



DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS

20 May 09

MEMORANDUM FOR THE CONVENING AUTHORITY

FROM: Major David Frakt, Detailed Defense Counsel

SUBJECT: Matters Submitted Pursuant to R.M.C. 1105 *U.S. v. Ali Hamza al Bahlul*

1. I was detailed to represent Mr. al Bahlul on April 28, 2008, after his previous counsel, COL Mike Sawyers, was excused at the completion of his one-year reserve tour. COL Sawyers was preceded by several other appointed military counsel. As you can imagine, I have been placed in an awkward position in this litigation. As with each of his prior detailed military counsel, Mr. al Bahlul has refused to accept my assistance. He rarely even agreed to meet with me prior to his trial and since the first morning of his trial by military commission on October 27, 2008, he has refused to meet with me. We have had no communications, either during the trial, or since, other than the letters I have sent him requesting a visit. I have attempted to meet with him several times and each time he has refused my visit to the detention facility, including earlier today. After his conviction, I did attempt to advise him in writing of his post-trial and appellate rights, but he refused to take the document I had prepared. I therefore asked the military judge to read him the document in open session, which he did.

2. Mr. al Bahlul did authorize me to represent him on one and only one issue. He asked for my assistance in securing his right to self-representation. I believe I am ethically bound to respect my client's wishes and limit my comments to the scope of the representation he has authorized. Therefore, the denial of Mr. al Bahlul's right of self-representation is the one and only issue that I will be addressing in this memorandum. I am not asking for any leniency or clemency on his behalf. You will recall that I participated in Mr. al Bahlul's boycott of the trial and remained silent throughout. However, before going silent, I did make an effort to preserve on the record Mr. al Bahlul's desire to represent himself. This was the only issue that I preserved for appeal, but it was a critically important one. In my view, the denial of Mr. al Bahlul's *pro se* right was plain error that has fatally affected the legality of the findings and sentence. By denying Mr. al Bahlul's right to represent himself, well knowing that Mr. al Bahlul would not, under any circumstances, allow himself to be represented by an American military officer, the military judge effectively denied Mr. al Bahlul not only effective assistance of counsel, but any assistance of counsel. As such, the revocation of Mr. al Bahlul's *pro se* right was arbitrary, capricious and an abuse of discretion. Undeniably, it was prejudicial, ensuring that no defense would be presented at all. There is no way to fix the problem other than to set aside the findings in their entirety.

3. Background: Mr. al Bahlul had been seeking to represent himself for several years, since he was first arraigned in the original military tribunals under President Bush's Executive Order in 2004. Those earlier commission proceedings were presided over by COL Peter Brownback. COL Brownback was also detailed as the military judge at Mr. al Bahlul's arraignment on May 7, 2008. At the arraignment, I asked COL Brownback to advise Mr. al Bahlul of his right of self-

representation and informed him that Mr. al Bahlul wished to represent himself. COL Brownback had developed a strong rapport with Mr. al Bahlul over the years in their multiple interactions. In fact, he was sufficiently comfortable with Mr. al Bahlul to sit down at Mr. al Bahlul's table during the arraignment when the microphone on the bench malfunctioned. (I was sitting in the second row, far away from Mr. al Bahlul, at his request.) He engaged in an appropriate colloquy with Mr. al Bahlul and determined that he did wish to represent himself. His comments indicated to Mr al Bahlul that if he chose to boycott the trial that would not be inconsistent with his right to self-representation so long as he was not disruptive.

4. The inability of the accused to defend himself was one of the significant criticisms of the early military commissions which caused them to fall short of being "regularly constituted courts." Accordingly, Congress addressed this concern by explicitly granting the accused the right of self-representation in MCA section 949a(b)(D) "The Accused shall be permitted to represent himself." The Rules for Military Commission specified that if found competent to represent himself, an accused must be permitted to do so. COL Brownback was familiar with Mr. al Bahlul's abilities in the courtroom and appropriately determined that he was competent, that his decision was voluntary, knowing and intelligent and he authorized him to represent himself. I was appointed standby counsel, consistent with R.M.C.501(b). The government did not object to the Judge's findings or orders. COL Brownback indicated Mr. al Bahlul could boycott and even voluntarily absent himself and still represent himself. Shortly after the arraignment, the Judge ordered the government to determine how best to facilitate Mr. al Bahlul's right of self-representation prior to the next session of the commission. It should not be noted that Mr. al Bahlul's arraignment was the first test of the new Expeditionary Legal Complex and was plagued with technical glitches. Mr. al Bahlul, a seasoned media relations expert, took full advantage of the snags to embarrass the U.S. government and make a mockery out of the military commissions. The hearing was well-covered by the press; it would be an understatement to call the arraignment a monumental public relations disaster.

