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

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| **UNITED STATES OF AMERICA**<br><br>**v.**<br><br>**ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI** | **AE 345E**<br><br>**RULING**<br><br>**DEFENSE MOTION FOR APPROPRIATE RELIEF: TO ALLOW MR. AL-NASHIRI'S HANDS BE UNBOUND DURING DICE SESSIONS**<br><br>**16 July 2015** |

1. The Accused is charged with multiple offenses in violation of the Military Commissions Act (M.C.A.) of 2009, 10 U.S.C. §§ 948 *et seq.*, Pub. L. 111-84, 123 Stat. 2574 (Oct. 28, 2009). He was arraigned on 9 November 2011.

2. In AE 345,[1] the Defense requested "[the Accused's] hands not be bound during DICE sessions with his elderly parents." *AE 345* at 1. The Defense argued the use of [redacted] shackles to restrain the Accused's hands and feet during his DICE sessions are without a legitimate purpose, arbitrary, and "represents a deliberate attempt to undermine [the Accused's] ability to communicate with his family, [and] improve his mental well-being" *Id.* at 6. The Defense asserted the effect of the Accused's lack of participation in DICE sessions hinders his ability to participate meaningfully in his Defense and receive effective assistance of counsel. *Id.* at 3. The Defense also argued the presumption of innocence, the history of punitive physical restraint used against the Accused, the Accused's history of not posing a danger while in foot-restraints alone, and the different treatment of the Accused as compared to other detainees in similar situations, amount to illegal pre-trial punishment as the use of [redacted] restraints on the Accused has no

[1] AE 345, Defense Motion for Appropriate Relief: to Allow Mr. Al-Nashiri's Hands be Unbound During DICE Sessions, filed 5 June 2015.

legitimate purpose. *Id.* at 3-5. The Government responded[2] the legitimate government objectives of the [redacted] restraints were to protect JTF-GTMO's detention facility, the staff, and the DICE video teleconferencing equipment. *AE 345A* at 7. The Government stated the [redacted] *Id.* at 4-5. The Defense's reply[3] reiterated the arguments that the Accused's past abuse, lack of adequate medical treatment for his PTSD, non-violent behavior while not in [redacted] shackles, and disparate treatment from "the vast majority of other detainees [who] remain unshackled during calls with family[,]" warrant intervention by the Commission. *AE 345B* at 4.

3. The Defense requested oral argument. The Prosecution's position was oral argument was not required, however, if the Defense request was granted, the Prosecution desired to be heard. "In accordance with Rule for Military Commission (R.M.C.) 905(h) the decision to grant oral argument on a written motion is within the sole discretion of the Military Judge."[4] In this instance, oral argument is not necessary to the Commission's consideration of the issue before it.[5] The Defense request for oral argument is **DENIED.**

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[2] AE 345A, Government Response to Defense Motion for Appropriate Relief: to Allow Mr. Al-Nashiri's Hands be Unbound During DICE Sessions, filed 19 June 2015.

[3] AE 345B, Defense Reply to Government Response to Defense Motion for Appropriate Relief: to Allow Mr. Al-Nashiri's Hands be Unbound During DICE Sessions, filed 25 June 2015.

[4] Military Commissions Trial Judiciary Rule of Court, RC 3.5.(m) (May 2014).

[5] Whether the Accused is being treated differently from other detainees may appear to be a disputed fact requiring an evidentiary hearing. [redacted] The Defense avers "the vast majority of other detainees remain unshackled during calls with family." *AE 345B* at 4. Both assertions could be true; the vast majority of other detainees who are unshackled may be detained in camps other than Camp VII. The

4. Any evaluation of institutional "practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). Several factors are relevant in determining the reasonableness of the regulation at issue. First, is there a "valid, rational connection" between the restriction and the legitimate governmental interest? Second, are there are alternative means of exercising the right that remain open to the Accused? Third, what impact will accommodating the asserted constitutional right have on guards and other inmates and prison resources generally? Finally, are there alternatives to the restriction? If an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider the same as evidence that the regulation does not satisfy the reasonable relationship standard. *Turner v. Safley*, 482 U.S. 78, 89-91, (1987).

