MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY

UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	AE321C(WBA) **Defense Reply** to Government Response to Defense Motion (AE 321 (WBA)) and Supplement (AE 321 (AAA Sup.)) to Permit Telephonic Access with family Members Date Filed: 14 November 2014

1. Timeliness: This Reply is timely filed.

2. Law and Argument:

A. Exposure to "Classified" Information Illegitimate Basis to Deny Access

Mr. bin 'Atash and his co-accused have been held in near-total isolation, in inhumane circumstances, for more than a decade. Despite this fact, the Government seeks to deny any form of contemporaneous communication to Mr. bin 'Atash and his family members on the basis that Mr. bin 'Atash has been "exposed to highly classified information." AE321B(GOV) at 1. However, this is an illegitimate basis on which to deny Mr. bin 'Atash access to his family, and the Government should be estopped from denying telephonic access where it seeks to justify such denial on the basis of Mr. bin 'Atash's unwilling participation in its own systematic program of torture and abuse.

The Government's current effort to muzzle Mr. bin 'Atash on the basis of his exposure to the Government's own embarrassing secrets is a continuation of a theme. Previously during oral

argument, Trial Counsel suggested that the "life experiences" of Mr. bin 'Atash are classified information because Mr bin 'Atash is presently "in control of the United States Government." Tr. at 6670. Trial Counsel made this assertion despite the fact that Mr. bin 'Atash is in no way in privity with the United States Government, having never signed any classified information nondisclosure agreement and having never acquiesced to his exposure to purportedly-classified information or agreed to treat such information as classified. *See generally* Tr. at 6701 (comparing Mr. bin 'Atash's "expos[ure] to sources and methods" to the manner in which "the citizens of Hiroshima were exposed to the classified Manhattan Project."). When the Commission noted that the Government, not the accused, had "voluntarily expose[d]" the accused to classified information, Trial Counsel made the preposterous suggestion that Mr. bin 'Atash and his co-accused had actually exposed themselves because the United States was "at war" and "needed intelligence." Tr. at 6671.

As Mr. bin 'Atash is not and has never been in any form of privity with the Government concerning the information that the Government chose to expose him to, the information in Mr. bin 'Atash's own mind that he garnered based upon his personal observations and experiences cannot be said to be "owned by" or "produced by" or "under the control" of the United States Government, as required to properly classify information. Exec. Order. No. 13526, 75 Fed. Reg. 707 (December 29, 2009). As such, the use and communication of the information in Mr. bin 'Atash's own mind is protected under the First Amendment, and the Government cannot properly prohibit telephone access on the basis of suppressing such information. *See generally Bartnicki v. Vopper,* 532 U.S. 514, 535 (2001) (in civil suit based upon media organization's use of telephone communications illegally intercepted by a third party, media organization's use was protected by First Amendment because "a stranger's illegal conduct does not suffice to remove

the First Amendment shield from speech about a matter of public concern."); *New York Times Co. v. United States,* 403 U.S. 713, 719 (1971) (Black, J., concurring) (in upholding press's publication of classified information stolen by a third party, concurrence notes that "the word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment."). The Commission should be mindful of this fact when determining whether JTF-GTMO's policies serve a "legitimate" Government interest.

B. Deference to Confinement Facility Not Without Constitutional Limits

In its Response, the Government states that Mr. bin 'Atash asserts "various rights of the Accused" while "omitting any explanation of how those rights are implicated in this case." AE321B(GOV) at 2. The rights at issue in AE321 are Mr. bin 'Atash's First and Fifth Amendment rights, in addition to his rights under international humanitarian law. While the Government asserts that Mr. bin 'Atash has put forth only "boilerplate language" to support these rights, in fact the defense dedicates nearly an entire motion, replete with reference to numerous authorities, in a thorough exploration of how Mr. bin 'Atash's rights are implicated in the instant case. This includes an explanation of how Mr. bin 'Atash's Fifth Amendment rights have been violated, as "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Bell v. Wolfish,* 441 U.S. 520, 535 (1979); *see also Block v. Rutherford,* 468 U.S. 576 (1984). This also includes a thorough explanation of how Mr. bin 'Atash's First Amendment rights have been violated, as Mr. bin 'Atash "retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier,* 417 U.S. 817 , 822 (1974). Where the defense dedicates nearly an entire brief to an

explication of the rights implicated in the denial of telephonic access to family members, it is incomprehensible that the Government would then compare the defense's thorough analysis to "[t]wo sentences of argument, a threadbare conclusion, and a handful of marginally relevant citations…" AE321B(GOV) at 2 (quoting *Davis v. Pension Benefit Guar. Corp.,* 734 F.3d 1161, 1166-67 (D.C. Cir. 2013)).

