



- 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 (4<sup>th</sup> Cir. 1997)
- f. McKaskle v. Wiggins, 465 U.S. 168 (1984)
- g. United States v. Davis, 285 F.3d 378, 383 (5<sup>th</sup> Cir. 2002)
- h. United States v. Betancourt-Arretuche, 933 F.2d 89, 95 (1<sup>st</sup> Cir. 1991)
- i. United States v. McDowell, 814 F.2d 245, 250 (6<sup>th</sup> Cir. 1987)
- j. United States v. Frazier-El, 204 F.3d 553, 558 (4<sup>th</sup> 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 (9<sup>th</sup> 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 (4<sup>th</sup> 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 (1<sup>st</sup> 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 (5<sup>th</sup> Cir. 1985)
- y. Raulerson v. Wainwright, 732 F.2d 803, 808 (11<sup>th</sup> 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 (10<sup>th</sup> Cir. 1976);
- gg. United States v. Whitesel, 543 F.2d 1176, 1177-81 (6<sup>th</sup> Cir. 1976);
- hh. United States v. Kelley, 539 F.2d 1199, 1201-03 (9<sup>th</sup> 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 (4<sup>th</sup> 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 (5<sup>th</sup> 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 (1<sup>st</sup> 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 (6<sup>th</sup> 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 Farretta 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 (4<sup>th</sup> 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 11<sup>th</sup> 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 (9<sup>th</sup> 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.” Farretta, 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 (4<sup>th</sup> 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, 465 U.S. at 177.

Standby counsel have conducted research on behalf of a *pro se* defendant, Barham v. Powell, 895 F.2d 19, 23 (1<sup>st</sup> 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 (5<sup>th</sup> 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 (11<sup>th</sup> 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 (10<sup>th</sup> Cir. 1976); United States v. Whitesel, 543 F.2d 1176, 1177-81 (6<sup>th</sup> Cir. 1976); United States v. Kelley, 539 F.2d 1199, 1201-03 (9<sup>th</sup> 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.

XXXX  
Commander, JAGC, USN  
Prosecutor



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26 April 2004

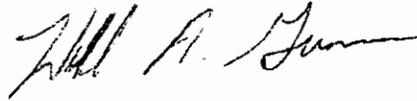
MEMORANDUM FOR MAJOR MARK BRIDGES AND LCDR PHILIP SUNDEL

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.

A handwritten signature in black ink, appearing to read "Will A. Gunn". The signature is fluid and cursive, with a prominent initial "W" and a long, sweeping underline.

WILL A. GUNN, Colonel, USAF  
Chief Defense Counsel

cc:

Appointing Authority

Legal Advisor to the Appointing Authority

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA )  
 )  
 v. ) Criminal No. 01-455-A  
 )  
 ZACARIAS MOUSSAOUI )  
 a/k/a "Shaqil," )  
 a/k/a "Abu Khalid )  
 al Sahrawi," )  
 )  
 Defendant. )

ORDER

Before the Court are the pro se defendant's pleadings docketed as #s 1116 and 1117. Read generously, Docket # 1116 is a request for a copy of the classified report of Congress concerning September 11<sup>th</sup>, and Docket # 1117 is a request for reconsideration of the Order of October 2, 2003, which imposed sanctions on the government and is presently the subject of an interlocutory appeal.

On November 5, 2003, the Court stayed all further action in this case, to conserve resources while the appeal is processed. By a separate order issued on November 5, 2003, Mr. Moussaoui was placed on clear notice that he faced sanctions, including losing his right to represent himself, if he filed "further frivolous, scandalous, disrespectful or repetitive pleadings," or violated any Court orders. By a letter dated November 7, 2003, the Court informally reminded Mr. Moussaoui of the sanctions he faced if he continued to send such writings to the Court.

Pleadings #s 1116 and 1117 violate the two orders of November

5, 2003. First, they ask for relief after the Court made clear that all action in this case was stayed. Second, Docket # 1116 asks for relief to which the defendant knows he is not entitled. Specifically, the defendant has been advised on numerous occasions that he cannot have access to classified material. Docket # 1117 merely expresses the defendant's dissatisfaction with the October 2, 2003 Opinion. It offers no new evidence or argument, and is therefore cumulative of what defendant has previously filed. Third, both pleadings include contemptuous language that would never be tolerated from an attorney, and will no longer be tolerated from this defendant.

