

UNITED STATES OF AMERICA

v.

ABD AL-RAHIM HUSSEIN MUHAMMED  
ABDU AL-NASHIRI

**Defense Reply**

D002: Defense Motion to [REDACTED]

3 Feb 2009

1. **Timeliness:** This reply is filed within the three day timeframe established by Rules of Court, Rule 3.
2. **Reply to Prosecution's Response:**
  - a. **The Commission has Jurisdiction under both Domestic and International Law to Order the Requested Relief.**

The Prosecution correctly asserts that this Commission, like a court-martial, is a court of limited jurisdiction. (Prosecution Response at 3a.) However, this Commission's jurisdiction must be viewed with the M.C.A, Supreme Court jurisprudence and, most importantly, the Constitution in mind. The M.C.A. specifically prohibits treatment that is considered cruel, inhuman and degrading. As such, this court must have jurisdiction to hear these types of claims or else this provision of the M.C.A remains unenforceable. It makes little sense for this to be Congress' intent. This same rational applies with respect to Common Article 3 of the Geneva Conventions, a provision that the Supreme Court held applies to detainees in Guantanamo Bay. *Hamdan v. Rumsfield*, 126 S. Ct. 2749, 2796 (2006).

Also, the Prosecution neglects to mention that even courts of limited jurisdiction may issue writs in aid of their jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651(a) (2006). *Denedo v. United States*, 66 M.J. 114 (C.A.A.F. 2008), *cert. granted*, 129 S. Ct. 622 (2008). Contrary to what is contained in the Prosecution's Response, *Clinton v. Goldsmith*, 526 U.S. 529 (1999) does not stand for the proposition that military courts cannot issue extraordinary writs.

Prosecution Response at 7. Rather, *Goldsmith* stands for the proposition that military courts may issue writs in aid of their jurisdiction, a principle reaffirmed by the C.A.A.F. last year in *Denedo*.

Defense asserted in its motion that [REDACTED] amounts to cruel, inhuman and degrading treatment—which is prohibited by Common Article III, the M.C.A. and the D.T.A. Given that this Commission is tasked with ensuring compliance with these laws and the administration of its docket, the issuance of an order prohibiting the government from [REDACTED] is in aid of this Court’s jurisdiction. Because the All Writs Act serves as a residual authority, a writ is not necessary or appropriate under the statute if another adequate legal remedy is available. *Denedo*, 66 M.J. at 121.

**b. This Commission need not give Blind Deference to the Opinion of Correctional Officials.**

The Prosecution argues that the method of transport is an operational decision and the Commanders should be given broad discretion. (Prosecution Reply at ¶6h.) But while these officials are entitled to some deference, “due deference does not mean blind deference.” *United States v. Gotti*, 755 F. Supp. 1159, 1164 (E.D.N.Y. 1991); *Bell v. Wolfish*, 441 U.S. 520, 584 (1979). In this case, the government, through an affidavit from [REDACTED] provided three overall reasons for [REDACTED] [REDACTED]

[REDACTED]

(Prosecution Reply at ¶4.) However, these broad based reasons can justify any draconian means of restraint, regardless of its detrimental effect on the detainee. The current restraint and precautionary measures utilized by the government, [REDACTED], reasonably satisfies the government’s safety concerns. As noted by the Supreme Court, “if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is

punishment that may not constitutionally be inflicted upon detainees *qua* detainees.” *Bell*, 441 U.S. at 539. In this case, [REDACTED] is an overly excessive procedure that causes undue harm to Mr. Al-Nashiri.

[REDACTED]  
[REDACTED] In those prisons, the guards have an even more compelling reason to minimize danger.

**c. Potential Harm Inflicted On Mr. Al-Nashiri Involves More Than Mere Preferences and Comfort.**

The Prosecution argues that Mr. Al-Nashiri’s motion deals with the minor issue of preference and comfort. (Prosecution Reply at 6g.) But this is a watered-down version of the harm that was raised in the motion. First, Mr. Al-Nashiri claims that his treatment violates international and domestic law—such claims are anything but trivial. Second, the affidavit from [REDACTED] illustrated the potential harm that the [REDACTED] has on Mr. Al-Nashiri. And if that is not enough proof, the Defense includes in this reply an affidavit from [REDACTED], a clinical psychologist. (Attachment A.)

[REDACTED] is currently a professor of Psychology and the Director of the doctoral program in Clinical Psychology at Fordham University. He is a licensed Forensic Psychologist, a member of the faculty of the New York University School of Medicine and a Research Consultant to the Bellevue/NYU Program for Survivors of Torture. [REDACTED] has conducted numerous evaluations of the effects of incarceration and torture, to include evaluations of detainees held at Guantanamo Bay. (*Id.*)

[REDACTED] has neither personally examined Mr. Al-Nashiri nor has personal knowledge of Mr. Al-Nashiri’s incarceration or the facts of this case. However, [REDACTED] has viewed publicly available sources on Mr. Al-Nashiri. [REDACTED] believes that Mr. Al-

Nashiri may likely be suffering from Posttraumatic Stress Disorder (PTSD), and that a substantially likelihood exists that [REDACTED] will cause further psychological damage and exacerbate any existing symptoms. (*Id.* at 3.)

**d. The Transport Procedures Interfere with Mr. Al-Nashiri's Right to Consult with Counsel.**

These procedures, in addition to being unnecessary, have made it impossible for counsel to meet with Mr. Al-Nashiri without contributing to his continued psychological harm.

Additionally, the Prosecution has never explained why Camp 7 could not provide space for attorney/client meetings which would obviate the need for any prisoner transport.

**3. Additional Witnesses.**

A. [REDACTED], COL, MP, Commanding, JTF-GTMO.

**4. Attachments.**

A. Declaration of [REDACTED], PhD

By: //s//  
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