MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BINALSHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI**	**AE 254JJJJJ** **RULING** **EMERGENCY DEFENSE MOTION TO BAR REGULATIONS SUBSTANTIALLY BURDENING FREE EXERCISE OF RELIGION AND ACCESS TO COUNSEL** **28 April 2016**

1. Procedural Background

a. On 17 October 2014, Mr. bin 'Attash filed a motion[1] requesting the Commission order the Commanders of Joint Task Force Guantanamo (JTF-GTMO) and Joint Detention Group (JDG) to stop using female military guard personnel (female guards) as escorts where the position requires physical touching of Mr. bin 'Attash by a female guard. The motion alleged the physical touching by female guards during moves to and from appointments, including attorney meetings, violated Mr. bin 'Attash's religious beliefs.[2] In conjunction with this motion, Mr. bin 'Attash requested the Commission issue a temporary order "barring the use of female escorts to physically move [him] until such time that a full exposition of the issue can be had."[3] Messrs. Hawsawi,[4] bin al Shibh,[5] and Mohammad[6] joined Mr. bin 'Attash's motion.[7] Messrs. bin al

[1] AE 254Y (WBA), Emergency Defense Motion to Bar Regulations Substantially Burdening Free Exercise of Religion and Access to Counsel, filed 17 October 2014.
[2] "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" *Id*., para 3.
[3] *Id.* para 7.
[4] AE 254Y (MAH Sup), Defense Supplement to AE 254Y, filed 7 November 2014.
[5] AE 254Y (RBS Sup), Mr. Bin al Shibh's Supplement to Emergency Defense Motion to Bar Regulations Substantially Burdening Free Exercise of Religion and Access to Counsel, filed 7 November 2014.
[6] AE 254Y (Mohammad Sup), Mr. Mohammad's Supplement To Emergency Defense Motion to Bar Regulations Substantially Burdening Free Exercise of Religion and Access to Counsel, filed 13 November 2014.
[7] Mr. Ali (a k.a. Mr. al Baluchi) is presumed to have joined the motion. *See* Rule for Military Commission 3.5.i.

Shibh and Mohammad[8] also joined in the request for a temporary order pending further resolution of the issues.

b. After receiving the Government response[9] and Defense replies[10] the Commission granted the Defense request and issued an *Interim* Order (AE 254JJ) "limiting the use of female guards to physically touch the Accused during movements to and from attorney-client meetings and Commission hearings, absent exigent circumstances, until such time as the Commission makes a final ruling on AE 254Y."[11]

c. Subsequent to the *Interim* Order, this Commission became aware, and gave notice to all parties, of an Equal Opportunity complaint (EO complaint) filed by JTF-GTMO guards.[12]

d. Following the notice of the EO complaint, Mr. Hawsawi filed a Motion for Appropriate Relief based on unlawful influence (UI) directed at the Military Judge[13] and requested the Military Judge either recuse himself from consideration of AE 254Y or defer ruling on AE 254Y until resolution of the EO complaint.[14] The Government response requested the Commission deny the motion, and recommended Defense Counsel voir dire the Commission regarding the impact the EO complaint would have on decisions made by the Military Judge.[15]

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[8] AE 254Y (RBS Sup), para 3, and AE 254Y (KSM Sup), para 3.
[9] AE 254EE (GOV), Government Response To Emergency Defense Motion to Bar Regulations Substantially Burdening Free Exercise of Religion and Access to Counsel, filed 4 December 2014.
[10] AE 254GG (WBA), Defense Reply to Government Response to Emergency Defense Motion to Bar Regulations Substantially Burdening Free Exercise of Religion and Access to Counsel, filed 12 December 2014; AE 254GG (KSM, AA, RBS), Messrs. Mohammad, al Baluchi, and Bin al Shibh's Reply to (AE 254EE), filed 18 December 2014.
[11] AE 254JJ, *Interim* Order Emergency Defense Motion to Bar Regulations Substantially Burdening Free Exercise of Religion and Access to Counsel, dated 7 January 2015.
[12] AE 254QQ, Notice Emergency Defense Motion to Bar Regulations Substantially Burdening Free Exercise of Religion And Access to Counsel, dated 23 January 2015.
[13] AE 254WW (MAH), Defense Motion for Appropriate Relief Based on Unlawful Influence Directed at the Military Judge, dated 4 February 2015.
[14] Messrs. Mohammad, bin 'Attash, bin al Shibh, are presumed to have joined the motion. *See* Rule for Military Commission 3.5.i. Mr. Ali moved the Commission to decline joinder of the motion, stating he "shares several of Mr. Hawsawi's concerns stated in AE 254WW (MAH), but does not concur with Mr. Hawsawi's proposed remedies." *See* Motion to Decline Joinder of AE 254WW (MAH), AE 254WW (AAA), Defense Motion for Appropriate Relief Based on Unlawful Influence Directed at the Military Judge, filed 27 February 2015.
[15] AE 254DDD, Government Response to Defense Motion for Appropriate Relief based on Unlawful Influence Directed

The Defense replied[16] and urged the Commission cure any UI by "not deciding the underlying issue until all traces of unlawful influence have been purged by the passage of time."[17]

e. On 29 October 2015, Counsel for Mr. Mohammad filed a motion that detailed public comments made by senior military and political leaders alleged to constitute UI on the Military Judge and requested abatement, dismissal, disqualification of senior military leaders who made the comments from further participation in this Commission, and "whatsoever additional relief the Commission may determine appropriate."[18] During Commission hearings, on 30 October 2015, Mr. Mohammad again moved the Commission to abate the proceedings because the public comments constituted UI on the Commission.[19] Defense Counsel argued there needed to be investigation into the comments. The Commission was purposefully unaware of the remarks prior to Mr. Mohammad's argument.[20] The Commission denied the request to abate.[21] On 4 November 2015, counsel for Mr. Hawsawi filed a supplement to his earlier motion and posited the only way to avoid the taint of the UI was to make the *Interim* Order (AE 254JJ) a permanent order.[22]

f. The Commission received evidence from the parties as attachments to their filings or submitted as separate appellate exhibits in the AE 254Y series. The Commission received

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at Military Judge, filed 18 February 2015.

[16] AE 254JJJ (MAH), Defense Reply to Government Response to Defense Motion for Appropriate Relief based on Unlawful Influence Directed at Military Judge, filed 23 February 2015.

[17] *Id.* at 2-3.

[18] AE 254WW (KSM), Mr. Mohammad's Emergency Motion for Appropriate Relief to remedy unlawful influence over the Military Commission by senior government officials including the Secretary of Defense regarding the issues pending in AE 254Y, filed 29 October 2015.

[19] *See* Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 29 October 2015 from 10:00 A.M. to 10:58 A.M. at pp. 8953-8960.

[20] *Id.* at 8955.

[21] *Id.* at 8959.

[22] AE 254ZZZ (MAH Sup), Defense Supplement to Defense Motion for Appropriate Relief Based on Unlawful Influence Directed at the Military Judge, filed 4 November 2015.

testimony from Colonel (COL) John V. Bogdan[23] during the February 2013 Commission hearings that is relevant to the issues presented in AE 254Y. The Commission also received testimony from five additional witnesses during the October 2015 and December 2015 Commission hearings. Four of the witnesses testified under pseudonyms, "Staff Sergeant Jinx,"[24] "Major Prior" (a former camp commander),[25] "Lieutenant Colonel" (the former camp commander),[26] and "Major" (the current camp commander).[27] The fifth witness, COL David Heath,[28] was identified by his real name. Two of the witnesses, "Major" (the current camp commander) and COL Heath gave classified testimony in a hearing closed to the public on 25 February 2016.[29]

[23] *See* Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 13 February 2013 from 10:28 AM to 12:02 PM at 2169 through Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 13 February 2013 from 1:02 PM to 2:36 PM at 2295.

[24] *See* Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 30 October 2015 from 09:03 AM to 10:54 AM at 9106 through Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 30 October 2015 from 09:03 AM to 10:54 AM at 9106 through Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 30 October 2015 from 2:01 PM to 4:07 PM at 9293.

[25] *See* Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 9 December 2015 from 1:23 PM to 2:57 PM at 9584 through Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 9 December 2015 from 3:29 PM to 4:40 PM at 9696. "Major Prior also filed a declaration regarding AE 254Y. *See* AE 254 EE (GOV Sup), Government Supplement to AE 254EE (GOV), the Government's Response to Emergency Defense Motion to Bar Regulations Substantially Burdening Free Exercise of Religion and Access to Counsel, filed 19 June 2015, Attachment B (Declaration of "Major Prior" dated 5 May 2015).

[26] *See* Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 8 December 2015 from 9:07 AM to 10:36 AM at 9340 through Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 8 December 2015 from 3:29 PM to 5:10 PM at 9545. "Lieutenant Colonel" also filed a declaration regarding AE 254Y. *See* AE 254EE (GOV), Attachment B (Declaration of "Lieutenant Colonel" dated 27 November 2014).

