

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON**

ABD AL-RAHIM HUSSEIN)	CASE NO:
MUHAMMED ABDU AL-NASHIRI,)	
)	
<i>Plaintiff,</i>)	
)	COMPLAINT
v.)	
)	
BRUCE MACDONALD,)	
)	
<i>Defendant.</i>)	
)	DATE: November 3, 2011
)	

NATURE OF THE CASE

1. The Defendant has issued orders to create a military commission empowered to try Plaintiff and recommend a death sentence. These orders violate the Constitution and the terms of the statute under which they were issued. They are therefore *ultra vires* and void. Plaintiff brings this action for a declaratory judgment pursuant to 28 U.S.C. § 2201 for the purpose of determining a question of actual controversy between the parties.

2. A military commission can only be created to try offenses that occurred during a time of and in a theater of war. Yet, all that Defendant’s orders allege is that Plaintiff is a criminal suspect for crimes that occurred in Yemen in 2000 and 2002. These alleged crimes predated the existence of any armed conflict and occurred far from any battlefield.

3. In order to decide this case, this Court does not need to conduct a trial or make factual findings about when or whether historical events in Yemen had the character of a war. As a matter of well-established constitutional law, whether hostilities should be recognized to exist and whether the laws of war should apply to them are political questions that only the political branches can answer.

4. The only question this Court must answer is a pure question of law. Did the President or Congress choose to invoke their war powers and apply the law of war in Yemen at any time relevant to the allegations against Plaintiff? The answer is no.

5. Plaintiff therefore asks this Court to enter a judgment declaring that the Defendant has exceeded his authority by issuing military commission orders for alleged crimes that did not occur in the context of an armed conflict subject to the laws of war.

JURISDICTION & VENUE

6. This Court has subject matter jurisdiction to grant the relief requested pursuant to 28 U.S.C. §§ 2201, 2202, & 1331.

7. Venue is proper pursuant to 28 U.S.C. § 1391(b). The Defendant resides and works in Kitsap County. Per Local Rule 5(e)(1), this civil action has been filed in the Tacoma Courthouse of the U.S. District Court for the Western District of Washington.

THE PARTIES

8. Plaintiff, Abd al-Rahim Hussein Muhammed Abdu Al-Nashiri, is a Saudi national. He was arrested by local authorities in the United Arab Emirates in October 2002 and soon thereafter transferred to U.S. custody. He is currently confined at the U.S. Naval Station at Guantanamo Bay.

9. Defendant, Bruce MacDonald, is a citizen of the United States and resides in Kitsap County. Mr. MacDonald serves as the Convening Authority for the U.S. Department of Defense, Office of Military Commissions. Mr. MacDonald maintains his residence in Silverdale, WA, and primarily works from his office on Naval Base Kitsap Bangor/Kitsap in Silverdale, WA. Mr. MacDonald is being sued in his individual capacity for actions taken beyond his statutory authority and in breach of the Constitution of the United States.

ALLEGATIONS

A. Nature of Mr. MacDonald's Authority to Create Military Commissions

10. On October 28, 2009, President Obama signed into law the Military Commissions Act of 2009, Pub. L. 111-84 §§ 1801-1807 (2009) ("2009 Act") (codified at 10 U.S.C. §§ 948a, *et seq.*). The 2009 Act authorized the President and his subordinates to "establish military commissions under this chapter for offenses triable by military commission as provided in this chapter." 10 U.S.C. § 948b(b) (2009). Congress vested the delegable authority to convene these commissions in the Secretary of Defense. 10 U.S.C. § 948h (2009).

11. The Secretary of Defense has, in turn, delegated this authority to the Defendant, Bruce MacDonald, a retired Navy admiral who serves as the Convening Authority for the Office of Military Commissions. The Convening Authority is a civil service position under the Secretary of Defense, whose only function is to create and administer military commissions. Mr. MacDonald has no role in detention operations and no authority over any individual's continued custody, release or conditions of confinement.

