

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

UNITED STATES OF AMERICA v. ABD AL HADI AL-IRAQI	AE 021M Government Supplemental Filing To AE 021A – Government Response To Emergency Defense Motion For Appropriate Relief To Cease Physical Contact With Female Guards 13 January 2015
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1. Timeliness

This supplemental filing is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court (“R.C.”) 3.5.e and 3.7.

2. Relief Sought

The Government respectfully requests that the Commission supplement AE 021A, Government Response To Emergency Defense Motion For Appropriate Relief To Cease Physical Contact with Female Guards, with the documents provided as Attachment A (Declaration of Outgoing Camp Commander, Camp VII, JTF-GTMO, Guantanamo Bay, Cuba (“OCC Decl.”)) and Attachment B (Letter from Khalid Shaikh Mohammad to the Accused, [REDACTED] (“KSM Letter”)).

3. Overview

The OCC Decl. provides greater detail concerning detainee movement and the circumstances resulting in female guards being assigned as escorts in the Camp VII detention facility at Naval Station Guantanamo Bay, Cuba. The OCC Decl. includes facts that supplement the previously filed declaration of COL David E. Heath. *See* AE 021A, Attachment B, Declaration of COL David E. Heath, U.S. Army, Commander, Joint Detention Group, dated 29 October 2014 (“Heath Decl.”). The OCC Decl. describes the practical difficulties and far-

reaching consequences that will result from granting the relief requested in the Defense motion that the Commission order Joint Task Force-Guantanamo (“JTF-GTMO”) and the Commander, Joint Detention Group (“JDG”), to cease all activities that bring female members of the JTF-GTMO guard force into direct physical contact with the Accused. AE 021 at 1. [REDACTED]

[REDACTED] The KSM Letter provides instructions to the Accused for answering questions anticipated from Defense and Government attorneys, as well as the military judge, in the event the Accused testifies during Commissions hearings on this issue.

The Supreme Court in *Turner v. Safley*, 482 U.S. 78 (1987), held the judiciary should give substantial deference to expert prison administrators with respect to detention operations where such operations are designed to meet penological interests. 482 U.S. at 89. The OCC Decl. provides additional, new evidence in support of legitimate and rational penological interests served in positioning female guards within Camp VII, and not restricting the ability of female guards to perform their required duties and responsibilities as Camp VII guards.

4. Burden of Proof

As the moving party, the Government must demonstrate by a preponderance of the evidence that the requested relief is warranted. Rules for Military Commission 905(c)(1)-(2).

5. Facts

On 16 October 2014, the Defense filed AE 021, Emergency Defense Motion For Appropriate Relief To Cease Physical Contact with Female Guards (“Defense Motion”). On 30 October 2014, the Government responded with AE 021A, Government Response To Emergency Defense Motion For Appropriate Relief To Cease Physical Contact With Female Guards. This motion was scheduled for oral argument during the Commission hearings on 17-19 November 2014. The oral argument, addressing the matters contained in AE 021 and AE 021A, was continued on 18 November 2014 until the 26-30 January 2015 Commission hearings.

The OCC Decl. adds additional facts not previously addressed in the Heath Decl.

Specifically, the OCC Decl. offers details regarding the composition and assignment of guards within the Camp VII [REDACTED] (OCC Decl. ¶¶ 4-5), [REDACTED] [REDACTED] (*Id.* at ¶¶ 6-8), and the potential extent of incidental contact between escort guards and detainees (*Id.* at ¶¶ 9-12). Further, the OCC Decl. describes the legitimate and rational penological interests served by the decision to move female guards into escort duties within Camp VII. *See id.* ¶¶ 13-15.