[27] *See* Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 30 October 2015 from 2:01 PM to 4:07 PM at 9300-9327 and Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 9 December 2015 from 1:23 PM to 4:40 PM at 9673-9696.

[28] Testimony of COL Heath, Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 10 December 2016 from 9:05 AM to 10:13 AM at 9711 through Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 10 December 2016 from 1:25 PM to 3:02 PM at 9888. COL Heath also submitted two declarations regarding AE 254Y. *See* AE 254EE (GOV), Attachment D (Declaration of COL Heath dated 26 November 2014) and AE 254KKKK, Declaration of Colonel Heath dated 29 October 2014, filed 10 December 2015.

[29] *See* AE 254UUUU, Order: Pursuant to Military Commission Rule of Evidence 505(h), dated 21 February 2016.

g. The Commission heard classified oral argument on AE 254Y, AE 254WW, and their supplements in a hearing closed to the public on 25 February 2016[30] and oral argument in open session on 26 February 2016.[31]

2. Findings of Fact Generally. The Commission has considered all filings in the AE 254 series to include attachments, evidence and witness testimony presented by the parties in both open and closed classified hearings, and argument of Counsel in making factual findings and conclusions of law in this ruling.

3. Findings of Fact - Detainee Operations

a. The Commission assumes the Accused have a bona fide religious belief that prohibits physical contact with unrelated females.[32]

b. The Department of Defense (DoD), at the national level, has implemented policies to fully integrate women in the military into all occupational specialties. The military occupation specialty for guard forces in military detention facilities is gender-neutral. These units are trained to specific standards commensurate with rank and position to enable the Army to maintain a fully qualified, trained, and experienced guard force capable to guard both male and female detainees in military detention facilities world-wide.

c. The guard force at Camp Seven is composed of units that rotate in and out of Guantanamo Bay in response to tasking requirements established by officials at the national level. JTF-GTMO oversees all aspects of the detention of the Accused. The Joint Detention

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[30] *Id.*

[31] *See* Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 26 February 2016 from 9:41 AM to 10:21 AM through Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 26 February 2016 from 1:32 PM to 3:36 PM.

[32] *See* Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 10 December 2015 from 1:25 PM to 3:02 PM through Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 10 December 2015 from 3:26 PM to 5:03 PM at 9920-9929; AE 254CCCCC, Order: Motions to Strike Wholly Irrelevant Attachments to AE 254EE (GOV), the Government Response to 254Y (WBA), dated 25 February 2016.

Group (JDG) is the component of JTF-GTMO in control of physical security, transportation, and access to the Accused. JTF-GTMO detention facilities separately house High Value Detainees (HVD) and non-HVD (general population). JTF-GTMO standard operating procedures for detention operations are modeled after DoD and Federal Bureau of Prisons (FBP) corrections procedures. The JTF-GTMO guard force responsible for the general population has long been gender-neutral, comprised of both male and female guard force members.

d. JTF-GTMO detention policies at Camp Seven afford accommodations to allow detainees to practice their religion, to include dietary and prayer accommodations, provision of the Quran to each detainee, and special procedures for handling the Quran and facilitating detainee observance of Ramadan.

e. JTF-GTMO has implemented policies similar to those employed by DoD and FBP to prevent female guards from observing male detainees taking showers or otherwise in the nude.

f. The *Interim* Order applies only to detainee movements to and from the Commission hearings and to appointments with Defense Counsel. Other detainee movements are not impacted by the *Interim* Order. The use of female guards on the Detainee Escort Teams (DET) in positions requiring physical contact with male detainees is not prohibited by the *Interim* Order for those other movements.

g. [redacted]

[redacted]

h. Historically, DET positions requiring physical contact with male detainees were staffed with male guards, however, there was no "policy" preventing female guards from occupying DET or any other positions requiring physical contact with male detainees. Female service members assigned to Camp Seven who were not part of the guard force, such as medics, corpsmen, nurses, physicians, and physical therapists, have routinely come into physical contact with male detainees at Camp Seven.

i. "Lieutenant Colonel" commanded Camp Seven between March and December 2014. Prior [redacted] arrival there were no females assigned to the DET at Camp Seven. Prior to arriving at GTMO, to meet the staffing requirement for the guard force, "Lieutenant Colonel" found it necessary to staff [redacted] guard force with personnel from [redacted] different units.

j. On or about late summer 2014, "Lieutenant Colonel" decided to address staffing shortfalls and security clearance requirements by rebalancing [redacted] staff and replacing [redacted] male noncommissioned officers on the DET with [redacted] female noncommissioned officers. These positions required physical contact with detainees during escort movements.

k. JDG Standard Operating Procedure (SOP) #39, Religious Support of Detainees, 24 June 2014 (SOP #39)[33] was in effect at Camp Seven during "Lieutenant Colonel's" tenure. SOP #39 was a routinely updated, unit-specific guide signed by COL Heath, Commander JDG, that was applicable to all personnel working for the JDG in support of JTF-GTMO. Section 39-5, entitled "Cultural Considerations" contained a list of "basic Islamic considerations that will be

[33] *See* AE 254IIII (MAH), SOP #39 Religious Support of Detainees (24 June 2014), filed 8 December 2015.

observed by all JDG personnel, *when practicable"* (emphasis added). Subsection 39-5(11) of the 24 June 2014 version contained the following guidance, "Female guards and interpreters should not insist that the detainees make eye contact with them during interactions. Close contact with unrelated females is culturally inappropriate." Neither "Lieutenant Colonel" nor COL Heath interpreted SOP #39, subsection 39-5(11), as a "policy" that would prevent female guards from occupying DET or any other positions requiring physical contact with male detainees. SOP #39 was updated on 29 October 2014,[34] and again, on 24 September 2015.[35] The 29 October 2014 update deleted the statement, "Close contact with unrelated females is culturally inappropriate" and changed Subsection 39-5(11) to provide, "Guard force personnel and interpreters should not insist that the detainees make eye contact with them during interactions." This language remained in the 24 September 2015 update. The change to subsection 39-5(11) was made after AE 254Y was filed on 17 October 2014, and a similar motion filed in *United States v. Hadi al Iraqi* on 16 October 2014.[36] The change predated the *Interim* Order of this Commission (AE 254JJ) dated 7 January 2015, and a similar Order issued on 7 November 2014 by the Commission presiding over *United States v. Hadi al Iraqi*.[37] The Commission finds the "close contact" language contained in the 24 June 2014, SOP #39 did not constitute a "policy" preventing female guards from assignment to the DET or from incidentally touching the Accused in the course of performing their duties. The change to SOP #39-5(11) was made, not for any nefarious purpose, but to remove gender-specific references from the SOP.

[34] *See* AE 254OOOO (KSM), SOP #39 Religious Support of Detainees (29 October 2014), filed 8 December 2015.
[35] *See* AE 254PPPP (GOV), SOP #39 Religious Support of Detainees (24 September 2015), filed 8 December 2015.
[36] *See* AE 254JJJJ (AAA), Emergency Defense Motion [in *United States v. Hadi al Iraqi*] For Appropriate Relief To Cease Physical Contact with Female Guards, filed 10 December 2015.
[37] *See* AE 254LLLL (AAA), *Interim* Order [in *United States v. Hadi al Iraqi*]: Emergency Defense Motion for Appropriate Relief to Cease Physical Contact with Female Guards, dated 7 November 2014, filed 10 December 2015.

l. The physical contact with the Accused by guards, male or female, during normal escort procedures is minimal and does not involve touching of the genital area of the Accused.

m. JTF-GTMO's gender-neutral policy of employing female guards in DET positions requiring physical contact with detainees was not enacted with intent to punish, traumatize, sexually abuse, or torture any detainee.

n. No female guard conducting a detainee movement has in any way attempted to sexually abuse a detainee.

o. Despite Defense Counsel assertions that the minimal contact by female guards conducting an escort movement "is extremely painful to them[,]" no evidence was presented to the Commission that any *Accused* has been reliving alleged "torture" when incidentally touched by female guards conducting such movements. In fact, the record contradicts these claims. Complaints made by the Accused to the Camp Seven guards and chain of command regarding touching by female guards was based on cultural and religious objections, not pain or relived trauma.[38] The Commission notes the letter Mr. Mohammad [redacted] to Mr. Hadi al Iraqi [redacted] discussing how Mr. Hadi al Iraqi should testify about touching by female guards, did not include objection to the touching because of pain or "reliving" previous torture.[39]

p. Implementation of the *Interim* Order causes operational strain on the guard force, negatively impacting overall readiness, morale, and unit cohesion. Although there have been no

[38] Mr. Mohammad moved this Commission to produce an expert to discuss the effects of torture. However, an expert opinion about generalities regarding how one could feel about specific acts of torture is not relevant where there are no facts to establish the predicate. *See United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005) (upholding a trial judge's denial of expert assistance to examine coercive interrogation techniques where the defense never presented evidence of, "abnormal mental or emotional problems" or a "submissive personality" such that he would make false incriminatory statements.) Like the appellant in *Bresnahan*, the Accused in this case have not presented any evidence to suggest that they have been reliving torture by the *de minimis* touching of a female guard.

