995, at para. 67, *citing Nicaragua v. United States*, 1986 I.C.J. 4 (Merits Judgment of 27 June 1986), *available at* http://www.un.org/icty/tadic/trialc2/decision-e/100895.htm (visited Dec. 20, 2004)("the rules contained in common Article 3 constitute a 'minimum yardstick' applicable in both international and non-international armed conflicts.").

who are in the power of a Party to the conflict," is another source for understanding the "judicial guarantees" protected by Common Article 3. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 75, reprinted in 16 I.L.M. 1391 (1977) [hereinafter Protocol I]. Pursuant to Protocol I, persons may only be tried by "an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include . . . *all necessary rights and means of defense*." Protocol I, art. 75(4)(a) (emphasis added).[12]

The minimum trial rights which the United States is bound to afford are reiterated and further defined in human rights law such as the International Covenant on Civil and Political Rights. G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 [hereinafter ICCPR]. Not surprisingly, the ICCPR provides that a "minimum guarantee" that must be afforded "[i]n the determination of any criminal charge," is the right of an accused "to defend himself in person" if he so chooses. ICCPR, art. 14(3).[13]

---

[12] Although the United States has not ratified Protocol I because of disagreement with some of its provisions, the United States considers Article 75 of Protocol I to be applicable customary international law. William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 Yale J. Int'l L. 319, 322 (Summer 2003)("[the United States] regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.").

[13] The Executive branch is bound to apply the provisions of the ICCPR and Common Article 3, as informed by the customary international law recognized in Article 75 of Protocol I, in formulating military commission procedures, as both the ICCPR and GPW have been ratified by the United States. Their provisions are the "supreme Law of the Land." U.S. CONST. art. VI, cl. 2. The Executive branch is not free to disregard these individual rights, regardless of whether the treaties are considered self-executing. Exec. Order No. 13,107, 63 Fed. Reg. 68,991 (1998)(requiring all "execu-

The right of self-representation "assures the accused of the right to participate in his or her defense, including directing the defense, rejecting appointed counsel, and conducting his or her own defense under certain circumstances." M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 283 (Spring 1993). As even the prosecution has acknowledged the applicability of this fundamental right,[14] it is anticipated that Mr. al Bahlul's request to represent himself will be granted once his military commission proceedings recommence.

II. AN ACCUSED'S RIGHT OF SELF-REPRESENTATION CAN BE RENDERED MEANINGLESS IF OTHER COMMISSION RULES ARE ALLOWED TO DENY HIM THE RIGHT TO BE PRESENT AT TRIAL AND TO CONFRONT THE WITNESSES AGAINST HIM.

An accused's right of self-representation can be effectively gutted by procedures restricting his right to confront the witnesses against him and to be present at trial. Military commissions would allow just such a gutting, in the form of rules that permit an accused to be excluded from the courtroom during any proceeding and for a broad and loosely defined array of reasons.

Both the Presiding Officer of an individual military commission and the Appointing Authority responsible for all military commissions may close the proceedings any time one

---

tive departments and agencies . . . including boards and commissions . . . to respect and implement [international human rights obligations, including the ICCPR] fully."); JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 79 (2d ed. 2003)("the President must faithfully execute an otherwise non-self-executing treaty.").

[14] Note 7, *supra*.

of them believes that it is justified for "the protection of information classified or classifiable []; information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, includ ing prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national secu rity interests." Military Commission Order Number 1, para. 6B(3) [hereafter MCO No. 1], 32 C.F.R. § 9.6(b). This sweeping authority to close the proceedings may include exclusion of the accused from the courtroom. *Id.*

The power is not limited to hearings involving the discussion of preliminary matters such as discovery or the admissibility of evidence. Rather, it extends to any proceeding, and has already been shown to include *voir dire. Hamdan v. Rumsfeld*, 2004 U.S. Dist. LEXIS 22724 at *12, 14 (D.D.C. November 8, 2004).

Excluding an accused from essential proceedings would effectively deny a *pro se* accused his right of self-representation. Further, forcing counsel representation on a *pro se* accused for the limited purpose of representing him during closed sessions, as the prosecution in Mr. al Bahlul's military commission has suggested,[15] is no substitute. First, while detailed military defense counsel is permitted to remain in the courtroom at all times, he is prohibited from disclosing any information presented during a closed session to an accused that has been excluded from the proceeding. MCO No. 1, para. 6B(3).

---

[15] Dep't of Defense, Answer to Presiding Officer's Questions on the Issue of Self-Representation, para. h, *United States v. al Bahlul, available at* http://www.defenselink.mil/news/Oct2004/d20041029rep.pdf (visited Dec. 21, 2004).

More significantly, the right of self-representation necessarily includes the right of confrontation, and both of the rights belong to the accused, not counsel:

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be "informed of the nature and cause of the accusation," who must be "*confronted with the witnesses against him*," and who must be accorded "compulsory process for obtaining witnesses in his favor."

Faretta v. California, 422 U.S. at 819 (emphasis added). Any suggestion that an unwanted counsel could adequately represent the interests of the *pro se* defendant in a session of trial from which the accused has been excluded is a legal fiction.

> It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas. Cf. *Henry v. Mississippi*, 379 U.S. 443, 451; *Brookhart v. Janis*, 384 U.S. 1, 7-8; *Fay v. Noia*, 372 U.S. 391, 439. This allocation can only be justified, however, by the defendant's consent, at the outset, to accept counsel as his representative. An unwanted counsel "represents" the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense.

Id. at 820-21 (emphasis in original).

A *pro se* accused must be given "a fair chance to present his case in his own way." *McKaskle v. Wiggins*, 465 U.S. 168, 177 (1984). Because of the danger that multiple defense voices will confuse the defendant's message, limits must

be placed on "the extent of standby counsel's unsolicited participation":

> First, the *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury. This is the core of the *Faretta* right. If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak *instead* of the defendant on any matter of importance, the *Faretta* right is eroded.
>
> Second, participation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself.

Id. at 178 (emphasis in original). Standby counsel does not represent the accused and should not be perceived as doing so. *United States v. Taylor*, 933 F.2d 307, 312 (5th Cir. 1991)("the key limitation on standby counsel is that such counsel not be responsible—*and not be perceived to be responsible*—for the accused's defense. Indeed, in many respects, standby counsel is not counsel at all.")(emphasis in original). A standby counsel who speaks instead of the accused with respect to important matters violates the right of self-representation. *United States v. McDermott*, 64 F.3d 1448 (10th Cir. 1995)(exclusion of accused from thirty bench conferences, attended by standby counsel, violated the right of self-representation).

The ability of the *pro se* accused to present his defense is further complicated by the structure of military commissions. Unlike a court-martial or criminal trial in federal court, where issues of law are decided by a judge outside the presence of the jury, military commissions are comprised of members who serve as both judge and jury. *See* Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,833 § 4(c)(2) (Nov. 16, 2001) ("the

military commission sit[s] as the triers of both fact and law").[16] Thus, all proceedings before a military commission will be in the presence of the "jury." Any participation by standby or unwanted detailed defense counsel would take place before the ever-present military commission "jury." Such participation by counsel during a closed session would substantially interfere with tactical decisions by the accused and be viewed as destroying the commission's perception that the accused is representing himself, violating both parts of the *McKaskle* test.

Standby counsel's participation in the presence of the jury is "more problematic" than participation outside the jury's presence because "excessive involvement by counsel will destroy the appearance that the defendant is acting *pro se*." *McKaskle*, 465 U.S. at 181. In the presence of the jury, standby counsel, even over the accused's objection, may assist the accused "in overcoming routine procedural or evidentiary obstacles to the completion of some specific task, such as introducing evidence or objecting to testimony, *that the defendant has clearly shown he wishes to complete* . . . [and] to ensure the defendant's compliance with basic rules of courtroom protocol and procedure." *Id.* at 183 (emphasis added). When standby counsel ventures beyond these basic procedural functions, the accused's self-representation rights are eroded.

The right to represent oneself cannot be separated from the right to confrontation, and the military commission cannot be permitted to ignore these two related, fundamental rights. Resolution of the question of whether a defendant before a military commission is entitled to a meaningful exercise of

[16] To make matters worse, only one of the commission members—the presiding officer—need be a lawyer or "judge advocate." MCO No. 1, para. 4A, 32 C.F.R. § 9.4(a). Thus, a majority of the required 3 to 7 commission members are likely to be non-lawyers. *Id.*

the right of self-representation is sufficiently central to the conduct of military commissions to justify the Court addressing the related confrontation issue presented in Petitioner's request for a writ of certiorari before judgment. Resolution of the correctness of Judge Robertson's recognition of the right of confrontation will also lift the veil of uncertainty presently surrounding all military commissions.[17] *See al Qosi v. Bush,* Civ. No. 04-1937 (PLF) (D.D.C. December 17, 2004) (order abating federal court proceedings pending higher court consideration of *Hamdan*), *infra* App. A; *Hicks v. Bush,* Civ. No. 02-CV-0299 (CKK) (December 15, 2004)(same), *infra* App. B.

[17] Uncertainty surrounding an accused's fundamental rights also greatly complicated the ability of counsel to conform to ethical requirements in the performance of their duties. Early resolution of the issues raised in *Hamdan* will facilitate appropriate responses to ethical quandaries that will inevitably arise within the commission process. Conversely, continued uncertainty will make resolution of questions involving professional responsibility obligations much more problematic.

CONCLUSION

For the foregoing reasons, *amicus* Military Attorneys Detailed to Represent Ali Hamza Ahmad Sulayman al Bahlul Before a Military Commission urges this Court to grant the petition for writ of certiorari before judgment.

Respectfully submitted,

MAJOR MARK A. BRIDGES,*
U.S. ARMY
LCDR PHILIP SUNDEL,
U.S. NAVY
OFFICE OF CHIEF DEFENSE
COUNSEL, OFFICE OF
MILITARY COMMISSIONS,
OFFICE OF THE SECRETARY
OF DEFENSE
1600 Defense Pentagon
Washington, D.C. 20301-1600
(703) 607-1521

* Counsel of Record

December 27, 2004

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 04-1937 (PLF)

IBRAHIM AHMED MAHMOUD AL QOSI,
Plaintiff,

v.

GEORGE W. BUSH, *et al.*,
Defendants.

ORDER

Petitioner Ibrahim Ahmed Mamoud al Qosi is a detainee at the United States Naval Station at Guantanamo Bay, Cuba. On November 8, 2004, Mr. al Qosi filed a petition for a writ of habeas corpus challenging, *inter alia,* his continued detention at Guantanamo, the United States government's designation of Mr. al Qosi as an "enemy combatant," and the government's intention to subject him to trial by military commission.

Many of the arguments raised by Mr. al Qosi were also raised by petitioner Salim Ahmed in *Hamdan v. Rumsfeld,* No. 04-1519 (D.D.C. filed Sept. 2, 2004). On November 8, 2004, Judge Robertson issued a memorandum opinion resolving some of those questions in favor of Mr. Hamdan and denying the government's motion to dismiss the petition. *See Hamdan v. Rumsfeld,* 2004 U.S. DIST LEXIS 22724. The government has noticed an appeal from that ruling, and the Court of Appeals for the District of Columbia Circuit has set oral argument for March 8, 2005. *See Hamdan v. Rumsfeld,* No. 05-5393 (D.C. Cir. filed Nov. 16, 2004).

In light of the court of appeals' consideration in *Hamdan* of issues that might prove dispositive in this case, and of news reports indicating that the government has suspended its system for the trial of individuals like Mr. Hamdan and Mr. al Qosi by military commissions at Guantanamo Bay, the Court on November 18, 2004 directed the parties to confer and, if possible, agree on a stipulation that would hold this case in abeyance pending the resolution of *Hamdan* by the court of appeals. The parties, however, could not agree to a stipulation. Petitioner instead filed a "Statement Opposing Abeyance," and the parties came before the Court for a status conference on December 13, 2004.

At the status conference, counsel for petitioner further articulated his reasons for opposing abeyance, while the government argued in favor of staying proceedings pending resolution of *Hamdan*. The government also tendered to the Court a directive from John D. Altenburg, Jr., Appointing Authority for Military Commissions in the Office of the Secretary of Defense, indicating that the military commission proceeding against petitioner would be held in abeyance pending resolution of *Hamdan* by the court of appeals. Counsel for the government represented that such abeyance will remain in effect until the court of appeals issues its mandate in *Hamdan*.

Upon consideration of the entire record in this case, and the arguments and representations of counsel, it is hereby

ORDERED that all proceedings in this matter will be held in abeyance pending resolution of *Hamdan v. Rumsfeld* by the court of appeals.

SO ORDERED.

/s/ Paul L. Friedman
PAUL L. FRIEDMAN
DATE: December 17, 2004 United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 02-CV-0299 (CKK)

DAVID M. HICKS,
Petitioner,

v.

GEORGE W. BUSH,
President of the United States, *et al.*,
Respondents.

ORDER HOLDING IN ABEYANCE RESPONDENTS' MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW WITH RESPECT TO CHALLENGES TO THE MILITARY COMMISSION PROCESS

By order dated November 18, 2004, counsel for petitioner and respondents were requested to show cause why the respondents' motion to dismiss petitioner David M. Hicks' claims challenging the legality of military commission proceedings should not be held in abeyance pending resolution of the appeal of the recent decision in *Hamdan v. Rumsfeld*, 04-CV-1519 (JR), 2004 WL 2504508 (Nov. 8, 2004) (D.D.C.).

In response to the show cause order, counsel for respondents stated their belief that resolution of the motion in this case should be held in abeyance pending appellate resolution of *Hamdan*. Counsel for the petitioner disagreed, citing the respondents' unwillingness to delay the trial of Mr. Hicks by military commission until this Court had time to adjudicate his challenges after resolution of *Hamdan*.

Petitioner's Brief Showing Cause Why This Case Should Not be Held in Abeyance, dated November 29, 2004, at 5.

On December 13, 2004, counsel for respondents filed a Notice of Recent Issuances informing the Court that "the Appointing Authority for Military Commissions has issued a formal written directive that any trial in David M. Hicks' military commission case . . . shall be held in abeyance pending the outcome of the appeal in *Hamdan*." Notice of Recent Issuances at 1. In light of this recent development, it is hereby

ORDERED that resolution of Respondents' Motion to Dismiss or for Judgment as a Matter of Law with Respect to Challenges to the Military Commission Process shall be held in abeyance pending final resolution of all appeals in *Hamdan v. Rumsfeld*. Should the circumstances forming the basis of this decision change, counsel may seek reconsideration of this Order.

IT IS SO ORDERED.
December 15, 2004

/s/ Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

DEPARTMENT OF DEFENSE
OFFICE OF THE APPOINTING AUTHORITY
1640 DEFENSE PENTAGON
WASHINGTON, DC 20301-1640

APPOINTING AUTHORITY FOR
MILITARY COMMISSIONS

JUN 14 2005

MEMORANDUM FOR CHIEF DEFENSE COUNSEL FOR MILITARY COMMISSIONS

SUBJECT: Request of Detailed Defense Counsel to Modify Military Commission Rules to Recognize Right of Self-Representation

Mr. Ali Hamza Ahmad Suliman al Bahlul's request for self-representation is denied. Military Commission Order (MCO) No. 1, paragraph 4(C)(4) states, "The accused shall be represented at all relevant times by Detailed Defense Counsel." After consideration of the attached materials, I do not support the request to change MCO No. 1.

Self-representation at a commission is impracticable. An unrepresented accused will be unable to investigate his case adequately because of national security concerns. An accused confined at Guantanamo, Cuba, who is unfamiliar with applicable substantive law, rules of evidence and procedure will not be able to present an adequate defense. An accused may not be sufficiently fluent in English to understand the nuances of the law. Translation requirements will be exponentially magnified. MCO No. 1, paragraph 6(B)(3) permits the exclusion of the accused from a hearing because classified or other protected information may be presented. Self-representation under these unique commission circumstances would be ineffective representation, and result in an unfair proceeding.

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

Attachments:
1. Memorandum DepSecDef, December 10, 2004 (1 page)
2. Defense Answers to PO Questions, October 25, 2004 (5 pages)
3. Email Detailed Defense Counsel, October 14, 2004 (6 pages)
4. Prosecution Motion, October 1, 2004 (10 pages)
5. Email Detailed Defense Counsel, May 11, 2004 with memorandum by Detailed Defense Counsel, May 11, 2004 (4 pages)

6. Memorandum Chief Defense Counsel, April 26, 2004 (2 pages)
7. Memorandum Detailed Defense Counsel, April 20, 2004 (1 page)

cc:
Presiding Officer
Chief Prosecutor for Military Commissions

UNITED STATES OF AMERICA	)	PO 101
	)	Resumption of Proceedings ORDER
v.	)	
ALI HAMZA AHMAD SULAYMAN AL BAHLUL	)	November 16, 2005

To all counsel in the above styled case.
To Chief Prosecutor.
To Chief Defense Counsel.

1. Changes to Commission law and other developments.

a. MCO # 1 and MCI # 8 have been reissued, superseding previous versions of those documents. The Appointing Authority has lifted his stay of 10 December 2004 in this case, and the Office of Military Commissions has advised the Presiding Officer that there are no judicial stays which would prevent the resumption of proceedings. The Appointing Authority has selected new members and issued other instructions concerning the trial of this case. Taken together, these developments will substantially change procedures for future proceedings.

b. The Presiding Officer is aware that a stay was issued by the Federal District Court for the District of Columbia in the case of *United States v. Hicks* on 14 November 2005. That stay has no apparent direct legal effect upon the case of *United States v. Al Bahlul*. Consequently, until such time as the Appointing Authority or a Federal Court issues a stay of the proceedings in this case, the case will proceed to trial.

c. In setting dates for trial sessions and in setting the dates below, the Presiding Officer has taken notice that the detailed defense counsel was only recently detailed to the case, and had not previously seen any of the evidence or had any exposure to Military Commission practice. Further, the detailed defense counsel has no assistant defense counsel nor does he have a paralegal.

2. Purpose of this ORDER. The purposes of this Order are:

a. To provide counsel with general information on the current procedural requirements and status of filings and Review Exhibits in this case. This Order will be followed by expanded memoranda and orders on discovery, motions, and docketing.

b. To set out certain time frames for counsel to provide information so the Presiding Officer may set a motions schedule and docket.

3. The current procedural posture.

a. Prior proceedings in this case were based upon an MCO and MCIs which have been revised and/or superseded and were held before certain members who are no longer detailed to the Commission. The net effect of the changes is that none of the below are before or binding upon the current Commission:

1) any motion or request for relief previously filed with the Commission,
2) any Review Exhibit previously entered into the record, and,
3) any ruling by the Commission.

b. While the session transcripts, previous filings inventories, and Review Exhibits exist as part of the case of *United States v. Al Bahlul*, the parties must submit new filings and Review Exhibits if they wish the current Commission to consider them. The practical effect is that any Review Exhibit or filing counsel wishes considered must be filed again. This includes the charge sheet, qualifications of counsel, all motions and requests for relief, and anything else which was presented by counsel to the Commission.

c. The only exception to the "previous filings rule" is the matter involving Mr. Al Bahlul's request to proceed *pro se*. All of the paperwork submitted in support of or in opposition to the request, as well as the decision on the request by the Appointing Authority, has been designated PO 102 and will be made a Review Exhibit. Parties are urged to supplement the matters contained in PO 102 with any other past documents. PO 102 also contains the transcript of that portion of the 26 August 2004 session in which the subject of *pro se* representation was discussed.

d. If counsel wish that a previous filing be considered, they may NOT refer to the previous filing or exhibit. They must re-file. The exception would be if counsel wished for the Presiding Officer to consider a previously made oral argument concerning a motion or other request for relief. In that case, counsel may mark the applicable pages of the transcript prepared and maintained by the CCMC and submit it as an exhibit.

e. The review exhibit list and the filings inventory will be restarted with number 101 to avoid any confusion concerning what is before the current Commission.

f. To assist the efficiency of the proceedings, the Assistant will arrange for all the voir dire of the Presiding Officer from the prior sessions in all prior cases to be marked as a Review Exhibit, as well as all matters provided by the Presiding Officer in the prior proceedings concerning his voir dire.

4. POMs. All the POMs remain in effect. The current POMs are at: http://www.defenselink.mil/news/Aug2004/commissions_memoranda.html

5. Communications. The required notices and other communications outlined below will be made to the Assistant and the Presiding Officer by email. See POM # 3-2. Copies of communications to the Assistant will also be provided to opposing parties. In this regard, the requirement to communicate and file via email is still the rule when the parties are at Guantanamo, and counsel and their legal NCOs must be up on email as soon as they arrive at

Guantanamo. Counsel who have problems with getting on the Guantanamo system must coordinate immediately with the CCMC for assistance in resolving those problems.

6. Identification of counsel. **NLT 28 November 05,** the Chief Prosecutor and Chief Defense counsel will provide the Assistant and the Presiding Officer the appropriate documents showing what counsel are detailed to the case, and which are lead counsel. It is recommended that a new detailing memo be prepared that supersedes previous memos. For civilian counsel and foreign attorneys, the Chief Defense Counsel will forward to the APO those items required by the MCIs to show that counsel are authorized to appear before the commission.

7. Preparation of docket and motions/filings schedule.

a. Counsel in the above styled case will comply with the provisions of this paragraph so the Presiding Officer can prepare a docket and a motions and filings schedule.

b. **NLT 7 December 2005,** *each counsel* will provide a calendar showing the dates in which they are (1) unavailable to attend a session of the Commission at Guantanamo Bay, Cuba, and (2) they are unavailable to work on Commission matters in representing their client. Sufficient information will be provided to assist the Presiding Officer in preparing a docket and motions/filing schedule from the date of this memo until 1 August 2006. This calendar shall be provided as an email attachment to those addressees designated by POM #4-3; and, the subject line of the email shall be "PO 101 - [Case name] Calendar - [Counsel's name].

c. **NLT 16 December 2006,** the lead counsel in each case shall recommend dates in which they are able to:

(1) Attend the first session of the Commission at Guantanamo Bay for the Presiding Officer to determine counsel rights, be subject to voir dire, and to hear any motions that counsel believe need immediate resolution and are prepared to argue.

(2) File motions that are not dependent on the opposing party's compliance with discovery (such as motions to suppress, evidentiary motions, and the like.)

(3) Prosecution only: Comply with Prosecution discovery obligations presuming a Discovery Order similar to the one in POM # 7-1 is issued. Prosecution shall immediately furnish counsel a listing of all previous discovery given to the defense and received from the defense. Prosecution should be prepared to deliver previously provided discovery, if required.

(4) Conduct voir dire with prospective Commission members at Guantanamo Bay, Cuba.

(5) Begin presenting evidence on the merits of their case presuming an orderly compliance with of discovery, litigation of motions addressed in paragraph 7c(2), evidentiary motions, and voir dire.

d. Compliance with the provisions of subparagraphs 7b and 7c of this ORDER shall be in the form of a properly styled email attachment to the persons and in the form provided in paragraphs 5 and 6, POM # 4-3. The subject of the filing, and subject line of the email, shall be: "PO 101 - [Defense] [Prosecution] Response to Presiding Officer's Resumption of Proceedings Order." The attachment shall address all the matters in subparagraphs 7 b-c above, and may

contain other information of value to the Presiding Officer in stetting a docket and motions schedule.

8. Defense Counsel Only. Advise the Presiding Officer of any problems involving ethical issues which may be or are created by representation of Mr. Al Bahlul, which affect or might affect representation before the Commission. This information will include efforts underway by the defense counsel to secure appropriate permissions, instructions, ethical guidance, and directives from state bar(s), from the Office of the Judge Advocate General, US Army, from the Office of the General Counsel (if appropriate), and from his military supervisors.

IT IS SO ORDERED:

Peter E. Brownback, III
COL, JA, USA
Presiding Officer

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	**CHARGE:**
ALI HAMZA AHMAD SULAYMAN AL BAHLUL	)	**CONSPIRACY**
a/k/a Ali Hamza Ahmed Suleiman al Bahlul	)	
a/k/a Abu Anas al Makki	)	
a/k/a Abu Anas al Yemeni	)	
a/k/a Mohammad Anas Abdullah Khalidi	)	

Ali Hamza Ahmad Sulayman al Bahlul (a/k/a Ali Hamza Ahmed Suleiman al Bahlul, a/k/a Abu Anas al Makki, a/k/a Abu Anas al Yemeni, a/k/a Mohammad Anas Abdullah Khalidi) is a person subject to trial by Military Commission. At all times material to the charge:

JURISDICTION

1. Jurisdiction for this Military Commission is based on the President's determination of July 3, 2003 that Ali Hamza Ahmad Sulayman al Bahlul (a/k/a Ali Hamza Ahmed Suleiman al Bahlul, a/k/a Abu Anas al Makki, a/k/a Abu Anas al Yemeni a/k/a Mohammad Anas Abdullah Khalidi, hereinafter "al Bahlul") is subject to his Military Order of November 13, 2001.

2. Al Bahlul's charged conduct is triable by a military commission.

GENERAL ALLEGATIONS

3. Al Qaida ("the Base"), was founded by Usama bin Laden and others in or about 1989 for the purpose of opposing certain governments and officials with force and violence.

4. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaida.

5. A purpose or goal of al Qaida, as stated by Usama bin Laden and other al Qaida leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States and other countries for the purpose of, *inter alia*, forcing the United States to withdraw its forces from the Arabian Peninsula and in retaliation for U.S. support of Israel.

6. Al Qaida operations and activities are directed by a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.

7. Between 1989 and 2001, al Qaida established training camps, guest houses, and business operations in Afghanistan, Pakistan, and other countries for the purpose of supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.

8. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans*," in which he called for the murder of U.S. military personnel serving on the Arabian Peninsula.

9. In February of 1998, Usama bin Laden, Ayman al Zawahari and others under the banner of the "International Islamic Front for Jihad on the Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."

10. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize enemies of God."

11. Since 1989, members and associates of al Qaida, known and unknown, have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the USS COLE in October 2000; and the attacks on the United States on September 11, 2001.

CHARGE: CONSPIRACY

12. Ali Hamza Ahmad Sulayman Al Bahlul (a/k/a Ali Hamza Ahmed Suleiman al Bahlul, a/k/a Abu Anas al Makki, a/k/a Abu Anas al Yemeni, a/k/a Mohammad Anas Abdullah Khalidi, hereinafter "al Bahlul"), in Afghanistan, Pakistan, Yemen and other countries, from on or about February 1999 to on or about December 2001, willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with Usama bin Laden, Saif al Adel, Dr. Ayman al Zawahari (a/k/a "the Doctor"), Muhammad Atef (a/k/a Abu Hafs al Masri), Salem Ahmed Salem Hamdan (a/k/a Saqr al Jadawi) and other members and associates of the al Qaida organization, known and unknown, to commit the following offenses triable by military commission: attacking civilians; attacking civilian

objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.

13. In furtherance of this enterprise and conspiracy, al Bahlul and other members or associates of al Qaida committed the following overt acts:

    a. In 1999, with knowledge of Usama bin Laden's 1996 "*Declaration of Jihad Against the Americans*" and the 1998 fatwa endorsed by bin Laden calling for the "killing of Americans and their allies, both military and civilian," al Bahlul voluntarily traveled from Yemen to Afghanistan (via Pakistan) with the intent and purpose of joining and supporting Usama bin Laden in his expressed cause.

    b. In 1999, upon arriving in Afghanistan, al Bahlul met Saif al Adel, the head of the al Qaida Security Committee.

    c. Based upon arrangements made by Saif al Adel, al Bahlul participated in military training for two months at the al Qaida-sponsored Aynak camp in Afghanistan.

    d. After completing his training at Aynak camp, al Bahlul met with and pledged *bayat* to Usama bin Laden. By pledging *bayat*, al Bahlul affirmed his willingness to perform any act requested by bin Laden and to protect bin Laden from all harm.

    e. In late 1999, after completing his training at Aynak camp, al Bahlul lived at an al Qaida-sponsored guesthouse in Qandahar and performed duties in support of al Qaida.

    f. From late 1999 through December 2001, al Bahlul was personally assigned by Usama bin Laden to work in the al Qaida media office. In this capacity, al Bahlul created several instructional and motivational recruiting video tapes on behalf of al Qaida.

    g. Usama bin Laden personally tasked al Bahlul to create a video glorifying, among other things, the attack on the USS COLE. Al Bahlul created this "USS COLE" video to recruit, motivate and "awaken the Islamic Umma to revolt against America" and inspire al Qaida members and others to continue violent attacks against property and nationals (both military and civilian) of the United States and other countries.

    h. After being placed on alert by Usama bin Laden in the weeks just before the attacks of September 11, 2001, al Bahlul assisted Usama bin Laden and other al Qaida members in mobilizing and moving from Qandahar.

i. On September 11, 2001, Usama bin Laden tasked al Bahlul to set up a satellite connection so that bin Laden and other al Qaida members could see news reports. Despite his efforts, al Bahlul was unable to obtain a satellite connection because of mountainous terrain.

j. In the weeks immediately following the attacks of September 11, 2001, Usama bin Laden tasked al Bahlul to obtain media reports concerning the September 11th attacks and to gather data concerning the economic damage caused by these attacks.

k. In 2001, al Bahlul served as a bodyguard and provided protection for Usama bin Laden. While traveling with Usama bin Laden, al Bahlul was armed and wore an explosives–laden belt so that he could provide Usama bin Laden with physical security and protection.

[redacted]

THE WHITE HOUSE

WASHINGTON

OFFICE OF THE SECRETARY OF DEFENSE

2003 JUL 14 PM 5:12

TO THE SECRETARY OF DEFENSE:

Based on the information available to me from all sources, including the factual summary from the Department of Defense Criminal Investigation Task Force dated June 24, 2003 and forwarded to me by the Deputy Secretary of Defense by letter dated July 1, 2003;

Pursuant to the Military Order of November 13, 2001 on "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism";

In accordance with the Constitution and consistent with the laws of the United States, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40);

I, GEORGE W. BUSH, as President of the United States and Commander in Chief of the Armed Forces of the United States, hereby DETERMINE for the United States of America that in relation to Ali Hamza Ahmad Suleyman al-Bahlul, Department of Defense Internment Serial No. US[redacted] who is not a United States citizen:

(1) There is reason to believe that he, at the relevant times:
- (a) is or was a member of the organization known as al Qaida;
- (b) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
- (c) has knowingly harbored one or more individuals described in subparagraphs (a) or (b) above.

(2) It is in the interest of the United States that he be subject to the Military Order of November 13, 2001.

Accordingly, it is hereby ordered that, effective this day, Ali Hamza Ahmad Suleyman al-Bahlul shall be subject to the Military Order of November 13, 2001.

DATE: July 3 2003

White House Office-controlled Document

DECLASSIFIED LAW
JTF-GTMO-JA SCG, 10JUL2004
DECLASSIFIED ON: 29AUG2004

[redacted]

X02375 /03

RE 104 (al Bahul)
Page 1 of 1

No. 040003

UNITED STATES v. ALI HAMZA AHMAD SULAYMAN AL BAHLUL a/k/a Ali Hamza Ahmed Suleiman al Bahlul a/k/a Abu Anas al Makki a/k/a Abu Anas Yemeni a/k/a Mohammad Anas Abdullah Khalidi	)	Military Commission Members June 28, 2004

The following officers are appointed to serve as a Military Commission for the purpose trying any and all charges referred for trial in the above-styled case. The Military Commission will meet at such times and places as directed by the Appointing Authority or the Presiding Officer. Each member of the Military Commission will serve until relieved by proper authority.

In the event of incapacity, resignation, or removal of a member who has not been designated as the Presiding Officer, the alternate member is automatically appointed as a member.

Colonel Peter E. Brownback, III, USA (Retired), Presiding Officer
Colonel [redacted] USMC, Member
Colonel [redacted] USMC, Member
Colonel [redacted] USAF, Member
Lieutenant Colonel [redacted] USAF, Member
Lieutenant Colonel [redacted] USA, Alternate Member

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

OFFICE OF THE SECRETARY OF DEFENSE
1640 DEFENSE PENTAGON
WASHINGTON, DC 20301-1640

APPOINTING AUTHORITY FOR
MILITARY COMMISSIONS

December 10, 2004

APPOINTING AUTHORITY DIRECTIVE

IN THE MATTERS OF
UNITED STATES V. IBRAHIM AHMED MAHMOUD AL QOSI
UNITED STATS V. SALIM AHMED HAMDAN
UNITED STATES V. DAVID M. HICKS
UNITED STATES V. ALI HAMZA AHMAD SULAYMAN AL BAHLUL

Pursuant to my authority under MCO No. 1, 6(B)(4), I direct that proceedings in the above styled military commission cases be held in abeyance pending the outcome of the appeal in the case of Hamdan v. Rumsfeld, United States Court of Appeals for the District of Columbia Circuit, No. 04-5393. Oral argument in that case is presently scheduled for March 8, 2005.

The presiding officer is authorized to issue discovery orders in the commissions, hold pre-trial conferences, and/or attend to other matters that do not require convening the full commission.

This order remains in effect until revoked.

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

[redacted]

Military Commission Case No. 04-003

UNITED STATES	)	
	)	**Military**
v.	)	**Commission**
	)	**Members**
ALI HAMZA AHMAD SULAYMAN AL BAHLUL	)	
a/k/a Ali Hamza Ahmed Suleiman al Bahlul	)	Appointing Order
a/k/a Abu Anas al Makki	)	No. 05-0003
a/k/a Mohammad Anas Abdullah Khalidi	)	November 4, 2005

The June 28, 2004, order appointing military commission members in the above-styled case is amended as follows:

The following members were excused pursuant to my written decision dated October 19, 2004:

Colonel [redacted] USMC, Member
Lieutenant Colonel [redacted] USAF, Member
Lieutenant Colonel [redacted] USA, Alternate Member

On August 31, 2005, Military Commission Order No. 1 was amended to remove all members, except the Presiding Officer, from the determination of all legal questions other than the admissibility of evidence. The following members, having previously participated in proceedings concerning the determination of such questions, are hereby excused to preclude any possibility that those discussions would inappropriately affect deliberations or votes on findings and sentencing (if necessary) in this case:

Colonel [redacted] USMC, Member
Colonel [redacted] USAF, Member

The following members and alternate member are appointed for the purpose of trying any and all charges referred for trial in the above-styled case:

Colonel [redacted] USAF, Member
Colonel [redacted] USAF, Member
Colonel [redacted] USAF, Member
Colonel [redacted] USA, Member
Colonel [redacted] USMC, Member
Colonel [redacted] USMC, Member
Commander [redacted] USN, Alternate Member

Colonel Peter E. Brownback, III, USA, previously appointed as the Presiding Officer, remains the Presiding Officer.

Should any member be excused by the Presiding Officer, that member will be automatically replaced by the named alternate member.

My December 10, 2004, Directive, staying the proceedings in four named cases, is hereby revoked for the above-styled case.

The Military Commission will meet at such time(s) as deemed appropriate by the Presiding Officer.

Any decisions previously made by the commission as a whole, whether or not announced, are hereby vacated. The parties will be provided a fresh opportunity to file and litigate motions in whatever manner the Presiding Officer determines will best provide the accused with a full and fair trial.

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

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	PROTECTIVE ORDER
ALI HAMZA AHMAD SULAYMAN AL BAHLUL	)	
a/k/a Ali Hamza Ahmed Suleiman al Bahlul	)	July 9, 2004
a/k/a Abu Anas al Makki	)	
a/k/a Abu Anas al Yemeni	)	
a/k/a Mohammad Anas Abdullah Khalidi	)	
	)	

PROTECTIVE ORDER FOR CLASSIFIED MATERIAL

The following Order is issued to protect against the unauthorized disclosure of classified evidence provided by the Office of the Chief Prosecutor to the Defense in the case of Ali Hamza Ahmad Sulayman al Bahlul.

In the Prosecution's discovery response of July 9, 2004, classified information was provided to the defense. It is anticipated that additional classified information will be provided by the Prosecution to the Defense in the future. This Protective Order is issued to ensure the proper handling and safeguarding of all classified information pertaining to this prosecution.

