

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

UNITED STATES OF AMERICA)	
)	DEFENSE MOTION TO DISMISS:
v.)	LACK OF SUBJECT-MATTER
)	JURISDICTION
IBRAHIM AHMED MAHMOUD AL QOSI)	[Commission Improperly Constituted]

1. **Timing:** This motion is filed in a timely manner, as the Defense gave written notice of its intent to file the same on 15 September 2004.

2. **Relief Sought:** The Defense requests that the Commission dismiss the charge against Mr. al Qosi for lack of subject-matter jurisdiction.

Article I of the United States Constitution leaves to Congress the power to authorize criminal courts such as this Commission. Similarly, international law requires a criminal court such as this Commission to be “established by law.” Congress has not established this Commission by law, and thus this Commission does not have the jurisdiction (the power) to try Mr. al Qosi. The Commission should recognize this and dismiss the charge against Mr. al Qosi.

3. **Facts:**

A. On 18 September 2001, after the terrible attacks of 11 September 2001, Congress authorized the President to:

use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.¹

B. Soon thereafter, the President issued an Executive Order allowing indefinite detention of individuals suspected of being members of, or having some connection with, the organization known as al Qaeda.²

C. Through this Executive Order, the President (through the Secretary of Defense) created Military Commissions. The President found the power to create this Commission

¹ Joint Resolution 12, Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001).

² Presidents Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2002)(hereinafter “PMO, 13 Nov 01”).

through two acts of Congress: (1) the 18 September 2001 Authorization of Force Joint Resolution; and (2) two Articles of the Uniform Code of Military Justice—18 U.S.C. §§821, 836.³

D. Mr. al Qosi, who is not and has never been a member of al Qaeda, was detained in Pakistan in December 2001 and shortly thereafter transferred to the control of United States' authorities.

E. Since then, under the Executive Order, Mr. al Qosi has remained in detention at Guantanamo Bay, Cuba.

F. On 3 July 2003, the President designated Mr. al Qosi for trial in this Commission.

G. On 28 June 2004, the Government referred a charge of conspiracy against Mr. al Qosi. The Government has charged that, from 1989 to 2001, Mr. al Qosi was a member of the organization known as "al Qaida," and that during that period of time conspired with others to engage in illegal activities, including "terrorism," allegedly "in the context of and associated with armed conflict."

4. Legal Analysis:

SOURCES OF LAW

The United States Constitution, the Uniform Code of Military Justice, international treaties and agreements, and customary international law, all bind this Commission as it decides issues of law. Rather than distinct from these sources of law, "Commission Law" is a subset (or amalgamation) of all of them. The Defense has prepared a "Memorandum of Points & Authorities," (attached) that in specific detail provides the legal reasoning why each of those sources of law bind this Commission and why the Commission need reference them in order to ensure a "full and fair trial" in this matter. With that Memorandum as a background, we turn to the specific issue presented here.

LAW – SPECIFIC PRINCIPLES

Militarization of Criminal Law: The United States has developed and long maintained a strong and deeply rooted tradition against military encroachment into civilian law enforcement.⁴ It was the widespread use of British soldiers to aid civil authorities in enforcing the law in the Colonies that was one of the major areas of confrontation with

³ PMO, 13 Nov. 01, preamble.

⁴ See *Duncan v. Kahanamoku*, 327 U.S. 304, 320 (1946) ("People of many ages and countries have feared and unflinchingly opposed the kind of subordination of executive, legislative and judicial authorities to complete military rule which, according to the Government, Congress has authorized here. In this country that fear has become part of our cultural and political institutions.").

the Crown.⁵ During the debate over ratification of the Constitution, The Federalist assured Americans that the military would never be used against the American people.⁶

In 1878, Congress enacted the Posse Comitatus Act to guard against this potential.⁷ The Act's primary purpose was to forbid military personnel from executing laws or having any direct involvement in civilian law enforcement activities. It now states:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

The courts have likewise long guarded against the encroachment of the military into spheres of civilian influence. In *Laird v. Tatum*,⁸ the Supreme Court discussed

a traditional and strong resistance of Americans to any military intrusion into civilian affairs. That tradition has deep roots in our history and found early expression, for example, in the Third Amendment's explicit prohibition against quartering soldiers in private homes without consent and in the constitutional provisions for civilian control of the military.

Similarly, the court in *Bissonette v. Haig*⁹ noted:

Civilian rule is basic to our system of government. The use of military forces to seize civilians can expose civilian government to the threat of military rule and the suspension of constitutional liberties. On a lesser scale, military enforcement of the civil law leaves the protection of vital Fourth and Fifth Amendment rights in the hands of persons who are not trained to uphold these rights. It may also chill the exercise of fundamental rights, such as the rights to speak freely and to vote, and create the atmosphere of fear and hostility which exists in territories occupied by enemy forces.

The problems with allowing the military to creep into those areas traditionally reserved for civilian law enforcement are inherent in the structure and purpose of the military itself.¹⁰

⁵ See Meeks, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 MIL. L. REV. 83, 86 (1975) ("The Declaration of Independence specifically enumerated the Colonists' objections to military interference with their lives.").

⁶ THE FEDERALIST No. 29 (Alexander Hamilton) ("If the federal government can command the aid of the militia in those emergencies which call for the military arm in support of the civil magistrate, it can the better dispense with the employment of a different kind of force. If it cannot avail itself of the former, it will be obliged to recur to the latter. To render an army unnecessary will be a more certain method of preventing its existence than a thousand prohibitions upon paper.").

⁷ See Army Appropriations Act, ch. 263, 15, 20 Stat. 145, 152 (1878) (codified as amended at 18 U.S.C. § 1385 (2000)).

⁸ 408 U.S. 1, 15 (1972).

⁹ 776 F. 2d 1384, 1387 (8th Cir. 1985), *aff'd on reh'g*, 788 F.2d 812 (8th Cir. 1986), *aff'd*, 485 U.S. 264 (1988).

Because military personnel are trained to fight wars, not to enforce civil and criminal laws, law enforcement concepts such as “probable cause,” “reasonable suspicion,” and “due process” are alien to such personnel.¹¹ Command and control networks developed for military offensives are not easily assimilated into civilian prosecutions against criminals.¹² The military’s “rules of engagement” are characterized by an inherent presumption of guilt (i.e., identification as an enemy). Victory is the military’s primary goal, to the near exclusion of all others.¹³ In the civilian criminal justice system, the means -- the methods whereby our constitutional liberties are protected -- receive at least as high a consideration as the end -- the conviction.¹⁴ Although the nature of the military’s mission has changed dramatically since colonial days, the framers’ fear that the military’s focus and training render it ill equipped to respect individual civil liberties in the domestic context remains valid.¹⁵

For essentially the same reasons, our courts have long held that the “jurisdiction” (the legal ability to consider a particular matter) of military tribunals is strictly limited to that which is expressly permitted. As a plurality of the Supreme Court held in *Reid v. Covert*:¹⁶

the jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language in Art. 1, § 8, and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law. Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections.

¹⁰ John P. Coffey, *The Navy’s Role in Interdicting Narcotics Traffic: War on Drugs or Ambush on the Constitution?* 75 Geo. L.J. 1947, 1960 (1987).

¹¹ See *United States v. McArthur*, 419 F. Supp. 186, 193-94 (D.N.D.) (“It is the nature of their primary mission that military personnel must be trained to operate under circumstances where the protection of constitutional freedoms cannot receive the consideration needed in order to assure their preservation.”), *aff’d sub nom. United States v. Caspar*, 541 F.2d 1275 (8th Cir. 1976), *cert. denied*, 430 U.S. 970 (1977).