[39] The Commission considers this attachment in accordance with AE 254CCCCC, Order: Motions to Strike Wholly Irrelevant Attachments to AE 254EE (Gov), The Government Response To 254Y(WBA), dated 25 February 2016.

security incidents resulting from implementation of the *Interim* Order to date [redacted] The imposition of different requirements for male and female guards conducting the escort mission increases the risk of mistakes or omissions when executing integral safety procedures, thereby increasing risk of harm to both the guards and the detainees.

q. Implementation of the *Interim* Order has adversely affected morale within the guard force rotations because it allocates burdens of detainee escort unequally among male and female guards and results in female noncommissioned officers working in positions not commensurate with their rank and position.

r. JTF-GTMO legal staff refusal to meet with defense teams is not relevant to the issue of whether JTF-GTMO policy regarding female guards on the DETs is a legitimate government interest or an intentional or wanton infliction of pain on the Accused.

4. Law - *Turner v. Safley*

a. As detailed in the Commission's prior ruling, AE 254XXX,[40] the four factor test from *Turner v. Safley*, 482 U.S. 78, 89 (1987) is appropriate to protect any constitutional rights that might apply in this case.[41]

b. Detention facility policies or regulations encroaching on the constitutional rights of inmates are valid if "reasonably related to legitimate penological interests," *Turner,* 482 U.S. at 89. In *Turner*, the Supreme Court applied a four factor test to determine whether a detention

[40] AE 254XXX, Order: Motions to Compel Witnesses and Produce Documentary and Physical Evidence in Regard to AE 254Y, dated 8 October 2015.

[41] *Id.* In addition to the constitutional arguments, AE 254Y cited the Religious Freedom Restoration Act (RFRA) and the Geneva Convention as additional legal bases for the motion. In AE 254XXX, the Commission previously held that the Accused are not "persons" within RFRA and are barred from using RFRA as a basis for asserting rights based on religion. *See Allaithi v. Rumsfeld,* 753 F.3d 1327, 1334 (D.C. Cir. 2014). The Commission further held the standards articulated in *Turner v. Safley,* 482 U.S. 78, 89 (1987) adequately protect the Accused from inhumane or degrading treatment forbidden by the Geneva Convention. The Commission reaffirms those holdings.

facility regulation was reasonably related to legitimate penological interests: (1) whether there is a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it," (2) "whether there are alternative means of exercising the right that remain open to prison inmates," (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally," and (4) "the absence of ready alternatives" to the regulation. *Id.* at 89-90. Courts have applied the *Turner* test to pre-trial detainees, including detainees held at Guantanamo Bay. *See Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012) and *Hatim v. Obama*, 760 F.3d 54 (D.C. Cir. 2014). Under *Turner*, the burden is on the Defense to show that a prison regulation or policy is not reasonably related to a legitimate governmental interest. *See Overton v. Bazzetta*, 539 U.S. 126, 132 (2003).

5. *Turner* Analysis

a. *Valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it.*

(1) The Government asserts gender-neutral assignment of guards to the DETs is in furtherance of at least three legitimate governmental interests: (1) employing gender neutral guard staffing to ensure an adequately staffed, well-run, and secure detention facility; (2) employing gender-neutral guard staffing to promote integration of women into the Armed forces as intended by the Secretary of Defense; and (3) preventing gender discrimination.[42]

(2) Prison security is a legitimate government interest. *Hatim*, 760 F.3d at 59 (citing *Bell v. Wolfish*, 441 U.S. 520, 546-47 (1979)).

[42] *See* AE 254EE (GOV) and Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. Motions Hearing Dated 26 February 2016 from 13:32 PM to 15:36 PM at 11596-11610.

(3) Courts afford great deference to corrections officials recognizing "[t]he task of determining whether a policy is reasonably related to legitimate security interests is peculiarly within the province and professional expertise of corrections officials." *Id*. (citing *Florence*, 132 S. Ct. at 1517). Prison administrators must be given "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." *Id*. (emphasis in original) (citing *Bell*, 441 U.S. at 547). The Commission recognizes effectively running a detention facility is a difficult task requiring the Army and JTF-GTMO chain of command to have flexibility to assign staff, allocate resources, and institute security procedures as deemed necessary.

(4) The Government maintains a legitimate security interest in ensuring Camp Seven is properly staffed with trained and experienced personnel assigned duties commensurate with their military ranks. Although no security incidents have occurred at Camp Seven since implementation of the *Interim* Order, the Commission concludes the Government has established a rational connection between employing a gender-neutral guard policy to staff escort positions requiring minimal physical contact with the Accused and the legitimate government interest of ensuring an adequately staffed, well-run, and secure detention facility. Restrictions on employing female guards in DET positions requiring touching of male detainees impinges upon the Commander's ability to assign the guard force staff to positions based on their military rank, performance, experience, and leadership ability. To accommodate the *Interim* Order, DET members who normally work, train, and execute detainee movements unrelated to the Commission as a team, have been separated; schedules and security procedures have been altered; and morale has been degraded.[43] Each escort guard on a DET has very specific duties.

[43] In *Timm v. Gunter*, the Eighth Circuit applied the *Turner* test to determine the constitutionality of female searches of inmates over their privacy rights based objections. The court noted that a prohibition on females conducting

Changing these duties decreases the efficiency of the team and raises the risk of mistake or oversight, thereby increasing the security risks to both staff and detainees.

(5) The Government has also established a valid connection between gender-neutral staffing at Camp Seven and the Army and Department of Defense interests at the national level to promote integration of women into the Armed Forces and prevent gender discrimination.

(6) Camp Seven is staffed by units in a deployed status. Based on the history of the last two units that have deployed, it takes in excess of a year to fill the staffing requirements and complete the pre-deployment training cycle. It can take several months to replace personnel, often impracticable in the middle of a deployment. Loss or change of status of personnel over the course of a deployment is inevitable for many reasons, including, but not limited to, medical issues, family, and legal concerns. Staffing adjustments are regular. The imposition of gender restrictions contributes to manning shortfalls and increases the risk service members will be assigned to positions they are not properly trained or qualified to perform.

(7) Gender-neutral tasking requirements, guard rotations, requirements for service members to maintain current training, and policies to ensure service members perform duties commensurate with their military rank and training are all legitimate government interests that affect the security, order, and morale of Camp Seven and its personnel as well as the effective functioning of military police units at the national level without unnecessary gender discrimination. Carrying this premise advanced by the Accused to the extreme would literally have the detainees dictate the composition of a military unit and the determinations of a commander how best to accomplish assigned missions. The Defense has failed to meet its burden

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searches of inmates created "scheduling difficulties, as well as resentment by male guards, tension among male and female employees, deterioration of morale, and a potential decrease in internal security . . . [and] could also result in ineffective female supervisors as a result of their lack of experience in certain posts." *Timm v. Gunter*, 917 F.2d 1093, 1100 n.10 (1990).

of demonstrating there is no valid or rational connection between the policy of assigning female guards to escort positions requiring minimal physical contact with the Accused and the legitimate governmental interests advanced by the Government.

b. *Whether there are alternative means of exercising the right that remain open to prison inmates.*

(1) The rights at issue are the Accuseds' access to Defense Counsel and the Accuseds' right to be present during Commission proceedings. Gender-neutral assignment of guards to the DETs does not prohibit the Accused from meeting with Defense Counsel. Should the Accused opt to forego or limit interaction with Defense Counsel to avoid physical contact with female guards, the Accused have alternate means of exercising their right to counsel.[44] They can defer the decision to consult with Counsel until they know whether the assigned DET will be all male. They can also communicate with Counsel via letter. *See Hatim,* 760 F.3d at 61.

(2) Gender-neutral assignment of guards to the DET is not a prohibition on the right of the Accused to be present for Commission proceedings. Before Assembly, the Commission requires the Accused to attend the first session of each Commission hearing.[45] After appropriate advisement, each Accused may waive his presence for some or all of the sessions during that hearing period. This mandated presence also provides the Accused an opportunity to work with their Defense Counsel.

