UNITED STATES v. KHALID SHEIKH MOHAMMED, *et al.* BEFORE A MILITARY COMMISSION CONVENED PURSUANT TO THE MILITARY COMMISSIONS ACT OF 2006 December 23, 2008	*Brief Amicus Curiae of the National Institute of Military Justice*

1. The National Institute of Military Justice (NIMJ) respectfully moves for leave to file the instant brief as *amicus curiae*.

a. NIMJ is a District of Columbia nonprofit corporation organized in 1991. Its overall purpose is to advance the fair administration of military justice in the Armed Forces of the United States. NIMJ also participates actively in the military commission process through such means as the filing of *amicus* briefs; serving as an alternate official nongovernmental organization observer to the military commissions at Guantanamo Bay, Cuba; and maintaining its website (www.nimj.org) and its publications program, including the Military Commissions Documentation Project.

b. Filing on behalf of NIMJ are the undersigned, Diane Marie Amann, Eugene R. Fidell, Michelle M. Lindo McCluer, Jonathan E. Tracy, and Stephen A. Saltzburg, who certify:

i. That she or he is licensed to practice law, as follows: Diane Marie Amann is licensed to practice law before the highest court of California, Eugene R. Fidell is licensed to practice law before the District of Columbia Court of Appeals, Michelle M. Lindo McCluer is licensed to practice law before the highest court of Oklahoma, Stephen A. Saltzburg is licensed to practice law before the highest court of Virginia, and Jonathan E. Tracy is licensed to practice law before the highest court of Ohio. Mr. Fidell, Ms. McCluer, and Mr. Tracy are admitted to practice before the Court of Military Commission Review.

ii. That neither the *amicus curiae* organization, NIMJ, nor any of the undersigned: is a party to any Commission case in any capacity; has an attorney-client relationship with any person whose case has been referred to a Military Commission; is currently or is seeking to be *habeas* counsel or next-friend for any such person.

iii. That she or he is filing in the good faith belief as a licensed attorney that the law in the attached brief is accurately stated, that she or he has read and verified the accuracy of all points of law cited in the brief, and that she or he is not aware of any contrary authority not cited to in the brief or substantially addressed by the contrary authority cited in the brief.

2. **Issue Presented.** MAY A MILITARY COMMISSION ADJUDGE A DEATH SENTENCE BASED ON A PLEA OF GUILTY?

3. Statement of Facts. At a pretrial session on Monday, December 8, 2008, the Commission considered a joint request by all accuseds made by letter dated November 4, 2008, to "confess." After questioning the accuseds, the judge seemed amenable to the setting of a plea hearing for three of the defendants, as competency issues were still outstanding for the other two. At the conclusion of the day's hearing, the military judge set a schedule for briefing on whether the Military Commissions Act of 2006 (the MCA) permits a commission to pass a death sentence on a defendant convicted by guilty plea.

4. The Law. The legal authority respecting the question of whether an accused can plead guilty to a capital offense and receive a sentence of death at a military commission includes The Military Commissions Act of 2006, Pub. L. 109-366, 120 Stat. 2600 (Oct. 17, 2006), codified at 10 U.S.C. § 948a-950w.

5. Argument.

a. An Accused May Plead Guilty to a Capital Offense.

An accused may plead guilty to a capital offense at a military commission pursuant to MCA § 949i(b), which states in pertinent part:

> (b) FINDING OF GUILT AFTER GUILTY PLEA. – With respect to any charge or specification to which a plea of guilty has been made by the accused in a military commission under this chapter and accepted by the military judge, a finding of guilty of the charge or specification may be entered immediately without a vote. The finding shall constitute the finding of the commission unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty.

The MCA permits and describes the process of pleading guilty, without respect to whether the offense is of a capital or non-capital nature.[1]

b. If an Accused is Convicted by Guilty Plea, a Death Sentence May Not Be Adjudged.

If the military judge enters a finding of guilt based on an accused's guilty plea at a military commission, a death sentence may not be adjudged in that case. MCA § 949m states, in pertinent part:

> (a) CONVICTION. – No person may be convicted by a military commission under this chapter of any offense, except as provided in section 949i(b) of this title or by concurrence of two-thirds of the members present at the time the vote is taken.

[1] However, in the interests of justice, as discussed below, the military judge should not allow a guilty plea to be used to convict an accused of a capitally charged offense.