12. Both historically and under the 2009 Act, military commissions are no different than other *ad hoc* investigatory commissions. Simply stated, a commission's "role is primarily a factfinding one – to determine, typically on the battlefield itself, whether the defendant has violated the law of war." *Hamdan v. Rumsfeld*, 548 U.S. 557, 597 (2006) (plurality op.). They are created on an as needed basis to make findings and recommendations about a particular case, which Mr. MacDonald can either accept or disregard. Once those findings and recommendations are made, the commission is disbanded.

13. A military commission comes into existence by virtue of the orders creating it for particular charges. Any uniformed military officer can write up charges against a particular individual. 10 U.S.C. § 948q (2009). Pursuant to the procedures laid out in the Secretary of

Defense's interpretive rules, this document can then be forwarded to Mr. MacDonald, who decides in his sole discretion whether they warrant the creation of a military commission.

ROBERT M. GATES, U.S. DEP'T OF DEF., *MANUAL FOR MILITARY COMMISSIONS* pt. 2, at Rule 401 (2010). If Mr. MacDonald is persuaded that they do, he can convene a commission by issuing orders that are specific with respect to the allegations and the individual, along with any pen-and-ink changes he makes to the charges. *Id.* at Rule 407.

14. Mr. MacDonald's orders also designate military officers to sit as members of the commission. 10 U.S.C. § 948i (2009). These members sit as finders of fact and recommend an upper bound of punishment to be imposed upon a finding of guilt. Mr. MacDonald can then decide in his sole discretion whether to approve or disapprove the findings and punishment recommended by the members he has designated. 10 U.S.C. § 950b(c) (2009). His only constraint is that he cannot make the findings or the punishment more severe than what the members recommended.

15. In the 2009 Act, Congress specified a number of limitations on the circumstances under which commissions may be convened. U.S. citizens, for example, cannot be brought before a military commission. 10 U.S.C. § 948c (2009). Of relevance to this case, Congress mandated that "An offense specified in this subchapter is triable by military commission under this chapter only if the offense is committed in the context of and associated with hostilities." 10 U.S.C. § 950p(c) (2009). "Hostilities" for the purpose of the 2009 Act is defined as an "armed conflict subject to the laws of war." 10 U.S.C. § 948a(9) (2009). Mr. MacDonald cannot, therefore, create a commission for offenses that did not take place in the context of and which were not associated with hostilities, as that term is defined.

B. Circumstances of Mr. Al-Nashiri's Arrest and Continued Detention

16. Mr. Al-Nashiri was arrested in Dubai in October 2002 and turned over to U.S. custody. In May 2003, the government named him as an unindicted co-conspirator in an indictment unsealed in the U.S. District Court for the Southern District of New York. *United States v. al-Badawi, et al.*, No. 98-CR-1023 (S.D.N.Y. unsealed May 15, 2003). This still-pending and death-eligible indictment alleges that he was part of a conspiracy that resulted in the bombing of the U.S. Naval vessel, the USS COLE, and the attempted bombing of another U.S. Naval vessel, the USS THE SULLIVANS. Both crimes are alleged to have occurred in Yemen in 2000. Mr. Al-Nashiri was publicly transferred to the U.S. Naval Station at Guantanamo Bay in September 2006, where he remains in custody.

C. The Creation of the Military Commission for Mr. Al-Nashiri

17. On April 20, 2011, Col. Edward Regan forwarded a charging document to Mr. MacDonald that contained eleven charges against Mr. Al-Nashiri for alleged conduct spanning 1996-2002.¹ The charges alleged that Mr. Al-Nashiri was involved in three incidents that transpired in Yemen in 2000 and 2002. Two of these incidents are identical to the allegations contained in the indictment currently pending in the Southern District of New York.