(3) To the extent the JDG policy of gender-neutral assignment of guards to the DETs can be interpreted as a restriction on the Accuseds' exercise of their religion, the Commission notes JTF-GTMO provides detainees at Camp Seven multiple avenues to exercise

[44] The Commission notes that a motion by the Accused to permit telephonic contact with their counsel is waiting for further argument and decision. *See* AE 183 *et seq*. Joint Defense Motion for Telephonic Access for Effective Assistance of Counsel, filed 25 June 2013.
[45] AE 037H, *Corrected Order*, Government Motion Regarding Accused's Presence During Commission Proceedings, dated 17 October 2012.

their religion, to include dietary and prayer accommodations, provision of the Quran to each detainee, and special procedures for handling the Quran and facilitating detainee observance of Ramadan. In addition to the policies implemented by JTF-GTMO, the Commission affords the Accused recesses for prayer and takes into consideration Ramadan and other religious observances when scheduling sessions.

(4) The Commission finds the logic of *Hatim* applicable to the facts of this case. If communication by letter is not a sufficient alternative for the exercise of the Accuseds' right to counsel, and there is no alternative to the Accused to exercise their right to be present for Commission hearings and avoid physical contact with female guards, such lack of alternative means is not conclusive of the reasonableness of the JDG policy of gender-neutral assignment of guards to the DETs. It is a factor to be balanced with the other three *Turner* factors.

c. *The impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally.*

(1) Both parties made arguments about the population and demographics of Camp Seven and the guard force. The Government argued the vast majority of Muslim detainees in the detention facility lodged no objection to physical contact by female guards. Although true, several of the Accused in this case did make objections based on religious and cultural grounds (Messrs. Mohammad, bin 'Attash, and bin al Shibh).

(2) The Defense argued the small number of female guards in Camp Seven and the small number of legal moves minimizes the *Interim* Order's effect on the detention facility. The Commission finds this argument unpersuasive. The guard force at Camp Seven is composed of military units that rotate in and out of the U.S. Naval Station in response to tasking requirements established by military officials at the national level. One rotation might have a

small number of female guards assigned to Camp Seven. The next unit may be 50% female or not have any female guards at all. The analysis regarding impact of accommodation on the detention facility should not vary with each guard rotation. Thus, the current number of male and female guards is not the benchmark for a determination by the Commission.

(3) The Defense points out there have been no security problems since the *Interim* Order was issued and no apparent negative impact on the facility or guard force demonstrated by compliance with the *Interim* Order. This is belied by the record. "Major Prior" described the requirement for continued rotation of guards and escorts to ensure security of Camp Seven. Restricting a segment of the guard force from assignment to rank appropriate duties requiring routine minimal physical contact with detainees directly impacts on how the commander may assign staff, allocate resources, and institute security procedures. All of the witnesses testified about the negative impact the *Interim* Order has made on the security of Camp Seven and on the morale of male and female guards assigned there.

(4) JTF-GTMO has made accommodations to protect the privacy of the Accused by implementing policies similar to those employed by DoD and FBP to prevent female guards from observing male detainees taking showers or otherwise in the nude. Civilian courts addressing these issues have not required additional accommodations under circumstances involving more intrusive searches. *See Timm v. Gunter,* 917 F.2d 1093, 1100 (8th Cir. 1990); *Madyun v. Franzen,* 704 F.2d 954 (7th Cir. 1983); *United States v. Ghailani,* 751 F. Supp. 2nd 508, 514 (S.D.N.Y 2010).

(5) The Commission concludes additional accommodation would negatively impact the security of Camp Seven and the morale of its guard-force and degrade the ability of

all the soldiers assigned to the JDG to perform their assigned jobs in accordance with their rank and position.

(6) The Commission similarly concludes additional accommodation would negatively impact the legitimate government interests in employing gender-neutral guard staffing to promote full integration of women into the Armed Forces as intended by the Secretary of Defense and to prevent gender discrimination. *See Madyun,* 704 F.2d at 960; *Timm,* 917 F.2d at 1091 n.11 and 12.

d. *The absence of ready alternatives to the regulation.*

(1) A ready alternative is an "obvious regulatory alternative that fully accommodates the asserted right while not imposing more than a *de minimus* cost to the valid penological goal." *Hatim,* 760 F.3d at 61 (quoting *Overton,* 539 U.S. at 136). As with the analysis regarding impact of accommodation on the detention facility, the analysis regarding whether there is a ready alternative should not vary with each rotation. The current number of male and female guards is a snap shot in time and not a benchmark for analysis.

(2) "Major Prior" detailed the staffing rotation requirements for Camp Seven and the limitations the *Interim* Order placed on the Command's discretion regarding staffing, resourcing, and imposition of security measures. The Commission finds these needs are not an exaggeration. The determinations by the former and current commanders of JTF-GTMO and JDG that deviations from Army policy of gender-neutral DET teams would lead to deterioration of Camp Seven security, impede the full integration of women into the Armed Forces, and promote gender discrimination are reasonable determinations.[46]

(3) The record establishes there is no "ready" alternative that does not impose more than a *de minimus* cost to the legitimate interests advanced by the Government.

[46] *See generally, United States v. Ghailani,* 751 F.2d 508 (S.D.N.Y. 2010).

e. The burden is on the Defense to show that a prison regulation or policy is not reasonably related to a legitimate governmental interest. The Defense has not met its burden.

6. Law - *Bell v. Wolfish*

a. Following the Commission's ruling in AE 254XXX, Counsel for Mr. Mohammad requested reconsideration[47] on the ground that, in addition to *Turner,* the JTF-GTMO policy regarding female guards in DET positions should be analyzed as cruel and unusual punishment under Eighth Amendment analysis as applied to pretrial detainees through the Fifth Amendment Due Process Clause. *See Bell v. Wolfish,* 441 U.S. 520 (1979). After oral argument,[48] the Commission granted Mr. Mohammad's request to consider such Due Process Clause analysis when deciding AE 254Y.

b. In *Bell*, the Supreme Court held that the proper inquiry is whether conditions of confinement amount to punishment of the detainee. *Id.* at 534. Whether a particular condition of confinement amounts to punishment turns on whether the condition is imposed "for the purpose of punishment" or whether the condition is "an incident of some other legitimate governmental purpose." *Id.* at 538. If there is no showing of "an expressed intent to punish on the part of detention facility officials" courts examine the purpose(s) served by the restriction or condition, and whether such purpose(s) are "reasonably related to a legitimate governmental objective" and are not "excessive in relation to the legitimate governmental objective." *Id.* at 539. An arbitrary or purposeless condition *not* reasonably related to a legitimate goal may be inferred to have a punitive purpose. *Id.* at 539 n. 20 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963)). However, for a condition of confinement to amount to punishment, the condition "must

[47] AE 254YYY (KSM), Motion for Reconsideration of AE 254XXX, Order, Motions to Compel Witnesses and Produce Documentary and Physical Evidence in Regard to AE 254Y, filed 15 October 2015.
[48] *See* Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 22 February 2015 from 1:31 P.M. to 3:40 P.M. at 10720-10744.

involve more than ordinary lack of due care for the prisoner's interests or safety." *Whitley v. Albers*, 475 U.S. 312, 319 (U.S. 1986).

c. *Bell* recognized the Government's legitimate interest in effectively managing detention facilities and that this interest "may require administrative measures that go beyond" those necessary to ensure a detainee's presence at trial. *Bell,* 441 U.S. at 540. Conditions of confinement reasonably related to the Government's interest in maintaining detention facility security and order are not punishment even if they are discomforting and conditions a detainee would not experience unless under pretrial detention. *Id.* The Supreme Court advised lower courts "to be mindful" to avoid analyzing the issue of whether conditions of confinement are punishment under the lens of "a court's idea of how to best operate a confinement facility." *Id.* at 539.

d. Conditions of confinement can amount to punishment if they are found to be (1) intentional imposition of punishment or (2) unnecessary and wanton infliction of pain. *See Whitley v. Albers*, 475 U.S. at 319. Wanton has been defined as a "deliberate indifference or conscious disregard for conditions that expose detainees to risk of damage…" *Farmer v. Brennan,* 511 U.S. 825 (1994).

7. Punishment Analysis

a. *Intent to Punish*

(1) The testimony by COL Heath, "Lieutenant Colonel," "Major Prior," and "Major" establishes the assignment of female guards to DET positions requiring minimal physical contact with the Accused was motivated by staffing and other security protocol requirements and not by an intent to punish the Accused.

(2) There is no evidence in the record that JTF-GTMO detention officials' assigned female guards to the DET with intent to punish the Accused or for any reason other than to accomplish military requirements.

b. *Unnecessary and Wanton Infliction of Pain*

(1) The Defense argued the assignment of females to DET positions requiring physical contact with the Accused was an unnecessary and wanton infliction of pain on the Accused because it was a change in policy that did not take into account the Accuseds' "history of torture."

