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1 [The R.M.C. 803 session was called to order at 0920,  
2 29 January 2015.]

3 MJ [CAPT WAITS]: The commission will come to order. Let  
4 the record reflect that all parties again are present that  
5 were present when the commission recessed. In addition, since  
6 we have returned to an open session of the commission, the  
7 accused is once again present.

8 All right, Counsel, are you ready to argue on  
9 Appellate Exhibit 021?

10 TC [MR. CLAYTON]: Your Honor, we are. But I also note  
11 that these proceedings are being transmitted to CONUS pursuant  
12 to the commission's order.

13 MJ [CAPT WAITS]: Very well, thank you.

14 DDC [LtCol JASPER]: Defense is prepared, Your Honor.

15 MJ [CAPT WAITS]: Very well. I know we had some  
16 discussion the other day about the burden on this motion, and  
17 I think the commission was clear that it believed that the  
18 burden was on the defense, so the commission will allow the  
19 defense to argue first and last, and you may proceed.

20 DDC [LtCol JASPER]: May I approach the well, Your Honor?

21 MJ [CAPT WAITS]: You may.

22 DDC [LtCol JASPER]: Good morning, Your Honor.

23 MJ [CAPT WAITS]: Good morning.

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1 DDC [LtCol JASPER]: You are correct, the burden of proof  
2 in this matter is on the defense by a preponderance of  
3 evidence because we are the moving party.

4 We are seeking the following relief, Your Honor. We  
5 are requesting, in particular Mr. Hadi al-Iraqi, that no  
6 females be used to physically transport him to legal meetings  
7 or any appointments as it substantially burdens his free  
8 exercise of religion and access to counsel. Note, such an  
9 order would not apply during exigency or any emergency  
10 circumstances that would involve the health, safety or welfare  
11 of the guard force or Mr. Hadi al-Iraqi himself or any other  
12 guard duties that do not require actual physical contact.

13 The thrust of this proceeding is that for the first  
14 time since 2007, and for no legitimate reason, female guards  
15 are now engaging in direct, religiously prohibited, unwanted,  
16 and inappropriate physical contact with Mr. Hadi al-Iraqi  
17 during transports for visits with his attorneys and other  
18 appointments at Guantanamo Bay, even medical ones. This  
19 religiously offensive, unwanted touching by women violates  
20 Mr. Hadi al-Iraqi's sincerely held religious beliefs and is a  
21 sin under the Muslim religion.

22 As a result of this recently instituted Joint  
23 Detention Group/JTF policy resulting in detainees being

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1 touched by female guards during transportation to and from  
2 attorney meetings and other meetings, Mr. al-Iraqi is put in  
3 an unfair predicament, and that presents a Hobson's choice for  
4 Mr. Hadi al-Iraqi: Either he violates the requirements of his  
5 religion or forgoes attending attorney meetings and medical  
6 appointments. Neither option is tenable. He is forced to  
7 choose between observing sincerely held religious beliefs and  
8 meeting with counsel to receive constitutionally adequate  
9 representation.

10 As I mentioned, the facts in this case are as  
11 follows: Mr. Hadi al-Iraqi was transported to Guantanamo Bay  
12 in 2007. For the very first time, October 8, 2014, a female  
13 guard approached him and attempted to touch him. You heard  
14 testimony yesterday morning, Your Honor ----

15 And I'm getting the slow-down button, so I am slowing  
16 down.

17 MJ [CAPT WAITS]: You sounded like you slowed down and now  
18 it stopped flashing, so go ahead.

19 DDC [LtCol JASPER]: ---- for the very first time on the  
20 morning of October 8 approached Mr. Hadi al-Iraqi and she  
21 claims that she had eye contact with him.

22 Now, Mr. Hadi al-Iraqi for seven years has not been  
23 dealing with females in this capacity and simply was not

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1 paying attention. And I asked on cross-examination yesterday  
2 of the escort guard whether it was possible she didn't see him  
3 touch him, because as you heard, she came up behind him and  
4 touched with her left hand on his shoulder and her right hand  
5 on his buckle, and they proceeded at about 20 to 30 feet into  
6 the escort van, and he did not turn around and look at her.  
7 So the contention and insinuation that he seen her that  
8 morning and didn't react is not reasonable from Hadi  
9 al-Iraqi's perspective.

10 He is not an American man. Clearly, I even asked --  
11 and I recognize I can differentiate between genders, because  
12 I'm an American person. I see females on a regular basis.  
13 Mr. al-Iraqi is here at Guantanamo for seven years. For all  
14 of these occasions, all of these meetings -- and it's  
15 uncontroverted and irrebuttable, because surely, Your Honor,  
16 if there were other females who touched him in that seven  
17 years, the government, with all of its power and resources and  
18 ability to seek other individuals that have touched  
19 Mr. Hadi al-Iraqi, they would have been here to rebut the  
20 claim and assertion that this was the very first time that  
21 Mr. al-Iraqi was touched. And this all goes to the sincerity  
22 of his belief.

23 Then you heard some testimony from the same escort

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1 guard yesterday that there was some interaction going on  
2 between Mr. Hadi al-Iraqi and another unknown detainee, and  
3 that the implication was that somehow they were going to  
4 concoct a story and make this up for later in the day when she  
5 approached him again and then for the first time react.

6 Well, Your Honor, you heard that she heard this story  
7 from someone who understands the Arabic language, another  
8 servicemember. Where was that servicemember yesterday to  
9 testify about what he heard? Surely if it was reliable  
10 information, that would have been very damning to  
11 Mr. Hadi al-Iraqi, and that person would have been here to  
12 testify about what he heard, the contents of the conversation,  
13 and, again, it would show the lack of sincerity of  
14 Mr. Hadi al-Iraqi. But you didn't hear from that  
15 servicemember, Your Honor, because that didn't happen.

16 For the very first time on October 8, after his legal  
17 meeting with me and Major Stirk around 1600 on October 8,  
18 Mr. Hadi al-Iraqi recognized that this escort guard was going  
19 to touch him, and he, with respect and dignity, simply  
20 claimed, "I cannot be touched by a female because it's  
21 against -- it's prohibited and sinful, against my religious  
22 rights." He said this not offensively. He didn't act out.  
23 He said it very professionally.

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1 She summoned her next person in the line, platoon  
2 sergeant. He asserted his rights over and over again with  
3 that next servicemember in the same fashion. This goes on for  
4 45 minutes, when ultimately, the camp commander, the former  
5 camp commander, and the JDG commander both spoke to him  
6 independently, and again he professed repeatedly that he is  
7 not refusing to be moved, but rather he's asserting his right,  
8 his religious right to not be touched by a female during  
9 escort moves because it's simply against his religion.

10 You've had the benefit, Your Honor, of reading the  
11 stipulation of fact. Subsequently, he was forcibly cell  
12 extracted to his cell. During that movement, it's been  
13 stipulated between the defense and the government that for 29  
14 different occasions, he said, "I cannot be touched by female.  
15 It's against my religion." 29 times during the forcible cell  
16 extraction, and just using your best judgment and what you  
17 heard yesterday for 45 minutes of conversation about this  
18 single issue, at least another 29 times. 60 occasions, he's  
19 professing his religious belief.

20 MJ [CAPT WAITS]: Okay. Tell me again how you got to 60.

21 DDC [LtCol JASPER]: A 45-minute conversation between four  
22 different camp workers during the discussions of why he  
23 doesn't want to be moved and why he is not refusing to be

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1 moved, but rather is asserting his religious right. And I'm  
2 estimating, Your Honor, that that is going to add up to  
3 between 60 times or higher. A minimum of 60 times, based on  
4 common sense.

5           Your Honor, forcing Mr. Hadi al-Iraqi to submit to  
6 unwanted physical touching by female guards violates the  
7 Religious Land Use and Institutionalized Persons Act as well  
8 as Mr. Hadi al-Iraqi's rights under the First, Fifth, Sixth  
9 and Eighth Amendments of the U.S. Constitution and also  
10 customary international humanitarian law.

11           First, the government claims that Mr. al-Iraqi is not  
12 a person, and, therefore, not under the protections afforded  
13 under the Religious Freedom Restoration Act, and I will for  
14 now refer to that as RFRA, which prohibits limitation --  
15 without limitation a person's exercise and their right to  
16 exercise their religion. RFRA dictates that the government  
17 may not substantially burden an individual's free exercise of  
18 religion except when the burden is in furtherance of a  
19 compelling government interest, and is the least restrictive  
20 means of furthering the compelling government interest.

21           All the cases cited by the government were cited  
22 prior to the Supreme Court's decision in  
23 Burwell v. Hobby Lobby. While there was previously a question

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1 as to RFRA's applicability to Guantanamo Bay detainees, the  
2 Supreme Court's decision in Burwell v. Hobby Lobby establishes  
3 that the term "person," as used under RFRA, includes  
4 nonresident aliens such as Mr. Hadi al-Iraqi.

5           While it is true that Hobby Lobby focused  
6 specifically on the religious activities of corporations, the  
7 court's plainly stated rationale for its holding is equally  
8 applicable to this case and entirely undermines the  
9 D.C. Circuit cases cited by the government.

10           Specifically, the Supreme Court found that because  
11 RFRA itself did not define the term "person," the definition  
12 is to be determined by the reference to the Dictionary Act,  
13 which defines "person" to include corporations, companies,  
14 associations, firms, partnerships, societies, as well as  
15 individuals. Your Honor, Mr. Hadi al-Iraqi is clearly an  
16 individual, whether he is an alien noncitizen or a U.S.  
17 citizen.