In reality, it is the Government that draws threadbare conclusions in this case – particularly with respect to the deference that should be given to the confinement facility. Mr. bin 'Atash has never denied that JTF-GTMO should be given some leeway in determining how to conduct its operations, but this deference must be measured against both constitutional and international law guarantees. Assuming the Commission is to apply the standard set forth in *Turner v. Safley,* 482 U.S. 78 (1987), this standard is not "toothless." *Thornburgh v. Abbott,* 490 U.S. 401, 414 (1989) (citation omitted); *see also Prison Legal News v. Columbia County,* 942 F. Supp. 2d 1068, 1084 (9th Cir. 2013) (noting that *Turner* does not give prison officials a "blank check' to restrict constitutional rights.") (citation omitted).[1] The Commission has both the authority and obligation to carefully scrutinize JTF-GTMO's policy in light of the various *Turner* factors, as the test would be rendered meaningless if it were to simply yield on every occasion to blind and unlimited deference to the unsubstantiated claims of the confinement facility.

In scrutinizing JTF-GTMO's telephone policy as applied to Mr. bin 'Atash and the detainees housed with him, it should be persuasive to the Commission that the Government admits that it has instituted telephone calls for other Guantanamo Bay detainees. AE321B(GOV)

[1] Mr. bin 'Atash agrees with Mr. al Baluchi that "[i]nternational humanitarian and human rights law, as adopted by the United States, requires Joint Task Force-Guantanamo to provide [Mr. bin 'Atash] to reasonable access to his family, through telephone/videoconferencing contact and family visits." AE321(AAA Sup.) at 2. This baseline requirement exists irrespective of whatever constitutional standard that the Commission may choose to apply.

at 7. *Turner* asks "whether the prisoner has pointed to some obvious regulatory alternative that fully accommodates the asserted right while not imposing more than a *de minimis* cost to the valid penological goal." *Overton v. Bazzetta,* 539 U.S. 126, 136 (2003). Assuming *arguendo* that JTF-GTMO can assert any valid penological goals in the imposition of a complete telephone ban, Mr. bin 'Atash (and the Government itself) have demonstrated a ready alternative that is not only applicable in theory but that, in fact, is already being carried out in practice without any harm to the detention facility. The existence of this ready alternative is a compelling factor which also undercuts JTF-GTMO's argument that the phone ban is rationally related to institutional security. *See, e.g. Prison Legal News,* 942 F. Supp. 2d. at 1083 ("[t]o determine whether there is a common-sense connection between the [questioned policy] and enhanced security, the Court must analyze the [questioned policy] within the context of the Jail's other practices and regulations."); *Thongvanh v. Thalacker,* 17 F.3d 256, 259 (8th Cir. 1994) (regulation prohibiting inmate form communicating with family in foreign language invalid where facility had translation services available and permitted other inmates to communicate in foreign language); *Kikimura v. Turner,* 28 F.3d 592, 599 (7th Cir. 1994) (noting that *Turner* requires "particularized finding[s]" concerning the legitimate penological interest at issue and further noting that regulations may fail the *Turner* test where a facility restricts rights "without even looking to see how the rights might be accommodated and estimating the expense entailed by doing so.").

In defense of its complete ban on meaningful and contemporaneous communications with family members, the Government points to *Al Odah v. United States,* 406 F. Supp. 2d 37 (D.D.C. 2005), which the Government claims holds that the "risks to national security and the public interest" counsel against detainee telephone calls. AE321B(GOV) at 6-7. However, *Al Odah* is

inapplicable because both the factual predicate and procedural posture relevant to the *Al Odah* decision were vastly different than the case at bar. The *Al Odah* decision cited by the Government was the result of a Guantanamo habeas Petitioner's motion for preliminary injunction which arose out of his ongoing hunger strike. Counsel for the Petitioner argued that providing direct communication between the Petitioner and his family might "provide a connection of trust and hope" at a time in which the Petitioner's health was in a downward spiral due to his hunger strike. *Id.* at 45. While the District Court declined to mandate telephonic communication under those circumstances, the Court did so without addressing the merits of any constitutional issues involved in the denial of telephonic access. In fact, the Court specifically noted that it was not addressing "constitutional claims not raised in the context of a habeas petition" or addressing the Petitioner's "constitutional rights" which the District Court found were "not presently an issue before the Court." *Id.* at 43. It is understandable that the District Court a decade ago was reluctant to address constitutional issues pertaining to the Petitioner's conditions of confinement in the context of a habeas case, because it was not until 2014 (nine years after the *Al Odah* preliminary injunction was decided) that the D.C. Circuit established that conditions of confinement claims *could* sound in habeas. *See Aamer v. Obama,* 742 F.3d 1023, 1032 (D.C. Cir. 2014) (finding that "one in custody may challenge the conditions of his confinement in a petition for habeas corpus…").

