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Nuernberg December 14, 1947

Alfried Krupp v. Bohlen und Halbach

FILED 15 Dec 1947
with Secretary General
for Military Tribunals
Defense Center

To: Military Tribunal III A

MOTION FOR RECONSIDERATION OF APPLICATION FOR REPRESENTATION
BY AMERICAN COUNSEL OF ALFRIED KRUPP VON BOHLEN UND HALBACH
OR SUBSTITUTION OF ATTORNEYS.

The defendant, Alfried Krupp v. Bohlen und Halbach, moves this Court to reconsider his application to be represented in his defense by a representative of the American firm of attorneys-at-law of Foley & Carroll on the following grounds:

- 1.) It is essential to a proper defense that defendant be represented by American as well as German counsel, in that:
 - a) The Tribunal hearing these charges is a Tribunal of the United States of America.
 - b) The constitution and procedure of the Tribunal invokes the laws of the United States of America as well as of International law.
 - c) This Tribunal is composed exclusively of American attorneys.
 - d) The prosecutor is an American attorney.
 - e) The charges and specifications involve intricate questions of the national laws of both Germany and the United States of America as well as international law and no adequate defense can be represented by the defendant if he is denied the right to engage the services of American counsel in the preparation and representation of his defense. The right to American counsel in the case of Alfried Krupp is particularly emphasized by the position announced on behalf of the United States of America by its chief of counsel, Robert H. Jackson, in the answer filed by the United States prosecution to the motion on behalf of the defendant Gustav Krupp von Bohlen before the International Military Tribunal in which he said,

"Public interests which transcend all private considerations require that Krupp von Bohlen shall not be dismissed unless some other representative of the Krupp armament and munitions interests be substituted. . . . To drop Krupp v. Bohlen from this case without substitution of Alfried drops from the case the entire Krupp family and defeats any effective judgement against the German armament makers."

2.) The application made by defendant is timely and in accord with the exercise of due diligence, in that:

a) Defendant was previously denied the opportunity to secure American counsel in that he had been held in continuous confinement from 11 April 1945 to this date. Charges were served upon him in confinement in August 1947. Prior thereto he was denied the opportunity to see counsel and so was prevented from making any preparations for his defense. On 18 August 1947 defendant was for the first time permitted to make some arrangements for defense counsel. Under the restrictions imposed upon him he was for all practical purposes limited to the preliminary selection of a German attorney. In this respect the decision handed down by the Tribunal in the case of I.G. Farben on 30 July 1947 on the request filed in that case for American counsel must be borne in mind. In that case the Tribunal said, the motion for approval of non-German counsel did not name any specific lawyer, that it was impossible to rule on such a blank motion and to approve a counsel whose identity was unknown. If the defense counsels wished to apply for the appointment of a non-German lawyer whose name was stated and if moreover there were no obligation on the part of the United States Government or any of its agencies to pay him for the services such application would be considered by the Tribunal. This ruling was communicated to the defendant in response to his immediate request for the procurement of American counsel by Dr. Otto Kranzbuehler who was instructed by his defendant to institute negotiations to secure a specific counsel in accordance with this ruling. Dr. Kranzbuehler was likewise handicapped by the various ordinances and decrees promulgated by the occupying powers in effecting this request of the defendant. Thus an application made to the British Controller in charge of the Krupp assets for the release of sufficient funds for the purposes of securing such counsel was denied on 6 November 1947.

b) Dr. Kranzbuehler as his representative immediately upon his appointment and continuously to the present date has negotiated to the best of his ability for the procurement of American counsel.

c) From the time of his selection as defense counsel in August 1947 no American counsel independent of employment by the government of the United States of America has been available in this Theater for negotiation save and excepting representatives of the American firm of Foley & Carroll to the knowledge of this defendant.

d) Negotiations for such representation by American counsel have been handicapped and precluded by reason of the fact that the entire assets of this defendant have been seized and otherwise denied to him for this purpose.

e) On or about 7 December 1947 preliminary arrangements were concluded with the said firm of American attorneys of Foley & Carroll for the representation of this defendant and on 8 December 1947 defendant made application through the General Secretary, and on the same date through his counsel, moved this court to permit defendant to be represented by a member of the said firm.

- 3.) The application was necessary to secure to the defendant proper representation and a fair trial in that said application was based upon the fact that Dr. Otto Kranzbuehler and any other German counsel known to the defendant is unfamiliar with the application both to the substance and the procedure of the American law involved in the trial of this defendant before this Tribunal and upon the further grounds that the right to such counsel was guaranteed by the provisions of Title 18 of the United States Code, sec. 563, which provides as follows:

"Every person who is indicted of treason or other capital crime shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, and they shall have free access to him at all seasonable hours."

