



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
WALTER REED ARMY MEDICAL CENTER
6900 GEORGIA AVENUE, NORTHWEST
WASHINGTON, DC 20307-5001

JUN 1 2010

MCAT-JA-SC

MEMORANDUM FOR MAJ Matthew J. Kemkes, US Army Trial Defense Service, 4217
Roberts Avenue, Suite 5030, Fort George G. Meade, MD 20755-5030

SUBJECT: Investigating Officer's Ruling on Defense Request for Witnesses and Evidence in
Accordance with Rule for Courts-Martial (R.C.M.) 405 – Article 32, UCMJ Investigation, US v.
LTC Terrence L. Lakin

1. On 30 April 2010 I sent the Defense and the Government a list of witnesses and documents I intend to examine pursuant to my duties as Investigating Officer. On 4 May 2010 the Defense requested an expansion of the list to include additional documents and witnesses. The requested documents consist of financial aid applications, school admission applications, and birth records pertaining to the President of the United States, Mr. Barack Obama, as well as all relevant documentary evidence within the possession and control of the Government. The requested witnesses are President Obama, the records custodians of the requested records, Army officers COL William Rice and COL Dale Block, federal employee Mr. Loren Friedman, and two witnesses for the accused, Major General (Retired) Paul Vallely and Mr. Alan Keyes.
2. Rule for Courts-Martial 405 provides for the production of witnesses “whose testimony would be relevant to the investigation and not cumulative [] if reasonably available.” R.C.M. 405 (g)(1)(A). “A witness is ‘reasonably available’ when the witness is located within 100 miles of the situs of the investigation and the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witness’ appearance.” *Id.* The standard for production of documents under Government control is identical, sans the 100-mile guidepost. See R.C.M. 405 (g)(1)(B).
3. The threshold determination I must therefore make is whether examination of the requested items could be relevant to the preferred charges and specifications. The charges are missing movement, failure to obey orders of three military officers and dereliction of duty. On 6 May 2010 I notified the parties that I did not understand how the requested documents and witnesses may be relevant. I set forth a briefing schedule for the parties to state reasons for or against production to assist in my relevancy determination. I expressly instructed, “[y]our submissions, if any, on the subject of lawfulness of orders, derivation of authority, political questions and the like should be sufficiently scholarly to allow me to make an informed determination of relevance of the requested items to the truth of the specifications and charges at issue in this case.” IO Memorandum dated 6 May 2010, para. 3.
4. The Defense submitted a Memorandum outlining the concept of chain of command, showing that the President is at the top of the chain, showing that the Constitution requires the President to be a natural born citizen, and stating that soldiers must disobey “illegal orders.” There is no scholarly discussion of what constitutes an illegal order or under what circumstances such an

MCAT-JA-SC

SUBJECT: Investigating Officer's Ruling on Defense Request for Witnesses and Evidence in Accordance with Rule for Courts-Martial (R.C.M.) 405 – Article 32, UCMJ Investigation, US v. LTC Terrence L. Lakin

order can be disobeyed or must be disobeyed. Rather, the Defense baldly asserts, “[LTC Lakin’s] submission is that if the president is ineligible under the constitution to serve in office, then axiomatically no order given by him is valid.” Justification for Requested Witnesses and Evidence for Article 32, UCMJ Investigation, United States v. LTC Terrence L. Lakin at 6.

5. The Government does not charge that the President gave an order directly to LTC Lakin. For the President’s credentials to have any bearing on the charges against LTC Lakin, the Defense proposition must be that military orders issued by superiors to juniors are all ‘invalidated’ during the period the President improperly holds office. This proposition fails to account for the law of lawfulness of orders, which in essence requires that a facially proper order be obeyed so long as it does not require the commission of a criminal act. See, e.g., United States v. New, 55 M.J. 95, 107-108 (2001) (medic who doubted lawfulness of order to deploy with United Nations uniform accoutrements unable to overcome presumption of lawfulness of superior’s orders to so deploy). Moreover, the Defense proposition fails to account for the de facto officer doctrine, a military variant of apparent authority. The Defense offers no legal support whatever for its position, which I find to be far from ‘axiomatic.’ As far as I have found, the position has no basis in law.

6. The Defense also fails to assert a legal basis by which its request might be allowable under the law of political questions, whereby courts will refrain from inserting themselves in matters constitutionally relegated to coequal branches of Government. The Defense quest to use a military justice forum to invalidate all military authority while undermining the authority of a sitting United States President certainly appears at first blush to be a nonjudiciable political question, see, e.g., New, supra, at 108-111. Despite my express invitation to show why that doctrine should not apply here, no such showing was made. In my view our constitutional jurisprudence allows Congress alone, and not a military judicial body, to put the President’s credentials on trial. For this reason and the reasons stated in para. 5 above, it is my opinion the discovery items pertaining to the President’s credentials are not relevant to the proof of any element of the charges and specifications set forth in the charge sheet. Consequently I will not examine the documents or witnesses pertinent to the President or his credentials to hold office.

