

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

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| <b>UNITED STATES OF AMERICA</b>      | ) |                                           |
|                                      | ) | <b><u>DEFENSE MOTION TO SUPPRESS:</u></b> |
| vs.                                  | ) | <b>FAILURE TO RECORD</b>                  |
|                                      | ) |                                           |
| <b>IBRAHIM AHMED MAHMOUD AL QOSI</b> | ) |                                           |

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**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 suppress all statements and interview notes offered by the Government that result from an unexcused failure to electronically record the entirety of the underlying interrogations.

As technology evolves, fundamental notions of fairness, of due process and of what a “full and fair trial” requires, do likewise. Technology and law have now developed to a point where the Government’s attempt to offer statements or summaries that follow an unexcused failure to electronically record the entirety of interrogations violates Mr. al Qosi’s due process and constitutional rights.

**3. Facts:**

A. In December 2001, Mr. al Qosi was detained in Pakistan and shortly thereafter transferred to the control of United States’ authorities.

B. Since early 2002, he has been detained at Guantanamo Bay, Cuba pursuant to presidential order.<sup>1</sup>

C. From that time until he was appointed legal counsel, Mr. al Qosi underwent lengthy and numerous interrogation sessions conducted by agents of the United States Government.

D. During these sessions, Mr. al Qosi would usually be brought into a small room where he was confronted with two or more agents and an interpreter (Mr. al Qosi does not speak English and the interrogation sessions were all conducted through an interpreter).

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<sup>1</sup> See 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”).

E. In the “main” room, there would be one or two video cameras focused on the group. Though there was a one-way mirror, it was not entirely opaque—Mr. al Qosi could observe a substantial amount of video equipment in a “hidden” room, including a television monitor that displayed the view of the “main” room. From time to time, Mr. al Qosi’s interrogators told him that the sessions were being recorded.

F. In the discovery provided to date, the Defense has not received any audio or videotapes of the interrogation sessions that Mr. al Qosi underwent.

G. Neither has the Government provided any notes taken during these interrogation sessions. Rather, the only apparent record of the substance of these interrogation sessions are typed summaries, in English, that are not and do not purport to be verbatim transcriptions and which were prepared by the agents, not the interpreters.

H. Additionally, the Government has provided to the Defense similar typed summaries of interrogations of other detainees that mention Mr. al Qosi.

I. Though the Government has yet to provide notice of any intent to call these individuals as witnesses in Mr. al Qosi’s case, or to offer their typed summaries as an alternative to their live testimony, the Defense expects this may occur.<sup>2</sup>

J. During these interrogation sessions, Mr. al Qosi was subjected to severe physical and psychological coercion, which the Defense expects the Government to deny.

K. The only objective evidence—a videotape or audiotape of the sessions—does not seem to exist as the Government, though it had the means, apparently chose not to create such a record. This denies Mr. al Qosi his due process right to a “full and fair trial.”

#### **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**

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<sup>2</sup> The Defense notes that in the *Hamden* case, the Prosecutor has sought pre-admission of such summaries.

**Summary:** To protect constitutional rights, courts routinely impose “prophylactic” rules that serve as benchmarks the Government must meet to introduce certain evidence. *Miranda*, which requires law enforcement to advise a suspect of their constitutional rights before custodial questioning, is such a benchmark. Requiring the Government to record all interrogations, in their entirety, likewise serves as a benchmark the Government should have to meet before they are allowed to introduce a detainee’s inculpatory statements.

### **A. General Legal Principles**

At the core of American, military law, and international law is the right to be free from compulsory self-incrimination.<sup>3</sup> While an individual may waive this right, and respond to a government agent’s questioning, such a waiver must be “voluntarily, knowingly and intelligently” made.<sup>4</sup> “[A] heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination ....”<sup>5</sup> In *Moran v. Burbine*,<sup>6</sup> the United States Supreme Court reaffirmed this heavy burden, requiring:

First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness, both of the nature of the right to be abandoned and consequences of the decision to abandon it.<sup>7</sup>

Further, when the accused raises the issue of a confession’s voluntariness, “[t]he necessary inquiry is whether the confession is the product of an essentially free and unconstrained choice by its maker.”<sup>8</sup> If instead the “maker’s will was overborne” and his “capacity for self-determination was critically impaired,” then the use of any resulting statements offends due process.<sup>9</sup> When determining whether this is the case, whether there was “free choice,” the court must make an assessment of “the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.”<sup>10</sup>

### **B. Development of prophylactic rules**

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<sup>3</sup> See U.S. CONST. AMEND V; Article 31, Uniform Code of Military Justice; Mil.R.Evid. 301, 304.

<sup>4</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>5</sup> *Miranda*, 384 U.S. at 475.

<sup>6</sup> 475 U.S. 412, 421 (1986).

<sup>7</sup> See also *United States v. Hill*, 5 M.J. 114, 117 (C.M.A. 1978)(citing *Escobedo v. State of Illinois*, 378 U.S. 478, 490, n. 14 (1964) and *Johnson v. Zerbst*, 304 U.S. 458 (1938)).

<sup>8</sup> *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961).

<sup>9</sup> *Culombe*, 367 U.S. at 602.

