

## Scott Fenstermaker

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**From:** Scott Fenstermaker [scott@fenstermakerlaw.com]  
**Sent:** Thursday, October 09, 2008 9:51 PM  
**To:** William Sowder (sowderw@dodgc.osd.mil)  
**Cc:** Lawrence Morris (morrisl@dodgc.osd.mil)  
**Subject:** Notice of Appearance - Ammar al-Baluchi  
**Attachments:** Notice of Appearance0001.pdf; MC Form 9-20001.pdf

IN RE: GUANTANAMO BAY DETAINEE LITIGATION

Doc. 1507 Att. 7

Lt. Col. Sowder,

Attached are a notice of appearance and MC Form 9-2 notifying the Office of the Trial Judiciary of my appearance as an attorney advisor to Ammar al-Baluchi. Please note that my notice of appearance acknowledges Colonel David's attempt to suspend me from the Pool of Qualified Civilian Defense Counsel. Colonel David's attempt to suspend me was an illegal act exceeding his authority. In addition to violating my due process rights, it violated the right to counsel rights of my clients Ammar al-Baluchi, Mustafa Bin-Ahmad Al-Hawsawi, Rahim al-Nashiri, and Ahmad Khalfan Ghailani. As such, Colonel David's attempt to suspend me is a nullity.

Please let me know if you or your colleagues have any questions.

Scott L. Fenstermaker, Esq.  
P.O. Box 3762  
Grand Central Station  
New York, New York 10163  
212-302-0201  
917-817-9001

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United States of America

CIVILIAN DEFENSE COUNSEL  
NOTICE OF APPEARANCE  
AND AGREEMENT

v.

AMMAR AL-BALUCHI

(October 9, 2008)

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1. Pursuant to procedures of court/instruction for counsel, I, Scott L. Fenstermaker, Esq., hereby provide notice to the Military Judge of my appearance as an attorney advisor on behalf of AMMAR AL-BALUCHI. My mailing address is P.O. Box 3762, Grand Central Station, New York, New York 10163. My phone number is 212-302-0201. My fax number is 212-302-0327. My e-mail address is: [scott@fenstermakerlaw.com](mailto:scott@fenstermakerlaw.com). I am an active member in good standing licensed to practice in the following jurisdictions: New York State, United States District Courts for the Southern and Eastern Districts of New York, the United States Courts of Appeals for the Second Circuit and the District of Columbia Circuit, and the United States Supreme Court.

2. I have attached MC Form 9-2, Affidavit and Agreement by Civilian Defense Counsel.

3. I have received notice, by letter dated August 29, 2008 from Colonel Steve David, the Chief Defense Counsel for the Military Commissions, that he suspended me from the Pool of Qualified Civilian Defense Counsel. Colonel David's attempt to suspend me was undertaken in violation of the United States Constitution, the Military Commissions Act of 2006 (the "Act"), the rules and regulations promulgated pursuant to the Act, and fundamental legal ethics. As such, it is a nullity. On behalf of MR. AL-BALUCHI, I object to Colonel David's illegal act as it violates MR. AL-BALUCHI's due process and right to counsel rights under the Fifth and Sixth Amendments to the United States Constitution.



Scott L. Fenstermaker, Esq.  
P.O. Box 3762  
Grand Central Station  
New York, New York 10163  
Attorney advisor to Ammar al-Baluchi

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**Figure 9.2. Affidavit and Agreement by Civilian Defense Counsel  
(MC Form 9-2)**

**AFFIDAVIT AND AGREEMENT BY CIVILIAN DEFENSE COUNSEL**

Pursuant to the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, *codified in part at* 10 U.S.C. § 948a. *et seq.*, the Manual for Military Commissions promulgated January 18, 2007, and Chapter 9 of the Regulations for Trial by Military Commission, I Scott L. Fenstermaker , make this Affidavit and Agreement for the purposes of applying for qualification as a member of the pool of civilian defense counsel available to represent the accused before military commissions and serving in that capacity.

- I. Oaths or Affirmations. I swear or affirm that the following information is true to the best of my knowledge and belief:
  - A. I have read and understand the Secretary's Manual for Military Commissions, and all other Military Commissions Regulations, Orders, Instructions and Directives applicable to trial by military commissions. I will read all amendments, rescissions or promulgations pertinent to the aforementioned.
  - B. I am aware that my qualification as a civilian defense counsel does not guarantee my access to any information subject to the national security privilege under 10 U.S.C. § 949d(f).

II. Agreements. I hereby agree to comply with all applicable regulations and rules for counsel, including any rules of court governing proceedings, and specifically agree, without limitation, to the following:

- A. I will notify the Chief Defense Counsel and, as applicable, the relevant military judge immediately if, after the execution of this Affidavit and Agreement but prior to the conclusion of proceedings (defined as the review and final decision of the Court of Military Commission Review), there is any material change in any of the information provided in my application, including this Affidavit and Agreement, for qualification as member of the civilian defense counsel pool. I understand that such notification shall be in writing and shall set forth the substantive nature of the changed information.
- B. I will be well prepared and will conduct the defense zealously, representing the accused throughout the military commission process, from the inception of my representation through the completion of any post-trial proceedings as detailed in 10 U.S.C. §§ 950a-950j and R.M.C. 1101-1209. Prior to undertaking representation of the accused, I will ensure that I can commit sufficient time and resources to handle the accused's case expeditiously and competently. In making this assessment, I am aware that the military judge may deny any request for a delay or continuance of proceedings based on reasons relating to matters that arise in the course of my law practice or other professional or personal activities that are not related to military commission proceedings, if in the military judge's determination such a continuation would unreasonably delay the proceedings.