7. The parties dispute whether I should examine COL William Rice, Mr. Loren Friedman, and COL Dale Block. The Defense states only that these witnesses “have first-hand knowledge of facts relating to LTC Lakin’s actions,” Justification for Requested Witnesses and Evidence for Article 32, UCMJ Investigation, United States v. LTC Terrence L. Lakin at 7. The Government responds that although the three witnesses all have a general understanding of LTC Lakin’s views, none of them has any relevant knowledge regarding the charged offenses and all three should be excluded. Although the Defense showing is paltry, my duty to investigate is broad. I must thoroughly examine all aspects of the matter, including the proof of each element of the charges, the applicable law, and all matters in extenuation or mitigation. With these principles in mind and in the interest of thoroughness and inclusiveness, I will allow testimony from these witnesses. COL Rice and COL Block are available on the scheduled hearing date, 11 June 2010. Mr. Friedman will be on Government travel to the west coast. He is unavailable under

MCAT-JA-SC

SUBJECT: Investigating Officer's Ruling on Defense Request for Witnesses and Evidence in Accordance with Rule for Courts-Martial (R.C.M.) 405 – Article 32, UCMJ Investigation, US v. LTC Terrence L. Lakin

R.C.M. 405. Following the conclusion of available testimony I will consider requests, if any, to hold the proceeding open for additional testimony.

8. With respect to the Defense requests to present testimony from Major General (Retired) Paul Vallely and Mr. Alan Keyes, the Government correctly asserts that the Defense offers no explanation of relevance as required by the Manual for Courts-Martial and my 6 May 2010 Memorandum. Nevertheless, again for reasons of thoroughness and inclusiveness, I will hear testimony from these witnesses.

9. Finally, the Defense requests “[a]ll documentary evidence within the possession and control of the Government and relevant to the case against LTC Lakin.” The Government responds that it has already provided the requested documents to the Defense.

10. In accordance with the above, my determinations on the defense requests are as follows:

Documents

- Para. 2.a., all relevant documents, **allowed**.
- Para. 2.b., Puhahou School documents, **denied**.
- Para. 2.c., Punahou School records, **denied**.
- Para. 2.d., Hawaii State Dept of Health records, **denied**.
- Para. 2.e., Occidental College records, **denied**.
- Para. 2.f., Occidental College records, **denied**.
- Para. 2.g., Columbia University records, **denied**.
- Para. 2.h., Columbia University records, **denied**.
- Para. 2.i., Harvard University School of Law records, **denied**.
- Para. 2.j., Harvard University School of Law records, **denied**.

Witnesses

- Para. 3.a., The Honorable Barack Obama, **denied**.
- Para. 3.b., COL William Rice, **allowed**.
- Para. 3.c., Mr. Loren Friedman, **allowed** but unavailable.
- Para. 3.d., COL Dale Block, **allowed**.
- Para. 3.e., Mr. Alan Keyes, **allowed**.
- Para. 3.f., MG [sic] Paul Vallely, **allowed**.
- Para. 3.g., Ms. Betsy Hata, records custodian, **denied**.
- Para. 3.h., Dr. Chiyome Fukino, records custodian, **denied**.
- Para. 3.i., Mr. Victor Eggito, records custodian, **denied**.
- Para. 3.j., Mr. Jeffrey Scott, records custodian, **denied**.
- Para. 3.k., Mr. Doug Berman, records custodian, **denied**.

MCAT-JA-SC

SUBJECT: Investigating Officer's Ruling on Defense Request for Witnesses and Evidence in Accordance with Rule for Courts-Martial (R.C.M.) 405 – Article 32, UCMJ Investigation, US v. LTC Terrence L. Lakin

11. The point of contact for this memorandum is the undersigned at daniel.driscoll@amedd.army.mil.

A handwritten signature in black ink, appearing to read 'D. Driscoll', with a large, stylized flourish at the end.

DANIEL J. DRISCOLL
LTC, JA
Investigating Officer

CF:

Mr. Paul Rolf Jensen, Jensen & Associates, APC, Trial Lawyers, 650 Town Center Drive, 12th Floor, Costa Mesa, CA 92626
CPT Heidi Stoltzfus, Trial Counsel, Office of the Center Judge Advocate, Walter Reed Army Medical Center, Washington, DC 20307-5001