<sup>10</sup> *Schneekloth v. Bustamonte*, 412 U.S. 218, 226 (1973); *United States v. Cristobal*, 293 F.3d 134, 140 (4th Cir. 2002); *United States v. Benner*, 57 M.J. 210, 214 (C.A.A.F. 2002); *United States v. Bubonics*, 45 M.J. 93, 94-95 (C.A.A.F. 1996).

As an aid in this fact-finding endeavor, the courts have developed “prophylactic” (protective) rules, and in fact such rules have become “a central and necessary feature of constitutional law.”<sup>11</sup> Essentially, “prophylactic” rules have been constitutionally enshrined to compensate for fact-finding limitations. These rules set out benchmarks against which admissibility can be measured.

Or, as Professor Klein has more eloquently explained, a “constitutional prophylactic rule” is a judicially created:

doctrinal rule or legal requirement determined by the Court as appropriate for deciding whether an explicit or “true” federal constitutional rule is applicable. It may be triggered by less than a showing that the explicit rule was violated, but provides approximately the same result as a showing that the explicit rule was violated. It is appropriate only upon two determinations: first, that simply providing relief upon a showing that the explicit right was violated is ineffective; second, that use of this rule will be more effective and involve only acceptable costs. It should be clear that, thus defined, a constitutional prophylactic rule is purely instrumental; it strives to achieve the rule and/or value inherent in that constitutional clause, and has no utility outside of that function.<sup>12</sup>

The most potent example of a “prophylactic” rule in the context of Fifth and Sixth Amendment jurisprudence is *Miranda*.<sup>13</sup> In *Miranda*, the Supreme Court announced the well-known “prophylactic” rule that

[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statements he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning.<sup>14</sup>

If the Government does not satisfy the prophylactic rule of *Miranda*, if it does not reach this benchmark, then any statements the Government obtains in the absence of *Miranda* warnings are inadmissible.<sup>15</sup>

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<sup>11</sup> David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988).

<sup>12</sup> Susan R. Klein, *The Fate Of The Pre-Dickerson Exceptions To Miranda: Identifying And Reformulating Prophylactic Rules, Safe Harbors, And Incidental Rights In Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1033 (2001).

<sup>13</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>14</sup> 384 U.S. at 444-45.

<sup>15</sup> Similarly, in *Weeks v. United States*, 232 U.S. 383 (1914), the Supreme Court fashioned the exclusionary rule to preserve and protect constitutional rights and to provide a remedy violations of such rights.

*Miranda* gives practical effect to Fifth and Sixth Amendment rights. It is also but one of the many prophylactic, yet constitutionally based, rules that abound in criminal procedure. For example, in *North Carolina v. Pearce*<sup>16</sup> the Supreme Court held that whenever a judge imposes a more severe sentence upon a defendant after a new trial, “the reasons [for] doing so must affirmatively appear [and] must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing.”<sup>17</sup> Absent this demonstration, a “presumption of vindictiveness” dictates finding of a due process violation. The Court later clarified that the *Pearce* rule was prophylactic, analogous to *Miranda*, and designed to preserve the integrity of the criminal justice system.<sup>18</sup> The prophylactic rule of *Pearce* is thus a benchmark against which a sentencing process can be measured.

Commentators have catalogued numerous other judge-made, prophylactic rules or benchmarks.<sup>19</sup> The automobile inventory search exception to the Fourth Amendment’s per se warrant requirement is one.<sup>20</sup> This prophylactic rule requires such a search to be conducted pursuant to standard police procedures; a benchmark against which the court can measure admissibility. The Supreme Court crafted the same exception, along with the same prophylactic rule, in the case of inventory searches of persons arrested.<sup>21</sup> The exclusion of an in-courtroom identification of an accused when the accused participated in a post-indictment lineup without counsel is another prophylactic rule.<sup>22</sup> *Bruton*<sup>23</sup>--prohibiting admission of one co-defendant’s confession against another co-defendant in a joint trial--is another. The presumption of incompetence of counsel whenever there is an actual conflict of interests in multiple representations is another.<sup>24</sup> *Anders*<sup>25</sup>--establishing procedures for an indigent’s right to appellate counsel--is another. *Batson*<sup>26</sup>--protecting equal protection by allowing a defendant to establish a prima facie case of discrimination based upon the Government’s use of preemptory challenge--is another of the many prophylactic rules, benchmarks, that the courts have developed to protect constitutional rights and fill the gaps where fact finding is difficult or impossible.

Similarly, in *Edwards v. Arizona*<sup>27</sup> the Supreme Court furthered the protection of *Miranda* by establishing another benchmark; *i.e.* that when a suspect asserts his right to counsel, he may not be questioned further unless he initiates the conversation.<sup>28</sup> The Court has since referred to that principle as “the bright-line, prophylactic *Edwards* rule,”<sup>29</sup> explaining that “the rule ensures that any statement is not the result of coercive

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<sup>16</sup> 395 U.S. 711 (1969).

<sup>17</sup> 395 U.S. at 726.

<sup>18</sup> See *Michigan v. Payne*, 412 U.S. 47, 53 (1973).

<sup>19</sup> See Klein, *supra* n.15.

<sup>20</sup> See *Colorado v. Bertine*, 479 U.S. 367 (1987); see also *Florida v. Wells*, 495 U.S. 1 (1990).

