MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY

UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	AE254Y(WBA) **Emergency Defense Motion** to Bar Regulations Substantially Burdening Free Exercise of Religion and Access to Counsel Date Filed: 17 October 2014

1. Timeliness: This motion is timely filed.

2. Relief Sought:

Mr. bin 'Atash requests that the Commission order JTF-GTMO and the Commander, Joint Detention Group (JDG) to cease all activities that bring female members of the JTF-GTMO guard force into direct physical contact with Mr. bin 'Atash. Specifically, Mr. bin 'Atash requests that the Commission order JTF-GTMO and the Commander, JDG to cease utilizing female guards to escort him, where female guards are required to touch his body. Mr. bin 'Atash requests that this Commission issue a temporary order barring such practices until a full hearing on the matters briefed below can be held.

3. Overview:

Mr. bin 'Atash is housed at "Camp 7" on Guantanamo Bay, where he is guarded by a rotating force [redacted] Mr. bin 'Atash is able to work with male guards and female guards in most situations. However, the use of female guards during the "escort" process (when Mr. bin 'Atash is moved from Camp 7 to

"Echo II" for attorney-client meetings, or when Mr. bin 'Atash is moved to the ELC for court appearances) requires touching of Mr. bin 'Atash by female guards in violation of his religious beliefs. The basis of Mr. bin 'Atash's objection to being touched by females to whom he is not related is his sincerely-held religious belief, as a devout Muslim, that his religion prohibits him from mixing or coming into contact with unrelated women due to the risk of sin.

On 8 October 2014, Camp 7's new Commander advised Mr. bin 'Atash and the remainder of the exclusively-male population housed at Camp 7 that female guards would be permitted to come into contact with the men housed in Camp 7 during detainee movement, including movement to attorney-client meetings. On the same date, another Camp 7 detainee, [redacted] was forcibly and violently extracted from his attorney-client meeting room following a meeting at Echo II when he refused to be shackled by a female guard – based upon his religious objections to female contact. JTF-GTMO personnel immobilized [redacted] and caused him injury in the process of returning him to Camp 7. Since that time, Mr. bin 'Atash and his fellow Camp 7 detainees have refused to be moved from Camp 7 unless they are assured that they will not be physically handled by female guards. The Camp 7 detainees have missed multiple meetings with their attorneys; attending the meetings and participating in their own defense would require them to violate a central tenet of their religion.

Mr. bin 'Atash has experienced stress, anxiety, lack of sleep, and other ailments as a result of JTF-GTMO's actions. He has notified counsel that, although he wishes to engage with counsel to prepare his capital defense, he cannot attend attorney-client meetings until JTF-GTMO's policy is reversed. He is also gravely concerned that, at the next session of the Commission, JTF-GTMO will forcibly transport him to the ELC as he will not be voluntarily moved by female guards.

JTF-GTMO's use of female guards in physical contact with Mr. bin 'Atash is in violation of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.* RFRA dictates that the Government may not "substantially burden" an individual's free exercise of religion except when the burden is in furtherance of a "compelling governmental interest" and is the "least restrictive means" of furthering the compelling interest. 42 U.S.C. § 2000bb-1. While there was previously a question as to RFRA's applicability to Guantanamo Bay detainees, the Supreme Court's recent decision in *Burwell v. Hobby Lobby,* 134 S. Ct. 2751 (2014) conclusively establishes that the term "person," as used in RFRA, includes nonresident aliens such as Mr. bin 'Atash.

RFRA claims are different than typical constitutional claims examined under *Turner v. Safley,* 482 U.S. 78 (1987) and its progeny. Under the *Turner* test a prison regulation is valid if "reasonably related to legitimate penological interests," while RFRA employs strict scrutiny for claims based upon the free exercise of religion. RFRA demands a searching inquiry that is focused on a law or regulation's impact on the *individual* in question – rather than a focus on the neutrality of the law or on broad, overarching governmental interests. Strict scrutiny under RFRA involves a burden-shifting analysis. The individual claiming his religious rights have been violated need only make a *prima facie* case that a government action substantially burdens his sincere religious exercise. Then, the Government must demonstrate both compelling governmental interest *and* least restrictive means.

It is clear that the Government policy of forcing these devoutly-religious men to be physically touched by a person of the opposite gender is a substantial burden on the exercise of their religion. Mr. bin 'Atash is a man with sincerely-held beliefs that physical contact with unrelated females is a sin. Substantial burden exists where a religious person is forced to choose

between his religious convictions and benefits that would otherwise be available to him. This case presents just such an untenable choice: Mr. bin 'Atash must choose his constitutionally and statutorily-guaranteed access to counsel *or* the free exercise of his faith which is also protected by the Constitution. There simply is no compelling governmental reason for requiring that choice. Male guards are always available for the movement of Mr. bin 'Atash. Utilizing *female* guards is not the least restrictive means of accomplishing the Government's objective.

In addition to presenting a claim under RFRA, Mr. bin 'Atash also presents parallel claims for violation of his rights under the First, Fifth, Sixth, and Eighth Amendments to the Constitution. Specifically, in addition to violating RFRA, JTF-GTMO's actions also prevent Mr. bin 'Atash from freely exercising his religion under the First Amendment, deny Mr. bin 'Atash due process under Fifth Amendment (including the due process right of a pretrial detainee to be free from punishment), and deny Mr. bin 'Atash his right to the effective assistance of counsel under the Sixth Amendment.

Constitutional claims are traditionally examined under the *Turner* test, whereby prison regulations must be "reasonably related to legitimate penological interests." However, in applying this test, the Commission must be mindful that as a *pretrial* detainee, JTF-GTMO has limited penological interests, as penological interests (such as punishment and deterrence) typically relate to convicted prisoners. Here, no legitimate penological interest requires that female guards touch and otherwise handle Mr. bin 'Atash.

Finally, in addition to violating RFRA and Mr. bin 'Atash's fundamental rights under the Constitution, JTF-GTMO's use of female guards to transport religious Muslim detainees is also in violation of international law. Under international law and domestic precedent, Mr. bin 'Atash is entitled to at least the protections of Common Article 3 of the Geneva Conventions,

which prohibit "outrages upon personal dignity" and "humiliating and degrading treatment." The new policy of forcing devout Muslim men to submit to women handling and touching them is in contravention of the religious beliefs of these men and thus constitutes an "outrage upon personal dignity" under the norms of customary international law.

For the foregoing reasons, Mr. bin 'Atash requests that the Commission order JTF-GTMO and the Commander, Joint Detention Group (JDG) to cease all activities that bring female members of the JTF-GTMO guard force into physical contact with Mr. bin 'Atash. Specifically, Mr. bin 'Atash requests that the Commission order JTF-GTMO and the Commander, JDG to cease utilizing female guards to escort him, where the female guards are required to touch his body. The Commission should enter an interim order on this matter as soon as possible, as it will not be possible to take evidence and hear argument until the resolution of AE292.

4. Burdens of Proof:

As to Mr. bin 'Atash's request for relief under the Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.,* Mr. bin 'Atash bears the initial burden to produce *prima facie* evidence to demonstrate that his free exercise of religion is substantially burdened. The Government then has the burden of persuasion to demonstrate (1) that the application of the burden is in furtherance of a compelling governmental interest and (2) that the burden is the least restrictive means of furthering the compelling governmental interest.

As to Mr. bin 'Atash's constitutional claims under the First, Fifth, and Sixth Amendments, the defense bears the burden of persuasion; the standard of proof is a preponderance of the evidence. R.M.C. 905(c)(1).

5. Facts:

A. Joint Task Force Guantanamo (JTF-GTMO) oversees all aspects of the detention of Mr. bin 'Atash. The Joint Detention Group (JDG) is a component of JTF-GTMO that controls the physical security of and access to Mr. bin 'Atash.

B. Mr. bin 'Atash and his co-accused are devout Muslims. As a devout Muslim, Mr. bin 'Atash has the sincerely-held religious belief that he may not mix freely or come into physical contact with women who are not among his closest relatives. The purpose of this religious prohibition is to avoid the possibility of sin.[1]

C. The JDG guard force is composed primarily of male Soldiers. While JDG has refused to provide information on the composition of the guard force, [redacted]

D. Mr. bin 'Atash does not object to the use of female guards. However, he does object to the use of female guards during the "escort" process (when Mr. bin 'Atash is moved from Camp 7 to Echo II for attorney-client meetings, or when Mr. bin 'Atash is moved to other locations such as the ELC that requires the use of an escort team) because the escort process requires Mr. bin 'Atash to come into physical contact with the escorting guards. As an exception, Mr. bin 'Atash does not object to female guards driving the escort van, because this does not require contact with Mr. bin 'Atash. Mr. bin 'Atash does have a religious objection to female guards touching or brushing against his body while seated in the back of the escort van.