IT IS ORDERED that you shall become familiar with Executive Order 12958 (as amended) with particular emphasis on the proper handling, storage and protection of classified information. Classified information entails evidence that is "CONFIDENTIAL," "SECRET" or "TOP SECRET." Additionally, you should review Section 6D(5) of Military Commission Order No. 1 related to Protection of Information.

IT IS ORDERED that classified information related to this prosecution may not be disseminated, in any form, to anyone other than properly cleared members of the defense team with an official "need to know."

Direct or indirect unauthorized disclosure, retention or negligent handling of this information may result in disciplinary action or other sanctions. The intent of this Protective Order is to ensure that persons subject to its restrictions will never divulge to unauthorized persons information that is protected, classified, or otherwise subject to a protective order. Any breach of these requirements may result in the termination of access to such information.

Members of the defense team shall not divulge, publish or reveal, either by word, conduct, or any other means, such documents or information unless specifically authorized to do so in the course of the performance of their duties as defense counsel or

[redacted]

as a member of the defense team. This edict is solely to ensure that no information is improperly disclosed that is classified, protected, or otherwise subject to a protective order.

This restriction will remain binding after the conclusion of any proceedings that may occur against Ali Hamza Ahmad Sulayman al Bahlul.

THOMAS L. HEMINGWAY
Brigadier General, U.S. Air Force
Legal Advisor, Appointing Authority
for Military Commissions

[redacted]

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	PROTECTIVE ORDER
ALI HAMZA AHMAD SULAYMAN AL BAHLUL	)	
a/k/a Ali Hamza Ahmed Suleiman al Bahlul	)	
a/k/a Abu Anas al Makki	)	June 30, 2004
a/k/a Abu Anas al Yemeni	)	
a/k/a Mohammad Anas Abdullah Khalidi	)	

PROTECTIVE ORDER FOR UNCLASSIFIED SENSITIVE MATERIAL

The following order is issued consistent with my previous Protective Order of March 17, 2004 to protect against the unauthorized disclosure of the identities of agents of the Federal Bureau of Investigation (hereinafter referred to as "FBI") who participated in the investigation of the case of Ali Hamza Ahmad Sulayman al Bahlul.

TAB A is a memorandum from the Prosecutor to the Detailed Military Defense Counsel in this case and contains the names of FBI agents that the prosecution intends to call as witnesses in this case. The names of these agents are considered sensitive material that constitutes Protected Information in accordance with Military Commission Order No. 1, Section 6 (D)(5). As such, this information shall not be disseminated by the Accused, Detailed Military Defense Counsel, or Civilian Defense Counsel, to any individuals, organizations, or other entities, other than the Accused and designated members of the defense team who are already bound by the provisions of this Protective Order, including: co-counsel, paralegals, investigators, translators, litigation support personnel, confidential consultants designated as members of the defense team, and secretarial staff. Requests for proposed dissemination to defense experts who are not designated members of the Defense Team shall be made to the Presiding Officer.

Each of the individuals to whom dissemination is made shall be provided a copy of this Protective Order and will be advised by the individual making the dissemination that he or she shall not disseminate the materials further. Copies of all materials given to experts must be returned to the government at the close of the case.

IT IS FURTHER ORDERED that the information contained in TAB A has been provided solely for the purpose of allowing the Accused to prepare his defense and that none of this information in TAB A provided by the government to the defense shall be disseminated to the media, unless otherwise approved in accordance with Military Commission Instruction No. 4.

IT IS FURTHER ORDERED that any motion or other matters filed with the panel that includes the names of the agents identified in TAB A shall be filed under seal and not disseminated to the media, unless otherwise approved in accordance with MCI No. 4.

[redacted]

[redacted]

IT IS FURTHER ORDERED that any motion or other matters filed with the panel that includes the names of the agents identified in TAB A shall be filed under seal and not disseminated to the media, unless otherwise approved in accordance with MCI No. 4.

FINALLY, IT IS ORDERED that nothing in this order shall be read as lessening the rules pertaining to classified materials, which will be provided in a separate Protective Order.

Thomas L. Hemingway
Brigadier General, U.S. Air Force
Legal Advisor to the Appointing Authority
for Military Commissions

[redacted]

UNITED STATES OF AMERICA
DEPARTMENT OF DEFENSE

UNITED STATES OF AMERICA	)	
v.	)	PROTECTIVE ORDER
ALI HAMZA AHMED SULIMAN AL BAHLUL a.k.a. Muhammad Anis Abdullah Khalidi a.k.a. Abu Malek a.k.a. Abu Anas Al Makki	)	March 17, 2004

PROTECTIVE ORDER FOR UNCLASSIFIED SENSITIVE MATERIAL

The following order is issued to protect against unauthorized disclosure of evidence provided by the Office of the Chief Prosecutor to the Defense in the case of Ali Hamza Ahmed Suliman Al Bahlul, a person subject to the President's Military Order of November 13, 2001 on "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."

Discovery materials provided to the defense may be divided into three categories: matters of public record, unclassified but sensitive materials, and classified materials.

Classified materials are covered by a separate Protective Order, which will be followed by all parties.

Unclassified but sensitive material that may constitute Protected Information in accordance with Military Commission Order No. 1, Section 6(D)(5), will be marked "Law Enforcement Sensitive" or "FOUO" and are subject to the following rules:

IT IS ORDERED that materials marked "Law Enforcement Sensitive" or "FOUO" shall not be disseminated by the Accused, Detailed Defense Counsel, or Civilian Defense Counsel, to any individuals, organizations, or other entities, other than the Accused and designated members of the defense team who are already bound by the provisions of this Protective Order, including: co-counsel, paralegals, investigators, translators, litigation support personnel, confidential consultants designated as members of the defense team, and secretarial staff. Requests for proposed dissemination to defense experts who are not designated members of the Defense Team shall be provided directly to the Presiding Officer for the Panel, or the Appointing Authority prior to the designation of the Presiding Officer, *ex parte* and under seal. No dissemination to such experts shall be made until approved by the Presiding Officer or the Appointing Authority. Each of the individuals to whom dissemination is made pursuant to the above provisions shall be provided a copy of this Protective Order and will be advised by the individual making the

[redacted]

dissemination that he or she shall not disseminate the materials further. Copies of all materials given to experts must be returned to the government at the close of the case. In addition, the Detailed Defense Counsel for the Accused, Civilian Defense Counsel for the Accused, and any defense investigator may show, but not provide copies of, any such general discovery materials to witnesses or potential witnesses, if the individual making the dissemination determines that it is necessary to do so for the purpose of preparing the defense of the case;

IT IS FURTHER ORDERED that all discovery materials are provided to the defense solely for the purpose of allowing the Accused to prepare his defense and that none of the discovery materials provided by the government to the defense shall be disseminated to the media, unless otherwise approved in accordance with Military Commission Instruction (MCI) No. 4;

IT IS FURTHER ORDERED that any motion or other matters filed with the panel that includes discovery materials or refers to the content of discovery materials which are either classified or sensitive, shall be filed under seal and not disseminated to the media, unless otherwise approved in accordance with MCI No. 4;

IT IS FURTHER ORDERED that all classified or sensitive discovery materials given to the defense or shared with any authorized person by the defense must and shall be returned to the government at the conclusion of the review and final decision by the President or, if designated, the Secretary of Defense, in each case.

FINALLY, IT IS ORDERED that nothing in this Order shall be read as lessening the rules pertaining to classified materials, which are provided in a separate Protective Order.

THOMAS L. HEMINGWAY
Brigadier General, U.S. Air Force
Legal Advisor, Appointing Authority
By direction

APPOINTING AUTHORITY'S APPROVAL OF CHARGES

FEB 2 3 2004

FOR: Legal Advisor to the Appointing Authority

SUBJECT: Approval of Charges, U.S. v. ALI HAMZA AHMAD SULAYMAN AL BAHLUL

The charge is approved. I direct trial by Military Commission to be convened at a future date.

THOMAS L. HEMINGWAY
Brigadier General, U.S. Air Force
Deputy Appointing Authority
Office of Military Commissions

2 Encls
1. Charge
2. Chief Prosecutor's Recommendation

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	**CHARGE:**
ALI HAMZA AHMAD SULAYMAN AL BAHLUL	)	**CONSPIRACY**
a/k/a Ali Hamza Ahmed Suleiman al Bahlul	)	
a/k/a Abu Anas al Makki	)	
a/k/a Abu Anas al Yemeni	)	
a/k/a Mohammad Anas Abdullah Khalidi	)	

JURISDICTION

1. Jurisdiction for this Military Commission is based on the President's determination of July 3, 2003 that Ali Hamza Ahmad Sulayman al Bahlul (a/k/a Ali Hamza Ahmed Suleiman al Bahlul, a/k/a Abu Anas al Makki, a/k/a Abu Anas al Yemeni a/k/a Mohammad Anas Abdullah Khalidi, hereinafter "al Bahlul") is subject to his Military Order of November 13, 2001.

2. Al Bahlul's charged conduct is triable by a military commission.

GENERAL ALLEGATIONS

3. Al Qaida ("the Base"), was founded by Usama bin Laden and others around 1989 for the purpose of opposing certain governments and officials with force and violence.

4. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaida.

5. A purpose or goal of al Qaida, as stated by Usama bin Laden and other al Qaida leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States and other countries to force the United States to withdraw its forces from the Arabian Peninsula and in retaliation for U.S. support of Israel.

6. Al Qaida operations and activities are directed by a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.

7. Between 1989 and 2001, al Qaida established training camps, guest houses, and business operations in Afghanistan, Pakistan, the Sudan and other countries for the purpose of supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.

8. In August of 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans*," in which he vowed that al Qaida would take violent actions against the United States unless American military forces withdrew from Saudi Arabia.

9. In February of 1998, Usama bin Laden, Ayman al Zawahari and others endorsed a fatwa under the banner of the "International Islamic Front for Jihad on the Jews and Crusaders." In this *fatwa* it was declared that all Muslims able do to so "should kill Americans and their allies, both civilian and military."

10. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize enemies of God."

11. On August 7, 1998, members or associates of al Qaida, known and unknown, assisted in the planning, preparation and commission of the bombing of the United States Embassies in Kenya and Tanzania.

12. On October 12, 2000, members or associates of al Qaida, known and unknown, assisted in the planning, preparation, and commission of the bombing of the USS COLE in Yemen.

13. On September 11, 2001, members or associates of al Qaida, known and unknown, assisted in the planning, preparation, and commission of the attacks on the United States.

CHARGE: CONSPIRACY

14. In that Ali Hamza Ahmad Sulayman Al Bahlul (a/k/a Ali Hamza Ahmed Suleiman al Bahlul, a/k/a Abu Anas al Makki, a/k/a Abu Anas al Yemeni, a/k/a Mohammad Anas Abdullah Khalidi, hereinafter "al Bahlul"), did, in Afghanistan, Pakistan, Yemen and other countries, from on or about February 1999 to on or about December 2001, willfully and knowingly join an enterprise of persons who shared a common criminal purpose and conspire and agree with Usama bin Laden (a/k/a Abu Abdullah), Saif al Adel, Dr. Ayman al Zawahari (a/k/a "the Doctor"), Muhammad Atef (a/k/a Abu Hafs al Masri), Salem Ahmed Salem Hamdan (a/k/a Saqr al Jadawi) and other members and associates of the al Qaida organization, known and unknown, to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an

unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism, said conduct being in the context of and associated with armed conflict.

15. In furtherance of this enterprise and conspiracy, al Bahlul and other members or associates of al Qaida committed the following overt acts:

    a. In 1999, with knowledge of Usama bin Laden's 1996 "*Declaration of Jihad Against the Americans*" and the 1998 fatwa endorsed by bin Laden calling for the "killing of Americans and their allies, both military and civilian," al Bahlul voluntarily traveled from Yemen to Afghanistan (via Pakistan) with the intent and purpose of joining and supporting Usama bin Laden in his expressed cause.

    b. In 1999, upon arriving in Afghanistan, al Bahlul met Saif al Adel, the head of the al Qaida Security Committee.

    c. Saif al Adel arranged for al Bahlul to stay at an al Qaida guesthouse near the Qandahar airport in Afghanistan.

    d. Based upon arrangements made by Saif al Adel, al Bahlul participated in military training for two months at the al Qaida-sponsored Aynak camp in Afghanistan.

    e. After completing his training at Aynak camp, al Bahlul met with and pledged *bayat* to Usama bin Laden. By pledging *bayat*, al Bahlul affirmed his willingness to perform any act requested by bin Laden and to protect bin Laden from all harm.

    f. In late 1999, after completing his training at Aynak camp, al Bahlul lived at an al Qaida-sponsored guesthouse in Qandahar and performed duties in support of al Qaida.

    g. From late 1999 through December 2001, al Bahlul was personally assigned by Usama bin Laden to work in the al Qaida media office. In this capacity, al Bahlul created several instructional and motivational recruiting video tapes on behalf of al Qaida.

    h. Usama bin Laden personally tasked al Bahlul to create a video glorifying, among other things, the attack on the USS COLE. Al Bahlul created this "USS COLE" video to recruit, motivate and "awaken the Islamic Umma to revolt against America" and inspire al Qaida members and others to continue violent attacks against property and nationals (both military and civilian) of the United States and other countries.

i. After being placed on alert by Usama bin Laden in the weeks just before the attacks of September 11, 2001, al Bahlul assisted Usama bin Laden and other al Qaida members in mobilizing and moving from Qandahar.

j. On September 11, 2001, Usama bin Laden tasked al Bahlul to set up a satellite connection so that bin Laden and other al Qaida members could see news reports. Despite his efforts, al Bahlul was unable to obtain a satellite connection because of mountainous terrain.

k. In the weeks immediately following the attacks of September 11, 2001, Usama bin Laden tasked al Bahlul to obtain media reports concerning the September 11th attacks and to gather data concerning the economic damage caused by these attacks.

l. Both prior to and after the attacks of September 11, 2001, al Bahlul served as a bodyguard and provided protection for Usama bin Laden.

m. From late 2000 until November 2001, al Bahlul routinely traveled in a caravan of vehicles with Usama bin Laden. While traveling, al Bahlul was armed and wore an explosives –laden belt so that he could provide Usama bin Laden with physical security and protection.

Hodges, Keith

From: Hodges, Keith [redacted]
Sent: Monday, December 05, 2005 5:26 PM
To: [redacted] Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; [redacted] Fleener, Tom, MAJ DoD GC; [redacted] OMC (L); keith.hodges [redacted] Brownback, Peter E. COL (L); [redacted]
Subject: RE: PO 101 - al Bahlul Calandar - Prosecution

Thank you.

We look forward to hearing from the defense on their calendar.

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

From: [redacted]
Sent: Monday, December 05, 2005 1:33 PM
To: Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; [redacted] Fleener, Tom, MAJ DoD GC; [redacted] 'keith.hodges [redacted] Brownback, Peter E. COL (L) [redacted]
Subject: PO 101 - al Bahlul Calandar - Prosecution

Sir -

This is in response to your inquiry as to calandar commitments of prosecution team members contained in PO 101, paragraph 7b, between now and 1 August 2006. Lt Col [redacted] LCDR [redacted] MAJ [redacted] and TSgt [redacted] all are available at your call. None have any firm commitments scheduled after 3 JAN 2006. LT [redacted] and his wife, however, are expecting their second child to debut in the days surrounding 24 JUN 2006. This is the only event which the prosecution asks that you take into consideration when we discus the litigation schedule on the record 10 JAN 2006. While prosecution team members undoubtedly will be taking leave during this period, it will be scheduled around the al Bahlul litigation schedule.

V/R

Lt Col [redacted] **USAFR**
Prosecutor, Office of Military Commissions,
Department of Defense
Phone: [redacted]
Fax: [redacted]
DSN Prefix: [redacted]
E-Mail: [redacted]

SIPR: [redacted]

Hodges, Keith

From: Hodges, Keith [redacted]
Sent: Tuesday, November 22, 2005 6:13 PM
To: [redacted]
Subject: Representation and Docketing Concerns - US v. Al Bahlul

Your attention is invited to the below email from the Presiding Officer.

This email will be placed on the filings inventory as PO 102 A.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

From: Pete Brownback [redacted]
Sent: Tuesday, November 22, 2005 4:54 PM
To: [redacted]
Subject: Representation and Docketing Concerns - US v. Al Bahlul

Mr. Hodges,

Please send this email to MAJ Fleener, all counsel in the case of US v. Al Bahlul, and the Chief Prosecution Counsel/Chief Defense Counsel.

Please place your forwarding email (containing this one) on the filings inventory as part of the PO 102 filings sequence.

COL Brownback

MAJ Fleener,

In connection with your detail "as Military Counsel for all matters relating to the Military Commission proceedings involving Ali Hamza Ahmad Sulayman al Bahlul", I need some reassurances, information, and actions from you, so that I can make sure that the case is docketed in a proper manner. Please respond to this email as soon as you receive it; copying all of the parties to whom it is addressed.

1. What bars are you a member of?

2. When do you intend to see your client? I ask this question because it is my understanding that you did not see him on 15, 16, or 17 November 2005, notwithstanding that you were in Guantanamo and you had an OMC-provided translator with you.

3. Do you believe that there is any reason which prevents you from seeing your client? If there is a problem with gaining access based on your expressed belief that you do not represent Mr. Al Bahlul, please let me know. I am sure that the JTF will allow you access when your status as detailed defense counsel is made clear to them.

4. Insofar as actions are concerned, your status as detailed defense counsel, regardless of your beliefs concerning representation, means that you must perform certain duties within and for these proceedings. These duties include, but are certainly not limited to:

a. Communicating with the Presiding Officer, the Assistant to the Presiding Officer, the Chief Defense Counsel, and the government on matters which do not constitute representation.
b. Advising the PO, APO, CDC, and the government when responding or communicating would, in your opinion, constitute representation.
c. Determining whether your client wishes to have you represent him.
d. Advising the PO, APO, CDC and the Prosecution whether your client wants you to represent him.
e. Advising the PO APO, CDC and the Prosecution whether you are going to represent him.
f. Any and all other duties of a detailed defense counsel.

5. As soon as you become aware of a matter which you believe you should not deal with because it might constitute representation, you must immediately make the PO, APO, and CDC aware of that fact. You may not wait until the due date to state that you can not respond to the requirement or answer the correspondence. This includes, for instance, PO 101 which has certain due dates laid out in it.

6. You, under the guidance and direction of the Chief Defense Counsel, have the duty to determine your ability ethically to represent Mr. Al Bahlul, if and when he states that he does not want you to represent him. I do not believe that you can make a decision on that matter until you see him, so I believe that you must make seeing him your first priority. You, obviously, believe that he will decline your services, but I do not think that you can make such a judgment without talking to him face to face. Times change and people change their decisions; for instance, according to the motion filed on behalf of Mr. Al Bahlul and others, he appears to want representation in Federal District Court on the issue of habeas corpus at least.

7. While you are making the arrangements to see Mr. Al Bahlul, you should also be gathering information and seeking advice or an opinion on the potential ethical dilemma. This can not wait. If you want me to send a letter to your bar(s), The Judge Advocate General of the United States Army, or the General Counsel of the Department of Defense explaining the situation or verifying your own letters to them, I will do so. If not, when do you intend to write these entities?

8. I draw your attention to the provisions of Military Commission Instruction #4 (16 Sep 05), specifically paragraphs 3B(11) and 3D.

Peter E. Brownback III

COL, JA
Presiding Officer

Hodges, Keith

From: Hodges, Keith
Sent: Tuesday, November 22, 2005 6:17 PM
To: [redacted]
Cc: Hodges, Keith; Brownback, Peter COL PO (Home) [redacted]
Subject: FW: Representation Concerns - US v. Al Bahlul - PO 102 B

Your attention is invited to the below email from the Presiding Officer.

This email will be placed on the filings inventory as PO 102 B.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

From: Pete Brownback [redacted]
Sent: Tuesday, November 22, 2005 5:02 PM
To: [redacted]
Subject: Representation Concerns - US v. Al Bahlul

Mr. Hodges,

Please send this email to the Chief Defense Counsel and MAJ Fleener.

Please place your forwarding email (containing this one) on the filings inventory as part of the PO 102 filings sequence.

COL Brownback

COL Sullivan

1. In addition to our telephone conversation of 16 November with myself and MAJ Fleener in Guantanamo and you in Washington, I have provided you a copy of PO 101. I also cc'd you on a letter I sent to MAJ Fleener today.

2. It is obvious that I have concerns about insuring that Mr. Al Bahlul is provided representation in accordance with Commission Law. It is also obvious that I am concerned about MAJ Fleener's "legal-ability" to provide that representation. I am not in any way commenting

upon his professional abilities or capabilities; instead, I am concerned that he may feel that his ethical responsibilities outweigh his duties under Commission Law and your detailing memorandum of 3 November 2005.

3. I do not claim to know the reaction of MAJ Fleener's state bar(s) to his perceived ethical dilemma. Nor do I know what The Judge Advocate General of the United States Army or the General Counsel of the Department of Defense will say about his ethical dilemma. However, I do need to know what actions MAJ Fleener and you are going to take concerning representation of Mr. Al Bahlul. I realize that there may be a delay of some sort in making a decision, but the delay can not be unnecessarily prolonged.

4. Commission Law puts certain responsibilities upon all parties in the commission process, including you, MAJ Fleener, and myself. It is not my responsibility to represent or provide a judge advocate to represent Mr. Al Bahlul. However, it is my responsibility to bring his case to trial in an expeditious manner. Currently, the issue of representation is the major problem I face in docketing the case. Whatever resolution MAJ Fleener reaches, I must know it as soon as possible.

5. I am not MAJ Fleener's supervisor; I am, however, the one appointed to the commission established to try a person whom he has been detailed to represent. As such, my concerns are focused upon trying Mr. Al Bahlul, whereas, until this issue is resolved, you and MAJ Fleener may have a different focus. Be that as it may, none of us will be able to reach a resolution until the initial question is answered: Does Mr. Al Bahlul want to have MAJ Fleener represent him?

6. I was surprised when informed that while MAJ Fleener was in Guantanamo with an OMC-provided translator, he did not see his client. If there is something in the JTF procedures which kept him from seeing his client, I need to know so that I can take whatever measures that are available to me to insure it does not happen again.

7. Not only have I read all of the paperwork contained in PO 102, I also participated in the discussion on the record with Mr. Al Bahlul. However, that was in late August of 2004 - as recently as 27 October 2005, certain attorneys have stated in court filings that Mr. Al Bahlul did want representation - at least in a habeas corpus proceeding. At this point in time, no one knows what Mr. Al Bahlul wants in connection with MAJ Fleener. The only way in which we are going to know anything is for MAJ Fleener to meet with his client.

8. Please advise soonest whether you believe anything I have raised above is somehow inconsistent with how you see our individual and collective responsibilities.

COL Brownback

Hodges, Keith

From: Hodges, Keith [redacted]
Sent: Monday, November 28, 2005 10:48 AM
To: Fleener, Tom, MAJ DoD GC; Hodges, Keith; Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; [redacted]
Subject: PO 102 C - RE: Representation and Docketing Concerns - US v. Al Bahlul

MAJ Fleener:

1. Thank you for the reply - and numbering the paragraphs.

2. Who is [redacted]

ALL: This email and the two below emails will be placed on the filings inventory as PO 102 C

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

From: Fleener, Tom, MAJ DoD GC [redacted]
Sent: Monday, November 28, 2005 10:32 AM
To: 'Hodges, Keith'; Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; [redacted] Fleener, Tom, MAJ DoD GC; [redacted]
Subject: RE: Representation and Docketing Concerns - US v. Al Bahlul

Colonel Brownback and others,

Ill number my responses to correspond to your questions/statements/concerns in the earlier email.

1) Iowa and Wyoming.

2) I consider when I intend to see Mr. al Bahul, or whether I intend to see Mr. al Bahul to be priviliged. Please understand though, the translator who was with us at Gitmo belonged to a different defense team. I also believe that the prisoner she was there to support has a conflict with Mr. al Bahul.

3) I am not aware of any logistical reasons why I would be unable to see Mr. al Bahul. I dont think JTF allows them to use the phone, so that makes it extremely difficult to speak with folks. If there was some way we could be able to speak with the prisoners by phone that would really save alot of time.

4) Concur.

5) Concur.

6) I am in the process now of determining my ethical duties.

7) This is taking some time, but I am working on it. Thank you for the offer of writing a letter. Im not sure if I need one, but will keep you informed.

8) Concur.

Major Tom Fleener

-----Original Message-----
From: Hodges, Keith [redacted]
Sent: Tuesday, November 22, 2005 18:13
[redacted]
Subject: Representation and Docketing Concerns - US v. Al Bahlul

Your attention is invited to the below email from the Presiding Officer.

This email will be placed on the filings inventory as PO 102 A.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

From: Pete Brownback [redacted]
Sent: Tuesday, November 22, 2005 4:54 PM
To: [redacted]
Subject: Representation and Docketing Concerns - US v. Al Bahlul

Mr. Hodges,

Please send this email to MAJ Fleener, all counsel in the case of US v. Al Bahlul, and the Chief Prosecution Counsel/Chief Defense Counsel.

Please place your forwarding email (containing this one) on the filings inventory as part of the PO 102 filings sequence.

COL Brownback

MAJ Fleener,

In connection with your detail "as Military Counsel for all matters relating to the Military Commission proceedings involving Ali Hamza Ahmad Sulayman al Bahlul", I need some reassurances, information, and actions from you, so that I can make sure that the case is docketed in a proper manner. Please respond to this email as soon as you receive it; copying all of the parties to whom it is addressed.

1. What bars are you a member of?

2. When do you intend to see your client? I ask this question because it is my understanding that you did not see him on 15, 16, or 17 November 2005, notwithstanding that you were in Guantanamo and you had an OMC-provided translator with you.

3. Do you believe that there is any reason which prevents you from seeing your client? If there is a problem with gaining access based on your expressed belief that you do not represent Mr. Al Bahlul, please let me know. I am sure that the JTF will allow you access when your status as detailed defense counsel is made clear to them.

4. Insofar as actions are concerned, your status as detailed defense counsel, regardless of your beliefs concerning representation, means that you must perform certain duties within and for these proceedings. These duties include, but are certainly not limited to:

a. Communicating with the Presiding Officer, the Assistant to the Presiding Officer, the Chief Defense Counsel, and the government on matters which do not constitute representation.
b. Advising the PO, APO, CDC, and the government when responding or communicating would, in your opinion, constitute representation.
c. Determining whether your client wishes to have you represent him.
d. Advising the PO, APO, CDC and the Prosecution whether your client wants you to represent him.
e. Advising the PO APO, CDC and the Prosecution whether you are going to represent him.
f. Any and all other duties of a detailed defense counsel.

5. As soon as you become aware of a matter which you believe you should not deal with because it might constitute representation, you must immediately make the PO, APO, and CDC aware of that fact. You may not wait until the due date to state that you can not respond to the requirement or answer the correspondence. This includes, for instance, PO 101 which has certain due dates laid out in it.

6. You, under the guidance and direction of the Chief Defense Counsel, have the duty to determine your ability ethically to represent Mr. Al Bahlul, if and when he states that he does not want you to represent him. I do not believe that you can make a decision on that matter until you see him, so I believe that you must make seeing him your first priority. You, obviously, believe that he will decline your services, but I do not think that you can make such a judgment without talking to him face to face. Times change and people change their decisions; for instance, according to the motion filed on behalf of Mr. Al Bahlul and others, he appears to want representation in Federal District Court on the issue of habeas corpus at least.

7. While you are making the arrangements to see Mr. Al Bahlul, you should also be gathering information and seeking advice or an opinion on the potential ethical dilemma. This can not wait. If you want me to send a letter to your bar(s), The Judge Advocate General of the United States Army, or the General Counsel of the Department of Defense explaining the situation or verifying your own letters to them, I will do so. If not, when do you intend to write these entities?

8. I draw your attention to the provisions of Military Commission Instruction #4 (16 Sep 05), specifically paragraphs 3B(11) and 3D.

Peter E. Brownback III
COL, JA
Presiding Officer

Hodges, Keith

From: Sullivan, Dwight, COL, DoD OGC [redacted]
Sent: Thursday, December 01, 2005 11:25 AM
To: 'Hodges, Keith'
Subject: RE: US v. al Bahlul - Representation

14 September 2005

-----Original Message-----
From: Hodges, Keith [redacted]
Sent: Thursday, December 01, 2005 11:22
To: Sullivan, Dwight, COL, DoD OGC
Subject: RE: US v. al Bahlul - Representation

Thank you, COL Sullivan.

Would you please advise the date that Mr. al Bahlul provided you this information.

Thank you.

Keith Hodges

From: Sullivan, Dwight, COL, DoD OGC [redacted]
Sent: Thursday, December 01, 2005 11:14 AM
To: 'Hodges, Keith'
Subject: RE: US v. al Bahlul - Representation

When I met with Mr. al Bahlul, he said the following and specifically authorized the transmission of this information to others:

He said he would not accept Major Fleener as his lawyer. He also specifically directed that Major Fleener not visit him in the camps.

Mr. al Bahlul also made other statements concerning potential representation, but he did not clearly authorize disclosure of those statements to others.

Semper Fi,
Dwight

-----Original Message-----
From: Hodges, Keith [redacted]
Sent: Thursday, December 01, 2005 10:48
To: Sullivan, Dwight, COL, DoD OGC
Subject: US v. al Bahlul - Representation

COL Sullivan,

Would you mind, please, sending me a reply email concerning what Mr. al Bahlul told you with respect to his desires as to counsel. I believe you told me that Mr. al Bahlul authorized you to make this matter public.

Thank you.

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

Hodges, Keith

From: Hodges, Keith[redacted]
Sent: Thursday, December 01, 2005 1:40 PM
To: [redacted]
Subject: US v. al Bahlul - Draft Request for Opinion to Army TJAG-SOCO
Attachments: SOCO - Request for opinion Dec 1 05.doc; PO 102 D - al Bahlul - CDC email about al Bahlul's desires on counsel - 1 Dec 05.pdf

Your attention is invited to the draft request for an opinion.

Any counsel, or Chief Prosecutor or Defense Counsel, that has any suggestions or comments must provide them NLT 1200, Tuesday, 6 December 2005.

Counsel have all the references mentioned in the draft with the possible exception of reference 1g. That document, which is also PO 102 D, is also attached.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

<<SOCO - Request for opinion Dec 1 05.doc>> <<PO 102 D - al Bahlul - CDC email about al Bahlul's desires on counsel - 1 Dec 05.pdf>>

Hodges, Keith

From: Hodges, Keith [redacted]

Sent: Thursday, December 01, 2005 6:21 PM

To: Fleener, Tom, MAJ DoD GC; Hodges, Keith; Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; [redacted]

Subject: Decision by PO Regarding US v. al Bahlul - Draft Request for Opinion to Army TJAG-SOCO

1. The Presiding Officer offered counsel and others an opportunity to comment on the request for an opinion attached to the originating email below. Comments were not required, but would be considered if presented by a certain date. The issues that the opinion addresses have been known for some time, and are the subject of the filings in the PO 102 series. The draft opinion raises no new issues that the addressees have not had time to consider for at least a month.

2. Those who wish to offer comments by the deadline established may do so, and comments received before the deadline will be considered. It is important to note that the attachment to the originating email below is only a request for an opinion of another entity, and not a draft of a ruling by the Presiding Officer.

3. Furthermore, the detailed defense counsel shall immediately contact the Military Judge detailed to the case at Fort Sill by email explaining that he (MAJ Fleener) is detailed to a Military Commission case that has been referred for over a year, and that the Presiding Officer will conduct a session of that case during the week of 9 Jan 06 at Guantanamo Bay, Cuba. Because there is the danger that there could be conflicts between the docket of the Military Judge and the Presiding Officer, MAJ Fleener will CC the Presiding Officer and the Assistant with the email directed by this paragraph. The email will be sent within 24 hours of receipt of this email.

4. Additionally, any other Military Judge detailed to a case to which MAJ Fleener is detailed shall be sent the same email as addressed in paragraph 3 above, and the Presiding Officer and Assistant shall be CC'd on that email.

5. MAJ Fleener shall also advise the Presiding Officer of any other scheduled activities no later than 1700 hours, 2 December 2005.

BY ORDER OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

From: Fleener, Tom, MAJ DoD GC [redacted]
Sent: Thursday, December 01, 2005 4:57 PM
To: 'Hodges, Keith'; Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; [redacted] Fleener, Tom, MAJ DoD GC; [redacted]
Subject: RE: US v. al Bahlul - Draft Request for Opinion to Army TJAG-SOCO

Please note.

RE 118 (al Bahlul)
Page 1 of 2

I have a court-martial at Ft. Sill next week. I just receive the casefile/ROT today. I requested a continuance, but the trial judge denied it. Consequently, I must devote the next few days to that case in an attempt to be somewhat prepared.

I request an additional week to answer the questions regarding scheduling and stuff. I know you wanted something on 6 Dec, but I will be in Oklahoma.

Tom Fleener

-----Original Message-----
From: Hodges, Keith [redacted]
Sent: Thursday, December 01, 2005 13:40
[redacted]
Subject: US v. al Bahlul - Draft Request for Opinion to Army TJAG-SOCO

Your attention is invited to the draft request for an opinion.

Any counsel, or Chief Prosecutor or Defense Counsel, that has any suggestions or comments must provide them NLT 1200, Tuesday, 6 December 2005.

Counsel have all the references mentioned in the draft with the possible exception of reference 1g. That document, which is also PO 102 D, is also attached.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]
<<SOCO - Request for opinion Dec 1 05.doc>> <<PO 102 D - al Bahlul - CDC email about al Bahlul's desires on counsel - 1 Dec 05.pdf>>

Hodges, Keith

From: Hodges, Keith [redacted]
Sent: Tuesday, December 06, 2005 2:20 PM
To: Hodges, Keith; Pete Brownback; [redacted]
Cc: OMC-P Mr. Swann; [redacted] OMC-P COL Davis; OMC-D MAJ Fleener; OMC-D COL Sullivan; OMC - Mr. Harvey; OMC - [redacted] USALSA; [redacted]
Subject: RE: Request for Opinion - Military Commission Proceedings in the case of US v. Al Bahlul

My apologies, PO 102 G is the correct filings designation.

Keith Hodges

From: Hodges, Keith [redacted]
Sent: Tuesday, December 06, 2005 2:18 PM
To: Pete Brownback; [redacted]
Cc: OMC-P Mr. Swann; [redacted] OMC-P COL Davis; OMC-D MAJ Fleener; OMC-D COL Sullivan; OMC - Mr. Harvey; [redacted] keith - 1 - work; [redacted]
Subject: RE: Request for Opinion - Military Commission Proceedings in the case of US v. Al Bahlul

This email and all attachments have been added to the filings inventory in US v. al Bahlul as PO 103 G.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

From: Pete Brownback [redacted]
Sent: Tuesday, December 06, 2005 1:38 PM
To: [redacted]
Cc: OMC-P Mr. Swann; [redacted] COL Davis; OMC-D MAJ Fleener; OMC-D COL Sullivan; OMC - Mr. Harvey; [redacted]
Subject: Request for Opinion - Military Commission Proceedings in the case of US v. Al Bahlul

Attached is my request for an opinion in the case of US v. Al Bahlul. Also attached are the six enclosures to the opinion. As I noted in the request, the initial (restart) session in Al Bahlul is scheduled for 10 January 2006.

LTC [redacted]

If you need any further information, please feel free to contact me or Mr. Keith Hodges, the Assistant to the

Presiding Officers at [redacted]. If your office believes that I, rather than you, need to send this request to anyone else, please so advise.

Mr. [redacted]/Mr. Harvey,

Request that you determine who in OMC should forward, or not forward, this request to OGC.

