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A Dilemma for the Defenders

Ordered to represent Guantanamo prisoners who repudiate them, military lawyers face a quandary that tests their highest obligations.

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GUANTANAMO BAY NAVAL STATION, Cuba - For military lawyers assigned to defend terrorism suspects, the job is a constant struggle over competing loyalties to client and command chain - and an uphill fight to gain the trust of men who have seen the same uniforms on their captors, interrogators and jailers.

Take the predicament of Army Lt. Col. Bryan T. Broyles, whose client, Jabran Said bin al Qahtani, rejects Broyles' legal assistance and the legitimacy of the war crimes commissions. Broyles has been ordered by a superior officer to represent the defiant Saudi anyway.

Or Army Capt. Wade N. Faulkner's client, Algerian Sufyan Barhoumi, who has been complying with the war crimes process but threatened to boycott his latest hearing when Faulkner couldn't explain why prison officials moved him into solitary confinement. Barhoumi alleges it was done without explanation and without regard for his handicap, a mangled left hand that he could better cope with when he lived in a communal compound.

Attorneys for three other charged suspects expressed frustration with a judicial forum they said denied fundamental rights and protections set out in the U.S. Constitution and courts, international law and the Uniform Code of Military Justice.

Distrustful of the process and their assigned attorneys, a number of the accused want to be able to represent themselves.

Gaining clients' confidence has been arduous, said Faulkner, because "we wear the same uniform as the people who captured them and who guard them."

The attorney-client relationship is at best "fragile" and can be damaged by perceived setbacks, said Faulkner. He cited as examples the government's failure to grant a security clearance to a civilian attorney assisting in Barhoumi's defense, and the months of bureaucratic delays in letting Barhoumi call home after learning of his father's death last year.

"Every little thing chips away at the relationship," Faulkner said, describing his attempts at providing Barhoumi with a good defense as a pattern of "one step forward, two back."

Broyles' efforts to do right by his contentious client prompted a phone call to his Kentucky Bar Assn. ethics office during a hearing recess Tuesday, for guidance on how or whether to proceed. Broyles said his conscience told him to respect Al Qahtani's wishes that he not represent him, yet the judge in the case, Navy Capt. Daniel E. O'Toole, ordered him to represent the Saudi. Broyles succeeded in persuading O'Toole to postpone the pretrial hearing to consider a legal motion.

Only 10 of the roughly 490 suspects still imprisoned here have been charged, and all but one of those have challenged the legitimacy of the court that denies defendants the rights and protections accorded prisoners of war under the Geneva Convention. The Bush administration says the convention doesn't apply, that the prisoners here are not POWs but "enemy combatants."

"I don't want this court. You judge me and you sentence me the way you want, if this is God's will," Al Qaeda pronounced in his first court appearance before O'Toole, who as presiding officer acts as a judge in the tribunal. The belligerent Saudi, who Broyles guesses is in his mid-20s, said he didn't want any part of the process and refused to return after a midmorning recess.

The chief prosecutor for the U.S. government in the terrorism trials, Air Force Col. Morris D. Davis, expresses little concern over the dilemmas faced by the military lawyers assigned to defendants who don't want them. "Right now they're military officers and they're ordered to do so," Davis said.

Human rights advocates and legal scholars monitoring the proceedings expressed admiration for the military lawyers who had insisted on basic rights for their clients. Such observers consider the ethical dilemmas confronting the defense attorneys to be among many flaws in what they consider an illegitimate tribunal.

Ben Wizner, staff attorney for the American Civil Liberties Union, said Broyles was "being ordered to provide representation that his ethical duties may prohibit."

In the case of Ethiopian suspect Binyam Ahmed Muhammad, who appeared earlier this month, his Air Force reservist counsel, Maj. Yvonne Bradley, refused the presiding officer's order to proceed after her client insisted on representing himself.

The right to be one's own attorney is accorded defendants in U.S. civilian courts - would-be hijacker Zacarias Moussaoui was allowed to represent himself until he became too unruly - as well as in military courts-martial. Guantanamo defendants are denied self-representation by Pentagon order.

Bradley invoked her 5th Amendment right against self-incrimination, risking a contempt citation and forcing the presiding officer, Marine Col. Ralph H. Kohlmann, to call for legal briefs to clarify the procedural guidance for the commissions.

In representing a Yemeni named Ali Hamza al Bahlul who is accused of being an Al Qaeda recruitment propagandist, Army reservist Maj. Thomas A. Fleener has argued well past the patience of the presiding officer that Al Bahlul should have the right to represent himself; to confront his accusers; and to be tried in a free, fair and open process.

Career military lawyers including Broyles have stopped short of defying presiding officers' orders but have recorded their objections.

The head of the Guantanamo defense team, Marine Col. Dwight Sullivan, described the situation as "extraordinarily difficult" because the legal guidance for the commission was "so vague, so ambiguous and constantly changing."

"The defense counsel works for the general counsel, who is effectively the prosecuting authority in the system," Sullivan said, noting the competing pressures of a military chain of command and his lawyers' commitment to provide the best defense possible for each client.

Those outside the military hierarchy criticize the tribunal's apparent indifference to the Hobson's choices imposed on the defenders.

"These young men and women are facing a tremendously difficult choice, and I have enormous respect for what they are doing," said veteran Vermont attorney and law professor Robert D. Rachlin, who has represented detainees in U.S. court proceedings challenging the detention camp and tribunal legitimacy. He described the work of the commission defense lawyers as "bushwhacking through the legal thicket where there is no path evident."

A former military lawyer, who requested anonymity because of the civilian job he is currently performing, said his time at the Guantanamo commissions "was the most challenging environment to act ethically in my career as a lawyer."

Priti Patel, an observer and analyst for the advocacy group Human Rights First, lamented the opinions of bar officials advising Fleener and Broyles that their first responsibility was to the tribunal. "The idea that you would have an ethical duty to the legal process instead of to your client is just shocking," she said.

Broyles agreed that the tribunal process was "fundamentally flawed," but said he believed his duty was to challenge it.

"They gave me a mission and the mission is to attack this process," he said.

Even if the government could prove every element in the charges against Al Qahtani, none constitutes a war crime, Broyles argued. Al Qahtani, Barhoumi and Saudi Ghassan Abdullah al Sharbi - dubbed the Faisalabad Three, for the Pakistani town in which they were arrested - are charged with conspiracy to commit terrorism for allegedly plotting to construct remote-controlled explosive devices. But none of their alleged deeds resulted in an attack on anyone, Broyles noted.

Attorneys for the charged suspects plan to argue that conspiracy is not a war crime and that because the government has said the Guantanamo inmates are not POWs, the U.S. military has no right to try the accused outside the functioning judiciary in the country where each was detained.

All 10 under indictment were picked up in Pakistan or Afghanistan and flown to Guantanamo by U.S. forces.

The Faisalabad Three appeared before the tribunal last week. Through or around their attorneys, they rejected the court's authority to try them.

"They're not making a mockery of the system," Broyles said of the defiant defendants. "They believe the system is a mockery of justice."