**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

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| SUHAIL SHARABI (ISN 569), | Case No. 04-cv-1194 (TFH) |
| ABDU LATIF NASSER (ISN 244), | Case No. 05-cv-764 (CKK) |
| ABDUL RABBANI (ISN 1460), AHMED RABBANI (ISN 1461), | Case No. 05-cv-1607 (RCL) |
| TOFIQ NASSER AWAD AL-BIHANI (ISN 893), SANAD AL KAZIMI (ISN 1453) | Case No. 05-cv-2386 (RBW) |
| ABDUL MALIK (ISN 10025), | Case No. 08-cv-1440 (CKK) |
| SHARQAWI AL HAJJ (ISN 1457), | Case No. 09-cv-745 (RCL) |
| Petitioners, | |
| v. | Cases Referred for Consideration of Petitioners' Respective Motions for Order Granting Writ of Habeas Corpus |
| DONALD J. TRUMP, in his official capacity as President of the United States, et al., | |
| Respondents. | |

**RESPONDENTS' OPPOSITION TO PETITIONERS' MOTION FOR LIVE AUDIO ACCESS TO THE ORAL ARGUMENT ON JULY 11, 2018, ON MOTION FOR ORDER GRANTING WRIT OF HABEAS CORPUS**

As set out below and in the attached declaration, the Commander, Joint Detention Group, Joint Task Force-Guantanamo Bay ("Commander, JDG, JTF-GTMO"), has determined that complying with Petitioners' request to listen to a live audio transmission of the oral argument set in this matter for July 11, 2018, would adversely impact security. See Ex. 1, Decl. of

COL S. Yamashita ¶¶ 4-7. In particular, the Commander determined that facility constraints and force-protection concerns prevent him from permitting the eight Petitioners to be congregated as a whole or in smaller groups to monitor the argument. Id. Well settled, binding precedent establishes that this determination is entitled to "wide-ranging" deference. Bell v. Wolfish, 441 U.S. 520, 547 (1979). For this reason alone, Petitioners' Motion for Live Audio Access to the Oral Argument on July 11, 2018, on Motion for Order Granting Writ of Habeas Corpus (the "Motion") should be denied.

But moreover, there is no need for the Court to override the JDG Commander's considered security-based judgment, for adequate alternatives to live monitoring exist. Petitioners' sole justification for the Motion is their assertion that listening to the oral argument "is critical to their ability to understand [the Motion's] resolution and make informed litigation decisions going forward." Mot. at 3. But nothing in that justification requires that they do so live, nor for that matter that they actually listen to the argument at all (given that they concede that a contemporaneous English-Arabic translation will be required for them to understand the argument, id. 3 n.3). Rather, it should be sufficient for their future informed decision-making that they have a transcript of the argument, or at best an audio recording of it. Either of these alternatives would provide Petitioners with the identical information they could obtain by listening to a translation of the argument in real-time. Respondents stand ready to facilitate Petitioners' and their counsels' efforts to pursue either of these options. And so, for this additional reason, the Court should defer to the JDG Commander's determination that permitting the eight Petitioners to monitor the oral argument in real-time would present a security hazard to themselves and to the guard force.

## BACKGROUND

Petitioners are eight of the eleven Guantanamo detainees who filed identical motions seeking a writ of habeas corpus. See, e.g., Rabbani v. Bush, Civil Action No 05-1607 (RCL) Mot. for Order Granting Writ of Habeas Corpus (ECF Nos. 380 & 381) (Jan. 11, 2018) (motions on behalf of detainees Ahmed Rabbani and Abdul Rabbani). These eight detainees are petitioners in six habeas cases assigned to four Judges of this District, including this Court.[1] Because their underlying motions are identical, the Calendar and Case Management Committee, with the concurrence of the judges to whom the underlying habeas cases had been assigned, referred their motions to this Court for decision to save judicial resources. Rabbani, Minute Order (Jan. 18, 2018).[2]

[1] The eight detainees and the cites to their underlying Motion for Order Granting Writ of Habeas Corpus are:

Suhail Sharabi (ISN 569), Anam v. Trump, 04-cv-1194 (TFH) (ECF No. 1109);
Abdu Latif Nasser (ISN 244), Imran v. Trump, 05-cv-764 (CKK) (ECF No. 274);
Abdul Rabbani (ISN 1460), Rabbani v. Trump, 05-cv-1607 (RCL) (ECF No. 381);
Ahmed Rabbani (ISN 1461), Rabbani v. Trump, 05-cv-1607 (RCL) (ECF No. 380);
Tofiq al-Bihani (ISN 893), Jabbarov v. Trump, 05-cv-2386 (RBW) (ECF No. 2061);
Sanad al-Kazimi (ISN 1453), Jabbarov v. Trump, 05-cv-2386 (RBW) (ECF No. 2062);
Abdul Malik (ISN 10025), Malik v. Trump, 08-cv-1440 (CKK) (ECF No. 248); and
Sharqawi al-Hajj (ISN 1457), Mattan v. Trump, 09-cv-745 (RCL) (ECF No. 1885)