¹² See H.R. REP. NO. 71, 97th Cong., 1st Sess. 11, *reprinted in* 1981 U.S. CODE CONG. & ADMIN. NEWS 1781, 1793-94 (expressing “concern about the potential for conflict” between civilian and military control of law enforcement operations).

¹³ See L.A. Times, Oct. 1, 1986, § 1, at 15, col. 4 (“‘We shoot people and take no prisoners,’ one military officer said, drawing an exaggerated picture of the distinction [between soldiers and police officers].”).

¹⁴ See *Elkins v. United States*, 364 U.S. 206, 217 (1960) (exclusionary rule compels state officers to respect fourth amendment rights by removing incentive to disregard them).

¹⁵ See H.R. REP. NO. 71, 97th Cong., 1st Sess. 19, *reprinted in* 1981 U.S. CODE CONG. & ADMIN. NEWS 1781, 1800 (statement of Rep. Conyers) (“principle that the military should not be involved in routine matters of civilian law enforcement remains as valid today as it was when the Constitution was drafted”); N.Y. Times, Aug. 27, 1986, at B6, col. 1 (relating politicians’ fears that involving military in new wave of anti-drug fervor could trample civil liberties).

¹⁶ 354 U.S. 1, 21 (1957).

Thus, every attempt to erode the military/civilian distinction in law enforcement must be carefully considered. From time to time, the Congress has done so and has crafted exceptions from the Posse Comitatus Act when circumstances so require.¹⁷ But it does so expressly, by statutory change, and it does so only after the cauldron of the legislative process. That democratic process ensures that there is a full debate, consideration of different opinions and perspectives, time for reflection, and reaching of consensus. There has been no similar process in the setting up of this Commission.

Subject-Matter Jurisdiction: The question is not whether the United States Government has the power to prosecute Mr. al Qosi for crimes it believes he committed. It does. The question is whether these military commissions are legally constituted—whether it has the authorization (the power, the jurisdiction) to so try Mr. al Qosi. It does not. While the Government may try Mr. al Qosi in “regularly constituted courts” (*e.g.* courts-martial, federal district court), it may not try him in this Commission.

Under the Constitution, each branch of the Government has different responsibilities. Under this separation-of-powers concept, one branch is prohibited from interfering with the responsibilities given to another branch. Article I of the United States Constitution vests in Congress the exclusive power to set up courts inferior to the Supreme Court.¹⁸ Congress has not set up these military commissions with any express statutory authorization. Thus, the Executive branch has violated the principles of separation of powers by interfering (by setting up this Commission) with the responsibilities of the Legislative Branch.

The President claims power to do so (establish these military tribunals) through two acts of Congress: (1) the 18 September 2004 Authorization of Force Joint Resolution; and (2) two Articles of the Uniform Code of Military Justice—18 U.S.C. §§821, 836.¹⁹ Essentially, the Government argues that the President has not violated the principles of separation of powers; rather, the President was acting with legislative blessing. This is incorrect.

Joint Resolution: The Authorization of Force Joint Resolution does not contemplate military commissions. Nothing in the text or scant legislative history gives even a hint that the Congress intended that it provide a legal basis for empanelling military commissions. Rather, the text of the Resolution itself expresses that the intent was to give the President authorization to use force in compliance with the War Powers Act [WPA]—the WPA requiring periodic Congressional approval of the use of military power in absence of a declaration of war: “Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute

¹⁷ See Coffey, *supra* note 11.

¹⁸ U.S. Const. Article I, section 8 (“The Congress shall have the power ... to constitute tribunals inferior to the Supreme Court.”)

¹⁹ PMO, 13 Nov. 01, preamble.

specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.”²⁰ Certainly, nothing in the WPA speaks of military commissions.

When the United States Supreme Court interpreted the Resolution in *Hamdi v. Rumsfeld*,²¹ it merely found that detention of “enemy combatants” was a so “fundamental and accepted incident to war” that Congress must have considered that as part of the all-necessary-and-appropriate-force language of the Resolution. But that “detention” was not considered broad enough to encompass these military commissions: the object of “detention” was “to prevent a combatant’s return to the battlefield,” for a period of time until he is “exchanged, repatriated, or otherwise released.”²²

Thus, nothing expressly in the Joint Resolution, or implicitly from the power it gives the President, is a congressional exercise under Article I, section 8. The Joint Resolution thus does not authorize this Commission.

UCMJ: Neither Article 21 nor Article 36, explicitly or implicitly, provide Congressional authorization for empanelling these Commissions. Article 21 is merely negative, providing that the jurisdiction of courts-martial does not deprive a military commission of jurisdiction over offenders or offenses that it, “by statute or by the law of war,” may otherwise have. And Article 36 (as discussed in the “Memorandum of Points & Authorities” that is attached), rather than establishing requirements for the appointment, composition, jurisdiction or procedure of military commissions, instead delegates to the President the ability to define procedures for military commissions—procedures that “may not be contrary or inconsistent with this chapter.”

In fact, the only legislation Congress has enacted relating to the subject-matter jurisdiction of military commissions involves three articles of the UCMJ—Article 49 (contempt), Article 104 (aiding the enemy), Article 106 (spying).²³ But these statutes do not authorize commissions—they merely allow otherwise properly created military commissions to try these offenses (as well as offenses under the “law of war”). They are conclusory—they give power to a military commission that is already congressionally authorized. There is no such authorization here.

²⁰ Joint Resolution 12, Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001). Under section 4(a) of the WPA, “[i]n the absence of a declaration of war, in any case in which United States Armed Forces are introduced ... into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;” the President must submit a report to Congress justifying the expenditure of funds for the “hostilities.” Under section 5 of the WPA, “[w]ithin sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States.”

²¹ ___ U.S. ___, 124 S.Ct. 2633 (2004).

²² 124 S.Ct. at 2460.

²³ See also Article 47 (refusal to appear or testify). This Article relates to military commissions, but gives the power to prosecute for violations to the United States Attorney General.

The other Articles of the UCMJ that reference “military commissions” are likewise conclusory—they also assume a military commission that is already congressionally authorized. These Articles include provisions authorizing convening authorities to assign court reporters and interpreters to military commissions, permit commissions to receive certain sworn testimony given before courts of inquiry, and direct military lawyers to revise and record the proceedings.²⁴

Thus, nothing in the Joint Authorization or the cited Articles of the UCMJ indicates congressional intent to erode the military/civilian divide in law enforcement and prosecution. This Commission is not the result of a legislative process; there has been no congressional debate, no reflection, no consideration of views, and no consensus. Congress never made a decision to cede the jurisdiction of federal district courts (criminal courts) to the military to allow the prosecution of the Guantanamo detainees. This Commission lacks the power (the jurisdiction) under Article I, section 8 to proceed.

International Law: But this is not simply a matter of the absence of congressional paperwork. To be in compliance with international law, Mr. al Qosi can only be tried by a “regularly constituted court,” or a “tribunal established by law.” This is the requirement of the International Covenant on Civil and Political Rights,²⁵ Common Article III to the Geneva Conventions,²⁶ and Article 75(4) of Protocol I. All of these apply through the Supremacy Clause of the United States Constitution, and especially as to Common Article III, provide a minimum standard to be followed.²⁷

Courts-martial and federal district courts are “regularly constituted courts” or “tribunals established by law.” This is so because Congress has set them up through detailed legislation that was the result of a lengthy legislative process—legislation that provides for their funding, organization, rules and procedures, and legislation that limits the discretion of the executive to mere prosecution (rather than “judge, jury and executioner” as with this Commission).