The right to counsel cannot be satisfied by mere formal appointment of a lawyer that is not sufficiently familiar with the pertinent law. In this connection, the Supreme Court, in *Avery v. Alabama* (308 U.S. 444), said at page 446:

"But the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment."

- 4.) The application is in accord with the fundamental principles of international law and is not in conflict with any valid rule of procedure. In support of this ground the defendant submits the following:

"International law requires that any state or group of states in exercising criminal jurisdiction over aliens shall not 'deny justice'."

The Law of the Nuremberg Trial - Quincy Wright, Amer. Journal of International Law, Vol. 41, Jan. 1947, p. 51-52;

Due Process and International Law, Quincy Wright Amer. Journal of International Law, Vol. 40 (1946) p. 398;

The International Responsibility of States for Denial of Justice, New York, 1938, A.V. Freeman, p. 262.

Art. 6, Charter of the International Tribunal.

Rule 7, Uniform Rules of Procedure, Military Tribunals Nuremberg.

- 5.) There is no obligation on the part of the U.S. government or any of its agencies to pay the firm Foley & Carroll or any of its representatives.

- 6.) In the event the application for such additional American counsel is granted the defendant hereby stipulates and agrees that no postponement of this trial will be requested by him by reason thereof.

ALTERNATE MOTION

Defendant respectfully urges that if this Tribunal denies his application for additional counsel, as hereinabove set forth, then, and in that event, defendant hereby elects to substitute the firm of Foley & Carroll in the place and stead of his present attorney, Dr. Otto Kranzbuehler, and defendant so moves this court and in support of this motion asserts that he has an absolute right to be represented by a counsel of his own selection and provision in that:

- a) The Fifth Amendment to the Constitution provides that no person shall be deprived of life, liberty or property without due process of law. . .; and the Sixth Amendment guarantees that "The accused shall enjoy the right to have the assistance of counsel."

"The right to a hearing, as a basic element of due process includes the right to the aid of counsel, and failure to give the accused a reasonable time and opportunity to secure counsel prior to trial constitutes a denial of due process. The right includes a fair opportunity to secure counsel of one's own choice."

Amer. Jurisprudence, sec. 167
Powell v. Alabama, 287 U.S. 45, 77
L.ed. 158, 53 S.Ct., 84 A.L.R. 527

In applying these fundamental principles to a trial by a courts-martial the Court of Claims of the United States recently said:

"The court-martial, of course, had jurisdiction of the case and ordinarily it would follow that any judgment rendered by it, however erroneous, would not be void; but the Supreme Court in Johnson v. Zerbst, 304 U.S. 458, held that while jurisdiction of the court may be complete in the beginning, it may be lost in the course of the proceedings due to failure to complete the court - as the Sixth Amendment requires - by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void. . . .

See also Smith v. O'Grady, 312 U.S. 329; McCleary v. Hudspeth, 124 F (2d) 445; Levine v. Hudspeth, 127 F (2d) 982. Since there was undoubtedly a denial of plaintiff's rights preserved under the Fifth and Sixth Amendments, and since the Supreme Court has held that a denial of the right of counsel deprives the court of further jurisdiction to proceed, we must hold the conviction void and the dismissal based on it illegal."

Sidney Shapiro v. The United States, Ct.Cl.No. 47425
(Jan. 6 1947)

b) It is everywhere recognized that a client may dismiss his attorney at any time with or without cause and that the right of a party to change his attorney in a cause is an absolute right and a rule to that effect will be granted upon application.

The Flush, 2 Circuit, 217 F 25
Kellog v. Winchell, 51 App. D.C. 17
213 F 743
16 A.L.R. 1159
Dagget v. Dauville Corp.
148 F 2d 881
Yates v. City of Milwaukee
11 U.S. 1947, 10 Wall 497,
19 L.ed. 984
Woodbury v. Andrew Jergens Co.
61 F 2d 736 cert. denied 1933
Berensen v. Woodbury, 53 S.Ct.
659
289 U.S. 740, 77 L.ed. 1487
In re Paschel, 77 U.S. 483
10 Wall, 483, 19 L.ed. 992
Rule 7, Uniform Rules of Procedure
Military Tribunals Nuremberg.

c) A member of the firm of Foley & Carroll is now present in the United States Occupied Zone of Germany and is able, ready and willing to undertake the immediate representation of this defendant before this Tribunal.

(s) Alfried Krupp von Bohlen und Halbach