

**IN THE UNITED STATES MILITARY COMMISSION AT GUANTANAMO BAY  
NAVAL BASE, CUBA**

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<b>UNITED STATES OF AMERICA</b>	)	<b>DEFENSE MOTION</b>
	)	<b>CHALLENGING</b>
v	)	<b>STRUCTURE OF</b>
	)	<b>PANEL: REQUEST FOR</b>
<b>IBRAHIM AHMED MAHMOUD AL QOSI</b>	)	<b>TRIAL BY COURT-MARTIAL</b>

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COMES NOW THE ACCUSED, Ibrahim Ahmed Mahmoud al Qosi, by and through his detailed defense counsel, and requests the Military Commission dismiss the charge against him and refer him to a general court-martial, as the military commission currently in place is based on an archaic system in existence prior to the enactment of the Uniform Code of Military Justice (UCMJ) and will not provide Mr. al Qosi with due process and a “full and fair” trial as mandated by the President’s Military Order of 13 November 2001.<sup>1</sup>

“Due Process is that which comports with the deepest notions of what is fair and right and just.”<sup>2</sup> In other words, “[w]hether the trial be federal or state [or military], the concern of due process is with the fair administration of justice.”<sup>3</sup>

What “due process” means at a particular time and in a particular case is not subject to mathematical formulation. Rather, it is an evolving process, one that requires constant reflection on the state of human affairs. As the Supreme Court has eloquently stated:

“due process,” unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, “due process” cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, “due process” is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of

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<sup>1</sup> This motion is filed in a timely manner consistent with the Defense Notice of Motions provided on 15 September 2004.

<sup>2</sup> *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting); see also *Argersinger v. Hamlin*, 407 U.S. 25, 47 (1972) (Burger, J., concurring) (principle of due process “requires fundamental fairness in criminal trials”).

<sup>3</sup> *Mayberry v. Pennsylvania*, 400 U.S. 455, 464 (1971).

adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process. Fully aware of the enormous powers thus given to the judiciary and especially to its Supreme Court, those who founded this Nation put their trust in a judiciary truly independent -- in judges not subject to the fears or allurements of a limited tenure and by the very nature of their function detached from passing and partisan influences.<sup>4</sup>

The enactment of the UCMJ in 1950 is a clear example of the evolutionary process that Congress and members of the Armed Services Committee tackled in bringing military justice within minimum standards of "due process". In the instant case, "It is elementary that 'a fair trial in a fair tribunal is a basic requirement of due process.' A necessary component of a fair trial is an impartial judge."<sup>5</sup>

### **LEGAL ANALYSIS**

1. The UCMJ became law on 5 May 1950 and was effective on 31 May 1951, along with the Manual for Courts-Martial (MCM).<sup>6</sup> The enactment came about as the result of a complete revision of the Articles of War, in an effort to integrate the armed services and establish a unified set of rules and procedures, applicable to all members of the military establishment. Congress took great care both to define the rights of those subject to military law, and provide a complete system of review within the military system to secure those rights. The revised articles and the new code are the result of painstaking study; they reflect an effort to reform and modernize the system --from top to bottom. See *Burns v Wilson*.<sup>7</sup>

### **BACKGROUND:**

2. The trial judiciary system in the military justice arena went through a great evolutionary process to ultimately bring the system in compliance with traditional notions of due process and fairness. From the Revolutionary War through World War I, courts-martial consisted of panels of officers who decided all questions of fact, including interlocutory issues.<sup>8</sup> With the 1920 amendments to the old Articles of War, the "law member" concept was developed in trials by court-martial. Under this system, the law member, preferably a judge advocate, was an officer specially qualified to serve as a member of the court. The law member voted with the other members on the findings, sentence, and challenges, and was also authorized to rule on interlocutory matters. With

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<sup>4</sup> *Joint Anti-Fascist Refugee Comm. v McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring).