This Commission is not a “regularly constituted court” or “tribunal established by law.” In fact, the same issue has already been decided internationally and that decision gives this Commission the framework to address the international component of the subject-matter jurisdiction question. The exact phrase – “established by law” – appears in the European Convention on Human Rights and the European Court of Human Rights has

²⁴ 10 U.S.C. §§828, 847-48, 850, 3037, 8037.

²⁵ Article 14.1 (“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”).

²⁶ Article 3, § 1(d) (“To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever ... the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people.”).

²⁷ See Memorandum of Points & Authorities [Applicable law], Attachment A, and Defense Memorandum of Points and Authorities on International Humanitarian and Human Rights Law (Attachment B), for discussion of applicable law.

interpreted it. The court found that the phrase was to guard against excessive executive discretion:

According to the case-law, the object of the term “established by law” ... is to ensure “that the judicial organization in a democratic society [does] not depend on the discretion of the Executive, but that it [is] regulated by law emanating from [the Legislature].”²⁸

The court further held that, to be “established by law,” the legislation establishing the tribunal must be comprehensive in scope: while the Legislature need not “regulate each and every detail” of the tribunal, it must set forth “the matters coming within the jurisdiction of [the] certain categories of courts,” and “establish[] at least the organizational framework for the judicial organization.”²⁹

Here, Congress has not passed any legislation providing any detail as to the scope of this Commission (except, perhaps, those discussed above). Nor has it passed any legislation establishing any organizational framework for this Commission. Rather, all matter of jurisdiction and organization are being created by the Executive. The PMO creates this Commission under section 4(a) and then delegates all power to the Secretary of Defense (another Executive branch official) to issue orders and regulations to do just what the legislature is supposed to do under international law – set up this Commission.³⁰

That is not what international law, and hence the Constitution, requires out of criminal tribunals. This Commission is not a “regularly constituted court” or “tribunal established by law,” and thus lacks jurisdiction to try Mr. al Qosi.

CONCLUSION

The Defense requests that the Commission dismiss the charge against Mr. al Qosi for lack of subject-matter jurisdiction.

5. Attachments:

- (A) Memorandum of Points & Authorities, Applicable Law
- (B) Defense Memorandum of Points and Authorities on International Humanitarian and Human Rights Law

²⁸ *Coeme and Others v. Belgium*, App. Nos. 00032492/96 et al., Eur.Ct.H.Rts., Judgment of 22 June 2000, ¶98, quoting *Zand v. Austria*, App. No. 7360/76, Eur.Comm’n H.Rts., Commission Report of 12 October 1978, DECISIONS AND REPORTS (DR) 15, pp. 70 and 80, available at <http://www.worldlii.org/eu/cases/ECHR/2000/249.html>.

²⁹ *Zane*, at ¶¶66, 68-69.

³⁰ PMO, 13 Nov 01, §4(b),(c).

6. Oral Argument:

The Defense hereby requests oral argument before the Military Commission on this motion. Oral argument is necessary under the President's Military Order of 13 November 2001 to provide for a "full and fair" trial.

7. Legal Authority:

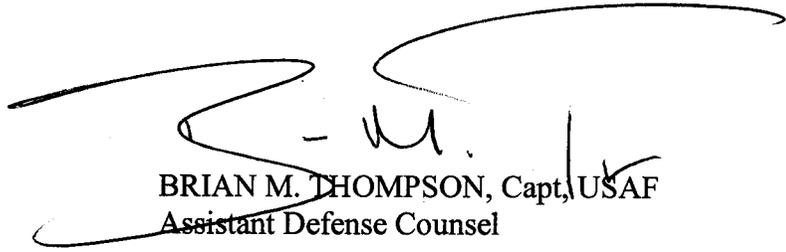
Joint Resolution 12, Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001).
Presidents Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2002)(hereinafter "PMO, 13 Nov 01").
Duncan v. Kahanamoku, 327 U.S. 304, 320 (1946)
Meeks, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 MIL. L. REV. 83, 86 (1975)
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408 U.S. 1, 15 (1972).
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John P. Coffey, *The Navy's Role in Interdicting Narcotics Traffic: War on Drugs or Ambush on the Constitution?* 75 Geo. L.J. 1947, 1960 (1987).
United States v. McArthur, 419 F. Supp. 186, 193-94 (D.N.D.)
H.R. REP. NO. 71, 97th Cong., 1st Sess. 11, *reprinted in* 1981 U.S. CODE CONG. & ADMIN. NEWS 1781, 1793-94
L.A. Times, Oct. 1, 1986, § 1, at 15, col. 4
Elkins v. United States, 364 U.S. 206, 217 (1960)
H.R. REP. NO. 71, 97th Cong., 1st Sess. 19, *reprinted in* 1981 U.S. CODE CONG. & ADMIN. NEWS 1781, 1800 (statement of Rep. Conyers)
N.Y. Times, Aug. 27, 1986, at B6, col. 1
354 U.S. 1, 21 (1957).
U.S. Const. Article I, section 8

8. Witnesses:

- a. Any witnesses that might be determined as necessary after the Defense receives and reviews the government's response.
- b. Any witness the commission desires to summon to testify on the matters herein.



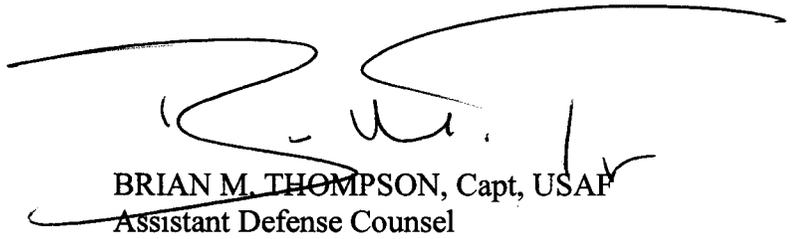
SHARON A. SHAFFER, Lt Col, USAF
Defense Counsel



BRIAN M. THOMPSON, Capt, USAF
Assistant Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on 19 Oct 2004, I sent this Defense Motion to Dismiss to the Presiding Officer, the legal assistant to the Presiding Officer, and the prosecutor via e-mail.



BRIAN M. THOMPSON, Capt, USAF
Assistant Defense Counsel

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

UNITED STATES OF AMERICA

v

IBRAHIM AHMED MAHMOUD AL QOSI

**DEFENSE MEMORANDUM
OF POINTS & AUTHORITIES
[APPLICABLE LAW]**

The basic legal principles that bind this Commission are varied, yet familiar—the United States Constitution, the Uniform Code of Military Justice, international treaties and international customary law. Even at a most basic level, this Commission is guided by the fundamental requirement, the basic notion, that every person charged with a crime is entitled to “due process.”

SOURCES OF LAW

1. **Commission Law:** Nascent “Commission Law” in fact already demands that the rules, procedures, and decisions of the Commissions comport with basic notions of “due process.” The President has ordered that these Military Commissions are to be run to, at a minimum, provide for “a full and fair trial.”¹ As the Supreme Court has often noted, having a right to a “full and fair trial” is the equivalent of having the right to “due process.”² The terms are essentially interchangeable.

2. **Constitutional Law:** Though “due process” is deeply rooted in American constitutional jurisprudence, its historic origins long predate the adoption of the United States Constitution. The origins of due process can be traced to England in 1215, when the king promised nobles that “no free man” would suffer restraint “except by the lawful judgment of his peers or by the law of the land.”³ The Supreme Court in fact long ago recognized that due process is not a uniquely American value.⁴

3. But due process is an American value and the United States Constitution protects every accused’s right to it. Just as the Constitution protects the “due process” rights of

¹ President’s Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terror, 3 C.F.R. 918 (2002)(hereinafter PMO, 13 Nov 01) at §4(c)(2).