18           As to the extraterritorial application of RFRA, RFRA  
19 defines "government" to include branch, government, agency,  
20 instrumentality, and official of the United States or of a  
21 covered entity. Notably, the term "covered entity" is defined  
22 to include the District of Columbia, the Commonwealth of  
23 Puerto Rico, and each territory and possession of the United

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1 States.

2 The use of the language "each territory and  
3 possession of the United States" evinces Congress' desire to  
4 include Guantanamo Bay Naval Base within the scope of  
5 geographic coverage.

6 MJ [CAPT WAITS]: Okay. Did you say Congress?

7 DDC [LtCol JASPER]: Congress, yes, sir.

8 Accordingly, the United States exercises exclusive  
9 jurisdiction over Guantanamo Bay Naval Base and by express  
10 terms and agreements with Cuba, the U.S. exercises complete  
11 jurisdiction and control of the Guantanamo Bay Naval Base and  
12 may constitute and continue to exercise control permanently if  
13 it so chooses. And that's cited under Guam v. Guerro, it's  
14 at 290 F.3d 1210.

15 The individual claiming the religious rights were  
16 violated need only make a prima facie case that the government  
17 action substantially burdens his sincere religious belief.  
18 Then the government must demonstrate both compelling  
19 government interest and least restrictive means.

20 The unacceptable dilemma that Mr. al-Iraqi was put in  
21 between choosing the following of important precepts of his  
22 Muslim faith versus abandoning the constitutional benefit of  
23 attorney meetings is the very definition of a substantial

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1 burden. Even if the government could demonstrate a compelling  
2 governmental interest, it would still have the burden of  
3 demonstrating that it is utilizing the least restrictive means  
4 of furthering its compelling interest.

5 In this case, the government has demonstrated by its  
6 actions for nearly a decade that least and less restrictive  
7 means are available, and those means work. Past practice is  
8 obvious proof of feasibility.

9 The alternative is simple and obvious: Return to the  
10 status quo prior to October 8, 2014, and eliminate the  
11 friction and confrontation that could impede not only the free  
12 exercise of religion under RFRA, but also Mr. Hadi al-Iraqi's  
13 access to counsel and his ability to assist his defense  
14 counsel to defend his case, this all going forward.

15 Just last week, Your Honor, the Supreme Court decided  
16 in Hobbs v. Holt, it was a 9-0 decision, it was an Arkansas  
17 Muslim inmate who wished to exercise his right to practice his  
18 Muslim faith by growing a half-inch beard. They applied  
19 RLUIPA, which is the Religious Land Use and Institutionalized  
20 Persons Act, as the sister statute of RFRA, and used the same  
21 government compelling interest standard in that particular  
22 case. And it was involving another inmate, and they also used  
23 the same rationale that I just articulated where they found

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1 that -- they even cited Hobbs -- Hobby Lobby v. Burwell, the  
2 same exact analysis that I just attempted to describe, Your  
3 Honor, to you, which is that in that particular case, the  
4 corporations should be -- if they're considered people and  
5 individuals, so should individuals.

6 That's the same type of analysis we're arguing, that  
7 Hobby Lobby's analysis and decision should trump the Ninth --  
8 excuse me, the Washington, D.C., District Court Rasul case  
9 that the government was articulating and you should apply  
10 RFRA, which is a higher strict scrutiny test, rather than the  
11 Turner v. Safley case that you are probably going to hear the  
12 government argue.

13 MJ [CAPT WAITS]: In Hobbs, the prisoner was tried,  
14 convicted and imprisoned in the continental United States,  
15 correct?

16 DDC [LtCol JASPER]: Yes, Your Honor.

17 MJ [CAPT WAITS]: He's not a UAEB, right?

18 DDC [LtCol JASPER]: Yes, Your Honor. And that person is  
19 a convicted person and still was allowed to exercise his  
20 religious right, whereas Mr. Hadi al-Iraqi is an unconvicted  
21 person and should be afforded even more protection.

22 MJ [CAPT WAITS]: Well, I have to say in that case, the  
23 so-called compelling government interest that the government

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1 advanced of the difference between a half-inch beard and a  
2 quarter-inch beard, I mean, that case all came down to one  
3 quarter inch of a beard ----

4 DDC [LtCol JASPER]: Your Honor ----

5 MJ [CAPT WAITS]: ---- so the facts of that case were,  
6 from my perspective, weak in the beginning, and there was  
7 really no burden on the government to allow someone to have  
8 his beard a quarter-inch longer compared to the volume of  
9 testimony we received yesterday about the government trying to  
10 fulfill the quotas for guards down here in GTMO, the lengths  
11 that they went to to get males to deploy here and just were  
12 not able to do that.

13 DDC [LtCol JASPER]: Your Honor, the government advanced  
14 the position that it was a security concern in that particular  
15 case and that the beard should not exist because someone could  
16 hide contraband, and they couldn't identify the person whether  
17 they have a half-inch beard or if they were cleanly shaved.  
18 So it had to do with security.

19 The government advanced the position yesterday as  
20 well that there was -- security is a possible issue because  
21 they have to integrate males and females regardless of gender  
22 on a continuous basis to ensure that the guards aren't  
23 coercing or developing relationships with certain guard

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1 members and that somehow could compromise the security and  
2 safety.

3           Here Mr. Hadi al-Iraqi, as I demonstrated  
4 yesterday -- as I demonstrated yesterday, walks around like a  
5 penguin. He is shackled literally from head to toe. He is a  
6 54-year-old man, and they have an armed guard present. You  
7 heard testimony that there are four people required to escort  
8 him. Only two or three, depending on which testimony you  
9 listened to, out of those four, needed to actually physically  
10 touch Mr. Hadi al-Iraqi, and that's all under the presence and  
11 supervision of another guard force member and an armed guard.  
12 So as it pertains to security, as that case was trying to  
13 demonstrate and advance on the government position, it is --  
14 the analogy does exist.

15           We're arguing that this is also -- the least  
16 restrictive means applied would be to simply integrate a male  
17 for a female for a limited purpose of using a key to shackle  
18 Mr. Hadi al-Iraqi. We're not even advancing the position and  
19 it's not against his religion that if -- all bets off, if he's  
20 unruly or disruptive. He clearly knows that. We're not even  
21 articulating that if something happened that necessitated a  
22 crisis or exigency circumstances, it could be a medical  
23 situation, that females would be allowed to touch him.

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1 Females are also allowed to be even present. He just simply  
2 doesn't want to be touched, and this is a tenet that we  
3 advanced, also unrebutted from any religious scholar, that  
4 this is not a legitimate -- legitimate religious belief in the  
5 Muslim world. We presented that evidence to you through  
6 Mr. Mohammad Fadel, and he explained in detail in that defense  
7 exhibit what's required of his religion.

8 All you heard, Your Honor, are guards and their  
9 experiences during wartime overseas, who have dealt with  
10 Muslims, don't know which denomination, don't understand the  
11 Muslim faith, and in their limited experience in life, they're  
12 trying to articulate that this is somehow not a legitimate  
13 religious belief. There's been no credible evidence presented  
14 to you to dispute or rebut Mr. Hadi al-Iraqi's sincere  
15 religious belief and that it is widely recognized.

16 MJ [CAPT WAITS]: Okay. I want -- since we're on the  
17 subject of the declaration Dr. Fadel ----

18 DDC [LtCol JASPER]: Yes, Your Honor.

19 MJ [CAPT WAITS]: Okay. This is your -- I don't recall  
20 what Appellate Exhibit number this was admitted as, but it's  
21 in the record. Down in paragraph 11, next to the last  
22 paragraph, last sentence it says -- this is your  
23 evidence -- "The categorical prohibition on intergender

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1 touching outside of marriage or close blood relationship is  
2 justified as a precautionary measure to prevent illicit sexual  
3 intercourse."

4 DDC [LtCol JASPER]: Arousal. It's -- Your Honor, it goes  
5 to potential arousal. If you don't touch the opposite gender,  
6 there couldn't be potential arousal. That's what he's  
7 alluding to there ----

8 MJ [CAPT WAITS]: Okay, we're ----

9 DDC [LtCol JASPER]: ---- no touching.

10 MJ [CAPT WAITS]: ---- in the context of a prison. We're  
11 in the context of people, of many other guards always being  
12 present whenever any touching occurs. We're talking about  
13 touching on a shoulder and on a body cuff handle.

14 DDC [LtCol JASPER]: That's right.

15 MJ [CAPT WAITS]: Does that really colorably give rise to  
16 the necessity for a precautionary measure to prevent illicit  
17 sexual intercourse?

18 DDC [LtCol JASPER]: Maybe not to American citizens like  
19 yourself or myself that aren't Muslim, but yes. Yes, Your  
20 Honor, that's exactly what Hadi al-Iraqi's religious belief  
21 is, no physical contact. It won't even -- if there's no  
22 physical contact, it can't lead to other things.

23 MJ [CAPT WAITS]: So it's going to possibly lead to sexual

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1 intercourse on the tier at the camp that Hadi al-Iraqi is  
2 residing at right now?