5. Subsequent to the arraignment, the prosecution apparently decided that a *pro se* trial, particularly with a clever showman like Mr. al Bahlul acting as his own attorney, was likely to be messy and embarrassing and was to be avoided at all costs. They decided to seek to persuade the military judge to revisit the issue of self-representation. After COL Brownback had been forcibly, involuntarily re-retired and a new military judge was detailed, the government filed a motion in which they argued that COL Brownback's decision to grant the *pro se* request was in error and that a new inquiry should be conducted. In short, they sought to persuade the new judge to rescind COL Brownback's order and start all over again. Mr. al Bahlul was not consulted or informed about this development, although he was counsel of record at that point. Over my objection, I was ordered to submit a response to the government's motion, P-002, which I did, under protest. This motion contains a lengthy description of the constitutional right of self-representation and how it applies to Mr. al Bahlul. Rather than rehash those arguments here, I refer you to the original motion.

6. Due to the government's repeated delay requests occasioned by their inability to come up with a workable plan for detainees to represent themselves, the next hearing was not held until August 15. During the over three months between the arraignment and the next hearing, I made repeated efforts to visit Mr. al Bahlul, but he refused to see me until the morning of the hearing.

At that time, I informed him that there would be a new military judge and that the government had persuaded the new judge to reconsider Judge Brownback's decision to allow him to represent himself. I explained that the new Judge would probably want to discuss the issue in some detail with him and would not allow him to represent himself unless he provided satisfactory answers to his questions. Mr. al Bahlul was extremely displeased with this development. He assumed that the decision to replace Judge Brownback was directly related to his decision to allow Mr. al Bahlul to represent himself. He felt that he should not have to go over ground that he had already covered multiple times. When the hearing commenced, Mr. al Bahlul requested that a document he had previously provided the commission be provided to the Judge for his review. The document contained several points which set forth Mr. al Bahlul's views. When the document could not be located by the government, he became agitated. He refused to cooperate with Judge Gregory's efforts to question him on the self-representation issue and ultimately announced his intention to leave. Col Gregory informed Mr. al Bahlul that he would allow him to absent himself from the proceedings, but that if he departed the courtroom that this would jeopardize his right to represent himself because being absent was inconsistent with self-representation. Upset by the disappearance of his document and by what he perceived as an unfair effort to revoke his hard fought right to represent himself, Mr. al Bahlul then departed (with the court's permission), without engaging in a further inquiry about self-representation, announcing that he would not voluntarily return until the verdict in the case was announced.

7. Prior to the session Mr. al Bahlul had instructed me that he wished to move forward to trial as quickly as possible and did not wish to engage in any pretrial litigation or motion practice. Accordingly, upon Mr. al Bahlul's departure, I demanded a speedy trial on his behalf.

8. The government requested a further session of the commission prior to the commencement of trial. One of the reasons they requested this additional session was their hope that Mr. al Bahlul would reconsider his decision to boycott because they did not want to try Mr. al Bahlul *in absentia*. The next hearing was held on 24 September 2008. Mr. al Bahlul voluntarily appeared at the hearing and announced that he had changed his mind and that he would attend all further sessions of his military commission. Throughout the hearing, Mr. al Bahlul directed me to remain silent and represented himself. A review of the transcript of that session will reveal that he was undisputably acting as his own counsel. He made a variety of legal motions and objections, entered his own pleas and commented on the charges and evidence.