Based on the defendant's repeated violation of orders of this Court, he has forfeited his right to represent himself any further in this case. For these reasons, it is hereby

ORDERED that the Order issued on June 14, 2002, granting defendant's request to represent himself be and is VACATED; and it is further

ORDERED that standby counsel are appointed as counsel of record for the defendant. The Court will only accept for filing pleadings submitted by counsel of record. Anything submitted to the Court by the defendant will simply be received for archival purposes, with a copy sent only to defense counsel.

If defendant wants to appeal this decision, he must file a

written notice of appeal within ten days with the Clerk of this Court.

The Clerk is directed to forward copies of this Order to counsel of record and the defendant.

Entered this 14<sup>th</sup> day of November, 2003.

\_\_\_\_\_/s/\_\_\_\_\_  
Leonie M. Brinkema  
United States District Judge

Alexandria, Virginia

**GENERAL ADVICE TO MR. AL BAHLUL**  
(Assumes a right to self-representation is recognized)

Mr. al Bahlul, you may waive your right to counsel and represent yourself, but only if you meet certain requirements. In particular, if you want to represent yourself, you must make a request to do so that is (1) clear and unequivocal, and not for purposes of delay or manipulation; (2) knowing, intelligent and voluntary; and (3) timely.

I will only permit you to represent yourself if you tell me you want to do so clearly and unequivocally. If you do not do that, then you will be represented by your Detailed Military Defense Counsel or any other counsel you may be entitled to under Military Commission Law.

Your request for self-representation must be knowing, intelligent and voluntary. I want you to understand the consequences of your decision and what is at stake here. You must know what you are doing and make your choice with your eyes open.

You are facing a very serious charge that could potentially result in your being confined for the rest of your life if you are convicted. Defending against this charge will require significant legal work, and require familiarity with Commission Law, United States federal and military law, and International Law. Defending against this charge will require the filing of legal motions; examining potential Commission Members to ensure they will be fair and impartial in deciding your case; making objections during the course of the trial; cross-examining witnesses; calling witnesses as part of your defense; making an opening statement; and making a closing argument.

All of these things are usually better done by a lawyer than a lay person, because the lawyer is specially trained to do them and has special knowledge of, and experience with, the substantive and procedural rules of law. Obviously there will be serious consequences if your defense is mishandled here. Moreover, because you are currently detained, your lawyers may have better and easier access to witnesses who may be of help to you. You will not have unlimited access to legal research materials or to telephones. Nor will you have access to visitors other than your counsel. You will also not be allowed to travel to any locations outside the detention camp where you are being held or the courtroom to conduct the examination of witnesses.

In addition, you will not be given access to classified materials as you do not have the proper security clearance to review such items. Nor will you be given access to other sensitive documents I find the disclosure of which would jeopardize public safety. However, as I will discuss in greater detail in a few minutes, I will appoint what is known as "standby counsel," who have the necessary security clearance to review classified materials. These counsel may make any legal motions regarding the classified materials, subject to your approval.

It is almost always a good idea for a defendant in a criminal case to have a lawyer. I do not, however, want you to take these warnings or anything else I am saying as any kind of threat, or as a suggestion that I or the other Commission Members will be disposed against you if you

decide to represent yourself. The choice is entirely yours, so long as you make it in a knowing, intelligent and voluntary fashion, with a proper understanding of what is at stake. I am only trying to ensure that you make an informed decision.

If you decide to represent yourself, I will appoint what is called a “standby” counsel to assist you. You will still largely control the presentation of your case, but you will have lawyers available to explain to you the details of courtroom protocol and the rules of procedure. The standby lawyers will be there to help you during the pretrial stage to investigate the facts and the law, identify possible defenses, and suggest appropriate motions to file. During the trial, they will be there to provide help in introducing evidence and objecting to testimony, and will be available to take over if I find that for some reason you have lost your entitlement to self-representation. Standby counsel are there to assist, but will not be permitted to interfere with your control of the case, with a few exceptions that I will discuss shortly.