[1] According to Mr. bin 'Atash's sincerely-held religious belief, there are many sources for this prohibition. One source of the prohibition can be found in the Qur'an: "when you ask the ladies for anything, ask them from before a screen. That makes for greater purity for your hearts and for theirs." Surah al-Ahzab: 53; *see also* Surah an-Nur: 30 "[t]ell the believing men to reduce [some] of their vision and guard their private parts. That is purer for them. Indeed, Allah is acquainted with what they do." Hadith also instruct on this prohibition. For example, it is said that the Prophet Muhammad said that "it is better for one of you to be pierced by a steel pin in his head than to touch the hand of a strange woman."

E. Because of Mr. bin 'Atash's sincerely-held religious beliefs, even the thought of coming into physical contact with a female guard causes Mr. bin 'Atash great stress and anxiety. This stress is nearly unbearable for Mr. bin 'Atash when combined with the psychological impact of past torture and mistreatment and the myriad other stressors of a decade-long incommunicado detention. Even where policies seem neutrally-applied from an outside observer's perspective, Mr. bin 'Atash's history of abuse, combined with his strong religious beliefs, cause the policies to appear as purposeful manipulation. Mr. bin 'Atash experiences physical manifestations of the stress and anxiety caused by the use of female guards, including an inability to sleep.

F. ~~(U//FOUO)~~ Mr. bin 'Atash has experienced problems with the use of female guards in the past at Camp 7. [redacted]

G. Mr. bin 'Atash is compliant with searches and escorts where female guards are not brought into physical contact with Mr. bin 'Atash. Mr. bin 'Atash has not had any major disciplinary issues since January 2011.

H. JTF-GTMO recently underwent a major force rotation, with the replacement of the guard force, Staff Judge Advocate, JDG Commander, and Camp 7 Commander. In July 2014, the new Camp Commander reintroduced females into detainee-contact roles at Camp 7. At the time, the [redacted] guards introduced into Camp 7 appeared to be in training for their new duties. Since July 2014, several detainees, including Mr. bin 'Atash, have met with the Camp Commander to

express their faith-based opposition to physical contact with female guards, going so far as to propose alternative methods of incorporating females in a manner consistent with their Islamic faith.

I. On 8 October 2014, the Camp Commander notified Mr. bin 'Atash and the other men housed in Camp 7 that female guards would be permitted to come into contact with Mr. bin 'Atash and his fellow detainees during movement. On 8 October 2014, another Camp 7 detainee, [redacted] refused movement and was forcibly removed from Echo II to Camp 7 when JDG inserted a female into his escort team. Following a meeting with his attorneys, a female guard arrived to unshackle and re-shackle [redacted] order to prepare him for transport [redacted] objected on the basis of his religious beliefs and requested that a male guard be called. Rather than summoning a male guard to unshackle and re-shackle [redacted] JTF-GTMO summoned four guards who physically restrained [redacted] suffered injuries due to JTF-GTMO's actions.

J. Because movement from Camp 7 to Echo II will likely now involve the use of female guards, Mr. bin 'Atash is no longer attending scheduled attorney-client meetings. *See* Attachment C. Mr. bin 'Atash has also notified counsel that other Camp 7 detainees also intend to avoid attorney-client meetings until their attendance is no longer accompanied by the chance that they will be handled by females to whom they are not related. Mr. bin 'Atash additionally has informed counsel that he is concerned that female guards may attempt to physically handle him for movement to upcoming mandatory court appearances. He is legitimately concerned that such attempts by the female guard force, accompanied by his refusal to be handled by a female,

will result in the violent use of force to bring him before the Commission and will result in physical harm to him, as well as additional discipline. *Id.*

K. On 11 October 2014, Mr. bin 'Atash "took a chance," as he explains it, and met with his Learned Counsel. Mr. bin 'Atash informed counsel that he attended the attorney-client meeting only after observing that a female would not be part of his escort team from Camp 7 to Echo II and after extracting assurance from the male escorts that they would be the same team to move him after the meeting had concluded. However, Mr. bin 'Atash informed counsel that he took a "risk" because, despite assurances, there was no guarantee that a female guard would not be used to escort Mr. bin 'Atash from Echo II to Camp 7 following the day's meeting. Because of the possibility that he would be violently extracted from the attorney-client meeting room due to his religious objection to the use of female guards, Mr. bin 'Atash did not bring his Qur'an to the attorney-client meeting, as is customarily his practice. Mr. bin 'Atash expressed concern that if he did not allow the female guards to touch his body during a move, he would first be violently extracted and then be placed in a disciplinary status. Mr. bin 'Atash expressed a desire to continue meeting with defense counsel and engaging with his attorneys on a variety of substantive issues, but he reiterated that he would be forced to miss additional attorney-client meetings because of his religious objection to the use of female escorts.

L. On 12 October 2014, Mr. bin 'Atash wished to attend his scheduled attorney-client meetings and inquired of the Assistant Staff Judge Advocate (ASJA) and Assistant Watch Commander as to whether the facility would be using female escorts. He was informed that the escorts could be male or female. Attachment C. As a result, Mr. bin 'Atash was unable to attend his attorney-client meetings on 12 October, and he has been unable to attend any meetings thereafter.

M. While counsel has maintained a continuous presence at Guantanamo Bay since 30 September 2014 in order to meet with Mr. bin 'Atash, since 9 October Mr. bin 'Atash has refused all attorney-client meetings with the exception of an 11 October meeting with Learned Counsel.

N. Problems engendered by the use of female escorts and by other policy changes have been exacerbated by JTF-GTMO's complete disregard for defense counsel's attempts to communicate regarding this issue. On 6 October 2014, counsel emailed JTF-GTMO's "Litigation Support" email address to express "serious concerns about the treatment [Mr. bin 'Atash] is receiving from some of the Camp 7 staff. Attachment D. Counsel indicated that she would be on island from 10-18 October, and she requested a meeting with Camp 7's legal advisor. JTF-GTMO did not respond.

O. On 9 October 2014, counsel again emailed Litigation Support, noting that the "situation is now taking on even more importance" due to Mr. bin 'Atash's cancelled attorney-client meetings; Learned Counsel expressed her growing concern for Mr. bin 'Atash's well-being. Attachment E. Counsel again sought a meeting with the Staff Judge Advocate and also sought contact information for the Staff Judge Advocate. While the identity of JTF-GTMO's former Staff Judge Advocates since 2011, CAPT Thomas Welsh and CDR Joseph Romero, were known to counsel, JTF-GTMO has refused to provide any contact information for the current Staff Judge Advocate – even to counsel on a confidential basis.

P. Litigation Support responded with a terse, unsigned one line email stating only that "[y]our client refused his meetings for today." *Id.*

Q. On 11 October 2014, prior to meeting with Mr. bin 'Atash, counsel encountered [redacted] who identified [redacted] as an Assistant Staff Judge Advocate. [redacted] wearing a U.S. Army

uniform and standing in the Echo II lobby. The ASJA refused to [redacted] real name or an alias. The ASJA indicated [redacted] monitored the "Litigation Support" email account and had received counsel's various requests to meet with the SJA. However, the ASJA indicated that the SJA was "not interested in meeting with defense attorneys." The ASJA further indicated [redacted] was not able to answer questions as to which commanders the SJA advises because answering the questions would divulge operational information. The unidentified ASJA refused to sign notes taken by counsel during this conversation.

R. Following counsel's meeting with Mr. bin 'Atash on 11 October 2014, counsel sent a third email to Litigation Support outlining counsel's encounter with the ASJA and again protesting that "Mr. bin 'Atash has religious beliefs that prohibit him from physical contact with a woman to whom he is not closely related or married. Physical contact with a female guard is a sin for Mr. bin 'Atash. JTF's newly instituted use of female guards to move Mr. bin 'Atash creates a Hobson's choice: Mr. bin 'Atash can choose between sinning by being touched by women to whom he is not related or choose to meet with his defense counsel." Attachment F. Counsel requested that JTF-GTMO rescind its "capricious rule and policy changes" in order to ensure access to counsel. Counsel received no response.

