

[ORAL ARGUMENT NOT YET SCHEDULED]
UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

ALI HAMZA AHMAD)	
SULIMAN AL BAHLUL,)	No. 11-1324
)	
<i>Petitioner,</i>)	RESPONSE TO THE UNITED
)	STATES' MOTION TO REQUIRE
v.)	COUNSEL TO DEMONSTRATE
)	AUTHORITY TO PURSUE
UNITED STATES OF)	APPEAL OR, IN THE
AMERICA,)	ALTERNATIVE, TO DISMISS
)	
<i>Respondent.</i>)	DATE: November 17, 2011
)	

This Court should reject the government's proposed inquest into Mr. Bahlul's relationship with his counsel. Congress set up an appeals process for military commissions that is modeled on the Uniform Code of Military Justice. 10 U.S.C. §§ 801, *et seq.* Under that process, a criminal defendant has a right of appeal to both the Court of Military Commission Review ("CMCR") and to this Court. 10 U.S.C. §§ 950f, 950g. A defendant can forfeit his appellate rights by executing a waiver within ten days after the Convening Authority's action, or withdrawing his appeal anytime thereafter. 10 U.S.C. § 950c(b) & (c). Congress has prescribed rules to ensure that military commission defendants' relinquishment of their appellate rights is knowing, intelligent and voluntary, and the Secretary of Defense has specified procedures that further reinforce this requirement.

There is no provision for an appeal to be deemed withdrawn by implication. There is no evidence in the record that Mr. Bahlul waived his rights of appeal. By the government's own admission Mr. Bahlul knows how to terminate his appeal if he so chooses and has declined every opportunity to do so.

Rather than evidence that Mr. Bahlul does not wish his appeal to be pursued, all that the Government has offered this Court are statements he has made to challenge the authority of his military commission and express dissatisfaction with the entire process. Far from being grounds to terminate the appeal, or question it going forward, his objections echo the very grounds on which he now appeals.

Absent a far clearer showing that the process Congress put in place has broken down, this Court should deny the government's motion so that this case may proceed without further delay.

STATEMENT OF FACTS

Prior to adjourning the military commission on November 3, 2008, the trial judge advised Mr. Bahlul of his post-conviction rights, including the right of direct appeal to this Court and procedures for waiving or withdrawing his appeal if he so desired. (Trial Tr. at 995-997 (included in Appendix A to the government's motion)). The judge directed that a copy of this appellate rights advice be translated into Arabic, Mr. Bahlul's native language, and given to him. (*Id.* at 997). Mr. Bahlul has never submitted a waiver or withdrawal in this case.

On May 8, 2009, the Chief Defense Counsel appointed Michel Paradis as appellate defense counsel for Mr. Bahlul. Subsequently, the Chief Defense Counsel appointed Major Todd Pierce, USA, and Captain Mary McCormick, USN, as additional counsel on the case.

Over the past three years, counsel filed several pleadings with the CMCR. In January 2010, counsel presented oral argument to the CMCR in support of Mr. Bahlul's appeal. Thereafter, counsel litigated on Mr. Bahlul's behalf by, *inter alia*, requesting review *en banc*, seeking recusal of two CMCR judges, briefing two issues specified by the *en banc* court, and by presenting a second oral argument at the CMCR's request on March 17, 2011. At no time did counsel for the government object to counsel's authority or lodge any inquiries to that effect with counsel directly or with the Chief Defense Counsel as provided by regulation. REG. T. MIL. COMM. §§ 10-1, *et seq.* (2007) (Attachment A to this filing).

Following an adverse decision by CMCR, counsel continued to proceed as they had by filing a timely petition with this Court. 10 U.S.C. § 950g(c). Counsel entered appearances, complied with the Court's order for initial filings, and entered into an agreement with government counsel for the timing of a briefing schedule. Government counsel entered appearances on September 20, 2011. The index and other required filings were subsequently lodged with the Court. On October 31, 2011, government counsel filed the subject motion.

ARGUMENT

I. Congress Created a Detailed Appellate Process for Military Commissions that Guarantees an Accused the Right to Appeal and Sets the Parameters for his Representation by Counsel.

Over ten years of experience and experimentation, Congress has legislated a detailed post-conviction process for military commissions, which is largely modeled on the post-trial process of the Uniform Code of Military Justice. 10 U.S.C. §§ 801, *et seq.* The primary difference between the two is that military commission defendants have a right to a direct appeal to an Article III court, namely this Court, instead of a discretionary appeal to the U.S. Court of Appeals for the Armed Forces. 10 U.S.C. § 950g. Consistent with court-martial practice, appeals proceed in the absence of an affirmative act by the client to forfeit his appellate rights. 10 U.S.C. § 950c (requiring waiver or withdrawal); *compare* 10 U.S.C. § 861 (same). *See United States v. Engle*, 28 M.J. 299, 300 (C.M.A. 1989) (“[U]nless he has obtained permission from his client to do so, an appellate defense counsel should not on his own initiative move to withdraw a petition for review.”).