3 DDC [LtCol JASPER]: That's not just what this declaration  
4 says, Your Honor.

5 MJ [CAPT WAITS]: I know, but that's the ----

6 DDC [LtCol JASPER]: That's one of the things in ----

7 MJ [CAPT WAITS]: That's the justification for this  
8 measure, for this religious prohibition.

9 DDC [LtCol JASPER]: That's one of the things that -- yes,  
10 Your Honor, we could ----

11 MJ [CAPT WAITS]: What are the others that are contained  
12 in this declaration?

13 DDC [LtCol JASPER]: It talks about no contact. That's  
14 one of the examples that it gives, and that's one of the  
15 underlying reasons that it's prohibited.

16 MJ [CAPT WAITS]: What are the others that are in the  
17 declaration?

18 DDC [LtCol JASPER]: It says, "The categorical prohibition  
19 on inter-gender touching outside of marriage or  
20 close-body [sic] relationships is justified as a precautionary  
21 measure to prevent illicit sexual intercourse." That's the  
22 reason cited.

23 Additionally, Your Honor, the new JDG policy violates

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1 Mr. al-Iraqi's First, Fifth, Sixth and Eighth Amendment rights  
2 to the Constitution. The first one is his right to freely  
3 practice his religion, First Amendment.

4 His Fifth right to due process, his right to be free  
5 from pretrial punishment because of excessive force from FCEs  
6 that result -- to date, he has been FCE'd three different  
7 times because of his trying to simply exercise his right to  
8 practice his religion.

9 His Sixth Amendment right to effective assistance of  
10 counsel could also be violated, and he won't attend meetings  
11 if this new policy is instituted permanently. His defense  
12 counsels cannot prepare an effective defense if they cannot  
13 meet with Mr. Hadi al-Iraqi, nor can defense counsel  
14 effectively prepare for the defense if they do not have a  
15 client who is capable of meaningfully and rationally  
16 participating in client meetings in the commissions  
17 proceedings. The right to effective counsel at trial is a  
18 bedrock principle in every U.S. justice system. This  
19 commission should be no exception. In-person attorney  
20 consultation is absolutely vital to Mr. al-Iraqi's defense.

21 Under the Eighth Amendment protection of the U.S.  
22 Constitution, Mr. al-Iraqi as a pretrial prisoner enjoys  
23 Eighth Amendment protection against punishment prior to the

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1 adjudication of guilt. When conditions of pretrial detention  
2 are not reasonably related to a legitimate goal, a court may  
3 permissibly infer that the purpose of the governmental action  
4 is punishment that may constitutionally be inflicted upon  
5 detainees. In the case at bar, custodial officials violate  
6 the Eighth Amendment when they show deliberate indifference or  
7 conscious disregard for conditions that expose Mr. al-Iraqi to  
8 mental, emotional, and physical harm by depriving him of the  
9 right to practice his religion.

10           Sir, if you find that Hobby Lobby is not controlling,  
11 constitutional claims are traditionally examined under the  
12 Turner case in the Supreme Court case Turner v. Safley,  
13 whereby prison regulations are not only valid if they are  
14 reasonably related to legitimate penological interests,  
15 whether alternative means of exercising the right remain open  
16 to the detainee, the impact of guards on other inmates, and  
17 the allocation of prison resources.

18           Note Turner applied to convicted persons, and we  
19 contend the government should be given less deference in  
20 determining what constitutes legitimate penological interests  
21 for pretrial persons such as Mr. Hadi al-Iraqi. Under Turner,  
22 there is no valid and rational connection between the use of  
23 female guards and physical contact with religiously observant

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1 Muslim detainees. This is readily apparent given the fact  
2 that Mr. Hadi al-Iraqi has not been touched by female guards  
3 in over seven years.

4           The practice of the Muslim religion requires many  
5 things of a devout Muslim: Prayer five times a day, certain  
6 foods are eaten, fasting periods, purification, pilgrimage,  
7 charity, and many other things. Another practice and accepted  
8 teaching of many scholars of Islam is that you should not  
9 engage in physical contact with a member of the opposite sex  
10 except for close relatives. The Muslim practice is  
11 uncontroverted by reliable evidence because the government  
12 knows this is widely recognized across Muslim denominations  
13 across the world.

14           If the court is not persuaded by the RFRA statute or  
15 the U.S. Constitution, clearly Mr. al-Iraqi is entitled to at  
16 least the protections afforded under Common Article 3 of the  
17 Geneva Conventions and his right to practice religion and  
18 prohibit outrages upon personal dignity and to humiliation and  
19 degrading treatment. The Geneva Conventions specifically  
20 state that persons are entitled to respect for their honor,  
21 family rights, religious convictions and practices, and their  
22 manners and customs. The ICRC Rule 127 also reads, "The  
23 personal convictions of religious practices of persons

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1 deprived of their liberty must be respected."

2 Common sense also applies in this situation, Your  
3 Honor. A number of women have served in the guard force on  
4 transport teams, even a number of women have served on  
5 Mr. Hadi al-Iraqi's defense team, paralegals, analysts.  
6 They're defense members and they have met with Mr. al-Iraqi  
7 but even they are not permitted to touch Mr. al-Iraqi because  
8 of this religious conviction. And this has gone on since  
9 Mr. al-Iraqi's been given defense teams. Again, they are  
10 allowed to be in the presence of Mr. Hadi al-Iraqi.

11 The government contends that this is a resourcing or  
12 a manpower issue, Your Honor, but that should not trump  
13 Mr. al-Iraqi's right to be represented by counsel in this case  
14 and his right to practice his religious freedoms.

15 They contend also that morale is an issue with their  
16 guard force and it's diminished. Really, Your Honor? Morale?  
17 By way of analogy, being a sports fan, I'm going to a sports  
18 analogy. And we're going to use a basketball team. It's got  
19 five starting members, they practice together before the  
20 season starts, they rehearse together with preseason games,  
21 and that's all in preparation of game time when the season  
22 starts.

23 Well, in basketball, you have a coach, and that could

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1 be considered like an OIC, and they constantly make  
2 substitutions in the game because the circumstances change.  
3 Your members get fouled, maybe a member is not performing  
4 well, maybe somebody gets injured, and they make those  
5 adjustments. And they make the adjustments pretty easily  
6 because they're prepared for that, because oftentimes your  
7 star players get hurt during the game or during the season,  
8 and somebody else fills that role.

9           Even in combat roles, Your Honor, I know ideally you  
10 train as you fight, but anybody that's been overseas knows  
11 that plan A never works. It's always plan B and C. You  
12 put -- you plan for contingencies. You remain flexible. You  
13 adapt and overcome. That's what units are trained to do.

14           Simply, if morale was an issue, Your Honor, the OIC  
15 could simply turn this into a positive. He could tell his  
16 female guards, listen -- educate them on this principle, why  
17 it's important to set the standard as the U.S. Government that  
18 we actually practice and adhere in the United States to the  
19 Geneva Conventions, we're going to set the example, we're  
20 going to overcome this little burden that we're challenged  
21 with right now, and we're going to show the world how it's  
22 done right and that we can accommodate a minor adjustment  
23 during game time.

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1           It's too hard. Let's have a pity party and have a  
2 rallying cry over this issue and quit, not even try. That's  
3 what you heard yesterday for six hours. It was appalling.  
4 That is not the can-do attitude that the U.S. Government and  
5 its military is trained to do when it's time to fight.

6           And, Your Honor, talk about gender discrimination,  
7 that's what you heard of a lot yesterday. We have female  
8 engagement teams that exclusively fight overseas and deal with  
9 the Muslim women because they can't even look at Muslim --  
10 male servicemembers aren't even supposed to look at the female  
11 Muslim women for the possibility of some impropriety or  
12 someone -- their perspective, they might not like it. And we  
13 accommodate that, and that's during wartime in a hot zone  
14 where bullets are flying.

15           Even here, the policy has some gender distinctions  
16 that are made where women aren't allowed to touch men to  
17 search them or be around when they're disrobing or changing  
18 clothes. There just are differences between males and females  
19 when it comes to touching, that's common sense.

20           The U.S. Government has decided to try this case in  
21 Guantanamo Bay and has offered the resources, and you train  
22 and you get the job done with what you got. That's what  
23 servicemembers are supposed to do. That's what leadership

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1 is -- should convey to the guard force. Simple game time  
2 adjustment and those resources are available. You heard the  
3 numbers, and it's not classified. Currently, 20 percent of  
4 the guard force is female. That's one out of five at  
5 Camp VII, one out of five folks by percentages. They could  
6 simply take two steps from front to back and have supervision  
7 there in case a security concern arises, and then the female  
8 would be allowed to step in. Two steps to uphold and respect  
9 somebody else's religion. That's not a lot to ask.

10           And, Your Honor, Mr. Hadi al-Iraqi is the very first  
11 person to assert this religious right. If you're worried  
12 about spillover as you heard about yesterday and if you're  
13 worried about opening up Pandora's box on this particular  
14 issue, well, peel the onion back a little bit. Hey, I'm  
15 sorry, Detainee Number Two, but for the last seven years or  
16 the last two months you have been touched and you've never  
17 complained about it. That's obviously not sincere.

18           You heard -- and I asked questions yesterday about  
19 screening complaints for legitimacy and validity. I asked  
20 both OICs, and they say that's part of their responsibilities.  
21 So simply, if there are other detainees that want to ride the  
22 coattails of Mr. Hadi al-Iraqi and try to make things  
23 difficult, they could simply screen through whether it's

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1 legitimate by looking to see in their records whether that  
2 particular individual is really sincere or not.