6. Law and Argument:

A. Policy is In Violation of the Religious Freedom Restoration Act

The Religious Freedom Restoration Act (RFRA) provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" except where the burden "is in furtherance of a compelling governmental interest" and is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. In enacting RFRA, Congress expressly sought to "restore the compelling

interest test as set forth in *Sherbert v. Verner,* 374 U.S. 398 (1963) and *Wisconsin v. Yoder,* 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened…" 42 U.S.C. § 2000bb.[2]

It is well-settled that "RFRA governs the activities of federal officers and agencies." *O'Bryan v. Bureau of Prisons,* 349 F.3d 399, 401 (7th Cir. 2003); *see also Ochs v. Thalacker,* 90 F.3d 293, 296 (8th Cir. 1996) ("Congress intended that RFRA apply to prison inmate Free Exercise Clause cases."). However, until recently there has been a question as to whether RFRA is applicable at Guantanamo Bay. In *Rasul v. Myers,* 563 F.3d 527, 532-33 (D.C. Cir. 2009), the D.C. Circuit held that "person[s]" within the meaning of RFRA did not include nonresident aliens such as those detainees housed at Guantanamo Bay. *See also Aamer v. Obama,* 742 F.3d 1023, 1043 (D.C. Cir. 2014). However, these cases are no longer good law on this point.

Rasul's reasoning was based upon the D.C. Circuit's belief that the "standard governing free exercise claims that prevailed before the Supreme Court's 1990 decision in *Employment Division v. Smith,* 494 U.S. 872 (199)" was a narrow standard that did not include nonresident aliens. The Supreme Court had previously concluded that Guantanamo Bay is *de facto* sovereign U.S. territory, and that the individuals housed at Guantanamo Bay are entitled to constitutional protections. *Boumediene v. Bush,* 553 U.S. 723 (2008). In *Rasul*, the D.C. Circuit attempted to

[2] The state and local Government-equivalent to RFRA is the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.* RLUIPA provides that "no government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution…even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person…(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest…" 42 U.S.C. § 2000cc-1(a). An individual may assert a RLUIPA violation as a "Claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000cc-2. "If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause…the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion." *Id.* RLUIPA was enacted in response to *City of Boerne v. Flores,* 521 U.S. 507, which found RFRA unconstitutional as applied to state and local governments. As RFRA and RLUIPA contain nearly identical statutory language, the judicial construction and interpretation of RFRA and RLUIPA has been nearly identical and interchangeable.

avoid the constitutional issue implicated by restrictions on the free exercise of religion by narrowly-construing the term "person" in the RFRA to exclude nonresident aliens. However, this narrow interpretation of RFRA's protected class has now been expanded well beyond the holding in *Rasul*.

The Supreme Court's recent holding in *Burwell v. Hobby Lobby,* 134 S. Ct. 2751 (2014), conclusively establishes that the term "person" in the RFRA is to be viewed expansively to include nonresident aliens (the decision also construes the term "person" to include for-profit corporations). In *Hobby Lobby,* Justice Alito, writing for the majority, notes tellingly that the Court is "not aware of any pre-Smith case in which [the Supreme Court] entertained a free-exercise claim brought by a resident noncitizen" and asks "[a]re such persons also beyond RFRA's protective reach simply because the Court never addressed their rights before Smith?" *Id.* at 2773; *see also Id.* at 2772 (noting that RFRA specifies that the exercise of religion "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.") (citing 42 U.S.C. § 2000cc-3(g)).

The *Hobby Lobby* Court's reasoning goes on to eviscerate the basis for the D.C. Circuit's holding in *Rasul*, stating that "nothing in the text of RFRA as originally enacted suggested that the statutory phrase 'exercise of religion under the First Amendment' was meant to be tied to this Court's pre-Smith interpretation of that Amendment." *Id.* at 2772. The Court further finds that "the results would be absurd if RFRA merely restored this Court's pre-Smith decisions in ossified form and did not allow a plaintiff to raise a RFRA claim unless that plaintiff fell within a category of plaintiffs one of whom had brought a free-exercise claim that this Court entertained in the years before Smith." *Id.* at 2773. The meaning is clear: *Hobby Lobby* holds that the

RFRA protects even corporations and nonresident aliens from Government actions restricting the free exercise of religion.

With RFRA now clearly-applicable at Guantanamo Bay, it is also clear that the Act bars the type of Government conduct at issue in the instant motion. RFRA claims and claims under RLUIPA (the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.* - the state and local government-equivalent of RFRA) are analyzed similarly. These claims are distinct from the type of constitutional claims that this Commission normally examines – the type of claims at issue in the remainder of the AE254 series (and also separately at issue in this motion). *See Id.* at 2772; *see also Jones v. Goord,* 435 F. Supp. 2d 221, 260 (S.D.N.Y. 2006) ("[t]o the extent that plaintiffs argue that RLUIPA controls all First Amendment claims brought by prisoners, they are incorrect. RLUIPA is an independent cause of action, not a directive to courts instructing how [to] evaluate claims brought under the First Amendment…District Courts in this circuit have adopted this approach, and treat claims under the First Amendment and under RLUIPA as separate causes of action."). As distinct causes of action, RFRA claims are examined under a different standard than the standard set forth in *Turner v. Safley,* 482 U.S. 78 (1987), that this Commission typically uses to examine confinement facility regulations impinging upon constitutional rights.

The RFRA standard gives far less deference to the confinement facility. Under *Turner,* a prison regulation is valid if it is "reasonably related to legitimate penological interests." *Id.* at 89. However, RFRA mandates a "strict scrutiny test" for free exercise claims that "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person,'" rather than merely accepting generalized claims regarding health, safety, and security as the basis for a regulation. *Gonzalez v. O Centro Espirita*

Beneficiente Uniao do Vegetal, 546 U.S. 418, 430-31 (2006); *see also Lovelace v. Lee,* 472 F.3d 174, 186 (4th Cir. 2006) (RLUIPA mandates a "more searching standard' of review of free exercise burdens than the standard used in parallel constitutional claims: strict scrutiny instead of reasonableness.") (citations omitted). In adopting strict scrutiny, RFRA explicitly effected a legislative workaround of cases such as *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 406 (1987), which had applied the *Turner* reasonableness test to a prison regulation which impinged upon Muslim inmates' opportunity to participate in Jumu'ah (communal prayer). *See, e.g. Warsoldier v. Woodford,* 418 F.3d 989, 998 (9th Cir. 2005) ("RLUIPA replaced *Turner*'s 'legitimate penological interest' test with a 'compelling government interest' test."); *United States v. Green,* 2007 CCA LEXIS 475 at 8 n. 2 (A.F.C.C.A. 2007) (*Turner* has been superseded by the Religious Freedom Restoration Act of 1993 (RFRA)…but only with respect to free exercise of religion.").

The RFRA strict scrutiny test involves a burden-shifting analysis. First, the claimant must "make out a *prima facie* case by…showing that the law in question would (1) substantially burden (2) a sincere (3) religious exercise." *Mich. Catholic Conf. v. Burwell,* 755 F.3d 372, 384 (6th Cir. 2014) (citation omitted); *see also Sample v. Lappin,* 424 F. Supp. 2d. 187, 192 (D.D.C. 2006). Once the claimant makes a *prima facie* case, the Government must then demonstrate "that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* "The government carries the burdens of both production and persuasion when it seeks to justify a substantial burden on a sincere religious practice." *Id.*

Mr. bin 'Atash easily carries his burden of demonstrating that JTF-GTMO's use of female guards for escort duty substantially burdens his sincerely held religious exercise. Courts have found that a substantial burden exists where "1) a follower is forced to choose between

following the precepts of his religion and forfeiting benefits otherwise generally available to other inmates versus abandoning one of the precepts of his religion in order to receive a benefit; or 2) the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs." *Washington v. Klem,* 497 F.3d 272 (3d Cir. 2007); *see also Garrawy v. Lappin,* 490 Fed. Appx. 440, 444 (3d Cir. 2012); *McEachin v. McGuinnis,* 357 F.3d 197, 202 n.4 (2d Cir. 2004); *Levitan v. Ashcroft,* 281 F.3d 1313, 1320-21 (D.C. Cir. 2002) (a "substantial burden," in the context of a constitutional or RFRA claim, exists where "the litigant's beliefs [are] sincere and the practices at issue [are] of a religious nature," and "[t]he challenged rule…burden[s] a central tenet or important practice of the litigant's religion."); *Adkins v. Kaspar,* 393 F.3d 559, 570 (5th Cir. 2004) ("a government action or regulation creates a 'substantial burden' on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violates his religious beliefs…the effect of a government action or regulation is significant when it either (1) influences the adherent to act in a way that violates his religious beliefs, or (2) forces the adherent to choose between on the one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, following his religious beliefs.").

