

UNITED STATES OF AMERICA

v.

ABD AL-RAHIM HUSSEIN MUHAMMED
ABDU AL-NASHIRI

Defense Motion

To Discontinue [REDACTED]
[REDACTED]

9 January 2009

1. **Timeliness:** This request is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905.
2. **Relief Requested:** The Defense respectfully requests that the Commission order that JTF GTMO discontinue the [REDACTED]
3. **Overview:** The [REDACTED] is detrimental to the health of Mr. Al-Nashiri and unduly burdens the attorney-client relationship.
4. **Burden of Proof:** The defense bears the burden of proof as the moving party on this motion and the standard is proof by a preponderance of evidence. R.M.C. 905(c).
5. **Facts:**

Initial Detention and Transfer to Guantanamo Bay, Cuba (GTMO)

- a. [REDACTED]
[REDACTED]
- b. [REDACTED]
[REDACTED]
- c. On or about September 2006, Mr. Al-Nashiri was transferred to Guantanamo Bay, Cuba.
- d. [REDACTED]
[REDACTED]

Transport of Mr. Al-Nashiri

e. Mr. Al-Nashiri's [REDACTED]
[REDACTED]

Initial Request to Commander JTF GTMO by the Defense and Request by the International Committee of the Red Cross (ICRC)

f. On or about August to September 2008, the ICRC made a request to have Mr. Al-Nashiri excepted from having his [REDACTED] (Attachment A.)

g. On 22 September 2008, the defense made a formal request to the JTF Commander to not have Mr. Al-Nashiri's [REDACTED] (Attachment A, B.)

h. On 7 October 2008, the Staff Judge Advocate's (SJA) office informed the defense that the JTF Commander had denied the defense's request. (Attachment C.)

Second Request to Commander JTF and Affidavit of Dr. [REDACTED]

i. On 14 October 2008, the defense made a second request to the JTF Commander. (Attachment D.) In support of the request, the defense attached an affidavit from [REDACTED] MD. (Attachment E.)

j. [REDACTED] is an Associate Professor of Medicine at the Boston University School of Medicine and Co-Director of the Boston Center for Refugee Health and Human Rights. Her clinical practice focuses on the care of asylum seekers, asylees and refugees, most of whom have experienced torture. She taught extensively on the medical care and evaluation of refugees and survivors of torture and published considerable work in this area in many professional journals.

[REDACTED] has been qualified as an expert witness for evaluation of the medical effects of torture in the Boston Immigration Court and in the United States Federal District Court. (*Id.*)

k. In her affidavit, [REDACTED] stated that sensory deprivation of Mr. Al-Nashiri will likely cause profound psychological symptoms and, most significantly, could serve as a continuation of torture. (*Id.*)

l. [REDACTED] has neither personally examined Mr. Al-Nashiri nor has knowledge of any specific allegations of the prior mistreatment of Mr. Al-Nashiri that occurred before his arrival in Guantanamo Bay. (*Id.*)

m. [REDACTED] medical opinion is based on [REDACTED]
[REDACTED]
[REDACTED]

n. [REDACTED] strongly recommends against any practice that involves [REDACTED]
[REDACTED] (*Id.*)

o. On 14 October 2008, JTF Guantanamo SJA's office informed the defense that its request was denied and that force protection issues continue to require that JTF-GTMO adhere to the current detainee movement procedures. (Attachment F.)

Defense Request to be Transported to Mr. Al-Nashiri

p. On 6 January 2009, in order to find a compromise with the [REDACTED] the defense requested that they be brought to Mr. Al-Nashiri's camp for attorney visits. The defense agreed to [REDACTED] On 7 January 2009, JTF-GTMO denied the request. (Attachment G.)

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Forced Cell Extraction.

u. Current Department of Defense Instruction require that if an accused refuses to attend a Commission proceeding that he be forcefully extracted from his cell, unless a military judge rules otherwise.

6. Argument:

[REDACTED]

[REDACTED]

[REDACTED] is a re-infliction of this torturous treatment and it constitutes cruel, inhuman and degrading treatment. [REDACTED] asserts in her affidavit that [REDACTED] of a person in Mr. Al-Nashiri's condition will likely cause undue physical and mental harm. *See* Attachment E (Affidavit of [REDACTED], MD). Specifically, such procedures are likely to cause profound psychological symptoms and, most significantly, could serve as a continuation of torture. *Id.* at ¶ 11. Also, it has been noted generally that [REDACTED] can have harmful effects on that individual.¹ Consequently, [REDACTED] is prohibited by both domestic and international law.

Cruel, Inhuman and Degrading Treatment

Common Article III of the Geneva Conventions, the Detainee Treatment Act (DTA) and the Military Commissions Act (MCA) prohibit the cruel, inhuman and degrading treatment of the

[REDACTED]

[REDACTED]

detainees held in Guantanamo Bay. Of note, these authorities pertain to the general day-to-day treatment of a detainee and not just during interrogations.

In both the DTA and the MCA the term *cruel, inhuman, or degrading treatment* means “cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.”