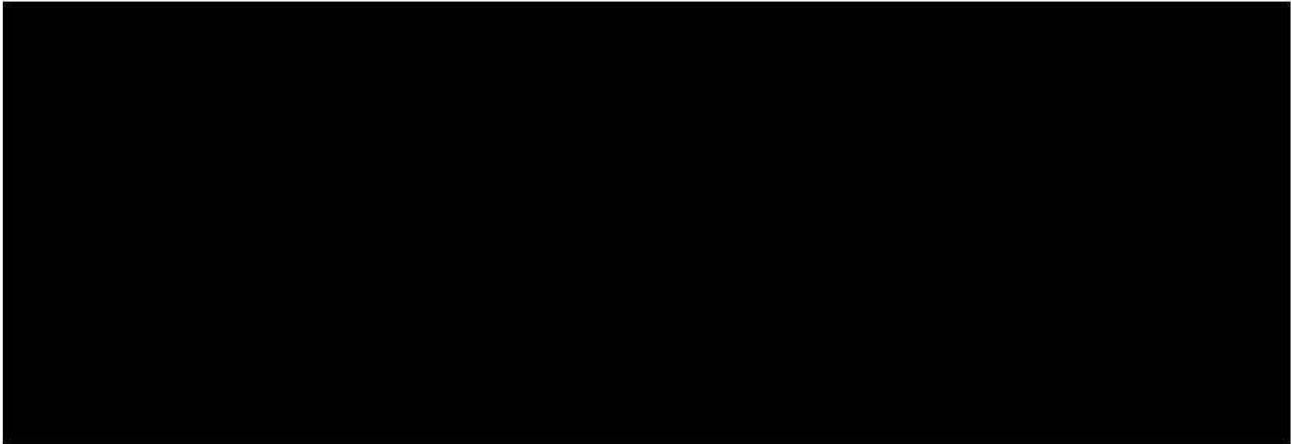
[REDACTED] *See id.* at ¶ 16. The KSM Letter coaches and instructs the Accused on what questions and answers the Accused should provide to the Defense and Government attorneys, as well as the military judge, in the event the Accused testifies on this issue. *See* Attachment B, KSM Letter at 1-3. The letter includes directions on how to respond to questions about why some of the other detainees do not refuse to be touched by the female guards—instructing that the answer should be that the other “brothers” who do not refuse to be touched by females were threatened when they saw the Accused after a forced cell extraction, and that the Accused should be sure to include that he had force used against him, which caused a headache, vomiting, and exhaustion. *Id.*

6. Law and Argument

I. The OCC Decl. Provides New Facts Pertaining to the Deployment of Female Guards at Camp VII as Reasonably Related to Legitimate Penological Interests

The Government in AE 021A argued the analysis pursuant to *Turner* in support of the Government’s decision to deploy female guards at Camp VII. *See* AE 021A at 19-25. As stated in AE 021A, the factors considered in *Turner* are 1) whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it, 2) whether there are alternative means of exercising the asserted right that remains open to the prisoners, 3) whether accommodation of the right will have an impact on guards and other

inmates, and 4) whether there are alternatives to the policy that fully accommodate the prisoner's rights at *de minimis* cost to valid penological interests. *See id.*; *Turner*, 482 U.S. at 89-91.



See id. at ¶¶ 6-8.

The description of guard roles and responsibilities offers a clearer picture of the level of full team member integration necessary for successful Camp VII escort teams in such a dynamic environment. Further, the OCC Decl. illustrates how restricting female members of the guard force from physical contact with detainees breaks down established practice and ultimately weakens [REDACTED] as an organic whole. Therefore, including female guards in Camp VII without restricting their capacity and ability to fully perform their duties is a valid, rational decision furthering the legitimate governmental interest of safe and secure detention operations. *See Turner*, 482 U.S. at 89-91.

Further, the OCC Decl. illustrates there is no simple alternative to changing the policy of deploying female guards to Camp VII that will fully accommodate the Accused's rights at *de minimis* cost to valid penological interests. *See id.* [REDACTED]

[REDACTED] *See* OCC Decl. ¶ 5. Removing female guards from the force [REDACTED] increases the workload of available male guards with a corresponding decrease in the availability

¹ The OCC Decl. also provides a more detailed description of potential incidental contact between female escort guards and detainees. *See* OCC Decl. ¶¶ 9-12.

of potential legal appointments. Therefore, accommodating the Accused's alleged rights results in more than a *de minimus* cost to the Government's valid penological interests of promoting the safety and security of the guard force and detainees.

II. The KSM Letter Provides New Facts Regarding the Potential Impact of Accommodation on the Government and Other Detainees

The KSM Letter provides the Commission with insight into Camp VII detainee dynamics, and the impact of this decision to change the guard force on other Camp VII detainees. [REDACTED] the document is proof that any decision regarding the role of female guards within Camp VII must be considered in light of the potential impact not only on the Government, but also on other detainees, as this is quite apparently [REDACTED] by the detainees. *See Turner*, 482 U.S. at 89-91. It is reasonable, based on this communication, to anticipate the accommodation for the Accused would understandably impact potential accommodation for other detainees at Camp VII. The corresponding impact on the Government caused by accommodating the Accused is therefore multiplied beyond this particular Commission and should not be considered in isolation.