9. After this hearing, the government filed a motion with the court suggesting that the judge revisit the *pro se* issue, in light of the fact that Mr. al Bahlul had declared that he would attend all further proceedings and as it appeared to them that Mr. al Bahlul had been representing himself. Col Gregory directed the government to draft proposed findings of fact to support his decision to rescind Mr. al Bahlul's *pro se* status. The government "declined", evoking a very angry reaction from Col Gregory at an R.M.C. 802 session held in mid-October. The government quite plainly recognized that Mr. al Bahlul was representing himself and there was no lawful basis to deny him *pro se* status if he were planning to attend future sessions. Mr. al Bahlul was unfailingly polite, was not disruptive and conducted himself with proper decorum in the courtroom. He had displayed a thorough grasp of the facts, a facility with the law and legal argument, and a command of the courtroom. He was unquestionably qualified to act in his own

behalf. Unfortunately, Col Gregory could not be persuaded to reopen the issue, stating during the 802 session, "That ship has sailed."

10. Despite the Judge's stubborn and unreasonable refusal of the government's request that he reopen the issue, Mr. al Bahlul requested that I try again. At the preliminary session prior to the commencement of the trial, I once again raised the issue of Mr. al Bahlul's desire to represent himself and asked to be excused from the case. Mr. al Bahlul had told me several times that he wanted nothing to do with me or any other military counsel and asked me repeatedly to try to get myself relieved, and each time I complied with his request. I even presented a case to the judge that stood for the proposition that a *pro se* prisoner could boycott his own trial, and even absent himself from the courtroom, and it would not be inconsistent with his *pro se* status. Following this logic, the fact that Mr. al Bahlul had absented himself from the courtroom at the hearing on 15 August 2008 with the court's permission should not have led to a permanent revocation of his right to represent himself. Indeed, COL Brownback had indicated as much to Mr. al Bahlul. Col Gregory was unmoved. Amazingly, Col Gregory found that Mr. al Bahlul's request to represent himself was "untimely."

11. A request is untimely when it would lead to delay. Mr. al Bahlul was present and prepared to proceed to trial and the defense did not request any delay. His request was not untimely. Indeed, Mr. al Bahlul had been requesting to represent himself for years before the military commission. He had been granted this right at his arraignment on May 7, 2008 and, aside from a brief hiatus when he departed the courtroom on August 15, 2008, had represented himself in all subsequent proceedings in the case.

12. It is not entirely clear why Col Gregory chose to deny Mr. al Bahlul's right to self-representation, but the reasons he offered were not supported on the record. Perhaps he did not want to preside over a circus trial, and believed that would be the likely outcome if he granted Mr. al Bahlul's request. Whatever the true reasons, the decision was plain error. Although Col Gregory suggested that Mr. al Bahlul was adequately warned, this is not true. Mr. al Bahlul was never warned that if he departed the courtroom on August 15th, that he would permanently and irrevocably forfeit his right of self-representation. What Mr. al Bahlul was told, and what he understood, was that he would not be able to represent himself if he were not present. When he returned voluntarily at the next hearing, he believed he was resuming his self-representation, and he acted accordingly.

13. Whether COL Brownback's colloquy with Mr. al Bahlul, prior to granting him *pro se* status, was adequate as a matter of law is subject to debate, but the fact remains that COL Brownback did make findings of fact and conclusions of law and did rule on the *pro se* request, granting it. In order to reverse that ruling, Col Gregory needed to formally reconsider the ruling and issue his own ruling rescinding the decision and explaining why. Prosecution motion P-002 asked him to do just that (among other things). Having done so, he would have been free to engage in a more extended colloquy with Mr. al Bahlul on the issue of *pro se* representation. Col Gregory skipped the formal reconsideration of COL Brownback's ruling and never issued a ruling on P-002. As such, Col Brownback's ruling should have stood.

