

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

v.

**KHALID SHAIKH MOHAMMAD;
WALID MUHAMMAD SALIH
MUBARAK BIN 'ATTASH;
RAMZI BINALSHIBH;
ALI ABDUL AZIZ ALI;
MUSTAFA AHMED ADAM
AL HAWSAWI**

AE 321B (GOV)

Government Response

To Defense Motion (AE 321 (WBA)) and
Supplement (AE 321 (AAA Sup.)) to
Permit Telephonic Access with Family
Members

24 September 2014

1. Timeliness

This Response is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court (R.C.) 3.7.

2. Relief Sought

The Prosecution respectfully requests this Commission deny, without oral argument, the requested relief in AE 321 (WBA) and AE 321 (AAA Sup.).

3. Overview

The Accused are charged as principals in the murder of 2,976 men, women, and children. Alleged to be associated with al Qaeda, the Accused are considered especially dangerous and have been exposed to highly classified information. Disregarding these important considerations, as well as federal precedent and previous rulings by this Commission, the

Accused now argue that the First and Fifth Amendment,¹ as well as international and customary law, grant these five accused the right to direct telephonic access with their family members. *See* AE 321 (WBA); AE 321 (AAA Sup.). However, in doing so, the Defense fails to cite to any relevant authority that specifically supports this Commission concluding that the Accused are entitled to such communications. As such, the Commission should deny the Defense Motion.

This lack of entitlement notwithstanding, the government remains committed to continuing to facilitate efficient means of communication between the Accused and their respective families. To this end, the government will continue to seek efficiencies to expeditiously deliver non-legal mail to family members whenever and wherever possible.

4. **Burden of proof**

As the moving party, the defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1).

5. **Facts**

The Accused in this case are being held as “high-value detainees” (HVDs) on United States Naval Station Guantanamo Bay, Cuba. Since 2006, the Commander, Joint Task Force-Guantanamo (“JTF-GTMO”), has been charged with the responsibility for the effective, safe,

¹ The Defense continues to assert-as it now does in nearly all of its pleadings-that denying the motion will violate various rights of the Accused, including rights that have not been extended to any detainee by any United States court. *See* AE 321 (WBA) at 2. The Defense, however, persists in omitting any explanation of how those rights are implicated in this case. Absent any explanation as to how those rights are implicated in this request and under these facts, the Commission should reject the Defense’s boilerplate language. *See Harding v. Illinois*, 196 U.S. 78, 87 (1904) (dismissing writ of error because no federal question was properly raised in the state court where the Illinois Supreme Court concluded that “no authorities were cited nor argument advanced in support of the assertion that [a] statute was unconstitutional” and thus the “point, if it could otherwise be considered, was deemed to be waived”); *Allaithi v. Rumsfeld*, 753 F.3d 1327, 1334 (D.C. Cir. 2014) (“In this circuit, it is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel’s work, create the ossature for the argument, and put flesh on its bones.” *Davis v. Pension Benefit Guar. Corp.*, 734 F.3d 1161, 1166-67 (D.C. Cir. 2013). Two sentences of argument, a threadbare conclusion, and a handful of marginally relevant citations do not provide us with enough to adequately assess the strength of their legal conclusions.”). *United States v. Heijnen*. 215 F. App’x 725, 726 (10th Cir. 2007) (“We nevertheless reject these arguments because they are unsupported by legal argument or authority or by any citations to the extensive record of the proceedings... [A]ppellant’s issues are not supported by any developed legal argument or authority, and we need not consider them.”).

and secure conduct of detention operations at the Naval Station for HVDs; the force protection of over 1,600 assigned service members and civilians; and the protection of national security information associated with the command's mission. AE 008A at 11. JTF-GTMO satisfies these security responsibilities, in part, by controlling the information and communications entering and exiting the detention camps and routinely inspecting information and other material for contraband. *Id.*

In accordance with its security responsibilities, and in furtherance of legitimate governmental objectives to minimize the risk to detention facility security and to protect classified as well as sensitive information, at this time the JTF-GTMO Commander does not permit telephonic communications by HVDs with either their counsel or families. Memorandum from Rear Admiral R.W. Butler, U.S. Navy, Commanding Joint Task Force Guantanamo, *Order Governing Communication and Defense Counsel Access to Detainees Involved in Military Commissions*, 17 (3 March 2014). HVDs and their families, nonetheless, may communicate with each other by mail or through video messages. *See* AE 321 (WBA) at 4.

6. Law and Argument

The Supreme Court has readily accepted that “[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government.” *Turner v. Safley*, 482 U.S. 78 (1987). As such, “[t]he inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution or, in the case of a federal prison, a statute. The wide range of ‘judgment calls’ that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.” *Bell v. Wolfish*, 441 U.S. 520, 562 (1979).