Courts have found "substantial burden" in cases where the impediment to religious practice is far less onerous than in the present case where Mr. bin 'Atash is defending his life. For example, in *Sample,* 424 F. Supp. 2d. at 194-95, the Court found substantial burden where a Bureau of Prisons regulation prohibited an observant Jew from consuming wine on the Sabbath and on Passover because the inmate was "effectively…prohibited from exercising his sincere religious beliefs…" In *Adkins,* 393 F.3d at 282, the Fifth Circuit similarly found a substantial burden where a ten-book-in-cell limitation impinged upon an inmate's religion which

"contain[ed] two interrelated components – reading four books per day about Africa and African people, and then proselytizing about what he [had] read." In *Warsoldier,* 418 F.3d at 996, the Ninth Circuit found a substantial burden where a prison grooming regulation impinged upon a Native American inmate's belief that his hair could be cut only upon the death of a close relative. The Court noted that the grooming policy "intentionally put[] significant pressure on inmates such as [plaintiff] to abandon their religious beliefs by cutting their hair…" *Id.*

In a case involving a similar scenario to this, the court in *Forde v. Baird,* 720 F. Supp. 2d. 170 (D. Conn. 2010) found a substantial burden. In *Forde*, a female Sunni Muslim complained of pat-down searches conducted by male guards. In holding that opposite gender touching could impose a substantial burden, the Court noted that "what matters here is that [plaintiff] sincerely believes that being pat searched by male correctional officers violates her understanding of the tenants of Islam. That Respondent presented evidence that this belief may not be universally held by all Muslims is without significance." *Id.* at 177. In *Holland v. Goord,* 758 F.3d 215 (2d Cir. 2014), the Second Circuit found substantial burden where a Muslim inmate was ordered to drink water and provide a urine sample during his Ramadan fast. In *Lovelace,* 472 F.3d at 187, the Court found that a Muslim inmate's removal from a Ramadan observance pass list "qualif[ied] as a substantial burden under RLUIPA" because it prohibited the inmate from "fulfill[ing] one of the five pillars or obligations of Islam." In *Couch v. Jabe,* 679 F.3d 197 (4th Cir. 2012), the Fourth Circuit found substantial burden where a Sunni Muslim inmate was not permitted to grow a beard more than one eighth of an inch in length.

In the present case, there can be no doubt that Mr. bin 'Atash has the sincerely-held belief that it is a sin to be in physical contact with an unrelated female guard. Mr. bin 'Atash and his fellow detainees have consistently maintained this belief, have consistently protested the use of

female guards, and have consistently been disciplined for resisting the use of female guards. It is of no import whether or not all Muslims share this worldview or whether the view is "mandatory" within the orthodoxy of the religion. *See, e.g. Employment Div. v. Smith,* 494 U.S. 872, 887 (1990) ("it is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.") (internal quotation marks and citation omitted); *Levitan,* 281 F.3d at 1321 (finding that religious practices need not be "mandatory" to gain protection). The only question is whether Mr. bin 'Atash is sincere in his own beliefs. He is, and that fact is beyond any dispute.

There can also be no doubt that JTF-GTMO's actions substantially burden Mr. bin 'Atash's sincerely-held belief. Under the present circumstances, Mr. bin 'Atash could only avoid violating his faith by remaining confined within his cell at all times, so as to avoid any possibility of a female escort. Even this would provide no guarantee, given that females were used to conduct cell and body searches in 2007. *See* Attachment B. Clearly, Mr. bin 'Atash cannot remain in his cell at all times.

In fact, the Commission requires all accused to be present on the first day of each session. Mr. bin 'Atash has expressed grave concern that, due to his religious objections, he would be "forced to refuse" a transfer to the ELC involving female guards and thus subjected to violent force. Attachment C. At times when the Commission is not in session, Mr. bin 'Atash must meet regularly with his defense counsel in order to assist in preparing his own defense. *See, e.g. Faretta v. California,* 422 U.S. 806, 819 (1975) ("[t]he Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense."). However, this presents an untenable dilemma for Mr. bin 'Atash because he must risk violating a central tenet of his faith in order to exercise his Sixth Amendment right,

and Mr. bin 'Atash and his fellow detainees have resolved this dilemma in favor of their faith, declining attorney-client meetings and thereby causing harm to their defense. Under these circumstances, Mr. bin 'Atash is forced to "choose between following the precepts of his religion" and abandoning a generally available benefit (attorney meetings) or "abandoning one of the precepts of his religion in order to receive a benefit" (attorney meetings). *Washington,* 497 F.3d at 280. This type of unacceptable dilemma is the very definition of "substantial burden" under RFRA.

Mr. bin 'Atash has easily demonstrated substantial burden. Now, the Government is required to show that its use of female guards on escort duty is in furtherance of a compelling governmental interest *and* is the least restrictive means of furthering the compelling governmental interest. The Government cannot sustain either of these burdens.

The Government has no compelling governmental interest in using female guards as escorts for Mr. bin 'Atash. RFRA demands a "strict" analysis of any excuses the government might assert, in stark contrast to the simple, blind deference sometimes provided to penal institutions. *See, e.g. Adkins,* 393 F.3d at 283 ("[e]ven in light of the substantial deference given to prison authorities, the mere assertion of security or health reasons is not, by itself, enough for the Government to satisfy the compelling governmental interest requirement."); *Couch,* 679 F.3d at 201 (while Court indicated it would give "due deference" to institutional security concerns, "the mere assertion of security or health reasons is not, by itself, enough for the Government to satisfy the compelling governmental interest requirement.") (quoting *Washington,* 497 F.3d at 283); *Yellowbear v. Lampert,* 741 F.3d 48, 57 (10th Cir. 2014) (noting that "[t]he more abstract the level of inquiry, often the better the governmental interest will look. At some great height,

after all, almost any state action might be said to touch on 'one or another of the fundamental concerns of government: public health and safety, public peace and order, defense, revenue.'").

In this case, the absence of evidence dictates that the Government will blindly assert, without any authority, that the use of female guards on escort duty furthers a compelling interest in safety and security. This is unacceptable under RFRA, which requires a "focused," case-by-case inquiry touching upon the necessity of imposing a specific regulation upon a specific impacted *individual*. *Gonzales,* 546 U.S. at 431-32. Here, any argument for compelling interest is belied by the facts on the ground. Mr. bin 'Atash has been escorted by an all-male guard force for most of his tenure at Camp 7 without incident. Were the guard force required to consist primarily of females, the Government might arguably be in a stronger position to argue compelling interests in terms of staffing levels and availability. In this case, no such argument exists. The JTF command chooses the Camp 7 escorts out of a pool that consists overwhelmingly of males. [redacted] Mr. bin 'Atash does not object to female guards performing non-contact duties such as driving escort vans.

In *Forde v. Baird,* the Court was faced with a similar situation involving a female Muslim inmate who objected to pat-down searches by male guards on the basis of her faith. The Court noted that it was the confinement facility's "burden to prove that pat searches performed…*by male correctional officers* serve a compelling governmental interest, not merely that pat searches themselves serve a compelling governmental interest." 720 F. Supp. 2d. at 178 (emphasis added). The Court then concluded that the Government could not demonstrate a compelling interest in pat-searches performed by males, because the facility could not "simply claim that the safety or security…will be negatively impacted by exempting [the inmate] from

cross-gender pat searches without showing evidence of how the facility would be negatively impacted." *Id.* at 80. Indeed, if anything, the Court noted "penological *disadvantages* to cross-gender pat searches" due to the possibility of both false sexual harassment complaints and less thorough searches by opposite-sex guards, for fear of complaints. *Id.* at 178. There is no dispute that escort details in general serve a compelling interest, but, as in *Ford,* there is simply no compelling interest in conducting these details using *female* guards – particularly in light of the contentious nature of this practice amongst the various HVDs.