If the accused wishes to forfeit his appellate rights, and he has not been sentenced to death, Congress provided a simple mechanism for the accused to formally waive or withdraw his appeal. 10 U.S.C. § 950c. Congress required that any waiver be made in writing and “be signed by both the accused and a defense counsel.” 10 U.S.C. § 950c(b). While the statute is silent as to the form of

withdrawal, the rules have consistently required requests to withdraw be in writing, made under the advice of counsel, and signed by both the accused and defense counsel. MANUAL FOR MILITARY COMMISSIONS, pt. 2, Rule 1110 (2010);¹ REG. T. MIL. COMM. § 24-3 (2007).²

¹ **Rule 1110. Waiver or withdrawal of appellate review.**

(a) *In general.* After any military commission, except one in which the approved sentence includes death, the accused may waive or withdraw appellate review.

(b) *Right to counsel.*

(1) *In general.* The accused shall have the right to consult with counsel qualified under R.M.C. 502(d)(1) before submitting a waiver or withdrawal of appellate review.

* * *

(c) *Compulsion, coercion, inducement prohibited.* No person may compel, coerce, or induce an accused by force, promises of clemency, or otherwise to waive or withdraw appellate review.

(d) *Form of waiver or withdrawal.* A waiver or withdrawal of appellate review shall:

(1) Be written;

(2) State that the accused and defense counsel have discussed the accused's right to appellate review and the effect of waiver or withdrawal of appellate review and that the accused understands these matters;

(3) State that the waiver or withdrawal is submitted voluntarily; and

(4) Be signed by the accused and by defense counsel.

² On November 7, 2011, the Secretary of Defense promulgated a new "Regulation for Trial by Military Commission." The revised regulation did away with the general appellate withdrawal provision and limited itself to the procedures to be followed by the CMCR. The reason for this change is unclear, although appears to

Congress further mandated that, throughout all phases of the appeal process, a person convicted by military commission “shall be represented” by counsel funded by the Department of Defense. 10 U.S.C § 950h(c) (“The accused shall be represented by appellate counsel appointed under subsection (a) before the United States Court of Military Commissions Review, the United States Court of Appeals for the District of Columbia, and the Supreme Court, and by civilian counsel if retained by the accused.”). The appointment of counsel is automatic and requires no affirmative act by the accused. Even if the accused retains civilian counsel on appeal, counsel appointed under the statute must remain detailed to the defense team. 10 U.S.C § 950h(c).

Congress provided the statutory authority for the Office of the Chief Defense Counsel to serve as a separate governmental agency to administer and oversee the conduct of defense counsel at all phases of the military commission process. 10 U.S.C. § 948k(d). The Secretary of Defense, pursuant to authority granted by Congress under 10 U.S.C. § 948k(a), designated the Chief Defense Counsel as the sole authority for appointing counsel on appeal. REG. T. MIL. COMM. § 24-4

be in recognition of the Department of Defense’s lack of regulatory authority over this Court or the Supreme Court. See Reg. T. Mill. Comm. §§ 1-1(b); 24-7(c) (“Counsel should refer to the Court’s Rules at www.cadc.uscourts.gov to ensure all filings are in compliance with the Federal Rules of Appellate Procedure and the Circuit Rules.”); 24-8(e) (“See the Rules of the United States Supreme Court at www.supremecourtus.gov for requirements on filing materials before the Court.”).

(2007). The Office of the Chief Defense Counsel has administered the representation of military commission defendants from the beginning. Complex cultural, linguistic and logistical challenges have provided learning experiences that continue to inform current client representations. As a consequence, the Chief Defense Counsel and his attorneys bring to bear unique knowledge and expertise.³

Based on that expertise, the Office of the Chief Defense Counsel has instituted formal rules and procedures that govern the conduct of attorneys appointed to represent military commission defendants, including specific procedures for appellate defense counsel. Within the Office of the Chief Defense Counsel, all three of Mr. al Bahlul's counsel have multiple supervisory chains of command, including one that is exclusively concerned with the conduct of appeals.

These chains of command exercise direct oversight regarding the scope of

³ The separate regulatory authority for defense counsel furthers Congress' stated finding that effective representation by counsel is integral to fairness and effectiveness of the novel process it was creating. Military Commissions Act of 2009, Pub. L. 111-84 § 1807 (2009) ("It is in the sense of Congress that - the fairness and effectiveness of the military commissions system under chapter 47A of title 10, United States Code (as amended by section 1802), will depend to a significant degree on the adequacy of defense counsel and associated resources for individuals accused."); *accord Penon v. Ohio*, 488 U.S. 75, 84-85 (1988) ("The need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to appellate stage. Both stages of the prosecution, although perhaps involving unique legal skills, require careful advocacy to ensure that rights are not forgone and that substantial legal and factual arguments are not inadvertently passed over."); *United States v. Palenius*, 2 M.J. 86, 92 (C.M.A. 1977) (stressing the unique importance of appellate defense counsel in the military justice system and placing a "heavy burden" on the government to demonstrate a waiver of counsel on appeal).

representation, are entitled to receive confidential attorney-client information, and are required to monitor compliance with the Rules of Professional Responsibility. REG. T. MIL. COMM. § 9-1(a) (2007). Supervisory authorities within the Office of the Chief Defense Counsel are, of course, aware of counsel's continued activity on behalf of Mr. Bahlul.