3           Mr. Hadi al-Iraqi is clearly sincere. He's willing  
4 to undergo forced cell extractions, which are very physical  
5 and unpleasant procedures, potentially endangering himself  
6 physically, to exercise his right. I don't know what screams  
7 more of sincerity than someone that's willing to go to those  
8 lengths to exercise their right to religion.

9           Your Honor, if the roles were reversed, what example  
10 is the U.S. Government setting for treatment of our captured  
11 servicemembers if the U.S. female servicemembers are forced to  
12 be touched by our enemy combatants and against our  
13 servicemembers' desires or even their religion? Gender just  
14 matters when it comes to touching regardless of religion or  
15 customs, Your Honor. It's common sense. And to ignore gender  
16 when it comes to touching duties of the opposite sex is  
17 problematic and a potentially dangerous precedent to set.

18           Mr. al-Iraqi is asking for a very limited  
19 accommodation. His movements are planned in advance. They  
20 are choreographed weeks in advance for legal meetings, months  
21 in advance for court hearings. The regimen and daily  
22 activities and hours are planned well in advance here at  
23 JTF-GTMO. This is the most controlled environment that most

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1 people have ever seen. It's highly secure.

2           What about the female guards getting their training  
3 on male detainees that don't assert this religious conviction?  
4 Can't they be evaluated on their performance of duties on  
5 those detainees? What leader is going to hold it against one  
6 of their servicemembers and not give them the marks that they  
7 deserve simply because they cannot shackle or unshackle or  
8 touch somebody's shoulder? Do those female members -- is what  
9 they are saying is they really want to touch  
10 Mr. Hadi al-Iraqi?

11           Very minor sacrifices, and, Your Honor, yes, hard  
12 work. It may be hard work, but it's the right thing to do.  
13 And when you're deployed, and this is a deployed setting,  
14 you're expected to work hard. It's not easy. Being deployed  
15 is not easy in any job or function, and there are challenges  
16 that exist and things are constantly changing. This is  
17 nothing new to any servicemember that ever deploys.

18           In sum, Your Honor, the world is watching how the  
19 commissions rule on the treatment of pretrial detainees at  
20 GTMO. We are simply asking the court to do the right thing,  
21 set the example, and send the right message to the world that  
22 the U.S. Government treats detainees with respect and dignity  
23 by honoring one's religious practices. There are real

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1 cultural and religious customs and valid reasons for  
2 differentiating between genders on certain practices, and  
3 resourcing cannot be allowed to trump rights under the U.S.  
4 Constitution, the U.S. Supreme Court and customary  
5 international law.

6 Thank you, Your Honor.

7 MJ [CAPT WAITS]: Thank you, Colonel Jasper.

8 Trial Counsel?

9 ATC [MAJ LONG]: Your Honor, may I approach the well?

10 MJ [CAPT WAITS]: You may.

11 ATC [MAJ LONG]: Good morning, Your Honor.

12 MJ [CAPT WAITS]: Good morning.

13 ATC [MAJ LONG]: Please the court, Lieutenant Colonel  
14 David Long for the government.

15 Your Honor, the defense has failed to carry its  
16 burden of proof and persuasion. They have failed to meet the  
17 standards required of them under the law of this jurisdiction,  
18 which as they described is Turner v. Safley, the United States  
19 Supreme Court case at 482 U.S. 78.

20 Instead, they have tried to shift the burden back to  
21 the government, which this court had initially provided to  
22 them or ascribed to them per the law, and to do that they  
23 needed to reach to the cases of Hobby Lobby v. Burwell, and

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1 that Holt v. Hobbs. I would highlight for the court, my  
2 esteemed colleague misstated the date of the cases cited by  
3 the government after the Hobby Lobby opinion was published.  
4 Unless I'm incorrect, the Hobby Lobby opinion was published by  
5 the Supreme Court with much fanfare and media spotlight on  
6 June 30th, 2014. The case cited by the government,  
7 Hatim v. Obama, 760 F.3d 54, was issued August 1, 2014.

8 In addition, the case cited by the government,  
9 Allaithi v. Rumsfeld, 753 F.3d 1327, also a D.C. Circuit case  
10 pertaining to Guantanamo Bay detainees, just as Hatim v.  
11 Obama, was considered for rehearing en banc, and then denied  
12 rehearing 18 November 2014, well after Hobby Lobby.

13 The significance of that is right in the D.C. Circuit  
14 Court opinion of Hatim where it reads, again, an opinion  
15 published a month after Hobby Lobby was issued by the Supreme  
16 Court, and I quote, "We review constitutional challenges to  
17 prison policies under the test announced by the Supreme Court  
18 in Turner v. Safley."

19 MJ [CAPT WAITS]: What was the second case you cited after  
20 Hatim?

21 ATC [MAJ LONG]: Second case?

22 MJ [CAPT WAITS]: Allaithi ----

23 ATC [MAJ LONG]: Allaithi v. Rumsfeld.

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1 MJ [CAPT WAITS]: How do you spell Allaithi.

2 ATC [MAJ LONG]: Yes, I'll spell, A-L-L-A-I-T-H-I. The  
3 citation, 753 F.3d 1327.

4 And although that opinion was in June of 2014  
5 originally, the D.C. Circuit considered en banc and rejected a  
6 rehearing of Allaithi on 18 November 2014, well after they had  
7 an opportunity to consider the Supreme Court's opinion in  
8 Hobby Lobby.

9 So in attempting to shift into a -- using the  
10 Religious Freedom Restoration Act or RFRA, and then they also  
11 reference RLUIPA in the Holt v. Hobbs case, the defense is  
12 seeking to get into a strict scrutiny type of test and away  
13 from the controlling law of the jurisdiction which was  
14 announced by the D.C. Circuit in Hatim following  
15 Turner v. Safley.

16 They need to do that because without switching the  
17 burden back to the government to show least restrictive means,  
18 once again, they have failed to meet their burden to show  
19 under the four-prong Turner test, which I did not hear any  
20 evidence that would go to carry the defense burden to show  
21 what the government evidence has provided, and what I will go  
22 into further on detail in my argument, that the government has  
23 provided the evidence to show that we have met a

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1 reasonably standard under the Hatim -- under Hatim as  
2 required by Turner v. Safley.

3 MJ [CAPT WAITS]: Okay. There's one overlay I guess I  
4 would like for you to put on your argument, and that is a lot  
5 of the case law pertains to convicted prisoners. So in those  
6 cases, you know, any potential interference of -- with the  
7 right to counsel pretrial, for a pretrial confinee or  
8 detainee, is not considered in those decisions.

9 So the context that we have here is the accommodation  
10 that the accused is requesting furthers the interest of his  
11 access to his counsel. Do you follow what I'm saying?

12 ATC [MAJ LONG]: Yes. Yes, Your Honor.

13 MJ [CAPT WAITS]: So to the extent that the interests that  
14 the government is attempting to advance, I'd like to hear how  
15 they are or if you believe they are not impacted by the fact  
16 that we are in a pretrial detention situation in this  
17 particular case and we have potential interference with the  
18 accused's access to counsel and appearance in the commission  
19 proceedings, if that makes sense.

20 ATC [MAJ LONG]: It does.

21 MJ [CAPT WAITS]: Okay.

22 ATC [MAJ LONG]: When the D.C. Circuit considered the  
23 facts as raised in Hatim -- of course, those facts pertained

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1 to a habeas litigation situation, however those were law of  
2 war or, in effect, pretrial detainees in that case -- there  
3 were two fact patterns that were raised in Hatim. One did  
4 pertain to a religious accommodation. The other pertained to  
5 health restrictions. However, in both cases, whether it was  
6 the religious accommodation of not being subject to a pat-down  
7 or frisk or whether it was a health restriction based on the  
8 Guantanamo detainee claiming they could not be moved, both  
9 involved legal visits.

10 In both cases, the detainee claimed they could not  
11 successfully meet with their counsel, one for religious  
12 reasons, the other for medical reasons. And the court in both  
13 instances decided, after analyzing the factors of  
14 Turner v. Safley, in favor of the government.

15 Your Honor, my lead counsel has just brought to my  
16 attention that the holding in Florence v. Board of Chosen  
17 Freeholders, 132 Supreme Court 1510, applies the Turner  
18 factors to pretrial detainees.

19 MJ [CAPT WAITS]: Okay. Give me that cite again.

20 ATC [MAJ LONG]: It's also footnote 15 in a string cite  
21 for our brief, Appellate Exhibit 021A.

22 MJ [CAPT WAITS]: Okay. I'll get it from there, then.

23 ATC [MAJ LONG]: As to the RFRA argument raised by the

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1 defense, no fewer than three cases cited by the government, to  
2 include the Allaithi v. Rumsfeld recently referenced, did not  
3 extend RFRA extraterritorially to Guantanamo Bay detainees.  
4 And, again, I note that the rejected en banc rehearing of  
5 Allaithi occurred after Hobby Lobby and after the expansion of  
6 RFRA, as described by the defense.

7           So whereas the defense has attempted to rely on  
8 Hobby Lobby or Hobbs to shift the burden back to the  
9 government to show a least restrictive means and a compelling  
10 interest, the fact of the matter is neither case changes the  
11 state of the law.

12           And as for Hobbs v. Holt, I would go one step  
13 further, and that is the RLUIPA statute is actually a state  
14 and local prison statute. It's applicable at the state and  
15 local level, whereas the RFRA statute is applicable for  
16 federal prisons or federal penitentiaries such as  
17 Guantanamo Bay, Cuba.