² See, e.g., *Miller v. French*, 530 U.S. 327, 350 (2000).

³ Magna Carta, ch. 39, quoted in William Sharp McKechnie, *Magna Carta - A Commentary on the Great Charter of King John 375* (2d rev. ed. 1914); see *Den v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855) (linking passage to Fifth Amendment’s Due Process Clause); cf. R.H. Helmholz, *NATURAL HUMAN RIGHTS: THE PERSPECTIVE OF THE IUS COMMUNE*, 52 *Cath. U. L. Rev.* 301, 316-18 (2003) (identifying sources of human rights, including right to due process, in earlier writings of medieval canonists).

⁴ *Ingraham v. Wright*, 430 U.S. 651, 674 (1976); see also *In re Oliver*, 333 U.S. 257, 266-71 (1948) (decrying the secrecy of the English Star Chamber, the Spanish Inquisition, and the French *lettres de cachet* in affirming that due process guarantees a right to public proceedings).

those accused of crimes in the United States, it likewise protects the “due process” rights of those accused of crimes who are being held at Guantánamo Bay, Cuba. Constitutional protections extend to non-citizens as well as citizens, regardless of whether their presence in an area of United States jurisdiction was “unlawful, involuntary, or transitory.”⁵ In the Guantánamo Bay detainee cases, the United States Supreme Court recently reaffirmed this principle in holding that the detention of persons such as Mr. al Qosi implicates “due process” concerns: “Petitioner’s allegations ... unquestionably describe ‘custody in violation of the Constitution or laws or treaties of the United States.’”⁶

4. In fact, in finding this to be the law, the Supreme Court approved a century’s worth of jurisprudence by holding that “the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic.”⁷ Though the Court held that all constitutional provisions do not automatically apply extraterritorially (outside the United States), it did establish a high standard for determining that a constitutional protection does not apply:

For *Ross* and the *Insular Cases* do stand for an important proposition, one which seems to me a wise and necessary gloss on our Constitution. The proposition is, of course, not that the Constitution “does not apply” overseas, but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place. In other words, it seems to me that the basic teaching of *Ross* and the *Insular Cases* is that there is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impracticable and anomalous.⁸

5. Essentially, therefore, before a constitutional protection can be determined not to apply to a Guantánamo Bay detainee, the Government must establish and the Commission must find that application of “conditions and considerations” render application of that “specific guarantee altogether impracticable and anomalous.”

6. While in the area of immigration the Supreme Court has permitted limitations on constitutional rights, it has never extended that permission to criminal prosecutions. The Supreme Court made this clear over one hundred years ago, in *Wong Wing v. United States*.⁹ There, after noting that unequal treatment in violation of the constitutional protection of the Fifth Amendment was permissible in deportation matters, the Court held that that permission ceased once the federal government attempted to impose criminal punishment: where Congress “sees fit to ... subject ... the persons of such aliens to

⁵ *Matthews v. Diaz*, 426 U.S. 67, 77 (1976).

⁶ *Rasul v. Bush*, 542 U.S. ___, 124 S.Ct. 2686, 2698 n.15 (2004).

⁷ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990)(Kennedy, J., concurring)(citing with approval in *Rasul*, 124 S.Ct. at 2698 n.15).

⁸ *Verdugo-Urquidez*, 494 U.S. at 278 (quoting *Reid v. Covert*, 354 U.S. 1, 74 (1957)(Harlan, J., concurring)).

⁹ 163 U.S. 228 (1896).

infamous punishment,” the ability to discriminate came to an end as: “even aliens shall not be held to answer for a capital or other infamous crime” without the protections afforded citizens under the Fifth Amendment.¹⁰ Since *Wong*, the Supreme Court has repeatedly reaffirmed and expanded upon the principle that the federal government may provide less than full constitutional protection to non-citizens in the immigration and foreign affairs areas, but may not punish non-citizens under different constitutional procedures.¹¹

7. Absent a governmental showing that for some reason they do not, all the constitutional protections enjoyed by those accused of crimes in the United States apply to Mr. al Qosi. These rights include, at a minimum, the prohibition against double jeopardy and self-incrimination, the right to confront witnesses, to a speedy and public trial in front of any impartial jury, notice of charges, the right to compel witnesses, and the right to effective assistance of counsel.¹² In fact, the fact that this Commission in developing rules and procedures has already codified some of these protections demonstrates that the rest should apply.

8. **International Law:** Furthermore, because the Constitution is alive in Guantánamo Bay, international treaties to which the United States is a party likewise apply. The Supremacy Clause of the United States Constitution provides that:

all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.¹³

9. There are many such treaties applicable here to which the United States is a party. These include the Geneva Conventions III and IV,¹⁴ the International Covenant on Civil and Political Rights [ICCPR], and the Convention Against Torture and Other Cruel,

¹⁰ 163 U.S. at 237-38.

¹¹ See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 694 (2001) (citing *Wong Wing* for the rule that, in the context of “punitive measures ... all persons within the territory of the United States are entitled to the protection of the Constitution”) (internal quotation and citation omitted). See also *Chan Gun v. United States*, 9 App. D.C. 290, 298 (D.C. Cir. 1896) (citing *Wong Wing* for the proposition that “[w]hen . . . the enactment goes beyond arrest and necessary detention for the purpose of deportation and undertakes also to punish the alien for his violation of the law, the judicial power will intervene and see that due provision shall have been made, to that extent, for a regular judicial trial as in all cases of crime”); *Rodriguez-Silva v. INS*, 242 F.3d 243, 247 (5th Cir. 2001) (noting that although the federal government has wide latitude to set “criteria for the naturalization of aliens or for their admission to or exclusion or removal from the United States,” it is settled that “an alien may not be punished criminally without the same process of law that would be due a citizen of the United States.”) (citing *Wong Wing*).

¹² U.S. Const., Amend. V-VI. These rights will be the subject of this, as well as many other, motions the Defense intends on filing with the Commission.

¹³ U.S. Const., Art. VI, cl. 2.

¹⁴ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3317 [Geneva III]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516 [Geneva IV].

Inhuman or Degrading Treatment or Punishment [CAT].¹⁵ Further, many international agreements to which the United States is not a party, announce principles of “customary international law” that are binding on the United States. As particularly relevant here, Article 75 of Protocol I of the Geneva Conventions¹⁶ details many fundamental trial rights to which accuseds are entitled. In fact, the United States has long recognized that this provision does announce customary international law that the United States is bound to follow.

10. Further, two pieces of executive action show that international law applies in these Commissions context. First, in an Executive Order dated 10 December 1998,¹⁷ the President specifically noted United States obligations under the ICCPR, CAT, and the Convention on the Elimination of All Forms of Racial Discrimination [CERD],¹⁸ and set United States foreign policy to fully “respect and implement” its obligations under international law. Second, the Preamble to the Rules for Courts-Martial (also an Executive Order) detail at various points the applicability of international law.¹⁹ In fact, Part I, ¶2(b)(2), expressly makes military commissions subject to international law:

Subject to any applicable rule of international law or to any regulations prescribed by the President or by other competent authority, military commissions ... shall be guided by the appropriate principles of law and rules of procedure and evidence prescribed for courts-martial.

