

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

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI</p>	<p>AE 284M</p> <p>Government Response To Defense Supplement To AE 284 Defense Motion For Appropriate Relief: To Allow A Supervised Call Between Mr. Al- Nashiri And His Elderly Parents</p> <p>6 October 2014</p>
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1. Timeliness

The government timely files this response pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.d.(1).

2. Relief Sought

The government respectfully requests that the Commission deny the defense motion.

3. Overview

The question before this Commission is “whether denial of the Skype call shows a ‘deliberate indifference to serious medical needs of prisoners [which] constitutes the unnecessary and wanton infliction of pain’” Order, AE 284I at 2 (quoting *Estelle v. Gamble*, 429 U.S. 97, 103-05 (1976)(denying the defense motion to compel witnesses relating to the initial defense motion to compel Skype access for the accused). It does not. And the defense’s supplemental filing does not change that answer.

In its supplemental filing, the defense provides the Commission with Department of Defense Directive 2310.01E (“DoDD 2310.01E”), which provides guidance for those involved in detainee operations. Dep’t of Def. Directive 2310.01E, Dep’t of Def. Detainee Program 1 (Aug. 19, 2014) [hereinafter DoDD 2310.01E]. This guidance focuses on detainee communication with individuals located outside of Naval Station Guantanamo Bay, Cuba, and it provides detention authorities with the necessary discretion to allow detainees to use certain technology

when “appropriate” and “where practicable.” *Id.* at 2. Here, the appropriate Department of Defense (“DoD”) authorities have determined that allowing High-Value Detainees (“HVDs”)—including the accused—with access to Skype is neither appropriate nor practicable due to the significant security risks posed to the facility and its personnel. That denial does not represent deliberate indifference to the accused’s medical care; rather, the denial is based on the reasonable judgment of Commander, Joint Task Force-Guantanamo (“JTF-GTMO”), who is responsible for the safety of the guard force, the detainees, and others located onboard the naval station. The Commission should defer to Commander, JTF-GTMO, on such decisions related to the daily operations of a detention facility. As such, the Commission should deny the defense motion.¹

4. **Burden of Proof**

As the moving party, the defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2).

5. **Facts**

The government charged Abd Al Rahim Hussayn Muhammad Al Nashiri (“the accused”) with multiple offenses under the Military Commissions Act of 2009 (“M.C.A.”), 10 U.S.C. §§ 948a *et seq.*, relating to terrorist attacks against the United States and its allies. These include the attempted attack on USS THE SULLIVANS (DDG 68) on 3 January 2000, and the attacks on USS COLE (DDG 67) on 12 October 2000, and on the French supertanker MV *Limburg* on 6 October 2002, which together resulted in the deaths of 18 people, serious injury to dozens of others, and significant property damage.²

¹ The government incorporates by reference its prior pleadings relating to Skype. *See* AE 284A; AE 284F.

² The Commission dismissed the charges relating to the accused’s alleged participation in the attack on MV *Limburg*. AE 168G; AE 241C. The government moved for reconsideration of the Commission’s orders dismissing those charges. AE 168H; AE 241D. The Commission granted reconsideration and, on reconsideration, denied the government’s requested relief. AE 168K; AE 241G. On 29 September 2014, the government filed an interlocutory appeal with the United States Court of Military Commission Review.

On 9 July 2014, the defense filed a motion requesting that the Commission order JTF-GTMO to provide the accused with access to Skype. On 23 July 2014, the defense filed a motion to compel the production of three witnesses to testify on its motion. AE 284C. The Commission heard argument on whether witnesses were relevant and necessary to resolution of the defense motion. Unofficial/Unauthenticated Transcript at 5076-89, 5092-5105 (Aug. 6, 2014). On 17 September 2014, the Commission denied the defense request to compel the production of witnesses, stating the issue before the Commission was “whether denial of the Skype call shows a ‘deliberate indifference to serious medical needs of prisoners [which] constitutes the unnecessary and wanton infliction of pain.’” AE 284I at 1-2 (quoting *Estelle*, 429 U.S. at 103-05).

On 19 August 2014, the DoD issued guidance for DoD personnel involved in detainee operations. See AE 284L, Attachment 1 at 1. In relevant part, the guidance to DoD detainee authorities provides that “[h]umane treatment includes . . . appropriate contacts with the outside world (including, where practicable, exchange of letters, phone calls, and video teleconferences with immediate family or next of kin as well as family visits).” DoDD 2310.01E at 2. The accused is permitted “appropriate contacts with the outside world” by exchanging letters and receiving video messages. See AE 284A, Attachment B at 2; AE 284A, Attachment C at 1.

