Translation of Evidence and the Presence of Interpreters

Rulings:

- *United States v. Mohammed*, *et al.*, 1 M.C. 285 (2008) (Commission Ruling on Motion to Compel Production of Transcripts in Arabic)

The translation of evidence and the presence of qualified interpreters at trials involving defendants who are unable to communicate effectively in the language of the court have long been acknowledged to form a substantive part of the Due Process Clause under the United States Constitution. *See United States v. Carrion*, 488 F.2d 12 (1st Cir. 1973). With respect to the military commissions and the defendants that face charges before them, the extent of constitutional due process guarantees that may be claimed on their behalf is a question that has yet to be fully answered.

Under § 948l of the Military Commissions Act ("MCA") of 2006, the convening authority has the discretion to appoint interpreters for the commissions. In almost all of the cases currently pending before the commissions, interpreters are, in fact, present. Yet numerous problems exist. Firstly, many of the defendants who know some English have complained that these interpreters often fail to provide a proper translation of their comments. These kinds of complaints have often been raised in the cases where the defendants have chosen to represent themselves. Secondly, there are instances where the interpreters are not cleared for access to certain information and are, therefore, unable to communicate certain information to the defendants or their civilian counsel.

This second point is tied to the translation of evidence. In every instance where the evidence is deemed classified and, therefore, accessible only to certain members of the defense team, the problem of translation may complicate matters when the translators for the prosecution do not have the same clearances as the ones receiving the documents for the defense. The defense, thus, must rely on the government's translation of evidence, which directly implicates how much may be revealed, in what context, and to what level of relevance.

With respect to the 9/11 cases, the defense argued that "translated transcript production is required to ensure the accused's understanding of the proceedings" and that this would "assist the accused in preparing their motions in the course of the on-going litigation." *United States v. Mohammed*, *et al.*, 1 M.C. 285 (2008). Judge Henley, however, found that translation of transcripts could not be compelled as part of the authentication process used to review transcripts of trial and stated that it was the responsibility of the defense to translate the documents they received. In light of the limited resources available to defense counsel –

which are even more limited in cases of *pro se* representation – the feasibility of this is questionable.

Several defense attorneys have publicly expressed concern about the quality of translated materials provided to the defense. Further, some of the accused, who speak and understand English, have complained that the court translators are inadequate.