OFFICE OF MILITARY COMMISSIONS
DEPARTMENT OF DEFENSE
BEFORE THE PRESIDING OFFICER

U N I T E D S T A T E S

v.

ALI HAMZA AHMED SULAYMAN AL BAHLUL,

Accused.

Date: March 29, 2006

MOTION OF THE NATIONAL INSTITUTE OF MILITARY JUSTICE FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE*

The National Institute of Military Justice ("NIMJ") respectfully moves for leave to file the instant brief as *amicus curiae* and to present oral argument.

INTEREST OF THE AMICUS CURIAE

NIMJ is a District of Columbia nonprofit corporation organized in 1991 to advance the fair administration of military justice and improve public understanding of the military law system. NIMJ's officers and advisory board include law professors, private practitioners, and other experts in the field, none of whom are on active duty in the military, but nearly all of whom have served as military lawyers, several as flag and general officers.

NIMJ appears regularly as an *amicus curiae* before the United States Court of Appeals for the Armed Forces, and has appeared in the United States Supreme Court as an *amicus* in support of the government in *Clinton v. Goldsmith*, 526 U.S. 529 (1999), and in support of the petitioners in *Rasul v. Bush*, 542 U.S. 466 (2004), *Hamdan v. Rumsfeld*, No. 05-184 (pending), and in the United States Court of Appeals for the District of Columbia Circuit in *Boumediene v. Bush*, No. 05-5062 (pending).

NIMJ is actively involved in public education through its website, www.nimj.org, and

through publications including the ANNOTATED GUIDE TO PROCEDURES FOR TRIALS BY MILITARY COMMISSIONS OF CERTAIN NON-UNITED STATES CITIZENS IN THE WAR AGAINST TERRORISM (LexisNexis 2002) and two volumes of MILITARY COMMISSION INSTRUCTIONS SOURCEBOOKS (2003-04). NIMJ has also sought to improve public understanding of military law by seeking release of comments on the rules governing military commissions. *National Institute of Military Justice v. Dep't of Defense*, Civil No. 04-312 (D.D.C.) (pending). NIMJ is independent of the government and relies exclusively upon private grants and donations for its programs.

ARGUMENT IN SUPPORT OF MOTION FOR LEAVE

The President's Military Order, the Secretary's Military Commission Orders, and the various Military Commission Instructions are currently silent on the issue of the appearance of *amici curiae* before the commission. However, Military Commission Instruction No. 9, dealing with the Review Panel, gives that body discretion to review *amicus* submissions. MCI No. 9, ¶ 4.C.4.c. This is "consistent with appellate practice in federal civil and military courts." Adele H. Odegard, Kevin J. Barry & Eugene R. Fidell, Discussion of MCI No. 9, MILITARY COMMISSION INSTRUCTIONS SOURCEBOOK 2d 276 (2004).[1]

There is no reason such submissions should not also be entertained earlier in the military commission process.

Military commissions historically have followed court-martial principles of law, and rules of practice and procedure. Colonel Winthrop, the pre-eminent nineteenth-century military law historian and commentator, stated this succinctly:

[1] A proposed rule (POM XX, dated 22 March 2006) would permit submission of *amicus* briefs but prohibit oral argument by *amici*. By email on March 27, 2006, NIMJ objected to the portion that would prohibit oral argument. The rule is not currently in force and, if and when it is promulgated, should not include a ban on oral argument.

> In the absence of any statute or regulation governing the proceedings of military commissions, the same are commonly conducted according to the rules and forms governing courts-martial. These war-courts are indeed more summary in their action than are the courts held under the Articles of war [courts-martial], and, as their powers are not defined by law, their proceedings—as heretofore indicated—will not be rendered *illegal* by the omission of details required upon trials by courts-martial . . . . But, as a general rule and as the only quite safe and satisfactory course for the rendering of justice to both parties, a military commission will—like a court-martial. . . ordinarily and properly be governed, upon all important questions, by the established rules and principles of law and evidence. Where essential, indeed, to a full investigation or to the doing of justice, these rules and principles will be liberally construed and applied.[2]

The clear import is that military commissions have always followed generally the rules applicable in courts-martial of the current era,[3] and to ensure their legitimacy, military commissions in the 21st century ought similarly to be so guided. In keeping with contemporary American practice, the Court of Appeals for the Armed Forces and the service Courts of Criminal Appeals allow the filing of briefs by *amici*. C.A.A.F.R. 26; A.C.C.A.R. 15.4; A.F.C.C.A.R. 5.5; N.-M.C.C.A.R. 4-4k. In fact, *amici* commonly appear at all levels of the federal judicial system, from district courts to the Supreme Court of the United States. *See generally* Michael K. Lowman, Comment, *The Litigating Amicus Curiae: When Does the Party Begin after the Friends Leave?*, 41 AM. U. L. REV. 1243 (1992).

Absent some compelling reason to the contrary, military commissions also ought to welcome such submissions from entities that can usefully contribute to the analysis of significant legal and policy questions such as the one presented here.

Advocates of the military commission system maintain that it is full, fair, open, and

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[2] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 841-42 (2d ed. 1895, 1920 reprint) (emphasis in original) (footnotes omitted); *see also* Kevin J. Barry, *Military Commissions: Trying American Justice*, Army Law. 1 (Nov. 2003).

transparent. This commission's willingness to entertain *amicus* briefs will be consistent with those objectives and thereby foster greater public confidence in the administration of justice under the President's Military Order than has heretofore been achieved.

