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Maj. Tom Fleener
Office of Military Commissions
Office of the Chief Defense Counsel
1600 Defense Pentagon, Rm. 3B688
Washington, DC 20301

Dear Maj. Fleener:

Summary

As an Army Reserve JAG Officer and a Member of the Iowa Bar, you have requested our opinion as to whether you can ethically comply with a military court order assigning you to undertake the defense of one who does not wish to be represented. The client's rejection of your service is not personal to you but an assertion of his demand to represent himself. The rules of the tribunal prohibit self representation. Our answer is yes.

Introduction

This matter arises from proceedings before a Military Commission established pursuant to a Military Order of November 13, 2001, issued by President George W. Bush as Commander in Chief of the Armed Forces of the United States, as per the authority granted by the Congressional Joint Resolution on the Authorization for Use of Military Force of September 14, 2001, effective September 18, 2001 (Public Law 107-40, 115 Stat. 224), and Sections 821 and 836 of Title X, *United States Code*. The Military Order gives the President the right to identify individuals who are not citizens of the United States to be subject to the provisions of the Order. Such designation must occur in writing and indicate that:

- 1) there is reason to believe that such individual, at the relevant times,
 - i) is or was a member of the organization known as al Qaida,
 - ii) has engaged in, aided or abetted or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused,

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threatened to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy, or

iii) has knowingly harbored one or more individuals described in sub-paragraphs i) or ii) of Sub-section 2(a)(1) of this Order; and

2) it is in the interest of the United States that such individual be subject to this Order.

Section 4(a) of the aforesaid Military Order provides:

"Any individual subject to this Order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death."

On July 3, 2003 President Bush entered a written finding that Ali Hamza Ahmad Sulayman al-Bahlul should be subject to the Military Order of November 13, 2001. Accordingly, proceedings were instituted before a Military Commission against al-Bahlul charging him with conspiracy, as defined by the aforesaid Military Order. The charge claims that from late 1999 through December, 2001 al-Bahlul was personally assigned by Usama bin Laden to work in the al Qaida media office and in that capacity created several instructional and motivational recruiting tapes on behalf of al Qaida. At his initial appearance before the Military Commission, al-Bahlul stated that he was 36-years-of-age with 16 years of formal education and has a "large amount of knowledge" about American culture. He speaks English but at the proceedings requested the assistance of a translator. He stated that he has some understanding of the law, having read legal matters and books and a "very good understanding" of the charges against him. At the hearing he challenged the structure of the Military Commission stating: "I don't think it's fair that the evidence would not be presented and the accused cannot defend himself without seeing the evidence for himself or even through an attorney," referencing the Commission's rule that certain classified evidence can only be examined by "detailed defense counsel," meaning defense counsel assigned by the Office of Chief Defense Counsel of the Office of Military Commissions, as compared to a civilian defense counsel.

At the hearing al-Bahlul rejected the services of detailed defense counsel and requested the right to represent himself before the Commission. The Military Order of November 13, 2001, while silent regarding the right to self-representation, grants in Section 6(a) to the Secretary of Defense the authority to issue orders and regulations to implement the Order. On August 31, 2005 Secretary of Defense Donald H. Rumsfeld issued Military Commission Order No. 1 defining "Procedures for Trial by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism." Paragraph 4 provides that:

"The accused must be represented at all relevant times by detailed defense counsel."

Pursuant to al-Bahlul's request for self-representation, unsuccessful litigation ensued before the Military Commission to amend Military Commission Order No. 1. Presumably that issue has been preserved for further review.

With that background in mind, we now turn to the specific questions presented by Maj. Fleener.

No. 1.

May a military lawyer obey the order of a military tribunal to represent a person charged with criminal offenses before the tribunal, when (1) that person has declined representation by counsel, (2) the tribunal has made no particularized finding that the person has been or will be disruptive to the tribunal or is mentally or physically incapable of representing himself, 3) the tribunal has made no finding that appointing standby counsel would be inadequate to protect against disruption of the proceedings, and 4) the tribunal's decision to deny the person's claim to represent himself or to choose his own counsel is based on a categorical assertion that national security and logistical concerns prohibit both courses, without regard to whether reasonable, less-restrictive means may be available?