Even assuming *arguendo* that the Government could demonstrate a compelling interest, it would still have the burden of clearing arguably the highest hurdle – of affirmatively demonstrating that it is utilizing the "least restrictive means" of furthering its compelling interest. Many RFRA defenses have fallen at this hurdle, because the hurdle requires the Government to demonstrate that it "has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Sample,* 424 F. Supp. 2d. at 195 (quoting *Gartrell v. Ashcroft,* 191 F. Supp. 2d 23, 39 (D.D.C. 2002)); *see also Warsoldier,* 418 F.3d at 999; *Jova v. Smith,* 582 F.3d 410, 416 (2d Cir. 2009); *Lovelace,* 472 F.3d at 190 (in examining whether policy is the "least restrictive means," the "court should not rubber stamp or mechanically accept the judgments of prison administrators.").

In this instance, the Government has demonstrated by its actions for nearly a decade that less restrictive means are available – and those means work. The male Camp 7 guards who have moved Mr. bin 'Atash since 2006 have proven that such a male escort policy is indeed feasible. The Government's own actions prove Mr. bin 'Atash's claim. Past practice is obvious proof of feasibility. *Couch v. Jabe* is instructive. In *Couch,* the Court found that a prison policy prohibiting Muslim inmates from growing beards longer than one eighth of an inch was in

furtherance of a compelling government interest, but the policy nevertheless failed because it was not the "least restrictive means" where the inmate proposed "a less restrictive alternative to the Policy: a religious exemption from the Policy, which would permit him to grow and maintain a one-eighth-inch beard." 679 F.3d at 202. In response to the inmate's proposal, prison officials simply reiterated their own policy and "failed to indicate any consideration of whether [the inmate's] proposed alternative might be equally as successful as the Policy in furthering the identified compelling interests…" *Id.* at 204; *see also Sample,* 424 F. Supp. 2d at 195-96 (even if prohibition on Jewish inmate's consumption of ritual alcohol was related to compelling interests in security, rehabilitation, punishment, and deterrence of criminal behavior, the institution "failed to demonstrate that an outright ban…on [] plaintiff's consumption of wine as part of a religious ritual is the least restrictive means of furthering the government's compelling interest" because the Government's assertions were "speculative…and neither compelling nor sufficient to meet the government's burden of showing that an outright ban is the least restrictive alternative under RFRA.").

Here, the Government cannot even speculate that Mr. bin 'Atash's proposed less-restrictive alternative (using male guards) would implicate any concerns, because the alternative has been instituted in the past with better success than the current policy. The alternative is simple and obvious – return to the status quo prior to July 2014 and eliminate the friction and confrontation that have impeded not only the free exercise of religion under RFRA, but also Mr. bin 'Atash's access to counsel and ability to participate in his own defense in this capital case.

This case presents a clear violation of RFRA, and this Commission has the authority to act in order to remedy this violation. Under RFRA, an aggrieved individual may "assert [the RFRA violation] as a claim or defense in *a judicial proceeding* and obtain appropriate relief

against a government." 42 U.S.C. § 2000bb-1(c) (emphasis added). Although RFRA claims are sometimes brought as independent civil actions, the broad reference to "judicial proceeding" indicates that RFRA claims are actionable in any type of judicial forum. In addition to the Act's broad language, there is also a nexus to this Commission. Military judges do not exercise plenary authority, as a "military judge's functions and duties are limited to the court-martial over which the judge presides." *United States v. Reinert,* 2008 WL 8105416 at 10 (A.C.C.A. 2008). However, with respect to the military commission at issue, the military judge exercises broad authority and has "broad discretion" to ensure "that a fair trial is conducted." *United States v. Quintanilla,* 46 M.J. 37, 41 (C.A.A.F. 2001). RFRA has been previously litigated in courts-martial. *See, e.g. United States v. Webster,* 65 M.J. 936 (A.C.C.A. 2008) (devout Muslim utilized RFRA to challenge court-martial conviction for failing to deploy to Iraq); *Hasan v. Gross,* 71 M.J. 416 (C.A.A.F. 2012) (noting but not deciding Accused's RFRA claim based upon Military Judge's requirement that Accused appear in court clean-shaven). Here, this Commission's authority to adjudicate Mr. bin 'Atash's RFRA claim is clear. It stems not only from RFRA's broad scope and from the previous application of RFRA to the military, but from the fact that the RFRA violation here has a direct impact upon Mr. bin 'Atash's ability to defend his very life. Mr. bin 'Atash is prevented from attending attorney-client meetings which are held for the express purpose of preparing a defense in this case. Should the facility's policy not be reversed, Mr. bin 'Atash will also be forced to endure additional violations of his religious beliefs and practice as he is compelled, likely by force, to be escorted by female guards to upcoming sessions of the Commission.

B. Policy as Applied to Mr. bin 'Atash is in Violation of First, Fifth, and Sixth Amendments to U.S. Constitution

As noted *supra*, RFRA claims are independent from constitutional claims which are examined under a traditional framework and which may be made at the same time as the RFRA claim. In the instant case, Mr. bin 'Atash has actionable constitutional claims because JTF-GTMO's arbitrary, capricious, and purposeless policy of utilizing female guards for detainee movements has deprived Mr. bin 'Atash of his right to freely exercise his religion, of his right to due process, and of his right to the effective assistance of counsel in this capital case.

It is well-settled that a prison inmate "retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier,* 417 U.S. 817, 822 (1974). This includes rights under the First Amendment's Free Exercise Clause. *Cruz v. Beto,* 405 U.S. 319 (1972). As an individual facing referred capital charges, Mr. bin 'Atash in this case also has both constitutional and statutory rights to counsel. *See, e.g.* U.S. Const. amend VI; 10 U.S.C. § 948k, 10 U.S.C. § 949c; *Strickland v. Washington,* 466 U.S. 668 (1984). The right to counsel is the right to the effective assistance of counsel. *See, e.g. McMann v. Richardson,* 397 U.S. 759 (1970); *Reece v. Georgia,* 350 U.S. 85 (1955); *Glasser v. United States,* 315 U.S. 60 (1942). The right to the effective assistance of counsel includes "the right of private consultation with [counsel]." *Coplon v. United States,* 191 F.2d 749, 757 (D.C. Cir. 1951).

As a pretrial detainee, Mr. bin 'Atash also has substantial due process rights at issue, including the due process right to be free from pretrial punishment. *See, e.g. Bell v. Wolfish,* 441 U.S. 520, 536-37 (1979) (noting that the Government "may detain [a pretrial detainee] to ensure his presence at trial and may subject him to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment, or otherwise violate the Constitution."); *Graham v. Connor,* 490 U.S. 386, 395 n.10 (1989) ([i]t is clear…the

Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment.") (citation omitted). Due process (as well as the Sixth Amendment) is further implicated in the denial of access to counsel. *Johnson-El v. Schoemehl,* 878 F.2d 1043, 1051 (8th Cir. 1989) ("[p]retrial detainees have a substantial due process interest in effective communication with their counsel and in access to legal materials. When this interest is inadequately respected during pre-trial confinement, the ultimate fairness of their eventual trial can be compromised."); *Campbell v. McGruder,* 580 F.2d 521, 531 (D.C. Cir. 1978) ("pretrial detention occurs in the important interval directly preceding trial. The conditions of pretrial confinement cannot be permitted negatively to affect the outcome of the criminal process.").

In evaluating confinement facility regulations that impinge upon the various constitutional rights outlined above, courts, including this Military Commission, have traditionally employed the test espoused by the Supreme Court in *Turner,* 482 U.S. 78. Under *Turner,* such regulations are only valid if they are "reasonably related to legitimate penological interests." *Id.* at 89. Factors to consider in assessing whether a regulation is reasonably related to a legitimate penological interest include a "valid, rational connection" between the regulation and the Government interest, the legitimacy and neutrality of the Government objective, whether "alternative means" of exercising the right remain open to the prisoner, the impact of accommodation of the right on guards and on other inmates, and the allocation of prison resources. *Id.* at 89-90.

