

**In the United States Military Commission at
Guantanamo Bay Naval Base, Cuba**

UNITED STATES OF AMERICA)

v.)

IBRAHIM AHMED MAHMOUD AL QOSI)

**DEFENSE POSITION ON
PROCEDURE TO ABATE
PROCEEDINGS IN THE
ABSENCE OF A COMMISSION**

1. **Timing:** This defense position statement is filed in a timely manner, as directed by the Presiding Officer in his e-mail of 19 October 2004.

2. **Relief Sought:** The Defense has been asked to brief the Presiding Officer on the following question: “In the absence of a Commission, the members of which have been subject to voir dire and challenge on behalf of Mr. Al Qosi, what procedure should be used to abate a proceeding – given that abatement due to translation issues is a legal issue and must be decided by the Commission?”

3. **Overview:** On 19 October 2004, the Defense filed a motion to abate proceedings or dismiss the charge against Mr. al Qosi because of serious issues noted with interpretation (See Defense Motion to Abate: D-11). In response to the motion filed, the Presiding Officer, on the same day, directed the Defense to brief on the aforementioned issue.

4. **Facts:**
 - A. In the single charge of conspiracy at issue in this case, Mr. al Qosi is alleged to have conspired to commit a variety of war crimes as a member of al Qaeda in the context of and associated with armed conflict, from June 1989 to December 2001.

B. Mr. al Qosi was initially notified of the charge on or about 23 February 2004.

C. The charge was provided to defense counsel in English and to Mr. al Qosi in Arabic.

D. The Arabic translation of the charge sheet fell far below the minimum standard in both content accuracy and formal correctness and “was translated by someone whose knowledge of Arabic was far below native knowledge, let alone scholarly knowledge.”¹

E. In fact, at least 69 incorrect and inappropriate translations, misquotations, and omissions were found.²

F. On 23 March 2004, the Defense received the first batch of discovery, Bates stamps 0001-118.

G. Upon examination of the discovery materials, it became readily apparent to Mr. Yahya that the material “was produced through a process that, in at least some of its steps, involved individuals whose knowledge of Arabic was so deficient as to compromise the integrity of the information.”³

H. On 27 August 2004, an initial hearing in Mr. al Qosi’s case was convened at Guantanamo Bay Naval Base, Cuba (GTMO).

I. For this hearing, simultaneous interpretation was provided by three court interpreters, two of whom were supposedly certified.

J. The third interpreter was not certified and had no experience in simultaneous interpreting.

¹ See Attachment A to D-11, a summary provided by Mr. Fuad M. Yahya, contract linguist for the Office of the Chief Defense Counsel, assigned to the al Qosi defense team.

² *Id.*

³ *Id.*, at page 8 of summary.

K. During the hearing, everyone in the courtroom was able to hear statements made by counsel, the Presiding Officer, and the other commission members.

L. Additionally, the Arabic spoken by Mr. al Qosi could be heard, as could the Arabic to English translation by the court interpreters.

M. Unfortunately, the English to Arabic interpretation provided by the court interpreters to Mr. al Qosi was not heard in open court and, based upon information and belief, was not recorded in any fashion.

N. In fact, the only people able to hear the English to Arabic interpretation were Mr. al Qosi and Mr. Yahya, both of whom were wearing headsets.

O. As evidenced from the observations of representatives from Human Rights Watch and the summary from Mr. Yahya, the August hearings suffered into a complete breakdown of communication and missed and lost translation.

P. According to Mr. Yahya, "It was only during the hearing of Mr. Al-Qosi that I had access to a headset, and therefore became fully aware of the magnitude of the problem with English-to-Arabic interpreting. As the hearing started, I followed the English script while listening to the interpreted proceedings through the headset. I observed the following:

a. No standard was being followed with respect to the choice of dialect.

The interpreter mostly used colloquial Egyptian, but switched to modern standard Arabic at will. Except in the case of addressing small children or unschooled individuals, I am not aware of any situation when a colloquial form of Arabic is used in providing formal court interpretation services.

b. The interpreting tempo was conspicuously inadequate for the simultaneous mode. This became obvious to all every time the Presiding Officer reminded speakers to slow down to help the interpreter catch up. What was not known to all, and what I could clearly observe, was that, to catch up, the interpreter had to **skip over sentences any time he fell behind** [emphasis added].

c. In the end, the service provided came to a nearly complete breakdown. In the beginning, I started taking notes about individual terms that were inadequately rendered. These were mostly legal terms, such as “review exhibit,” “protective order,” “findings,” “voir dire,” “brief,” etc. Some of the terms were specific to the Military Commission process. For instance “Appointing Authority” was rendered “Appointing Committee.” Other terms were military jargon, such as military ranks. I hastened to the conclusion that the quality of the interpretation was at the level known in the translation/interpreting industry as “Swiss cheese,” which means “full of holes.” However, as the hearing progressed, the interpretation deteriorated further. Individual errors and lacunae were beside the point at this stage, as the interpretation became almost totally incoherent. At the point when the Presiding Officer and you were discussing the issues of lack of resources and the conflict arising from your reassignment, the “Swiss cheese” analogy did not fit anymore. It was more like “shredded cheese,” I thought. I stopped taking notes, because it was pointless.⁴

Q. One of the most disturbing points observed, notes Mr. Yahya, was the fact that there was a complete absence of any effort from anyone in the Appointing Authority’s office to create a multi-lingual glossary of commission and/or legal terms (a point which is stressed by other linguists as a must in any court proceeding in which interpretation is required).⁵

5. Legal Resources:

Black’s Law Dictionary: Black’s Law Dictionary defines abatement as, “The act of eliminating or nullifying; the suspension or defeat of a pending action for a reason unrelated to the merits of the claim.”⁶ The term “abatement” is oftentimes used synonymously for a “stay of proceedings”; however, the two are distinguishable. “When

⁴ *Id.*, at page 10.