18           I would also conclude that by stating that in the  
19 commission's order, the interim order of 7 November 14, the  
20 language of paragraph 3 would indicate that the commission  
21 determined that the jurisdiction of the commission was limited  
22 to criminal offenses under the Military Commissions Act of  
23 2009, and lacks authority to engage civil issues like RFRA.

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1           The government would then turn to the  
2 Turner v. Safley test as the controlling law of this  
3 jurisdiction, and there are a few factors that I'd like to  
4 raise in doing so. Again, as I've stated a couple of times,  
5 the burden is on the accused to show that each one of the  
6 Turner factors has not been established by the government, and  
7 we'll go through how the defense has simply not done so. The  
8 evidence has not borne out the government has failed to show a  
9 reasonable policy or a valid penological interest in the  
10 evidence we've presented. So in other words, the accused has  
11 to demonstrate the policy of the inclusion of female guards at  
12 Camp VII is therefore unreasonable, something that they have  
13 not been able -- they have provided no evidence to show. And  
14 further, under Florence v. Board of Chosen Freeholders, the  
15 standard of the evidence must be substantial, substantial  
16 evidence, in order to show that policy is unreasonable, and  
17 that's 132 Supreme Court at 1523.

18           Turner v. Safley holds that the judiciary is to give  
19 deference to the expert prison administrators regarding  
20 detention operations. The Supreme Court language reads,  
21 "Running a prison is an inordinately difficult undertaking  
22 that requires expertise, planning, and the commitment of  
23 resources, all of which are peculiarly within the province of

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1 the legislative and executive branches of government." That's  
2 Turner, 482 U.S. at 84 and 85.

3           The Supreme Court in Bell v. Wolfish at 441 U.S. 520  
4 says, "The inquiry of federal courts into prison management  
5 must be limited to the issue of whether a particular system  
6 violates any prohibition of the Constitution or, in the case  
7 of a federal prison, a statute. The wide range of judgment  
8 calls that meet constitutional and statutory requirements are  
9 confided to officials outside of the judicial branch of  
10 government."

11           Again, Thornburgh v. Abbott, 490 U.S. 401 at 411,  
12 "Every administrative judgment would be subject to the  
13 possibility that some court somewhere would conclude it had a  
14 less restrictive way of solving the problem at hand."

15           The government's already referenced  
16 Florence v. Board of Chosen Freeholders, 132 Supreme Court at  
17 1513, "Courts must defer to the judgment of correctional  
18 officials unless the record contains substantial evidence  
19 showing their policies are an unnecessary or unjustified  
20 response."

21           Finally, once again, as I've alluded to a couple of  
22 times, the case of Hatim v. Obama, which then cites to  
23 Overton v. Bazzetta, 539 U.S. 126, "The burden, moreover, is

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1 not on the State to prove the validity of prison regulations,  
2 but on the prisoner to disprove it."

3           The case of O'Lone v. Estate of Shabazz, 482 U.S.  
4 342, the court states, "When observing that the court of  
5 appeals failed to give appropriate deference to prison  
6 authorities where it placed the burden on prison officials to  
7 disprove the availability of alternatives, that fails to  
8 reflect the respect and deference that the United States  
9 Constitution allows for the judgment of prison  
10 administrators."

11           All of these cases, Your Honor, just go to the fact  
12 that from the Supreme Court, the D.C. Circuit, the controlling  
13 court of this jurisdiction, that substantial judicial  
14 deference to policy decisions by professional jailers or those  
15 who operate detention facilities, for all of the reasons that  
16 the government evidence provided to the court yesterday, that  
17 goes to the complexity and it goes to the factors that are  
18 sometimes not apparent; certainly an education for myself as I  
19 investigated this.

20           I could imagine as the evidence came out in the  
21 operational dynamics, the resources and manning, the  
22 challenges in filling the manning document, the challenges of  
23 maintaining safety and security, whether it's in the escort

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1 team or the tier team, all of that just highlights the fact  
2 that the series of cases that I have cited to recognize -- the  
3 Supreme Court and the circuit courts recognize that in this  
4 arena it is wise, it is the prudent thing to -- that those who  
5 are -- the defense used common sense -- that it is those who  
6 operate the prisons day after day, those who have to resource  
7 staff, man them day after day, deserve a significant amount of  
8 deference.

9           The JTF-GTMO policy of using female guards in  
10 Camp VII operations is reasonably related to legitimate  
11 penological interests under the Turner v. Safley test, and the  
12 government cites to three: The first, running a humane and  
13 well-functioning detention facility; the second, maintaining  
14 similar standards for employment for female guards across all  
15 military and federal detention facilities; and third,  
16 promoting a gender integration while avoiding gender  
17 discrimination among servicemembers.

18           And in Turner, the Supreme Court states, "When a  
19 prison regulation impinges on inmates' constitutional rights,  
20 the regulation is valid if it is reasonably related to  
21 legitimate penological interests. In our view, such a  
22 standard is necessary if prison administrators and not the  
23 courts are to make difficult judgments concerning

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1 institutional operations."

2 I'm getting the blinking light, as hard as that is  
3 for me to believe, but I'll ----

4 MJ [CAPT WAITS]: I know. You sound like you're talking  
5 pretty slow and deliberately to me. But since you interrupted  
6 your own argument ----

7 ATC [MAJ LONG]: Yes, Your Honor.

8 MJ [CAPT WAITS]: ---- this is just -- I guess, a matter  
9 of semantics, but -- and I don't see it -- I haven't seen it  
10 discussed in any of the cases, but the term "penological," it  
11 has the word "penal" in there.

12 Is it the government's position and is this borne out  
13 in case law, that penological just means the business of  
14 running prisons? It has nothing to do with whether an  
15 incarcerated person is being subject to punishment or not?  
16 It's just penological encompasses the business, I'll just call  
17 it, or the enterprise of running a prison; is that a  
18 correct ----

19 ATC [MAJ LONG]: Certainly the government's interpretation  
20 of that word and the use of that word in the case law, Your  
21 Honor. If there is another definition, I'm certainly not  
22 aware of it, and that's how I'm using it in my argument.

23 MJ [CAPT WAITS]: So it applies across the spectrum of

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1 detention or confinement, and it doesn't really distinguish --  
2 it doesn't really distinguish between whether this pertains to  
3 pretrial or post-trial confinees, detainees, prisoners,  
4 whatever you want to call them?

5 ATC [MAJ LONG]: I'm not aware of a distinction, Your  
6 Honor, no.

7 MJ [CAPT WAITS]: Okay.

8 ATC [MAJ LONG]: The case Overton v. Bazzetta, at the risk  
9 of beating this drum too often, 539 U.S. at 132, also citing  
10 to O'Lone v. Estate of Shabazz, in the Turner analysis, the  
11 burden is on the person challenging the prison policy to show  
12 the policy is unreasonable. Again, the defense has failed to  
13 offer any evidence that would show the penological interests  
14 that the government has put forward and the policy of Camp VII  
15 female guards as it relates is somehow unreasonable. There is  
16 no evidence based on what the government has presented to the  
17 court that would reach that conclusion.

18 Just by way of running through the Turner factors,  
19 Your Honor, the court -- the Supreme Court in Turner, as then  
20 followed by the D.C. Circuit in Hatim, the first factor is  
21 whether there is a valid, rational connection between the  
22 prison regulation and the legitimate governmental interest put  
23 forward to justify it; second, whether there are alternative

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1 means of exercising the asserted right that remains open to  
2 the prisoners; third, whether accommodation of the right will  
3 have an impact on guards and other inmates; fourth, whether  
4 there are ready alternatives to the policy that fully  
5 accommodate the prisoners' rights at de minimis costs to valid  
6 penological interests. That's Turner, 482 U.S. at 89 to 91.

7           Turning to the first factor, the defense has failed  
8 to show that the government's evidence does not offer the  
9 court a valid, rational connection between the introduction of  
10 female guards at Camp VII and the legitimate governmental  
11 interest that I've previously referenced. As to this first  
12 factor, in Al-Owhali v. Holder, that's 687 F.3d 1236, among  
13 these factors, the first is the most important. As we have  
14 noted, it is not simply a consideration to be weighed, but  
15 rather an essential requirement.

16           The first prong is equivalent to a rational basis  
17 review in the equal protection context, which examines  
18 connection between the policy and the goal put forward,  
19 Amatel v. Reno, 156 F.3d 192, again, a D.C. Circuit case.  
20 Other factors of the other Turner factors are logically  
21 related -- I'm sorry, which are logically related to the  
22 policy itself may add little one way or another to the first  
23 factor's basic logical rationale, Beard v. Banks,

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1 548 U.S. 521.

2 As the government has already stated, there is a  
3 valid, rational connection between the JTF-GTMO policy of  
4 employing female guards at Camp VII and the legitimate  
5 governmental interest of running a humane, well-functioning  
6 detention facility. Note, no evidence on the record would  
7 oppose that.

8 Running a humane and well-functioning detention  
9 facility requires the proper staffing. The testimony of the  
10 former commander and the current commander gave the court  
11 ample evidence to demonstrate the difficulties and challenges  
12 of the Army National Guard presently filling the current  
13 deployment cycle at Guantanamo Bay.

14 One unit took about 12 months to fill the manning  
15 document. The second took approximately 15 months. In both  
16 instances, the manning document was filled ultimately by both  
17 males and females, predominantly by volunteers. As the  
18 National Guard are, as the court is aware and as the evidence  
19 displayed, mostly, more than 90 percent, civilians, citizen  
20 soldiers, the command understandably seeks for volunteers  
21 first rather than having to order people who have not  
22 volunteered.