You do not have a right to reject these standby lawyers. If you decide to represent yourself, you will have standby counsel. However, even with standby counsel, you will still largely control the presentation of your case to the Commission. You will have the right to control the organization and content of your own defense, to make motions, to argue points of law, to participate in voir dire, to question most witnesses, and to address the Commission at appropriate points in the trial. Standby counsel may express disagreement with your decisions, but must do so outside the Commission’s presence. You ultimately retain final authority over the case. Of course, you will have to do all of these things within the limits set by rules of courtroom procedure and other Commission Law.

If you do not waive your right to counsel and you are represented by a lawyer, then the lawyer will conduct your defense: you will not be permitted to examine witnesses, offer evidence, address me or the other Commission members directly or perform any of the attorney’s core functions in the courtroom. You will of course be permitted to remain in the courtroom during all unclassified portions of your trial – provided as always that you maintain proper decorum. If you are represented by a lawyer, your only public speaking role would arise if you decided to testify, in which case you would answer the specific questions posed by your lawyers, the prosecutors, and the Commission Members. Again, if you are represented by lawyers, then it is the lawyers, and not you, who will conduct the defense.

If you decide to represent yourself, you will not be treated any differently than any other defendant and the Review Panel will not treat your case any differently. If you make the decision to represent yourself and you make mistakes, you are not going to be able to come back and complain about those mistakes. You will have accepted responsibility for them.

There are some other things you should know. If you do choose to represent yourself, you must understand that it does not give you a license to abuse the dignity of the courtroom, or a license to violate the relevant rules of procedural and substantive law. You must always abide by courtroom protocol and maintain proper decorum, and you may not improperly disrupt the proceedings. If you deliberately engage in serious and obstructionist misconduct, I will terminate your self-representation and you may forfeit your right to remain in the courtroom for the rest of your trial.

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In a moment, I will ask you questions so that I can learn a little more about your background, education, job experience, knowledge of English and familiarity with military and International law to determine if your decision today is made knowingly and voluntarily. I will also inquire as to your current physical and mental health to assure myself that your judgment today is not clouded.

## COLLOQUY

1. When were you born?
2. Where were you born?
3. Where were you raised?
4. Describe your education?
5. Describe your work experience?
6. What languages do you speak?
7. What is your understanding of the English language?
8. How did you learn English?
9. Have you ever studied law?
10. What system of law did you study?
11. Are you familiar with International Law?
12. How did you gain this familiarity?
13. Have you reviewed the Military Commission Orders and Instructions?
14. Do you feel that you understand the information in these documents?
15. Do you understand that if you represent yourself, the Commission will not tell you how to try your case or give you advice on how to try your case?
16. Are you aware that there may be classified materials involved in this case?
17. Do you understand that you will not be permitted to see these materials and that you will have to rely on your standby counsel, after consultation with you, to represent your interests with respect to these materials?
18. How is your physical health?
19. Are you currently on any medications?
20. How is your mental health?
21. Do you feel you are in need of any psychiatric care?
22. Has anyone threatened you or made any promises to you that have influenced your decision to want to represent yourself?
23. Do you understand that you are charged with the offense of conspiracy?
24. What is your understanding as to what a conspiracy is?
25. Do you understand that you have the right to be represented by your Detailed Military Counsel?
26. Do you understand you have the right to request that a different Military Counsel represent you?
27. Do you understand that assuming they meet criteria of the Military Commission instructions, you can be represented by a civilian counsel at no expense to the United States government?
28. Do you understand that your choice as to who represents you is solely your choice and that the court will not be biased against you regardless of your decision?
29. Do you understand that if you choose to represent yourself, you will have standby counsel appointed?
30. Do you understand that even with standby counsel you will still largely control the presentation of your case?
31. If you are represented by a lawyer, do you understand that the lawyer, and not you will conduct your defense and that you will not be permitted to be an advocate in the courtroom?

32. Do you understand that if you represent yourself and you elect to testify, you will be subject to cross-examination by the Prosecution?
33. Do you understand that if you represent yourself, there may be limits to your access to legal research materials and to visitors, as well as to your use of the telephone and mail system?
34. Do you understand that if you are convicted, you may receive a sentence up to and including spending the rest of your life in confinement?
35. Do you understand everything I have just explained to you?
36. Do you have any questions?
37. Do you still wish to represent yourself?
38. Do you feel you can adequately represent yourself?
39. Are you making this decision to represent yourself of your own free will and voluntarily?