This detailed scheme for the appointment and supervision of counsel in military commission cases presents a marked contrast to the absence of any legislative or regulatory guidance for the administration of *habeas corpus* petitions filed by the Guantanamo detainees. As this Court is well aware, the District Courts have been forced to administer these *habeas* cases by *ad hoc* judicial order, such that the right to and responsibilities of counsel are largely governed by orders in the consolidated cases. *See In re Guantanamo Bay Detainee Litigation*, 577 F.Supp.2d 143, 157-58 (D.D.C. 2008) (requiring "Verification of Representation"). The procedures the District Courts have devised to administer the *habeas* actions are therefore inapposite to the elaborate legislative and regulatory scheme that governs this case.

Congress envisioned that appointed counsel would zealously advocate on a client's behalf and protect their rights as a criminal defendant. Absent a knowing, intelligent and voluntary waiver of those rights, including the right for direct

appeal to this Court, it would be unethical for counsel to sit on their hands.⁴ *See, e.g., United States v. Guillen*, 561 F.3d 527, 529 (D.C. Cir. 2009) (to be effective, waiver of appellate rights must be “knowing, intelligent and voluntary”); *In re Sealed Case*, 527 F.3d 174, 175-176 (D.C. Cir. 2008) (counsel must protect a client’s right to appeal and may not place the burden on the client to take affirmative steps); *see also United States v. Hernandez*, 33 M.J. 145, 148-149 (C.M.A. 1991) (the seminal military justice case on waiver of appellate rights, in which the C.M.A. required strict adherence to Congress’ statutory scheme). The statutory scheme is clear and the government has offered no reason, let alone a legal basis, to impose additional burdens on Mr. Bahlul that Congress has not thought necessary or appropriate.⁵

⁴ Government counsel rely primarily on *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000), for the proposition that “an attorney, including appointed counsel, may not take the procedural step of noticing an appeal unless the client authorizes it.” (Gov’t Mot. at 12). *Flores-Ortega*, however, neither says nor implies this. All *Flores-Ortega* held was that when a defendant pleads guilty, it is not *per se* ineffective assistance of counsel if an attorney fails to file an appeal when the client has not expressed an opinion. The obvious implication of the Court’s holding was that missing a filing deadline very well may be ineffective assistance. It is just not *per se* ineffective assistance. Because of differences between the civilian and military justice systems however, a *per se* rule may exist for military appeals. *See United States v. Byrd*, 53 M.J. 53 (C.A.A.F. 2000) (“This Court has inferred that Congress did not wish to have an accused’s effort to appeal thwarted by the omissions, indifference or ineptitude of the military counsel provided to him.”) (*quoting United States v. Ortiz*, 24 M.J. 323, 324 (C.M.A. 1987) *abrogated on other grounds by United States v. Rodriguez*, 67 M.J. 110 (C.A.A.F. 2009)).

⁵ Tellingly, this additional burden to affirmatively “demonstrate authority to pursue the appeal” is not one that government counsel has sought to impose on appellate

II. The Motion should be Denied because the Government has Failed to Present Substantial Proof that Counsel Lack the Authority to Proceed.

The government does not dispute that the undersigned counsel were properly appointed, nor does it dispute that they have an ongoing attorney-client relationship with Mr. Bahlul. Instead, the government's asserted concern is that it "has strong reason to believe that petitioner [Mr. Bahlul] . . .has, in fact, instructed Mr. Paradis not to prosecute an appeal on his behalf." (Gov't Mot. at 1).

The government's heavy reliance on Guantanamo *habeas* cases to justify its inquiry is inappropriate. The existence of a continuing attorney-client relationship between Mr. Bahlul and his counsel distinguishes this case in a manner that should be dispositive. None of those *habeas* cases involved existing attorney-client relationships. They involved attorneys attempting to initiate civil actions as or on behalf of a "next friend." Counsel here do not claim to be Mr. Bahlul's next friend.

Mr. Bahlul is a criminal defendant and his counsel were appointed to represent him as such. They were appointed by the Chief Defense Counsel, who remains their supervisory authority and continues to oversee the conduct of this appeal with benefit of confidential attorney-client information. Decisions of the Chief Defense Counsel carry as a matter of law and warrant as a matter of fact a

counsel in the related case of *Hamdan v. United States*, Case No. 11-1257, filed on July 11, 2011. The Petitioner there returned to Yemen long ago. The only difference between the circumstances of the appeals filed by Mr. Hamdan and Mr. Bahlul is that the government exerts physical control over Mr. Bahlul.