Not only does Supreme Court precedent in this area demand judicial deference to prison administrators, it discourages a standard of heightened judicial scrutiny for detention operations, for fear that, “every administrative judgment would be subject to the possibility that some court

somewhere would conclude that it had a less restrictive way of solving the problem at hand.” *Thornburgh v. Abbott*, 490 U.S. 401, 411 (1989). Furthermore, the Supreme Court has stated that “courts must defer to the judgment of correctional officials unless the record contains substantial evidence showing their policies are an unnecessary or unjustified response” *Florence v. Bd of Chosen Freeholders*, 132 S. Ct. 1510, 1513-1514 (2012). The United States Court of Appeals for the District of Columbia Circuit recently applied the *Turner* test to JTF-GTMO’s search as well as detainee movement and transportation procedures. *See Hatim v. Obama*, 2014 U.S. App. LEXIS 14759 (D.C. Cir. Aug. 1, 2014) (holding that “this deferential standard [*Turner*] applies to military detainees as well as prisoners.”). Finding the government’s asserted purpose “beyond cavil a legitimate governmental interest,” the D.C. Circuit answered the singular question of importance in the case: “whether the new policies [searches and movements] are rationally related to security,” in favor of the government. *Id.* at 12.

I. The Defense Motion Fails to Cite or Give Credence to the Commission’s Previous Rulings in AE 018 and AE 093

The Commission has long shown appropriate deference to JTF-GTMO with respect to detention operations; particularly concerning detainee communications with outside third-parties. In its ruling effectuating AE 018U, the Commission explicitly stated:

The JTF-GTMO Commander is responsible for maintaining safety and security within JTF-GTMO detention facilities. The Commission is not in the business of overseeing the daily operations of the detention facility and will generally defer decisions relating to executing responsibility for the facility to the Commander. However, the Commission is responsible to ensure appropriate legal protections for the Accused and will intervene when it is established the daily operations of the detention facility adversely impact the Commission’s ability to proceed or the Accused’s rights.

AE 018T/AE 032PP/AE 049B/AE 144W, Privileged Written Communications Ruling, ¶ 6. Furthermore, while the Commission’s ruling in AE 018T primarily dealt with written communications, this Commission has also previously taken a similar approach regarding the issue now before it.

On 14 October 2012, counsel for Mr. Ali filed AE 093 (AAA) with the Commission specifically requesting “permission to have a humanitarian one-time audiovisual communication with his family via a phone call, video-teleconference, or recorded video message in order to convey his condolences on the recent death of his father.” AE 093 (AAA) at 1. Following oral argument, where the Defense stressed the humanitarian nature of its request and equated the telephone prohibition to a Special Administrative Measure (SAM), the Commission denied the Defense motion on 9 February 2013. *See* Unofficial/Unauthenticated Transcript (Tr.) at 1646-1656. Specifically, the Commission stated, “[it] does not run detention facilities and will defer to the judgment of the facility commander unless that judgment impacts on the legal proceedings in some manner.” AE 093A (citing *Procunier v. Martinez*, 416 U.S. 396 (1974)). While this Commission has previously ruled on a matter similar to that within the instant motion and supplement, the Defense now insists on requesting that this Commission reverse course, and grant even more direct telephonic access than it previously denied.

Despite offering no new nexus between its current requested relief and the legal proceedings now before this Commission, the Defense, in AE 321 (WBA) and AE 321 (AAA Sup.), requests even greater telephonic access in an attempt to get what it was previously denied. However, nowhere in its motions do Defense Counsel even attempt to draw a nexus to these legal proceedings or answer the inquiry the Commission put forth previously when this issue was argued.² Instead, the Defense completely ignores the Commission’s ruling in AE 093, and instead cites to constitutional and international law sources, in an attempt to request reconsideration where no new facts or law exist. The Commission should recognize this

² During oral argument, the Commission directly asked Defense counsel “do I even have the authority to order such relief? And if so, from whence does that come?” Tr. at 1652. After Defense counsel proffered a basis for authority, the Commission stated the following, “the fact there is a wrong, assuming there’s a wrong out there, does not necessarily imply that this commission has authority to give a remedy. I’m not disputing there may not be an administrative relief. But I still come back to where I’m at. I understand you – and it’s got great service appeal. I’m not – but I’m still coming back to where does it say I have this authority to do this? Even by analogy, your example deals with an Article III court in a civil action and they tell people to do things all the time.” Tr. at 1654.

motion for what it is (a motion to reconsider past rulings), and the foundation it lacks (any real nexus to these court proceedings), and deny the Defense's motion, consistent with its previous rulings in AE 018T and AE 093A.

II. Federal Courts Have Previously Deferred to JTF-GTMO Pertaining to Direct Telephonic Access for Detainees

In an attempt to persuade the Commission to order its requested relief, the Defense cites to numerous federal court opinions, as well as international and customary law, in a talismanic manner to support its argument. However, despite the ample case law it cites, the Defense fails to cite the lone federal court opinion that is not only directly on-point, but speaks in opposition to the argument the Defense advances.