In this case, if the Commission chooses to apply the *Turner* test to the constitutional claims, it must also apply the test in the context of Mr. bin 'Atash's status as a *pretrial* detainee. *See, e.g. Benjamin v. Fraser,* 264 F.3d 175, 187 (2d Cir. 2001) ("[p]enological interests [as highlighted in *Turner*] are interests that relate to the treatment (including punishment, deterrence,

rehabilitation, etc…) of persons convicted of crimes…Penological interests are therefore arguably not an appropriate guide for the pretrial detention of accused persons."); *see also Demery v. Arpaio,* 378 F.3d 1020, 1028 (9th Cir. 2004) (applying *Bell v. Wolfish,* rather than *Turner,* to a claim involving alleged pretrial punishment in part because "*Turner* dealt with convicted prisoners, not pretrial detainees."). At a minimum, consideration of Mr. bin 'Atash's *pretrial* status should afford the Government less deference in determining what constitutes "legitimate penological interests."

Applying the *Turner* factors to the present case, it is clear that the Government cannot demonstrate that its actions are reasonably related to legitimate penological interests. The Government's actions in this case inhibit Mr. bin 'Atash's free exercise of religion, Mr. bin 'Atash's right to counsel, and Mr. bin 'Atash's due process rights because the use of female guards causes Mr. bin 'Atash such distress and anxiety that he cannot risk attending court proceedings or meetings with his attorneys during a crucial pretrial period. Mr. bin 'Atash's access to counsel has already been significantly curtailed by the unconstitutional denial of attorney-client meetings and restrictions placed upon meeting dates and times. *See* AE254(WBA); AE254G(WBA); AE254I(WBA); AE254O(WBA); AE254(AAA Sup); AE254(MAH Sup). The effect of JTF-GTMO's latest action in using female guards to transport devoutly religious Muslims with deeply-held aversions to contact with unrelated females is to deny meaningful access to counsel altogether.

It is undoubtedly true that the confinement facility does have a legitimate interest in the safety of the institution and in the health and wellbeing of guards and other detainees. However, JTF-GTMO's use of female guards on escort duty is in no way reasonably related to this interest. Under *Turner,* there is no valid and rational connection between the use of *female* guards in

physical contact with religiously-observant Muslim detainees and safety and security. This is readily apparent where male guards have been utilized to transport detainees to attorney-client meetings and court sessions for years without adverse consequences. In fact, a disinterested observer might conclude that the use of female guards to transport Mr. bin 'Atash and his fellow Camp 7 detainees only *decreases* safety and security. It has already led to clashes and confrontations such as the recent Forced Cell Extraction involving [redacted] at Echo II. *Cf. Hatim v. Obama,* 760 F.3d 54 at 12-13 (D.C. Cir. 2014) (Court gave deference to confinement facility in adoption of invasive search policies where only where facility clearly "explained that they adopted the new search policies to address the risk to security posed by hoarded medication and smuggled weapons" and where "enhancing the thoroughness of searches at Guantanamo in the way called for by standard Army prison protocol would enhance the effectiveness of the searches."). While staffing levels may also impact safety and security, there is simply no evidence that JTF-GTMO's decision to utilize female guards was in any manner related to staffing shortages.

For similar reasons to those explored above, the policy of utilizing female guards in close physical contact with Mr. bin 'Atash fails the remaining *Turner* factors. In this case, "alternative means" do not remain available to Mr. bin 'Atash to exercise his rights because Mr. bin 'Atash cannot remain in his cell at all times, is compelled to attend sessions of the Commission, and is unable to effectively engage with his defense counsel where other forms of contemporaneous communication, such as telephone calls, are foreclosed to him. On the other hand, accommodation of Mr. bin 'Atash's various constitutional rights would require nothing more than to revert to a policy that was previously in place and that had no impact upon the rights of guards and other inmates. *See Id.* at 8 ("the existence of an alternative that fully accommodates

the religious adherent at a *de minimis* cost to the penological interest may be evidence that the challenged regulation does not reasonably relate to the interest at stake…"). Reversion to the prior, successful policy would have no impact upon the allocation of prison resources given the multitude of positions that have always been available to females and given the exceedingly small number of female guards in comparison to their male counterparts.

C. Policy as Applied to Mr. bin 'Atash is in Violation of International Law

In addition to those statutory and constitutional protections afforded to Mr. bin 'Atash under domestic law, Mr. bin 'Atash is entitled to additional protection under international humanitarian law. The present Commission is international in character, being empowered to try "alien unprivileged enemy belligerents" for violations of the law of war. 10 U.S.C. §§ 948c, 948d. In *Hamdan v. Rumsfeld,* 548 U.S. 557, 629 (2006), the Supreme Court concluded that, at a minimum, those detainees held at Guantanamo Bay should receive the protections of Common Article 3 that are applicable to "non-international armed conflict." The Department of Defense has agreed that it will "comply with the law of war with respect to the treatment of all detainees" and will, at a minimum, apply Common Article 3 in all cases. DoD Directive 2310.01E (August 19, 2014) (hereinafter "DoDD 2310.01E") at Para. 3(a).

Common Article 3 to the Geneva Conventions prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment…" While Common Article 3 does not specifically define "outrages upon personal dignity" and humiliating treatment, it is evident from the overwhelming weight of authority that respect for the religious convictions and practices of persons detained during armed conflict, whether those persons be classified as Enemy Prisoners of War or as Civilian Internees, is a fundamental component of customary international law. *See* International Committee of the Red Cross, Customary IHL Database, Rule 104, *available at*

https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule104 (ICRC recognizes that "[r]espect for convictions and religious practices" is a "fundamental guarantee for civilians and persons *hors de combat.*").

In international armed conflicts, Article 38 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GCIV) specifies that civilian protected persons "shall be allowed to practice their religion and to receive spiritual assistance from ministers of their faith." With respect to both civilians and Enemy Prisoners of War in international armed conflicts, the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) provides at Article 75(1) that "[e]ach Party shall respect…the convictions and religious practices" of all persons who are in its power. While the United States has not ratified Protocol I, this precept has gained the status of customary international law, and the United States has specifically agreed to apply the principles of Article 75 with respect to the treatment of detainees in the course of international armed conflict. DoDD 2310.01E at Para. 3(a)(3); *see also* AR 190-8/OPNAVINST 3461.6/AFJI 31-304/MCO 3461.1 (1997) at Para. 1-5(g)(1) (providing that Enemy Prisoners of War shall "enjoy latitude in the exercise of their religious practices…") and Para 5-1(a)(2) (providing that civilian internees will be "treated with respect for…their religious convictions and practices, and their manners and customs.").

In non-international armed conflicts, religious beliefs and practice are similarly protected. The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict (Protocol II) provides at Article 4(1) that it is a "fundamental guarantee" that "[a]ll persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to

respect for their person, honour and convictions and religious practices." As with Article 75 of Protocol I, Article 4 of Protocol II has been specifically incorporated by the United States Government into detainee practice in the course of non-international armed conflict. *See* DoDD 2310.01E at Para. 3(a)(2).

No competent tribunal has ever determined Mr. bin 'Atash's status, and therefore Mr. bin 'Atash is entitled to protection as an Enemy Prisoner of War, subject to the full protections of GCIII. *See* AE119(MAH), Defense Motion to Dismiss and to Compel a Status Determination pursuant to Article 5 of the Geneva Conventions. However, no matter the status determination ultimately made by this or any other tribunal, whether in international or non-international armed conflict, it is clear that international law prohibits the affront upon Mr. bin 'Atash's faith and dignity that is JTF-GTMO's arbitrary and purposeless use of female guards in violation of Mr. bin 'Atash's sincerely-held beliefs. Mr. bin 'Atash and his fellow detainees have repeatedly protested the use of female guards on escort duty and have repeatedly offered common-sense solutions that have been implemented in the past without difficulty. JTF-GTMO's lack of caring or respect for these detainees' beliefs, in the face of repeated protestations, demonstrates a gross violation of international humanitarian law with respect to the "fundamental guarantee" of religious freedom.

D. Unlawful Policy Aggravated by Lack of Communication With JTF-GTMO

The fear and anxiety engendered by JTF-GTMO's lack of concern for Mr. bin 'Atash's sincerely-held religious beliefs and practices in this case is heightened JTF-GTMO's complete disregard for both Mr. bin 'Atash's and his counsel's attempts to communicate regarding the issue. Beginning in July 2014, Mr. bin 'Atash and his fellow detainees attempted to communicate their legitimate concerns regarding the re-introduction of female guards into Camp

7 to the Camp 7 leadership, but their protestations fell on deaf ears. At that time, Mr. bin 'Atash proposed common sense alternatives that would have avoided a substantial burden to his religious beliefs, such as utilizing female guards as escort van drivers, but his proposals were ignored.