<sup>21</sup> See *Illinois v. LaFayette*, 462 U.S. 640 (1983).

<sup>22</sup> See *United States v. Wade*, 459 U.S. 359 (1983).

<sup>23</sup> *Bruton v. United States*, 391 U.S. 123 (1968).

<sup>24</sup> See *Cuyler v. Sullivan*, 446 U.S. 335 (1980).

<sup>25</sup> *Anders v. California*, 386 U.S. 738 (1967).

<sup>26</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986).

<sup>27</sup> 451 U.S. 477 (1981).

<sup>28</sup> 451 U.S. at 484-85.

<sup>29</sup> *Arizona v. Roberson*, 486 U.S. 675, 682 (1988).

pressures. *Edwards* conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness.”<sup>30</sup>

Military law has adopted many of these examples of judge-made, prophylactic rules or benchmarks, and created even more when necessary to protect service member’s rights. In *United States v. Mitchell*,<sup>31</sup> the Court of Appeals for the Armed Forces (CAAF) noted that Article 31 is the embodiment of the *Edwards* prophylactic rule. The Court of Military Appeals in *United States v. Franklin*<sup>32</sup> created a prophylactic rule for consideration of evidence. In *United States v. Roa*,<sup>33</sup> the Court of Military appeals considered, but declined to adopt, a prophylactic rule requiring that counsel be given an opportunity to monitor search requests.

*United States v. Care*<sup>34</sup> is an excellent example of imposing a prophylactic rule to protect a constitutional right. In *Care*, the issue was whether the accused’s waivers during a guilty plea satisfied due process in that they were voluntarily, knowingly and intelligently made. The concern was that the record did not reflect a full colloquy between the military judge and the accused regarding the rights he was waiving, the consequences of such waiver, and the factual basis for the guilty pleas. In order to protect the constitutional right (Due Process), the Court in *Care* created a prophylactic rule, a benchmark, against which future guilty plea inquiries would be measured (*i.e.* the *Care* inquiry).

While some may have argued that judge-made, prophylactic rules such as *Miranda* are not of constitutional import, the United States Supreme Court has held, on the urging of the United States Government, that they are. In *Dickerson v. United States*,<sup>35</sup> when squarely confronted with this issue, the Supreme Court upheld the constitutional validity of the protections of *Miranda*. Rather than enter the semantic fray, the *Dickerson* majority held that “*Miranda* is constitutionally based,” that *Miranda* has “constitutional underpinnings,” that *Miranda* is “a constitutional decision,” and that *Miranda* “announced a constitutional rule.”<sup>36</sup> In its recent jurisprudence, the Court has expressly recognized that prophylactic rules are necessary in other constitutional contexts, such as the constitutional right to representation.<sup>37</sup>

In fact, the United States itself, through the Department of Justice, opposes those who oppose judge-made, prophylactic rules such as *Miranda*. As the Government argued in supporting *Miranda* during *Dickerson*, “‘prophylactic’ though it may be, in protecting a defendant’s Fifth Amendment privilege against self-incrimination, *Miranda* safeguards ‘a

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<sup>30</sup> *Minnick v. Mississippi*, 498 U.S. 146, 151 (1990).

<sup>31</sup> 51 M.J. 234, 244 (C.A.A.F. 1999).

<sup>32</sup> 35 MJ 311, 317 (C.M.A. 1992); see also *United States v. Acton*, 38 M.J. 330, 334 (C.M.A. 1993).

<sup>33</sup> 24 M.J. 297 (C.M.A. 1987).

<sup>34</sup> 40 C.M.R. 247 (C.M.A. 1969).

<sup>35</sup> 530 U.S. 428 (2000).

<sup>36</sup> 530 U.S. at 440, n. 5, 432, 444.

<sup>37</sup> See *Smith v. Robbins*, 528 U.S. 259, 265, 273 (2000).

fundamental trial right.”<sup>38</sup> In detailing *Miranda*’s constitutional stature, the United States canvassed the prevalence of prophylactic rules and their uncontroverted presence in constitutional jurisprudence.<sup>39</sup> As the United States explained, “[p]rophylactic rules are now and have been for many years a feature of [the Supreme] Court’s constitutional adjudication.”<sup>40</sup>

### C. Due Process; An Evolving Process

The United States’ reliance on judge-made, prophylactic rules to safeguard “fundamental trial right[s]” is an allusion to general principles of fundamental fairness--*i.e.* due process. In fact, in *Wainwright v. Greenfield*,<sup>41</sup> the Supreme Court characterized a *Miranda* violation as fundamentally unfair and thus in violation of the Due Process Clause. “Due Process is that which comports with the deepest notions of what is fair and right and just.”<sup>42</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>43</sup> It is an evolving process, one that requires constant reflection on the state of human affairs and, here, the state of technology.

Thus, judge-made, prophylactic rules are essential to ensure this “fair administration of justice” as:

[t]he tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.<sup>44</sup>

### D. Due Process Requirement for Recording

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<sup>38</sup> United States brief supporting petition for writ of *certiorari*, *Dickerson v. United States*, No. 99-5525, (U.S. Sup. Ct. No. 99-5525) at 8 (quoting *Withrow v. Williams*, 507 U.S.685, 691 (1991)).