<sup>5</sup> *Weiss v United States*, 510 U.S. 163, 114 S.Ct. 752, 127 L.Ed.2d 1 (1994), at 13

<sup>6</sup> 10 U.S.C. 801-940 (1952 Ed.Supp V)

<sup>7</sup> 346 U.S. 137, 141 (1953)

<sup>8</sup> W. Winthrop, *Military Law and Precedents* 172 (2d ed. 1920 Reprint). For a generally good discussion of the history of the trial judiciary in the military justice system, see *United States v Norfleet*, 53 M.J. 262 (CAAF 2000).

the exception of certain evidentiary issues, however, the law member could be overruled by a majority of the panel.<sup>9</sup>

3. The next revision to the military justice system came about in 1948, when James Forrestal, the first Secretary of Defense of the newly created Department of Defense, appointed a committee to draft a new uniform code that would be applicable to all of the services.<sup>10</sup>

The American experience in World War II and the United States' new role as the world's primary guardian of freedom and democracy in the War's aftermath resulted in a sweeping overhaul of the Armed Forces. Principles that had governed the missions, organization, and operating procedures of the Armed Forces since the Revolutionary War were reexamined and in many cases changed or cast aside as the United States' military establishment was reformed to meet its global responsibilities. The military justice system was part of this overall revision.<sup>11</sup>

4. One of the major problems with the court-martial process under the Articles of War was the perception that the court-martial was an instrumentality and agency to express the will of the commander. The commander referred the charges, appointed the members, convened the courts, and reviewed the findings. Under this system, the commander, in selecting the law member, also had the power to, in essence, appoint a professional juror to every court-martial, thus insuring findings of guilt. He even had influence over the members and could reprimand them at his leisure if he was dissatisfied with the results.<sup>12</sup>

5. In addressing the "law member" role, the legislative committee closely studied the British system, upon which the Articles of War were largely based. Even the British recognized the need for fundamental change, and the committee ultimately adopted their recommendation. The committee determined the law member should not be a member of the court and deliberate on findings and sentence with the other members. They identified great problems with the law member, noting that this person not only ruled on interlocutory matters and instructed the court on the law, but also deliberated as a voting member on findings and sentence. Part of the concern was the fact that the law member would influence the other members.

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<sup>9</sup> *Norfleet*, at p. 4., See also *Swords and Scales: The Development of the Uniform Code of Military Justice*, William T. Generous, Jr., National University Publications, Kennikat Press, N.Y. and London, 1973.

<sup>10</sup> *Index and Legislative History of the Uniform Code of Military Justice 1950*. Preface, William S. Hein & Company, Inc., Buffalo, N.Y. 2000.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Index and Legislative History of the Uniform Code of Military Justice 1950*. Preface, William S. Hein & Company, Inc., Buffalo, N.Y. 2000, House of Representatives, Committee on Armed Services, Subcommittee No.1, Washington D.C., March 7, 1949. Statement of Professor Edmund M. Morgan, Jr., Harvard University Law School, p.606.

The law member, when he retires with the court, may make any kind of statement to them. And it has been stated – I would not say on how good authority – that frequently when he went back there why he said, ‘of course the law is this way, but you fellows don’t have to follow it’.<sup>13</sup>

6. The committee’s response to the concerns levied resulted in what is now Article 26 of the UCMJ. Under this provision, the law member was changed to law officer. The law officer was required to be a judge advocate, and certified as qualified to perform the duties required by the service Judge Advocate General. The law officer ruled on all interlocutory questions of law, and except for motions to dismiss and motions relating to an accused’s sanity, his rulings were considered final. On these other issues, the members of the court voted, and a majority would rule. Since the law officer was not considered a member of the court, he did not deliberate and vote on findings and sentence with the other members. He did, however, instruct the court on the law in the presence of all parties prior to the members’ deliberations. This new provision brought the “law officer” role more in line with a civilian judge and freed him from potential influence by the commander who convened the court.<sup>14</sup> It is also interesting to note that with regard to challenges of the members, the members of the court, not the law officer, voted on challenges by secret written ballot. Any member, including the law officer, could be challenged by a majority vote. A tie vote on a challenge disqualified the member challenged.<sup>15</sup>

7. Amendments since the enactment of the UCMJ have been made to further perfect the military justice system. In 1968, for example, the Military Justice Act brought another change to the “law officers” by designating them “military judges.” With this change, military judges brought complete independence to the table, serving substantially in the same capacity as civilian judges, instructing the court on the law and ruling on all interlocutory motions.