“presumption of regularity.” “[I]n the absence of clear evidence to the contrary” this Court should presume he has “properly discharged [his] official duties.”

United States v. Armstrong, 517 U.S. 456, 464 (1996) (U.S. Attorney’s prosecutorial discretion carries same “presumption of regularity” due all government agencies) (quoting *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926)). See also *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001) (“a presumption of regularity attaches to the actions of government agencies”).

Government counsel have not alleged any facts or produced any evidence, let alone “clear evidence”, to overcome that presumption of regularity. And absent clear evidence that the Chief Defense Counsel has failed in his duties, or that the formal procedures and policies his office has in place are inadequate, this Court should reject the government’s invitation to second-guess the due diligence exercised by the Chief Defense Counsel, supervisory attorneys in the Office of the Chief Defense Counsel or the undersigned counsel.

In their motion, counsel for the government correctly cite to this Court’s decision in *Communist Party of the U.S.A. v. Commissioner*, 332 F.2d 325, 328-29 (D.C. Cir. 1964), for the “ancient” legal proposition that an attorney is presumed to have the authority to proceed. (Gov’t Mot. at 13). That case also lays out the standard for overcoming that presumption. “[A] party challenging the authority of an attorney at law ‘must present substantial proof in the form of countervailing

evidence that authority is lacking, in order to justify, on that ground, an order to strike a pleading from the files.” *Id.* at 328 (quoting *Booth v. Fletcher*, 101 F.2d 676, 683 (D.C. Cir. 1938) *cert. den’d* 307 U.S. 628 (1939)).⁶

While Mr. Bahlul’s statements reflect hostility toward the military commissions system that convicted him, his sentiments are hardly unusual, nor particularly significant. Hostility to the criminal justice system is not uncommon among even the most run-of-the-mill defendants. To be sure, if a client’s open hostility to the criminal justice system were the test for determining whether counsel lacked authority, this country’s courts would see fewer criminal appeals. Far from substantial proof, the fragmented post-conviction exchanges it relies upon fall well short of what this Court required in civil cases, let alone what Congress has required to terminate a criminal appeal.

⁶ Government counsel do not appear to acknowledge this Court’s “substantial proof” standard or explain how they have met it. Instead, they implicitly offer an alternative standard from the Tenth Circuit, whereby “Although the party seeking to rebut the presumption has the burden of proving that the attorney acted without authorization, . . . the burden . . . is not severe.” *F.D.I.C. v. Oaklawn Apartments*, 959 F.2d 170, 175 (10th Cir. 1992) (as quoted in Gov’t Mot. at 13). But their quotation should not be taken at face value. Their second ellipses omit the three words “in this Circuit,” so that the actual quotation reads, “the burden in this Circuit is not severe.” Government counsel fail to note that the Tenth Circuit implicitly acknowledged that it takes a minority view, specifically contrasting its own view with that of the Fourth Circuit, which like this Court’s, makes the presumption a “strong one” overcome only by “clear and convincing” evidence. *Id.* (quoting *Bethlehem Steel Corp. v. Devers*, 389 F.2d 44, 45-46 (4th Cir.1968)).

The government nevertheless wishes the Court to undertake an invasive fact-finding expedition into what they concede to be an ongoing attorney-client relationship between a criminal defendant and the lawyers that Congress has required represent him. And they argue that injecting themselves into the most sensitive areas of Mr. Bahlul's legal representation is warranted because of a handful of statements selected from the nearly eight years during which his case has been pending; statements that neither gave the government cause for concern before now nor withstand the weight placed upon them when viewed in context. Indeed, they ask this Court to do so despite Mr. Bahlul's refusal to execute documents that would waive his appellate rights, even when they handed them to him just last month. (*See* Gov't Mot. at Attachment C ¶ 3). Other than its speculation about Mr. Bahlul's genuine desires, the government has offered this Court no basis, let alone "substantial proof," to second-guess counsel's authority.

III. The Appropriate Remedy for the Government's Complained of Error is a Writ of Error *Coram Nobis* to Vacate the Judgment Below along with an Order to Render Mr. Bahlul's Conviction Final as of May 2009.

In its motion, the government seeks the wrong remedy for its claimed error. Appellant has neither waived nor withdrawn his appeal, and counsel continue to act under the informed, good faith belief that they are effectuating Mr. Bahlul's desires and their statutory obligation to protect his rights. Assuming *arguendo*, however, that this Court ultimately holds otherwise, the proper remedy for the

government's claimed error is not the dismissal of his petition to this Court. It is a writ of error *coram nobis* to vacate the CMCR's judgment pursuant to this Court's supervisory jurisdiction over military commissions, along with an order that Mr. Bahlul's case be finalized as of the Convening Authority's action in May 2009.