11. The Defense concedes that there is some debate among scholars whether, as a matter of law, the provisions of all the treaties that the United States is a party to are “self-executing.” In other words, whether adoption of the treaty automatically renders the treaty provisions the “law of the land,” (self-executing) or whether the treaty provisions only become the “law of the land” when Congress incorporates them in legislation (not self-executing). The better weight of argument and authority weighs in favor of finding that all the treaties that may have some application to this matter are “self-executing” and therefore entitled to automatic application.²⁰

12. But even if the Commission were somehow to be convinced that the applicable treaties are not “self-executing,” they still must be given persuasive effect consistent with basic canons of constitutional interpretation. As a matter of constitutional interpretation, treaties (international law) should be read to be consistent with domestic law whenever possible. As Chief Justice John Marshall's classic statement in *Murray v. The Schooner Charming Betsy* notes: statutes enacted by Congress “ought never to be

¹⁵ The President signed the treaty on April 19, 1988, and the Senate gave its advice and consent to ratification with certain conditions on October 27, 1990. Pub. L. No. 103-36, 2340, 108 Stat 463 (1994).

¹⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1978, 1125 U.N.T.S. 4.

¹⁷ Implementation of Human Rights Treaties, Executive Order 13107 (dated December 10, 1998).

¹⁸ *Opened for signature* Mar. 7, 1966, 660 UNTS 195, *reprinted in* 60 AJIL 650 (1966).

¹⁹ Part I, ¶1 (“The sources of military jurisdiction include the Constitution and international law.”).

²⁰ See generally Jordan J. Paust, *Customary International Law And Human Rights Treaties Are Law Of The United States*, 20 Mich. J. Int'l L. 301 (1999).

construed to violate the law of nations if any other possible construction remains.”²¹ There is little, if any, dispute as to the validity of *Charming Betsy*.

13. Here, the President relies on the statutory authorization of the Uniform Code of Military Justice (UCMJ), particularly Articles 21 and 36, to justify empanelling this Commission.²² Therefore, should the Commission determine that the applicable treaties are not “self-executing,” and thus are not automatically the “law of the land” pursuant to the Supremacy Clause, *Charming Betsy* still requires that this purported statutory authorization—the UCMJ—be interpreted in a way that their procedures are consistent with international law. This is important, because military, statutory law—the UCMJ—applies in Commission proceedings.

14. **Military Law**: Whether based on statutory authorization or constitutional requirements, all provisions of the UCMJ are applicable to these Commissions. Article 36, cited by the President as authorization for empanelling these Commissions, states:

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commission, and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter. (emphasis added)

(b) All rules and regulations made under this article shall be uniform insofar as practicable.

15. The Court of Appeals for the Armed Forces (CAAF) has long held that the whole panoply of rules of statutory construction applies when interpreting the UCMJ.²³ In *United States v. Brinston*,²⁴ CAAF summarized these general principles in military law contexts:

- legislative intent in enacting a statute should be gleaned from the statute as a whole rather than from any of its parts
- “the entire act must be read together because no part of the act is superior to any other part”

²¹ *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). In *Charming Betsy* the Court held that the Nonintercourse Act of February 27, 1800, 2 Stat. 7, did not apply to a former resident of the United States who had moved to St. Thomas and sworn allegiance to the king of Denmark. The Court concluded that the Nonintercourse Act, which by its terms applied to persons under the protection of the United States, did not include the former resident, declaring that any other construction would depart from the customary international standards of diplomatic protection. The Court would not infer that Congress intended such a result. *Charming Betsy*, 6 U.S. (2 Cranch) at 8.

²² PMO, 13 Nov. 01; 18 U.S.C. §§821, 836.

²³ See *United States v. Brinston*, 31 M.J. 222, 226 (C.M.A. 1990).

²⁴ 31 M.J. at 226.

- “statutes in pari materia must be construed together.”²⁵

16. Here, as a matter of statutory construction, the language of Article 36 expressly provides that all provisions of the UCMJ are applicable to these Commissions. First, the plain language of Article 36 notes that it is subject to “this chapter.” Article 36 is located in a “chapter” entitled “Uniform Code of Military Justice” which comprises 145 sections—18 U.S.C. §801-946.

17. Further, statutory construction requires the Commission reads the UCMJ a “coherent whole,” being mindful that “the construction that produces the greatest harmony and the least inconsistency is that which ought to prevail.”²⁶ Such a reading here requires the Commission to follow all provisions of the UCMJ. To read Article 36 independent of the other provisions of the UCMJ would render them superfluous and the duty of the Commission is not to do that.

18. Article 36b even requires that any rules prepared by the Commission be “uniform” with all the rules and regulations issued pursuant to it. The Rules of Court-Martial (RCM) are issued pursuant to Article 36b and thus any rules of this Commission cannot by Congressional mandate materially diverge from the dictates of the RCM.

19. In any event, the Supreme Court has long ago decided that the procedural provisions of the UCMJ apply to a person in Mr. al Qosi’s position. In *In re Yamashita*,²⁷ the Court was presented with essentially the same argument: *i.e.* that “enemy combatants” were entitled to application of the procedural provisions of the Articles of War (the precursor to the UCMJ) during military commissions. The Court held that they were not, because they were not designated as persons to whom Article 2 of the Articles of War stated they applied.²⁸

20. Under the same analysis, the opposite now holds true. Now, Article 2 of the UCMJ (the successor to the same provision of the Articles of War) expressly enumerates Mr. al Qosi as a person who is subject to the Code: “persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary and which is outside the United States and is outside the Canal Zone, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.”²⁹ This is Guantánamo Bay. This is Mr. al Qosi.

²⁵ See also *FTC v. Ken Roberts Co.*, 276 F.3d 583, 589 (D.C. Cir. 2001) (“in pari material—like any canon of statutory construction—is a reflection of practical experience in the interpretation of statutes: a legislative body generally uses a particular word with a consistent meaning in a given context.”)(quoting *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972)).

²⁶ 310 F.3d at 902 (citations omitted); see also *Market Co. v. Hoffman*, 101 U.S. 112, 115-116, (1879).

²⁷ 327 U.S. 1 (1946).

²⁸ 327 U.S. at 20. Article 2 of the Articles of War then enumerated “the persons . . . subject to these articles,” who are denominated, for purposes of the Articles, as “persons subject to military law.” In general, the persons so enumerated are members of the Army and the personnel accompanying the Army. Enemy combatants are not included among them.

²⁹ 18 U.S.C. §802(12).

21. Thus, the Supreme Court has decided and statutory construction dictates that all provisions of “this chapter” (the entire UCMJ), apply in the military commission context. Any Commission ruling must comply with the UCMJ provisions, and all procedures must be “uniform,” must not be contrary and must not be inconsistent. Essentially, if the UCMJ says something can or cannot happen, then this Commission by rule or decision cannot say the opposite.

22. **Due Process/“Full and Fair Trial”**: But even if the Commission were somehow to determine that Guantánamo Bay is a dark corner of the world where the light established principle of law does not shine, all of these sources of law (the Constitution, the UCMJ, international treaties and customary international law) should still enlighten what a “full and fair trial” requires. In other words, these sources of law are, at a minimum, persuasive of what due process means today.

23. At its heart, due process protects the right to a fair trial, which is “the most fundamental of all freedoms”³⁰-- “More than an instrument of justice and more than one wheel of the Constitution, it is the lamp that shows that freedom lives.”³¹ “Due Process is that which comports with the deepest notions of what is fair and right and just.”³² 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.”³³

24. What “due process” in a general sense 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.³⁴

³⁰ *Estes v. Texas*, 381 U.S. 532, 540 (1965).

³¹ *Duncan v. Louisiana*, 391 U.S. 145, 156 n. 23 (1968) (quoting P. Devlin, TRIAL BY JURY 164 (1956) (internal quotes omitted)).