<sup>39</sup> *Id.* at 12 (citing *Michigan v. Jackson*, 475 U.S. 625, 636 (1986); *Michigan v. Harvey*, 494 U.S. 344 (1990); *North Carolina v. Pearce*, 395 U.S. 711 (1969); *Wasman v. United States*, 468 U.S. 559 (1984); *United States v. Goodwin*, 457 U.S. 368, 372-377 (1982); *Colten v. Kentucky*, 407 U.S. 104, 166 (1972); *Bruton v. United States*, 391 U.S. 123 (1968); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Freedman v. Maryland*, 380 U.S. 51, 58 (1965)).

<sup>40</sup> Brief for United States at 47.

<sup>41</sup> 474 U.S. 284, 289-90 (1986).

<sup>42</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>43</sup> *Mayberry v. Pennsylvania*, 400 U.S. 455, 464 (1971).

<sup>44</sup> *Weeks*, 232 U.S. at 392; *see also Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, J., concurring)(as Justice Harlan succinctly put it, “the appearance of evenhanded justice . . . is at the core of due process.”)

Due process requires the bright-line, constitutionally based, prophylactic rule that an unreasonable failure to electronically record the entirety of an interrogation violates the detainee's constitutional rights and renders any statements purportedly obtained from such interrogation inadmissible.

This rule already finds application in a variety of jurisdictions. The Supreme Court of Minnesota in *State v. Scales*<sup>45</sup> incorporated the rule under its "supervisory authority to insure the fair administration of justice," holding "that all custodial interrogation including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention."<sup>46</sup>

The Supreme Court of Alaska in *State v. Stephan*<sup>47</sup> also did so as a matter of due process. The Alaska high court held "that an unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect's right to due process, under the Alaska Constitution, and that any statement thus obtained is generally inadmissible."<sup>48</sup> In so doing, the court noted:

Such recording is a requirement of state due process when the interrogation occurs in a place of detention and recording is feasible. We reach this conclusion because we are convinced that recording, in such circumstances, is now a reasonable and necessary safeguard, essential to the adequate protection of the accused's right to counsel, his right against self-incrimination and, ultimately, his right to a fair trial.<sup>49</sup>

The Alaska court further recognized that the recording requirement enhances judicial integrity:

The integrity of our judicial system is subject to question whenever a court rules on the admissibility of a questionable confession, based solely upon the court's acceptance of the testimony of an interested party, whether it be the interrogating officer or the defendant. This is especially true when objective evidence of the circumstances surrounding the confession could have been preserved by the mere flip of a switch. Routine and systematic recording of custodial interrogations will provide such evidence, and avoid any suggestion that the court is biased in favor of either party.<sup>50</sup>

Thus, to preserve constitutional rights and promote judicial integrity, Alaska invoked the exclusionary rule:

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<sup>45</sup> 518 N.W.2d 587, 592 (Minn. 1994).

<sup>46</sup> 518 N.W.2d at 592.

<sup>47</sup> 711 P.2d 1156 (Alaska 1985).

<sup>48</sup> 711 P.2d at 1158.

<sup>49</sup> 711 P.2d at 1159-60.

<sup>50</sup> 711 P.2d at 1164.

Exclusion is warranted [when a tape recording is not made of the entire interview] because the arbitrary failure to preserve the entire conversation directly affects a defendant's ability to present his defense at trial or at a suppression hearing. Moreover, exclusion of the defendant's statement is the only remedy which will correct the wrong that has been done and "place the defendant in the same position he or she would have been in had the evidence been preserved and turned over in time for use at trial."<sup>51</sup>

Many other courts that have considered the issue approve of the process.<sup>52</sup> In *Hendricks v. Swenson*,<sup>53</sup> the court recognized that a tape will convey if the defendant "is hesitant, uncertain, or faltering . . . [if] he has been worn out by interrogation, physically abused, or in other respects is acting involuntarily, the tape will corroborate him in ways a typewritten statement would not." As the Eighth Circuit explained, "[f]or jurors to see as well as hear the events surrounding an alleged confession or incriminating statement is a forward step in the search for the truth."<sup>54</sup> Based upon this, the court concluded "we feel that it is an advancement in the field of criminal procedure and a protection of defendant's rights. We suggest that to the extent possible, all statements of defendants should be so preserved."<sup>55</sup>

At its heart, the analysis is one of due process and "[t]he concept of due process is not static; among other things, it must change to keep pace with new technological developments."<sup>56</sup> Further, it cannot be denied that, "judicial solutions to problems of constitutional dimension have evolved decade by decade. As courts have been presented with the need to enforce constitutional rights, they have found means of doing so."<sup>57</sup>

### **E. Evolving Notions of Fundamental Fairness**

As time marches on, both technology and public opinion cry out for a requirement of recording the entirety of interrogations. Requiring suspect interviews to be tape-recorded

<sup>51</sup> 711 P.2d at 1164 (footnote and citation omitted).