If appointed counsel are without authority to act now, then they never had authority to act. The government has offered this Court no evidence that Mr. Bahlul's wishes have changed. Indeed, it predicates its motion on inferences that are almost exclusively drawn from conduct that predated — by years — the CMCR's decision and the docketing of this appeal. If Mr. Bahlul genuinely does not want his appeal to proceed now, he never did. The Chief Defense Counsel misevaluated the facts when he erroneously appointed counsel. Once appointed, counsel should have moved to withdraw his appeal as soon as the case was taken up by the CMCR. And counsel for the government should have moved to dismiss this appeal when it was before the CMCR.

If the government is now correct, then all parties involved in this case have been operating under a material mistake of fact from the outset. The proper remedy is a writ of error *coram nobis* to correct this mistake of fact, "which had not been put in issue and passed upon, and were material to the validity and regularity of the legal proceeding itself." *United States v. Mayer*, 235 U.S. 55, 68 (1914); *see also Farnsworth v. United States*, 232 F.2d 59 (D.C. Cir 1956); *United States v. Jones*,

2008 WL 783542 (W.D.La. 2008) (“So, it has been held that the writ [of error *coram nobis*] lies to vacate or correct judgments obtained . . . upon unauthorized appearance of counsel.”).

CONCLUSION

The fact that the government did not seek to dismiss the appeal below nor seeks this particular remedy now raises questions as to the confidence that this Court should have in accepting what it has offered. As is clear from the government’s own proof, Mr. Bahlul knows how to terminate his appeal if he so desires and has declined every opportunity to do so. Moving forward, if the undersigned counsel come to believe that Mr. Bahlul wishes to forfeit his appellate rights, counsel will obviously raise that fact with this Court. Since this has not happened, this Court should deny the government’s motion so that Mr. Bahlul can achieve finality in the determination of his rights without further delay.

The motion should be denied.

Respectfully submitted,

/s/ Mary R. McCormick

Michel Paradis

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CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2011 a copy of the foregoing was filed electronically with the Court. Notice of this filing will be sent to all parties by operation of this Court's electronic filing system. Parties may access this filing through the Court's system.

Dated: November 17, 2011

Respectfully submitted,

/s/ Mary R. McCormick

Michel Paradis

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ATTACHMENT A

Chapter 9

DEFENSE COUNSEL

9-1. DETAIL OF DEFENSE COUNSEL

Every accused shall have a qualified military defense counsel detailed to the accused at government expense during every stage of the proceedings. Should the military judge approve the request of an accused to represent himself, detailed military defense counsel shall serve as standby counsel. Should the accused retain civilian counsel, a military defense counsel shall remain detailed to the accused.

a. Chief Defense Counsel.

1. The Chief Defense Counsel shall be a judge advocate of any United States armed force and shall be designated by the Secretary of Defense or his designee. The Chief Defense Counsel shall report directly to the Deputy General Counsel (Personnel and Health Policy) of the Department of Defense.

2. The Chief Defense Counsel shall supervise all defense activities and the efforts of detailed defense counsel and other office personnel and resources pursuant to the M.C.A. and the M.M.C.; ensure proper supervision and management of all personnel and resources assigned to the Office of the Chief Defense Counsel; and facilitate the proper representation of all accused referred to trial before a military commission appointed pursuant to the M.C.A. In cases where a conflict of interest between or among accused precludes the Chief Defense Counsel from supervising the efforts of a detailed defense counsel, such supervisory authority may be exercised by another designated by the Chief Defense Counsel.

3. The Chief Defense Counsel shall ensure that all personnel assigned to the Office of the Chief Defense Counsel review, and attest that they understand and will comply with, the M.C.A., the M.M.C., this Regulation and all Supplementary Regulations and Instructions issued in accordance therewith. Furthermore, the Chief Defense Counsel shall regulate the conduct of detailed defense counsel as deemed necessary, consistent with the aforementioned legal authorities as well as subordinate instructions and regulations. The Chief Defense Counsel also shall ensure that military counsel who remain detailed when an accused is represented by civilian counsel are familiar with the provisions and restrictions contained in MC Form 9-2, Affidavit and Agreement By Civilian Defense Counsel, and are prepared to assist civilian defense counsel in complying with that agreement.

4. The Chief Defense Counsel shall detail a judge advocate of any United States armed force, who is assigned to or performing duty with, the Office of the Chief Defense Counsel, to perform the duties of the detailed defense counsel as set forth in R.M.C. 502(d)(6). The Chief Defense Counsel shall also detail or employ any other personnel as approved by the convening authority. The Chief Defense Counsel may not detail himself

to perform the duties of detailed defense counsel.

5. The Chief Defense Counsel may, when appropriate, detail an additional judge advocate or qualified civilian attorney performing duty with the Office of the Chief Defense Counsel, as assistant detailed defense counsel to assist in performing the duties of the detailed defense counsel.

6. The Chief Defense Counsel may structure the Office of the Chief Defense Counsel to include subordinate supervising attorneys who may incur confidentiality obligations in the context of fulfilling their supervisory responsibilities with regard to defense counsel.

