

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

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<b>UNITED STATES OF AMERICA</b>	)	
	)	
v	)	<b>DEFENSE MOTION FOR</b>
	)	<b>ACCESS TO WITNESSES<sup>1</sup></b>
	)	
<b>IBRAHIM AHMED MAHMOUD AL QOSI</b>	)	

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The Government had three years to prepare its prosecution of Mr. al Qosi. During that time, the Government has collected information about Mr. al Qosi from various people. As a matter of due process and Commission law, the Defense is entitled to access to these people to prepare Mr. al Qosi's defense. The Defense requests that the Commission enter an order requiring the Government to provide such access.

**FACTS**

1. For nearly three years, Mr. al Qosi has been detained in United States' custody pursuant to presidential order.<sup>2</sup> During that time, he has been subject to innumerable interrogation sessions. Based on the limited discovery to date, the Defense believes that these interrogations have been conducted by the following members of various state and federal agencies:

- A. Special Agent [REDACTED]
- B. Special Agent [REDACTED]
- C. Special Agent [REDACTED]
- D. Special Agent [REDACTED]
- E. Special Agent [REDACTED]
- F. Special Agent [REDACTED]
- G. Special Agent [REDACTED]
- H. Special Agent [REDACTED]
- I. Special Agent [REDACTED]
- J. Special Agent [REDACTED]
- K. [REDACTED]
- L. Detective [REDACTED]
- M. Special Agent [REDACTED]
- N. Special Agent [REDACTED]

2. As Mr. al Qosi and these individuals do not speak the same language, these interrogation sessions have been conducted with the "assistance" of various linguists.

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<sup>1</sup> **TIMING:** This motion is timely filed, the Defense having given notice of its intent to file the same on 15 September 2004. **REQUESTED RELIEF:** The Defense requests the relief sought in paragraph 11, *infra*.

<sup>2</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 02").

The Defense believes it logical that all of these linguists were, or are currently, employed by the United States Government. Based on the limited discovery to date, the Defense believes that these are the linguists who have assisted in interrogations of Mr. al Qosi:

- A. [REDACTED]
- B. [REDACTED]
- C. [REDACTED]
- D. [REDACTED]
- E. [REDACTED]
- F. [REDACTED]
- G. [REDACTED]
- H. [REDACTED]
- I. [REDACTED]
- J. [REDACTED]
- K. [REDACTED]
- L. [REDACTED]
- M. [REDACTED]
- N. [REDACTED]
- O. [REDACTED]
- P. [REDACTED]
- Q. [REDACTED]
- R. [REDACTED]

3. Further, the Defense believes that the following individuals have information relevant to the charge against Mr. al Qosi and his defense against the same.

- A. [REDACTED]
- B. [REDACTED]
- C. [REDACTED]
- D. [REDACTED]
- E. [REDACTED]
- F. [REDACTED]
- G. [REDACTED]
- H. [REDACTED]

The Defense believes that all of these individuals are under United States' control, either as detainees at Guantanamo Bay, or working with the United States Government in some capacity.

4. In order to prepare for Mr. al Qosi's defense, the Defense needs immediate access to these individuals, as well as other interrogators, linguists and witnesses who may be identified through future discovery and investigation. To date, the Government has not provided information through discovery that would allow the Defense access to these witnesses.<sup>3</sup>

<sup>3</sup> See Defense Motion to Compel Discovery, dtd 17 Sept 04 (in which the Defense detailed the discovery problems and sought relief).

## LAW

5. Commission Law: The President has ordered that these Military Commissions be run to, at a minimum, provide for “a full and fair trial.”<sup>4</sup> Department of Defense Military Commission Order [MCO] No.1 (21 March 2002), para. 5(E) provides that “[t]he Prosecution shall provide the Defense with access to evidence that the Prosecution intends to introduce at trial and with access to evidence known to the Prosecution that tends to exculpate the Accused.” Further, MCO No. 1, para. 5(H) gives Mr. al Qosi the right to “obtain witness and documents” for the defense “to the extent necessary and reasonably available as determined by the Presiding Officer.”