<sup>52</sup> See, e.g., *State v. James*, 678 A.2d 1338, 1360 (Conn. 1996) ("We agree with the defendant that the recording of confessions and interrogations generally might be a desirable investigative practice, which is to be encouraged"); *State v. Kekona*, 886 P.2d 740, 746 (Haw. 1994) ("We nevertheless stress the importance of utilizing tape recordings during custodial interrogations when feasible"); *State v. Kilmer*, 439 S.E.2d 881, 893 (W. Va. 1993) ("It would be the wiser course for law enforcement officers to record . . . the interrogation of a suspect where feasible and where such equipment is available, since such recording would be beneficial not only to law enforcement, but to the suspect and the court when determining the admissibility of a confession"); *Commonwealth v. Fryer*, 610 N.E.2d 903, 910 (Mass. 1993) (describing electronic recording as a "helpful tool" and noting that a rule requiring it "would have much to recommend it"); *State v. Buzzell*, 617 A.2d 1016, 1018 (Me. 1992) (referring to "the obvious benefits to be realized when statements are recorded"); *Williams v. State*, 522 So. 2d 201, 208 (Miss. 1988) ("We accept that whether or not a statement is electronically preserved is important in many contexts"); and *State v. James*, 858 P.2d 1012, 1018 (Utah App. 1993) (recognizing that recording interrogations has the potential to prevent "actual coercive tactics by the police.").

<sup>53</sup> 456 F.2d 503 (8th Cir. 1972).

<sup>54</sup> 456 F.2d at 507.

<sup>55</sup> 456 F.2d at 506.

<sup>56</sup> *Stephan*, 711 P.2d at 1161.

<sup>57</sup> David Rodstein, et al., *CRIMINAL CONSTITUTIONAL LAW*, 2nd vol., P4.01[2] (1998).

has long been recognized as an advancement in criminal justice.<sup>58</sup> It has long been recommended by the National Conference of Commissioners on Uniform State Laws and by the American Law Institute.<sup>59</sup> It is consistent with the apparent policy behind Federal and Military Rules of Evidence: Rule 1002 (Best Evidence Rule, requiring an original writing or recording), Rule 613(a) (requiring that a prior statement be shown or disclosed to opposing counsel), Rule 613(b) (allowing a witness to explain or deny a prior inconsistent statement and affording the opposite party to interrogate the witness thereon), and Rule 106 (allowing an adverse party to require the proponent of a statement to introduce other parts of the statement that should be considered with it).

At least three other common-law countries have adopted the rule that police must tape record interviews with suspects: Great Britain, Canada and Australia.<sup>60</sup> A 1993 review of the requirement by the Great Britain Royal Commission on Criminal Justice reported: "By general consent, tape recording in the police station has proved to be a strikingly successful innovation providing better safeguards for the suspect and the police officer alike."<sup>61</sup>

Perhaps more persuasively, law enforcement (with almost universal approval of the courts) arms itself with the latest technology in the "often competitive enterprise of ferreting out crime."<sup>62</sup> Law enforcement has used, and the courts have approved, wiretaps,<sup>63</sup> drug-sniffing dogs,<sup>64</sup> fingerprints,<sup>65</sup> and DNA,<sup>66</sup> to name a few. In fact, the Supreme Court has even had to step in when law enforcement's love of technology has overstepped the public expectation of privacy.<sup>67</sup>

Further, the courts have allowed recorded statements when offered by the Government. The Supreme Court has employed tape recordings to determine voluntariness.<sup>68</sup> Most jurisdictions now permit the introduction of taped confessions.<sup>69</sup> In particular, agents with the Office of Special Investigations have at one time or another recorded interrogations, recorded "pretext" telephone calls and undercover operations, and by "policy" will videotape interviews with child witnesses.

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<sup>58</sup> See, e.g., Roscoe Pound, *Legal Interrogation of Persons Accused or Suspected of Crime*, 24 J. AM. INST. CRIM. L. & CRIMINOLOGY 1014, 1017 (1934).

<sup>59</sup> See UNIFORM RULE OF CRIMINAL PROCEDURE 243 (1974) ("The information of rights, any waiver thereof, and any questioning shall be recorded upon a sound recording device whenever feasible and in any case where questioning occurs at a place of detention.") and the MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 130.4 at 37 (same) (1975).

<sup>60</sup> See Daniel Donovan and John Rhodes, *The Case for Recording Interrogations*, THE CHAMPION (December 2002) at 14.

<sup>61</sup> *Id.* (citing ROYAL COMM'N ON CRIMINAL JUSTICE, Report 26 (1993)).

<sup>62</sup> *Johnson v. United States*, 333 U.S. 10, 14 (1948).

<sup>63</sup> See *Olmstead v. United States*, 277 U.S. 438 (1928).

<sup>64</sup> See *United States v. Place*, 462 U.S. 696 (1983).

<sup>65</sup> See *United States v. Allen*, 34 M.J. 228 (C.M.A. 1992).

<sup>66</sup> See *United States v. Youngberg*, 43 M.J. 379 (C.A.A.F. 1995).

<sup>67</sup> See *Kyllo v. United States*, 533 U.S. 27 (U.S. 2001) (prohibiting police from aiming a thermal-imaging device at a residence to "view" the interior).

<sup>68</sup> See, e.g., *California v. Prysock*, 453 U.S. 355, 356-357, 361-362 (1981).

<sup>69</sup> See, e.g., Diane M. Allen, *Admissibility of Visual Recording of Event or Matter Other Than That Giving Rise To Litigation or Prosecution*, 41 A.L.R.4th 877 (1985).