(2) The Defense cited *Jordan v. Gardner,* 986 F.2d 1521 (9th Cir. 1993) as analogous to the instant case.[49] In *Jordan*, an all-female facility had a policy of routine suspicion-less searches of inmates solely at fixed checkpoints by female guards. The policy was changed to increase the number of searches, make the searches random, and allow male guards to conduct the searches. *Id.* at 1523. These searches included pushing "inward and upward" on the crotch area, squeezing and kneading of the crotch area and upper thighs, and flattening the breast. The only day of implementation resulted in severe reactions from some of the female inmates who had previously been sexually abused by men. The reactions included vomiting by an inmate after her hands were pried from bars she grabbed during the search by a male guard. *Jordan* distinguished itself from a prior case, *Grummett v. Rushen*, 779 F.2d 491 (9th Cir. 1985) (holding female guard pat downs of male inmates did not violate the Eighth Amendment because the inmates had not shown sufficient evidence of pain). The Ninth Circuit found that given the

[49] AE 254Y (KSM Sup), AE 254YYY (KSM), Motion for Reconsideration of AE 254XXX, Order Motions to Compel Witnesses and Produce Documentary and Physical Evidence in Regard to AE 254Y, filed 15 October 2015, at 7; AE 254EEEEE at 16; and Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohamad et al. Motions Hearing Dated 26 February from 10:32 AM to 1209 PM at 11514-11515.

facts in *Jordan,* the cross-gender clothed body search policy constituted "infliction of pain." *Id.* at 1526.

(3) *Jordan* found the change in policy was not required for security purposes and was adopted after the Superintendent of the detention facility was "urged by members of his own staff not to institute cross-gender clothed body searches due to the psychological trauma which many inmates would likely suffer." Under these facts, the Court held the new policy was wanton under a "deliberate indifference" standard. *Id.* at 1527-28. In the instant case, the decision was not made wantonly or indifferently. Though the Camp Seven Commanders received complaints from some of the Accused voicing religious and cultural objections to touching by female guards during escort movements, they received no complaint that the touching caused psychological trauma from reliving alleged "torture" caused by a touch by female guards on the hand or shoulder of an Accused. Moreover, the continual observation and respect for a number of religious practices belies any implication of disrespect for the Muslim faith.[50]

(4) The facts in this case are more akin to *Grummett* than to *Jordan.* The plaintiffs in *Jordan* demonstrated evidence of pain and trauma caused by the very intrusive searches which, under other circumstances, were factually indistinguishable from a sexual assault (forced non-consented touching of private areas, to include squeezing, kneading, and upward pushing on the crotch). This is not the case here. The touching by female guards during escort procedures is minimal and does not involve private areas of the body. The touching in this case involves a hand on a shoulder or ankle. It does not equate to rubbing and squeezing by a male guard on a sexual assault victim inmate's crotch or breasts.

(5) A rectal search procedure, far more intrusive than the touching at issue in this case, was challenged to be unlawful punishment by a detainee previously confined in

[50] *See* paras 3d and 5b(3) above.

Guantanamo Bay, Cuba, in *United States v. Ghailani*, 751 F. Supp. 2d 508 (S.D.N.Y. 2010). Mr. Ghailani was captured and turned over to the Central Intelligence Agency for detention and interrogation for two years before being detained at JTF-GTMO until June 2009 when he was transferred to face a federal indictment. Mr. Ghailani was subject to a policy that required inmates "to undress and to bend over or squat briefly in order to display his rectum to the officer conducting the search." *Id.* at 510. Mr. Ghailani alleged that he suffered from post-traumatic stress disorder because of "enhanced interrogation techniques" he experienced. *Id.* at 511. Applying *Turner* and citing *Bell*'s deference to security considerations, the District Court upheld the policy.

(6) The record does not establish minimal touching by female guards during normal detainee escort movements amounts an infliction of pain on the Accused. Assuming arguendo, the touching during escort movements amounted to an infliction of pain on the Accused, the Commission finds the touching is not "unnecessary or wanton".

8. Findings of Facts – Equal Opportunity Complaint (EO complaint)

a. On 23 January 2015, the Commission became aware, and gave notice to all parties, of an EO complaint filed by JTF-GTMO guards.[51]

b. The Commission clarified its 23 January 2015 notice to the parties during the February 2015 hearings:

> The only other thing was an e-mail request to my staff for my bio by the investigating officer…I have had no contact whatsoever, I have directed any contact be done with my office, and I have told my office to tell them I do not intend and will not be interviewed in this process, and I've seen zero paper on it... I will update everybody *sua sponte* on anything I hear, but that's the sum and substance of my knowledge.[52]

[51] AE 254QQ, Notice Emergency Defense Motion to Bar Regulations Substantially Burdening Free Exercise of Religion and Access to Counsel, dated 23 January 2015.
[52] *See* Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 12 February 2015 from 1:28 P.M. to 2:26 P.M. at 8497.

c. On 14 May 2015, the Defense filed a motion requesting the Commission compel discovery of information related to the EO complaint against the Military Judge.[53] After oral argument the Commission denied the request.[54]

d. The Commission has not seen any EO complaint filed in relation to the Commission's *Interim* Order (AE 254JJ) and is not aware of any additional information regarding the processing or resolution of any such EO complaint.

e. Neither the EO complainants nor anyone else involved in the processing or resolution of the EO complaint has attempted to contact the Commission with respect to the timing of the litigation in the AE 254 series or the merits of the underlying issues.

f. No finding or decision from the investigation of any EO complaint has been made public by military officials.

9. Findings of Fact - Comments by Public Officials Alleged to Constitute Unlawful Influence on the Commission

a. On or about 12 March 2015, General John F. Kelly, Commander, U.S. Southern Command, appeared before the Senate Armed Services Committee (SASC) and testified, "Anyone that knows anything about the Moslem [sic] religion knows that it's not against their religion . . . As soon as it's over it'll be, 'We don't want to be touched by Jews. Or we don't want to be touched by black soldiers. Or we don't want to be touched by Roman Catholics,' . . .

[53] AE 254SSS (MAH), Mr. al Hawsawi's Motion to Compel Discovery Related to the EO Complaint Against the Military Judge, filed 14 May 2015.
[54] AE 254XXXX, Order: Mr. al Hawsawi's Motion To Compel Discovery Related To The EO Complaint Against The Military Judge, dated 23 February 2016.

It's beyond me why we even consider these requests, . . . But I'm not a lawyer. I'm not smart enough to figure this out."[55]

b. On or about 1 July 2015, General Kelly made the following additional statements to the news media, "Since November, we have labored under an order that discriminates specifically against some of our personnel because of who they are. And that's un-American. And I, as a personal failure, have not been able to convince people [who] could change that ruling to change that."[56]

c. On 27 October 2015, Chairman of the Joint Chiefs of Staff, General Joseph Dunford, appeared before the SASC and testified the *Interim* Order "ought to be fixed" and that:

> I can tell you how I feel about that. I feel the same way as the Commander of U.S. Southern Command, General Kelly, who describes it as outrageous, and I read his weekly report and have read it for about probably the last seven or eight weeks, to include the two or three weeks before transition, so, it's outrageous. He's identified it. That's being worked by lawyers, it's an injunction. I'm not using that as an excuse, but that's where it is right now, it's being worked by lawyers. The Commander has identified it. I think it ought to be - it's outrageous, it ought to be fixed, it hasn't been to date.[57]

d. During the same hearing, Secretary of Defense Ashton Carter, also appeared before the SASC and testified in response to Senate questioning that the *Interim* Order was "outrageous."[58] He also endorsed the description by General Kelly to "fix it" and further testified, "This is pursuant to an action by a Federal Judge. I think it is counter to the way we treat service members, including women service members, and outrage is a very good word for it."

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[55] "Southcom wants to expand Guantánamo's 'balsero' camp infrastructure" by Carol Rosenberg, 13 March 2015, Miami Herald at http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article13982705 html#storylink=cpy.

[56] "Southcom's Kelly installs new Guantánamo prison commander, rips media coverage" by Carol Rosenberg, 1 July 2015, Miami Herald, at http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article26027224 html#storylink=cpy.

[57] *Id.*

[58] United States Senate Armed Services Committee Hearing on United States Military Strategy in the Middle East, 27 October 2015, video at http://www.c-span.org/video/?328955-1/secretary-carter-general-dunford-testimony-middle-east-strategy (relevant testimony beginning at approximately 2 hours 48 minutes) (hereafter "Video of SASC Testimony 27 Oct 2015").

e. During the 27 October 2015 SASC hearing, Senator Kelly Ayotte described the *Interim* Order as "outrageous."[59] She, along with other Senators, criticized the *Interim* Order.[60]

f. None of these officials has made any public retraction of these statements or attempted to clarify that they were in no way attempting to influence the Commission in either the timing of or the merits of this litigation.