The accused is held as an HVD onboard Naval Station Guantanamo Bay, Cuba. Since 2006, Commander, JTF-GTMO, has been responsible for the effective, safe, and secure conduct of detention operations at the Naval Station for HVDs, protecting service members and civilians onboard Naval Station Guantanamo Bay, Cuba, and protecting national-security information associated with the mission. The Commander satisfies these responsibilities, in part, by regulating communications entering and exiting the detention camps and routinely inspecting material for contraband.

In accordance with its responsibilities, and in furtherance of legitimate governmental objectives [REDACTED]

[REDACTED] the Commander, JTF-GTMO, does not permit Skype communications by HVDs.

See AE 284A, Attachment B at 1. The HVDs, nonetheless, may communicate through other means, including mail. AE 284A, Attachment C at 1.

6. Law and Argument

The question before this Commission is whether denying an HVD, like the accused, access to Skype rises to the level of “deliberate indifference to serious medical needs of [the accused which] constitutes the unnecessary and wanton infliction of pain” AE 284I at 2 (quoting *Estelle*, 429 U.S. at 103-05). The DoD directive relied upon by the defense in its supplemental pleading does not change that answer: Commander, JTF-GTMO, has not demonstrated deliberate indifference to the accused’s medical needs by denying the accused access to Skype. The defense has offered no evidence to the contrary.

What is more, the defense continues to ignore the reality that the accused receives adequate medical care, including supportive psychotherapy, psychopharmacotherapy medications, therapeutic counseling, and other medical care. To the extent that allowing the accused to contact his family constitutes medical care, the accused has the means to initiate contact by sending and receiving letters; he also can receive video messages from his family through the International Committee of the Red Cross. See AE 284A, Attachment B at 2; AE 284, Attachment C at 1.

To be certain, the DoD directive does not deprive Commander, JTF-GTMO, of his discretion when considering the safety and security of the detention facility for which he is responsible. The directive offered by the defense here provides guidance for those involved in “detainee operations.” DoDD 2310.01E at 1. This guidance relates to the humane treatment of detainees and provides, in relevant part, that detainees should have “appropriate contacts with the outside world,” including, “where *practicable*, exchange of letters, phone calls, and video teleconferences with immediate family or next of kin, as well as family visits.” *Id.* at 2 (emphasis added). The Commander, JTF-GTMO, found it impracticable to provide HVDs with real-time Skype access because of the significant security risks posed to the facility and its personnel. The defense, however, ignores the important distinction between HVDs and non-

HVDs, stating “[b]ecause detainees are routinely allowed to make Skype calls to loved ones, a Skype call for Mr. Al-Nashiri is eminently practicable.” AE 284L at 3. No HVD held at Guantanamo has had real-time Skype access to communicate with family.

It is significant that the directive allows for phone or video communication only when *practicable* and *appropriate*, thereby providing Commander, JTF-GTMO, with discretion to determine whether Skype is practicable and appropriate for certain detainees—like an HVD—to have access to real-time Skype communications. Commander, JTF-GTMO, must account for the security and safety of the facility and its personnel. In doing so, Commander, JTF-GTMO, may find that it is necessary to limit real-time communication from certain detainees. Decisions by the Commander, JTF GTMO—while subject to review by the Commission—should be left to the Commander’s reasonable judgment. To date, the Commission has provided “wide-ranging deference” to the Commander of the detention facility. *See* Unofficial/Unauthenticated Transcript at 372 (Jan. 17, 2012) (Commission stating “[t]he normal rule is that the Commission will not interfere with the running of a confinement facility unless there’s some showing of exceptional or extraordinary circumstances that warrant exception in this case.”). The Commission established its “normal rule” in part because of the well-established jurisprudence from the United States Supreme Court. *See Turner v. Safley*, 482 U.S. 78, 89, 90 (1987) (stating “when a prison regulation impinges on an inmate’s constitutional rights,³ the regulation is valid if it is reasonably related” to legitimate government interests, and “courts should be particularly conscious of the measure of judicial deference owed” to government officials in such circumstances).⁴ As such, “[t]he inquiry of federal courts into prison management must be

³ The prosecution is in no way asserting Skype access for any detainee is a Constitutional right.