## ANALYSIS

To fully protect Mr. al Qosi's Fifth and Sixth Amendment rights, and more generally his due process right to a "full and fair trial," the Commission should suppress any statements or interview notes offered by the Government that follows an unreasonable failure to electronically record the entirety of a detainee's interrogation.

### A. The Policy Benefits

Certainly, policy benefits are a factor in determining what "due process" requires. This policy review is just the kind of analysis the Court undertook in *Miranda* when determining whether the prophylactic rule was appropriate there. Here, only good flows from requiring recording as a matter of due process--everyone benefits, the system benefits. As noted in *Stephan*:

The recording of custodial interrogations is not, however, a measure intended to protect only the accused; a recording also protects the public's interest in honest and effective law enforcement, and the individual interests of those police officers wrongfully accused of improper tactics. A recording, in many cases, will aid law enforcement efforts, by confirming the content and the voluntariness of a confession, when a defendant changes his testimony or claims falsely that his constitutional rights were violated. In any case, a recording will help trial and appellate courts to ascertain the truth.<sup>70</sup>

Recording also provides a neutral, objective account of what actually transpired during an interrogation. It preserves the context of the interrogation while preserving the substance of the statements themselves for evidence at trial. Perhaps most importantly, recording of interrogations brings an invisible event to life. Otherwise, the trier of fact must reconstruct what occurred months or even years before with incomplete information. As *Miranda* notes, "[i]nterrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms."<sup>71</sup> Thus, whether the issue is the admissibility of statements, the reliability of the statements, or what was said, recording will advance the truth-finding process and justice--it will ensure the fundamental fairness of all trials.

This is all the more important in this instance because the statements and interview notes offered are not directly out of the mouth of Mr. al Qosi. In this case, the statements are being filtered through numerous levels—first the question, in English, is translated into Arabic by the interpreter and asked of Mr. al Qosi; then, in Arabic, Mr. al Qosi's answer goes to back to the interpreter; then the interpreter translates the answer from Arabic to English for the interrogator; then the interrogators, apparently some time later, summarize all of this in a typed statement (which is never shown to Mr. al Qosi, or

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<sup>70</sup> 711 P.2d at 1161.

<sup>71</sup> *Miranda*, 384 U.S. at 448.

apparently the interpreter, for review or confirmation). Moreover, in Mr. al Qosi's case, it was clear to him that at least 30% of the time the interpreter did not understand what he was saying. As has been seen and is subject of a different motion, there are substantial problems with even the in-court translations in this case. Without a videotape or audiotape of all the steps in an interrogation, there can be no certainty, nor even reliability, that what is presented is a true recitation of what occurred.

Without a recording rule, the Commission will have to rely on less than direct and reliable evidence to answer voluntariness and admissibility questions. Certainly law enforcement has an interest:

It is not because a police officer is more dishonest than the rest of us that we ... demand an objective recordation of the critical events. Rather, it is because we are entitled to assume that he is no less human -- no less inclined to reconstruct and interpret past events in a light most favorable to himself -- that we should not permit him be a "judge of his own cause." Defendants, undoubtedly, are equally fallible.<sup>72</sup>

Applying the prophylactic, recording requirement works to "conserve[] judicial resources which would otherwise be expended in making difficult determinations of voluntariness."<sup>73</sup>

The objectivity of a recording is particularly insightful when judging credibility. A recording minimizes the swearing match between law enforcement and the accused over what actually happened. Experience teaches who wins that match. As the Supreme Court noted, "[t]here is the word of the accused against the police. But his voice has little persuasion."<sup>74</sup> Recording will not stack the deck against or in favor of the accused. It will make the process fuller and fairer. An objective recording cures the effect of the human tendency to recollect events in a self-serving manner.

## **B. The Practicality**

Further, the Government cannot argue that a recording rule imposes an undue burden on it; quite the contrary, the requirement lessens the Government's burden. A picture speaks a thousand words, a videotape many more. Voluntariness issues that engender substantial time and resources, and threaten to torpedo the Government's case, are reduced. With a video and audio record of all that transpires during an interrogation, the questions that seem to arise in every case disappear:

- Was the detainee informed of his rights? Answered in the recording.
- Did he understand them? Answered in the recording.
- Were they waived? Answered in the recording.

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<sup>72</sup> *Stephan*, 711 P.2d at 1161 (quoting Yale Kamisar, *Forward: Brewer v. Williams -- A Hard Look at a Discomfiting Record*, 66 Geo. L. J. 209, 242-43 (1977-78)).

<sup>73</sup> *Minnick*, 498 U.S. at 151.

<sup>74</sup> *Reck v. Pate*, 367 U.S. 433, 446 (1961).

- Was the waiver voluntary? Answered in the recording.
- Was the statement voluntary? Answered in the recording.
- Was either the statement or waiver in any way coerced? Answered in the recording.
- What substantive questions were asked? Answered in the recording.
- How were they asked? Answered in the recording.
- And conversely, what answers were given and how were the responses made? Answered in the recording.
- How did the interrogator's demeanor (and appearance) contrast with the suspect's behavior (and appearance)? Answered in the recording.
- What is the fit between what the tape reveals and the testimony of the people on the tape? Answered in the recording.
- What was really said? Answered in the recording.
- What pressures were applied to elicit statements? Answered in the recording.