10. Recusal. The question of recusal has been raised. The Commission finds that recusal of the Military Judge would not change the litigation framework. Only a military judge detailed to the Commission could hear this motion. As such, any judge would face the same alleged UI as the current judge. Accordingly, recusal is not an appropriate remedy.

11. Law - Unlawful Influence

a. 10 U.S.C. § 949b of the Military Commissions Act of 2009 (M.C.A. 2009) prohibits Unlawful Influence (UI) regardless of source and states in pertinent part:

> "(1) No authority convening a military commission…may censure, reprimand, or admonish the military commission, or with respect to any other exercises of its or their functions in the conduct of the proceedings.
> (2) No person may attempt to coerce or, by any unauthorized means, influence
> (A) the action of a military commission under this chapter, or any member thereof in reaching the findings or sentence in any case;
> (B) the action of any convening, approving or reviewing authority with respect to their judicial acts; or
> (C) the exercise of professional judgement by trial counsel or defense counsel."

b. The M.C.A. 2009 prohibition against UI is broader in scope than Article 37 of the Uniform Code of Military Justice (UCMJ), a comparable provision prohibiting Unlawful

[59] *Id.*
[60] *Id.* Video of SASC Testimony and *Id*; s*ee also* video footage of Senator Ayotte, Senator Scott and Senator Capito press conference at https://www.youtube.com/watch?v=HWmV8u49yeo ; and "Senior Defense Dept. officials decry Guantánamo judge's female guard ban," Carol Rosenberg, 27 Oct 2015, Miami Herald, at http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article41615208 html#storylink=cpy.

Command Influence (UCI). [61] Article 37, UCMJ limits influence by persons "subject to the code". 10 U.S.C. § 849 prohibits UI from any "person."[62]

c. Although the M.C.A. 2009 prohibition against UI is more expansive than the Article 37, UCMJ prohibition against UCI, extensive UCI litigation in military courts provides an appropriate framework for the Commission to use in analyzing the issue of UI as presented in AE 254WW (MAH) and its supplements.

d. Article 37, UCMJ, was enacted by Congress to prohibit commanders and convening authorities from attempting to coerce, or by unauthorized means, influence the action of a court-martial, or any member thereof in reaching the findings or sentence in any case. Article 37(a), UCMJ. Military courts have described UCI is "the mortal enemy of military justice." *See United States v. Lewis*, 63 M.J. 405, 407 (C.A.A.F. 2006).

e. UCI can arise in a multitude of different situations and can affect the various phases of the court-martial process. *See United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004). "[T]he term 'unlawful command influence' has been used broadly in our jurisprudence to cover a multitude of situations in which superiors have unlawfully controlled the actions of subordinates in the exercise of their duties under the UCMJ." *United States v. Hamilton*, 41 M.J. 32, 36 (C.M.A. 1994).

f. UCI can manifest itself in one of two ways, either through actual UCI or apparent UCI. Even if there is no actual UCI, there may be apparent UCI, and the military judge must take affirmative steps to ensure that both forms of UCI are eradicated from the court-martial in question. *Lewis,* 63 M.J. at 416. The "appearance of unlawful command influence is as devastating to the military as the actual manipulation of any given trial." *Id.* at 407. Thus, the

[61] Uniform Code of Military Justice (UCMJ), 64 Stat. 109, 10 U.S.C. §§ 801–946.
[62] Compare 10 U.S.C. § 837a and 10 U.S.C. § 949b(a)(2)(A).

disposition of an issue involving UCI, once it has been raised, is insufficient if it fails to take into full consideration even the mere appearance of UCI. *Id* at 416.

g. Like the UCMJ, the Regulation for Trial by Military Commission (2011) (R.T.M.C. 2011) recognizes the dangers of both actual and apparent UI in military commission proceedings, "all persons…should be sensitive to the existence, or appearance, of unlawful influence, and should be vigilant and vigorous in their efforts to prevent it."[63]

h. The question of whether there is an appearance of UCI is determined "objectively." *Id.* This objective test for apparent UCI is similar to the tests that are applied in determining questions of implied bias of court members or in reviewing challenges to military judges for an appearance of a conflict of interest. *Id.* Courts focus on the "perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public." *Id.* The central question to ask is whether an "objective, disinterested observer fully informed of all the facts and circumstances would harbor a significant doubt about the fairness of the proceeding." *Id.*

i. In *United States v. Biagase,* 50 M.J. 143 (C.A.A.F. 1999), the U.S. Court of Appeals for the Armed Forces (C.A.A.F.) provided an analytical framework to address whether UCI is present in a case. The Court held:

(1) The initial burden is on the defense to raise the issue of UCI. This burden is "low," but it is more than mere allegation or speculation. The quantum of evidence required to meet this burden, and raise the issue of UCI is "some evidence." *Id.* The defense must show facts which, if true, would constitute UCI, and it must show that such evidence has a "logical connection" to the court-martial at issue in terms of potential to cause unfairness in the proceedings. If the defense shows "some evidence" of such facts, then the issue is "raised." [64]

[63] R.T.M.C. Chapter 1, p. 1-4.
[64] *See also Stoneman,* 57 M.J. at 41 (citing *Biagase*, 50 M.J. at 151).

(2) Once UCI has been raised, the burden then shifts to the government. The government may show either there was no UCI, or any UCI would not taint the proceedings. If the government elects to show that there was no UCI, then it may do so either, by disproving the predicate facts on which the allegation of UCI is based, or, by persuading the Military Judge that the facts do not constitute UCI. Alternatively, the government may choose not to disprove the existence of UCI, but demonstrate the UCI will not affect the proceedings at issue. The government's burden is beyond a reasonable doubt, despite which tactic they choose.

j. If actual or apparent UCI is found to exist, the military judge "has broad discretion in crafting a remedy to remove the taint of unlawful command influence," and the remedy will not be reversed, "so long as the decision remains within that range." *United States v. Douglas,* 68 M.J. 349, 354 (C.A.A.F. 2010). The Court of Appeals for the Armed Forces encouraged military judges to take proactive curative steps to remove the taint of UCI and, therefore, ensure a fair trial. "[T]his Court has recognized that a military judge can intervene and protect a court-martial from the effects of unlawful command influence." *Id.* Once UCI is raised "…it is incumbent on the military judge to act in the spirit of the UCMJ by avoiding even the appearance of evil in his courtroom and by establishing the confidence of the general public in the fairness of the court-martial proceedings." *Gore*, 60 M.J. at 186.

k. The military judge *may* consider dismissal of charges when the accused would remain prejudiced by the UCI despite remedial actions, or if no useful purpose would be served by continuing the proceedings. *Douglas,* 68 M.J. at 354 ([W]hen an error can be rendered harmless, dismissal is not an appropriate remedy. Dismissal is a drastic remedy and courts must look to see whether alternative remedies are available.")

l. The goal of prohibiting UI is to ensure the accused receives a trial free from the effects or appearance of the effects of unlawful influence. *See United States v. Ashby,* 68 M.J. 108 (C.A.A.F. 2008).

12. Analysis - Unlawful Influence Generally

a. It has long been a tenet of American law that an independent trial judiciary is essential to any system of justice. It is elementary that "a fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison,* 349 U. S. 133, 136 (1955). A necessary component of a fair trial is an impartial judge. *See United States v. Salyer*, 72 M.J. 415, 424 (C.A.A.F. 2012); *Tumey* v. *Ohio,* 273 U. S. 510, 532 (1927).

b. The Commission will apply the framework used by military courts to determine whether there is actual or apparent UCI in determining whether there is actual or apparent UI in this Commission.

13. Analysis - Unlawful Influence of the EO Complaint

a. *Initial Threshold of "Some Evidence"*

(1) While some regulations and investigatory systems have limitations for judicial conduct and trial practices[65] the Army regulation governing the EO complaints[66] does not exempt judicial actions and empowers commanders to resolve EO complaints "by action to restore benefits and privileges lost because of unlawful discrimination."[67] Thus, the act of filing an EO complaint regarding EO ramifications resulting from the *Interim* Order is a legal act by

[65] Under R.M.C. 109(c), there is an exception to typical professional responsibility procedures for acts undertaken within statutes and regulations that control trials by military commission. The R.M.C. corollary R.C.M. 109(c) similarly limits: "[e]rroneous decisions of a judge are not subject to investigation under this rule." Challenges to these decisions are more appropriately left to the appellate process." *See* Discussion of R.C.M. Rule 109(c). Article 138 of the Uniform Code of Military Justice (UCMJ) also excludes complaints of: "Matters relating to courts-martial, nonjudicial punishment, confinement, and similar actions taken pursuant to the UCMJ, the MCM, or military criminal law regulations." Army Regulation 27-10, Chapter 19-5, (October 2011).
[66] *See* Army Regulation 600-20.
[67] *Id.*

the complainant(s) and the processing of such complaints is a legal action by the chain of command.[68]

(2) Neither the EO complainant nor anyone else involved in the processing or resolution of the EO complaint has attempted to contact the Commission with respect to the timing of the litigation in the AE 254 series or the merits of the underlying issues. The Defense has not presented evidence sufficient to raise actual UI impacting the decisions of the Military Judge in this Commission.