⁴ The Commission should likewise provide deference to the detention facility on issues relating to an accused’s medical care. *Estelle v. Gamble*, 429 U.S. 97, 103-05 (1976) (noting that courts may intervene in the medical care provided to prisoners only where the level of care demonstrates “deliberate indifference to serious medical needs of prisoners [which] constitutes the ‘unnecessary and wanton infliction of pain’ . . . proscribed by the Eighth Amendment”).

limited to the issue of whether a particular system violates any prohibition of the Constitution or, in the case of a federal prison, a statute. The wide range of ‘judgment calls’ that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.” *Bell v. Wolfish*, 441 U.S. 520, 562(1979).

The United States Court of Appeals for the District of Columbia Circuit recently applied the deferential *Turner* test to JTF-GTMO’s search and detainee-movement procedures, holding that the *Turner* “deferential standard applies to military detainees as well as prisoners.” *Hatim v. Obama*, 760 F.3d 54, 58 (D.C. Cir. 2014). There, the appellate court answered the question at issue here: “whether the new policies are rationally related to security.” *Id.* at 59. Like *Hatim*, the Commission should ask whether the Commander’s decision not to allow HVDs access to real-time Skype communications is rationally related to the legitimate government interest in maintaining a safe and secure detention facility. It is.

The accused is charged with serious violations of the law of war that include extreme acts of violence resulting in the deaths of 17 United States Sailors and serious injury to many others. Where Commander, JTF-GTMO, sets policies relating to the safety and security of the detention facilities, like those policies prohibiting the accused from having real-time communications with family located overseas, the Commission should grant the Commander deference provided the policies are “reasonably related to a legitimate government interest,” which is the case here as to the security of the detention facility and its personnel. *Turner*, 482 U.S. at 78, 89, 90. This would not be the first court to grant deference on a real-time communication issue. *See Al Odah v. United States*, 406 F. Supp. 2d 37, 45-46 (D.D.C. 2005) (denying the defense motion for real-time communication between detainee and his family, stating “real-time or near real-time nature of a telephone conversation poses a heightened risk that impermissible information could be transmitted . . . posing a real risk of injury to the government and potentially endangering the public interest”). As the court did in *Odah*, the Commission should deny the defense motion because of the legitimate security risk Skype communications pose to JTF-GTMO and its

personnel, and because such denial would not constitute “deliberate indifference to [the] serious medical needs of the accused (*Estelle*, 429 U.S. at 104).

7. Conclusion

The Commission should defer to Commander, JTF-GTMO, who is responsible for ensuring the safety of personnel onboard Naval Station Guantanamo Bay, as the Commission has done previously when asked by the defense to interfere with the daily operations of the detention facilities. *See* Unofficial/Unauthenticated Transcript at 372 (Jan. 17, 2012). The DoD directive does not require Commander, JTF-GTMO, to provide the accused with access to Skype. Rather, the DoD directive provides the Commander, JTF-GTMO, with the discretion to decide whether to allow detainees to have access to real-time communications, such as Skype. Using that discretion, Commander, JTF-GTMO, found it inappropriate and impracticable to provide HVDs with Skype access. Accordingly, the Commission should deny the defense motion.

8. Oral Argument

The defense requests oral argument. The Commission can decide this matter without oral argument. *See* Military Commissions Trial Judiciary Rule of Court 3.9(a). If the Commission grants the defense an opportunity to present oral argument, however, the government requests an opportunity to do the same.

9. Witnesses and Evidence

The government does not intend to rely on any witnesses or evidence in support of this response.

10. Additional Information

The government has no additional information.

11. Attachments

A. Certificate of Service, dated 6 October 2014.

Respectfully submitted,

 //s//

Justin T. Sher
Trial Counsel

Mikeal M. Clayton
LT Bryan M. Davis, JAGC, USN
LT Paul B. Morris, JAGC, USN
Assistant Trial Counsel

Robert C. Moscati
Deputy Chief Prosecutor

Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

Filed with TJ
6 October 2014

Appellate Exhibit 284M (Al-Nashiri)
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CERTIFICATE OF SERVICE

I certify that on the 6th day of October 2014, I filed AE 284M, Government Response To Defense Supplement To AE 284 – Defense Motion For Appropriate Relief: To Allow A Supervised Call Between Mr. Al-Nashiri And His Elderly Parents, with the Office of Military Commissions Trial Judiciary and served a copy on counsel of record.

//s//

Justin T. Sher
Trial Counsel
Office of the Chief Prosecutor
Military Commissions