8. The legislative history of the UCMJ thus reflects a great deal of hard work to bring the military justice system in line with traditional notions of due process and fairness, free from undue influences of command.

We have set up a system which resembles the independent civilian court, but we have placed it within the framework of military operations. At the trial and in the review of facts the men who function as counsel, trial judge, and intermediate appellate judges will be skilled in law and in military matters. They will be independent of command

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<sup>13</sup> Ibid, p. 607.

<sup>14</sup> *Index and Legislative History of the Uniform Code of Military Justice 1950*. Preface, William S. Hein & Company, Inc., Buffalo, N.Y. 2000, Committee on Armed Services: Senate Report, p.6.

<sup>15</sup> See attached Public Law 506 – 81<sup>st</sup> Congress, Uniform Code of Military Justice, Articles 41, 51, and 52.

and subject to a supreme civilian tribunal on questions of law.<sup>16</sup>

9. In *United States v Keith*,<sup>17</sup> a case decided shortly after enactment of the UCMJ, the issue addressed before the former United States Court of Military Appeals concerned the issue of prejudicial error when the law officer met with the members of the court outside the presence of the defense counsel and the accused and gave them legal advice on various matters. The Court, finding prejudice in the law member's actions, noted,

No one who has read the legislative history of the Code can doubt the strength of the Congressional resolve to break away completely from the old procedure and insure, as far as legislatively possible, that the law officer perform in the image of a civilian judge. This policy is so clear and so fundamental to the proper functioning of the procedural reforms brought about by the Uniform Code of Military Justice that it must be strictly enforced. In the words of *United States v Berry*, (No. 69), USCMA, 2 CMR 141 (1952), This record '...discloses an inherently and generally prejudicial disregard for an important segment of the procedures deemed necessary by Congress in the establishment of a scheme of military law administration more nearly in accord with the American system of criminal justice. To condone the practice reflected in this record would be to invite subversion of what we cannot escape regarding as an overriding policy of vital import—a critical and basic norm operative in the area of military justice'.

## **ARGUMENT**

10. The government will likely argue that military commissions have jurisdiction to try Mr. al Qosi under Article 21 of the UCMJ, which provides, "The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions..." While this may be true, any established military commission must nonetheless comply with traditional notions of due process and fundamental fairness as evolved over time.

11. In establishing military commissions, the President, through his Military Order of 13 November 2001, directed that military commissions sit as the "triers of both fact and law". The commission as established appears to be in line with the "law

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<sup>16</sup> See note 12

<sup>17</sup> 4 C.M.R. 85, at 4 (USCMA 1952)

member" system, with sprinklings of the "law officer" concept interspersed. It is based on an archaic system, which has no place in a post-UCMJ world. While the Defense has no objection in theory to an established military commission, such a commission must comply with the minimum standards of due process. When such a system, as structured here, does not exist, the only recourse is trial in a system with such fundamental guarantees – a general court-martial.

### **REQUESTED RELIEF**

12. Through the enactment of the UCMJ in 1950 and subsequent amendments thereto, Congress went through great pains to bring our military justice system up to the standards applied in the civilian sector. The Defense respectfully requests the Military Commission dismiss the charge against Mr. al Qosi and refer him to a general court-martial. Trial by general court-martial will provide the appropriate forum for a "full and fair" trial as mandated by the President's Military Order with appropriate oversight by an independent judge. In the end, the traditional notions of due process and fairness, for which Congress and members of the legislative committee fought so hard to secure, will be upheld and the United States, as the world's guardian of freedom and democracy, can try Mr. al Qosi before a fair and impartial system with all of the judicial guarantees of independence and impartiality in place. The Defense hereby requests oral argument before the Military Commission on this request for trial by general court-martial.



SHARON A. SHAFFER, Lt Colonel, USAF  
Defense Counsel



BRIAN M. THOMPSON, Captain, USAF  
Assistant Defense Counsel

### **CERTIFICATE OF SERVICE**

I hereby certify that on 7 OCT 2004, I e-mailed this Request for Trial by General Court-Martial to the Presiding Officer and legal assistant to the Presiding Officer, and e-mailed a copy to the prosecutor.



SHARON A. SHAFFER, Lt Colonel, USAF  
Defense Counsel