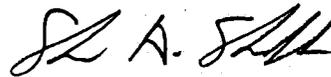
³² *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting); see also *Argersinger v. Hamlin*, 407 U.S. 25, 47 (1972) (Burger, J., concurring) (“principle of due process “requires fundamental fairness in criminal trials”).

³³ *Mayberry v. Pennsylvania*, 400 U.S. 455, 464 (1971).

³⁴ *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring).

25. When creating new legal machinery from scratch (as the Commission will be doing if it does not rely on constitutional, international and military jurisprudence), reference to international law is not only appropriate, it is historically proven. From the beginnings of the Nation, the customary "law of nations" was considered the "the laws of the United States" and our courts often turned to it for guidance.³⁵ An author of The Federalist Papers urged decision-makers in the nascent United States to pay "attention to the judgment of other nations."³⁶ The intent was to help produce decisions that would "appear to other nations as the offspring of a wise and honorable policy;" furthermore, "in doubtful cases, particularly where the national councils may be warped by some strong passion or momentary interest, the presumed or known opinion of the impartial world may be the best guide that can be followed."³⁷ If early Justices of the United States Supreme Court, confronted with novel legal questions, turned to international law with little compunction, so should this Commission.³⁸

26. **General Principles—Conclusion:** Unlike our Founding Fathers, this Commission has many more sources of law that should, at a minimum, guide its rules, procedures, and decisions. This Commission cannot simply abandon 800 years of Anglo-Saxon jurisprudence, more than 200 years of constitutional law, more than 100 years of international law, and 50 years of modern military law simply because it is expedient. To have any credibility, and to provide basic due process, these sources of law should inform the creation of Commission law.



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³⁵ *Henfield's Case*, 11 Cas. 1099, 1101 (C.C.D.Pa. 1793) (No. 6,360)

³⁶ The Federalist No. 63, at 407-08 (Alexander Hamilton or James Madison) (1st Modern Library ed., 1941).

³⁷ *Id.* at 407-08 (further asking "what has not America lost by her want of character with foreign nations; and how many errors and follies would she not have avoided, if the justice and propriety of her measures had ... been previously tried by the light in which they would probably appear to the unbiased part of mankind?").

³⁸ See Diane Marie Amann, *Guantanamo*, 42 Colum. J. Transnat'l L. 263 (2004).

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

UNITED STATES OF AMERICA

v.

IBRAHIM AHMED MAHMOUD AL QOSI

**DEFENSE MEMORANDUM
OF POINTS & AUTHORITIES
ON INTERNATIONAL
HUMANITARIAN AND HUMAN
RIGHTS LAW**

In addressing the issues raised in this Motion, the Commission must apply international humanitarian and human rights law. Under the Supremacy Clause of the Constitution, “all Treaties” are part of the “supreme Law of the Land.” U.S. Const. Art. VI, §2.

Humanitarian and human rights treaties matter to this Commission’s assessment of the legal validity of its procedures for three main reasons. First, all United States treaties, regardless of whether they are self-executing, must be considered in the interpretation of United States statutes. The Presidential Order authorizing the establishment of this and other military commissions, and on which the subsequent military orders and instructions are based, purports to exercise authority conferred by a statute, namely 10 U.S.C. §836 (2004), which authorizes the President to prescribe procedures for military commissions. Like all statutes, this one must be interpreted, if possible, in a manner consistent with international law. As Chief Justice John Marshall declared in *Murray v. Schooner Charming Betsy*, “[A]n Act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains ...” 6 U.S. (2 Cranch) 64, 118 (1804). This principle has been consistently reaffirmed by the Supreme Court. *E.g., F.Hoffman-La Roche Ltd. v. Empagran S.A.*, ___ U.S. ___, 124 S.Ct. 2359, 2366

(2004); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *McCulloch v. Sociedad Nacional de Marineros*, 370 U.S. 10, 20-21 (1963).

The *Charming Betsy* canon requires construction of Acts of Congress, wherever possible, in a manner consistent with United States treaty obligations. *Sale v. Haitian Centers Council*, 509 U.S. 155, 178 and n. 35 (1993).

Second, the *Charming Betsy* canon also requires that construction of U.S. statutes be consistent, if possible, with another prong of the “law of nations,” namely customary international law. *Hoffman-La Roche, supra*, 124 S.Ct. at 2366 (statutory construction reflecting “principles of customary international law--law that (we must assume) Congress ordinarily seeks to follow”). Customary international law consists of norms reflecting general practices of nations, accepted by them as binding norms.¹ Thus, even where the U.S. has not joined a treaty, it must be taken into account in construing U.S. statutes if it is widely recognized as a statement of customary international law.

Nothing in the statute here -- 10 U.S.C. §836 -- purports to authorize or require military commission procedures in conflict with international law. Thus the statute may -- and accordingly must -- be interpreted to authorize only procedures consistent with United States treaties and customary international law.

And third, certain treaty provisions -- such as the fair trial provisions of the Geneva Conventions -- are “self-executing.” *U.S. v. Noriega*, 808 F.Supp. 791, 799 (S.D.Fla. 1992); *U.S. v. Lindh*, 212 F.Supp. 2d 541, 553-54 and n. 20 (E.D.Va. 2002).² As the Supreme Law of the Land, they prevail over inconsistent executive procedures.

¹ Restatement (Third) of the Foreign Relations Law of the United States § 102 (2) (1987).

² The Fourth Circuit concluded in *Hamdi v. Rumsfeld*, 316 F. 3d 450, 468-69 (4th Cir. 2003), *vacated*, 124 S.Ct. 2686 (2004) that the Geneva Conventions are not self-executing. Whatever the merit of that conclusion with respect to the provision addressed in that case -- the right to a POW status hearing -- the Fourth Circuit’s analysis, which relied heavily on diplomatic avenues of relief, has no application to the procedural safeguards for the benefit of individuals in criminal trials, at issue in this case.

APPLICABLE INTERNATIONAL NORMS

While international humanitarian law guarantees rights specifically in the context of armed conflict, international human rights law applies in both war and peace.³ Both require fair treatment of persons accused of crimes, and both apply to the procedures of this commission.

Applicable humanitarian law treaties to which the United States is a party include the 1949 Geneva Convention on prisoners of war ("GC III").⁴ In addition, customary international humanitarian law is embodied in Common Article 3 of the 1949 Geneva Conventions and in the "fundamental guarantees" (art. 75) of the 1977 Geneva Protocol I ("Protocol I").⁵ Applicable human rights treaties joined by the United States include the International Covenant on Civil and Political Rights ("ICCPR")⁶ and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention").⁷

Under the 1949 Geneva Convention III ("GC III"), prisoners of war charged with crimes are guaranteed a series of fair trial rights.⁸ In addition, GC III guarantees POW's the right to be tried only by the same courts, under the same procedures, as in cases against military personnel of the detaining power.⁹ POWs in the hands of the United States are thus entitled to trial by court-martial. These fair trial guarantees of GC III are so essential that "willfully depriving a

³ See *infra* at p. 11-13.

⁴ Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, entered into force, Oct. 21, 1950, entered into force for the U.S., Feb. 2, 1956, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III].

⁵ Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, entered into force, Dec. 7, 1978, reprinted in 16 I.L.M. 1391 (1977) [hereinafter Protocol I].

⁶ G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force, Jan. 3, 1976 [hereinafter ICCPR].

⁷ G.A. Res. 39/46, annex, 39 U.N. GAOR Supp., (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force, June 26, 1987 [hereinafter Torture Convention].