COL Brownback

Memorandum For: The Judge Advocate General, US Army, 6 December 2005
ATTN: Standards of Conduct Office (Professional Responsibility Branch)

Subject: Request for Opinion - Military Commission Proceedings in the case of *United States v. Al Bahlul*

1. References:

a. President's Military Order of 13 November 2001, available at http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html

b. Military Commission Order # 1, 31 August 2005, available at http://www.defenselink.mil/news/Sep2005/d20050902order.pdf

c. Military Commission Instruction # 4, 16 September 2005, available at http://www.defenselink.mil/news/Oct2005/d20051003MCI4.pdf

d. Transcript, Proceedings of a Military Commission, US v. Al Bahlul, 26 August 2005 (Pages 10-25 of Enclosure 1)

e. Office of the Chief Defense Counsel, Detailing Letter Regarding Military Commission Proceedings of Ali Hamza Ahmad Sulayman al Bahlul, 4 November 2005. Enclosure 2.

f. Email, MAJ Fleener to Presiding Officer, 28 November 2005. Enclosure 3.

g. Email, COL Sullivan to Presiding Officer, 1 December 2005. Enclosure 4.

h. PO 102, Al Bahlul, Documents concerning the legal position of the parties on Pro Se Matters generated when Mr. al Bahlul was represented by LCDR Sundel and MAJ Bridges. Enclosure 1.

i. PO 102 A - C, Al Bahlul, Representation Matters. Enclosure 5.

j. Prosecution Counsel, Memorandum, Subject: Defense Representation in Al Bahlul, 5 December 2005. Enclosure 6.

2. The President ordered that certain persons be tried by military commissions (Reference 1a). The Secretary of Defense implemented this order (Reference 1b) and delegated to others within DoD the authority to make further rules and regulations as necessary. Pursuant to this delegation, the General Counsel set forth certain rules for defense counsel (Reference 1c).

3. The case of US v. Al Bahlul was referred to a military commission for trial on 28 June 2004. On the record during proceedings in August 2004, Mr. Al Bahlul stated that he did not want his (then-) detailed counsel to represent him, preferring to either have a Yemeni lawyer or represent himself (Reference 1d). Due, in large part, to a Federal District Court ruling in another case, Mr. Al Bahlul's case was stayed on 10 December 2004 by the Appointing Authority.

4. The stay in Mr. Al Bahlul's case was lifted on 4 November 2005. MAJ Thomas A. Fleener, US Army JAGC, was detailed to represent Mr. Al Bahlul on 3 November 2005 (Reference 1e). MAJ Fleener is a member of the bars of Iowa and Wyoming (Reference 1f). On 14 September 2005, the Chief Defense Counsel (COL Dwight Sullivan) spoke

with Mr. Al Bahlul, and Mr. Al Bahlul told the Chief Defense Counsel that he would not accept Major Fleener as his lawyer. Mr al Bahlul also specifically directed that Major Fleener not visit him in the camps. (Reference 1g)

5. Due to the lapse in time between the August 2004 arraignment, the change in detailed defense counsel, the change in Reference 1b, the excusal of all former members except the Presiding Officer, and the detail of a new defense counsel, I have determined that the case must be completely restarted. In order to give the defense counsel sufficient time to prepare, I will not hold the initial (restart) session in this case until 10 January 2006.

6. Request you provide me The Judge Advocate General's opinion concerning the ability of an Army Judge Advocate to refuse to represent a person who expressly states that he does not want to be represented by that judge advocate or by any judge advocate in the following circumstances:

a. The judge advocate has been properly detailed to the case.

b. Secretarial instructions require that detailed counsel represent the person, regardless of the person's wishes concerning representation (see paragraph 3D, reference 1c).

7. Under the circumstances stated in paragraph 6 above, request you provide me The Judge Advocate General's opinion concerning the authority of an Army Judge Advocate serving as a Presiding Officer of a Military Commission to order an Army Judge Advocate to represent the client. In this instance, "represent" includes at least filing and answering motions, examining and cross-examining witnesses, and making argument.

8. Please note the session date of 10 January 2006. All parties to this case need an answer to this question as soon as possible.

9. On 1 December 2005, the Assistant to the Presiding Officer forwarded the final draft of this request to counsel for both sides and to the Chief Defense Counsel/Chief Prosecution for comments. The deadline for the comments was 1200 hours, Tuesday, 6 December 2005. The only comments received were made by the Prosecution Counsel and they are enclosed at Enclosure 6.

Peter E. Brownback III
COL, JA
Presiding Officer

6 Encls:

as

RE 101 - United States v. Al Bahlul

Index of Contents (Pages 1-2)

1. Detailed Defense Counsel, US v. Al Bahlul, Memorandum for Chief Defense Counsel, Subject: Request to Withdraw as Detailed Defense Counsel, United States v. Al Bahlul, 20 April 2004. (Page 3)

2. Chief Defense Counsel, Memorandum for Major Mark Bridges and LCDR Philip Sundel, Subject: Request to Withdraw as Detailed Defense Counsel, United States v. Al Bahlul, 26 April 2004. (Pages 4-5)

3. LCDR Sundel, Memorandum for Secretary of Defense; General Counsel, Department of Defense, and Appointing Authority, Subject: Request for Modification of Military Commission Rules to Recognize the Right of Self-Representation, United States v. Al Bahlul, 11 May 2004. (Pages 6-7)

4. Legal Advisor to the Appointing Authority for Military Commissions, Memorandum for Mr. John D. Altenburg, Jr., Appointing Authority for Military Commissions, Subject: Response to Accused's request to modify the Military Commission Rules to recognize the right of self-representation, 25 May 2004. (Pages8-9)

5. Transcript, Proceedings of United States v. Al Bahlul, 26 August 2004. (Pages10-26)

6. Detailed Defense Counsel, US v. Al Bahlul, Memorandum of Law, Right to Self-Representation; Right to Choice of Counsel, 2 September 2004. (Pages27-33)

7. Chief Defense Counsel, Memorandum for Mr. John D. Altenburg, Jr., Appointing Authority for Military Commissions, Subject: Preservation of right to full and fair trial by military commission in the case of Ali Hamza Sulayman Al Bahlul, 23 September 2004. (Pages 34-35)

8. Detailed Prosecution Counsel, Prosecution Response to Defense Memo for Self-Representation and Right to Choice of Counsel, 1 October 2004. (Pages 36-44)

9. Detailed Defense Counsel, Defense Reply: Right to Self-representation; right to choice of counsel, 8 October 2004. (Pages 46-52)

10. Detailed Defense Counsel, Email, Subject: Defense Reply Brief -- Representation (US v. al Bahlul), 13 October 2004. (Page 53)

11. Presiding Officer, Email, Subject: Defense Reply Brief -- Representation (US v. al Bahlul), 13 October 2004. (Page 54)

12. Detailed Defense Counsel, Email, Subject: Defense Reply Brief -- Representation (US v. al Bahlul), 14 October 2004. (Page 55)

13. Presiding Officer, Email, Subject: Defense Reply Brief -- Representation (US v. al Bahlul), 14 October 2004. (Pages 55-62)

14. Presiding Officer, Email, Subject: Al Bahlul - Order to Brief Pro Se Issue and Other Issues, 18 October 2004. (Pages 63-66)

15. Detailed Defense Counsel, Answers to Presiding Officer's Questions on the Issue of Self-Representation, 22 October 2004. (Pages 67-71)

16. Detailed Defense Counsel, Memorandum of Law: Right to Self-Representation; Right to Choice of Counsel, 22 October 2004. (Pages 72-79)

17. Detailed Prosecution Counsel, Answers to the Presiding Officer's Questions on the Issue of Self-Representation, 25 October 2004. (Pages 80-86)

18. Deputy Secretary of Defense, Memorandum for General Counsel of the Department of Defense, Appointing Authority for Military Commissions, Legal Advisor to the Appointing Authority for Military Commissions, Chief Prosecutor for Military Commissions, Chief Defense Counsel for Military Commissions, Subject: Request of Detailed Defense Counsel to Modify Military Commission Rules to Recognize Right of Self-Representation, 10 December 2004. (Page 87)

19. Detailed Defense Counsel, Amicus Brief, Hamdan v. Rumsfeld, on petition for writ of certiorari before judgment, 27 December 2004. (Pages 88-112)

20. Appointing Authority, Memorandum for Chief Defense Counsel for Military Commissions, Subject: Request of Detailed Defense Counsel to Modify Military Commission Rule to Recognize Right of Self-Representation, 14 June 2005. (Pages 113-114)

DEPARTMENT OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1931 JEFFERSON DAVIS HIGHWAY, SUITE 103
ARLINGTON, VIRGINIA 22202

20 April 2004

MEMORANDUM FOR CHIEF DEFENSE COUNSEL

SUBJECT: Request to Withdraw as Detailed Defense Counsel, *United States v. al Bahlul*

1. Undersigned counsel, detailed by you on 3 February 2004, to represent Ali Hamza Ahmed Sulayman al Bahlul in proceedings before a military commission, met with Mr. al Bahlul on several occasions during the week of 12-16 April 2004, in the detention facility at Guantanamo Bay, Cuba. At the last of those meeting Mr. al Bahlul informed us that he did not desire the services of either ourselves or any other counsel, military or civilian. Rather, Mr. al Bahlul wishes to represent himself in any military commission proceedings.

2. Consequently, pursuant to the authority granted you in Section 4C of Military Commission Order No. 1, dated March 21, 2002, we respectfully request permission to withdraw as Mr. al Bahlul's detailed defense counsel.

3. To assist you in acting on this request, we note that international law recognizes the right of self-representation before criminal tribunals,[1] as do the Rules for Courts-Martial.[2] The rules governing the military commissions, however, do not appear to have provided a mechanism for such.[3]

4. Thank you for your consideration of this request.

Major Mark A. Bridges, USA
Defense Counsel
Office of Military Commissions

Philip Sundel
LCDR, JAGC, USN
Defense Counsel

[1] Article 21(4)(d), Statute of the International Criminal Tribunal for the Former Yugoslavia; Article 20(4)(d), Statute of the International Criminal Tribunal for Rwanda.
[2] Rule for Courts-Martial 506(c).
[3] *See* Section 4C(4), Military Commission Order No. 1; Section 3B(11), Military Commission Instruction No. 4.

DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

26 April 2004

MEMORANDUM FOR MAJOR MARK BRIDGES AND LCDR PHILIP SUNDEL

SUBJECT: Request to Withdraw as Detailed Defense Counsel, *United States v. al Bahlul*

1. I have reviewed your memorandum dated 20 April 2004 in which you informed me of your client's desire to represent himself in any military commission proceedings. In the same memorandum you requested permission to withdraw as Mr. al Bahlul's detailed defense counsel. In my opinion, I do not have the authority to decide whether Mr. al Bahlul can represent himself in military commission proceedings. I see that as a question for the Appointing Authority and/or for a military commission. As a result, I will not decide that issue.

2. While I lack the authority to decide whether Mr. al Bahlul can represent himself before military commissions, as Chief Defense Counsel, I do have the authority pursuant to Military Commission Order (MCO) No. 1 and Military Commission Instruction (MCI) No. 4 to make a decision on your request to withdraw as Mr. al Bahlul's defense counsel. Your request to withdraw is denied.

3. The procedures for military commissions as currently drafted envision a central role for Detailed Defense Counsel. Accordingly, several provisions of MCO No. 1 and MCI No. 4 convince me that it would be inappropriate to approve your request to withdraw as Detailed Defense Counsel. These provisions include: paragraph 4C(4) of MCO No. 1 which states that "the Accused must be represented at all relevant times by Detailed Defense Counsel;" paragraph 5D of MCO No. 1 which states that at least one Detailed Defense Counsel shall be made available to the Accused sufficiently in advance of trial to prepare a defense *and until any findings and sentence become final in accordance with Section 6(H)(2)*" (emphasis added); paragraph 6B(3) of MCO No. 1 which allows an Accused to be excluded from commission proceedings but provides that Detailed Defense Counsel can never be excluded; and paragraph 6B(5)(b) of MCO No. 1 which sets out procedures for handling Protected Information during commission proceedings and provides that such information can never be admitted into evidence if not presented to Detailed Defense Counsel.

4. Paragraph 3C(2) of MCI No. 4 speaks directly to the point of whether or not Detailed Defense Counsel can be relieved of the responsibility of representing an Accused before a Military Commission. This paragraph provides that "Detailed Defense Counsel shall represent the Accused before military commissions" and that counsel "*shall so serve notwithstanding any intention expressed by the Accused to represent himself.* (Emphasis added)."

5. You are to continue to represent Mr. al Bahlul consistent with my letter (dated 3 February 2004) detailing you to represent him. In the event, your client decides to exercise other options with respect to representation by Detailed Defense Counsel, please notify me so that I can consider his request. I am copying the Appointing Authority and the Legal Advisor to the Appointing Authority on this memorandum and I invite you to appeal to the Appointing Authority if you disagree with my decisions on these matters.

WILL A. GUNN, Colonel, USAF
Chief Defense Counsel

cc:
Appointing Authority
Legal Advisor to the Appointing Authority

DEPARTMENT OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1931 JEFFERSON DAVIS HIGHWAY, SUITE 103
ARLINGTON, VIRGINIA 22202

11 May 2004

MEMORANDUM FOR SECRETARY OF DEFENSE; GENERAL COUNSEL, DEPARTMENT OF DEFENSE; AND APPOINTING AUTHORITY

SUBJECT: Request for Modification of Military Commission Rules to Recognize the Right of Self-Representation, *United States v. al Bahlul*

1. Lieutenant Commander Philip Sundel, JAGC, USN, and Major Mark Bridges, USA, were detailed by the Chief Defense Counsel, Office of Military Commissions on 3 February 2004, to represent Ali Hamza Ahmed Sulayman al Bahlul in proceedings before a military commission. Detailed counsel met with Mr. al Bahlul on several occasions during the week of 12-16 April 2004, in the detention facility at Guantanamo Bay, Cuba. At the last of those meetings Mr. al Bahlul informed us that he did not desire the services of either ourselves or any other counsel, military or civilian. Rather, Mr. al Bahlul wishes to represent himself in any military commission proceedings.

2. On 20 April 2004, detailed counsel requested permission of the Chief Defense Counsel to withdraw as Mr. al Bahlul's detailed counsel (enclosure 1). On 26 April 2004, based on his view that the rules governing military commissions precluded self-representation, the Chief Defense Counsel denied our request (enclosure 2).

3. Pursuant to section 4(b) of the President's Military Order of November 13, 2001, section 7(A) of Military Commission Order Number 1, dated March 21, 2002, and paragraph 6.3 of Department of Defense Directive 5105.70 of February 10, 2004, respectively, each of you has the authority to modify or supplement the rules governing military commissions as necessary to facilitate the conduct of proceedings by military commissions.

4. Given the view of the Chief Defense Counsel regarding the restrictive nature of the rules governing military commissions, we respectfully request that each of you exercise his authority to modify or supplement those rules so as to allow withdrawal by detailed defense counsel and recognize the right of persons to represent themselves before military commissions.

5. In acting on this request, we ask that you consider the fact that international law recognizes the right of self-representation before criminal tribunals,[1] as do the Rules for Courts-Martial.[2] Further, while the rules governing military commissions presently do not appear to have provided a mechanism for such, we invite you to consider the significant difficulties that will arise if counsel are required to represent accused who wish to represent themselves.

---

[1] Article 21(4)(d), Statute of the International Criminal Tribunal for the Former Yugoslavia; Article 20(4)(d), Statute of the International Criminal Tribunal for Rwanda.
[2] Rule for Courts-Martial 506(c).

6. As this matter involves ongoing litigation, we anticipate pursuing other avenues of redress if this request is not acted on by 11 June 2004. Thank you for your consideration of this request.

Very respectfully,

Philip Sundel
LCDR, JAGC, USN
Defense Counsel

[redacted]

DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTION, DC 20301-1600

May 25, 2004

MEMORANDUM FOR Mr. John D. Altenburg, Jr., Appointing Authority for Military Commissions

SUBJECT: Response to Accused's request to modify the Military Commission Rules to recognize the right of self-representation

The Accused, Ali Hamza Ahmed Sulayman al Bahlul, through detailed defense counsel, Lieutenant Commander Philip Sundel, JAGC, USN, and Major Mark Bridges, USA, requests that that the Appointing Authority modify the Military Commission Rules to recognize the right of self-representation of the Accused. The Appointing Authority is without authority to modify Military Commission Orders or Instructions.[1] The authority to modify Military Order No. 1 rests solely with the Secretary of Defense. The General Counsel of the Department of Defense may modify Military Commission Instructions consistent with Military Order No. 1.[2]

I recommend Accused's request be denied. The Accused has no right to self-representation. Further, self-representation is inconsistent with a full and fair trial of the Accused.

Under the Military Commission Orders and Instructions, the Accused is not authorized to conduct his own defense.[3] The Military Commission Orders and Instructions state that the Accused must be represented by Detailed Defense Counsel during all relevant times, notwithstanding any intention expressed by the Accused to represent himself.[4]

The requirement of Detailed Defense Counsel arises from the authority of the Appointing Authority and Presiding Officer to close military commission proceedings and exclude the accused on grounds of protection of classified information or information protected from unauthorized disclosure; safety of Commission participants; intelligence and law enforcement sources, methods, and activities; and other national security interests.[5] Although the Accused may be excluded from these closed sessions, Detailed Defense Counsel may not be excluded.[6] If the Accused conducts his own defense, he is without

[1] Military Order of November 13, 2001 (President's Military Order No. 1), 4(b), November 13, 2001; DoD MCI No. 1, 4(A), April 30, 2003; and DODD 5105.70, 6.3, Feb 10, 2004. *See also,* DoD MCO, 7(A), March 21, 2002, although cited by Accused as authority to amend orders and instructions, this Order authorizes the Appointing Authority to promulgate Regulations consistent with the Orders and Instructions, subject to approval of the General Counsel of the Department of Defense.
[2] DoD MCO No. 1, 7(A).
[3] DoD MCO No. 1, 4(C)(4); DoD MCI No. 4, 3(B)(11), 3(D)(2).
[4] DoD MCI No. 4, 3(D)(2).
[5] DoD MCO No. 1, 4(A)(5)(a), 6(B)(3), DODD 5105.70, 4.1.7.
[6] DoD MCO No. 1, 5(K), 6(B)(3).

representation in closed sessions from which he is excluded and thus is not afforded a full and fair trial.

The Office of the Chief Prosecutor recommends that the issue be addressed at a later time and that it is more appropriately handled by the Presiding Officer once charges are referred. (TAB A)

I recommend that the Accused's request to modify Military Commission Rules to recognize the right of self-representation be denied and that you sign the attached memorandum to the General Counsel of the Department of Defense.

If you have any questions regarding this memorandum, please contact me at (703) 602-4173.

for Sean M. Connelly CPT, U.S. Army Assistant Legal Advisor
Thomas L. Hemingway
Legal Advisor to the Appointing Authority
for Military Commissions

The Commission Hearing was called to order at 0931, 26 August 2004.

PO: The military commission is called to order.

P (CDR [redacted]): This military commission is convened by Appointing Order number 04-003, dated June 28th 2004; copies of which have been furnished to the members of the commission, counsel, and the accused, and which will be marked as Review Exhibit 1 and attached to the record. There are no corrections noted to the appointing order. The Presidential determination that the accused may be subject to trial by military commission has been marked as Review Exhibit 2 and has been provided to all members.

The charge has been properly approved by the appointing authority and referred to this commission for trial. The prosecution caused a copy of the charge in English and Arabic, the accused's native language, to be served on the accused on August 12, 2004.

The prosecution is ready to proceed in the commission trial of the United States versus Ali Hamza Sulayman al Bahlul.

The accused, commission members, and alternate commission member named in the appointing order and detailed to this commission are present.

All detailed counsel are present.

Gunnery Sergeant [redacted] has been detailed reporter for this commission and has previously been sworn.

PO: I'll note that she's gotten a promotion that she isn't aware of.

P (CDR [redacted]): Yes, sir. Sergeant [redacted]

Security personnel have been detailed for this commission and have been previously sworn.

The interpreters have been detailed for this commission and have also been previously sworn. The full names of the interpreters who are providing interpretation for today's hearing are contained in Review Exhibit 3, a copy of which has been previously provided to the

defense and the reporters for inclusion in the record.

The bailiff has also previously been sworn.

PO: Previously marked, shown to counsel, and signed is RE 4, a protective order concerning the identity of the interpreters. Either side object to that order?

P (CDR[redacted] No, sir.

DC (LCDR Sundel): No, sir.

PO: I have been designated as the presiding officer of this commission by the appointing authority, and I have been previously sworn. All other members of the commission and the alternate member will now be sworn.

All persons in the courtroom, please rise.

The members were sworn.

PO: The commission is assembled.

I would ask before we continue all people who are going to speak to remember that we have to speak so the interpreters, the translators can translate.

Before continuing with preliminary matters, it is necessary for me to inquire into the accused's need for an interpreter.

Mr. al Bahlul, do you understand and speak English?

ACC: I prefer to have an interpreter.

PO: Would you repeat the translation, please?

ACC: I prefer to have an interpreter present.

PO: What language do you speak?

ACC: Arabic language.

PO: As I said earlier, translators have been appointed to this case. Do you understand the translation that is being made?

ACC: Clear.

PO: Commander [redacted] please state the detailing and qualifications of the prosecution.

P (CDR [redacted] Sir, all members of the prosecution have been detailed to this military commission by the chief prosecutor. All members of the prosecution are qualified under Military Commission Order Number 1, Paragraph 4(b), and we have previously been sworn. No member of the prosecution has acted in any manner which might tend to disqualify us in this proceeding. The detailing document has been marked as Review Exhibit 5 and previously provided to the court reporter.

PO: Commander Sundel, have either you or Major Bridges -- well, have you and Major Bridges been properly detailed to this case?

DC (LCDR Sundel): We have, sir.

PO: Has either of you acted in any manner inconsistent with your duties?

DC (LCDR Sundel): Not that I'm aware of.

PO: I'll take that for a no.

Mr. al Bahlul, pursuant to Military Commission Order Number 1, you are now at this moment, represented by your detailed counsel, Commander Sundel and Major Bridges. They are provided to you at no expense. You may also request a different military lawyer to represent you. If the person you ask for is reasonably available, he or she would be appointed to represent you. If that happens, your detailed counsel, Commander Sundel and Major Bridges, would normally be excused; however, you could request that they remain on the case.

In addition, you may request to be represented by a civilian lawyer. A civilian lawyer would represent you at no expense to the government. Such a lawyer must be a United States citizen and certified to practice law in the United States. She or he must be eligible for a secret clearance and agree in writing to comply with the rules of the commissions. If you had a civilian lawyer, the detailed counsel, Commander Sundel and Major Bridges would remain on the case. Do you understand what I just said?

ACC: Clear.

PO: Do you have any questions about your rights to be being represented before this commission?

ACC: Am I allowed to represent myself?

PO: I'm referring to Military Commission Order Number 1, Paragraph 4(c), sub (4). It states, the accused must be represented at all relevant times by detailed defense counsel. So the answer is, no, you're not allowed to represent yourself.

ACC: Excuse me. If I can ask the judge --

PO: Please speak up.

ACC: -- if I can to know the reason that disqualifies me from representing myself. I would like to know why, and if not --

PO: Okay. Are you asking to represent yourself before this commission?

ACC: Yes, I would like to represent myself.

PO: Sir, could you please try speaking -- or move the mic closer to yourself.

ACC: Yes, I would like to represent myself. [Interpreter: Is that better?]

PO: Let's talk about that. I want to go over several matters with you so that you understand what such a request means. Let me talk about your detailed counsel.

To be detailed counsel, they have to be qualified attorneys; that means that they have to be admitted to practice before the highest court of a state, and be commissioned as a judge advocate in one of the military services of the United States.

Commander Sundel, you're obviously Navy. What state?

DC (LCDR Sundel): I am barred in Maryland, sir.

PO: Major Bridges you're Army. What state?

ADC (Maj Bridges): Kentucky, sir.

PO: Okay. So Commander Sundel is admitted to practice in Maryland, and he's been certified by the Judge Advocate General of the Navy as a judge advocate. Major Bridges is admitted in Kentucky, and he's been certified by the Judge Advocate General of the Army.

Okay. Second, before they got here, they were nominated; they were chosen by the Navy and the Army as representatives of those services to serve as defense counsel. And then they were selected as defense counsel by Colonel Gunn who is the Chief Defense Counsel of the commissions. He's an Air Force officer. They have to have a security clearance, and they both do have security clearances; correct?

DC (LCDR Sundel): Yes, sir.

ADC (Maj Bridges): Yes, sir.

PO: So they can see all the information for that tribunal or commission. In addition to graduating from college and law school, they've each received extensive training in military law which is, at times, a confusing subset of law. From the time they became judge advocates, they've learned not only military legal principles and terminology, but they've learned military terminology about troops and airplanes and ships and things like that. And they've become familiar with the general military practice and how things are handled in the Departments of the Navy, Army, and the Department of Defense.

And -- I resist making a comment about Kentucky -- they are both fluent in English, which is a necessity here.

Perhaps even more importantly, they are not on trial here, which means that they are not personally involved, which means that they can remain objective in situations when a person about whom things are being said might become emotional or heated. Do you understand what I've said so far?

ACC: Yes, I understood.

PO: Now, like I said before, Commander Sundel and Major Bridges are both judge advocates. They have both been

detailed to represent you since the 3rd of February of 2004. During this period, while I'm not aware of their exact activities since they don't reveal things to me, I feel certain that they have been studying the law which is applicable to these proceedings, preparing various matters to present to the commission and to other authorities, and determining how best to represent you in front of the commission.

Given their background and training, they have the skill and knowledge to force the commission to apply the rules and the law on your behalf; and if they feel that the commission has not done so, they have instant access to computers to make and file motions. They can make objections. They can argue by analogy to federal, military, and international law; and they have research resources, both computer and personal, which will help them insure that your rights are represented or protected in these proceedings. Do you understand what I just said now?

ACC: Yes, I understand. I have a question based on what you said. Are you done?

PO: Not yet.

ACC: When you're done.

PO: No, I'm sorry. Yes, you may ask your question now.

ACC: I have some idea about practicing law in Yemen. [To interpreter]

PO: Excuse me. Could you please lean forward and speak just a little louder.

ACC: I have some idea about practicing law in Yemen.

DC (LCDR Sundel): Excuse me, sir. I'm not sure that was exactly what Mr. al Bahlul said. My understanding is he said that he knows some people who practice law.

INT: I do apologize, sir. Correction, I have --

ACC: Nobody represents me until this point. I wish nobody would interrupt you while I'm talking. I have some people that do practice or are familiar with law in the country of Yemen from different areas.

If the American law, as far as I know, would allow me to be represented by a Yemeni attorney through American system, is it possible that I can be granted this, a Yemeni attorney. And as far as I know, if I'm right, that I cannot be represented by anybody other than an American. Is it possible that the Yemeni attorney, through the American attorney, can be involved in my case?

PO: So we are talking correctly, so I can make sure I understood what you requested, referring again to MCO Number 1, Paragraph 4(c)(3), it states, in talking about civilian counsel -- which just means anyone who's not wearing a uniform -- that the attorney, the civilian must be a United States citizen. And you understood that you -- it appeared to me that you understand that.

Now, is what you are telling me that you want to have a Yemeni attorney provided at no expense to the government, meaning the United States Government, present to assist your detailed counsel, Commander Sundel and Major Bridges for this proceeding? I don't know, that's why I'm asking.

ACC: Yes.

DC (LCDR Sundel): Sir, if I just may?

PO: Yeah, you may.

DC (LCDR Sundel): I think perhaps what we may want to do is to clarify if his first preference is to represent himself; if that is not allowable, his second preference is to be represented exclusively by a Yemeni attorney; and if that is not allowable, his last preference is to be represented by military counsel, with a Yemeni attorney assistant.

PO: Thank you for your assistance, I mean it.

You heard Commander Sundel, so now I'm going to ask you. I explained to you generally your rights to counsel. Detailed counsel, a requested military counsel, a civilian counsel, U.S. citizen, those are your rights to counsel. As you're sitting there, please just tell me, right now, what do you want? Do you want a second talk to someone? Honest, I mean -- do you want to take a --

ACC: I have mentioned previously, and you answered it. I asked if I can represent myself, you said no. But what I meant -- I do not want an attorney representing me. I'll attend the sessions if it's mandatory to attend; I'll be here. If I do have that choice attending the sessions, I'd rather not be here. This is an order.

PO: What was the last word, sir?

ACC: If I do not have -- if it's have to attend the hearing, then I'd rather not attend.

PO: I do not recall directing or stating that you are not allowed to represent yourself. What I said and I read was the provision of the military commission order. I am trying, honestly, to find out your desires and to find out something more about you and those desires. I have not ignored what you said, but I want to find out some more before I say anything in that regard; okay?

ACC: Good.

PO: Commander [redacted] did I say, on the record -- if I did -- did I say he couldn't represent himself, or did I read from the -- I'm not trying to trick anyone. I don't remember saying he could not represent himself.

P (CDR [redacted] One moment, sir. Sir, I believe that when you read the instruction, that's the reasonable interpretation of the instruction.

PO: Order, but that's fine.

P (CDR [redacted] The order that you read.

PO: Okay. I get to interpret my words, he gets to translate them.

Before I say anything on that subject, Mr. al Bahlul, I'd like to know something more about you. And if you wish, you can take a moment and talk with anyone and you can tell me whether or not you want to answer these questions.

How old are you?

ACC: You can ask me anything. I don't need to go back to anybody.

PO: How old are you?

ACC: Thirty-six years.

PO: How many years of formal education do you have?

ACC: Sixteen years.

PO: Have you spent much time in the American culture other than your time here at Guantanamo?

ACC: This is personal, to me?

PO: Yes, personally.

ACC: Are you interested or is it important to you that I answer this question?

PO: I'm asking the question because the proceedings that you're in front of are derived from our culture, and different cultures have different ways of handling things. And I guess what I'm asking is this: Is your knowledge of our culture sufficient to make things that would appear strange if you had no knowledge, not appear so strange? That's all I'm asking.

ACC: I have large amount of knowledge.

PO: Okay. Talking about language, we are using a translator now, but there are things that are said, no matter how good the translator might be, that lose something in translation. And therefore, I ask: Is your fluency level in English such that you can understand most of what's said without translation?

ACC: Not a large scale.

PO: Have you had any formal training in the law? And here I'm not talking just about the American legal system, but any legal training.

ACC: I've read legal matters and books.

PO: Other than the legal motions that you've seen, have you ever studied international law or the law of war? It's not something that most people may much attention to.

ACC: Yes, I did. I've read.

PO: You have been given a copy of the charges against you at this proceeding -- and before you answer this question, please take time to consider my use of the word "understand". When I say "understand", what I mean is, do you comprehend, as they are written, what they are charging? Having put that caveat -- having put that explainers in, do you understand the charges against you?

ACC: Very good.

PO: Do you realize that because -- well, that in accordance with the President's military order and Military Commission Order Number 1, there may be evidence against you which you would not be allowed to see because of its protected nature?

ACC: Do you have another question? The protected information, this is something that is intentional. The people that started this were the British, relating to Muslims. I don't think it's fair that the evidence would not be presented and the accused cannot defend himself without seeing such evidence for himself, or even through an attorney.

PO: You have made in your response, what you just said, a challenge to the structure, the way the commission is set up. And the commission will take a motion -- piece of paper on this.

That wasn't my question. My question was: Whether you believe it's fair or not fair, do you understand right now that you will not be able to see certain evidence because it is either classified or protected. Right now, you can't see it. Do you understand that?

ACC: For the protected evidence, let's put it aside. It's all well known in all those -- the civilian or the local, the decision is the evidence, especially if that decision is under no pressure, and based on the person without any -- without being placed under any pressure, and based on personal decision or preference.

I know that the presiding officer is not interested that I decide that I am from al Qaida or not. Let the proceedings take its course regarding if I am guilty or not.

One point that I would like the judge to understand and the members or the panel, and the people -- the people that are the jurors, or the people that were sworn in, and the prosecutor, and the defense team that until this point does not represent me, and the visitors and detainees, and if it's being, you know, viewed via media channels, people that are watching as well, people of the entire globe should know, I testify that the American government is under no pressure. Nobody has put the United States Government under pressure. I am from al Qaida, and the relationship between me and September 11th --

PO: Members -- thank you. Please stop for a second.

Members, you all understand that I am questioning Mr. al Bahlul in order to determine his representation. You all understand that; right? You all understand that Mr. al Bahlul has not been placed under oath?

Apparently so.

You further understand that none of this is evidence in any way. Do you all understand that?

Apparently so.

I apologize for interrupting you.

P (CDR [redacted]: Sir, before we go on, we'd note our objection to that statement and ask for a recess.

PO: What do you wish to discuss in the recess?

P (CDR [redacted]: I think our objection is noted. We don't think that's an accurate statement of commission law.

PO: Thank you. You may provide a brief on that matter.

P (CDR [redacted]: Yes, sir.

PO: Go on.

ACC: I know that this is like an arraignment, and the questions are limited legally, and there is other sessions that will take place. And it's normal from the presiding officer and the others sitting here take their time to see that probably they might render an improper

judgment; so that we don't really go into, you know, side things, you know, over here.

In short, I would like to represent myself, and I'm telling this to the presiding officer, or the judge. For the questions that the judge have asked, for the things that you need to know about me relating to being familiar with the law and the new laws. Specifically, there was new laws that were drafted in the United States specifically after the September 11th incident. I would like to file a motion to represent myself and defend myself at the same time.

I can write or everybody in this room can be a witness in the next sessions. Nobody should be worried relating to me causing problems, or being loud, or basically saying things that might be inflammatory. I can give you my word, you know, my verbal promise, that basically I would not, you know, go against that, what I'm saying today.

From your questions, you know, you wanted to know my level of law-wise, you know, legal terms, legal terms relating to the local. I know all the Islamic laws and according to your questions, basically wants to verify my ability. And if the American system would not allow me to defend myself, then I'll be forced to attend and I'll be a listener. Only.

PO: While I'm thinking, let me make a note that's an aside. I have motioned at counsel and Mr. al Bahlul and myself with what I prefer to think of as a slow-down motion solely because we all talk too fast for the translators sometimes.

You stated that up until this time, while Commander Sundel and Major Bridges were detailed as your counsel, they were not representing you.

ACC: They don't represent me.

PO: There's a term in the law called amicus curiae. What it means is a friend of the court. Would you permit Commander Sundel and Major Bridges to file, or to give to the commission on your behalf a motion requesting that you be allowed to represent yourself, which is what you've told me you want to do? Because until someone tells the commission that this order does not apply, the

commission is not able to let you represent yourself. And I further tell you that, based on my experience, the best way to get an answer to your question would be to have a motion filed.

Will you permit them to file a motion on your behalf, not stating that they are representing you?

ACC: If I represent that motion through me, through the legal term, that means I did have them represent me.

PO: No, I have just said that they would file a motion as an amicus, meaning just as a friend of the commission.

ACC: Friends of the commission?

PO: As a --

ACC: As a mediator between the two of us?

PO: I would imagine that sitting there, Commander Sundel and Major Bridges have the desire to get you what you want, if they can. No one on this commission is going to write a brief -- a brief is just the law that's attached to a motion -- which puts forth your side. By allowing them to file an amicus brief, you have said and I've heard, we've all heard, it's on the record that they're not representing you. And you -- by allowing them to file an amicus brief, you're not changing that. You're just getting the benefit -- how long in the service, Major Bridges? JAG Corps?

ADC (Maj Bridges): Twelve-and-a-half years, sir.

DC (LCDR Sundel): About 14 years, sir.

PO: -- of 26-and-a-half years of legal training who are trying to get you what you want on this one issue.

ACC: I would only stick to the verbal offer.

PO: Well, you get your recess, Commander [redacted] Court's in recess.

The Commission Hearing recessed at 1028, 26 August 2004.

The Commission Hearing reconvened at 1110, 26 August 2004.

PO: The commission will come to order. Let the record reflect that all parties present when the commissions recessed are once again present.

In looking at my notes, I note that I failed to mention on the record the defense counsel detailing letter which is already what, Commander [redacted]

P (CDR [redacted] Six, sir.

PO: Thank you. Mr. al Bahlul, in the course of our discussions, I believe I determined what it is you want. I'm going to ask you again so that I can make sure that I know. The first thing you want, your desires are that you be permitted to represent yourself before this commission; is that correct?

ACC: Yes.

