

# THE RIGHT TO COUNSEL AT GITMO

Best as I understand it, the shiny new military commission manual says the following about right to counsel:

- Defendants will generally get military lawyers
- Defendants can use civilian attorneys, but the government isn't going to pay those attorneys
- If a defendant is charged with a capital crime, they can have someone who specializes in death penalty cases in addition to their other lawyer and the government might even spring for a civilian lawyer
- The government can prevent specific military lawyers from defending defendants by simply not detailing those lawyers to the Office of Military Commission as defense counsel (in the past, the government has basically forced detainees to change defense counsel by reassigning the lawyers; though see the update that seems to limit this to good cause reasons)
- It appears that the manual does not prohibit a detainee

from defending himself in a capital case (which is what KSM wanted to do)

All of which seems to make it more likely KSM will end up in a military commission, so he can plead guilty and become a martyr. Though they have required that defendants who represent themselves maintain a particular decorum, suggesting that if KSM uses self-representation as a soapbox, they will force him to accept a lawyer.

Here's the text of the section on right to counsel [all emphasis my own]:

Rule 506. Accused's rights to counsel

(a) In general. The accused has the right to be represented before a military commission by civilian counsel if provided at no expense to the Government, by military counsel detailed under R.M.C. 503, or by military counsel of the accused's own selection, if reasonably available. Except as otherwise provided by section (b) of this rule, the accused is not entitled to be represented by more than one military counsel; however, the person authorized under regulations prescribed by R.M.C. 503 to detail counsel, in such person's sole discretion, may detail additional military counsel to represent the accused.

(b) Capital Offenses. In any case in which the trial counsel makes a recommendation to the convening authority pursuant to R.M.C. 307(d) that a charge be referred to a capital military commission, or in which the convening authority refers a charge to a capital military commission, the accused has the right to be represented in accordance with section (a) above, and by at least one additional counsel who

is learned in applicable law relating to capital cases. The right to be represented by at least one additional counsel who is learned in applicable law relating to capital cases terminates at such time as all charges for which the death penalty is authorized are dismissed or referred as a non-capital offenses. Such appointment of learned counsel shall be in accordance with regulations prescribed by the Secretary of Defense. If necessary, such additional learned counsel may be a civilian and may be compensated in accordance with regulations prescribed by the Secretary of Defense.

#### Discussion

See R.M.C. 502(d)(4) for determining qualifications of civilian defense counsel. See R.M.C. 502(d)(7) and 505(d)(2) concerning the duties and substitution of defense counsel. These rules and this Manual do not prohibit participation on the defense team by consultants not expressly covered by section (d) of this rule, as provided in such regulations as the Secretary of Defense may prescribe, subject to the requirements of Mil. Comm. R. Evid. 505. See 10 U.S.C. § 949a(b)(2)(C).

#### (c) Individual Military Counsel

(1) Reasonably available. Counsel are not reasonably available to serve as individual military counsel unless detailed or assigned to the Office of Military Commissions to perform defense counsel duties at the time the request is received by the Office.

(2) Procedure. Subject to this section, the Secretary may prescribe procedures for determining whether a requested person is "reasonably available" to act as individual military counsel. Requests for individual military counsel shall be

made by the accused or the detailed defense counsel with notice to the trial counsel. If the requested person is not reasonably available under this rule, the Chief Defense Counsel shall deny the request and notify the accused. If the requested counsel is not among those listed as not reasonably available in this rule, the Chief Defense Counsel shall make an administrative determination whether the requested person is reasonably available. This determination is a matter within the sole discretion of that authority.

(d) Self-representation. The accused may knowingly and competently waive the assistance of counsel, subject to the provisions of subparagraph (3).

(1) 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.

(2) The military judge shall require that a detailed defense counsel remain present even if the accused waives counsel and conducts the defense personally.

(3) If the waiver is accepted, the accused shall conform the accused's deportment and the conduct of the defense to the rules of evidence, procedure, and decorum applicable to trials by military commission.

(A) Failure of the accused to conform to the rules described in subsection (3) may result in a partial or total revocation by the military judge of the

right of self-representation.

(B) In such case, the military counsel of the accused or an appropriately authorized civilian counsel shall perform the functions necessary for the defense.

Update: In another section, the manual does seem to limit how the government can change defense counsel somewhat:

(d) Changes of detailed counsel.

(1) Trial counsel. An authority competent to detail trial counsel may change the trial counsel and any assistant trial counsel at any time without showing cause.

(2) Defense counsel.

(A) Before formation of attorney-client relationship. Before an attorney-client relationship has been formed between the accused and detailed defense counsel or associate or assistant defense counsel, an authority competent to detail defense counsel may excuse or change such counsel without showing cause.

(B) After formation of attorney-client relationship. After an attorney-client relationship has been formed between the accused and detailed defense counsel or associate or assistant defense counsel, an authority competent to detail such counsel may excuse or change such counsel only:

(i) Upon request of the accused or application for withdrawal by such counsel; or

(ii) For other good cause shown on the record.

[snip]

(f) Good cause. For purposes of this

rule, "good cause" includes physical disability, military exigency, and other extraordinary circumstances which render the member, counsel, or military judge unable to proceed with the military commission within a reasonable time. "Good cause" does not include temporary inconveniences which are incident to normal conditions of military life.