6. Military and Federal Law: The equal right of the prosecution and the defense in criminal proceedings to interview witnesses before trial is clearly recognized by the courts.<sup>5</sup> Witnesses do not belong to either the Prosecution or the Defense. They simply possess information on a matter that may be relevant to issues of consequence.<sup>6</sup>

7. Article 46 of the Uniform Code of Military Justice [UCMJ] provides that all parties “shall have equal opportunity to obtain witnesses and other evidence ....” This provision of military law is not novel as it generally reflects practice in federal civilian courts.<sup>7</sup> Rule for Courts-Martial [RCM] 701(e) succinctly summarizes established military practice in this regard: “Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. No party may unreasonably impede the access of another party to a witness or evidence.”

## PROCEDURAL HISTORY

8. On 5 May 2004, the Defense made essentially this same request to the Appointing Authority, copied to the Prosecution. On 14 June 2004, the Appointing Authority determined that the request was premature and directed the Defense to make it of the Commission (the Presiding Officer) at an appropriate time. Subsequently, after preparing this motion, the Defense was provided a copy of Presiding Officer Memorandum [POM] No. 10. As this request is for basic access to witnesses, in terms of discovery, the Defense does not believe the use of the procedure suggested in POM No. 10 is applicable in this instance.<sup>8</sup>

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<sup>4</sup> PMO, 13 Nov 01 at §4(c)(2).

<sup>5</sup> *United States v. Arboleda*, 929 F.2d 858, 868 (1st Cir., 1991); *Kines v. Butterworth*, 669 F.2d 6, 9 (1st Cir. 1981), *cert. denied*, 456 U.S. 980 (1982).

<sup>6</sup> *United States v. Cadet*, 727 F.2d 1453, 1469 (9th Cir. 1984).

<sup>7</sup> *United States v. Irwin*, 30 M.J. 87, 92 (C.M.A. 1990)(citing cases).

<sup>8</sup> If the Commission were to find that POM No. 10 should control then there is a contradiction between the direction of the Appointing Authority (of 14 June 2004) and this POM. In light of this contradiction, the Defense believes it better practice to follow the more formal process of this motion.

## ARGUMENT

9. There should be no argument about this matter. It should be uncontested that Mr. al Qosi is entitled to a vigorous and effective defense. It should be uncontested that an effective defense requires Mr. al Qosi's counsel to have an opportunity sufficiently in advance of trial to interview potential witnesses—witnesses who may provide information for the Prosecution and witnesses that may provide information for the Defense. It should be uncontested that should such witnesses be essentially in the control of the United States Government, that the Government should be willing to make accommodation for the Defense's access to them. While that has yet to happen, the prodding of an order from the Commission to that effect should be sufficient.

10. But even if access is contested, the law—general principles as embodied in federal and military law and specific language of Commission law—requires the Defense to have the requested access. The Defense is not requesting that the Government do our work for us (though with the “inequality of arms” present here, the Prosecution certainly seems to have the resources to spare), but the Government should not be allowed through intention or inattention to deny the Defense access to crucial evidence. By not providing requested discovery, which would provide names and contact information for these and other people, the Government has essentially prevented the Defense from being able to prepare Mr. al Qosi's defense. This is wrong, this is illegal, and this is something the Commission can quickly remedy.

## REQUESTED RELIEF

11. The Defense requests that the Presiding Officer enter an order requiring the Government to provide access to the named individuals by a date certain.



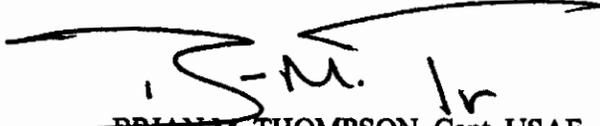
SHARON A. SHAFFER, Lt Col, USAF  
Defense Counsel



BRIAN M. THOMPSON, Capt, USAF  
Assistant Defense Counsel

**CERTIFICATE OF SERVICE**

I hereby certify that on 23 Sept 2004, I sent this Defense Motion for Access to Witnesses to the Presiding Officer and the legal assistant to the Presiding Officer via e-mail and hand-delivered a copy to the prosecutor.

  
BRIAN M. THOMPSON, Capt, USAF  
Assistant Defense Counsel