14. As the Convening Authority, it is your responsibility to read the entire record of trial, and I urge you to do so, paying particular attention to the following points:

- a. Mr. al Bahlul requested to represent himself on May 7, 2008 and referenced that he had wanted to do since 2004.
- b. Judge Brownback made specific findings and conclusions that Mr. al Bahlul's decision was knowing, competent and voluntary.
- c. Judge Brownback's comments to Mr. al Bahlul indicated his understanding that Mr. al Bahlul could represent himself and be absent. He said nothing about revoking his just granted pro se right if he didn't show up.
- d. At the 15 August session, Col Gregory did advise Mr. al Bahlul that leaving would be inconsistent with self-representation and would provide a basis to terminate pro se status, but did not affirmatively say that he would do so, or that such a revocation or "termination" of the right would be permanent and irreversible.
- e. At the 24 September session, Mr. al Bahlul indicated that he understood it was his right not to have an attorney forced upon him, and refused to have anyone defending him. He then proceeded to represent himself throughout the hearing. He stated that I did not represent him and I asked to withdraw or to be excused from the Court. I made a motion to the judge to reconsider his decision to rescind Mr. al Bahlul's pro se status. The judge refused to reconsider, and simply denied the request summarily. He then stated: "you are the detailed counsel and I will not allow you to withdraw and will not release you. So perhaps you will find some role with Mr. Bahlul, perhaps not; but you will remain on the case, as I directed last time." Thus, knowing that the decision could lead to Mr. al Bahlul being essentially undefended at trial because of his unwillingness to be defended by a military attorney, he refused to allow Mr. al Bahlul to serve as his own counsel and ordered me to represent him.
- f. Concerned that the Judge was making an error which could lead to a reversal on appeal, the government tried to persuade Col Gregory to reopen this issue prior to the trial. He declined.
- g. At a pretrial session on 27 October 2008, I reiterated my request for Mr. al Bahlul to represent himself and again asked to be released. Despite Mr. al Bahlul's promise to attend all sessions of the trial, eliminating the sole reason offered by Col Gregory for revoking his pro se status, Col Gregory once again refused.
- h. As a direct result of Col Gregory's unsupported decision, no defense was offered in Mr. al Bahlul's case. No government witnesses were cross-examined, no objections were raised to any exhibits or questions, no motions were made, no defense witnesses were called, no exculpatory or mitigation and extenuation evidence was offered, no opening statement or closing arguments were made.

15. I realize that the typical focus of the Legal Advisor and the Convening Authority is whether the evidence offered by the government was sufficient to support the findings and sentence adjudged. But that question is largely irrelevant in this case. The only real question before you is whether the Judge erred in permanently rescinding Mr. al Bahlul's pro se status and then refusing to reconsider that ruling despite the changed circumstances. While I understand the temptation and the pressure to simply approve the findings and sentence and be done with this

case is likely very strong, if you are to be true to your legally assigned roles, then you must not do what is simply expedient here. I also urge you not to abdicate your responsibility and leave the issue to the appellate courts. Mr. al Bahlul has refused to meet with his appellate counsel and there is no guarantee an appeal will be filed. While appellate review may be mandatory, the best and most appropriate time to fix a legal error such as this one is upon taking final action on the case.

16. In considering this issue, I would urge you also to consider the change in circumstances of the military commissions as a whole. Although the new administration has indicated that they are willing to consider the use of military commissions, the President has made it clear that he will not do so without significant changes to the rules and procedures to provide greater due process and afford more rights to the accused. One of the areas of focus of the president is expanding the right of the accused to the counsel of his choosing. All other cases have now been delayed for 240 days while the administration reviews the commissions. Some changes have already been proposed and the President's statement as well as the stay requests submitted by the government indicate that additional changes are in the works. Under the circumstances, approving a conviction and life sentence from a military commission under the earlier flawed rules where the detainee was denied the counsel of his choice and was completely undefended strikes me as inconsistent with the Commander in Chief's intent and his stated desire to "preserve the status quo" until the new commission rules are completed. Ironically, the other two detainees convicted by military commission have both been repatriated and are now free men. For Mr. al Bahlul to be denied his freedom in perpetuity because of a cavalier and unsupportable decision by the military judge to deny him his statutory and fundamental right to self-representation would be a gross miscarriage of justice.

17. Accordingly, the findings and sentence must be set aside. If you would like to discuss this matter further, I can be reached at [REDACTED] Thank you very much for your consideration in this most important matter.

Respectfully Submitted,

//signed//

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