[2] The underlying motions filed on behalf of the remaining three detainees were not referred to this Court for decision. Two of those detainees' habeas cases are pending before Judge Sullivan:

Said Nashir (ISN 841), Abdullah v. Trump, 05-cv-23 (EGS) (ECF No. 332); and
Abu Zubaydah (ISN 10016), Husayn v. Mattis, 08-cv-1360 (EGS) (ECF No. 488).

The third detainee's habeas case is assigned to Judge Leon:

Abdul Razak Ali (ISN 685), Ali v. Trump, 10-cv-1020 (RJL) (ECF No. 1512).

Almost seven weeks ago, on motion by the eight Petitioners, the Court scheduled oral argument on their motions for July 11, 2018. See, e.g., Rabbani, Order (ECF No. 405) (May 15, 2018). Over three weeks later, on June 7, 2018, coordinating counsel for these eight detainees approached Respondents regarding the possibility of broadcasting the oral argument live to all detainees at Guantanamo Bay. Ex. 2, e-mail from P. Kebriaei to R. Wiltsie. On June 15th, after exploring the feasibility of doing so—at least for the eight Petitioners referred here—Respondents denied the request due to the lack of appropriate facilities and the related force-protection issues. Ex. 3, e-mail from R. Wiltsie to P. Kebriaei. Eleven days later, counsel filed the present motion seeking an order to permit all ten detainees whose motions have yet to be heard [3] to listen live to the oral argument. Given that only 15 days remained to the argument, the Court ordered Respondents to oppose the Motion within six days. Rabbani, Minute Order (June 27, 2018).

**ARGUMENT**

The proper management of detention facilities is "an inordinately difficult undertaking," Turner v. Safley, 482 U.S. 78, 84-85 (1987), the difficulties of which "must not be underestimated by the Courts," Florence v. Board of Chosen Freeholders, 132 S.Ct. 1510, 1515

Judge Leon has heard oral argument on the underlying motion pending on his docket. Ali, Minute Entry (Mar. 23, 2018).

[3] The Motion seeks an order to permit live audio-monitoring of the oral argument by not just the eight Petitioners here, but also by the two detainees whose non-referred motions remain pending before Judge Sullivan. See Mot. at 2 n.2; cf., e.g., Anam v. Trump, 04-cv-1194 (TFH) Minute Order (May 15, 2018) (setting argument for only the eight assigned motions). The reasons set out below for denying the motion as to the eight detainees whose motions were referred to the Court would, of course, apply with full force to these additional two detainees as well. As to these two detainees, Respondents also respectfully suggest that this Court may deny the request because they are not properly before this Court. If for no other reason, denial would be appropriate as a matter of comity to Judge Sullivan.

(2012). See also Bell v. Wolfish, 441 U.S. 520, 547 (noting, regarding a pre-trial detention facility, that "the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions"). In the face of those difficulties, maintaining institutional security and preserving internal order and discipline remain "essential goals" for facility administrators. Wolfish, 441 U.S. at 546. Or, as the Court of Appeals has put it concerning the detention facility at Guantanamo Bay: "Prison security . . . is beyond cavil a legitimate government interest[;] . . . Turner teaches that, and common sense shouts it out." Hatim v. Obama, 760 F.3d 54, 59 (D.C. Cir. 2014).

Consequently, the courts have routinely held that detention officials must be free to take appropriate action to ensure the safety of both detainees and facility personnel. Wolfish, 441 U.S. at 547. These holdings are given effect by a "wide-ranging" deference that the courts grant facility administrators to craft policies and practices that in the administrators' judgment are needed to preserve security, order, and discipline. Id. The "touchstone" of this deference is whether it is reasonable to connect the challenged policy, practice, or decision, on the one hand, to facility security, on the other. Hatim, 760 F.3d at 59-60. But in making that determination, the courts recognize that such reasonableness decisions themselves are "peculiarly within the province and professional expertise" of facility officials. Id. 59. Accordingly, in the absence of substantial evidence establishing that officials have exaggerated their response to a perceived threat to the essential goals of security and order, the courts defer to the officials' expert judgment in such matters. Pell v. Procunier, 417 U.S. 817, 827 (1974). This deference applies fully to habeas matters. Hatim, 760 F.3d at 56. And at all times, the burden of proof is not on the administrators to establish the validity of a policy or decision, but on the detainee to disprove it. Overton v. Bazzetta, 539 U.S. 126, 132 (2003).