23 In order to fill the manning documents, these units

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1 had to go far beyond the units receiving the mission to fill  
2 that manning document. And in both instances, the commanders  
3 described how they went statewide or to multiple units in an  
4 effort to fill those manning documents. Part of the process  
5 of filling that with the right personnel involves not just  
6 volunteers, but those who are trained as military police  
7 soldiers, 31B, 31E. So beyond just the initial filling the  
8 pool of potential applicants, volunteers, soldiers who may  
9 deploy, is further limited by the fact that the soldiers  
10 deploying in this capacity at Camp VII will have to be trained  
11 as military police soldiers.

12           It's reasonable to expect a Military Police Corps --  
13 and this is something that was in the Colonel Heath  
14 declaration, which is Attachment B to the government's  
15 AE 021A, where he talks about approximately 20 percent of the  
16 Military Police Corps as a whole is female. So opening up the  
17 resources or the manning in the selection process to all  
18 available military police soldiers is naturally going to  
19 include that 20 percent.

20           Every one of these witnesses, representing a combined  
21 70 years of military experience, discussed the gender-neutral  
22 experience of their military police officer and  
23 noncommissioned officer service. They did not select on the

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1 basis of gender. They selected on the basis of volunteers,  
2 training, experience, and the fact that these soldiers were  
3 military policemen and properly capable of completing the  
4 deployment.

5           There was a gender-neutral selection, there was a  
6 gender-neutral training, and that is consistent with each  
7 witness' testimony as to their experience prior to arriving at  
8 Guantanamo Bay, that as a military police soldier or officer,  
9 the functions, the roles, the duties, were not distinguishable  
10 between gender.

11           So by opening up the manning to the 20 percent of the  
12 Military Police Corps, or females, that is a reasonable policy  
13 in order to fill the current mission, which took extensive  
14 effort to do so. To have foreclosed that and to not have  
15 opened up to the female soldiers would have added additional  
16 burdens, not just expanding the search for eligible either  
17 volunteers or people ordered to go, but possibly missed out on  
18 the experience and training, knowledge that some of the female  
19 soldiers such as the tier guard were to bring to this  
20 deployment.

21           So by virtue of the percentage of the Military Police  
22 Corps, by virtue of the fact that in a gender-neutral manner  
23 these soldiers have deployed multiple times, and they have

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1 done so in an environment where their roles and  
2 responsibilities were not restricted based on their gender  
3 and, therefore, their selection as part of this humane,  
4 well-functioning detention facility within Camp VII is  
5 reasonable.

6           The government mentioned a second penological  
7 interest as a valid, rational connection between the JTF  
8 policy of employing female guards at Camp VII and a legitimate  
9 governmental interest in maintaining standard detention  
10 policies with the rest of the Department of Defense and the  
11 Federal Bureau of Prisons. On this I reference to the  
12 Colonel Heath declaration, paragraph 7.

13           What the accused is asking of the government and  
14 asking of this court would set Guantanamo Bay apart as the  
15 only detention facility that would restrict female guards in a  
16 portion of their basic and fundamental duties, shackling,  
17 unshackling, moving certain detainees. Guantanamo Bay, the  
18 JTF-GTMO, has a reasonable interest in maintaining, just as  
19 Colonel Heath describes, a consistency across the Department  
20 of Defense, and that includes the Military Disciplinary  
21 Barracks at Fort Leavenworth and those policies, as well as  
22 the policies of the Federal Bureau of Prisons.

23           Thirdly, there's a valid, rational connection between

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1 the JTF-GTMO policy of employing female guards and preventing  
2 gender discrimination against female guard members pursuant to  
3 DoD regulations and United States law.

4           The defense opened by mentioning a Hobson's choice  
5 for the accused. The government has its own Hobson's choice.  
6 The chain of command within Camp VII, within JDG, within  
7 SOUTHCOM, the entire chain of command has to decide, do they  
8 respond to the accused's request for accommodation and  
9 discriminate against the female guards who have equally served  
10 and are equally positioned to perform the duties as their male  
11 counterparts, or do they just go on business as usual and  
12 allow the detainee then to continue with his present  
13 situation? That's the Hobson's choice that this request has  
14 put the government in, Your Honor.

15           There has been ample evidence provided by both the  
16 escort guard and the tier guard as to their -- the unit impact  
17 and learning of this limitation and the personal impact that  
18 the limitation or restriction as noncommissioned officers  
19 places on them when they are evaluated and measured against  
20 their male peers and counterparts. The escort guard mentioned  
21 she felt like less of a soldier.

22           Every witness testified, particularly during their  
23 periods of deployments, that the female military police

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1 officers and noncommissioned officers who were deployed in  
2 Iraq, Afghanistan, had never experienced in the course of  
3 their duties there gender discrimination. So by coming to  
4 Guantanamo Bay, it was the first time that any of them, any of  
5 the witnesses, had encountered in their military police  
6 experience a limitation or restriction based solely on their  
7 gender from performing the duties and responsibilities as a  
8 military police soldier.

9           By restricting or limiting the female guards in their  
10 duties and responsibilities side by side with their male peers  
11 puts them, as the tier guard described it, in a separate  
12 group, splits the unit, creates -- it breaks up the team  
13 integrity and it causes division.

14           The government has a reasonable, legitimate  
15 penological interest in establishing a gender-neutral policy  
16 in staffing and manning at Camp VII pursuant to DoD  
17 regulations and United States law. To do otherwise, as was  
18 described by the current commander, placed him in the Hobson's  
19 choice that the defense referenced of having to decide, does  
20 he follow in his experience, does he follow in the regulations  
21 and the laws that he has grown to understand that make a part  
22 of his career, 16-year military police career, or does he  
23 accommodate the accused's request?

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1 I wanted to direct the court's attention to the case  
2 of Madyun v. Franzen, 704 F.2d 954. The facts of that case  
3 involved a female guard with a Muslim male inmate, and the  
4 female guard on duty requested that the male go through a  
5 standard frisk search in the process of being processed in  
6 detention. The male informed the female guard he would only  
7 submit to a search by a male guard because his Islamic  
8 religion forbade physical contact with women other than his  
9 wife or his mother.

10 The defendant then brought an action and the Seventh  
11 Circuit rejected the defendant's argument, stating that, "If  
12 women are not allowed to perform these limited searches or can  
13 perform them only on women inmates, the utility of women  
14 prison guards would be significantly diminished." Madyun  
15 argues that women can serve the prison system in other  
16 capacities. This misses the point.

17 We observed in Smith v. Fairman, 678 F.2d at 54-55,  
18 "The state is obligated to avoid discriminating on the basis  
19 of sex in the employment of guards."

20 Although it wasn't touched on, I move beyond now the  
21 first of the four Turner factors, the second factor of Turner  
22 is whether or not alternative means of exercising the asserted  
23 right remains open to prisoners. Although I won't spend much

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1 time on the topic, it was addressed by the D.C. Circuit in  
2 Hatim. And in that case, again involving Guantanamo Bay  
3 detainees, the court concluded detainees can still communicate  
4 with counsel via letter. Supreme Court precedent teaches that  
5 alternative means of exercising the claimed right need not be  
6 ideal, however, they need only be available. In that case,  
7 the D.C. Circuit quotes Overton v. Bazzetta, 539 U.S. 126.  
8 The court does go on to mention that even if there were no  
9 other means or -- of the communication, that the other  
10 factors -- it's not conclusive, because other factors must be  
11 considered.

12           With that, I move on to the third Turner factor.  
13 Again, that the defense has failed to meet their burden to  
14 show that the accommodation as requested, and which I would  
15 note only as of yesterday expanded to not just the legal  
16 meetings, not just the commissions hearings, but every move,  
17 which obviously compounds the difficulty, compounds the  
18 challenge to the guard force and the guard force leadership,  
19 they have failed to show how this accommodation will not have  
20 an impact on guards or the other inmates.

21           All the government evidence presented before the --  
22 to the court suggested just the opposite, that there would --  
23 there is absolutely an impact, and that impact is felt at the

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1 personal level, at the team level, the unit level, all the way  
2 up the chain of command and all the way back to the state.

3           Your Honor, if you would consider two units, one that  
4 took 12 months to fill the manning document, a second that  
5 took 15, then it is reasonable -- again, common sense as the  
6 defense alluded to -- that the next unit preparing to deploy  
7 is already in that cycle.

8           So the impact on the guards and all of the evidence  
9 presented to the court is not just at the individual guard  
10 level, it's not even at the command or unit level, the  
11 second -- third order affects, however unforeseen, however  
12 unintended for a National Guard mobilization has the potential  
13 impact on volunteers, as the tier guard mentioned and as the  
14 current commander mentioned, guards stating, "Had I known it  
15 was going to be like this, I would not have volunteered."

16           Then there's the impact on other detainees. The  
17 former commander's declaration references a letter that was  
18 surreptitiously placed in a newspaper from Khalid Shaikh  
19 Mohammad destined for the accused. And although that letter  
20 never arrived, that letter does offer the court evidence of  
21 the impact of this accommodation for or against government or  
22 accused on other inmates and how that impact is sufficient  
23 that it resulted in this attempt at communication.