PO: If that is not permitted, your second choice is to be represented by a Yemeni attorney; is that correct?

ACC: As far as the Yemeni attorney is concerned, if I get the guarantees that he'll not be harmed neither by the Yemeni, nor by the American authority because of the sensitivity of the matter, and the sensitivity of the matter as far as the al Qaida case and the United States of America, if I get guarantees from the Yemeni government and the Americans that they will not be harmed, as far as the sensitivity of the matters, then I can appoint if law permits me to do so.

PO: I'll rephrase my understanding. If you are not allowed to represent yourself, you wish to have a Yemeni lawyer represent you subject to the guarantees you just stated; is that correct?

ACC: This is okay because I don't want anybody to be harmed because of me.

PO: What you have posed, as I believe I stated before, are structural challenges to the commission proceedings. The commission, as it sits here, does not have the authority to make those structural changes.

However, the commission will cause -- will make a transcript of everything that's been said and forward it to the people who can make or authorize structural

changes. You have told me that you do not wish Commander Sundel and Major Bridges to do anything on your behalf.

ACC: Yes, either them or anybody else.

PO: Commander Sundel, speaking for yourself and Major Bridges, recognizing that Mr. al Bahlul says that you do not represent him, I hereby direct you to provide, for forwarding to the appointing authority, a motion. And this motion will address two structural changes and your support -- your legal support -- a motion. The structural changes will be concerning the right of an accused to represent himself, and the right of an accused to get a foreign attorney to represent him.

Y'all have been on the case for a long time. By the -- I'm sorry, I also did not say, you will not in this motion state that you are representing the views or desires of Mr. al Bahlul. Any question about that?

DC (LCDR Sundel): No, sir.

PO: Don't sit down yet. When can you have a well-reasoned and well-researched brief on those matters prepared to send forward?

DC (LCDR Sundel): I think we could have that ready a week from tomorrow, sir. That would be the 3rd of September, sir.

PO: Okay. Provide it to prosecution; prosecution, you provide your response to Commander Sundel and Major Bridges in their capacity as detailed counsel who are not representing Mr. al Bahlul by the 17th of September.

You provide, Commander Sundel, by the 30th of September your final reply and all the matters therewith to the appointing authority, Mr. Altenburg.

I will provide both counsel -- I will provide the prosecution and Commander Sundel and Major Bridges no later than Saturday, a transcript of these proceedings so that you both -- so that the prosecution and the detailed defense counsel may see what Mr. al Bahlul stated verbally on the record. This transcript will be authenticated in due course.

All authenticated means, Mr. al Bahlul, is that I will

review it and sign it and say that's what happened and I will forward it and a certified interlocutory question to Mr. Altenburg for his action. And all that should arrive for him to start work on by the 30th of September.

Commander [redacted] is there anything else that I can do at this time, in your opinion, to frame the issue or to get this matter resolved?

P (CDR [redacted] No, sir. We believe what you laid out is the approved course of action.

PO: Mr. al Bahlul, you've heard what I've said. The appointing authority will be the one to start the decision making on this process. If you wish to submit any matters to Mr. Altenburg other than what you've stated on the record here today, those matters will have to be forwarded so as to reach him by the 30th of September.

ACC: And it is about what?

PO: About the whole thing we've been talking. Earlier, you stated that you did not want to put anything in writing; you wanted it to be all words. I have told you --

ACC: A verbal request. Like he said earlier, verbal request.

PO: What you stated verbally, has been taken down by Sergeant [redacted] and it will become written. I am telling you, though, that if you change your mind -- I'm not telling you to change your mind -- I'm saying if you change your mind and you want to submit anything to Mr. Altenburg those matters have got to reach him by the 30th of September.

Anything else, Commander [redacted]

P (CDR [redacted] No, sir.

PO: Members?

I am not going to set a date for the next hearing in this case. Once Mr. Altenburg or others in the chain make a decision, I'll do something then; okay?

All rise. Court's in recess.

The Commissions Hearing recessed at 1125, 26 August 2004.

	)	MEMORANDUM OF LAW:
UNITED STATES OF AMERICA	)	
	)	RIGHT TO SELF-
v.	)	REPRESENTATION;
	)	RIGHT TO CHOICE OF
	)	COUNSEL
ALI HAMZA AHMAD SULAYMAN AL BAHLUL	)	
	)	2 September 2004

1. Purpose of Memorandum.

On 26 August 2004, the Presiding Officer of Mr. al Bahlul's military commission directed the undersigned, detailed defense counsel, to address the issues of an accused's right to self-representation and counsel of his own choice in the context of military commissions. This Memorandum is provided in accordance with that direction.

2. Facts.

During counsel's initial meetings with Mr. al Bahlul in April 2004, he stated that he did not want detailed defense counsel to represent him. Instead, he stated that he intended to represent himself before the commission. Consistent with Mr. al Bahlul's wishes, on 20 April 2004 detailed defense counsel requested that the Chief Defense Counsel approve a request to withdraw as detailed defense counsel. The Chief Defense Counsel denied the request to withdraw on 26 April 2004. Specifically, the Chief Defense Counsel found that MCO No. 1 and MCI No. 4 required detailed defense counsel to represent the accused despite the accused's wishes. The most relevant provision cited by the Chief Defense Counsel states that detailed defense counsel "shall so serve notwithstanding any intention expressed by the Accused to represent himself." MCI No. 4, para. 3D(2). See also MCO No. 1, para. 4C(4)("The Accused must be represented at all relevant times by Detailed Defense Counsel.")

After our request to withdraw was denied by the Chief Defense Counsel, detailed defense counsel submitted a request to the Secretary of Defense, General Counsel of the Department of Defense, and Appointing Authority to modify or supplement the rules for commissions to allow for withdrawal of detailed defense counsel and recognize the right of self-representation. See attached memorandum, dated 11 May 2004, entitled "Request for Modification of Military Commission Rules to Recognize the Right of Self-Representation, *United States v. al Bahlul*"). The Secretary of Defense, General Counsel, and the Appointing Authority have not responded to this request.

Before the military commission on 26 August 2004, Mr. al Bahlul stated that he wished to represent himself. Transcript of 26 August 2004 Commission Hearing (Transcript) at 6, 7, 11, 15, 16, 18. Mr. al Bahlul went on to state that if he is prohibited

from representing himself he desires to be represented by a Yemeni attorney of his own choosing. Transcript at 10, 18-19. Finally, Mr. al Bahlul made clear that he did not wish to be represented by detailed defense counsel, and that he did not accept the services of detailed defense counsel. Transcript at 11, 16, 17, 19.

3. Law.

A. An Accused has a Fundamental Right to Represent Himself Before a Military Commission.

Binding treaty law, procedural rules for comparable international tribunals for the prosecution of war crimes, and United States domestic law all establish an accused's fundamental right to represent himself, and the concurrent right to refuse the services of appointed defense counsel. This recognized right of self-representation "assures the accused of the right to participate in his or her defense, including directing the defense, rejecting appointed counsel, and conducting his or her own defense under certain circumstances." M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 Duke J. Comp. & Int'l L. 235, 283 (Spring 1993). Not since the Star Chamber of 16th and 17th century England, has defense counsel been forced upon an unwilling accused. *Faretta v. California*, 422 U.S. 806, 821 (1975).

The International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (AMCHR), and the Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF) all recognize an accused's right to represent himself in criminal proceedings. ICCPR, Article 14(3)(d); AMCHR, Article 8(2)(d); CPHRFF, Article 6(3)(c); Bassiouni at 283. Representative of these three treaties is the ICCPR's mandate that "in the determination of any criminal charge against him, everyone shall be entitled . . . to defend himself in person or through legal assistance of his own choosing." ICCPR, Article 14(3)(d). The plain language of this provision establishes an accused's right to represent himself.

The right of self-representation is enforced by the both of the current international tribunals established to prosecute violations of the law of war. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) both allow for self-representation before the tribunal. Statute of the ICTY, Article 21(4)(d); Statute of the ICTR, Article 20(4)(d).

It is worth noting that the World War II international military tribunals also recognized the right of self-representation. The rules of procedure governing the Nuremberg military tribunals provided that "a defendant shall have the right to conduct

his own defense."[1] Similarly, the tribunal for the Far East recognized an accused's right to forgo representation by counsel except where the Tribunal believed that appointment of counsel was "necessary to provide for a fair trial."[2]

The internationally recognized right of self-representation in criminal proceedings is consistent with United States domestic law. The Sixth Amendment of the United States Constitution, as well as English and Colonial jurisprudence, support the right of self-representation. In *Faretta v. California*, the Supreme Court found that "forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." 422 U.S. at 807. In surveying the long history of English criminal jurisprudence, the Supreme Court concluded that only one tribunal "adopted a practice of forcing counsel upon an unwilling defendant in a criminal proceeding" – the Star Chamber. *Id.* at 821. The Star Chamber which was of "mixed executive and judicial character" and "specialized in trying 'political' offenses . . . has for centuries symbolized disregard of basic individual rights." *Id.*

Soon after the disestablishment of the Star Chamber the right of self-representation was again formally recognized in English law:

> The 1695 [Treason Act] . . . provided for court appointment of counsel, *but only if the accused so desired.* Thus, as new rights developed, the accused retained his established right 'to make what statements he liked.' The right to counsel was viewed as guaranteeing a choice between representation by counsel and the traditional practice of self-representation. . . . At no point in this process of reform in England was counsel ever forced upon the defendant. The common-law rule . . . has evidently always been that 'no person charged with a criminal offence can have counsel forced upon him against his will.'

Faretta, 422 U.S. at 825-26 (footnotes and internal citations omitted).

This common law approach continued in Colonial America, where "the insistence upon a right of self-representation was, if anything, more fervent than in England." *Id.* at 826.

> This is not to say that the Colonies were slow to recognize the value of counsel in criminal cases. . . . At the same time, however, the basic right of self-representation was never questioned. We have found no instance where a colonial court required a defendant in a criminal case to accept as his representative an unwanted lawyer. Indeed, even where counsel was permitted, the general practice continued to be self-representation.

---

[1] Rule 2(d), Nuremberg Trial Proceedings Vol. 1 Rules of Procedure (Nuremberg Proceedings); Rule 7(a), Rules of Procedure Adopted by Military Tribunal I in the Trial of the Medical Case (Medical Case); Rule 7(a), Uniform Rules of Procedure, Military Tribunals, Nuremberg, Revised to 8 January 1948 (Uniform Rules) (http://www.yale.edu/lawweb/avalon/imt/imt.htm#rules).

[2] Article 9(c), Charter of the International Military Tribunal for the Far East (Far East Tribunal) (http://www.yale.edu/lawweb/avalon/imtfech.htm).

Id. at 827-28 (footnote omitted).

Further, there can be no legitimacy to a view that counsel can be forced upon an unwilling defendant for the defendant's own good:

> It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. . . . The right to defend is personal . . . . It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'

Faretta, 422 U.S. at 834 (internal citation omitted).

Finally, rules of professional responsibility governing attorneys' conduct also recognize an individual's right to self-representation. In discussing the formation of a client-attorney relationship, one commentary observes "The client-lawyer relationship ordinarily is a consensual one. A client ordinarily should not be forced to put important legal matters into the hands of another or accept unwanted legal services." Restatement 3d of the Law Governing Lawyers, American Law Institute (2000), §14. Similarly, §1.16(a)(3) of the American Bar Association's Model Rules of Professional Responsibility, which exists in each of the Service's rules of professional responsibility, "recognizes the long-established principle that a client has a nearly absolute right to discharge a lawyer." The Law of Lawyering, Hazard & Hodes, Aspen Law & Business 2003 (3d ed.), 20-9.

Treaties, procedures of international tribunals, Anglo-American common law, current domestic law, and rules of professional responsibility are unanimous in recognizing a criminal accused's right to self-representation. The only contrary provisions are those found in the procedural rules contained in the orders and instructions designed to implement the President's Military Order establishing the military commissions.

B. An Accused has a Fundamental Right to Counsel of His Own Choosing Before a Military Commission.

The International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (AMCHR), and the Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF) all recognize an accused's right to be represented by counsel of his own choosing. ICCPR, Article 14(3)(b) and (d);

AMCHR, Article 8(2)(d); CPHRFF, Article 6(3)(c). The plain language of these provisions unequivocally establish such a right.

Further, the right to counsel of choice is enforced by the both of the current international tribunals established to prosecute violations of the law of war. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) both allow for representation by counsel of one's own choosing before the tribunal. Statute of the ICTY, Article 21(4)(d); Statute of the ICTR, Article 20(4)(d).

Historically, the Nuremburg military tribunals also recognized the right of an accused to be represented by counsel his own selection, with two of the tribunals requiring only that "such counsel [be] a person qualified under existing regulations to conduct cases before the courts of defendant's country, or [be] specially authorized by the Tribunal."[3] Interestingly, the military tribunal for the Far East and one of the Nuremberg tribunals imposed no limitations on an accused's choice of counsel, although the former did provide for "disapproval of such counsel at any time by the Tribunal."[4]

The internationally recognized right of self-representation in criminal proceedings is consistent with United States domestic law. The Sixth Amendment of the United States Constitution supports the right to counsel of choice; over seventy years ago the Supreme Court wrote "it is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice." *Powell v. Alabama,* 287 U.S. 45, 53 (1932). While this right is not absolute, its "essential aim . . . is to guarantee an effective advocate for each criminal defendant." *Wheat v. United States*, 486 U.S. 153, 159 (1988).

The right of a criminal accused to be represented by counsel of his own choosing is widely recognized in international and domestic law as being an essential part of the right to present a defense. The decision as to who qualifies as an effective advocate for a foreign national charged with war crimes before a military commission is an individual one which should be permitted each accused. Rules governing military commissions that limit an accused's choice of counsel based solely on the counsel's nationality impermissibly infringe on the right to present a defense, and thus are inconsistent with the law.

C. The Military Commission Must Respect an Accused's Right to Self-Representation and Choice of Counsel.

Treaties, signed by the Executive and ratified by the Senate, are binding law. U.S. Constitution, Article VI, Clause 2 ("Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land"). The ICCPR has been signed and ratified by the United States.[5] Furthermore, the President has

---

[3] Rule 7(a), Medical Case; Rule 7(a), Uniform Rules, note 1, infra.
[4] Article 9(c), Far East Tribunal; Rule 2(d), Nuremberg Proceedings, note 2, infra.
[5] http://www.unhchr.ch/pdf/report.pdf

ordered executive departments and agencies to "fully respect and implement its obligations under the international human rights treaties to which [the United States] is a party, including the ICCPR." Executive Order 13,107, Section 1(a), 61 Fed.Reg. 68,991 (1998). The Executive Order provides that "all executive departments and agencies . . . including boards and commissions . . . shall perform such functions so as to respect and implement those obligations fully." Executive Order 13,107, Section 2(a).

The commission is also bound by customary international law. Customary international law is developed by the practice of states and "crystallizes when there is 'evidence of a general practice accepted as law.'" Yoram Dinstein, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 5 (Cambridge University Press 2004). The United States considers itself bound by customary international law in implementing its law of war obligations. Department of Defense Directive (DODD) Number 5100.77, DoD Law of War Program, Dec. 9, 1998, para. 3.1 ("The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law."); DODD Number 2310.1, DoD Program for Enemy Prisoners of War (EPOW) and Other Detainees, Aug. 18, 1994, para. 3.1 ("The U.S. Military Services shall comply with the principles, spirit, and intent of the international law of war, both customary and codified, to include the Geneva Conventions."); Field Manual 27-10, The Law of Land Warfare, July 1956, Chapter 1, Section I, para. 4 (the law of war is derived from both treaties and customary law).

Finally, Article 21, Uniform Code of Military Justice, which the President cites as authority for the military commissions, recognizes that jurisdiction for military commissions derives from the law of war. 10 U.S.C. Section 821 (jurisdiction for military commissions derives from offenses that "by the law of war may be tried by military commission"); see also Manual for Courts-Martial, 2002 edition, Part I, para. 1 (international law, which includes the law of war, is a source of military jurisdiction). Just as the jurisdiction of military commissions are bounded by the law of war, so the procedures followed by military commissions must comply with the law of war, whether it be codified or customary.

The ICCPR, AMCHR, CPHRFF, ICTY and ICTR rules, and United States domestic law establish that self-representation and counsel of one's choosing are recognized as rights that must be afforded as part of one's ability to present a defense. Additional Protocol I to the Geneva Conventions provides that a court trying an accused for law of war violations "shall afford the accused before and during his trial all necessary rights and means of defence." Geneva Conventions (1949), Additional Protocol I, Article 75, para. 4(a). The United States considers Article 75 of Additional Protocol I to be applicable customary international law. William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 Yale J. Int'l L. 319, 322 (Summer 2003)("[the United States] regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.")

The military commission is bound by treaties, international agreements, and customary international law, all of which recognize an accused's right to self-representation and choice of counsel. Any provisions in the President's Military Order, or the Military Commission Orders and Instructions, that conflict with those rights are unlawful.

4. Attached Files.

A. Memorandum, dated 11 May 2004, "Request for Modification of Military Commission Rules to Recognize the Right of Self-Representation, *United States v. al Bahlul*."

/s/
Philip Sundel
LCDR, JAGC, USN
Detailed Defense Counsel

/s/
Mark A. Bridges
MAJ, JA, USA
Assistant Detailed Defense Counsel

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

23 September 2004

MEMORANDUM FOR MR. JOHN D. ALTENBURG, APPOINTING AUTHORITY, OFFICE OF MILITARY COMMISSIONS

SUBJECT: PRESERVATION OF RIGHT TO FULL AND FAIR TRIAL BY MILITARY COMMISSION IN THE CASE OF ALI HAMZA AHMAD SULAYMAN AL BAHLUL

1. Mr. Ali Hamza Ahmad Sulayman al Bahlul's initial hearing before the military commission occurred on 26 August 2004. During that hearing Mr. al Bahlul stated that he wished to represent himself, and that if he is prohibited from representing himself he desires to be represented by a Yemeni attorney of his own choosing. Mr. al Bahlul also stated that he did not wish to be represented by detailed defense counsel and that he did not accept the services of detailed defense counsel.

2. The Presiding Officer of the military commission ultimately concluded that the commission did not have the authority to rule on Mr. al Bahlul's representation requests, and directed that the matter be submitted to the Appointing Authority. A schedule was set which was to result in the filing of all relevant matters regarding these issues with the Appointing Authority by 30 September 2004. With respect to their brief on the issues the Presiding Officer instructed detailed defense counsel that "you will not in this motion state that you are representing the views or desires of Mr. al Bahlul." The hearing concluded with the Presiding Officer informing the participants that "I am not going to set a date for the next hearing in this case. Once [the Appointing Authority] or others in the chain make a decision, I'll do something then."

3. There are at present no events scheduled in Mr. al Bahlul's case after submittal of the representation issues to you. The cases of U.S. v. Hamdan, U.S. v. Hicks, and U.S. v. al Qosi, however, are proceeding – motions hearings are scheduled to occur in all three in either November or December, and trials are scheduled for December 2004, January 2005, and February 2005, respectively. Further, counsel are being provided the opportunity to comment on procedural matters being addressed outside of the motions hearings, such as Interlocutory Questions submitted by the Presiding Officer and Presiding Officer Memoranda (POM) detailing rules of practice before the commissions.

4. It is likely that procedures established for the first commissions, and many of the legal rulings made during them, will control or significantly impact all subsequent military commissions. Indeed, many of the issues are treated as joint issues across all of the current commissions, with all counsel being given an opportunity to comment, and the Government filing a single pleading, signed by the Chief Prosecutor or his Deputy, to be used as its response in all cases. Consequently, the right of an accused to participate in the decisions that will be made over the next few months is an important one, and one that each person whose case is currently before a military commission should have.

5. Unfortunately, it appears that Mr. al Bahlul is being denied the opportunity to participate in these decisions. Mr. al Bahlul's detailed defense counsel are taking no actions on his behalf pending resolution of questions regarding his right to decline their services. At the same time, no competent authority has taken steps to craft an alternate mechanism to ensure Mr. al Bahlul's interests in the military commission proceedings are protected pending resolution of the representation issues. I am concerned that this situation compromises Mr. al Bahlul's right to a full and fair trial.

6. Since Mr. al Bahlul has stated that he does not wish to be represented by military counsel I do not believe that there are any steps I can take to remedy the situation. Nonetheless, as Chief Defense Counsel I believe that I am obligated to communicate my concerns to competent authority if I believe that a defendant's rights are being violated. In discharge of that duty I request that you take steps necessary to ensure that Mr. al Bahlul is not denied the opportunity to participate in military commission matters of potential interest to him. I recommend that you direct the Presiding Officer and his Assistant, members of the Office of the Chief Prosecutor, and members of your own staff to communicate with Mr. al Bahlul directly on matters which are of potential interest to him, and allow him the opportunity to respond.

Will A. Gunn

WILL A. GUNN, Colonel, USAF
Chief Defense Counsel

cc:
Presiding Officer
DoD Deputy General Counsel (Personnel and Health Policy)
Chief Prosecutor

UNITED STATES OF AMERICA v. ALI HAMZA AHMAD SULAYMAN AL BAHLUL	)))))))))	**PROSECUTION RESPONSE TO DEFENSE MEMO FOR SELF-REPRESENTATION AND RIGHT TO CHOICE OF COUNSEL** 1 October 2004

1. Timeliness. This motion response is being filed within the timeline established by the Presiding Officer.

2. Prosecution Position on Defense Motion. The Prosecution joins the Defense in their implied requested relief to amend Commission Law and permit the Accused to represent himself in these Commission proceedings conditioned upon standby counsel being appointed. Standby counsel need to be available to:

a. Assist the Accused in his Defense consistent with the desires of the Accused;
b. Represent the Accused at closed sessions involving classified or otherwise protected information;
c. Take over the representation should the Accused forfeit his right to represent himself.

3. Agreed Upon Facts. The Prosecution does not dispute the factual assertions contained in the Memorandum of Law submitted by the Defense on 2 September 2004.

4. Additional Facts. Mr. al Bahlul appeared before the Military Commission on 26 August 2004. During this appearance, the following was established:

a. The Accused clearly stated that he wished to represent himself before the Military Commission (transcript pages 6-7);
b. Other than his refusal to rise when the Commission members entered and exited the courtroom, the Accused was respectful during the Commission proceedings (see transcript in its entirety);
c. The Accused is 36-years-old and has 16 years of formal education (transcript page 12);
d. The Accused stated clearly that while under no pressure from the American government, he wanted to state that he is an al Qaida member (transcript page 14);
e. The Accused gave his word that he would not be loud or disruptive and that he would not make inflammatory statements if permitted to represent himself (transcript page 16).

5. Legal Authority.

a. Military Commission Instruction No. 4
b. Military Commission Order No. 1
c. Farretta v. California, 422 U.S. 806 (1975)
d. Brady v. United States, 397 U.S. 742 (1970)
e. United States v. Singleton, 107 F.3d 1091, 1095 (4th Cir. 1997)
f. McKaskle v. Wiggins, 465 U.S. 168 (1984)
g. United States v. Davis, 285 F.3d 378, 383 (5th Cir. 2002)
h. United States v. Betancourt-Arretuche, 933 F.2d 89, 95 (1st Cir. 1991)
i. United States v. McDowell, 814 F.2d 245, 250 (6th Cir. 1987)
j. United States v. Frazier-El, 204 F.3d 553, 558 (4th Cir. 2000)
k. Patterson v. Illinois, 487 U.S. 285,299 (1988)
l. Torres v. United States, 140 F.3d 392, 401 (2d Cir. 1998)
m. United States v. Lane, 718 F.2d 226, 233 (1983)
n. United States v. Bin Laden, 58 F. Supp.2d 113, 121 (S.D.N.Y. 1999)
o. Illinois v. Allen, 397 U.S. 337 (1970)
p. United States v. Kaczynski, 239 F.3d 1108, 1116 (9th Cir. 2001)
q. Moussaoui, Criminal No. 01-455-A, Court Order of November 14, 2003 (E.D. Va.).
r. United States v. Lawrence, 11 F.3d 250, 253 (4th Cir. 1998)
s. United States v. Dougherty, 473 F.2d 1113, 1125 (D.C. Cir. 1972)
t. Barham v. Powell, 895 F.2d 19, 23 (1st Cir. 1990)
u. President's Military Order of November 13, 2001, Section 4(c)(2).
v. Haig v. Agee, 453 U.S. 280, 309-10 (1981)
w. United States v. Dennis, 341 U.S. 494, 519 (1951) (Frankfurter, J., concurring)
x. McQueen v. Blackburn, 755 F.2d 1174, 1177 (5th Cir. 1985)
y. Raulerson v. Wainwright, 732 F.2d 803, 808 (11th Cir. 1984)
z. Prosecutor v. Vojislav Seselj, "Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj", Case No.: IT-03-67-PT, 9 May 2003
aa. Prosecutor v. Jean-Bosco Barayagwiza, ICTR-97-19-T, 2 November 2000
bb. Rule for Court-Martial 502
cc. United States v. Jackson, 54 M.J. 527, 535 (N.M. Ct. Crim. App. 2000)
dd. United States v. Steele, 53 M.J. 274 (2000)
ee. Frazier v. Heebe, 482 U.S. 641, 645 (1987)
ff. United States v. Grismore, 546 F.2d 844, 847 (10th Cir. 1976);
gg. United States v. Whitesel, 543 F.2d 1176, 1177-81 (6th Cir. 1976);
hh. United States v. Kelley, 539 F.2d 1199, 1201-03 (9th Cir. 1976).
ii. Rule 1.16(c) of Navy Judge Advocate General Instruction 5803.1B

6. Analysis

a. Current Military Commission Law Does not Permit Self-representation

Military Commission Instruction (MCI) No. 4 clearly delineates that an accused cannot represent himself before a Military Commission. Section 3(D) (2) of this Instruction states that "Detailed Defense Counsel shall represent the Accused before Military Commissions" and that counsel "shall so serve notwithstanding any intention

expressed by the Accused to represent himself." While not worded as unambiguously or as strongly, Sections 4(C) (4) and 5(D) of Military Commission Order (MCO) No. 1 do nothing to contradict MCI No. 4.

The Prosecution concurs with the analysis of the Chief Defense Counsel in his Memorandum of 26 April 2004 where he denied the Defense Counsel's request to withdraw from representing Mr. al Bahlul (Attached).

The Prosecution joins the Defense in their prior request that the Military Commission Instructions be amended to permit self-representation. As will be discussed in detail below, such an amendment will align Commission practice with U.S. Domestic and International Law standards.

b. There is a Right to Self-representation under United States Domestic Law.

Although not binding on Commission proceedings, the right to self-representation is recognized under United States domestic law and in other judicial systems and there are compelling reasons to permit self-representation at Commission trials.

The United States Supreme Court has recognized that a criminal defendant has a Constitutional right to represent himself in a criminal proceeding. Farretta v. California, 422 U.S. 806 (1975). A defendant may waive his right to counsel so long as the waiver is knowing, intelligent and voluntary. See Brady v. United States, 397 U.S. 742 (1970); Johnson v. Zerbst, 304 U.S. 458, 468 (1938); United States v. Singleton, 107 F.3d 1091, 1095 (4th Cir. 1997). The right to self-representation must be preserved even if the trial court believes that the defendant will benefit from the advice of counsel. McKaskle v. Wiggins, 465 U.S. 168 (1984); United States v. Davis, 285 F.3d 378, 383 (5th Cir. 2002) (rejecting appointment of "independent counsel" to present mitigating evidence in capital case against express wishes of defendant).

Mr. al Bahlul has 16 years of formal education and demonstrated that he is very articulate and intelligent during his preliminary hearing. He did express that he only had a rudimentary understanding of the English language. Regardless, a defendant's otherwise valid invocation of his right to self-representation should not be denied because of limitations in the defendant's education, legal training or language abilities. United States v. Betancourt-Arretuche, 933 F.2d 89, 95 (1st Cir. 1991) (neither lack of post-high school education or inability to speak English is "an insurmountable barrier to *pro se* representation"); United States v. McDowell, 814 F.2d 245, 250 (6th Cir. 1987) ("To suggest that an accused who knows and appreciates what he is relinquishing and yet intelligently chooses to forego counsel and represent himself, must still have had some formal education or possess the ability to converse in English is . . . to misunderstand the thrust of Faretta and the constitutional *right* it recognized.") (emphasis in original).

c. A Detailed Inquiry is Required Before Self-representation is Permitted

In United States Federal District Courts, a detailed inquiry of the defendant is required before he is permitted to represent himself. Singleton, 107 F.3d at 1096. If *pro se* representation is permitted before a Military Commission, this safeguard should also be adopted.

An effective assertion of the right of self-representation "must be (1) clear and unequivocal; (2) knowing, intelligent and voluntary; and (3) timely." United States v. Frazier-El, 204 F.3d 553, 558 (4th Cir. 2000). To constitute a knowing, intelligent and voluntary waiver, the defendant must be aware of the disadvantages of self-representation. Patterson v. Illinois, 487 U.S. 285,299 (1988); see e.g., Torres v. United States, 140 F.3d 392, 401 (2d Cir. 1998) (court should conduct on-the-record discussion to ensure that defendant was aware of risks and ramifications of self-representation).

An important facet of making a knowing, intelligent and voluntary waiver of the right to counsel is knowing the conditions under which a defendant will be permitted to represent himself. For example, the Seventh Circuit held in United States v. Lane, that a waiver of counsel is properly made when the defendant was advised that he would not be permitted unlimited legal access to research facilities away from the prison in which he was detained. 718 F.2d 226, 233 (1983). This inquiry is of significant importance in this case as Mr. al Bahlul does not possess nor will he qualify for the required security clearance necessary to review certain classified materials that have already been provided by the Prosecution as part of the discovery process.

Based upon prior admissions to investigators as well as his own assertion during his initial hearing before the Commission, the Accused is an al Qaida member. He has previously stated that he fully supports Usama bin Laden's *fatwa* calling for the killing of American civilians. He has stated that all those killed in the World Trade Center on September 11th were legitimate targets. He has further admitted to pledging *bayat* to Usama bin Laden and stated that he joined al Qaida because he believed in the cause of bin Laden and the war against America. He acknowledges that he will kill Americans at the first opportunity upon release from detention.

It is clear that under these unique circumstances, measures must be taken to safeguard information in the interests of national security. The investigation of al Qaida and its members is an ongoing endeavor and the concerns over the premature or inappropriate disclosure of classified information are heightened. See United States v. Bin Laden, 58 F. Supp.2d 113, 121 (S.D.N.Y. 1999) (government's terrorism investigation ongoing thereby increasing possibility that unauthorized disclosures might place additional lives in danger). The accused must fully comprehend the limitations required due to national security concerns and give an affirmative waiver with respect to these limitations before being permitted to proceed *pro se*.

The Prosecution has provided a proposed colloquy as an attachment to this response. While we acknowledge that a colloquy was commenced during the Accused's

initial hearing before the Commission, we feel that there must be a more in-depth inquiry before the Accused could qualify to engage in self-representation.

d. The Right to Self-representation is not Absolute and Can Be Forfeited

The Supreme Court in Farretta held that the right to self-representation is not absolute and may be forfeited by a defendant who uses the courtroom proceedings for a deliberate disruption of their trial. 422 U.S. at 834; McKaskle v. Wiggins, 465 U.S. 168, 173 (1984) (defendant forfeits right to represent himself if he is unable or unwilling to abide by the rules of procedure or courtroom protocol); Illinois v. Allen, 397 U.S. 337 (1970); United States v. Kaczynski, 239 F.3d 1108, 1116 (9th Cir. 2001) (right to self-representation forfeited when right being asserted to create delay in the proceedings). The right of self-representation is not "a license to abuse the dignity of the courtroom," nor a license to violate the "relevant rules of procedural and substantive law." Faretta, 422 U.S. at 834 n.46. Forfeiture of the right to proceed *pro se* occurred recently in the high visibility prosecutions of Zacarias Moussaoui (inappropriate and disruptive behavior) and Slobadan Milosevic (Milosevic case being tried before International Criminal Tribunal for the former Yugoslavia (ICTY) and right was forfeited based on poor health of Milosevic). See Moussaoui, Criminal No. 01-455-A, Court Order of November 14, 2003 (E.D. Va.).

Based on his demonstrated behavior at his initial hearing as well as his personal promise on the record, the Accused appears willing to abide by courtroom rules and protocol. There is currently no indication that the Accused's approach to his self-representation will change. However, should he become disruptive, the Commission and/or Appointing Authority should not hesitate to revoke his ability to proceed *pro se*. The Commission should be positioned to be able to continue the Commission trial if things change and the Accused proves to be unable to represent himself. For this and other reasons discussed below, standby counsel should be appointed.

e. Standby Counsel Should be Appointed

Once a court has decided to allow a person to proceed *pro se*, the court may, if necessary, to protect the public interest in a fair trial, appoint standby counsel. McKaskle, 465 U.S. at 173. Once standby counsel are appointed, trial courts are given broad discretion in delineating their responsibilities and defining their roles. United States v. Lawrence, 11 F.3d 250, 253 (4th Cir. 1998). This may be done over the objection of the defendant. McKaskle, 465 U.S. at 184. Clear in all cases where standby counsel are present, is the notion that such counsel must be prepared to step into the representative mode should the defendant lose the right of self-representation. United States v. Dougherty, 473 F.2d 1113, 1125 (D.C. Cir. 1972). The only limitation to the role of standby counsel is that the participation cannot undermine the right to self-representation or the appearance before the jury as one who is defending himself. McKaskle, 456 U.S. at 177.

Standby counsel have conducted research on behalf of a *pro se* defendant, Barham v. Powell, 895 F.2d 19, 23 (1st Cir. 1990). They have assisted with other substantive matters throughout the trial. McKaskle, 465 U.S. at 180 ("Counsel made

motions, dictated proposed strategies into the record, registered objections to the prosecution's testimony, urged the summoning of additional witnesses, and suggested questions that the defendant should have asked of witnesses.").

Standby counsel cannot however interfere with the defendant's control of the case. They may express disagreement with the defendant's decisions, but must do so outside the jury's presence. Id. at 179.

The appointment of standby counsel is crucial in this case because of the interplay of classified material with this prosecution. While the Prosecution does not intend to admit any classified evidence as part of its cases on the merits or sentencing, classified materials have been provided as part of the discovery process. Standby counsel would be needed to review such information and make appropriate motions pertaining to such information. Such motions may include requests for unclassified summaries of the information they deem pertinent that could then be provided to the Accused.

In the Federal system, the role of standby counsel with respect to classified information is less intrusive to the accused's right of self-representation because such issues are normally resolved outside the presence of the jury. As the entire Commission panel is both the finder of fact and law, trial sessions dealing with issues involving classified information may be conducted in the Accused's absence before the entire Commission panel. See President's Military Order of November 13, 2001, Section 4(c)(2).

Members of this Military Commission were chosen based upon their experience and maturity. They have all had command as well as combat experience. They will already be involved in the litigation of motions and will be exposed to evidence they otherwise would not have seen had they solely been traditional finders of fact. Any impact that exposure to standby counsel litigating classified matters on the Accused's behalf will certainly not outweigh the benefit to the Accused of meeting his desire to proceed *pro se*.

While the right of self-representation is universally recognized, "it is not a suicide pact." Haig v. Agee, 453 U.S. 280, 309-10 (1981). The fundamental principle of self-preservation necessarily demands that some reasonable and well-defined boundaries may be placed on the Accused's ability to represent himself in this case. Cf. United States v. Dennis, 341 U.S. 494, 519 (1951) (Frankfurter, J., concurring). What is of the utmost importance is that the Accused be advised of these lawful limits before he waives his right to counsel with his eyes wide open. United States v. McDowell, 814 F.2d at 250; - McQueen v. Blackburn, 755 F.2d 1174, 1177 (5th Cir. 1985) (court must be satisfied accused understands the nature of the charges, the consequences of the proceedings, and the practical meaning of the right that he is waiving); Raulerson v. Wainwright, 732 F.2d 803, 808 (11th Cir. 1984) ("Once there is a clear assertion of that right [self-representation], the court must conduct a hearing to ensure that the defendant is fully aware of the dangers and disadvantages of proceeding without counsel"). If the Accused can show that he fully understands that he will not have access to classified information and he voluntarily continues to assert his desire for self-representation, he should be permitted to proceed *pro se*.