18. The first incident was the allegedly attempted but unsuccessful bombing of the USS THE SULLIVANS.² The failed attempt is alleged to have occurred on or about January 3, 2000 in Aden, Yemen. Neither in January 2000 nor at any time relevant to the alleged attempt on

¹ On September 15, 2011, Col. Regan forwarded a second charging document to Mr. MacDonald. The first and second charging documents differed only in the identification of alleged victims, who were non-fatally injured, and how certain allegations were worded.

² The charges relating to the USS THE SULLIVANS were: Charge III (Attempted Murder in Violation of the Law of War); Charge V (Conspiracy); and Charge VIII (Attempted Destruction of Property in Violation of the Law of War).

the USS THE SULLIVANS was the United States engaged in any hostilities in Yemen and the alleged attempt on the USS THE SULLIVANS triggered no hostile response.

19. The second incident was the bombing of the USS COLE, also in Aden, Yemen.³ The USS COLE was bombed on October 12, 2000 and resulted in the death of seventeen U.S. personnel. In response, President Clinton affirmatively declined to treat the bombing as subject to the laws of war. Pursuant to the War Powers Resolution of 1973, Pub. L. 93-148 (1973) (codified at 50 U.S.C. §§ 1541, *et seq.*), President Clinton submitted a report to Congress, notifying it that he had deployed military personnel to Aden for the sole purpose of assisting in the recovery effort. *Letter to Congressional Leaders Reporting on the Deployment of United States Forces in Response to the Attack on the U.S.S. COLE*, 36 WEEKLY COMP. PRES. DOC. 2482 (Oct. 14, 2000). This report emphasized that military personnel in the area were armed “solely for the purpose of assisting in on-site security.” *Id.*

20. In a series of official public statements, President Clinton reiterated that he declined to recognize the bombing of the USS COLE as being in the context of and associated with hostilities, saying on diverse occasions that “America is not at war.” *The President’s Radio Address*, 36 WEEKLY COMP. PRES. DOC. 2464 (Oct. 14, 2000) (“This tragic loss should remind us all that even when America is not at war, the men and women of our military risk their lives every day in places where comforts are few and dangers are many. No one should think for a moment that the strength of our military is less important in times of peace, because the strength of our military is a major reason we are at peace.”); *see also Remarks at a Dinner for Governor Gary Locke and Representative Jay Inslee in Seattle*, 36 WEEKLY COMP. PRES. DOC. 2489 (Oct.

³ The charges relating to the USS COLE were: Charge I (Perfidy); Charge II (Murder in Violation of the Law of War); Charge III (Attempted Murder in Violation of the Law of War); Charge IV (Terrorism); Charge V (Conspiracy); Charge VI (Intentionally Causing Serious Bodily Injury); and Charge VII (Destruction of Property in Violation of the Law of War).

14, 2000) (“But it’s a humbling reminder that even in times of peace, freedom is not free.”).

After multiple hearings and its own investigation, Congress likewise declined to take any action that would have triggered the application of the laws of war in response to the bombing.

Congress passed no declaration of war or other authorization for the use of military force in Yemen or elsewhere.

21. The third incident was the bombing of a French tanker, the *M/V Limburg*, also in Yemen.⁴ The bombing of the *M/V Limburg* took place on October 6, 2002 and resulted in the death of a foreign crewmember. President Bush deployed no U.S. military personnel, made no report to Congress pursuant to the War Powers Resolution and issued no executive order otherwise indicating that either the United States or France was engaged in hostilities in Yemen. Likewise, Congress did not declare war, pass an authorization for the use of military force or otherwise take any legislative action affirmatively recognizing the applicability of the laws of war in Yemen. The only U.S. involvement in the incident was law enforcement assistance given to France’s criminal investigation.

22. President Bush did not certify the existence of hostilities of any kind in Yemen until September 2003, when he submitted a War Powers Resolution report to Congress stating for the first time that the United States had undertaken “military operations against al-Qaida and other international terrorists in the Horn of Africa region, including Yemen.” *Letter to congressional leaders reporting on efforts in the global war on terrorism*, 39 WEEKLY COMP. PRES. DOC. 1247 (Sept. 19, 2003). Subsequent to this date, the President issued a series similar reports certifying the existence of hostilities in Yemen. *See, e.g., Letter to Congressional*

⁴ The charges relating to the *M/V Limburg* were: Charge IV (Terrorism); Charge V (Conspiracy); Charge IX (Attacking Civilians); Charge X (Attacking Civilian Objects); and Charge XI (Hazarding a Vessel).

