

UNITED STATES OF AMERICA

v.

ABD AL-RAHIM HUSSEIN
MUHAMMED ABDU AL-NASHIRI

D002 (Nashiri)

PROSECUTION RESPONSE

To Defense Motion [REDACTED]
[REDACTED]

29 January 2009

1. Timeliness. This response is filed within the timeframe established by Rules for Military Commission (R.M.C.) 905.

2. Relief. The Defense motion should be denied as a matter of law.

a. As a matter of law, the facts set forth by the Defense do not require action by the Military Judge. The Military Judge should find in favor of the Prosecution on the basis of the filings alone.

b. Alternatively, if the Military Judge directs a hearing for this motion, the Military Judge should deny the Defense motion based upon the facts supplied in the filings, without requiring further production of witnesses or evidence.

c. Alternatively, if the Military Judge grants a full hearing in this matter, the Military Judge should deny the Defense motion.

3. Overview.

a. Military Commissions, like all other military tribunals, are courts of limited jurisdiction. The authority of the Military Commission is defined by the Military Commissions Act of 2006. The authority of the Military Commission, and the Presiding Officer, does not extend to "all writs."

b. Contrary to Defense assertions, neither the Geneva Conventions, the Detainee Treatment Act nor the Military Commissions Act provide authority for the Military Judge to grant the relief requested.

c. The Accused, together with his fellow detainees, is held at Guantanamo Bay, Cuba under the authority of the President.

d. The Commander, Joint Task Force - Guantanamo Bay, Cuba (JTF-GTMO), has the immediate responsibility for the custody of the detainees charged before Military

Commissions, including the management of the detention facilities, security, operational efficiency, general conditions of confinement, and safety, consistent with long-established detention doctrine.

e. The decision of the JTF-GTMO Commander as to the manner of transferring detainees from place to place is an operational decision grounded in sound detention practices, a wealth of correctional experience and intimate knowledge of the ever-changing circumstances in the facilities for which he is responsible. The procedures adapted by the JTF-GTMO Commander are reasonable and based on security concerns. The decision falls within the extraordinarily broad discretion accorded to a commander in the conduct of military operations. It also falls within the broad discretion accorded those responsible for the management of correctional facilities. The decision should not be disturbed by the Military Judge absent a compelling interest that clearly outweighs the extraordinary deference courts are bound to afford operational decisions of military commanders in the field, and to members of the executive responsible for operating detention facilities.

4. Facts.

a. For purposes of this motion, the Governments stipulates to the facts alleged in paragraphs 5f, g, h, i and o in the Defense motion. [REDACTED]

b. The Commander JTF-GTMO has promulgated rules and regulations requiring that a certain class of detainees, when transported from their camp, [REDACTED] The defendant is a member of this class.

c. [REDACTED]

5. Legal Authority.

a. *Clinton v. Goldsmith*, 526 U.S. 529 (1999)

b. *Dalton v. Specter*, 511 U.S. 462 (1995)

c. *Bell v. Wolfish*, 441 U.S. 520 (1979)

d. *In re Yamashita*, 327 U.S. 1 (1946)

e. *Holtzman v. Schlesinger*, 414 U.S. 1304 (1973)

f. *The Adula*, 176 U.S. 361 (1900)

g. Military Law and Precedents, Col. William Winthrop (2^d Ed., War Dept. Reprint, 1920).

6. Discussion

a. The Defense motion does not allege the source of authority that would allow the Military Judge to change the circumstances of the Defendant's detention. The jurisdiction of the Commission is defined by Military Commissions Act of 2006 ("the Act"). The Act provides as follows:

“§ 948b. Military commissions generally

“(a) Purpose.—This chapter establishes procedures governing the use of military commissions *to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission.*

“(b) Authority for military commissions under this chapter.—The President is authorized *to establish military commissions under this chapter for offenses triable by military commission as provided in this chapter. ...*

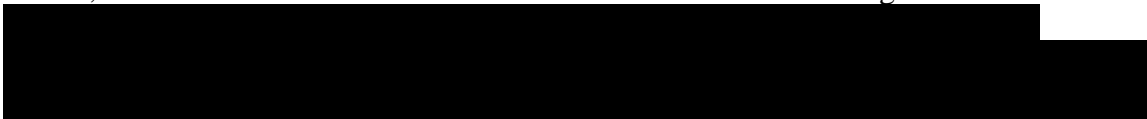
“§ 948d. Jurisdiction of military commissions


“(a) JURISDICTION.—A military commission under this chapter shall have jurisdiction *to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.*

b. The authority of the Military Commission under the Act is to try alien unlawful enemy combatants for offenses made punishable by the act or the Law of War. The authority of the Commission does not extend beyond trial of those offenses and does not allow for the dictation of terms and conditions of detention of prisoners held under the Law of War by military authority. The implementing statute indicates that the Military Commissions, like all other military tribunals, are courts of limited jurisdiction. See also Military Law and Precedents, Col. William Winthrop, pp 831-46 (2d Ed. 1920); *Clinton v. Goldsmith*, 526 U.S. 529 (1999). The authority of the Military Commission, and the Presiding Officer, does not extend to “all writs.” See *Goldsmith* at 536-37.