In summary, standby counsel should be appointed regardless of the Accused's desires. They are needed to assist the Accused consistent with his desires, represent the Accused on matters related to classified information and be prepared to assume full representation should the accused forfeit his right to represent himself.

f. Right of Self-representation under International Law

The Prosecution agrees with the Defense assertion that the right of self-representation is fully recognized under International Law. The Prosecution does contend that the Defense Memorandum is at times misleading as it implies that various international treaties **mandate** this Commission to permit self-representation. They fail to note that with respect to many of the treaties they mention, the United States is either not a party, or did not ratify these documents. See, Additional Protocol I to the Geneva Conventions; American Convention on Human Rights; Convention for the Protection of Human Rights and Fundamental Freedoms.

With respect to the International Covenant on Civil and Political Rights (ICCPR), the United States has signed and ratified this treaty. However its applicability and binding effect on the United States is not as simple and straightforward as the Defense opines. A lengthy discussion on this issue is unnecessary at present as the Prosecution believes that the right to self-representation should be provided to give what has been recognized as a fundamental right both domestically and internationally.

g. Standby Counsel and Forfeiture of the Right to Self-representation are Recognized Under International Law

In Prosecutor v. Vojislav Seselj, the ICTY recognized that a counsel can be assigned to assist an accused engaging in self-representation on a case by case basis in the interests of justice. "Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj", Case No.: IT-03-67-PT, 9 May 2003 paras 20-21. Noting that the right to self-representation is a starting point and not absolute, the Tribunal asserted its fundamental interest in a fair trial related to its own legitimacy in justifying the appointment of standby counsel. Id.

The recognition of the appropriateness of imposition of defense counsel on an accused was emphasized in a decision of the International Criminal Tribunal for Rwanda (ICTR). Prosecutor v. Jean-Bosco Barayagwiza, ICTR-97-19-T, 2 November 2000 para 24. Similar to our present case, Barayagwiza instructed his attorneys "not to represent him in the courtroom" and as a result they initially remained passive and did not mount a defense. Id. at para 17. These attorneys requested to withdraw from representation and their request was denied by the Trial Chamber. Id. at paras 17-20. Viewing the accused's actions as a form of protest and an attempt to obstruct the proceedings, counsel were deemed to be under no obligation to follow the accused's instructions to remain passive. Id. at paras 21-24. In his concurring opinion, Judge Gunawardana opined that the counsel should more appropriately be classified as "standby counsel" whose obligations were not just to protect the interests of the accused, but also the due

administration of justice. Barayagwiza, Concurring and Separate Opinion of Judge Gunawardana (relying on Article 20(4) of the ICTR Statute).

h. The Accused's Alternative Request to be Represented Exclusively by an Attorney from Yemen should be Denied

Section 4(C)(3)(b) of MCO No. 1 requires a civilian attorney representing an accused to be: (1) a United States citizen; (2) admitted to practice law in a State, district, territory, or possession of the United States, or before a Federal court; (3) has not been subject to any sanction or disciplinary action . . . (4) has been determined eligible for access to SECRET information; and (5) agrees in writing to comply with all regulations or instructions for counsel. It is clearly evident that a Yemen citizen attorney who is not eligible to practice law in the United States does not meet these criteria.

Additionally, the Accused's first fallback request is not in accord with Section 4(C)(3)(b) of MCO No.1 as his request for representation is conditioned upon his current detailed military Defense Counsel having absolutely no role in his representation. This conflicts directly with MCO No. 1 where it states that representation by a Civilian Defense Counsel will not relieve Detailed Defense Counsel of their duties specified in Section 4(C)(2). Similarly, even a cleared Civilian Counsel is not guaranteed the ability to be present at closed Commission proceedings. MCO No. 1 Section 4(C)(3)(b); MCI No. 4, Section 3(F).

There are sound reasons for the requirements imposed on civilian counsel. As explained by the Presiding Officer in the Accused's initial hearing, there is great importance in counsel having expertise in military law, military terminology, and the ability to argue by analogy to federal, U.S. military and international law (transcript pages 7-9). Furthermore, as already demonstrated by the Defense's attempt to utilize a non-citizen interpreter in this case, it can take upwards to a year (if ever) to do the background investigation necessary for an appropriate security clearance to be granted. Several months have already been lost in the trial preparation process awaiting the granting of this clearance (which has still not been obtained). Protocol and procedures cannot be disregarded when it comes to national security. The time commitment for obtaining a security clearance would not be consistent with Section 4(A)(5)(c) of MCO No. 1 where the Presiding Officer is tasked to ensure an expeditious trial where the accommodation of counsel does not delay the proceedings unreasonably.

In the court-martial setting, Rule for Court-Martial 502(d)(3) requires that a civilian counsel representing an accused be "[a] member of the bar of a Federal court or of the bar of the highest court of a State." Absent such membership, the lawyer must be authorized by a recognized licensing authority to practice law and must demonstrate to the military judge that they have the demonstrated training and familiarity with criminal law applicable to courts-martial. RCM 502(d)(3)(B). For practical purposes, the civilian counsel must in fact be a lawyer who is a "member in good standing of a recognized bar." United States v. Jackson, 54 M.J. 527, 535 (N.M. Ct. Crim. App. 2000). The Prosecution is unaware of any caselaw questioning the propriety of these conditions. The decisions of military and other federal courts reflect that admission to practice is a

necessary indicia that a level of competence has been achieved and reviewed by a competent licensing authority. United States v. Steele, 53 M.J. 274 (2000).

The United States Supreme Court has held that federal district courts can regulate the admission of people to its own bar so long as these regulations are consistent with "the principles of right and justice." Frazier v. Heebe, 482 U.S. 641, 645 (1987). Greater approval is given to regulations restricting outside attorneys coming into other "state" courts as opposed to other federal courts as the laws and procedures may differ substantially from state to state. Id. at 647. These differences in laws and procedures are of even greater significance in our case as the laws of Yemen differ dramatically from our laws and procedures. Depending on the qualifications of the yet unnamed proposed attorney from Yemen, it may almost be akin to permitting a lay person or non-licensed attorney to represent the Accused. A right to such representation is not recognized in U.S. domestic law. United States v. Grismore, 546 F.2d 844, 847 (10th Cir. 1976); United States v. Whitesel, 543 F.2d 1176, 1177-81 (6th Cir. 1976); United States v. Kelley, 539 F.2d 1199, 1201-03 (9th Cir. 1976).

Part C of the Defense Memorandum appears to merge the concept or entitlement to self-representation with the entitlement to having another individual who does not meet the court's requisite qualifications represent the Accused. These two concepts require distinct analysis as the right to self-representation has an independent source in the structure and history of the Constitution. No such independent source can be found for the alleged right to the assistance of a non-qualified lawyer. Kelley, 539 F.2d at 1202.

The limitations of MCO No.1 with respect to requiring counsel to be a U.S. citizen are narrowly drawn. If the Accused truly desires an attorney from Yemen to play a role in strategizing for his Commission trial, this individual can be requested as a "foreign attorney consultant." Requests for "foreign attorney consultants" have been requested in two of the other three currently pending Commission cases and these requests have been granted. To date, the Accused has not submitted any such request.

7. Conclusion. Current Military Commission Law does not permit the Accused to represent himself. Absent an amendment to current Commission Law, the Detailed Military Defense Counsel should be ordered by the Commission to represent the Accused. See Rule 1.16(c) of Navy Judge Advocate General Instruction 5803.1B (Professional Responsibility Instruction which requires continued representation when ordered by a tribunal or other competent authority notwithstanding good cause for terminating the representation).

The Prosecution believes that an amendment to current Commission Law to permit self-representation is appropriate to bring the Commission in accord with the standards established for United States domestic courts as well as under Customary International Law.

Exclusive representation by a yet unnamed attorney from Yemen should not be permitted. Military Commission Law does not permit this and Commission Law is narrowly tailored in this regard to promote national security as well as the "principles of

right and justice." Any request for a Yemen attorney to act as a foreign attorney consultant should be looked upon favorably assuming all preconditions are met.

8. Attached Files.

   a. Chief Defense Counsel Memorandum dated 26 April 2004
   b. Moussaoui, Criminal No. 01-455-A, Court Order of November 14, 2003 (E.D. Va.).
   c. Proposed colloquy.

[redacted]
Commander, JAGC, USN
Prosecutor

UNITED STATES OF AMERICA	)	DEFENSE REPLY:
	)	
v.	)	RIGHT TO SELF-REPRESENTATION;
	)	
ALI HAMZA AHMAD SULAYMAN AL BAHLUL	)	RIGHT TO CHOICE OF COUNSEL
	)	
	)	
	)	8 October 2004

1. Timeliness of Motion.

This reply is being filed within the timeline established by the Presiding Officer.

2. Legal Authority.

a. *United States v. Ray*, 933 F.2d 307 (5th Cir. 1991)
b. *McKaskle v. Wiggins*, 465 U.S. 168 (1984)
c. ABA Standards for Criminal Justice, Standards 4-3.9 and 6-3.7, <http://www.abanet.org/crimjust/standards/home.html>
d. Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,833 § 4(c)(2) (Nov. 16, 2001)
e. Military Commission Order (MCO) No. 1
f. *Arizona v. Fulminante*, 499 U.S. 279 (1991)
g. Rule for Courts-Martial (RCM) 502
h. *Soriano v. Hosken*, 9 M.J. 221 (C.M.A. 1980)
i. *United States v. Jackson*, 54 M.J. 527 (2000)
j. *United States v. Steele*, 53 M.J. 274 (2000)
k. *United States v. Grismore*, 546 F.2d 844 (10th Cir. 1976)
l. *United States v. Whitesel*, 543 F.2d 1176 (6th Cir. 1976)
m. *United States v. Kelley*, 539 F.2d 1199 (9th Cir. 1976)
n. *Frazier v. Heebe*, 482 U.S. 641 (1987)
o. Military Commission Instruction (MCI) No. 8

3. Analysis.

a. **Standby Counsel.**

As the government correctly notes, the practice of appointing standby counsel to assist the *pro se* defendant has been recognized by domestic and international courts. Although useful in such cases, "the proper role of standby counsel is quite limited." *United States v. Ray*, 933 F.2d 307, 312-13 (5th Cir. 1991), *citing McKaskle v. Wiggins*, 465 U.S. 168, 177-78 (1984).

> Standby counsel does not *represent* the defendant. The defendant represents himself, and may or may not seek or heed the advice of the attorney standing by. As such, the role of standby counsel is more akin to that of an observer, an attorney who attends the trial or other proceeding and who may offer advice, but who does not speak for the defendant or bear responsibility for his defense.

United States v. Ray, 933 F.2d at 313 (emphasis in original).

If the military commission determines that appointment of standby counsel is appropriate, the commission must be cognizant of the limited authority of standby counsel to speak for the accused. The commission must also define the role of standby counsel, consistent with the desires of the accused, so that all parties understand the responsibilities of standby counsel.

(1) **Defining the Role of Standby Counsel.**

In exercising its discretion, the commission should consider the desires of the accused in defining the parameters of standby counsel's role. The American Bar Association (ABA) Standards for Criminal Justice differentiate between standby counsel appointed to "actively assist" a pro se accused and standby counsel whose duty it is to assist "only when the accused requests assistance." Standard 4-3.9, *Obligations of Hybrid and Standby Counsel* (visited Oct. 5, 2004) <http://abanet.org/crimjust/standards/dfunc_blk.html>.

If an accused desires no assistance, then the latter, more passive role should be assumed by standby counsel. In this passive role, standby counsel should only be required to "bring to the attention of the accused matters beneficial to him . . . but should not actively participate in the conduct of the defense." Standard 4-3.9(b). If on the other hand the accused desires assistance, standby counsel should be authorized to "actively assist" the accused, but should nonetheless allow the accused to "make the final decisions on all matters, including strategic and tactical matters relating to the conduct of the case." Standard 4-3.9(a). In order to avoid confusion, the court should "notify both the defendant and standby counsel of their respective roles and duties." Standard 6-3.7(b), *Standby Counsel for Pro Se Defendant* (visited Oct. 5, 2004) <http://abanet.org/crimjust/standards/trialjudge.html>.

(2) **Defining the Role of the "Unwanted" Standby Counsel in the Context of Military Commission Proceedings.**

Although the accused should first be consulted regarding his desires, it is likely that he will object to the appointment of standby counsel. If so, any significant role played by standby counsel during military commission proceedings will undermine the accused's right to self-representation. Standby counsel's role should be limited to providing advice on routine procedural and evidentiary matters, and basic courtroom protocol.

In *McKaskle v. Wiggins*, the Supreme Court addressed the role of standby counsel who is present at trial "over the defendant's objection." 465 U.S. 168, 170 (1984). Because of the danger that multiple defense voices will confuse the defendant's message, the court recognized that limits must be placed on "the extent of standby counsel's unsolicited participation":

> First, the *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury. This is the core of the *Faretta* right. If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak *instead* of the defendant on any matter of importance, the *Faretta* right is eroded.
>
> Second, participation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself.

McKaskle v. Wiggins, 465 U.S. at 178 (emphasis in original).

Unlike the ordinary criminal trial where issues of law are decided by a judge, outside the presence of the jury, military commissions are comprised of members who serve as both judge and jury. *See* Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,833 § 4(c)(2) (Nov. 16, 2001)("the military commission sit[s] as the triers of both fact and law"). Thus, all proceedings before a military commission will be in the presence of the "jury." The ever-present military commission "jury" is a major limitation on the role which can be played by standby counsel.

Standby counsel's participation in the presence of the jury is "more problematic" than participation outside the jury's presence because "excessive involvement by counsel will destroy the appearance that the defendant is acting *pro se*." *McKaskle v. Wiggins*, 465 U.S. at 181. In the presence of the jury, standby counsel, even over the accused's objection, may assist the accused "in overcoming routine procedural or evidentiary obstacles to the completion of some specific task, such as introducing evidence or objecting to testimony, that the defendant has clearly shown he wishes to complete . . . [and] to ensure the defendant's compliance with basic rules of courtroom protocol and procedure." *Id.* at 183. When standby counsel ventures beyond these basic procedural functions, the accused's self-representation rights are eroded.

(3) Standby Counsel Cannot Represent the Accused at Closed Sessions Without the Accused's Consent.

Without the consent of the accused, representation by standby counsel during closed sessions, from which the accused has been excluded, would violate the accused's right to self-representation. Closed sessions of commission proceedings are allowed for a variety of reasons. MCO No. 1, para. 6.B.(3)(proceedings may be closed to protect

classified information or other information protected by law; the physical safety of participants; intelligence and law enforcement sources, methods, or activities; and other national security interests). Participation by standby counsel, on behalf of the accused, at these merits-phase, closed proceedings would undermine the notion that the accused was representing himself and would prevent the accused from making important tactical and strategic decisions regarding his defense. Such a role would violate not only part two of the *McKaskle* test, but part one as well by "effectively allow[ing] counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak *instead* of the defendant on any matter of importance." *McKaskle v. Wiggins*, 465 U.S. at 178. Such a role would also signal that the military commission "cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)(discussing impact on a criminal trial of a structural defect such as denial of the right to self-representation).

Excluding the accused from the courtroom violates international and domestic standards of a fair trial on many levels, not the least of which include the accused's self-representation rights. Furthermore, representing an accused over his objections at a closed hearing and outside of the accused's presence presents difficult ethical issues which standby counsel would need to resolve with his state bar and military ethics advisors.

b. **Choice of Counsel**

The Prosecution readily admits that domestic and international law recognize an accused's right to self-representation. In deference to this fact, the Prosecution agrees that "an amendment to current Commission Law to permit self-representation is appropriate to bring the Commission in accord with standards established for the United States domestic courts as well as Customary International Law."

Similarly, the Prosecution does not appear to dispute that domestic and international law recognize an accused's right to representation by counsel of his choice. Indeed, the Prosecution does not even address, let alone question, the international authority for this right. Curiously, though, the Prosecution does not believe that this right deserves the same recognition, and opposes an amendment to bring the military commission into line with this standard. The Prosecution's arguments opposing this amendment, however, are both woefully incomplete and unconvincing.

In arguing that foreign counsel should not be allowed to appear before a military commission the Prosecution relies in large part on RCM 502(d)(3). The Prosecution draws an analogy between qualifications that apply to a civilian lawyer seeking to appear before a court-martial and qualifications it believes should apply to a civilian lawyer seeking to appear before a military commission. It then concludes that "[f]or practical purposes, the civilian counsel must in fact be a lawyer who is a 'member in good standing of a recognized bar,'" apparently seeking to imply that only a domestic state or federal bar qualifies as a "recognized bar."

Contrary to this implication, however, the Rules for Courts-Martial specifically contemplate allowing foreign attorneys to appear. The Discussion section immediately following RCM 502(d)(3)(B) states "[i]n making such a determination – *particularly in the case of civilian counsel who are members only of a foreign bar* – the military judge should also inquire . . . " (emphasis added). The Discussion section is not binding authority, but it is unquestionably relevant. Although the Prosecution does not acknowledge it, the fact is that the very RCM it cites in opposition to foreign counsel appearing before a military commission actually supports the view that choice of counsel, even including choice of foreign counsel, is a right that should be respected.

Further, the Court of Appeals for the Armed Forces (then the Court of Military Appeals) addressed this very issue over 20 years ago, and held that "a member of a local bar in a foreign country may be qualified to represent a military accused at a court-martial." *Soriano v. Hosken*, 9 M.J. 221, 222 (C.M.A. 1980). The Court went on to write that "[i]t is the military judge assigned to the court-martial who must make the determination whether such a lawyer is minimally qualified to act as civilian counsel." *Id.* Finally, in direct contradiction of the Prosecution's argument the Court stated "[w]e do not anticipate that the military judge will establish any *per se* disqualification with respect to any recognized foreign bar or act on an individual basis in a niggardly fashion." *Id.*

Significantly, none of the cases cited by the Prosecution actually dealt with foreign attorneys. Rather, the cases arose in the context of domestic civilian attorneys accused of providing ineffective assistance of counsel (*United States v. Jackson*, 54 M.J. 527 (2000); *United States v. Steele*, 53 M.J. 274 (2000)), or people requesting to be represented by lay persons (*United States v. Grismore*, 546 F.2d 844, 847 (10th Cir. 1976); *United States v. Whitesel*, 543 F.2d 1176, 1177-81 (6th Cir. 1976); *United States v. Kelley*, 539 F.2d 1199, 1201-03 (9th Cir. 1976). While one of the cases the Prosecution cited does have relevance, that case stands for the proposition that rules precluding otherwise qualified attorneys from practicing in a particular court should be related to legitimate objectives. *Frazier v. Heebe*, 482 U.S. 641, 645 (1987)(error to prohibit attorney residing in one state from practicing in federal court in another state when attorney qualified to practice law in state courts of both states). *Frazier*, therefore, appears to support Mr. al Bahlul's request more than it does the Prosecution's opposition.

The Prosecution's remaining arguments against recognition of this right are similarly unpersuasive. While a security clearance for a foreign counsel might take a significant amount of time, the Prosecution is already aware that such need not be the case -- Mr. Kenny, the Foreign Attorney Consultant for Mr. David Hicks, was able to obtain a security clearance allowing him to participate in military commission proceedings within a matter of weeks. Further, although we have been waiting quite some time for a security clearance for a foreign national interpreter we seek to hire, there is every reason to believe that the process might have been much quicker had a government official associated with the military commissions taken a personal interest. Since the clearance request has instead been delegated to an inexperienced civilian firm

operating under contract, it is not clear that such a lengthy process is inevitable. Finally, even a slow clearance procedure does not justify continuing to bar foreign attorneys. Almost every aspect of the painfully slow military commission process has moved to date according to the Government's timetable. Given that, the Prosecution's reliance on MCO No. 1's provision against unreasonable delay is scant support for denying Mr. al Bahlul's right to representation by counsel of his choice.

The military commission is certainly free to reserve the right to decide whether a particular civilian counsel is qualified. Recognizing that there are differences in laws and procedures between military commissions and the laws of Yemen, however, hardly supports the Prosecution's conclusion that allowing a Yemeni attorney to appear before the commission "may almost be akin to permitting a lay person or non-licensed attorney to represent the Accused." Being qualified to conduct cases before the courts of a defendant's country was sufficient to permit a counsel to represent persons at Nuremberg[1], and little more than that is required by RCM 502 (d)(3)(B). There is no reason to accept the view that all Yemeni attorneys are by definition incompetent to provide representation before a military commission. Mr. al Bahlul's right to find a qualified Yemeni attorney to represent him should be recognized.

c. **The Military Commission Must Rule on Mr. al Bahlul's Requests**

Section 4(A)(5)(d) of MCO No. 1 and paragraph 4(A) of MCI No. 8 authorize the Appointing Authority to decide interlocutory questions certified by the Presiding Officer. Both provisions state that a question "the disposition of which would affect a termination of proceedings with respect to a charge" is a mandatory question that "shall" be certified to the Appointing Authority. Both provisions also allow that the Presiding Officer "may" certify other interlocutory questions that the Presiding Officer deems appropriate.

With respect to the latter class of questions, the Appointing Authority has determined that a Presiding Officer can exercise his discretionary authority to certify interlocutory matters only after the full military commission has ruled on the question. Memoranda from Appointing Authority to Presiding Officer on Interlocutory Questions 1-5 of 5 October 2004. This is based on the military commission's role as the adjudicator of all questions of fact and law. *Id.* Consequently, if the disposition of an issue cannot affect a termination of proceedings with respect to a charge, the matter is not properly raised as a discretionary interlocutory question until after it has been addressed by the full commission. *Id.*

Of the two classes of interlocutory matters, any questions involving Mr. al Bahlul's representation requests would be discretionary. Mr. al Bahlul challenges the legality of military commission procedures that are inconsistent with domestic and international law. Regardless of how these challenges are decided, there is no way that the outcome might affect a termination of the proceedings against him. Whoever

[1] Rule 7(a), Rules of Procedure Adopted by Military Tribunal I in the Trial of the Medical Case; Rule 7(a), Uniform Rules of Procedure, Military Tribunals, Nuremberg, Revised to 8 January 1948. (http://www.yale.edu/lawweb/avalon/imt/imt.htm#rules).

represents him, Mr. al Bahlul will still be facing the same charge. Thus, these matters do not qualify for mandatory interlocutory certification, and any certification of the issues must follow the procedures established for discretionary questions.

Since the issues raised by Mr. al Bahlul's representation requests fall squarely within the military commission's power and obligation to decide questions of law, no interlocutory certification procedure is available until after the commission has discharged its duty.[2] Contrary to the Presiding Officer's apparent intent to pass these issues directly to the Appointing Authority, therefore, the military commission must decide the legality of the challenged rules first.

d. **Timely Resolution of Mr. al Bahlul's Requests is Critical**

Despite concerns recently expressed by the Chief Defense Counsel, Mr. al Bahlul continues to be denied the opportunity to participate in the on-going process addressing legal matters affecting the military commissions. Memorandum from Chief Defense Counsel to Appointing Authority, "Preservation of Right to Full and Fair Trial by Military Commissions in the case of Ali Hamza Ahmad Sulayman al Bahlul," of 23 September 2004. The issues that have been and soon will be addressed are critical to the development of the military commission process, and the decisions will substantively impact Mr. al Bahlul's rights in that process. *Id.* Apparently, the longer resolution of Mr. al Bahlul's representation issues are delayed the longer he will be shut out of the development process. Consequently, the military commission should expeditiously address the legal questions posed by Mr. al Bahlul's representation requests.

4. Attached Files.

a. Memoranda from Appointing Authority to Presiding Officer, Interlocutory Questions 1-5, of 5 October 2004.

b. Memorandum from Chief Defense Counsel to Appointing Authority, "Preservation of Right to Full and Fair Trial by Military Commission in the case of Ali Hamza Ahmad Sulayman al Bahlul," of 23 September 2004

/s/	/s/
Philip Sundel	Mark A. Bridges
LCDR, JAGC, USN	MAJ, JA
Detailed Defense Counsel	Assistant Detailed Defense Counsel

[2] Counsel acknowledge that there may be practical difficulties involved with the military commission passing on legal matters prior to *voir dire* and challenges. Such difficulties would not change the nature of the underlying legal questions, however, and cannot justify interlocutory certification in violation of established procedures, although they might be evidence of a structural defect in the process. *See Arizona v. Fulminante*, 499 U.S. 279, 309-310 (1991)(participation of trial judge who was not impartial affected entire course of trial.)

From: Sundel, Philip, LCDR, DoD OGC
To: 'Pete Brownback' ; [redacted] 'Hodges, Keith'
Cc: [redacted] Bridges, Mark, MAJ, DoD OGC ; Gunn, Will, Col, DoD OGC ; [redacted] Swann, Robert, COL, DoD OGC ; [redacted]
Sent: Wednesday, October 13, 2004 11:16 AM
Subject: RE: Defense Reply Brief-- Representation (US v. al Bahlul)

Sir,

Is your intent still to submit this as a "certified interlocutory question" as you indicated during the 26 August 2004 hearing?

V/r
LCDR Sundel
Detailed Defense Counsel

From: Pete Brownback [redacted]
Sent: Wednesday, October 13, 2004 15:45
To: 'Hodges, Keith'; [redacted] Sundel, Philip, LCDR, DoD OGC
Cc: [redacted] Swann, Robert, COL, DoD OGC; [redacted] Gunn, Will, Col, DoD OGC; Bridges, Mark, MAJ, DoD OGC; [redacted]
Subject: Re: Defense Reply Brief-- Representation (US v. al Bahlul)

LCDR Sundel,

1. If the Appointing Authority makes a ruling, there will be no need for an interlocutory question.
2. If the Appointing Authority does not make a ruling, the issue will be presented to the Commission for decision.
3. I do not, at this time, intend to send the matter as an interlocutory question to the Appointing Authority prior to the Commission acting upon the matter.
4. I am, however, quite willing to listen to any input from the parties.

COL Brownback

From: Sundel, Philip, LCDR, DoD OGC
To: 'Pete Brownback' ; 'Hodges, Keith' ; [redacted]
Cc: [redacted] Swann, Robert, COL, DoD OGC ; [redacted] Gunn, Will, Col, DoD OGC ; Bridges, Mark, MAJ, DoD OGC [redacted]
Sent: Thursday, October 14, 2004 11:45 AM
Subject: RE: Defense Reply Brief-- Representation (US v. al Bahlul)

Sir,

There is a need for Mr. al Bahlul's representation issues to be placed squarely before a decision maker. You have indicated that you will not allow the military commission to address these matters, and that you do not intend to certify the issue to the Appointing Authority. This leaves Mr. al Bahlul's case in a "no-man's-land" with no one accepting responsibility to decide the issue of his right to self-representation.

Mr. al Bahlul made his request to be allowed to represent himself to the military commission. We have filed a Memorandum of Law and a Reply with the military commission. We believe that the matter is presently before the military commission, and that the commission needs to address it.

However, you have indicated that you believe the request must be addressed by the Appointing Authority or a higher power. If that is still your belief, then the matter needs to in fact be presented to the Appointing Authority. Certifying the issue to him as an interlocutory question would appear to be the only mechanism to formally place it before the Appointing Authority (though I again reiterate that we disagree with the legality of that course of action). Simply assuming that he is aware of it, and hoping that he elects to take it up, does not seem like a judicious approach.

Along those lines, it is worth remembering that this matter has already been before the Appointing Authority for five months. Unfortunately, we have received no response or status update on our mid-May request for a rule change. Consequently, we are concerned with a plan that may rely on an assumption that the Appointing Authority will choose to take this up because it is the right thing to do.

The Prosecution has acknowledged that it is not sure whether the representation issues should be addressed by the military commission or the Appointing Authority. We believe that concession, along with the arguments contained in our Reply brief, should be enough to return the matter to the commission.

Regardless of how you choose to handle this, though, it must be clear what authority is responsible for deciding Mr. al Bahlul's representation issues. Allowing them to possibly languish in a gray area between the military commission and the Appointing Authority is unacceptable.

V/r

LCDR Sundel
Detailed Defense Counsel

From: "Pete Brownback" [redacted]
To: [redacted] "'Hodges, Keith'" [redacted] "Bridges, Mark, MAJ, DoD OGC" [redacted] "Gunn, Will, Col, DoD OGC" [redacted] "Swann, Robert, COL, DoD OGC" [redacted] LTC, DoD OGC" [redacted]
COL, DoD OGC" [redacted]
Subject: Re: Defense Reply Brief-- Representation (US v. al Bahlul)
Date: Thursday, October 14, 2004 1:43 PM

MessageLCDR Sundel,

1. I am very sensitive to Mr. aL Bahul's situation -- as evidenced by my actions and directions thus far. Mr. Hodges and I have been monitoring the self-representation issue. During and immediately after Mr. Al Bahlul's appearance before the Commission in Guantanamo, I believed that the correct and most efficient route to see if Mr. aL Bahul could get what he wanted was to see if the rules could and would be changed. That is why that course of action was pursued.

2. Please look again at paragraph 2 of my note of 13 Oct 2004 (below). At some point the matter will be placed before the Commission, unless action is taken by other authorities. If I thought that submitting an Interlocutory Question would hasten the process, I would submit an IQ.

3. I would suggest that detailed defense counsel work with the prosecution to assemble all the documents and filings concerning the right to self-representation into one place, so that it will be ready for the Commission to hear. Although the docket is not final, I expect Mr. Al Bahlul to be part of the November motions session.

4. Since detailed defense counsel and the prosecution seem to be in accord on the right to self-representation, I would also urge detailed defense counsel and the prosecution to consider and discuss the problems involved in the matter of a defendant, who rejects representation, presenting his position before a body that under the current state of Commission Law requires representation. I feel certain that the Commission would welcome constructive suggestions on this matter.

5. Finally, please be prepared to explain where you and MAJ Bridges stand with your Bars and with the Department of Defense with regard to presenting these matters before the Commission. I am not asking for you to address these matters now, but to think about how they might be addressed if and when the time comes.

COL Brownback
----- Original Message -----
From: Sundel, Philip, LCDR, DoD OGC
To: 'Pete Brownback' ; 'Hodges, Keith' ; [redacted]
Cc: [redacted] Swann, Robert, COL, DoD OGC ; [redacted] Gunn, Will, Col, DoD OGC ; Bridges, Mark, MAJ, DoD OGC ; [redacted]

Sent: Thursday, October 14, 2004 11:45 AM
Subject: RE: Defense Reply Brief-- Representation (US v. al Bahlul)

Sir,

There is a need for Mr. al Bahlul's representation issues to be placed squarely before a decision maker. You have indicated that you will not allow the military commission to address these matters, and that you do not intend to certify the issue to the Appointing Authority. This leaves Mr. al Bahlul's case in a "no-man's-land" with no one accepting responsibility to decide the issue of his right to self-representation.

Mr. al Bahlul made his request to be allowed to represent himself to the military commission. We have filed a Memorandum of Law and a Reply with the military commission. We believe that the matter is presently before the military commission, and that the commission needs to address it.

However, you have indicated that you believe the request must be addressed by the Appointing Authority or a higher power. If that is still your belief, then the matter needs to in fact be presented to the Appointing Authority. Certifying the issue to him as an interlocutory question would appear to be the only mechanism to formally place it before the Appointing Authority (though I again reiterate that we disagree with the legality of that course of action). Simply assuming that he is aware of it, and hoping that he elects to take it up, does not seem like a judicious approach.

Along those lines, it is worth remembering that this matter has already been before the Appointing Authority for five months. Unfortunately, we have received no response or status update on our mid-May request for a rule change. Consequently, we are concerned with a plan that may rely on an assumption that the Appointing Authority will choose to take this up because it is the right thing to do.

The Prosecution has acknowledged that it is not sure whether the representation issues should be addressed by the military commission or the Appointing Authority. We believe that concession, along with the arguments contained in our Reply brief, should be enough to return the matter to the commission.

Regardless of how you choose to handle this, though, it must be clear what authority is responsible for deciding Mr. al Bahlul's representation issues. Allowing them to possibly languish in a gray area between the military commission and the Appointing Authority is unacceptable.

V/r

LCDR Sundel

Detailed Defense Counsel

-----Original Message-----
From: Pete Brownback [redacted]
Sent: Wednesday, October 13, 2004 15:45
To: 'Hodges, Keith'; [redacted] Sundel, Philip, LCDR, DoD OGC
Cc: [redacted] Swann, Robert, COL, DoD OGC; [redacted] Gunn, Will, Col, DoD OGC; Bridges, Mark, MAJ, DoD OGC; [redacted]
Subject: Re: Defense Reply Brief-- Representation (US v. al Bahlul)

LCDR Sundel,

1. If the Appointing Authority makes a ruling, there will be no need for an interlocutory question.
2. If the Appointing Authority does not make a ruling, the issue will be presented to the Commission for decision.
3. I do not, at this time, intend to send the matter as an interlocutory question to the Appointing Authority prior to the Commission acting upon the matter.
4. I am, however, quite willing to listen to any input from the parties.

COL Brownback

----- Original Message -----
From: Sundel, Philip, LCDR, DoD OGC
To: 'Pete Brownback' ; [redacted] 'Hodges, Keith'
Cc: [redacted] Bridges, Mark, MAJ, DoD OGC ; Gunn, Will, Col, DoD OGC ; [redacted] Swann, Robert, COL, DoD OGC ; [redacted]
Sent: Wednesday, October 13, 2004 11:16 AM
Subject: RE: Defense Reply Brief-- Representation (US v. al Bahlul)

Sir,

Is your intent still to submit this as a "certified interlocutory question" as you indicated during the 26 August 2004 hearing?

V/r
LCDR Sundel
Detailed Defense Counsel

-----Original Message-----
From: Pete Brownback [redacted]
Sent: Wednesday, October 13, 2004 10:47

To: [redacted] Sundel, Philip, LCDR, DoD OGC; 'Hodges, Keith'
Cc: [redacted] Bridges, Mark, MAJ, DoD OGC; Gunn, Will, Col, DoD OGC; [redacted] Swann, Robert, COL, DoD OGC; [redacted]
Subject: Re: Defense Reply Brief-- Representation (US v. al Bahlul)

CDR [redacted]

Thank you for the reply.

Mr. Hodges will inventory this motion as one pending before the AA - with a note that it is one the Commission may ultimately have to resolve.

COL Brownback

----- Original Message -----
From: [redacted]
To: 'Pete Brownback' ; [redacted] Sundel, Philip, LCDR, DoD OGC ; 'Hodges, Keith'
Cc: [redacted] Bridges, Mark, MAJ, DoD OGC ; Gunn, Will, Col, DoD OGC ; [redacted] Swann, Robert, COL, DoD OGC ; [redacted]
Sent: Wednesday, October 13, 2004 10:30 AM
Subject: RE: Defense Reply Brief-- Representation (US v. al Bahlul)

Sir,

COL Gunn sent a memo to the AA on 23 Sep 04 raising the issue that the Accused is being denied participation in this Commission. The AA in a responsive memo of 30 Sep 04 said the Accused was not being denied the ability to participate and that he would take the matter under advisement.

In response to Mr. Hodge's questions - my answer is that I don't know.

VR
-----Original Message-----
From: Pete Brownback [redacted]
Sent: Wednesday, October 13, 2004 09:51
To: [redacted] Sundel, Philip, LCDR, DoD OGC; 'Hodges, Keith'
Cc: [redacted] Bridges, Mark, MAJ, DoD OGC; Gunn, Will, Col, DoD OGC; [redacted] Swann, Robert, COL, DoD OGC; [redacted]
Subject: Re: Defense Reply Brief-- Representation (US v. al Bahlul)

CDR [redacted]

1. It does not appear to me that Mr. Hodges was soliciting any litigation by email. His question was:

Is this issue in the Presiding Officer's (Commission members) "box", or is this matter waiting resolution by the Appointing Authority?

On matters such as this, Mr. Hodges is authorized to act on my behalf. If you have a legal reason not to answer a question he presents to you, tell him the legal reason. If you're not happy with his response, tell me about it.