7. Conclusion

The Government respectfully requests that the Commission consider this Supplement along with the attached declarations, and deny the Defense Motion.

8. Affirmative Statement

Military Commissions Trial Judiciary Rule of Court 3.5.e permits a party to file a supplement if it "add[s] new facts, not known at the time of filing, or newly decided case law to an existing motion." This supplemental filing does not raise new issues or advance new arguments. The new facts included in this supplement were not known by the Government at the time of filing the existing response (AE 021A).

9. Oral Argument

The Commission should decide this matter without oral argument. *See R.C. 3.9(a)*.

10. Witnesses and Evidence

The Government relies on the OCC Decl. and KSM Letter attached to this supplement, as well as the testimony of witnesses at an appropriate hearing on this issue. *See* Attachment A-B.

11. Certificate of Conference

The Government conferred with the Defense, and the Defense objects to the relief requested.

12. Additional Information

The Government has no additional information.

13. Attachments

- A. Certificate of Service, dated 13 January 2015.
- B. Declaration of Outgoing Camp Commander, Camp VII, JTF-GTMO, Guantanamo Bay, Cuba.
- C. Letter from Khalid Shaikh Mohammad to the Accused, [REDACTED]

Respectfully submitted,

//s//

Mikeal M. Clayton
Trial Counsel
LTC David J. Long, JA, USA
Assistant Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 13th day of January, 2015, I filed **AE 021M, Government Supplemental Filing To AE 021A – Government Response To Emergency Defense Motion For Appropriate Relief To Cease Physical Contact With Female Guards**, with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

/s/

Mikeal M. Clayton
Trial Counsel
Office of the Chief Prosecutor
Military Commissions

ATTACHMENT B

~~UNCLASSIFIED//FOR OFFICIAL USE ONLY - NOT RELEASABLE TO DETAINEES~~

I, Lieutenant Colonel [REDACTED], pursuant to 28 U.S.C. § 1746, hereby declare under penalty of perjury under the laws of the United States of America as follows:

1. ~~(U)~~ I make the following statements based on my personal knowledge and information made available to me in my official capacity.

2. ~~(U//FOUO)~~ I am a Lieutenant Colonel in the Massachusetts National Guard with 32 years of service as a military police officer. [REDACTED]

[REDACTED] I currently serve as the Officer-in-Charge of Camp VII at Joint Task Force-Guantanamo (JTF-GTMO), Guantanamo Bay, Cuba. I have held this position since March 20, 2014. As such, I am responsible for the safe, humane, legal, and transparent execution of law of war detention operations for detainees at Camp VII. As the Camp VII OIC, my primary concerns are the safety of my service members, the humane custody of detainees, and the security of my area of operations.

3. ~~(U//FOUO)~~ Because of my position I am familiar with Camp VII Standard Operating Procedures (SOPs) applicable to detainee movements. I am also familiar with Camp VII guard force manning, rank, training, professional development and clearance requirements.

4. ~~(U//FOUO)~~ [REDACTED]

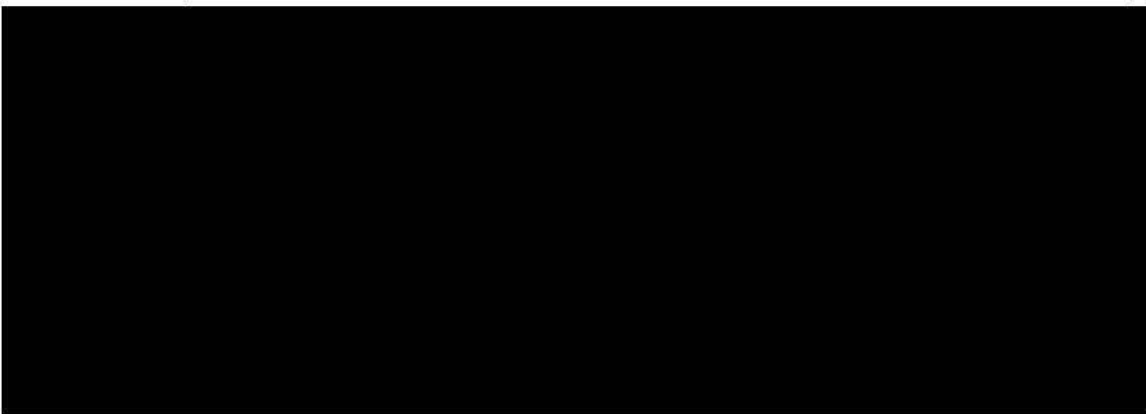
[REDACTED] One of the roles [REDACTED] is to escort detainees to legal meetings and Military Commissions sessions. [REDACTED]