On 6 October 2014, counsel became aware of serious concerns regarding Mr. bin 'Atash's treatment in Camp 7 under the Camp's new leadership. Counsel immediately emailed JTF-GTMO's "Litigation Support" division, but her requests for a meeting with Camp 7's legal advisor were ignored. Attachment D. As the situation gained heightened urgency with the cancellation of attorney-client meetings, counsel again reached out to Litigation Support, asking only for a meeting with or contact information for the Staff Judge Advocate, but those requests were met only with a terse, one-line, unsigned response from an unknown individual: "[y]our client refused his meetings for today." Attachment E.

On 11 October 2014, Mr. bin 'Atash took a "risk" and made a one-time trip to Echo II in order to meet with his Learned Counsel and explain to her the urgency of the situation. When counsel arrived at Echo II, she encountered an Assistant Staff Judge Advocate who refused to provide a name or an alias and who indicated that the Staff Judge Advocate was "not interested in meeting with defense attorneys." After counsel's meeting, she again emailed Litigation Support to express concerns regarding the Camp's policy and the impact on Mr. bin 'Atash's free exercise of religion and to recount her experience with the Assistant Staff Judge Advocate. However, counsel was once again ignored.

In a typical confinement facility, where counsel has concerns regarding the treatment of a client, counsel is able to phone, email, or visit the facility's warden or associate wardens in order to express those concerns and attempt to resolve them in an amicable manner that would avoid

the need for litigation. While JTF-GTMO's communications with attorneys have never been completely open or reliable, in the past counsel was at least aware of the identity of the Task Force's legal advisor. Occasionally, defense counsel were able to correspond directly with that individual. At present, JTF-GTMO's disregard for detainee rights is so integrated into the culture of Camp 7 that JTF is actively hiding the identity and contact information of the senior attorney advising the confinement facility's command. The JTF-GTMO legal team acts with such lawless impunity that they encourage Assistant Staff Judge Advocates to refuse providing even an alias that would allow counsel to identify the individual in a future proceeding. The fact that JTF-GTMO's anonymous senior legal advisor is "not interested in meeting with defense attorneys" should cause this Commission to question the actions and policies of the detention facility holding Mr. bin 'Atash. The fact that JTF-GTMO's anonymous senior legal advisor is "not interested in meeting with defense attorneys" should also inform this Commission on the amount of deference to be given to any later Government explanations.

Beginning in October 2013, this Commission has received a flurry of filings from multiple defense teams complaining of unconstitutional restrictions on attorney-client access. Were JTF-GTMO to have any compelling basis for its actions, its legal advisor would stand behind those actions and at least provide basic information to counsel. Counsel have not asked for information related to security concerns – no requests for prison maps, names of guards or even the location of the Camp have been made. Counsel have not asked for information that would implicate operational security – only information that impacts Mr. bin 'Atash's ability to prepare his defense. Answers from the JTF-GTMO command have been tellingly absent.

Instead of explaining the Government's actions, JTF-GTMO and the Prosecution have instead chosen to hide behind an irrational and unwarranted curtain of secrecy. On 11 September

2014, prior to the latest issues implicating free exercise of religion, Mr. bin 'Atash moved to compel the production of various current and former Guantanamo Bay officials to testify on the remainder of the AE254 series. AE254T(WBA). The Government has opposed the production of every single witness requested by the defense. AE254W. Without noting the obvious irony, the Government opposed the production of numerous anonymous witnesses on the basis that the defense was unable to provide more information about those witnesses. *Id.* at 12. Taken together, the Government's opposition to witnesses on the AE254 series, as well as its refusal to provide even basic information directly to counsel in extrajudicial forums, demonstrate a desire to stonewall any inquiry into JTF-GTMO's actions. The JTF-GTMO command's complete disregard for counsel's questions and concerns demonstrate the urgency and necessity of producing witnesses to inform this Commission of the facts they have hidden from defense counsel.

7. Oral Argument: The defense requests the opportunity to present evidence and make oral argument at the earliest opportunity. Because the Commission is unable to take evidence and hear argument prior to determination of the conflict issues raised in AE292, Mr. bin 'Atash requests the Commission issue a temporary order barring the use of female escorts to physically move Mr. bin 'Atash until such time that a full exposition of the issue can be had.

8. Witnesses:

A. COL John V. Bogdan, Former Commander, Joint Detention Group (JDG)

B. COL David Heath, Commander, Joint Detention Group (JDG)

C. The Staff Judge Advocate and any Assistant Staff Judge Advocates responsible for advising the Camp 7 command, whose names and contact information have been withheld from defense counsel.

D. Any and all Camp 7 detainees who have been subjected against their will to physical contact by female guards.

E. An expert on mental health issues presented in the instant motion, to be named at a later date.

F. An expert on the Islamic faith, to be named at a later date.

G. Any and all individuals assigned to Camp 7 escort duties in 2007, 2008, and 2014, whose names and contact information have been withheld from defense counsel.

H. Any and all individuals responsible for JTF-GTMO policy with respect to Camp 7 escort details and the movement of Camp 7 detainees to Echo II and to the ELC, whose names and contact information have been withheld from defense counsel.

I. Mr. bin 'Atash reserves the right to add to or amend this list.

9. Conference with Opposing Counsel: The Government indicates that it will be unable to offer a position until seeing the instant filing.

10. Attachments:

A. Certificate of Service
B. ~~(U//FOUO)~~ Detainee Information Management System (DIMS) Record [redacted]
C. Letter from Mr. bin 'Atash dtd 12 Oct 14
D. Email from Cheryl Bormann dtd 6 Oct 14
E. Email from Cheryl Bormann dtd 9 Oct 14 and Litigation Support Response
F. Email from Cheryl Bormann dtd 11 Oct 14
G. TS//SCI Under Seal Supplement

//s//
CHERYL T. BORMANN
Learned Counsel

//s//
JAMES E. HATCHER
LCDR, USN
Defense Counsel

//s//
MICHAEL A. SCHWARTZ
Capt, USAF
Defense Counsel

//s//
TODD M. SWENSEN
Maj, USAF
Defense Counsel

Attachment A

CERTIFICATE OF SERVICE

I certify that on 17 October 2014, I electronically filed the attached **Emergency Defense Motion to Bar Regulations Substantially Burdening Free Exercise of Religion and Access to Counsel** with the Trial Judiciary and served it on all counsel of record by e-mail.

//s//
CHERYL T. BORMANN
Learned Counsel

Attachment A

Attachment B

~~UNCLASSIFIED//FOR OFFICIAL USE ONLY~~

~~Not Releasable to Detainee or Public~~

		trimmer, finger nail clippers, broom and dust pan, mop, towel and disinfectant spray on a one for one basis. Detainee trimmed hair, used nail clippers, swept, mopped and cleaned surfaces. All items returned and accounted for.
010014	[redacted]OOI Ate Meal	ISN#010014. [redacted] Detainee trash collected, detainee consumed his meal.
010014	[redacted]Meal Served	ISN#010014. [redacted] Breakfast meal Detainee meal consists of the following: (1) Portion waffle (1) Syrup packet (1) Raisin bran crunch cereal (1) Yogurt (1) Apple (2) White milks (1) Coffee
010014	Action	ISN#010014. Canceled pending action.
010014	[redacted]OOI Ate Meal	ISN#010014. [redacted] Detainee trash collected, detainee consumed his meal.
010014	[redacted]Detainee Note	ISN#010014. [redacted] Detainee exchanged water bottle.
010014	[redacted]Meal Served	ISN#010014. [redacted] (Regular) Dinner Meal Detainee meal consists of the following: (1) Portion of grilled fish with sumac (1) Portion of egg noodles (1) Portion of zucchini with tomato (1) Portion of green salad (1) Serving of sliced wheat bread (1) Serving of honeydew (1) Pear (1) Grape juice (1) Chocolate milk (1) Coffee
010014	Detainee Report	[redacted]
010014	[redacted]Failure to Follow Guard Instruction	ISN#010014. [redacted] Detainee refused to be shackled by female. Shift Team Leader notified.
010014	[redacted]Other	[redacted]
010014	[redacted]Refused Meal	ISN#010014. [redacted] Detainee refused meal. Detainee missed meal #1.
010014	[redacted]Meal Served	ISN#010014. [redacted] Lunch Meal Detainee meal consists of the following:

~~Not Releasable to Detainee or Public~~

~~UNCLASSIFIED//FOR OFFICIAL USE ONLY~~

Attachment C

10/12/2014

12/18/1435

To: Cheryl,

I wanted to come to the appointment this morning but unfortunately I couldn't.