2. Please answer Mr. Hodges' question so that he can continue to get these motions in order. Constructing and deconflicting the motions inventories for these cases is not an easy task and will benefit all .

COL Brownback

----- Original Message -----
From: [redacted]
To: Sundel, Philip, LCDR, DoD OGC ; 'Hodges, Keith' ; 'Pete Brownback'
Cc: [redacted] Bridges, Mark, MAJ, DoD OGC ; Gunn, Will, Col, DoD OGC [redacted]
Sent: Friday, October 08, 2004 1:22 PM
Subject: RE: Defense Reply Brief-- Representation (US v. al Bahlul)

Sir,

The Prosecution is prepared to discuss these issues on the record. We are opposed to litigating this issue via email. While we agree with the Defense position that the right to pro se representation is recognized in other forums, it appears we have lost sight of the fact that current detailed military defense counsel do at this point in time represent the Accused and should continue to do so until relieved by competent authority.

VR

CDR [redacted]
-----Original Message-----

From: Sundel, Philip, LCDR, DoD OGC
Sent: Friday, October 08, 2004 11:54
To: 'Hodges, Keith'; Pete Brownback
Cc: [redacted] Bridges, Mark, MAJ, DoD OGC; Gunn, Will, Col, DoD OGC; [redacted] OGC; Swann, Robert, COL, DoD OGC; [redacted]
Subject: RE: Defense Reply Brief-- Representation (US v. al Bahlul)

Sir,

We believe that the full military commission must rule on the legality of regulations that preclude an accused from representing himself or being represented by a foreign attorney. We believe that until the military commission rules the matter may not properly be certified as an interlocutory question.

V/r
LCDR Sundel
Detailed Defense Counsel

-----Original Message-----
From: Hodges, Keith [redacted]
Sent: Friday, October 08, 2004 11:42
To: Sundel, Philip, LCDR, DoD OGC; Pete Brownback
Cc: [redacted] Bridges, Mark, MAJ, DoD OGC; Gunn, Will, Col, DoD OGC; [redacted] OGC; Hodges, Keith; Swann, Robert, COL, DoD OGC; [redacted] OGC
Subject: RE: Defense Reply Brief-- Representation (US v. al Bahlul)

Let me be sure I know where we are on this issue.

Is this issue in the Presiding Officer's (Commission members) "box", or is this matter waiting resolution by the Appointing Authority?

I appreciate that counsel could submit a matter to the PO after AA action, or perhaps along with it, but I just want to know where we are on the pro se question so I know who is going to answer the mail.

Thank you.

Keith Hodges

-----Original Message-----
From: Sundel, Philip, LCDR, DoD OGC
[mailto:[redacted]
Sent: Friday, October 08, 2004 11:24 AM
To: 'Pete Brownback'
Cc: [redacted] Hemingway, Thomas, BG, DoD OGC; Altenburg, John, Mr, DoD OGC; [redacted] Bridges, Mark, MAJ, DoD OGC; Gunn, Will, Col, DoD OGC; [redacted] 'Hodges, Keith'; Swann, Robert, COL, DoD OGC

Subject: Defense Reply Brief-- Representation (US v. al Bahlul)

Sir,

Attached please find our Reply and copies of the six attached documents.

V/r
LCDR Sundel
Detailed Defense Counsel

-----Original Message-----
From: [redacted]
Sent: Friday, October 01, 2004 16:59
To: Brownback, Peter
Cc: Swann, Robert, COL, DoD OGC; Hodges, Keith; [redacted] Gunn, Will, Col, DoD OGC; Sundel, Philip, LCDR, DoD OGC; Bridges, Mark, MAJ, DoD OGC
Subject: AL BAHLUL - PROSECUTION PRO SE RESPONSE

Sir,

Attached is the Prosecution response to the defense memorandum of law re pro se representation, with three attachments.

V/R,

LtCol [redacted] USMC

Prosecutor, Office of Military Commissions

Department of Defense

Phone: [redacted]

Fax: [redacted]

E-mail: [redacted]

SIPR: [redacted]

From: "Pete Brownback" [redacted]
To: "Sundel, Philip, LCDR, DoD OGC" [redacted]

Subject: Al Bahlul - Order to Brief Pro Se Issue and Other Issues
Date: Monday, October 18, 2004 2:09 PM

Message

United States of America v. Al Bahlul

1. Detailed defense counsel will brief the issue of self-representation by Mr. Al Bahlul to the Commission, using the procedures established in POM 4-2. The defense brief may consist of briefs and other matters already filed with the Appointing Authority on this issue. If so, a cover document meeting the formatting requirements of POM 4-2 will accompany all the matters the defense wishes the Commission to consider. (Counsel will not presume that matters previously sent to the Presiding Officer as courtesy copies are before the Commission.) The initial brief will be sent prior to 1700 hours, 22 October 2004. The response and reply will follow in accordance with POM 4-2. The prosecution may provide as its response any matters that may have filed with the Appointing Authority, in the same fashion as provided above for the defense. Any questions about this filing requirement should be forwarded to Mr. Hodges immediately.

2. In addition to the filings required by paragraph 1 above, detailed defense counsel and the prosecution will address the questions and issues listed in paragraph 4 below in a separate filing. The questions and issues listed will be addressed in this separate filing, even if counsel believe that the matters have been previously addressed. The style of the filing will be in accordance with POM 4-2 with the subject: Answers to Presiding Officer's Questions on the Issue of Self-Representation. Other than that, the filing does not have to be in any particular format. Each of the questions or issues listed below, however, will be in a separate paragraph or section - head-noted by the question or issue being addressed. Detailed defense counsel and the prosecution will file and present their views not later than 1200 hours, 25 October 2004 to the Presiding Officer and the Assistant only. When both filings are received, the Assistant will ensure that each counsel has the filing of opposing counsel, and counsel will be permitted to reply to the filings. Any questions about this filing requirement should be forwarded to Mr. Hodges immediately.

3. Notwithstanding that the initial filings will be sent simultaneously to the Presiding officer before being served on opposing counsel, counsel are encouraged to consult with each other in their initial filings to see if both agree to the answer. For example, if counsel for both sides agree that a certain procedure would meet the requirements of law, counsel may cause their initial filings to reflect such an agreement. Any questions about making joint filings should be forwarded to Mr. Hodges immediately.

4. Issues and questions to be addressed.

a. A candid consideration of the evidence and a statement by counsel concerning whether they believe any closed sessions or presentation of protected information will be necessary. Part of the answer to this issue will be an explicit statement that a closed session or presentation of protected information is, is not, or may be required.

b. The procedural problem involved in having the Commission determine the issue of self-representation when the Commission has not been subject to voir dire on behalf of Mr. Al Bahlul. (That is, for the Commission to decide a question of fact or law, the Commission has to be established. Assume that for the Commission to be established it should be subject to voir dire and a decision on challenges. Who will represent Mr. Al Bahlul in this process when the question presented to the Commission is who is representing him?)

c. Should the Appointing Authority consider the challenges made in US v. Hamdan and US v. Hicks as reflecting the challenges of any competent counsel and use them for US v. Al Bahlul? Additionally, assuming that members originally appointed to sit on the defendant's trial were challenged and removed in the cases of Hamdan and Hicks, are those members required to be available for voir dire in US v. aL Bahul?

d. Is self-representation required in order to provide Mr. Al Bahul a full and fair trial, and the authority that requires allowing the defendant to represent himself notwithstanding the current state of Commission Law?

e. Are current detailed defense counsel permitted or required to argue the issue of self-representation to the Commission, given Mr. Al Bahlul's expressed desire that he does not wish detailed counsel to represent him?

f. If detailed defense counsel are permitted or required to represent the defendant on the limited issue of whether self-representation shall be allowed,

and detailed defense counsel believe that self-representation is not in the defendant's best interests, can or should detailed defense counsel argue in favor of self-representation?

g. If detailed defense counsel are permitted or required to represent the defendant on the limited issue of whether self-representation shall be allowed, and detailed defense counsel believe that self-representation would deprive the defendant of a full and fair trial, can or should detailed defense counsel argue in favor of self-representation?

h. Assuming that Mr. Al Bahlul is allowed to represent himself, what procedures might be used if there is a closed session from which the defendant is excluded and at which evidence is presented to the Commission that the Commission might consider? The answer to this issue will not be limited to only an assertion there should be no closed sessions.

i. Assuming that Mr. Al Bahlul is allowed to represent himself, how would stand-by counsel be appointed and how they would communicate with Mr. Al Bahlul?

j. Assuming that Mr. Al Bahlul is allowed to represent himself, how would the issues of access to evidence be handled?

k. Assuming that Mr. Al Bahlul is allowed to represent himself, is there any requirement that those matters to which the defense is entitled under Commission Law - less classified or protected information - must be translated into the defendant's language?

l. Assuming that Mr. Al Bahlul is allowed to represent himself, is there any requirement that the accused be allowed access to that information or those sessions that he would not have access to were he being represented by detailed defense counsel under the current state of Commission Law?

m. Assuming that Mr. Al Bahlul is allowed to represent himself, what are the consequences of, possible uses of, and ability of the Commission to consider any and all statements made by Mr. Al Bahlul, while representing himself at times when Mr. al Bahul is not a witness?

n. Assuming that Mr. Al Bahlul is allowed to represent himself, the methods by which Mr. Al Bahlul would be able to control his notes and other working documents given his current status and security precautions taken with detainees?

o. Any other problems or issues which might arise from allowing Mr. Al Bahlul to represent himself.

Peter E. Brownback III

COL, JA

Presiding Officer

UNITED STATES OF AMERICA	)	DETAILED DEFENSE COUNSEL'S ANSWERS TO PRESIDING OFFICER'S QUESTIONS ON THE ISSUE OF SELF-REPRESENTATION
v.	)	
ALI HAMZA AHMAD SULAYMAN AL BAHLUL	)	
	)	22 October 2004

1. Pursuant to direction of the Presiding Officer of 18 October 2004, detailed defense counsel provide the following responses to the questions presented.

2. Letters correspond to that proceeding each question posed in the 18 October message:

a. A candid consideration of the evidence and a statement by counsel concerning whether they believe any closed sessions or presentation of protected information will be necessary. Part of the answer to this issue will be an explicit statement that a closed session or presentation of protected information is, is not, or may be required.

It is our understanding that detailed defense counsel have not yet received all of the evidence in this case. Additionally, we have not interviewed any potential witnesses, have not begun a pretrial investigation, and do not know what evidence the Prosecution intends to present at trial. Further, defense counsel have no way of predicating what trial evidence will ultimately be considered "protected," and what if any "protected information" will be limited to closed sessions. Consequently, at this stage it is impossible for counsel to know whether any closed sessions will be required.

b. The procedural problem involved in having the Commission determine the issue of self-representation when the Commission has not been subject to voir dire on behalf of Mr. Al Bahlul. (That is, for the Commission to decide a question of fact or law, the Commission has to be established. Assume that for the Commission to be established it should be subject to voir dire and a decision on challenges. Who will represent Mr. Al Bahlul in this process when the question presented to the Commission is who is representing him?)

A regularly constituted court providing fundamental due process is structured so as to give it competence to address preliminary questions such as an accused's right to self-representation or representation by counsel of his own choice. Mr. al Bahlul's military commission must address his right to represent himself or be represented by counsel of his choosing before it can proceed with any other matters, including voir dire and challenges. Whether military commissions have been structured in a way to allow Mr. al Bahlul's to do so is a matter that may not be answered until long after the commission proceedings have been completed.

c. Should the Appointing Authority consider the challenges made in US v. Hamdan and US v. Hicks as reflecting the challenges of any competent counsel and use them for US v. Al Bahlul? Additionally, assuming that members originally appointed to sit on the defendant's trial were challenged and removed in the cases of Hamdan and Hicks, are those members required to be available for voir dire in US v. aL Bahul?

The Appointing Authority has already acted on this issue.

d. Is self-representation required in order to provide Mr. Al Bahul a full and fair trial, and the authority that requires allowing the defendant to represent himself notwithstanding the current state of Commission Law?

Yes, self-representation and representation by counsel of one's choosing are fundamental rights recognized in both domestic and international law as being essential parts of a fair criminal proceeding. Any military commission rule, instruction, or order to the contrary must be considered invalid and unenforceable as it would require a process which, by definition, would violate due process and the President's mandate that military commissions be full and fair. Further discussion of this matter can be found in the Memorandum of Law filed by detailed defense counsel on 2 September and 21 October 2004, and the Reply brief filed on 8 October 2004.

e. Are current detailed defense counsel permitted or required to argue the issue of self-representation to the Commission, given Mr. Al Bahlul's expressed desire that he does not wish detailed counsel to represent him?

Current detailed defense counsel are in a very difficult position with respect to what actions they may take on Mr. al Bahlul's behalf. While counsel are detailed to represent Mr. al Bahlul, they have never been accepted by him as his representative. Mr. al Bahlul has both instructed counsel and stated in open court that counsel are to take no actions on his behalf. Under applicable rules of professional responsibility, counsel would appear to be precluded from arguing the issue of self-representation on Mr. al Bahlul's behalf.

At the same time, there appears to be no mechanism for counsel to argue an issue to the military commission in any capacity other than as representatives of an accused.

Finally, however, Mr. al Bahlul has been denied the means to effectively address this matter himself. Mr. al Bahlul has no access to legal or research material. Further, the majority of orders, instructions, and rules relevant to military commission have not been translated into Arabic, nor have any of the numerous documents and electronic massages that have been generated on various substantive aspects of military commissions. Finally, Mr. al Bahlul has not been kept apprised of any discussions or developments that have occurred since the 26 August 2004 hearing, and expressions of concern voiced both by detailed defense counsel and the Chief Defense Counsel that Mr. al Bahlul has been unfairly frozen out of military commission matters have resulted only in assurances by the Appointing Authority that everything is fine, and that he would continue to monitor the situation.

f. If detailed defense counsel are permitted or required to represent the defendant on the limited issue of whether self-representation shall be allowed, and detailed defense counsel believe that self-representation is not in the defendant's best interests, can or should detailed defense counsel argue in favor of self-representation?

Mr. al Bahlul has a fundamental right to represent himself if he so chooses. As the United States Supreme Court recognized in *Faretta v. California*, the question is not whether others think that self-representation is the right choice, only whether an accused whishes to exercise that right.

g. If detailed defense counsel are permitted or required to represent the defendant on the limited issue of whether self-representation shall be allowed, and detailed defense counsel believe that self-representation would deprive the defendant of a full and fair trial, can or should detailed defense counsel argue in favor of self-representation?

The right of self-representation and the right to fundamental due process in a full and fair proceeding are not interchangeable, and they cannot be mutually exclusive. If Mr. al Bahlul's choice to exercise his right to represent himself means that he will be denied a fair proceeding then the military commission process must be changed. Mr. al Bahlul cannot be denied one fundamental right because the structure of military commissions would then result in the denial of another fundamental right.

h. Assuming that Mr. Al Bahlul is allowed to represent himself, what procedures might be used if there is a closed session from which the defendant is excluded and at which evidence is presented to the Commission that the Commission might consider? The answer to this issue will not be limited to only an assertion there should be no closed sessions.

Fundamental due process as well as domestic and international notions of fairness require that Mr. al Bahlul be present and allowed to represent himself during all proceedings, particularly those involving the presentation of evidence. Mr. al Bahlul chooses to exercise his right to represent himself, thus no one is available to act on his behalf in either open or closed sessions. While sessions from which the media and general public are excluded are permissible, there can be no sessions from which Mr. al Bahlul is excluded.

i. Assuming that Mr. Al Bahlul is allowed to represent himself, how would stand-by counsel be appointed and how they would communicate with Mr. Al Bahlul?

While there is presently no mechanism in place for the appointment of standby counsel, presumably the Appointing Authority, the General Counsel of the Department of Defense, or the Secretary of Defense would create a mechanism if the military commission directed such an appointment. Standby counsel could communicate with Mr. al Bahlul via the same interpreters and during similar face-to-face meetings as have previously been utilized.

j. Assuming that Mr. Al Bahlul is allowed to represent himself, how would the issues of access to evidence be handled?

Mr. al Bahlul must be allowed access to evidence. It would presumably be the responsibility of JTF-GTMO to create the mechanism for his reviewing, storing and handling such evidence in a way that does not interfere with his ability to represent himself.

k. Assuming that Mr. Al Bahlul is allowed to represent himself, is there any requirement that those matters to which the defense is entitled under Commission Law - less classified or protected information - must be translated into the defendant's language?

Pursuant to MCO No. 1 Mr. al Bahlul is entitled to have the proceedings and any documentary evidence translated into Arabic. In order to provide him a fair trial, Mr. al Bahlul is also entitled to have translated into Arabic any other matters necessary to allow him to represent himself.

l. Assuming that Mr. Al Bahlul is allowed to represent himself, is there any requirement that the accused be allowed access to that information or those sessions that he would not have access to were he being represented by detailed defense counsel under the current state of Commission Law?

In order to provide a fair process that comports with fundamental due process, Mr. al Bahlul must be allowed access to any information necessary to allow him to represent himself. He must also be allowed to be present during any military commission proceeding.

m. Assuming that Mr. Al Bahlul is allowed to represent himself, what are the consequences of, possible uses of, and ability of the Commission to consider any and all statements made by Mr. Al Bahlul, while representing himself at times when Mr. al Bahul is not a witness?

Since Mr. al Bahlul will not be testifying under oath while representing himself, nothing he says while doing so should be admissible as evidence against him.

n. Assuming that Mr. Al Bahlul is allowed to represent himself, the methods by which Mr. Al Bahlul would be able to control his notes and other working documents given his current status and security precautions taken with detainees?

The methods by which Mr. al Bahlul will be allowed to control his notes and other working documents must be determined by JTF-GTMO and implemented in such a way as to not interfere with his ability to represent himself.

o. Any other problems or issues which might arise from allowing Mr. Al Bahlul to represent himself.

Detailed defense counsel have no thoughts on other issues that might arise from recognizing Mr. al Bahlul's right to represent himself.

/s/
Philip Sundel
LCDR, JAGC, USN
Detailed Defense Counsel

/s/
Mark A. Bridges
MAJ, JA, USA
Assistant Detailed Defense Counsel

	)	MEMORANDUM OF LAW:
UNITED STATES OF AMERICA	)	
	)	RIGHT TO SELF-REPRESENTATION; RIGHT TO CHOICE OF COUNSEL
v.	)	
	)	
	)	
ALI HAMZA AHMAD SULAYMAN AL BAHLUL	)	
	)	22 October 2004

1. Timeliness.

This pleading is being filed within the timeline established by the Presiding Officer.

2. Relief Sought.

Mr. al Bahlul wishes to represent himself. If he is denied that right, Mr. al Bahlul desires to be represented by a Yemeni attorney of his own choosing. Mr. al Bahlul does not wish to be represented by detailed defense counsel.

3. Facts.

a. During counsel's initial meetings with Mr. al Bahlul in April 2004, he stated that he did not want detailed defense counsel to represent him.

b. Instead, he stated that he intended to represent himself before the commission.

c. Consistent with Mr. al Bahlul's wishes, on 20 April 2004 detailed defense counsel requested that the Chief Defense Counsel approve a request to withdraw as detailed defense counsel.

d. The Chief Defense Counsel denied the request to withdraw on 26 April 2004.

e. Specifically, the Chief Defense Counsel found that MCO No. 1 and MCI No. 4 required detailed defense counsel to represent the accused despite the accused's wishes.

f. The most relevant provision cited by the Chief Defense Counsel states that detailed defense counsel "shall so serve notwithstanding any intention expressed by the Accused to represent himself." MCI No. 4, para. 3D(2).

g. See also MCO No. 1, para. 4C(4)("The Accused must be represented at all relevant times by Detailed Defense Counsel.")

h. After our request to withdraw was denied by the Chief Defense Counsel, detailed defense counsel submitted a request to the Secretary of Defense, General Counsel of the Department of Defense, and Appointing Authority to modify or supplement the rules for commissions to allow for withdrawal of detailed defense counsel and recognize the right of self-representation. See attached memorandum, dated 11 May 2004, entitled "Request for Modification of Military Commission Rules to Recognize the Right of Self-Representation, *United States v. al Bahlul*").

i. The Secretary of Defense, General Counsel, and the Appointing Authority have not responded to this request.

j. Before the military commission on 26 August 2004, Mr. al Bahlul stated that he wished to represent himself. Transcript of 26 August 2004 Commission Hearing (Transcript) at 6, 7, 11, 15, 16, 18.

k. Mr. al Bahlul went on to state that if he is prohibited from representing himself he desires to be represented by a Yemeni attorney of his own choosing. Transcript at 10, 18-19.

l. Finally, Mr. al Bahlul made clear that he did not wish to be represented by detailed defense counsel, and that he did not accept the services of detailed defense counsel. Transcript at 11, 16, 17, 19.

4. Law.

A. An Accused has a Fundamental Right to Represent Himself Before a Military Commission.

Binding treaty law, procedural rules for comparable international tribunals for the prosecution of war crimes, and United States domestic law all establish an accused's fundamental right to represent himself, and the concurrent right to refuse the services of appointed defense counsel. This recognized right of self-representation "assures the accused of the right to participate in his or her defense, including directing the defense, rejecting appointed counsel, and conducting his or her own defense under certain circumstances." M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 Duke J. Comp. & Int'l L. 235, 283 (Spring 1993). Not since the Star Chamber of 16th and 17th century England, has defense counsel been forced upon an unwilling accused. *Faretta v. California*, 422 U.S. 806, 821 (1975).

The International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (AMCHR), and the Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF) all recognize an accused's right to represent himself in criminal proceedings.[1] ICCPR, Article 14(3)(d); AMCHR, Article

[1] The United States has ratified the ICCPR (http://www.unhchr.ch/pdf/report.pdf). The AMCHR and CPHRFF are cited as evidence of customary international law.

8(2)(d); CPHRFF, Article 6(3)(c); Bassiouni at 283. Representative of these three treaties is the ICCPR's mandate that "in the determination of any criminal charge against him, everyone shall be entitled . . . to defend himself in person or through legal assistance of his own choosing." ICCPR, Article 14(3)(d). The plain language of this provision establishes an accused's right to represent himself.

The right of self-representation is enforced by the both of the current international tribunals established to prosecute violations of the law of war. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) both allow for self-representation before the tribunal. Statute of the ICTY, Article 21(4)(d); Statute of the ICTR, Article 20(4)(d).

It is worth noting that the World War II international military tribunals also recognized the right of self-representation. The rules of procedure governing the Nuremberg military tribunals provided that "a defendant shall have the right to conduct his own defense."[2] Similarly, the tribunal for the Far East recognized an accused's right to forgo representation by counsel except where the Tribunal believed that appointment of counsel was "necessary to provide for a fair trial."[3]

The internationally recognized right of self-representation in criminal proceedings is consistent with United States domestic law. The Sixth Amendment of the United States Constitution, as well as English and Colonial jurisprudence, support the right of self-representation. In *Faretta v. California*, the Supreme Court found that "forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." 422 U.S. at 807. In surveying the long history of English criminal jurisprudence, the Supreme Court concluded that only one tribunal "adopted a practice of forcing counsel upon an unwilling defendant in a criminal proceeding" – the Star Chamber. *Id.* at 821. The Star Chamber which was of "mixed executive and judicial character" and "specialized in trying 'political' offenses . . . has for centuries symbolized disregard of basic individual rights." *Id.*

Soon after the disestablishment of the Star Chamber the right of self-representation was again formally recognized in English law:

> The 1695 [Treason Act] . . . provided for court appointment of counsel, *but only if the accused so desired.* Thus, as new rights developed, the accused retained his established right 'to make what statements he liked.' The right to counsel was viewed as guaranteeing a choice between representation by counsel and the traditional practice of self-representation. . . . At no point in this process of reform in England was counsel ever forced upon the defendant. The common-law rule . . . has

[2] Rule 2(d), Nuremberg Trial Proceedings Vol. 1 Rules of Procedure (Nuremberg Proceedings); Rule 7(a), Rules of Procedure Adopted by Military Tribunal I in the Trial of the Medical Case (Medical Case); Rule 7(a), Uniform Rules of Procedure, Military Tribunals, Nuremberg, Revised to 8 January 1948 (Uniform Rules) (http://www.yale.edu/lawweb/avalon/imt/imt.htm#rules).
[3] Article 9(c), Charter of the International Military Tribunal for the Far East (Far East Tribunal) (http://www.yale.edu/lawweb/avalon/imtfech.htm).

> evidently always been that 'no person charged with a criminal offence can have counsel forced upon him against his will.'

Faretta, 422 U.S. at 825-26 (footnotes and internal citations omitted).

This common law approach continued in Colonial America, where "the insistence upon a right of self-representation was, if anything, more fervent than in England." *Id.* at 826.

> This is not to say that the Colonies were slow to recognize the value of counsel in criminal cases. . . . At the same time, however, the basic right of self-representation was never questioned. We have found no instance where a colonial court required a defendant in a criminal case to accept as his representative an unwanted lawyer. Indeed, even where counsel was permitted, the general practice continued to be self-representation.

Id. at 827-28 (footnote omitted).

Further, there can be no legitimacy to a view that counsel can be forced upon an unwilling defendant for the defendant's own good:

> It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. . . . The right to defend is personal . . . . It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'

Faretta, 422 U.S. at 834 (internal citation omitted).

Finally, rules of professional responsibility governing attorneys' conduct also recognize an individual's right to self-representation. In discussing the formation of a client-attorney relationship, one commentary observes "The client-lawyer relationship ordinarily is a consensual one. A client ordinarily should not be forced to put important legal matters into the hands of another or accept unwanted legal services." *Restatement 3d of the Law Governing Lawyers*, American Law Institute (2000), §14. Similarly, §1.16(a)(3) of the American Bar Association's Model Rules of Professional Responsibility, which exists in each of the Service's rules of professional responsibility, "recognizes the long-established principle that a client has a nearly absolute right to discharge a lawyer." *The Law of Lawyering*, Hazard & Hodes, Aspen Law & Business 2003 (3d ed.), 20-9.

Treaties, procedures of international tribunals, Anglo-American common law, current domestic law, and rules of professional responsibility are unanimous in recognizing a criminal accused's right to self-representation. The only contrary provisions are those found in the procedural rules contained in the orders and instructions designed to implement the President's Military Order establishing the military commissions.

B. An Accused has a Fundamental Right to Counsel of His Own Choosing Before a Military Commission.

The International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (AMCHR), and the Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF) all recognize an accused's right to be represented by counsel of his own choosing. ICCPR, Article 14(3)(b) and (d); AMCHR, Article 8(2)(d); CPHRFF, Article 6(3)(c). The plain language of these provisions unequivocally establish such a right.

Further, the right to counsel of choice is enforced by the both of the current international tribunals established to prosecute violations of the law of war. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) both allow for representation by counsel of one's own choosing before the tribunal. Statute of the ICTY, Article 21(4)(d); Statute of the ICTR, Article 20(4)(d).

Historically, the Nuremburg military tribunals also recognized the right of an accused to be represented by counsel his own selection, with two of the tribunals requiring only that "such counsel [be] a person qualified under existing regulations to conduct cases before the courts of defendant's country, or [be] specially authorized by the Tribunal."[4] Interestingly, the military tribunal for the Far East and one of the Nuremberg tribunals imposed no limitations on an accused's choice of counsel, although the former did provide for "disapproval of such counsel at any time by the Tribunal."[5]

The internationally recognized right of self-representation in criminal proceedings is consistent with United States domestic law. The Sixth Amendment of the United States Constitution supports the right to counsel of choice; over seventy years ago the Supreme Court wrote "it is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice." *Powell v. Alabama,* 287 U.S. 45, 53 (1932). While this right is not absolute, its "essential aim . . . is to guarantee an effective advocate for each criminal defendant." *Wheat v. United States*, 486 U.S. 153, 159 (1988).

The right of a criminal accused to be represented by counsel of his own choosing is widely recognized in international and domestic law as being an essential part of the

[4] Rule 7(a), Medical Case; Rule 7(a), Uniform Rules, note 2, infra.
[5] Article 9(c), Far East Tribunal; Rule 2(d), Nuremberg Proceedings, note 3, infra.

right to present a defense. The decision as to who qualifies as an effective advocate for a foreign national charged with war crimes before a military commission is an individual one which should be permitted each accused. Rules governing military commissions that limit an accused's choice of counsel based solely on the counsel's nationality impermissibly infringe on the right to present a defense, and thus are inconsistent with the law.

C. The Military Commission Must Respect an Accused's Right to Self-Representation and Choice of Counsel.

Treaties, signed by the Executive and ratified by the Senate, are binding law. U.S. Constitution, Article VI, Clause 2 ("Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land"). The ICCPR has been signed and ratified by the United States. Furthermore, the President has ordered executive departments and agencies to "fully respect and implement its obligations under the international human rights treaties to which [the United States] is a party, including the ICCPR." Executive Order 13,107, Section 1(a), 61 Fed.Reg. 68,991 (1998). The Executive Order provides that "all executive departments and agencies . . . including boards and commissions . . . shall perform such functions so as to respect and implement those obligations fully." Executive Order 13,107, Section 2(a).

The commission is also bound by customary international law. Customary international law is developed by the practice of states and "crystallizes when there is 'evidence of a general practice accepted as law.'" Yoram Dinstein, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 5 (Cambridge University Press 2004). The United States considers itself bound by customary international law in implementing its law of war obligations. Department of Defense Directive (DODD) Number 5100.77, DoD Law of War Program, Dec. 9, 1998, para. 3.1 ("The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law."); DODD Number 2310.1, DoD Program for Enemy Prisoners of War (EPOW) and Other Detainees, Aug. 18, 1994, para. 3.1 ("The U.S. Military Services shall comply with the principles, spirit, and intent of the international law of war, both customary and codified, to include the Geneva Conventions."); Field Manual 27-10, The Law of Land Warfare, July 1956, Chapter 1, Section I, para. 4 (the law of war is derived from both treaties and customary law).

Finally, Article 21, Uniform Code of Military Justice, which the President cites as authority for the military commissions, recognizes that jurisdiction for military commissions derives from the law of war. 10 U.S.C. Section 821 (jurisdiction for military commissions derives from offenses that "by the law of war may be tried by military commission"); see also Manual for Courts-Martial, Part I, para. 1 (international law, which includes the law of war, is a source of military jurisdiction). Just as the jurisdiction of military commissions are bounded by the law of war, so the procedures

followed by military commissions must comply with the law of war, whether it be codified or customary.

The ICCPR, AMCHR, CPHRFF, ICTY and ICTR rules, and United States domestic law establish that self-representation and counsel of one's choosing are recognized as rights that must be afforded as part of one's ability to present a defense. Additional Protocol I to the Geneva Conventions provides that a court trying an accused for law of war violations "shall afford the accused before and during his trial all necessary rights and means of defence." Geneva Conventions (1949), Additional Protocol I, Article 75, para. 4(a). The United States considers Article 75 of Additional Protocol I to be applicable customary international law. William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 Yale J. Int'l L. 319, 322 (Summer 2003)("[the United States] regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.")

The military commission is bound by treaties, international agreements, and customary international law, all of which recognize an accused's right to self-representation and choice of counsel. Any provisions in the President's Military Order, or the Military Commission Orders and Instructions, that conflict with those rights are unlawful.

5. Attached Files.

a. Memorandum, dated 11 May 2004, "Request for Modification of Military Commission Rules to Recognize the Right of Self-Representation, *United States v. al Bahlul*."

6. Oral argument.

Counsel take no position on whether oral argument is required.

7. Legal authority.

a. M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 Duke J. Comp. & Int'l L. 235, 283 (Spring 1993)
b. *Faretta v. California*, 422 U.S. 806, 821 (1975)
c. International Covenant on Civil and Political Rights (http://www1.umn.edu/humanrts/instree/ainstls1.htm)
d. American Convention on Human Rights (http://www1.umn.edu/humanrts/instree/ainstls1.htm)
e. Convention for the Protection of Human Rights and Fundamental Freedoms (http://www1.umn.edu/humanrts/instree/ainstls1.htm)
f. Statute of the International Criminal Tribunal for the Former Yugoslavia (http://www1.umn.edu/humanrts/instree/ainstls1.htm)

g. Statute of the International Criminal Tribunal for Rwanda (http://www1.umn.edu/humanrts/instree/ainstls1.htm)

h. Nuremberg Trial Proceedings Rules of Procedure (http://www.yale.edu/lawweb/avalon/imt/imt.htm#rules)

i. Rules of Procedure Adopted by Military Tribunal I in the Trial of the Medical Case (http://www.yale.edu/lawweb/avalon/imt/imt.htm#rules)

j. Uniform Rules of Procedure, Military Tribunals, Nuremberg (http://www.yale.edu/lawweb/avalon/imt/imt.htm#rules).

k. *Restatement 3d of the Law Governing Lawyers*, American Law Institute (2000)

l. *The Law of Lawyering*, Hazard & Hodes, Aspen Law & Business 2003 (3d ed.)

m. *Powell v. Alabama,* 287 U.S. 45, 53 (1932)

n. *Wheat v. United States*, 486 U.S. 153, 159 (1988)

o. U.S. Constitution

p. Executive Order 13,107, 61 Fed.Reg. 68,991 (1998) (http://www.archives.gov/federal_register/executive_orders/executive_orders.html)

q. Yoram Dinstein, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 5 (Cambridge University Press 2004)

r. Department of Defense Directive Number 5100.77 (http://www.dtic.mil/whs/directives/)

s. Department of Defense Directive Number 2310.1 (http://www.dtic.mil/whs/directives/)

t. Field Manual 27-10, The Law of Land Warfare, July 1956 (http://www.usapa.army.mil/)

u. Article 21, UCMJ, 10 U.S.C. Section 821

v. Manual for Courts-Martial

w. Geneva Conventions (1949), Additional Protocol I (http://www1.umn.edu/humanrts/instree/ainstls1.htm)

x. William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 Yale J. Int'l L. 319, 322 (Summer 2003) (http://www.ihlresearch.org/ihl/)

/s/
Philip Sundel
LCDR, JAGC, USN
Detailed Defense Counsel

/s/
Mark A. Bridges
MAJ, JA, USA
Assistant Detailed Defense Counsel

UNITED STATES	)	
	)	ANSWERS TO THE PRESIDING
v.	)	OFFICER'S QUESTIONS ON THE ISSUE
	)	OF SELF-REPRESENTATION
ALI HAMZA SULEIMAN AL BAHLUL	)	
	)	
	)	October 25, 2004

The following is the Prosecution's responses to the Presiding Officer's questions concerning self-representation.

a. **A candid consideration of the evidence and a statement by counsel concerning whether they believe any closed sessions or presentation of protected information will be necessary. Part of the answer to this issue will be an explicit statement that a closed session or presentation of protected information is, is not, or may be required.**

In our proposed Protective Order, the Accused is entitled to see FOUO and Law Enforcement Sensitive information that is considered protected information. We intend to introduce a lot of this form of protected information, but it should not create any issues with respect to the Accused's access and preparation.

Depending on the Accused's theory of the case, the Prosecution may introduce a limited amount of classified (and thereby protected information) in either the case in chief or in rebuttal. The Accused would not be entitled to see unsanitized versions of this information.

b. **The procedural problem involved in having the Commission determine the issue of self-representation when the Commission has not been subject to voir dire on behalf of Mr. Al Bahlul. (That is, for the Commission to decide a question of fact or law, the Commission has to be established. Assume that for the Commission to be established it should be subject to voir dire and a decision on challenges. Who will represent Mr. Al Bahlul in this process when the question presented to the Commission is who is representing him?)**

LCDR Sundel and Major Bridges are the counsel detailed to this Commission. Until relieved by competent authority, they are to continue to represent the Accused to include during any voir dire. They have previously asked to be relieved by competent authority (Chief Defense Counsel), and that request was denied.

To ensure that ethics issues are not problematic, the Presiding Officer and or Commission as a whole should order that LCDR Sundel and Major Bridges represent the Accused through voir dire and other preliminary matters. This is consistent with Navy JAGINST 5803.1B Rule 1.16(c) which states that "when ordered to do so by a tribunal or other competent authority, a covered attorney shall continue representation notwithstanding good cause for terminating the representation." This is consistent with the ABA Model Rules.