5. ~~(U//FOUO)~~ [REDACTED]

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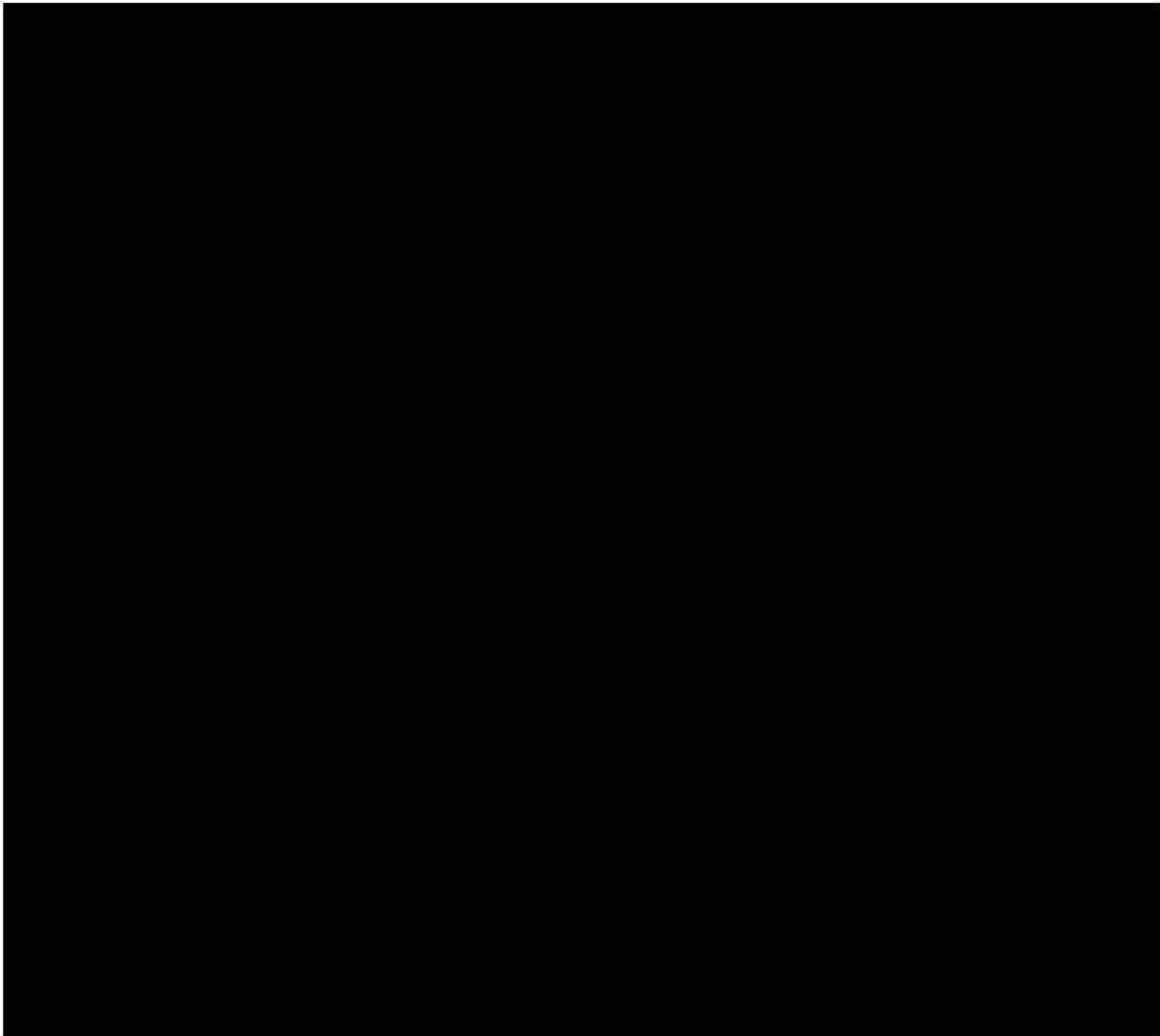
6. ~~(U//FOUO)~~