⁵ *Id.*, at page 11.

⁶ Black’s Law Dictionary, Seventh Edition, Bryan A. Garner, Editor in Chief, St. Paul, Minnesota (1999)

grounds for abatement of an action exist, the abatement of the action is a matter of right, but a stay is granted in the court's discretion."⁷

"Commission Law": In a recent decision on challenges for cause in the Hamdan and Hicks cases, the Appointing Authority noted, "The Presiding Officer must conduct the proceedings with independent and impartial guidance and direction in a trial-judge-like manner. At the same time, the Presiding Officer must ensure that the other non-attorney members of the commission fully exercise their responsibilities to have an equal vote in all questions of law and fact."⁸ While the military commission instructions (MCIs) provide no guidance on abatement procedures, the concept is recognized in MCI 8, dated 31 August 2004. According to paragraph 3A(3), concerning challenges of commission members for good cause, "While awaiting the Appointing Authority's decision on such matter, the Presiding Officer may elect either to hold proceedings in abeyance or to continue."⁹

ARGUMENT

The question posed by the Presiding Officer is an example of yet another fundamental flaw in the military commission process currently in place. While the commission as a whole must decide all questions of law and fact, how is this possible when issues such as the defense motion to abate proceedings are at stake and must be resolved prior to any further proceedings taking place? The bottom line is that without adequate measures in place for qualified simultaneous court interpretation, Mr. al Qosi's fundamental right to confront the witnesses against him is meaningless if he cannot

⁷ *Id.*, citing 1 Am. Jur. 2d, *Abatement, Survival, and Revival* sect. 3 (1994)

⁸ Appointing Authority Decision on Challenges for Cause, Decision No. 2004-001, October 19, 2004

⁹ Military Commission Instruction #8, para. 3A(3), dated August 31, 2004

understand their testimony. Proper interpretation of all that takes place in the commission hearings is critical and vital to the defense and is absolutely necessary to ensure a “full and fair” trial as mandated by the President’s Military Order of 13 November, 2001. The ramifications of incompetent interpretation are of such a constitutional dimension that Mr. al Qosi is entitled to abatement as a matter of right. Certainly, the concept of abatement is not foreign to the military commission process, as “abeyance” has been built into MCI #8, giving the Presiding Officer the authority, pending rulings on challenges for good cause, to hold the proceedings in abeyance or continue.

CONCLUSION

The Defense takes no position on what procedure should be used to abate a proceeding in the absence of a commission. As we see it, the Commission is faced with two options. The first option would be to acknowledge that there are such inherent, fundamental flaws in the current military commission system that cannot be repaired to provide for a “full and fair” trial and opt for a general court-martial, with its’ over fifty years of military legal jurisprudence and traditional notions of due process and fairness, for which Congress and members of the legislative committee fought so hard to secure. This option would provide for a military judge, who would have the power to abate proceedings when issues of such a constitutional dimension, as the one presented in the defense motion to abate, are at stake.

The second option would be to continue with the pretense that the Uniform Code of Military Justice (to include the Rules for Courts-Martial) is a completely alien concept to the military commission process, and continue to make up rules and procedures “on

the fly.” This option only serves to further demonstrate the inherent problems in the military commission process.

The Defense has, in a pending motion before the Commission, and continues to advocate that the only answer to provide for a “full and fair” trial for Mr. al Qosi is to refer him to a general court-martial. This will alleviate the frustrating and continual exercise in having to make up rules and procedures “on the fly” when fundamental flaws in the commission system are discovered. The question posed by the Presiding Officer is yet another example of the fundamental flaws noted in the system currently in place. The Presiding Officer may very well take a leap of faith and determine that he has the “implied power” to abate, as he has been given that authority under MCI #8. Whatever the result, Mr. al Qosi’s ability to participate in his own defense, confront the witnesses against him, and receive a “full and fair” trial is so inextricably tied to the necessity of competent, in-court interpreters, that until adequate measures are put into place to provide for appropriate simultaneous, in-court interpretation, he is entitled to abatement as a matter of right.

6. **Attachments:** None

7. **Oral Argument:** Not applicable

8. **Legal Authority:**

Black’s Law Dictionary, Seventh Edition, Bryan A. Garner, Editor in Chief, St. Paul, Minnesota (1999)
Appointing Authority Decision on Challenges for Cause, Decision No. 2004-001, October 19, 2004
Military Commission Instruction #8, para. 3A(3), dated August 31, 2004

9. Witnesses: Not applicable



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CERTIFICATE OF SERVICE

I hereby certify that on 25 OCT 2004, I e-mailed this Defense position on the procedure for abatement in the absence of a commission to the Presiding Officer and legal assistant to the Presiding Officer. A copy was also e-mailed to the prosecutor.



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