On 21 October 2005, Fawzi Al Odah (Petitioner), a Kuwaiti citizen held at Guantanamo Bay, filed a Motion for Preliminary Injunction with the U.S. District Court for the District of Columbia (hereinafter "D.C. District Court") seeking, among other things, direct communications with family members. *See Al Odah v. United States*, 406 F. Supp. 2d 37, 39 (D.D.C. 2005). In support of his request, Petitioner argued that it was an expert's assessment that family involvement was a critical component to his medical care. *See id.* at 45.

Additionally, he claimed:

The Court should order [the Government] to provide direct, interactive communications between Petitioner and his family because certain detainees (those that have been charged with war crimes) are already allowed to have direct communications with their families [and] Bureau of Prison regulations allow such contact.

Id. The District Court found otherwise, ruling in favor of JTF-GTMO and the Government and denied the Motion for Preliminary Junction on 8 November 2005. *Id.* at 46.

In denying that detainee's motion, the D.C. District Court stated explicitly that it was unwilling to second-guess telephonic access determinations by JTF-GTMO given the national security concerns at issue. *See id.* at 45. Further explaining its holding, the Court stated, "the real-time or near real-time nature of a telephone conversation poses a heightened risk that

impermissible information could be transmitted from Petitioner to his family or vice versa, posing a real risk of injury to the government and potentially endangering the public interest.” *Id.* at 46. Furthermore, because the detainee already had the means to send and receive written communications with family members, the D.C. District Court denied his request for an injunction. *Id.* While it may be true that JTF-GTMO eventually determined that phone calls for certain non-HVDs be made available, it was a decision by the detention facility command, and not a judge, to do so. For now, the Commander at JTF-GTMO has not made such a determination for HVDs.

While advancing many of the same arguments as those posed by the Petitioner in *Al Odah* (i.e., expert assessments regarding rehabilitation, Bureau of Prison Regulations, and ready alternatives), the Defense now chooses to ignore the D.C. District Court’s holding in an attempt to gain a different result. This Commission should not take this invitation to reconsider this issue. Instead, it should view the *Al Odah* case as highly persuasive authority that speaks directly to the issue now before it. In accordance with that authority, and consistent with this Commission’s previous rulings, this Commission should hold, similar to the D.C. District Court, that the risks to national security and the public interest require the same judicial deference usually afforded JTF-GTMO with respect to detention operations. As such, this Commission should deny the Defense motions.

III. Right to Telephonic Access to Family Is Not a Self-Executing Right Under International Law

The Defense recycles various motions by claiming rights their clients enjoy under the Constitution, the Convention Against Torture, the Geneva Conventions, and other various International tribunals that apparently permit phone calls between detainees and their families. However, many of the federal cases cited by the Defense are for pre-trial or post-conviction prisoners in the United States, not detainees being detained under the Authorization for Use of Military Force (AUMF) as informed by the principles of the laws of war as enemy belligerents, and as such are highly distinguishable.

In regard to the recycled claims being made under International Law, the Prosecution's response to these recycled International Law challenges will not be reiterated herein, but are incorporated by reference. *See* AE 119A (Prosecution's position that the Accused are not entitled to an Article 5 Hearing under the Geneva Conventions as Alien Unlawful Enemy Belligerents); AE 200F (Prosecution's position on the non-self-executing nature of the Convention Against Torture); AE 200II (Military Judge's finding that the Convention of Torture is a non-self-executing treaty and thus confers no individual rights on the Accused).

Furthermore, in accordance with Common Article 3 of the Geneva Conventions, the United States takes seriously its role and responsibility to ensure that the Accused's conditions of confinement comport with all applicable international and customary law associated with the Accused's status as Alien Unprivileged Enemy Belligerents. The United States has met its responsibilities, and the Accused's conditions of confinement "meet or exceed all U.S. obligations under international law." 2013 CAT Report ¶ 216; *see also* U.S. DEP'T OF DEF., REVIEW OF DEPARTMENT COMPLIANCE WITH PRESIDENT'S EXECUTIVE ORDER ON DETAINEE CONDITIONS OF CONFINEMENT (Feb. 20, 2009) (AE 303B, Attachment C) (concluding that "the conditions of confinement in Guantánamo are in conformity with Common Article 3 of the Geneva Conventions" and that they "also meet the directive requirements of Common Article 3 of the Geneva Conventions.").

In accordance with this appropriate determination of the Accused's status as Alien Unlawful Enemy Belligerents and the security risk they pose, JTF-GTMO has, for now, properly denied all detainees classified as HVDs, access to direct telephonic communications to outside third-parties. However, despite this limitation, the Accused and other detainees are permitted to send mail and video messages to their family members, ensuring that their family connections can be maintained. AE 321 (WBA) at 4. While the Accused and their family members may find the method by which communication can occur inconvenient and less than the preeminent method, the Defense cannot point to a single authority under domestic or International Law that explicitly guarantees the right/entitlement they now seek.

ATTACHMENT A