BRIEF AS *AMICUS CURIAE*

Argument

SELF-REPRESENTATION MUST BE PERMITTED

The universal rule in American jurisprudence is that a criminal defendant has a right to self-representation. Absent some compelling reason to the contrary, that rule should apply in these proceedings.

Any competent defendant in a civilian criminal trial has the right to represent himself. *Faretta v. California*, 422 U.S. 806 (1975). In court-martial practice, an accused also has the right to self-representation. This is spelled out in R.C.M. 506(d):

> The accused may expressly waive the right to be represented by counsel and may thereafter conduct the defense personally. Such waiver shall be accepted by the military judge only if the military judge finds that the accused is competent to understand the disadvantages of self-representation and that the waiver is voluntary and understanding.

As the second sentence's waiver provision suggests, the Constitution does not require that a criminal defendant be competent to serve as his or her own counsel in order to proceed *pro se*; rather, the standard is whether the defendant is competent to waive the right to counsel. *Godinez v. Moran*, 509 U.S. 389, 399-400 (1993).

While a competent defendant would apparently have the right to waive counsel and self-represent in any criminal justice system in the United States, that right is apparently being denied

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[3] *See generally* Eugene R. Fidell, Dwight H. Sullivan & Detlev F. Vagts, *Military Commission Law*, Army Law. 47, 48-49 (Dec. 2005).

to commission accused. Military Commission Order No. 1 (Aug. 31, 2005) provides that "[t]he Accused must be represented at all relevant times by Detailed Defense Counsel." MCO No. 1, ¶ 4.C(4). Military Commission Instruction No. 4 states: "Detailed Defense Counsel shall so serve notwithstanding any intention expressed by the Accused to represent himself." MCI No. 4, ¶ 3.D(2).

The accused asked to represent himself when proceedings began in 2004. R. 4. In response to that request, the prosecution took the position that current military commission law does not permit the accused to represent himself. R.E. 101, Encl. 8, p. 44 of Vol. 7. The prosecution expressly stated in its brief (at 9):

> Rule I.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 standard established for United States domestic courts as well as under Customary International Law.

In summary, the prosecution took the position that the accused should be allowed to represent himself, with detailed defense counsel serving as stand-by counsel. However, it was determined that an accused has no right to represent himself in military commissions.

After a stay resulting from Judge Robertson's decision in *Hamdan*, the *al Bahlul* case resumed in January 2006. At that time, the Presiding Officer ruled that the accused could not represent himself for two reasons: (1) he had expressed an intention to boycott the proceedings and therefore could not effectively represent himself (a determination that seems to run directly counter to the Supreme Court's analysis in *Godinez*, in which the Court made clear that the relevant issue was whether the defendant is competent to waive counsel, not whether he is competent to be his own lawyer); and (2) that the Appointing Authority had already determined

that there is no right to self-representation in the commission process.

NIMJ submits that the ruling in this case not only denies the accused a right applicable in every other criminal case conducted under American law, but it unduly compromises the independence of defense counsel and that counsel's ability to provide competent and effective representation.

It is bad enough that, directly contrary to the rationale in *Faretta*, military commission defense counsel are being forced on unwilling competent clients. But in addition, there is also an important subtlety that have may escaped notice in the process of seeking to implement the rule that requires the detailed defense counsel to participate against the accused's wishes: it is counsel's duty to promote the litigation goals of the client, not those assumed by the system. *See* ABA Model Rule 1.2A.

Under the current rule, it seems that defense counsel is forced to participate in pursuing an unstated rationale: that an uncooperative accused's litigation goal is necessarily to minimize the risk of conviction or minimize any adjudged confinement. Rather, an uncooperative accused's litigation goal may be to delegitimate the commission process in the eyes of the world community. A defense counsel who has been thrust upon an unwilling accused may have to advance *that* goal, rather than treating the case like a mock trial exercise and making arbitrary decisions about the accused's "best interest," as if detailed counsel were guardian *ad litem* for an incompetent client rather than the advocate for and agent of a competent accused. That issue, of course, is avoided if the competent accused is allowed to self-represent. *See, e.g., Torres v. United States*, 140 F.3d 392 (2d Cir. 1998).

Self-representation is a threshold legal issue of great importance to the integrity and viability of the commission system. It also implicates important philosophical questions, such as

the nature of the attorney-client relationship (agency v. guardianship) and the accused's right to vindicate his personal autonomy by choosing a legal strategy that may seem unwise from an objective standpoint, but that has a rational basis anchored in the accused's personal beliefs.

Rather than ensuring that these longstanding legal policy concerns that underlie a universal rule of American law are given effect, denying self-representation seems calculated to ensure that there always will be a counsel present on behalf of a defendant during the military commission proceedings, even when (contrary to another absolute rule of American criminal law) the defendant is not allowed to be present because the evidence being presented is classified. *See* Barry, *supra* note 2, at 6. This is a classic "two wrongs don't make a right" situation.

A higher goal than implementing a mere commission rule is at stake. The commission represents American justice on the world stage, and it is necessary and appropriate that rules inimical to our traditions and consistent American jurisprudence not be given effect. Prior contrary rulings should be reconsidered. This accused should be allowed to waive his right to counsel so long as he is competent to make that decision. The usual on-the-record-inquiry, as in guilty plea or other waiver contexts, should be conducted to ensure that the waiver of the right to counsel—and assertion of the right to self-representation—is knowing and voluntary. This will furnish a proper record for review by higher authority and the courts.

Respectfully submitted,

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