Our situation is unique as the Commission as a whole is the finder of fact and law. In a traditional situation, the Accused is represented by detailed counsel during the colloquy used to determine if the accused qualifies for self-representation. This colloquy is normally only conducted in the presence of the judge.

The Prosecution believes that Detailed Defense Counsel should represent the Accused during voir dire and through the colloquy. At that point, the Commission can decide if they desire to certify this issue as an interlocutory question. If they decide not to, then current Commission Law prevails and the Accused is not entitled to represent himself. If the question is certified as an interlocutory question, and if rules are amended to permit self-representation, the Accused should be provided the opportunity to conduct additional voir dire in his capacity as a pro se defendant.

It is noteworthy that "the right to self-representation complements the right to counsel and is not meant as a substitute thereof." M. Cherif Bassiouni, Human Rights in the Context of Criminal Justice: Identifying International Protections and Equivalent Protections in National Constitutions, 3 Duke J. Comp. & Int'l L. 235, 283 (1993).

c. Should the Appointing Authority consider the challenges made in US v. Hamdan and US v. Hicks as reflecting the challenges of any competent counsel and use them for US v. Al Bahlul? Additionally, assuming that members originally appointed to sit on the defendant's trial were challenged and removed in the cases of Hamdan and Hicks, are those members required to be available for voir dire in US v. al Bahlul?

This issues appears either moot or at a minimum not yet ripe for discussion. The Appointing Authority has already stated his position that "official orders appointing replacement commission members for the cases of . . . United States v. al Bahlul will be issued at a future date." We desire to reserve comment until these official orders are issued.

d. Is self-representation required in order to provide Mr. Al Bahlul a full and fair trial, and the authority that requires allowing the defendant to represent himself notwithstanding the current state of Commission Law?

The Prosecution's position is that current Commission Law does not permit self-representation. The sole basis for certifying this as an interlocutory issue is the requirement that a full and fair trial be provided. Based upon the case law identified in the submissions of both the Prosecution and the Defense, there appears to be no precedent for denying the opportunity to represent oneself (where standby counsel are also appointed), and therefore we believe self-representation is necessary for a full and fair trial unless and until the Accused forfeits this opportunity.

e. Are current detailed defense counsel permitted or required to argue the issue of self-representation to the Commission, given Mr. Al Bahlul's expressed desire that he does not wish detailed counsel to represent him?

Yes. As previously discussed, these detailed counsel are to represent the Accused until relieved by an appropriate authority. Even in cases where pro se representation is permitted, the detailed counsel remain on the case until the colloquy is conducted where the accused demonstrates that he is capable of self representation.

As it is the Prosecution's position that a colloquy should also be conducted, the Accused will be provided an opportunity to put on the record his position as to whether he desires to engage in self-representation and this will be part of what is forwarded to the Appointing Authority should it be certified.

The discussion of McKaskle v. Wiggins below demonstrates the active role that a standby counsel can engage in even against the wishes of the accused. More on point is the case of Prosecutor v. Seselj, Case No. IT-03-67-PT, Decision on Prosecution's Motion for Order Appointing Counsel, (ICTY Order of May 9, 2003). In this case, the Trial Chamber held that things are examined on a case by case basis and that even in the case of an accused desiring no assistance and wanting to proceed pro se (accused was a qualified lawyer), it was appropriate to assign counsel in the interest of justice. Id. at para 20. Permitting counsel to represent such an accused in some capacity may be necessary for a "fair trial which is not only a fundamental right of the accused, but also a fundamental interest of the Tribunal related to its own legitimacy." Id. at para 21. Similarly, Detailed Defense Counsel in this case should zealously represent this Accused unless the Accused is permitted to engage in some form of self-representation. Absent this requirement, the Prosecution contends that a full and fair trial for the Accused may be jeopardized.

f. **If detailed defense counsel are permitted or required to represent the defendant on the limited issue of whether self-representation shall be allowed, and detailed defense counsel believe that self-representation is not in the defendant's best interests, can or should detailed defense counsel argue in favor of self-representation?**

Until this issue is formally resolved either through a Commission decision, or the certification of an interlocutory question, the Detailed Defense counsel should argue for self-representation on the Accused's behalf. Examining ABA Defense Counsel Standard 4-5.2, while not specifically mentioned, the desire to engage in self-representation appears to be the type of decision that belongs to the Accused and is not a strategic or tactical decision that belongs to counsel. Furthermore Rule 1.2(c)of the Rules of Professional Responsibility states that a "covered attorney shall follow the client's well-informed and lawful decisions concerning case objectives, **choice of counsel**, forum, pleas, whether to testify, and settlements.

g. **If detailed defense counsel are permitted or required to represent the defendant on the limited issue of whether self-representation shall be allowed, and detailed defense counsel believe that self-representation would deprive the defendant of a full and fair trial, can or should detailed defense counsel argue in favor of self-representation?**

The hypothetical is not the situation at hand. Detailed Defense Counsel have been filing correspondence for months stating that they believe the Accused is entitled to represent himself.

It is recommended that the Commission should not exceed the scope of the question with regard to these particular facts in resolving this issue.

h. **Assuming that Mr. Al Bahlul is allowed to represent himself, what procedures might be used if there is a closed session from which the defendant is excluded and at which evidence is presented to the Commission that the Commission might consider? The answer to this issue will not be limited to only an assertion there should be no closed sessions.**

At the outset, the Accused must be told that there may be closed sessions involving classified information and that he will not be able to be present at these sessions. Absent an affirmative understanding and acknowledgement of this condition, the Accused should not be permitted to represent himself. Furthermore, he should be reminded of his decision to engage in self-representation and its impact each time we going into a protected session where the Accused cannot be present.

While not directly applicable, under the Classified Information Procedures Act (CIPA), court sessions involving classified information are routinely held outside the presence of the accused. 18 U.S.C. app. 3 (1980); United States v. bin Laden, 2001 U.S. Dist Lexis 719 (S.D.N.Y. 2001). In the bin Laden case the defendants were not given security clearances and were denied access to the relevant classified information in the case.

Standby counsel in this case should be required to represent the Accused's interests at any closed session where the Accused is not present. Part of this representation should include advocating for redacted or sanitized versions of the classified documents that can then be provided to the Accused. To the extent not requiring the disclosure of classified information, the Accused should also be involved in this process. In bin Laden, a defendant argued that his Sixth Amendment right was violated because his attorneys could not effectively confront the evidence against him without his input. Id. The court held that mere speculation on this issue would not override the compelling interest to protect classified information. Id. The Prosecution can state in good faith that it does not intend to introduce more than a few pages of classified information against the Accused, and depending on the Accused's strategy, there may be no need to introduce any classified information.

The Moussaoui case demonstrates that such closed sessions can be held with the absence of a pro se defendant who is not being cooperative with his standby counsel. In the context of an al Qaida member charged with a conspiracy to commit acts of terrorism transcending national boundaries, it was held that the interest of the United States in protecting national security information outweighed the pro se accused's desire to review the information. United States v. Moussaoui, 2002 U.S. Dist. Lexis 16530 (E.D. Va. August 23, 2002)

i. **Assuming that Mr. Al Bahlul is allowed to represent himself, how would stand-by counsel be appointed and how would they communicate with Mr. Al Bahlul?**

The Commission could rule that standby counsel are required and could order the Chief Defense Counsel to appoint standby counsel. The Commission is permitted great discretion in defining the role of standby counsel. A starting point would be to ask the Accused how he

prefers to communicate with standby counsel. Regardless, standby counsel would need to be present at all stages in the proceedings and available to perform any and all functions the Commission deems appropriate for a full and fair trial mindful of the fact that the Accused be permitted to represent himself both in fact and in appearance.

The Military Commission is unique in having the entire panel as finders of fact and law. Throughout any commission trial, they will be exposed to a variety of evidence they would not ordinarily see and arguments they would not ordinarily hear if solely finders of fact. While it is true that the greater role of standby counsel is at times justified because they perform actions outside the presence of the jury, the Commission system is built around experienced, proven officers who must be entrusted to maintain the perspective that the Accused is making his own trial decisions. Furthermore, the Supreme Court has ruled that a categorical bar on participation by standby counsel in the presence of the jury is unnecessary. McKaskle v. Wiggins, 465 U.S. 168, 181 (1984)

In McKaskle, standby counsel were quite active as they frequently expressed their views to the judge, made motions, dictated proposed strategies into the record, and registered objections to the prosecution's evidence. Id at180. There were even open disagreements between the accused and his standby counsel. Id. at 181. However, the trial judge cautiously and correctly was quick to opine that any conflicts between the tactical calls of the accused and standby counsel would be resolved in favor of the accused. Id.

In McKaskle, the Supreme Court saw a more active role for standby counsel as needed for a just trial. The Court specifically reversed the judgment of a lower court that had held that "standby counsel is to be seen and not heard" and that his "presence is there for advisory purposes only, to be used or not used as the defendant sees fit." Id. at 173.

The Supreme Court specifically said that there is no infringement of pro se rights when standby counsel assists in: (1) helping to overcome routine procedural or evidentiary obstacles; (2) assisting in the introduction of evidence; (3) helping to object to evidence the accused clearly does not want admitted; and (4) ensuring the accused complies with basic courtroom protocol and procedure. Id. at 183. What is clear is that the accused's lack of desire for standby counsel is not a "free pass" for standby counsel to abandon playing an important and significant role in the trial.

The Seselj Trial Chamber has provided excellent guidance on the role of standby counsel that should be the Commission's starting point in defining this role. It includes requiring standby counsel to:

(1) assist the accused in pretrial preparation when requested by the accused;

(2) assist the accused in presentation of the trial case when the accused requests;

(3) receive copies of all court filings and discovery;

(4) be present in the courtroom for all proceedings;

(5) be actively engaged in substantive preparation of the case;

(6) address the Court when requested by the accused or Trial Chamber;

(7) offer advice or suggestions to the accused when they see fit;

(8) question protected or sensitive witnesses when so ordered; and

(9) take over representation if accused forfeits ability to proceed pro se.

j. **Assuming that Mr. Al Bahlul is allowed to represent himself, how would the issues of access to evidence be handled?**

The majority of the evidence is FOUO or Law Enforcement sensitive and the Accused is entitled to see this evidence. If it is classified, the Standby counsel would have to view it on the Accused's behalf, and consistent with the Accused's interests, they could represent the Accused in a quest to obtain declassified sanitized versions of the evidence.

k. **Assuming that Mr. Al Bahlul is allowed to represent himself, is there any requirement that those matters to which the defense is entitled under Commission Law - less classified or protected information - must be translated into the defendant's language?**

The Accused should maintain the relationship he has with his current translator and this translator should be available to either read or translate documents for the Accused as the Accused deems necessary for him to adequately represent himself. There is no independent burden on the Prosecution to translate every document.

l. **Assuming that Mr. Al Bahlul is allowed to represent himself, is there any requirement that the accused be allowed access to that information or those sessions that he would not have access to were he being represented by detailed defense counsel under the current state of Commission Law?**

No. Consistent with Moussaoui and other cases, one does not get access to classified evidence or evidence he is otherwise not entitled to see simply because he engages in self-representation. As the case law holds, so long as the Accused is informed up front of the limitations he will experience should he desire to pursue self-representation, it is completely permissible to have standby counsel represent his interests with respect to this evidence.

m. **Assuming that Mr. Al Bahlul is allowed to represent himself, what are the consequences of, possible uses of, and ability of the Commission to consider any and all statements made by Mr. Al Bahlul, while representing himself at times when Mr. al Bahlul is not a witness?**

The standard for admissibility is does the evidence have probative value to a reasonable person. If in the course of engaging in self-representation the Accused says something that has probative value to a reasonable person in relation to this case, it qualifies as admissible evidence. Just as the Accused has previously made admissible incriminating statements on the record, his self-representation does alter his status and provide him greater protection.

n. **Assuming that Mr. Al Bahlul is allowed to represent himself, the methods by which Mr. Al Bahlul would be able to control his notes and other working documents given his current status and security precautions taken with detainees?**

At the time of this filing, I have not resolved this issue with JTF GTMO personnel. We will continue to pursue an answer.

o. **Any other problems or issues which might arise from allowing Mr. Al Bahlul to represent himself.**

Not aware of any at this time.

[redacted]
Commander, JAGC, U.S. Navy
Prosecutor

THE DEPUTY SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301

DEC 10 2004

MEMORANDUM FOR GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
APPOINTING AUTHORITY FOR MILITARY COMMISSIONS
LEGAL ADVISOR TO THE APPOINTING AUTHORITY FOR MILITARY COMMISSIONS
CHIEF PROSECUTOR FOR MILITARY COMMISSIONS
CHIEF DEFENSE COUNSEL FOR MILITARY COMMISSIONS

SUBJECT: Request of Detailed Defense Counsel to Modify Military Commission Rules to Recognize Right of Self-Representation

I have reviewed the attached request by Lieutenant Commander Philip Sundel, United States Navy and Major Mark Bridges, United States Army, Defense Counsel for Mr. Ali Hamza Ahmed Suliman al Bahlul, that Secretary Rumsfeld change *Military Commission Order No. 1*, to allow for self-representation by persons brought before a military commission. I am returning this request without taking action. This Memorandum shall serve as guidance for similar requests in the future.

Following the issuance of a Reason to Believe (RTB) memorandum by the President, all questions concerning the Military Commission process, its rules and issues applicable to a given case shall be addressed to and decided by the Appointing Authority. After a referral of charges and detailing of a Presiding Officer to a case, all questions shall be addressed first to the Presiding Officer unless a process specifically set forth in any commission rule provides otherwise.

Paul Wolfowitz

Attachments:
As stated

OSD 19463-04

No. 04-702

IN THE

Supreme Court of the United States

SALIM AHMED HAMDAN,
Petitioner,

v.

DONALD H. RUMSFELD, ET AL.,
Respondents.

On Petition for Writ of Certiorari Before Judgment to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF MILITARY ATTORNEYS DETAILED TO REPRESENT ALI HAMZA AHMAD SULAYMAN AL BAHLUL BEFORE A MILITARY COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

MAJOR MARK A. BRIDGES,*
U.S. ARMY
LCDR PHILIP SUNDEL,
U.S. NAVY
OFFICE OF CHIEF DEFENSE COUNSEL, OFFICE OF MILITARY COMMISSIONS, OFFICE OF THE SECRETARY OF DEFENSE
1600 Defense Pentagon
Washington, D.C. 20301-1600
(703) 607-1521

* Counsel of Record

December 27, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THE RIGHT OF SELF-REPRESENTATION IS A FUNDAMENTAL TRIAL RIGHT APPLICABLE TO MILITARY COMMISSIONS	5
II. AN ACCUSED'S RIGHT OF SELF-REPRESENTATION CAN BE RENDERED MEANINGLESS IF OTHER COMMISSION RULES ARE ALLOWED TO DENY HIM THE RIGHT TO BE PRESENT AT TRIAL AND TO CONFRONT THE WITNESSES AGAINST HIM	10
CONCLUSION	16
APPENDIX A	
Order of the District Court of the District of Columbia, *al Qosi v. Bush*, December 17, 2004	1a
APPENDIX B	
Order of the District Court of the District of Columbia, *Hicks v. Bush*, December 15, 2004	3a

TABLE OF AUTHORITIES

FEDERAL CASES Page

al Qosi v. Bush, Civ. No. 04-1937 (PLF) (D.D.C. December 17, 2004) 4, 15
Faretta v. California, 422 U.S. 806 (1975) 5-7, 12
Hamdan v. Rumsfeld, 2004 U.S. Dist. LEXIS 22724 (D.D.C. November 8, 2004) 2, 11
Hicks v. Bush, Civ. No. 02-CV-0299 (CKK) (December 15, 2004) 4, 15
McKaskle v. Wiggins, 465 U.S. 168 (1984) 12-14
United States v. McDermott, 64 F.3d 1448 (10th Cir. 1995) 13
United States v. Taylor, 933 F.2d 307 (5th Cir. 1991) 13

FEDERAL CONSTITUTIONAL PROVISIONS

U.S. CONST., art. VI, cl. 2 9

REGULATIONS

Military Commission Instruction No. 4, 32 C.F.R. § 13.3 2
Military Commission Order No. 1, 32 C.F.R § 9.4 ..... 2, 11, 14
Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001) 2, 13-14

OTHER AUTHORITIES:

Charter of the International Military Tribunal for the Far East 8
Exec. Order No. 13,107, 63 Fed. Reg. 68,991 (1998) 9
Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316, 74 U.N.T.S. 135 8

TABLE OF AUTHORITIES—Continued

Page

International Covenant on Civil and Political Rights. G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 9

JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 79 (2d ed. 2003)..... 10

M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections In National Constitutions*, 3 Duke J. Comp. & Int'l L. 235 (Spring 1993) 10

Milosevic v. Prosecutor, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, Nov. 1, 2004..... 7

Prosecutor v. Tadic, Case No. IT-94-1-A, ICTY, Trial Chamber, Decision of Defense Motion on Jurisdiction, Aug. 10, 1995..... 8

Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, reprinted in 16 I.L.M. 1391 (1977)..... 9

Rules of Procedure Adopted by Military Tribunal I in the Trial of the Medical Case 7

Rules of Procedure for the Trial of the German Major War Criminals, (Oct. 29, 1945) 7

Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598 7

TABLE OF AUTHORITIES—Continued

Page

Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at 1-2, U.N. Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 1159 7

Uniform Rules of Procedure, Military Tribunals, Nuernberg, (Revised 8 Jan 48) 7

William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 Yale J. Int'l L. 319 (Summer 2003) 9

IN THE

Supreme Court of the United States

No. 04-702

SALIM AHMED HAMDAN,
Petitioner,
v.

DONALD H. RUMSFELD, ET AL.,
Respondents.

On Petition for Writ of Certiorari Before Judgment to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF MILITARY ATTORNEYS DETAILED TO REPRESENT ALI HAMZA AHMAD SULAYMAN AL BAHLUL BEFORE A MILITARY COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE* [1]

Lieutenant Commander Philip Sundel and Major Mark A. Bridges are military counsel detailed to represent Ali Hamza Ahmad Sulayman al Bahlul, a detainee at Guantanamo Bay,

[1] This brief is filed with the consent of all parties. No counsel for a party in this case authored this brief in whole or in part and no person or entity other than the *amicus* made a monetary contribution to it. Filing and printing costs were paid by the Office of the Chief Defense Counsel, Office of Military Commissions.

Cuba, before a military commission convened to try "war crimes" pursuant to the President's Military Order of November 13, 2001.[2] The views expressed in this brief do not represent the official views of the United States Government.

Lieutenant Commander Sundel and Major Bridges submit this brief to highlight the importance of the confrontation issue addressed in *Rumsfeld v. Hamdan* to the related issue of self-representation presently being considered by Mr. al Bahlul's military commission—for Mr. al Bahlul to be able to exercise the right of self-representation in a meaningful way the related right of confrontation must also exist.

At his initial hearing on August 26, 2004, Mr. al Bahlul told the military commission that he wanted to represent himself during his trial for war crimes.[3] The Presiding Officer informed Mr. al Bahlul that the military commission rules did not allow an accused to represent himself,[4] a statement that is consistent with the existing provisions governing military commissions.[5] Nonetheless, the Presiding Officer directed the defense and prosecution to file briefs related to the self-representation issue, and stated he would not schedule further proceedings until a higher authority resolved the issue.[6]

---

[2] Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

[3] Dep't of Defense, Unofficial Transcript of Initial Hearing Before a Military Commission, *United States v. al Bahlul*, at 6-7, 15, *available at* http://www.defenselink.mil/news/Nov2004/d20041109hearing.pdf (visited Dec. 21, 2004).

[4] *Id.* at 6.

[5] Military Commission Order No. 1, para. 4(C)(4), 32 C.F.R § 9.4(c) (an accused "must be represented at all relevant times by Detailed Defense Counsel."); Military Commission Instruction No. 4, para. 3D(2), 32 C.F.R. § 13.3(c) ("Detailed Defense Counsel shall represent the Accused . . . notwithstanding any intention expressed by the Accused to represent himself.")

[6] Note 3, *supra*, at 19-20.

Ultimately, the prosecution agreed that an accused tried before a military commission must be afforded the right to represent himself.[7] Subsequent to that concession the Appointing Authority for Military Commissions continued all proceedings in the case, pending appointment of new commission members. While Mr. al Bahlul's request to represent himself was never acted on by the military commission, it is likely that it will be honored once commission proceedings resume.

SUMMARY OF ARGUMENT

There is no question more fundamental to a criminal proceeding than the question of who will represent the defendant. The answer to that question will shape the course of the proceeding. There is no right more fundamental than the right of a defendant to choose to represent himself. Domestic and international law recognize that right as being an indispensable element of a fair criminal process. *Amicus* anticipates that Mr. al Bahlul's request to represent himself before his military commission will be granted soon after his commission proceedings resume.

Along with recognizing the fundamental right of self-representation, however, military commissions must also be required to recognize the related right of an accused to be present at his own trial and to confront the witnesses against him. Otherwise, the power that presently exists to involuntarily exclude Mr. al Bahlul from closed sessions of his trial will render his right of self-representation meaningless. Since the right of confrontation inevitably impacts the right of self-representation, it is appropriate for the Court to grant Petitioner's request for a writ of certiorari prior to judgment

[7] Dep't of Defense, Prosecution Response to Defense Memo for Self-Representation and Right to Choice of Counsel, *United States v. al Bahlul*, *available at* http://www.defenselink.mil/news/Oct2004/d20041006pro.pdf (visited Dec. 21, 2004).

to address the District Court's recognition of the right of confrontation.

The right of self representation is integrally bound up with the second question presented in this case, that the "military commission . . . lacks jurisdiction and is improperly constituted because it . . . violates the Uniform Code of Military Justice and other federal guarantees." As the decision below recognized, a defendant's right to be present and to confront the witnesses against him is fundamental. The military commission abridges this fundamental right, asserting that the presence of counsel alone is enough. The view that a military commission is not bound by the longstanding right of confrontation, and that the President has the raw power to abridge these rights, cannot be correct. Judge Robertson disagreed on this specific question, finding that a defendant cannot be excluded from the courtroom. Should this Court affirm Judge Robertson's decision, it will necessarily end the uncertainty around the right to self-representation in the commission. This Court should grant certiorari before judgment to resolve this matter, which impacts not only Hamdan, but Bahlul and every defendant who will face a commission.

More generally, the need for certiorari before judgment has grown extreme because the Hamdan case has generated a crisis of uncertainty in the commission process. Indeed, the two other judges in the federal courts who have military commission cases before them have formally placed those cases in abatement pending the outcome of Petitioner's case. *al Qosi v. Bush,* Civ. No. 04-1937 (PLF) (D.D.C. December 17, 2004) (order), *infra* App. A; *Hicks v. Bush*, Civ. No. 02-CV-0299 (CKK) (December 15, 2004)(order), *infra* App. B. The commissions are halted, no one knows what the rules are, and the defendants languish waiting, perhaps for years, for ultimate resolution of these weighty matters. Such uncertainty is bad for accused and counsel, bad for the commissions

themselves, and bad for the interest in prompt and speedy justice.

ARGUMENT

I. THE RIGHT OF SELF-REPRESENTATION IS A FUNDAMENTAL TRIAL RIGHT APPLICABLE TO MILITARY COMMISSIONS.

One of the first matters addressed in any criminal proceeding is the question of who will represent the defendant. It is a decision that is central to the entire proceeding, and one which will affect all that follows. The central nature of this question is illustrated by the fact that the right of a defendant to choose to represent himself is universally recognized as a fundamental right in criminal trials. As the Court concluded in *Faretta v. California*, 422 U.S. 806 (1975), the right is implicit in the Sixth Amendment of the United States Constitution, and was long recognized in English and Colonial jurisprudence as one of the indispensable guarantees of a fair criminal justice system.

The Court opined in *Faretta* that "forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." 422 U.S. at 817. In surveying the history of self-representation in English criminal jurisprudence the Court concluded that only one tribunal "adopted a practice of forcing counsel upon an unwilling defendant in a criminal proceeding"—the Star Chamber. *Id.* at 821. A proceeding of "mixed executive and judicial character . . . . the Star Chamber has for centuries symbolized disregard of basic individual rights." *Id.*

Soon after the disestablishment of the Star Chamber the right of self-representation was formally recognized in English law:

> The 1695 [Treason Act] . . . provided for court appointment of counsel, *but only if the accused so desired.* Thus, as new rights developed, the accused retained his

> established right 'to make what statements he liked.' The right to counsel was viewed as guaranteeing a choice between representation by counsel and the traditional practice of self-representation. . . . At no point in this process of reform in England was counsel ever forced upon the defendant. The common-law rule . . . has evidently always been that 'no person charged with a criminal offence can have counsel forced upon him against his will.'

Faretta, 422 U.S. at 825-26 (emphasis in original, footnotes and internal citations omitted).

This common law approach continued in Colonial America, where "the insistence upon a right of self-representation was, if anything, more fervent than in England." *Id.* at 826.

> This is not to say that the Colonies were slow to recognize the value of counsel in criminal cases. . . . At the same time, however, the basic right of self-representation was never questioned. We have found no instance where a colonial court required a defendant in a criminal case to accept as his representative an unwanted lawyer. Indeed, even where counsel was permitted, the general practice continued to be self-representation.

Id. at 827-28 (footnote omitted).

The Court has even rejected the view that counsel can be forced upon an unwilling defendant for the defendant's own good:

> It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. . . . The right to defend is personal . . . . It is the defendant, therefore, who must be

> free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'

Faretta, 422 U.S. at 834 (internal citation omitted).

The right of self-representation is recognized as well in international tribunals. Both of the currently operating *ad hoc* international tribunals for the prosecution of war crimes provide for the right of self-representation. Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), art. 21(4)(d), adopted at New York, May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at 1-2, U.N. Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 1159; Statute of the International Criminal Tribunal for Rwanda (ICTR), art. 20(4)(d), adopted at New York, Nov. 8, 1994, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598. The ICTY Appeals Chamber recently reaffirmed this fundamental right in holding that the right of self-representation is "an indispensable cornerstone of justice," and cited *Faretta* in doing so. *Milosevic v. Prosecutor*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, Nov. 1, 2004, at para. 11.[8]

Historic precedence also recognizes the right of self-representation. Rules of procedure governing the post-World War II Nuremberg military tribunals provided that "a defendant shall have the right to conduct his own defense."[9] Similarly,

---

[8] *Available at* http://www.un.org/icty/milosevic/appeal/decision-e/041101.htm (visited Dec. 21, 2004).

[9] Rule 2(d), Rules of Procedure for the Trial of the German Major War Criminals, (Oct. 29, 1945); Rule 7(a), Rules of Procedure Adopted by Military Tribunal I in the Trial of the Medical Case (Medical Case); Rule 7(a), Uniform Rules of Procedure, Military Tribunals, Nuremberg, Re-

the war crimes tribunals held in the Pacific theater recognized an accused's right to forgo representation by counsel except where the Tribunal believed that appointment of counsel was "necessary to provide for a fair trial."[10]

Subsequently, the right of self-representation was implicitly guaranteed by the Geneva Conventions of 1949, formally adopting it as part of the law of armed conflict in treaties ratified by the United States. Common Article 3 of the Geneva Conventions requires "regularly constituted court[s] affording all the judicial guarantees which are recognized as indispensable by civilized peoples" in trials for law of war violations or other criminal offenses during armed conflict. Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316, 74 U.N.T.S. 135 [hereinafter GPW].[11] Domestic law, including treaties of the United States, as well as customary international law help define which judicial guarantees are "recognized as indispensable by civilized peoples."

The first additional protocol to the Geneva Conventions, which similarly provides "minimum" guarantees for "persons

---

vised to 8 January 1948 (Uniform Rules), *available at* http://www.yale.edu/lawweb/avalon/imt/imt.htm#rules (visited Dec. 21, 2004).

[10] Article 9(c), Charter of the International Military Tribunal for the Far East (Far East Tribunal), *available at* http://www.yale.edu/lawweb/avalon/imtfech.htm (visited Dec. 21, 2004).

[11] Although Common Article 3 is specifically addressed to "armed conflict not of an international character," its protections are widely recognized as a minimum due process guarantee in all armed conflicts. *Prosecutor v. Tadic*, Case No. IT-94-1-A, ICTY, Trial Chamber, Decision of Defense Motion on Jurisdiction, Aug. 10, 1995, at para. 67, *citing Nicaragua v. United States*, 1986 I.C.J. 4 (Merits Judgment of 27 June 1986), *available at* http://www.un.org/icty/tadic/trialc2/decision-e/100895.htm (visited Dec. 20, 2004)("the rules contained in common Article 3 constitute a 'minimum yardstick' applicable in both international and non-international armed conflicts.").

who are in the power of a Party to the conflict," is another source for understanding the "judicial guarantees" protected by Common Article 3. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 75, reprinted in 16 I.L.M. 1391 (1977) [hereinafter Protocol I]. Pursuant to Protocol I, persons may only be tried by "an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include . . . *all necessary rights and means of defense*." Protocol I, art. 75(4)(a) (emphasis added).[12]

The minimum trial rights which the United States is bound to afford are reiterated and further defined in human rights law such as the International Covenant on Civil and Political Rights. G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 [hereinafter ICCPR]. Not surprisingly, the ICCPR provides that a "minimum guarantee" that must be afforded "[i]n the determination of any criminal charge," is the right of an accused "to defend himself in person" if he so chooses. ICCPR, art. 14(3).[13]

---

[12] Although the United States has not ratified Protocol I because of disagreement with some of its provisions, the United States considers Article 75 of Protocol I to be applicable customary international law. William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 Yale J. Int'l L. 319, 322 (Summer 2003)("[the United States] regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.").

[13] The Executive branch is bound to apply the provisions of the ICCPR and Common Article 3, as informed by the customary international law recognized in Article 75 of Protocol I, in formulating military commission procedures, as both the ICCPR and GPW have been ratified by the United States. Their provisions are the "supreme Law of the Land." U.S. CONST. art. VI, cl. 2. The Executive branch is not free to disregard these individual rights, regardless of whether the treaties are considered self-executing. Exec. Order No. 13,107, 63 Fed. Reg. 68,991 (1998)(requiring all "execu-

The right of self-representation "assures the accused of the right to participate in his or her defense, including directing the defense, rejecting appointed counsel, and conducting his or her own defense under certain circumstances." M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 283 (Spring 1993). As even the prosecution has acknowledged the applicability of this fundamental right,[14] it is anticipated that Mr. al Bahlul's request to represent himself will be granted once his military commission proceedings recommence.

II. AN ACCUSED'S RIGHT OF SELF-REPRESENTATION CAN BE RENDERED MEANINGLESS IF OTHER COMMISSION RULES ARE ALLOWED TO DENY HIM THE RIGHT TO BE PRESENT AT TRIAL AND TO CONFRONT THE WITNESSES AGAINST HIM.

An accused's right of self-representation can be effectively gutted by procedures restricting his right to confront the witnesses against him and to be present at trial. Military commissions would allow just such a gutting, in the form of rules that permit an accused to be excluded from the courtroom during any proceeding and for a broad and loosely defined array of reasons.

Both the Presiding Officer of an individual military commission and the Appointing Authority responsible for all military commissions may close the proceedings any time one

---

tive departments and agencies . . . including boards and commissions . . . to respect and implement [international human rights obligations, including the ICCPR] fully."); JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 79 (2d ed. 2003)("the President must faithfully execute an otherwise non-self-executing treaty.").

[14] Note 7, *supra*.

of them believes that it is justified for "the protection of information classified or classifiable []; information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, includ ing prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national secu rity interests." Military Commission Order Number 1, para. 6B(3) [hereafter MCO No. 1], 32 C.F.R. § 9.6(b). This sweeping authority to close the proceedings may include exclusion of the accused from the courtroom. *Id.*

The power is not limited to hearings involving the discussion of preliminary matters such as discovery or the admissibility of evidence. Rather, it extends to any proceeding, and has already been shown to include *voir dire. Hamdan v. Rumsfeld*, 2004 U.S. Dist. LEXIS 22724 at *12, 14 (D.D.C. November 8, 2004).

Excluding an accused from essential proceedings would effectively deny a *pro se* accused his right of self-representation. Further, forcing counsel representation on a *pro se* accused for the limited purpose of representing him during closed sessions, as the prosecution in Mr. al Bahlul's military commission has suggested,[15] is no substitute. First, while detailed military defense counsel is permitted to remain in the courtroom at all times, he is prohibited from disclosing any information presented during a closed session to an accused that has been excluded from the proceeding. MCO No. 1, para. 6B(3).

[15] Dep't of Defense, Answer to Presiding Officer's Questions on the Issue of Self-Representation, para. h, *United States v. al Bahlul*, *available at* http://www.defenselink.mil/news/Oct2004/d20041029rep.pdf (visited Dec. 21, 2004).

More significantly, the right of self-representation necessarily includes the right of confrontation, and both of the rights belong to the accused, not counsel:

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be "informed of the nature and cause of the accusation," who must be "*confronted with the witnesses against him*," and who must be accorded "compulsory process for obtaining witnesses in his favor."

Faretta v. California, 422 U.S. at 819 (emphasis added). Any suggestion that an unwanted counsel could adequately represent the interests of the *pro se* defendant in a session of trial from which the accused has been excluded is a legal fiction.

> It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas. Cf. *Henry v. Mississippi*, 379 U.S. 443, 451; *Brookhart v. Janis*, 384 U.S. 1, 7-8; *Fay v. Noia*, 372 U.S. 391, 439. This allocation can only be justified, however, by the defendant's consent, at the outset, to accept counsel as his representative. An unwanted counsel "represents" the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense.

Id. at 820-21 (emphasis in original).

A *pro se* accused must be given "a fair chance to present his case in his own way." *McKaskle v. Wiggins*, 465 U.S. 168, 177 (1984). Because of the danger that multiple defense voices will confuse the defendant's message, limits must

be placed on "the extent of standby counsel's unsolicited participation":

> First, the *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury. This is the core of the *Faretta* right. If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak *instead* of the defendant on any matter of importance, the *Faretta* right is eroded.
>
> Second, participation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself.

Id. at 178 (emphasis in original). Standby counsel does not represent the accused and should not be perceived as doing so. *United States v. Taylor*, 933 F.2d 307, 312 (5th Cir. 1991)("the key limitation on standby counsel is that such counsel not be responsible—*and not be perceived to be responsible*—for the accused's defense. Indeed, in many respects, standby counsel is not counsel at all.")(emphasis in original). A standby counsel who speaks instead of the accused with respect to important matters violates the right of self-representation. *United States v. McDermott*, 64 F.3d 1448 (10th Cir. 1995)(exclusion of accused from thirty bench conferences, attended by standby counsel, violated the right of self-representation).

The ability of the *pro se* accused to present his defense is further complicated by the structure of military commissions. Unlike a court-martial or criminal trial in federal court, where issues of law are decided by a judge outside the presence of the jury, military commissions are comprised of members who serve as both judge and jury. *See* Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,833 § 4(c)(2) (Nov. 16, 2001) ("the

military commission sit[s] as the triers of both fact and law").[16] Thus, all proceedings before a military commission will be in the presence of the "jury." Any participation by standby or unwanted detailed defense counsel would take place before the ever-present military commission "jury." Such participation by counsel during a closed session would substantially interfere with tactical decisions by the accused and be viewed as destroying the commission's perception that the accused is representing himself, violating both parts of the *McKaskle* test.

Standby counsel's participation in the presence of the jury is "more problematic" than participation outside the jury's presence because "excessive involvement by counsel will destroy the appearance that the defendant is acting *pro se*." *McKaskle*, 465 U.S. at 181. In the presence of the jury, standby counsel, even over the accused's objection, may assist the accused "in overcoming routine procedural or evidentiary obstacles to the completion of some specific task, such as introducing evidence or objecting to testimony, *that the defendant has clearly shown he wishes to complete* . . . [and] to ensure the defendant's compliance with basic rules of courtroom protocol and procedure." *Id.* at 183 (emphasis added). When standby counsel ventures beyond these basic procedural functions, the accused's self-representation rights are eroded.