7. The Chief Defense Counsel shall take appropriate measures to preclude defense counsel conflicts of interest arising from the representation of accused before military commissions. The Chief Defense Counsel shall be provided sufficient information (potentially including classified information, to the extent authorized by the M.C.A. and M.M.C.) to fulfill this responsibility.

8. The Chief Defense Counsel shall take appropriate measures to ensure that each detailed defense counsel is capable of zealous representation, unencumbered by any conflict of interest. In this regard, the Chief Defense Counsel shall monitor the activities of all defense counsel (detailed and civilian) and take appropriate measures to ensure that defense counsel remain unencumbered by conflicts of interest (*see also* Chapter 10).

9. The Chief Defense Counsel shall ensure that when an accused proceeds *pro se* a detailed defense counsel is assigned to the case. Detailed defense counsel may act as standby counsel at the direction of the military judge.

10. The Chief Defense Counsel shall administer all requests for replacement detailed defense counsel requested in accordance with this chapter. He shall determine the availability of such counsel in accordance with this Regulation.

11. The Chief Defense Counsel shall administer the civilian defense counsel pool, screening all requests for qualification and making qualification determinations and recommendations in accordance with 9-5(b), and ensuring appropriate notification to an accused of civilian attorneys available to represent accused before a military commission.

12. The Chief Defense Counsel shall ensure that all detailed defense counsel and civilian defense counsel who are to perform duties in relation to a military commission have taken an oath to perform their duties faithfully.

13. The Chief Defense Counsel shall ensure that all personnel properly under the supervision of the Office of the Chief Defense Counsel possess the appropriate security clearances.

14. The Chief Defense Counsel may appoint one or more deputies to assist him in his duties as Chief Defense Counsel.

Chapter 10

ALLEGATIONS OF MISCONDUCT, PROFESSIONAL RESPONSIBILITY AND CONFLICTS RESOLUTION

10-1. GENERAL

- a. Each Judge Advocate General is responsible for technical supervision and, when necessary, discipline of military lawyers from the respective armed services who practice in proceedings governed by the M.C.A. and the M.M.C. Technical supervision includes providing professional responsibility training and determining the credibility of allegations of or suspected violations of applicable rules of professional responsibility.
- b. Failure, by any individual, including military or civilian counsel, to adhere to the rules, procedures, regulations, and instructions applicable to trials by military commission may result in action by the Secretary of Defense or his designee, convening authority, or the military judge of a military commission. Such action may include permanently barring an individual from participating in any military commission proceeding convened pursuant to the M.C.A., punitive measures imposed under R.M.C. 809, and any other lawful sanction.
- c. Consistent with R.M.C. 109(b)(3)(A), rules, regulations, and instructions applicable to trials by military commission are paramount to those of a military or civilian counsel's licensing jurisdiction, unless expressly forbidden by the licensing jurisdiction of the practitioner.
- d. Allegations of failure by a counsel to comply with an armed service's Rules of Professional Conduct in the context of that counsel's participation in military commissions proceedings will be directed to The Judge Advocate General of the appropriate military department. In resolving such allegations, appropriate officials will adhere to the guidance in R.M.C. 109 and this Regulation.
- e. Allegations of failure by a counsel to comply with the professional responsibility rules of that counsel's licensing jurisdiction will be processed as required by each such jurisdiction.
- f. Nothing in this Regulation prevents any person from reporting any allegation of personal or professional misconduct directly to the appropriate standards of conduct officer within the Office of the Judge Advocate General of the appropriate military department or to the appropriate official or agency of an attorney's licensing jurisdiction.

10-2. ACTION ON ALLEGATIONS OF MISCONDUCT AGAINST COUNSEL

- a. *Consultation recommended.* Although not required, any counsel participating in military commissions proceedings or assigned to the Office of Military Commissions who suspects another attorney of unprofessional conduct or is contemplating a complaint

to that effect, should, given the gravity and potential distraction of such an allegation or complaint, consult with the Chief Prosecutor, Chief Defense Counsel, or legal advisor, as appropriate, before initiating action under this chapter.

b. Definitions.

1. For the purpose of this chapter, “misconduct” is defined as any act or omission that is a violation of an applicable standard of professional responsibility or serves to demonstrate the unfitness of the respective attorney to perform his or her legal duties. This chapter does not affect any other criminal or administrative proceedings arising from the underlying alleged misconduct. This chapter addresses only the authority of military judges, military attorneys and civilian attorneys to practice as a judge or attorney before a military commission.

2. For purposes of this chapter, “Licensing Jurisdiction” means the state or federal bar, or regulatory equivalent responsible for supervision and governance of the professional responsibility of the attorney.

c. Conflict with other rules of professional responsibility. Officials responsible for receiving, processing, or resolving allegations of professional misconduct arising in commissions practice should recognize the specialized nature of that practice and apply the following principles and procedures:

1. In effecting a choice of law between the professional responsibility rules of a counsel’s licensing jurisdiction and the rules, regulations, and instructions applicable to trials by military commission, the latter shall be considered paramount, unless such consideration is expressly forbidden by the rules of a counsel’s licensing jurisdiction.