Petitioners cannot meet this burden here, so the deference owed the JDG Commander's decision not to allow live, remote audio monitoring of the July 11th oral argument is dispositive. As the Commander's declaration attests, it is his judgment that permitting the detainees to listen to the argument live would present an unacceptable risk to the safety and security of both the detainees and assigned detention personnel, and would be detrimental to the ability of the JDG to conduct operations in the camp. Ex. 1, ¶ 5. First, there is no capability to broadcast the argument to the Petitioners in either Camp V or Camp VI. Id. ¶ 4. Accordingly, for them to listen to the argument they would have to be transported to another Guantanamo facility that would have the necessary communication and security capabilities. Id. ¶¶ 4 & 5.

There are two locations outside the residential camps that could possibly be used to support some number of detainees listening to the argument live. The first location contains the six legal-meeting rooms, which are normally used for attorney-client meetings. Ex. 1 ¶ 5. These rooms could not be used to allow all eight detainees to listen to the argument, however, as they could not be properly restrained while doing so. When detainees are transported to a facility outside their residential camps, such as to these rooms, it is the policy and practice of the JDG to always maintain a level of restraint on the detainees. Id. The level 1 type of restraint, which is typically used in the legal meeting rooms, is for the detainee to have a single point of restraint, meaning that the detainee has at least one limb restrained. Id. This usually means that the detainee is restrained by the leg to a metal bolt, secured to the floor or wall. Id. As applicable here, the need to use these restraints means that each meeting room can accommodate only one detainee at a time, because each has only one single restraint point available. Id. Placing more than one detainee in a legal meeting room would violate established security procedures because

of the inability to properly secure each detainee. Id. And doing so would, in the judgment of the JDG Commander, constitute a significant risk of harm to the detainees or the guard force. Id.

Moreover, use of this location is further constrained such that it could accommodate, at most, only three of the detainees. The legal-meeting rooms are not equipped with commercial phones. Id. There is one dedicated secure legal phone that can be brought into a meeting room and that is typically used for a detainee to speak with his legal team. Id. There are two other non-secure phones that, if they were not being used for other purposes, could be used as well. Id. Thus at best, if there are no conflicts regarding room or phone use, it might be possible to use three rooms and three phones to permit three detainees to listen to the argument separately. Id. But all eight could not be accommodated.

As for the second location, one of the two courtrooms used by the military commissions and by the Periodic Review Boards has sufficient restraint points to accommodate eight detainees. Ex. 1 ¶ 6. This location, however, is controlled by the Office of Military Commissions, not by the JDG. Id. In any event, it is the JDG Commander's considered judgment that logistical constraints render this choice severely impractical. See id.

Simply put, transporting the eight detainees to this facility would divert too many guards for too long, thus seriously compromising camp operations and security. See Ex. 1 ¶ 6. There is limited manning available within the guard force and a limited number of movement vehicles. Id. It is JDG policy that, for security, detainees are transported one detainee per vehicle. Id. ¶ 5. There are three vehicles currently available for detainee movements. Id. ¶ 6. To accommodate all eight detainees, and follow JDG security protocol, the first movement would have to begin at least three and half hours prior to the argument start time, id., (and, conversely, approximately the same amount of time would be needed to return the detainees to their residential camps after

the argument, see id.). This is based on the number of vehicles, the distance to the courtroom, the time to move each detainee from the vehicle into the courtroom, the need to stagger the arrival of the detainees in accordance with JDG security protocols to ensure that any unplanned situations that arise can be managed properly by the guard force, and the time to return the vehicles to the camps to repeat the process. Id. Further, there are no holding cells located by the courtroom for detainees from Camps V and VI, therefore the detainees would be waiting in the courtroom, restrained, for an extended period before and after the proceedings. Id.

Conducting a move of this nature is far outside JDG normal procedures, and the strain on the guard force to execute the move would be detrimental to all other operations in the camps during this time. Ex. 1 ¶ 6. It would eliminate all other moves for possibly the entire day depending on the length and start time of the proceeding. Id. This could impact other detainees' access to ICRC phone calls to family, medical appointments, and meetings with attorneys. Id. Although nothing is currently scheduled for July 11th, requests for meetings such as medical appointments tend to come on only a few days' notice. Id. And it is not uncommon for attorneys on island to change their schedule and request additional meetings that were not originally scheduled to occur. Id.