The first *Turner* factor weighs in favor of the Government. The Accused was placed in [redacted] restraints in a small room with communications equipment belonging to JTF-GTMO. The Government maintains this is JTF-GTMO's standard operating procedure for all High-Value Detainees (HVDs) housed in Camp VII, such as the Accused. [redacted]

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assertions could conflict. The Commission is able to decide the issue of restraint at future DICE sessions without resolving this potential evidentiary matter.
[redacted]

*Turner's* second factor also weighs in favor of the Government. There are alternative means of communication available to the Accused. The Accused, "can send and receive letters, receive video messages from his family via the International Committee of the Red Cross, or continue to use the DICE program to communicate with his family." *AE 345A* at 9.

The third *Turner* factor requires the Commission to weigh the Accused's significant history of non-violent behavior at JTF-GTMO while in lesser forms of restraint. While the Accused's history of non-violence while in custody is undisputed, The hand restraints kept an unpredictable and volatile situation under control.

*Turner's* fourth and final factor requires the Commission to consider the alternative method presented by the Accused and to determine if the alternative fully accommodates his rights at *de minimis* cost to valid penological interests. The Government views the cost as the risks to the guards and DICE equipment associated with allowing the Accused full use of his hands, The Government's interests in preserving order, ensuring the safety of the JTF-GTMO staff, and protecting its equipment are clear and valid. The question becomes, is the use of ankle-shackles only, which provides the Accused the full use of his hands during his DICE sessions, an alternative with *de minimus* cost?

[redacted] The Commission finds this risk is not a *de minimus* cost to valid penological interests. The fourth factor favors the Government.

JTF-GTMO's decision to restrain the Accused with [redacted] restraints during DICE sessions has a valid, rational connection to legitimate governmental objectives. Despite the restraints, the Accused remains able to communicate with his family during DICE sessions. While [redacted] restraints may interfere with a detainee's "desire to live as comfortably as possible and with as little restraint as possible during confinement[,]" it does not convert the conditions or restrictions of detention into punishment in this case. *Bell,* 441 U.S. at 537. "[I]n the absence of substantial evidence in the record to indicate that . . . [prison] officials have exaggerated their response to [maintaining security]" the Commission will defer to their expert judgment in such matters. *See Pell v. Procunier*, 417 U.S. 817, 827 (1974) (holding that a "regulation limiting one of several means of communication by an inmate" did not violate the Constitution). The Commission will "not attempt to detail the precise extent of the legitimate governmental interests that may justify conditions or restrictions of pretrial detention," nor will it purport to know how best to operate a detention facility. *See Bell,* 441 U.S. at 540, 547.

5. The Defense's arguments that the use of [redacted] shackles during the Accused's DICE sessions hinder his ability to participate meaningfully in his Defense and receive effective assistance of counsel are unsupported. It is the Accused's decision whether or not he will participate in DICE sessions as they are offered. The Accused remains able to communicate with his family through the DICE program and through alternative means. The Commission will not

re-litigate or reconsider issues previously decided in the AE 205 series.[7] The Defense's claim of the Accused's past abuse and current PTSD in connection with the Accused's decision not to participate in a DICE session due to the [redacted] restraints does not raise the issue of Governmental actions rising to a "deliberate indifference" to the Accused's medical needs as required by *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). Accordingly, AE 345 is **DENIED**.

So **ORDERED** this 16th day of July, 2015.

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VANCE H. SPATH, Colonel, USAF
Military Judge
Military Commissions Trial Judiciary

[7] AE 205, Defense Motion To Abate The Proceedings Until The Accused Receives Adequate Medical Care, filed 17 January 2014.