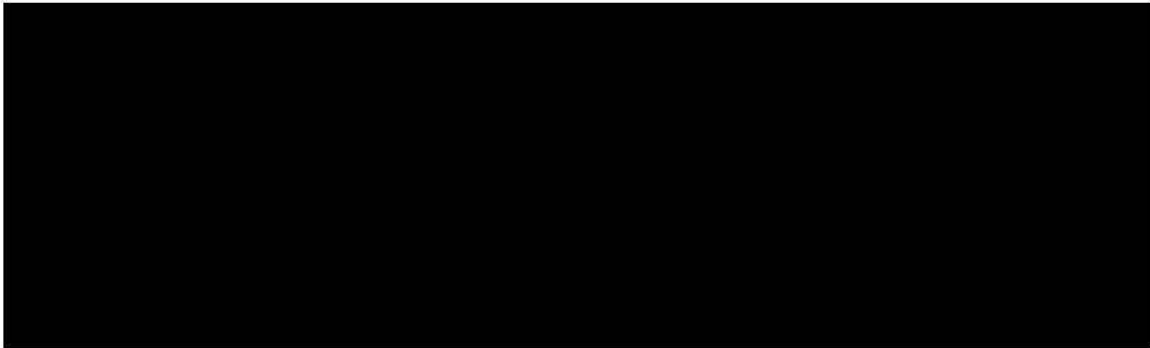
7. ~~(U//FOUO)~~



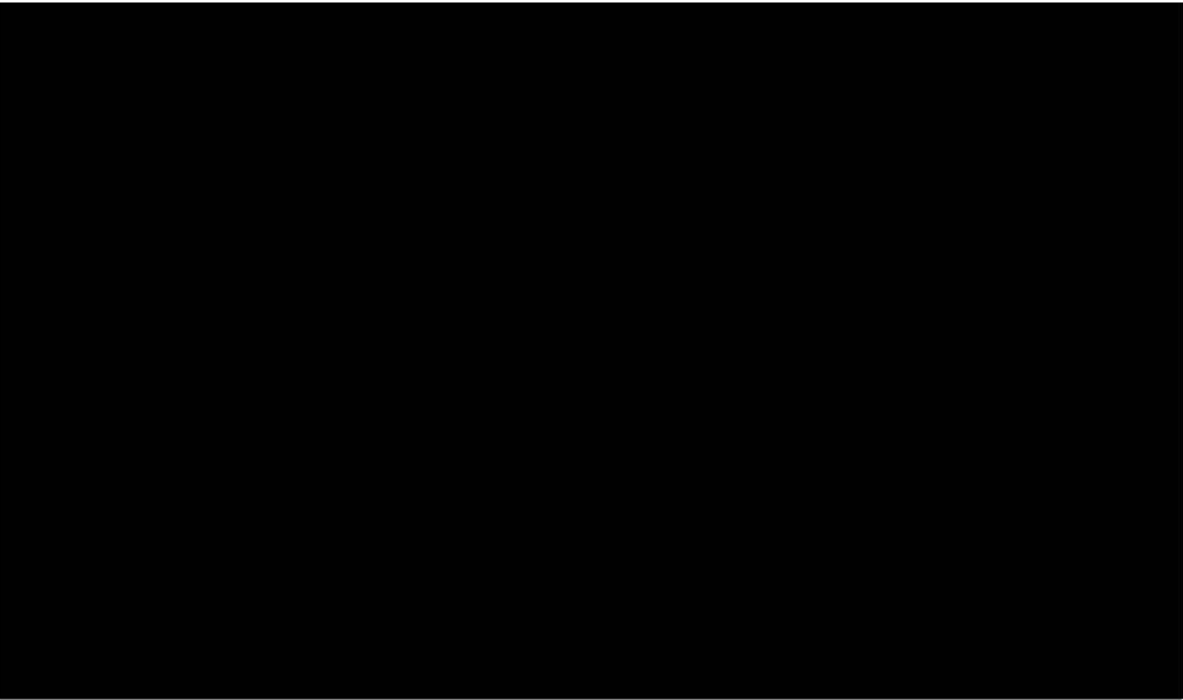
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8. ~~(U//FOUO)~~

