

**MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY**

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>ABD AL HADI AL-IRAQI</p>	<p><b>AE 021</b></p> <p>Emergency Defense Motion For Appropriate Relief To Cease Physical Contact with female Guards</p> <p>16 October 2014</p>
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1. Timeliness: This motion is filed within the timeframe established by Rule for Military Commission (R.M.C.) 906 and is timely pursuant to Military Commissions Trial Judiciary Rule of Court (R.C.) 3.7.c.(1).

2. Relief Sought: The Defense seeks an emergency order from the Military Commission to the staff of JTF-GTMO to the effect that no female guards should be used during transfers to and from attorney-client meetings and to/from Commission hearings when they would be in a position to need to physically touch Mr. Hadi al Iraqi. In the ordinary course of business this would include only the shackling and un-shackling of Mr. Hadi al Iraqi and would not apply to any other duties of the guards or have any other impact on mission readiness. Such an order would also not apply during any exigent circumstances involving the health, safety and welfare of the guard force or Mr. Hadi al Iraqi. Furthermore, the Commission should conduct an inquiry into the policies and procedures regarding rules for use of force at JTF-GTMO given the gross overreaction of the guards and use of excessive force in response to such a simple religious

accommodation request.

3. Overview: The Religious Freedom Restoration Act of 1993 (RFRA) 42 U.S.C. §2000bb-1 provides in part: “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability,” unless the burden “is in furtherance of a compelling governmental interest,” and does so by “the least restrictive means.” Mr. Hadi al Iraqi’s Muslim faith requires him to avoid physical contact with any females to whom he is not married or related. He has indicated that the presence and use of female guards is not objectionable in and of itself, only when they are required to perform the more intimate duty of shackling and un-shackling and other physical contact. Mr. Hadi al Iraqi has stated that he will no longer attend attorney-client meetings or Commission sessions if the female guards continue to perform those duties.

4. Burden and Standard of Proof: The burdens of proof and persuasion are on the defense as the moving party. R.M.C. 905(c).

5. Facts:

- a) Mr. Hadi al-Iraqi has been in the custody of JTF-GTMO and held at the U.S. Naval Station, Guantanamo Bay, since April 2007.
- b) On 8 October 2014, Mr. Hadi al Iraqi had a meeting with his attorneys. Pursuant to policy and practice at JTF-GTMO this meeting was conducted at Camp Echo II.
- c) Upon conclusion of the meeting at approximately 1600 his attorneys departed Camp Echo II, and Mr. Hadi al Iraqi was to be transported back to his normal cell.

- d) To effectuate the transfer, a female guard came to unshackle and re-shackle Mr. Hadi al Iraqi in order to prepare him for transport to his camp.
- e) Mr. Hadi al Iraqi at this time requested a male guard be called as this procedure involved direct physical contact between guard and detainee.
- f) The staff of JTF-GTMO interpreted this as non-compliance, summoned four male guards who physically restrained Mr. Hadi al Iraqi (a 53 year old man), [REDACTED]  
[REDACTED]  
[REDACTED]
- g) Mr. Hadi al Iraqi suffered aggravating injuries to a pre-existing back condition (also known to the staff of JTF-GTMO).
- h) Mr. Hadi al Iraqi has indicated that he will no longer attend attorney-client meetings or Commissions hearings under these conditions as they significantly interfere with his religious beliefs.

6. Law and Argument:

**A. The policy is in violation of the Religious Freedom Restoration Act**

The Religious Freedom Restoration Act of 1993 provides that:

(a) In general. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief. A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.

However, the DC Circuit Court in *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009), expressly held that RFRA's protections do not extend to Guantanamo detainees, who, as nonresident aliens, do not qualify as protected "person[s]" within the meaning of that statute. That same court also recently rejected a very similar argument in holding that RFRA's protections of the free exercise of religion do not extend to corporations. *Gilardi v. U.S. Department of Health and Human Services*, 733 F.3d 1208, 1214–15 (D.C. Cir. 2013). As this Commission must be well aware the Supreme Court's recent decision in *Burwell v. Hobby Lobby Stores Inc.*, 134 S. Ct. 2751 (2014) turns much of this jurisprudence on its head.