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1           And if I may just get into a little bit of that  
2 letter, in attempting to instruct or provide guidance to the  
3 accused were he to testify, the letter references not just the  
4 sender, Khalid Shaikh Mohammad, but "my brothers." The letter  
5 is written in such a way that it would indicate it's not the  
6 first time this subject, whether it's the testimony or the  
7 issue of female guard touching, has come up between these  
8 parties. The letter is written in such a way that the  
9 receiver would understand already what the context of the  
10 letter and the instructions are, but in several instances, the  
11 letter references "my brothers," plural.

12           In one particular section where it says, "The  
13 prosecutor might ask you this," I would note one of the  
14 answers -- or the questions and answers is, "He might ask you  
15 about sitting with females," then in parentheses, "some  
16 lawyers." "Better to say that the touching is forbidden."

17           I believe as to impact on other detainees, in a sense  
18 the letter speaks for itself. The fact that the letter was  
19 drafted, the fact that the letter was intended for the accused  
20 for the purpose of instructing him on how to testify in this  
21 particular matter, reflects how the outcome of this commission  
22 hearing could impact -- and the accommodation, whether or not  
23 that was afforded, then reaches to others.

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1           The defense did mention what had come out of the  
2 former commander's testimony, which was spillover and, in  
3 fact, spillover did occur. The spillover didn't occur on the  
4 former commander's watch, it occurs on the current commander's  
5 watch, whereas on 7 January 2015, the case of  
6 U.S. v. Mohammad, Appellate Exhibit 254JJ, an interim order  
7 was entered in that particular case that also restricted and  
8 limited female guards from touching those inmates. So the  
9 spillover that was the concern, really, the issue for the  
10 former commander when this first came up did in fact occur.

11           So, again, as to impact on other detainees, the  
12 defense has failed to show that there is no impact. In fact,  
13 the evidence is just the opposite. They failed to show  
14 there's no impact on the guards. The wealth of evidence  
15 provided by the government shows absolutely not only is there  
16 an impact on the guards here, the corresponding impact is  
17 there will be -- that will be felt and reverberate all the way  
18 back to the states that are preparing to send soldiers for  
19 these deployments.

20           I would also add, Your Honor, the testimony provided  
21 ample evidence that the impact on guards of this accommodation  
22 just at the unit and guard level is the potential for -- the  
23 word used was counterelicitation, so by reducing the available

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1 number of guards either in escort or tier increased the amount  
2 of time any particular guard would be present in a particular  
3 shift, increased the amount of time they would interact with  
4 the same detainees. And there was a -- the testimony was  
5 there was a corresponding increase in the risk to safety and  
6 security and to compromise as a result of that.

7 I move on now to the fourth factor. Again, the  
8 defense has failed to offer any evidence that would challenge  
9 that there was an alternative to what the government's policy  
10 was to accommodate the prisoner's right at de minimis cost to  
11 valid penological interests, which is the deployment and  
12 staffing of female guards at Camp VII.

13 The evidence that the defense then mentioned in their  
14 argument and the questioning of the -- of several of the  
15 witnesses referenced this adapt and overcome. It's hard, but  
16 not impossible. But, Your Honor, the test is de minimis. So  
17 by virtue of the fact that it's hard is already beyond the de  
18 minimis requirement the defense has got to show. And I would  
19 also add the government did adapt and overcome, and they did  
20 so by opening up the guard force rotations to female guards  
21 and bringing female guards to Camp VII.

22 I would add that any alternative must be a ready  
23 alternative. This is something referenced also in Hatim at

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1 760 F.3d at 61, "To be a ready alternative policy must be an  
2 obvious, regulatory alternative that fully accommodates the  
3 asserted right while not imposing more than a de minimis cost  
4 to the valid penological goal." Every witness testified to an  
5 impact that was far greater than de minimis.

6           And I would also highlight that simply in the Ninth  
7 Circuit case of Jordan v. Booth, 953 F.2d 1137, simply  
8 pointing to alternatives that may exist does not satisfy the  
9 inmate's burden of proving those alternatives involve little  
10 or no cost.

11           So in addition, Your Honor, I would note there is --  
12 in addition to the four Turner factors, the reasons, the  
13 evidence the government has provided as to the reasonableness  
14 of the policy of providing females in Camp VII, I would also  
15 note that the unforeseen or certainly unintended consequence  
16 is to potentially impact -- were this accommodation to become  
17 a permanent possibility, that the potential impact is not just  
18 on the penological interests because this is a military  
19 detention facility, it is being staffed and run by Army  
20 National Guardsmen. The selection process, as I've already  
21 gone into, involves the chain of command within the Army  
22 National Guard in order to fill the manning document.

23           So there is an overlap. Not only are these soldiers

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1 as guards operating in the penological interests in advancing  
2 this reasonable policy, there is also a military operational  
3 impact that I would raise for the court's attention. That  
4 comes into play as the Army National Guard seeks to fill these  
5 rosters, either initially or with replacement soldiers.

6           What I mean by that, and that's something, I believe,  
7 in the testimony of the former commander, if you cannot use  
8 the trained, validated, and already deployed female soldier  
9 and must then for any number of reasons that was raised in the  
10 testimony -- injuries, emergencies, Red Cross messages, other  
11 reasons that soldiers must leave the deployment -- to reach  
12 back and grab a replacement soldier, that impacts another  
13 deployment. That soldier then is no longer available for a  
14 subsequent or a secondary deployment, now having to be pulled  
15 out of whatever military assignment or projected assignment  
16 they were in, in order to backfill instead of using the  
17 soldiers valid -- or validated, trained and present. So there  
18 is a military operational impact on the state side in addition  
19 to the penological interest implicated.

20           And I would then cite to a case in the Fourth  
21 Circuit, LeBron v. Rumsfeld, 670 F.3d 540, where courts  
22 typically prefer that Congress is explicitly authorizing some  
23 cause of action before implicating command decisions of those

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1 charged with the national defense.

2           Your Honor, I also add an additional factor to  
3 consider as we -- as the government is faced with the request  
4 by the accused, and I believe it's rather significant. To  
5 concede to the accused's demands simply to avoid maybe not  
6 coming to a hearing, or to avoid an FCE, is essentially  
7 allowing the detainee to establish policy, establish a system.  
8 So rather than the camp leadership and the camp commanders  
9 having the authority and the ability to set policy, they then  
10 become reactive, reactionary, allowing the detainee then to  
11 set policy and establish when they refuse to come or not come.

12           Again, I would reference what happened yesterday and  
13 you heard again today as evidence perhaps of a slippery slope,  
14 whereas the initial request, emergency motion of this  
15 commission, was legal visits and commissions hearings, that  
16 has now expanded to every move.

17           But it doesn't take too much imagination in light of  
18 Hatim to think it wouldn't necessarily end there. When you  
19 look at the facts of Hatim, it was a religious-based refusal  
20 for a pat down and groin search and a subsequent inability to  
21 see counsel. It was also a health-based, detainee claiming he  
22 could not be moved from one location to another and therefore  
23 not see counsel.

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1           So as to accommodating this request by the detainee,  
2 there is also evidence or proof through the Hatim facts and  
3 through what's happened in the course of these hearings that  
4 there is a possibility of that demand growing. And then again  
5 we've seen the spillover, the spillover from this commission  
6 to the U.S. v. Mohammad commission and potential growth there  
7 of accommodations requested simply to maintain the detainees  
8 without the use of force FCEs or get them to where they need  
9 to be.

10           The prison, the detention facility, cannot run with  
11 the guards and the guard leadership responding to detainees  
12 issuing their requests or demands before they comply, and it  
13 is really for that reason that the line of cases through the  
14 D.C. Circuit, the Supreme Court in Turner show such  
15 significant deference to the prison warden, to the detention  
16 facility, and is very reluctant and hesitant to wade into that  
17 arena.

18           One thing I would correct for the record that the  
19 defense had raised, when they said that the government  
20 evidence was that this belief was for something they  
21 understood to be for all Muslims, that was actually not what  
22 the government evidence would indicate. The deployment  
23 experience of the government witnesses would actually show

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1 that they never encountered this particular refusal of  
2 touching of females in the guard context.

3 I would also note that the defense indicated that a  
4 conversation by the commanders with their female guards could  
5 be turned into a positive, and I challenge that, how telling  
6 female guards who are being asked for the first time in their  
7 military police careers, they cannot do the full duties and  
8 responsibilities that they have been trained to do, they  
9 cannot do the duties that would be commensurate with their  
10 rank, they cannot do what their male counterparts are doing in  
11 order to accommodate a request by a detainee. I disagree that  
12 that would be a positive.

13 Your Honor, I would like to read just a few of the  
14 accommodations that are made, but I would like to note the  
15 distinction. The accommodations are made with a full  
16 appreciation and respect -- and, again, this is part of the  
17 Colonel Heath declaration -- for the religious beliefs and the  
18 convictions of the accused, but not one of them is going to  
19 restrict or limit the guard force on the ability to do their  
20 job.

21 Quran, prayer rugs, prayer caps and prayer beads are  
22 provided. These items can be replaced as needed. Detainees  
23 permitted to wear cultural and religious garments, not a

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1 detention uniform.

2 Qurans are not touched by the guard force absent  
3 exigent circumstances. Passages from the Quran and  
4 explanations of the words of the Quran are handled according  
5 to the same guidelines as the Quran.

6 Guards must maintain respectful silence during prayer  
7 time with no guards on tier during prayer time. During  
8 Ramadan, meals are scheduled around sunrise and sunset. Dates  
9 and honey are served after the fourth prayer. Detainees are  
10 not served pork, alcohol or meats not slaughtered according to  
11 Islamic guidelines.