⁸ GC III, *supra* note 4, arts. 99 and 103-07, guarantee the rights not to be tried or sentenced for acts not forbidden by law at the time; not to give coerced confessions; the right to defense and to assistance of a qualified advocate or counsel; speedy trial; limits on pretrial confinement; timely notice of charges; the right to call witnesses; the right to an interpreter if necessary; the right to private communications between the advocate or counsel and the accused; the right of appeal in the same manner as for members of the armed forces of the detaining power, and to announcement of judgment and sentence. GC III does not expressly provide for the rights to a fair and public hearing before an independent and impartial tribunal established by law, equality before the courts, or the presumption of innocence. These latter rights are, however, sought to be assured by GC III's additional provision giving POW's the right to trial before the same courts with the same procedures as would hear cases against military personnel of the detaining power. *Id.*, art. 102.

prisoner of war of the rights of a fair and regular trial prescribed in this Convention” is deemed a “grave breach,” which makes the persons responsible subject to criminal punishment.¹⁰

Mr. Al Qosi is entitled to be treated as a POW under GC III, because so long as there is “any doubt,” he is entitled to be treated as a POW “until such time as [his] status has been determined by a competent tribunal.”¹¹

Common Article 3 of the 1949 Geneva Conventions reflects customary international law. The International Court of Justice long ago ruled that there is “no doubt” that its norms “constitute a minimum yardstick” and “minimum rules” applicable in all armed conflicts.¹² These essential norms are recognized as a part of customary international law.¹³

Common Article 3’s minimum rules include a prohibition on passing sentences and carrying out executions “without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”¹⁴ In view of the subsequent inclusion of fundamental fair trial guarantees in widely ratified humanitarian and human rights law treaties, these “indispensable” judicial guarantees of Common Article 3 should now be understood to include the “fundamental guarantees” for fair trials of Protocol I and the fair trial safeguards of the ICCPR, both discussed below.¹⁵

The “fundamental guarantees” set out in Article 75 of Protocol I are even more protective of fair trials than the 1949 Geneva Conventions. These fundamental guarantees largely parallel

⁹ *Id.*, art. 102.

¹⁰ *Id.*, art. 130.

¹¹ *Id.* art. 5.

¹² *Military and Paramilitary Activities in and Against Nicaragua*, Merits, Judgment, I.C.J. REPORTS 1986, p. 14, para. 218, 219, 220. This principle is also reflected in U.S. domestic law, which makes violations of Common Article 3 subject to criminal prosecution. 18 U.S.C. § 2441 (c)(3) (2004).

¹³ George Aldrich, *Symposium: The Hague Peace Conferences: The Laws of War on Land*, 94 AM. J. INT’L L. 42, 60 (2000).

¹⁴ GC III, *supra* note 4, art. 3 (1)(d); GC IV, *supra* note 5, art. 3(1)(d).

¹⁵ The “fundamental guarantees” of Protocol I, *supra* note 6, art. 75, give “valuable indications to help explain the terms of [Common] Article 3 on guarantees.” CLAUDE PILLOUD ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, art. 75.4, para. 3084 (Yves Sandoz et al. eds., International Committee of the Red Cross, 1987) [hereinafter ICRC Commentary to Protocol I].

the fair trial safeguards of ICCPR Article 14.¹⁶ They apply to all persons who are within the power of a state participant in an armed conflict and who do not benefit from more favorable treatment under the Geneva Conventions or Protocol I.¹⁷ This includes Mr. Al Qosi.

The fundamental guarantees of Article 75 of Protocol I reflect customary international law. More than 160 states are parties to Protocol I. Although the United States has not ratified Protocol I, it has signed the treaty, and its stated reasons for not ratifying did not include objections to the fair trial guarantees of Article 75.¹⁸ On the contrary, U.S. government legal experts and military manuals have identified Article 75 as among those provisions of Protocol I that reflect customary international law.¹⁹ Article 75 is consistent with the fair trial standards of widely ratified treaties on both human rights (e.g., ICCPR Article 14) and humanitarian law (GC III and GC IV). Leading commentators as well as the American Bar Association agree that it reflects customary international law.²⁰

¹⁶ Whereas ICCPR Article 14, *supra* note 7, guarantees the right to a “fair and public hearing by a competent, independent and impartial tribunal established by law,” Article 75.4 of Protocol I, *supra* note 6, assures the right to trial before an “impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure . . .” It then lists essentially the same safeguards as in ICCPR Article 14.2 and 14.3. Right to counsel, though not expressly delineated, is deemed implicit in the “necessary rights and means of defence.” ICRC Commentary to Protocol I, *supra* note 23, art. 75.4(a), para. 3096.

¹⁷ Protocol I, *supra* note 6, art. 75.1.

¹⁸ See *Message from the President Transmitting Protocol II Additional to the 1949 Geneva Conventions*, 26 I.L.M. 561, 562, 564 (1987) (stating objections to Protocol I while “recogniz[ing] that certain provisions of Protocol I reflect customary international law”).

¹⁹ T. Meron, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 64-65 (1989), citing Panel, *Customary Law and Additional Protocol I to the Geneva Conventions for the Protection of War Victims: Future Directions in Light of the U.S. Decision Not to Ratify*, 81 ASIL PROC. 26, 37 (1987) (Lt. Col. B. Carnahan of the Joint Chiefs of Staff in personal capacity only); *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law*, 2 AM.U.J. INT’L.L. & POL’Y 415, 427 (1987) (M. Matheson, Deputy Legal Adviser, U.S. Dept. of State); D. Scheffer, *Remarks*, 96 ASIL PROC. 404, 406 (2002) (Ambassador Scheffer stated that “we need to understand fully that Article 75 of Protocol I is a very vibrant article that the United States government has actually said represents customary international law (even though we have not ratified Protocol I).”) Additionally, the 1997 edition of the U.S. Army, Judge Advocate General’s School, International & Operational Law Department, OPERATIONAL LAW HANDBOOK (p. 18-2) stated expressly that the U.S. views article 75 of Protocol I as “customary international law.” (Accessible at, <http://www.cdmha.org/toolkit/cdmha-rltk/PUBLICATIONS/oplaw-ja97.pdf>, visited June 4, 2004.) Although more recent editions do not repeat this statement, neither do they qualify or retract it.

²⁰ E.g., George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT’L L. 891, 893 (2002); Christopher Greenwood, *Protection of Peacekeepers: The Legal Regime*, 7 DUKE J. COMP. & INT’L L. 185, 190 (1996); David L. Herman, *A Dish Best Not Served at All: How Foreign Military War Crimes Suspects Lack Protection Under United States and International Law*, 172 MILITARY L. REV. 40, 81-82 (2002); American Bar Association Recommendation 10-B, adopted by the ABA House of Delegates Aug. 9, 2004 (“customary international law, including Article 75 of the 1977 Protocol I to the Geneva Conventions”).

The International Covenant on Civil and Political Rights (“ICCPR”) is a multilateral treaty to which 153²¹ countries are States Parties. The United States in 1992 became party to, and thus bound by, the ICCPR.²² Among the rights guaranteed by this treaty are the right to judicial review of the lawfulness of detentions (art. 9.4), to a catalogue of fair trial safeguards for “everyone” charged with a criminal offense (art. 14), to the treatment of prisoners with humanity and respect for their inherent dignity (art. 10.1), and to non-discrimination and equality before the law (arts. 2.1, 14.1, and 26).

Guidance in interpreting the ICCPR is provided by the Human Rights Committee (“HRC”), established under the ICCPR and “charged with implementing and interpreting the ICCPR” *United States v. Duarte-Acero*, 208 F.3d 1282, 1285 n.12 (11th Cir. 2000). HRC interpretations “are recognized as a major source for interpretation of the ICCPR.” *Maria v. McElroy*, 68 F.Supp. 2d 206, 232 (E.D.N.Y. 1999), *abrogated on other grounds*, *Restrepo v. McElroy*, 369 F.3d 627 (2d Cir. 2004).