Instead of addressing *Turner* or any other constitutional or international law standards applicable to conditions of confinement, the *Al Odah* Court decided upon telephonic access only in the context of preliminary relief, which the Court noted was considered an "extraordinary remedy" requiring a showing of irreparable injury which is "both certain and great." *Id.* at 41 (quoting *Wisconsin Gas Co. v. FERC,* 758 F.2d 669, 674 (D.C. Cir. 1985)). Only in that very

limited context did the Court decline to mandate telephonic access. Also placing the decision in proper context, *Al Odah* was decided before JTF-GTMO determined that it could, in fact, provide telephonic access to detainees. *See* AE321B(GOV) at 7.

Thus, while the Government claims that *Al Odah* is "directly on-point," it is clear from the case's factual and procedural history that it is not on-point at all. Those cases most on point are those cited in the defense brief, where courts have considered the constitutional implications of telephone access restrictions for "high-risk" prisoners and concluded that the law requires access, subject only to reasonable restrictions. Those cases include *Mohammad v. Holder,* ___ F. Supp. 2d. ___, 2014 WL 2743935 (D. Colo. 1994), wherein the Court applied *Turner* and, while giving deference to the Government, nevertheless concluded that Special Administrative Measures ("SAMs") unduly limiting telephonic access for a *confessed and convicted member of Al Qaeda* were "arbitrary and capricious" where more reasonable restrictions (such as call monitoring) were readily available. *See also* Attachment B (in Government's Response to defense Motion to Vacate Special Administrative Measures imposed on Boston Marathon bombing defendant Dzhokhar Tsarnaev, Government indicates that defendant is already permitted "weekly social calls to his family" as well as in-person family visits).

C. Authority of Commission to Grant Relief

The Government questions the Commission's authority to grant the relief requested in AE321(WBA), indicating that there is "no nexus between [the] requested relief and the legal proceedings now before this Commission." AE321B(GOV) at 5. However, there is a direct impact between the denial of all meaningful and contemporaneous communications with family and Mr. bin 'Atash's ability to participate in his own defense, and in any event the law requires

no specific demonstration of direct "nexus" for the Commission to take action to cure illegal conditions of confinement.

As noted *supra* and in AE321(WBA), the Government's ban on all contemporaneous communication between Mr. bin 'Atash and his close relatives constitutes impermissible pretrial punishment under the Due Process Clause of the Fifth Amendment. The Fifth Amendment's prohibition on punishment for pretrial detainees is analogous to Article 13, UCMJ, which prohibits a court-martial accused from being "subjected to punishment or penalty other than arrest or confinement upon the charges pending against him…" 10 U.S.C. § 813. Military judges have the authority and responsibility to affect relief from unlawful pretrial punishment. *See, e.g. United States v. Palmiter,* 20 M.J. 90, 96 (C.M.A. 1985) (if a "confinee believes that he is being punished by conditions in the confinement facility, he should…appeal to the convening authority or to the military judge depending on the state of the proceedings at the time…review of the conditions of such confinement should be an ongoing process to limit the duration of any violation which might arise following the initial incarceration."). While the authority of the military judge to affect relief from unlawful pretrial punishment stems in part from Article 13, UCMJ, it also has its roots in the Constitution. The Court of Appeals for the Armed Forces has noted that the question of unlawful pretrial punishment "involves both *constitutional* and statutory considerations." *United States v. King,* 61 M.J. 225, 227 (C.A.A.F. 2005) (emphasis added) (citing *Bell,* 441 U.S. at 535-36). In fact, the Court has gone so far as to interpose on Article 13 the same test for unlawful pretrial punishment espoused by the Supreme Court in *Bell* – that restrictions or conditions imposed must be "reasonably related to a legitimate governmental objective." *King,* 61 M.J. at 227 (quoting *Bell,* 441 U.S. at 539); *see also Palmiter,* 20 M.J. at 95 (noting that the Supreme Court's pretrial punishment jurisprudence

"start[s] with the same premise [as Article 13, UCMJ] prohibiting punishment prior to trial."); *United States v. McCarthy,* 47 M.J. 162, 166 (C.A.A.F. 1997). Courts-martial do not require a specific showing of "nexus" as a prerequisite for relief from unlawful pretrial punishment; the "nexus" is obvious where an accused is punished incident to pretrial confinement which has been imposed, at least in part, "ensure [his] presence for trial." *King,* 61 M.J at 227.