Further, the technology is in place to record--audio and visually--interrogations from start to finish; from advisement to purported statements. The Government already uses such inexpensive and widely available technology when it serves its purposes. They use it to record interviews of child witnesses. They use it to record pretext telephone calls. They use it when they desire to record interrogations. They use it for wiretaps and undercover operations. They had it available here and chose not to use it. They use it when it is in their perceived interests; they should use it for the best interests of the system by recording the entirety of interrogations.

Even if a recording requirement imposes some minimal, administrative burden on the Government, the benefits to the system and the need to protect constitutional rights far outweighs it. *Miranda* certainly imposed an administrative burden on law enforcement, but in the grand scheme this minor burden was far outweighed by the importance of protecting individual rights. It is difficult to fashion an argument why recording will not work to protect a detainee's rights and enhance the Commission's truth-finding function, at a small administrative cost to law enforcement. Perhaps the Government will create one in order to effect their true intent--to shield their interrogation practices from the light of scrutiny.

### CONCLUSION

The Defense requests that the Commission suppress all statements and interview notes offered by the Government that result from an unexcused failure to electronically record the entirety of the underlying interrogations.

#### **5. Attachments:**

Memorandum of Points & Authorities, Applicable Law

## **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:**

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").

U.S. CONST. AMEND V; Article 31, Uniform Code of Military Justice; Mil.R.Evid. 301, 304.  
*Miranda v. Arizona*, 384 U.S. 436 (1966).  
475 U.S. 412, 421 (1986).  
*United States v. Hill*, 5 M.J. 114, 117 (C.M.A. 1978)(citing *Escobedo v. State of Illinois*, 378 U.S. 478, 490, n. 14 (1964) and *Johnson v. Zerbst*, 304 U.S. 458 (1938)).  
*Culombe v. Connecticut*, 367 U.S. 568, 602 (1961).  
*Schneekloth v. Bustamonte*, 412 U.S. 218, 226 (1973)  
*United States v. Cristobal*, 293 F.3d 134, 140 (4th Cir. 2002)  
*United States v. Benner*, 57 M.J. 210, 214 (C.A.A.F. 2002)  
*United States v. Bubonics*, 45 M.J. 93, 94-95 (C.A.A.F. 1996).  
David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988).  
Susan R. Klein, *The Fate Of The Pre-Dickerson Exceptions To Miranda: Identifying And Reformulating Prophylactic Rules, Safe Harbors, And Incidental Rights In Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1033 (2001).  
*Weeks v. United States*, 232 U.S. 383 (1914)  
395 U.S. 711 (1969).  
*Michigan v. Payne*, 412 U.S. 47, 53 (1973).  
*Colorado v. Bertine*, 479 U.S. 367 (1987)  
*Florida v. Wells*, 495 U.S. 1 (1990).  
*Illinois v. LaFayette*, 462 U.S. 640 (1983).  
*United States v. Wade*, 459 U.S. 359 (1983).  
*Bruton v. United States*, 391 U.S. 123 (1968).  
*Cuyler v. Sullivan*, 446 U.S. 335 (1980).  
*Anders v. California*, 386 U.S. 738 (1967).  
*Batson v. Kentucky*, 476 U.S. 79 (1986).  
451 U.S. 477 (1981).  
*Arizona v. Roberson*, 486 U.S. 675, 682 (1988).  
*Minnick v. Mississippi*, 498 U.S. 146, 151 (1990).  
51 M.J. 234, 244 (C.A.A.F. 1999).  
35 MJ 311, 317 (C.M.A. 1992)  
*United States v. Acton*, 38 M.J. 330, 334 (C.M.A. 1993).  
24 M.J. 297 (C.M.A. 1987).  
40 C.M.R. 247 (C.M.A. 1969).  
530 U.S. 428 (2000).  
*Smith v. Robbins*, 528 U.S. 259, 265, 273 (2000).  
United States brief supporting petition for writ of certiorari, *Dickerson v. United States*, No. 99-5525, (U.S. Sup. Ct. No. 99-5525) at 8 (quoting *Withrow v. Williams*, 507 U.S.685, 691 (1991)).  
*Michigan v. Jackson*, 475 U.S. 625, 636 (1986)  
*Michigan v. Harvery*, 494 U.S. 344 (1990)  
*North Carolina v. Pearce*, 395 U.S. 711 (1969)  
*Wasman v. United States*, 468 U.S. 559 (1984)