Using the above definition as it applies to the Constitution, courts have looked to the individual physical or mental condition of the prisoner in determining whether there is constitutional violation: Namely, a condition or procedure that may seem harmless to some may be extremely debilitating to others. For instance, in *Madrid v. Gomez*, the court found that conditions in a Special Housing Unit (SHU) caused serious mental harm to those inmates with mental health problems, and not to others. 889 F. Supp. 1146, 1265 (N.D.C.A. 1995).² The court held that for those inmates, “placing them in the SHU is the mental equivalent of putting an asthmatic in a place with little air to breathe. The risk is high enough, and the consequences serious enough, that we have no hesitancy in finding that the risk is plainly ‘unreasonable.’” *Id.* (citing *Helling v. McKinney*, 509 U.S. 25 (1993)).

As a consequence, he is an atypical detainee, and this factor should weigh heavily in the Commission’s judgment.

² Although an Eighth Amendment case, courts have held that Eighth Amendment protection applies to detainees in pre-trial status. See *Graham v. Connor*, 490 U.S. 386 (1989); *Bell v. Wolfish*, 441 U.S. 520 (1979). But an integral distinction that must be kept in mind is that the pre-trial detainee has not been judged by a tribunal and therefore society’s need to punish the offender through the deprivation of certain liberties is not relevant.

Proceeding further, courts have found a Constitutional violation when the detainee is subjected to serious mental or physical harm. See *Id.*; but see *Hudson v. McMillian*, 503 U.S. 1, 7 (1992)(noting that in excessive force cases a prisoner can still prove an Eighth Amendment violation absent an injury). Such harm can stem from non-physical conduct such as verbal threats and sexual advances, as noted in *United States v. Brennan*, 58 M.J 351 (C.A.A.F. 2003), to the potential harm resulting from second hand smoke, as noted by the Supreme Court in *Helling*, 509 U.S. 25. In this case, [REDACTED] affidavit clearly demonstrates the harm.

International Law

The [REDACTED] on prisoners has been found to be inhuman and degrading throughout international law. For instance, the Supreme Court of Israel in commenting on the techniques used by the General Security Service (GSS) held that the hooding of a prisoner constitutes both cruel and degrading treatment insofar as it is demeaning to his humanity, inflicts physical harm and causes the prisoner to lose sight of time and place. See The Judgment Concerning the Interrogation Methods Implied by the GSS, the Supreme Court of Israel, sitting as the High Court of Justice, adjudicating H.C. 5100/94, et.al., available at [http:www.court.gov.il]. The Supreme Court of Israel required the GSS to impose less harmful means of fulfilling its stated goal of preventing eye contact with other prisoners. Another example is found in the case of *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) para. 94 (1978). In this case, the court held that the use of sensory deprivation techniques know as the “five techniques” amounted to cruel and inhuman treatment. One of these techniques was the hooding of a prisoner.

[REDACTED]

[REDACTED]

No Legitimate Purpose in [REDACTED]

Lastly, the Commission should look to whether there is a legitimate purpose behind the [REDACTED]. The defense argues that this procedure is unnecessary in light of the physical isolation of Guantanamo Bay and the other security precautions placed upon Mr. Al-Nashiri. *See, e.g., Hope v. Pelzer*, 536 U.S. 730 (2002)(finding a violation of the Eighth Amendment when a prisoner was handcuffed to a post significantly beyond what was necessary to quell the harm).

In stark contrast is how similarly charged defendants in Federal and State Courts were transported. For instance, according to the counsel for one of the Embassy Bombers, Josh Dratel, [REDACTED]. Notably, these defendants were alleged members of al-Qaeda and were accused of similar crimes as Mr. Al-Nashiri. Mr. Dratel also notes that he has been involved in several terrorist related cases; and in those cases, [REDACTED]. Another example is that of Terry Nichols, the Oklahoma City Bomber. According to his state defense counsel, Terry Nichols [REDACTED] (Attachment J.)

These two cases of similarly charged defendants belies the government's argument that force protection measures necessitate the [REDACTED]. If the above defendants can be transported throughout the open streets in the United States with their [REDACTED] then it is unnecessary for Mr. Al-Nashiri's [REDACTED] in the isolated and secured facility of U.S. Naval Base, Guantanamo.

7. **Oral Argument:** The defense requests a hearing to present evidence and oral argument. In light of the specific nature of this motion, the defense requests that this hearing occur prior to the arraignment and without Mr. Al-Nashiri's presence.

8. **Witnesses:**

- a. Major [REDACTED] U.S. Army, Deputy Staff Judge Advocate, JTF GTMO
- b. [REDACTED]
- c. Brigadier General (Ret.) [REDACTED], MD

9. **Conference with Opposing Counsel:** The defense has conferred with trial counsel about this motion. Trial counsel expressed that they will take the motion under consideration and respond accordingly.

10. **List of Attachments:**

- A. Email to Deputy SJA JTF-GTMO, dtd 25 Sep 08
- B. Request for an Exception to Detainee Transport, dtd 22 Sep 08
- C. Email from Deputy SJA JTF-GTMO, dtd 7 Oct 08
- D. Renewed Request for and Exception to Detainee Transport, dtd 14 Oct 08
- E. Declaration of [REDACTED] MD, dtd 6 Oct 08
- F. Email from Deputy SJA JTF-GTMO, dtd 14 Oct 08
- G. Denial of Request to Travel, dtd 7 Jan 09
- H. Affidavit of Josh Dratel
- I. Affidavit of [REDACTED]

//s//
LCDR STEPHEN C. REYES, USN
Detailed Defense Counsel
Office of the Chief Defense Counsel
Office of Military Commissions

[REDACTED]