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## **Right to Be Own Lawyer Weighed;**

As the Pentagon reopens its military commissions, the first issue will be whether an alleged war criminal has the right to defend himself.

CAROL ROSENBERG  
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GUANTANAMO BAY NAVY BASE, Cuba -- When the first U.S. military commission since World War II resumes today, military lawyers will be tackling a thorny issue bedeviling the Bush administration effort to try suspected terrorists: the rights of an alleged war criminal to defend himself.

Ali Hamza Bahlul, a Yemeni who allegedly made recruitment films for Osama bin Laden's al Qaeda movement, has tied up the Pentagon process for more than a year while military lawyers try to balance the national security interests that led the Bush administration to create the war-crimes court with the right of an accused to confront his accuser.

The issue, in short, is this: Can the Pentagon compel a military lawyer to defend Bahlul, 37, who at his last hearing declared himself a member of al Qaeda and said he didn't want an American soldier to defend him?

Bahlul was among the first captives brought here four years ago from Afghanistan on an 8,000-mile airlift.

"It's a difficult ethical conundrum. What happens if the tribunal were ultimately to say you must represent him?" said Marine Reserves Col. Dwight Sullivan, the chief defense counsel who was mobilized from a job with the American Civil Liberties Union.

Self-representation is a Sixth Amendment right, legal experts say.

But Pentagon officials may have had recent courtroom theatrics in mind when they decreed this summer that Bahlul must accept his U.S. military lawyer.

### **MOUSSAOUI TRIAL**

Alleged al Qaeda terrorist Zacarias Moussaoui hamstrung his trial in a U.S. District Court for months through his on-again, off-again self-representation. Similarly, the one-time Serbian warlord Slobodan Milosevic has transformed his international tribunal into a spectacle of self-representation.

But Army Maj. Tom Fleener, who has been assigned the case, says civilians and soldiers the world over -- especially in the United States -- are guaranteed the right to confront their accuser and be their own lawyer.

He says Bahlul has that right regardless of the allegation that bin Laden personally assigned Bahlul to make a video celebrating the 2000 suicide bombing of the USS Cole off Yemen. Seventeen American sailors were killed when al Qaeda members rammed a speedboat into the destroyer.

### **SAME RIGHTS**

"If he's an alleged al Qaeda propagandist, he gets the same fundamental rights as someone who is accused of a different crime," said Fleener, a 20-year Army veteran who has been a lawyer for 10 years, most recently as a federal public defender in Wyoming. "We don't judge based on what the guy's accused of doing."

Now the judge on Bahlul's case, Army Col. Peter Brownback, must figure out who gets to speak for Bahlul, since he's not allowed to speak for himself.

Fleener is consulting the Wyoming and Iowa bars, where he is licensed, on what to do.

Sullivan called the self-representation issue "a stalking horse for the whole issue of what extent do the Bill of Rights apply to military commission practice."

The Supreme Court decides later this year the overarching issue of whether President Bush had the power in late 2001 to create military commissions, which treat captives as unprivileged belligerents not prisoners of war and have different standards than U.S. military or civilian courts. Oral arguments take place in March.

Meantime, government attorneys argue a new kind of war requires reinvention.

"Some say we're making up the rules as we go along. But the law has to adapt to today's environment," the chief prosecutor, Air Force Col. Morris Davis, said Tuesday. "Al Qaeda, the Taliban are new enemies that the law didn't contemplate."

For example, the other defendant facing a commission this week is Omar Khadr, a Toronto-born teen who was 15 years old at the time of his July 2002 capture in a firefight in Afghanistan. U.S. troops had assaulted a suspected al Qaeda compound and Khadr allegedly threw a grenade, which fatally wounded Sgt. 1st Class Christopher Speer, 28.

The teen is accused of murder, in what his civilian defense attorneys claim will be modern history's first tribunal for war crimes allegedly committed by a juvenile.

His defense team wants a Marine lieutenant colonel assigned to defend the Canadian because, they say, the case is stacked against the teen.

Right now, Khadr's military lawyer is a 31-year-old Army captain, just back from Iraq, who has never before defended a client, "not even for charges for jaywalking," said American University law professor Muneer Ahmad, Khadr's civilian counsel.

"It would be laughable if the stakes weren't so high," he said.

### **ONE-DAY HEARING**

Evidence will not be presented in either case today, set aside for a one-day administrative hearing more than a year after a federal judge froze another war-crimes case, which set the stage for the Supreme Court challenge.

After the war-crimes court solves the sticky self-representation question, a jury of military officers, or commission, must be convened.

Air Force Maj. Jane Boomer, a Pentagon spokeswoman, said the judge at Bahlul's trial has the power to declare lawyers in contempt of court -- the judiciary's version of insubordination.

### **BOYCOTT POSSIBLE**

But Boomer also left open the possibility that Bahlul might boycott the proceedings altogether. Bahlul said at his August 2004 arraignment that, given the choice, he would not attend the U.S. proceeding.

"If he doesn't want to come, he doesn't have to come," Boomer said. The court has an adjacent high-security cell -- out of sight and out of earshot of the proceedings.

Only 50 to 75 of the 500 or so captives at Guantánamo are likely to ever be charged with war crimes, Boomer said.

But times have changed, said West Point law professor Gary Solis, a former Marine who predicts the commission process may become so tied up in challenges that one will never conclude with an actual verdict.

"Since the last military commission [in World War II], an international awareness and concern for human rights and due process has burgeoned," he said, and "rightly or wrongly" become a concern by human rights groups, nongovernmental organizations and concerned citizens.