Leaders Transmitting a Consolidated Report on the Deployment of United States Combat-Equipped Armed Forces, 40 WEEKLY COMP. PRES. DOC. 444 (Mar. 22, 2004); *Letter to Congressional Leaders Transmitting a Consolidated Report on the Deployment of United States Combat-Equipped Armed Forces*, 40 WEEKLY COMP. PRES. DOC. 2800 (Nov. 8, 2004).

23. Congress has never passed a declaration of war or other authorization for the use of military force in Yemen. The first Congressional recognition of an armed conflict in Yemen of any kind was a 2009 Senate resolution that concerned a rebel insurgency that began in 2004. *See* Supporting peace, security, and innocent civilians affected by conflict in Yemen. S. Res. 341, 111th Cong. (2009) (enacted).

24. On July 15, 2011, counsel for Mr. Al-Nashiri submitted a formal request to Mr. MacDonald, asking that he not convene a commission for these charges because, *inter alia*, the underlying allegations did not occur in the context of and were not associated with hostilities. On September 28, 2011, Mr. MacDonald nevertheless issued orders creating a commission and assigning as many as thirty-seven military officers as members to hear all but two of the allegations made by Col. Regan. Mr. MacDonald further empowered the members to recommend the imposition of death.⁵ *See* Attachments A - E (“MacDonald Orders”).

⁵ Mr. MacDonald lined out charges alleging destruction of property. These were the only charges that by statute were not death eligible.

GROUNDS FOR RELIEF

GROUND I

The MacDonald Orders Violate 10 U.S.C. § 950p(c)

25. Mr. Al-Nashiri incorporates by reference paragraphs 10-24 above.

26. The MacDonald Orders impose upon Mr. Al-Nashiri the burden of defending himself against capital charges whose factual allegations occurred neither in the context of nor were associated with hostilities. Congress has given Mr. MacDonald no authority to issue these orders, to contravene its express limits on the circumstances under which military commissions may be convened, or to overrule the political judgments of the Congress and two Presidents as to whether the laws of war should apply to particular events that occurred during their terms of office. Mr. MacDonald's issuance of these orders contravenes the plain dictates of 10 U.S.C. § 950p(c), making them *ultra vires* and all actions taken under them unlawful.

GROUND II

The MacDonald Orders Violate Article III § 2

27. Mr. Al-Nashiri incorporates by reference paragraphs 10-24 above.

28. Article III of the U.S. Constitution vests the judicial power of the United States in the federal courts, which encompasses the exclusive jurisdiction over "the trial of all crimes." U.S. CONST., art. III § 2, cl. 3. The only recognized exceptions to Article III are courts established for the District of Columbia and incorporated territories, *Palmore v. United States*, 411 U.S. 389 (1973), *American Ins. Co. v. Canter*, 1 Pet. 511 (1828), the courts-martial of members of the U.S. Armed Forces for conduct arising and tried during their time of service, *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), and military trials for offenses that occurred in the context of and were associated with an armed conflict subject to the laws of war. *Ex parte Quirin*, 317 U.S. 1 (1942); *In re Yamashita*, 327 U.S. 1 (1946); *Madsen v. Kinsella*, 343 U.S. 341 (1952).

29. The MacDonald Orders unconstitutionally impose upon Mr. Al-Nashiri the burden of defending himself against capital charges where none of these narrow exceptions apply. The MacDonald Orders seek to circumvent the U.S. District Courts in an area of their exclusive jurisdiction. This breach of the separation of powers therefore makes the MacDonald Orders unconstitutional and actions taken under them unlawful.

