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CASE COVERAGE: AL NASHIRI CASE

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The D.C. Circuit decided Tuesday that it would let a military commission take the first whack at a crucial issue in the prosecution of Abd Al-Rahim Al-Nashiri, the alleged mastermind of the attack on the U.S.S. Cole. Al-Nashiri, citing issues discussed by Marty here and Marty and Steve here, had asked the court to intervene in the military commission proceedings, to determine whether an armed conflict existed at the time of the Cole attack. The government argued that the existence vel non of an armed conflict with Al Qaeda at the time of the attack was a matter to be proved at Al-Nashiri's military commission trial. The D.C. Circuit, in an opinion by Judge Thomas Griffith, who was joined by Judge David Sentelle (Judge David Tatel filed a dissent), agreed with the government that the court should abstain from deciding this question. Given that the equitable remedies sought by Al-Nashiri hinge on judicial prudence, the court's decision was sound.

The decision is momentous: a military commission could not try Al-Nashiri if the court had intervened and then determined that no armed conflict existed. Marty, Steve, and I agree that an armed conflict is a basic precondition for military commission proceedings under Article III. Absent armed conflict, the government would have to find another forum for Al-Nashiri's trial.

As the D.C. Circuit found, gearing up a whole new prosecution would have disrupted a process that both political branches view as vital in the "sensitive realm" of national security, where the deference owed by courts is at its height. The court held that the need for inter-branch comity justified abstention, just as respect for military justice counseled abstention in *Schlesinger v. Councilman* and federalism interests favor abstention under *Younger v. Harris* regarding state court criminal prosecutions.

While the court abstained from deciding whether an armed conflict existed at the time of the *Cole* attack, the court did note in denying Al-Nashiri's mandamus petition that no "clear and indisputable" arguments favored Al-Nashiri's position. As the court noted, the *Cole* attack followed Al Qaeda's bombing of U.S. East African embassies in 1998 and President Clinton's ordering of missile strikes on Al Qaeda training camps in Afghanistan and a suspected chemical weapons facility in Sudan. Those opposing uses of lethal force may rise to the armed conflict threshold. The court found that a "totality-of-the-circumstances" standard was appropriate, rather than a rigid inquiry into a single factor such as the participation of U.S. ground troops. This contextual standard could include the government's post-9/11 conclusions, such as those in the Military Commissions Act, which authorized trials for conduct occurring "before, on, or after" September 11.

In addition to the importance of deference, Judge Griffith undertook a careful analysis of the ample safeguards in the military commissions that Congress authorized in 2009. As Judge Griffith observed, these commissions aren't the creatures of executive unilateralism that the Supreme Court struck down in 2006's *Hamdan* decision. Rather, current commissions feature procedures that the court, citing Steve, said, "closely (and intentionally) mirror[] the current structure for … review of courts-martial." (p. 22). Defendants receive counsel, including experienced death penalty lawyers; have access to both incriminating and exculpatory evidence; and are entitled to a presumption of innocence. Indeed, the court suggested, review of commission judgments is actually *superior* to courts-martial. In the commission context, the D.C. Circuit reviews the judgment and ensures compliance with the rule of law. That contrasts with review of courts martial by the Court of Appeals for the Armed Forces, whose members don't have lifetime tenure or salary protections. Since the relief Al-Nashiri sought was equitable in nature, the existence of an adequate forum for Al-Nashiri's factual and legal arguments counseled abstention.

Moreover, Judge Griffith explained, judicial intervention was potentially wasteful and inefficient. While Marty has suggested that the existence vel non of an armed conflict is a purely legal issue, resolving this issue would be far more complex. The government might seek to introduce testimony from officials with knowledge of the United States' dealings with Al Qaeda before 9/11. The government would surely file acres of affidavits, declarations, and supporting documents that would make Leo Tolstoy's "War and Peace" seem like chopped liver. The defense would just as surely seek discovery, countering with evidence of its own and cross-examination of government witnesses, whose credibility will be at issue. In sum, a federal district court would be obliged to conduct a veritable mini-trial on the question of when the armed conflict with Al Qaeda began. If the court agreed that an armed conflict had begun, the military commission would have had to revisit this issue with those same witnesses and evidence. Equity, as Judge Griffith wisely observed, abhors such duplicative proceedings.

The equities favoring Al-Nashiri can't compete. Al-Nashiri argued that he had suffered trauma in the early years of his detention. Judge Tatel, in an eloquent dissent, detailed the brutal treatment that Al-Nashiri had received. Al-Nashiri argued that the wait for a military commission trial, which the government now estimates will begin in 2018, will exacerbate that trauma. Judge Griffith rightly gave this argument little weight in the court's equitable balancing.

Al-Nashiri's trauma argument proves too much. Even in the ordinary criminal context, pretrial confinement is often harrowing and sometimes dangerous. Federal courts still abstain from deciding matters at issue in criminal prosecutions – to do otherwise would be to undermine the comity that drives abstention. When conditions of detention are illegal, as they clearly were in the first 2-3 years of Al-

Nashiri's custody, the state has a duty under both domestic law and the law of armed conflict to remedy the problems. Those problems may well figure in Al-Nashiri's trial. The Pentagon's Office of Military Commissions, headed by General Mark Martins, has produced hundreds of thousands of pages of discovery to Al-Nashiri and his fellow defendants, including thousands of pages documenting their ill treatment. That material will surely be relevant to the question of voluntariness if the government seeks to introduce any post-capture statements by Al-Nashiri at trial. Moreover, if Al-Nashiri is convicted, the defense may seek to argue that Al-Nashiri's ill treatment is a factor mitigating against imposition of the death penalty. However, speculation about trauma to the defendant does not justify intervening to decide a matter that the military commission should decide in the first instance, such as the existence of an armed conflict.

While in some cases defendants literally have a right "not to be tried," the D.C. Circuit correctly observed that those cases are few and far between. A defendant seeking to avoid Double Jeopardy can make this argument. However, in most cases, including whether a conviction would violate constitutional rights such as free speech, the trial court must weigh in before the appellate court tackles the issue. That's as it should be.

Abstaining from intervention is particularly important when, as here, the defendant himself is responsible for much of the delay. The court observed that Al-Nashiri had not objected to substantial delays caused by a legal dispute about the composition of the Court of Military Commission Review, which will review any conviction in Al-Nashiri's case before the D.C. Circuit gets its chance. Indeed, Al-Nashiri had *requested* delays. A petitioner seeking equitable relief must have clean hands; on the delay issue, Al-Nashiri's hands are badly smudged. However, the court wisely noted that it could revisit the delay issue if need be. Al-Nashiri may also seek an en banc rehearing of the panel's decision, although a rehearing grant would tee up further delays, setting the stage for oral argument some time in 2017.

In sum, the court's decision on Tuesday is not a recipe for government complacency; rather, it's an opportunity for the military commission process to play itself out in an efficient and fair manner. That's what we expect of any tribunal. Now Al-Nashiri's military commission must fulfill that fundamental expectation.

Topics: Military Commissions, Case Coverage: Al Nashiri Case

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