> (b) SENTENCES. – (1) No person may be sentenced by a military commission to suffer death, except insofar as –
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> ...
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> (C) the accused is convicted of the offense by the concurrence of all the members present at the time the vote is taken; and
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> (D) all the members present at the time the vote is taken concur in the sentence of death.

This section expressly forbids imposition of the death penalty unless the accused has been "convicted...by the concurrence of all the members..." *Id.* Therefore, if the accused is convicted by guilty plea, imposition of the death sentence would be unlawful.

Although the statute appears clear on its face, it is contradicted by the discussion to Rule 910 in the Manual for Military Commissions (the MMC). The relevant portion of the discussion reads: "The M.C.A. permits an accused to plead guilty to a capital offense referred to a capital military commission, at which trial death remains an authorized sentence, notwithstanding the accused's plea of guilty." R.M.C. 910(a)(1), *Discussion.* Since the Court of Military Commission Review has held that the discussion sections of the Rules for Military Commissions are non-binding – *see United States v. Khadr*, No. 07-001, slip op. at 11 (Ct. Mil. Comm'n Rev. Sept. 24, 2007) – and another military commission has found the discussion of the R.M.C. to be "non-binding" -- *see United States v. Khadr*, Military Commission, slip op. at 1, Ruling (D-029) Defense Motion to Compel Discovery of Statements of Omar Khadr, Mar. 13, 2008 – controlling authority demonstrates that the discussion note does not have the force of law.

There is a hierarchy between comments in regulatory material and a statute. It is a long-established rule of military appellate courts that, "When the Manual [Manual for Courts-Martial] conflicts with the Code [Uniform Code of Military Justice], the Code prevails." *United States v. Price*, 7 U.S.C.M.A. 590, 593, 23 C.M.R. 54, 57 (1957). The same approach applies here. In fact, the Rules for Military Commissions "must be consistent with the M.C.A." MMC, Preamble (1)(f), Jan. 18, 2007. Accordingly, the plain language of the MCA must prevail over the "non-binding" discussion in the MMC. Therefore, a death sentence may not be adjudged when a defendant is convicted by guilty plea.

c. <u>The Military Judge is Not Required to Accept a Provident Plea.</u>

Despite the fact that an accused may plead guilty at a military commission, the military judge is not required to enter a finding of guilty even when the plea is provident. By the process established in MCA § 949i(b), an accused may "make" a plea of guilty before the military commission, and the military judge "may" enter such a plea without a vote by the members. 10 U.S.C. § 949i(b). By choosing the term "may," rather than a term such as "shall" or "must," Congress clearly intended to confer upon the military judge discretion to refuse to enter a finding of guilty. It is a "cardinal canon" of statutory construction that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). That canon was invoked by the Court of

Military Commission Review in *Khadr*. There, the court held that it was lawful for the Deputy Secretary of Defense to perform certain duties assigned to the Secretary where there was no "express" provision of law prohibiting the delegation. *United States v. Khadr*, No. 07-001, slip op. at 3, Ruling on Motion to Abate (Ct. Mil. Comm'n Rev. Sept. 24, 2007). The court applied the plain meaning of the term "express" to find that Congress intended to allow delegation as long as no explicit provision of law prohibited the delegation. *Id.* Here, the military judge is not required to accept a plea. The plain meaning of "may" is that the military judge has discretion to reject a plea.

Rejecting a proffered guilty plea pursuant to the authority granted by Congress violates no constitutional rights of the accused—even assuming that the Constitution applies in these circumstances and that a defendant has the same rights protected in civilian courts and military courts-martial. Both the Supreme Court and the highest court of the military justice system have held that there is no constitutional right to plead guilty. *See North Carolina v. Alford*, 400 U.S. 25, 38 n.11 (1970); *Lynch v. Overholser*, 369 U.S. 705, 719 (1962); *United States v. Matthews*, 16 M.J. 354, 362 (C.M.A. 1983). Therefore, a military judge may refuse to enter a conviction based on a provident guilty plea.

d. <u>The Military Judge Should Not Enter a Plea of Guilty in a Capital Case.</u>

Although the military judge may enter a conviction based on a guilty plea in a capital military commission, in the interests of justice, the military judge should not do so for three reasons: (1) it would lead to a result plainly contrary to congressional intent; (2) it is contrary to our system of criminal justice to allow defendants to dictate their own punishment; and (3) it would conflict with court-martial practice. Congress clearly contemplated that some military commissions would be capital cases. *See* 10 U.S.C. § 949m. To allow the accused unilaterally to transform a capital case into a non-capital case solely based upon his provident guilty plea would clearly subvert congressional intent.