Opinion No. 1: Yes

The answer is "yes." The Committee notes that the proceedings in question do not involve a person "charged with criminal offenses." In this situation the criminal laws of the United States regarding substance and procedure are inapplicable. The Military Commission and its process are the creation of the

Executive Branch, by operation of *United States Constitution*, Article II, Section 2, in that the President is the Commander in Chief of the Armed Forces of the United States, and supported by the Congressional Joint Resolution of September 14, 2001 regarding the use of military force. As such the Military Commission and its process, including Section 4 of the Military Commission Order No. 1, of August 31, 2005, are entitled to a presumption of Constitutional validity. Whether the process withstands Constitutional attack is not the province of this Committee, nor is it material in answering the ethical question posed by Maj. Fleener. Consequently items number two, three and four in Maj. Fleener's first question are not relevant for our purposes.

The heart of the ethical question is whether Maj. Fleener can purport to act on behalf of al-Bahlul when the accused expressly declines the representation. American lawyers are considered officers of the Court with regards to any tribunal before whom they appear. Consequently Maj. Fleener owes a duty of loyalty to both al-Bahlul and the Military Commission. The fact that al-Bahlul, in opposition to Section 4, Military Commission Order No. 1 of August 31, 2005, wishes to self-represent does not *ipso facto* relieve Maj. Fleener of his obligation to the tribunal. For, if it did, disgruntled clients could routinely throw the court system into disarray and ultimately pervert the course of justice. For example, in Ethics Opinion 75-01 the Committee recognized that a defense attorney has the affirmative ethical duty to inform the court as to a procedural error notwithstanding the fact that the defendant would receive a reversal upon appeal. In these circumstances the duty of the attorney as an officer of the court takes precedence. Recognizing their role as officer of the court, attorneys are often called upon to act for clients for whom the law does not allow self representation. See, for example Estate of Leonard, ex rel., Palmer v. Swift, 656 NW2d 132 (Iowa 2003), regarding the attorneys role as guardian ad litem and officer of the court.

No greater authority than Sir William Blackstone in his Commentaries recognized the primary duty that a lawyer owes to the court before whom the lawyer appears. As stated by Reynoldson, C.J., Committee on Professional Ethics and Conduct of Iowa State Bar Ass'n v. Humphrey, 377 NW2d 643, 648 (Iowa, 1985):

From the early history of the common law to this day, lawyers have been inextricably linked in the minds of persons generally, as well as in fact, to the functions of the courts and the adjudication process. Blackstone in the middle of the 18th century wrote that attorneys were "admitted to the execution of their office by the superior

courts of Westminster Hall, and are in all points officers of the respective courts of which they are admitted."

We are of the opinion that as an officer of the court, Maj. Fleener has an obligation to act in accordance with the rules of the tribunal and accept the representation of al-Bahlul notwithstanding his objection thereto. Consistent with that duty, Maj. Fleener has a corresponding obligation to make whatever record is necessary to protect al-Bahlul's objection to the rule.

No. 2.

May a military lawyer obey the order of a military tribunal to represent a person before a military commission, when the rules of the tribunal depart significantly from customary, domestic and international standards for due process? More specifically, the rules of the tribunal permit (1) non-disruptive defendants to be excluded from their own commission proceedings and testimonial hearsay admitted, in contrast to the Confrontation clause, (2) statements obtained through torture or other coercive means to be admitted into evidence, (3) the admission of all evidence that is "probative to a reasonable person," regardless of the prejudicial effect such evidence may have, (4) the death penalty to be imposed with as few as seven panel members and no requirement that aggravating factors be charged or proven, and (5) the accused's trial to be delayed indefinitely?

Opinion No. 2: Yes

Counsel is frequently called upon to discern Constitutional deficits in substance and procedure and raise the issue before the tribunal, where it can either be remedied or preserved for appeal. The Committee notes that detailed defense counsel has done an admirable job of doing so in this case. If by some perceived ethical prohibition counsel could elect not to do so, Constitutional defects would neither be identified nor cured. Indeed, vigilant defense counsel stands as a gatekeeper to ensure that the client's rights are fully protected.

No. 3.

Does either your answer to question Nos. 1 or 2 change if the conditions outlined in both questions are applicable to the proceeding?

Opinion No. 3: Declined

As presently worded the question is not sufficiently stated so as to call for an answer. Counsel is referred to Opinions 1 and 2 above for guidance.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Nick Critelli". The signature is fluid and cursive, with the first name "Nick" and last name "Critelli" clearly distinguishable.

Nick Critelli,

Chair,

Ethics and Practice Guidelines Committee

Iowa State Bar Association

NC/mjg