

NATIONAL INSTITUTE OF MILITARY JUSTICE

STATEMENT ON CIVILIAN ATTORNEY PARTICIPATION AS DEFENSE COUNSEL IN MILITARY COMMISSIONS

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NIMJ has examined in detail both the March 21, 2002 Procedures for Trials by Military Commissions and the April 30, 2003 Military Commission Instructions.*

An important issue has arisen as to whether civilian counsel should participate in trials by military commission. In a variety of significant ways, the Secretary of Defense's procedures treat civilian defense counsel differently from the way they are treated in federal and state courts and in courts-martial. Many members of the bar and the public both here and overseas are concerned, as we are, that those procedures could materially affect counsel's ability to fully and adequately represent military commission accuseds. These concerns may have dissuaded some lawyers, who might otherwise have volunteered their services in the interest of justice, from doing so.

The question whether to participate in proceedings when one believes that the governing procedures are an unwarranted departure from due process norms must be decided according to each individual's conscience and professional values. But it would be as unfortunate for the American justice system for competent civilian defense counsel to make themselves unavailable in military commissions as it would be if civilians were formally precluded from participation. Military lawyers have proven over many years that they can and will provide zealous representation, even for highly unpopular clients. Nonetheless, and whatever else may be said of military commissions, public confidence in the administration of justice would be ill-served by a boycott by the civilian bar. Public esteem for the bar would also suffer.

The preamble to the American Bar Association's Model Rules of Professional Conduct provides in relevant part: "[a] lawyer, as a member

of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice,” and “[a]s a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession.”

Even where a lawyer personally believes that the procedures adopted by a tribunal are unfair, unwise, unconstitutional, or contrary to international norms, the lawyer nonetheless performs an important public service by representing accused persons before that tribunal. The lawyer has the opportunity—and, where warranted, the duty—to challenge the validity of the procedures, to suggest changes, to make a record of any disadvantages suffered by the accused as a result of the procedures, and to use his or her knowledge, experience and skill to provide the best possible defense in the circumstances. To date, no State bar has ruled that ethical considerations preclude civilian attorney participation in military commissions as currently structured.

If experienced and talented lawyers are willing to volunteer their services, some of the procedures that have been prescribed for military commissions may well be deemed unnecessary. If, for example, lawyers make clear that they will not share attorney-client information with third parties, there may be no need for the government to monitor all lawyer-client conversations. Annex B to Military Commission Instruction No. 5 (April 30, 2003) contains an affidavit and agreement that civilian defense counsel must sign to participate in trials by military commissions. Although paragraph I provides that attorney-client communications “may be subject to monitoring,” there is no requirement for monitoring, and there is the opportunity for civilian defense counsel to persuade government officials that monitoring is unnecessary and may damage the attorney-client relationship between civilian defense counsel and the accused.

Military commissions have been used in wartime in the past. But we now face a new use of these tribunals as part of the war on terrorism—a struggle that pits the country against individuals and groups rather than other nations, and does so without the prospect of a clearly defined end-date. As military commissions commence their work, new law will be made, precedents will be created, verdicts will be rendered, and sentences will be imposed upon conviction.

The absence of competent civilian defense counsel from military commissions would mean that talent and experience that might improve the quality of justice and promote confidence in the fairness and integrity of the proceedings will be missing. There is an argument, of course, that by abstaining from military commissions, civilian lawyers will demonstrate their rejection of the procedures chosen for these tribunals. But as long as those accused face trial by commission, abstention by the civilian bar cannot increase the likelihood that they will receive justice or at least as much justice as might be obtained with help of civilian counsel.

Like the military bar, the civilian bar has a role to play. It has a voice with which to speak. It has the talent and breadth of experience to use the tools of direct and cross-examination to help put the government to its proof, to demonstrate the unreliability of various kinds of hearsay, and to muster facts favorable to the defense. The civilian bar knows how to argue for procedural fairness and to make a record documenting procedural unfairness.

None of the procedural rules that govern military commissions are immune to change. Indeed, modest changes have already been made. The participation of civilian lawyers might well result in improved procedures. There is, of course, no guarantee that arguments for change will prevail. It is certain, however, that there will be no change without argument.

Mindful of the fact that the decision to participate may be a function of deeply held and, in many instances, conflicting personal and professional values, and that reasonable people may well differ on the matter, we recommend that attorneys who are otherwise qualified for the civilian defense counsel pool, and have the time, give serious consideration to submitting their names. The highest service a lawyer can render in a free society is to provide quality independent representation for those most disfavored by government.

Neither this Statement nor the participation of any individual attorney should be construed as an endorsement of the use of military commissions or the procedures and instructions that have been prescribed by the government.

* ANNOTATED GUIDE—PROCEDURES FOR TRIALS BY MILITARY COMMISSIONS OF CERTAIN NON-UNITED STATES CITIZENS IN THE WAR AGAINST TERRORISM (LexisNexis Matthew Bender 2002); NIMJ MILITARY COMMISSION INSTRUCTIONS SOURCEBOOK (2003). The Military Commission Instructions may be downloaded from NIMJ's website, www.nimj.org.