12 Prayer caps can be worn to and from recreation and  
13 other appointments. Detainees can carry their Quran with them  
14 to recreation or have an interpreter carry their Quran to  
15 their appointments or legal meetings. Detainees are not moved  
16 during prayer time. The noon prayer times are 40 minutes long  
17 to allow for the Friday sermon.

18 Appointments such as legal meetings are scheduled  
19 around prayer times. Cells have arrows pointing toward Mecca.  
20 Grooming standards allow for full-length beards without  
21 restriction.

22 Again, I cite these religious accommodations to show  
23 that the leadership and the guards at JTF-GTMO take very

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1 seriously and do go to great lengths to accommodate and  
2 respect the religious beliefs of the detainees. But what has  
3 been asked of the guard force by the accused and now by others  
4 goes not -- goes to the fundamental duties and  
5 responsibilities of the guards, and really that religious  
6 distinction then comes full steam headlong into the cultural  
7 differences, into the rules, regulations, DoD policy that  
8 would drive a different conclusion for the chain of command,  
9 that in the context of using female guards in their duties and  
10 responsibilities as trained, for all of the reasons cited by  
11 the government, that in this instance the government cannot,  
12 for the valid penological reasons stated, accommodate this  
13 particular request.

14 I'd like to turn to certain documentary evidence that  
15 was previously marked and provided in these hearings. I first  
16 turn to Appellate Exhibit 021AA. It's a memorandum of the  
17 secretaries of the military departments. The subject is the  
18 "Elimination of the 1994 Direct Ground Combat Definition and  
19 Assignment Rule," and I quote -- the memorandum is dated  
20 January 24, 2013. It is signed by then Chairman of the Joint  
21 Chiefs of Staff Martin E. Dempsey and by Secretary of Defense  
22 Leon E. Panetta. "We are fully committed to removing as many  
23 barriers as possible to joining, advancing, and succeeding in

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1 the U.S. Armed Forces. Success in our military based solely  
2 on ability, qualifications, and performance is consistent with  
3 our values and enhances military readiness."

4 I drop down to the bottom of the first page where it  
5 reads, "Integration of women into newly opened positions and  
6 units will occur as expeditiously as possible, considering  
7 good order and judicious use of fiscal resources, but must be  
8 completed no later than January 1, 2016. Any recommendation  
9 to keep an occupational specialty or unit closed to women must  
10 be personally approved first by the Chairman of the Joint  
11 Chiefs of Staff, and then by the Secretary of Defense; this  
12 approval authority may not be delegated. Exceptions must be  
13 narrowly tailored and based on a rigorous analysis of factual  
14 data regarding the knowledge, skills and abilities needed for  
15 the position."

16 Turn next to what's been marked Appellate Exhibit  
17 021BB. This is a corresponding memo to the Secretary of  
18 Defense from then Chairman of the Joint Chiefs, General Martin  
19 Dempsey. The first line -- the subject is, "Women in the  
20 Service Implementation Plan." The date of the memo is  
21 9 January 2013.

22 "The time has come to rescind the direct combat  
23 exclusion rule for women and to eliminate all unnecessary

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1 gender-based barriers to service."

2 I drop down to the second guiding principle towards  
3 the bottom of the page: "Ensuring all Service men and women  
4 are given the opportunity to succeed and are set up for  
5 success with viable career paths."

6 Your Honor, I turn next to what's been previously  
7 marked as Appellate Exhibit 021CC. It is a statement by the  
8 President on the opening of combat units to women. The  
9 statement is dated January 24, 2013. It is the same date as  
10 Appellate Exhibit 021AA.

11 "Earlier today I called Secretary of Defense Panetta  
12 to express my strong support for this decision, which will  
13 strengthen our military, enhance our readiness, and be another  
14 step toward fulfilling our nation's founding ideals of  
15 fairness and equality. Today, every American can be proud  
16 that our military will grow even stronger with our mothers,  
17 wives, sisters, and daughters playing a greater role in  
18 protecting this country we love."

19 The defense previously raised the Hobson's choice. I  
20 mentioned it in the context of the current commander, but from  
21 the Commander in Chief through the Chairman of the Joint  
22 Chiefs and the SECDEF down through the entire chain of  
23 command, taking into account again the cumulative 70 years of

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1 experience represented by the four witnesses in the Military  
2 Police Corps, their Hobson's choice is to follow this  
3 guidance, this progression of integration of females, the  
4 opening, not closing, the moving forward, not stepping back,  
5 as far as gender integration, and to do that to the greatest  
6 extent possible and then to come here and face this  
7 restriction, that is their Hobson's choice.

8           Your Honor, I conclude by stating that the government  
9 has charged the accused with having been in a conspiracy that  
10 involved Khalid Shaikh Mohammad, the author of the letter that  
11 was put surreptitiously in the newspaper and destined for  
12 Hadi. And I simply raise the fact that in our charging  
13 document, that connection, that collusion goes back many  
14 years.

15           And what the letter represents and as our charge  
16 sheet indicates, two instances in specifically the spring of  
17 2002 when Abd al Hadi and Khalid Shaikh Mohammad met and  
18 plotted against Americans, their allies and plotted to  
19 assassinate the Pakistani President Pervez Musharraf; and then  
20 this is Common Allegation 24, in or about spring of 2002, Abd  
21 al Hadi received approximately \$1,000 U.S. from Khalid Shaikh  
22 Mohammad to fund al Qaeda's operations.

23           At the time that the accused swore bayat, as alleged

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1 by the government, to Usama bin Laden, there had been a series  
2 of religious decrees or fatwas. So by taking that oath, after  
3 those fatwas were issued, by joining al Qaeda, by becoming a  
4 military and operational commander, the accused did so with an  
5 understanding of a religious foundation or purpose behind  
6 al Qaeda and the actions of al Qaeda, particularly in  
7 Afghanistan. In fact, one of those acts that the government  
8 alleges involved the accused's, in the March 2001, destruction  
9 of the Buddhist statues in Bamiyan, Afghanistan. Again, a  
10 religious-based act. It was done in an effort to purify the  
11 land, which is consistent with the goals and purposes of  
12 al Qaeda.

13           It is the government's position, and fast-forward to  
14 this letter, that that collusion, that conspiracy, endures;  
15 that the beliefs that took the accused into a position of  
16 leadership, as alleged by the government, in al Qaeda, that  
17 caused him to swear bayat to Usama bin Laden, that caused him  
18 to destroy the Buddhist statues in Bamiyan, that caused him to  
19 continue interacting with al Qaeda leadership such as Khalid  
20 Shaikh Mohammad, that religious conviction, the foundation for  
21 which al Qaeda is built, continues, that the conspiracy  
22 continues.

23           And so when this request is made, and it was through

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1 counsel in the last session where we heard the accused  
2 consider America as his enemy, that it is in that context as  
3 well that, when he makes this request on these religious  
4 grounds, that the government must take into consideration that  
5 background, that conspiracy, and now evidence of even further  
6 collusion in determining safety and security requirements, and  
7 by using the most qualified, capable, trained, experienced  
8 people, which includes soldiers such as those who testified in  
9 court yesterday, safety and security of not just the detainee  
10 but also the guards is enhanced.

11           The reasonable policies of gender-neutral assignment,  
12 the reasonable policy of assisting female military police  
13 soldiers to advance their careers, the reasonable policy of  
14 having a detention facility not isolated, not being viewed or  
15 treated differently than other detention facilities, either in  
16 the military or in the Bureau of Prisons, and manning and  
17 staffing, with all of the demands placed on the National Guard  
18 units that are sending soldiers to Guantanamo Bay, all of  
19 those are reasonable policies and rationally connected to  
20 valid penological interests as advanced by the government.

21           And, again, no evidence has been presented by the  
22 defense to challenge what is the law of this jurisdiction, as  
23 put forward as recently as 1 August of last year, of 2014, in

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1 the Hatim case, that it is the defense burden in order to  
2 establish that none of those factors would apply to the  
3 government's benefit. They have failed to do so. And by  
4 contrast, the government has offered a vast amount of  
5 information that would support -- and testimony that would  
6 support just the opposite, that they are reasonable policies,  
7 they were based on valid penological interests.

8           For that reason the government would request that the  
9 court deny the accused's request for accommodation and rescind  
10 the interim order. Thank you, Your Honor.

11           MJ [CAPT WAITS]: Thank you, Colonel Long.

12           Colonel Jasper, any rebuttal argument?

13           DDC [LtCol JASPER]: No, Your Honor.

14           MJ [CAPT WAITS]: Very well. All right. I don't have --  
15 again, I do not have my calendar with me. Are there any other  
16 matters that we need to take up here in an open proceeding  
17 before I recess the commission until our next scheduled  
18 session from either side?

19           TC [MR. CLAYTON]: Nothing from the government, Your  
20 Honor.

21           DDC [LtCol JASPER]: Nothing from the defense, Your Honor.

22           MJ [CAPT WAITS]: All right, then. Based on the  
23 scheduling order promulgated early in this commission, our

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 next scheduled session is the week of 23 March. So I think we  
2 have certain things that are due between now and then related  
3 to the in personam jurisdiction hearing, so please make sure  
4 that you file those in a timely way so we can keep everything  
5 on track for that hearing in July.

6 So if there are no other issues from either side,  
7 this commission is in recess until 0900 on 23 March of this  
8 year.

9 [The R.M.C. 803 session recessed at 1115, 29 January 2015.]

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