The Court of Military Commission Review has repeatedly emphasized the significance of implementing congressional intent. When considering the issue of personal jurisdiction of military commissions over an "unlawful enemy combatant," the court utilized settled principles of statutory construction. *See Khadr, supra*, at 11-16. The court held: "It is unequivocally clear to us from the plain language of the MCA that Congress intended trials by military commission to be utilized solely and exclusively to try only 'alien unlawful enemy combatants.'" *Id.* at 11. The MCA is ambiguous in certain respects, and, with respect to guilty pleas in capital cases, it is far from a model of clarity; nonetheless, Congress clearly defined the individuals who may be tried by military commission. Furthermore, Congress clearly provided that the death penalty is an available punishment in these commissions and that such punishment must be voted on by the commission members, not vetoed by the accused. *See* 10 U.S.C. § 949m.

Our criminal justice system does not allow defendants to dictate the punishment they receive; to the contrary, judges and juries convict defendants and impose sentences throughout the American system of criminal justice. The military commission system is no different. *See*

10 U.S.C. § 949m. Under the MCA, it is the clear and unambiguous intent of Congress that the military commission members are the appropriate decision makers as to the conviction and sentence of an accused charged with a capital offense. *Id.* The C.M.C.R. implemented the clear intent of Congress in *Khadr* when it determined what class of persons could be subject to charge under the MCA. *See Khadr, supra*, slip op. at 11-16. We respectfully suggest that the military judge, to be consistent with congressional intent, is required to exercise discretion to refuse to permit the accuseds to plead guilty, given that such a plea would prohibit a death sentence.

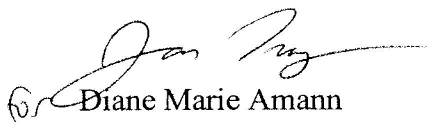
Although it may not be a serious concern as to these defendants, in other cases there may be serious questions raised whether allowing the accused to preclude a death penalty by making a provident plea of guilty would create an unconstitutional penalty for pleading not guilty. *See generally, United States v. Jackson*, 390 U.S. 570 (1967). In *Jackson*, the Court held a provision of the Federal Kidnapping Act, which only allowed the death penalty to be imposed on persons who asserted the right to contest their guilt before a jury, to be unconstitutional for the reasons that the provision discouraged the assertion of the Fifth Amendment right not to plead guilty and deterred exercise of the Sixth Amendment right to demand a jury trial. *Id.* Under the canon of avoidance, *see Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), the commission should not read the MCA in a way that needlessly gives rise to a constitutional issue.

Prohibiting an accused from pleading guilty in a capital case is not unique to military commissions. In court-martial practice, an accused is prohibited from pleading guilty to a capital offense. "A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged." Article 45(b), UCMJ, 10 U.S.C. § 845(b), *see also* R.C.M. 910(a)(1). "Military appellate courts have rejected constitutional challenges to this prohibition." *Matthews*, 16 M.J. at 362.

Nor is the requirement that members must unanimously agree on conviction and a death sentence unique to military commissions. The same requirements exist in court-martial practice, where, to impose a death sentence, the members must convict and sentence by unanimous verdict in a capitally referred case in which the members find at least one of a list of aggravating factors exists beyond a reasonable doubt. R.C.M. 1004.

In order for this capitally charged case to proceed as Congress intended, evidence first must be presented to the members of the panel, and those members must convict by a unanimous vote. Given the clear congressional intent and the instructive practice of courts-martial, the appropriate course of action in these circumstances is for the military judge to refuse to enter a conviction by guilty plea.

Respectfully submitted,



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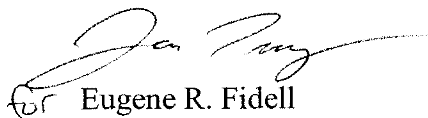

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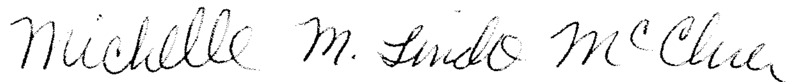

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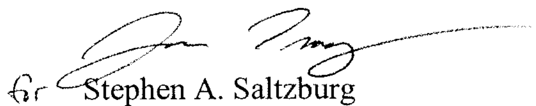

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