(3) Although the filing of the EO complaint is a legal act and actual UI is not raised, the timing of the complaint raises at least "some evidence" that is more than speculative that an outside observer might perceive the filing of an EO complaint as an attempt to unlawfully influence the Commission in either the timing of litigation pertaining to AE 254Y or the merits of deciding whether to make the *Interim* Order permanent.[69] The Commission finds the Defense has raised apparent UI.

b. *Whether the EO Complaint Constitutes Apparent UI, and if so, whether the EO Complaint Affected This Commission.*

(1) The EO complaint has not been shown to the Military Judge nor has any finding, decision, or result from the EO investigations been made public. The Military Judge has taken steps to ensure that the EO complaint has not had any effect on the proceedings. Even if, as the Defense has alleged, the intent of the EO complaint or statements made by senior officials was to coerce the Military Judge to change or alter his decision, or to override his decision by some other authority, the Military Judge did not do so at any point at or near the filing of the EO

[68] The EO process does not distinguish between the personal conduct of a military judge (e.g. sexually harassing a subordinate) and the judicial act of rendering a decision in a trial.
[69] *See Salyer*, 72 M.J. at 423 (citing *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002)).

complaint. The Military Commission declined the Government's requests[70] to lift the *Interim* Order, leaving the Order in place during the time necessary to receive evidence and full briefing from all parties. The EO complaint was filed over a year prior to issuance of this Ruling. The Commission held three separate hearing sessions (October 2015, December 2015, and February 2016) since the public comments were made to address the merits of AE 254Y (among other issues) without altering the *Interim* Order despite several requests by the Government to do so.[71] Additionally, the issues raised by the complaint are ancillary to the determination of the guilt or innocence of the Accused standing trial before this Commission. Given the time since the EO complaint was filed, the separation maintained between the details of the substance of the EO complaint and the Commission, the thoroughness of the pleadings, presentation of evidence, and argument through the course of three separate hearing sessions and the ancillary nature of the issues raised, the Commission concludes an objective and informed member of the public would not have significant doubts that the timing of the litigation of AE 254Y was not unlawfully impacted or that the decisions on the merits made by the Commission were made fairly and impartially based on the evidence and the law.

(2) The Government has demonstrated beyond a reasonable doubt that no actual or apparent UI from the EO complaint affected these proceedings.

14. Analysis - Unlawful Influence of Public Comments

a. *Initial Threshold of "Some Evidence"*

[70] AE 254RR, Order: Government Motion For An Expedited Litigation Schedule to Resolve AE 254Y, dated 26 January 2015; AE 254LLL (GOV), Government Motion to Reconsider AE254JJ Order, filed 2 March 2015; *See also* AE 254NN, Order: Government Motion to Reconsider AE 254JJ *Interim* Order, dated 12 March 2015; and Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 10 December 2015 from 1:25 PM to 3:02 PM.
[71] *Id.*

(1) Comments by senior officials are a common theme in allegations of UCI in courts-martial. *See Douglas*, 68 M.J. at 349 (C.A.A.F. 2009) (disparaging an accused while investigation was ongoing by a military superior was found to be UCI); *United States v. Simpson*, 58 M.J. 368 (C.A.A.F. 2003) (finding under the circumstances leadership's comments did not demonstrate "either the intent to improperly influence the court-martial process or the appearance of such an influence"); *United States v. Jiles*, 2014 CCA LEXIS 151 (N-M.C.C.A. Mar. 6, 2014) (finding Marine Corps Commandant's public Heritage Brief raised UCI).[72]

(2) The Defense argues UI is raised because "The direct superior of the Military Judge in this case has publicly condemned an Order by the Military Judge on a contested matter of active litigation, and has publicly endorsed statements that the Order 'ought to be fixed'."[73]

(3) The Government argued the statements had no connection to the Commission given the forum of the senior military leader's comments. The senior leaders were simply "uninformed."[74] As an example, the Government noted Secretary Carter identified the Commission as a "federal court."

(4) Military courts have been deferential to the military judge in cases where senior military and political leaders have made public comments regarding ongoing courts-martial and military justice matters in the absence of evidence the of a judge being influenced:

> Notwithstanding the appellant's assertion that the military judge was aware of the President's statements, the appellant does not offer and we find no evidence that the military judge actually succumbed to any pressure, perceived or otherwise, to improperly convict or otherwise punish the appellant. Military judges are presumed to know the law and to follow it and there is no evidence the military judge failed to do so in this case.

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[72] The Commission considers unpublished opinions of military courts of criminal appeal as persuasive non-binding authority. The Commission also understands the distinctions between UCI under the UCMJ and UI under the M.C.A. 2009. These cases are cited as examples of the concepts of UCI being judicially applied.
[73] AE 254WW (KSM Sup) at 11.
[74] *See* Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 22 February 2016 from 1:31 P.M. to 3:40 P.M. part 2 at 11606.

United States v. Guin, 2016 CCA LEXIS 79, *24 (N-M.C.C.A. 2016) (citing *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007)); *see also United States v. Corcoran,* 2014 CCA LEXIS 901, *27 (N-M.C.C.A. Dec. 23, 2014) (following full opportunity for voir dire and no challenge to the military judge, given the presumption to know the law and no evidence the judge failed to do so, the Navy-Marine Court of Criminal Appeals was satisfied an objective, disinterested observer, fully informed of all the facts and circumstances, would not harbor any significant doubts).

(5) Absent evidence the Commission was actually influenced by the comments made by Senator Ayotte and other Senators during the 27 October 2015 SASC hearings, the Commission does not find actual UI raised by these comments.

(6) The Commission also does not find apparent UI raised from the comments of Senator Ayotte or political leaders during the 27 October 2015 SASC hearings. Both JTF-GTMO and the military commissions are newsworthy topics and have been widely debated in the media and by the executive and legislative branches officials. Political speech by elected, and prospective, politicians in a Congressional Committee hearing regarding these issues would not lead an objective informed observer to have significant doubt as to the fairness of this Commission, absent some affirmative attempt by the politicians to actually influence the Military Judge regarding the pace of litigation or the merits of AE 254Y.[75]

(7) Comments by senior military leaders are a different matter. There is no evidence on the record that the Military Judge of this Commission was unlawfully influenced by the comments of Secretary Carter, General Kelly, or General Dunford. The Commission is presumed to know and apply the law correctly to include litigating the issues before this

[75] The Commission notes a recent Coast Guard Court of Criminal Appeals decision where the Court found comments addressed to Congress and not to members of the Coast Guard were not direct evidence of UCI. *United States v. Rogers*, 2015 CCA LEXIS 472, *15-16 (C.G.C.C.A. July 8, 2015).

Commission based solely on the evidence presented and the applicable law. Actual UI from the comments made by these senior military leaders has not been raised.

(8) The comments of Secretary Carter, General Kelly, and General Dunford do raise apparent UI. The comments provide some evidence a disinterested observer, fully informed of all the facts and circumstances, could harbor significant doubt that the Military Judge was not pressured by these comments to increase the pace of AE 254Y litigation, rescind the *Interim* Order, or decide the merits of AE 254Y on grounds other than the evidence presented and the applicable law and, thereby, question the fairness of this Commission.[76]

b. *Whether the Public Comments Constitute Unlawful Influence, and if so, whether the Statements Affected This Commission.*

(1) Apparent UI has been raised. The burden now shifts to the Government to prove beyond a reasonable doubt either no apparent UI exists or any apparent UI would not affect the proceedings. *Biagase*, 50 M.J. at 150-151.

(2) The Commission recognizes Secretary Carter, General Kelly, and General Dunford, as senior leaders in the Department of Defense, are appropriately summoned to appear before Congress to express their opinions and give their advice regarding issues involving the national defense and military force structure. The M.C.A. 2009 prohibition against UI does not require senior military and civilian leaders to refrain from making public statements about issues of import to the United States Military to include its personnel policies. *See Simpson*; 58 M.J. at 374; *United States v. Rockwood,* 52 M.J. 98, 103 (C.A.A.F. 1999).

[76] Courts have found that awareness of comments made by senior military leaders about an ongoing trial have caused unlawful command influence. *United States v. Howell*, 2014 CCA LEXIS 321, *31 (N-M.C.C.A. May 22, 2014).