The right to represent oneself cannot be separated from the right to confrontation, and the military commission cannot be permitted to ignore these two related, fundamental rights. Resolution of the question of whether a defendant before a military commission is entitled to a meaningful exercise of

[16] To make matters worse, only one of the commission members—the presiding officer—need be a lawyer or "judge advocate." MCO No. 1, para. 4A, 32 C.F.R. § 9.4(a). Thus, a majority of the required 3 to 7 commission members are likely to be non-lawyers. *Id.*

the right of self-representation is sufficiently central to the conduct of military commissions to justify the Court addressing the related confrontation issue presented in Petitioner's request for a writ of certiorari before judgment. Resolution of the correctness of Judge Robertson's recognition of the right of confrontation will also lift the veil of uncertainty presently surrounding all military commissions.[17] *See al Qosi v. Bush,* Civ. No. 04-1937 (PLF) (D.D.C. December 17, 2004) (order abating federal court proceedings pending higher court consideration of *Hamdan*), *infra* App. A; *Hicks v. Bush,* Civ. No. 02-CV-0299 (CKK) (December 15, 2004)(same), *infra* App. B.

[17] Uncertainty surrounding an accused's fundamental rights also greatly complicated the ability of counsel to conform to ethical requirements in the performance of their duties. Early resolution of the issues raised in *Hamdan* will facilitate appropriate responses to ethical quandaries that will inevitably arise within the commission process. Conversely, continued uncertainty will make resolution of questions involving professional responsibility obligations much more problematic.

CONCLUSION

For the foregoing reasons, *amicus* Military Attorneys Detailed to Represent Ali Hamza Ahmad Sulayman al Bahlul Before a Military Commission urges this Court to grant the petition for writ of certiorari before judgment.

Respectfully submitted,

MAJOR MARK A. BRIDGES,*
U.S. ARMY
LCDR PHILIP SUNDEL,
U.S. NAVY
OFFICE OF CHIEF DEFENSE
COUNSEL, OFFICE OF
MILITARY COMMISSIONS,
OFFICE OF THE SECRETARY
OF DEFENSE
1600 Defense Pentagon
Washington, D.C. 20301-1600
(703) 607-1521

* Counsel of Record

December 27, 2004

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 04-1937 (PLF)

IBRAHIM AHMED MAHMOUD AL QOSI,
Plaintiff,

v.

GEORGE W. BUSH, *et al.*,
Defendants.

ORDER

Petitioner Ibrahim Ahmed Mamoud al Qosi is a detainee at the United States Naval Station at Guantanamo Bay, Cuba. On November 8, 2004, Mr. al Qosi filed a petition for a writ of habeas corpus challenging, *inter alia,* his continued detention at Guantanamo, the United States government's designation of Mr. al Qosi as an "enemy combatant," and the government's intention to subject him to trial by military commission.

Many of the arguments raised by Mr. al Qosi were also raised by petitioner Salim Ahmed in *Hamdan v. Rumsfeld,* No. 04-1519 (D.D.C. filed Sept. 2, 2004). On November 8, 2004, Judge Robertson issued a memorandum opinion resolving some of those questions in favor of Mr. Hamdan and denying the government's motion to dismiss the petition. *See Hamdan v. Rumsfeld,* 2004 U.S. DIST LEXIS 22724. The government has noticed an appeal from that ruling, and the Court of Appeals for the District of Columbia Circuit has set oral argument for March 8, 2005. *See Hamdan v. Rumsfeld,* No. 05-5393 (D.C. Cir. filed Nov. 16, 2004).

In light of the court of appeals' consideration in *Hamdan* of issues that might prove dispositive in this case, and of news reports indicating that the government has suspended its system for the trial of individuals like Mr. Hamdan and Mr. al Qosi by military commissions at Guantanamo Bay, the Court on November 18, 2004 directed the parties to confer and, if possible, agree on a stipulation that would hold this case in abeyance pending the resolution of *Hamdan* by the court of appeals. The parties, however, could not agree to a stipulation. Petitioner instead filed a "Statement Opposing Abeyance," and the parties came before the Court for a status conference on December 13, 2004.

At the status conference, counsel for petitioner further articulated his reasons for opposing abeyance, while the government argued in favor of staying proceedings pending resolution of *Hamdan*. The government also tendered to the Court a directive from John D. Altenburg, Jr., Appointing Authority for Military Commissions in the Office of the Secretary of Defense, indicating that the military commission proceeding against petitioner would be held in abeyance pending resolution of *Hamdan* by the court of appeals. Counsel for the government represented that such abeyance will remain in effect until the court of appeals issues its mandate in *Hamdan*.

Upon consideration of the entire record in this case, and the arguments and representations of counsel, it is hereby

ORDERED that all proceedings in this matter will be held in abeyance pending resolution of *Hamdan v. Rumsfeld* by the court of appeals.

SO ORDERED.

/s/ Paul L. Friedman
PAUL L. FRIEDMAN
DATE: December 17, 2004 United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 02-CV-0299 (CKK)

DAVID M. HICKS,
Petitioner,

v.

GEORGE W. BUSH,
President of the United States, *et al.*,
Respondents.

ORDER HOLDING IN ABEYANCE RESPONDENTS' MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW WITH RESPECT TO CHALLENGES TO THE MILITARY COMMISSION PROCESS

By order dated November 18, 2004, counsel for petitioner and respondents were requested to show cause why the respondents' motion to dismiss petitioner David M. Hicks' claims challenging the legality of military commission proceedings should not be held in abeyance pending resolution of the appeal of the recent decision in *Hamdan v. Rumsfeld*, 04-CV-1519 (JR), 2004 WL 2504508 (Nov. 8, 2004) (D.D.C.).

In response to the show cause order, counsel for respondents stated their belief that resolution of the motion in this case should be held in abeyance pending appellate resolution of *Hamdan*. Counsel for the petitioner disagreed, citing the respondents' unwillingness to delay the trial of Mr. Hicks by military commission until this Court had time to adjudicate his challenges after resolution of *Hamdan*.

Petitioner's Brief Showing Cause Why This Case Should Not be Held in Abeyance, dated November 29, 2004, at 5.

On December 13, 2004, counsel for respondents filed a Notice of Recent Issuances informing the Court that "the Appointing Authority for Military Commissions has issued a formal written directive that any trial in David M. Hicks' military commission case . . . shall be held in abeyance pending the outcome of the appeal in *Hamdan*." Notice of Recent Issuances at 1. In light of this recent development, it is hereby

ORDERED that resolution of Respondents' Motion to Dismiss or for Judgment as a Matter of Law with Respect to Challenges to the Military Commission Process shall be held in abeyance pending final resolution of all appeals in *Hamdan v. Rumsfeld*. Should the circumstances forming the basis of this decision change, counsel may seek reconsideration of this Order.

IT IS SO ORDERED.
December 15, 2004

/s/ Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

DEPARTMENT OF DEFENSE
OFFICE OF THE APPOINTING AUTHORITY
1640 DEFENSE PENTAGON
WASHINGTON, DC 20301-1640

APPOINTING AUTHORITY FOR
MILITARY COMMISSIONS

JUN 14 2005

MEMORANDUM FOR CHIEF DEFENSE COUNSEL FOR MILITARY COMMISSIONS

SUBJECT: Request of Detailed Defense Counsel to Modify Military Commission Rules to Recognize Right of Self-Representation

Mr. Ali Hamza Ahmad Suliman al Bahlul's request for self-representation is denied. Military Commission Order (MCO) No. 1, paragraph 4(C)(4) states, "The accused shall be represented at all relevant times by Detailed Defense Counsel." After consideration of the attached materials, I do not support the request to change MCO No. 1.

Self-representation at a commission is impracticable. An unrepresented accused will be unable to investigate his case adequately because of national security concerns. An accused confined at Guantanamo, Cuba, who is unfamiliar with applicable substantive law, rules of evidence and procedure will not be able to present an adequate defense. An accused may not be sufficiently fluent in English to understand the nuances of the law. Translation requirements will be exponentially magnified. MCO No. 1, paragraph 6(B)(3) permits the exclusion of the accused from a hearing because classified or other protected information may be presented. Self-representation under these unique commission circumstances would be ineffective representation, and result in an unfair proceeding.

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

Attachments:
1. Memorandum DepSecDef, December 10, 2004 (1 page)
2. Defense Answers to PO Questions, October 25, 2004 (5 pages)
3. Email Detailed Defense Counsel, October 14, 2004 (6 pages)
4. Prosecution Motion, October 1, 2004 (10 pages)
5. Email Detailed Defense Counsel, May 11, 2004 with memorandum by Detailed Defense Counsel, May 11, 2004 (4 pages)

6. Memorandum Chief Defense Counsel, April 26, 2004 (2 pages)
7. Memorandum Detailed Defense Counsel, April 20, 2004 (1 page)

cc:
Presiding Officer
Chief Prosecutor for Military Commissions

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

3 November 2005

MEMORANDUM DETAILING DEFENSE COUNSEL

To: Major Thomas A. Fleener, JA, USAR

Subj: DETAILING LETTER REGARDING MILITARY COMMISSION PROCEEDINGS OF ALI HAMZA AHMAD SULAYMAN AL BAHLUL

1. Pursuant to the authority granted to me by my appointment as Chief Defense Counsel; Sections 4.C and 5.D of Military Order No. 1, dated August 31, 2005, and Section 3.B(8) of Military Commission Instruction No. 4, dated September 16, 2005, you are hereby detailed as Military Counsel for all matters relating to Military Commission proceedings involving Ali Hamza Ahmad Sulayman al Bahlul. Your appointment exists until such time as any findings and sentence become final as defined in Section 6.H(2) of Military Commission Order No. 1, unless you are excused from representing Mr. al Bahlul by a competent authority.

2. In your representation of Mr. al Bahlul, you are directed to review and comply with the President's Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Fed. Reg. 57,833 (Nov. 16, 2001), Military Commission Orders Nos. 1 and 3, Military Commission Instructions 1 through 9, and all Supplementary Regulations and Instructions issued in accordance therewith. You are directed to ensure that your conduct and activities are consistent with all applicable prescriptions and proscriptions.

3. You are directed to inform Mr. al Bahlul of his rights before a Military Commission. In the event that Mr. al Bahlul chooses to exercise his rights to Selected Military Counsel or his right to Civilian Defense Counsel as his own expense, you shall inform me as soon as possible.

4. In the event that you become aware of a conflict of interest arising from the representation of Mr. al Bahlul before a Military Commission, you shall immediately inform me of the nature and facts concerning such conflict. You should be aware that in addition to your State Bar and Service Rules of Professional Conduct, that by virtue of your appointment to the Office of Military Commissions you will be attached to the Defense Legal Services Agency and will be subject to professional supervision by the Department of Defense General Counsel.

5. You are directed to inform me of all requirements for personnel, office space, equipment, and supplies necessary for preparation of the defense of Mr. al Bahlul.

Dwight H. Sullivan
Colonel, United States Marine Corps Reserve

cc:
Colonel Morris Davis
Brigadier General Thomas L. Hemingway
Mr. [redacted]

Hodges, Keith

From: Hodges, Keith[redacted]
Sent: Monday, November 28, 2005 10:48 AM
To: Fleener, Tom, MAJ DoD GC; Hodges, Keith; Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; [redacted]
Subject: PO 102 C - RE: Representation and Docketing Concerns - US v. Al Bahlul

MAJ Fleener:

1. Thank you for the reply - and numbering the paragraphs.

2. Who is [redacted]

ALL: This email and the two below emails will be placed on the filings inventory as PO 102 C

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

From: Fleener, Tom, MAJ DoD GC [redacted]
Sent: Monday, November 28, 2005 10:32 AM
To: 'Hodges, Keith'; Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; [redacted] Fleener, Tom, MAJ DoD GC; [redacted]
Subject: RE: Representation and Docketing Concerns - US v. Al Bahlul

Colonel Brownback and others,

Ill number my responses to correspond to your questions/statements/concerns in the earlier email.

1) Iowa and Wyoming.

2) I consider when I intend to see Mr. al Bahul, or whether I intend to see Mr. al Bahul to be priviliged. Please understand though, the translator who was with us at Gitmo belonged to a different defense team. I also believe that the prisoner she was there to support has a conflict with Mr. al Bahul.

3) I am not aware of any logistical reasons why I would be unable to see Mr. al Bahul. I dont think JTF allows them to use the phone, so that makes it extremely difficult to speak with folks. If there was some way we could be able to speak with the prisoners by phone that would really save alot of time.

4) Concur.

5) Concur.

6) I am in the process now of determining my ethical duties.

7) This is taking some time, but I am working on it. Thank you for the offer of writing a letter. Im not sure if I need one, but will keep you informed.

8) Concur.

Major Tom Fleener

-----Original Message-----
From: Hodges, Keith [redacted]
Sent: Tuesday, November 22, 2005 18:13
[redacted]
Subject: Representation and Docketing Concerns - US v. Al Bahlul

Your attention is invited to the below email from the Presiding Officer.

This email will be placed on the filings inventory as PO 102 A.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

From: Pete Brownback [redacted]
Sent: Tuesday, November 22, 2005 4:54 PM
To: [redacted]
Subject: Representation and Docketing Concerns - US v. Al Bahlul

Mr. Hodges,

Please send this email to MAJ Fleener, all counsel in the case of US v. Al Bahlul, and the Chief Prosecution Counsel/Chief Defense Counsel.

Please place your forwarding email (containing this one) on the filings inventory as part of the PO 102 filings sequence.

COL Brownback

MAJ Fleener,

In connection with your detail "as Military Counsel for all matters relating to the Military Commission proceedings involving Ali Hamza Ahmad Sulayman al Bahlul", I need some reassurances, information, and actions from you, so that I can make sure that the case is docketed in a proper manner. Please respond to this email as soon as you receive it; copying all of the parties to whom it is addressed.

1. What bars are you a member of?

2. When do you intend to see your client? I ask this question because it is my understanding that you did not see him on 15, 16, or 17 November 2005, notwithstanding that you were in Guantanamo and you had an OMC-provided translator with you.

3. Do you believe that there is any reason which prevents you from seeing your client? If there is a problem with gaining access based on your expressed belief that you do not represent Mr. Al Bahlul, please let me know. I am sure that the JTF will allow you access when your status as detailed defense counsel is made clear to them.

4. Insofar as actions are concerned, your status as detailed defense counsel, regardless of your beliefs concerning representation, means that you must perform certain duties within and for these proceedings. These duties include, but are certainly not limited to:

a. Communicating with the Presiding Officer, the Assistant to the Presiding Officer, the Chief Defense Counsel, and the government on matters which do not constitute representation.
b. Advising the PO, APO, CDC, and the government when responding or communicating would, in your opinion, constitute representation.
c. Determining whether your client wishes to have you represent him.
d. Advising the PO, APO, CDC and the Prosecution whether your client wants you to represent him.
e. Advising the PO APO, CDC and the Prosecution whether you are going to represent him.
f. Any and all other duties of a detailed defense counsel.

5. As soon as you become aware of a matter which you believe you should not deal with because it might constitute representation, you must immediately make the PO, APO, and CDC aware of that fact. You may not wait until the due date to state that you can not respond to the requirement or answer the correspondence. This includes, for instance, PO 101 which has certain due dates laid out in it.

6. You, under the guidance and direction of the Chief Defense Counsel, have the duty to determine your ability ethically to represent Mr. Al Bahlul, if and when he states that he does not want you to represent him. I do not believe that you can make a decision on that matter until you see him, so I believe that you must make seeing him your first priority. You, obviously, believe that he will decline your services, but I do not think that you can make such a judgment without talking to him face to face. Times change and people change their decisions; for instance, according to the motion filed on behalf of Mr. Al Bahlul and others, he appears to want representation in Federal District Court on the issue of habeas corpus at least.

7. While you are making the arrangements to see Mr. Al Bahlul, you should also be gathering information and seeking advice or an opinion on the potential ethical dilemma. This can not wait. If you want me to send a letter to your bar(s), The Judge Advocate General of the United States Army, or the General Counsel of the Department of Defense explaining the situation or verifying your own letters to them, I will do so. If not, when do you intend to write these entities?

8. I draw your attention to the provisions of Military Commission Instruction #4 (16 Sep 05), specifically paragraphs 3B(11) and 3D.

Peter E. Brownback III
COL, JA
Presiding Officer

Hodges, Keith

From: Sullivan, Dwight, COL, DoD OGC [redacted]
Sent: Thursday, December 01, 2005 11:25 AM
To: 'Hodges, Keith'
Subject: RE: US v. al Bahlul - Representation

14 September 2005

-----Original Message-----
From: Hodges, Keith [redacted]
Sent: Thursday, December 01, 2005 11:22
To: Sullivan, Dwight, COL, DoD OGC
Subject: RE: US v. al Bahlul - Representation

Thank you, COL Sullivan.

Would you please advise the date that Mr. al Bahlul provided you this information.

Thank you.

Keith Hodges

From: Sullivan, Dwight, COL, DoD OGC [redacted]
Sent: Thursday, December 01, 2005 11:14 AM
To: 'Hodges, Keith'
Subject: RE: US v. al Bahlul - Representation

When I met with Mr. al Bahlul, he said the following and specifically authorized the transmission of this information to others:

He said he would not accept Major Fleener as his lawyer. He also specifically directed that Major Fleener not visit him in the camps.

Mr. al Bahlul also made other statements concerning potential representation, but he did not clearly authorize disclosure of those statements to others.

Semper Fi,
Dwight

-----Original Message-----
From: Hodges, Keith [redacted]
Sent: Thursday, December 01, 2005 10:48
To: Sullivan, Dwight, COL, DoD OGC
Subject: US v. al Bahlul - Representation

COL Sullivan,

Would you mind, please, sending me a reply email concerning what Mr. al Bahlul told you with respect to his desires as to counsel. I believe you told me that Mr. al Bahlul authorized you to make this matter public.

Thank you.

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

Hodges, Keith

From: Hodges, Keith [redacted]
Sent: Tuesday, November 22, 2005 6:13 PM
To: [redacted]
Subject: Representation and Docketing Concerns - US v. Al Bahlul

Your attention is invited to the below email from the Presiding Officer.

This email will be placed on the filings inventory as PO 102 A.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

From: Pete Brownback [redacted]
Sent: Tuesday, November 22, 2005 4:54 PM
To: [redacted]
Subject: Representation and Docketing Concerns - US v. Al Bahlul

Mr. Hodges,

Please send this email to MAJ Fleener, all counsel in the case of US v. Al Bahlul, and the Chief Prosecution Counsel/Chief Defense Counsel.

Please place your forwarding email (containing this one) on the filings inventory as part of the PO 102 filings sequence.

COL Brownback

MAJ Fleener,

In connection with your detail "as Military Counsel for all matters relating to the Military Commission proceedings involving Ali Hamza Ahmad Sulayman al Bahlul", I need some reassurances, information, and actions from you, so that I can make sure that the case is docketed in a proper manner. Please respond to this email as soon as you receive it; copying all of the parties to whom it is addressed.

1. What bars are you a member of?

2. When do you intend to see your client? I ask this question because it is my understanding that you did not see him on 15, 16, or 17 November 2005, notwithstanding that you were in Guantanamo and you had an OMC-provided translator with you.

3. Do you believe that there is any reason which prevents you from seeing your client? If there is a problem with gaining access based on your expressed belief that you do not represent Mr. Al Bahlul, please let me know. I am sure that the JTF will allow you access when your status as detailed defense counsel is made clear to them.

4. Insofar as actions are concerned, your status as detailed defense counsel, regardless of your beliefs concerning representation, means that you must perform certain duties within and for these proceedings. These duties include, but are certainly not limited to:

a. Communicating with the Presiding Officer, the Assistant to the Presiding Officer, the Chief Defense Counsel, and the government on matters which do not constitute representation.
b. Advising the PO, APO, CDC, and the government when responding or communicating would, in your opinion, constitute representation.
c. Determining whether your client wishes to have you represent him.
d. Advising the PO, APO, CDC and the Prosecution whether your client wants you to represent him.
e. Advising the PO APO, CDC and the Prosecution whether you are going to represent him.
f. Any and all other duties of a detailed defense counsel.

5. As soon as you become aware of a matter which you believe you should not deal with because it might constitute representation, you must immediately make the PO, APO, and CDC aware of that fact. You may not wait until the due date to state that you can not respond to the requirement or answer the correspondence. This includes, for instance, PO 101 which has certain due dates laid out in it.

6. You, under the guidance and direction of the Chief Defense Counsel, have the duty to determine your ability ethically to represent Mr. Al Bahlul, if and when he states that he does not want you to represent him. I do not believe that you can make a decision on that matter until you see him, so I believe that you must make seeing him your first priority. You, obviously, believe that he will decline your services, but I do not think that you can make such a judgment without talking to him face to face. Times change and people change their decisions; for instance, according to the motion filed on behalf of Mr. Al Bahlul and others, he appears to want representation in Federal District Court on the issue of habeas corpus at least.

7. While you are making the arrangements to see Mr. Al Bahlul, you should also be gathering information and seeking advice or an opinion on the potential ethical dilemma. This can not wait. If you want me to send a letter to your bar(s), The Judge Advocate General of the United States Army, or the General Counsel of the Department of Defense explaining the situation or verifying your own letters to them, I will do so. If not, when do you intend to write these entities?

8. I draw your attention to the provisions of Military Commission Instruction #4 (16 Sep 05), specifically paragraphs 3B(11) and 3D.

Peter E. Brownback III

COL, JA
Presiding Officer

Hodges, Keith

From: Hodges, Keith
Sent: Tuesday, November 22, 2005 6:17 PM
To: [redacted]
Cc: Hodges, Keith; Brownback, Peter COL PO (Home)[redacted]
Subject: FW: Representation Concerns - US v. Al Bahlul - PO 102 B

Your attention is invited to the below email from the Presiding Officer.

This email will be placed on the filings inventory as PO 102 B.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

From: Pete Brownback [redacted]
Sent: Tuesday, November 22, 2005 5:02 PM
To: keith - 1 - work
Subject: Representation Concerns - US v. Al Bahlul

Mr. Hodges,

Please send this email to the Chief Defense Counsel and MAJ Fleener.

Please place your forwarding email (containing this one) on the filings inventory as part of the PO 102 filings sequence.

COL Brownback

COL Sullivan

1. In addition to our telephone conversation of 16 November with myself and MAJ Fleener in Guantanamo and you in Washington, I have provided you a copy of PO 101. I also cc'd you on a letter I sent to MAJ Fleener today.

2. It is obvious that I have concerns about insuring that Mr. Al Bahlul is provided representation in accordance with Commission Law. It is also obvious that I am concerned about MAJ Fleener's "legal-ability" to provide that representation. I am not in any way commenting

upon his professional abilities or capabilities; instead, I am concerned that he may feel that his ethical responsibilities outweigh his duties under Commission Law and your detailing memorandum of 3 November 2005.

3. I do not claim to know the reaction of MAJ Fleener's state bar(s) to his perceived ethical dilemma. Nor do I know what The Judge Advocate General of the United States Army or the General Counsel of the Department of Defense will say about his ethical dilemma. However, I do need to know what actions MAJ Fleener and you are going to take concerning representation of Mr. Al Bahlul. I realize that there may be a delay of some sort in making a decision, but the delay can not be unnecessarily prolonged.

4. Commission Law puts certain responsibilities upon all parties in the commission process, including you, MAJ Fleener, and myself. It is not my responsibility to represent or provide a judge advocate to represent Mr. Al Bahlul. However, it is my responsibility to bring his case to trial in an expeditious manner. Currently, the issue of representation is the major problem I face in docketing the case. Whatever resolution MAJ Fleener reaches, I must know it as soon as possible.

5. I am not MAJ Fleener's supervisor; I am, however, the one appointed to the commission established to try a person whom he has been detailed to represent. As such, my concerns are focused upon trying Mr. Al Bahlul, whereas, until this issue is resolved, you and MAJ Fleener may have a different focus. Be that as it may, none of us will be able to reach a resolution until the initial question is answered: Does Mr. Al Bahlul want to have MAJ Fleener represent him?

6. I was surprised when informed that while MAJ Fleener was in Guantanamo with an OMC-provided translator, he did not see his client. If there is something in the JTF procedures which kept him from seeing his client, I need to know so that I can take whatever measures that are available to me to insure it does not happen again.

7. Not only have I read all of the paperwork contained in PO 102, I also participated in the discussion on the record with Mr. Al Bahlul. However, that was in late August of 2004 - as recently as 27 October 2005, certain attorneys have stated in court filings that Mr. Al Bahlul did want representation - at least in a habeas corpus proceeding. At this point in time, no one knows what Mr. Al Bahlul wants in connection with MAJ Fleener. The only way in which we are going to know anything is for MAJ Fleener to meet with his client.

8. Please advise soonest whether you believe anything I have raised above is somehow inconsistent with how you see our individual and collective responsibilities.

COL Brownback

Hodges, Keith

From: Hodges, Keith [redacted]
Sent: Monday, November 28, 2005 10:48 AM
To: Fleener, Tom, MAJ DoD GC; Hodges, Keith; Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; [redacted]
Subject: PO 102 C - RE: Representation and Docketing Concerns - US v. Al Bahlul

MAJ Fleener:

1. Thank you for the reply - and numbering the paragraphs.

2. Who is [redacted]

ALL: This email and the two below emails will be placed on the filings inventory as PO 102 C

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

From: Fleener, Tom, MAJ DoD GC [redacted]
Sent: Monday, November 28, 2005 10:32 AM
To: 'Hodges, Keith'; Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; [redacted] Fleener, Tom, MAJ DoD GC; [redacted]
Subject: RE: Representation and Docketing Concerns - US v. Al Bahlul

Colonel Brownback and others,

Ill number my responses to correspond to your questions/statements/concerns in the earlier email.

1) Iowa and Wyoming.

2) I consider when I intend to see Mr. al Bahul, or whether I intend to see Mr. al Bahul to be priviliged. Please understand though, the translator who was with us at Gitmo belonged to a different defense team. I also believe that the prisoner she was there to support has a conflict with Mr. al Bahul.

3) I am not aware of any logistical reasons why I would be unable to see Mr. al Bahul. I dont think JTF allows them to use the phone, so that makes it extremely difficult to speak with folks. If there was some way we could be able to speak with the prisoners by phone that would really save alot of time.

4) Concur.

5) Concur.

6) I am in the process now of determining my ethical duties.

7) This is taking some time, but I am working on it. Thank you for the offer of writing a letter. Im not sure if I need one, but will keep you informed.

8) Concur.

Major Tom Fleener

-----Original Message-----
From: Hodges, Keith [redacted]
Sent: Tuesday, November 22, 2005 18:13
[redacted]
Subject: Representation and Docketing Concerns - US v. Al Bahlul

Your attention is invited to the below email from the Presiding Officer.

This email will be placed on the filings inventory as PO 102 A.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

From: Pete Brownback [redacted]
Sent: Tuesday, November 22, 2005 4:54 PM
To: keith - 1 - work
Subject: Representation and Docketing Concerns - US v. Al Bahlul

Mr. Hodges,

Please send this email to MAJ Fleener, all counsel in the case of US v. Al Bahlul, and the Chief Prosecution Counsel/Chief Defense Counsel.

Please place your forwarding email (containing this one) on the filings inventory as part of the PO 102 filings sequence.

COL Brownback

MAJ Fleener,

In connection with your detail "as Military Counsel for all matters relating to the Military Commission proceedings involving Ali Hamza Ahmad Sulayman al Bahlul", I need some reassurances, information, and actions from you, so that I can make sure that the case is docketed in a proper manner. Please respond to this email as soon as you receive it; copying all of the parties to whom it is addressed.

1. What bars are you a member of?

2. When do you intend to see your client? I ask this question because it is my understanding that you did not see him on 15, 16, or 17 November 2005, notwithstanding that you were in Guantanamo and you had an OMC-provided translator with you.

3. Do you believe that there is any reason which prevents you from seeing your client? If there is a problem with gaining access based on your expressed belief that you do not represent Mr. Al Bahlul, please let me know. I am sure that the JTF will allow you access when your status as detailed defense counsel is made clear to them.

4. Insofar as actions are concerned, your status as detailed defense counsel, regardless of your beliefs concerning representation, means that you must perform certain duties within and for these proceedings. These duties include, but are certainly not limited to:

a. Communicating with the Presiding Officer, the Assistant to the Presiding Officer, the Chief Defense Counsel, and the government on matters which do not constitute representation.
b. Advising the PO, APO, CDC, and the government when responding or communicating would, in your opinion, constitute representation.
c. Determining whether your client wishes to have you represent him.
d. Advising the PO, APO, CDC and the Prosecution whether your client wants you to represent him.
e. Advising the PO APO, CDC and the Prosecution whether you are going to represent him.
f. Any and all other duties of a detailed defense counsel.

5. As soon as you become aware of a matter which you believe you should not deal with because it might constitute representation, you must immediately make the PO, APO, and CDC aware of that fact. You may not wait until the due date to state that you can not respond to the requirement or answer the correspondence. This includes, for instance, PO 101 which has certain due dates laid out in it.

6. You, under the guidance and direction of the Chief Defense Counsel, have the duty to determine your ability ethically to represent Mr. Al Bahlul, if and when he states that he does not want you to represent him. I do not believe that you can make a decision on that matter until you see him, so I believe that you must make seeing him your first priority. You, obviously, believe that he will decline your services, but I do not think that you can make such a judgment without talking to him face to face. Times change and people change their decisions; for instance, according to the motion filed on behalf of Mr. Al Bahlul and others, he appears to want representation in Federal District Court on the issue of habeas corpus at least.

7. While you are making the arrangements to see Mr. Al Bahlul, you should also be gathering information and seeking advice or an opinion on the potential ethical dilemma. This can not wait. If you want me to send a letter to your bar(s), The Judge Advocate General of the United States Army, or the General Counsel of the Department of Defense explaining the situation or verifying your own letters to them, I will do so. If not, when do you intend to write these entities?

8. I draw your attention to the provisions of Military Commission Instruction #4 (16 Sep 05), specifically paragraphs 3B(11) and 3D.

Peter E. Brownback III
COL, JA
Presiding Officer

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

5 December 2005

MEMORANDUM FOR PRESIDING OFFICER

SUBJECT: Defense Representation in al Bahlul

1. References:

a. Army Regulation 27-26, 1 May 1992 (Rules of Professional Conduct for Lawyers) http://www.apd.army.mil/pdffiles/r27_26.pdf
b. Iowa Code of Professional Responsibility, 20 April 2005 http://www.judicial.state.ia.us/rules/amendments/Iowa%20Rules%20of%20Professional%20Conduct%20%20%284-15-05%29.pdf
c. Wyoming Rules of Professional Conduct for Attorneys at Law, 1 April 2002 http://courts.state.wy.us/RULES/Professional%20Conduct%20for%20Attorneys.html

2. Input has been invited concerning the ability of an Army judge advocate to refuse to represent an accused before this Military Commission where said accused has expressly stated he does not want representation by any judge advocate. The circumstances of the refusal are that said judge advocate has been properly detailed to the case and the rules of the Military Commission require denial of self-representation.

3. It is the prosecution's position that an Army judge advocate, regardless of circumstances, may not ethically refuse to represent an accused unless and until he is relieved by competent authority. Army Rule 1.16 (Reference a) makes it clear that one shall not represent a client if one is dismissed by said client, with one exception:

> 1.16 (c) When ordered to do so by a tribunal or other competent authority, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

4. Iowa Rule 32.1.16(c) (Reference b) has identical language to Army Rule 1.16(c), excepting the words "or other competent authority." Wyoming Rule 1.16(c) (Reference c) has the same language as the Iowa Rule, except "shall" is replaced by "may." The permissive language of the Wyoming Code does not ethically prevent the representation if ordered to do so by a tribunal, which means the directive language of both the Army and Iowa Codes control the issue.

5. The Comment section to Army Rule 1.16 concerning continued representation notwithstanding good cause, states "[n]otwithstanding the existence of good cause for terminating representation, a lawyer appointed to represent a client shall continue such representation until relieved by competent authority." With regard to discharge by the

client, the Comment states "[w]hether a client can release appointed counsel may depend on applicable law."[1] Applicable commission law does not provide for a defendant to represent himself. Therefore, legal representation of the accused is even more paramount here than at any other legal forum. An accused cannot be allowed to manipulate and delay his case by firing appointed counsel.

6. In the context of this Military Commission, it is clear the Army judge advocate has been properly detailed. He cannot then withdraw from representation, even if dismissed by the accused, without permission from competent authority. Competent authority differs according to the circumstances. In a trial by court-martial, competent authority is the appointing authority prior to trial and the military judge once trial begins.[2] At this Military Commission, that would translate to the Chief Defense Counsel prior to commencement of the tribunal, and the Presiding Officer once it has commenced.

Lieutenant Colonel, USAFR
Prosecutor
Office of Military Commissions

[1] This language is virtually identical in the respective commentaries of both References b and c. ["Whether a client *can* discharge appointed counsel may depend on applicable law." Iowa Rule 32.1.16 (Reference b). "Whether a client *may* discharge appointed counsel may depend on applicable law." Wyoming Rule 1.16 (Reference c)]. (Emphasis added)

[2] See, AR 27-26, Rule 1.16 (Comment to Continued Representation Notwithstanding Good Cause).

Hodges, Keith

From: Hodges, Keith [redacted]
Sent: Thursday, December 01, 2005 6:32 PM
To: [redacted]
Subject: Decision of the Presiding Officer - Scheduling of a Jan 2006 Session in al Bahul

1. The Presiding Officer has personally and carefully considered the emails pasted below with respect to whether a session in the case of US v. al Bahlul should be held the week of 9 Jan 06.

2. The charges against Mr. Al Bahlul were referred to a military commission for trial on 28 June 2004. As of today, there is no judge advocate who is willing to stand up and say, "I represent Mr. Al Bahlul." A review of the PO 102 filings series will reveal the problems involved in determining Mr. Al Bahlul's representation and counsel rights.

3. The Presiding Officer, based on his years of experience as a judge advocate, believes that having experienced trial lawyers such as MAJ Fleener present instruction to military attorneys who are or will become trial advocates is important. On balance however, the needs to resolve important issues with respect to Mr. al Bahlul, to include his representation which has been pending for over one year, outweighs the need to have a specific judge advocate present the class or classes in trial advocacy. There is only one person detailed to represent Mr. al Bahlul, but there are many judge advocates who can present quality instruction in trial advocacy generally and voir dire specifically.

4. Presuming that MAJ Fleener's statement in his email of 4:25 PM of today (pasted below) that he is scheduled to teach at the AF JAG school was a request for delay, the Presiding Officer has denied the request. The session scheduled for the week of 9 Jan 2006 at GTMO shall be held, and MAJ Fleener will be present at it.

BY ORDER OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

From: Fleener, Tom, MAJ DoD GC [mailto: [redacted]
Sent: Thursday, December 01, 2005 4:25 PM
To: 'Hodges, Keith'; Davis, Morris, COL, DoD OGC; Swann, Robert, Mr, DoD OGC; [redacted] Sullivan, Dwight, COL, DoD OGC; [redacted] Fleener, Tom, MAJ DoD GC; [redacted]
Subject: RE: US v. al Bahlul - Jan 2006 Session

I am scheduled to teach at the Air Force JAG School that week.

Tom Fleener

From: Hodges, Keith [redacted]
Sent: Thursday, December 01, 2005 4:22 PM
[redacted]
Subject: US v. al Bahlul - Jan 2006 Session

To all counsel in US v. al Bahlul.
The Presiding Officer intends to hold the initial restart session in this case during the week of 9 Jan 2006. The specific date(s) will be provided later. This session will cover counsel rights and representation, and all counsel will be prepared to conduct voir dire of the Presiding Officer and discuss motions schedules and dates, and docketing of future sessions.

Any counsel who believes that s/he has a valid reason why the session can not or should not be held at the time indicated will respond immediately. This includes both personal and legal reasons.

BY DIRECTION OF THE PRESIDING OFFICER
Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]