C. The defense team shall consist entirely of myself, detailed defense counsel, and other personnel provided by the Chief Defense Counsel, the military judge, or the convening authority. I understand I must include the justification for particular individuals to be added to the defense team in a request to the Chief Defense Counsel, the military judge, or the convening authority as appropriate, and I will state any special requests regarding access to the accused, classified information, as defined at 10 U.S.C. § 948a(4), or privileged under 10 U.S.C. § 949d(f), R.M.C. 701, and Mil. Comm. R. Evid. 505, or the ability to enter into a confidential relationship. Regarding entering into a confidential relationship, I understand that those determined eligible to receive attorney confidences or attorney work product containing facts specific to the case will be required to complete an affidavit similar to this Form prior to receiving any attorney confidences or attorney work product containing facts specific to the case. I further understand that those I request to have access to the accused, other detainees, or classified information will be required to obtain a security clearance and be specifically approved for access to each individual or item of classified information requested, prior to access being granted. I understand that nothing in this agreement allows me to disregard any laws, rules, regulations, or instructions governing the handling of classified information or privileged information. I will make no claim against the U.S. Government for any fees or costs associated with my conduct of the defense or related activities or efforts.

D. Recognizing that my representation does not relieve detailed defense counsel of duties specified in 10 U.S.C. § 949c(b) and R.M.C. 502(d)(6), I will work cooperatively with such counsel to ensure coordination of efforts and to ensure such counsel is capable of conducting the defense independently if necessary.

E. During my representation of an accused before a military commission, I will comply with the following restrictions on my travel and communications:

1. I will not discuss, transmit, communicate, or otherwise share documents or information that are classified or protected prior to their use at trial, with anyone except as is necessary to represent my client before a military commission. In the case of doubt regarding whether I may share information about a case with another, I understand that I have an affirmative duty to request clarification from the Deputy General Counsel (Personnel and Health Policy) or military judge before discussing, transmitting, communicating, or otherwise sharing documents or information. I understand that nothing in this agreement allows me to disregard any laws, rules, regulations, or instructions governing the handling of classified information and material, or other protected information.

2. I understand that once proceedings have begun, I may be required by the military judge to remain at the site of the proceedings until he or she approves my departure.

3. I understand I will obtain prior approval from the convening authority

for a country clearance for travel to Guantanamo Bay, Cuba.

- F. At no time, to include any period subsequent to the conclusion of the proceedings, will I make any public or private statements regarding any closed sessions of the proceedings or any document or material constituting classified information under 10 U.S.C. § 948a(4) or subject to the national security privilege under 10 U.S.C. § 949d(f), R.M.C. 701, and Mil. Comm. R. Evid. 505. This restriction does not apply to discussions with other members of the defense team or the Chief Defense Counsel who are appropriately authorized to receive the specific classified information and privileged information in question, when such disclosure is related to the defense efforts on behalf of the accused during military commission proceedings or subsequent review. I understand that nothing in this agreement allows me to disregard any laws, rules, regulations, or instructions governing the handling of classified or privileged information.
- G. I understand and agree to comply with all rules, regulations and instructions governing the handling of classified information and material or other privileged information.
- H. I understand that there may be reasonable restrictions on the time and duration of contact I may have with my client, as imposed by the convening authority, the military judge, detention authorities, or regulation.
- I. I understand that communications with an accused are not protected if they would facilitate criminal acts or a conspiracy to commit criminal acts, or if

those communications are not related to the seeking or providing of legal services to the client.

J. I agree that I shall reveal to the Chief Defense Counsel, and any other appropriate authorities, information relating to the representation of my client to the extent that I reasonably believe necessary to prevent the commission of a future criminal act that I believe is likely to result in death or substantial bodily harm, or significant impairment of national security.

K. I understand and agree that nothing in this Affidavit and Agreement creates any substantive, procedural, or other rights for me as counsel or for my client(s).

*/s/ Scott L. Fenstermaker*

Print Name: . Scott L. Fenstermaker, Esq.  
Address: . P.O. Box 3762  
Grand Central Station  
New York, New York 10163

Date: 10/9/08

STATE OF New York )

COUNTY OF Westchester )

Sworn to and subscribed before me, by Scott Fenstermaker this 9<sup>th</sup> day of October, 2008

Notary *[Signature]*

My commission expires:

LINDA F. FENSTERMAKER  
Notary Public, State of New York  
No. 02FE6058164  
Qualified in Westchester County  
Commission Expires ~~April 30, 2011~~  
6/30/2011