Just as there is no question as to the statutory *and constitutional* authority of military judges to cure illegal pretrial punishment, there is also no question as to a military judge's authority to provide relief from cruel or unusual punishment. As with Article 13 and the Due Process Clause, Article 55, UCMJ (which prohibits "cruel or unusual punishment") is largely coterminous with the Eighth Amendment, which also prohibits cruel and unusual punishment. U.S. Const. amend VIII; *see generally United States v. Pena,* 64 M.J. 259, 265 (C.A.A.F. 2007); *United States v. Matthews,* 16 M.J. 354, 367 (C.M.A. 1983). In evaluating claims involving cruel and unusual punishment under Article 55, UCMJ, courts-martial "apply the Supreme Court's Eighth Amendment jurisprudence." *Pena,* 259 M.J. at 265; *see also United States v. Lovett,* 63 M.J. 211, 215 (C.A.A.F. 2006). As with illegal pretrial punishment, no specific finding of "nexus" is required in order to affect relief.

While Articles 13 and 55 do not specifically apply to military commissions, the lack of a specific "nexus" requirement at court-martial is highly instructive in light of the similarly-situated role of the Commission and the fact that the prohibition on both illegal pre- and post-trial punishment involves universal constitutional (not only statutory) considerations that are as applicable at military commissions as they are at courts-martial. The Court of Appeals for the Armed Forces has consistently encouraged counsel to "seek relief from the military judge" in cases involving conditions of confinement (even illegal conditions of post-trial confinement,

where the record has not yet been authenticated). *United States v. Miller,* 56 M.J. 248, 250 (C.A.A.F. 1997) (further noting that "in a case in which a record has been made on the [constitutional issue at the trial level], the purposeful interference with a servicemember's [constitutional rights]…would be cause for judicial intervention, either to provide credit for illegal pretrial punishment or to mandate relief to cure post-trial abuses.") (citing *United States v. Phillips,* 42 M.J. 346, 348 (1995)). Once the issue is raised, a military judge has "broad authority" to take action with respect to illegal pretrial punishment. *United States v. Stringer,* 55 M.J. 92, 94 (C.A.A.F. 2001) (citing *United States v. Suzuki,* 14 M.J. 491, 493 (C.M.A. 1983)). The authority enjoyed by military judges in this arena is similar to the authority of the federal courts to modify unlawful conditions of pretrial confinement. *See, e.g. United States v. Mikhel,* 552 F.3d 961, 963 (9th Cir. 2009) (directing modification to overly-restrictive Special Administrative Measures upon defendant-appellant's motion in course of appellate proceeding, noting that authority to take action derives from a "court's authority to control its own proceedings" which is "both an inherent power and, in the federal circuit courts, embodied in [federal rule of procedure].") (quoting *Daccarett-Ghia v. Comm'r,* 70 F.3d 621, 623 (D.C. Cir. 1995). There is simply no reason that this Commission, when considering the exact same constitutional issues in the same context, should not have similarly-broad authority and discretion.

In the face of this Commission's clear ability and responsibility to adjudicate unlawful pretrial punishment and cruel and unusual punishment claims, it is the *Government* that now seeks to impose a new and novel "nexus" requirement without offering any authority in support. While such a requirement does not exist, there is in any event a clear and obvious "nexus" between this Commission and JTF-GTMO's wholesale denial of contemporaneous

communications with family members. First, Mr. bin 'Atash is confined in circumstances designed at least in part to secure his presence before this Commission, and his rights have been violated incident to that confinement. *See King,* 61 M.J at 227. Second, the lack of any form of contemporaneous communication with his family members, over the span of more than a decade, has harmed Mr. bin 'Atash's ability and hampered his will to participate meaningfully in his own defense. *See generally Faretta v. California,* 422 U.S. 806, 819 (1975) ("[t]he Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense.").