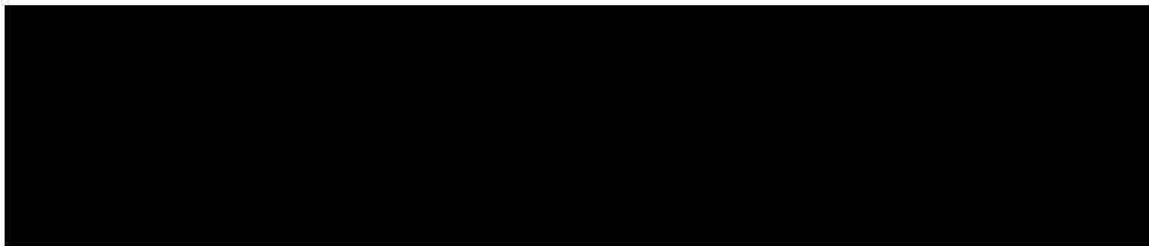


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9. ~~(U//FOUO)~~ [REDACTED] duties and responsibilities may require incidental contact with a detainee during a typical detainee movement. That includes guards who operate within Camp VII who secure the detainee at his cell. The touching of the detainees is very specific in regard to where on the detainee's body the touching occurs, and well as when in the process it occurs. Required searches of the detainee's clothing and person are conducted by the male guards in the facility [REDACTED]

10. ~~(U//FOUO)~~ [REDACTED]



11. ~~(U//FOUO)~~ [REDACTED]



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12. (U//FOUO) [REDACTED]

13. (U//FOUO) Prior to my unit's arrival at JTF-GTMO in March 2014, there were no females assigned to the escort [REDACTED]. Aside from DoD and U.S. Army specific gender neutral assignment policies, I cannot say with certainty why there were periods of time when female guard force members were present and then not present at Camp VII. I can say, however, that execution of my duties as Camp VII OIC requires me to utilize without gender discrimination all qualified and appropriately cleared personnel assets assigned to my command.

14. (U//FOUO) Upon my unit's arrival at JTF-GTMO, I learned that [REDACTED] positions in the camp [REDACTED] required adjudicated TS/SCI clearances. This required me to move [REDACTED] female NCOs [REDACTED] male NCOs with adjudicated TS/SCI clearances [REDACTED] female MP NCOs had not trained for the Escort [REDACTED] mission prior to arriving at Guantanamo. Because of this, I integrated them slowly into the operation, starting with the duties that did not require direct interaction with detainees as I did not want any mistakes made due to insufficient training. The female NCOs were initially assigned [REDACTED] [REDACTED]. These positions allowed them to support the mission requirements while they trained for the escort mission. These roles are generally filled with junior enlisted MPs; they are not NCO leader positions. This overgrade assignment of female NCOs to tasks meant for more junior MPs is not sustainable over the long-term with respect to team dynamics and professional development since it does not provide for an appropriate use of all of the Soldiers' leadership skills, knowledge and experience.

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15. ~~(U//FOUO)~~ In late July, as the August scheduling requests indicated an increased operations tempo following a very slow movement schedule during the July Ramadan period, I identified that due to personnel losses (REFRADS) and injuries in the Escort [REDACTED] staff rebalancing was required to augment the Escort [REDACTED]. This action resulted in a [REDACTED] female MP NCO being assigned to the Escort [REDACTED]. By late August, I reviewed the staffing requirements in the Escort [REDACTED] again and directed that the female MPs be moved into [REDACTED] roles commensurate with their [REDACTED] grades, training and experience. The first moves with female MPs [REDACTED] occurred in September 2014.