I tried to get a word from the Assistant SJA or the Assistant Watch Commander that I will not be subjected to any physical contact with the female guards. However, no one was able to give me any word. They told me that the guards might be males or females.

When I came to the appointment yesterday, it was a risk on my part as I have explained to you. Thank God, there were no female guards escorted me. I came to the appointment because of the necessity and importance of the meeting. I had to do it in order to explain to you the new problems that prevent our future meeting. It is difficult to take a risk one more time because if I am subjected to being escorted by female guards, I would be forced to refuse. Then, as you know they will use guard force with me and will be taken forcefully to the camp and will be put on punishment. Therefore, I hope you can find a quick solution to the problem if you can. I think that it is important for the Judge to be informed of these problems. That way, he doesn't think that we are trying to obstruct the procedures and for him to know that the obstacles have always come from either the government or the JTF.

Regarding the cancelation of the hearings this week, I hope that you will inform me about the reasons for the postponement as soon as they become known to you.

A few minutes ago, I spoke with my brother Mokhtar (KSM) concerning coming to the meeting tomorrow. This subject makes me worried a lot. I am trying to remove it from my chest and my thinking and not to continue to think about it because it has always been worrisome to me.

[redacted]

Attachment D

Safdi, Sean A CPT OSD OMC Defense

From: Bormann, Cheryl T CIV OSD OMC Defense
Sent: Monday, October 06, 2014 11:27 AM
To: JTFGTMO-SJA-Litigation Support
Cc: Schwartz, Michael A Capt OSD OMC Defense; Hatcher, James LCDR OSD OMC Defense; Safdi, Sean A CPT OSD OMC Defense; Swensen, Todd M Capt OSD OMC Defense; Henkel, Kenneth R CIV OSD OMC Defense; 'Tim Jon Semmerling'
[redacted]
Subject: Request fori meeting with SJA
Signed By: [redacted]

Litigation Support,
As you know, I am learned counsel for Mr. bin 'Atash. I have serious concerns about the treatment he is receiving from some of the Camp 7 staff. I believe that his treatment is in violation United States law and international treaties (e.g., the Geneva Convention). I intend to be on base in Guantanamo Bay from October 10 through October 18 and wish to meet with the legal advisor for the camp. Can you please provide me with the contact information for the Staff Judge Advocate in charge of providing legal advice to JTF-GTMO and the Joint Detention Group command? I wish to contact him or her to schedule a time to discuss Mr. bin 'Atash's current conditions of confinement.
Thank you.

Cheryl T. Bormann
Counsel for Walid bin 'Atash

[redacted]

Attachment E

Safdi, Sean A CPT OSD OMC Defense

From: JTFGTMO-SJA-Litigation Support
Sent: Thursday, October 09, 2014 9:51 AM
To: Bormann, Cheryl T CIV OSD OMC Defense; JTFGTMO-SJA-Litigation Support
Cc: ''Tim Jon Semmerling' [redacted]'; MLADD-OMCDefenseTeamBinAttash
Subject: RE: Request for meeting with SJA

ALCON,

1. Your client refused his meetings for today.

V/R
LSS

-----Original Message-----
From: Bormann, Cheryl T CIV OSD OMC Defense [redacted]
Sent: Thursday, October 09, 2014 9:38 AM
To: JTFGTMO-SJA-Litigation Support
Cc: ''Tim Jon Semmerling' [redacted]'; MLADD-OMCDefenseTeamBinAttash
Subject: RE: Request for meeting with SJA

To whoever is responsible for monitoring this JTFGTMO-SJA-Litigation Support email account, I am Learned Counsel for Walid bin 'Atash. As I wrote two days ago, I am attempting to meet with the SJA regarding my client's treatment. I have asked for his or her contact information and have yet to receive a response. The situation is now taking on even more importance. Today, the SJA canceled my client's previously scheduled meeting with his counsel. We met with Mr. bin 'Atash yesterday and when we last saw him, he was anticipating meetings today. We have been provided no information regarding the reason for this cancelation and are very concerned about Mr. bin 'Atash's well-being. Please provide us the name and contact information for the Staff Judge Advocate to whom you report so that we may speak with him/her regarding the well-being of our client. It is a matter of some urgency in light of the message from the SJA's office that today's meetings have been canceled. I appreciate a very prompt response to this request.

Cheryl T. Bormann
Counsel for Walid bin 'Atash

[redacted]

Attachment F

Safdi, Sean A CPT OSD OMC Defense

From: Bormann, Cheryl T CIV OSD OMC Defense
Sent: Saturday, October 11, 2014 11:43 PM
To: JTFGTMO-SJA-Litigation Support
Cc: MLADD-OMCDefenseTeamBinAttash; 'Tim Jon Semmerling'
[redacted]
Subject: FW: Letter re female contact
Signed By: [redacted]

To the people who answer the SJA Lit Support email address:

As learned counsel for Mr. Bin 'Atash, I am writing yet again to meet with the attorney who advises command. Today when I met with Mr. Bin 'Atash, I first addressed a series of questions [redacted] as an assistant SJA. [redacted] wearing a United States Army uniform without additional identifying information, refused [redacted] name, or to give a fake name like others [redacted] works with, explained [redacted] had received my request to meet with the legal advisor tasked with assuring Camp 7's compliance with applicable United States and international law. [redacted] name, or even an alias [redacted] could be called, answered that the Staff Judge Advocate [redacted] reports had not responded to my numerous requests to meet regarding the welfare of Mr. bin 'Atash and "is not interested in meeting with defense attorneys" at this time.

As detention facility staff is aware, the use of women to move the detainees requires women to have physical contact with the detainees. My client Mr. Bin 'Atash has religious beliefs that prohibit him from physical contact with a woman to whom he is not closely related or married. Physical contact with a female guard is a sin for Mr. Bin 'Atash. JTF's newly instituted use of female guards to move Mr. Bin 'Atash creates a Hobson's choice: Mr. Bin 'Atash can choose between sinning by being touched by women to whom he is not related or choose to meet with his defense counsel.

The number of female guards working in Camp 7 is few. In fact, only recently has camp 7 begun employing female guards for duty requiring physical contact with detainees. Mr. Bin 'Atash wishes to meet with counsel and has been denied attorney meetings twice this week because the camp staff refuses to ensure he will not be touched by a female guard. On multiple occasions, Mr. Bin 'Atash and defense counsel have attempted to confirm with JTF personnel that female guards will not be used to move WBA to attorney visits. On each occasion, the guard staff has referred us to the Staff Judge Advocate - the very person whose identity has been hidden from defense counsel.

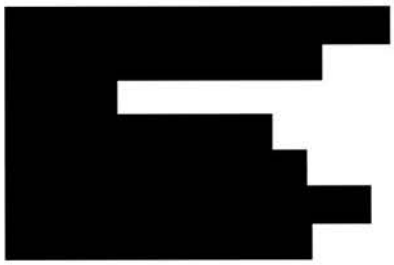
Today, Mr. Bin 'Atash "took a risk," as he explained to me, and attended a meeting at Echo II in order to explain to me, his Learned Counsel, his situation. He explained that he had been prevented from meeting with military counsel the past two days, 9 and 10 October 2014 because movement to and from his attorney meetings would have required contact with unrelated females. He explained that he was not certain he would remain unmolested by a female guard during the movement to or from Echo II, and that until he had reasonable assurances that female guards would not be required to touch him during moves to and from attorney meetings, he would not be meeting with counsel at Echo II.

This is an unacceptable situation of JTF's making. Please address and repair the problem immediately. Mr. Bin 'Atash is defending his life and must have access to counsel, unfettered by JTF's capricious rule and policy changes. Please advise when the aforementioned policy has been rescinded. Until that occurs, Mr. Bin 'Atash is unable to meet with his defense counsel.

Please let me know if I can provide further information.

Cheryl T. Bormann

Counsel for Walid bin 'Atash



Attachment G

PLACEHOLDER

UNDER SEAL

TS//SCI Supplement