A. Any military counsel who believes such an express prohibition exists shall immediately bring the matter to the attention of the Chief Prosecutor or Chief Defense Counsel, the convening authority, and the military judge, if one has been detailed. If the conflict cannot be resolved, the military judge or the Chief Prosecutor or Chief Defense Counsel, as appropriate, shall remove the affected counsel from the case. Thereafter, an appropriate official may effect detail of another military counsel.

B. Any civilian counsel who believes such a prohibition exists may elect to remain on the case, but may not thereafter raise the conflict as an impediment to complying with any statute, rule, regulation, or instruction applicable to trials by military commissions and waives any issue arising from any alleged prohibition or conflict on appeal, either interlocutory or due course.

C. Military commissions shall be deemed a “court,” “forum,” or “tribunal” for the purposes of construing any choice of law provision in the professional responsibility rules of a counsel’s licensing jurisdiction that defers to the rules of a court, tribunal, or other forum.

2. If an express conflict exists between the rules applicable to trials by military

commission and the branch specific armed forces Rules of Professional Conduct, the convening authority will coordinate with The Judge Advocate General of the appropriate armed force, or his designee, to resolve the conflict. If the conflict cannot be resolved, the chief prosecutor or chief defense counsel, as appropriate, or the military judge, shall remove the affected counsel from the case. Thereafter, an appropriate official may effect detail of another military counsel.

3. Prior to accepting assignment of a military defense counsel to the Office of Chief Defense Counsel, the Chief Defense Counsel will verify that licensing bar association rules of each such counsel cannot reasonably be foreseen as an impediment to that counsel's adherence to the rules of professional responsibility expressly applicable to trials by military commission.

4. Consistent with court-martial practice, no automatic conflict of interest arises for a defense counsel working within the Office of the Chief Defense Counsel when that counsel represents an accused whose alleged co-conspirator(s) is/are represented by one or more other defense counsel in the Office of the Chief Defense Counsel.

10-3. ACTION ON ALLEGATIONS OF MISCONDUCT AGAINST A MILITARY JUDGE

a. Information as to alleged personal or professional misconduct by the military judge presiding over a military commission should be reported, together with appropriate supporting information, to the Chief Trial Judge for Military Commissions. If the Chief Trial Judge determines a complaint against a military judge is substantiated, the Chief Trial Judge shall forward the complaint to the Chief Trial Judge of the military department to which the subject military judge is assigned, or The Judge Advocate General of that department. The Chief Trial Judge may also take no action or take minor professional disciplinary action. In the event the personal or professional misconduct is alleged against the Chief Trial Judge, the complaint along with the appropriate supporting information shall be forwarded to The Judge Advocate General of the military department to which the Chief Trial Judge is assigned.

b. Minor professional disciplinary action is defined as verbal or written counseling.

c. Only the appropriate Judge Advocate General may take other than minor professional disciplinary action against a military judge pursuant to R.M.C. 109(c).

Chapter 24

APPELLATE REVIEW

* * *

24-3. WAIVER OR WITHDRAWAL OF APPELLATE REVIEW

- a. For any case resulting in a conviction but not including an approved sentence of death, an accused may waive appellate review or, if appellate review is already in progress, may withdraw his case from review, by using MC Form 2330, Waiver/Withdrawal of Appellate Rights in Military Commissions Trials (Figure 24-1).
- b. The accused may waive appellate review at any time within 10 days after being served with a copy of the convening authority's action. The accused may effect this waiver by submitting a signed and completed MC Form 2330 to the Office of Military Commissions, 1600 Pentagon, Washington, D.C. 20310-1600. The deadline for submitting a waiver may be extended by the convening authority, at the request of the accused or his counsel, until a date not later than 40 days after the convening authority's action.
- c. Following expiration of the period during which the accused may waive appellate review, the accused may withdraw his case from appellate review by completing and signing MC Form 2330, indicating thereon that he is requesting withdrawal, and submitting the form to the address in 24-3(b), above. If the convening authority has already transmitted the record of trial to the Court of Military Commission Review at the time the accused's request for withdrawal is received, the convening authority shall cause the MC Form 2330 to be transmitted to the Clerk of Court, Court of Military Commission Review; however, if the convening authority determines that the record of trial has been acted on by the CMCR and is pending before a higher appellate court, the convening authority will cause the MC Form 2330 to be transmitted to the appropriate clerk of court.
- d. Once submitted, a properly completed MC Form 2330, whether electing waiver or withdrawal of the appellate process, may not be withdrawn.
- e. Appellate review is mandatory for any case in which the convening authority has approved a sentence of death.