GROUND III

The MacDonald Orders Violate the Fifth, Sixth and Eighth Amendments

30. Mr. Al-Nashiri incorporates by reference paragraphs 10-24 above.

31. The Fifth, Sixth and Eighth Amendments collectively require that the government only impose death following a regular trial affording all the necessary safeguards of due process and procedural fairness. The only narrow and partial exceptions to the trial guarantees of the Bill of Rights are for the courts-martial of members of the U.S. Armed Forces for conduct arising and tried during their time of service, *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), and the military trial of offenses that occurred in the context of and were associated with an armed conflict subject to the laws of war. *Ex parte Quirin*, 317 U.S. 1 (1942); *In re Yamashita*, 327 U.S. 1 (1946); *Madsen v. Kinsella*, 343 U.S. 341 (1952).

32. The MacDonald Orders unconstitutionally impose upon Mr. Al-Nashiri the burden of defending himself against capital charges where neither of these narrow exceptions applies. The MacDonald Orders seek to hold Mr. Al-Nashiri to answer for capital crimes at the sole discretion of Mr. MacDonald and a panel of military officers of his own choosing. This disregard for the fair trial guarantees of the Bill of Rights makes the MacDonald Orders unconstitutional and actions taken under them unlawful.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff asks this honorable court to:

1. Enter a judgment declaring that neither the President nor the Congress certified the existence of an armed conflict subject to the laws of war in Yemen prior to September 2003.
2. Enter a judgment declaring that Mr. MacDonald acted beyond his authority and in violation of the constitution by issuing orders to convene a military commission with the power to recommend the sentence of death for allegations relating to the attempted bombing of the USS THE SULLIVANS because that event did not occur, as a matter of law, in the context of and was not associated with hostilities;
3. Enter a judgment declaring that Mr. MacDonald acted beyond his authority and in violation of the constitution by issuing an order to convene a military commission with the power to recommend the sentence of death for allegations relating to the bombing of the USS COLE because that event did not occur, as a matter of law, in the context of and was not associated with hostilities;
4. Enter a judgment declaring that Mr. MacDonald acted beyond his authority and in violation of the constitution by issuing an order to convene a military commission with the power to recommend the sentence of death for allegations relating to the bombing of the *M/V Limburg* because that event was not occur, as a matter of law, in the context of and was not associated with hostilities; and
5. Order other such relief as this Court deems proper.

Respectfully submitted,

//Robert Gombiner//

Robert Gombiner
Local Counsel
Law Offices of Robert Gombiner
119 1st. Ave. S.
Suite 500
Seattle, WA 98104
TEL: 1-206-621-8777

//Richard Kammen//

Richard Kammen
Counsel for Plaintiff
Pro Hac Vice Application Pending
Gilroy, Kammen, Maryan and Moudy
135 N. Pennsylvania St.
Suite 1175
Indianapolis, IN 46204
richard@kammenlaw.com
TEL: 1-317-236-0400

//Michel Paradis//

Michel Paradis
Counsel for Plaintiff
Pro Hac Vice Application Pending
Office of the Chief Defense Counsel⁶
1620 Defense Pentagon
Washington, DC 20301
michel.paradis@osd.mil
TEL: 1-703-696-9490 x115

⁶ Mr. Al-Nashiri is also represented by LCDR Stephen Reyes, USN, and Maj Allison Danels, USAF. In 2009, the Department of Defense prohibited uniformed officers from appearing in federal court cases arising out of Guantanamo Bay.

ATTACHMENTS

- A. DA Form 200 Transmittal Record, signed by Jason R. Keith (September 28, 2011)
- B. Bruce MacDonald, Military Commission Order 11-02 (September 28, 2011)
- C. Bruce MacDonald, Direction of the Convening Authority (September 28, 2011)
- D. Bruce MacDonald, Direction of the Convening Authority (September 28, 2011)
- E. Bruce MacDonald, Referred Charges (September 28, 2011)