*Hobby Lobby* establishes that the Circuit Court's previous interpretation of RFRA was incorrect. In *Hobby Lobby*, the Supreme Court held that Congress intended RFRA, as amended by the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc et seq., "to effect a complete separation from First Amendment case law." 134 S.Ct. at 2762. The Court in *Hobby Lobby* goes on to note that the RFRA itself does not define the term "person" and looks to the Dictionary Act, "which we must consult '[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise.'" 1 U.S.C. §1. Under the Dictionary Act, "the wor[d] 'person' include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.'" The Court goes on to find that "nothing in RFRA... suggests a congressional intent to depart from the Dictionary Act definition." Therefore, this ruling that corporations qualify as "persons", overturning prior DC Circuit rulings, certainly suggests that detainees (actual human beings, and definitely "individuals") should be treated as "persons" under the Religious Freedom and Restoration Act

(RFRA), and as such, are entitled to freedom from substantial burdens on their religious practices. Following *Hobby Lobby's* determination that the meaning of "persons" is unconstrained by existing constitutional case law, this Commission should no longer treat *Rasul I* as good law.

Mr. Hadi al Iraqi's Muslim faith requires many things of him. One of which is to avoid all contact with females to whom he is not related or married. This is an essential part of his religious faith and violation of it represents a substantial burden on the exercise of his religion.

The policy of JTF-GTMO to use a female guard for the shackling and un-shackling of Mr. Hadi al Iraqi, which requires close physical proximity and physical contact, is not in furtherance of a compelling government interest, and based solely on the facts of this incident is by no means the least restrictive means of furthering any interest. In response to his request for a male guard, the staff at JTF-GTMO declared Mr. Hadi al Iraqi noncompliant with their instructions and summoned four male guards to violently physically restrain him and perform a Forced Cell Extraction (FCE). Four male guards are four times as many as he had requested as a simple accommodation of his religious beliefs. That four male guards were available shows that this was in no way a burden on the Government, and suggests that the JTF is far more interested in asserting its dominance and control than in accommodating a benign request for statutorily protected religious accommodation.

#### **B. The Policy is in Violation of First, Fifth, and Sixth Amendments to U.S. Constitution**

JTF-GTMO's arbitrary, capricious, and purposeless policy of utilizing female guards in close physical proximity and in direct physical contact has deprived Mr. Hadi al Iraqi of his right

to freely exercise his religion, of his right to due process, and of his right to the effective assistance of counsel in this case. It is well-settled that a prison inmate “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). This includes rights under the First Amendment’s Free Exercise Clause. *Cruz v. Beto*, 405 U.S. 319 (1972).

Mr. Hadi al Iraqi also has both constitutional and statutory rights to counsel. *See, e.g.* U.S. Const. amend VI; 10 U.S.C. § 948k, 10 U.S.C. § 949c; *Strickland v. Washington*, 466 U.S. 668 (1984). The right to counsel is the right to the effective assistance of counsel. *See, e.g. McMann v. Richardson*, 397 U.S. 759 (1970); *Reece v. Georgia*, 350 U.S. 85 (1955); *Glasser v. United States*, 315 U.S. 60 (1942). The right to the effective assistance of counsel includes “the right of private consultation with [counsel].” *Coplon v. United States*, 191 F.2d 749, 757 (D.C. Cir. 1951).

As a pretrial detainee, Mr. Hadi al Iraqi also has substantial due process rights at issue, including the due process right to be free from pretrial punishment. *See, e.g. Bell v. Wolfish*, 441 U.S. 520, 536-37 (1979) (noting that the Government “may detain [a pretrial detainee] to ensure his presence at trial and may subject him to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment, or otherwise violate the Constitution.”); *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989) ([i]t is clear...the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment.”) (Citation omitted). Due process (as well as the Sixth Amendment) is further implicated in the denial of access to counsel. *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1051 (8th Cir. 1989) (“[p]retrial detainees have a substantial due process interest in effective

communication with their counsel and in access to legal materials. When this interest is inadequately respected during pre-trial confinement, the ultimate fairness of their eventual trial can be compromised.”); *Campbell v. McGruder*, 580 F.2d 521, 531 (D.C. Cir. 1978) (“pretrial detention occurs in the important interval directly preceding trial. The conditions of pretrial confinement cannot be permitted negatively to affect the outcome of the criminal process.”).

In evaluating confinement facility regulations that impinge upon various constitutional rights, courts, including this Military Commission, have traditionally employed the test espoused by the Supreme Court in *Turner v. Safley*, 482 U.S. 78. Under *Turner*, such regulations are only valid if they are “reasonably related to legitimate penological interests.” *Id.* at 89. Factors to consider in assessing whether a regulation is reasonably related to a legitimate penological interest include a “valid, rational connection” between the regulation and the Government interest, the legitimacy and neutrality of the Government objective, whether “alternative means” of exercising the right remain open to the prisoner, the impact of accommodation of the right on guards and on other inmates, and the allocation of prison resources. *Id.* at 89-90.