*United States v. Goodwin*, 457 U.S. 368, 372-377 (1982)  
*Colten v. Kentucky*, 407 U.S. 104, 166 (1972)  
*Bruton v. United States*, 391 U.S. 123 (1968)  
*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)  
*Freedman v. Maryland*, 380 U.S. 51, 58 (1965).  
Brief for United States at 47.  
474 U.S. 284, 289-90 (1986).  
*Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting)  
*Argersinger v. Hamlin*, 407 U.S. 25, 47 (1972) (Burger, J., concurring) ("principle of due process  
"requires fundamental fairness in criminal trials").  
*Mayberry v. Pennsylvania*, 400 U.S. 455, 464 (1971).  
518 N.W.2d 587, 592 (Minn. 1994).  
518 N.W.2d at 592.  
711 P.2d 1156 (Alaska 1985).  
711 P.2d at 1158.  
711 P.2d at 1159-60.  
711 P.2d at 1164.  
711 P.2d at 1164  
*State v. James*, 678 A.2d 1338, 1360 (Conn. 1996)  
456 F.2d 503 (8th Cir. 1972).  
456 F.2d at 507.  
456 F.2d at 506.  
*Stephan*, 711 P.2d at 1161.  
David Rodstein, et al., CRIMINAL CONSTITUTIONAL LAW, 2nd vol., P4.01[2] (1998).  
Roscoe Pound, *Legal Interrogation of Persons Accused or Suspected of Crime*, 24 J. AM. INST.  
CRIM. L. & CRIMINOLOGY 1014, 1017 (1934).  
UNIFORM RULE OF CRIMINAL PROCEDURE 243 (1974)  
MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 130.4 at 37 (same) (1975).  
Daniel Donovan and John Rhodes, *The Case for Recording Interrogations*, THE CHAMPION  
(December 2002) at 14.  
*Johnson v. United States*, 333 U.S. 10, 14 (1948).  
*Olmstead v. United States*, 277 U.S. 438 (1928).  
*United States v. Place*, 462 U.S. 696 (1983).  
*United States v. Allen*, 34 M.J. 228 (C.M.A. 1992).  
*United States v. Youngberg*, 43 M.J. 379 (C.A.A.F. 1995).  
*Kyllo v. United States*, 533 U.S. 27 (U.S. 2001)  
*California v. Prysock*, 453 U.S. 355, 356-357, 361-362 (1981).  
Diane M. Allen, *Admissibility of Visual Recording of Event or Matter Other Than That Giving  
Rise To Litigation or Prosecution*, 41 A.L.R.4th 877 (1985).  
*Reck v. Pate*, 367 U.S. 433, 446 (1961).

**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.



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Assistant Defense Counsel

**CERTIFICATE OF SERVICE**

I hereby certify that on 19 OCT 2004, I sent this Defense Motion to Suppress: Failure to Record 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

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UNITED STATES OF AMERICA

v

IBRAHIM AHMED MAHMOUD AL QOSI

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

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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.”<sup>1</sup> 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.”<sup>2</sup> 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.”<sup>3</sup> The Supreme Court in fact long ago recognized that due process is not a uniquely American value.<sup>4</sup>
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

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<sup>1</sup> 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).

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

<sup>3</sup> 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).

<sup>4</sup> *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.”<sup>5</sup> 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.’”<sup>6</sup>

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.”<sup>7</sup> 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.<sup>8</sup>

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*.<sup>9</sup> 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

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<sup>5</sup> *Mathews v. Diaz*, 426 U.S. 67, 77 (1976).

<sup>6</sup> *Rasul v. Bush*, 542 U.S. \_\_\_, 124 S.Ct. 2686, 2698 n.15 (2004).

<sup>7</sup> *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).

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

<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup>

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.<sup>12</sup> 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.<sup>13</sup>

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

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<sup>10</sup> 163 U.S. at 237-38.

<sup>11</sup> See, e.g., *Zadydas 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*).

<sup>12</sup> 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.

<sup>13</sup> U.S. Const., Art. VI, cl. 2.

<sup>14</sup> 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].<sup>15</sup> 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 Conventions<sup>16</sup> 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,<sup>17</sup> the President specifically noted United States obligations under the ICCPR, CAT, and the Convention on the Elimination of All Forms of Racial Discrimination [CERD],<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup>

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

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<sup>15</sup> 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).

<sup>16</sup> 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.

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

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

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

<sup>20</sup> 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.”<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup> In *United States v. Brinston*,<sup>24</sup> 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”

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<sup>21</sup> *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.

<sup>22</sup> PMO, 13 Nov. 01; 18 U.S.C. §§821, 836.

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

<sup>24</sup> 31 M.J. at 226.

- “statutes in pari materia must be construed together.”<sup>25</sup>

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.”<sup>26</sup> 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*,<sup>27</sup> 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.<sup>28</sup>

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.”<sup>29</sup> This is Guantánamo Bay. This is Mr. al Qosi.

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<sup>25</sup> 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)).

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

<sup>27</sup> 327 U.S. 1 (1946).

<sup>28</sup> 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.

<sup>29</sup> 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”<sup>30</sup> -- “More than an instrument of justice and more than one wheel of the Constitution, it is the lamp that shows that freedom lives.”<sup>31</sup> “Due Process is that which comports with the deepest notions of what is fair and right and just.”<sup>32</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>33</sup>

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. ....<sup>34</sup>

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<sup>30</sup> *Estes v. Texas*, 381 U.S. 532, 540 (1965).

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

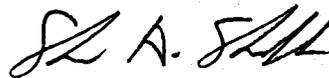
<sup>32</sup> *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting); see also *Argersinger v. Hamlin*, 407 U.S. 25, 47 (1972) (Burger, J., concurring) (“principle of due process “requires fundamental fairness in criminal trials”).

<sup>33</sup> *Mayberry v. Pennsylvania*, 400 U.S. 455, 464 (1971).

<sup>34</sup> *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.<sup>35</sup> An author of The Federalist Papers urged decision-makers in the nascent United States to pay “attention to the judgment of other nations.”<sup>36</sup> 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.”<sup>37</sup> 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.<sup>38</sup>

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

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

<sup>37</sup> *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?”).

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