Where Mr. bin 'Atash is not permitted to have meaningful interaction with his family members, the Government's actions engender a sense of hopelessness that causes Mr. bin 'Atash to withdraw from interaction with his counsel. This is exemplified by the Government's recent implementation of a "video message" program for Camp 7 detainees. *See* AE321(WBA) at 4-5. These short and non-contemporaneous messages are accompanied by so many restrictions that many detainees view them as a source of stress, anxiety, and "mental torture." *Id.* Because of the myriad restrictions imposed on the messages, only two of the seven detainees housed in the same facility as Mr. bin 'Atash have participated in the program. Mr. bin 'Atash, having not spoken to many family members in more than twenty years (including his entire time in captivity), initially hoped to participate. He provided the facility approximately one month in advance with the names of his parents, two sisters, and one of his brothers. As he was only permitted to request five viewers, he listed his other three surviving brothers as alternates. After submitting his list of names, Mr. bin 'Atash repeatedly asked the status of his requested viewers – whether they had been approved or denied, and he was repeatedly told that the detention facility was "working on it." After requesting information over the course of a month, Mr. bin

'Atash learned approximately one hour before his scheduled taping that both his father and brother would be denied access to his video. Recognizing JTF-GTMO's game as nothing more than further manipulation and unlawful pretrial treatment, including torture, that he has experienced since his enforced disappearance in 2003, Mr. bin 'Atash refused to participate in what he reasonably believed was a meaningless taping. In the absence of any form of contemporaneous communication, the impact of the denial of even this short video message was greatly amplified, causing Mr. bin 'Atash to lose focus on trial preparation and interaction with his attorneys as he lamented his continuing inability to communicate meaningfully with his family.

For the foregoing reasons, as well as those reasons set forth in AE321(WBA) and AE321(AAA Sup.), Mr. bin 'Atash requests that the Military Commission order Joint Task Force Guantanamo and the Commander, Joint Detention Group (JDG) to provide Mr. bin 'Atash with live and contemporaneous telephonic access to his family. Mr. bin 'Atash additionally joins Mr. al Baluchi's requests for video teleconference (VTC) access to family and in-person visits with family members.

3. Oral Argument: Mr. bin 'Atash reiterates his request for oral argument on the subject motion. The Government indicates that "this issue should be resolved by the Commission on the parties' submissions alone." AE321B(GOV) at 9. However, the instant motion involves complicated and disputed points of both fact and law. Permitting oral argument, in this instance, is "necessary to provide a full and fair trial." R.C. 3.9.a.3; *see also Herring v. New York,* 422 U.S. 853, 862 (1975) ("[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.").

4. Attachments:

A. Certificate of Service
B. Excerpt from Government's Opposition to Motion to Vacate Special Administrative Measures, *United Sates v. Tsarnaev,* Crim. No. 13-10200-GAO (D. Mass.), filed 21 Oct 13

//s//
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A

CERTIFICATE OF SERVICE

I certify that on 14 November 2014, I electronically filed the **Defense Reply to Government Response to Defense Motion (AE 321 (WBA)) and Supplement (AE 321 (AAA Sup.)) to Permit Telephonic Access with family Members** with the Trial Judiciary and served it on all counsel of record by e-mail.

//s//
CHERYL BORMANN
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B

As for Tsarnaev's apparent wish to associate with other inmates, the Supreme Court has recognized that an "inmate's 'status as a prisoner' and the operational realities of a prison dictate restrictions on the associational rights among inmates." Jones, 433 U.S. at 126. Tsarnaev is no position to second-guess BOP's judgment that allowing him to mix with other inmates could jeopardize the safety and security of both him and others. It bears repeating that "[b]ecause the realities of running a penal institution are complex and difficult . . . wide-ranging deference [is] to be accorded the decisions of prison administrators." Id.

Tsarnaev neglects to mention that many accommodations have and continue to be made on his account, including the closure of the facility for the protection of counsel and staff during every visit. A separate room in a separate area is provided for counsel to meet in confidence with their client. Since the implementation of the SAMs, those procedures have not changed. With respect to the SAMs provision regarding phone calls, although the SAMs and BOP policy only require a minimum of one call per month, Tsarnaev has been permitted weekly social calls to his family since July 24 and such continue to the present.

Based upon information and belief, only one request was made for a family visit before this motion was filed. That request was made after the SAMs were implemented, and sufficient

notice under the SAMs was not provided by the defense. BOP offered to accommodate the visit the following day but Tsarnaev declined to reschedule the meeting.

CONCLUSION

Based upon all of the foregoing, the motion to vacate the Special Administrative Measures should be denied in its entirety.

Very truly yours,

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CERTIFICATE OF SERVICE

I hereby certify that these document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF)

/s/Nadine Pellegrini
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Date: October 21, 2013