In summary, the JDG Commander attests that any attempt to allow all eight detainees to listen to the argument live would, at a minimum, place a severe strain on the guard force and, at worst, constitute a significant security risk. And as fundamentally, the procedures he describes are not an exaggerated response to Petitioners' request, but rather the normal practices used and needed to assure the safety and security of the detainees and the guard force on a daily basis. Thus, the Court should not override the JDG Commander's judgment that he cannot safely and

securely acquiesce in the request, but rather should defer to that judgment, as the binding and persuasive precedent detailed above demands.

Respondents acknowledge that they have arranged for Guantanamo detainees to listen to the unclassified opening statements by counsel when the merits of their habeas cases were being presented to a court. See Mot. at 3. Additionally, detainees are permitted to testify via video conference during merits or other proceedings, if appropriate. Id. 3-4. But those situations generally involve only one detainee who can be properly restrained while testifying in or monitoring the proceedings. Petitioners note that in 2008 Judge Leon ordered that six detainees be permitted to listen simultaneously to the opening of their joint merits hearing. Id. at 4 n.5. Petitioners fail to note, however, that due to technical problems, the six detainees were unable to do so. Boumediene v. Bush, 579 F.Supp.2d 191, 193 (D.D.C. 2008). Rather, they listened to an audiotape of the opening statements the next day. Id. In any event, Respondents are no longer aware of how their predecessors attempted to comply with Judge Leon's order ten years ago. Ex. 1 ¶ 7. And more importantly, as set out above, current policies and facilities cannot accommodate a similar result today. See id. ¶¶ 4-7. Accordingly, Judge Leon's ten-year old order provides no support here.

But more fundamentally, there is no reason for the Court not to defer to the judgment of the JDG Commander. Here, two adequate alternatives exist, rendering the Commander's security-grounded decision not to provide live access to the oral argument reasonable. See Wolfish, 441 U.S. at 542 n.25 (government's chosen solution "does not have to be the only alternative or even the best alternative for it to be reasonable, to say nothing of constitutional"). First, Respondents are willing to facilitate the expedited transmission of a transcript of the hearing from their counsel to the detainees under the habeas legal mail procedures. This will

permit the detainees to review the oral argument in depth and to retain the transcript in their cells, pursuant to normal habeas legal-mail rules. Alternatively, Respondents propose that the detainees' counsel arrange with the Court for an audio recording of the oral argument to be made (and, if necessary, translated). Informationally identical to a transcript, this alternative additionally will preserve (at least in English) the aural nuances of the argument (to the extent Petitioners or their counsel deem such nuances important). Each detainee has the capability to listen to an appropriately formatted recording in his cell. Ex. 1 ¶ 8. Once an original recording is made, Respondents will work with Petitioners' counsel to format copies and provide them to Petitioners.

Notably, each of these alternatives address the concerns of all parties: Petitioners will be able to either read or hear the argument, so that they may better understand the resolution of their motions "and make informed litigation decisions going forward." Mot. at 3. And, as for Respondents, neither alternative poses any of the security risks arising from moving the detainees to a location external to their residence camp and permitting them to congregate as a group to listen to the argument.[4]

[4] Petitioners have not asserted that they have a right to listen to the argument, let alone the basis for that right. Consequently, Respondents have not based their opposition on the framework of Turner v. Safley, which applies when a detention-facility policy, practice, or regulation infringes a constitutional right. Nevertheless, for the reasons stated above, that framework would be satisfied here. First, there is a valid connection between the need to restrain Guantanamo detainees when they are located outside of their residential camp and facility security. Accordingly, there is a "valid, rational connection" between the inability to do so here (at least without severely disrupting camp operations) and the decision not to allow Petitioners to monitor the oral argument live. 482 U.S. at 89. Second, both a transcript and an audio recording provide Petitioners with an alternative means for exercising their asserted right, namely monitoring the argument. Id. 90. Third, the JDG Commander's declaration makes clear that complying with an order to allow Petitioners to listen to a live broadcast can be accomplished only with a severe impact to the allocation of his guard force, and even then with a serious degradation to facility security. Id. And lastly, there are no ready alternatives that would fully accommodate Petitioners' request to listen to the argument live at de minimis cost to facility security. Id. 91.

## CONCLUSION

Accordingly, for the foregoing reasons, Petitioners' Motion should be denied.

2 July 2018

Respectfully submitted,

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Given that Turner is satisfied here, the Court need not decide whether the Motion implicates a right or, if it did, the source or scope of that right. See Hatim, 760 F.3d at 59 (declining to explore scope of asserted right because Turner satisfied under any circumstance).