(3) In *Simpson* a high profile case of cadre/trainee sexual abuse with multiple victims, the defense alleged senior officials in the Army to include the Secretary of the Army, the Assistant Secretary for Manpower and Reserve Affairs, and the Chief of Staff of the Army committed UCI by making public comments by (1) "using phrases as 'no leniency' and 'severe punishment'; (2) asserting as a factual conclusion there had been an 'abuse of power'; and (3) articulating an incorrect legal conclusion –that 'there is no such thing as consensual sex between drill sergeants and trainees.'" C.A.A.F. found UCI was raised, there was apparent UCI, and held the government proved beyond a reasonable doubt that the apparent UCI did not taint the trial. Key to the holding were the significant remedial measures the military judge took to mitigate the impact of the apparent UCI. *Simpson,* 58 M.J. at 376.

(4) In this case, the Government has not proved beyond a reasonable doubt no apparent UI exists. The comments made by Secretary Carter, General Kelly, and General Dunford were not general comments about military readiness or other topics within their portfolios that senior military leaders would be expected to address during the course of a SASC hearing.[77] Instead, these were substantive comments regarding ongoing litigation in this Commission. They were also comments disparaging the decision made by the Commission to implement the *Interim* Order. These comments were entirely inappropriate. They crossed the line. Senior military leaders should know better than to make these kinds of comments in a public forum during an ongoing trial.

(5) The Commission notes none of these senior military officials made any attempt to clarify or retract their inappropriate comments.[78] As with the military judge in

[77] General Kelly made additional disparaging comments regarding the Commission's *Interim* Order on 1 July 2015 to the media. *See* n. 56.

[78] Compare the lack of clarification or retraction in this case with the memorandum sent throughout the military services by former Secretary of Defense Hagel on 6 August 2013, Subject: Integrity of the Military Justice Process.

Simpson, the Commission has a duty to intervene and proactively take steps to cure the taint of apparent UI on the Commission and ensure a fair trial.[79]

(6) The Defense requested the Commission make the *Interim* Order permanent as a remedy. In light of the legitimate government interests and security concerns of JTF-GTMO with continued implementation of the *Interim* Order the Commission finds such a remedy inappropriate.

(7) The inappropriate comments are germane only to the issues in AE 254Y regarding female guards on the DET, an ancillary issue that has nothing to do with the merits of the case. The Defense posits the taint from the comments so promulgated these proceedings that an informed and objective observer would not feel the decisions made by the Commission in this Ruling were free from UI. With no actual UI impacting the Commission, the available remedies to cure the apparent UI are limited.[80] The Commission has already taken curative measures in ensuring the *Interim* Order remained in effect throughout the litigation of AE 254Y from 7 January 2015 to date despite Government requests to rescind the Order. The Commission also ensured the full briefing cycle was complete, witnesses testified, evidence was taken, and the Commission heard oral argument in normal due course before ruling on the merits of AE 254Y.

(8) The Commission remains concerned about the potential for UI should there be additional inappropriate comments by senior military and civilian officials regarding issues pending litigation before the Commission. As the C.A.A.F. advised, "We note that senior officials and the attorneys who advise them concerning the content of public statements should

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See http://online.wsj.com/public/resources/documents/081413hagel.pdf. The memorandum stressed the importance of the independence of the military justice process following the Commander in Chief's public comments regarding his expectations of punishment in the military for sexual assault convictions.

[79] This is not the first time the Commission has had to take action to remedy apparent UI against the Military Judge. *See* AE 343C, Ruling, Defense Motion to Dismiss for Unlawful Influence on Trial Judiciary, dated 25 February 2015 (abating the proceedings until the regulatory provision causing the apparent UI was rescinded.)

[80] Defense Counsel argued the appropriate remedy was to rule against what the senior officials would like to see happen. A remedy is fashioned to eradicate any taint of UI, not to reward or windfall a party not entitled to relief.

consider not only the perceived needs of the moment, but also the potential impact of specific comments on the fairness of any subsequent proceedings in terms of the prohibition against unlawful command influence." *Simpson,* 55 M.J. at 377.

(9) The DoD faced a similar imbroglio in 2013 when intemperate and ill-informed comments by senior military leaders created a similar atmosphere of UCI. Then Secretary of Defense Chuck Hagel, took the initiative to express his concern and belief in the military justice system with a Memorandum reaffirming his and the President's expectations regarding the "integrity of the military justice process" to include the expectation that everyone involved in the military justice apply independent judgement.[81]

(10) To deter such additional inappropriate comments and further ameliorate the taint of the inappropriate comments made by Secretary of Defense Carter, General Kelly, and General Dunford regarding the Commission's decision to implement the *Interim* Order, the Commission extends the *Interim* Order for six-months from the date this Ruling is issued. The Commission does not take this action lightly in light of the legitimate government interests in gender-neutral guard staffing to promote JTF-GTMO detention facility security, full integration of women into the Armed forces, and prevention of gender discrimination, but is obliged to ensure the independence of the Military Commission from undue UI from any source.

(11) Should the senior military officials who made the comments causing the apparent UI take appropriate action to absolve any taint from their comments upon the public's view of the independence of the Commission, the Commission remains open to a motion to rescind the *Interim* Order at an earlier date.

(12) In light of the actions taken by the Commission to date and by this Ruling to ameliorate the taint of the apparent UI, the Commission concludes a fully informed objective

[81] *See* http://online.wsj.com/public/resources/documents/081413hagel.pdf.

observer witnessing the pace of litigation and timing of decision for AE 254Y would not harbor a significant doubt about the fairness of the proceedings or the independence of the Military Judge.[82] The Government has proven beyond reasonable doubt the apparent UI caused by the inappropriate comments from Secretary of Defense Carter, General Kelly, and General Dunford did not taint the Commission proceedings.

15. Ruling[83]

a. The Defense Motion for the *Interim* Order to be made permanent is **DENIED**.

b. The Government Motion to rescind the *Interim* Order is **GRANTED IN PART**. The *Interim* Order will be rescinded six-months from the date of issuance of this Ruling.

c. The Defense Motion to recuse the Military Judge from considering AE 254Y or to defer ruling on AE 254Y until the EO Complaint is resolved is **DENIED**.

d. The Defense Motion to dismiss the charges; disqualify Secretary Carter, General Dunford, and General Kelly from further participation in the Commission; and abate the proceedings is **DENIED**.

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[82] Defense Counsel also urged the Commission that it must craft a remedy because the comments by the senior officials were outrageous. Even if the law required remedy for apparent UI deemed to be outrageous, the Commission finds the comments, while inappropriate, are not outrageous.

[83] The Defense has raised a number of "emergency motions" regarding meetings with the Accused on the eve of hearings scheduled over the last two years. *See* AE254 (WBA), Emergency Defense Motion to Permit Attorney Client Meetings 3 and 4 December 2013, filed 3 December 2013; AE254 (AAA Sup), Defense Supplement to AE254(WBA) Emergency Defense Motion to Permit Attorney-Client Meetings 3 and 4 December 2013, filed 12 June 2014; AE254G (WBA) Emergency Defense Motion to Permit Attorney Client Meetings 22-23 March 2014, filed 19 March 2014, AE254I (WBA), Emergency Defense Motion to Permit attorney-Client Meetings 5 and 6 April 2014, filed 1 April 2014; AE254L (MAH Sup), Mr. Hawsawi's Joinder and Supplemental facts to AE 254L, Defense Reply on Motion to Permit Client Meetings, filed 15 April 2014; AE254L (MAH 2nd Sup), Mr. Hawsawi's Second Supplemental facts to AE 254L, Defense Reply on Motion to Permit Client Meetings, filed 8 August 2014; AE254O (WBA), Defense Motion to Provide Mr. bin 'Attash Weekend and After- Business-Hours Access to Counsel When Reasonably Requested, filed 13 August 2014; AE254S (WBA), Emergency Defense Motion to Compel Attorney-Client Meetings 13, 14, 15, and 16 September 2014, filed 11 September 2014; AE254T(WBA), Defense Motion to Compel Production of Witnesses for AE 254(WBA), AE 254G(WBA), AE 254I(WBA), AE 254O(WBA), and Associated Pleadings, filed 11 September 2014; and AE254Z(WBA), Emergency Defense Motion to Abate Proceedings Due to Denial of Access to Counsel, filed 23 October 2014. As the dates for the requested meetings have passed, the Commission considers these motions **MOOT.**

e. The Defense Motion to grant other relief for UI resulting from public comment by senior military and civilian officials is **GRANTED** as set forth in paragraph 14b(10) of this Ruling**.** Rescission of the *Interim* Order is deferred for six-months from the date of issuance of this Ruling to cure the taint of apparent UI caused by the public comment.

16. ORDER: The *Interim* Order (AE 254JJ) issued by the Commission will remain in effect for six-months from the date of issuance of this Ruling upon which time the *Interim* Order is rescinded.

So **ORDERED** this 28th day of April, 2016.

//s//
JAMES L. POHL
COL, JA, USA
Military Judge