In this case, if the Commission chooses to apply the *Turner* test, it must also apply the test in the context of Mr. Hadi al Iraqi’s status as a pretrial detainee. *See e.g. Benjamin v. Fraser*, 264 F.3d 175, 187 (2d Cir. 2001) (“[p]enological interests [as highlighted in *Turner*] are interests that relate to the treatment (including punishment, deterrence, rehabilitation, etc...) of persons convicted of crimes...Penological interests are therefore arguably not an appropriate guide for the pretrial detention of accused persons.”); *see also Demery v. Arpaio*, 378 F.3d 1020, 1028 (9th Cir. 2004) (applying *Bell v. Wolfish*, rather than *Turner*, to a claim involving alleged pretrial punishment in part because “*Turner* dealt with convicted prisoners, not pretrial detainees.”). At a minimum, consideration of Mr. Hadi al Iraqi’s pretrial status should afford the



Government less deference in determining what constitutes “legitimate penological interests.”

Applying the *Turner* factors to the present case, it is clear that the Government cannot demonstrate that its actions are reasonably related to legitimate penological interests. The Government’s actions in this case inhibit not only Mr. Hadi al Iraqi’s free exercise of religion but also Mr. Hadi al Iraqi’s counsel and due process rights. The effect of JTF-GTMO’s latest action in using female guards to transport devoutly religious Muslims with deeply-held aversions to contact with unrelated females is to deny meaningful access to counsel altogether.

It is undoubtedly true that the confinement facility does have a legitimate interest in the safety of the institution and in the health and wellbeing of guards and other detainees. However, JTF-GTMO’s use of female guards on escort duty is not reasonably related to this interest. Under *Turner*, there is no valid and rational connection between the use of female guards in physical contact with religiously-observant Muslim detainees and safety and security. This is readily apparent where male guards have been utilized to transport detainees to attorney-client meetings and court sessions for years without adverse consequences. If anything, the use of female guards to transport Mr. Hadi al Iraqi and his fellow HVDs only decreases safety and security given that it directly lead to the FCE incident on October 8th.

The policy of utilizing female guards in close proximity or in physical contact to Mr. Hadi al Iraqi fails the remaining *Turner* factors. There are no “alternative means” available to Mr. Hadi al Iraqi to exercise his rights because he cannot remain in his cell at all times, may be compelled to attend sessions of the Commission, and is unable to effectively engage with his defense counsel where other forms of contemporaneous communication, such as telephone calls, are foreclosed to him. Mr. Hadi al Iraqi is left with only a prisoner’s dilemma – if he chooses to meet with counsel he will not know in advance if a female guard will be on the escort detail in



physical contact with him, if he then declines to move he risks being found noncompliant and beaten. There can be no effective attorney-client relationship under such circumstances.

On the other hand, accommodation of Mr. Hadi al Iraqi's various constitutional rights would require nothing more than to revert to a policy that was previously in place and that had no impact upon the rights of guards and other inmates. Reversion to the prior, successful policy would have no impact upon the allocation of prison resources given the multitude of positions that have always been available to females and given the apparently exceedingly small number of female guards in comparison to their male counterparts.

7. Conclusion: The staff of JTF-GTMO should be immediately enjoined from using female guards to shackle and unshackle Mr. Hadi al Iraqi under any circumstances other than emergencies and situations presenting a direct threat to the health, safety and welfare of JTF personnel or Mr. Hadi al Iraqi. Only under the most extreme and unusual of situations should the Government be allowed to trounce on Mr. Hadi al Iraqis exercise of his religion.

8. Request for Oral Argument: The Defense believes that this is an issue the Commission should decide immediately in order to preserve Mr. Hadi al Iraqi's religious liberty and his attorney-client rights. If the Military Judge is not so inclined, the Defense requests oral argument.

9. Request for Witnesses: The Defense anticipates that Mr. Hadi al Iraqi may testify for the limited purposes of this motion.

- a) JTF-Joint Detention Group CC
- b) The Defense requests the assistance of the Government and Military Judge in

identifying the guards who were witnesses to the events of 8 October and the production of any video recordings of the incident.

10. Conference with Opposing Counsel: We have conferred with the prosecution and they oppose this motion.

11. Attachments:

A. Certificate of Service

Respectfully Submitted,

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THOMAS F. JASPER, Jr., LtCol, USMC  
Detailed Defense Counsel

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ROBERT B. STIRK, Maj, USAF  
Assistant Detailed Defense Counsel

# ATTACHMENT A

**CERTIFICATE OF SERVICE**

I certify that on the 16th day of October 2014, I filed AE021, the “*Defense Emergency Motion for Appropriate Relief*,” with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

/s/

ROBERT B. STIRK, Maj, USAF  
Assistant Detailed Defense Counsel