24-4. APPELLATE COUNSEL

- a. The Government shall be represented before the Court of Military Commission Review, by counsel appointed for that purpose by the Chief Prosecutor. Appellate trial counsel may represent the United States before the United States Court of Appeals for the District of Columbia Circuit and the Supreme Court of the United States, if requested to do so by the Attorney General of the United States. The accused will be represented by defense counsel appointed by the Chief Defense Counsel at all levels of appeal. The accused may also obtain properly cleared civilian defense counsel at no expense to the

Government.

1. The Chief Prosecutor may appoint, to represent the Government on appeal, one or more trial counsel who prosecuted the case before a military commission. Instead of or in addition to such counsel, the Chief Prosecutor may appoint, in his sole discretion, any other counsel assigned or available to the Office of the Chief Prosecutor.

2. Except in those cases in which ineffective assistance or another representational impediment is claimed by the accused, the Chief Defense Counsel may appoint the trial defense counsel to represent the accused on appeal. Instead of or in addition to such counsel, the Chief Defense Counsel may appoint, in his sole discretion, any other counsel assigned or available to the Office of the Chief Defense Counsel. The accused may elect to retain properly cleared civilian defense counsel at no expense to the government to represent him on appeal; however, detailed counsel must also be appointed.

b. Once appointed, appellate counsel who do not already have a copy of the record of trial will obtain a copy from the Office of the Chief Prosecutor (for government counsel) or from the detailed trial defense counsel (for appellate defense counsel). If the detailed trial defense counsel does not have a copy of the record of trial, appellate defense counsel will obtain a copy of the record of trial from the Office of Military Commissions, 1600 Pentagon, Washington, D.C. 20310-1600.

c. The accused may not represent himself in person before the Court of Military Commission Review. The accused, however, may file briefs with or without the assistance of counsel before the courts.

d. Counsel will follow the court rules and procedures in filing briefs and other pertinent materials with the Appellate Courts.

Figure 24.1 Waiver/Withdrawal of Appellate Rights in Military Commissions Trials

WAIVER/WITHDRAWAL OF APPELLATE RIGHTS IN MILITARY COMMISSIONS TRIALS
SUBJECT TO REVIEW BY THE COURT OF MILITARY COMMISSION REVIEW

NOTE: See R.M.C. 1201 concerning which cases are subject to review by the Court of Military Commission Review. See R.M.C. 1110 concerning waiver or withdrawal of appellate review.

I have read the attached action dated _____.

I have consulted with _____, my (appellate) (associate) (substitute) defense counsel concerning my appellate rights and I am satisfied with his/her advice.

I understand that:

1. If I do not waive or withdraw appellate review -
 - a. My Military Commission trial will be reviewed by the Court of Military Commission Review.
 - b. The Court of Military Commission Review will review the findings and sentence in my case for errors of law.
 - c. After review by the Court of Military Commission Review, my case could be reviewed for legal error by the United States Court of Appeals for the District of Columbia Circuit, on petition by me.
 - d. If the Court of Appeals reviews my case, my case could be reviewed for legal error by the United States Supreme Court on petition by me.
 - e. I have the right to be represented by military counsel, at no cost to me, or by civilian counsel, at no expense to the United States, or both, before the Court of Military Commission Review, the United States Court of Appeals for the District of Columbia Circuit, and the Supreme Court.
2. If I waive or withdraw appellate review -
 - a. My case will not be reviewed by the Court of Military Commission Review, or be subject to further review by the Court of Appeals for the District of Columbia Circuit, or by the Supreme Court under 28 U.S.C. 1259.
 - b. I may petition the Convening Authority for a new trial under R.M.C. 1210 on the ground of newly discovered evidence or fraud on the military commission. Such a petition must be filed within 2 years of the convening authority's approval of the sentence.
 - c. A waiver or withdrawal, once filed, cannot be revoked, and bars further appellate review.

Understanding the foregoing, I (waive my rights to appellate review) (withdraw my case from appellate review). I make this decision freely and voluntarily. No one has made any promises that I would receive any benefits from this waiver/withdrawal, and no one has forced me to make it.

TYPED NAME OF ACCUSED

ISN NUMBER OF ACCUSED (LAST FOUR)

SIGNATURE OF ACCUSED

DATE

STATEMENT OF COUNSEL

(Check appropriate block)

- 1. I represented the accused at his/her military commission trial.
- 2. I am associate appellate counsel detailed under R.M.C. 1110(b). I have communicated with the accused's (detailed) (civilian) defense counsel concerning the accused's waiver/withdrawal and discussed this communication with the accused.
- 3. I am substitute counsel detailed under R.M.C. 1110(b).
- 4. I am a civilian counsel whom the accused consulted concerning this matter. I am a member in good standing of the bar of _____.
- 5. I am appellate defense counsel for the accused.

I have advised the accused of his/her appellate rights and of the consequences of waiving or withdrawing appellate review. The accused has elected to (waive) (withdraw) appellate review.

TYPED NAME OF COUNSEL

UNIT OF COUNSEL

RANK OF COUNSEL

BUSINESS ADDRESS (If Civilian Counsel)

SIGNATURE OF COUNSEL

DATE