c. The Department of Defense dictates the conditions of confinement at the Guantanamo Bay facility. The procedure adopted by the DOD are designed to be safe, reasonable and humane, as well as to protect the security interests at the Camp. The decision regarding which procedures to adopt should appropriately be within the full discretion of the Department of Defense and the Commanders charged with authority to hold the detainees.

d. The Commander, JTF-GTMO, has provided a Declaration, filed herewith, setting forth the practices and procedures which are followed during transportation or movement of the Accused, along with other High Value Detainees (“HVDs”). According to this Declaration, a variety of force protection measures are used when transporting the HVDs, in order to reduce the risk of harm to the detainee and to the guard force.





e. The procedures adopted by the Commander JTF-GTMO are reasonable and necessary for force protection and security as well as providing, under the circumstances, humane treatment of the detainee being moved. The Commander's decision on the matter is well within his authority.

f. The length of time the detainee spends in a movement status is minimal, and such movements occur only infrequently. The physical safety of the detainee is assured by competent escorts.

g. Domestic pretrial detention jurisprudence, where a defendant enjoys the full panoply of Constitutional protections, recognizes that a defendant's preference and comfort are irrelevant to a challenge to the conditions of pretrial detention.

Once the Government has exercised its conceded authority to detain a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate this detention.

Traditionally, this has meant confinement in a facility which, no matter how modern or how antiquated, results in restricting the movement of a detainee in a manner in which he would not be restricted if he simply were free to walk the streets pending trial. Whether it be called a jail, a prison, or a custodial center, the purpose of the facility is to detain. Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility. And the fact that such detention interferes with the detainee's understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into "punishment."

Bell v. Wolfish, 441 U.S. 520, 537 (1979).

h. The decision of the Commander JTF-GTMO, regarding the methods and conditions of transporting detainees charged before Military Commissions, including the accused, is an operational decision. This decision falls within the broad discretion accorded to a commander in the conduct of military operations. *Beard v. Burts*, 95 U.S. 434 (1877); *The Adula*, 176 U.S. 361 (1900); *Dalton v. Specter*, 511 U.S. 462 (1995). This decision should not be disturbed by the Military Commission absent a compelling interest that clearly outweighs the extraordinary deference courts are bound to afford to the operational decisions of military commanders in the field. See *id.*; *In re Yamashita*, 327 U.S. 1 (1946); *Holtzman v. Schlesinger*, 414 U.S. 1304 (1973)

i. The order of the Commander, JTF-GTMO determining the methods and conditions of transporting detainees charged before Military Commissions must be accorded deference not only because it is an operational decision of a military commander, but also because domestic pretrial detention jurisprudence recognizes that corrections officials are accorded broad judicial deference.

[T]he problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. Such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters

Prison administrators are responsible for maintaining internal order and discipline [and] for securing their institutions against unauthorized access or escape The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons ... are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism.

Wolfish at 547-48 (citations and quotations omitted). The decision of the JTF-GTMO Commander to determine the methods and conditions of transporting detainees charged before Military Commissions was grounded in sound detention practices, a wealth of correctional experience and intimate knowledge of the ever-changing circumstances in the facilities for which he is responsible. It should not be disturbed by the Military Commission.

j. In *Wolfish*, the Supreme Court recognized that even under the full panoply of Constitutional protections enjoyed by U.S. citizens within the United States, practices such as double-bunking, “shake-downs,” and body-cavity searches are appropriate to the maintenance of security in a detention facility housing pretrial detainees. *Id.*, at 542-43,

555, and 558-59. [REDACTED]

The accused has failed to meet his burden in this motion. As a matter of law, the Military Judge should deny the Defense motion.

7. Burdens. The Defense has correctly stated that, as the moving party, they have the burden, by a preponderance of the evidence.

8. Oral Argument. If the Defense is granted oral argument, the Prosecution requests the opportunity to respond.

9. Witnesses and Evidence.

a. Witnesses. No witnesses are required to resolve this motion. However, should the Military Judge determine that additional live testimony is needed, the Prosecution provides notice that it may call the following witness.

(1) Colonel [REDACTED] [REDACTED] of the Joint Detention Group, JTF-GTMO.

b. Evidence.

(1) Declaration of Colonel [REDACTED] [REDACTED] of the Joint Detention Group, JTF-GTMO.

10. Additional Information. None.

11. Attachments. Declaration of Colonel [REDACTED] of the Joint Detention Group, JTF-GTMO.

12. Submitted by:

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