Although ICCPR Article 4 permits “derogations” from certain rights in times of national emergency, ICCPR fair trial norms are non-derogable. As the HRC has made clear, no derogation may be made which would violate “humanitarian law or peremptory norms of international law, for instance . . . by deviating from fundamental principles of fair trial,”²³ The United States has not attempted to invoke the derogation clause with respect to the proposed trials by military commission.

²¹ See Ratification Table, Office of the U.N. High Commissioner for Human Rights (visited Sept. 28, 2004) <http://www.ohchr.org/english/countries/ratification/index.htm>.

²² 138 Cong. Rec. S4781-01 (daily ed., Apr. 2, 1992). See also S. Rep. No. 103-35, at 6-10 (1993).

²³ *General Comment No. 29 on Article 4 of the Covenant: States of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para. 11. See also *id.* at para. 15-16.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture Convention”) has 138²⁴ States Parties, including the United States. It requires States Parties to ensure “that any statement which is established to have been made as a result of torture shall not be invoked as evidence” against an accused.²⁵

* * *

Each of these sources of international law -- GC III, Common Article 3 of the 1949 Conventions and article 75 of Protocol I as customary international law, and the ICCPR and Torture Convention -- apply to these proceedings. Under the *Charming Betsy* canon, each must be applied to the interpretation of the statute, 10 U.S.C. 836, which authorizes the President to establish commission procedures. To the extent commission procedures conflict with these international norms, they exceed the President's statutory authority and are unlawful.

In applying these norms, three further principles come into play: complementarity, most favorable protection and territorial scope.

A. Complementarity

In wartime international humanitarian and human rights law are complementary, not mutually exclusive. As confirmed by the Human Rights Committee, the ICCPR continues to apply

“in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain [ICCPR] rights, more specific rules of international humanitarian law may be specially relevant for the purposes of interpretation of [ICCPR] rights, both spheres of law are complementary, not mutually exclusive.”²⁶

²⁴ See Ratification Table, *supra* n. 30.

²⁵ Although the United States attached reservations and understandings to its ratification of the Torture Convention, none sought to limit the applicability of this exclusionary rule. 136 Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990).

²⁶ *General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13 (General Comments), para. 11 [hereinafter Gen. Cmt. 31].

The International Court of Justice likewise affirms that “the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the [ICCPR].”²⁷ As noted above, the United States has not purported to derogate from its ICCPR obligations with respect to the military commissions, nor could it, since fair trial rights are non-derogable.²⁸ The Torture Convention also explicitly applies in war as in peace: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, . . . or any other public emergency, may be invoked as a justification of torture.”²⁹

In regard to fair trial rights of persons detained in connection with armed conflict, article 75 of Protocol I provides rules “additional to . . . other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict.”³⁰ The International Committee of the Red Cross (“ICRC”) Commentary to Protocol I specifies that these “other applicable rules” include ICCPR norms.³¹

B. Most Favorable Protection

Article 75.8 of Protocol I provides that Article 75 may not be construed to limit “any other more favorable provision granting greater protection, under any applicable rules of international law.” This includes greater protection resulting from “another Convention [e.g., the ICCPR and the Convention Against Torture] or from customary law.”³² This principle of the “most favourable protection” applies as well where there is doubt about whether a prisoner

²⁷ I.C.J. Advisory Op. of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. - - -, para. 106, available at http://www.icj-cij.org/icjwww/idocket/imwp/imwp_advisory_opinion/imwp_advisory_opinion_20040709.pdf. See also, *id.* at para. 105, (quoting I.C.J. Advisory Op. of 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, para. 25).

²⁸ See *supra* at p. 5.

²⁹ Torture Convention, *supra* note 8, art. 2.2.

³⁰ Protocol I, *supra*, note 6, Art. 72, referring to arts. 72-79.

³¹ ICRC Commentary to Protocol I, *supra* note 23, art. 72, para. 2927-28.

³² Protocol I, *supra* note 6, para. 3146.

qualifies as a prisoner of war, and hence benefits from the fair trial guarantees for POWs. “In case of doubt, the defendant can always invoke the most favourable provision.”³³ As a consequence, whatever his status, Mr. Al Qosi is entitled to the most favourable protection afforded by applicable international humanitarian or human rights law, be it the GC III, Protocol I, the ICCPR or the Torture Convention.

C. Territorial Scope

International humanitarian and human rights law obligations reach beyond the borders of a state’s own territory, and hence govern U.S. military commission trial procedures in Guantanamo. As the HRC has reaffirmed, States Parties are bound to ensure ICCPR rights “to all persons subject to their jurisdiction” and “to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.”³⁴ This is consistent with the HRC’s longstanding jurisprudence,³⁵ and has recently been confirmed by the International Court of Justice.³⁶

The Geneva Conventions and customary international humanitarian law likewise apply to commission trials at Guantanamo, because they govern a state’s conduct beyond its own borders, wherever the state exercises jurisdiction or effective control.³⁷ This reflects the consistent case

³³ *Id.*, para. 3142.

³⁴ Gen. Cmt. 31, *supra* note 36, para. 10.

³⁵ *Lopez Burgos*, Communication No. R.12/52, Views of 29 July 1981, para. 12.1; *Celiberti*, Communication No. R.13/56, Views of 29 July 1981, para. 10.1.

³⁶ I.C.J. Advisory Op. of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. ---, paras. 107-11, available at http://www.icj.org/icjwww/idocket/imwp/imwp_advisory_opinion/imwp_advisory_opinion_20040709.pdf.

³⁷ Extraterritorial application of the Geneva Conventions is reflected in State practice, including by the U.S. as a member of the Security Council. *E.g.*, Article 7 of the Statute of the International Criminal Tribunal for Rwanda, which has subject matter jurisdiction *inter alia* over violations of Common Article 3 of the Geneva Conventions, provides in relevant part that its “territorial jurisdiction . . . shall extend to the territory of Rwanda . . . as well as to the territory of neighboring States in respect of serious violations of international humanitarian law committed by Rwandan citizens.” *Available at* <http://www.ictt.org/ENGLISH/basicdocs/statute.html> (last visited Aug. 9, 2004).

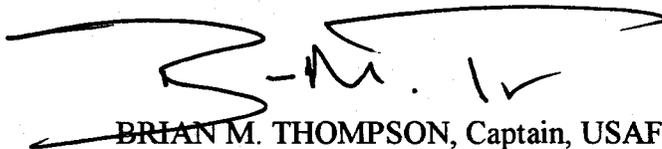
law of other human rights bodies on the territorial application of international human rights instruments.³⁸

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In sum, both international humanitarian and human rights law obligations govern the proper interpretation of the President's authority under 10 USC 836 to establish procedures for military commissions, and require that prisoners tried by military commission at Guantanamo, including Mr. Al Qosi, be given the benefit of the most favorable applicable norms.



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³⁸ *E.g., Bankovic et al. v. Belgium et al.*, Eur.Ct.H.Rts. App. No. 00052207/99, Decision of 12 Dec. 2001 (Grand Chamber), para. 71; *Loizidou v. Turkey*, App. No. 000015318/98, Judgment of 23 March 1995 (preliminary objections), para. 62 (State Party responsible under European Convention when it “exercises effective control of an area outside its national territory”); *Coard et al. v. U.S.*, Int.-Am.Comm.H.Rts., Case No. 10.951, Report No. 109/99, 29 Sept. 1999, para. 37.