16. ~~(U//FOUO)~~ [REDACTED]
[REDACTED]

This letter provided instructions to Mr. al Iraqi on how to litigate and possibly testify in the female guard motion filed in his case. This letter was serialized [REDACTED]

17. ~~(U//FOUO)~~ Detainees were not specifically advised of this evolution in my operational staffing assignments as the actions did not constitute a change to any policy or SOP regarding this operation. Assignments were made in order to most effectively use available Soldiers in the positions they were most qualified to perform thereby maximizing the effectiveness of the mission by fully utilizing the leadership, training and experience of all of the NCOs in this unit. These personnel decisions were in no way intended to intentionally target the religious beliefs of any of the detainees in my care.

Dated: 28 November 2014

[REDACTED]

LTC, MP
Camp VII OIC

ATTACHMENT C

[REDACTED]
[REDACTED] ISN: 10024

NAME: KSM [REDACTED]

BEGIN TRANSLATION



Take this paper with you

Take this paper with you, it does not have a number, read the back if you don't take it with you. I don't see you testifying, but if it happens, these are some of the questions you will write there, give it to the lawyer, and have the translator work on it first thing in the morning when you get there:

- How many times (FCE) occurred against you?
- Is it possible to mention to us the dates of each time?
- Why did the (FCE) happen the first time? (I had a legal appointment with the lawyer... I was restrained by the men going, and on the way back it happened.)
- Did you refuse to leave the cell?
- Why did you refuse a woman to restrain you? (Because this procedure was stopped four years ago after it caused many problems between the administration and the detainees. Few detainees were punished for long periods, and in our camp, it was not obligatory for guards to restrain us, but it was voluntarily. And when the detainee refused, the female guard would go back and male guard will come forward and the procedure took only seconds.)
- When you refused to be restrained by a female? Did you say; you refuse to return and to leave or you will return just as the way you came with the male guard restraining you.
- What happened? (when the camp commander and the JDG commander arrived)
- Did they use woman guards by force? Did they hurt you? Did you resist? (remember to use the force, headache, vomiting, and being exhausted)
- That you were agreeable to be restrained by male guards?
- How many days they gave you for punishment?
- The second time: when was the date and what day?
- Did you refuse to go for X-ray?

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
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[REDACTED]

- 
- How many guards were there and how many females?
 - Did they deny your request?
 - Did you refuse to go for x-ray? (No, not at all, I was in agreement with the men?)
 - Why they take you back to your cell, while you were originally restrained with shackle by the hands and feet?
 - Did you resist?
 - Did you see female guards all the way inside the hospital and what was their percentage approximately?
 - Did you tell the doctor what happened to you, and what was his answer?
 - Did he [Doctor] make take x-ray by force? How? Can you explain?
 - Did he [Doctor] get a good x-ray?
 - Those guards, who were holding your hands during the x-ray, did their heads and hands have protection from the x-ray?
- 

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The prosecutor might ask you this:

Do all the detainees refuse females like you? And refused taking X-ray alongside the female?

The answer: I was the first detainee from  to face this problem after four years. Because for the last four years, we are dealing with female guards but they did not touch us. We dealt with female guards for the library purpose and medical center or when they are with the guards, but the direct touching procedures on our bodies did not happen. We were in the past and before four years ago, had the choice to refuse or accept. Therefore, on the date of (you will mention the date of the first attack) when they

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[REDACTED]

surprised me to tell me that it is a new order from JTF that a female will have to restrain me and punish me by force? This situation made a threatening climate for all, to show that any one refuses, we will hurt them. My brothers saw me that I came back by force, exhausting, and insult. Some of the brothers saw this threat and the use of force might make the situation necessary to deal with it. Some of the brothers asked to see the camp commander, the doctor, and people in charge and wrote letters which made some of the brothers to go with it without any other option, specifically that some of them have appointment with their lawyers once every six months, for example, ABU AL- FARAJ [ISN10017] and others set out for the choice of hunger strike and refusing appointments of which made them lose all their legal meeting since that date.

Did others refuse on the day of the X-ray? [REDACTED] they were intentionally bringing to me a female guard while they brought male guards to [REDACTED] and a female guard to [REDACTED] while he was sick and takes medicine more than food. And if he would have resisted... or even if he talked with all the people in charge and agreed with them, it will not make the situation lawful and end the problem.

He might ask you about sitting with females? Some lawyers better to say that the touching is forbidden, but as for dealing with them in rooms that have cameras and monitoring 24 hours, now that is another thing.

END OF TRANSLATION

NOTE: [The rest of the letter was written in English]

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[REDACTED]